

1926  
 \*Feb. 15, 16.  
 \*Mar. 13.

A. S. RODOVSKY AND OTHERS (PLAIN-  
 TIFFS) ..... } APPELLANTS;

AND

THE CALIFORNIA ASSOCIATED }  
 RAISIN CO. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE,  
 PROVINCE OF QUEBEC

*Principal and agent—Mandate—Agency—Revocation—Commission—  
 Damages—Quantum meruit—Art. 1756 C.C.*

The plaintiffs sued for \$23,055.85 as commissions earned by them under a contract on orders for the purchase of raisins of the crop of 1920 to the value of \$924,420.58 obtained by them as brokers or agents for the defendant company prior to the revocation of their agency on May 10, 1920.

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

(1) [1910] 42 Can. S.C.R. 694.      (2) [1910] 44 Can. S.C.R. 187.  
 (3) Cameron (3rd ed. 1924) 332.

*Held*, that the plaintiffs were not entitled to the commission stipulated in the contract of agency as, at the date of its revocation, they had not taken any orders and had not performed various other duties for the discharge of which the stipulated commission would remunerate them.

*Held*, also, that assuming the revocation of the plaintiff's agency to have been unfair and actuated by reprehensible motives, it was not open to them to have a judgment based upon a right not asserted in their declaration or at trial, to recover damages for unlawful revocation of the agency.

*Per* Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.—Neither can compensation be allowed on a *quantum meruit* basis for whatever benefit the defendant company may have derived from such work as the plaintiffs had done before the revocation of their mandate.

Judgment of the Court of King's Bench (Q.R. 40, K.B. 97) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and dismissing the appellants' action.

The material facts of the case and the questions at issue are fully stated in the judgments now reported.

*Geoffrion K.C.* and *Badeaux* for the appellants.

*John T. Hackett K.C.* for the respondent.

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

ANGLIN C.J.C.—The plaintiffs sue for \$23,055.85 as commissions earned by them under a contract on orders for the purchase of raisins of the crop of 1920 to the value of \$924,420.58 obtained by them as brokers or agents for the defendants.

The learned trial judge gave judgment for \$2,833 as damages for revocation of the plaintiffs' agency at an inopportune time and without cause, computed on the basis of orders which he held had been obtained by the plaintiffs in the course of their agency and which were subsequently filled by the defendants.

The Court of King's Bench (Lafontaine C.J., Dorion, Tellier, Hall JJ.—Greenshields J. dissenting) reversed this judgment and dismissed the action. The majority of the court held that the brokers' employment was revocable at the will of the principals; that it was revoked before any

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orders had been obtained; that the commission at the fixed rate would be earned only when the brokers had performed other important services subsequent to obtaining the orders; that no claim for *quantum meruit* had been preferred or attempted to be proved at the trial; that no claim for damages for wrongful revocation of the agency had been put forward by the plaintiffs and that they had failed to establish the only cause of action which they had presented.

The facts out of which this litigation arose are fully stated in the judgment of Mr. Justice Hall and in the dissenting opinion of Mr. Justice Greenshields. The latter learned judge concludes his opinion in these words:

Lest there be any uncertainty as to my holding, I do not maintain the action as an action for damages, but I maintain it as and for commission earned under a contract. If my concluding statement is incorrect, the action of respondents is unfounded and should be dismissed (1).

It is, therefore, apparent that the Court of King's Bench unanimously took the view that it was not open to the plaintiffs to have in the present action a judgment based upon a right to damages for wrongful revocation of their agency.

Whatever recourse the plaintiffs might have on the footing of an unfair and inopportune (*intempestive*) revocation of their agency. (*Galibert v. Atteaux* (2); *Baugh v. Porcupine et al* (3); *Labonté v. Desjardins* (4); *Cyr v. Lecours* (5); *Comp. 2 Colin & Cap.*, 3 ed., 717; 6 *Aubry et Rau*, 6 ed., 186; *Fuzier Herman Rép.*, vo. *Mandat*, no. 783), it seems to be impossible to accord such relief in this action. The defendants have not been called upon, and have been given no opportunity, to meet such a demand.

Neither can compensation on a *quantum meruit* basis for whatever benefit the defendants may have derived from such work as the plaintiffs had done before the revocation of their mandate be now allowed. If, under the circumstances of this case, such a demand could be made, no claim was preferred on that basis and evidence at the trial was not directed to establishing the value of what the plaintiffs had done up to the time of the revocation.

(1) Q.R. 40 K.B. 97, at p. 104.

(3) [1911] 17 Rev. de J. 415.

(2) [1895] Q.R. 23 S.C. 427.

(4) [1911] Q.R. 40 S.C. 521.

(5) [1914] Q.R. 47 S.C. 86.

It has also been suggested that from the defendants' circular letter of the 11th of March:

To our brokers:

Effective May 1, 1920, brokerage covering the sale of raisins for the account of this company will be paid upon the basis of  $1\frac{1}{2}$  per cent. On sales made prior to May 1, 1920, brokerage will be paid at the rate of  $2\frac{1}{2}$  per cent.

Raisins have advanced so greatly in price during the last few years that the brokerage is out of proportion with the service rendered, hence the revision.

Please advise us by return mail if you desire to continue representing this company, in the territory assigned to you, upon the basis of  $1\frac{1}{2}$  per cent brokerage.

and the plaintiffs' letter of the 22nd of March accepting the new basis of remuneration, which was couched in these terms:

Dear sir:

We have received your brokers' letter dated March 11 pertaining to reduction of commission.

We certainly wish to remain as representatives for the California Assorted Raisin Co. in the assigned territory as in the past, even if at a new rate of commission \* \* \*.

it is a fair inference that the plaintiffs were engaged to represent the defendants at least until the close of the business year then about to open. But what the defendants asked was whether the plaintiffs desired "to continue representing" the company and the plaintiffs' assent was to remain such representatives "as in the past." The plaintiffs had been acting as selling agents for the defendants from 1916. There is no suggestion that during that period there ever was an engagement for any definite time, or that the plaintiffs' mandate was not revocable at any moment at the will of the defendants. The continuing mandate contemplated in the letters quoted was evidently to be on the same footing as formerly as to all its terms except the rate of commission. It would require something much more definite and precise to exclude the application to it of the general rule of law expressed in the Civil Code:

Art. 1756. The mandator may at any time revoke the mandate \* \* \*. This is a term recognized by law in every contract of agency (*Cantlie v. Coaticook Cotton Co.* (1), Pand. Belges, 1896, no. 222), unless clearly excluded, when, of course, *conventio vincit legem*. The basis of the plaintiffs' action

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is a contract of agency or mandate, inherent in which is the risk of revocation at the will of the principal.

On the evidence it is clear that the plaintiffs were not in a position to obtain, and they did not in fact obtain any orders for the year 1920, although they did certain preparatory work in the mutual interest of themselves and of the defendants, which would probably have proved advantageous to both parties had the plaintiffs subsequently received, as they expected, and probably with good reason, authority to solicit and take actual orders. The plaintiffs in fact did none of the manifold things which they would have been obliged to do in order to become entitled to the stipulated commission had their agency not been revoked. That commission was a single fixed percentage to cover all the services to be rendered by the plaintiffs in the course of their duty as defendants' agents. It could be earned only by, and no part of it was payable until, the complete fulfilment of those services.

It may be that the revocation of the plaintiffs' agency was as unfair and was actuated by motives as reprehensible as they suggest. To whatever liability such action of the defendants may have subjected them, that liability was not the contractual obligation to pay commission which is the sole basis of the claim made in this action.

The appeal fails and must be dismissed with costs.

MIGNAULT J.—The appellant's action, as I read it, and I have very carefully read it, is not an action in damages for breach of contract by reason of the termination of his agency. He claims commission under the agency contract for orders which he alleges he obtained for the sale of the defendant's raisins between the 28th of January and the 4th of May, 1920. To be entitled to that commission, it did not suffice to secure what are called memorandum orders, but commission was due only on sales actually carried out. The appellant did not carry out the sales. It may well be that he was prevented from so doing by the termination of his agency early in May, 1920, but if this termination was a breach of his contract, he had a cause of action against the respondent which he has not asserted in this case. We must deal with his action as brought, and it would not be permissible to transform it into a claim for damages for wrongful dismissal.

Having thus stated my reason for concurring in the judgment dismissing the appeal, I do not wish to be taken as agreeing in the conclusion that the respondent had the right to terminate the appellant's agency during the season of 1920, having regard to the circular letter of the 11th of March offering the agency to the appellant at a commission of 1½ per cent on sales subsequent to May 1st, 1920, and the acceptance by the appellant of this agency on these terms. The respondent terminated the agency shortly after May 1st, so that the appellant had no opportunity thereafter to earn his commission. If this was a breach of the agency contract, the appellant had the right to claim damages, but, as I have stated, this is not the cause of action which he asserts in these proceedings.

I therefore think that his appeal fails.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Buchanan, Badeaux & Buchanan.*

Solicitors for the respondent: *Foster, Mann, Place, MacKinnon, Hackett & Mulvena.*

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