production of which might be prejudicial to the public interest, it may well be that the legislature thought it best to give no new facilities for the disclosure of such documents by Commonwealth officers. In my opinion, therefore, sec. 102 gives no power to a Judge to order an affidavit of discovery to be made by the Commonwealth. It follows that there can be no power to order an affidavit to be made by an officer on behalf of the Commonwealth. The case of *Ranger* v. *Great Western Railway Co.* (1) cannot, under these circumstances, be an authority to justify the order which has been made. I therefore agree that the order of Mr. Justice *A. H. Simpson* must be set aside, and the appeal upheld.

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Appeal allowed.

Solicitors for appellant, *McNamara & Smith*, for the *Crown Solicitor of the Commonwealth.*

Solicitor for respondent, *Mark Mitchell.*

C. A. W.

Appl Combulk Pty Ltd v TNT Management Pty Ltd (1993) 118 ALR 214 Appl Combulk Pty Ltd v TNT Management Pty Ltd (1993) 41 FCR 59

(1) 4 De G. & J., 74; 28 L. J. Ch., 741.

[HIGH COURT OF AUSTRALIA.]

LYSAGHT BROS. & CO. LTD. . . . APPELLANTS; DEFENDANTS,

AND

FALK . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 27, 28, 29.

Griffith C.J., Barton and O'Connor JJ.

Evidence—Pleading—Principal and agent—Authority—Action against principal on contract made with agent—Plea of non-assumpsit—Fraud of Agent—Knowledge of Contractee—Regulæ Generales, Dec. 1902 (*N.S. W.*), *rr.* 64, 67.

It is not within the scope of an agent's authority to bind his principals by a contract which, although made ostensibly on their behalf, is, to the knowledge of the other party, really made for his own benefit, even though the contract is of a kind which he has a general authority to make; and there-

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fore, where an agent makes such a contract, and the party with whom he is dealing is aware of the circumstances, the principals are not bound.

Howard v. *Braithwaite*, 1 V. & B., 202; *British Mutual Banking Company* v. *Charnwood Forest Railway Company*, 18 Q.B.D., 714; and *Shipway* v. *Broadwood* (1899), 1 Q.B., 369, considered and applied.

In an action against the principals, upon a contract made by an agent under such circumstances, the defendant may give evidence, under a plea of *non-assumpsit*, of all circumstances which tend to show that the agent, in making the contract, was acting without authority, to the knowledge of the plaintiff, even though that evidence may also show that there was fraudulent collusion between the plaintiff and the agent in making the contract.

The mere fact that the evidence would disclose such fraud, does not render it necessary to plead the facts specially under Rule 67.

Decision of the Supreme Court (1904), 4 S.R. (N.S.W.), 665, reversed.

APPEAL from a decision of the Supreme Court of New South Wales, refusing to grant a rule *nisi* for a new trial (1).

The respondent brought an action against the appellants for breach of a contract, by which the appellants agreed to sell to the plaintiff, for twelve months from 2nd September, 1903, the whole of the appellants' output of spelter dross at £11 per ton, to be delivered by the appellants from time to time as the dross was produced at the works of the appellants.

The appellants were manufacturers of galvanized iron and wire-netting, and the spelter dross was a valuable product left over after the process of passing the iron or wire through the galvanizing tanks.

The breach of contract alleged in the declaration was a refusal to deliver the dross as agreed.

The appellants pleaded in the first instance (1) *non assumpsit*, (2) denial of respondent's readiness and willingness, and (3) denial of the breaches.

After issue had been joined and the case set down for trial, the appellants, in the course of an audit of their books, made certain discoveries as to the circumstances surrounding the making of the contract, which pointed to the conclusion that the contract had been procured by the respondent acting in fraudulent collusion with the appellants' general manager, one Wilkinson. The respondent himself had formerly held the position of secretary in

(1) (1904) 4 S.R. (N.S.W.), 665.

the appellant company, but at the date of the contract was no longer in its employment.

The appellants took out a summons in Chambers for leave to add a plea to the following effect:—That the contract sued upon had been made by Wilkinson ostensibly on behalf of the appellants, but really in fraudulent collusion with the respondent, solely for the benefit of the respondent, and against the interest of the appellants, to the knowledge of Wilkinson and the respondent, and that Wilkinson had entered into the contract in order to reward the respondent for having fraudulently countersigned, as secretary of the appellants, certain cheques on the appellants banking account, after he had ceased to be secretary or to possess any authority to so bind the appellants, these cheques being then presented by Wilkinson and the proceeds misappropriated by him. The summons was dismissed by *Pring* J., mainly on the ground that the affidavit filed in support did not state sufficiently the facts relied upon, nor the time when they came to the knowledge of the appellants: *Falk* v. *Lysaght Bros. & Co. Ltd.* (1).

The case subsequently came on for trial before *Cohen* J., at *nisi prius*, and evidence was tendered by the appellants, under the plea of *non assumpsit*, to prove that Wilkinson in making the contract had acted in fraudulent collusion with the respondent, and outside the scope of his authority, to the knowledge of the respondent, in the manner indicated in the proposed plea. *Cohen* J. rejected the evidence, on the ground that by virtue of rr. 64 and 67 it was only admissible under a plea of fraud, and fraud had not been pleaded. The appellants then asked to be allowed to amend by adding such a plea, but His Honor, under the circumstances, refused to allow the amendment. The reasons for the refusal did not clearly appear on His Honor's notes, but the cases *Rosset* v. *Hartley* (2); and *Thompson* v. *Southern Coal Co. of N.S.W. (No. 2)* (3), were referred to. The jury found a verdict for the respondent, damages £840.

The appellants then moved the Full Court for a rule *nisi* for a new trial on the grounds *inter alia*, that His Honor was in error in rejecting the evidence as above stated, and in refusing to

(1) 21 N.S.W. W.N., 38.
(2) 7 A. & E., 522.
(3) 15 N.S.W. L.R. (L.), 166.

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allow an amendment as asked, and that there was no evidence that the contract sued upon was made by the authority of or was binding on the appellants.

The Full Court refused to grant a rule, on the ground that the appellants, under r. 67 of 22nd December, 1902, *Regulæ Generales*, should have pleaded the fraud (1).

The terms of the rules in question appear in the judgments.

J. L. Campbell (*Want* K.C. with him), for the appellants. The facts which the appellants sought to prove do not amount to a confession and avoidance, within the meaning of r. 67. They go to the root of the contract, and, if established, prove that the contract sued upon was not the contract of the appellants. In making the contract, Wilkinson was not acting as their agent, in their interests, but in the interests of himself and the respondent, to the knowledge of the respondent. The appellants were therefore not liable: *Hambro* v. *Burnand* (2). An agent's authority must be exercised honestly, and if it is exercised dishonestly, to the knowledge of the party with whom the agent is dealing, the principal is not bound. The principal cannot be made liable on the ground of estoppel or holding out, where the facts are known to the contractee: *Shipway* v. *Broadwood* (3); *Foster* v. *Mackinnon* (4); *Hine* v. *Steamship Insurance Syndicate* (5); *Cheshire* v. *Bailey* (6); *Salomons* v. *Pender* (7); *Coleman* v. *Riches* (8); *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (9); *George Whitechurch Limited* v. *Cavanagh* (10); *Bryant Powis and Bryant* v. *Quebec Bank* (11); *Cundy* v. *Lindsay* (12).

[GRIFFITH C.J. referred to *Ewart on Estoppel*, and *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Company* (13).

The facts alleged in the proposed plea amount to an argumentative plea of the general issue, which under the old rules of pleading might have been objected to on special demurrer. Denial of

(1) (1904) 4 S.R. (N.S.W.), 665.
(2) (1904) 2 K.B., 10.
(3) (1899) 1 Q.B., 369.
(4) L.R., 4 C.P., 704.
(5) 72 L.T.N.S., 79.
(6) L. T. Journal, Jan. 7th, 1904.
(7) 3 H. & C., 639; 34 L.J., Ex., 95.
(8) 16 C.B., 104; 24 L.J., C.P., 125.
(9) 18 Q.B.D., 714.
(10) (1902) A.C., 117.
(11) (1893) A.C., 170.
(12) 3 App. Cas., 459.
(13) L.R., 10 Ch., 515.

authority is a denial of the contract, and therefore the evidence was admissible under the general issue: *Grant* v. *Norway* (1). A plea going to the validity of a deed is equivalent to *non est factum*: *National Provincial Bank of England* v. *Jackson* (2). A plea in confession and avoidance is, therefore, inappropriate.

[BARTON J. referred to *Martin* v. *Smith* (3).]

If the evidence is relevant under the general issue, as showing that the alleged contract was outside the scope of the agent's authority, to the knowledge of the respondent, and therefore not binding upon the appellants, it is not objectionable because it incidentally shows fraud on the part of the respondent. If the evidence was inadmissible under the general issue, the amendment should have been allowed. Such an amendment comes within the meaning of sec. 260 (2) of the *Common Law Procedure Act* (N.S.W.) 1899, "all such amendments as are necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." That section is mandatory, and therefore, although the Judge has a discretion, it is his duty to allow an amendment in a proper case. The respondent could not have been misled or prejudiced in any way by the amendment, because he had notice of the defence from the previous application in Chambers for an amendment. [He referred to *Riding* v. *Hawkins* (4).]

Gordon K.C. and *A. Thomson*, for the respondent. It is admitted that, if the proper issues had been raised and the facts alleged had been proved, there would have been a good defence, but under the general issue this evidence may not be given. The alleged contract is not void *ab initio*, but one which, if the defence is established, might be rescinded or affirmed by the principal at his option. The proper method of raising this defence is by a special plea confessing the contract and setting out the facts relied upon in avoidance. Until rescinded the contract binds the principal: *Grant* v. *Gold Exploration and Development Syndicate* (5); *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta*

(1) 10 C.B., 665; 20 L.J., C.P., 93.
(2) 33 Ch. D., 1.
(3) 4 Bing. N.C., 436.
(4) 14 P.D., 56.
(5) (1900) 1 Q.B., 233.

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Percha and Telegraph Works Co. (1); *Pollock on Contracts*, 7th ed., p. 288.

[GRIFFITH C.J. referred to *Clough* v. *London and North-Western Railway Co.* (2); and *Reynell* v. *Lewis* (3).

O'CONNOR J. referred to r. 67 of the Supreme Court Rules, and *Bullen and Leake on Pleadings*, 3rd ed., p. 467.]

The evidence showed that such a contract as this was within the scope of the agent's authority. He was general manager and had made similar contracts for the appellants before.

[GRIFFITH C.J.—That would be evidence of holding out, but here the only evidence of the agent's authority is given by the respondent, who knew that the agent was acting fraudulently and without authority. Under the plea of *non assumpsit* the plaintiff must prove authority. Here his own evidence negatives it.]

The same objection would apply in the case of an action upon an illegal contract. The defendant cannot avail himself of the defence of illegality without specially pleading it, even if it appears on the plaintiff's case. The question is whether r. 67 requires this defence to be pleaded. The defence is, in fact, fraud on the part of the respondent, whatever it may be in form, and the object of the rule is to prevent such a defence being raised unless the plaintiff is given notice, by the plea, of the facts upon which the defendant intends to rely. The rule should be liberally construed so as to give the party in whose interest the rule was made the full benefit which it was intended that he should receive. [They referred also to *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (4); and *Cavendish-Bentinck* v. *Fenn* (5).]

The point as to the amendment was not argued in the Court below, and the appellant should not be allowed to rely upon it now. It was virtually abandoned, because the judgment of the Court was not asked for upon the point. There had been no appeal from the decision of *Pring* J. in Chambers, refusing to allow the amendment, and the Judge at *nisi prius* was justified in treating such failure to appeal as an acquiescence by the

(1) L.R., 10 Ch., 515.
(2) L.R., 7 Ex., 26.
(3) 15 M. & W., 517.
(4) 39 Ch. D., 339.
(5) 12 App. Cas., 652.

appellants. The Court will not interfere with the exercise of his discretion unless he acted upon a wrong principle: *Young* v. *Thomas* (1).

[GRIFFITH C.J. referred to *Australian Steam Navigation Co.* v. *Smith & Sons* (2).]

Campbell, in reply, referred to rr. 64 and 67 of Supreme Court Rules; *Stephen on Pleading*, 6th ed., p. 185; *Rolin and Innes, Supreme Court Practice*, p. 386; *Halbot* v. *Lens* (3); and *Morrison* v. *Universal Marine Insurance Co.* (4).

March 29.

GRIFFITH C.J. The question for determination in this appeal is, in one aspect of it, a mere question of form; in another aspect it involves a very important question of principle. The action was brought by the respondent against the appellants upon an alleged contract for the sale of a quantity of spelter dross for future delivery during a period of twelve months. The appellants pleaded *non assumpsit*, as the plea is called still in New South Wales. Rule 64 of the Rules of the Supreme Court is practically a transcript of the English rule 6 of Trinity Term 1853. It provides: "In all actions on simple contract, except as hereinafter excepted, the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law."

That plea put the respondent upon the proof of all that was necessary to establish the fact of the contract between himself and the appellants. The contract in question was entered into, not by the appellants themselves, under their seal, but by a person alleged to be their agent. Now, when an action is brought by a plaintiff against a defendant on a contract, he must prove that the contract was made, and, if the contract was made by an agent, he must prove the authority of the agent to make it. That proof may be given in various ways, but the onus is upon the plaintiff to prove the agent's authority to make the specific contract sued upon. It may be done by showing that the agent had express

(1) (1892) 2 Ch., 134.
(2) 14 App. Cas., 318.
(3) (1901) 1 Ch., 344.
(4) L.R. 8 Ex., 197.

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authority to make that contract, or it may be done by giving evidence to show that *primâ facie* he had authority to make contracts of that kind. But in every case the question is: Had he authority in fact to make that contract? The most common case is, I think, that though the agent had not express authority to make the particular contract in question, he had been held out by his principal as having authority to make contracts of that kind. In that case the principal cannot say to a person who dealt with the agent on the faith of the holding out—"Oh, I gave secret instructions to my agent." The principal is not allowed to set that up by reason of estoppel. Having held out the agent as his agent to make contracts of that kind, he cannot set up, against a person dealing innocently with the agent on the faith of the holding out, that the agent has in fact gone beyond the limits of his authority. What a plaintiff undertakes to prove in a case of this sort is set out very clearly in a considered judgment of the Court of Exchequer in the case of *Reynell* v. *Lewis* (1). In delivering judgment, *Pollock* C.B. said (2):—

"The question, in all cases in which the plaintiff seeks to fix the defendant with liability upon a contract express or implied, is whether such contract was made by the defendant, by himself or his agent, with the plaintiff or his agent, and this is a question of fact for the decision of the jury upon the evidence before them.

"The plaintiff, on whom the burden of proof lies in all these cases, must, in order to recover against the defendant, show that he (the defendant) contracted expressly or impliedly; expressly, by making a contract with the plaintiff, impliedly, by giving an order to him under such circumstances as shew that it was not to be gratuitously executed: and if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorized, and that it was made as his contract." The learned Chief Baron then, after pointing out how the agency may be constituted, continued: "In all these cases, if the agent, in making the contract, acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise. This agency may be

(1) 15 M. & W., 517. (2) 15 M. & W., 517, at p. 526.

created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff, that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound; he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent." A little further on he says: "Upon none of these propositions is there, we apprehend, the slightest doubt."

Clearly, therefore, by the denial of the contract all these matters are put in issue. I will again summarise what the plaintiff must prove. He must prove that the person with whom he dealt was the agent of the defendant, and that, in making the contract, the agent was acting as the agent of the defendant. Let me give an illustration of the difference. It is not enough that a man should be the agent of another to enable him to make any contract on his behalf; he must make it as his agent. For example: suppose the case of a person authorized to sign a promissory note, *per proc.*, and he makes a promissory note in payment of his own private debt and gives it to his own creditor. Clearly that is not within his authority. The promissory note is not the note of his principal, because the person taking it knows that the agent is not acting for his principal, but for himself. Again, the master of a ship is agent for the shipowner, and may sign a bill of lading on behalf of the owner for goods, but if the master were to sign a bill of lading for goods not put on board the ship, he would not be acting for the owner; and although he had authority to sign bills of lading, a contract made by him in such a way is not the contract of his principal. That was decided in the case of *Grant* v. *Norway* (1). In the present case the respondent, as plaintiff, undertook to prove that the alleged agent, in making the contract, was acting for the appellants and on their behalf. It has never been disputed that an agent who is not acting for

(1) 10 C.B., 665; 20 L.J.C.P., 93.

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his principal but for his own benefit is acting beyond the scope of his authority. In the present case the appellants sought to give evidence under the plea of *non assumpsit* to prove facts which, if established to the satisfaction of the jury, would have shown that the alleged contract was not made in any sense for the appellants' benefit, but for the joint benefit of the agent and the respondent. According to all the statements of the law of agency that have been brought under our notice, a contract made under those circumstances is not within the authority of the agent. In the case of *Howard* v. *Braithwaite* (1), decided by *Eldon* L.C., in 1812, the question was as to the authority of the agent by whom the contract had been made. The Lord Chancellor said (2): "Whether a man is a general, or a special, agent, and, admitting the difference of the principle governing the question, how much further one can bind the principal than the other can, it is impossible, supposing a special agent can bind beyond his authority, to contend, that if he made at the time a declaration that he had no authority, the principal can be bound. So in the case of a general agent as an auctioneer, he may at the auction state, what limitations are imposed on his general power of agency." That is an instance of a case where an agent tells the other party that he is acting beyond the scope of his authority. But the principle is the same. It is manifestly unimportant whether the agent tells the person with whom he is dealing that he has no authority to make the contract, or whether the circumstances under which he makes it are, to the knowledge of the other party, such as to show that he had no such authority. In either case the agent is acting beyond the scope of his authority, and the other person knows it. The rule was put very plainly by Lord *Esher* M.R., in *The British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (3). That was an action against a company to recover damages for fraudulent misrepresentations, alleged to have been made by an agent of the company when acting within the scope of his authority. Lord *Esher* said (4): "The rule has often been expressed in the terms, that to bind the principal the agent must be acting 'for the benefit' of the principal. This, in my opinion, is

(1) 1 V. & B., 202.
(2) 1 V. & B., 202, at p. 209.
(3) 18 Q.B.D., 714.
(4) 18 Q.B.D., 714, at p. 717.

equivalent to saying that he must be acting 'for' the principal, since if there is authority to do the act it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest."

The same principle applies here. If the agent has acted in his own interest, he does not bind his employer. But there is an exception to this rule in the case of a person dealing *bonâ fide* with the agent without knowledge of the limitation of his authority. That is based upon the principle of estoppel; but there can be no estoppel if the person dealing with the agent knows the actual facts, and knows that the agent is acting in his own interests and not in the interests of his employer. That is manifest from the case of *Hambro* v. *Burnand* (1). The headnote of that case is: "Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted *bonâ fide*, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests, and not in those of his principal." The point of that is that the other party was acting *bonâ fide*. The proposition assumes that the agent, when acting in his own interests, was acting outside his authority, but, the other person not knowing that, the principle to which I have referred applies, and the principal is estopped from denying the authority of the agent. All that it is necessary to read from the judgment in that case is the passage quoted from the judgment of the Privy Council delivered by Lord *MacNaghten* in *Bryant, Powis, and Bryant, Limited* v. *Quebec Bank* (2). *Collins* M.R. said (3): "The passage referred to is as follows: 'Whenever the very act of the agent is authorized by the terms of the power, that is whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts *aliunde*.

(1) (1904) 2 K.B., 10. (2) (1893) A.C., 170.
(3) (1904) 2 K.B., 10, at p. 21.

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The apparent authority is the real authority.'" But, as I pointed out a few moments ago, the underlying proposition, which it was not thought necessary to state, is this: that the other party must be dealing in good faith with the agent. If the person with whom the agent is dealing has a knowledge of circumstances which show that the agent is acting in his own interest, and not in the interest of his principal, he cannot allege that there was authority.

It is conceded that, if the facts alleged in this case, and of which the appellants sought to give evidence, were established, they would have shown that the alleged agent had no authority in fact, because he was acting for himself and the respondent, and not for the appellants, in making the contract. Of course I express no opinion as to what would have been the result of the trial if the evidence had been given, but it is conceded that, if these facts were proved, that is what they would establish.

The matters to which I have referred hitherto, are matters of law. I now come to what I described as the point of form. It is this. It is contended that evidence of these facts cannot be given under the plea of the general issue, because, although they tend to show a want of authority in the agent, they also show fraudulent collusion between the agent and the respondent. But one of the facts which the respondent, as plaintiff, has undertaken to establish is the authority of the agent. If he fails to establish that, and if upon the evidence it appears that the agent had no authority, and that the respondent knew it, what difference can it make whether, in addition to proving that the agent had no authority, the appellants proved that he was engaged in a fraudulent enterprise? For his contention in that regard the respondent relies on r. 67, which is as follows:—"In every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded," and examples are given. That rule in terms applies only to matters in confession and avoidance. A matter in confession and avoidance is one which admits the facts alleged in the declaration to be true. Now the fact alleged in this declaration is that the appellants made a contract. The appellants' defence is:—"We made no

such contract. The contract alleged to be ours was made by an agent acting beyond the scope of his authority, to the knowledge of the plaintiff." It is clear that, although in this case the contract is stated shortly, as it is allowed to be, as a contract made by the defendants, yet the substance of the matter is that the short form is to be taken to include an allegation of all the material facts which the plaintiff undertakes to prove, as laid down by the Court of Exchequer in *Reynell* v. *Lewis* (1). Now, expanding the declaration, it comes to this: "One Wilkinson, the agent of the defendants, and acting for and on behalf of the defendants, entered into a contract with the plaintiff." The plea of *non assumpsit* puts in issue the making of the contract by the agent in fact, but it also denies that in making the contract, if he made it, the agent was acting as agent for the defendants. I felt considerable difficulty, that fact being put in issue by the appellants, in apprehending how any rule regarding pleas in confession and avoidance could come in. The argument presented to us on that point is that the appellants do in fact admit that there was a contract, though in point of form they deny it. This defence, it is said, admits that there was a contract between the agent and the respondent, but alleges that it was made in fraud of the principals. For the reasons I have given it must be perfectly obvious that, on the facts stated, there was no contract at all between the respondent and the appellants. The defence is a denial of the contract, by reason of the agent having exceeded his authority, and if in order to establish that case the appellants charge the agent with acting fraudulently in collusion with the respondent, that is altogether immaterial. I can conceive of no case in which an agent purports to bind his principal, when acting outside the scope of his authority, to the knowledge of the other party, which would not be very fairly designated a case of fraud; that is to say, it is a fraud if the other party goes on and endeavours to insist on the contract as a valid one. It seems to me not to be a question of confession and avoidance, but one of traverse, and that the evidence sought to be given was properly admissible under the general issue.

The learned Chief Justice when the rule *nisi* for a new trial

(1) 15 M. & W., 517.

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was refused, is reported to have merely said (1): "You should have pleaded the fraud." I cannot help thinking that under the old system of pleading, a plea setting out the facts alleged in this case would have been held to be bad on special demurrer, as being equivalent to the general issue. The learned Chief Justice has now favoured us with written reasons for the decision. He says: "It would have been most unjust to a plaintiff coming into Court to prove as a matter of fact that the contract had been entered into, and so negative a plea of *non assumpsit*, if the defendant were at liberty to say, 'I admit that there was in fact a contract, my plea of *non assumpsit* does not avail me, but I was induced to enter into the contract by fraud or misrepresentation.'" Well, if I may respectfully say so, I agree entirely with every word of that. We had occasion during the last few weeks to make use of almost the same words in reference to a case which came before us in Hobart. Nothing could be more unfair than to charge a party with fraud without giving him notice of it, but in this case we are dealing with a specific rule of pleading. What the respondent has undertaken to prove is that the agent in making the contract was acting as the agent of the principal, and the appellants are entitled to negative that by any evidence which will show that he was not so acting. The fallacy of the reasoning of the learned Chief Justice is that he assumes that the appellants say in this case, "We admit that there was in fact a contract." It seems to me on these pleadings that the appellants deny that there ever was a contract made by them, and that therefore it is not a question of confession and avoidance, but of denial.

Objection was taken at the trial to the admission of this evidence, and it was rejected, and the appellants' counsel then asked for leave to amend by pleading the matter of fraud specially. For the reasons given I do not think that the amendment was necessary, but, if it was, I think I ought to say that, in my opinion, it was an amendment which, following the words of the *Common Law Procedure Act* 1899, sec. 260, the Court was required to make "for the purpose of determining the real question in controversy between the parties." It is said that this matter is not open to us to consider on the appeal. It is not

(1) (1904) 4 S.R. (N.S.W.), 665.

necessary for us to decide it, if I am right in the opinion that I have expressed, but I think that it is open to us on this appeal, because the substantial question between the parties was whether the appellants should be allowed to prove that their alleged agent had no authority to make the contract, and that the respondent knew it. If that could be proved, it was a substantial defence to the action. If it could not be done without an amendment, then the amendment applied for should have been allowed. That was one of the grounds taken in the memorandum of the rule *nisi* for a new trial, and, although it does not seem to have been dealt with specifically by counsel who moved for the rule *nisi*, it was one of the essential points of the case. For the reasons I have given, I think that no amendment was necessary, but that, if it was, it ought to have been allowed. Of course, if the respondent would have been prejudiced by allowing an amendment of this kind, that might have been a reason for an adjournment, upon such terms as to costs or otherwise as justice might require; but, as a matter of fact, the material facts were elicited from the respondent himself in cross-examination.

For these reasons I am of opinion that a new trial should be granted.

BARTON J. In this case, the facts of which have already been detailed, an interlocutory application was made to *Pring* J. in Chambers for leave to add a special plea of fraud. The plea was in these terms: [His Honor then read the plea, the effect of which has already been given in the statement of the facts, and continued.] That application was refused, and, the case coming on to trial in due course, the appellants, who were defendants, in cross-examination of the plaintiff, the respondent in this appeal, tendered evidence appropriate to that plea, if it had been allowed. The question is whether it was not also appropriate to the general issue as pleaded. After the evidence in question had been tendered under the existing pleadings, and rejected, an application was made by the appellants to allow a plea setting up those facts to be added. That application was also refused by *Cohen* J., who tried the case, and the result was a verdict for £840 damages for

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the plaintiff. [His Honor having referred to the proceedings in the Supreme Court, proceeded.]

The real question for us is, not as to whether any amendment which was applied for ought to have been allowed—I will not discuss the decision of the Judge in Chambers or of the Judge who presided at the trial in that respect—but the question, as now placed before us on the argument of the appellants, is whether the evidence was not admissible under the plea of *non assumpsit*. As to the general law on the subject of the plea, which in my opinion amounts to the general issue, the case of *Hambro* v. *Burnand* (1), to which the Chief Justice has referred, is instructive. The headnote accurately represents the substance of the decision. His Honor the Chief Justice cited a quotation made in that case by *Collins* M.R. from the judgment of Lord *MacNaghten* in the case of *Bryant, Powis, and Bryant* v. *Quebec Bank* (2). I will only add to what His Honor cited a few words occurring near the conclusion of the judgment of *Romer* L.J., which seem to me to apply specially to the facts of the present case (3): "In conclusion I wish to say that, although, upon the terms of the written authority given, the signing of the policies by the defendant Burnand was within the scope of his authority as agent, yet, if the plaintiffs had taken them with notice of the fraud of the agent, they would not have been entitled to recover upon them against the person defrauded." What his Lordship stated there appears to me to have been the real ground of the decision in *Shipway* v. *Broadwood* (4). There the defendant agreed to purchase a pair of horses from the plaintiff provided they were passed as sound by a veterinary surgeon who was employed by the defendant to examine them. The horses were certified as sound by the veterinary surgeon, and the defendant sent a cheque for the price. The horses were found to be unsound and were returned and the cheque stopped. In an action on the cheque it appeared that the veterinary surgeon had accepted a bribe from the plaintiff, the vendor. It was held that the offer and acceptance of the bribe invalidated the certificate, and that the plaintiff could not recover under the contract, which depended upon the

(1) (1904) 2 K.B., 10.
(2) (1893) A.C., 170.
(3) (1904) 2 K.B., 10, at p. 25.
(4) (1899) 1 Q.B., 369.

validity of the certificate. I regard that case as in principle identical with the present, assuming the evidence which was tendered by the defendants to be before the Court, that is to say, evidence applicable to the plea which they endeavoured to have placed on the file, and which in my opinion is only another way of stating the general issue. These authorities clearly state what is the law to be applied to such cases, but do not specifically touch the question of pleading, except so far as they show this, that an action brought under such circumstances is bad at the root, because the evidence tendered in support of the plaintiff's case fails to prove the contract. Put in another way, it may be stated thus: if there is an entire absence of authority, which is the case here, if the proof tendered is borne out by the evidence, a plea setting up such a defence is not in confession and avoidance, but a traverse. The rule which deals with the matter is one of the rules of Trinity Term 1853, now called r. 67 of the Supreme Court. The rule is as follows. [His Honor read the rule and continued.] Then examples are given. Those examples refer to matters which are in their essence instances of confession and avoidance. The rule provides that fraud must be specially pleaded, but the matter which must be so pleaded is matter in confession and avoidance, and we are consequently brought back to the question which is at the root of the matter, viz., whether the evidence applicable to the real defence of the appellants is matter in confession and avoidance. Now, the evidence, as it has been put before us, goes to the question whether there was any authority in the agent to make the contract, or at least, whether, supposing there was authority, there was a genuine exercise of that authority on behalf of the appellants. It can never be that a party is prevented from giving that evidence under a plea which puts in issue the authority of the agent to make the particular contract, which is a traverse, merely because there is a rule which says that matters in confession and avoidance shall be specially pleaded. I will here read a passage from *Stephen on Pleading* which deals with this subject. It is at pages 161, 162 of the 6th ed., as follows:—"On the subject of the general issues, it remains only to remark, that other pleas are ordinarily distinguished from them by the appellation of *special pleas*; and when resort is had

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to the latter kind, the party is said to plead *specially*, in opposition to pleading the general issue."

The author in that passage shows the meaning of the rule to be that where there is matter which in its essence is matter of confession and avoidance, it shall not be disguised in pleading by an attempt to get it in under a plea of the general issue. But to say that, wherever the circumstances on which the plea is based involve fraud, they shall be made the subject of a plea in confession and avoidance, is to demand that in some cases the mere existence of facts of fraud shall turn the plea scientifically applicable into one that scientifically ought not to be possible. If the fraud alleged is matter of confession and avoidance, it must be specially pleaded. That is not to say that matter which is essentially a traverse is to be specially pleaded in confession and avoidance, or that a denial of the mere existence or of the exercise of authority, that is, a denial of the alleged contract *in toto*, is to be turned into what it cannot be—an admission of the contract and an excuse for its non-performance. Speaking of pleas in confession and avoidance, I quote again from *Stephen on Pleading*, 6th ed., at p. 174: "With respect to the *quality* of these pleadings it is to be observed that it is of their essence (as the name itself imports) to *confess* the truth of the allegation which they propose to answer or avoid," that is to say, as is stated at p. 49 of the same treatise, admitting the averments of fact in the declaration, to allege new facts which obviate or repel their legal effect. Now the legal effect of the averments in the respondent's declaration is that there is a complete and binding contract by the appellants. Obviously that is a legal fact which the appellants dare not admit in pleading. The author continues: "It is essential, however, to every well-drawn plea of this class that the confession, though not express, should be distinctly implied in or inferable from the matter of the pleading . . . If a pleading, therefore, purporting to be by way of confession and avoidance (or, in other words, not pleaded by way of traverse), does not import a confession of the adverse allegation, it is informal and improper." And, at p. 179: "It remains only to be observed that in all those cases where the nature of the answer is to give no colour to the adverse party, the proper course is to plead by way of traverse."

From these passages it appears (i) that it would not be good pleading in this case to put on the file a plea which began by admitting the contract the very existence of which the appellants contest, and (ii) that, as it would be impossible under such circumstances to frame a plea which would give colour to the averment of a contract, the only proper course is to plead by way of traverse. And it will be admitted that the only proper traverse to cover the facts put forward by the appellants in this case is the plea of *non assumpsit*.

Thus there is found in an admirable though elementary text book, what I venture to think a complete answer to the argument for the respondent.

I am forced to the conclusion that the learned Judge who presided at the trial should have admitted the evidence tendered in cross-examination of the respondent, and all other evidence material to the defence that this was a contract to which the appellants were no parties, since it was entered into by Wilkinson with the respondent, not on behalf of the appellants, but for, and to the mutual advantage of Wilkinson and the respondent – that is to say, for reward to the former and to the profit of the latter, at the expense of the appellants.

I am therefore of opinion that the appeal should be allowed, and that the case should go down to a new trial on the present pleadings.

O'CONNOR J. I do not think there can be any doubt in this case as to the law which regulates the rights of the parties, assuming that the facts alleged by the appellants are proved. Every authority conferred upon an agent, whether express or implied, must be taken to be subject to a condition that the authority is to be exercised honestly and on behalf of the principal. That is a condition precedent to the right of exercising it, and, if that condition is not fulfilled, then there is no authority, and any act purporting to have been done under it, unless in a dealing with innocent parties, is void. Further, it is quite clear that if a person dealing with an agent has knowledge that there has been a fraudulent exercise of the authority, then as far as he is concerned, he is not allowed to say that the authority exists.

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But the question has been raised whether, under the form of the pleadings, the appellants are allowed to set up those facts by which they seek to invalidate the authority of their agent. That, although a matter of form, is a matter of some considerable importance. As long as rules exist which regulate the form in which pleadings are to be carried on, it is important that those rules should be fairly and reasonably administered, since, if they are not, they become a delusion and a snare to those who frame the statement of their case, whether for plaintiff or defendant, upon the faith of them.

Now, the rule which is first to be looked at is r. 64, which provides [His Honor read the rule and continued]:—The plaintiff in his declaration setting out his facts according to their legal effect alleges a contract, not by the appellants' agent, but by the appellants themselves. The only plea of the appellants, that it is material to consider, is a denial of their having made such a contract. It will be observed that the contract put in evidence is not a contract under the seal of the appellant company. If it had been, different considerations might have arisen. It is a contract which can only bind the appellants by reason of the existence of certain facts, from which it could be implied that a contract binding on the appellants had been made, or, to quote the words of the rule "from which the contract promise or agreement alleged may be implied by law." Now, there are several facts which the respondent must necessarily prove before a contract binding on the appellants can be implied. Amongst those facts the principal is the fact of authority. This authority is sought to be made out, first, by reason of Wilkinson's position as general manager of the company; in the second place, by the nature of the contract, which deals with one of the waste products of the appellants' business, which they had been in the habit of selling before; and thirdly, because of the adoption of contracts of a similar nature made by their manager on previous occasions. From these facts it is sought to imply that there was authority to make the particular contract sued upon. But, as I pointed out before, there must always be, in every grant of authority, whether express or implied, a condition that the authority is to be honestly exercised, and exercised on behalf of the principal,

if it is open to the respondent under his allegation of a contract made by the appellants to prove those facts upon which he relies to show the existence of authority, it is clearly open to the appellants, on the plea of traversing the making of the contract under r. 64, to deny those facts or to prove any other facts which will negative the implication which the respondent seeks to draw from them. Now, one of the inferences which the respondent seeks to draw is that the authority was honestly exercised. If the appellants could prove any facts tending to show that the authority was not so exercised, such facts would come within the meaning of r. 64. But the proof of dishonest conduct on the part of the agent is not in itself sufficient; it must also be proved that the respondent had notice of it. If, however, it is proved that the respondent had notice of the dishonest conduct, it is quite immaterial that he benefited by it. If the fact proved here was that the then manager, Wilkinson, had, in making this contract, exercised his authority dishonestly, and for his own benefit, and not on behalf of his principals, and that that fact had come to the knowledge of the respondent, the respondent could not succeed in the action, even though he were quite innocent of any participation in the benefit so fraudulently obtained.

But, it is said that, as the respondent did derive benefit from the dishonesty of the agent, the rights of the appellants under r. 64, have been altered, and that if the facts show fraud on the part of the plaintiff, that fraud must be specially pleaded. Well, I cannot assent to that proposition. It appears to me that, if the fact of authority is a matter to be proved by a plaintiff, a defendant is entitled to give in evidence any facts which show no authority, even though one of the facts may be fraud on the part of the agent. If those facts also show a fraud on the part of the plaintiff, that circumstance cannot deprive a defendant of his right to set up the defence of want of authority under r. 64.

I have been dealing with r. 64, because it is upon that rule that the appellants rely for their right to set up their answer to the respondent's case. But it is really under r. 67 that the respondent has contended that there ought to be a plea of fraud here, and, before he can succeed in that contention, he must be prepared to show that the facts here take the case out of r. 64

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and bring it under r. 67. Now, what is the governing idea of the latter rule? The rule is: [His Honor then read the rule, and continued]. The governing idea is that there must be a special plea wherever the contract alleged is admitted to have been made in fact, but there is some reason based either on law or upon the principles of equity, why the defendant should not be bound by it. There is no mystery about the words "confession and avoidance." It is a perfectly well-known expression. "Confession" means admission, and "avoidance" means a statement of reasons why, notwithstanding the admission, the defendant is not bound. It therefore seems to me that the first element which must be present in any pleading in order to bring it under r. 67 is an admission of the statements of fact made in the particular pleading to which it is an answer. If that rule were to be applied here, it would be imperative for the appellants to admit that they made this contract. But they do not admit that. Their case is that they did not make it; that there never was any such contract on their part, because they say that one of the subsidiary facts which are essential to the existence of the contract cannot be proved by the respondent. It appears therefore on examination that r. 67 is quite inapplicable to the state of affairs disclosed in this case, and I am of opinion, agreeing with my learned brothers, that the facts here alleged, and which the appellants claim to be entitled to give in evidence, amount to such a defence as may be given under the plea of *non assumpsit*.

I am of opinion therefore that the evidence tendered ought to have been admitted.

With regard to the amendment. I will only say this. We have not before us all the facts which were before the learned Judge in Chambers or the learned Judge at *nisi prius*. Both of them refused to allow the amendment. But I think there can be no doubt as to the general rule applicable to cases of amendment, viz., that wherever an amendment can be made, without such prejudice to the other party as cannot be compensated by the imposition of terms as to costs or otherwise, the amendment ought to be allowed, especially in cases of this kind, where, if the facts relied on cannot be given effect to as a defence, it is very difficult to see how they can be given effect to in any way at all. Therefore,

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to refuse to allow these facts to be put before a jury would be, to a very large extent, to deprive the appellants of the opportunity of ever at any time setting up what appears to have been, if the appellants are right in their facts, a palpable fraud on the part of their agent and collusion on the part of the respondent. The question whether the amendment should have been allowed or not, is not, however, a matter for our decision at the present time, because, in view of the conclusion at which we have arrived, the amendment becomes unnecessary.

Appeal allowed. Order appealed from discharged. Respondent to pay the costs of the motion for a rule nisi and of the appeal. Costs of the first trial to be costs in the cause. Money paid into Court by the appellants as security for verdict and costs of the first trial to be repaid to appellants.

Solicitor for appellants, *H. C. E. Rich.*

Solicitors for respondent, *Shipway & Berne.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

LYSAGHT BROS. & CO. LTD. . . . APPELLANTS;

AND

FALK . . . . RESPONDENT (No. 2).

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 26.

Griffith C.J., Barton and O'Connor JJ.

Attachment—Non-payment of costs of appeal—New trial—High Court Procedure Act 1903 (*No.* 7 *of* 1903), *sec.* 26 (*b*)—*Rules of the High Court* 1903, *Part I., Order XXXV., r.* 1.

An order for payment of the costs of an appeal is an order for the payment of money to some person within the meaning of *Rules of the High Court* 1903, Part I., Order XXXV., r. 1.