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May 20, 21.

*June 6.

E. T. CARTER (DEFENDANT).....APPELLANT,

AND

LONG & BISBY (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trust—Principal and agent—Advances to agent to buy goods—Trust goods mixed with those of agent—Replevin—Equitable title.

If an agent is entrusted by his principal with money to buy goods the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing it.

If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance.

Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin.

APPEAL from the decision of the Court of Appeal for Ontario (1), affirming the judgment of the Divisional Court in favour of the plaintiffs.

The material facts of this case are not in dispute. The appellant Carter is the assignee of the insolvent firm of Smith Bros., local wool buyers in Dresden, Ont. The respondents, Long & Bisby, are wool merchants in Hamilton who in 1894, after some correspondence with Smith Bros., who had bought wool for them in former years, advanced to Smith Bros. money with which to buy wool for which they agreed to pay seventeen cents per pound. All the money advanced, except $201, was used by Smith Bros. as agreed and the latter having failed all the wool they had on hand, including

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 23 Ont. App. R. 121.

that bought for Long & Bisby, passed to the assignee, from whom it was replevied by the plaintiffs.

The questions for decision on the appeal were, whether or not the wool in the hands of the assignee was affected with a trust in favour of the plaintiffs, their portion of it never having been set apart or separated from the mass, and whether or not the plaintiffs had sufficient property in the wool to enable them to maintain an action of replevin. The courts below all held in favour of the plaintiffs.

Gibbons Q.C. for the appellants, argued that the property never passed to Long & Bisby and they could not gain possession of it in the face of the statute 55 Vict. ch. 26 (O).

Crerar for the respondents, cited *Pennell* v. *Deffell* (1); *Harris* v. *Truman* (2).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that the wool in question in this appeal was trust property and the sum of $200 also in question was a trust fund in the hands of Smith Bros., held by them at the time of their insolvency as trustees for the respondents Messrs. Long & Bisby. I entirely agree that no legal property in the wool had vested in the respondents, but I think they had, for reasons which I will presently state, a clear equitable title to a quantity of wool to be taken out of all the wool Smith Bros. had on hand, equivalent to the funds advanced by them to the insolvents (less $200) at the rate of 17c. per pound, as well as to the balance of trust moneys on hand.

There can be no dispute as to the material facts. The respondents employed Smith Bros. as their agents to buy wool with money furnished by the respondents, for which service the agents were to be paid by any

(1) 4 DeG. M. & G. 372. (2) 9 Q. B. D. 264.

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difference between the amount at which they might be able to purchase the wool and the agreed price of 17 cents per pound. This mode of remuneration did not make it any less a contract of agency than if the commission had been fixed in some other way and the wool had been the exact proceeds of the advances. As to the facts, I entirely agree in the opinion of Mr. Justice Burton expressed in the following extract from his judgment:

> It is clear, I think, upon the letters that it was the intention of both parties that the one should furnish funds to be expended by the other in the purchase of wool as agents, their remuneration being the difference between the sums at which they could purchase and the 17c. which the plaintiffs were willing to allow, and this is made particularly plain by the plaintiff's letter of the 18th of May, in which they decline to entertain a proposal to increase the rate and inclose a cheque for $400 "on account of wool to be purchased for our account," and the reply in which Smith Bros. accept the terms, and those of the previous letter, to keep the wool insured; and Smith Bros. throughout the correspondence lead the plaintiffs to believe that they are holding the wool for them and that they had, on the 14th of June, between 6,000 and 7,000 lbs. in hand, and the learned trial judge has expressly found that Smith Bros. were agents merely for the plaintiffs.

I adopt this as a perfectly correct statement of the facts established by the evidence, and based upon these facts the judgments appealed against appear to me to be well supported as regards the law both by principle and authority.

A great number of cases decided in courts of equity ranging over more than a century have established that trust moneys may always be traced into property of any species into which it may have been converted, in such a way that the court will give the *cestui que trust* as nearly as possible the same interest in the property as that which he had in the money of which it is the produce (1).

(1) See *Re Hallett's estate*, 13 Ch. D. 696.

That money placed in the hands of an agent or other person standing in a fiduciary relationship in order that he may invest it for the benefit of his principal will be considered trust funds within this principle is also commonplace doctrine not calling for any authority.

The case however of *Harris* v. *Truman* (1), if there was any ground for raising a reasonable doubt as to the law, would be conclusive against the appellant. That case in all features which are material exactly resembles the case before us. It proceeded entirely upon the equitable doctrine alluded to. Lord Coleridge at page 268, says:

> The judgment of the court below is founded mainly on two grounds. The first ground is of this nature: When large amounts of money are entrusted to a man to buy goods and carry on a business he becomes a trustee for the person to whom the money belongs and the proceeds of the money are affected with a trust. This is an old and well established doctrine in equity; it applies where the relation of principal and agent in the ordinary sense of the word does not exist. According to this doctrine where a confidence is created between two persons and where the one receives the money on the faith that he will do a certain thing and leads the other who has given the money to understand that the thing has been done, as between these two persons it is considered in equity to have been done. Therefore the person receiving the money is bound to hold what he gets for the person giving the money. I think that this ground is quite right.

The learned counsel for the appellant, whilst admitting the principles propounded in the case of *Harris* v. *Truman* (1), endeavoured to distinguish it from the present case on two grounds. First it was said that *Harris* v. *Truman* (1) was (as no doubt it was) a case of fraud on the part of the trustee or quasi-trustee, that the doctrine in question is never applied except in cases of fraudulent conduct on the part of the person who stands in a fiduciary position, and that in the present case there

(1) 7 Q. B. D. 340; 9 Q. B. D. 264.

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had been no fraudulent or dishonest conduct on the part of Smith Bros. I quite agree that no such imputation can be made against the agents in this case; but I entirely deny the proposition that courts of equity only apply the doctrine in cases of fraud. On the contrary, wherever the operation of the equity is essential to the protection of the person beneficially entitled who is considered in equity to be the owner of the property, however innocent the conduct of the fiduciary legal owner may have been a court of equity will always intervene. If there were any such distinction as that suggested it could only proceed upon the ground that the court acted *in pœnam* against a wrong doer, but such a mode of proceeding has been disclaimed over and over again by equity judges.

Then it was said, and with perhaps a little more force and reason, that the authority of *Harris* v. *Truman* (1) could not apply here, inasmuch as in that case all the malt and barley seized by the defendants had been or were presumed to have been purchased with the money of the defendants, whilst in the present case Smith Bros. had mixed the wool bought for the respondents and their own wool together, so that the wool which the respondents claimed title to could not be distinguished for the purposes of an action of replevin.

It has been already said that there is not the slightest ground for any imputation of wrongful conduct against the trustees or agents, and this applies to the mixing of the wool as well as in all other respects (2). Where the owner of chattels, having the legal property in them, has had his property mixed with similar chattels belonging to other persons so that out of the

(1) 7 Q. B. D. 340; 9 Q. B. D. 264.

(2) 9 Q. B. D. 268.

mass thus commingled the chattels originally belonging to each person are indistinguishable, as in the case which has so frequently happened of a quantity of saw-logs being thus mixed (1), the rule at common law is that where this has been done without fraud or wrong an original owner is entitled to take from the mass an equivalent in quantity and quality for the property which he has lost by the mixing, and he is treated as having a legal title to such property.

Then if this can be done where goods are mixed in which the several parties interested all have legal titles, there is no reason why it should not be equally applicable when the title of one of the parties is, as in the present case, equitable merely.

In his judgment in *Harris* v. *Truman* (2), Lord Coleridge addresses himself to this point also ; he says :

> I think that the second ground of the Queen's Bench Division is right also. A person placed in a fiduciary relation with another may have dealings of his own and may mix up his own dealings with the dealings on behalf of his *cestui que trust*, but it has been held in courts of equity that when a fiduciary relationship has been created in respect of a fund which has been misapplied, and when it cannot be shown what portion of the proceeds of the fund is really subject to the trust, the trust shall be considered to be attached to the whole of the proceeds and it shall not lie in the mouth of the trustee to say that any portion of those proceeds is not affected with the trust.

This appears to me to show conclusively that the respondents might have done here just what was done by the defendants in *Harris* v. *Truman* (2), namely, have seized, not through an act of the law but by their own act, the same goods which they actually seized here by means of this action of replevin. I am not aware of any authority, shewing that under the present system of procedure an equitable title to chattel property is not sufficient to support an action

(1) See Cooley on Torts (2 ed.) p. 68 and cases there cited.

(2) 7 Q. B. D. 340 ; 9 Q. B. D. 264.

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of replevin, and there is no good reason that I can see why it should not be sufficient. It is true that the more apt remedy would seem to be an action for the specific delivery of the property which before judgment might be protected provisionally by the interim remedies of an injunction and receiver. This would be in conformity with the practice which prevailed before the fusion of the two jurisdictions. Although not ordinarily interfering in the case of chattels, courts of equity would always take jurisdiction in two cases viz., where the chattel was of peculiar value so that damages would be no adequate compensation, a ground with which we are not concerned in this case. The other ground was where a fiduciary relationship existed between the parties; there, irrespective altogether of the nature and value of the property, the jurisdiction of equity could always be invoked for the protection of the *cestui que trust* (1).

The $201, the unexpended balance of the advances made by the respondents, was of course a sum of trust money; that it was a balance of the last remittance appears from the evidence of William T. Smith, who proves that when the Smiths proposed to draw it out of the bank in order to return it to the respondents, the bank manager persuaded him to leave it in his hands on the distinct understanding that it was Long & Bisby's money.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gibbons, Mulkern & Harper.*

Solicitor for the respondents: *Crerar, Crerar & Bankier.*

(1) See *Pooley* v. *Budd* 14 Beav. 34; *Fuller* v. *Richmond* 2 Gr. 24; *Flint* v. *Corby* 4 Gr. 45.