NEGLIGENCE AND NON EST FACTUM: CARLISLE AND CUMBERLAND BANKING COMPANY v. BRAGG RE-EXAMINED.

Few leading cases on contract can have attracted more academic censure than *Carlisle and Cumberland Banking Company v. Bragg.*[1] The text-book writers, however, while condemning the decision in principle, agree that it represents the law at the present time. It is proposed to look at both these propositions more carefully.

Cheshire and Fifoot, when dealing with the subject of negligence in relation to a plea of *non est factum,* state:—[2]

> "It can confidently be asserted that the law was firmly established on a reasonable basis until it was thrown back into a state of complete chaos in 1911 by the decision of the Court of Appeal in *Carlisle and Cumberland Banking Company v. Bragg.* The rule before 1911 was that if A, the victim of the fraud of C, was guilty of negligence in executing a written instrument different in kind from that which he intended to execute, then he was estopped as against innocent transferees from denying the validity of the written contract."

In support of this assertion Cheshire and Fifoot cite *Foster v. Mackinnon.*[3]

In *Foster v. Mackinnon* an old man was induced to indorse a bill of exchange, thinking that he was signing a guarantee. At the trial Bovill C.J. told the jury that if the defendant signed the paper without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict. The Court of Common Pleas (Bovill C.J., Byles, Keating and Montague Smith JJ.) held that this direction was right. On closer examination, however, it will be seen that this decision does not give such strong support to the view of Cheshire and Fifoot as might at first appear. At no point in its judgment did the Court state that the defendant could not plead *non est factum* if he was negligent, and Byles J., delivering the judgment of the Court said:—[4]

1 [1911] 1 K.B. 489.

2 LAW OF CONTRACT (6th ed.), 221.

3 (1869) L.R. 4 C.P. 704.

4 *Ibid.,* at 711. Italics added by author.

> "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, *at least if there be no negligence,* the signature so obtained is of no force."

The question as to whether negligence would destroy a plea of *non est factum,* therefore, was left open.

Stronger support for the view of Cheshire and Fifoot may be found in the case of *Lewis v. Clay.*[5] In that case the defendant was induced to sign a promissory note by a fraudulent misrepresentation that he was witnessing a deed. Lord Russell of Killowen C.J. held that the defendant could plead *non est factum,* and said:—[6]

> ". . . the defendant is not, in my judgment, estopped or precluded from setting up the actual facts upon any principle of law. Apart from statute, such preclusion or estoppel can only arise (in circumstances like the present) where the defendant had so conducted himself that it would be contrary to natural justice to permit him to assume a position inconsistent with that which he had ostensibly occupied, or which he had led others to believe he occupied, and upon which others had, misled by his conduct, been suffered to act. . . . [T]he defendant was in the circumstances guilty of no want of due care in . . . signing his name as he did; . . . . I conclude, therefore, the defendant is not, upon any principle of law, estopped or precluded from setting up the true facts."

Clearly, had Lord Russell been of the opinion that the defendant had been negligent in acting as he so did he would not have allowed him to set up the defence of *non est factum.*

However, both *Foster v. Mackinnon* and *Lewis v. Clay* were concerned with negotiable instruments, and it was on this ground that they were distinguished by the Court of Appeal in *Carlisle and Cumberland Banking Company v. Bragg.*[7] In that case the defendant negligently signed a guarantee, thinking that he was signing an insurance document. The Court of Appeal held that the defendant's negligence

5 (1897) 67 L.J. (Q.B.) 224.
6 *Ibid.,* at 226.
7 [1911] 1 K.B. 489.

did not prevent him from setting up a plea of *non est factum,* and Vaughan Williams L.J. said:—[8]

> "In my opinion the judgment of Pickford J. in this case was quite right. He held that the finding of negligence by the jury was immaterial, and he did so after discussing the case of *Foster v. Mackinnon,* and coming to the conclusion that the doctrine there laid down as regards negligence really has reference to the particular case of a negotiable instrument, to an action on which the defence that the defendant was induced to sign the instrument by fraud and misrepresentation as to its nature is set up as against a bona fide holder for value. As I understand it, that doctrine is limited to negotiable instruments, and that was really the ground of the judgment of Pickford J. in this case."

Cheshire and Fifoot, attacking this distinction, state that the ground of the decision in *Bragg's Case* is that estoppel only operates where a duty is owed to the person who relies upon it and that Bragg owed no duty to the bank, and go on to argue that on this reasoning the rule should apply to all documents, including negotiable instruments.[9] It is submitted that this is not the true basis of the distinction, and that the question of estoppel is an unfortunate red herring. The true reason for the decision in *Bragg's Case,* it is submitted, is that negotiable instruments are an exception to the general rule that negligence is irrelevant in a plea of *non est factum,* and that this rule is sound in principle. *Non est factum* is a branch of the general law of mistake, as can be seen from a comparison of the rules of *non est factum* with the rules of mistake as to person: the rule that mistake as to the very nature of a document will ground a plea of *non est factum* while a mistake merely as to its contents will not is analogous to the rule that mistake as to the identity of the person contracted with will render a contract void while mistake as to his attributes will not. Negligence does not prevent a person from pleading fundamental mistake, nor does it prevent him from pleading *non est factum*: negotiable instruments are a special exception to this general rule. The exceptional position of negotiable instruments appears in a passage from the judgment of Vaughan Williams L.J. in *Carlisle and Cumberland Banking Company v. Bragg,* where he said:—[10]

> "If the document in question had been not a guarantee, but a bill of exchange, and the question had arisen what was the

8 *Ibid.,* at 493.

9 LAW OF CONTRACT (6th ed.), 223-224.

10 [1911] 1 K.B. 489, at 494.

position of a holder for value without notice of the fraud, the matter might have been different, because the law merchant, and now the statute law, puts persons who in such circumstances take bills of exchange and such like instruments in the position that they have to prove that they gave value for the bill or other like instrument honestly, but, if they prove that, it does not matter that it was originally procured by fraud."

Some judicial doubts as to the correctness of the decision in *Bragg's Case* were expressed by the Court of Appeal in *Muskham Finance, Ltd. v. Howard,*[11] when Donovan L.J. delivering the judgment of the Court (Ormerod, Donovan and Pearson L.JJ.), said *obiter*:—[12]

> "We add this further observation. There was here no plea of estoppel raised by the plaintiffs. Had there been, then, seeing that the seller was, as the judge finds, very careless in signing the form without reading it, this court might have had to reconsider the decision in *Carlisle and Cumberland Banking Company v. Bragg* which, as the county court judge says, has been much criticised."

However, *Carlisle and Cumberland Banking Company v. Bragg* is a decision of the Court of Appeal which has stood for over half a century, and it is hard to see how any court other than the House of Lords can overrule it, at any rate in England.[13]

In Australia the only reported decision on the matter appears to be *Carlton and United Breweries Ltd. v. Elliott,*[14] a case at first instance. In that case the defendant negligently signed a guarantee, thinking that it was a business reference. Gavan Duffy J. held that the defendant could plead *non est factum,* and said:—[15]

> "I reserved my decision in order to consider whether *Carlisle and Cumberland Banking Company v. Bragg* was a clear authority that in this case negligence on his part was immaterial. I am satisfied that it is. The case has been subject to considerable criticism from text-book writers, but I know of no later decision that would justify me in refusing to treat *Carlisle and Cumberland Banking Company v. Bragg* as authority."

It is submitted that *Muskham Finance, Ltd. v. Howard* does not justify a refusal to treat *Carlisle and Cumberland Banking Company*

11 [1963] 1 All E.R. 81.
12 *Ibid.,* at 84.
13 See Young v. Bristol Aeroplane Company, [1944] K.B. 718.
14 [1960] V.R. 320.
15 *Ibid.*

v. Bragg as authority, and that *Bragg's Case* represents the law in Australia, at any rate as far as State Supreme Courts are concerned.

It is interesting to note the attitude taken by the courts in other Commonwealth jurisdictions. In Canada the decision in *Bragg's Case* has been followed uniformly,[16] culminating in the decision of the Supreme Court of Canada in *Prudential Trust Company v. Cugnet,*[17] where Locke J. said:—[18]

> "It is my opinion that the result of the authorities was correctly stated in the *Bragg Case.*"

The position in New Zealand is peculiar. The only reported decision is *Bank of Australasia v. Reynell.*[19] In that case the defendant negligently signed a guarantee for £5,000 thinking that he was signing a guarantee for £500. The Court of Appeal held that he could not plead *non est factum,* (1) because he had been negligent, and (2) because his mistake was as to the contents and not the nature of the document he signed. The case was decided in the last century, prior to the decision in *Bragg's Case*: it is submitted, therefore, that it is open to the Court of Appeal in New Zealand not to follow its own earlier decision.

In conclusion it is submitted that the rule in *Carlisle and Cumberland Banking Company v. Bragg* is settled law in Canada and also in England, at least until the decision is overruled by the House of Lords; that in Australia it is settled law, at least as far as State Supreme Courts are concerned; and that in New Zealand the position is doubtful.

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16 Imperial Bank of Canada v. McLellan, [1934] 1 W.W.R. 65; Alstadt v. Whitemouth, [1949] 2 W.W.R. 522; Brown v. Prairie Leasholds, (1953) 9 W.W.R. (N.S.) 577; Maloney v. Eldorado Mining Company, (1954) 11 W.W.R. (N.S.) 49.

17 (1956) 5 D.L.R. (2d) 1.

18 *Ibid.,* at 4.

19 (1892) 10 N.Z.L.R. 257.

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