REPORTS OF CASES

DETERMINED BY THE

HIGH COURT OF AUSTRALIA

1905-1906.

[HIGH COURT OF AUSTRALIA.]

MOONEY . . . . . APPELLANT;
PLAINTIFF,

AND

WILLIAMS . . . . . RESPONDENT.
NOMINAL DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 14, 15.

Griffith C.J., Barton and O'Connor JJ.

Principal and agent—Sale of goods—Vendor created agent during negotiations for sale—Principal undisclosed—Final offer and acceptance after creation of agency—Right of principal to sue for purchase money.

A person offered, in his own name, to sell to the Government certain machinery which at that time did not belong to him. Before acceptance of the offer the appellant agreed with the vendor to buy the machinery and employ the vendor as his agent to effect a sale of it to the Government. The Government then sent to the agent a request to deliver the machinery at the price originally asked, but under somewhat different conditions. Without disclosing the agency the agent delivered the machinery and it was accepted by the Government. The appellant, before payment, gave notice to the purchasers that he was the owner of the machinery, and that the sale had been made on

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his behalf by the agent. The purchasers on these representations agreed to treat him as the person entitled to payment, the agent acquiescing in the arrangement.

Held, that, as the original offer to sell was not accepted in terms by the purchasers, the request by the latter to deliver was really a new offer to purchase, which was accepted by delivery in accordance therewith, and therefore that as the agency was in existence at the date of this offer, and as the agent did in fact sell on the principal's behalf, the principal was entitled to sue for the purchase money, and the purchasers were not discharged by an unauthorized payment to the agent.

Decision of the Supreme Court, *Mooney* v. *Williams*, (1905) 5 S.R. (N.S.W.), 304, reversed.

APPEAL from a decision of the Supreme Court.

This was an action by the appellant against the respondent, who was sued as nominal defendant on behalf of the Government of New South Wales, to recover the price of a steam crane alleged to have been sold by the appellant, through his agent one Lycett, to the Government. The declaration was framed on the common indebitatus counts for goods sold and delivered, accounts stated &c., and the pleas were: never indebted, and payment. The action was tried before *Simpson* J. and a jury. Certain questions were left by His Honor to the jury. They were:—

1. Was the contract made by the Government with the plaintiff either directly or through his agent Lycett?

2. Was there a delivery of the crane by Mooney?

3. Did the plaintiff so conduct himself as to enable Lycett to hold himself out to the Government as the owner of the crane?

4. Did the Government deal with Lycett in the purchase and receipt of and payment for the crane as if he was the owner, believing him to be the owner?

The jury answered the first and second questions in the affirmative, the third in the negative, and the fourth in these words "Yes; but erroneously, owing to an error of judgment on the part of the Government officials." They found a verdict for the plaintiff for £235.

The Full Court (consisting of *Cohen*, *Walker* and *Pring* JJ.) by a majority (*Cohen* J. dissenting) set aside the verdict, and made the rule absolute to enter a verdict for the defendant: *Mooney* v.

Williams (1). The majority of the Court were of opinion that the case was governed by the decision in *Keighley, Maxsted & Co.* v. *Durant* (2).

From this decision the present appeal was brought, by special leave.

The facts are set out in the judgment.

Gordon K.C. and *Blacket*, for the appellant. The case of *Keighley, Maxsted & Co.* v. *Durant* (2), which was relied upon in the Supreme Court, does not apply here. In that case the action was brought on the special contract made by the alleged agent. Here the plaintiff sues, not on any contract embodied in a written offer and acceptance, but on the contract implied from delivery of goods and their acceptance. All the facts were found in favour of the plaintiff. The crane was his property, and the Government were so informed, after delivery and before payment. There was no excuse for paying Lycett. The only possible answers to the action are that the crane was not the plaintiff's, or that he had been paid. Lycett was agent for the plaintiff at the only time which was material, that is when the contract was made. While the offer was unaccepted, no property had passed; it is only at the moment of acceptance that the rights of the parties are to be considered. The contract sued upon was not made until the crane was delivered, and at that time the property in the crane was undoubtedly in the plaintiff. This was not a contract in which personality was material, and the purchaser having accepted the crane could not refuse to treat the plaintiff as principal after notice of the facts. In *Keighley, Maxsted & Co.* v. *Durant* (2), the contract sued upon was executory, and it may be conceded that, if that were the case here, the plaintiff could not have compelled the Government to complete. But the only question here is, who was entitled to be paid, and the purchaser cannot be heard to say that the person, who is admittedly the owner, is not the proper person to be paid. If the delivery was made without his authority he could demand his goods and sue for conversion, or waive the tort and recover the price. The Govern-

(1) (1905) 5. S.R. (N.S.W.), 304. (2) (1901) A.C., 240.

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ment might then hand the goods back, but they could not keep them and refuse to pay the owner. If, on the other hand, the delivery was made with authority, the purchaser cannot, after notice of the agency, pay anybody but the owner or some person authorized to receive payment for him. There is no escape from this dilemma, and, as it is clear on the evidence that Lycett had no authority to receive the money, and never handed it over to his principal, the Government must pay again.

Moreover, there is a complete cause of action on an account stated on the documents put in evidence. There was no defence of non-delivery or excessive price or that the plaintiff was not the proper person to receive the money. On that ground alone the verdict can be sustained.

Cullen K.C. (with *Peden*), for the respondent. The appellant must fail unless he can establish that the case comes within the class of cases in which an agent, acting on instructions from a principal, makes a contract in his own name. The evidence only discloses that the plaintiff, on being informed by Lycett that he had arranged to buy the crane from the owner, agreed to finance Lycett, but gave no instructions to him to deal as his agent. There was no evidence to support the jury's finding as to agency. There was, at the utmost, evidence of an equitable assignment by Lycett to the plaintiff, but it was clear that the plaintiff thought that the sale to the Government had already been made.

[GRIFFITH C.J.—Why was there not an application for a non-suit ?]

Possibly there should have been, but the point may be relied upon now. The question of agency was argued.

[*Gordon* K.C. referred to the shorthand note of the Judge's summing up.]

That is not part of the record and should not be used.

[GRIFFITH C.J.—It may be looked at. We often look at such a note in order to see what were the points really in issue at the trial. We are entitled to inform ourselves in any way we please, by consulting the Judge who presided or otherwise.]

The crane having been already offered for sale, the appellant could not have been the person who sold. Anything that

happened after the offer could not confer contractual rights on the person who intervened as against the purchaser, or *vice versa*. The appellant could have refused to deliver the crane. There could be no ratification so as to bind the appellant to the purchaser: *Keighley, Maxsted and Co.* v. *Durant* (1). If a contract is to be implied from delivery and acceptance it is a contract with Lycett, not with the appellant. The jury's answer to the fourth question rebuts any implication of a contract to pay the appellant, such as would entitle him to sue on the *indebitatus* count. The rule as to waiving the tort and suing in *assumpsit* does not apply, because there was no element of wrong in the retention of the goods. They were never demanded. Claiming the money did not indicate to the purchaser that the claimant was the owner. There was no other evidence of notice of his claim. In order to establish conversion or *indebitatus assumpsit* he must prove that the Government kept his goods knowing them to be his, and he has failed to do so. He was therefore estopped from asserting his claim afterwards, because he allowed Lycett to deal with the goods as his own until after payment.

[GRIFFITH C.J. referred to *Russell* v. *Bell* (2); *Marsh* v. *Keating* (3).]

There must be an element of wrong. The implied promise to pay in such cases is *quasi ex contractu*, as against conscience: *Moses* v. *Macpherlan* (4). There was neither agency nor tort in this case, but a mere arrangement to allow Lycett to deliver the goods to carry out a contract that he had made on his own behalf. The contract of agency, if there was any, did not go beyond the delivery of the crane; it did not authorize Lycett to bind the appellant by a contract. The intervention of the appellant did not prevent the Government from treating Lycett as principal, because, at the time when the contract was made, there was no agency. There can be no ratification unless there has previously been some act done by the agent as an agent.

[GRIFFITH C.J.—Does that make any difference except to this extent, that the owner could not sue upon the contract while

(1) (1901) A.C., 240.
(2) 10 M. & W., 340.
(3) 1 Bing., N.C., 198.
(4) 2 Burr., 1005.

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executory? But can he not sue for the price when his property is taken and kept after notice of his ownership?]

That was not put to the jury. They were not dealing with the implied contract on which the appellant now relies, and their finding had no reference to it. It was the executory contract to which attention was directed at the trial.

[GRIFFITH C.J.—Was not the position this, that the executory contract became merged in the executed contract?]

There was no unambiguous evidence of that. On the evidence the appellant might either have been claiming to be paid as owner, or because Lycett was the owner and for some reason or or other the appellant was entitled to the money. There was therefore no evidence to support the findings of the jury. [He referred to *Wakelin* v. *London and South-Western Railway Co.* (1); *Ryder* v. *Wombwell* (2); *Hiddle* v. *National Fire and Marine Insurance Co. of New Zealand* (3).] When an undisclosed principal alleges agency he must unequivocally establish it: *Sims* v. *Bond* (4). He must show that the purchaser had an opportunity of exercising his option of affirming or disaffirming the sale after notice of the ownership: *Bullen and Leake*, 3rd ed., p. 38; *Boston Ice Co.* v. *Potter* (5). Any alteration in the capacity in which the offeror is acting is a change in the nature of the offer which should be brought to the notice of the person to whom the offer is made, before acceptance: *Henthorn* v. *Fraser* (6).

As to the claim on accounts stated, there was no such account stated and agreed to by the Government, as would entitle the plaintiff to sue upon it.

[GRIFFITH C.J. referred to *Boulton* v. *Jones* (7); and *Benjamin on Sales*, 4th ed., p. 378.]

Gordon K.C., in reply. The contract was not completed until the letter of 19th May, because the terms of that are different from the terms in Lycett's offer. That letter therefore was not an acceptance, but a new offer, and at that date Lycett was the appellant's agent. The offer was accepted by delivery of the

(1) 12 App. Cas., 41, at p. 44.
(2) L.R., 4 Ex., 32.
(3) (1896) A.C., 372.
(4) 5 B. & Ad., 389.
(5) 25 Am. Rep., 9.
(6) (1892) 2 Ch., 27.
(7) 2 H. & N., 564; 27 L.J., Ex., 117.

crane by Lycett as agent for the appellant. The whole contract was made after the appointment of the agent, and therefore the principal was entitled to intervene before payment. The evidence shows beyond doubt that he did so on 23rd July, when he made his claim for payment. He did not hold out Lycett as his agent to receive the money, or do anything else to estop him from bringing his action to recover it.

The judgment of the Court was delivered by:—

September 15.

GRIFFITH C.J. In this case there has been an equal division of opinion amongst the learned Judges before whom the matter has come. At the trial *Simpson* J. thought that, certain facts having been found by the jury, the plaintiff was entitled to recover. When the matter came before the Full Court *Cohen* J., was of the same opinion, but the other two learned Judges, *Walker* J. and *Pring* J., held that the plaintiff had failed to establish his case, and made the rule absolute to enter a verdict for the defendant.

The facts are in a small compass. It appears that one Lycett in April, 1902, made an offer to sell to the Government of New South Wales a locomotive crane for £235, offering to make some alterations in it and deliver it in good working condition within a week after receipt of an order. At that time the crane did not belong to him. Subsequently, on 13th May, the appellant bought the crane and authorized Lycett to sell it to the Government. At that time Lycett had informed him that the Government were probable buyers, but there was no contract in existence between Lycett and the Government. On 19th May the Department of Public Works sent to Lycett an order in these terms: "Please supply for the Central Railway Station, c/o. F. H. Small, engineer-in-charge steam loco. crane as quoted £235, to be delivered or despatched within two days from date." That was not an acceptance of Lycett's offer. At that time, therefore, there was no contract between the parties. It may be regarded as a qualified acceptance of the offer, but if that is so, it was equivalent in law to a new offer for the crane on altered conditions. This was accepted by Lycett, who at that time had been appointed by the plaintiff as his agent. The crane was delivered in accordance with the contract. Now, the question for consideration is whether the

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contract was made by Lycett as agent for an undisclosed principal, the plaintiff, or on his own behalf. He says that it was made on his own behalf. If the offer which he made on his own behalf had been accepted *simpliciter*, there and then, the plaintiff could not have come in and asked to be made a party to that completed contract, on the ground that Lycett had afterwards agreed to accept him as a principal. But there was no contract between Lycett and the Government until Lycett had become agent for the plaintiff. Under those circumstances the contract was one made by an agent acting for an undisclosed principal. This is a very ordinary practice, and the rule to be applied in such cases is perfectly well known and settled, that the principal may come in and claim the benefit of the contract subject to any rights that the third party may have as against the agent. No question of that sort arises in this case. The learned Judge left to the jury the question whether the contract so made by the Government was made with the plaintiff directly or through his agent Lycett. The jury found that it was, and that the plaintiff had delivered the crane and had done nothing to estop him from claiming payment from the Government.

The only question considered by the Full Court was whether the plaintiff could be considered a party to the contract sued on. They held that he could not, because Lycett was not acting as his agent when he made the first offer. But that offer was not a contract and it was not accepted. When the new offer was made he was the agent for the plaintiff. The case relied on by the majority of the Supreme Court has therefore no application. The contract in controversy at the trial was that arising from performance of the request made by the Government on 19th May. On the evidence that was the first day on which any contractual relationship existed, and at that time, as the jury found, Lycett was agent for the plaintiff. There was a conflict of evidence on the point, and the jury believed that of the plaintiff.

The only other question is whether the plaintiff is entitled to be paid. Clearly he is, unless the defendants can establish that they have already paid him or someone authorized by him to receive payment. Before payment was made he gave notice to the Government that he was the principal and that Lycett was

his agent in making the contract. He sent an account in his own name on an ordinary voucher, attended himself at the Department, and asked for the money. He was asked how he would like the money paid, and said that he wished it paid into his credit at the Commercial Bank of Sydney. After that, however, by some mistake the Government paid the money to Lycett. The consequence is that, having paid the wrong person, they must pay it over again. They must pay the person who was the principal when the contract was made, of which fact they were informed, and it is no answer to say that they have paid the agent.

It is not necessary to refer to the other interesting points raised in the discussion of the case. But it would be very singular if when a person, whose property is sold by his consent, informs the purchaser that it is his property he could not, in the absence of any special circumstances giving the purchaser rights as against the person by whom the sale is made, recover the price from the purchaser. It is not necessary to refer to the authorities on that point.

We are therefore of the opinion that the learned Judge who presided at the trial, with whom *Cohen* J. agreed, was right, and that the appeal should be allowed and the verdict restored.

Appeal allowed with costs. Order appealed from discharged with costs. Rule nisi discharged with costs. Verdict for the plaintiff restored.

Solicitors for the appellant: *Pigott & Stinson.*

Solicitor for the respondent: *The Crown Solicitor for New South Wales.*

C. A. W.