[HIGH COURT OF AUSTRALIA.]

INTERNATIONAL PAPER COMPANY . APPELLANTS; DEFENDANTS,

AND

SPICER AND OTHERS . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 23, 26, 27, 28. *Dec.* 3.

Griffith C.J., Barton and Isaacs JJ.

Principal and Agent—Secret instructions limiting apparent authority—Contract reserved for approval of principal—Effect of principal's silence—Holding out —Evidence—New trial—Costs—Discretion of Court.

The appellants were paper manufacturers carrying on business in New York. The agency for the sale of their goods in Australasia was held by a Sydney firm who acted under a written authority which provided *inter alia*, that all contracts should be made in the name of the appellants to whom all contracts were to "be submitted for approval."

In an action by the respondents against the appellants on a contract alleged to have been made for the appellants by their agents in Sydney for the supply of paper to the respondents, the respondents put in evidence the document containing the authority, and also sought to show that the appellants had held out the agents or allowed them to hold themselves out as having authority to enter into such contracts without reference to their principals.

Held, that, though the document put in evidence by the respondents contained the actual terms of the agency, they were not precluded thereby from giving evidence of the holding out, for the jury were entitled to disregard the limitation upon the authority contained in the document, if it was unknown to the respondents, and if the principals knew that the agents were acting as if their authority was not so limited; and

That, even if the respondents knew the exact terms of the document, the clause relating to the approval of the principals, taken in connection with the rest of the document, was reasonably capable of the construction that the

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agents had authority to make provisional contracts binding the principals unless they thought fit to notify that they would not perform them, and that, if the respondents had acted upon the assumption that that was the proper construction, and the principals had failed to notify them within a reasonable time that they disapproved the contract, it was open to the jury to infer from the silence of the principals that they had assented to it.

Ireland v. *Livingston*, L.R., 5 H.L., 395, and *Prince* v. *Clark*, 1 B. & C., 186, applied.

The terms of the document of agency being such as to justify the inference that, however limited the authority of the agents in respect of making contracts, they had at least authority to inform persons dealing with their principals through them whether a proposal had been accepted or not, a statement by the agents that the contract was being performed by their principals was admissible as evidence that the proposal of the respondents had been accepted, and that the principals had ratified the action of their agents.

Held, also, that documents relating to prior transactions between the principals and third persons through the agents, and tending to show that the principals knew that the agents were holding themselves out as having authority to make contracts similar to that sued upon, were not rendered inadmissible by the mere fact that what was actually done by the principals in furtherance of these transactions was done after the date of the contract sued upon.

The Supreme Court in making absolute a rule *nisi* for a new trial, made no order as to costs, the result being that by the rules of the Supreme Court each party must bear his own costs of the first trial. The ground of the Court's refusal to make any order did not distinctly appear, though in a similar case it had refused on the ground that it had no jurisdiction to make an order as to costs in such a case.

Held, that, under the circumstances, the Supreme Court must be taken to have exercised its discretion as regards costs, and that discretion should not be reviewed.

Decision of the Supreme Court (*Spicer* v. *International Paper Co.*, (1906) 6 S.R. (N.S.W.), 170), affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

This was an action by the respondents against the appellants for breach of a contract for the supply of paper. The contract was alleged to have been made by the appellants through their Sydney agents. The appellant company carried on business in New York. At the trial *Pring* J., who presided, rejected certain

evidence tendered by the plaintiffs and granted a nonsuit. The Supreme Court on appeal made absolute a rule *nisi* setting aside the nonsuit and granting a new trial: *Spicer* v. *The International Paper Company* (1). From this decision the present appeal was brought, by leave of the High Court.

The facts are very fully stated in the judgments of *Darley* C.J. and *Cohen* J. in the Supreme Court, and, sufficiently for the purposes of this appeal, in the judgments of *Griffith* C.J. and *Isaacs* J.

Shand K.C., and *Rolin* (*Pilcher* K.C. with them), for the appellants. The defendants cannot be made liable unless either there was specific authority in the agents to make this contract or contracts of the same kind, or the agents were placed by the defendants in such a position that the public, knowing the nature of the authority of such agents in general, would naturally infer that these agents had authority to make such a contract, or the defendants had held them out to be their agents for such a purpose by ratifying contracts of this kind when made by the agents on their behalf. There was no actual authority in this case, because the written contract provided that all contracts must be submitted to the principals for approval. A party who deals with an agent must make himself acquainted with the limits of the agent's authority; if he does not, he deals at his own risk unless the principal has by his conduct estopped himself from denying the authority: *Evans on Principal and Agent*, 2nd ed., p. 122. There was nothing in the position of the agents that would lead the public to infer that they had authority to bind their principals by such a contract as this. To the public they appeared merely as agents to make sales of the principals' goods on the spot, and the contract was not an usual or ordinary one for such agents.

Before the principals can be bound by acts of the agents which, if they had been permitted by the principal, would have constituted a holding out, it must be proved that the principal had knowledge of those acts: *Brazier* v. *Camp* (2). There was no evidence of such knowledge here. The statements made by the

(1) (1906) 6 S.R. (N.S.W.), 170. (2) 63 L.J.Q.B., 257.

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agents as to the knowledge of their principals were not admissible. They were not agents for the purpose of making such admissions. Even if these statements were admitted they would not have proved a ratification of the contract, because the effect of them was that the contract was not in fact being carried out. Evidence of the previous transactions was irrelevant, because the transactions were not similar to the present, and were not carried out until after the date of the contract in question. Ratification of the agents' acts in those instances could not be a holding out to the plaintiffs that the agents had authority to make the present contract.

[GRIFFITH C.J., referred to *Watteau* v. *Fenwick* (1).]

In that case, the principal allowed the agent to act as owner of the hotel, and so held him out to the public as occupying a position which would naturally have involved authority to make the contract in question.

Bruce Smith K.C. and *Ferguson* (*J. L. Campbell* with them), for the respondents. There was evidence from which the jury might have inferred that the agents had authority to make the contract, or that the defendants had ratified the act of the agents in making it. There was nothing unusual in the contract itself. The evidence as to previous contracts was admissible as showing the nature of the agency. The form in which the documents were drawn up showed that the agents, with the knowledge of the defendants, called themselves the Australian Division of the International Paper Company, and that they were the sole agents for the sale of paper in Australasia. As such agents they would be looked upon by the public as having authority to make contracts like that now in question. [They referred to the different documents tendered on this point.] The contract was within the scope of their apparent authority. The plaintiffs were not bound to rely solely upon the written authority. The whole of the circumstances were for the jury, though one part of the plaintiffs' evidence might conflict with others: *Richards* v. *Morgan* (2). The document itself is not inconsistent with a general agency to make contracts of sale. The reservation is

(1) (1893) 1 Q.B., 346.

(2) 4 B. & S., 641, at p. 663.

more in the nature of a direction to the agents than a condition precedent to the making of a contract. Third parties, even if they were aware of the terms of the document, were entitled to assume that the agents had carried them out, and the jury would have been justified in assuming that the contract had been communicated to the principals. The agents must at least have had authority to communicate to third parties the fact of the acceptance by the principals. The fact that the contract was not repudiated within a reasonable time was evidence for the jury that it was approved. [They referred to *Bowstead on Agency*, 2nd ed.. Art. 29, p. 54; *Story on Agency*, 7th ed., par. 258; *Robinson* v. *Gleadow* (1); *Pott* v. *Bevan* (2); *The Australia* (3); *Prince* v. *Clark* (4); *Proudfoot* v. *Montefiore* (5); *Blackwood Wright on Principal and Agent*, 2nd ed., p. 60, and cases there cited; *Spooner* v. *Browning* (6).]

[ISAACS J. referred to *Rolland* v. *Hart* (7); *Bradley* v. *Riches* (8); *Lucy* v. *Mouflet* (9).]

The document of agency was at any rate capable of meaning that the agents had full power to make contracts, and were only required to submit them at once to the principals, and the plaintiffs were entitled to assume that that was the meaning.

[GRIFFITH C.J. referred to *Ireland* v. *Livingston* (10).]

The fact that the principals were a foreign corporation was also a matter which the jury might take into consideration. It would be unreasonable to expect a person who wished to buy paper of this kind to wait several months before knowing whether he would get it or not from the defendants. [They referred to *Wilson* v. *West Hartlepool Harbour and Railway Co.* (11); *Smith* v. *M'Guire* (12); *Rossiter* v. *Trafalgar Life Assurance Association* (13); *Edmunds* v. *Bushell* (14); *Prescott* v. *Flinn* (15); *Montaignac* v. *Shitta* (16).]

If the position of the agents was such as to lead the plaintiffs to believe they had authority, the existence of the secret document

(1) 2 Bing. N.C., 156.
(2) 1 C. & K., 335.
(3) 13 Moo. P.C.C., 132.
(4) 1 B. & C., 186.
(5) L.R. 2 Q.B., 511.
(6) (1898) 1 Q.B., 528.
(7) L.R. 6 Ch., 678.
(8) 9 Ch. D., 189.
(9) 5 H. & N., 229, at p. 233.
(10) L.R. 5 H.L., 395.
(11) 34 Beav., 187.
(12) 3 H. & N., 554.
(13) 27 Beav., 377.
(14) L.R. 1 Q.B., 97.
(15) 9 Bing., 19.
(16) 15 App. Cas., 357.

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cannot affect the liability of the principals: *Story on Agency*, 7th ed., p. 127.

As to costs, if the appeal fails and the plaintiffs succeed at the second trial, they should have their costs of the first trial also. As the matter now stands, no order as to costs was made by the Supreme Court, and consequently the costs of the first trial will abide the event, which means that the plaintiffs will not get their costs of that trial, whatever the result of the second trial. [They referred to *Wills* v. *Gorman* (1); *Sydney Harbour Trust Commissioners* v. *Warburton* (2); *Dowling* v. *Farrell* (3); *Marshall on Costs*, 1860 ed., p. 149; *Hallock on Costs*, 2nd ed., pp. 387, 390; *Emery* v. *Armstrong* (4); *Anderson* v. *George* (5); *Creen* v. *Wright* (6); *Field* v. *Great Northern Railway Co.* (7).]

Rolin, in reply. No inference can be drawn against the defendants from the fact that their disapproval of the proposed contract was not communicated to the plaintiffs within a reasonable time. The onus was on the plaintiffs to prove affirmatively that the defendants had assented to the contract. The written authority merely gave the agents power to receive and submit offers, not to conclude contracts, and the defendants were entitled to assume that the agents had not exceeded their authority. The statements of the agents cannot amount to estoppel, because they had no authority to do more than communicate acceptance, if instructed to do so. Moreover, there was no holding out by the defendants that they would execute orders given to the agents without communicating their approval. There was no course of dealing upon which such a presumption could be founded, and no representation of authority. [He referred to *Spooner* v. *Browning* (8); *Grant* v. *Norway* (9); *George Whitechurch Ltd.* v. *Cavanagh* (10).] The documents tendered to prove other contracts were all consistent with the written authority having been carried out, and therefore would not have carried the case any further.

(1) (1906) 6 S.R. (N.S.W.), 472; at p. 479.
(2) (1906) 6 S.R. (N.S.W.), 102.
(3) (1903) 3 S.R. (N.S.W.), 42.
(4) Legge (N.S.W.), 887.
(5) 1 Burr., 352.
(6) 2 C.P.D., 354.
(7) 3 Ex. D., 261.
(8) (1898) 1 Q.B., 528.
(9) 10 C.B., 665.
(10) (1902) A.C., 117.

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[ISAACS J. referred to *Ramazotti* v. *Bowring* (1).]

No notice was given by the respondents of their intention to apply for a variation of the order of the Supreme Court as to costs. In any case this Court will not interfere with the practice of the Supreme Court in such matters. [He referred to *Rolin and Innes*, Sup. Ct. Prac., p. 151; *Campbell* v. *Commercial Bank* (2).]

Cur. adv. vult.

December 3rd.

GRIFFITH C.J. This is an appeal from an order of the Supreme Court of New South Wales setting aside a nonsuit and granting a new trial in an action brought by the respondents against the appellants to recover damages for breach of contract. This contract, which was dated 29th December 1903, is described by *Darley* C.J. in his judgment as "an agreement by which the defendants agreed that they would to the satisfaction of the plaintiffs perform and carry out the terms and conditions of a certain agreement made between the plaintiffs and the Australian Newspaper Company, and would deliver to the said company paper at the price of 1¼d. per pound less 5 per cent. discount." The contract was alleged to have been made by a joint stock company in New South Wales called Carmichael, Wilson & Co. (Limited), as agents for the defendants. The defendants pleaded *non assumpsit*, and it was therefore necessary for the plaintiffs to prove that the contract was made by Carmichael, Wilson & Co. with the authority of the defendants. The learned Judge who presided at the trial rejected certain evidence tendered for that purpose, and upon the evidence that was admitted held that there was no case to go to the jury, and nonsuited the plaintiffs. The learned Judges of the Full Court were of the contrary opinion.

The contract purports to be made between the International Paper Company of the first part and the respondents of the second part. As I have said, it was necessary for the plaintiffs in the action to prove that Carmichael, Wilson & Co. were the agents of the defendants for the purpose of making this contract. Now such an agency may, generally speaking, be proved either

(1) 7 C.B.N.S., 851. (2) 2 N.S.W. L.R., 375, at p. 388.

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by showing that actual authority was given by the alleged principal to the alleged agent to make the specific contract; or by showing an actual general authority to make contracts of that kind; or by evidence of conduct on the part of the alleged principal of such a nature as to induce the person contracting with the agent to infer that he was an agent for that purpose. The rule of law was thus stated by *Pollock* C.B. in the case of *Reynell* v. *Lewis* (1):—"This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff, that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound; he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly so that it may be inferred to have reached him, and may be made by words or conduct. Upon none of these propositions is there, we apprehend, the slightest doubt."

The same rule was stated by the same learned Judge in *Smith* v. *M'Guire* (2), in these words:—"I think that questions of this kind, whether arising on a charter-party, a bill of exchange, or any other commercial instrument, or on a verbal contract, should be decided on this principle—Has the party who is charged with liability under the instrument or contract authorized and permitted the person, who has professed to act as his agent, to act in such a manner and to such an extent that, from what has occurred publicly, the public in general would have a right to reasonably conclude, and persons dealing with him would naturally draw the inference, that he was a *general* agent? If so, in my judgment, the principal is bound, although, as between him and the agent, he takes care on every occasion to give special instructions; and I think it makes no difference whatever, whether the agent acts as

(1) 15 M. & W., 517, at p. 527. (2) 3 H. & N., 554, at p. 560.

if he were the principal, or proposes to act as agent, as by signing 'A.B. agent for C.D.'" In cases where the authority is sought to be proved by evidence of what is called "holding out," it very rarely, I might almost say never, can happen that the principal himself has made the representation by direct communication to the other party, for, if he did, that would be evidence of actual authority. Where a person tells another that a certain person is his agent, that is sufficient proof of the agency as to all matters to which the statement relates. But where the communication is not made directly the questions to be considered are those suggested by *Erle* C.J. in *Ramazotti* v. *Bowring* (1). In that case the question was whether a person, not the owner of goods, had been held out by the true owner of the goods as being the owner. Although ostensible ownership is not the same thing as ostensible agency, still the principle applicable is identical where the question is one of authority to be proved by conduct. *Erle* C.J. said (2):—"The proper questions, under the circumstances, would have been whether Ramazotti so conducted himself as to enable Nixon to hold himself out to be the true owner of the goods, whether Nixon did so hold himself out, and whether the defendants in dealing with Nixon believed him to be the owner." I think, therefore, that the questions to be answered in this case, substituting agency for ownership, would be, whether the International Paper Company so conducted themselves as to enable Carmichael, Wilson & Co. to hold themselves out to be their agents for the purpose of making such contracts as that sued upon; whether Carmichael, Wilson & Co. did so hold themselves out; and whether the plaintiffs in dealing with them believed them to be such agents.

These being the principles of law relating to the subject, I proceed to deal with the facts. The plaintiffs endeavoured to establish the authority of Carmichael, Wilson & Co. by proving that some months before the date of the contract in question that company were holding themselves out as agents for the defendants for the purpose of making contracts of this kind. They first of all tendered evidence of a contract made with the plaintiffs themselves. That was a contract for the supply of

(1) 7 C.B.N.S., 851.

(2) 7 C.B.N.S., 851, at p. 856.

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a comparatively small quantity of paper, but the order was given to Carmichael, Wilson & Co. as agents for the defendants, and was executed by the defendants, and the plaintiffs paid the defendants the agreed price, and received from them invoices coming from New York direct. Evidence was tendered to prove that the defendants received the price through a special banking account which Carmichael, Wilson & Co. kept in Australia for the defendants' benefit, but the evidence was rejected. That fact, if proved, would have been some evidence, in my opinion, that the defendants were aware that Carmichael, Wilson & Co. were holding themselves out to be their agents for the purpose of making such contracts. That evidence ought therefore, in my opinion, to have been received, though, perhaps, it would not have gone very far towards enabling the plaintiffs to succeed in this action.

Evidence was then tendered to prove that about six months before the contract sued upon Carmichael, Wilson & Co. as agents for the defendants had entered into a contract with the Brisbane Newspaper Company, which publishes several important papers in Queensland, for the supply of paper by deliveries extending over three years. The document tendered was an offer in this form :—"The Manager, Brisbane Newspaper Company, Limited. Dear Sir. We hereby offer to conclude a contract for the supply of news printing paper to be used in the production of your publications on the following terms and conditions :" (which were then set out) ; (Signed) " International Paper Company. Managers Australasian Division Carmichael, Wilson & Co. Limited. J. A. Wilson," and accepted by the Brisbane Newspaper Company, Limited.

It was proposed to prove that this contract was afterwards performed by the defendants, and that there was nothing to suggest that they signified their approval of it otherwise than by performing it in ordinary course as a contract made for them by their agents. It was further proposed to show that the defendants sent paper, accompanied by invoices, from New York in respect of this transaction, which was described in those invoices as a contract, and that some of the correspondence was written on forms with printed headings on which the largest

words were:—"International Paper Company of New York, Head Australasian Office, 24 Bond Street, Sydney," with, in the margin, "Australasian Division, Carmichael, Wilson & Company Limited," 24 Bond Street being Carmichael, Wilson & Co.'s address. This, it was urged, was some evidence that the defendants knew that Carmichael, Wilson & Co. were holding themselves out as their agents. It was also proposed to prove that the defendants had received the price of the paper supplied under that contract. Now that, in my opinion, was evidence that tended to establish, first, that Carmichael, Wilson & Co. held themselves out as agents for the defendants, and, secondly, that the defendants were aware of that fact, and took the benefit of the contract made by their ostensible agents. That was, of course, only one instance, and perhaps would not of itself go very far, but I think that evidence of the transaction was admissible.

Another piece of evidence tendered was a contract made about the same time by the same Carmichael, Wilson & Co. who signed it "International Paper Company of New York, Managers Australasian Division, Carmichael, Wilson & Company Limited, Bond Street, Sydney," with Messrs. Wilson and Mackinnon, proprietors of the Melbourne *Argus* and other papers in Australia, for deliveries of paper extending over twelve months, and it was sought to show that this contract, having been made by the alleged agents, had been performed by the defendants, that invoices relating to the transaction were sent from the defendants' New York office with the paper, some of which bore printed headings indicating that the paper was supplied by the defendants under the contract made by Carmichael, Wilson & Co. And it was also sought to show that the price paid for the paper was received by the defendants. In my opinion, that evidence also was admissible as evidence that the defendants on their part knew that Carmichael, Wilson & Co. were holding themselves out as their agents to make contracts of that sort. It is true that the evidence that the defendants performed these contracts with the Brisbane Newspaper Co. and Wilson & Mackinnon relates to a period subsequent to the making of the contract now in question. But the material point is whether they were admissible as evidence that the defendants, when they were made, allowed

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Carmichael, Wilson & Co. to hold themselves out as having authority to make such contracts. That fact may be proved by evidence of matters subsequent. In my opinion, therefore, all this evidence was wrongly rejected, and I think that, if it had been received, there would have been evidence to go to the jury on which they could have found that the defendants had authorized Carmichael, Wilson & Co. to make the contract in question.

All this evidence having been rejected, the plaintiffs were driven to rely upon another piece of evidence. It appeared that, during the course of some interlocutory proceedings taken by the defendants, an affidavit was filed on their behalf, in which was set out what was said to be a copy of the agreement by which the only actual authority was given to Carmichael, Wilson & Co. by the defendants. It was a document dated in 1903, more than two years before the contract sued upon, and before the actual incorporation of Carmichael, Wilson & Co. From the document it appeared that a joint stock company was to be formed with that name, who were to act as the defendants' agents in Australasia. They were to do their utmost in the interests of their principals, to receive a commission on what they did, and to perform a number of other duties to which it is not necessary to refer in particular. The agreement stipulated, in the 9th clause, that all contracts should be made in the name of the defendants, to whom all contracts should be submitted for approval. It was contended for the defendants that in the face of that stipulation no room was left for any speculation as to what was the actual authority of Carmichael, Wilson & Co., or as to how far the defendants had held them out as their agents, because we now know what actual authority they had. It appears to me, however, that in view of the other evidence tendered, and, in my opinion, wrongly rejected, the jury might properly have been told that they might disregard any secret limitations of the authority given to the agents, if they came to the conclusion that the principals knew that the agents were acting as if they had unlimited authority. The words relied on are :—"To whom all contracts shall be submitted for approval." The best that can be said in favour of the defendants' contention

in this respect is that the plaintiffs have no greater rights than if they had known the exact terms of this document. I do not think that that is a sound view to take of the position, but, assuming it to be so, how does the matter stand? Those words are at best ambiguous. They may mean either that the agents are not to have authority to enter into contracts at all, but only to submit offers to their principals, or that they may make provisional contracts binding the principals unless they think fit to notify that they will not perform them. The case of *Ireland* v. *Livingston* (1) is authority for the proposition that where the words of such an authority are ambiguous they must be construed in favour of the party who has acted upon them according to a reasonable construction of the language used. If that is the case in the interpretation of a contract as between principal and agent, it is so *a fortiori* as between the principal and a third party who has dealt with the agent; because, even if the plaintiffs had no greater rights than those given by the document, they are at any rate entitled to the benefit of any reasonable construction that is open on the language used. Further, it is quite consistent with such a restriction having been inserted in the document in 1901 that two years afterwards the course of dealing between the principals and the agents had altered, and that the defendants no longer insisted upon contracts being submitted for their approval before being completed. There is a third answer, that if this document means that every transaction entered into in the name of the principals by the agents is to be submitted to the principals for approval, then if the principals, having notice, or being informed, that such a contract has been entered into by their agents in their name, do not within a reasonable time inform the person with whom the agents have made the contract whether they approve or disapprove the contract, the jury may infer from their silence that they assented to it. The authority being in this view only conditional, the condition is to be taken to have been performed. I think that the passage read by *Cohen* J. from *Story on Agency* is ample authority for that proposition; so also is the case of *Prince* v. *Clark* (2). I think, therefore, that this document of 1901 was,

(1) L.R., 5 H.L., 395. (2) 1 B. & C., 186.

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of itself, sufficient evidence to prevent the case from being withdrawn from the jury.

Evidence was also tendered and rejected to the effect that when the time had arrived for the delivery of the paper in accordance with the contract, Carmichael, Wilson & Co. communicated with the plaintiffs' manager on the subject of the paper, and informed him, in substance, that it was on its way to Australia, that is, in effect, that the principals were performing the contract. In my opinion, it is a fair inference from the document of 1901 that however limited the authority of the agents, and even assuming that they had not authority to make absolute contracts, they at least had authority to tell a person with whom a provisional contract had been made whether his offer had been accepted by their principals or not. And if they say that an offer has been accepted, that is some evidence of a statement made by the principals' authority, from which it may be inferred that the principals have ratified the action of their agents.

There was still another piece of evidence tendered and rejected. It appeared that Carmichael, Wilson & Co. showed the plaintiffs' manager a book of advertisements containing a number of pictures of the places at which the defendants carried on operations, with a list of their agents in different parts of the world, Carmichael, Wilson & Co. being described as the "sales agents" of the defendants in Australasia. In my opinion, the document of 1901 was *primâ facie* evidence of the agents' authority to publish an advertisement of that kind, that is, to represent themselves to the world in general and the plaintiffs in particular as the "sales agents" for the defendants, whatever that may mean. The book ought therefore to have been admitted in evidence.

The agreement of 1901 was made with the persons who afterwards formed the company of Carmichael, Wilson & Co., but before that company was formed. It was not, therefore, evidence of the authority of that company at that date, but if it was acted on afterwards, as was in fact shown, it was evidence of authority given after the formation of the company. There is no necessity that such authority should be given in express terms, it may be given in any way in which persons may express their intention.

For these reasons I think that the rule *nisi* for a new trial was properly made absolute.

Another incidental point was made for the respondents. The order of the Supreme Court says nothing as to the costs of the first trial, and by rule 159 of the Supreme Court it is provided that:—"Where a new trial is granted (except on the ground that the verdict was against evidence) without mention of costs, each party shall bear his own costs of the first trial." So that as the order stands, even if the plaintiffs succeed at the second trial, they cannot get their costs of the first trial. It was suggested that the Supreme Court made the order because they were of opinion that they had no jurisdiction to award costs of the first trial. If that were so, of course this Court would have jurisdiction to review the decision, and indeed it would be our duty to do so if we thought the order was wrong. But when the Court appealed from has a discretion, it is not the practice of a Court of Appeal to review their decision on a matter of mere discretion. It does not appear distinctly that the Court thought that they had no jurisdiction to award these costs. It appears that in a later case they said they had no jurisdiction to do so, but it does not appear that the point was brought to their notice in this case. Under these circumstances I do not think it would be proper for us to interfere with the order of the Supreme Court refusing to make any order as to costs.

BARTON J. The judgment of His Honor the Chief Justice represents the conclusions at which we have arrived in conference, and therefore I do not propose to add anything to what he has said beyond expressing my concurrence in it.

ISAACS J. In this case the firm of James Spicer & Sons sue the International Paper Company for breach of an agreement which is substantially for the sale of paper so as to enable the plaintiffs to carry out a prior contract between them and the Australian Newspaper Company Limited.

The agreement sued upon is dated 29th December 1903. It was made in the name of the defendants Carmichael, Wilson & Co. Limited purporting to be the defendants' agent in that behalf, and

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is signed "International Paper Company Australasian Division, Carmichael, Wilson & Co. Limited J. A. Wilson." Mr. J. A. Wilson was a director of Carmichael, Wilson & Co. Limited.

The defendant company failed to perform the agreement and contends that it is not binding upon them.

At the trial before *Pring* J. in September 1903, the learned Judge nonsuited the plaintiffs on the ground that there was no evidence proper to be submitted to a jury of authority in Carmichael, Wilson & Co. Limited to make a contract immediately binding upon the defendant company, and no evidence of any subsequent approval of this agreement on the part of the defendant company. His Honor excluded certain evidence tendered consisting partly of other transactions which Carmichael, Wilson & Co. Limited had previously entered into for the sale of paper as agent of the defendants, and partly of a book of advertisements.

The Full Court set aside the nonsuit and ordered a new trial, holding that there was sufficient evidence for the jury to act upon in the testimony actually admitted, and one of the learned Judges further held that evidence of the prior transactions had been wrongly rejected.

We are now asked to say that the judgment of the Full Court was wrong.

The plaintiffs' case is put alternatively; they first say that the International Paper Company of New York impliedly authorized Carmichael, Wilson & Co. Limited of Sydney to act as its general agent for the sale of paper, and as a proof of that fact they offer in evidence the previous transactions and documents excluded at the trial; the second position of the plaintiffs rests on a document which has been called the authority of 15th October 1901, made between the defendant company and Messrs. Carmichael and Wilson, as individuals, before the incorporation of Carmichael, Wilson & Co. Limited, which did not take place till 8th February 1902. It is in proof however that the defendant company appointed Carmichael, Wilson & Co. Limited to act upon the terms of the authority of 15th October 1901. This document recites the intention of Carmichael and Wilson to form a limited company for the purpose of under-

taking agency business in connection with the sale of paper and products of a like nature, such company to establish offices in Sydney, Melbourne, Brisbane and Auckland, and to be the sole representatives of the Paper Company for the sale of its products in Australasia. It also states that the Paper Company has agreed to employ "the said Agents" for the exclusive sale of the products of the Paper Company in Australasia upon the terms and conditions thereinafter mentioned. "Agents" by clause 22 included the intended company of Carmichael, Wilson & Company Limited. The document provided for the formation of the intended company by its present name, that the agents should be the sole and exclusive representatives of the Paper Company for the sale in Australasia of its products and other similar products which it might furnish for sale, that the agents should use their best efforts to dispose of the Paper Company's products in the most judicious and advantageous way so as to produce the best results for the Paper Company; that they would not sell any competing or conflicting product, and that they would procure and transmit to the principals information as to newspapers and paper dealers in Australasia.

The Paper Company was to regulate and control prices and the extent of sales and deliveries in Australasia during the term of the contract, but was bound to make its prices as low as it considered market conditions would allow so as to enable the agents to dispose of the products, and was bound also to use its best efforts to supply the agents promptly with such quantities of paper as might be required for the trade.

The agents guaranteed and were to be responsible for the amounts due on sales. The Paper Company promised that the paper should be of the best quality of its kind.

The payment which the agents were to receive for their services and undertakings and certain expenses, was a commission equal to certain percentages mentioned in the net selling price of paper mentioned in Australasia. Then came clause 9, which the defendants submit as one complete answer to the plaintiffs' claim. It begins in these words:—"All transactions shall be made in the name of the International Paper Company to whom all contracts shall be submitted for approval." It provides that

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all forms used by the agents in the transactions of their business as agents of the Paper Company shall be as far as possible in the name of the International Company, that all invoices shall, as far as possible, be made out by the International Paper Company direct, and the moneys collected by the agents immediately deposited by them to the credit of the International Company in the Union Bank of Sydney to be drawn on by the Paper Company by drafts from New York or otherwise as it may determine. A second banking account called a current account is provided for, to be fed by the Paper Company, and out of which, when authorized by the Paper Company by power of attorney, the agents may draw for their common expenses.

A fidelity bond is stipulated for, and provision is made for monthly statements of account and periodical auditing. The duration of the agreement is ten years unless sooner terminated as provided.

One of the causes justifying a termination of the agreement is contained in clause 14, and seems to me of considerable importance in construing the document. That clause provides :—"In case the agents shall fail to sell on or before February first One thousand nine hundred and three at least ten thousand tons of paper for delivery prior to the first day of February One thousand nine hundred and four or shall fail in any year thereafter to make sales and deliveries of at least ten thousand tons per year the Paper Company shall have the right forthwith upon written notice to absolutely terminate this contract and upon such notice all rights of the agents therein and thereunder shall be at an end except as to any commissions actually earned or any disbursements which may be payable by the Paper Company."

If, therefore, during the year which included 29th December 1903 the agent failed "to make sales and deliveries of at least ten thousand tons" the Paper Company had the right forthwith on written notice to absolutely terminate the contract, and put an end to all rights of the agents except commission actually earned and disbursements to be recouped.

The plaintiffs as their alternative proof of authority rely upon this document, and say that it conferred power on Carmichael, Wilson & Company Limited to make the agreement of December

1903 either as binding the defendant company without more, the provision requiring it to be submitted to the defendants being treated as a matter merely between principal and agent, or if the contention cannot be put so high, then that submission to and approval by the defendants may be inferred from the circumstances. That inference, it is argued, may arise either from the absence of any communication of dissent, or from the notification of Carmichael, Wilson & Company in March 1904 that some of the paper was on the way.

The third ground upon which the plaintiffs rest their claim is that, even if they fail as to actual authority, they ought to succeed because the agents were held out as having general authority to contract and without reference to their principals, and the express limitation contained in clause 9 was never in fact brought to plaintiffs' knowledge.

The defendants' answer, as I gather it, is this:—"They say the authority of October 1901 is expressly limited by the requirement of submitting every contract to the defendant company for their affirmative approval, and without proof of the fulfilment of this condition no contractual relation can be created by the agents. They say that any person dealing with the agents must take the risk of there being the requisite authority, and that the principals are sufficiently protected so far as actual authority is concerned by clause 9.

Then they contend that the prior transaction and other evidence excluded are perfectly consistent with strict adherence on the part of the agents to the authority of 15th October 1901, and, as the plaintiff has not shown affirmatively that these transactions were specifically approved by the defendants and such approval communicated to the other contracting parties, they afford no evidence of any authority outside the document of 15th October 1901.

They also say that there is no evidence of holding out, for the reasons just mentioned, and further that whatever was done by the defendants in furtherance of these transactions was done after 29th December 1903, and consequently was no ground for raising an estoppel in favor of the plaintiffs.

Lastly, it was urged for the defendants that upon the evidence

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it appeared that the agreement was made expressly subject to a stipulation that it was to be confirmed from New York by letter, and that, this condition remaining unfulfilled, no contractual obligation was ever created.

As this case will stand for re-trial before a jury, I shall abstain from any observation with regard to the weight which ought to be attached to any evidence upon the facts in controversy. That is for another tribunal to consider, and possibly upon a different body of testimony.

But it is necessary to examine the case in relation to the propositions of law which the parties have laid before the Court.

Taking the defendants' last argument first, that is to say, as to the special stipulation for confirmation by letter from New York, I do not see how it can be acceded to. The evidence of Mr. Wilson, which is relied on to sustain it, is on this point contradicted by Mr. Gates, and therefore, whatever its effect might be if ascertained to be true, it is not yet established. But still more, even if the conversation as deposed to by Wilson really took place, the further question arises, namely, was it anything more than a promise by him to get a letter from headquarters to satisfy Gates that Carmichael, Wilson & Company Limited really had the authority they asserted they had. In other words, not desiring for obvious reasons to disclose all the contents of their agreement with their principals, they are willing to substitute an equally satisfactory proof of authority in the shape of a confirmatory letter.

If the defendants cannot ride off on this point, then there remain the questions of general authority, and the agreement of 15th October 1901, and estoppel by holding out.

With respect to the evidence of general authority beyond the written agreement of 1901, I agree with the observations that have fallen from the learned Chief Justice. In view of the possible submission of the issues of fact to a jury hereafter, I shall not do more than point out certain features from which a jury would be at liberty to form its own conclusions, and which therefore justify the Court in holding that the evidence was properly admissible and the nonsuit wrong.

The documents relating to prior contracts were produced as,

and purport to be, the complete records of the transactions they refer to; they show that the defendant company have supplied the goods and received payment for them, and, so far as appears up to the present, without either questioning or supplementing the authority of the agents or signifying approval of the contracts that had been made.

The headings of some of the documents and the references in others, together with the other circumstances just mentioned, appear to me to make it impossible to withdraw them from consideration, or to say that no honest jury, if so minded, could reasonably draw the necessary conclusions in favour of the plaintiffs; whether such conclusions are the proper conclusions to draw is a matter entirely for the jury, and with respect to that I offer no opinion and make no suggestion.

I pass from that to the authority of October 1901, the contents of which have been already referred to. I do not agree with the defendants' view of the meaning and effect of clause 9. They construe the provision as to submitting contracts for approval as if it were contained in some short and simple authority to receive offers and possibly to negotiate in order to get the best offer available, but always leaving it to the absolute and unquestionable will of the principals to say "yes" or "no" or nothing at all without being considered unreasonable.

Can it be supposed that the agreement of 15th October 1901 is to be so construed? Is it a reasonable interpretation of that document to say that Carmichael, Wilson & Company Limited were bound to look for orders, to canvass Australasia, to use their best efforts to dispose of goods, to incur expense, to abstain from selling competing goods, to effect sales, tentatively at all events to communicate the fact of these transactions, and yet, although their remuneration and even the continuance of the agreement might depend on the reply, the principals were not expected to answer unless they chose. If less than 10,000 tons of paper were sold and delivered in the year severe consequences might follow to the agents at the option of the principals. Is it reasonable to suppose that any person reading that document could arrive at the conclusion that, unless the Paper Company thought fit to send a reply, the agents would have to

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rest content without one, and remain in doubt whether their commission were earned or not, or it may be, whether the minimum of effective business had been attained? Very difficult and unfair situations in which the principals' silence might place the agents can easily be suggested, if no duty on the part of the principals is to be implied to inform them of their approval or disapproval. The provision that "all contracts shall be submitted for approval" cannot be read apart from the rest of the agreement, and reading it in conjunction with all the other terms and by the light of the whole situation, I am of opinion that there existed an implied duty or promise on the part of the Paper Company to communicate to Carmichael, Wilson & Company Limited, within a reasonable time, their disapproval of any proposed contract at the peril of having its silence construed into consent.

And if that is the effect of the provision with relation to Carmichael, Wilson & Company Limited, it follows that any other person desiring to enter into a contract with the International Paper Company through Carmichael, Wilson & Company Limited and reading the authority, would conclude that in the case of non-approval such a notification would without delay be made to Carmichael, Wilson & Company Limited, and that he would, either on application to that company or spontaneously from that company, be in his turn informed of the fact.

"Submitted for approval" means submitted by Carmichael Wilson & Company Limited and not by the purchaser. The answer would be of course to Carmichael, Wilson & Company Limited and not to the purchaser. How, then, can the purchaser know his position? Either he must, in the absence of any notification within a reasonable time, assume that approval is given, or he must ascertain as best he can from Carmichael, Wilson & Company Limited what has been done. It seems to me there is no other course reasonably open to a business man.

In this case, having regard to the fact that the plaintiffs were known to be under contract to the Australian Newspaper Co., there was even more reason for expecting some distinct and timely communication if the defendants were not going to stand by the arrangement. It was not the case of a person for the first

time proposing a purchase and receiving no answer. Whether the arrangement of 29th December 1903 could in strictness be called a contract or not, at all events it was a dealing between parties which might be thought as between business men to raise a reasonable expectation of an answer. In *Lucy* v. *Mouflet* (1), *Pollock* C.B., says :—" Now though it is true that if a stranger were to write and say to a person, 'If I do not hear I will send goods,' the omission to reply would be no evidence of a contract, yet it is different where two persons are actually engaged in dealing or under contract with each other. Then, if a proposal is made to which assent might be reasonably expected amongst men of business, and no answer is sent to it, acquiescence may be presumed." In *Sutton & Co.* v. *Ciceri & Co.* (2) it was considered by Lord *Watson* that reticence in mercantile correspondence may under some circumstances be irrebutably assumed to be equivalent to admission. Consequently, putting the best possible interpretation on the words for the defendants, namely, that without actual approval there was no contract, it is still open for the jury, in my opinion, under the circumstances of this case, to find as a fact that there was approval. The construction of these words, however, is not necessarily so favourable for the defendants as that. Taken together with the rest of the agreement they appear to me to be at least ambiguous and to be reasonably capable of meaning that they are only inserted for the protection of the principals if they choose to avail themselves of the power. I think, looking at the document as a whole, according to well established rules of construction (*see North Eastern Railway Co.* v. *Lord Hastings* (3)), that this is their true signification. But looking at them as merely ambiguous how does it stand ? The learned Chief Justice referred to *Ireland* v. *Livingston* (4), as an authority for the legal point in such a case. The Privy Council has acted upon the same principle in *United Insurance Co.* v. *Cotton*—of which the only report of the judgment, so far as I know, is found in the *South Australian Law Reports* (5). Referring to certain instructions to an agent their Lordships intimate their opinion as to their

(1) 5 H. & N., 229, at p. 233.
(2) 15 App. Cas., 144.
(3) (1900) A.C., 260.
(4) L.R. 5 H.L., 395.
(5) 19 S.A.L.R , 124, at p. 127.

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meaning, and then proceed to say:—"Of course a more limited construction may be put upon it. Their Lordships merely desire to indicate that the wider construction is one which might, in their estimation, be reasonably put upon it by the person to whom it is addressed." Applying that principle to the present case, the error of a nonsuit is still more evident.

If words are susceptible of only one plain and unambiguous meaning, that must be the meaning attributed to them, and no different interpretation can be substituted merely because the parties may have thought differently and acted accordingly. For this the case already quoted of *North Eastern Railway Co.* v. *Lord Hastings* (1) is a decisive authority. But where the words admit of more than one construction, that which the parties themselves have by their conduct adopted may be very important in determining the interpretation which, in the event of a subsequent dispute, the Court will place upon them: *Forbes* v. *Watt* (2).

In this view I am not sure that the various prior transactions are not, by reason of the apparent absence of specific approval, some evidence that both the parties to the agreement have construed and regarded the expression "submitted for approval" as meaning that, in the absence of notice to the contrary, approval is to be assumed, and therefore that is an interpretation which a reasonable business man might fairly place upon it.

I should not omit to mention the contention on behalf of the defendants that there was no evidence of Carmichael, Wilson & Company Limited ever having in fact forwarded the agreement of 29th December 1903 to the defendants for approval, and consequently no inference could be drawn from the defendants' silence. I think that is sufficiently answered by the presumption that Carmichael, Wilson & Company Limited did fully inform the defendants of the whole of the circumstances of the agreement, because that was at once their duty to their principals, the advancement of their own interests, and the honest and natural course to pursue towards the plaintiffs. No circumstance appears that repels that presumption, but on the contrary the non-production at the trial of the document signed by Gates, and

(1) (1900) A.C., 260. (2) L.R. 2 H.L., Sc. 214.

which was asked for both upon subpœna *duces tecum* and notice to produce, is a circumstance which a jury might be asked to regard as supporting the *primâ facie* impression.

On the question of holding out I do not wish to add anything to what has already been said except to refer to *Farquharson Brothers & Co.* v. *King & Co.* (1). Lord *Lindley* there says:— "It was pointed out by *Parke J.*, afterwards Lord *Wensleydale*, in *Dickinson* v. *Valpy* (2), that 'holding out to the world' is a loose expression; the 'holding out' must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it."

As to the case of *Watteau* v. *Fenwick* (3), it is not necessary for the purpose of to-day to say more about it than that I am at present not prepared to assent to it. Its correctness I observe is questioned in *Lindley on Partnership*, 7th ed., p. 146.

Appeal dismissed with costs.

Solicitors, for appellants, *Norton, Smith & Co.*

Solicitors, for respondents, *J. Stuart Thom Bros. & Co.*

C. A. W.

(1) (1902) A.C. 325, at p. 341. (2) 10 B. & C., at p. 140.
(3) (1893) 1 Q.B., 346.