[HIGH COURT OF AUSTRALIA.]

ARTHUR VICTOR LEGGO (TRADING AS A. VICTOR LEGGO & CO.) . . PLAINTIFF, } APPELLANT;

AND

BROWN & DUREAU LIMITED . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 15, 16, 19; *May* 24.

Knox C.J., Isaacs and Rich JJ.

Principal and Agent—Breach of warranty of authority—Cause of action——Belief of plaintiff in existence of authority—Inducement for plaintiff to enter into contract.

Held, by *Knox* C.J., *Isaacs and Rich* JJ., that in an action against a person representing himself to be an agent, for breach of warranty of authority to enter into a contract, it is not an essential ingredient of the cause of action that the plaintiff when he entered into the contract believed that the defendant had the authority he represented himself to have.

Held, also, by *Isaacs* and *Rich* JJ., that in such an action the plaintiff must prove that he was induced to enter into the contract or other transaction by the representation, express or implied, of the defendant that he had authority, and that the fact that the plaintiff was so induced is prima facie implied from the representation and the subsequent making of the contract or entering into the transaction and must be disproved by the defendant.

Per Knox C.J.:—The cause of action in such an action is the breach of the express or implied promise of the person who assumes to act as agent that he has authority so to act, the consideration necessary to make that promise binding being the action of the plaintiff in entering into the contract. The promise being established and being supported by consideration, the only question is whether the defendant broke it.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) reversed.

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APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Arthur Victor Leggo (trading as A. Victor Leggo & Co.) against Brown & Dureau Ltd. in which the plaintiff by his statement of claim alleged that the defendant, assuming to be the agent of W. R. Leven & Co., induced the plaintiff to enter into a contract in writing with him as such agent for the sale by the plaintiff to W. R. Leven & Co. of twenty-five tons of arsenite of soda; that the defendant asserted and warranted to the plaintiff that the defendant was authorized by W. R. Leven & Co. to make the contract for W. R. Leven & Co. as their agent; and that the plaintiff, on the faith of such assertion and warranty, entered into the contract with the defendant as such agent: but that the defendant was not authorized by W. R. Leven & Co. to make the contract and W. R. Leven & Co. repudiated it, and the plaintiff was unable to enforce the contract and suffered damage. The defence was a denial of the allegations in the statement of claim. The action was heard by *Macfarlan* J., who gave judgment for the defendant.

From that decision the plaintiff now appealed to the High Court.

The other material facts appear in the judgments hereunder.

Stanley Lewis (with him *Hudson*), for the appellant. In an action for breach of warranty of authority it is sufficient for the plaintiff to show that he entered into the contract with the defendant as agent and who described himself as agent, and that the defendant had not the authority he represented himself to have; and the onus is upon the defendant to show that the plaintiff knew that the defendant had not the authority (*Adamson* v. *Morton* (1); *Yonge* v. *Toynbee* (2); *Simmons* v. *Liberal Opinion Ltd.* (3)). The belief of the plaintiff in the existence of the authority is immaterial. [Counsel also referred to *Chr. Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan* (4).]

Owen Dixon K.C. (with him *Lowe*), for the respondent. The finding that the plaintiff was not induced by the defendant's representation of authority to enter into the contract is supported by the

(1) (1881) 7 V.L.R. (L.), 307; 3 A.L.T., 31.
(2) (1910) 1 K.B., 215, at p. 227.
(3) (1911) 1 K.B., 966.
(4) (1905) A.C., 302, at p. 309.

evidence; and that he was so induced must be proved by the plaintiff (*Collen* v. *Wright* (1); *Dickson* v. *Reuter's Telegram Co.* (2)).

[KNOX C.J. referred to *Hughes* v. *Graeme* (3).]

The fact that the plaintiff was so induced would ordinarily be proved by proving the making of the representation and the subsequent entering into the contract. But the facts here are such as to warrant the finding that the plaintiff was not so induced. (See also *Starkey* v. *Bank of England* (4).) The provision in clause 3 of the conditions of the contract providing that "this contract (unless marked 'confirmed' by sellers) is subject on sellers' side only, but not on buyer's side, to confirmation by the sellers before delivery," has the effect of making what is called a "contract" merely an offer, and while it was open the buyer withdrew (*Helby* v. *Mathews* (5)). This is a point which could not be cured by evidence, and, being open on the pleadings, may be taken now for the first time (*North Staffordshire Railway Co.* v. *Edge* (6)).

[KNOX C.J. referred to *Banbury* v. *Bank of Montreal* (7).]

Stanley Lewis, in reply. If clause 3 of the conditions has the effect contended for, it is repugnant to the rest of the contract. The point could have been cured by evidence that there was a confirmation, and therefore the point cannot be taken now.

[ISAACS J. referred to *Sydney Harbour Trust Commissioners* v. *Wailes* (8); *Owners of Ship Tasmania* v. *Smith* (9).]

Cur. adv. vult.

May 24.

The following written judgments were delivered:—

KNOX C.J. This is an appeal against the decision of *Macfarlan* J. ordering judgment to be entered for the defendant in an action in which the appellant was plaintiff and the respondent company was defendant.

The action was brought to recover damages for breach of warranty of authority by which the defendant on 10th September 1918,

(1) (1857) 8 El. & Bl., 647, at p. 657.
(2) (1877) 3 C.P.D., 1, at p. 7.
(3) (1864) 33 L.J. Q.B., 335.
(4) (1903) A.C., 114, at p. 118.
(5) (1895) A.C., 471, at p. 476.
(6) (1920) A.C., 254, at p. 265.
(7) (1918) A.C., 626.
(8) (1908) 5 C.L.R., 879, at p. 889.
(9) (1890) 15 App. Cas., 223.

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assuming to be the agent of Messrs. Leven & Co., of Durban, South Africa, induced the plaintiff to enter into a contract with it as such agent for the sale to the said Leven & Co. of a quantity of arsenite of soda, and warranted to the plaintiff that it was authorized by the said Leven & Co. to make the said contract for them as agent. The defence set up was a denial of every allegation in the statement of claim. The contract price of the goods was £2,928 15s. 2d., and the plaintiff incurred expense to the amount of £10 in cabling to South Africa. The net proceeds of the sale of the goods on the repudiation of the contract by Leven & Co. amounted to £1,477 9s. 6d. The loss sustained by the plaintiff amounted to £1,461 5s. 8d.

The contract for sale, which was dated 10th September, was expressed to be made between the defendant on behalf of Messrs. Leven & Co. and the plaintiff. It was signed on behalf of the defendant by one H. W. Senior, who was in charge of the chemical department of the defendant. It was admitted that defendant was not authorized by Leven & Co. to enter into the contract, and at the trial the learned Judge held that Senior had authority from the defendant to enter into a contract in the terms of the contract of 10th September. Other contentions put forward at the trial by the defendant, but not persisted in on this appeal, were rejected by *Macfarlan* J., but he ultimately decided in favour of the defendant on the ground that Leonard (who represented the plaintiff in the negotiations for the contract) did not believe that the defendant had authority from Leven & Co. to enter into the contract of 10th September, and that he did not rely on and was not induced by any express or implied representation of authority in entering into that contract. The learned Judge further found that there was not sufficient evidence to warrant the inference that Leonard knew, or that his mind had definitely reached a belief, that the defendant had not the authority assumed; but he was of opinion that the plaintiff, in order to succeed in the action, was bound to establish that he was induced to enter into the contract by the representation that the defendant had authority from the principal for whom it assumed to act in making it. He added that the same result was arrived at by saying that no warranty of authority would be implied where the

representation was not trusted or relied on by the other party to the contract or where his agreement was not induced by the representation.

In my opinion this decision cannot be sustained.

The contract in this case was made by the defendant expressly as agent for Leven & Co., and the rule laid down in *Collen* v. *Wright* (1) is that a person who enters into a contract expressly as agent for a principal named impliedly warrants his authority; and, if he has in fact no such authority, he may be sued on that implied contract and is bound to make good to the other contracting party what that party has lost, or failed to obtain, by reason of the non-existence of the authority. The precedent contained in *Bullen & Leake*, 3rd ed., p. 66, for a declaration in an action of this kind contains no allegation of the knowledge or belief of the plaintiff, or that the plaintiff was induced by the representation of the defendant to enter into the contract or relied on the truth of such representation. It is, in my opinion, clear that the cause of action is the breach of the express or implied promise of the person who assumes to act as agent that he has authority so to act, the consideration necessary to make that promise binding being found in the action of the other party in entering into the contract. The promise being established and being supported by consideration, the only question is whether the defendant broke it.

No doubt, in *Collen* v. *Wright* (1) and in many other cases observations have been made to the effect that the liability attaches to a person who induces another to contract with him as the agent of a third party by an untrue assertion of authority. But there is, so far as I know, no case in which it has been decided that the plaintiff in such an action must establish that he believed the assertion of the defendant. Indeed, the absence of such belief on the part of the plaintiff would afford the strongest reason for his insisting on a promise by the defendant that he had the authority in pursuance of which he assumed to act, or that he would indemnify the plaintiff against any damage which he might incur by entering into the contract and so acting on the representation that the defendant had authority from the alleged principal.

(1) (1857) 7 El. & Bl., 301; 8 El. & Bl., 647.

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Mr. *Dixon*, for the respondent, sought to uphold the judgment in his favour on another ground, namely, that the alleged contract of 10th September was by condition 3 expressly made subject, on sellers' side only, to confirmation by sellers before delivery, that consequently no binding contract existed until such confirmation, and that there was no evidence of any confirmation by the sellers before 12th December 1919, on which day the plaintiff was informed that Leven & Co. had instructed defendant to cancel the order. This contention was not raised at the trial, and the case appears to have been conducted in the Supreme Court on the footing that if the defendant had authority to make the contract on behalf of Leven & Co., and if Senior had authority from the defendant, the contract would have been binding on Leven & Co. My brothers *Isaacs* and *Rich* are of opinion that, in the circumstances, the respondent should not be allowed to raise for the first time in this Court the contention to which I have referred, and, although my mind is not free from doubt on the question, I am not prepared, having regard to the conduct of the trial in the Supreme Court, to dissent from the conclusion at which they have arrived.

In order to avoid the necessity of a new trial, *Macfarlan* J. assessed the damages which the plaintiff would be entitled to recover, if he succeeded in the action, at £1,461.

In my opinion the appeal should be allowed, and judgment should be entered for the plaintiff in the action for the amount of damages so assessed.

ISAACS J. All issues of fact in contest at the trial, except one, have been found in favour of the appellant, who was the plaintiff. But judgment was given against him on the ground that he did not rely on the representation that the respondent had the authority it by its contract professed to have. His Honor said: "If it is necessary as a matter of law for plaintiff to prove this, the action must in my opinion fail." I have been greatly exercised in my mind as to what precisely was meant by this. Reading the judgment as a whole, and by the light of the evidence, as every judgment must be read, I have little doubt there has been an undue burden put upon the plaintiff, occasioned to a large extent by reason of the absence of

Leonard and also by the influence of the finding that Leonard formed no belief as to the existence or non-existence of the authority. Leonard, who acted as plaintiff's agent in the making of the contract of sale, was not called. He had left the plaintiff's employ in or about October 1920, his whereabouts was unknown, and he was last heard of in Sydney. He was afterwards sought for unsuccessfully, but the learned Judge thought his absence was not satisfactorily explained. There is no circumstance leading to the supposition that he has been suppressed. In his findings of fact the learned Judge says: "I think that there is not sufficient evidence to warrant the inference that Leonard *knew* or that his mind had definitely reached a *belief* that defendant *had not authority* to enter into the contract of the 10th." Then he says: "The proper inference, in my opinion, is that he *never formed a belief that it had.*" Lastly, he says: "Certainly he did not rely on and was not induced by any implied or express representation of authority in entering into the contract of 10th September." Later on in the judgment his Honor, after referring to legal principles enunciated in various authorities, observes: "The same result is arrived at by saying that no warranty of authority will be implied where the representation is not trusted or relied on by the other party entering into the contract or where his agreement is not induced by the representation." "Usually," continued the learned Judge, "the inducement by a reliance on the representation would be inferred from the fact that the misrepresentation was made and that plaintiff made the contract or did or refrained from doing the act." Substantially that is accurate; and, if the matter stopped there, the question we have to determine would be quite simple. However, his Honor proceeds: "But that is because usually there are no circumstances such as there are here from which it can be inferred that the act was not induced by, or that reliance was not placed on, the representation." This it is that, taken with passages previously quoted, raises the difficulty. Unfortunately the "circumstances" from which the inference of non-reliance was drawn are not stated, and I have been unable to discover them. Counsel for the respondent were unable to point to any evidence, even of so strong a partisan as Senior, to show that Leonard was not acting in reliance on the representation implied by Senior's

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contract. No doubt, the respondent contested the authority of Senior to make that contract; but, assuming the failure of the respondent as to that, there was no circumstance deposed to that I can find to overcome the primary inference from the contract itself. Leonard's absence from the trial cannot, in the circumstances, create affirmative evidence of non-reliance on the warranty. If Leonard had said or done anything, or been told anything by Senior, which could weaken the primary inference, Leonard's absence might facilitate the acceptance of Senior's testimony in that regard. But as neither Senior nor anyone else offers any substantive evidence showing such non-reliance, it seems to me inevitable, and the passages quoted from the judgment under appeal confirm it, that the conclusion as to non-reliance, is based or largely based on the finding that Leonard's mind was a *blank as to belief* in the existence or non-existence of the professed authority in fact. Even that finding is for the most part conjecture when the evidence is examined. But I am willing to assume it. That the contract was honestly made is not disputable; and if honestly made, and if as found there was no actual belief that authority was wanting, it is difficult to discover any reason, other than the absence of affirmative belief in the authority, for holding that plaintiff did not rely on defendant's promise that the authority existed. What did he rely on if not on the representation which is ordinarily implied from a contract so made? The learned Judge says that, if he were allowed to guess, he would say that probably Leonard, if asked as to his belief regarding authority, would have said, "Well, now you ask me, I don't suppose they 'have,' or possibly 'I'll risk it.'" His Honor, however, very properly adds: "But I am not allowed to guess." Courts cannot decide men's rights on conjecture. If that, however, be put aside, there is nothing I can see on which to rest the finding of non-reliance on the representation of authority except the mere absence of positive belief in its inherent truth. It becomes, therefore, a question of law whether such affirmative belief is necessary to constitute the necessary reliance on the promise, because I quite agree with the learned Judge that as a legal proposition the plaintiff cannot succeed unless he did rely on the representation. Closely related as these two considerations are, they are different, and there is a vast difference in the obligation according as it depends

on one or the other. In order to elucidate the matter it is necessary to recall the steps by which this very important branch of the law has reached its present position.

It is not a little remarkable how often the Courts have been required to consider the true meaning and limitations of the principle of law usually called the doctrine of *Collen* v. *Wright* (1). Decisions of great authority have gradually elucidated its scope and application; and the present case calls for an examination of the doctrine from a standpoint, not directly covered by any recorded decision, but unquestionably involved in the general reasoning that has governed the judicial conclusions. The doctrine upon which *Collen* v. *Wright* was determined by the illustrious tribunal which decided it was not novel. The Judges did not legislate. They found in the common law a special principle and applied it to the case before them, which happened to be a case where the defendant had *as professing agent of another* entered into a *contract* with the plaintiff. The principle was stated by *Story* J. in his book on *Agency*. In *Cherry* v. *Colonial Bank of Australasia* (2) the Judicial Committee, referring to that, say :—" The ground therein stated is said to be, ' a plain principle of justice ; for every person, so acting for another, by *a natural, if not by a necessary, implication*, holds himself out, as having competent authority to do the act, and he thereby *draws the other party into a reciprocal engagement*,' ch. x., § 264. According to the opinion of that eminent jurist, if a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who *confided in the representation*, whether the party making it acted with a knowledge of its falsity or not. In short, says Story J., he *undertakes* for the truth of his representation." (The italics are mine.) That states and interprets the principle enunciated by *Story*. The particular case in which it was applied by the Privy Council was *not a contract* entered into by *the professing agents as such* with the bank. It was an " engagement," as their Lordships termed it, into which the bank

(1) (1857) 7 El. & Bl., 301; 8 El. & Bl., 647.

(2) (1869) L.R. 3 P.C., 24, at p. 31.

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was drawn, by inference from the evidence of the circumstances. The engagement was advancing money on the cheques of the person who had been named by the persons who in effect held themselves out as authorized—though they were not authorized—to give him the necessary power to bind the company. That case, so far, is a recognition of the basic principle of which *Collen* v. *Wright* (1) is only an illustration, and as applied to a contract with the professing agent as such. It is also a direct instance of the application of the principle to a " reciprocal engagement " of another kind into which the other party was drawn by the representation. It is true that the particular way in which the bank was drawn into the " engagement " was by being led to believe in the power of Clarke (not the professing agents themselves) to bind the company, but there is nothing in the judgment to indicate that if the bank, without forming any positive belief on that point, had been content simply to accept the defendant's assurance, the result would have been any different. The statement of law already quoted phrases the essential term as " confided in the representation." The almost universal expression in declarations at law was " relying on such promise." (See *Cherry* v. *Colonial Bank of Australasia* (2); *Simons* v. *Patchett* (3); *Hughes* v. *Graeme* (4); *Spedding* v. *Nevell* (5), where the full count is not given, but see at p. 225 in the judgment of *Montague Smith* J.)

In *Collen* v. *Wright* (1) there were no pleadings. In the Court of Queen's Bench Lord *Campbell* C.J. says (6): " *If he induced the plaintiff to act upon it*, he was bound." Also, " He acted as a reasonable man would who *gave faith to the representation*." *Wightman* J. speaks (7) of " *confidence being given to the representation*." In the Exchequer Chamber *Willes* J. says (8):—" A person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, *upon the faith of the professed agent being duly authorized*, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is

(1) (1857) 7 El. & Bl., 301; 8 El. & Bl., 647.
(2) (1869) L.R. 3 P.C., 24.
(3) (1857) 7 El. & Bl., 568.
(4) (1864) 33 L.J. Q.B., 335.
(5) (1869) L.R. 4 C.P., 212.
(6) (1857) 7 El. & Bl., at p. 312.
(7) (1857) 7 El. & Bl., at p. 313.
(8) (1857) 8 El. & Bl., at pp. 657-658.

good consideration for the promise." "Upon the faith" there obviously means "upon the basis." The professing agent is assumed to know whether he is authorized or not; and when he asserts unqualifiedly that he is authorized, the other party impliedly accepts that as conventionally true, and therefore enters into the contract "upon the faith" of its truth, without being called upon to weigh or test the statement in the scales of truth. The obligation of the professing agent cannot depend on the mental attitude of the other party undisclosed to him; he cannot be heard to say the other party must have disbelieved him when he asserted he had authority. The obligation depends on whether the circumstances show that expressly or impliedly the transaction was based on the existence of the authority as asserted by him.

In *Dickson* v. *Reuter's Telegram Co.* (1) the Court of Appeal held that the doctrine referred to did not extend to the case of an honest misrepresentation which, though causing damage, was not a representation of authority or character inducing a transaction with the person whose authority the professing agent represents he has. The "different and independent rule," that is, different and independent from the ordinary rule as to misrepresentation, is stated thus by *Brett* L.J. (2): "Where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into *upon that footing*, he is liable to an action if he does not fill that character; but the liability arises not from the misrepresentation alone, but from the *invitation* to act *and from the acting in consequence of that invitation.*" That case confines the liability to cases where, in *Story's* words, the agent "draws the other party into a reciprocal engagement," and for that purpose it employs the words "requests" (3) and "invites" (2). But clearly the phrase of *Brett* L.J., "a contract is entered into upon that footing," indicates that the assertion of authority is merely a conventional basis.

In 1886, in *Firbank's Executors* v. *Humphreys* (4), Lord *Esher* M.R. formulated the rule in terms quite in accordance with *Story* and the formula in *Cherry's Case* (5). He said (6): "The rule

(1) (1877) 3 C.P.D., 1.
(2) (1877) 3 C.P.D., at p. 8.
(3) (1877) 3 C.P.D., at p. 5.
(4) (1886) 18 Q.B.D., 54.
(5) (1869) L.R. 3 P.C., 24.
(6) (1886) 18 Q.B.D., at p. 60

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to be deduced is, that where a person *by asserting that he has the authority* of the principal induces another person to enter into any transaction which *he would not have entered into but for that assertion*, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it *undertook* that it was true, and he is liable personally for the damage that has occurred." The essentials are (1) assertion of authority; (2) inducement by asserting; (3) transaction which but for that assertion the other party would not have entered into. Where they coexist there is a warranty. There is no suggestion that there must be "belief" in the truth of the assertion; there must, of course, be reliance on the assertion, for that is connoted by the "inducement." The other party might well say to the professing agent: "I have no belief about it; as to the instructions you have I am ignorant and agnostic, but I am content to rest upon and trust to your assurance and to base my dealing upon that." That is the only operative effect of the word "warranty." The rule as stated in *Firbank's Executors' Case* (1) was approved by *Vaughan Williams* L.J. in *Oliver* v. *Bank of England* (2), and by *Stirling* L.J. (3), and concurred in by *Cozens-Hardy* L.J. (4). In the same case in the House of Lords, *Starkey* v. *Bank of England* (5), Lord *Davey* says: "As a separate and independent rule of law it is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is *induced to enter by a representation* that the person with whom he is doing business has the authority of some other person." Lord *Davey*, indeed, in his judgment acknowledges the doctrine as asserted by *Story*.

Chr. Salvesen & Co. v. *Rederi Aktiebolaget Nordstjernan* (6) may be considered as complementary to *Dickson* v. *Reuter's Telegram Co.* (7). The earlier case emphasized the necessity of being "drawn into a reciprocal engagement"; the later case insists on the necessity of the representation being an assertion of "authority or character" of the representer. Up to this point it is evident that "belief" on the part of the person invited is immaterial; but

(1) (1886) 18 Q.B.D., 54.
(2) (1902) 1 Ch., 610, at p. 624.
(3) (1902) 1 Ch., at p. 629.
(4) (1902) 1 Ch., at p. 630.
(5) (1903) A.C., at pp. 118-119.
(6) (1905) A.C., 302.
(7) (1877) 3 C.P.D., 1.

"reliance" by him on the assertion—in other words, "inducement"—is essential, to constitute the warranty.

Then comes the question, how is this to be established; or, in other words, what considerations are to guide the Court in determining whether the plaintiff has "relied on the promise," as it is somewhat inaccurately phrased? It should be "relied on the representation." That question is answered by two cases of high authority. In 1893 the House of Lords dealt with the case of *Suart* v. *Haigh*, reported in the *Times Law Reports* (1). That is the only report of the case I can find. Lord *Watson* delivered the judgment; in which, says the report, the Lord Chancellor (Lord *Herschell*), Lord *Ashbourne*, Lord *Macnaghten* and Lord *Morris* concurred. It was a breach of warranty action. The contract was made by a shipowner with shipbrokers who, receiving a telegram from certain agents in Bombay, believed they were authorized to make the contract for a third firm in Colombo as principals, and did so with the shipowners, stating in the contract that the parties hiring were the agents from whom the telegram came, and describing them as agents for the charterers, the third firm. The defendants contended that, having stated the names of the Bombay agents, they had disclosed the source of their information and, therefore, there was no warranty. Lord *Watson* said (2): "It does not, in my opinion, admit of doubt that a contract professing to bind B as a principal executed on his behalf by A in the character of his agent conveys to the other contracting party an implied, but *very distinct, assertion by A* that he has full authority from B to make the contract." Further on he says what is very material here:—"That assertion is the *natural inference* from an act done by the appellants, which *can only be valid if they have authority*. An inference of that kind *cannot be displaced* except by words which amount to *a distinct intimation* and the other contracting party had *notice* that the agreement made was not meant in certain circumstances to be effectual." He thought the words relied on as a defence were not sufficient for that purpose. That case, which appears to contain a recognition of *Story's* phrase "natural if not necessary implication," seems to require a very clear displacement of the inference usually arising

(1) (1893) 9 T.L.R., 488.

(2) (1893) 9 T.L.R., at p. 489.

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from a contract, if it is honestly made and not a mere sham. It is, of course, possible that the party agreed to take a personal risk: it is possible that he was not content to take the assurance but determined to investigate for himself, and so found out all the facts; but these displacements are matters to be proved before it can be said that he did not rely on the assertion of the agent evidenced by his act.

In *Halbot* v. *Lens* (1) *Kekewich* J. deals with one such case as I have figured, namely, where the agent gives express notice that in fact he has no such authority, but expects it. And the basis of his decision is the judgment of *Mellish* L.J. in *Beattie* v. *Lord Ebury* (2) dealing with the case of the contractor having *full notice of the facts.*

Finally, in *Yonge* v. *Toynbee* (3) *Buckley* L.J., again adopting the rule in *Firbank's Executors' Case* (4), and quoting Lord *Davey's* general statement in *Starkey's Case* (5), says that the "liability arises from the fact that *by professing to act as agent he impliedly contracts that he has authority*, and it is immaterial whether he knew of the defect of his authority or not." But, says the Lord Justice: "*This implied contract may, of course, be excluded by the facts of the particular case.*" Then he instances cases where the agent negatives any implied assertion, and refuses to warrant or tells the other party facts which show there is no intention to warrant authority. Having gone through the facts (6), the learned Lord Justice concludes the warranty by saying: "They" (the defendants) "proved no facts addressed to show that implied contract was excluded."

In the present case there is the "natural inference" referred to by Lord *Watson*, and there are no facts excluding the implication arising from that inference. The Court, therefore, must give effect to the implication. In *Cherry's Case* (7) the Privy Council say: "The warranty which the law implies depends on the position of the parties, and on the nature and effect of the representation." Applying that rule to the facts before us, the warranty is that Leven & Co. authorized the contract as entered into.

(1) (1901) 1 Ch., 344, at p. 351.
(2) (1872) L.R. 7 Ch., 777.
(3) (1910) 1 K.B., 215, at p. 226-227.
(4) (1886) 18 Q.B.D., at p. 60.
(5) (1903) A.C., 114.
(6) (1910) 1 K.B., at p. 228.
(7) (1869) L.R. 3 P.C., at p. 32.

Unless, therefore, there be some other defence, the ordinary result must follow, which is represented by the damages £1,461, as assessed by the learned primary Judge.

On this appeal, and for the first time in the history of the case, learned counsel urged, as fatal to the appellant's claim, a point appearing on the face of the agreement itself. The contract note as to both duplicates, after declaring that the respondent "buys" and the appellant "sells" the goods described at the prices mentioned and "on the terms and conditions mentioned therein," states various stipulations. One of the duplicates then bears the signature of the appellant and the other the signature of the respondent *by their respective agents*. Then follow eight clauses, containing statements and stipulations unsigned with reference to the contract. At the end of the third of these clauses appear the following words: "This contract (unless marked 'confirmed' by sellers) is subject, on sellers' side only, but not on buyer's side to confirmation by the sellers before delivery." The point sought to be raised at that stage was that unless both parties were bound neither was bound, that until confirmation by the sellers they were not bound, and as there was no evidence of confirmation until after 12th December, when the respondent's principals repudiated, there never was a binding contract. Had that point been raised in proper time, it might have presented some difficulty. The Court would then have had to consider first what it meant, whether—assuming the bargain was not intended to be a one-sided transaction, giving an unfair advantage to the sellers—it did not mean merely that the appellant's agent Leonard was enabling his principal, the appellant, to ratify or decline to ratify his act on the appellant's behalf. Again, if that were not the meaning, it might have been necessary to consider whether the words relied on should not be disregarded as repugnant to the bargain already definitely set forth (see *Forbes* v. *Git* (1)). But there is one clear ground for not entertaining the point at this stage, and on that ground leave to raise it was refused. It is avowedly a point on which evidence as to confirmation prior to repudiation was admissible so as to close the bargain. At the trial, not only was the point not suggested, but the case was conducted

(1) (1922) 1 A.C., 256, at p. 259.

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on a basis inconsistent with it. The learned Judge in his judgment, after resuming the facts, states: "If these facts stood alone and Senior had authority from defendant to sign the contract note of 10th September *it is not disputed* that there would have been established a breach of warranty of authority on defendant's part or that plaintiff would be entitled to damages therefor." His Honor then sets out the various defences raised, and deals with each. Even the notice of appeal gives no indication of such a point. If that were essential, learned counsel for the appellant stated that he could, if necessary, have called evidence to establish the requisite confirmation. However, apart from that, the law is clear that parties are bound by the way the case is conducted. While an incurable point of law is always open, the rule is now well established, not to give effect to any contention which had not been fought and which might have been met by evidence.

In these circumstances the appeal must be allowed.

RICH J. I agree that the appeal should be allowed.

The basis on which the action rests is contained in the judgment of *Willes* J., for the majority of the Court, in *Collen* v. *Wright* (1). He said:—"The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise." Later cases elaborate, explain and sometimes differentiate this statement, but the kernel of the matter is contained in the passage I have quoted. The action, therefore, is for breach of an undertaking or promise, i.e., a warranty, that the defendant has the authority he professes to have. The plaintiff must, of course, rely on the warranty because it is made, and need not concern himself with investigating whether it is true. If circumstances properly admissible in evidence, whether contained in the terms of the formal contract or not, show that the defendant did not expressly or

(1) (1857) 8 El. & Bl., at pp. 657-658.

impliedly lead the plaintiff to believe there was a warranty or, in other words, an undertaking or promise that the agency in fact existed, the plaintiff must fail. Amongst other instances of such a case I may mention *Lilly, Wilson & Co.* v. *Smales, Eeles & Co.* (1), where it was proved that a particular form of signature was understood by brokers to be adopted "with the very object of avoiding the implication of an absolute warranty." The ground on which the judgment in the case under appeal was given for the defendant is, for the reasons I have stated, insufficient to support it.

Another ground was suggested at the eleventh hour on behalf of the defendant, as to whether there ever was a binding contract. Whatever might have been the ultimate result had that point been thoroughly fought out, the suggestion came too late. In any case the result of it depended upon facts which might or might not have been proved or disproved. The conduct of the case at the trial in my opinion precludes the defendant from relying on the point, whatever its value might be; and the appeal must, therefore, stand or fall on the issues that were in contest. That being so, the appeal should be allowed and judgment entered for the plaintiff.

Appeal allowed. Judgment as of 20th July 1922 to be entered for the plaintiff for £1,461 with costs of action. Respondent to pay costs of appeal.

Solicitor for the appellant, *Arthur Phillips.*

Solicitors for the respondent, *Connelly & Crocker.*

B. L.

(1) (1892) 1 Q.B., 456.