IN THE MATTER OF THE PETITION OF RIGHT OF HOSPICE DESROSIERS, SUPPLIANT;

AND

HIS MAJESTY THE KING, RESPONDENT.

1919
Feb. 12.

*Principal and Agent—Liability of undisclosed principal—Action against agent—"Factor or commission merchant."*

M., without disclosing the fact that he was acting as agent for the Crown, purchased hay from the suppliant and was sued in a provincial court for a balance of the purchase price. At the trial that fact became known to the suppliant, but he nevertheless proceeded with the case and recovered judgment against M. Later the suppliant brought an action in the Exchequer Court to enforce the claim against the Crown.

*Held,* the suppliant having elected to proceed to judgment against M. could not afterwards sue the Crown.

2. That M., having been retained to make such purchases on a commission basis, was a "factor or commission merchant" and alone liable under arts. 1736, 1738, of the Quebec Civil Code.

PETITION OF RIGHT to recover a balance for goods sold and delivered.

Tried before the Honourable Mr. Justice Audette, at Montreal, January 31, 1919.

*E. F. Surveyer,* K.C., and *L. E. Beaulieu,* K.C., for suppliant.

*F. J. Laverty,* K.C., and *O. Gagnon,* for respondent.

AUDETTE, J. (February 12, 1919), delivered judgment.

This matter comes before the Court under the provisions of rule 126, whereby the points of law arising upon the statement in defence are *in limine* submitted for adjudication before trial.

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The facts alleged by the pleadings are, for the purposes herein, taken as admitted.

During the months of August, September and October, 1914, the suppliant sold and delivered to one James McDonnell a certain quantity of hay which was partly paid for, leaving, however, a balance due, for the recovery of which the present action is instituted under the circumstances hereinafter mentioned.

McDonnell always acted in his own name, never disclosing whether or not he was acting for any principal. Failing to pay the balance claimed by the suppliant, an action was—prior to the filing of the present petition of right—instituted by Desrosiers against him (McDonnell) in the Superior Court for the District of Montreal for the same claim set out in the present action.

At the opening of the trial of that case in the Superior Court, counsel for the defendant McDonnell informed the Court that the hay in question had been intended for the benefit of the Imperial Government. Nevertheless Desrosiers elected to pursue his remedy to judgment against McDonnell in the Superior Court. He did not ask to suspend the action and made no claim against the Crown until after judgment had been rendered in his favour in this action before the provincial court.

The question now submitted is whether or not the fact of having pursued his remedy against McDonnell by obtaining judgment against him is now a bar to the present action,—accepting as a fact for the purposes herein that McDonnell was, in purchasing and accepting delivery of the hay, acting for an undisclosed principal, a fact which came to Desrosiers'

knowledge at the opening of the trial of the case before the Superior Court, and *before judgment was entered against McDonnell.*

Under the laws of the Province of Quebec, as laid down in art. 1716, a mandatory (agent) who acts in his own name is liable to third parties with whom he contracts, without prejudice to the rights of the latter against the mandator (principal) also. There is no corresponding article in the Code Napoleon. At page 10, vol. 3, of the Report of the Commissioners appointed to codify the law of Lower Canada, it is said that the law as laid down in art. 1716 "declares useful rules of undoubted authority in our "law, which, it may be observed, differs from the "Roman Law. Under that system, originally the "mandatory was always personally liable, being "obliged to contract in his own name. This rigor, "however, was afterwards modified by the praetors "in dealing with commercial mandatories known as "*Institores, Exercitores* and *Prepositi.*"

Under art. 1727 of the Civil Code, also relied upon by the suppliant and which really completes art. 1716, the mandator (principal) is bound in favour of third persons for all the acts of his mandatory (agent), except in the case of art. 1728,—to which reference will be hereafter made. Now, under this doctrine, the Commissioners for the Codification say (vol. 3, p. 12) that this article "announces the gen- "eral rule of the liability of the mandator and does "not materially differ from art. 1998 of the Code "Napoleon. Troplong, however, puts the construc- "tion upon that article that the mandator is not "bound when the contract is in the name of the "mandatory, without the name of the other being

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"disclosed, except in certain cases. This is in har-
"mony with the doctrine of the Roman law; but it is
"directly against the rule declared by Pothier, with
"*whom the English, Scotch and American law coin-*
"*cides.* The article submitted is based upon
"Pothier's statement of the rule, and includes all
"acts of the mandatory whether in his own name or
"that of the principal."

It would seem conclusive that under the articles just cited that the English common law is introduced upon the general principles of the subject matter in question and that where no solution or precedent can be found upon the question submitted herein which necessarily flows from such general principles, recourse should be had to the English common law, which is rich and exhaustive upon the question under consideration, and to which reference will be hereafter made.

Counsel for the suppliant—it may be said *en passant*—seems to rely with great stress upon the citation to Story, at p. 570 of vol. 13, in de Lorimier's Bibliothèque du Code Civil; but he overlooks that the learned author's reference is not apposite and is absolutely *nihil at rem,* because he relies upon *Story on Bailment,* which is quite a different doctrine from that of agency. Indeed, from the perusal of a few pages of *Story on Bailment,* under the head of *Mandates,* it is immediately realized that the whole of that chapter refers to bailment and not to agency; the doctrine of law corresponding to bailment under the Code is known as that of deposit, and that of agency as mandate. Moreover, in referring to *Story on Agency,* we find the very leading case of *Priestly*

*v. Fernie*[1]—to which reference will be hereafter made.

Strong, J., in *V. Hudon Cotton Co. v. Canada Shipping Co.*,[2] says: "Articles 1716 and 1727 of the "Civil Code, which make the principal liable to third "persons, even although the agent may have con- "tracted in his own name, and as a principal, thus "assimilating the law of Quebec to the English law, "must, I think, be considered by an extensive con- "struction as also making third persons so contract- "ing with the agent liable reciprocally to the prin- "cipal. . . . From the terms of the articles and from "the Report of the Commissioners, it appears to "have been intended to make this provision accord "with the doctrine of Pothier . . . and the cor- "responding rule of English commercial law which, "as is well known, differs in this request from the "modern French law."

In this case the Supreme Court of Canada has felt bound to accept the English common law in construing art. 1716 and its consequences—that is, in dealing with the rights and liabilities arising thereunder. See also *Bryant v. Banque du Peuple.*[3]

I was, at the argument, referred to no jurisprudence of the Province of Quebec upon the subject in question, and after research I have been unable to find any. In the absence of the same, I take it that as arts. 1716 and 1727 are different from the Code Napoleon and are borrowed from both Pothier and the English law, that general principles of the English law governing such doctrine should also be adopted in questions flowing from such doctrine and

[1] (1863), 3 H. & C. 977; 159 E.R. 820.
[2] (1883), 13 Can. S.C.R. 401.
[3] [1898] A.C. 170.

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which are a sequence from the same, as Strong, J., seems to have found in the case above mentioned.

The English common law is indeed redundant with precedents upon the subject in question. The effect of such doctrine is that the creditor may make his *election* to sue either the principal or the agent at any time before he has obtained judgment against either of them; but he has no such option after he has so sued one of them to judgment. Conclusive evidence of such an election is afforded by an action which has been proceeded with to judgment and execution even without satisfaction, says *Evans on Agency*—2nd ed. p. 529.

The leading case upon this point is *Priestly v. Fernie*,[1] decided in 1865, before the Civil Code, P.Q., was in force. In that case it was held that the second action did not lie, even if the judgment was not satisfied. "If this," says Baron Bramwell, who delivered the judgment of the court, "were an ordinary case "of principal and agent, where the agent, having "made a contract in his own name, has been sued on "it to judgment, there can be no doubt that no second "action would be maintainable against the principal. "By an election to sue was meant an election to sue "to judgment. The reason given being that an "action against one might be discontinued and fresh "proceedings be well taken against the other.— "*Evans*, 530." And Baron Bramwell, in the *Priestly* case (ubi supra), adds: "The very expression that "where a contract is so made, the contractee has an "election to sue agent or principal, supposes *he can* "*only* sue one of them; that is to say, sue to judg- "ment."

[1] 3 H. & C. 977; 159 E.R. 820.

In *Kendall v. Hamilton*,[1] Lord Cairns says: "I "take it to be clear that, where an agent contracts in "his own name for an undisclosed principal, the "person with whom he contracts may sue the agent, "or he may sue the principal, but if he sues the agent "and recovers judgment, he cannot afterwards sue "the principal, even although the judgment does not "result in satisfaction of the debt. . . . But the rea- "sons why this must be the case are, I think, obvious. "It would be clearly contrary to every principle of "justice that the creditor who had seen and known "and dealt with and *given credit to the agent*, should "be driven to sue the principal if he does not wish "to sue him, and, on the other hand, it would be "equally contrary to justice that the creditor, on "discovering the principal, who really has had the "benefit of the loan, should be prevented suing "him if he wishes to do so. But it would be no "less contrary to justice that the creditor should be "able to sue first the agent and then the principal "when there was no contract, and when it was never "the intention of any of the parties that he should "do so." (And in the present case it is alleged in the petition of right that McDonnell was buying on a commission upon the number of tons.) "Again, if "an action were brought and judgment recovered "against the agent, he (the agent) would have a "right of action for indemnity against his principal, "while, if the principal were liable to be also sued, "he would be vexed with a double action. Farther "than this, if actions could be brought and judgment "recovered first against the agent and afterwards "against the principal, you would have two judg- "ments in existence for the same debt or cause of

[1] (1879), 4 App. Cas. 504.

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"action; they might not necessarily be for the same "amounts."

There is upon this doctrine a very long catena of decisions to the same effect and purport and I will limit myself to mentioning only the following:—*Halsbury;*[1] 10 Encyclopædia of the Laws of England, 373, and cases therein cited; *Wright;*[2] *Ethier v. Pilon;*[3] *Huard v. Banville;*[4] *Beaudoin v. Charruau* et al;[5] *Barnard v. Duplessis Independent Shoe Co.;*[6] *Anson on Contract;*[7] *Bowstead on Agency;*[8] *Morel v. Earl of Westmoreland.*[9]

In addition to all that has already been said, there is the important allegation, in the first paragraph of the petition, that McDonnell, in purchasing the hay from the suppliant, was acting under a contract whereby he was receiving a commission based upon the number of tons procured. This allegation would certainly make McDonnell, under art. 1736, "a factor or commission-merchant", and bring the whole matter within the purview of art. 1738, referred to in art. 1727. If the facts disclosed at the trial of the case before the Superior Court, at Montreal, are as alleged in sub-par. (d) of par. 3 of the statement in defence, does not then the case come under art. 1738, and is not the factor alone liable under these circumstances?

I therefore find, under the circumstances of the case, that McDonnell's principal was disclosed to the

[1] Vol. 1, No. 445, p. 209.
[2] *Principal and Agent,* 401.
[3] (1901), 7 Rev. de Jur. 97.
[4] (1907), 31 Que. S.C. 27.
[5] 15 Rev. Leg. 213.
[6] (1907), 31 Que. S.C. 362; 19 Que. K.B. 414.
[7] (ed. 1917) 420.
[8] 5th ed. 306, 321.
[9] [1904] A.C. 11.

suppliant before he obtained judgment in time for him to stay his hand, and that the fact of persisting to sue to judgment with such knowledge amounts to a bar and estoppel which denies him a second action against the principal. It is a *fin de non recevoir*.

The suppliant is therefore found not entitled to the relief sought by his petition of right.

*Petition dismissed.*

Solicitors for suppliant: *E. F. Surveyer, L. E. Beaulieu.*

Solicitors for respondent: *Rainville & Gagnon.*