RICHARD C. BARRY, DOING BUSINESS AS JOHN BARRY & SONS (DEFENDANT)..... APPELLANT;

AND

THE STONEY POINT CANNING COMPANY (PLAINTIFFS)..... RESPONDENTS.

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*March 14, 15.
*May 1.

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

Sale of goods—Agency—Agent's authority—Ratification—Secret commission to agent.

In an action against B. claiming damages for refusal to accept goods alleged to have been purchased, it appeared that the contracts for sale were made with one D. who had a desk in B's office, was allowed to use his stationery and the services of his stenographer and signed the contract in his name. The brokers who, for the vendors, procured the contracts from D. agreed to pay him, personally, half of their commission for effecting the sale. B. when asked to pay for the goods repudiated the contracts on the ground that D. was not authorized to purchase.

Held, reversing the judgment of the Appellate Division (36 Ont. L.R. 522), Fitzpatrick C.J. dissenting, that as the half of the commission promised to D. would be a substantial amount; that as it was not proved that B. knew of it until after the contracts were signed; and as it was not shewn that D. had any expectation of such profit from B. as would prevent the commission from interfering with his duty to the latter; the offer of such payment to D. made the contracts for sale void and it was immaterial whether or not the vendors had knowledge of it.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment at the trial in favour of the defendant.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 36 Ont. L.R. 522.

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The circumstances of the case are indicated in the above head-note.

McKay K.C. for the appellant.

Tilley K.C. and *J. G. Kerr* for the respondents.

THE CHIEF JUSTICE (dissenting).—I am by no means satisfied that Durocher, who made the contracts sued on, had not the appellant's authority to enter into them on his behalf. Admittedly the only question is as to the extent to which the appellant was committed to the speculative schemes of Durocher, and if these had been successful, the appellant, at any rate, would never have raised a doubt as to the authority given by him. He admits that Durocher had not a dollar in the goods himself and, questioned as to some more or less dubious methods resorted to by Durocher in his attempted "corner," he says with perhaps unconscious cynicism:

> I had no reason to interfere. If he had been successful, it would have been to my advantage.

A man who enters into speculations of this sort through a close friend ought not to be in the position of taking the profits if it is successful or repudiating the authority of the friend if it fails; still less if, as in the present case, he is obliged to admit the authority to a very large extent and only stops short when failure was clearly in sight. I do not think his bare denial of authority, still less that of his friend, can be entitled to much weight against the facts proved. I do not mean a formal authority, for, of course, he cannot escape liability by denying this however plausibly.

But even if it is assumed that the appellant did not give his express authority, I think there is abundant ground for saying that he is precluded from raising this

defence by having held out his friend as his authorized agent.

It is not necessary for me to go through the evidence in detail to point out the grounds in which I come to this conclusion. They are sufficiently set out in the reasons of the learned judges for the judgment under appeal. Briefly, the appellant, a wholesale dealer in fruit, constituted Durocher his purchaser of all canned goods and left to him the sole management of what was in effect a branch of his business. He housed him at his place of business from which he himself was frequently absent for long periods; allowed him not only to use the firm's stationery with printed headings, but actually to conduct his correspondence in the firm's name and over its signature. Contracts made by Durocher previous to those now sued on were either authorized by him or if, as alleged sometimes, unauthorized, were ratified without complaint and the goods accepted and paid for by the appellant.

The appellant really, I think, held Durocher out as his agent in every possible way.

That the respondent's broker, Wm. Millman, supposed that he was dealing with the appellant through his authorized agent seems indubitable. He would hardly have entered into contracts for sale of the magnitude involved in an attempted corner of an important article of produce with a man not possessed of a dollar and only allowed desk room in the office of a friend. That he would not have dealt with him as an agent for the appellant if he had thought he was not his agent goes without saying. Mr. Millman swears that Durocher told him he was the appellant's agent and that he thought he had his authority.

The contracts, in my opinion, were duly made on behalf of the appellant in the ordinary course of busi-

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ness which could hardly be carried on if repudiation were possible under the circumstances of the case.

I do not attach much importance to the fact that the respondent's brother, Mr. Wm. Millman, agreed to split his 2% commission with the appellant's agent Durocher.

The principle that anything in the nature of a bribe by the vendor to the purchaser's agent to neglect his duty to look solely after his principal's interest should invalidate the sale is clear and well established in innumerable cases. Here, however, the payment was not made by the vendors, nor with their money. It cannot be said that it was within the scope of the duties of the vendors' agent to bribe the purchaser's agent. There is no suggestion that the vendors had any knowledge of the arrangement. Presumably Durocher must have said that he could not get any other remuneration himself as the vendors' broker would not have been likely to pay him half his own commission in addition to the commission of a purchaser's agent. Mr. Millman says that it is a common practice in his trade and that he had never thought of any secrecy about the payment. The total amount was comparatively small. We should be going beyond anything decided in the cases with which I am acquainted and unduly straining the widest interpretation of the principle involved if we were to hold these contracts invalid on such ground.

The appeal should, in my opinion, be dismissed with costs.

DAVIES J.—This is an appeal from the judgment of the second Appellate Division of Ontario reversing a judgment of the trial judge (except with respect to a sum of $400 for storage not disputed) on the ground that the contracts of sale sued upon were valid and

binding upon the defendant, now appellant, and that the plaintiffs were entitled to damages for breach thereof.

The trial judge had dismissed the action except with respect to the $400 above mentioned on the grounds that no valid or binding contracts had been entered into by the defendant for the purchase of the goods.

The plaintiffs' claim was for $8,229.68 for loss or damage sustained by them on the sale of goods after defendant's repudiation of the contracts, that sum being the difference between the alleged contract prices and the price which the goods actually realized when sold.

There were two contracts sued on, one for 11,000 cases of canned tomatoes alleged to have been purchased by defendant on or about the 12th of October, 1914, and another for 12,000 alleged to have been purchased by the acceptance of an option dated 7th November, 1914.

The contracts were made and entered into by Millman & Sons, who acted as brokers for the Independent Canners, of which the Stoney Point Canning Company was one, and one Durocher assuming to act for Barry, the defendant.

No controversy arises as to the agency of Millman & Sons to sell the goods. The whole controversy hinges upon the authority of Durocher to purchase them as agent for Barry.

The trial judge after hearing all the witnesses, including Barry, Durocher and Millman, stated in his considered judgment that:—

> Mr. Desmarais, who is really the plaintiff, acted, I think, in perfect good faith throughout, supposing that he had in truth made the contract sued upon with Mr. Barry, who was carrying on business under

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the name of John Barry & Son. On the other hand, Mr. Barry acted, I think, throughout with perfect honesty, and I accept his evidence without question.

Afterwards he stated his findings on the facts to be—

The situation seems to me plain upon the facts. Durocher never had any authority; there never was any ratification, and there never was any holding out by Barry. This being so, the plaintiff must fail

The learned judge was also of opinion that the action must fail on the ground that:—

Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher the commission which he as vendor's broker would be entitled to recover.

The learned judges of the Appellate Division who gave reasons for their conclusions while agreeing to reverse the judgment of the trial judge and to hold Barry liable on the alleged contracts, did not agree in their reasons. Meredith C.J. held that:—

It was not a question whether the defendant assented to or did not assent to any particular sale, that narrow view of the case seems to have led to some serious misconceptions of the parties' rights; there was a general power and the authority to use the defendant's name in these operations; they could not have been carried on without that; no one would have wasted an hour upon any scheme that had no more than the credit financially of Arthur Durocher behind it; the defendant knew this; no one concerned in the matter could help knowing it; and in view of the manner in which the correspondence began and was carried on throughout the purchases made by Durocher and treated by the defendant as binding upon him, the opening of the office in Toronto and the defendant's personal participation in the negotiations for the purchase of a controlling interest in the output of the "independent" factories, with a full knowledge of all that had been done and was being done in his name and on his credit, how is it possible for him to escape liability on the contract in question merely because he did not give any specific authorization respecting it?

I understand that the learned Chief Justice in stating that "there was a general power and authority to use the defendant's name in these operations" was merely drawing an inference from the facts and documents proved and not intending to state or imply that there was any such direct or express general power.

His inference may or may not be a proper inference to draw from all of the proved facts. In my judgment it is not.

Later on in his judgment the Chief Justice says:—

> I cannot but find upon the whole evidence that the purchases in question were purchases within the authority of the witness Arthur Durocher acting for and in the name of the defendant carrying on business as John Barry & Sons; and that, if that were not so, the defendant is estopped from denying that the contracts in question are his contracts.

Of course, if the purchases were within the authority Barry had given Durocher, there is an end to the controversy. But if they were not within such authority, I fail to find any evidence from which the defendant could be held as

> plainly estopped from denying that the contracts in question were his contracts;

that is I assume precluded from denying Durocher's authority because of having held him out as his agent under such circumstances that authority would be presumed.

Mr. Justice Lennox, after disposing adversely of the "secret commission" defence by holding that

> the divided commission was not intended as a dishonest or fraudulent inducement or to be kept from the knowledge of the defendant

went on to deal with the merits at very great length. He says:—

> The first branch of the claim for 11,000 cases contracted for on the 5th of October, 1914, can I think be safely determined by a careful examination of Mr. Barry's letter to Durocher on the 8th of October, 1914, in reply to Durocher's letter to him of the day before, the admitted confidential relations, common purpose, and course of dealing established between these two men, and Barry's total inability to account for a liability for 94,000 cases of tomatoes mentioned in his letter without including in the 94,000 cases the 50,000 cases purchased by Durocher on the 5th October, and of which the 11,000 cases sued for is the part allotted to the plaintiff company.

It is quite apparent that the supposed or "unexplained discrepancy," as the learned judge calls it,

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with regard to these 94,000 cases, had very great weight in inducing him to come to the conclusion he did that whether Durocher had actual antecedent authority to purchase the 50,000 cases or not, Barry knew and approved of it and included it as a liability when he wrote the letter of the 8th October to Durocher.

It seems to me reasonably clear that the conclusion reached by Lennox J. that of the 94,000 cases of canned goods specifically referred to in the defendant Barry's letter to Durocher of the 8th October, 1914, 50,000 were those purchased by the latter from Millman & Co. as brokers of the plaintiff and others and now in controversy, settled his mind on the vital questions of Barry's knowledge and approval of the purchase, ratification of it if there was an absence of antecedent authority, and general authority of Durocher to make the purchase. If he was right in concluding that these 94,000 cases included the 50,000 cases in controversy, his final conclusion as to Barry's liability would be difficult to dispute. If it was not sufficient proof of an antecedent authority to make the purchase it would be very strong evidence of knowledge and approval of the purchase and ratification of it, and would in addition go very far to discredit Barry's credibility. No such acceptance "without question" by the trial judge of Barry's testimony would in that case have been possible.

Mr. Justice Lennox, however, seems to have overlooked the testimony of Millman, the plaintiff's broker and agent, on the point, who while advancing or accepting as correct the theory as put to him in his main examination of the inclusion of the 50,000 cases in the 94,000 referred to in the letter of the 8th October, when cross-examined seems unqualifiedly to admit that any such theory was not under the facts tenable, and that the 94,000 cases mentioned in that letter of Barry's,

referred to a different and antecedent purchase of 94,000 cases made with his authority, which did not include or have any reference to the 50,000 cases in controversy. I notice that the theory put forward by Mr. Justice Lennox was favourably noticed in his reasons for judgment by the Chief Justice, and no doubt must have had weight with him though, as he said, he preferred putting the defendant's liability on what he called the

ground of the previous general and undisputed authority.

Mr. Justice Masten held that while at the beginning of the purchases of these canned goods Barry was a special agent only with limited authority afterwards but prior to the date of the contract sued on

the business changed and Durocher became in fact the general agent of Barry in the buying and selling of canned tomatoes, peas and other like merchandise. This conclusion, he went on to say, rests on a general course of dealing rather than on any specific act of concurrence. Just precisely when this change took place I think it is impossible to say. It is sufficient that it took place, in my opinion, before the contracts now sued on were entered into.

The learned judge doubted whether there was any such "holding out" to the plaintiff as would make a basis for the liability claimed, and repudiated the contention

that there was anything in the nature of a conspiracy to defraud between Barry and Durocher

but found Barry

liable for the loss in question without any impropriety on his part.

In view of the differences of judicial opinion and feeling some doubt at the conclusion of the argument on the question involved, I found it necessary to read the evidence with much care and have given the case much consideration.

The conclusions I have reached on the evidence written and oral are in general accord with those of the

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trial judge, that Durocher never had any authority to enter into or bind Barry by the contracts in question, that the latter never ratified them in any way but that as soon as he reasonably could when they were first brought to his notice on the 28th of November, when the draft for their purchase price was presented, refused payment and repudiated liability—and lastly that there never was any "holding out" of Durocher by Barry as his agent authorized to purchase these goods.

I frankly admit that the circumstances are peculiar. The facts that Barry had in the first instance given Durocher a limited authority to purchase some canned goods; that Durocher had exceeded that authority and had persuaded Barry to approve of and ratify the excess and accept the drafts therefor; the intimate relationship existing between the two parties; the letters which passed between them and the opening by Durocher, with Barry's assent, of a branch office of Barry & Son in Toronto, all afford ground for a strong argument either that there was a holding out of Durocher as an agent authorized to buy for Barry, or that the proper inference from all the facts proved, was that he had been so authorized as a general agent to buy.

But it does seem to me that the evidence taken as a whole is conclusive against any such holding out or any such an inference of general agency. Barry and Durocher both swear positively that no such authority as Durocher usurped ever was given, and Millman, the agent of the plaintiffs, who sold the goods and completed the contracts with Durocher, was obliged to admit in his cross-examination that when he made the contracts with Durocher assuming to act for Barry,

he (Millman) knew he (Durocher) had to go back to Barry and get authority before he could buy.

Nothing could be more unequivocal. There was no qualification to Millman's statement nor was any satisfactory answer given to the argument based upon this witness' statement. It shewed beyond any doubt that the vendor knew Durocher had no authority to buy without going to Barry and getting authority. Now Millman was the plaintiffs' agent who carried on the negotiations for the sale and completed them. How in the face of this unqualified admission it can be successfully argued that there was a holding out of Durocher as Millman's agent or an authority to complete such a purchase as we have here in controversy without going back to Barry and getting authority, I do not understand.

Both parties to the contract, Durocher, the alleged agent of Barry, and Millman, the admitted agent of the plaintiffs, swear, the one that he had not authority, and the other that he knew the person to whom he was selling had to go back to his principal and get authority before he could buy. When to this is added the evidence of Barry accepted by the trial judge "without question" that he never gave Durocher authority but repudiated the contract when it was first brought to his notice, how can it be held that there was authority either special or general?

As to the other defence relied upon, namely, the non-enforceability of the contracts sued upon because of the payments of commission by the vendors' broker to the purchaser's agent, I have had the advantage of reading my brother Anglin's reasons and concur in them.

The appeal should be allowed with costs in this court and in the Appellate Division and the judgment of the trial judge restored.

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IDINGTON J.—Assuming that this action is maintainable, upon all the attendant facts and circumstances it is clear that the fundamental facts are that Durocher was employed by the appellant, or permitted by him whilst occupying a desk in his office, to act as if a clerk duly authorized to use the firm name in carrying on that branch of its business correspondence relative to canned goods such as in question, and in short to wear in that regard the semblance throughout from the 2nd of March till the end of November following, of a mere employee of appellant.

I am of the opinion that the giving by the respondent, through its agent, a share in his commission to induce Durocher under such circumstances to contract in said firm's name and on its behalf for the purchase of the goods in question from the respondent was corrupt and corrupting and, unless known to and presumably assented to by the appellant, destroyed any legal right to recover upon the alleged contracts.

Reason, fairness and consistency, alike demand herein that the law which forbids, as does also moral sense, the employment of such means to induce such a departure from duty on the part of any mere employee or trusted friend, in acting on behalf of his employer or friend entrusting business to him, should be applied to determine the liability of the appellant herein, which must rest, if at all, only upon facts and circumstances constituting Durocher an agent of one or either of the classes I refer to.

It is idle to put forward the cases of brokers who in certain localities and classes of business wherein and in relation to which all those dealing by and through them are, by reason of a practice or custom, well known to all such persons, habitually to divide the commission, or indeed in some cases, have become entitled to receive

and demand it from the party the principal has contracted with.

This man Durocher, though possibly calling himself a broker, had in fact no visible means of support and was not employed, as to matters herein referred to, as a broker.

That in truth is what renders the case somewhat difficult on the other issues raised, and enables the respondent to present a plausible argument in order to maintain the action at all, so far as such issues are concerned.

Had the business been conducted through a broker there would not have likely arisen any such complications as exist on the facts. Indeed all, or nearly all, that tends to support the respondent on the issue of authority or no authority could not have had any existence.

The evidence on this point of Mr. Millman, who acted for the respondent and made the offer to share his commission, is as follows:—

Q.—And mentioning it in a telegram would not give you that impression? A.—No, I did not know, only I knew he was with John Barry & Sons.

Q.—And you did not know him as a broker? A.—I never heard of him as a broker.

Q.—Then you thought he was John Barry's agent? A.—He told me he was.

Q.—And you made an agreement to pay him 1%? A.—Yes.

Q.—To the agent of the man? A.—Yes.

Q.—That was buying from you? A.—Yes, he told me it made no difference, Mr. Barry knew what he was doing.

The appellant denies all knowledge of such fact till after his repudiation of those contracts.

The learned trial judge believed him and I see no reason for setting aside his finding. Indeed I see some reasons the other way.

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For example, a specimen of how this man was approached is furnished by the following letter:—

27 Front Street, East,
Toronto, Aug. 29th, 1914.

Mr. A. Durocher,
Montreal, Que.

Dear Sir,

On contract number 1493 from ourselves to John Barry & Sons 2500 c/s peas we allow you personally 1% brokerage also on contract number 98 Beaver Canning Co. contract number 99 Ed. McCaw, contract number 100 A. A. Morden & Sons, at Wellington. All these we allow 1% brokerage to yourself when goods are paid for.

Yours very truly,
W. H. Millman & Sons,
Per "M."

This particular letter possibly does not refer to these identical contracts now in question. I quote it only to shew the spirit of the giving and how Durocher was specially and personally addressed, instead of the firm, had it been intended for them. It was not given as sometimes happens between a commission man dealing with a buyer personally and offering to share his commission with him in order to close the deal thus effecting a lowering of the price, though desirous not to call it that. Nor does such a personal address to the agent tend to inspire the belief that the principal knew all about it. In that case it would have been addressed to the first with a polite request to see that poor Arthur got his tip for his civility.

It was not denied in argument that the like commission sharing applied to the contracts in question. I gather that sometimes it was agreed on with Durocher orally. Indeed it seems to be suggested he was the first to hold out his hand and shew how it might be advantageously managed. And it was stated in argument that the total of such gratuities thus paid to Durocher exceeded $1,200.

I suspect but for this bountiful stream we might never have been troubled with the numerous exhibitions of commercial schemes and plotting and contriving which appellant denies he was an actor in but I think evidently quite willing to encourage, or as he, knowing of it, expresses it:—

> I had no reason to interfere. If it had been successful it would have been to my advantage,

and which we have had presented for our serious consideration.

Sometimes fine distinctions have been drawn heretofore as to the intention and the result of such gratuities for which at least in this case I find no warrant, and I respectfully submit there never was a place therefor in law.

The encouragement thus lent as by expressions in the case of *Smith* v. *Sorby* (1), to lessen the rigour and force of the law on the subject and somewhat corrected as Mr. Justice Field pointed out in *Harrington* v. *Victoria Graving Dock Company* (2), at page 552, should neither receive approval or extension.

What he there expressed regarding loose commercial practice has so grown as to be a menace to those trying to adhere to honest practices and continue in business.

The illicit commission must be most rigidly suppressed if honest men who will not stoop to its use are to be given a fair chance for their commercial life in Canada. The proof of knowledge on the part of any one whose agent has yielded rests with him so asserting. An honest business man giving such gratuity will always put beyond peradventure his ability to prove that he had given notice to the principal in the plainest terms.

(1) 3 Q.B.D. 552 (note). (2) 3 Q.B.D. 549.

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If such clear proof be required there will not be many gratuities of substantial amount going into the hands of the agent, I imagine.

It seems bordering on childishness to ask in this age for further proof of the motive than the promise of such substantial payment, on the successful accomplishment of its purpose, as implied in above letter.

Nor can I entertain the *pro formâ* submission made that as it was not proven that respondent knew of this splitting of commission it should succeed, although the legal existence of the contract repudiated therefor is gone.

The repudiating of fraud on that ground possibly should have come earlier but *Clough* v. *London and North Western Rly. Co.*(1), will support raising it even at the trial so long as no affirmation of the contract by him defrauded or his estoppel in some other way. And the learned trial judge notes he gave leave at the trial to amend.

I think for these reasons the appeal should be allowed and the judgment of the trial judge restored. I think, however, there should be no costs allowed either party in regard to the appeal below or here. The great weight of the appellate costs here certainly consisted in presenting and arguing about the issue of law and fact in regard to what the appellant does not succeed as to, and I presume the same was the case below.

An apportionment of costs according to the result of the issues hardly fits the case.

To give appellant costs generally when the argument of the point on which he succeeds (if my view adopted) took less than twenty minutes on each side would not be a satisfactory result. The costs allowed

(1) L.R. 7 Ex. 26.

him by the learned trial judge should stand. The item upon which judgment below was allowed by the trial judge with costs fixed at $75 did not trouble us and judgments therefor should also stand and be set off as directed.

MR. JUSTICE DUFF concurs with Mr. Justice Idington's conclusion.

ANGLIN J.—This action is brought to recover damages for breach by the purchaser of two contracts for the sale of canned goods. The defence originally pleaded was that the defendant's alleged agent, Durocher, was not authorized to make the contracts.

Early in the trial, however, the plaintiffs' broker, Millman, deposed that although he understood Durocher to be the defendant's agent, he agreed on Durocher's demand to divide with him his 2% commission from the vendors on sales made to the defendant for the plaintiffs and other canners whom he (Millman) represented. Durocher's share of these commissions (according to a statement of counsel made at bar and not controverted) would amount to the substantial sum of $1,200. Millman's evidence indicates that he was relying upon Durocher to "put the deal through" with Barry, the defendant, and that Durocher was insistent upon being paid the commission. Millman says he made no secret about the commission and that Durocher told him that the defendant knew what he was doing. The defendant denied having had knowledge of any commission arrangement with Millman until some time after the alleged contracts had been made—some time about the end of November—about the time that he repudiated Durocher's authority. Durocher corroborates this testimony.

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The defendant's explanation of his having failed at once to repudiate liability on this ground is that it was then too late to object to the commissi ns as Durocher had received them and probably spent them. The omission from the statement of defence of a plea based on the commission agreement would indicate that, even when giving instructions to his solicitor, Barry did not appreciate its importance and neglected to bring it expressly to the solicitor's attention.

Durocher was largely indebted to the defendant and, while no definite arrangement was made as to the amount of his remuneration, the defendant advanced him money for expenses and says that he expected to pay him for his services. An amendment to the statement of defence alleging voidability because of the payment of commission by Millman to Durocher was allowed at the trial.

Mr. Justice Middleton, who tried the action, has had a large experience as a trial judge. In his judgment he says of the defendant:—

> Mr. Barry acted, I think, throughout with perfect honesty and I accept his evidence without question.

Accepting Barry's evidence, corroborated as it was by that of Durocher, notwithstanding many features of the correspondence in evidence and some circumstances which go far to warrant contrary inferences in regard to some phases of the case, the learned judge expressly found that:—

> Durocher never had any authority; there never was any ratification and there never was any holding out by Barry. This being so, the plaintiffs must fail.

No doubt this conclusion was not a little influenced by the explicit acknowledgment of Millman that, while he regarded and dealt with Durocher as Barry's agent, he also,

knew he (Durocher) had to go back to Barry and get authority before he could buy,

by Barry's explicit denial that he ever authorized or ratified the contracts, and by the absence of any direct evidence of ratification.

If disposing of the case on this aspect of it, notwithstanding the forceful presentation by the learned judges of the Appellate Division of such facts and circumstances in evidence as tend to support their reversal of the findings of the trial judge, I am not satisfied that I should have been prepared to concur in their conclusion. I should not improbably have felt impelled to hold, for the reasons stated by my brother Davies, that, depending, as it necessarily did, almost entirely upon the credit to be attached to the oral evidence of the defendant given in his presence, the opinion of the trial judge on the pure question of fact in issue should not have been disturbed.

But having regard (as Field J. put it in *Harrington* v. *Victoria Graving Dock*(1)), to

how sadly loose commercial practice has become in respect to transactions of this nature,

it seems highly desirable and, on the whole, more satisfactory that this appeal should be disposed of on the other question which it presents, viz., the effect on the enforceability of the contracts sued on of the payment of commission by the vendors' broker to the purchaser's agent. On this branch of the case the trial judge said:—

Upon another branch of the defence the plaintiffs must, I think, also fail. Mr. Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher the commission which he as vendors' broker would be entitled to receive. Mr. Millman seeks to shew that that division was not to be with Durocher, but between Millman and Barry & Sons. I cannot so find upon the evidence.

(1) 3 Q.B.D. 549, 552.

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In *Hitchcock* v. *Sykes*(1), I stated my views that the payment of any sum to any person occupying any fiduciary position, by way of secret commission, is fraudulent and cannot be permitted to be explained away, and that, as held in *Panama Co.* v. *India Rubber Co.*(2), any surreptitious dealing between one party to a contract and the agent of the other party is a fraud in equity, and invalidates the agreement. Although this was said in a dissenting opinion, that view was subsequently sustained, and I am informed by counsel who presented a petition to the Privy Council for leave to appeal, that their Lordships expressly assented to this view.

The learned judge's opinion was substantially approved in this court (3).

That Durocher was the defendant's agent, authorized to bind him by the contracts sued upon is the basis of the plaintiffs' case and of the judgment of the Appellate Division. Speaking of the 1% commission paid Durocher, Millman himself tells us:—

I said you (Durocher) can do what you like with it.

Dealing with this defence in the Appellate Division (4), Meredith C.J., C.P. after disposing of the question of Durocher's authority adversely to the defendant (which involved discrediting utterly Barry's denial of that authority and of all knowledge that Durocher had contracted for him), said:—

After being asked to swallow the camel of the defendant's "innocence" involving more than $8,000, we are urged to strain at the gnat of the divided commission amounting to a few hundred dollars and upset the whole transaction on the ground of fraud in it.

I venture to think that in his necessitous circumstances Durocher did not look upon the $1,200 commission as a mere "gnat." The learned Chief Justice himself subsequently emphasizes its importance to Durocher when, on the assumption that he was not to be remunerated by Barry for his services, he says:—

The defendant knew that the man could not live upon air alone.

(1) 29 Ont. L.R. 6.
(2) 10 Ch. App. 515.
(3) 49 Can. S.C.R. 403.
(4) 36 Ont. L.R. 536.

The Chief Justice proceeds to hold that the payment of commission by Millman to Durocher was innocuous and affords no defence to the plaintiff's claim, because of its comparative insignificance; because the arrangement for it appears in the correspondence; because the evidence does not disclose actual fraudulent intent on the part of Millman; because splitting commissions was customary in the trade; because the commission was received by Durocher "in good faith"; because, not having agreed with Durocher for a definite remuneration for his services, the defendant knew, or must be taken to have known, that he would seek remuneration from "the other side"; because the defence based on the commission agreement should be regarded as only " a solicitor's defence raised at the eleventh hour"; and because the arrangement for the commission was made not by the plaintiffs themselves but by their broker, Millman, and it did not appear that it was made in the course of the plaintiffs' business and for their benefit.

Mr. Justice Lennox discards this defence in three sentences:—

> It is so much a question of fact that no nice point of law arises; and the reliable evidence in this case is documentary. That the divided commission was not intended as a dishonest or fraudulent inducement or to be kept from the knowledge of the defendant is manifest from the correspondence. The contracts ought not to be avoided on this ground.

Mr. Justice Masten, who had said:—

> I do not for a moment differ from the learned trial judge in his estimate of the evidence given by the witnesses

and "felt great difficulty" in dealing with this defence, disposed of it by holding that there was no evidence that the commission was paid

> with the view of influencing Durocher to purchase more canned goods or at an enhanced price

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and that, because of his expectation of sharing in the defendant's profits from the transaction,

> his interest was immeasurably greatest in the direction of doing the best he could for Barry, and the commission receivable from Millman was not such, * * * either in amount or in the way in which it was received, as to bribe;

We have not the advantage of knowing the grounds on which Mr. Justice Riddell based his concurrence.

These reasons for reversing the judgment of the learned trial judge on this aspect of the case, with respect, appear to me to be based in part on a misunderstanding or erroneous appreciation of the evidence, and in part on a misconception of the effect of the authorities on this branch of English law.

To deal first with Mr. Justice Masten's view:—

There is no evidence whatever that Durocher was to share in the defendant's profits. The evidence is that the defendant "expected to pay him a commission for his services." Neither is there any evidence that the price of the goods sold was enhanced by reason of Durocher sharing in Millman's commission. There is, therefore, nothing to indicate that the substantial interest, directly adverse to that of his principal, created by Durocher having been promised a commission by Millman was in any way, or to the slightest extent, offset by a countervailing interest in prospective profits. No doubt where it is demonstrably obvious on undisputed facts that the advantage promised by "the other side," whatever form it took, could not have created an interest in the agent in conflict with his duty to his principal (as it was in *Rowland* v. *Chapman* (1), cited by the learned judge) the right of repudiation does not arise. But the courts will not undertake an investi-

(1) 17 Times L.R. 669.

gation involving a speculative weighing and balancing of opposing influences in the mind of the agent in order to determine which of them dominated. To do so would be to enter on the prohibited field of inquiry whether the bribe had been effectual. *Parker* v. *McKenna* (1), at pages 118, 124-5; *Harrington* v. *Victoria Graving Dock* (2); *Shipway* v. *Broadwood* (3), at page 373.

All three of the learned appellate judges appear to have shared the opinion that in order to maintain this defence it was necessary for the defendant to establish actual fraudulent or dishonest motive or intent on the part of Millman. The learned Chief Justice speaks of the trial judge having "been carried away" by the contrary view, adding:—

> it need hardly be said that that is not the law. In such cases, it is fraud and fraud only that had that effect,

i.e., of rendering the contract voidable by the principal.

No doubt actual fraud must be shewn when no fiduciary relationship exists (*Lands Allottment Co.* v. *Broad* (4); see, however, the observations on this decision of Collins L.J. in *Grant* v. *Gold Exploration and Development Syndicate* (5), at pp. 249-50). But given that relationship between one principal and the recipient of a secret commission and knowledge of it by the other principal (or his agent), who makes the agreement to pay such commission, it is quite as unnecessary (and it would seem even more clearly immaterial), to prove an actual fraudulent or dishonest motive on the part of the latter as it is to prove that the former was in fact induced by the promise of the commission to betray his trust.

(1) 10 Ch. App. 96.
(2) 3 Q.B.D. 549.
(3) [1899] 1 Q.B. 369.
(4) 13 R. 699; 2 Manson, 470.
(5) [1900] 1 Q.B. 233.

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The fundamental principle in all these cases is that one contracting party shall not be allowed to put the agent of the other in a position which gives him an interest against his duty. The result to the agent's principal is the same whatever the motive which induced the other principal to promise the commission. The former is deprived of the services of an agent free from the bias of an influence conflicting with his duty, for which he had contracted and to which he was entitled. "The tendency of such an agreement as this," said Cockburn C.J. in *Harrington* v. *Victoria Graving Dock* (1), at page 551,

> must be to bias the mind of the agent or other person employed and to lead him to act disloyally to his principal.

As Chitty L.J. said in *Shipway* v. *Broadwood* (2), at page 373:—

> In *Thompson* v. *Havelock* (3) Lord Ellenborough said "no man should be allowed to have an interest against his duty." That great principle has been applied in cases innumerable.

In *Andrews* v. *Ramsay* (4), at page 637, Lord Alverstone quoted with approval the following passage from Story on Agency, page 262, par. 210:—

> In this connection, also, it seems proper to state another rule in regard to the duties of agents, which is of general application, and that is, that, in matters touching the agency, agents cannot act as so to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may, and even if impartiality could possibly be presumed on the part of an agent where his own interests were concerned, that is not what the principal bargains for; and in many cases it is the very last thing which would advance his interests. The seller

(1) 3 Q.B.D. 549.
(2) [1899] 1 Q.B. 369.
(3) 1 Camp. 527.
(4) [1903] 2 K.B. 635.

of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may.

Moreover, by whatever sophistry the person who promises the secret benefit may endeavour to persuade himself to the contrary, the instances are rare indeed in which in his inmost heart he does not hope to derive some advantage from it, direct or indirect, which from the nature of the case must involve a dereliction of duty by the agent to his own principal.

For gifts blind the eyes of the wise and change the words of the just. Deut. XVI., 19.

The same doctrine was acted on in *Panama Co.* v. *India Rubber Co.* (1), by Lord Justice James, who said at page 527:—

In this court a surreptitous sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty.

And the Lord Justice speaks of this as

a plain principle of equity which is to be enforced without regard to the particular circumstances of the case * * * You must act upon the general principle from the impossibility in which the court finds itself of ever ascertaining the real truth of the circumstances.

He had already said:—

According to my view of the law of this court I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court.

Romer L.J. in *Hovenden & Sons* v. *Millhoff* (2), at page 43, still more definitely states the rule that the motive which induced the offer of the benefit cannot be considered:—

The courts of law of this country have already strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe the mercantile community as a whole appreciate and approve of the court's views on

(1) 10 Ch. App. 515. (2) 83 L.T. 41.

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the subject. But some persons undoubtedly hold laxer views. Not that these persons like the ugly word "bribe" or would excuse the giving of a bribe, if that word be used, but they differ from the courts in their view as to what constitutes a bribe. It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition, I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent—that is to say without the knowledge and consent of the principal—then the gift is a bribe in the view of the law. If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, *the court will not inquire into the donor's motive in giving the bribe nor allow evidence to be gone into as to the motive.* Secondly, the court will presume in favour of the principal and as against the briber and the agent bribed that the agent was influenced by the bribe; and this presumption is irrebuttable.

Indeed the decision in this case is very much in point. Although a jury had negatived conspiracy between the agent and "the other side", and had estimated the loss of the principal at one farthing, the secret commission was nevertheless unhesitatingly treated by the Court of Appeal as a bribe. See also *Hough* v. *Bolton* (1), at page 789.

In the same judgment in which he laid down the doctrine that the secret benefit to the agent must invariably be regarded as a bribe and the promise of it as a fraud, Lord Justice James added:—

> That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him.

These principles of equity, so far as I am aware, have never been departed from or questioned. They have, on the contrary, been frequently recognized, approved and applied.

(1) 2 Times L.R. 788.

Since the contracts sued upon in the present case still remained executory and there had been no laches on the part of the defendant such as might render repudiation inequitable, I am at a loss to understand the applicability of the distinction to which the Chief Justice of the Common Pleas alludes between the right to set aside the transaction and the right of the principal to recover from his agent the commission or other benefit received by him. Speaking generally, when the circumstances do not actually preclude the relief of rescission or render it inequitable, the same facts which will support a claim to recover the commission from the agent and damages from the other principal will justify repudiation of the contract with the latter.

Neither in *Hippisley* v. *Knee Bros.*(1), nor in *Great Western Ins. Co.* v. *Cunliffe* (2), to which the learned Chief Justice refers in this connection, did any question arise as to the effect upon the enforceability of the contract of the receipt by the agent of one of the parties of a secret benefit from the other. In neither case was the transaction in respect of which the agent received a secret allowance or gratuity the making of a contract between his principal and the person who paid such allowance or gratuity. In neither case could the payment or allowance by any possibility have given the agent an interest adverse to his principal in transacting the business for which he was employed.

Moreover, in the *Cunliffe Case* (2) the circumstances were such that the court found that knowledge of the allowance should be imputed to the principal and that with such knowledge he had acquiesced in it. Barry has sworn that the agreement for splitting the commission in the present case was unknown to him. The

(1) [1905] 1 K.B. 1. (2) 9 Ch. App. 525.

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only ground for questioning his statement is the fact that the commission is alluded to in some correspondence concerning the contracts sued upon. But the letters which contain these references were either written by Durocher or addressed to him, or, if addressed to the defendant, were placed in envelopes marked "personal attention of Mr. Durocher," and the evidence of the practice as to the handling and disposing of correspondence in the defendant's office makes it quite probable that he never saw these letters. I have found nothing in the record to justify a reversal of the finding of the learned trial judge that the commission was "secret"—in the sense that Barry was ignorant of it.

Although there is some evidence that it was Millman's practice to split commissions with purchasers' agents, there is no evidence that that custom was so prevalent in the trade that Barry should be charged with knowledge of it—if indeed knowledge of a custom involving such an essential departure from the usual relations of principal and agent could be imputed without proof that it actually existed. *Robinson* v. *Mollett* (1); *Johnson* v. *Kearley* (2), at page 530.

Nor is this a case in which, because he did not himself contemplate remunerating Durocher for his services, Barry must be taken to have expected that he would seek remuneration from the "other side," such as were the cases of *Baring* v. *Stanton* (3), and *Great Western Ins. Co.* v. *Cunliffe* (4), cited by the Chief Justice of the Common Pleas. (See comment of Alverstone C.J. on these two decisions in *Hippisley* v. *Knee Bros.*(5), at page 7.) On the contrary, the evidence of

(1) L.R. 7 H.L. 802.
(2) [1908] 2 K.B. 514.
(3) 3 Ch. D. 502.
(4) 9 Ch. App. 525.
(5) [1905] 1 K.B. 1.

both Barry and Durocher is that, while no definite basis was fixed, it was expected that Barry would pay Durocher for his services. Moreover, Durocher was largely indebted to Barry.

It may be, and not improbably is, quite true that Millman did not intend that the payment of commission to Durocher should be concealed from Barry and that he was deceived by Durocher's assurance that Barry knew what he was doing. But the law is thus stated by Collins L.J. in *Grant* v. *Gold Exploration Co.* (1), at pp. 248, 249,—

> In my opinion, if a vendor pays a commission to a buyer's agent in order to secure his help in bringing about the sale, and does not inform the buyer of the fact, he cannot defend the transaction, if impeached by the buyer, who had, in fact, had no notice, by proving that he believed that the agent had disclosed the circumstances to his principal. I think it is clearly established that in such circumstances the buyer would be entitled to rescind the purchase; see *Panama Telegraph Co.* v. *India Rubber Works Co.*, where it is pointed out both by Malins V.C. and by the Lords Justices that *bona fides* without disclosure will not suffice to bar rescission * * *
>
> I think that if he takes the hazardous course of paying a sum to the buyer's agent in order to secure his help, and does not himself communicate it, he must at least accept the risk of the agent's not doing so. He has taken a course which can be validated only by actual disclosure to the opposite principal.

As Chitty L.J. said in *Shipway* v. *Broadwood* (2), at page 373:—

> It was the plaintiff's duty to inform the defendant of the promise * * * if he wished to escape the consequences of having made it * * * The real evil is not the payment of the money, but the secrecy attending it.

There was nothing in the present case amounting to acquiescence or waiver by Barry of his right to rescind on account of the payment of the secret commission to his agent. He discovered the commission arrangement only after the contracts sued upon had

(1) [1900] 1 Q.B. 233. (2) [1899] 1 Q.B. 369.

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been entered into. Where that is so a very clear and a very strong case indeed must be made to support an allegation of acquiescence or waiver. *De Bussche* v. *Alt* (1), at page 314; *Bartram & Son* v. *Lloyd* (2).

Nor does the failure to set up the defence based on the secret commission until the facts concerning it had been disclosed at the trial present a formidable obstacle. *Shipway* v. *Broadwood* (3); *Hough* v. *Bolton* (4). Moreover, the trial judge exercised a discretion in allowing the amendment setting up this defence which, in my opinion, should not have been interfered with on appeal.

Finally the fact that the agreement to split the commission was not made by the plaintiffs themselves, but by their agent Millman, is not an answer to the defendant's assertion of his right to repudiate. What Millman did was done while purporting to act within the scope of his employment, and in the course of the service for which he was engaged by the plaintiffs; and it is immaterial that it may have been in his own interest as well as in, or even to the exclusion of, that of the plaintiffs. *Lloyd* v. *Grace, Smith & Co.* (5). The defendant's agent was given the disqualifying adverse interest which made him incapable of binding his principal.

My apology for having dealt with this appeal at what may seem inordinate length is that when a judgment which deals with matter so fundamental is reversed, courtesy to the learned judges who pronounced it demands an adequate statement of the grounds on which it is held to have been erroneous; and also that it is of the utmost importance that it should be clearly

(1) 8 Ch. D. 286.
(2) 90 L.T. 357.
(3) [1899] 1 Q.B. 369.
(4) 1 Times L.R. 606.
(5) [1912] A.C. 716.

understood that in this, the court of last resort in Canada, the rule of equity on which the judgment allowing this appeal rests is regarded as inflexible and its application as universal.

In conclusion I cannot do better than quote some apposite observations from the judgments of Lord Alverstone C.J. and Kennedy J. in *Hippisley* v. *Knee Bros.* (1). Mr. Justice Kennedy said at page 9:—

> If a principal when contracting for the services of an agent, is told that the agent is going to receive a profit out of the agency beyond the remuneration that the principal is to pay, there can be no possible harm in the agent receiving it; but, unless it had been in this way authorized by the principal, the receipt of such a profit is an indefensible act. I quite agree with my Lord that in this case the defendants were only doing what they honestly believed to be right having regard to a general practice; but I should be sorry to say that the practice itself is an honest one, if it is to be taken as extending to cases in which the fact that the profit will be received and kept by the agent is not brought to the knowledge of the employer.

And Lord Alverstone, at page 7:—

> Unfortunately there appears to prevail in commercial circles in which perfectly honourable men desire to play an honourable part an extraordinary laxity in the view taken of the earning of secret profits by agents. The sooner it is recognized that such profits ought to be disapproved of by men in an honourable profession, the better it will be for commerce in all its branches.

The appellant is entitled to his costs in this court and in the Appellate Division, and the judgment of the learned trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *Johnston, McKay, Dods & Grant.*

Solicitors for the respondents: *Kerr & McNevin.*

(1) [1905] 1 K.B. 1.