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MASON,
In re.
BING,
Ex parte.
Wright J.

difficulty of putting a construction on that section, not for the first time, but on the whole I think the proof ought to be postponed. Then, according to *In re Grason* (1), that amounts to a declaration that for the present the proof is to be rejected subject to any application to amend. There will be no order as to costs.

Solicitors for applicant: *Billings, Robbins & Busk.*

Solicitor for trustee: *S. Myers.*

H. L. F.

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March 7, 20.

BURROWS v. RHODES AND JAMESON.

False Representation—Right of Action—Person induced by Misrepresentation to Commit Crime—Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), s. 11.

Where a person is induced by the fraudulent misrepresentation of another to do an act which, in consequence of such misrepresentation, he believes to be neither illegal nor immoral, but which is in fact a criminal offence, he has a right of action against the person so inducing him for damages sustained by him in consequence of his having done such act.

QUESTION of law raised by pleadings.

The statement of claim was as follows:—

1. The British South Africa Company is a British company, incorporated by Royal Charter dated October 29, 1889, for trading and other purposes, as in the said charter more particularly mentioned, with powers of government and other powers, as therein also mentioned, having for the principal field of its operations a region of South Africa in the said charter defined.

2. The defendant Rhodes was, at all times material to this action, a director of the said company, and was intrusted with the management of all its property and affairs in South Africa. The defendant Jameson was at all such times as aforesaid an officer and agent of the said company, and was intrusted with the control of the forces of the company which were employed in the invasion hereinafter mentioned.

3. In or about the month of September, 1894, the plaintiff was employed by the company to serve for a year in the armed forces of the company within the territorial limits prescribed

(1) 12 Ch. D. 366.

for the company by the said charter, and he entered upon and remained continuously in such employment from the time of his engagement as aforesaid until after the happening of the matters hereinafter complained of.

4. In the month of September, 1895 (when the plaintiff was at Buluwayo, and his period of service was about to expire), the defendants, having secretly determined to invade the territory of the South African Republic with a hostile armed force, in order to induce the plaintiff to renew his engagement and take part in such invasion as a member of the said force, fraudulently represented to the plaintiff that the detachment in which he was serving was about to be employed in active service, and that it would be to his benefit, and they requested him, to continue in the service of the said company. The defendants intended the plaintiff to believe, and he did believe, that the service on which the said detachment was about to be employed was of a lawful nature, and, relying upon the aforesaid representations, the plaintiff agreed to and did continue in the said company's service for a further period. The said representations were to the knowledge of the defendants untrue.

5. Shortly after the plaintiff had entered into the agreement in paragraph 4 hereof mentioned, the defendants caused a considerable number of the troops in the employment of the said company (including the detachment in which the plaintiff was serving) to be concentrated at or near Pitsani, under the control of the defendant Jameson, for the purpose of the said invasion.

6. On December 29, 1895, the defendants, for the purpose of the said invasion, and in order to induce the plaintiff to take part therein, and to enter the territory of the said Republic as a member of the said company's armed forces, fraudulently represented to the plaintiff that fighting was about to commence in or near Johannesburg, that protection was needed for the women and children there, that a body of the Rhodesian Horse would meet to co-operate within the territory of the said Republic with the troops with which the plaintiff was serving, that a body of Cape Mounted Rifles (forces of Her Majesty) was also waiting near the frontier of the said Republic to join and co-operate with the said troops, and that the proposed

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invasion had the sanction and support of Her Majesty's Government. The representations in this paragraph mentioned were to the knowledge of the defendants untrue.

7. The plaintiff, believing the aforesaid representations to be true, and relying thereupon, was induced thereby to enter the territory of the South African Republic as a member of the said company's armed forces, and to engage in hostilities with the troops of the said Republic.

8. By reason of the matters aforesaid the plaintiff suffered great injury, and was subjected to severe hardship and imminent dangers. The troops of the said company with which the plaintiff was serving as aforesaid were defeated by the forces of the said Republic at Doornkop, and in the battle which was fought there the plaintiff was severely wounded and lost a leg, and subsequently had to undergo seven surgical operations. He was taken and kept prisoner by the authorities of the said Republic, and was liable to summary execution at their hands. Hospital accommodation was refused him, and he was left lying exposed in the street at Pretoria. He was also rendered liable to severe punishment in England for offences against the laws of England, and was brought to England as a prisoner. He was caused much pain and suffering, and his health and capacity for earning his livelihood were, and still are and always will be, greatly impaired.

Particulars of special damage.

	£	s.	d.
1. Loss of kit	25	0	0
2. Loss of pay for first eight months of 1896 at 15 <i>l.</i> a month (rations were provided)	120	0	0
3. Loss of earnings from September 1, 1896, to November 1, 1898, at 200 <i>l.</i> a year	433	6	8
4. Loss of leg.			

The plaintiff claims 3000*l.*

By paragraph 11 of the statement of defence :—

“The defendants will submit that the statement of claim discloses no cause of action.”

It was ordered by consent that the question of law raised by paragraph 11 of the statement of defence be set down for hearing forthwith, and that, pending such hearing, all further proceedings be stayed.

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Cohen, Q.C. (Lord Robert Cecil with him), for the defendants. Assuming for the purposes of the argument that the facts stated in the statement of claim are true, the plaintiff has no cause of action. By s. 11 of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), fitting out a military expedition against a friendly State—which, for the purposes of this argument, the defendants admittedly did—is an offence against the Act. The plaintiff being engaged in the same expedition was also guilty of an offence against the Act. He and they were, therefore, equally guilty, and he has no right of action. If a person is induced by false representations to commit a criminal offence, believing that what he is doing is legal, he has no remedy for the misrepresentation against those who have so induced him, and who are also guilty of the commission of the offence. The statement of claim does not aver that the plaintiff believed that what he did was legal. The main question, however, is whether a person who has committed a criminal offence can under any circumstances obtain damages from any one for the consequences of that offence. In *Holman v. Johnson* (1) Lord Mansfield said: “The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy. . . . The principle of public policy is this, *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.” In *Scott v. Brown* (2) Lindley L.J. said (3): “If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him,” and cited Lord Mansfield’s dictum in *Holman v. Johnson* (1); and A. L. Smith L.J. said (4): “If a plaintiff cannot maintain his cause

(1) (1775) 1 Cowp. 341.

(2) [1892] 2 Q. B. 724.

(3) [1892] 2 Q. B. at p. 728.

(4) [1892] 2 Q. B. at p. 734.

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of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action." That is precisely the case here. The foundation of the plaintiff's claim is that there was an illegal expedition in which he took part. That is to say, he bases his claim on the commission of an act declared by law to be criminal. In *Colburn v. Patmore* (1) Lord Lyndhurst C.B. said (2): "I know of no case in which a person who has committed an act declared by law to be criminal has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime."

The rule that there is no contribution among joint tortfeasors was settled by *Merryweather v. Nixan* (3); but that rule does not apply to the present case, where the question is whether a person who has committed a criminal offence can be allowed to recover damages for any injury he has sustained in consequence of the commission of that offence.

Lawson Walton, Q.C. (*Barnard Lailey* with him), for the plaintiff. It cannot be admitted that the plaintiff was guilty of an offence against the Foreign Enlistment Act, 1870. He had no mens rea in what he did, and a mens rea is an essential element for an offence under that Act. It is essential to every criminal offence except an extremely special and limited class of offences which are the creation of particular statutes. If, therefore, there was no violation of the Foreign Enlistment Act by the plaintiff, he was not a particeps criminis with the defendants, and the question does not arise. But if the plaintiff was guilty of an offence against the Foreign Enlistment Act, there is no authority for saying that a person who has been fraudulently induced to violate the provisions of a penal statute has no remedy for the misrepresentation. The dictum of Lord Lyndhurst in *Colburn v. Patmore* (1) was obiter and cannot be upheld. Why should a man be able to recover if the act which he is fraudulently induced to do is a civil wrong but not if it is a crime? On what principle is such a distinction drawn? As Best C.J. points out in *Adamson v. Jarvis* (4), the rule that

(1) (1834) 1 C. M. & R. 73.

(2) 1 C. M. & R. 83.

(3) (1799) 8 T. R. 186.

(4) (1827) 4 Bing. 66, at p. 73.

wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act; and in *Palmer v. Wick and Pulteneytown Steam Shipping Co.* (1), the House of Lords said that *Merryweather v. Nixan* (2) was not founded on any principle of equity and ought not to be extended. No doubt where a remedy is sought to be enforced for damage arising either from a breach of contract or from a tort, the Court will not aid in a case where both parties were engaged in conduct which they knew or must be taken to have known to be wrongful. That is not the case here. The plaintiff did not know, and could not know, that what he did was wrongful. [He cited *Campbell v. Campbell*. (3)]

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Cohen, Q.C., replied.

Cur. adv. vult.

March 20. The following judgment was read by

GRANTHAM J. In this case we are asked to determine whether on the statement of claim as presented to us (or with such amendments, if any, as may be necessary to raise the question of law desired to be determined) any cause of action has been shewn for which an action is maintainable according to English law.

For the purposes of our judgment, this being a demurrer by the defendants, all the facts alleged in the claim must be taken to be true and admitted by the defendants. What, therefore, are those facts? Shortly these. That the defendants having secretly determined to invade the territory of a friendly Power with a hostile armed force, they, for the purpose of inducing the plaintiff to enter their service as an armed servant, deceived the plaintiff as to their intentions, told him that the service on which they wished to employ him was lawful, that as fighting would shortly take place in the said South African Republic between other forces his services were required for the protection of women and children, that the force of which he was

(1) [1894] A. C. 318.

(2) 8 T. R. 186.

(3) (1840) 7 Cl. & F. 166.

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a member would have the support of other lawfully appointed forces, and that such invasion of the territory of the South African Republic had the sanction and support of Her Majesty's Government; whereas in fact all the aforesaid representations were untrue to the knowledge of the defendants. Acting on and believing in these statements, the plaintiff entered the service of the defendants, and in obeying their orders received the injuries and suffered the losses complained of, and for which he seeks to recover damages in this action.

It is difficult to realize any period of our history in which a defendant making such fraudulent statements and inflicting such serious injury would not be liable for the consequences of his fraud, and yet it has been solemnly argued that such is the law at the present time.

Let us see, therefore, on what grounds the learned counsel attempts to support his contention that this statement of claim discloses no good cause of action. He does not rely on a possible assumption that the damages resulted from the voluntary enlistment of the plaintiff on a warlike expedition for the pay and the prospective advantages likely to accrue to him, and were not in any way caused or aggravated by the fraud, but he admits that his contention rests solely on the assumption that the plaintiff, innocent of all knowledge of wrong on his part, did, by obeying the orders of the defendants, in fact become a criminal himself, and could not therefore complain of any wrong done him by the defendants who were participes criminis with him. But how does he shew that he is a criminal? He relies on the Foreign Enlistment Act, 1870, s. 11: "If any person within the limits of Her Majesty's dominions and without the licence of Her Majesty prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State the following consequences shall ensue: Every person engaged in such preparation or fitting out or assisting therein or employed in any capacity in such expedition shall be guilty of an offence against this Act and shall be punishable" accordingly.

The defendants contend, therefore, that, it being immaterial whether the person employed in such expedition had a mens

rea or guilty knowledge of the nature of his act or not, and though believing as the plaintiff did that his action had the sanction of the Queen's Government, yet he was just as much a criminal as the defendants who had knowingly broken the law, and, once prove that the plaintiff was a criminal, he could not, according to the defendants, be heard to complain of the original and deeper-dyed fraud of the defendants which had placed the plaintiff unwittingly on his part in a position which made him liable to be called a criminal.

A grosser perversion of English justice it is impossible to imagine, and I should indeed be sorry if, under any circumstances, it could be proved to be English law.

It must not be forgotten that the plaintiff has not been proved to be a criminal in any court of law. He has not been tried, much less convicted, and never will be tried, and therefore cannot be convicted; and under these circumstances a jury would, I doubt not, acquit him if he was now tried; but till he has been convicted, how can the defendants be heard to say that as in their opinion the plaintiff's conduct was an infringement of the Act, he must be treated as if he had been convicted of being a criminal by Act of Parliament?

Let us look, therefore, at the authorities relied upon by the learned counsel on behalf of the defendants to see what aid (if any) they give him in his contention.

First he relies on the dictum of Lord Mansfield in *Holman v. Johnson* (1), where he says: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed. . . . No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causâ* . . . there the Court says he has no right to be assisted. . . . So if the plaintiff and defendant were to change sides . . . the latter would have the advantage of it, for where both are *equally* in fault *potior est conditio defendentis*." It seems to me that no stronger authority could

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(1) 1 Cowp. 341, at p. 343.

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be quoted against the defendants. The plaintiff's cause of action is not founded, as far as he is concerned, on any immoral or illegal consideration; but as the defendants rely on their own immorality and illegality, it does sound very ill in their mouths to endeavour to rob the plaintiff of his rights by their (the defendants') illegality; and as in these proceedings the defendants have changed places with the plaintiff and are practically plaintiffs (as they are claiming a judgment on their demurrer), I am only re-echoing Lord Mansfield's words in saying, I will not allow the plaintiffs to rely on their illegality to obtain a judgment against the defendant, for *potior est conditio defendantis*, and, the demurrer being dismissed, the present plaintiff's right of action is admitted.

The next case relied on was *Colburn v. Patmore*. (1) This case when it is carefully examined seems to me to help the defendants less even than the last. The only matter under discussion in that case was whether the plaintiff, the owner of a paper, having been convicted of a criminal libel and fined 100*l.*, could recover that sum from the defendant, the editor of the paper, who he alleged inserted it contrary to his duty to the plaintiff and so induced the plaintiff to publish it. It was held that he could not recover because he had not shewn that he had not himself approved of the libel before publishing it. Let us assume that the obiter dicta of Lord Lyndhurst in that case are law, where he says (2): "I know of no case in which a person who has committed an act declared by the law to be criminal has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime." Quite true; but what compensation is it that he cannot recover? Why, compensation for the damages he has incurred by proceedings having been taken against him for the commission by him of the wrongful act complained of. As was said during the argument, "The main question is whether a person convicted of a criminal offence can claim indemnity from another who has participated with him in the commission of that offence," i.e., indemnity for the damages recovered against him for the

(1) 1 C. M. & R. 73.

(2) 1 C. M. & R. at p. 83.

commission of the offence. In this case the plaintiff in the first place has been convicted of no offence, and in the second place is not seeking to recover an indemnity for damages recovered against him, but is seeking to recover damages for a wrong done to him and in which he did not participate except as a sufferer, and in which it cannot be said that he was a particeps criminis. When the false and fraudulent representation was made which was the causa causans of this action no crime had been committed by the defendants, much less by the plaintiff, and, as far as the plaintiff knew, no crime had been committed by the defendants at any time up to the happening of the events which caused the damage to the plaintiff, for if the invasion had the authority and sanction of Her Majesty or Her Majesty's Government, as the defendants alleged, there was no breach of any statute for which the plaintiff or the defendants could be made liable.

Reliance was next placed on the case of *Merryweather v. Nixan* (1), in which it was held that one wrongdoer cannot have redress or contribution against another. True it was so held; but what does Best C.J. say about it in delivering the judgment of the Court in *Adamson v. Jarvis*? (2) He says (3): "From the concluding part of Lord Kenyon's judgment in *Merryweather v. Nixan* (1), and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Again, in the case of *Palmer v. Wick and Pulteneytown Steam Shipping Co.* (4), the noble Lords though not overruling *Merryweather v. Nixan* (1), damn the case with faint praise, decline in terms to apply it to Scotland, and refuse to extend its operation one iota. While as the action of the plaintiff is only made a criminal act by statute, and is not inherently a criminal act, the plaintiff cannot be presumed to have known of his guilt until he has been proved to have been guilty. As the expedition in question is alleged to have been something in the nature of a highway robbery, I

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(1) 8 T. R. 183.

(3) 4 Bing. at p. 72.

(2) 4 Bing. 66 .

(4) [1894] A. C. 318.

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am surprised that the defendants did not refer to the case of *Everet v. Williams* (1), mentioned in Lindley on Partnership, 6th ed. 101, which it was said was a suit by one highwayman against another for an account of their plunder, the bill alleging that the plaintiff was engaged in dealing in several commodities, such as plate, rings, watches, &c., and that the defendant applied to him to become a partner, and that after dealing together at several places such as Bagshot, Salisbury, Hampstead, &c., they differed as to their respective shares, and so a test suit in Chancery was commenced for an account. The bill was dismissed with costs, because it was held that they were both participes criminis, and so that the plaintiff could not recover. Perhaps it may be that the learned counsel were afraid to refer us to this case lest the same results should happen, namely, that the counsel who signed the bill was made to pay the costs of the bill, and the solicitors were fined 50*l.*, and the plaintiff and defendant were both hanged.

As the defendants have failed to establish their case, it is hardly necessary to refer to any authority on the other side, and I will only mention *Campbell v. Campbell* (2), where one partner in a distillery had been convicted of illegal transactions and made liable to penalties; he was held entitled to recover against his co-partner contribution for those penalties notwithstanding the authority of *Colburn v. Patmore* (3) before referred to, because, as Lord Cottenham said, he was not *particeps criminis* in the sense which would disentitle him to sue for contribution. If in such a case he could recover, how much more so when the cause of action is not for indemnity for damages given against him for the commission of the alleged illegal act, but is for damages for the alleged fraud on the part of the defendants in putting the plaintiff into such a position as caused him personal injury and loss quite irrespective of any alleged complicity in a crime?

It is true the plaintiff also refers in his statement of claim

(1) 2 Pothier on Obligations, by Evans, p. 3, note, citing *Europ. Mag.* 1737, vol. ii. p. 360; and see the orders of the Court corrected from the

originals in the Record Office in Law Quart. Rev. ix. 197.

(2) 7 Cl. & F. 166.

(3) 1 C. M. & R. 73.

to the liability the defendants had made him incur to severe punishment in England for offences against the English law ; but he never was made liable to punishment, he never was made a criminal, and he suffered no damage from that liability ; and I therefore treat that part of the statement of claim as struck out, as no damages are really claimed under that head.

As the defendants have entirely failed to refer us to any authority that in my judgment justifies their contention that the plaintiff's declaration discloses no good cause of action for which he can sue, I am glad to be able to say that our law has been purged from the suggestion that fraud and false representation injurious to an innocent person can be committed with impunity if the injured person has by such fraud and false representation been unwittingly and innocently made to commit what the law has said shall be called a crime. For these reasons, in my judgment, the demurrer must be dismissed with costs.

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The following judgment was read by

KENNEDY J. The plaintiff in this action seeks to recover damages from the defendants on the ground that they induced him by false and fraudulent representations to renew an engagement of service with the British South Africa Company, and to take part in the well-known expedition which was led by the defendant Jameson into the Transvaal in December, 1895, in consequence whereof he was damnified in various ways which are set forth in the statement of claim.

In paragraph 8 of the statement of claim the plaintiff alleges, amongst other things, that by reason of the premises he was rendered liable to severe punishment in England for offences against the laws of England. The defendants, in paragraph 11 of the statement of defence, have pleaded that the statement of claim discloses no cause of action, their point being that the allegation of paragraph 8, which I have just quoted, puts the plaintiff out of court. It is an admission that the plaintiff's participation in the expedition constituted a criminal offence under s. 11 of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), and the defendants' argument is that no action can be

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maintained to recover damages for having been induced to commit a crime. It is upon the correctness of this contention that the Court is called upon to adjudicate, as if the point had been raised by a demurrer under the old common law practice.

I have come to the conclusion, for reasons which I will state, that the defendants' contention ought not to prevail.

It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void. In *Shackell v. Rosier* (1), where, in consideration that the plaintiff had published a libel at the defendant's request, and had at the like request consented to defend an action brought against the plaintiff for such publication, the defendant promised to indemnify the plaintiff from the costs of the action, the Court of Common Pleas held that the promise could not be enforced. In the preceding year, in the American case of *Arnold v. Clifford* (2), Story J. held that a promise to indemnify another for doing a private wrong or for committing a public crime is against public policy and is void in law (see also *Martyn v. Blithman* (3), which is cited in the note to *Farebrother v. Ansley*. (4))

Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear.

In the next place, it is, I think, also clear that an action for indemnity, grounded either on deceit or warranty, may be maintained where the party who seeks the indemnity has incurred damage by reason of his having been authorized or (as is alleged in this action) fraudulently induced by another to do an act indifferent in itself, which has turned out, because it constitutes a private wrong, to be unlawful, but which was

(1) (1836) 2 Bing. N. C. 634.

(3) (1611) Yelv. 197.

(2) (1835) 2 Sumner's Circuit Court Reports, United States, 238.

(4) (1808) 1 Camp. 343, at p. 348.

not at the time apparently unlawful, and was done in honest ignorance of the particular circumstances which constituted its unlawfulness. (See the judgment of Best C.J. in *Adamson v. Jarvis* (1); *Betts v. Gibbins* (2); *Dixon v. Fawcus* (3); Pollock on the Law of Torts, 5th ed. p. 171.) In such a case an express promise to indemnify is valid in law: *Fletcher v. Harcot*. (4)

I come now to the question which was very fully argued before us in the present case, namely, Does this right of indemnity, which exists in the case of a private wrong done by misadventure, exist also in any case in which the wrong is a criminal offence?

The defendants contend that it does not. They say that in no case whatever where the act done constitutes a criminal offence can the doer of it have a right of indemnity against any of the consequences of the act. It appears to me that this proposition of the defendants is wider and more general than the law warrants.

Certainly there is no right of indemnity where the doer of the act which another has authorized or induced knows it at the time to be a criminal offence. If, in a case in which knowledge is an essential ingredient of the offence, the plaintiff, in his claim for an indemnity, admitted that he was guilty of the offence, his claim would be on the face of it bad. If, in the like case, he was, on the trial of his claim for indemnity, proved to have been convicted of the offence, judgment must be given against him. Nor, in my judgment, can there be any valid claim to indemnity where the doer of the act which constitutes the offence has done it with knowledge of all the circumstances necessary to constitute the act an offence, but in ignorance that the act done under those circumstances constituted an offence. A man is presumed to know the law.

Thirdly, although it is not necessary to decide the point, I am inclined to think that there could be no valid claim to indemnity for being authorized or induced to do an act where the act which is in fact criminal is done in ignorance of the existence of some circumstance which is necessary to make it

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(1) 4 Bing. 66.

(3) (1861) 30 L. J. (Q.B.) 137.

(2) (1834) 2 A. & E. 57.

(4) (1623) Hutton, 55.

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a crime, or even is done in a belief that such circumstance does not exist, but where it is known that the act is morally a wrong act. In such a case the doer of the act has, it may be said, the mens rea in the sense attributed to that expression by Bramwell B. in the well-known case of *Reg. v. Prince* (1), and referred to by Wills J. in *Reg. v. Tolson*. (2) Such a case might, I think, occur, although it is not likely to occur often.

But I am unable to accept the defendants' proposition, where the act, though a criminal offence—*malum prohibitum*—is, upon the state of facts which the doer by the fraudulent misrepresentation of the person against whom he claims indemnity has been induced to believe to be the true state of facts, neither criminal nor immoral. Take the present case as an example. For the purposes of the argument of the point before us, the facts must be assumed to be as the plaintiff alleges them to be. It must, therefore, be assumed that he was rendered liable to be convicted of an offence under s. 11 of the Foreign Enlistment Act, 1870. It must also be assumed (in regard to the construction of that section) that a man may be convicted of an offence under that section if he assists or is employed in such an expedition as the expedition in question, although he can prove that he was induced to do what he did by a fraudulent misrepresentation that a portion of Her Majesty's regular forces was waiting near the frontier of the South African Republic to join and co-operate, and that the proposed invasion had the sanction and support of Her Majesty's Government—a statement of facts from which any one, I should think, would naturally and reasonably infer, and would believe that it was meant that he should infer, that the licence of Her Majesty, which would legalise the expedition, had been granted. It appears to me that a representation that the expedition had the "sanction" of Her Majesty's Government necessarily involves a representation that the "sanction" had been given in the way in which, by this section of the Act of Parliament, it could properly be given, namely, with the licence of Her Majesty.

(1) (1875) L. R. 2 C. C. 154, at p. 173.

(2) (1889) 23 Q. B. D. 168, at p. 180.

The learned counsel for the defendants contends that even in such a case a claim for indemnity, or indeed any claim for damages arising out of the matter which constitutes the offence, is on grounds of public policy legally inadmissible. Speaking for myself, I can see no ground of public policy upon which redress for consequent damage should be refused to the person so led to commit an offence by the false and fraudulent representations of fact which, in this case, as I understand their import, justified the doer in believing that he was acting in accordance with the law.

It appears to me that if the defendants' reasoning on this point were adopted a real injustice might result. Two illustrations, drawn from cases which present simpler features than are presented by this case, have occurred to me: the one, the case of an offence which is dealt with in courts of summary jurisdiction; the other, an offence which is matter of indictment. The Licensing Act, 1872, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. It was held in *Cundy v. Lecocq* (1) that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. Suppose A. by a fraudulent representation of the sobriety of B., who gives no indication of intoxication, but whom A. knows to be drunken, authorizes and induces a licensed victualler, who has no reason to disbelieve and does honestly believe the truth of the representation, to sell drink to B., and the licensed victualler is convicted and fined, upon what consideration of public policy should a man who, if the representation as to sobriety had been true would have committed no offence either against law or morals, be debarred from redress against the man who had by fraud inflicted upon him what might be a very serious injury? Or, to take a case under the 8 & 9 Vict. c. 100, s. 44. A person who receives two or more lunatics into his house, not being a registered asylum or hospital or a house duly licensed under that Act, or any previous Act, commits an indictable offence, and in *Reg. v. Bishop* (2) it was held by the Court for Crown Cases Reserved that it afforded no defence to

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(1) (1884) 13 Q. B. D. 207.

(2) (1880) 5 Q. B. D. 259.

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prove, as was proved in that case, that the defendant honestly and on reasonable grounds believed that the persons whom he received were not lunatic. Suppose in such a case that the belief had been induced by a false and fraudulent misrepresentation on the part of the person who requested and authorized the proprietor of the house to receive the persons into his care; I am unable to see upon what ground of public policy or principle of justice the proprietor who has been led into the commission of the offence by the fraud of another, and who is free from any imputation of moral wrongdoing, should be denied a right of suing for damages the person whose successful fraud has caused him to do that which the law, in its care for the health and safety of lunatics, has made an offence. I may add, upon the question of public policy, that (as I think was stated by counsel in the course of the argument) there is express provision in the Sale of Food and Drugs Act, 1875, s. 28, for the right of a person convicted under the Act to recover the amount of any penalty in which he may have been convicted under the Act, together with the costs which have been paid or incurred by him in defending himself, from the person who sold him the adulterated article.

If we turn from the consideration of principle to look for authority, it appeared to be agreed by the learned counsel who argued the case before us that there is no decision which can be invoked as an authority upon the point under consideration. Mr. Cohen, however, cited a passage from the judgment of Lord Mansfield in *Holman v. Johnson* (1) in favour of the defendants which does not in my judgment appear to have any real bearing upon the question which we are considering; but he relied principally upon the opinion which was expressed by Lord Lyndhurst C.B., and in which Bolland, Alderson, and Gurney BB. concurred, in *Colburn v. Patmore*. (2) It is quoted and criticised in the notes to *Lampleigh v. Brathwait*, in the 3rd, 4th, 5th, 6th, and 7th editions of Smith's Leading Cases. It does not appear to me to help the defendants in the present case. The facts shortly were that the plaintiff, the proprietor of a journal, had been prosecuted, convicted, and fined for

(1) 1 Cowp. 341.

(2) 4 Tyrw. 677; 1 C. M. & R. 73.

falsely and maliciously printing and publishing a libel in his journal. He thereupon sued the editor for inserting the libel in the journal falsely, maliciously, and negligently, and without his authority or consent, and he claimed to recover damages, which included the amount of the fine and the expenses to which he had been put in defending himself. The decision of the Court, which was adverse to the plaintiff, was given upon a point of pleading; but there was a very full discussion in the course of the argument as to the right of the plaintiff, having been himself convicted and fined for the libel, to sue the editor for indemnity. The members of the Court expressed in the course of their judgments a strong opinion that he had no such right. Lord Lyndhurst said, in the passage upon which the present defendants rely: "I am not aware of any case in which a man duly convicted of an act declared by law to be criminal" (in the report in Crompton, Meeson, and Roscoe the words are, "who has committed an act declared by the law to be criminal") "and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offence in order to procure indemnity for the damages occasioned by that conviction; but after hearing the argument I entertain little or no doubt that such an action could not be maintained." It appears to me that the facts in *Colburn v. Patmore* (1), or in such analogous cases as Lord Lyndhurst evidently intended to refer to when he pronounced this opinion, and the facts as pleaded in the present case, give rise to very different considerations. The plaintiff in *Colburn v. Patmore* (1) could not after his conviction be heard to say that he did not falsely and maliciously publish the libel. As it was put by Alderson B. in the course of the argument, the plaintiff though actually ignorant was legally cognizant of the publication of the libel. As I have already pointed out, it can never, in my judgment, be successfully contended that a claim for indemnity can be maintained where the doer of the act knew at the time, or must be presumed to know, of circumstances which make the act either a private wrong or a public crime. Here the gist of the case is

(1) 4 Tyrw. 677; 1 C. M. & R. 73.

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that the plaintiff did not know the facts which made his conduct criminal, but, on the contrary, was led by the defendants to believe, and did believe, in the existence of a fact—the sanction of the British Government—which, if it had been given, as he had a right (upon the defendants' representation) to assume it had been given, in the proper way, namely, under the licence of Her Majesty, would have been an answer to any imputation of illegality.

Further, whilst I have felt it to be my duty, after having had the valuable assistance of the full and careful arguments addressed to us, to deal with the case as if the plaintiff had been convicted and was claiming an indemnity for the penal consequences of the commission of a criminal offence, it should, I think, be borne in mind that in fact the plaintiff here has not been convicted, and is claiming under various heads damages which are unconnected with the possibility of conviction or punishment. The claim nearest in character to an indemnity for damages consequent upon the conduct of the defendants as inducing the commission of a crime, is contained in the allegation that he was brought to England as a prisoner. Whether any of these other heads of damage are so proximately connected with the alleged tortious conduct of the defendants as to be legally recoverable, we have not now to consider. That is a matter which, like the act itself, the plaintiff will have to prove at the trial. It may be that some of these claims of damages might be legally maintained, even if a claim for indemnity against the penal consequences of the commission of an offence could not. I prefer, however, to base my judgment for the plaintiff in regard to the question before the Court upon the broader grounds which I have stated.

Judgment for the plaintiff.

Solicitor for plaintiff: *G. B. Crook.*

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

A. P. P. K.