JAMES CARRUTHERS & CO. (PLAINTIFFS) ..... } APPELLANTS;

AND

ERNEST A. SCHMIDT (DEFENDANT) RESPONDENT.

1916
*May 22, 23.
*Oct. 24.

ON APPEAL FROM THR COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Broker—Transactions of change—Sale of goods—Principal and agent—Action—Evidence—Parol testimony—Arts. 1206, 1233, 1235 *C.C.*

An action by a broker against his principal to recover commissions and expenses incurred in respect of sales and purchases of goods is not an action upon the contracts of sale or purchase, in which evidence in writing is required by clause four of article 1235 of the Civil Code, and proof may be made therein by oral testimony of the facts concerning the transactions as provided by article 1233 C. C. *Trenholme* v. *McLennan* (24 L. C. Jur. 305), overruled.

Judgment appealed from (Q.R. 24 K.B. 151), reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Montreal, by which the plaintiffs' action was dismissed with costs.

The plaintiffs, who were brokers and members of the Montreal Corn Exchange, were instructed by the defendant to purchase oats for future delivery and sale on his account in anticipation of a rise in the market. The plaintiffs carried out several transactions, according to alleged instructions, which resulted in a net loss, and brought the action to recover

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

(1) Q.R. 24 K.B. 151.

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the balance claimed to be due on settlements and for commission and outlay for freight and storage charges. The action was dismissed by the Superior Court on the ground that the plaintiffs had failed to adduce evidence of any memorandum in writing signed by the defendant, or by the customary brokers' bought-and-sold notes, shewing the actual purchase of the oats and their authority to make the purchases and sales on the defendant's account. This decision was affirmed by the judgment now appealed from.

The questions in issue on the present appeal are stated in the judgments now reported.

R. C. Smith K.C. and *George H. Montgomery* K.C. for the appellants.

A. W. Atwater K.C. and *Mailhiot* for the respondent.

THE CHIEF JUSTICE.—The only point for our decision in this case is whether the plaintiff, the present appellant, was entitled to give oral evidence as to the transactions which the respondent commissioned them to carry out on his behalf.

In a number of similar cases, including the case in the Privy Council of *Forget* v. *Baxter*(1), it has been pointed out that the onus is upon the plaintiff to prove, first, a mandate from the defendant to act for him in the several transactions which the plaintiff claims to have carried out on his behalf; and, secondly, the due execution of that mandate.

Articles 1233 and 1235 of the Civil Code, which are both in section III. of ch. 9, are, so far as is material, as follows:—

1233. Proof may be made by testimony—

(1) Of all facts concerning commercial matters.

(7) In cases in which there is a commencement of proof in writing.

(1) [1900] A.C. 467.

In all other matters proof must be made by writing or by oath of the adverse party.

The whole, nevertheless, subject to the exceptions and limitations specially declared in this section and to the provisions contained in article 1690.

1235. In commercial matters * * * no action or exception can be maintained against any party or his respresentatives unless there is a writing signed by the former, in the following cases—

(4) Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.

As stated by the learned Chief Justice, delivering the judgment appealed from, it has been held by the courts of the Province of Quebec in similar cases that though the broker's authority may be proved by verbal testimony, yet article 1235 C.C. requires the purchase made thereunder to be proved by writing. I must with reluctance dissent from the latter of these propositions. The Chief Justice quotes the late Judge Cross saying in the case of *Trenholme* v. *McLennan*(1):

The plaintiff as a broker could by written contract, made out and evidenced by his own signature, bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase, and this he cannot make for himself as against the party who instructed him to effect the purchase.

Article 1235 C.C. does not, however, say that there must be written evidence to establish the purchase; it says no action can be maintained against any party upon any contract for the sale of goods unless there is a writing signed by him. Now what writing can it be suggested the respondent could have given in a case like the present? No writing by him could be required for the purpose of the purchase which he had authorized the broker to make. Article 1235 C.C. is really only effective when the relations between the parties are those of seller and buyer and there is here no

(1) 24 L.C. Jur. 305.

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dispute between such; it is a question between principal and agent. Again I think it is necessary to distinguish between proving the purchase and proving the contract for sale; article 1235 C.C. is referring to executory not executed contracts such as are here in question.

I am assuming that the facts are as above stated and I desire to add that this judgment applies only in such cases. I say this because, though I have not gone at any length into the facts of the case, yet I see that in paragraph 22 of the amended declaration it is alleged that on the arrival of a quantity of oats at Montreal "the defendant failed to take delivery and to pay therefor." Any case in which the respondent is sued as a purchaser for failure to carry out his contract is governed by article 1235 C.C. and is not within this judgment.

Subject to this reservation I am of opinion that it was competent to the plaintiff appellant to give oral evidence under the provisions of article 1233 C.C. The appeal must be allowed and the action referred back for further hearing and decision.

DAVIES J.—I concur in the opinion stated by the Chief Justice.

IDINGTON J.—In an action like this by a broker for services rendered to a client in buying and selling grain for him I do not think the article 1235 C.C. must necessarily have any application.

The action is not within the express language of the article. It relates to executed or alleged executed contracts wherein the delivery not only of the part, but of the whole has taken place within the meaning of what such parties as these concerned herein attach to the word.

It is not suggested that there had been any failure of respondent to reap what he bargained for by reason of any default on the part of the appellant to procure the contracts or any of them in writing. I can conceive of a broker in failing to get for his client a written contract thereby leading him to make a loss. In such a case the question might come up under article 1235 C.C.

There seems nothing of that sort in the alleged transactions in question. They have all been fully executed or their existence denied.

There is nothing illegal in carrying on business by means of mere oral bargains. People may be foolish in not reducing their contract to writing but the contract once executed it matters not in the commercial world whether in fact reduced to writing or not.

I think the appeal must be allowed with costs.

ANGLIN J.—With very great respect I am of the opinion that there has been in this case a misconception of the purview and effect of article 1235 (4) C.C. which reads 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:—

4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.

It should be noted that although this provision deals with contracts for the sale of goods it is in the form of the fourth section of the English Statute of Frauds ("no action should be brought etc.") rather than in that of the old 17th section ("no contract shall be good"). The difference in effect between these two provisions is illustrated in the well-known case of *Leroux* v. *Brown*(1).

(1) 12 C.B. 801.

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An action such as this to recover an agent's commission and outlay on sales and purchases of goods is not, in my opinion, an action upon the contracts for the sales or purchases and therefore is not within clause 4 of article 1235 C.C. Moreover, while it might be a defence to such an action that the contracts made by the agent on behalf of his principal were unenforceable because not provable under article 1235 and that the agent had, therefore, not earned his commission, and was not entitled to re-imbursement of his outlay, no such question can arise in the case of executed contracts such as we are dealing with. Indeed, in an action upon the contract itself, where it has been executed, the statute will not afford a defence. *Green* v. *Saddington* (1); *Seaman* v. *Price*(2); Addison on Contracts (11 ed.), p. 26; 4 Amer. & Eng. Encycl., p. 982. I am unable to distinguish the decision of the Court of Queen's Bench in *Trenholme* v. *McLennan*(3), and I am, with great respect, of the opinion that it must be overruled.

The appeal should be allowed with costs.

BRODEUR J.—The appellants are brokers and members of the Montreal Corn Exchange and they claim from the respondent a sum of nearly $25,000 for the difference between the purchase and the sale price of oats made by them on behalf of the respondent.

The only question at issue before this court is the admissibility of parol evidence.

The trial judge decided that the transactions could not, on the authority of article 1235 of the Civil Code and of a judgment rendered by the Court of Queen's Bench in the case of *Trenholme* v. *McLennan*(3), be proved.

(1) 7 E. & B. 503.

(2) 2 Bing. 437.

(3) 24 L.C. Jur. 305.

That decision of the trial judge was confirmed by the Court of King's Bench, Justices Trenholme and Cross dissenting.

The appellant claims that the relations of the parties are those of principal and agent and not of vendor and purchaser, that the Statute of Frauds does not apply and that the question of admissibility of evidence is ruled by the provisions of article 1233 of the Civil Code.

There is no divergence of opinion between the parties as to the evidence of the contract of agency. They all admit that the plaintiff could prove by oral testimony the contract by which he was commissioned to buy and sell the goods in question. *Forget* v. *Baxter*(1), is authority for the proposition that the transactions by a broker in respect of sales and purchases of shares are

> commercial matters within article 1233 of the Civil Code and might be established by parol evidence.

In the case of *Trenholme* v. *McLennan*(2), so much relied on by the respondent, the same proposition was also declared.

There is then no question as to the right of the plaintiff to prove by oral evidence his contract of agency.

But it is contended that if the transactions of the agent cover sales of goods, then a written contract or a memorandum as required by article 1235 (4) of the Civil Code, or the Statute of Frauds, is required.

I must say, in the first place, that the relations of the parties are not those of vendor and purchaser, but those of principal and agent.

It is not alleged in the action that the plaintiff sold goods to the defendant, but that the plaintiff in

(1) [1900] A.C. 467.

(2) 24 L.C. Jur. 305.

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execution of his mandate bought and sold goods on behalf of the respondent. If the plaintiff can prove by witnesses that he was duly authorized or instructed by the defendant to purchase and sell oats, it seems to me that he has established all the facts which are necessary for the existence of their contractual relations. I do not see how it is possible to separate those relations.

The Statute of Frauds and the provisions of article 1235 (4) C.C. provide that in commercial matters no action can be maintained unless there is a writing signed by the defendant upon any *contract for the sale of goods*. It has reference to actions taken by the vendor against the purchaser, but it has no reference to instructions or mandate given by a person to purchase goods.

It is a well established rule of law that authority for an agent to sign a memorandum need not be given in writing. It may be given in any way in which an authority is conferred by law on an agent. It has been decided in England in the case of *Rochefoucald* v. *Boustead*(1), that an agent to whom land purchased on behalf of his principal has been conveyed will not be permitted to plead the statute against the principal for whom he is trustee and the latter may give parol evidence of the trust.

Applying that decision to the facts in this case, it shews that Schmidt could by parol evidence establish that those sales of goods were made on his behalf. If he can prove that himself by parol evidence, why should not the plaintiff have the same power?

I have given much consideration to the case of *Trenholme* v. *McLennan*(2), and especially to that part of the judgment where it is stated that

(1) [1897] 1 Ch. 196.

(2) 24 L.C. Jur. 305.

the plaintiff as a broker could by a written contract made out and evidenced by his own signature bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase and this he cannot make for himself as against the parties who instructed him to effect the purchase.

What are the instructions which the broker received and which he has proved? It was to buy and sell goods for the principal. That was the contract alleged; that was a contract proved, and I do not see how those instructions can be disjoined as it has been done in that case of *Trenholme* v. *McLennan*(1).

I may add that this question has also come up before the courts in the United States and they have invariably decided with one exception that oral evidence could be made of the mandate alleged by the broker. *Holden* v. *Starks*(2); *Bibb* v. *Allen*(3); *Wilson* v. *Mason*(4); Amer. & Eng. Encycl. of Law (2 ed.), p. 984.

The fact that the contract entered into by the parties is not enforceable under the Statute of Frauds because not in writing does not affect the right of the broker to recover for his services.

I am of opinion that this appeal should be allowed with costs of this court and the court below and that the plaintiff should be permitted to adduce verbal evidence of the alleged mandate and of its execution.

Appeal allowed with costs.

Solicitors for the appellants: *Smith, Markey, Skinner, Pugsley & Hyde.*

Solicitors for the respondent: *Elliot, David & Mailhiot.*

(1) 24 L.C. Jur. 305.
(2) 159 Mass. 503.
(3) 149 U.S.R. 481.
(4) 158 Ill. 304.