[HOUSE OF LORDS.]

ISAAC COOKE & SONS . . . . . APPELLANTS;

AND

HENRY DOUGLAS ESHELBY . . . . RESPONDENT.

H. L. (E.)
1887
March 15.

Principal and Agent—Contract with Agent for Undisclosed Principal—Set-off against Principal of Debt due from Agent—Estoppel.

Where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent unless in making the contract he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account.

L. & Co. sold cotton to C. in their own names, but really on behalf of an undisclosed principal. C. knew that L. & Co. were in the habit of dealing both for principals and on their own account, and had no belief on the subject whether they made this contract on their own account or for a principal:—

Held, affirming the decision of the Court of Appeal, that C. could not in an action brought by the principal for the price of the cotton set off a debt due from L. & Co.

APPEAL from a decision of the Court of Appeal.

In April and June 1883 Livesey Sons & Co., cotton brokers at Liverpool, sold to Isaac Cooke & Sons, on the Liverpool Cotton Market, cotton for future deliveries. Livesey Sons & Co. made these two contracts in their own names, but were really acting as agents for Maximos, their undisclosed principal. Before maturity of the contracts Livesey Sons & Co. suspended payment, and under the rules of the Liverpool Cotton Association, Limited, the contracts were closed in the form of repurchases by Livesey Sons & Co. from Isaac Cooke & Sons. The price of cotton having fallen, the result of this transaction was that a sum of £680 was due from Isaac Cooke & Sons to Livesey Sons & Co. For this sum an action was brought against Isaac Cooke & Sons by Eshelby as trustee in the liquidation of Maximos who had failed.

The defendants by their defence claimed to set off against the plaintiff's claim money due from Livesey Sons & Co. to the defendants upon a general account.

H. L. (E.) 1887 COOKE v. ESHELBY.

In answer to the plaintiff's interrogatories whether in the transactions sued on the defendants did not believe that Livesey & Co. were acting as brokers on behalf of principals the defendants said: "We had no belief on the subject. We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals."

At the trial at Liverpool in February 1884 before Baggallay L.J. without a jury it was proved that Livesey & Co. bought and sold both for principals and on their own account, and that Cooke & Sons knew this. Baggallay L.J. held that the defendants were entitled to the set-off and gave judgment for them.

The Court of Appeal (Brett M.R. Lindley and Bowen L.JJ.) reversed this decision and entered judgment for the plaintiff for the amount claimed, on the ground that the defendants were not entitled to the set-off unless they had been induced by the conduct of Maximos the principal to believe, and did in fact believe, that they were dealing with Livesey & Co. as the principals.

Against this decision the defendants appealed.

1886. Nov. 30, Dec. 2. *W. R. Kennedy* Q.C. and *T. G. Carver* for the appellants:—

The facts support the defendants' claim of set-off. Livesey & Co. were undoubtedly principals on the face of the contract: there was nothing to suggest that they were acting as agents. In so contracting they were acting under the express instructions of their principal, Maximos, that his name should not be given. Treating Livesey & Co. as principals the defendants balanced their contract book accordingly and set off the gains against the losses upon all contracts, whether of sale or purchase, with Livesey & Co. If Maximos had been named the defendants would have had nothing to do with a contract in which he was the principal, not altogether because they were unwilling to take his name, but because it might destroy their chance of set-off with Livesey & Co. The defendants claim the right of set-off, not on the ground of estoppel, but on the ground of an equitable qualification on the right of the undisclosed principal to adopt the contract, the

qualification being that he cannot prevent the right of set-off if he instructs or allows his agent to contract as principal. To establish such a right it is not necessary to have a representation that the contracting party is the person solely interested: all that is necessary is a representation and belief that the buyer is entitled to deal with him as the principal. Once the authority is shewn by the principal to the agent to contract as principal, he may be safely treated as principal. The basis of the right to set-off is not belief or representation but authority. It is a mistake to suppose that in the factors' cases or any cases any representation is ever made that no one but the seller is interested.

Where a contract not under a seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue: but if the principal sues "the defendant is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party:" *Sims* v. *Bond* (1). The defendant "is entitled to the same defence whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal:" *Isberg* v. *Bowden* (2); *George* v. *Clagett* (3): and see *Dresser* v. *Norwood* (4). It is not necessary to negative means of knowledge that the agent dealt as agent: *Borries* v. *Imperial Ottoman Bank* (5). Nor is it necessary to shew belief in the defendant that the agent was acting on his own account: *Stacey* v. *Decy* (6). It is enough to shew that the defendant had not the means of knowing and did not know that the agent was not acting on his own account: *Carr* v. *Hinchcliff* (7); *Purchell* v. *Salter* (8); *Semenza* v. *Brinsley* (9). It is true that in the latter case Willes J. said that the defendant must deal with the agent as, and believe him to be, the principal, but that was only a dictum not necessary for the decision. If the principal instructs or allows the agent to deal in his own name he can only sue subject to the right of set-off: *Moore* v.

(1) 5 B. & Ad. 389, 393.
(2) 8 Ex. 852, 859.
(3) 7 T. R. 359; 2 Sm. L. C. 8th Ed. p. 118.
(4) 17 C. B. (N.S.) 466.
(5) Law Rep. 9 C. P. 38.
(6) 2 Esp. 470.
(7) 4 B. & C. 547.
(8) 1 Q. B. 197.
(9) 18 C. B. (N.S.) 467, 477.

H. L. (E.) 1887 COOKE v. ESHELBY.

Clementson (1); *Turner* v. *Thomas* (2); *Baring* v. *Corrie* (3); *Coates* v. *Lewes* (4); *Tucker* v. *Tucker* (per Parke B.) (5); *Browning* v. *Provincial Insurance Company of Canada* (6); *Maspons* v. *Mildred* (7).

Broadly, the principal's right to adopt the contract of his agent is subject to this, that he must in all respects stand in the shoes of his agent. It is a mistake to treat the factors' cases as if they were decided on the ground of estoppel. Secret instructions to the agent not to sell in his own name do not prevent the right to set-off: *Ex parte Dixon* (8) explaining *Semenza* v. *Brinsley* (9). To create estoppel there must be not only belief in a fact but representation of that fact: *Wilde* v. *Gibson* (per Lord Campbell) (10). The only representation a factor makes is that he has authority to sell and convey a good title to the goods. Estoppel is defined by Lord Selborne in *Citizens Bank of Louisiana* v. *New Orleans Canal and Banking Company* (11); see also *Farmeloe* v. *Bain* (12). The rule as to an undisclosed buyer is independent of estoppel: *Armstrong* v. *Stokes* (per Blackburn J.) (13); *Irvine* v. *Watson* (14).

The true view of the facts here is that Maximos did not intend to be a party to this contract, as shewn by his instructions. The mere fact that the contract was made for the benefit of some one does not make him a party to the contract: *Addison* v. *Gandasequi* (15).

D. French Q.C. and *Synnott*, for the respondent, were not heard, Lord Halsbury L.C. saying that notice would be given if their Lordships desired to hear them.

The House took time for consideration.

(1) 2 Camp. 22.
(2) Law Rep. 6 C. P. 610, 613.
(3) 2 B. & Ald. 137, 143.
(4) 1 Camp. 444.
(5) 4 B. & Ad. 745, 750.
(6) Law Rep. 5 P. C. 263, 272.
(7) 9 Q. B. D. 530, 543; 8 App. Cas. 874.
(8) 4 Ch. D. 133.
(9) 18 C. B. (N.S.) 467.
(10) 1 H. L. C. 605, 633.
(11) Law Rep. 6 H. L. 352, 360.
(12) 1 C. P. D. 445.
(13) Law Rep. 7 Q. B. 598, 607.
(14) 5 Q. B. D. 102, 414.
(15) 4 Taunt. 573; 2 Sm. L. C. 8th ed. p. 369.

1887. March 15. LORD HALSBURY L.C. :—

My Lords, in this case a merchant in Liverpool effected two sales through his brokers. The brokers effected the sales in their own names. The appellants, the merchants with whom these contracts were made, knew the brokers to be brokers, and that it was their practice to sell in their own names in transactions in which they were acting only as brokers. They also knew that the brokers were in the habit of buying and selling for themselves. The appellants with commendable candour admit that they are unable to say that they believed the brokers to be principals; they knew they might be either one or the other; they say that they dealt with the brokers as principals, but at the same time they admit that they had no belief one way or the other whether they were dealing with principals or brokers.

It appears to me that the principle upon which this case must be decided has been so long established that in such a state of facts as I have recited the legal result cannot be doubtful. The ground upon which all these cases have been decided is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief. With reference to both those propositions, namely, first, the permission of the real principal to the agent to assume his character, and with reference to the fact whether those dealing with the supposed principal have in fact acted upon the belief induced by the real principal's conduct, various difficult questions of fact have from time to time arisen; but I do not believe that any doubt has ever been thrown upon the law as decided by a great variety of judges for something more than a century. The cases are all collected in the notes to *George* v. *Clagett* (1).

In *Baring* v. *Corrie* (2), in 1818, Lord Tenterden had before him a very similar case to that which is now before your Lordships, and although in that case the Court had to infer what we have here proved by the candid admission of the party, the principle upon which the case was decided is precisely that which appears to me to govern the case now before your Lordships.

(1) 2 Sm. L. C. 8th Ed. 118. (2) 2 B. & Ald. 137, 144, 147.

H. L. (E.) 1887 COOKE v. ESHELBY. Lord Halsbury, L.C.

Lord Tenterden says of the persons who were in that case insisting that they had a right to treat the brokers as principals: "They knew that Coles & Co. acted both as brokers and merchants, and if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they made no inquiry." And Bayley, J., says: "When Coles & Co. stood at least in an equivocal situation, the defendants ought in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed, when they bought the goods, that Coles & Co. sold them on their own account. And if so, they can have no defence to the present action."

I am therefore of opinion that the judgment of the Court of Appeal was right. The selling in his own name by a broker is only one fact, and by no means a conclusive fact, from which, in the absence of other circumstances, it might be inferred that he was selling his own goods. Upon the facts proved or admitted in this case the fact of selling in the broker's name was neither calculated to induce nor did in fact induce that belief.

I now move your Lordships to affirm the judgment of the Court of Appeal and to dismiss this appeal with costs.

LORD WATSON:—

My Lords, Livesey Sons & Co. cotton brokers and members of the Liverpool Cotton Association, in April and June 1883 sold two parcels of cotton, for future delivery, to the appellants who were members of the same association. These sales were in reality made on account of one N. C. Maximos; but in accordance with his instructions they were effected by Livesey Sons & Co. in their own name and without any mention of a principal. Livesey Sons & Co. suspended payment on the 20th July 1883 at which date they owed the appellants a balance on general account. On the same day Maximos gave written notice to the appellants that both sales had been made by Livesey Sons & Co. as his agents. The present action was brought by Maximos, and is now insisted in by the trustee in his liquidation, for reco-

very of the sums due by the appellants in respect of these two purchases. There is no dispute as to the amount of the claim; the only defence pleaded by the appellants being that they are entitled to set off that amount against the balance admittedly due to them from Livesey Sons & Co.

The only facts which have a material bearing upon the appellants' defence are these. According to the practice of the Liverpool cotton market with which the appellants were familiar, brokers in the position of Livesey Sons & Co. buy and sell both for themselves and for principals; and in the latter case they transact, sometimes in their own name without disclosing their agency, and at other times in the name of their principal. In their answer to an interrogation by the plaintiff touching their belief that Livesey Sons & Co. were acting on behalf of principals in the two transactions in question, the appellants say: "We had no belief upon the subject. We dealt with Livesey Sons & Co. as principals, not knowing whether they were acting as brokers on behalf of principals or on their own account as the principals."

That is a very candid statement, but I do not think any other answer could have been honestly made by persons who, at the time of the transactions, were cognisant of the practice followed by members of the Liverpool Cotton Association. A sale by a broker in his own name to persons having that knowledge, does not convey to them an assurance that he is selling on his own account; on the contrary it is equivalent to an express intimation that the cotton is either his own property or the property of a principal who has employed him as an agent to sell. A purchaser who is content to buy on these terms cannot, when the real principal comes forward, allege that the broker sold the cotton as his own. If the intending purchaser desires to deal with the broker as a principal and not as an agent in order to secure a right to set-off, he is put upon his inquiry. Should the broker refuse to state whether he is acting for himself or for a principal, the buyer may decline to enter into the transaction. If he chooses to purchase without inquiry, or notwithstanding the broker's refusal to give information, he does so with notice that there may be a principal for whom the broker is acting as agent; and should that ultimately prove to be the fact, he has,

H. L. (E.) 1887 COOKE v. ESHELBY. Lord Watson.

in my opinion, no right to set off his indebtedness to the principal against debts owing to him by the agent.

It was argued for the appellants, that in all cases where a broker, having authority to that effect, sells in his own name for an undisclosed principal, the purchaser, at the time when the principal is disclosed, is entitled to be placed in the same position as if the agent had contracted on his own account. That was said to be the rule established by *George* v. *Clagett* (1), *Sims* v. *Bond* (2), and subsequent cases. It is clear that Livesey Sons & Co. were not mere brokers or middlemen, but were agents within the meaning of these authorities, and if the argument of the appellants were well founded they would be entitled to prevail in this appeal, because in that case their right of set-off had arisen before the 20th of July 1883, when they first had notice that Maximos was the principal.

I do not think it necessary to enter into a minute examination of the authorities, which were fully discussed in the arguments addressed to us. The case of *George* v. *Clagett* (1) has been commented upon and its principles explained in many subsequent decisions, and notably in *Baring* v. *Corrie* (3), *Semenza* v. *Brinsley* (4), and *Borries* v. *Imperial Ottoman Bank* (5). These decisions appear to me to establish conclusively that, in order to sustain the defence pleaded by the appellants, it is not enough to shew that the agent sold in his own name. It must be shewn that he sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account and not for an undisclosed principal; and it must also be shewn that the agent was enabled to appear as the real contracting party by the conduct, or by the authority, express or implied, of the principal. The rule thus explained is intelligible and just; and I agree with Bowen L.J. that it rests upon the doctrine of estoppel. It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon

(1) 2 Sm. L. C. 8th Ed. 118.
(2) 5 B. & Ad. 389.
(3) 2 B. & Ald. 137.
(4) 18 C. B. (N.S.) 467.
(5) Law Rep. 9 C. P. 38.

a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.

I therefore agree with the conclusion of the learned judges of the Court of Appeal, and with the reasoning upon which it is founded. A broker who effects a sale in his own name with an intimation, express or implied, that he is possibly selling as an agent, does not sell the goods as his own, and in such a case the purchaser has no reasonable grounds for believing that the agent is the real party with whom he has contracted.

LORD FITZGERALD:—

My Lords, the supposed importance of this case in its bearings upon the operations of the Liverpool Cotton Market appears to render it rather a duty that each of us should deliver his own judgment. But when we reach a correct appreciation of the facts of this case it seems to me that all difficulty disappears as to the application of the principle on which it ought to be decided. Although my noble and learned friends have concisely and accurately stated their views of the facts, I ask your Lordships' permission to advert to some parts of the evidence somewhat more in detail.

The third paragraph of the defence alleges that "the defendants believed that Livesey & Co. made the contracts as principals," which must be interpreted to mean that they so believed at the time the contracts in question were entered into. This essential averment has not been proved, and has been disproved. My noble and learned friend (Lord Watson) has already called attention to an answer given by the appellants which seems to become more pointed when we refer to the actual interrogatories in reply to which that answer was given. The fourth interrogatory was: "Is it not the fact that in the transactions mentioned in the statement of claim the defendants believed that Livesey & Co. were acting as brokers on behalf of principals?" The fifth interrogatory was: "Did the defendants believe that in such transactions Livesey & Co. were speculating and dealing on their own account as the principals?" To which the defendants answered:

H. L. (E.) 1887 COOKE v. ESHELBY. Lord FitzGerald.

"To the fourth and fifth interrogatories, *that we had no belief on the subject.* We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals;" and it appears on the notes of the learned judge at the trial, that to some similar question Mr. Cooke, on his vivâ voce examination, answered: "I had no belief in the matter."

It is quite true that Messrs. Cooke had not at the time of the contract any actual knowledge that Livesey had a principal, but it is equally clear that they purposely abstained from obtaining information from Livesey on the subject. Messrs. Cooke relied on a custom in the Liverpool market that where the principal was undisclosed at the time of the contract he could only intervene and claim on the contract provided his doing so "was not to the detriment of the broker of the other contracting party;" or, to put it in the exact words of a question and answer at the trial: "(Mr. Carver): Then, my Lord, I will put this question: In the arrival market where one of the parties on the face of the contract fails, is there any custom which governs the right of undisclosed principals to claim upon the contracts made in the name of the party who has failed? (*A.*) He can only claim subject to the rights of the other party to the contract to take into account whatever differences there may be on other outstanding contracts." The special custom alleged to prevail in the Liverpool arrival market was not established in proof.

The disclosure at the time of the contract that there was an undisclosed principal would not alone have been very undesirable information to Cooke & Co., but would have prevented the contract being entered into, for in case of the failure of Livesey & Co. Messrs. Cooke could not (I am giving the language used in the course of the evidence) have "squared their books," that is, have applied the money due on the contracts to Maximos to discharge the liability of Livesey & Co. Mr. Tobin, one of the principal witnesses for the appellants (defendants), explains the objects to be achieved very clearly: "(*A.*) If I have a number of transactions with a broker I treat that broker as the dealer. He is called 'broker' technically, but practically he is the dealer or the contracting party with me. *I know nobody else in the trans-*

action. I have bought from him certain cotton, and I have sold to him certain cotton. I know how my account stands. If an undisclosed principal can come forward and claim on a certain portion of the contracts, those that are in his favour, and saddle me with the rest, my position is entirely altered." Mr. Tobin also says that unless there was such a rule as he had stated in a previous answer it would be impossible to carry on business in the Liverpool Cotton Arrival Market. He means of course that there would be difficulties in the way of carrying on such business in the manner in which it is carried on in that market. Whether that may or may not be so I do not know, nor shall I ventrue to speculate whether such a result would prove to be a mercantile calamity. We must not alter the law to suit the views or the convenience of the Liverpool Cotton Market.

The case at one time seemed to present a novel aspect which it might have been difficult for the plaintiff to encounter. It was alleged that Maximos authorized Livesey & Co. to contract in their own names, and also prohibited them from disclosing his name as principal, and this seemed to be close on the confines of an express authority to contract in their own names as principals and as if owners of the cotton. I put the case to Mr. Kennedy during the argument, but he did not seem to attribute any weight to it, and properly so, for on examining the evidence carefully it falls short of the allegation, and does not appear to have been relied on in the Court of Appeal or in the Court below. The evidence in this particular rests on two answers given by Mr. Tobin. In the one on direct examination he spoke as to a conversation with Maximos ten days before the trial and said: "*Mr. Maximos told me that he had instructed Messrs. Livesey not to give his, Mr. Maximos', name, in the arrival market, but to give his own, Livesey's, name.*" But on cross-examination he corrected that statement from a memorandum made at the time "as it was known that Livesey did business for him, but as other brokers came to him for business *he authorized Livesey not to give his name,* that is the reason he gave you for saying what you have said he said? (*A.*) Yes." This seems to me to fall short of authorizing Livesey & Co. to contract in their own names as principals.

H. L. (E.) 1887 COOKE v. ESHELBY. Lord FitzGerald.

If Messrs. Cooke had asked Livesey, "Have you a principal in these contracts?" we may assume their answer would have been in the affirmative; and if further asked to name that principal they would have replied, "He does not wish us to do so." The ascertained facts appear to stand thus: Livesey & Co. were extensive cotton brokers on the Liverpool Cotton Arrival Market. They also dealt in cotton arrivals on their own account as principals. Their position was well-known to Cooke & Co. Maximos employed Livesey & Co. as brokers to sell for him the particular lots of cotton, and they did so, the contracts which they entered into, though in their own names, being in law contracts for and on behalf of Maximos. He also "*authorized* them not to give his name," which may be read as meaning not to give his name either in the contract notes or in answer to inquiries, his special object seeming to be to avoid the jealousies or solicitations of other brokers. He did not prohibit them from giving his name, nor did he give them any right to sell in their own names as principals, or as if they were the owners of the goods, and he did not arm them with the indicia of property if any such existed. Cooke and Sons having at their hand the fullest means of information abstained from making any inquiry as to whether Livesey & Co. were acting as brokers for a principal or on their own account as principals and owners, and they say "they had no belief on the subject."

Such being the facts I do not propose to criticise the numerous cases which *George* v. *Clagett* (1) gave rise to, or to enter on the consideration whether the head-note to that case is misleading. The head-note frequently is misleading if you read it alone and do not take the trouble to read the case. It seems to me that the judgment of the Master of the Rolls in the Court of Appeal is quite correct and supported by a number of authorities, including *Fish* v. *Kempton* (2); *Borries* v. *Imperial Ottoman Bank* (3), and the lucid passage from the judgment of Willes J. in *Semenza* v. *Brinsley* (4).

I concur with my noble and learned friend in adopting at once the decision and the reasons of the Court of Appeal. I

(1) 2 Sm. L. C. 8th Ed. 118.
(2) 7 C. B. 687.
(3) Law Rep. 9 C. P. 38.
(4) 18 C. B. (N.S.) 467, 477.

have, however, some hesitation in accepting the view that the decisions rest on the doctrine of estoppel. Estoppel in pais involves considerations not necessarily applicable to the case before us. There is some danger in professing to state the principle on which a line of decisions rests, and it seems to me to be sufficient to say in the present case that Maximos did not in any way wilfully or otherwise mislead the defendants (Cooke & Sons) or induce them to believe that Livesey & Co. were the owners of the goods or authorized to sell them as their own, or practice any imposition on them. The defendants were not in any way misled.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 15th March 1887.

Solicitors for appellants: *Field, Roscoe & Co., for Harvey, Alsop & Stevens, Liverpool.*

Solicitors for respondent: *Andrew, Wood & Glasier, for Yates, Stananought & Johnson, Liverpool.*