STINUS & DEPUICHAFFRAY - - *Appellants* 14*th February*, 1922.

v.

PICKERING & BERTHOUD, LTD. - - *Respondents.*

Action for balance of account for services rendered by Plaintiffs as shipping agents and moneys paid by Plaintiffs for the Defendants at their request—Undisclosed profits of agents.

The facts of this case are sufficiently set out in the judgment.

Appeal from a judgment of Purcell, C.J., in the Supreme Court of Sierra Leone.

Thompson for Appellants cites:—

Order 38, Rule 3 (Annual Practice, 1905).
Order 50, Rule 1a, Local Rules of Supreme Court.
Order 35, Rule 13, Local Rules of Supreme Court.
Order 35, Rules 4 and 5, Local Rules of Supreme Court.
Anlaby *v.* Praetorius, 57 L.J., Q.B., p. 287.
Vint *v.* Hudspith, L.R., 29 Ch. D., p. 322.
Smith *v.* Sydney, 39 L.J., Q.B., p. 144.
Cash *v.* Wells, I.B. & A., p. 375.

Graham for the Respondents.

SAWREY-COOKSON, J.

This is a case which, for reasons which it is not necessary to give here, was ordered by this Court to be re-tried by itself, and it has now been so re-tried at considerable length.

The Plaintiffs are the well-known branch in this Colony of a firm with its headquarters in Manchester and acted as agents for the Defendants, a firm carrying on business in this Colony as Merchants, in the matter (so far as it is material to consider here) of shipping the Defendants' produce to England. The statement of claim as shown on a specially endorsed writ is " for a sum of £238 9s. 9d. being the balance of an account for services rendered and work done by the Plaintiffs as shipping agents and for moneys paid by the Plaintiffs for the Defendants at their request" and the particulars of that claim show the manner in which that balance remains due and owing to the Plaintiffs. The evidence is mainly documentary apart from that of the two witnesses, Phillips and Stinus, as local managers of the Plaintiffs' firm and head of the Defendants' firm respectively.

The Defendants deny that any portion of the balance claimed is due to the Plaintiffs and allege that such balance is made up of sums overcharged them by the Plaintiffs and, if I understand them correctly, would even go so far as to maintain that inasmuch as these sums were profits made by the Plaintiffs without disclosure to them as principals they, the Defendants, are entitled to have them paid over.

That counterclaim need not, however, be considered as it is only to be gathered from certain expressions of learned counsel for the defendants when citing certain cases in support of the fraud which he alleges has been practised upon his clients. In substance the defence is that considerable overcharges have been made and an account is asked to be taken in order that the manner in which even the sum of £1,627 7s. 4d. shown in the particulars of the Plaintiffs' claim to have been due as far back as January 1st, 1918, may be gone into. This, I take it, means that it is desired to re-open the whole of the account between the parties from the year 1914, when the business relations material to this case first existed. However, there was nothing to be gathered from the Defendants' evidence which suggested any more than that the sum claimed was made up of overcharges and that he would be satisfied if this Court would hold that the Plaintiffs' claim therefore failed. So that the proper issue for this Court to determine should be—Is the Plaintiff entitled to the balance claimed and is that balance constituted by charges of a nature which they, as Defendants' agents, had no right to make? Now it is not, of course, in dispute that the Plaintiffs were entitled to, and did, charge commission at various and increasing rates from time to time, the increase being due to and doubtless, to some extent, justified by the stress of war; hence mainly the Defendants' contention that any other profits the Plaintiffs might make out of them were such as they were not entitled to make as their agents. But what was the nature of those profits and were they such as fall within the scope of either of the two main cases upon which the Defendants' counsel has relied, viz., Morrison *v.* Thompson (1874) 43 L.J.Q.B. at p. 215, or Williamson *v.* Barbour (1877), 50 L.J., Ch. p. 147? The Plaintiffs have not attempted to conceal the fact upon which during a greater part of the re-hearing it was understood that Defendants' counsel relied in order to show that the whole of the transactions were so tainted with fraud that virtually none of those transactions were free from the gravest suspicion, viz., the fact they had actually overcharged by way of insurance premiums to the extent of £482 odd; but it is perfectly clear

as was again and again pointed out, that the moment the Defendants repudiated those overcharges the Plaintiffs accepted that repudiation, admitting that they were not justified because no notice had been given of the increased rates and that steps were taken to rectify the matter, with the result that the whole of this amount was refunded to the Defendants. The result of such acceptance of the repudiation and refunding is naturally that the matter is at an end and nothing remains for which the intervention of the Court can be sought. But the effect produced upon this Court by the stressing of this factor in the case has been the feeling that nothing that could be said should be left unsaid in order to besmirch the business probity of the Plaintiffs It remained, however, open to the Defendants to satisfy this Court that the balance of the £238 odd should similarly have been admitted to be an overcharge. So that we may now consider how this sum of £238 is to be accounted for according to the Defendants, and even slightly over-accounted for, according to Mr. Stinus, with the result that, if justice were done on an account being taken, there would actually remain a small balance due to his firm. Finally, there is the item of some £24 10s. 0d. which the Plaintiffs quite freely admit was charged in the account for a certain considerable number of cables at a rate which it would have cost the Defendants to send those cables had each cable been sent by the Defendants themselves—the charge in this respect for well over 95 per cent. of the cables sent and so charged for, being 8s. 4d.—and they equally freely admit that they charged each of their customers or clients in the same manner, *i.e.*, that they did not divide the cost of each cable although it might have been sent on behalf of, say, 10 such clients into ten parts. This division the Defendants say, ought to have been made, and as it was not made, the profit thereby accruing to the Plaintiffs was such as no agent is allowed by law to make out of his principal. This is a contention with which this Court cannot agree for two reasons—

(1) because the Defendants are shown to have been charged only with the cost of so much of each such cable as affected their interests, and

(2) because the two cases already mentioned are clearly no authority for saying that the profit which admittedly did result from sending clients' cables in this manner was such as could be recovered by the Defendants as principals from the Plaintiffs as their agents.

The facts and circumstances in those two cases are, indeed, to be clearly distinguished from those found here. It would

have been well if Mr. Thompson had read (for presumably he cannot have read) the lengthy note preceding the Judgment of Jessel, M.R., setting out the facts upon which the allegation of fraud was based, such as for example that the Plaintiffs (who were asking that the whole accounts between them and the Defendants be opened over a period of nearly 20 years of the dealings between them) had not allowed them certain considerable discounts received from the bleachers of certain grey linen goods bought by the Defendants for them as well as from the vendor of those goods, but had also added for themselves a sum over and above the gross charge for the bleaching as a separate profit for themselves with which they had not credited the Plaintiffs: that, being ordered by the Plaintiffs to insure the goods sent to India in some reliable public office they often did not do so at all, sending them at their own risk, or else only insured to an amount smaller than that represented to the Plaintiffs, at the same time charging the Plaintiffs with the premiums for the full amount which were often higher than would have been charged by the office: that the Defendants had frequently invoiced the goods as having been paid for before they had been, and charged the Plaintiffs with interest on such alleged payments from the alleged date of payment. Is it to be wondered at in such circumstances as these that the learned Master of the Rolls said (*inter alia*) in his judgment " when we find an agent buying goods, paying one price and invoicing them at a higher, we must take him to know that he is committing a breach of his duty as an agent and that he has taken out of the pocket of his employer a sum which belongs to that employer, and unless it were done on a single occasion by accident or mistake he cannot treat that overcharge as being properly described by any other term than a fraudulent overcharge." He then went on to hold that there was no defence or excuse for the charges made in regard to the insurance. How, indeed, could the learned Judge in that case have held otherwise? But is it not abundantly clear that what the Plaintiffs are alleged to have done, indeed admit they did, in the case before us, is as unlike as possible the facts in that case?

The other case, Morrison *v.* Thompson, was one in which the Defendant acted as agent for the purchase of a ship on the basis of an offer of £9,000 or as much more cheaply as possible, but by some kind of collusion with the vendor's broker who was authorised to retain any sum over £8,500 for himself, purchased the ship for £9,250 and retained £225 for himself. In such circumstances it was of course found as a well established

principle of law, that the principal could recover that sum of £225 inasmuch as it was a profit acquired by an agent in connection with his agency. And Cockburn, C.J., quoted a dictum of Lord Justice James (as he then was) in regard to the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting. In both these cases there was such a fiduciary relationship as certainly cannot be found in the present case, and they are as little of authority for finding fraud in regard to the cabling transaction complained of as they are for finding it in the " Memnon " transaction, indeed considerably less so if possible. All that the Plaintiff did in that transaction was to charge £55 10s. 0d. as their commission for work done by them and as what they would have been entitled to on the gross sale price of the shipment had it arrived safely at its destination instead of going down with the " Memnon." It is manifest that the Defendants cannot be heard to say that such commission was never earned by the Plaintiffs, and as was pointed out several times during the re-hearing, this Court attaches no importance whatsoever to the point made with considerable urgency by the Defendants that this charge is described as for " collecting commission."

There remains only the question of overcharges constituted by the insuring of the freight against, as it is alleged, the wishes and without any authority express or implied of the Defendants, the matter of 4s. 11d. claimed in respect of " sweepings " being a very fair instance in which to apply the legal maxim, *de minimis non curat lex.*

There appeared at one stage of the re-hearing to be a good deal to be said for the contention of the Defendants in this regard viz., that they never desired or did or said anything justifying this insurance of the freight which no doubt would never have been insured but for certain action taken by the War Risk and Marine Insurance authorities in England. The point as to whether or not the Defendants understood and agreed to the charge in this respect being made, would probably have remained in such a state of doubt that this Court might well have held that the Plaintiffs' claim to this considerable part of the balance had not been made out. For so it might well have been held but for the fact that account sales in which such charges appeared were actually rendered to the Defendants from time to time. Hence it is impossible, in view of the length of time that elapsed

between these being rendered and any sort of protest coming from the Defendants, and in view of the fact that the Defendant Stinus (though " only a Frenchman " as he appeared to the Court to protest too much) has been in business over 20 years in this Colony, it is impossible to come to any other conclusion than that the Defendants knew of those charges to an extent at any rate which estops him from now coming to this Court and setting up that the Plaintiffs knew of his having repudiated them. Such delay in protesting (in addition to being such an estoppel by conduct) lends in itself considerable colour to the Plaintiffs' version that they were justified in believing that he approved of those charges; and certainly it is remarkable that if, as Defendants allege, it was made quite clear at the interview (of which so much was heard) following as it did considerable correspondence on the subject, that the Defendants declined to insure the freight, that they should not have been at pains as business men to state that fact in writing.

The result, therefore, is that there must be judgment for the Plaintiffs and with costs in accordance with the terms of the order of this Court remitting this case for re-trial.

PURCELL, C.J.

I concur.

McDONNELL, Acting J.

I concur.