THE BOWMANVILLE MACHINE COMPANY ..... } APPELLANTS; 1877 June 9.*

AND

JAMES DEMPSTER ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Goods sold by Agent as Principal.—Right of set off.

The *B. M. Co.* (Plaintiffs) sued *D.* (Defendant) for goods sold and delivered. *D.* pleaded that the goods were sold to him by one *A.*, whom the Defendant believed to be the Principal, and that before the Defendant knew that the Plaintiffs were the Principals, the said *A.* became indebted to the Defendant in a sum of $400, which he, the Defendant, was willing to set-off against the Plaintiff's claim. The Jury found a verdict for the Defendant on this plea:—

Held,—That the Defendant, having purchased the goods without notice of *A's* being an agent, and *A.* having sold them in his own name, could set off the debt due to him from *A.* personally, in the same way as if *A.* had been the Principal; and that the verdict should be sustained.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging the rule *nisi* taken out on the part of the Appellants to set aside the verdict and obtain a new trial.

The action was brought for goods sold and delivered, work and materials, money lent, laid out and out and expended, for money received, money due on account stated, and for interest on moneys of the Plaintiffs held by the Defendants.

The pleas were—

1st. Never indebted;

2nd. Payment before action;

*PRESENT:—Richards, C. J., and Ritchie, Strong, Taschereau and Fournier, J. J.

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3rd. Special plea of set-off that the goods so sold and delivered, and the work and materials, and moneys paid, &c., were sold to Defendant, and provided and paid by one *Alexander B. Almour*; that the said *Almour* sold the said goods, &c., &c., in his own name, and as his own goods, &c., &c., with the consent of the Plaintiffs, and that the Defendant believed the said *Almour* to be the Principal, and did not know the Plaintiffs in the matter, and that before the Defendant knew that the Plaintiffs were the Principals, the said *Almour* became indebted to the Defendant in an amount greater than the Plaintiff's claim, upon his (*Almour's*) promissory note then overdue, and for money lent and advanced, and $400 of which moneys, he, the Defendant, was willing to set off against the Plaintiffs' claim.

The case came on for trial at *Halifax* on the 31st March, 1876.

There was conflicting evidence as to whom the goods were purchased from. The Respondent positively stated that he bought the goods from *Almour*, not knowing him to be Appellants' agent, and that he would not have bought them if *Almour* had not been indebted to him. This statement was disputed and contradicted by *Almour* and the witness *Cutlip*, his clerk. The following order taken from the order book and admitted to have been signed by the Defendant was put in evidence in support of their version of the contract:

"*Halifax, N. S.*, 13th March, 1875

ORDERED FOR BOWMANVILLE MACHINE COMPANY.

From *James Dempster*:

Terms—$400 cash on arrival *Halifax*, balance 4 months."

A red line here divides these entries from the list of articles ordered, and Defendant's signature is appended. The Respondent positively denied that the words above

the red line, viz.: "Bowmanville Machine Company—*James Dempster*—$400 cash on arrival *Halifax*, balance 4 months" were present when he signed the order. *Almour* refused to produce his books at the trial, which, as testified to by his clerk, would have shewn an entry of the machine. The Appellants were not examined as to the nature of *Almour's* agency.

The Judge in his charge to the Jury amongst other things, stated that if they thought that all the writing above the red lines was inserted in the order after the Defendant signed it, then Defendant might very well consider it as an order to *Almour*, and that he was dealing with him as a Principal and not as an agent of the Plaintiffs, a fact which was not, but might and ought to have been, disclosed at the time, and, in that case, he thought the debt claimed to be due to Defendant by *Almour* might be set off against the debt claimed by Plaintiffs from Defendant in this suit.

They found a verdict for Defendant for $75.

On the 12th day of April, A. D. 1876, a rule *nisi* was taken out on the part of the Appellants to set aside the verdict, and to obtain a new trial on the grounds, amongst others:—

1. Because the verdict was against law and evidence.
2. Because the verdict was against the weight of evidence.
3. Because the verdict was against the direction of the Judge who tried the case.
4. For excessive damages.

On the 11th September following, the Defendant entered a *remittitur* in favor of the Plaintiffs, as to the the amount of the verdict rendered in his favour, viz.: the sum of $75.00.

On the fifth day of February, A.D. 1877, an order was made by the Court discharging the rule *nisi*, granted to set aside the verdict, and for a new trial as above stated.

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Mr. *A. F. McIntyre* for Appellant :—

To entitle the Respondent to set off a debt due him from *Almour* against the claim of the Appellants, he should have averred and *proved* that the sale was made by a person whom the Appellant had intrusted with the possession of the goods. *Almour* sold them as his own goods, in his own name, as Principal, with the authority of the Plaintiff. The Respondent dealt with him as, and believed him to be, the Principal in the transaction, and before the Defendant was undeceived in that respect the set-off accrued.

And there is a total absence of evidence to establish the fact that at the time of the sale *Almour* had in any wise the possession of the goods.

Fish v. *Kempton* (1) ; *George* v. *Claggitt* (2) ; *Hall* v. *Hamilton* (3).

In the case of *Semenza and others* v. *Brinsley* (4), the plea was held bad, for not averring that the Defendants did not know and had not the means of knowing that *Moll* at the time he sold the goods to them was a mere agent. In this case *Almour* was not entrusted with the possession of the goods.

[RITCHIE, J. :—*Exparte Dixon* (5) is the latest case.]

A factor generally sells in his own name, but a broker cannot sell in his own name. The order which Respondent signed proves that *Almour* was acting for others.

The Appellants also contend that the Respondent could not cure a verdict bad for excess save on motion and by order of the Court, and that it is not shewn that the *remittitur* was entered by virtue of any order of the Court. *Usher* v. *Dansey* (6).

(1) 7 C. B. 694.
(2) 2 *Smith's* L.C., 6th Am. ed., 198-9.
(3) 24 U. C. C. P. 305.
(4) 18 C. B. N. S. 467.
(5) L. R. 4 Ch. D. 133.
(6) 4 M. & S. 94.

Mr. *Cockburn*, Q. C., for Respondent, was not called upon.

The judgment of the Court was delivered by THE CHIEF JUSTICE:

We are all of opinion that the judgment of the Court below is right. From the evidence, so far as it goes, the jury, it is clear, decided on all the facts. There is no evidence of any sort, or affidavit, to show that the Appellants were prejudiced. They rested their case on the evidence adduced, and we think the reasons given by the Court below on discharging the rule are sufficient to sustain the verdict, and that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellants: *Walker, McIntyre* and *Ferguson.*

Solicitor for Respondent: *W. F. McCoy.*