WILLIAM E. BEAMISH (DEFENDANT) ..... } APPELLANT;

AND

JAMES RICHARDSON & SONS, LIMITED (PLAINTIFFS) ..... } RESPONDENTS.

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*Feb. 13, 14.
*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Broker—Dealings "on 'Change"—Speculative options—Principal and agent—Liability for contracts by agent in his own name—Privity of contract — Purchases and sales on "margin" — Settlements through clearing house—Wagering contract—Malum prohibitum —Criminal Code, sec. 231.

B. entered into speculative transactions, on "margin," by instructing the plaintiffs, members of a "Grain Exchange" to buy and sell for him on the Exchange, from time to time, quantities of grain for future delivery in accordance with the rules, regulations and customs of the Exchange, and a number of purchases and sales were made on commission for him. He was not, however, informed of the names of any sellers or purchasers, the brokers carrying out the transactions in their own names. There was a "clearing house" association connected with the Grain Exchange of which the brokers dealing on the Exchange were members and through which all transactions were settled daily by setting off purchases against sales, liability for the same being assumed by the clearing house and the brokers released upon a settlement for the resulting balances instead of for every separate transaction reported. It was not proved that B. was aware of this practice as to settlements, although he, from time to time, had paid "margins" to the brokers when required to do so by them in order to protect them against losses on his account. B. became in arrears for "margins" and, in an action against him, the brokers recovered the amount of their claim.

Held, reversing the judgment appealed from (23 Man. R. 306), the Chief Justice and Duff J. dissenting, that, as the evidence failed to shew that, by the manner in which the transactions were made, the amounts claimed had been expended in carrying out

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

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the commissions according to the instructions the brokers had received from B., they were not entitled to recover the balance so claimed from him.

Held, further, *per* Idington and Brodeur JJ., and *semble per* Anglin J.—Where, in such transactions, neither party intends that there should be actual delivery made or received of the commodities to which the purchases or sales relate the contracts are illegal and prohibited by the terms of section 231 of the Criminal Code.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers C.J., at the trial, by which the plaintiffs' action was maintained with costs.

The circumstances of the case are stated in the judgments now reported.

W. A. T. Sweatman for the appellant.

Chrysler K.C. and *E. A. Cohen* for the respondents.

THE CHIEF JUSTICE (dissenting).—I would dismiss this appeal with costs.

IDINGTON J.—This is an action by an agent to recover from his principal moneys expended in his service.

The respondent as a commission merchant was instructed from time to time either to buy or sell, as directed, wheat and other grains on the Winnipeg Grain Exchange.

The ordinary agency in way of buying and selling anything does not give rise to implications out of which can arise claims for reclamations by the agent. Either the agent is directed merely to make the bargain as directed, to buy and pay for or sell, and there the matter rests.

(1) 23 Man. R. 306.

But, on change, there has arisen a practice of buying and selling of options and a custom of the agent advancing the needed cash, called margins, for the purpose of securing or of protecting the bargain and out of this peculiar form of agency often arise claims by way of reclamations.

The claim made herein is for a series of reclamations arising out of such mode of dealing. The parties are agreed, so far, that the law declares in such case that the agent has implied authority to act according to the usage and customs of the particular place, market or business in which he is employed, provided that no agent has implied authority to act in accordance with any usage or custom which is unreasonable unless the principal had notice of such usage or custom at the time when he conferred the authority.

Applying this to the facts, it is clear that as regards the several dealings in question, in which the respondent acted as agent, it expressly represented, time and again, that the dealing entered upon was as follows:—

> On all marginal business we reserve the right to close transactions when margins are running out, without further notice. All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange.

On these rules alone the bargains made would each have created a privity of contract between the appellant principal and some one else to whom he could have looked and to whom he would have been bound.

None of the transactions in question here were allowed to remain in that simple primitive condition which the observance of these rules and ancient well-known usages would have produced.

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A few years before these dealings the "Clearing House," known as "The Winnipeg Grain and Produce Clearing House," was incorporated. Any member of the voluntary association known as "The Winnipeg Grain Exchange," referred to in the above-quoted memo., could become a member of this Clearing House.

But all the members of the Grain Exchange were not members of the incorporated Clearing House. The latter had a peculiar set of by-laws which no doubt bound its own members to each other, but could not bind others unless expressly or impliedly assenting to be so bound.

I shall not enter into the details of the system for I find the learned counsel engaged in this case are very wide asunder not only as to the law, but the essential facts relative to the consequence of members of this Clearing House using its machinery and dealing through means thereof with bargains made between them on the "Exchange"; and I find the learned judges in the court below seem to be in as hopeless a sort of disagreement in same regard as counsel in the case; and, to crown all, counsel for respondent will not accept the evidence of its own manager as to the position in which the practice and dealings of its members are supposed to have brought their respective clients in relation to contracts on their behalf when dealt with by means of this Clearing House.

Indeed, we are invited to determine that matter by the construction of a few obscurely worded rules and, in doing so, to first determine that the meaning thereof is that which will best serve the purposes of respondent in this appeal, and next, under such circumstances, to find that appellant must be held bound

by reason of his knowledge, or duty to know of the existence of such a Clearing House and its uses, and the legal consequence of such use, as part of the usage and custom of the Grain Exchange on which he authorized respondent to deal for him.

There is not a word of evidence to shew appellant had ever heard of such an institution or knew anything of its uses and the consequences of such use.

His examination for discovery is put in, so far as serving respondent's purpose, and a perusal of it leads me to conclude that all his apparent knowledge of the Grain Exchange was at best shallow; and it by no means leads me to conclude that he ever got beyond very old-fashioned notions of the business he was engaged in when entering on the dealings now in question.

To impute to such a man knowledge of what his agent would be likely to do in regard to the Clearing House seems absurd.

And if the radical differences of opinion, amongst those likely to know about such a mode of doing business, which I have presented do not demonstrate how unreasonable it would be to bind an ignorant man to its adoption, I imagine I should fail if I attempted further elaborate demonstration.

The ordinary man cannot realize the existence of a contract without its continuation till ending in the ordinary way. It is contended that the twenty-four contracts involved herein each ended in some sort of novation by which the party with whom in each case appellant was brought into some contractual relation either as buyer or seller became discharged almost immediately after the contract had been framed.

And it is said the Clearing House corporation be-

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came substituted in and by such novation as either buyer or seller as suited the exigencies of the case.

That is the position taken by counsel for the respondent and it has some colour of support in one if not more of the opinion judgments in the court below.

But the respondent's manager who took part in these deals and was at the time of giving evidence herein president of this Clearing House Association, and I infer, from a reading of his evidence, was possessed of a clear head, says:—

Q.—In other words, two days later Bingham may have closed the transaction so far as he was concerned?

A.—Yes; of course, his position would be the same as ours. The purchase he made from another may have cancelled some deal he had outstanding, and he may have cleared on the Clearing House that day.

* * * * * * *

Q.—And the clients would look to you and no one else?

A.—Yes.

Q.—No one else would be responsible to the clients except you? You alone would be responsible to the clients?

A.—We are in every case. They can only look to us; they cannot look to the Clearing House.

The result would seem to be, as the man best fitted to know thus explains it, that there was by means of the ingenious and beneficent plan of the Clearing House a method whereby the commission agent and his clients could by due process of law form an apparently contractual relation between them, as basis for betting against the rise and fall of the market without the annoyance of being troubled by others, and the Clearing House be a good and safe place for recording the bet and, barring some occasional accidents, form a stakeholding security.

At least such is what the appellant charges and relies upon as his second line of defence resting upon

the section 231 of the Criminal Code, which, abbreviated, is as follows:—

> Every one is guilty of an indictable offence * * * who * * * (*a*) without the *bonâ fide* intention of acquiring any such * * * goods, * * * or of selling the same * * * makes * * * any contract * * * purporting to be for the sale or purchase * * * of any * * * goods * * * ; or, (*b*) makes * * * any contract * * * purporting to be for the sale or purchase of any such * * * goods * * * in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery."

The contention of respondent, either through its witness or counsel, as to the consequences of dealing through the machinery of the Clearing House, if correct, produces a situation that better lends itself to the operating of a system of betting or wagering than the old system of treating the contracts, as between the buyer and seller, as being kept on foot.

But the most significant fact bearing upon the essential question of whether or not these transactions were intended to be mere wagering transactions is that we have presented at least twenty-four transactions between the parties hereto in which alleged contracts of selling and buying are apparently involved yet not one of them resulted in the transfer and delivery of a single pound of goods of any kind.

Surely it is asking too much of us to believe that the sale and form of delivery in all these cases was made with the *bonâ fide* intention to make or receive such delivery as the law contemplates and that in such a mass of cases it so signally failed of fruition in a single instance.

There is, however, more than that curious and continuous unbroken chain of business dealings between these parties to be considered; for we find that the very first contract, in January, 1910, was one of a

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sale for delivery in the future of "May wheat" and long before the time for delivery had arrived, indeed, within a few days, another alleged contract is made for the purchase of exactly the same quantity of wheat, ostensibly bought for "May delivery," and these parties seem to have set the one off against the other and settled on that basis allowing a small item of profit as the result to the appellant.

An examination of other similar transactions and reckoning shews this process was gone through and a settlement arrived at, on the like basis and through the like methods, long before the respective times at which the future delivery ostensibly contemplated by the form of the transaction had arrived. Whether all were recorded in the Clearing House or not does not appear.

In some ancient temples we are told ceremonies were performed which no one but the initiated were supposed to behold or quite understand and outside that charmed circle the whole performance was treated with that respectful awe which is ever due to mystery.

In this modern temple probably some consecrated symbolical delivery takes place accompanied with appropriate ceremony. No ruthless hand has dared to lay bare before us exactly what form or symbol was substituted and accepted by the faithful as something they may call, and swear, to be delivery of that grain; in the clouds or four hundred miles away.

It never, in transactions such as presented herein, moves out of the warehouse or helps to propel the wheels of commerce. But the chips change sides and the bank accounts are expected to do the rest.

I assume the usual ceremony or form was gone through on twenty-four successive occasions. No one saw, or felt, or ever handled a pound of grain or flax in any single instance!

This was not, I imagine, all accidental, but a mere using of the forms of the law to promote an illegal purpose present to the minds of those concerned. And the methods used and consequences involved in the use of the machinery provided by the Clearing House and its system facilitated this mode of mere wagering.

I am not to be understood as alleging that the Clearing House and its system is used solely for that purpose and is not used for an honest and most beneficent purpose.

But, when asked to find that it was not used for such wagering purpose and could not be so used, I must say that to ask so much seems like trading on one's credulity, in face of the facts presented. As I read the statute it fits these facts.

It is idle to call a mere symbolical form, never intended to result in anything but a change in the bank ledger containing records of the gains and losses of those concerned, a delivery or evidence of intention to make or receive delivery.

There is a letter from appellant which opens the dealing in flax that is relied upon as lending colour to the abandonment of the vicious system pursued in the eighteen wheat deals which had preceded it.

If the flax sale had taken the form that it might have done or, by any reasonable interpretation of what transpired, have been attributed to a sale of flax grown or to be grown upon the farms in which appellant was interested, then I might have found some colour of reason for supposing the practices of a year's

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duration now spread out before us had been abandoned.

I can find nothing in the transaction to bear this out. I conclude that the appellant is entitled to succeed on both grounds taken and that the reasoning of the learned Chief Justice of Manitoba both upon the facts and the law and application of the authorities he relies upon is well founded and that I accept to cover the ground which I have not dwelt upon in detail.

I think the appeal must be allowed with costs.

DUFF J. (dissenting).—I think this appeal should be dismissed. My reasons for thinking that the plaintiff is chargeable in respect of the transactions upon which the action is based, are so fully and satisfactorily stated in the judgments of Mr. Justice Perdue and Mr. Justice Cameron that I should not have considered it necessary to do more than simply express my concurrence in those judgments, had it not been for the difference of opinion in this court. The first point for consideration arises out of the position taken by the appellant that the transactions in course of which the moneys were paid for which he had been held responsible in the courts below, were not within the scope of the respondents' employment. Reduced to its lowest terms the appellant's contention upon this head could, perhaps, be stated in this way: The respondents were instructed by the appellant as *brokers* to buy or sell grain; under such instructions the authority of the respondents was limited to making contracts of sale or purchase in a representative capacity for and on behalf of the appellant, or to put it more concretely — it was the respondents' duty, and their authority was limited by this duty, in executing the instructions of

the appellant, to constitute agreements of sale and purchase between the appellant as seller or buyer with a purchaser or seller, which contracts should be enforceable by the appellant as the respondents' principal, and in respect of which contracts, moreover, the rights of the appellant should not be affected by the state of the account between the respondents or their clients and the other party, or parties, to the transactions. The process by which these legal incidents are said to be ascribable to the respondents' employment is something like this: first, it is said — and perhaps I ought to say assumed — that *primâ facie* the respondents were employed as agents of the appellant to make contracts of sale or purchase for him as his representatives, and this is assumed to involve as a legal consequence the limitations upon the authority of the respondents above indicated in the absence of evidence proving the contrary which, it is argued, is not forthcoming in this case.

I think this is not the right road of approach for arriving at the nature of the employment of the respondents. I will discuss later the decisions of the courts upon which the appellant relies. In the meantime, for the purpose of stating my view as to the nature of the respondents' authority, I refer to a passage of the judgment of Parke, B., in *Foster* v. *Pearson* (1), at pages 858 and 859, which indicates, I think, the point of view from which the evidence bearing upon the question ought to be examined. In point of fact, the respondents, as the appellant knew, were grain merchants carrying on business at many places in Canada in buying and selling on their own account and also as commission merchants. They were also

(1) 1 C. M. & R. 849.

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commission merchants and members of the Winnipeg Grain Exchange and the appellant dealt with them as such. The commissions they undertook for the appellant were to buy or sell grain "on margin" in the Winnipeg Grain Exchange and they were, by the terms of the respondents' employment, to be executed according to the "rules, regulations and *customs*" of the Exchange. As regards the incidents of the respondents' employment in these circumstances, those observations of Baron Parke in the case above mentioned appear to me to be pertinent.

> The judgment in the case of *Haynes* v. *Foster*(1), is treated in the argument for the defendant as establishing that it is a sort of *legal incident* to the character of a bill broker that he is to pledge the bills of each customer separately; but we think that such is not the fair meaning of the judgment, but that it is to be taken in connection with the evidence, and that all that was intended was this, that, in the absence of evidence as to the nature of such an employment, a bill broker must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had, therefore, no right to mix bills together and pledge the mass for one entire sum. In truth, *a bill broker is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely upon the course of dealing.* It may differ in different parts of the country; it may have powers more or less extensive in one place than in another: what is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place.

Instead of beginning with certain presumptions founded upon legal decisions with reference to states of fact, more or less remotely similar to that disclosed by the evidence in this case, I shall try to ascertain what the facts in evidence have to say as to the nature of the transactions contemplated by the appellant's instructions to the respondents to make sales and purchases for his benefit "in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange."

(1) 2 C. & M. 237.

Connected with the Winnipeg Grain Exchange is an incorporated company, known as the Winnipeg Grain Exchange Clearing House Association, the members of which are necessarily members of the Grain Exchange. The function of the Clearing House Association is to "clear" transactions entered into between its members. Members of the Grain Exchange who are not members of the Clearing House Association were not entitled to avail themselves of the services of the latter. As to members of the Clearing House Association it is their duty to report any transactions entered into between any two of them, within three-quarters of an hour after closing on the date of the transaction. The transaction is examined by the manager of the Clearing House Association and, if accepted by him, the Association itself intervenes, assuming towards the seller the obligations of buyer and towards the buyer the obligations of seller. The single contract between two members becomes decomposed into two contracts, the Clearing House Association being a party to each, in one case being seller and in the other case being buyer. For the purposes of these two contracts the price is the closing price of the day, and if that differs from the price in the original contract, the difference is settled by payment in cash. This practice applies, of course, only to sales and purchases for future delivery. These contracts between the purchasing member, on the one hand, and the Association, and the buying member, on the other hand, and the Association, are, of course, subject to the rules of the Clearing House Association and there are two points as to the effect of these rules which are important; indeed, it is upon these two points that the defence and the appeal are based. The first of these is

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that the Clearing House Association treats the buying member, or the selling member as the case may be, as the principal and the only principal in the transaction. It is admitted by Mr. Ruttan, the general manager of the respondents, that according to the system in force the Clearing House Association is not bound to recognize any client of any member. The next point is: according to the regulations of the Clearing House Association a settlement takes place each day between each member and the Association, which settlement is effected in this way. At the close of any given day each member is credited by the Association with the aggregate amount of any advance in that day's closing price of commodities in respect of which the member is seller over the closing price of the previous day, or debited, as the case may be, with the amount in the aggregate of the decline, while with regard to commodities in respect to which he is a purchaser the process is reversed. The difference between the credits and debits is paid to the Clearing House Association by the member or to the member by the Clearing House Association, according to the state of the account. In order to secure payments of differences by members, the manager of the Association is entitled to call upon members from time to time for reasonable "margins" which are placed to the credit of the member. In the event of a member failing to pay differences, or to produce margins, when called upon to do so, authority is conferred upon the manager of the Association by the by-laws, in respect of transactions in which the member is a seller, to produce commodities sufficient to fulfil such contracts, and, in respect of contracts in which he is buyer, to sell the commodities to which he is entitled. That, it appears to me,

on careful reading of them, is the true construction of sections 3 and 4 of by-law 14.

The sum of the matter as affecting the respondents' transactions now in question is this: As regards sales a contract arose between the C.H.A. and the respondents by which the C.H.A. agreed to take delivery of a given number of bushels of grain at a certain future date and pay for them at the closing price of the date of the sale and to credit the respondents in the daily settlement with the decline in price (if any) for that day while the respondents undertake to deliver on the named date and to account in daily settlement for the rise in price (if any) for that day and to provide margins when called upon. When the date for delivery arrives, the respondents are bound to deliver the commodity contracted for unless they have it at the Clearing House, *i.e.,* unless they have contracts entitling them to receive an equal amount from the Clearing House.

The incidents of a purchase are the same *mutatis mutandis*. As for the appellant (assuming the respondents are right) he had no right to enforce these contracts as against the Clearing House Association by which he would not be recognized; but, as between him and the respondents, he was entitled to have them carry out any transactions entered into for him so long as he furnished the required "margins" and to have the benefit of all profits arising from such transactions.

All contracts for delivery of commodities within the scope of the business of the Grain Exchange made between two members of the Grain Exchange who are also members of the Clearing House Association, being necessarily subject to the rules of the Clearing

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House Association, have the incidents, and the rights of the parties to them are held subject to the conditions just indicated.

It follows, of course, that any contract for sale or purchase of commodities for future delivery made by a commission merchant who is a member of the Clearing House Association with another member of the Clearing House Association, in execution of a commission to buy or sell such commodities, is necessarily affected by the same incidents. The question is whether transactions having such incidents are within the class of transactions contemplated by the appellant's instructions to the respondents.

For more than five years before the first of the transactions in question the appellant had been dealing in options on the grain exchange. That he was familiar with the practice of depositing margins is shewn by the correspondence. He was also familiar with the practice of "closing out" one transaction by entering into another; by off-setting a sale with a purchase and taking the profits. It seems reasonable to conclude from the whole correspondence touching these matters that the appellant knew perfectly well that when a sale was made for his benefit the purchaser was not looking to him as principal. It seems reasonably clear that he never entertained any idea of assuming any obligation to anybody but the respondents.

But it is not necessary to go so far as that. The appellant knew there was some system in operation among the members of the Exchange by which profits could be made through speculating in sales and purchases for future delivery; and it was this system he wished to take advantage of.

He desired and expected the benefit of all the advantages the respondents could offer their clients; he expected doubtless to have them act as they would act for themselves. If anybody had conceived the impracticable idea that, in executing his commissions they should buy only from persons who were not members of the Clearing House Association or sell only to such persons I think it is fair to assume he would have been the first to protest. Yet that would be the necessary effect of the appellant's construction by reason of the rigorous rule requiring all transactions between members of the Clearing House Association to be reported to the Association.

On a fair interpretation the stipulation that "all purchases and sales" are "made in accordance with and subject to the" * * * "customs of the Winnipeg Grain Exchange" seems to authorize these transactions. It would assuredly not be "in accordance with" the "customs" of the Exchange for a member of the Clearing House Association, in executing commissions for a client, to confine himself in his dealings with persons not members of the Association; nor would it be "in accordance with" those customs for members of the Association to fail to report their transactions to the Association and the requirement that a transaction between two members of the Association should be "made * * * subject" to the "customs" of the Exchange would seem to import that a practice not only obligatory, but universally observed as regards such transactions should be followed.

But it is said that there is a series of decisions which oblige us to hold that the duty of the respondents was to establish privity of contract between the appellant and somebody else in each one of these trans-

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actions. I think that is a proposition which cannot be sustained. Lord Blackburn in his judgment in *Robinson* v. *Mollett*(1), pointed out that where a merchant instructs an agent in a foreign country to enter into a contract for him, the rule founded upon the presumed intention of the parties in the circumstances is that the agent contracts as principal and not as representative. In *Clarke* v. *Bailie*(2), I called attention to the fact that in the State of Massachusetts (see *Chase* v. *City of Boston*(3)) stockbrokers engaged in buying on margins for their clients are deemed to buy on their own account entering at the same time into an executory agreement to sell to the client on demand at the market price. That seems also the legal effect of transactions on the London Stock Exchange known as "contango" transactions which constitute, apparently, a very large proportion indeed of the transactions on the Exchange. There is nothing startling or inherently improbable in the idea of a person buying and selling on margin speculation, that is to say, by the aid of the credit of a broker or a commission merchant who lends his credit for a commission, agreeing with the broker or the commission merchant that in the transactions in which he expects to make his profits the commission merchant shall act as principal while at the same time the client or customer shall be entitled to the profit derived from the transaction.

Robinson v. *Mollett*(1), and cases following it, are the authorities chiefly relied upon. But, the principle of those cases appears to have no application to the circumstances now under consideration. The plaintiff there relied upon an implied term of his employment

(1) L.R. 7 H.L. 802. (2) 45 Can. S.C.R. 50.
(3) 180 Mass. 458.

founded upon a custom of his trade. It was held that a custom which, on being imported, would have the effect of altering the essential character of the employment could not be implied by law. It was not held that the plaintiff must fail if the contract of employment had expressly or by necessary implication provided that the employment was to be subject to a specified custom or the custom of the trade, whatever it might be, or if the circumstances shewed such to be the intention. Lord Blackburn, page 810, then Blackburn J.(1), uses these words:—

> Had the order in the present case expressed that it was to buy according to the custom of the tallow market, there can, I think, be no question that the custom would have been incorporated, and that all that the plaintiffs did would have been in strict conformity with the authority given.

Lord Blackburn had been in the same case in the Exchequer Chamber and on the question which presented itself for decision (namely, whether in the absence of any reference to the custom in the written order on which the plaintiff acted, the custom was to be incorporated), he had differed from other very able judges, including Mr. Justice Willes, and I do not think he would have used the language quoted above if he had supposed they entertained a different opinion upon the point he is there dealing with.

The next question arises on the second branch of the defence, namely, whether these dealings were illegal. Section 231 of Criminal Code, R.S.C., ch. 146, declares:—

> 231. Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company, or

(1) *Robinson* v. *Mollett* (L.R. 7 H.L. 802).

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undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise,—

(*a*) without the *bonâ fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or

(*b*) makes or signs, or authorizes to be made or signed, any contract or agreement oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery,

2. It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the articles sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

This enactment first appeared in 1888, 51 Vict., ch. 42. The preamble to the Act shews that the legislature had in view the suppression of "bucket shops." A "bucket shop" has been held to be a place where bets are made as to the rise or fall of commodities under the guise of fictitious sales and purchases. See *Pearson* v. *Carpenter*(1). Now it cannot be contended that the sales and purchases entered into by the respondents for the account of the appellant were fictitious. In each case there was an actual contract. It is quite true that in each of these cases the contract, on being reported to the Clearing House Association and accepted by the manager, became pursuant to the rules of the Association transformed into two contracts in the manner already described, but these two contracts were legally binding contracts which either party could be called upon at the proper time to fulfil and which in the ordinary course would be fulfilled either by the delivery of the commodity sold and the

(1) 35 Can. S.C.R. 380, at p. 382.

payment of the purchase price actually or by setting off the performance of one contract against the performance of another between the same parties relating to the same commodity deliverable at the same time.

The evidence shews that the Winnipeg Grain Exchange and the Winnipeg Clearing House are not mere conveniences for speculation. All transactions for future delivery, in fact, take place through the Grain Exchange and the vast majority apparently through the instrumentality of the Clearing House Association. When the commission merchant buys or sells for future delivery on the exchange and the transaction takes place between two members of the Clearing House Association, the commission merchant enters into a contract which he knows he will be obliged to carry out either by payment or delivery actually or by set-off of payments against the exigible obligations under some other real contract which has been accepted by the manager of the Clearing House Association. I think the following observations of Mr. Justice Holmes in *Board of Trade of Chicago* v. *Christie Grain and Stock Co.*(1), at page 247, are pertinent:—

> As has appeared, the plaintiff's Chamber of Commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market, contracts are not confined to sales for immediate delivery. People will endeavour to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have

(1) 198 U.S.R. 236.

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recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange: *Clews* v. *Jamieson*(1).

When the Chicago Board of Trade was incorporated, we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the state of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time, and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then, as now, a settlement would be made by the payment of differences, after the analogy of a Clearing House. This naturally would take place no less that the contracts were made in good faith for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small.

The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence, that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired.

(1) 182 U.S.R. 461.

In point of fact, the particular transactions entered into in this case were transactions with milling companies or other exporters and, as regards the sales, the evidence of the respondents' manager is that in every case the warehouse receipts were actually delivered.

The argument most strongly pressed upon us under this head was that the appellant had no *bonâ fide* intention of acquiring any commodity or selling any commodity or of making or receiving delivery of any commodity. What I have already said as to the intention of the appellant furnishes, I apprehend, the answer to this argument. The appellant's intention was to "speculate in futures" but to do so by means of sales and purchases of commodities for future delivery by the respondents "in accordance and subject to the rules, regulations and customs of the Winnipeg Grain Exchange." The contracts authorized were to be contracts in accordance with those rules, regulations and customs. As the authority was in fact executed the contracts entered into were contracts to which the appellant was not a party. They were not contracts which in any way professed to be purchases or sales by him, or to give him the right to demand delivery, or to insist upon delivery being taken. But they were contracts in every case, as I have already pointed out, which bound the respondents as principals in a contract of sale or purchase to make or receive delivery as the case might be; and there is no support in the evidence — indeed, the evidence is entirely against it — for the proposition that the respondents in entering into these contracts had no intention of acquiring commodities or selling commodities or to make or receive delivery.

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ANGLIN J.—The facts of this case are fully stated in the judgment of the learned Chief Justice of Manitoba.

The plaintiffs sue to recover moneys expended by them in alleged discharge of their employment as brokers of the defendant. It is essential to their right to recover that they should prove that this expenditure was incurred in carrying out the commission entrusted to them. Either failure on their part to establish that, or proof that the undertaking was itself illegal, is fatal to their right to recover.

Their commission was to procure persons to enter into binding contracts to buy grain from the defendant. It is admitted that, although they made contracts with other brokers for the sale of grain in the quantities stipulated, these contracts were all subject to the rules of the Clearing House Association — an adjunct of the Winnipeg Grain Exchange. It is conclusively established by the evidence that, as the result of what the plaintiffs did in professed fulfilment of the defendant's commission, he did not, and it was intended that he should not, obtain any contract whereby any other person became and remained bound to him as a purchaser of the grain which he instructed the plaintiffs to sell on his account. By the system of the Clearing House his purchasers and their brokers were discharged, on the respective days on which the several contracts were made, from any obligations under them to accept delivery from, and make payment to, the defendant. That obligation was assumed by the Clearing House and was in turn set off by it against other obligations of the plaintiffs to the Clearing House. The adjustment of accounts between the

plaintiffs and the Clearing House would afford a complete answer to any claim which the defendant might attempt to prefer against the Clearing House. In fact, as the net result of what occurred, the personal responsibility and solvency of the plaintiffs was the only security which the defendant had that, at the maturity of the contract he had employed them to make for him, purchasers would be available to take his grain and pay him the sale prices. Nobody else was under any contractual obligation to do so. Such an outcome is something so radically and essentially different from what is contemplated by the instructions ordinarily given to a broker to buy or sell stocks or commodities that it could be taken to be a performance of the broker's undertaking only upon the clearest proof that the principal knew of the rules which operated to produce it, and therefore contemplated the adoption of this method of carrying out his mandate. That the evidence does not establish. The present case, in my opinion, falls within the principle of the authorities cited and relied upon by the learned Chief Justice of Manitoba, in whose conclusions on this branch of the appeal I respectfully concur.

While I do not rest my judgment on the ground of illegality, because in the view I take on the other question it becomes unnecessary that I should do so, I incline to think the evidence discloses that neither the plaintiffs nor the defendant at any time contemplated that delivery of the grain sold should be made or taken under the agreements purporting to be contracts for the sale of such grain which the defendant authorized and the plaintiffs made. The intent always was to meet the obligation to deliver by an off-set of a contract to purchase a like quantity of grain — to

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adjust the differences between the selling and the buying prices and by thus dealing in such differences to make gain or profit by an anticipated fall in the price of the merchandise. Such transactions are within the literal terms of section 231 of the Criminal Code, and, I believe, are also within the mischief against which it was directed. The difference in morals between thus dealing in differences and speculative transactions in which there is an actual purchase accompanied by present or future receipt and a subsequent sale accompanied by delivery, the intent being to make profit by the rise in price of the commodity so dealt in, may not be very clear; but Parliament in its wisdom has deemed it proper to make this distinction, with the result that a transaction of the former class is, while one of the latter is not, *malum prohibitum*.

For these reasons I would allow this appeal and would dismiss the plaintiffs' action.

BRODEUR J.—I concur in the opinion of my brother Idington.

Appeal allowed with costs.

Solicitors for the appellant: *Richards, Sweatman, Kemp & Fillmore.*

Solicitors for the respondents: *Critchton, McClure & Larmonth.*