[HIGH COURT OF AUSTRALIA.]

BROWNETT AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

NEWTON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 21; *May* 1.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Company—Commencement of business—Statutory condition precedent unfulfilled—Supply of goods to company—Directors—Warranty of authority—Companies Act 1936 (*N.S.W.*) (*No.* 33 *of* 1936), *sec* 77*.

An action for breach of warranty of authority may be maintained against directors of a company who enter on the company's behalf into contracts which are not binding on the company because of its failure to comply with sec. 77 (1) (*c*) of the *Companies Act* 1936 (N.S.W.), where the conduct of the directors has been such that an implied warranty of their authority to make contracts immediately binding on the company may properly be inferred therefrom.

Decision of the Supreme Court of New South Wales (Full Court): *Newton* v. *Brownett*, (1940) 41 S.R. (N.S.W.) 1; 58 W.N. (N.S.W.) 15, affirmed.

* Sec. 77 of the *Companies Act* 1936 (N.S.W.) provides: "(1) Where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers unless —(*a*) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; (*b*) every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription; and (*c*) there has been filed with the Registrar-General a statutory declaration by the secretary or one of the directors, in the prescribed form, that the conditions mentioned in paragraphs (*a*) and (*b*) of this sub-section have been complied with. . . . (3) The Registrar-General shall, on the filing of the statutory declaration, certify that the requirements of sub-section one . . . have been complied with, and that certificate shall be conclusive evidence of that fact in favour of any person dealing

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APPEAL from the Supreme Court of New South Wales.

A writ was issued out of the Supreme Court of New South Wales by Stanley Lipscombe Newton against Charles Alfred Brownett, Henry Michael Mullins, George Myer Hains, Edwin Percy Shelley and John Stuart Dunbar, who, at all material times, were the directors of Applied Concrete (Broken Hill) Ltd. His amended declaration contained five counts, of which only the fourth count was seriously pressed. This count alleged that, in consideration of Newton entering into certain contracts with the defendants as and assuming to be the agents of the company for the sale by Newton to the company of certain goods, the defendants promised Newton that they were authorized by the company to make immediately binding contracts for it as its agents; that Newton did enter into the said contracts and was always ready and willing to perform the same, yet the defendants were not authorized by the company to make immediately binding contracts for it, whereby Newton, *inter alia*, was not able to enforce the performance of the said contracts and lost the value of the materials supplied thereunder.

Applied Concrete (Broken Hill) Ltd. was incorporated under the *Companies Act* 1936 (N.S.W.) as a limited liability company by registration on 9th February 1938, and in September 1938 it went into liquidation.

Article 92 of the company's articles of association provided that the management of the business and the control of the company should be vested in the directors, who should have power, *inter alia*, "(*d*) to acquire any property and any rights which the company is authorized to acquire at such prices and generally on such terms and conditions as they think fit, and (1) to enter into all such negotiations and contracts . . . and . . . do all such . . . things in the name, and on behalf of the company as they may consider expedient . . . for the purposes of the company."

At a meeting of the board of directors held on 17th February 1938 it was resolved that the secretary obtain competitive quotations for the purchase of material. Newton was thereupon asked to quote a price for the supply to the company of Brighton Portland cement, and at a board meeting held on 22nd February 1938 it was resolved that the price submitted by him be accepted. On 23rd

with the company. . . . (4) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding. . . . (6) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be guilty of an offence."

February 1938 a letter was sent by the secretary of the company to Newton stating that the quotation tendered by him had been accepted by the board. The letter continued :—" This company will require approximately 95 tons of cement. As a result of my conversation with you on 21st instant we will expect you to be able to supply us with either large or small quantities, without delay." On 26th April 1938 Newton sent a letter to the company stating : " We have very much pleasure in quoting you as under : Speedite cement (24 bags to ton) £5 16s., delivered to site, Broken Hill," and, on 2nd May 1938, the secretary of the company sent him a reply stating that his quotation had been accepted by the company, " viz., 4s. 10d. per bag delivered at the factory site." The company's ledger account with Newton, which was put in evidence, showed that Newton supplied goods to the company every month from February to December 1938, the first supply having been made on 28th February. Up to and including 31st July 1938 the price of the goods so supplied amounted to £1,709 1s. 8d. The total price of all the goods supplied by Newton was £1,973 8s. 9d. The company made payments on account totalling £950, of which the last was made on 17th October. Hence, at the close of the account in December 1938, a balance of £1,023 8s. 9d. was shown as owing by the company to Newton, of which £809 1s. 8d. was shown as owing in respect of goods supplied by Newton up to the end of July 1938. It was admitted on behalf of the defendants that Newton did supply goods to the company.

The company was one to which sec. 77 of the *Companies Act* 1936 (N.S.W.) applied. It was not disputed that the statutory declaration required by sec. 77 (1) (c) was never filed with the Registrar-General, and that the company was, therefore, throughout its career, subject to the statutory prohibition against commencing business.

Newton in giving evidence stated that he first heard about certificates under sec. 77 in August 1938. It appeared also that it was reported to a meeting of the board of directors of the company held on 14th February 1939 that the provisions of sec. 77 had not been complied with. At this meeting it was resolved that, in view of the insolvent position of the company's finances, the company be advised to go into voluntary liquidation. This it did in September 1939.

At the hearing of the action the trial judge granted a nonsuit to the defendants, but upon an appeal by Newton the Full Court of the Supreme Court ordered that this be set aside and a new trial be had : *Newton* v. *Brownett* (1).

(1) (1940) 41 S.R. (N.S.W.) 1 ; 58 W.N. (N.S.W.) 15.

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From this decision the defendants appealed, by leave, to the High Court.

Further facts and the relevant statutory provisions appear in the judgments hereunder.

Asprey, for the appellants. Non-compliance with the provisions of sec. 77 of the *Companies Act* 1936 does not prevent the making of a contract, but only renders illegal the performance of the contract. The implied warranty the directors must be taken to have given, if they gave any at all, was only that the company had power to enter into a contract for the delivery of the goods. A contract so entered into is a provisional contract (sec. 77 (4)), and should be construed as if it contained a clause that it should not be binding on the company unless and until the company became entitled to commence business (*In re "Otto" Electrical Manufacturing Co.* (1905) *Ltd.*; *Jenkins' Claim* (1); *Buckley* on *Companies*, 11th ed. (1930), p. 212; *Palmer's Company Precedents*, 15th ed. (1938), Part I., pp. 19, 296-304; *Topham's Company Law*, 9th ed. (1934), p. 61)—See also the *American Restatement of the Law of Agency*, pp. 735, 736, par. 332. This case is completely different from those cases where directors have caused the issue of debentures, such as *Firbank's Executors* v. *Humphreys* (2) and *Weeks* v. *Propert* (3), in which cases the transactions were absolutely void *ab initio*. This case is analogous to *Elkington & Co.* v. *Hürter* (4). By entering into the subject contracts the appellants, as directors, did not warrant that the company was going to do anything to carry them out, or that the contracts would become immediately binding on the company; they did not become guarantors of the future performance of the contracts: See *In re National Coffee Palace Co.*; *Ex parte Panmure* (5).

Miller K.C. (with him *Dwyer*), for the respondent. The course of conduct as shown by the evidence clearly enables the inference to be drawn that the warranty by the directors was that in consideration of the respondent supplying goods to the company the company was in a position to make immediately binding contracts with respect to such goods. The obligation of satisfying the requirements of sec. 77 is upon those persons who are associated with the company, and not upon a person dealing with the company. A person so dealing with a company is not presumed to know whether a particular requirement of the *Companies Act* has or has not been complied with. It is not suggested that either expressly or impliedly there was any

(1) (1906) 2 Ch. 390, at p. 392.
(2) (1886) 18 Q.B.D. 54.
(3) (1873) L.R. 8 C.P. 427.
(4) (1892) 2 Ch. 452.
(5) (1883) 24 Ch. D. 367, at pp. 370, 371.

warranty with respect to sec. 77, but there is abundant evidence from which the inference of fact can be drawn that the directors, the appellants, warranted that the company was in a position to trade and to make binding contracts. The question is one of fact and is not one of law. There is nothing in sec. 77 which precludes the making of the warranty made by the directors. A creditor is unable to compel directors to comply with the requirements of sec. 77; nor is there any way by which he could insist upon the contract being made legally binding (*New Druce-Portland Co. (Ltd.)* v. *Blakiston* (1)). The respondent is entitled to maintain proceedings as upon breach of warranty even though it involved reliance by him on the compliance by the directors with certain statutory requirements. The respondent was not bound to inquire as to whether the statutory requirements had been satisfied (*Royal British Bank* v. *Turquand* (2)). In the circumstances the appellants are personally liable for the moneys owed to the respondent (*Chapleo* v. *Brunswick Building Society* (3); *Starkey* v. *Bank of England* (4); *West London Commercial Bank Ltd.* v. *Kitson* (5)).

Asprey, in reply. The directors did not have personal contact with matters relating to the respondent; therefore *Chapleo* v. *Brunswick Building Society* (6) is distinguishable. If a warranty involves an incorrect statement of the law relief is not granted (*Rashdall* v. *Ford* (7)).

Cur. adv. vult.

May 1.

The following written judgments were delivered:—

RICH A.C.J. I have had the advantage of reading the judgment of *Williams* J., and, as I agree with it, it is unnecessary for me to recapitulate what he has said.

STARKE J. The question in this case is whether there is any evidence fit to be submitted to a jury of an implied warranty on the part of the appellants, the directors of Applied Concrete (Broken Hill) Ltd., of their authority to order and obtain supplies of materials from the respondent.

On 9th February 1938 the company, which is now in liquidation, was incorporated in New South Wales. It was formed to manufacture and sell concrete fences and suchlike materials. The respondent

(1) (1908) 24 T.L.R. 583.
(2) (1856) 6 E. & B. 327, at p. 332 [119 E.R. 886, at p. 888]; (1855) 5 E. & B. 248 [119 E.R. 474].
(3) (1881) 6 Q.B.D. 696, at pp. 701, 714, 716, 717.
(4) (1903) A.C. 114, at p. 119.
(5) (1884) 13 Q.B.D. 360, at p. 362.
(6) (1881) 6 Q.B.D. 696.
(7) (1866) L.R. 2 Eq. 750.

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offered to supply materials to the company, and on 23rd February 1938 the following letter was sent to him by the secretary of the company:—"I have much pleasure to advise that the following quote tendered by you was accepted by the board on the 22nd inst. Brighton Portland Cement, bagged 24 bags to ton at 4s. 8d. net per bag. Delivered on site Broken Hill. This company will require approximately 95 tons of cement. As a result of my conversation with you on 21st instant we will expect you to be able to supply us with either large or small quantities, without delay." Thereafter the respondent supplied and delivered to the company considerable quantities of cement and possibly other materials, for some of which he was paid, but a balance remains due to him of about £1,000.

The respondent contends that the directors thus authorized and made for the company a contract or a series of contracts between him and the company for the supply of materials to the company under a promise express or implied to pay the price agreed or, if none were agreed, a reasonable price for the materials supplied. It is clear enough that there is evidence of such a contract or a series of contracts of this nature being concluded. But it is also clear that the company was precluded from making any such contract in the circumstances of this case by reason of the provisions of sec. 77 of the *Companies Act* 1936 of New South Wales:—"Where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers unless—(*a*) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; (*b*) every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription; and (*c*) there has been filed with the Registrar-General a statutory declaration by the secretary or one of the directors, . . . that the conditions mentioned in paragraphs (*a*) and (*b*) of this sub-section have been complied with": See *In re "Otto" Electrical Manufacturing Co.* (1905) *Ltd.* (1); *New Druce-Portland Co.* (*Ltd.*) v. *Blakiston* (2). The Registrar-General is required, on the filing of the declaration, to certify that the requirements of the section have been complied with, and his certificate is conclusive evidence of that fact in favour of any person dealing with the company. Further, it is provided that any contract

(1) (1906) 2 Ch. 390. (2) (1908) 24 T.L.R. 583.

made by a company before the date at which it is entitled to commence business shall be provisional only and shall not be binding on the company until that date and on that date it shall become binding. The company had a share capital and had issued a prospectus inviting the public to subscribe for its shares, but the statutory declaration required by the section was never filed, and consequently no certificate from the Registrar-General was or could be obtained. Accordingly, the principle stated in *Collen* v. *Wright* (1) was relied upon to establish that the directors were liable upon an implied warranty that they had authority to make the concluded contract or series of contracts on behalf of the company which they did make.

The doctrine of implied warranty of authority is as applicable to directors of companies as to other agents (*Cherry and M'Dougall* v. *Colonial Bank of Australasia* (2); *British Russian Gazette and Trade Outlook Ltd.* v. *Associated Newspapers Ltd.* (3)). "But with respect to directors, it must not be forgotten that in most cases the limits of their authority can be readily ascertained, and are supposed to be known; and a person who deals with directors whom he knows, or is supposed to know, to be exceeding their authority, cannot complain of them if he finds that their acts are repudiated" (*Lindley* on *Companies*, 6th ed. (1902), vol. 1, at pp. 350, 351; *Rashdall* v. *Ford* (4); *Eaglesfield* v. *Marquis of Londonderry* (5)).

And a warranty of authority cannot be relied upon if all the material facts from which the nature and extent of the authority of the director or agent may be inferred were fully known to the other contracting party or if in fact he did not rely upon any warranty. But it is quite "immaterial for the purpose of the application of this branch of the law whether the supposed agent knew of the defect of his authority or not; he undertakes for the truth of his assertion of authority" (*Cherry and M'Dougall* v. *Colonial Bank of Australasia* (6); *Starkey* v. *Bank of England* (7)), though an honest mistake on the part of directors as to the legal extent of their authority would not render them liable (*Beattie* v. *Lord Ebury* (8)).

No doubt persons who deal with companies whose memorandum and articles of association are registered and accessible to the public cannot hold them liable if the directors exceed their authority as disclosed by the regulations (*Moss Steamship Co. Ltd.* v. *Whinney* (9)). And this is equally true of the provisions of the *Companies*

(1) (1857) 8 E. & B. 647, at p. 657 [120 E.R. 241, at p. 245].
(2) (1869) L.R. 3 P.C. 24.
(3) (1933) 2 K.B. 616, at p. 642.
(4) (1866) L.R. 2 Eq. 750.
(5) (1876) 4 Ch. D. 693; (1878) 38 L.T. 303 (H.L.).
(6) (1869) L.R. 3 P.C., at p. 31.
(7) (1903) A.C., at p. 119.
(8) (1872) 7 Ch. App. 777; (1874) L.R. 7 H.L. 102.
(9) (1912) A.C. 254, at p. 266.

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Act and, in particular, of sec. 77. "This doctrine," says *Lindley* on *Companies* (6th ed. (1902), vol. 1, p. 218), "is based upon the necessity of protecting shareholders (and the public) against the unauthorized acts of . . . directors, and ought not to be extended to cases in which persons who are really ignorant of the powers of directors, seek to make them personally responsible for the assumption of powers they did not really possess." Accordingly it has been held that "directors, like other agents, impliedly warrant all facts necessary to confer the authority which they profess to exercise . . . So where directors of a company authorized the manager to overdraw the company's account, they were held liable for the overdraft, for although the company had no power to borrow without the consent of a meeting of shareholders, they had power to do so with such consent (*Cherry and M'Dougall* v. *Colonial Bank of Australasia* (1)). So where a company had power to issue debenture stock to a limited extent, and the directors, after the power was exhausted, issued more debenture stock, they were held personally liable to the holders of the unauthorized stock (*Firbank's Executors* v. *Humphreys* (2))" (*Lindley* on *Companies*, 6th ed. (1902), vol. 1, pp. 351, 352).

In the present case the company's contracts were declared by the Act to be provisional only until the company was entitled to commence business. And whether the company was entitled to commence business and conclude contracts depended upon compliance with the provisions of the *Companies Act*; upon a matter of fact, and not upon the construction of the Act or any matter of law. But there is evidence that the directors made a concluded contract or a series of concluded contracts which did not bind the company because of the provisions of the *Companies Act* and which under the Act were provisional only until the company was entitled to commence business (*British Russian Gazette and Trade Outlook Ltd.* v. *Associated Newspapers Ltd.* (3)).

In my opinion, therefore, there is evidence fit to be submitted to a jury of a warranty on the part of the directors, to be implied from their acts and conduct, that they had authority to make the contract or the series of contracts which in fact were made by them on behalf of the company with the respondent. It will be for the jury to consider and determine whether the respondent relied upon this warranty and whether he did not know and appreciate as a business man all the material facts in connection with the restriction imposed upon the company to commence business.

The appeal should be dismissed.

(1) (1869) L.R. 3 P.C. 24.
(2) (1886) 18 Q.B.D. 54.
(3) (1933) 2 K.B., at p. 642.

McTIERNAN J. The appellants were the directors of a limited-liability company, called Applied Concrete (Broken Hill) Ltd., to which the respondent supplied cement during the period from February 1938 down to the following December. It appeared that the total price of the materials supplied was £1,973, of which the company paid £950, leaving an unpaid balance of £1,023. The company went into liquidation.

The articles of association of the company empowered its directors to purchase such goods for the company. But the powers of the company to make contracts were restricted by sec. 77 of the *Companies Act*. The company was subject to sec. 77 (1), which provides that a company in its situation shall not commence business unless the conditions mentioned in pars. *a*, *b* and *c* are complied with. The last of these conditions is that "there has been filed with the Registrar-General a statutory declaration by the secretary or one of the directors, in the prescribed form, that the conditions mentioned in paragraphs (*a*) and (*b*) of this sub-section have been complied with." No statutory declaration was filed. Sec. 77 (4) provides that "any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding." If a company commences business in contravention of these provisions, every person who is responsible for the contravention is liable to a penalty of £50 for every day during which the contravention continues (sec. 77 (6)). Referring to similar provisions, *Buckley* J. said in *In re "Otto" Electrical Manufacturing Co.* (1905) *Ltd.* (1): "The word 'provisional' there means, I think, this, that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company becomes entitled to commence business."

Having no enforceable claim against the company, the respondent brought an action against the appellants. He sued on five counts, two of which he abandoned at the trial, and on the others he was nonsuited. The fourth count is the only one which is now material. This is in the usual form of a count against an agent on the implied warranty that he had authority to contract with the person suing him. It varies from the usual form by alleging that the contracts which the agent warranted he was authorized to make were "immediately binding" contracts. But this verbal variation does not alter the substance of the cause of action: Cf. *Simons* v. *Patchett* (2).

(1) (1906) 2 Ch., at p. 392.
(2) (1857) 7 E. & B. 568, at p. 574 [119 E.R. 1357, at p. 1359].

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The count stated that, in consideration of the plaintiff, the present respondent, entering into certain contracts with the defendants, the present appellants, as and assuming to be the agents of the company, for the sale by the plaintiff to the company of certain goods, the defendants promised the plaintiff that they were authorized by the company to make immediately binding contracts for it as its agents; that the plaintiff did enter into the contracts with the defendants as and assuming to be the agents of the company, and was always ready and willing to perform the same on his part, yet the defendants were not authorized by the company to make the contracts for it as its agents; and that by reason thereof the plaintiff was not able to enforce the performance of the contracts, and the same were not performed, and he suffered the damage then alleged in the count. Defences were pleaded, which are to be read distributively, denying the promise and the breaches alleged in the count, and issue was joined thereon.

The cause of action pleaded is based on the rule in *Collen* v. *Wright* (1). In this case *Willes* J., in affirming the judgment of the Court of Queen's Bench, laid down the following rule with the concurrence of *Pollock* C.B., *Williams* J. and *Bramwell*, *Watson* and *Channell* Bs., *Cockburn* C.J. dissenting:—"A person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. 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. Indeed the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter. This was, in effect, the view taken by the Court of Queen's Bench, and to which I

(1) (1857) 7 E. & B. 301 [119 E.R. 1259]; 8 E. & B. 647 [120 E.R. 241].

adhere" (1). In *Dickson* v. *Reuter's Telegram Co. Ltd.* (2) *Bramwell* L.J. explained the rule, using these words:—"The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. This general rule is admitted by the plaintiff's counsel, and prima facie includes the present case. But then it is urged that the decision in *Collen* v. *Wright* (3) has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that *Collen* v. *Wright* (3), properly understood, shows that there is an exception to that general rule. *Collen* v. *Wright* (3) establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen* v. *Wright* (3)." *Brett* L.J. made these observations on the rule: "The decision in that case" (*Collen* v. *Wright* (3)) "was founded upon a different and independent rule, which may be stated to be, that 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" (4). It would be impossible, without undue length, to discuss all the cases in which the rule was applied. In *Starkey* v. *Bank of England* (5) Lord *Lindley* said that the rule was disputed for the first time in that case. It was then affirmed again. Lord *Halsbury* said in that case that what gave rise to the liability of the defendant were the circumstances of the power of attorney being presented to the bank "for the purpose of being acted upon, and being acted upon on the representation that the agent had the authority of the principal, which he had not" (6). "That," the Lord Chancellor added, "does import an obligation—the contract being for good consideration—an undertaking on the part of the agent that the thing which he represented to be

(1) (1857) 8 E. & B., at pp. 657, 658 [120 E.R., at p. 245].
(2) (1877) 3 C.P.D. 1, at p. 5.
(3) (1857) 8 E. & B. 647 [120 E.R. 241].
(4) (1877) 3 C.P.D., at pp. 7, 8.
(5) (1903) A.C., at p. 119.
(6) (1903) A.C., at p. 118.

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genuine was genuine. That contains every element of warranty" (1). Lord *Davey* said of the rule that "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" (2).

The question for our consideration is whether or not the jury could properly infer that there was such a representation by the appellants to the respondent of authority to make the contracts for the purchase of the cement which he supplied in 1938 as to found the warranty sued upon in the fourth count of the declaration. The evidence is fully reviewed in the judgment of *Jordan* C.J. The contracts were constituted by orders given for the supply of cement presumably at the price and on the conditions expressed in quotations which the company invited from the respondent. He was informed that one of these quotations had been accepted on 22nd February 1938 by the board of directors, and on 2nd May 1938 he was informed that the other had been accepted by the company. It was clearly open to the jury to find that the appellants or some of them were responsible for giving the orders and for the acceptance of the cement by the company. No question of misjoinder is raised.

The warranty sued upon is one that has to be implied. In *Marzetti* v. *Williams* (3) *Patteson* J. said that the only distinction between the two species of contract, express or implied, is as to the mode of proof. "The one" he stated, "is proved by the express words used by the parties, the other by circumstances showing that the parties intended to contract." If there were no other circumstances to be taken into consideration by the jury except the evidence of the course of dealing and the part which the jury could reasonably infer that the appellants took in it, the jury could properly have found that the appellants or some of them represented to the respondent that they were authorized by the company to make those contracts. The liability of the person who proposes to act as agent but whose authority is defective arises under an implied contract. In *Yonge* v. *Toynbee* (4) *Buckley* L.J. said :—"This implied contract may, of course, be excluded by the facts of the particular case. If, for instance, the agent proved that at the relevant time he told the party with whom he was contracting that he did not know whether the warrant of attorney under which he was acting was genuine or not, and would not warrant its validity, or that his principal was

(1) (1903) A.C., at p. 118.
(2) (1903) A.C., at p. 119.
(3) (1830) 1 B. & Ad. 415, at p. 428 [109 E.R. 842, at p. 847].
(4) (1910) 1 K.B. 215, at p. 227.

abroad and he did not know whether he was still living, there will have been no representation upon which the implied contract will arise." And in *Halbot* v. *Lens* (1) *Kekewich* J. said that in order to maintain an action against the person professing to have the authority which he has not "there must be misrepresentation in fact trusted by the person to whom it is made." He added :—"I cannot myself see how a man can be properly said to have made such a representation when in truth and substance he has said, 'Although I will, if you wish it, sign this on behalf of the alleged principal, I tell you plainly that I have no authority from him to do so, and have every reason to believe such authority will not be forthcoming.' A man, of course, might say, 'I have no authority, and probably cannot obtain such authority, but yet I will contract to obtain it, and run the risk of damages.' Such a contract is conceivable, and would be good in law, but ought not, I think to be inferred except from facts leading directly to that conclusion" (2). It is immaterial whether the appellants knew of the defects in their authority or not (*Starkey* v. *Bank of England* (3)). There is evidence from which the jury could infer that they took a part in the transactions between the respondent and the company which was capable of implying the representation that no restrictions existed on the powers of the company to carry on business and make contracts under which the respondent would be entitled to payment for the goods he supplied. It is not suggested that the appellants gave any warning or notice to the respondent which might exclude the representation which their profession of authority could imply. The restrictions on the powers of the company which prevented the contracts binding the company were imposed by the *Companies Act*, and it contains provisions which have the object of enabling any person dealing with the company to ascertain whether the restrictions had been removed without trusting to any representation by the company or the directors that the restrictions had been removed. The absence of the statutory declaration which is prescribed by sec. 77 (1) (*c*) from the Registrar-General's file was notice to the world that the restrictions continued in force. "In the case of a registered joint stock company, all the world, of course, have notice of the general Act of Parliament, and of the special deed which has been registered pursuant to the provisions of the Act: and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being

(1) (1901) 1 Ch. 344, at p. 351. (2) (1901) 1 Ch., at p. 351.
(3) (1903) A.C., at p. 119.

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exceeded" (*Fountaine* v. *Carmarthen Railway Co.* (1))—See also *Royal British Bank* v. *Turquand* (2).

The case is in this respect different from such cases, for example, as *Firbank's Executors* v. *Humphreys* (3), where *Lindley* L.J. said:—"He" (the plaintiff) "could not know whether the company had or had not already issued the full amount of debenture stock which it was authorized to issue. He was justified in assuming that the directors had power to do what they did: and by giving him the debenture stock certificates they in truth represented to him that they had such power." It is true as a general proposition that a person dealing with the company would not be justified in assuming that sec. 77 (1) (*c*) had been complied with: See *Irvine* v. *Union Bank of Australia* (4). It would be his duty to ascertain whether it had done so or not by looking at the file in the Registrar-General's office to see if the statutory declaration had been filed or by inspecting the certificate which sec. 77 (3) requires the Registrar-General to give on the filing of the statutory declaration. This certificate is made by sub-sec. 3 of sec. 77 conclusive evidence that the requirements mentioned in sec. 77 (1) have been complied with in favour of any person dealing with the company. But the contract alleged in the present case is one between the respondent and the appellants personally. It is collateral to the contracts which they assumed to enter into as the agents of the company. The evidence does not show that the respondent knew in fact that the requirements of sec. 77 (1) had not been complied with. For the purposes of this collateral contract there is no presumption that he must be taken to have known that the restrictions imposed on the company by sec. 77 of the Act had not ceased. The appellants on their part and the respondent on his part were free to enter into such a contract. Neither the Act nor any rule of law stood in the way of the respondent relying upon the representation of authority implied by the appellants' acts and the part they took in the transactions between the respondent and the company.

In my opinion, there was evidence upon which the jury could find that the appellants or some of them represented that they had the authority of the company to purchase the goods supplied to it by the respondent. It has been observed that no question of misjoinder was raised. There was also evidence, in my opinion, that consideration was given by him in the shape of action on the faith of such representation. There were no circumstances proved which,

(1) (1868) L.R. 5 Eq. 316, at p. 322.
(2) (1856) 6 E. & B., at p. 332 [119 E.R., at p. 888].
(3) (1886) 18 Q.B.D., at p. 62.
(4) (1877) 2 App. Cas. 366, at p. 379.

taken in conjunction with the representation which the jury could quite reasonably find had been made by the appellants, would exclude the warranty or render it impossible as a matter of law for the jury to find that the warranty alleged in the fourth count was made and that the appellants failed to make it good.

In my opinion this appeal should be dismissed.

WILLIAMS J. The company was incorporated under the *Companies Act* 1936 (N.S.W.) on 9th February 1938. The first meeting of the board of directors was held on the same day. The minutes of the meeting state that the secretary reported that the company's solicitor had received information from Sydney that the company had been registered and that more than the number of shares referred to in the prospectus as the minimum subscription on which the directors would proceed to allotment had been applied for. The company had in fact issued two prospectuses inviting the public to subscribe for its shares, one dated 13th December 1937 and the other 4th February 1938. The minimum subscription in the first was 3,000 and in the second 1,000 shares, but it would appear that the second was treated as the operative document. Mr. *Asprey* so informed the court, and his statement was not contested by Mr. *Miller*.

The board then proceeded to allot 1,020 shares, which was more than the minimum required by the second prospectus.

The board appears to have been ignorant of the provisions of sec. 77 of the Act, because it commenced to carry on the business of the company from the date of incorporation. As a consequence of this ignorance, although sub-secs. 1 (*a*) and (*b*) were in fact complied with, the directors never caused the declaration required by par. *c* to be filed.

At a meeting of the board held on 22nd February 1938 it was resolved that the price submitted by the respondent be accepted, namely, Brighton Portland cement, bagged, twenty-four bags to the ton, at 4s. 8d. net per bag delivered on site Broken Hill. The respondent was notified to this effect by a letter dated 23rd February signed by the secretary for and on behalf of the company, which stated that he had much pleasure in advising him that his quotation had been accepted by the board on 22nd inst. He added that the company would require approximately ninety-five tons of cement.

It is to be noted that this offer and acceptance did not constitute a contract for the delivery of any quantity of cement. It was only an agreement that cement would be supplied, when ordered, on the terms mentioned. The contract would have been constituted by the orders for particular quantities of cement and its delivery

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pursuant thereto. Subsequently, on 26th April 1938, the respondent quoted a price for Speedite cement (twenty-four bags to the ton) £5 16s. delivered to site Broken Hill, and this was accepted by the secretary on behalf of the company on 2nd May 1938. Again the contracts would have been constituted by orders and deliveries pursuant thereto.

The company's ledger shows that, commencing on 28th February 1938, the respondent did in fact supply the company with goods every month during the balance of the year and received certain payments in respect thereof, leaving a balance unpaid of £1,023 8s. 9d., of which £809 1s. 8d. was for goods supplied prior to the end of July 1938. The respondent first ascertained that the company had not complied with the requirements of sec. 77 from his solicitor in August 1938, but the directors do not appear to have realized its obligations under the section until about February 1939, because, at a meeting of the board held on that date, the solicitor (Mr. Davoren) reported that he had ascertained that the provisions of the section had not been complied with. He undertook to see the Registrar-General about this and another difficulty caused by two prospectuses having been filed, and left the meeting. After he had left the meeting, the board resolved that, in view of the insolvent position of the company's finances and the legal difficulties which must be faced, it would take the steps necessary to advise the company to go into voluntary liquidation if the matters referred to by Mr. Davoren were settled satisfactorily.

The company went into voluntary liquidation in September 1939. The liquidator rejected the proof of the respondent for the balance of his account.

Sub-sec. 4 of sec. 77 provides that any contract made by a company before the date at which it is entitled to commence business shall be provisional only and shall not be binding on the company until that date and on that date it shall become binding. The contracts for the supply and delivery of goods made between the respondent and the company, therefore, never became binding on the company, and the liquidator was right in refusing to allow the respondent to prove (*In re "Otto" Electrical Manufacturing Co.* (1905) *Ltd.* (1); *New Druce-Portland Co.* (*Ltd.*) v. *Blakiston* (2)).

On 2nd February 1940 the respondent issued a writ against the appellants, who were the five directors of the company from the date of its incorporation, and his amended declaration dated 9th August 1940 contained five counts, of which only one (namely, the

(1) (1906) 2 Ch. 390.

(2) (1908) 24 T.L.R. 583.

fourth) was seriously pressed. This count alleged that in consideration of the plaintiff entering into certain contracts with the defendants as agents for the company for the sale of goods the defendants promised that they were authorized to make immediately binding contracts for it as its agents, that the plaintiff did enter into the said contracts and was always ready and willing to perform the same yet the defendants were not authorized to make immediately binding contracts for it whereby the plaintiff, *inter alia*, was not able to enforce the performance of the said contracts and lost the value of the materials supplied thereunder.

The action came on for hearing in September 1940 before *Maxwell* J., who granted a nonsuit. The plaintiff appealed to the Full Court, which ordered that this be set aside and a new trial be had by the parties. The defendants have by leave appealed to this court against the order of the Full Court.

The substantial question in issue on the appeal is whether there is any evidence on which the jury could reasonably find that the appellants impliedly warranted their authority to make absolutely binding contracts on behalf of the company for the purchase of the goods already mentioned.

It is clear that every person dealing with a company registered under the Act is bound to read the statute and its memorandum and articles of association, copies of which are registered in the office of the Registrar-General and available for public inspection (*Royal British Bank* v. *Turquand* (1); *Mahony* v. *East Holyford Mining Co.* (*Ltd.*) (2)). Notice is imputed to such a person of all that is contained therein, or, in other words, of what has been called "the external position of the company."

Sec. 77 imposes on every company subject to its provisions the necessity of complying with its requirements as a condition precedent to the lawful commencement of the carrying on of its business. It provides means by which members of the public may ascertain whether this condition has been fulfilled or not. The statutory declaration referred to in sub-sec. 1 (*c*) is open to public inspection. Sub-sec. 3 requires the Registrar-General, on its filing, to certify that the requirements of sub-sec. 1 or 2 of the section, as the case may be, have been complied with, and provides that the certificate shall be conclusive evidence of that fact in favour of any person dealing with the company. Persons dealing with such a company are bound to ascertain that the condition has been fulfilled (*Peirce*

(1) (1856) 6 E. & B. 327 [119 E.R. 886].
(2) (1875) L.R. 7 H.L. 869.

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v. *Jersey Waterworks Co.* (1); *Fountaine* v. *Carmarthen Railway Co.* (2); *Pacific Coast Coal Mines Ltd.* v. *Arbuthnot* (3)).

Where directors purport to enter into a contract on behalf of a company they are acting for a principal whose powers are limited. So long as their action does not involve any express or implied warranty of a fact, they cannot be made liable if the operation of the contract is affected by legal consequences which are deemed to be within the knowledge of both parties. For instance, the contract may be *ultra vires* the objects of the company on the proper construction of its memorandum; the object relied on to give the power to enter into the contract, though sufficient on its face, may be illegal; the contract may contain a clause which is inoperative, because it is in conflict with some section of a statute which is to take effect notwithstanding any stipulation to the contrary (See, for instance, the *Conveyancing Act* 1919-1939 (N.S.W.), sec. 97 (1)), or because some statutory condition to its efficacy is missing (avoidance of personal covenants in mortgages of land in New South Wales in the absence of the certificate required by the *Moratorium Act* 1932-1937 (N.S.W.), sec. 34); the registration of the company may be void because it is a trade union (sec. 5 (3))—*Rashdall* v. *Ford* (4); *Beattie* v. *Lord Ebury* (5); *Saffron Walden Second Benefit Building Society* v. *Rayner* (6).

Relief will not be granted where a mistake is one of general law (*Halsbury's Laws of England*, 2nd ed., vol. 23, p. 131; *Werrin* v. *The Commonwealth* (7)).

As Lord *Atkinson* said in *Moss Steamship Co. Ltd.* v. *Whinney* (8), "the directors of a company . . . are not estopped at law from relying on the fact that a contract which they made or an act which they did was *ultra vires* and invalid (whether it was an act which could be ratified by the shareholders or not) as against a person who knew, or should be taken to have known, what their powers were, and therefore knew, or should be taken to have known, that the contract or act was *ultra vires*."

The respondent must therefore be deemed to have known that until the declaration had been filed the company could only enter into a provisional contract, but that when it had been filed the company could make an absolute one.

An express statement that the company could make an absolute contract would be a mixed representation of law and fact, because

(1) (1870) L.R. 5 Ex. 209.
(2) (1868) L.R. 5 Eq., at pp. 322, 323.
(3) (1917) A.C. 607, at p. 616.
(4) (1866) L.R. 2 Eq. 750.
(5) (1872) 7 Ch. App. 777; (1874) L.R. 7 H.L. 102.
(6) (1880) 14 Ch. D. 406.
(7) (1938) 59 C.L.R. 150.
(8) (1912) A.C., at p. 266.

it would involve a promise that a necessary fact to enable the company to do so, namely, the filing of the declaration, had occurred. The appellants never made such a statement, and the critical question is whether the professed entering into contracts on behalf of a company by directors, which were intended to be absolute, would be conduct from which such a promise could be implied.

In *Collen* v. *Wright* (1) *Willes* J. said that "a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue," because "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." As Lord *Davey* pointed out in *Starkey* v. *Bank of England* (2), it is utterly immaterial whether the supposed agent knew of the defect of his authority or not.

In *British Russian Gazette and Trade Outlook Ltd.* v. *Associated Newspapers Ltd.* (3) *Scrutton* L.J. said the doctrine of *Collen* v. *Wright* (4) had been extended beyond making contracts to doing acts having a legal effect by *Starkey* v. *Bank of England* (5) and *Firbank's Executors* v. *Humphreys* (6), and *Greer* L.J. said: "It is clear that even in cases where the contract which the agent warranted he had authority to make would not, if authorized, create any legal obligation by his principals, the agent is none the less liable for damages for a breach of warranty of authority" (7).

The doctrine of *Collen* v. *Wright* (4) has often been applied to contracts entered into by directors on behalf of bodies corporate and unincorporate.

In *Halsbury's Laws of England*, 2nd ed., vol. 5, p. 416, it is stated: "When an agent expressly contracts on behalf of his company or makes a contract in the name of the company, he is not personally liable to the other contracting party in the absence of fraud or misrepresentation unless he expressly or impliedly warrants an authority which he has not got or a state of facts that does not exist, in which case the contracting party has a remedy against him." In *Weeks* v. *Propert* (8), *Chapleo* v. *Brunswick Permanent Building Society* (9), *West London Commercial Bank Ltd.* v. *Kitson* (10),

(1) (1857) 8 E. & B., at pp. 657, 658 [120 E.R., at p. 245].
(2) (1903) A.C., at p. 119.
(3) (1933) 2 K.B., at p. 642.
(4) (1857) 8 E. & B. 647 [120 E.R. 241].
(5) (1903) A.C. 114.
(6) (1886) 18 Q.B.D. 54.
(7) (1933) 2 K.B., at p. 649.
(8) (1873) L.R. 8 C.P. 427.
(9) (1881) 6 Q.B.D. 696.
(10) (1884) 13 Q.B.D. 360.

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Firbank's Executors v. *Humphreys* (1), *Whitehaven Joint Stock Banking Co.* v. *Reed* (2) and other similar cases, some or all of the directors were held liable for having falsely warranted that their institutions had power to borrow or had not exceeded a borrowing limit. The powers of these institutions depended upon private Acts of Parliament or rules, knowledge of the contents of which would not be imputed to outsiders. A representation that the directors had authority to borrow on behalf of their principal would relate to matters of private right and so of fact, while the question whether such a limit had been exceeded would also be one of fact. In *West London Commercial Bank Ltd.* v. *Kitson* (3) *Bowen* L.J. said:— "It is a representation as to the powers of a company to accept bills, and that depends on their private Acts of Parliament. Suppose I were to say I have a private Act of Parliament which gives me power to do so and so. Is not that an assertion that I have such an Act of Parliament? It appears to me to be as much a representation of a matter of fact as if I had said I have a particular bound copy of 'Johnson's Dictionary.'" These cases do not, therefore, solve a problem such as the present, arising under a public Act. But *Cherry and M'Dougall* v. *Colonial Bank of Australasia* (4) is an authority directly in point. There the Loch Fyne Gold Mining Co. was incorporated under a public Act, namely, the *Mining Companies Limited Liabilities Act* 1864 (Vict.), sec. 21 of which authorized a company registered under the Act with the sanction of a majority in number and value of the shareholders given in general meeting to borrow money not exceeding such sum as such majority directed. Two directors, without this sanction, wrote a letter to the bank informing it that they, as directors of the company, had appointed one C. E. Clarke to be the legal manager of the company and had authorized him to draw cheques upon the account of the company. The account was overdrawn at the time, as the two directors knew. In an action brought by the bank against the directors, the Privy Council held there was evidence on which the jury could find that they had impliedly warranted their authority to make the contract on behalf of the company. The extent of the decision was explained by Sir *G. Mellish* in *Beattie* v. *Lord Ebury* (5), where he said:— "There the directors of a joint stock company gave authority to their manager to overdraw the account. If the facts of the case are examined it will be found that the directors had power to borrow

(1) (1886) 18 Q.B.D. 54.
(2) (1886) 54 L.T 360.
(3) (1884) 13 Q.B.D., at p. 363
(4) (1869) L.R. 3 P.C. 24.
(5) (1872) 7 Ch. App., at pp. 801, 802.

money, provided they got the consent of a meeting of the shareholders, but not otherwise. There was, therefore, a misrepresentation in point of fact, because when they represented they had power to borrow they *practically* represented they had obtained authority from a meeting of the shareholders to enable them to borrow," and by Lord *Cairns* L.C. on appeal (1) as follows :—" Two directors of a company in a colony, who were not a majority, and who, therefore, according to the company's Act, had no right to bind it, transmitted to the bankers a letter, in which they stated that a particular person had been legally appointed manager of the company, and was authorized to draw cheques. At the time when this letter was transmitted, in point of fact, the account of the company was overdrawn at the bankers, and the manager had not been legally appointed. It was a statement false in fact and erroneous in law, that he had authority to draw cheques upon the bankers, or to bind the company." So also would directors who gave an order for the immediate delivery of goods impliedly warrant that the company was then authorized to carry on business and able to make such a contract. Their conduct would involve, as in *Cherry's Case* (2), a representation of fact, namely, that the company had complied with the requirements of sec. 77 (1), which, if false, they would have to make good.

The remaining question is whether there was any evidence on which the jury as reasonable men could hold that the directors had so warranted. The prospectus showed that the principal business of the company was the manufacture and sale of precast concrete sections ready to be pieced together on the site. Article 92 provided that the management of the business of the company should be vested in the directors. The minutes of the meetings of directors showed the company was carrying on business. The statutory report, filed under sec. 93 of the Act, showing receipts and payments up to 27th April 1938, contained items relating to the business; namely, receipts from progress payments, £500, and disbursements, wages and salaries, £697 14s. 7d., welding, £121 11s. 7d., and plant and machinery, £377 19s. 9d. The two letters sent by the secretary to the respondent on 23rd February and 2nd May 1938 each contained the names of the appellants on the letter-heads, and the first letter stated: " As a result of my conversation on the 21st instant we will expect you to be able to supply us with either large or small quantities *without delay*." The two quotations accepted by these letters were only preliminary to actual orders, but they were obviously accepted in immediate anticipation thereof. The ledger showed a regular

(1) (1874) L.R. 7 H.L., at p. 111. (2) (1869) L.R. 3 P.C. 24.

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supply of goods by the respondent to the company for a period of nine months. Its admissibility in evidence against the appellant was not made a ground of appeal. The concrete was required for manufacture into concrete sections. It could only have been ordered by a principal able to enter into an absolute contract.

This evidence would be sufficient to enable the jury to infer that the orders the respondent received were given by the authority of the directors and that by authorizing such orders the directors had impliedly warranted that the company was such a principal (*Leggo* v. *Brown & Dureau Ltd.* (1)).

The way in which damages should be assessed if the plaintiff succeeded was not argued, and I therefore express no opinion on this question.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants, *J. J. Davoren*, Broken Hill, by *C. M. P. Horan.*

Solicitor for the respondent, *E. R. Hudson*, Broken Hill, by *Nicholl & Hicks.*

J. B.

(1) (1923) 32 C.L.R. 95, at p. 107.