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*Nov. 25.
*Dec. 10.

J. P. BICKELL & COMPANY (DEFENDANT) ..... APPELLANT;

AND

LIONEL FORBES CUTTEN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Agency—Broker and client—Transactions in foreign country carried out by broker's correspondents there—Right of client to benefit of exchange.

The judgment of the Appellate Division of the Supreme Court of Ontario (57 Ont. L.R. 113) was affirmed (Duff and Newcombe JJ. dissenting), sustaining plaintiff's right to be credited in the Canadian equivalent of New York funds, according to the rate of exchange prevailing on the dates when the moneys were received in the transactions, in arriving at the profit for which defendant, his broker, was accountable to him on transactions carried out by defendant's correspondents in New York. *Barthelmes* v. *Bickell* (62 Can. S.C.R. 599) applied.

Defendant's contention that upon the facts there was an understanding or implied agreement that all accounts were to be settled in Canadian funds was negatived by the court on the evidence, Duff and Newcombe JJ. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1), affirming in part the judgment of Mowat J. in favour of the plaintiff.

The plaintiff, who resided in Toronto, Ontario, employed the defendant broker in Toronto, as his broker in respect of certain purchases and sales which were carried out on

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) 57 Ont. L.R. 113.

the New York Cotton Exchange and the New York Stock Exchange. The defendant had an arrangement with its New York correspondents under which the latter made purchases and sales on the Exchanges upon the defendant's instructions. The correspondents had an account in a bank in Toronto and moneys payable by the defendant were deposited to the credit of the correspondents in this account, while moneys payable to the defendant by the correspondents were paid to them by cheques drawn upon it. The correspondents and defendant accepted payments reciprocally in Canadian funds, the understanding being that no charge was to be made for exchange in respect of any of such payments. The plaintiff did not know of this arrangement. During the period in which the transactions in question were carried out Canadian funds were at a discount in New York. The transactions resulted in a profit to the plaintiff. He claimed that in arriving at the profit for which the defendant was accountable to him as his agent he was entitled to be credited in terms of New York funds for the moneys received in respect of the transactions, in other words, that he was entitled to be credited in Toronto in respect of any New York funds so received in their equivalent in Canadian funds, according to the rate of exchange prevailing on the date of receipt, and that debits, of course, should be dealt with on a like principle. The defendant contended that the facts established an understanding and agreement between the parties that all accounts between them were to be settled in Canadian funds, and that the facts differentiated the case from that of *Barthelmes* v. *Bickell* (1).

W. N. Tilley K.C. for the appellant.

A. G. Slaght K.C. and *F. J. Hughes* for the respondent.

The judgment of the majority of the court (Anglin C.J.C., Mignault and Rinfret JJ.) was delivered by

ANGLIN C. J. C.—The material facts of this case sufficiently appear in the judgments of the learned trial judge and of the Appellate Divisional Court (2).

The question before us is purely one of fact—whether the circumstances in evidence warrant the inference of an implicit agreement by the respondent that the defendant,

(1) 62 Can. S.C.R. 599. (2) 57 Ont. L.R. 113

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admittedly his broker, should, in addition to its regular commission and charges for the transactions carried on for him, be allowed to retain for its own benefit, or for that of its sub-agents, out of the profits made on sales of commodities for the respondent, a sum equal to the exchange difference between Canadian and United States funds at the dates of such sales. That the respondent is entitled to the profit of the exchange in the absence of a special agreement, or a custom binding on him, entitling the appellant to retain these moneys, is concluded by the authority of the decision of this court in *Barthelmes* v. *Bickell* (1), if, indeed, authority for anything so elementary in the law of fiduciaries be needed. No such custom was alleged or proved. That no such agreement was explicitly made is admitted. The learned trial judge and the Appellate Divisional Court affirming him have held that the circumstances in evidence do not justify an inference of assent by the respondent to such an arrangement.

Any successful attempt to affect the respondent's rights by the custom or arrangement which is said to have obtained between the appellant and its New York correspondents, but was unknown to the respondent, is also precluded by the authority referred to. Other matters relied upon to show that the respondent had knowledge during the currency of the transactions of the appellant's intention to assert the right to retain the moneys in question, such as the rendering of a few statements showing credits to him at par for Canadian funds deposited by him with it, and balances apparently arrived at on the basis of treating Canadian and United States funds as of equal value, fall short of establishing such an appreciation by him of the appellant's assertion of a claim in derogation of a right which the law ordinarily imputes to a principal as would be essential to an inference of assent by him to forego that right. When the respondent demanded the moneys in question from the appellant his right thereto was not challenged on the ground of any arrangement to the contrary express or implied. Acquiescence on his part in the appellant's retention of them was not even suggested. The arrangement between the appellant and its New York correspondents was then communicated to him, which he was told prevented

(1) 62 Can. S.C.R. 599.

the appellant recovering the sum in question from its correspondents, and it was suggested that the adjustment of the matter should be deferred until the respondent's brother should come to Toronto, as he "knew the way cotton was handled and traded in". The evidence discloses that when Mr. A. W. Cutten came he did not agree with the appellant's view of its rights in the matter.

We have carefully considered all the evidence. No useful purpose would be served by attempting to review it. Not only are we satisfied that it does not disclose the case of manifest error requisite to entitle the appellant to a reversal of the concurrent findings in the provincial courts, but it rather leaves us with the impression that had it been held below that the respondent had assented to the broker's retention of the moneys in question, that holding could not have been supported.

The appeal fails and must be dismissed with costs.

The judgment of Duff and Newcombe J. J., dissenting, was delivered by

DUFF J.—This litigation originated in a dispute touching the reciprocal rights and liabilities of the appellants and the respondent arising out of certain transactions carried out by the appellants in New York pursuant to orders from the respondent between the 9th of April, 1919, and the 16th of January, 1920. During this period, Canadian funds were at a discount in New York. The appellants had an arrangement with their New York correspondents, who were members of the New York Cotton Exchange and of the New York Stock Exchange, under which these correspondents made purchases and sales on the exchanges upon the instructions of the appellants. The New York correspondents had an account in a bank in Toronto, and moneys payable by the appellants were deposited to the credit of the correspondents in this account, while moneys payable to the appellants by the correspondents were paid to them by cheques drawn upon it. The correspondents and the appellants accepted payments reciprocally in Canadian funds, the understanding being that no charge was to be made for exchange in respect of any of such payments.

The dealings on behalf of the respondent resulted on the whole in a very considerable profit; and the respondent

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contended, and still contends in this litigation, that in arriving at the profit for which the appellants are accountable to him as his agents, he is entitled to be credited in terms of New York funds for the moneys received in respect of the transactions carried out for him by the appellants' New York correspondents in New York; in other words, that he is entitled to be credited in Toronto in respect of any New York funds so received in their equivalent in Canadian funds, according to the rate of exchange prevailing on the date of receipt; and that, of course, debits should be dealt with on a like principle.

In the absence of any agreement expressed either in words or by conduct to the contrary, the respondent would indisputably be entitled to call upon the appellants to account for all profits realized out of transactions undertaken for him on the New York Exchange, and would at the same time be bound to indemnify the appellants in respect of any losses entailed by such transactions. The arrangement between the appellants and their New York correspondents was not communicated to the respondent, whose rights are not therefore in any way affected by it. The question in controversy is a question of fact, whether, namely, the appellants have established by satisfactory evidence an agreement between the respondent and themselves that the business was being conducted on the footing that, as between them, the risk of fluctuations in exchange between New York and Canada was to be borne entirely by the appellants.

Express agreement in words is not contended for. Broadly, it is said on behalf of the appellants that the respondent was informed by them and became aware early in course of the dealings between them that the appellants considered, and were acting upon the belief, that the business between them was being conducted on the footing that moneys received in New York on behalf of the respondent should be credited to him in corresponding figures in Canadian funds, and that moneys paid for him in New York were to be debited in the same way; and that the respondent, having become aware that the appellants were proceeding on this basis, acted in such a way as to preclude himself from disputing that such were the terms of the understanding between them.

The sole question is: does the evidence establish this? The evidence relied upon consist of the accounts and statements furnished from time to time, as above mentioned, beginning with the ninth of April, and the evidence of Cashman and Bickell on behalf of the appellants, and of Cutten himself. In the documents, credits and debits are dealt with on the principle mentioned. It will not be necessary to examine the documents in detail, but one or two illustrative entries may be mentioned: In April, 1919, a sum of $10,000, paid by the respondent in Toronto in Canadian funds as margin, was credited to him without deduction, Canadian funds being then in New York at a discount of a little more than two per cent; in September, 1919, a loss of twenty-three thousand odd dollars in New York funds on the sale of 2,000 bales of March cotton was debited to him in Canadian funds at par, the exchange being then about four per cent; in November, 1919, the sum of $3,000, received on behalf of the respondent on the 31st of October as dividends in New York, and in New York funds, was credited to him in Canadian funds as $3,000. In the same month, $100,000 paid to the respondent in Canadian funds on account of his profits on a sale of cotton, was charged to him at par, the exchange being then at four per cent. Later, in the same month, the respondent paid the appellants $50,000 as margin in Canadian funds, and this sum was also debited to him at par, the exchange being then at five per cent.

In all the numerous statements of account, during this period, debits and credits were treated in the same way; moneys paid and received in Canada are debited and credited without deduction in Canadian funds; moneys received and paid out in New York are credited and debited in terms of Canadian funds in figures identical with those expressing in New York funds the sums received or paid there. In every case the balance is struck on the principle that all credits and debits are computed and expressed according to the same standard, that standard being obviously, to anyone who compared the figures of the accounts with the facts of the transactions, the Canadian dollar. It is undisputed that the respondent understood this; and when one looks at the form which these statements assume, one cannot doubt that the respondent must have realized that the appellants were proceeding upon the

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assumption that such was the footing on which the business was being conducted. It is hardly denied that the accounts and statements were carefully checked by the respondent personally. He admits that therein the appellants were dealing with the moneys "as Canadian funds in a Canadian account"; that he recognized the profits or losses shown in them as net profits or losses in Canadian funds, "without anything being added for American exchange." He says:

the accounts I received from Mr. Bickell were accounts in Canadian funds; no question about that; (and) when I got any statement from Mr. Bickell, I naturally would see it was in Canadian funds.

Nor is there any room for suggestion that Cutten regarded the principle of the account, as manifested by these documents, as merely provisional, and subject to revision. His attention was attracted to the subject early in November. He tells, indeed, of a conversation with Cashman, manager of the appellants, in which he says he raised the question of the payment of profits in American funds. For reasons to be mentioned presently, it seems quite clear that this conversation did not occur until after the transactions now in question had been closed. But that the question of his right to be paid in New York funds was actually present to his mind in the course of these transactions seems to be made clear by what he says about a credit for dividends already mentioned, received on the 31st of October and included in a November statement. He says:

I came to the conclusion—I saw the dividend somewhere—that the dividend was earned in New York, and that dividend should have been given to me in American funds.

Asked why he made no protest, his explanation was that they had already refused to allow him American exchange, and that it had been agreed that the question should stand over for further discussion with his brother. As I have said, it is impossible to accept his statement that this last mentioned incident took place earlier than January. But the evidence leaves little room for doubt that he understood the appellants' statements as involving a notice to him that the appellants were dealing with him on the basis of crediting and debiting all moneys received and paid respectively as Canadian funds.

Had the appellants in express terms informed the respondent during the course of these transactions that this was the basis upon which their dealings with him were being conducted, and he had proceeded without demur to enter into further dealings and to receive accounts and statements without protesting, nobody, of course, would argue that he could, as to later transactions affected by an abnormal rise or fall in exchange, seek to take advantage of this situation by repudiating his previous tacit acquiescence in the proposal or declaration of the appellants. His failure to demur in such circumstances could only be construed as an acceptance of the appellants' declaration as constituting the terms governing their relations. And if such was the effect of the communications which in fact passed from the appellants to the respondent as the respondent, as a reasonable business man, ought to have conceived it, and as he did in fact conceive it, then the result must be the same. With great respect, I can entertain no serious doubt that such was the effect of these communications as the respondent ought to have conceived it and as he did in fact conceive it, and that the appellants, having proceeded to conduct their affairs without any protest or demur, according to the principle expressed in their communications, are entitled to insist that such was the arrangement between them. The principle, that a man is bound by the reasonable interpretation of his words and conduct by another who reasonably interprets such words or conduct as meant to be acted upon, is a principle which, as Lord Haldane said, in *London Joint Stock Bank Ltd.* v. *McMillan* (1),

> is essential to the conduct of business between the members of every well-ordered community. It is generally recognized in ordinary social life as imposing obligation of honour as much as of law.

The business would have borne an entirely different colour had the respondent succeeded in establishing, as he sought to do, that he did protest, and that by arrangement with Cashman the matter of exchange was left open. Cashman's evidence as to the date of the conversation is explicit, and the failure of the respondent to refer to this conversation in the correspondence in January, when the fact that it had occurred would have been a complete

(1) [1918] A.C. 777, at p. 818.

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answer to the position assumed by Cashman in his letter, seems to show clearly enough that at the trial the respondent's recollection was seriously at fault.

While the question involved in the appeal is purely the question of fact, it is a question which does not depend, except as regards the conversation just mentioned—and as to that there is no finding by either court—upon any view as to the credibility of witnesses. The primary facts are not seriously in controversy; the sole question is, what is the proper inference to be drawn from them? Nor is it at all useful to consider the previous decision of this court in *Barthelmes* v. *Bickell* (1). The view taken in that case was that the facts did not afford sufficient ground to support the inference of any understanding between the customer and broker on the subject of exchange. There, as here, it was a question of fact. The considerations pointing to the conclusion that such an agreement ought to be inferred in this case are vastly more powerful than in the former case. But it is, perhaps, not unimportant to add, in view of some observations in the courts below, that it is a misconception of the doctrine which governs the use of precedent in the law of England to suppose that it applies to decisions which are decisions solely upon points of fact. Lord Halsbury said, in *London Joint Stock Bank* v. *Simmons*, at p. 208 (2):

> If, as I believe, it be accurate that the question is one which is to be determined upon the facts of the case, no one case can be an authority for another;

and Lord Herschell said, at p. 221, speaking of *Sheffield* v. *The London Joint Stock Bank* (3):

> It may, perhaps, be a binding authority as to the conclusions of fact arrived at, where the facts are identical, but not otherwise.

There are observations much to the same effect by Lord Macnaghten in *Colls* v. *Home & Colonial Stores Limited* (4).

The appeal should be allowed, and the action dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tilley, Johnston, Thomson & Parmenter.*

Solicitors for the respondent: *Hughes & Agar.*

(1) 62 Can. S.C.R. 599.
(2) [1892] A.C. 201.
(3) 13 App. Cas. 333.
(4) [1904] A.C. 179, at pp. 191 and 192.