N. N. MALOOF (PLAINTIFF).....APPELLANT;

AND

J. P. BICKELL AND COMPANY (DEFENDANTS).....RESPONDENTS.

1919
*Nov. 20.
*Dec. 22.

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

Principal and agent—Stock broker—Dealing in margins—Failure to Cover—Sale by broker.

Stock brokers bought corn for M. on margin. The price having fallen they wired him for money to cover and receiving no answer they sold the corn at a loss to M.

Held, that according to the evidence M. must be deemed to have known of the rules governing the stock exchange authorizing brokers to sell for their own protection stock carried on margin; that though M., being beyond reach of communication by telegraph, only received the broker's wire two days after it was sent the latter had done all they reasonably could to notify him and he must submit to the loss.

Held, also, Brodeur J. expressing no opinion, that the transaction was *bonâ fide* and not within the prohibitions of sec. 231 of the Criminal Code.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming, for a different reason, the judgment at the trial which dismissed the appellant's action.

The material facts are set out in the above headnote.

McKay K.C. for the appellant.

Dewart K.C. for the respondents.

THE CHIEF JUSTICE:—I think this appeal should be dismissed with costs. I am of the opinion that the carefully reasoned judgment of the Appellate Division

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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delivered by Mr. Justice Ferguson dismissing the plaintiff's action is correct. The learned judge has in that judgment stated fully all the material facts and circumstances necessary to reach a conclusion on the points in controversy and as I am in full accord with his findings alike in law and in fact, I cannot see any useful purpose to be gained in again re-stating them with any fullness. In substance they were that the purchase by the respondents Bickell & Co. of the 50,000 bushels of corn in question on the order given to them by the witness Symmes on the 26th August was fully authorized by the plaintiff and that the subsequent sale by the defendants of that corn on the 28th of August owing to a sudden slump in its market price was justified under the conditions subject to which the brokers transacted the business of buying and selling grain for the plaintiff. One of these conditions was that in marginal business which included the one in question the right was reserved by the brokers of closing the transactions without further notice when margins were unsatisfactory. The other finding, reversing the trial judge, was that the transactions in question were not within the prohibitions of section 231 of the Criminal Code; that they were on the contrary *bonâ fide* transactions made for good consideration on the Chicago Board of Trade; and that there was no evidence of any express, implied or tacit understanding that the contracts so made were not enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences. *Nelson* v. *Baird* (1). In other words, that the purchase and sale of the wheat in question at the times and in the manner in which it was bought and sold were *bonâ fide* trans-

(1) 25 Man. R. 244; 22 D.L.R. 132.

actions authorized by the plaintiff and were not illegal gambling transactions within the provisions of sec. 231 of the Criminal Code. See *Forget* v. *Ostigny* (1).

IDINGTON J.—This appeal depends entirely upon a single question of fact on which the two courts below have concurred.

That question is whether or not appellant authorized Symmes to employ respondents to make on his (appellant's) behalf the purchase of 50,000 bushels of May corn in question.

And its answer depends upon the veracity of Symmes in the circumstances.

If ever there was a case in which the trial judge's opinion on the facts must be held, by reason of his seeing and hearing the witnesses, to have had such superior advantages that his opinion must be accepted, this certainly is one.

Symmes's mode of thought and manner of answering questions give rise to some suspicion of whether he was trifling with the court and counsel, or merely beset by an absent-minded sort of condition which prevented him from concentrating his mind upon the questions put to him. The learned trial judge alone of those having to consider these peculiar features could, from the advantages he had of watching and hearing the witness, rightly appreciate and determine what importance is to be attached thereto.

Sometimes, indeed often, there exists in a case some outstanding undoubted fact or set of circumstances which may enable an appellate court to overrule the trial judge's appreciation of the credibility of the respective witnesses on either side of a case, but herein I am unable to find anything of that kind as a guide to support me in maintaining this appeal.

(1) [1895] A.C. 318.

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Indeed what there is seems to tend the other way. The witness Symmes says, and is not contradicted as he might easily have been if speaking untruly, that though an extensive dealer in the sort of bargaining involved in buying and holding by virtue of margins in and through a broker's office, he had not up to that time in question so dealt in grain but had confined his operations to dealing in stocks.

On the other hand the appellant had been for five months previously constantly dealing, through respond nts, in grain chiefly if not solely.

Why he should not with such an amount as he had lying idle in respondents' hands, and not apparently needed for anything else, respond to the chance presented, I see no reasonable explanation for.

Moreover his conduct and expressions later hardly consist with what he now sets up.

And the transaction does not fit into the only suggestion made in the way of explaining why the witness Symmes should suddenly depart from his accustomed means of enjoying the excitement of the market and enter on a new field therein.

Moreover there is no explanation of why, if he did so, he should have reported such a deal to appellant on returning to his place.

That he did so is corroborated by another witness who could not testify to hearing appellant's answer, yet does confirm the fact of Symmes reporting it as he says he did.

The learned trial judge's judgment having been concurred in by the Appellate Division I think we cannot reverse under such circumstances.

The respondents' right to resell the grain to protect themselves against loss, if it rested upon the elementary

legal right which arises when A. tells B. to go and buy for him and pay so much on account of the purchase and hold it for him might give rise to difficult questions of law and the authorities which appellant's counsel cites as relevant would help perhaps to another solution of the case giving rise to this appeal than that reached by the Appellate Division.

I agree entirely with the view of the facts taken by the judgment of the Appellate Division, and think there is ample evidence from which it may and should be inferred that appellant knew and approved of the usual course of the respondents in conducting such like business as he entrusted to them and the right which they were likely to assert in case of necessity to protect themselves against loss on his account.

That was reduced to writing well known to appellant, according to my view of the evidence (though I admit it might have been better to have gone a step further in making the proof quite conclusive by calling the mailing clerk as to this transaction), which is set forth in Ex. 15, as follows:—

> Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed, and also with the distinct understanding that actual delivery is contemplated and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon, or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close transactions without further notice when margins are unsatisfactory.

The four or five months of appellant's existence as a "roomer" so called in respondents' office, did not leave him ignorant of this basis of all his dealings with respondents including that in question, and he has not pretended to say he was ignorant or to deny

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the receipt of, I imagine, scores of such notices as governing the contractual relations between him and respondents so far as they concerned the brokerage business done by them on his behalf.

I cannot, therefore, discard that which is therein set forth as forming part and parcel of the understanding existent between these parties, or doubt the efficacy of the last sentence thereof as maintaining respondents' right to do as now complained of by appellant.

The judgment of the Appellate Division sets forth in more detail the facts and circumstances bearing on that issue of fact in such a forcible way that I need not enlarge by repetition of same here.

My view of the question of illegality raised by the learned trial judge, so far as of any moment herein, is briefly this: that the counsel on each side being now agreed that if there was in fact an employment of the respondents, it was to conduct purchases on the Grain Exchange in Chicago; I am, therefore, unable to see how our Criminal Code can have any possible effect on contractual relations formed there.

We have no proof of illegality relative to the contracts of such a nature there.

I adhere to my view expressed in *Beamish* v. *Richardson & Sons* (1), relative to the law applicable thereto in circumstances such as in evidence in that case.

The appeal should be dismissed with costs.

DUFF J.—This appeal turns upon the question whether the unanimous finding of the Appellate Division to the effect that according to the terms

(1) 49 Can. S.C.R. 595.

under which the appellant and the respondents had conducted their dealings the respondents were entitled to close transactions without * * * notice when margins are unsatisfactory.

I think this finding is adequately supported by the evidence and that the contracts acquired for his benefit under the transactions of the 21st and 26th August were held under these terms.

It seems necessary to add a reference to the opinion of the learned trial judge that on the authority of *Beamish* v. *Richardson & Sons* (1), the orders given by the appellant were illegal under sec. 231 of the Criminal Code.

I am by no means certain that the transactions contemplated by the appellant's orders were in any relevant sense distinguishable from the transactions which certain members of this court held to be illegal in *Beamish* v. *Richardson* (1). The purchases authorized by the appellant's orders were to be purchases in the corn pit of the Chicago Board of Trade and in the usual course of business, that is to say, by agents in Chicago; with the consequence that in the absence of agreement to the contrary, the agents would contract as principals and not as representatives, in other words, the purchases and sales would be purchases and sales enforceable only by the agent. *Robinson* v. *Mollett* (2).

The contracts which were the subject of discussion in *Beamish* v. *Richardson* (1), were contracts subject to the "rules, regulations and customs" of the Winnipeg Grain Exchange and the Winnipeg Clearing House Association, and were contracts in which, by virtue of the rules of the Exchange, the brokers were necessarily principals on the one hand as buyers or sellers

(1) 49 Can. S.C.R. 595. (2) L.R. 7 H.L. 802.

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and the Clearing House Association on the other as seller or buyer; and it was made quite clear in the evidence that the vast majority of transactions in grain in Winnipeg at that time took place through the instrumentality of the Grain Exchange and the Clearing House Association, in other words, that the Grain Exchange and the Clearing House Association were not merely conveniences for speculation but together constituted a large market where a great deal of the grain and provision business in Canada were transacted, the brokers, Richardson & Co., being commission merchants trading very largely on their own account on this market. It was made quite clear also that a commission merchant entering into a contract with the Clearing House Association to buy or sell would understand that he must carry out that contract either by actual payment or delivery or by set-off payments against exigible obligations under some other real contract. Such a system of carrying on business of course affords opportunities for speculation and must largely be used for that purpose; and the contracts in question being of the character mentioned, it was held by some members of this Court (in *Beamish* v. *Richardson* (1)), that because the customer's intention was by means of such contracts to speculate in futures merely, with no expectation either of delivering or taking delivery in kind of any commodity, the transactions fell under the ban of the section of the Criminal Code above referred to. *Beamish* v. *Richardson* (1), nevertheless, is not a decision upon any point as to the application of that section. My brother Idington and my brother Brodeur based their judgment, it is true, upon the

(1) 49 Can. S.C.R. 595.

view just explained of the effect of the Code, but my brother Anglin, though expressing an inclination of opinion in the same direction, explicitly stated that he did not rest his judgment upon that ground; while the remaining members of the court (the Chief Justice and myself) took the opposite view.

In these circumstances I should not consider these opinions (which did not form in whole or in part the *ratio decidendi*), to be binding on me judicially and I should not feel at liberty to act as if they relieved me from the responsibility of forming and giving effect to my own view. *Ex parte Willey* (1), at page 127.

I may add that I entirely concur in the opinion expressed in the judgment of Mr. Justice Ferguson that sec. 231 of the Criminal Code does not reach the transactions under consideration on this appeal.

The appeal should be dismissed with costs.

ANGLIN J.—I would dismiss this appeal for the reasons stated by Mr. Justice Ferguson in delivering the unanimous judgment of the Appellate Divisional Court to which I feel that I can usefully add nothing unless it be to supplement *Nelson* v. *Baird*(2), cited by the learned judge on the question of the defendants' right for his and their protection to sell the plaintiff's corn, which they were carrying for him, by a reference to *Foster* v. *Murphy* (3); *Leiter* v. *Thomas* (4), and *Belleau* v. *Lagueux* (5).

BRODEUR J.:—This is a suit between a customer and his broker concerning the purchase of corn on margin.

The transactions between them were very numer-

(1) 23 Ch. D. 118.
(2) 22 D.L.R. 132; 25 Man. R. 244.
(3) 135 Fed. R. 47.
(4) 97 N.Y. Sup. 121.
(5) Q.R. 25 S.C. 91.

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ous and very extensive. It appears that at a certain date, on the 23rd of August, 1916, the plaintiff Maloof had to his credit a balance of about $2,000 and that the respondents, his brokers, were holding for him a corn purchase of 25,000 bushels of December corn. He left Toronto, where these speculations were carried on, on the above date, for the Cobalt district, with some friends amongst whom was a Mr. Symmes who is also an active stock operator.

On the 26th of August, Symmes called on the telephone the respondent firm to inquire about the market conditions; and, receiving a favourable reply, he gave instructions to purchase for Maloof 50,000 bushels of May corn. He claims that he was authorized by Maloof to give such instructions. Maloof denies it; but Symmes' story was accepted by the courts below and I am convinced myself that if Maloof has not given formal authority to Symmes he has at least adopted the order which was given.

That was on a Saturday. On the following Monday the market turned for the worse and the brokers telegraphed to Maloof for margin money. No answer to their request being received, the respondent company sold the 75,000 bushels of corn they were holding for Maloof.

They claim having acted on a well known condition of their stock transactions and which are to be found on their confirmation notices of purchase which contained the following:—

> It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities either for the sum due thereon or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close transactions without further notice when margins are unsatisfactory.

The plaintiff cannot very easily deny knowledge of those conditions. He was day by day, and week by week, in the office of the respondent company: in fact, his mail was being received there and undoubtedly he was aware, according to my opinion, of the conditions under which Bickell & Co. were carrying on marginal transactions. According to those conditions Bickell & Co. had the power to sell for the plaintiff the securities which they had in their possession. They asked for money on the 28th August. The market was then in a very bad condition; war had been declared the day before (27th August) by Roumania and on Monday morning corn in Winnipeg and Chicago opened four cents lower than the closing on Saturday. The decline was more than sufficient to wipe out the $2,000 that Maloof had to at his credit the 23rd of August.

Another question has been raised in this case as to whether this transaction was a *bonâ fide* transaction or one in violation of the provisions of the Criminal Code.

I would be inclined to think that this case cannot be distinguished from the case of *Beamish* v. *Richardson* (1); but it is not necessary for me to base my judgment upon this ground.

I am satisfied that the plaintiff has no case and that the judgment of the courts below dismissing his action should be confirmed with costs.

MIGNAULT J.—The litigation here has arisen out of grain transactions on margin carried out by the respondents, who are stock and grain brokers, on behalf of the appellant, on the Chicago market.

As all the facts are fully stated in the judgments appealed from, I may very briefly say that the appel-

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lant was a large speculator in grain, and for several months—during the greater part of which he spent most of his time in the respondents' office, where he received his mail and was known as a "room trader"—he had bought and sold grain on the Chicago market through the respondents. On August 23rd, 1916, the appellant had a balance of over $2,000.00 in his favour in the respondents' books, and the latter had, on August 21st, purchased for him, on his order, 25,000 bushels of December corn at 74. On the evening of August 23rd, the appellant left Toronto with a party, including Mr. H. D. Symmes, a prominent engineer, for Sesikinika Lake, in Northern Ontario, where he had a house. On the 26th August, a Saturday, Mr. Symmes telephoned to the respondents from Sesikinika, instructing them to purchase at the market price for the appellant 50,000 bushels of May corn, which the respondents bought at 78¾ and 78⅞, and of this purchase the respondents at once advised the appellant by a telegram sent to Sesikinika. On Monday, the 28th August, the news that Roumania had entered the war caused a break in the grain market and the respondents, in the forenoon of Monday, sent the following telegram to the appellant at Sesikinika:—

Roumania declared war on Austria. Wheat broke nine cents bushel. December corn now seventy-three. May seventy-seven. Please let us have two thousand. Answer.

Receiving no reply, at about the close of the market, in the afternoon of August 28th, Mr. Cashman, of the respondents' firm, gave orders to close out the appellant's account, and to sell his 75,000 bushels of corn. The December corn was sold at 72¼ and the May corn at 75½ and 75⅝, with the result that the balance standing to the appellant's credit on August 23rd, was wiped out, and he became indebted to the respondents in the sum of $156.62.

Two questions are involved on this appeal. 1st. Was Mr. Symmes authorized by the appellant to order the purchase of 50,000 bushels of May corn? 2nd. Had the respondents the right to sell out the appellant's holdings?

The learned trial judge found that Mr. Symmes was authorized by the appellant to purchase the 50,000 bushels of May corn, and in this finding the learned judges of the Appellate Division concur. I would not disturb this finding of fact, the more so as the testimony of the appellant and of Mr. Symmes was directly contradictory on this point, and the learned trial judge believed the latter.

The second question is not free from difficulty. The notice printed on the confirmation form, that on marginal business the right was reserved to close transactions without further notice where margins were unsatisfactory—assuming that the appellant had received several similar notices, which appears to be a fair inference—is printed in very small type and could be easily overlooked. But the appellant for months had been dealing on a large scale with the respondents, entirely on margin, spending most of his time in the respondents' office, and he had from time to time been called on to furnish margins, and I cannot believe that he did not fully understand, when he told Mr. Symmes to purchase 50,000 bushels of May corn, that additional margin, over and above the sum standing to his credit, and on the strength of which he no doubt considered the purchase of 25,000 bushels of December corn fully covered, would be required to carry so large a transaction, especially as he was far away and fluctuations in the market could be expected. For the respondents, the carrying of 75,000 bushels of corn in the sudden collapse of the grain market, meant a liability of $750.00 for each cent of decline,

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and I do not think that they were obliged, not having received an answer to their telegram demanding $2,000.00, to assume such a liability. It is true that the appellant did not receive the respondents' telegrams, including one of August 28th, informing him of the sale of the 75,000 bushels, until the afternoon or evening of Tuesday, August 29th, but that was the appellant's misfortune—being at a place where there was no telegraphic communication, and where telegrams had to be telephoned from Swastika some distance away—and not the respondents' fault. I find that the respondents did what was possible to advise the appellant of the situation that had suddenly developed, and the appellant cannot blame them if their efforts to reach him in time were unavailing.

The learned trial judge dismissed the appellant's action and the respondents' counterclaim for $156.62 on the ground that the transactions in question amounted to gambling transactions, prohibited as such by article 231 of the Criminal Code. The Appellate Division, on the contrary, decided that they were real purchases and sales under the authority of *Forget* v. *Ostigny* (1), and similar cases. In this I agree, but I think, for the reasons stated above, that the appellant's appeal here fails. The counterclaim of the respondents is no longer in question, the latter not having appealed from the judgment of the trial court by which it was dismissed.

The appeal in my opinion should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondents: *Dewart, Harding, Maw & Hodgson.*

(1) [1895] A.C. 318.