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*Nov. 15
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Jan. 22

INDUSTRIAL FUEL AND REFRIGERATION CO. LTD. (*Defendant*) .. APPELLANT;

AND

PENNBORO COAL COMPANY (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Agency—Whether contract made with agent or principal—Reasonable cause given for belief in mandate—To what extent estoppel recognized in Quebec law—Evidence of telephone conversation—Civil Code, arts. 1235(3), 1727, 1730.

The defendant company instructed P to buy coal in the United States and have it shipped to a customer for the defendant's account. The plaintiff company was asked by P to supply and ship the coal, and it shipped 552.05 tons. The defendant received payment from the customer for this coal, but refused to pay the plaintiff, on the ground that the defendant had contracted to buy the coal from P as principal and that there was no privity of contract between the two companies. In its action to obtain payment from the defendant, the plaintiff contended that P had represented himself as the defendant's agent and was buying the coal on its behalf. Evidence of the contract between the defendant and P was rejected by the trial judge, but he found as a fact that the defendant, in a telephone conversation with the plaintiff, had authorized the shipment and undertaken to pay for it, and gave judgment for the plaintiff. This judgment was affirmed by a majority in the Court of Appeal. The defendant appealed.

Held: The appeal should be dismissed.

Per Taschereau and Abbott JJ.: The liability of the defendant was clearly established. It arose under art. 1727 of the *Civil Code* if P was in fact the defendant's mandatary. It also arose under art. 1730, which is the only case in the *Code* of the application of the English theory of "estoppel", when P clearly represented himself as a mandatary and the telephone conversation between the officers of the defendant and the plaintiff (the latter being in good faith) gave the latter reasonable cause for believing that representation.

The contract between P and the defendant was clearly *res inter alios acta,* and was rightly rejected by the trial judge.

The evidence of the telephone conversation was not inadmissible under art. 1235(3) of the *Civil Code,* since it was not tendered to show that the defendant had made representations to enable P to obtain goods or personal credit, but rather to establish that the defendant had given reasonable cause to believe that P was its mandatary and that it would pay its own debt.

Per Locke, Fauteux and Nolan JJ.: The question whether the defendant had dealt with P *qua* principal was directly in issue and the written contract between them tendered in evidence was improperly rejected. The ground of the objection made to its admission that it was *res inter alios acta* was irrelevant.

*PRESENT: Taschereau, Locke, Fauteux, Abbott and Nolan JJ.

The concurrent findings that the defendant had contracted directly with the plaintiff should not, however, be disturbed, the improper rejection of the evidence not affecting the determination of that issue.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming, Rinfret J. dissenting, the judgment at trial. Appeal dismissed.

A. Laurendeau, Q.C., and *J. Dupré, Q.C.,* for the defendant, appellant.

S. Fenster, for the plaintiff, respondent.

The judgment of Taschereau and Abbott JJ. was delivered by

TASCHEREAU J.:—In its statement of claim the plaintiff company, respondent in the present case, alleged that acting upon the appellant's instructions, it agreed to ship to the Canadian National Railways, for the account of the defendant, 552.05 tons of coal for which defendant agreed to pay plaintiff respondent the sum of $3.85 per ton, making a total of $2,125.39.

The plaintiff respondent further alleged that it shipped to the Canadian National Railways as aforesaid, a total of 552.05 tons of coal for which it was enttiled to claim from the defendant appellant the sum of $2,125.39. It is not contested that the Canadian National Railways received delivery of this shipment and paid to the appellant the sum of $2,125.39 plus profits, making a grand total of $2,558.78.

The Superior Court, Chief Justice Scott presiding, maintained the action and this judgment was affirmed by the Court of Queen's Bench (1), Mr. Justice Rinfret dissenting.

The respondent is a coal producer operating in the State of Pennsylvania and the appellant has its place of business in the city of Montreal. After having his name placed on the list of prospective sellers of coal to the Canadian National Railways, Mr. Alexis Nihon of Montreal incorporated the appellant in 1948, and in the year 1949, his company received a large order for the sale of coal to the Canadian National Railways. The appellant then got in touch with H. C. Parse, a coal dealer of Pittsburg, Pennsylvania, for the purpose of obtaining the necessary coal, and

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it appears that the latter approached the respondent company asking it to supply the coal in order to fulfil the contract. It is as a result of that interview between Parse and the respondent in Pennsylvania, and of telephone conversations between the appellant and the respondent, that the first shipment above mentioned was made to the Canadian National Railways.

The respondent instituted legal proceedings against the appellant to obtain payment for this first shipment, which had remained unpaid and which constituted the only expedition of coal.

It is the contention of the appellant that there is no privity of contract, no legal relationship existing between the litigants; that the appellant entered into an agreement with Parse to purchase coal from him personally, and that it was the latter's own concern and responsibility to purchase the coal wherever he desired. It is against Parse who ordered and bought the coal, that the respondent should exercise its legal rights, if it has any.

Mr. Alexis Nihon, president of the appellant company, testified; but, he was not allowed to produce as evidence the contract entered into between his company and Parse as to the legal relationship that existed between both parties. That contract was obviously *res inter alios acta,* and was therefore irrelevant to the issue.

I have reached the conclusion that the appellant's liability to pay the amount claimed in the action is clearly established. If Parse was in fact the appellant's mandatary to purchase the coal for the former, the respondent's claim cannot be contested: *Civil Code,* art. 1727. If he was not the mandatary, the appellant is also liable because the former represented that he was, and the respondent was given reasonable cause for such belief: *Civil Code,* art. 1730.

When Parse was instructed by the appellant company to buy coal in the United States, to be shipped to the Canadian National Railways, he went to Barsboro, Pennsylvania, and met the officers of the Pennboro Coal Company. He represented to them that he was buying coal for the Industrial Fuel Refrigeration Co. Ltd. of Montreal, the appellant in the present case. At that meeting were present Mr. Hazard, fuel inspector for the Canadian National Railways, Mr. Watters, Mr. Tibbott and Mr. Weakland, all

three officers of the respondent company. Mr. Hazard was not available as a witness on account of absence nor was Mr. Watters. But, Mr. Weakland and Mr. Tibbott are very positive that *such representation was made.* This has not been denied. Parse, having disappeared, could not be called.

Parse was well known to the officers of the respondent company. His credit was bad, and it was found necessary to contact the appellant in Montreal. Mr. Weakland, president of the respondent company, telephoned Mr. McMaster, vice-president of the appellant company, who confirmed the order that had been given by Parse. Weakland testifies that McMaster said further that the company would naturally pay the bill, and it is therefore to the appellant only that credit was given. That is also the understanding of Mr. Tibbott, the vice-president of the respondent company. When the case had been heard, the enquête was reopened to allow McMaster to give evidence, as he had not previously testified. He admitted having had telephone conversations with the plaintiff company, but denied ever promising to pay for the shipment of 552.05 tons, but his evidence was not believed by the trial judge, and this finding was confirmed by the Court of Appeal. On this point, Chief Justice Scott said:

> The manner in which McMaster gave his evidence and his demeanour in the witness box created a bad impression as to his recollection of what he did say.
>
> On the other hand, the manner in which Weakland gave his evidence and his demeanour throughout created a most favourable impression. I am satisfied that Weakland told the truth in saying that McMaster instructed this shipment to be made for the price above mentioned and promised that the defendant company would pay for it. *I find as a fact Weakland's story is the true story.*

This naturally brings into play art. 1730 of the *Civil Code* which reads as follows:

> 1730. The mandator is liable to third parties who in good faith contract with a person not his mandatary, under the belief that he is so, when the mandator *has given reasonable cause for such belief.*

This is the only case where we find in the Quebec *Civil Code* the application of the English theory of "estoppel". Parse clearly, according to the evidence, represented himself to the respondent who was in good faith, as the mandatary of the appellant. The conversation with McMaster

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surely gave to the respondent reasonable cause for such belief. The responsibility of the appellant therefore arises.

It has been argued that Weakland's evidence as to his conversation with McMaster was inadmissible, as being a violation of art. 1235(3) of the *Civil Code* which is as follows:

> 1235. In commercial matters in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former, in the following cases:
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> * * *
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> 3. Upon any representation, or assurance in favor of a person to enable *him to obtain credit, money or goods thereupon;*

I do not think that this objection can prevail. The evidence given by Weakland is not to show that McMaster, on behalf of the appellant, made representations to enable Parse to obtain goods or personal credit. It was merely to establish that the appellant company, through McMaster, had given reasonable cause to believe that Parse was acting as mandatary for the appellant, and that the latter would pay its *own debt*. This evidence, therefore, does not fall within the ban of art. 1235(3).

I am, for the above reasons, of the opinion that the appeal should be dismissed with costs.

The judgment of Locke, Fauteux and Nolan JJ. was delivered by

LOCKE J.:—In support of its contention that it had shipped the coal in question to the Canadian National Railway on the appellant's instructions, the respondent tendered evidence that the coal had been purchased by one Parse, who represented himself as the representative of the appellant company and that he was buying the coal on its behalf to be shipped to the railway company.

There was no evidence that Parse was authorized in any way to contract on behalf of the appellant or that the appellant either authorized or knowingly permitted him to hold himself out as its representative or agent. The fact apparently was that the appellant company had entered into a contract with Parse *qua* principal to supply the coal required to fill a contract which it had entered into with the railway company. The written contract which, according to statements made at the time it was tendered in evidence

would have proven this fact, was rejected. This, in my opinion, was error since on this aspect of the matter the question as to whether the relations existing between the appellant and Parse were those of principal and agent, or whether they were principals contracting with each other for the purchase of the coal, was directly in issue.

The question as to whether Parse was in fact the appellant's agent or whether he was held out or permitted by the appellant to hold himself out to the respondent as such were distinct questions. In considering the first, the contract was clearly relevant. The ground alleged for its rejection appears to have been that it was *res inter alios acta*. This was, of course, quite true, but in deciding the first of the above-mentioned questions the ground of the objection was irrelevant: indeed if that were not so, any person sued on an obligation which a dishonest third person had assumed to contract on his behalf would be precluded from proving by way of defence what was the true relationship existing between him and such person.

The respondent had not in its declaration given the date upon which it received the instructions for the shipment of the coal and, apparently, the appellant did not ask for particulars. In these circumstances, the respondent was permited to give evidence of a conversation which took place after Parse had ordered the coal between its president Ralph Weakland and J. A. McMaster who, at the time in question, was vice-president of the appellant company. According to Weakland, he was instructed by McMaster to make the shipment of coal in question to the Canadian National Railway Company, McMaster agreeing on the appellant's behalf to pay for the shipment. According to Weakland, Parse was of no finacial worth and his company would not have shipped any coal, relying on his credit. McMaster denied that he had made any such agreement on the appellant's behalf.

The learned trial judge who had the advantage of seeing the witnesses accepted Weakland's evidence, finding as a fact that McMaster had instructed the respondent to make the shipment at the price of $3.85 a ton, and agreed that the defendant would pay for it and that, relying on this promise, the coal had been shipped, the respondent giving

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credit to the appellant alone and not to Parse. The coal was shipped to the railway company and the purchase-price paid by it to the appellant.

The present appellant appealed and the majority of the Court, Rinfret J. dissenting, dismissed the appeal (1). Marchand J. did not give reasons for his opinion that the appeal should be dismissed. Casey J. agreed with the conclusion of the learned trial judge that McMaster had instructed the respondent to make the shipment and had undertaken to pay the respondent for the coal.

As will be seen, nothing turned upon what took place between Parse and the respondent company in Pennsylvania, liability having been found upon the footing that the appellant had contracted directly with the respondent. The question to be determined is one of fact and there are concurrent findings. While I do not think that I would have reached the same conclusion on the evidence which, in my opinion, indicates that what McMaster gave was an oral guarantee of Parse's liability to the respondent which would be unenforceable, I am not prepared to reverse these findings.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Duranleau, Dupré & Duranleau, Montreal.

Solicitors for the plaintiff, respondent: Gameroff & Fenster, Montreal.

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