I. W. C. SOLLOWAY AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

SAMUEL BLUMBERGER (PLAINTIFF) .... RESPONDENT.

1932
*Oct. 4, 5.
1933
*Feb. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Stock exchange—Broker and client—Stocks delivered as collateral security —Wrongful conversion—Evidence.

The respondent employed as stock brokers the appellants who carried on business first as partners and later as a limited company. From time to time the respondent delivered to them stocks, shares and bonds as security to finance his transactions with the appellants with whom he carried on an active trading account. In each case, before depositing the shares, the respondent endorsed the certificates in blank, and they became what is known as "street certificates." The respondent, when placing orders to buy or orders to sell, received from the appellants confirmation in the form of a bought or sold note and also during the whole course of his trading, received each month a statement showing the position of his account. The respondent took no exception to the bought and sold notes or to the monthly statements, and, at the time, accepted them as correct. The securities were first transferred over from the partners to the limited company and, when it closed out, they were at the respondent's request turned over to newly employed firm of stock-brokers. Several months later, without making any previous demand upon the appellants, the respondent brought an action for damages for wrongful conversion of the securities so deposited with them. The appellants did not give evidence other than calling the secretary and a member of the Vancouver Stock Exchange, who testified as to the rules and customs of the exchange. The respondent, however, not without objection, secured the production of the appellants' books and documents. An extract of the ledger so produced showed in respective columns the name of the stock deposited by the respondent, the date of the deposit, the number of shares, the number of the certificate and its date, that it was received from the respondent, and then, under the heading "To whom delivered," an indication that delivery had been made either to "H.O." (head office) or to certain brokers whose names were given, together with mention of the date on which such delivery was made. The trial judge held against the appellants on the ground that the entries in the books showed that the appellants "dealt with these securities as if they were their own property, without notice and regardless of the rights of the plaintiff." This judgment was unanimously affirmed by the Court of Appeal: Martin and McPhillips, JJ.A., agreed with the conclusions arrived at by the trial judge, although Martin, J.A., admitted the case was "not free from doubt," and Macdonald, C.J., thought the respondent's evidence was "insufficient to support the action"; but he was of opinion that the onus was upon the appellants

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

1933

SOLLOWAY ET AL v. BLUMBERGER.

"to show that, in accordance with their duty, they had properly disposed of the collateral securities."

Held (reversing the judgment appealed from) that the respondent's action ought to have been dismissed on the ground that, on the record submitted and upon the evidence, the court could not come to the conclusion that wrongful conversion had been established. *Smith* v. *Great Western Ry* [1922] A.C., 178, foll.

Semble that the onus was upon the respondent to prove wrongful conversion.

APPEAL from the decision of the Court of Appeal for British Columbia affirming the judgment of the trial judge, Macdonald J. (1), and maintaining the respondent's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

W. B. Farris K.C. for the appellants.

J. A. MacInnes K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The appellants were stock brokers and members of the Vancouver Stock Exchange. They carried on their business, at first, as partners; and later they were incorporated into a limited company. The respondent employed them as his brokers; and, between June 14, 1928, and September 14, 1929, he proceeded to place with them orders to buy and sell stock. For this purpose, he delivered certain shares as security to the appellants, with whom he carried on an active trading account. In each case, before depositing the shares, the respondent endorsed the certificates in blank, and they became what is known as "street certificates."

As the respondent placed orders to buy or orders to sell, in every instance he got from the appellants confirmation in the form of a bought or sold note. He admits the amounts shown in these confirmations were in accordance with current market prices.

Further, during the whole course of his trading, he received each month a statement showing the position of his account. He took no exception to the bought and sold notes, or to the monthly statements, and, at the time, accepted them as correct. In fact, the trading went on between the parties as a continuous account.

(1) (1931) 45 B.C.R. 66.

1933

SOLLOWAY ET AL v. BLUMBERGER

Rinfret J.

Incidentally the account was transferred over from the partners to the limited company and, in the end, when it was closed out, the shares and stocks shown in the account (on the assumption that it was correct) were, at the respondent's request, turned over to Branson & Brown, other brokers of Vancouver.

Several months later, without making any previous demand upon the appellants, the respondent brought this action into court for the alleged wrongful conversion of the shares he had deposited with the brokers. Judgment was given in favour of the respondent as against the partners for the period covering the transactions with them, and as against Solloway, Mills & Co. Ltd., for the period covering the remaining transactions. The limited company is not an appellant in this court, and we are concerned only with the dealings between the respondent and the partnership, all gone through within a single month, to wit, from June 14th to July 14th, 1928.

The respondent did not sue for an accounting. At the trial, the issues were clearly limited to the question of wrongful conversion; and the trial judge declared all he was going to consider was that question of conversion and the ensuing damages.

The appellants did not give evidence. At the conclusion of the plaintiff's case, they moved for non-suit. When warned by the court that it would be more advisable to reserve this, if they wished to put in further evidence, they contented themselves with calling the secretary and a member of the Vancouver Stock Exchange, who testified as to the rules and customs of the Exchange.

The respondent, however, not without discussion and strenuous objections on the part of the appellants' counsel, succeeded in securing the production of the appellants' books and documents. He relied on these for his success. The learned trial judge held against the appellants on the ground that the entries in the books, as he thought, showed that the appellants

> dealt with these securities as if they were their own property, without notice and regardless of the rights of the plaintiff.

In the Court of Appeal, two of the judges, Martin and McPhillips, JJ.A., agreed with the conclusions arrived at by the trial judge, although Martin, J.A., admitted the case was " not free from doubt." The Chief Justice thought the

1933

SOLLOWAY ET AL v. BLUMBERGER.

Rinfret J.

respondent's evidence was "insufficient to support the action"; but he was of opinion that the onus was upon the appellants

to show that, in accordance with their duty, they had properly disposed of the collateral securities.

M. A. Macdonald, J.A., did not write any notes.

The holding of the learned trial judge was entirely based on his reading and interpretation of the entries in the books. An extract from the ledger was produced. It showed in respective columns the name of the stock deposited by the respondent, the date of the deposit, the number of shares, the number of the certificate and its date, that it was received from the respondent, and then, under the heading "To whom delivered," an indication that delivery had been made either to "H.O." (head office) or to certain brokers whose names were given, together with mention of the date on which such delivery was made. From those entries, the learned judge gathered that the stock had been delivered as indicated on the several dates stated in the ledger and that the appellants had therefore failed to hold the stock under their control. It is in that respect, we assume, that he held the monthly statements did not agree with the account of the securities as entered in the books; and, for that reason, he came to the conclusion that

the disposition of the securities there shown by the (appellants) amounted to a denial of plaintiff's ownership and an assertion on their part of a right to dispose of them as they saw fit. This (he held) clearly was conversion.

In our view, the conclusions of the courts below are not consistent with the nature of the contract between the parties, nor with the nature of the action brought by the respondent.

This was an agreement for dealing in stocks on the Vancouver Stock Exchange. In the absence of evidence to the contrary, the respondent, who gave authority to the appellants to do business for him on the Exchange, should be deemed to have contracted subject to the rules and customs of the Exchange; and the nature of the powers and the duties of the brokers would be determined by the usage and course of dealing in transactions of this character between broker and customer in Vancouver (Parke B. in *Foster* v. *Pearson* (1); *Clarke* v. *Baillie* (2); *Cartwright* v. *Mac-*

(1) (1835) I C.M. & R. 849, at 859.

(2) (1911) 45 Can. S.C.R. 50.

Innes (1); *Forget* v. *Baxter* (2). Moreover, it is a fair inference from the evidence that the respondent was pretty familiar with the usages and customs of the stock market.

The meaning and effect of the evidence is that the universal practice of brokers—and the prevailing practice in Vancouver—is to treat "street certificates" as dollar bills, that is to say: as money to finance the transactions for which the client has given the securities. The physical certificate itself is immaterial; it is used indiscriminately to make deliveries or otherwise, provided the broker, at all times, has on hand or keeps under his immediate control a sufficient quantity of each stock to meet his obligations towards his customers. To borrow the expressions of Mr. Justice Day, delivering the opinion of the United States Supreme Court, in *Gorman* v. *Littlefield* (3):

> the certificates of stocks are not the property itself, but merely the evidence of it . . . a certificate for the same number of shares (represents) precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; the return of a different certificate or the substitution of one certificate for another makes no material change in the property right of the customer * * * such shares are unlike distinct articles of personal property, differing in kind and value, as a horse, wagon or harness, and stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another.

Assuming, as was held by the courts below, that the respondent's securities were deposited with the intent that they should be held by the appellants as collateral security for any indebtedness which the respondent might owe them in the course of their employment, the agreement should be taken to have been entered into with reference to the established practice. And, there being no express understanding to the contrary, all that the agreement meant was that a like amount of shares—not the same identical certificates—but a like amount of similar shares would be held by the appellants for the purpose mentioned. One of the objects of giving a blank form of transfer and of transforming the documents into "street certificates" must be precisely so that they may be used in the manner referred to.

Now perhaps it should be emphasized that this was not an action for accounting. The respondent elected to sue in tort and brought an action to recover damages for the

(1) [1931] S.C.R. 425 at 429, 430. (2) [1900] A.C. 467.
(3) [1908] 229 U.S. 19.

1933

SOLLOWAY ET AL v. BLUMBERGER.

Rinfret J.

alleged wrongful conversion of the shares deposited. On that issue of wrongful conversion the burden, of course, was on the plaintiff. The proof of the entries in the appellants' ledger does not sustain the respondent's cause of action. Certainly, the mere indication, without more, that the certificates had been sent to the head office, did not prove that they had been withdrawn from the control of the appellants and that they had ceased to be held by them. Nor did the indication that the certificates had been delivered to certain brokers establish wrongful conversion. At best, these entries might have shown disposal of the particular certificates to the brokers mentioned, but it does not follow that the appellants did not retain in their possession and hold similar stock, as represented in their monthly statements, and which they could have delivered to the appellant had he demanded the same. (*Rogers* v. *Thomson* (1).) At all events, the respondent did not prove wrongful conversion by showing mere delivery of the physical certificates—an operation quite consistent with the general practice and the well understood usage. The proper inference was that such dealings were authorized by the arrangement between the parties and constituted an implied condition of their agreement. (*Clarke* v. *Baillie* (2).) The entries in the books were not *per se* sufficient evidence of the improper use which it was incumbent upon the respondent to establish.

Contrary to what was stated in the Court of Appeal, we would not think the onus was upon the appellants to show that they had properly disposed of the securities. The respondent had undertaken to establish wrongful conversion. He was bound to prove it. It was no part of the appellants' case to help the respondent in the task he had set out for himself. There are dicta to that effect by Finch J. delivering the judgment of the Appellate Division of the Supreme Court of New York in *Rogers* v. *Thomson* (3) and by Lord Buckmaster in *Smith* v. *Great Western Ry. Co.* (4), which would indicate a view contrary to that expressed in the British Columbia Court of Appeal.

(1) (1926) 215 N.Y. App. 541, at 545.
(2) (1911) 45 Can. S.C.R. 50.
(3) 215 App. Div. Rep. N.Y. 541 at 545, 546.
(4) [1922] I. A.C. 178.

But, in the present case, it is quite unnecessary to decide the particular question of onus, for the statement made in the Court of Appeal totally disregards the orders to sell—which the respondent had to admit in cross-examination. He admitted that, immediately after the orders were given, he got confirmation of the sales, and, in each case, the transactions as shown in the "sold notes" agreed with the current market prices. These orders gave complete authority to the appellants and afforded full explanation of the disposal of the shares deposited. The respondent received the "sold notes" without taking exception to them. More than that, he acquiesced in them and he acted upon them. He gave orders to buy on the basis of the credits standing in his name in the appellants' books as a result of the sales made pursuant to his orders to sell. He went on, in that way, for a year and a half, receiving confirmations and monthly statements and, in the end, when he closed his account,

> he admits (as pointed out by the Chief Justice of the Court of Appeal) that according to the monthly statements rendered to him if they were bona fide, that is to say that if the purchases and sales were actually made as therein stated by defendants, everything which he was entitled to from them was transferred to Branson & Brown.

all of which goes to show that, when the respondent ordered the sale of the shares deposited, they must have been available, for the proper inference is that the sale was carried out. The proceeds were undoubtedly placed to the credit of the respondent; and, in the end, when he asked for delivery to Branson & Brown of the stock remaining in his name, his demand was complied with.

Of course, throughout his testimony, the respondent, although admitting these facts and circumstances, keeps on repeating that "he does not believe them now." But that is hardly sufficient to establish his case. We fail to understand how, having received and still retaining the proceeds of the sales, the respondent can be heard to question the reality of those sales.

The respondent did intimate a charge of "bucketting," but there is an absolute lack of evidence to substantiate the charge. He suggested the entries or the accounts or the statements were fictitious, but he did not even attempt to prove it. His testimony is built upon suppositions and suspicions and, of course, that comes far short of showing

1933

SOLLOWAY ET AL v. BLUMBERGER.

Rinfret J.

wrongful conversion, which it was the respondent's duty to establish, if he wished to be successful.

We are of opinion that the action ought to have been dismissed on the short ground that, on the record submitted, and upon the evidence, the court could not come to the conclusion that wrongful conversion had been established (*Smith* v. *Great Western Ry.* (1)).

There remains one point to mention. As already stated, the respondent brought his action both against the partnership and against the company. The defendants joined in their written statement of defence. After having specifically denied each and every allegation of fact contained in the statement of claim, in the alternative, whilst denying liability, they brought into court the sum of $175, saying that, at all events, that sum was enough to satisfy the plaintiff's claim for damages, because, at most, the plaintiff would be entitled only to nominal damages. It follows that the deposit was made on behalf of both defendants. In the result, the respondent fails in his action against the partners, but succeeds against the company.

Under the circumstances and upon the record submitted, we are not in a position to make any order in respect of the deposit. The point was not discussed at bar. We trust that the parties will be able to agree between themselves as to its final disposition. Should they be unable to do so, the matter may be spoken to.

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

Appeal allowed with costs.

Solicitors for the appellants: *Farris, Farris, Stultz & Sloan.*

Solicitors for the respondent: *Fleishman & MacLean.*

(1) [1922] I. A.C. 178 at 189.