great a strain on my powers to ask me to imply it from the mere fact of his being the secretary or the proper person to deliver documents. But even if I could make the implication that the appellants desire I do not think that it would assist them, for I agree with the learned Judges in the Court of Appeal that every part of the legal proposition stated by Willes, J. in his well-known judgment in *Barwick* v. *English Joint Stock Bank* (16 L. T. Rep. 461, L. Rep. 2 Ex. 259) is of the essence of it. Willes, J.'s, words are these—"The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." Where, therefore (as in the present case), the secretary is acting fraudently for his own illegal purposes, no representation by him relating to the matter will bind his employers. And in my opinion it would be a matter of reproach if the law were otherwise. The reason for the qualification, I suppose, is that a representation made under such circumstances, whether express or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master. Finally, it is in my opinion open to serious doubt whether on the facts of the present case the parties relied on Rowe's representation at all. The evidence indicates that they refused to do so because they declined to part with their money on Rowe's certifying the transfer (as it is called), and if they acted in reliance on the certificate apart from any representation their case of course fails, for nobody can pretend that the certificate itself created any estoppel against the company. I guard myself from expressing any opinion whether, even if the certificate had been genuine but issued under some innocent mistake, it would have been an estoppel in favour of the present appellants. It will be remembered that the appellants themselves propounded the forged transfer to the company for registration of the supposed transferees' names. I share the doubt expressed by my noble and learned friend Lord Macnaghten in *Balkis Consolidated Company* v. *Tomkinson* (69 L. T. Rep. 598, (1893) A.C. 396), "whether under such circumstances a person ought to be permitted to rely upon a representation innocently made to which he has in a sense and to a certain extent contributed." The recent decision of this House in *Mayor of Sheffield* v. *Barclay* (93 L.T. Rep. 83, (1905) A.C. 392) may be found to have some bearing upon this point. It is, however, unnecessary to express any opinion upon it on the present occasion. I am of opinion that the appeal should be dismissed.

LORD JAMES OF HEREFORD—Concurring as I do in the judgments which have been delivered, I do not propose to add to them except by making one observation. This is one of the cases in which it is said that one of two innocent persons must suffer. I cannot help observing that the decision now about to be given may cause those who receive certificates in commercial life to be anxious, and to be shaken in their confidence in the validity of those certificates. But in this case a transferee has a safeguard which a company has not. A company cannot protect itself against the fraud of its secretary, and if the company has to bear the burden of this loss of course the loss placed upon companies will be very great, and they must guard against it. But—certainly theoretically, I do not know if it is quite the case practically—the transferee has a safeguard. He can always apply to the two directors whose names appear upon the certificate and inquire from them whether those signatures are valid and genuine signatures or not. If the answer is that they are genuine the certificate of course is valid; if the answer is "No, I have not signed that certificate," then he is aware that it is invalid. I do not know whether in commercial life transferees will take the trouble to inquire of directors whose signatures appear on certificates whether those signatures are genuine or not, but at any rate there is that power if they choose to exercise it.

LORD ROBERTSON and LORD ATKINSON concurred.

Appeal dismissed.

Counsel for the Appellants—Rufus Isaacs, K.C.—Danckwerts, K.C.—J. D. Crawford. Agents—Gilbert Samuel & Company, Solicitors.

Counsel for the Respondents—Sir R. Finlay, K.C.—Eldon Bankes, K.C.—Bremner. Agents—Ashurst, Morris, Crisp, & Company, Solicitors.

HOUSE OF LORDS.

Thursday, July 26.

(Before the Lord Chancellor (Loreburn), Lords Davey, James of Hereford, and Robertson.)

OGDENS LIMITED *v.* WEINBERG.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Assignation—Terms of Assignation Held to Carry Right to Sue Action for Damages of Breach of Contract.

The trustee of a bankrupt trader assigned to a third party the goodwill of a bankrupt's business, "and also all the book and other debts, securities, credits, effects, contracts, and engagements belonging or appertaining to the said business to which the vendor as such trustee is entitled."

At the time of his bankruptcy the trader was in a position to bring an action of damages for breach of contract against a wholesale firm which had undertaken to divide a certain bonus and profits among its customers

for a number of years, but had put it out of its power to fulfil its contract by going into voluntary liquidation and selling its business.

Held that the contract and right to sue upon it were conveyed by the assignation.

Ogdens Limited, wholesale tobacco merchants, in March 1902 contracted with a number of their customers, including one Slobodinsky, to give them a proportion of a bonus of £200,000 a-year for four years, and a proportion of their total profits during the same period. In September 1902 Ogdens Limited sold their business to another company and thereby put it out of their power to carry on their business and fulfil their contracts.

The House of Lords held that the company were liable in damages to their customers for breach of contract—*Ogdens* v. *Nelson* (1905), A.C. 189.

In March 1903 Slobodinsky became bankrupt, and a trustee was appointed on his estate, who assigned to Weinberg, the respondent in this appeal, the goodwill of the bankrupt's business "and also all the book and other debts, securities, credits, effects, contracts, and engagements belonging or appertaining to the said business to which the vendor as such trustee is entitled."

The question in this appeal was whether the trustee's agreement with the respondent was operative to convey to the latter the right to damages for breach of contract which Slobodinsky would have had if he had not become bankrupt.

At the conclusion of the arguments their Lordships gave judgment as follows:—

LORD CHANCELLOR (LOREBURN)—In this case the only question which your Lordships have to consider is whether the assignment of the 15th January 1904 from the trustee in the bankruptcy of Slobodinsky was operative to convey to the respondent the claim of Slobodinsky against the appellants under the agreement of March 1902. Now, what was that claim? In the first place it was for a sum already due as bonus, with regard to which no question is raised, In the next place it was for damages against the appellants for not carrying out their contract. Now, when the appellants disabled themselves from carrying out their contract Slobodinsky could have brought an action on the breach. He did nothing, but his property and rights became vested in the trustee in his bankruptcy. In my opinion, the contract, although unperformed, was nevertheless not annulled, so as to prevent any person entitled to sue on it from bringing his action for damages for the breach of it. Accordingly, looking at the words of the assignment of the 15th January 1904, I am of opinion that amongst other things assigned was this contract, and the right to sue upon it. That concludes the case. I am therefore of opinion that the judgment of the Court of Appeal was right and should be affirmed, and I move your Lordships accordingly.

LORD DAVEY—In my opinion the case is not free from difficulty, for the question is one of great nicety, but on the whole I think that the decision of the Court of Appeal should be upheld. I desire, however, to say that in my opinion the word "debts" no doubt means something recoverable by an action for debt, and nothing can be recovered in an action for debt except what is ascertained or can be ascertained. A claim for an amount which is uncertain, and cannot be adjusted in an account, cannot, I think, be justly called "a debt." But, on the other hand, I confess that I think that the word "contract" carries it, and is sufficient for the respondent's purpose. Read with the context the word "contracts" includes the benefit of any contract. No doubt the appellants had not only broken their contract but had made it incapable of performance, so that there was no contract which anyone could ask them to perform, for the simple reason that there were no customers of the business, and the amount of anybody's claim would depend upon how many other customers there were, in order that his share might be ascertained. Therefore I think that in that sense the contract had ceased to exist, but no doubt there is a contract which is capable of being sued upon, and that, I think, is the important matter for the purposes of this case. Therefore what Slobodinsky had at the time when he became bankrupt, and what passed to the trustee in his bankruptcy, was a right of action to recover damages for breach of contract, which has become effectually vested in the respondent. The contract was clearly one which appertained to the business, and therefore I think that the assignment was enough to carry the benefit of it, or, in other words, the right of suing upon it. I agree in the motion which has been proprosed.

LORD JAMES OF HEREFORD—I have entertained considerable doubts during the course of the argument, but I do not think that they are sufficient to justify me in dissenting from the motion which has been proposed.

LORD ROBERTSON—I agree entirely with the judgment of the Lord Chancellor.

Judgment appealed from affirmed, and appeal dismissed.

Counsel for the Appellants—Sir E. Carson, K.C.—F. E. Smith—Hemmerde. Agent—A. Middleton Rickards, Solicitor.

Counsel for the Respondent—Lush, K.C.—Robertson Dunlop. Agents—Jennings, Son, & Allen, Solicitors.