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*Feb 26.
*May 4.

HARRY BUTLER (DEFENDANT).....APPELLANT;

AND

G. B. MURPHY AND S. T. SMITH, CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF G. B. MURPHY & CO. (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Principal and agent—Broker selling on Grain Exchange—Contract in broker's name—Liability of principal—"Futures"—"Options"—"Margins"—Board rules—Indemnity.

On 14th August, 1907, the defendant, who resided in the State of Nebraska, wrote the following letter to the plaintiffs, grain dealers at Winnipeg, Man.: "Yours of recent date enclosing market report rec'd. I shall be North in about four weeks to look after the new crop and, if you can sell No. 2 oats for 37c. or better, in store Fort William, you had better sell 4,000 bus. for me, and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then." The plaintiffs, who were also brokers on the Winnipeg Grain Exchange, sold the oats at 38½ cents on the "Board," without disclosing the name of their principal, for October delivery, becoming personally liable for the performance of the contract according to the rules of the Exchange. Upon defendant refusing to deliver the oats, the plaintiffs purchased the quantity of oats so sold at an advance in price in order to make the delivery and brought the action to recover the amount of their loss thus sustained.

Held, reversing the judgment appealed from (18 Man. R. 111), that the authority so given did not authorize the plaintiffs to make a sale under the Grain Exchange Rules binding upon their principal; that no contract binding on the principal outside of these rules had been entered into, and, consequently, that he was not liable to indemnify them for any loss sustained by reason of their contract.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment at the trial, by Macdonald J. and maintaining the plaintiffs' action with costs.

The circumstances of the case are stated in the head-note and in the judgments now reported.

Haydon for the appellant. The judgment appealed from is erroneous in holding, in effect, that the rules of the "Exchange" were incorporated in and became part of the authority to sell and that appellant is liable to indemnify plaintiffs against any loss incurred by them as a consequence of selling in the manner in which they did; that the appellant was a foreign principal and his agents had, therefore, authority to sell in their own name and, having done so, appellant should indemnify them against loss; that instructions by a non-member to a member of a Grain Exchange authorizes the member to contract in his own name regardless of whether the non-member knows that the member belongs to an Exchange or of whether the non-member instructs him to deal or knows that he will deal on that market; that the respondents had authority to contract in their own names; and that privity of contract was established between the buyer and the appellant, still calling appellant a foreign principal.

The respondents were only agents to establish privity of contract between the appellant and a third party and were not authorized or justified in assuming any liability whatever. The custom or rule of the Grain Exchange whereby the "clearing house" became principals with its members was unreasonable and of

(1) 18 Man. R. 111.

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no effect as far as the appellant was concerned. The evidence shews that the liability, if any, assumed by respondents was a liability to the "clearing house" and not to the purchaser of the oats and that that liability was not one of any particular trade, but rather a balancing on each day's transaction. The appellant should not be held to have contemplated as part of the authority to sell grain for him an agreement to indemnify respondents against any such liability.

In the absence of specific instructions to the contrary an agent to sell has only authority to establish privity of contract between his principal as vendor and some third person as purchaser. *Robinson* v. *Mollett*(1). There were no instructions to sell on a particular market, the appellant did not know that the respondents were members of the Exchange or that it existed, he was never informed of the alleged custom, and knew nothing of "margins" or "options." *North-West Transportation Co.* v. *McKenzie*(2); *Northern Elevator Co.* v. *Lake Huron & Manitoba Milling Co.* (3); *Kirchner* v. *Venus*(4), at page 399.

The respondent, Smith, admitted that he did not attempt to sell the grain to any one other than a member of the Exchange, but would not say that he could not have disposed of it elsewhere. He admitted that he might have sold direct to a consumer in which case he would not have incurred any personal responsibility. Even assuming a custom to be incorporated in a contract it can only control the mode of performance, it cannot change its intrinsic character. *Mollett*

(1) L.R. 7 H.L. 802.
(2) 25 Can. S.C.R. 38.
(3) 13 Ont. L.R. 349.
(4) 12 Moo. P.C. 361.

v. *Robinson*(1), at page 656, *per* Willes J. No custom, and certainly not one that is unreasonable, is binding upon a person merely because he instructs a broker on the Stock Exchange to enter into a transaction with him. *Benjamin* v. *Barnett*(2). The principal is not fixed with loss suffered by agents, members of a stock exchange, unless it is found that the contract contemplated that the business would be under and according to the rules of that exchange, or that the rules thereof were incorporated into the contract of employment. *Bibb* v. *Allen*(3); *Irwin* v. *Williar*(4); *Risdon Iron and Locomotive Works* v. *Furness*(5); *Halbronn* v. *International Horse Agency and Exchange*(6); *Robinson* v. *Mollett* (7), at pp. 837 and 838; *Hartas* v. *Ribbons*(8); *Chapman* v. *Shepherd*(9), at p. 237; *Van Dusen-Harrington Co.* v. *Morton*(10); *Duncan* v. *Hill*(11).

Nothing more unreasonable than the alleged custom could be imagined. On the contrary the appellant would expect to enter into a contract where he sold direct and was not asked for margins.

As to the contention that the appellant was a foreign principal and the presumption being that the appellant did not give the respondents authority to pledge his credit, even if this be so, and if in such circumstances the agents might contract in their own names, they had no power to make a contract with an outsider—such as the clearing house. The authority of the agent, in such circumstances, is one of fact, and

(1) L.R. 5 C.P. 646.
(2) 19 Times L.R. 564.
(3) 149 U.S.R. 481.
(4) 110 U.S.R. 499.
(5) [1906] 1 K.B. 49.
(6) [1903] 1 K.B. 270.
(7) L.R. 7 H.L. 802.
(8) L.R. 22 Q.B.D. 254.
(9) L.R. 2 C.P. 228.
(10) 15 Man. R. 222.
(11) L.R. 8 Ex. 242.

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there is no finding by the trial judge on the point, nor could such a finding have been reached, on the evidence. *Webb* v. *Sharman*(1).

The appellant was a home producer, a farmer with land in Manitoba and the grain proposed to be sold was growing on that farm. The plaintiffs were aware of this, and in the preceding years they had themselves bought the crop from off this same farm. They did not treat him as a foreign principal, but simply continued their business relations, the only difference being that, on former occasions, they had bought direct from him instead of acting as his agents to sell. It is clear that they had authority to contract in defendant's name. He was selling the actual grain and he expected, and had a right to expect, that he would receive a contract with some third party to whom the sale was made.

The presumption that an agent has no authority to pledge the credit of a foreign principal only applies between merchants. It does not apply to a single transaction where the foreigner is a farmer. *Hutton* v. *Bullock*(2), *per* Brett J. at page 576; *Kaltenbach, Fischer & Co.* v. *Lewis & Peat*(3).

The rule as to a foreign principal not being liable to be sued or to sue upon a contract made on his behalf by a home agent and preventing the agent from pledging the credit of the foreign principal is based upon convenience, as the other party to the contract should not be expected to investigate the financial standing of or give credit to a foreign principal; *Armstrong* v. *Stokes*(4); *Ireland* v. *Livingston*(5), at page 408; *Elbinger Actien-Gesellschaft* v. *Claye*(6). The effect

(1) 34 U.C.Q.B. 410.
(2) L.R. 9 Q.B. 572.
(3) 10 App. Cas. 617.
(4) L.R. 7 Q.B. 598.
(5) L.R. 5 H.L. 395.
(6) L.R. 8 Q.B. 313.

of *Kaltenbach, Fischer & Co.* v. *Lewis & Peat*(1), is misconceived by Perdue J. A foreigner cannot intervene and claim his rights as an undisclosed principal for all purposes.

The respondents contend that the appellant through his silence and on account of not answering the respondents' telegrams or letters acquiesced in what the respondents had done. The obvious answer is that before notifying the appellant they had already exceeded their authority and all the mischief had been done, they had placed themselves into a position from which they could not recede. *Conmee* v. *Securities Holding Co.*(2). Silence with respect to transactions already past, cannot be held to alter the character of the authority conferred on the agents.

Ewart K.C. and *Noble* for the respondents. It is quite evident that the real reason of the appellant's default in delivering the oats was the unforeseen rise in the price. If the market price had fallen the appellant would have delivered the oats and got 38½ cents per bushel. There would have been no objection then to the sale the respondents had made for him or to the fact that it was made in their own name on his account. The defences raised in his pleading shew that the contention he is now relying upon was not present to his mind when he deliberately defaulted or for long after. All the contentions raised by his statement of defence he either failed to support at the trial or did not attempt to support.

The construction, which the respondents put upon the appellant's instructions, that they were to sell 4,000 bushels of oats for the appellant for future de-

(1) 10 App. Cas. 627. (2) 38 Can. S.C.R. 601.

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livery in the ordinary and customary way in vogue at the place where the sale was to be made is reasonable. If he intended some other construction to be put on this letter he should have made it plain. If he intended his agents to adopt an unusual, and in this case no doubt impossible, way of selling the oats he should have specified this mode of selling in his letter of instructions. Where the authority conferred on an agent is fairly capable of more than one construction, every act done by him in good faith which is warranted by any one of those constructions is deemed to have been duly authorized though the construction adopted and acted on by him was not the one intended by the principal: *Boden* v. *French*(1); *Ireland* v. *Livingston*(2); Bowstead on Agency (3 ed.) 66. The respondents, therefore, having adopted the most reasonable construction and the only reasonable construction under the circumstances, and having carried them out in good faith and having notified their principal, he should not have stood by for over two months without raising any objection. He should be taken as having acquiesced in and ratified what the agents did. Story on Agency, 302; Evans on Principal and Agent, 110.

The appellant contends that he intended his instructions to be taken to mean that the respondents were to have found some purchaser for these oats who would have been willing to look to the credit of a foreign principal for the delivery of the oats and that an agreement to that effect should have been drawn up in which the principals only and not the agents were to be bound. This would have been obviously impossible and unreasonable from any practical point

(1) 10 C.B. 886. (2) L.R. 5 H.L. 395.

of view and it is hardly possible that any grain broker or any grain producer who had for years been dealing with grain brokers would have ever contemplated such a thing. A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which such brokers are governed. *Sutton* v. *Tatham*(1); *Bayliffe* v. *Butterworth*(2); *Pollock* v. *Stables*(3); Dos Passos on Stock Brokers, 424.

The distinction of *Robinson* v. *Mollett*(4) is quite apparent because, in the present case, the contract effected is in strict compliance with the written authority, and the custom of grain brokers contracting in their own names on sales for future delivery, especially when their principals are foreigners, residing in a foreign country, is, to say the least, reasonable.

The appellant being a foreigner, resident in a foreign country, the presumption is against the right of the agents to bind him unless expressly authorized. *Armstrong* v. *Stokes*(5); *Elbinger Actien-Gesellschaft* v. *Claye*(6); *Hutton* v. *Bulloch*(7).

The appellant was, under the contract, in the same position as if it had been made in his own name. His rights would have been the same. He could have sued the buyer either in his own name or in that of the respondents. *Anderson & Co.* v. *Beard*(8); *Levitt* v. *Hamblet*(9); *Ponsolle* v. *Webber*(10); *Scott & Horton*

(1) 10 A. & E. 27, at p. 30.
(2) 1 Ex. 425.
(3) 12 Q.B. 765.
(4) L.R. 7 H.L. 802.
(5) L.R. 7 Q.B. 598.
(6) L.R. 8 Q.B. 313.
(7) L.R. 8 Q.B. 331; 9 Q.B. 572.
(8) [1900] 2 Q.B. 260.
(9) [1901] 2 K.B. 53, at p. 62.
(10) [1908] 1 Ch. 254.

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v. *Godfrey*(1); *Nickalls* v. *Merry*(2); *Browning* v. *Provincial Ins. Co.*(3); *Bell* v. *Plumbly*(4); *Kaltenbach, Fischer & Co.* v. *Lewis & Peat*(5).

The respondents have a right to be indemnified by the appellant against liabilities incurred in executing his orders. *Thacker* v. *Hardy*(6), at p. 687; *Bayley* v. *Wilkins*(7); Bowstead on Agency (3 ed.), pp. 202-210, and cases there collected.

THE CHIEF JUSTICE.—In my opinion this appeal should be allowed with costs for the reasons given in the court below.

GIROUARD J.—I concur in the judgment allowing the appeal with costs.

DAVIES J.—The right to maintain this action seems to me to depend entirely upon the answer to the question whether or not the rules and regulations of the Winnipeg Corn Exchange can be held applicable as against the defendant to the contract of sale of 4,000 bushels of oats alleged by the plaintiffs to have been sold by them as his brokers to Pearson, and which oats defendant failed to deliver. Both Murphy and Pearson were members of this Corn Exchange and there does not seem to be evidence to justify any holding that the sale was not as between them binding under these rules.

It seems equally plain to me that, apart from these rules and regulations, no binding or enforceable con-

(1) [1901] 2 K.B. 726, at p. 738.
(2) L.R. 7 H.L. 530, at p. 547.
(3) L.R. 5 C.P. 263, at p. 272.
(4) 16 Times L.R. 393.
(5) 10 App. Cas. 617.
(6) 4 Q.B.D. 685.
(7) 7 C.B. 886.

tract was made by the plaintiffs as defendant's brokers with respect to this sale.

The trial judge dismissed the action as I gather upon this ground. The Court of Appeal, proceeding mainly upon the ground that these rules and regulations were binding upon the defendant, reversed that judgment and awarded plaintiffs damages equal to the loss he had sustained by reason of defendant's refusal to carry out the contract alleged to have been made on his behalf by the plaintiffs.

Assuming the law to be that these rules and regulations were binding upon the defendant, *quoad* this transaction, I see no reason to doubt that the conclusions of the Court of Appeal were correct and that the broker could recover against his client for indemnity in respect of the grain sold for the client in a way sanctioned by the rules and usages of the grain exchange.

I am not able, however, to see upon what ground these rules can be held applicable to the contract as far as defendant is concerned. He was a farmer, living at the time he gave plaintiffs the authority to sell his oats, in Nebraska but carrying on farming also in Manitoba at a place called Snowflake.

The evidence is clear and uncontradicted that defendant did not know Murphy & Co. in any other character than as dealers in grain. As such he had on several different occasions sold them his surplus grain. The sales were *bonâ fide* sales and had nothing to do with "futures," "options," or "margins." Defendant swears that his

only knowledge of the plaintiffs was that they were grain merchants in Winnipeg buying and selling grain at one cent per bushel. That he supposed they were independent grain merchants and that they

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never informed him they were in any way connected with the Grain Exchange.

There was no evidence in any way contradicting these statements and the previous dealings between the parties tend to confirm them. Defendant swears that "he did not know what a 'margin' or an 'option' was"; that he never did anything except sell his grain, and that the reason why he did not reply to the letters and telegrams the plaintiffs wrote to him asking him to put up margins, etc., was that he "felt that they were trying to ring him into an option deal."

Defendant's authority to plaintiffs to sell reads as follows:

BELLWOOD, NEB., August 14, 1907.

G. B. MURPHY,

Dear Sir,—Yours of recent date enclosing market report rec'd. I shall be North in about four weeks to look after the new crop, and if you can sell No. 2 oats for 37c. or better, in store Fort William, you had better sell 4,000 bus. for me, and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then.

Yours truly,

(Sgd.) HARRY BUTLER.

There is some ambiguity about the time of delivery and, in consequence of that, I think that when plaintiffs replied they had sold his oats per slip inclosed for *October delivery,* he was in duty bound, had the slip been enclosed, to have promptly repudiated the construction put upon his letter of a delivery in October if that did not express his intention.

But, as a fact, defendant says, and he is confirmed by his wife, that no such slip was enclosed and that he had no knowledge who the purchaser was and expected further letters giving him the information. The evidence respecting the enclosure of this slip having been in accordance with mercantile custom is

defective and insufficient, and my conclusion is that defendant did not receive it.

As a fact, the further letters and telegrams were demands upon him for $300 and $400 to be put up in margins, and he then concluded as he says that his agents were trying to "ring him into an option deal" and ignored their communications.

As I find the rules and usages of the Grain Exchange were not, under the circumstances of this case, binding on the defendant or applicable to the authority he gave the plaintiffs to sell, the only remaining question is whether or not, apart from these rules and usages, there was any contract for sale of defendant's oats made by his agents, the plaintiffs, which bound defendant.

This question is largely one of the intention of all the parties to be gathered or inferred from the facts and circumstances. As I have said I do not think the rules of the Exchange applied or were ever intended by defendant to apply.

The specific thing the plaintiffs had authority to do was to make a contract for the sale of defendant's oats.

They clearly had no authority to sell to themselves. The contract of sale they were authorized to make was one in which the defendant was to be one party and a person or firm found by the plaintiffs the other. The making of such a contract was, therefore, as said by Brett J. in his answer to the question put to the judges by the House of Lords in *Robinson* v. *Mollett*(1), at page 820:

The very essence of their contract with the defendant which is a contract of employment.

(1) L.R. 7 H.L. 802.

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This case of *Robinson* v. *Mollett*(1) does not determine the point in question here, but the reasoning on which the conclusions there reached is based is alike instructive and controlling.

I think, in the view I take of the facts of this case, the language of Blackburn J., approved by the Lord Chancellor in delivering the judgment of the House of Lords in *Robinson* v. *Mollett*(1), at page 837, very applicable to this appeal

> that the respondent's mode of executing the appellant's orders was a departure from the ordinary duty of a broker, that duty requiring the broker to establsh privity of contract between the two principals.

It is another mode of expressing what Brett J., said in the quotation I have above given from his opinion.

For the reasons, therefore, that the rules and usages of the Stock Exchange must be eliminated from our consideration in determining the defendant's liability and that the very essence of the contract of employment made between the parties required the broker to establish privity of contract between the two principals and that the contract alleged to have been made was one which though binding between the two brokers under the Stock Exchange rules was not binding upon or enforceable by the defendant, I think this appeal should be allowed and the judgment of the trial judge dismissing the action restored with costs in all courts.

IDINGTON J.—The appellant was a farmer whose home was in Nebraska at the time of the happenings that gave rise to this action, but had been in Manitoba for some years before then where he owned and farmed land, latterly worked on shares.

In doing so he had known respondents as grain-

(1) L.R. 7 H.L. 802.

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merchants and sold them part of his crops for three or four years in succession and, being minded to do so again with his crop of 1907, wrote them on the 2nd of August of that year asking the best price for a certain quality of oats "on track at Snowflake" (which was a Canadian Pacific Railway station near his Manitoba farm), "or store Winnipeg, or Fort William" and to have daily market list sent to him for the next thirty days. He added he should have a fair crop at Snowflake.

The following correspondence ensued:

BELLWOOD, NEB., August 14, 1907.

G. B. MURPHY,

Dear Sir,—Yours of recent date enclosing market report rec'd. *I shall be North in about four weeks to look after the new crop and if you can sell No. 2 oats for 37c. or better, in store Fort William, you had better sell* 4,000 *bus. for me,* and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then.

Yours truly,
HARRY BUTLER.

WINNIPEG, Aug. 20th, 1907.

H. BUTLER, ESQ.,
Bellwood, Nebraska.

Dear Sir,—Received your favour 14th yesterday and sold 4,000 bus. October oats for you as per slip enclosed, which we hope you will find correct. Will be glad to have the handling of your car old oats as soon as you are able to get it shipped out. If you will notice we sold this 4,000 bus. for October delivery, which we presume is what you require.

Will be glad to hear from you again at any time.

Yours truly,
G. B. MURPHY & Co.,
W. Scott,
Pro manager.

The appellant denies that he ever received slip referred to, and it is not proven that any such slip was ever put in the letter. The person whose duty it would

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have been to enclose the slip and mail the letter was not called. No explanation is offered for this.

I know of no case where such omission in a chain of proof was ever accepted as proof to found a claim upon.

The appellant says he expected the letter would be followed by a contract binding the purchaser to him and for him to sign binding himself to the purchaser.

Instead, the next thing was a telegram from the respondents dated the 7th of Sept., 1907, asking him as follows:

> Please wire three hundred dollars margins on oats to our credit Bank Hamilton.

The conflict as to another letter concerns no one now, save as to the suspicions the incident suggests, but with which I submit we have nothing to do here.

We have to take the two letters copied above and the telegram of the 7th September and see if it is possible to found on them any obligation on the part of the appellant which would support such a judgment as the Court of Appeal has entered for $985 and reversing the trial judge's dismissal of the action.

The conduct of the appellant has been severely criticized, but boorish or stupid or dishonest conduct does not merely because of its quality found a contract.

We are told these respondents are brokers and hence flows much in law.

They are as one of them describes them "grain merchants." They were not addressed as brokers or commission agents though the latter is what their solicitor calls them in his statement of claim.

The appellant knew them only as the buyers of his grain.

Mr. Smith says frankly in his evidence that such is

the quality of the business they had done with each other and that he never knew the appellant in a margin transaction before. Nor do they offer any excuse for supposing he meant this deal to be something of a different kind from that of marketing his farm produce.

The letter of the appellant does not warrant the wide inferences of fact drawn therefrom to found thereon any application of the authorities cited for what may be undoubted law.

The letter tells them that the appellant in four weeks from the 14th August will go to Snowflake and be there looking after loading of oats and will send the old oats then. And forthwith they rush on to change next day and sell according to terms implied as binding those trading on that grain exchange, 4,000 bushels of oats for October delivery.

The letter does not say October, but indicates a time in September and, as a fact, the oats were stored in grain elevator between the 3rd and the 6th of October.

The Chief Justice of Manitoba erroneously, I submit with great respect, founds his judgment on supposed instructions to sell for October delivery given to a broker with whom the appellant had former dealings.

The facts and the letter do not warrant these assumptions, or any of them and yet each and all are needed to support the holding of the court below.

The appellant denied that he ever dealt in buying or selling any grain on the Grain Exchange or that he knew the respondents or any of them were members of the Exchange or that in any way he was expected to have bound himself to abide by the rules thereof and

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there is not a word to contradict him. And whatever may be said of his failure, from stupidity or want of sense of propriety, to reply to the numerous letters and telegrams the conduct of the respondents pouring out telegrams and letters unnoticed and without stopping to investigate the reason for no reply seems ridiculous.

The man might, for aught they knew, have been dead from the 14th day of August; and, had that been the case, how could they have hoped to look to his estate, with nothing to rest upon but the letter of that date?

Is their position any stronger because the appellant failed to reply?

The act of the agent having exceeded his specific authority how can he add to it by silence of the principal?

The silent contempt of the latter for an agent clearly exceeding his authority may in some cases be most fitting.

In other cases it might be most contemptible conduct to so treat a communication made in good faith, yet how could the doing so add to the expressly limited authority?

If the agent before acting had written saying I understand your instructions to mean so and so and unless I hear from you to the contrary within a named reasonable time and no answer had been vouchsafed the principal's conduct might have bound him but where, as here, the agent goes on to do what evidently he felt was doubtful and then sought for ratification from his principal's silence he presumed too much.

The ratification by conduct of an agent's act as of any other person's acts can only bind when clearly attributable to such a purpose and with full knowledge and appreciation of what the agent had really done.

To be able to understand the question of either ratification or aught else in the case we must determine what was the appellant's intention in his letter of the 14th of August.

Let any one analyze the letter and see how it could be conceivable to take out of it in the light of the past relations and dealings of the parties with each other, authority to make immediate sale on a grain exchange of a future option for October delivery as within what is meant by a man going up in four weeks to harvest, sell and deliver his crop.

The retainer of a broker to go on change or sell or buy such options implies a readiness in the principal to put up such margins as may be necessary from time to time if and when needed and demanded as here.

If the respondents on the failure of the appellant, early in September, to meet such demands of indemnity had brought an action therefor and the true nakedness of this case, divested of the suspicions later events surrounded it with, had become clear, it seems hard to conceive of judgment being given for the $300. Yet, if the claim will not stand that test it must fail.

Then the entire case of a contract made on change to be governed by the rules and practices of that market is so entirely different in every way from what the ordinary farmer's methods of marketing his crops implies that unless the former and not the latter is what an agent to sell is told to adopt the court should not, as of course, assume that such a letter as in question carries with it the authority to adopt the Grain Exchange methods.

So much was this and much more relative to that phase of the case clear to counsel for the respondents that they, in argument, sought to eliminate from the

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case all that appears therein as to the claim for margins.

That will not do. For if the agent had authority to go on to that market he had a right to use and submit to all the legal methods known to arise for and against an agent sent there to deal and the principal as a consequence would be bound to indemnify; and he either ratified all or nothing.

For example, an agent employed merely to form a contract requiring for its validity compliance with the Statute of Frauds would be bound to see the statute complied with or would fail through his own negligence to have become entitled to either commission or indemnity.

On the other hand, he who sends a broker to an exchange where they both well know compliance with the Statute of Frauds may be well nigh impossible, but the other effective means of compelling an agent to observe the contracts he makes there are daily observed these conditions when known to a principal are such as to imply that the principal has undertaken to indemnify step by step if such be the rule or practice even though the Statute of Frauds may not have been complied with.

The rules and practice governing members of the Exchange in question having been ruled out at the trial I put the case, hypothetically, as to the Statute of Frauds, which it seemed to be admitted had not been complied with.

Not having been complied with and the nature of the agency requiring a compliance I think that alone should end the respondent's case. See Wright on Principal and Agent (2 ed.), p. 134.

The cases relative to what might be the rights and remedies between principals in two different countries or jurisdictions when an agent in the same country as one of such principals has entered into a contract on behalf of the other have little or nothing to do with this case.

In the last analysis all that class of cases and the agent's rights and duties and remedies rest upon, as this must rest upon, what was the intention of the parties.

The real point here is, taking these things into consideration, whether or not the appellant intended when penning the letter and using the expression therein "you had better sell 4,000 bus. *for me*" set as it is in relation to what is to be done, and when it is to be done, and who is to carry it out, the contract of the buyer should have been formed as it was with the agent or with his principal, the writer of the letter.

If it means that the appellant intended the contract to have been with himself as its language and all else I have referred to seem to imply then that privity of contract was never brought about and the respondents' action rightfully failed.

Can any one imagine the respondents would have acted differently had the letter come from Snowflake instead of Bellwood, or that the slightest consideration was given to the International boundary line?

Their great error was in hastily misconceiving the nature of the business they were asked to attend to and attending to something else entirely different.

Hence they have themselves to blame entirely regardless of what the appellant's character or conduct may have been.

I think the appeal should be allowed with costs

1909

BUTLER v. MURPHY & Co.

Idington J.

and the trial judge's judgment restored with costs of the courts below.

DUFF J. concurred with Davies J.

Appeal allowed with costs.

Solicitors for the appellant: *Richards, Affleck & Co.*

Solicitors for the respondent: *Hunt, Noble & Card.*