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*May 25.
*Oct. 9.

THE TRENT VALLEY WOOLLEN MANUFACTURING COMPANY (DEFENDANTS)..... ..... } APPELLANTS;

AND

OELRICHS & CO. (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of goods by sample—Place of inspection—Delivery—Sale through brokers—Agency—Acquiescence.

Where goods are sold by sample the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there when opportunity therefor is afforded is a breach of the contract to purchase.

Evidence of mercantile usage will not be allowed to add to or affect the construction of a contract for sale of goods unless such custom is general.

Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York by parties domiciled there unless the latter are shown to have been cognizant of it, and can be presumed to have made their contract with reference to it.

If parties in Canada contract to purchase goods in New York through brokers, first by telegram and letters, and completed by exchange of bought and sold notes signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to the form of the contract or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court in favour of the defendants.

The action in this case was for damages for breach of a contract by defendants to purchase wool from

* PRESENT:—Sir Henry Strong C. J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 20 Ont. App. R. 673.

plaintiffs in New York. The facts of the case are fully set out in the judgment of the court, the main question for decision being the validity of the contract within the statute of frauds, the authority of brokers in New York to bind the defendants being disputed, and the right of defendants to have the wool forwarded to their place of business in Campbellford for inspection, plaintiffs contending that they were bound to inspect in New York.

Christopher Robinson Q.C., and *Clute* Q.C., for the appellants, argued that the agreement to buy goods "laid down in New York" did not necessarily mean that New York was the place of delivery. If it was it did not follow that they must be inspected there. They relied on *Perkins* v. *Bell* (1), and cited also *Grimoldby* v. *Wells* (2); *Barnard* v. *Kellogg* (3).

McCarthy Q.C., for the respondents, referred to Campbell on Sales (4).

The judgment of the court was delivered by:—

THE CHIEF JUSTICE.—This was an action brought by the respondents against the appellants for the non-acceptance of certain wool which the respondents agreed to sell to the appellants. The trial took place before Mr. Justice Falconbridge, without a jury, and the action was by him dismissed. This judgment was, however, reversed on appeal.

The appellants carry on a large woollen factory at Campbellford in Ontario. The respondents are merchants at New York, engaged in the wool trade there. On the 26th March, 1894, Messrs. Cass & Mote, brokers in New York, sent six samples of Buenos Ayres wool to the appellants, at the same time writing to them as follows:

(1) [1893] 1 Q. B. 193.
(2) L. R. 10 C. P. 391.
(3) 10 Wall. 383.
(4) 2 ed. pp. 411-2 and 560.

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We send you by mail to-day some samples of Buenos Ayres wool as per memo below and wait your report on same.

The samples were numbered 126-127-129-130-131 and 132 and the prices of each lot were stated. To this letter the appellants replied on the 31st March, 1890, first by a telegram as follows:

If you will give us six months flat will take lots 127-128-129-130-131-132, answer quick.

It is explained in the evidence that the expression "six months flat" meant payment by promissory note payable six months after date without interest. On the same day (the 26th March) the appellants confirmed their telegram by a letter in the same words. By telegram of the same date Messrs. Cass & Mote informed the appellants that the wool was on the other side of the Atlantic, a fact which they had omitted to mention in their letter, and on the same day they wrote confirming their telegram. The appellants in reply to the telegram sent the following:

Our offer is for wool laid down in New York

to which Cass & Mote replied by letter of the 1st of April, 1890, saying:

We so understand your offer.

On the 3rd of April the brokers sent to the appellants the following despatch:

Can get 125-130-131, prices named four months, privilege six months adding sixty days interest, shall we take them? Cannot get other three lots, answer.

To this the appellants answered on the same day:

If you cannot get six months, to date from arrival of wool at New York, we withdraw our offer.

To this Messrs. Cass & Mote replied also on the same day:

Telegram received have bought the three lots B. A. pulled at six months.

The mention of lot number 125 in Cass & Mote's telegram of the 3rd of April was clearly a mistake for 127; no such number as 125 was included in the list

of lots originally sent to the appellants, and in the contract afterwards entered into, as will be stated, this mistake was rectified; although some stress was laid in the argument in the court below on this circumstance it is of no importance and no further notice of it will be taken here.

The contract was perfected by the delivery and transmission to the respective parties to the contract, that is to the respondents as vendors and to the appellants as vendees, of bought and sold notes the bought note having been sent to the appellants and the sold note handed to the respondents. These bought and sold notes were as follows:

NEW YORK, April 3rd, 1890.

Bought for Trent Valley Woollen Co.
From Messrs. Oelrichs & Co.
N. Y. City.

To say
127 about 14,000 lbs. B.A. pulled wool at 35c. per pound in bond.
130 about 7,000 lbs. B.A. pulled wool at 34½c. per pound in bond.
131 about 7,000 lbs. B.A. pulled wool at 35c. per pound in bond.

Terms, note at 6 months. To arrive
Tare, actual CASS & MOTE.
Remarks. Brokers.
Ship via.

NEW YORK, April 3rd, 1890.

Sold for Messrs. Oelrichs & Co. to Trent Valley Woollen Co.
Campbellford, Ont., Canada.

To say
127, about 14,000 lbs. B.A. pulled wool at 35 cents per pound in bond.
130 " 7,000 " " at 34½ cents per pound in bond.
131 " 7,000 " " at 35 cents per pound in bond.

Terms, note at six months. To arrive.
Tare, actual. CASS & MOTE,
Remarks. Brokers.
Ship via.

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The appellants retained the bought note and made no objection either to the terms of the contract or to the authority of Messrs. Cass & Mote as brokers to bind them. On the 28th May, 1890, the wool arrived at New York of which the appellants were at once advised by telegram from the respondents to whom they replied also by telegram as follows :—

If wool is equal to samples in our possession representing the lots send it on, if not do not want it.

To which the respondents replied :

You must accept the wool here before we ship it.

Then ensued a correspondence between the parties by letter and telegraph in which the respondents insisted that they were not bound to forward the wool until it was accepted by the appellants in fulfilment of the contract and as equal to samples, and that they were not bound to forward the wool to Campbellford in order that the appellants might there examine and compare it with the samples, but that such examination must take place in New York, and in the course of which the appellants on their part contended that notwithstanding the terms of contract they were entitled to have the wool sent to Campbellford in order that it might be there inspected before acceptance by the respondents. The result was that the wool was stored on the New Jersey side of the port of New York, and ultimately sent to Canada ; first to Sherbrooke and then to the Auburn Woollen Mills at Peterborough where it was used, a large reduction of price having been necessitated by a general fall in prices, and also by the reason of the wool having, after it arrived at New York and after it had been refused by the appellants, been damaged by moths.

The points insisted upon by the appellants in their defence to the action were, first, that there was no contract for the reason that Messrs. Cass & Mote were

not the appellants' brokers and had no authority to sign the bought and sold notes as their agents, and secondly, because either upon the construction of the contract by itself, or with the addition of a term which it is said ought to be added to it, by implication, arising from the usage of trade, the appellants had the right to have the wool forwarded to them at Campbellford before acceptance in order that it might be there ascertained if it agreed with the samples.

Upon the first point raised I am of opinion that the appellants were bound by the contract entered into by Cass & Mote; they knew perfectly well that Cass & Mote were dealing with them as brokers for the respondents, the real vendors, and their letters and telegrams sent in the course of the negotiations which preceded the signing of the brokers' notes implied authority to Cass & Mote to perfect the contract on their behalf. But even if there had been no original authority to Messrs. Cass & Mote to complete the contract on behalf on the appellants there was such acquiescence by the latter as amounted to ratification of the agreement embodied in the bought and sold notes and entered in the brokers' books. Mr. Owen, the appellants' manager, who acted for the company throughout the transaction out of which this dispute has arisen, in his evidence given at the trial, admits this very distinctly. I extract the following passage from his evidence:—

Q. You received a telegram from Cass & Mote; "Have bought the lots B. A. pulled at six months." Did you reply to that telegram? A. I do not think we did.

Q. You were content to rest there? A. Certainly.

Q. And you received the sold note or bought note, whichever it was, and you rested on that? A. Yes.

Q. You did not object to that? A. No.

Q. You did not write down to them and say "You have no right to sign that for us?" A. We did not consider they signed it for us.

Q. You rested on that as a transaction completed? A. Yes.

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These sale notes were signed by Cass & Mote as brokers as appeared from the bought note in which the whole bargain, including the names of both sellers and buyers, was stated and this gave the appellants distinct notice that the brokers were, if without authority, at least assuming, to act as their agents. If they objected to this they should at once have repudiated their act, but instead of doing anything of the kind they acquiesced as Mr. Owen states, and said nothing until the dispute about inspection and delivery arose. If authority is wanted in support of the view that the appellants were bound by the contract the authorities quoted in the judgment of Mr. Justice Falconbridge, who decided against the appellants on this point, are decisive in the respondents' favour. The citation from Campbell on Sales (1) shows that from two distinct points of view the failure to object concludes the appellants. First, the bought and sold notes give each party information of the terms of the contract and afford an opportunity of objecting to the contract either as not within the authority of the broker, on any ground, personal, as regards the other party to the bargain, and "they further afford the presumption that the contract is ratified if no objection is made within a reasonable time."

Further if the notes are acquiesced in and are in identical terms they "complete a new consensus forming a good contract (and one valid within the Statute of Frauds) if there was not a valid contract already and a novation of the contract if there was."

The appellants' manager himself, on his examination for the purposes of discovery, disclaims all objection on this head. He says:—

Q. And this fact did not suggest to you the advisability of keeping the samples?

(1) 2 ed. p. 566.

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A. No; it never entered our head to keep the samples; we did not think it was necessary; if we had we would have kept them. We wanted it distinctly understood that we never tried to get out of the wool in any shape at all; there was no catch about it; we acted fair and honest.

Q. I suppose the real question as far as your company is concerned is as to this question of inspection in New York, or the sending on to Canada for inspection?

A. We claim we have always inspected at Campbellford.

Q. That is the real difference between you?

A. Certainly we did not try to get out of it in any other way. We never agreed to go to New York and never had gone to New York and we did not see why we should go to New York in this case.

Of course no admission of this kind would preclude the appellants from insisting on any point of law arising upon the facts, and I do not refer to the evidence for any such purpose as that but as establishing the fact of acquiescence in the terms of the contract of sale which it certainly does beyond all question.

The contract therefore must be held to be sufficiently established and there remains only the question, which was the real issue between the parties, as to the performance of the contract. Were the appellants bound to inspect the wool and take delivery at New York, or were they entitled to have it forwarded to Campbellford for their inspection there? I should have said when stating the facts that, in the absence of any proof by the appellants that the wool was not equal to sample, there is sufficient *primâ facie* evidence to establish the fact that it did agree with the sample and upon its arrival at New York was sound and merchantable wool. I refer to the testimony of Mr. Isherwood, a member of the Liverpool firm which sold the wool to the respondents, to that of Mr. Schlinghoff described as an "outside man" in the employ of the respondents who examined the wool at New York, and to that of Mr. Kendry, the manager of the Auburn Woollen Mills at Peterborough, who ultimately pur-

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chased and used it. If therefore it was material to the respondents' case to show that the goods agreed with the samples I take that fact to have been well proved in the absence of contradiction by the appellants.

Then, were the appellants well founded in their claim to inspect the wool at Campbellford before taking delivery of it and giving the promissory notes for the price? That it was the intention and understanding of both parties that delivery should be at New York is evident from the appellants' second telegram of the 31st March, in which they say: "Our offer is for wool laid down at New York"; and from the letter of Messrs. Cass & Mote of the 1st of April replying thereto, in which they say: "We so understand your offer." Therefore if we are entitled to consider this stipulation as to the wool being laid down at New York as forming a term of the contract, then the delivery was by the express contract of the parties to be at New York, and there the vendors were bound to deliver and the vendees to accept. This is further confirmed by the telegram of the 3rd of April in which the appellants say they will withdraw their offer unless the brokers can get six months' credit, to date from arrival of the wool at New York. The payment was to be by promissory note; the giving of this note and the delivery and final acceptance of the wool were according to settled construction to be concurrent acts; the vendors were therefore bound to accept or reject the wool promptly in order that the vendees might receive the paper representing the price which they were entitled to receive as soon after the arrival of the goods as would allow a reasonable interval for inspection. If these telegrams are to be excluded, and we are to confine the contract within the limits of the bought and sold notes which say nothing about any place of delivery, it will make no difference, as the law

is that where the contract of sale is silent as to the place of inspection of goods sold by sample it is to be presumed that the purchaser is to accept the goods at the place of delivery which here was undoubtedly New York, being the place at which the contract was made.

Therefore upon the construction of the written contract, with or without the aid of the telegrams which preceded it, and excluding any addition to its terms by evidence of custom, it is plain that the respondents were right in their contention that the place of inspection was New York, and the respondents were not bound to forward the goods to Campbellford before receiving the note to be given for the price. That this is the law is apparent from the cases of *Perkins* v. *Bell* (1); and *Thomson* v. *Dyment* (2) · which are ample authority for the proposition. It follows that unless we are able to say that it is sufficiently proved that there existed some mercantile usage to the contrary warranting us in superadding to the contract by implication a term providing for an inspection at the appellants' mills at Campbellford the respondents are entitled to recover damages for the breach of the contract of sale. Such an addition to the agreement of the parties may, no doubt, if sufficiently proved, be engrafted on it by parol evidence of the custom.

The case is thus narrowed to a question of evidence. Is it sufficiently proved that there existed a usage of trade controlling the *primâ facie* effect of the contract as expressed in the written agreement of the parties, by importing into it by implication an additional term? I am of opinion that no such usage is proved. The evidence entirely fails to establish it. The Canadian wool merchants called to prove a custom such as the appellants contend for have not shown that any

(1) [1893] 1 Q.B. 193. (2) 13 Can. S.C.R. 303.

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such general custom exists even with regard to contracts made in Canada. What these dealers, four witnesses, two from Montreal, one from Toronto, and one from Hamilton speak of, is not a general usage or course of practice universally governing the trade but of the course pursued by them in their own business. Such evidence is of course insufficient to establish a universal custom of trade and must be regarded as irrelevant. For the same reason the evidence of Mr. Breckenridge, the manager of a woollen mill at Carleton Place, and of Mr. Owen, the appellants' own manager, is insufficient to establish anything like a general usage of trade. Then the existence of any universal custom in Canada is negatived by the two witnesses called by the respondents, Mr. Rosamond and Mr. Kendry, whose evidence must be deemed conclusive on this point. The authorities establish that in order to engraft a new term in a mercantile contract by evidence of this kind a general course of dealing must be shown to exist, and that isolated instances of the way in which particular parties carry on their business is inadmissible.

Even if it had been established by sufficient evidence that such a mercantile custom as is contended for prevailed generally in the wool trade in Canada that could not possibly affect the respondents, New York merchants selling goods in the New York market and not shown to be cognizant of any such Canadian usage as the appellant contend for. The passage from the judgment of the Privy Council in *Kirchner* v. *Venus* (1) quoted in the respondents' factum is so apposite that, being as it is binding upon us as a conclusive authority, I transcribe it here.

> The ground upon which it appears to us that this case must be decided in favour of the appellants is this, that when evidence of usage

(1) 12 Moo. P.C. 361.

of a particular place is admitted to add to or in any manner affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognizant of the usage and must be presumed to have made their contract with reference to it. But no such presumption can arise when one of the parties is ignorant of it. In this case the indorsees of the bills of lading were evidently not in Liverpool but in Sydney, and though they may be agents of persons residing in London, there is no evidence that these gentlemen were acquainted with the alleged usage in Liverpool.

The additional authorities referred to by the respondents, *Bartlett* v. *Pentland* (1); *Pearson* v. *Scott* (2); *Bayliffe* v. *Butterworth* (3); *Pollock* v. *Stables* (4); *Greaves* v. *Legg* (5); Addison on Contracts (6); are all to the same effect.

In the argument of the learned counsel for the appellants, as well as in the factum presented on their behalf, much reliance was placed on the argument *ab inconvenienti*. It was said that the inconvenience of inspecting at New York would be so great, and the presumption of a contrary practice consequently so strong, that it requires but little evidence to establish the usage contended for. This argument is sufficiently met by what has been already demonstrated, namely, that in the absence of sufficient legal evidence of a usage one is not to be inferred from circumstances for the purpose of altering the terms expressed by the parties in their written contract. But so far from the weight of the argument from inconvenience being in favour of the appellants it is, in my opinion, strongly in favour of the respondents. To say that a New York merchant entering into a contract for the sale of goods at New York, calling for delivery there, is to be either bound to send the goods to Canada, and also an agent to be present at an inspection, in order to ascertain if

(1) 10 B. & C. 760.
(2) 9 Ch. D. 198.
(3) 1 Ex. 425.
(4) 12 Q. B. 765.
(5) 11 Ex. 642.
(6) 9 ed. p. 66.

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the goods correspond with the sample, or to submit to an *ex parte* inspection there, before being paid the price, would be to introduce into contracts a condition so unreasonable and inconvenient as seriously to interfere with the conduct of business, and would inevitably lead to the insertion in contracts of special clauses excluding the operation of such a usage. On the other hand there would be no inconvenience in an examination of the goods at New York. The objection that the wool could not be examined in the bonded warehouse at New York entirely fails, for it is plain upon the evidence that if it should have been found necessary to open the bales that could have been done at comparatively small expense by changing the entry from one for direct export to Canada into an ordinary bonded warehouse entry according to the United States customs regulations, upon which a permit could be obtained for a thorough examination of the goods so held.

The respondent in his factum takes the objection that this was not a sale by sample at all. I incline to think that this objection is well founded. I do not, however, express any decided opinion upon it, for I desire to place my judgment upon the same grounds as those on which the judgments of the Chief Justice and the Chancellor proceeded, and upon the hypothesis assumed by the appellants that this was a sale by sample.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Clute & William.*

Solicitors for the respondents: *McCarthy, Osler, Hoskin & Creelman.*