Rights of Agents Acting for Foreign Principals

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RIGHTS OF AGENTS ACTING FOR FOREIGN PRINCIPALS

English decisions of the last fifty years have tended materially to enlarge or modify what has generally been understood to be the law regarding the rights of agents acting for foreign principals, but it is doubtful whether the doctrine found in the text-books and in the professional opinion in this country has quite assimilated the position as it now stands in the light of recent authorities. It has been too readily accepted that by presumption of law the agent is personally liable on the contract, the foreign principal being left altogether out of the account. There was formerly authority for this view; but it has been now shaken and perhaps altogether discredited, and recent decision will, it is suggested, establish that the liability of the agent is, as in other cases, a question to be decided upon a construction of the instrument which is before the court in any given case.

I shall endeavor to present the modifications in the doctrine by calling attention, not to all the decisions on the point, for they are innumerable, but to those which mark a definite stage in development.

Hutton v. Bullock was decided in 1874. The facts are unimportant, but the judgments in the case are significant. Thus Keating, J.:

"The presumption is that the foreign principal does not intend that the agent employed in London shall make him a party to the contract to purchase these goods. I see nothing in this case to vary the general principle."

Similarly, Brett, J.:

"In such cases it is now settled that it is not in ordinary course for the foreign merchant to authorize the English merchant to bind him for the English contract."

A few years earlier Paice v. Walker was decided on the same principle, to which great emphasis was given by Cleasby, B., who quotes Eyre, C. J., as saying,

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1 See for example Leake on Contract, 343; Bowstead on Agency 389.
3 (1870) L. R. 5 Ex. 173, 39 L. J. Ex. 109.
"I am not aware that I have ever concurred in any decision in which it has been held that if a person, describing himself as agent for another residing abroad, enters into a contract here, he is not personally liable on the contract."

The judgments in *Hutton v. Bullock* and *Paice v. Walker* are representative, then, of the older authorities and carry on their tradition.

*Gadd v. Houghton*⁴ (1876) can hardly be described as anything short of revolutionary, in view of the language used in the previous discussions. Fruit-brokers in Liverpool gave a fruit-merchant a sold note in which they recited the sale of 2000 cases of Valencia oranges "on account of James Morand & Co., Valencia," without any additional words limiting or purporting to limit their liability to that of agents. The Exchequer Division held that the brokers were not liable, their decision being upon the express ground that on a true construction of the sold-note there was an intention to make the foreign principals and not the brokers liable on the contract.

There is no authority of any importance on the point until the great case of *Miller, Gibbs & Co. v. Smith & Tyrer, Ltd.*, (1917).⁵ This is, in the opinion of the writer, an epoch making authority, and it will be consequently necessary to refer to it in some detail. Lumber was sold by foreign principals "through the agency of Smith & Tyrer, Ltd." (the defendants). The contract was signed "By authority of our principals, Smith & Tyrer, Ltd., Chas. T. Tyrer, Managing Director, as agents." The plaintiffs sought on this contract to make Smith & Tyrer personally liable, as having contracted for foreign principals, and failed.

Swinfen Eady, M. R., in giving judgment, cited the opinions of Blackburn, J., in *Armstrong v. Stokes*,⁶ and Lord Tenterden in *Thomson v. Davenport*⁷ to the effect that it had been "long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account," a doctrine which is founded by those learned judges on long usage of trade. The learned Master of the Rolls then went on to show how the existence of such a custom, assuming it for the moment

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⁴ (1876) L. R. 1 Ex. Div. 357, 46 L. J. Ex. 71.
⁵ (1917) 2 K. B. 141, 86 L. J. K. B. 1289.
⁶ (1872) L. R. 7 Q. B. 598, 41 L. J. Q. B. 253.
⁷ (1829) 9 B. & C. 78, 4 Man. & Ry. 110.
to be proved, can and should be reconciled with *Gadd v. Houghton.* He said:—

"If upon the contract the foreign principal is directly liable to the persons with whom the agent contracts, this provision is inconsistent with the custom, and the custom is thereby excluded."

It is suggested that this is both good sense and good law, for it rests upon the general and indisputable rule that a custom will not be allowed to prevail if it is at variance with the plain terms of a written instrument.

Brag, J., in his judgment is clear and emphatic in his language. He said:—

"Many years have elapsed since Blackburn, J., stated that there was this usage. Trade has changed greatly and has increased enormously. My experience at the Bar and on the Bench in the Commercial Court leads me to doubt whether this usage still exists. British firms and companies do not hesitate to make contracts with foreign firms and companies, whether negotiated or not through British agents. British agents are loth to make themselves responsible for their foreign principals. But, however that may be, according to the terms of the usage it seems only to apply when the foreign principal is buying. To apply it to contracts such as we have been considering would be contrary to *Gadd v. Houghton.* . . . It is not true to say that there is a presumption of fact or law that the agent for the foreign principal is primarily liable."

With this, the most recent authoritative expression of the law, it is appropriate that our enquiry should close. The case discussed above places the law upon a clear footing and does away with an artificial presumption which served too often to obscure realities.

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8 (1876) L. R. 1 Ex. Div. 357, 46 L. J. Ex. 71.