

A. MOYER & COMPANY (DEFENDANT) . . . APPELLANT;

1929

AND

*May 30, 31.
*June 13.SMITH & GOLDBERG LIMITED }
(PLAINTIFF) } RESPONDENT.ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME
COURT OF ONTARIO*Contract—Sale of goods—Statute of Frauds (now s. 5 of Sale of Goods Act, R.S.O., 1927, c. 163)—Revocation of agent's authority before signing by agent of memorandum.*

Appellants claimed (by counterclaim) damages for breach of contract of sale of goods from respondent to them. They alleged an oral contract made by G. for respondent. To meet the requirements of s. 17 of the Statute of Frauds (now R.S.O., 1927, c. 163, s. 5), they relied upon a subsequent "confirmation" signed by G. for respondent. They also set up a subsequent written agreement of settlement made by G. for respondent, fixing the damages.

Held, that at the time G. signed the confirmation he was not respondent's "agent in that behalf" within the requirement of the Statute of Frauds. Assuming the oral contract, and that on its date G. had authority to sell and that this included authority to sign a memorandum evidencing such sale (*Rosenbaum v. Belson*, [1900] 2 Ch. 267), his authority could be effectively revoked at any time before he signed the memorandum (*Farmer v. Robinson*, 2 Camp., 339n; *Bowstead, Agency*, 7th Ed., p. 470; *Warwick v. Slade*, 3 Camp. 127; *Xenos v. Wickham*, L.R. 2 H.L. 296, at p. 314, referred to); and the evidence established such revocation and notification thereof to appellants before G. signed the confirmation.

Held, also, that, upon the evidence, G. had no authority, actual or ostensible, to make with appellants the agreement for settlement.

Judgment of the Appellate Division, Ont., 63 Ont. L.R. 388, dismissing appellants' counterclaim, affirmed.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which, reversing the judgment of Logie J., dismissed their counterclaim, which was the only matter in dispute.

The appellants carry on business at Fort Wayne, Indiana. The respondent company carries on business at Toronto, Ontario. The appellants claimed damages from respondent for failure to carry out an alleged contract of sale of hides from respondent to them, made in December, 1927. This alleged contract was made orally between one

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

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Goldberg (who was the secretary-treasurer of the respondent company) on behalf of the respondent company, and a member of the appellant firm. The appellants then gave instructions to their brokers in Toronto, MacNeillie & Co., who communicated with the respondent. Some controversy arose, and Smith, the president of the respondent company, refused to sign the "confirmation" note sent to respondent by the brokers. Thereafter, however, the "confirmation" was signed by Goldberg, purporting to act for the respondent company. Subsequently Goldberg, purporting to act for the respondent company, made a written agreement of settlement whereby the appellants' damages for breach of contract were fixed at \$2,500. The appellants claimed for this sum, and, alternatively, for \$3,000 damages for breach of contract. The respondent denied that any contract was ever arrived at, set up the Statute of Frauds (now the *Sale of Goods Act*, R.S.O., 1927, c. 163, s. 5), and denied Goldberg's authority to bind it by signing on its behalf the "confirmation" or the agreement of settlement. The further material facts (as found by this Court) appear in the judgment now reported.

At the trial Logie J. gave judgment for the defendants (the present appellants) on their said counterclaim. This judgment was reversed by the Appellate Division (1). The appeal to this Court was dismissed with costs.

I. F. Hellmuth K.C. and *I. Levinter* for the appellants.

R. H. Greer K.C. and *A. H. Brown* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—In this action, begun on the 26th of January, 1928, the plaintiff (respondent) claimed \$900 as a balance due it on account for goods sold and delivered to the defendants (appellants). Subject to their counterclaim for \$2,500 as damages for breach of contract, which forms the sole subject of the present appeal, the defendants admitted owing the \$900 claimed; and the plaintiff at present holds a judgment for that amount, the judgment at the trial in the defendants' favour on the counterclaim having been unanimously reversed by the Second Appellate Divisional Court (1), from whose judgment the present appeal is taken.

The counterclaim is based on a breach of an oral contract for the sale of a specific lot of hides to the appellants, alleged to have been made by one Goldberg, as salesman of the respondent company, on the 30th of December, 1927. The Appellate Divisional Court has upheld the respondent's plea of the Statute of Frauds in answer to this counterclaim in so far as it rests upon the oral contract of the 30th of December, 1927, and its plea of lack of authority in so far as the counterclaim rests on an alleged settlement in writing of the appellants' claim for damages, which Goldberg purported to make on behalf of the respondent on the 14th of February, 1928.

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On the short ground that at the time he signed a so-called confirmation note, relied upon by the appellants to meet the requirements of s. 5 of R.S.O., 1927, c. 163 (Statute of Frauds, s. 17), Goldberg was not the "agent in that behalf" of the respondent company, we would affirm the judgment in appeal, in so far as the appellants' claim depends on the enforcement of the original oral contract. *Thirkell v. Cambi* (1). We assume, in the appellants' favour, that Goldberg actually made a verbal contract for the sale to them of the goods in question, and that he had, on the 30th of December, 1927, the date at which the oral contract is said to have been made, authority to sell and that this included authority to sign a memorandum evidencing such sale (*Rosenbaum v. Belson* (2)). Subject to two definite exceptions, within neither of which the case at bar falls, the authority conferred by an agency contract is, from its very nature, revocable at any time at the will of the principal. It may be effectively revoked, when writing is necessary, "even after a verbal contract has been made by the agent," at any time before he has signed the statutory memorandum. Lord Ellenborough, applying this doctrine, so held, as early as 1805, in *Farmer v. Robinson* (3), which is cited in Bowstead, Agency, (1924), 7th Ed., p. 470, as authority for this proposition. See also *Warwick v. Slade* (4), cited with approval in *Xenos v. Wickham* (5).

The only question in such a case is one of notice of the revocation to the third party dealing with the agent. The

(1) [1919] 2 K.B. 590, at p. 595.

(3) (1805) 2 Camp. 339n.

(2) [1900] 2 Ch. 267.

(4) (1811) 3 Camp. 127.

(5) (1867) L.R. 2 H.L. 296, at p. 314.

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admitted facts in evidence put it beyond doubt that the appellants had such notice from the 10th of January, 1928. They had actual knowledge that the president of the respondent company, Smith, repudiated the contract on behalf of the company and that the hides in question had in fact been sold to another purchaser.

The evidence of the broker, McNeillie, who was accredited by the learned trial judge, clearly establishes that he was exclusively the agent of the appellants in the transaction; that he knew on the 10th of January, 1928, that the president of the respondent company had refused to sign the confirmation note, sent him by Mr. McNeillie in the usual course for signature to bind that company, and was in fact repudiating any obligation on its part to carry out the contract sued upon; that the hides, the subject matter thereof, had already then been sold to another purchaser; and he, McNeillie, then communicated these facts to his principals. There is no suggestion of any subsequent authority having been given to Goldberg "to confirm" the contract in question.

McNeillie, nevertheless, procured Goldberg to sign a so-called confirmation note (dated back to the 30th of December, 1927) at some later time—within three weeks after the 10th of January, 1928, is his best recollection of the time, though he will not swear that it was not signed in February—with the obvious purpose of furnishing to the appellants an answer to the defence of the Statute of Frauds, should the respondent invoke it, and with the clear intent of rendering the respondent company liable to them for damages for breach of contract. These circumstances rebut any suggestion that Goldberg had ostensible authority to sign the confirmation note and that McNeillie took it in good faith from Goldberg, relying upon the latter having authority thereby to bind the respondent as his principal.

As to the alleged settlement of the appellants' claim, against the respondent for damages for breach of contract at \$2,500, signed on February 14, 1928, by Goldberg at Fort Wayne, the difficulties in the way of the appellants' attempt to maintain Goldberg's authority to bind the respondent are even more formidable. Upon the evidence of Gurofsky, a witness for the appellants, to contend for

any actual authorization of Goldberg by the respondent company to make such settlement is impossible; and the antecedent circumstances preclude the view that the appellants dealt with him on any footing of ostensible authority, were it possible to support an agreement so far out of the course of a salesman's or secretary's ordinary powers and duties on the footing of mere ostensible authority. The attempt to prove that Goldberg went to Fort Wayne on the 14th of February to make a settlement with the appellants with the knowledge and tacit approval of the president of the respondent company, in our opinion, wholly fails. Goldberg's own evidence, when carefully read, does not support it; and the evidence of Smith is distinctly against it. All the surrounding circumstances render it incredible that anything of the kind occurred.

It is, perhaps, not without significance that within eight days afterwards, i.e., on the 22nd of February, 1928, Goldberg sold out all his interest in the respondent company. There is no evidence whatever that the respondent company, or its president, had any knowledge or notice either of the so-called confirmation note or of the agreement for settlement signed by Goldberg until the 23rd of March, 1928, the date of the appellants' statement of defence and counterclaim, which set them up, and that they had not notice or knowledge of them prior to that time is the proper inference from all the circumstances in evidence.

We are not presently concerned with the ethics of the respondent's repudiation of the oral contract of the 30th of December, 1927. It is not setting up an equitable defence; it pleads, by way of legal defence, a purely statutory right to have the contract alleged evidenced in writing; and it must not be forgotten, as Scrutton L.J., says, in *Thirkell v. Cambi* (1), that:

It has often been said that the Statute of Frauds covers more frauds than it prevents. On the other hand those who have experience of disputes as to oral contracts and of findings rather prompted by sympathy than guided by evidence know the value of a statute which removes uncertainty as to the terms of a contract by prescribing that they shall be in writing; and it is a mistake in the administration of the law to whittle away this statute in order to do what is supposed to be justice in a particular case.

(1) [1919] 2 K.B. 590, at pp. 596-7.

1929 The appeal, therefore, fails and will be dismissed with
Moyer & Co. costs.

Appeal dismissed with costs.

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Solicitors for the appellants: *Luxenberg & Levinter.*

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Solicitors for the respondent: *Brown & Smith.*
