Present : Bertram C.J. and De Sampayo J. 1921.

MAJEED *v.* WEISS *et al.*

250—D. C. Colombo, 49,328.

Seller dealing with broker abroad—No privity of contract between seller and person buying from broker—Contract—Stipulation as to time—Stipulation waived—Breach of contract thereafter—Claim for damages—Person holding out another as agent—Extent and nature of ostensible authority—Instructions to agent ambiguous—Interpretation put by agent different to what was intended by principal—Rights of agent and person dealing with the agent—Ratification of contract.

Where A deals with B, a broker abroad, the parties are in the position of principals, and no privity is established as between B's buyers and A. The fact that B, to the knowledge of A himself, acted as broker, and was himself personally responsible to his buyers, is only material for the purpose of damages.

If there is a contract containing a time stipulation, which is of the essence of the contract, but that stipulation is waived, and on the expiration of the time the contract is treated as being still open, the party liable on the stipulation is entitled, if the other party commits a breach which is fundamental to the contract himself, to rescind the contract and to claim damages for the breach; while, on the other hand, the party who was originally entitled to claim enforcement of the time stipulation is no longer entitled on his part to claim damages for the breach of that stipulation.

In considering the nature of the authority of a person whom the principal was holding out as his agent, the question to be answered is, Would a reasonable business man, dealing with an agent in the circumstances of the case, think himself justified in accepting the assurance of the agent that in the transaction in question he was acting with the authority of his principal ?

Where instructions to an agent are so worded as to be capable of two interpretations, and where the agent fairly and honestly assumes it to bear one of those interpretations and acts on that assumption, the principal cannot be released from his contract on the ground that he intended it to bear the other; and not only is the agent entitled to insist upon the authority so conveyed, but the other principal is also entitled to insist upon the contract.

Where the principal telegraphed to his agent asking him to get a seller to renew his offer which had expired, and the agent thought that, if the offer was renewed, he was to accept the offer, and so accepted—

Held, that the principal was bound by the acceptance of the agent.

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Where the principal repudiated a contract for the purchase of goods made on his behalf by his agent as made without authority, but the seller insisted on the contract, and the agent subsequently took delivery of a part of the goods and shipped it to his principal, and the principal dealt with the goods and accounted for them to the seller at the contract price—

Held, that the principal must be taken to have ratified the contract.

THE facts appear from the judgment. [Large portions of the judgment have been omitted from this report.]

Bawa, K.C. (with him *H. J. C. Pereira, K.C.*, and *Samarawickreme*), for appellant.

Drieberg, K.C. (with him *Keuneman*), for respondent.

July 29, 1921. BERTRAM C.J.—

This is a commercial case raising certain questions of importance with regard to the position of merchants in this country dealing with the agents of European firms. The plaintiff is Ahamado Lebbe Marikar Alim Abdul Majeed, who carries on business under the style of A. M. Ahamado Lebbe Marikar Alim & Co. His business is entirely managed and transacted by his manager, Mr. D. N. Kekulawala, and whenever the plaintiff is referred to in this judgment, the reference is really to Mr. Kekulawala. The first defendant is Mr. Samuel Weiss, a London merchant, carrying on business under the name of Samuel Weiss & Co. The second defendant did not appear in the action. Mr. Weiss was the only effective defendant, and he is referred to as "the defendant" in this judgment.

For the purpose of all the transactions referred to in these proceedings defendant always acted as broker. He always spoke of himself as "buying" for clients, and, when differences arose, repeatedly referred to the possible action of his buyers; similarly, in notifying the conclusion of a contract to the plaintiff, he telegraphed "Sold ninety tons bristle fibre" (S. W. 56). Plaintiff in offering goods for sale telegraphed to defendant's Calcutta agent "Sell London 300 tons ordinary mill coconut oil" (P 26).

According to a well-recognized rule of law, however, the principals in all these transactions are the plaintiff and the defendant, and no privity is to be considered as established as between defendant's buyers and plaintiff. (See the cases cited in the notes to *Smith's Leading Cases* on *Thompson v. Davenport* and in particular *Armstrong v. Stokes*.[1]) The fact that defendant, to the knowledge of plaintiff himself, acted as a broker, and was himself personally responsible.

[1] *(1872) L. R. 7 Q. B. 598.*

to his buyers, is only material for the purpose of damages. This principle was accepted by both parties in the argument, though at one point Mr. Bawa seemed disposed to question it.

The troubles that arose in connection with the transactions between plaintiff and defendant are all attributable to the action of a local agent of the defendant, Mr. Gordon Bonas, the second defendant, who unfortunately was not called as a witness in the case. Mr. Gordon Bonas was a young man of 24. He was an old schoolfellow of defendant's son, Mr. Harold Weiss, and was on intimate terms with defendant, as shown by the fact that some of his business letters were simply signed with the name "Gordon." He started business in the East in partnership with Mr. Harold Weiss, with the assistance of capital from their respective families shortly before the war (see S. W. 1). Mr. Harold Weiss, as a member of the Territorial Forces, was mobilized when the war began, and Mr. Gordon Bonas continued in business alone. When connection was first established between plaintiff and defendant, defendant wrote to plaintiff (S. W. 3) on July 15, 1915: "Our representative, Mr. Gordon Bonas, who is at present staying at the Grand Oriental Hotel in Colombo, would be pleased to discuss this matter with you further, and we shall be glad if you will call upon him; but in any case you can write us fully about everything without delay." Mr. Bonas carried on business both at Calcutta and Madras. In both cases, to the knowledge of defendant, his notepaper was conspicuously headed "Samuel Weiss & Co."; it gave the London address of defendant "7, Mincing lane," and purported to give the telegraphic addresses of the firm both in London and in Madras. In communications with the plaintiff at the very inception of their relations defendant described Mr. Bonas as "our Madras house." For example, on October 21, 1915, he wrote (P 1): "We have received from our Madras house samples of your bristle fibre"; and again on the same date (D 1): "We have received direct from you samples of what we received earlier in the week from our Madras house, and have reported on same under this date in another letter." When differences about freight arose, Mr. Bonas came to Colombo on defendant's instructions. He paid a subsequent visit either on defendant's directions or, at any rate, with his subsequent approval, and on both occasions there dealt with plaintiff on behalf of defendant. Mr. Bonas also appears to have had authority to deal with defendant's bankers, and to give them instructions on defendant's behalf (see D 4). The real question we have to decide in all matters arising in this action is whether defendant is responsible for the negligences, indiscretions, and, it is to be feared, want of principle of Mr. Gordon Bonas, or whether, as defendant contends, Mr. Bonas was simply a canvasser for orders, whose authority, both actual and ostensible, was strictly limited, and who had no right to pledge his principal's credit.

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In the argument on appeal, Mr. Bawa, who appeared for the plaintiff, waived certain points made by the plaintiff in the Court below. He explained that he did not mean to admit that the plaintiff was wrong in his contentions on these points, but only that as they were of minor importance he did not desire to press them. The conflict between the parties was thus reduced to three transactions:—

(*a*) Certain drawings made by Mr. Bonas in respect of some mattress fibre consigned by plaintiff for sale by the defendant.

(*b*) A contract relating to 90 tons of bristle fibre.

(*c*) A further contract relating to 150 tons of coconut oil.

I will proceed to consider these transactions *seriatim*.

. . . . . .

(*b*) *The Bristle Fibre Contract.*

We now come to the question of the bristle fibre contract. This was concluded in December, 1918. On December 15 (S. W. 54) defendant cabled the prices at which he was prepared to buy bristle fibre in three qualities, namely, £23 per ton for the first, £22 per ton for the second, and £19 per ton for the third. On December 18, by telegram (S. W. 55), plaintiff accepted this offer for January to March, adding "draft sixty days." On the same date (S. W. 56) defendant cabled "Sold 90 tons bristle fibre, draft ninety days, confirm immediately," defendant thus stipulating for a draft of ninety days' sight, instead of sixty days' sight as proposed by plaintiff. The following day (S. W. 57) plaintiff telegraphed "Fibre confirmed." The whole of this transaction was thus arranged direct between plaintiff and defendant. Defendant lays emphasis on this circumstance as indicating the course of business between the parties.

In pursuance of this purchase, defendant on December 20 made a corresponding contract (S. W. 84) with his own buyers, Messrs. Landauer & Co. On December 23 (see S. W. 58 and S. W. 59) he cabled to plaintiff that his buyers required half the quantities of each grade shipped to Havre, and that they would pay any extra freight over the London rate. Mr. Kekulawala swears in his evidence that, before receipt of this telegram, he had booked freight to London for the whole consignment. This is confirmed by his letter of December 23 (S. W. 59), and though this fact might have been proved with more particularity, it must be accepted as established; but he promised in his letter to cancel half the freight bought and to ship to Havre. In his telegraphic reply of December 24 (S. W. 28), apparently in a spirit of sanguine optimism, he said "Shipping half fibre Havre." Thus inspired by the belief that freight to Havre was available, defendant

on December 24 (see S. W. 62) cabled "Ship remainder fibre Havre"; but on December 30 (S. W. 61) plaintiff had to cable "Freight Havre unavailable." Defendant then cabled to plaintiff (see S. W. 62) asking him to do his utmost to arrange the shipment as desired. On January 21 plaintiff had to cable defendant (S. W. 68) "Freight absolutely unobtainable till May." On January 24 defendant cabled (S. W. 69) "Arranged fibre," explaining in a confirming letter of January 27 (S. W. 70) that he had been able to induce his buyers, being personal good friends of his, to accept the fibre *in* May; and in a subsequent letter of February 17 (S. W. 42) observed: "With our fibre buyer we are glad to have no difficulty, and would count on your positively getting the 90 tons shipped during April-May." An extension of time until the May shipment was thus arranged.

On February 28, 1916 (S. W. 71), plaintiff wrote suggesting that this fibre should be sent through Mr. Bonas at Calcutta, as there was no possibility of securing freight from Colombo to Havre, though he might possibly do so in May. On March 11 (S. W. 72) defendant inquired by cable "Will you ship fibre." Plaintiff on the following day telegraphed (S. W. 73) "Shipping fibre as arranged." Plaintiff repeatedly gave assurances of this nature in his transactions with the defendant, but they appear in almost all cases to be merely expressions of his anticipations, and not to corrspond to any arrangements actually made. It will readily be understood that this had an exasperating effect on defendant, and no doubt contributed to the subsequent friction.

On April 26, 1916, the promised time for the shipments drawing near, defendant telegraphed (S. W. 76) "Cable particular fibre shipment," and in a confirming letter of the following day explained that prices had risen by £10 or £12, and that his buyers were pressing him to name the ship. On April 28 (S. W. 78), in the same spirit of optimism which has already been commented on, plaintiff replied "Shipping fibre direct Havre about twelfth, wire credits." Plaintiff's only justification for this telegram was that he had secured a provisional booking (see S. W. 81). Credit was accordingly arranged, but no shipment followed, and on May 2 defendant cabled (see S. W. 120) "Have you arranged freight bristle fibre? Please reply immediately." We have no record of the reply.

At this point, in the relations between plaintiff and defendant, there arose a misunderstanding about another contract, namely, a contract for the sale of 150 tons of coconut oil, which will be fully discussed later. The defendant, Mr. Weiss, early in May went to America, and remained there till the end of June. In spite of the rise in price, no further communication with regard to the shipment of the bristle fibre appear to have been interchanged. If any such communications were interchanged, they have not been

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disclosed to us. It seems likely some communication had passed between defendant and Mr. Bonas, for in June 14, in reply to a message from Mr. Bonas relating to an instalment of the oil contract just referred to, defendant wired to Mr. Bonas (S. W. 83) "Oil forty-eight, arrange fibre first." The meaning of this message was that before Mr. Bonas dealt with the oil he was to arrange for the shipment of the fibre, and on June 21, in pursuance either of this or of some subsequent direction, Mr. Bonas appeared in Colombo, where he proceeded to deal with plaintiff, entering at the same time into telegraphic correspondence with his principal in London.

Having ascertained the local conditions, Mr. Bonas, on June 26 (P 6), telegraphed to defendant "Havre impossible before August, can ship Marseilles July." This was probably not the only telegram sent, for in a long letter (S. W. 81) subsequently recapitulating his version of the story plaintiff writes to defendant: "Then Mr. Bonas tried to book freight, and as he also was unsuccessful, he cabled to you and got your permission to ship the fibre to London." On June 28 (P 8) Mr. Bonas, in fact, cabled to defendant "Shipping to-day London, immediate transhipment Madras." A way of getting the fibre to London had, in fact, presented itself, namely, *viâ* Galle and Madras. But this was an expedient which involved considerable extra cost in freight, and plaintiff pressed upon Mr. Bonas that he ought to pay this extra freight.

It is not necessary for us to decide whether plaintiff was right in this contention. He fully explains his case in the matter in subsequent letters to both defendant and Mr. Bonas (see S. W. 104 and S. W. 105). His case was that he had already booked freight to London at the then ruling rate, which was 54*s*. per ton, but that at the request of defendant he had cancelled those bookings in order to ship the fibre to Havre on an assurance that the buyers would pay the extra freight. Although it was now impossible to obtain freight to Havre, yet he considered that he was entitled to any freight which he had to pay over and above the 54*s*. per ton above referred to, any such extra expenses being really occasioned by the cancellation of his previous bookings. He calculated the extra freight so claimed at £378. This included railway transport to Galle.

There is no question that Mr. Bonas, in view of the high prices ruling in London, and that the fact that his principal's credit was involved, was most anxious to get the fibre shipped, and pressed plaintiff to use every possible means for getting this done. But plaintiff further says that Mr. Bonas, on behalf of his principal, definitely promised to pay this extra freight, and points to a circumstance which seems to clinch the matter. Mr. Bonas in plaintiff's office drew up shipping documents for the greater part of the intended consignment by the ss. Clan MacIntyre. The

terms of the material part of the invoice which form part of these documents are:—

	£
292 bales = 43 tons bristle fibre at £28 per ton..	1,204
Part extra freight	150
	1,354

and the accompanying bill of exchange was for this amount.

. . . . . .

[The Chief Justice then gave the effect of certain correspondence on what Mr. Bonas subsquently disclaimed responsibility for extra freight, and demanded that the shipping documents should be sent to Madras, and the plaintiff thereupon repudiated the contract.]

We have now to discuss the legal effect of the above correspondence. Plaintiff on his side claims as damages for breach of the contract the contract value of the fibre shipped, together with the extra freight less the amount realized by Messrs. Volkart Brothers' sale, and in respect of the unshipped fibre damages at the rate of Rs. 5 per cwt. Defendant on his side claims as damages the £900 which he has paid to his buyers.

We must first consider what it was that put the parties at arm's length and caused the repudiation of the contract. This appears to be due to two circumstances: First, the refusal of Mr. Bonas to pay the extra freight; secondly, his refusal to provide credit at Colombo, and his insisting on the documents being sent to Madras. By his telegram of July 11 (P 15) plaintiff had, indeed, repudiated the contract on the first ground alone. It was assumed in argument that if Mr. Bonas had, in fact, promised the extra freight, and if this was within the scope of his authority, his subsequent refusal would have justified plaintiff in terminating the contract. I will not discuss, therefore, whether plaintiff would have been so entitled, or whether he ought not to have fulfilled the contract, and claimed the freight in a separate action. I think, however, it is more reasonable to regard plaintiff's repudiation on July 11, not as an absolute but as a conditional repudiation, and to consider that the cause of the breach between the parties was partly this circumstance, and partly, in combination with it, the refusal of Mr. Bonas to provide credit at Colombo, though it is on the latter circumstance alone that plaintiff's claim for damages is based to the plaint. That Mr. Bonas did, in fact, promise to pay the extra freight I have no doubt. His story that he included an item for extra freight in the invoice, subject to his principal's approval, is incredible; some memorandum would certainly have been made of any such arrangement. His statement in his telegram of July 1 (P 13) that he had cabled asking for extra freight I believe to be false. If such a telegram had been contemplated, it would have been sent before he left Colombo. I believe that he either made the promise

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intending afterwards to shuffle out of it, or else that he made it thinking that it would be approved, but afterwards on the journey to Madras felt qualms about the responsibility he had assumed, and so determined to go back on his action. No such telegram and no answer have been produced. I do not believe that he cabled to defendant about extra freight until August 9. Further, in my opinion, having been instructed by defendant's cable of June 14 (S. W. 83) to arrange about the shipment of the fibre, I think that he had authority to make any reasonable arrangement, and that, at any rate, the plaintiff was justified in thinking, from all the circumstances of the case, that he had an ostensible authority for the purpose.

With regard to the connected cause of the breach, the refusal to place credit at plaintiff's disposal in Colombo and his offer of credit at Madras, I think that plaintiff, in the circumstances, was justified in regarding this as a trick, and as an attempt to get hold of the documents. Up to this point defendant had taken no steps to declare the contract at an end; he had treated the contract as still being open. He was under an obligation, therefore, by the terms of his general agreement with plaintiff, to provide credit at Colombo, and his failure to do so entitled plaintiff to treat the contract at an end and to dispose of the goods.

The legal position I take to be as follows. If there is a contract containing a time stipulation which is of the essence of the contract, but that stipulation is waived, and on the expiration of the time the contract is treated as being still open, the party liable on the stipulation is entitled, if the other party commits a breach which is fundamental to the contract, himself to rescind the contract and to claim damages for the breach; while, on the other hand, the party who was originally entitled to claim enforcement of the time stipulation is no longer entitled on his part to claim damages for the breach of that stipulation. No doubt, under the original contract, subject to the extension of time arranged, plaintiff was bound to ship at the latest in May, but in view of the difficulties caused by the state of war this had not been insisted upon. The contract was treated as still open; defendant had never notified plaintiff that he was liable for damages; he never sought to make any arrangement with his buyers until plaintiff had himself rescinded the contract, and I do not think it is now open to defendant to claim damages on the basis of that contract.

. . . . . .

(c) *The Oil Contract.*

We now come to the question of the 150 tons oil contract, which is one of the most difficult parts of the case. It was the fourth and last transaction between plaintiff and the defendant (apart from the mattress fibre transaction). The other transactions were

a sale of plumbago on consignment, the 100 tons oil contract, and the 90 tons bristle fibre contract. All these previous contracts had been made direct between plaintiff and defendant, but it will be remembered that owing to the difficulty of obtaining freight, Mr. Bonas had been sent by defendant to Colombo, and as a result of that visit a change in the course of business had been arranged. Plaintiff by his letter of March 15 (S. W. 17*a*) had intimated that, in view of the scarcity of freight in Colombo, he would in future offer goods through Mr. Bonas in Calcutta, as he would be "in a better position to ascertain definitely regarding freight." A copy of this letter had been forwarded to defendant on March 22, and would be in his hands by the middle of April. The shipping of the first consignment of coconut oil by this route was notified by Mr. Bonas to defendant on April 7. On March 23, in pursuance of the course of business proposed by his letter of March 15, plaintiff cabled to Mr. Bonas (P 26) an offer of 300 tons of coconut oil: "Sell London three hundred tons ordinary mill coconut oil £57 . . . . insurance from Calcutta . . . . your account." On April 5 he wrote a letter to defendant (S. W. 18) confirming the offer thus transmitted through Mr. Bonas. He heard there was a possibility of direct freight also being available, and in that case he would cable other offers direct. Mr. Bonas replied to the telegram of March 30 (P 26) by a counter offer (not produced, see Mr. Kekulawala's evidence). This counter offer was apparently limited to 150 tons. Plaintiff replied on March 30 P 27): "£57, insurance our account, cannot do better." Mr. Bonas then telegraphed (see S. W. 105) requesting plaintiff to hold open his offer for a week as he was cabling London. Plaintiff on this arranged to keep open the offer until 5 P.M. on April 7 (see S. W. 105). Mr. Bonas, however, with the negligence which seems to have been characteristic of him, did not cable the plaintiff's offer until April 6 (S. W. 90). On April 8, after the expiration of the week's limit which had been arranged, plaintiff received a cable direct from defendant (see S. W. 105) accepting the 150 tons. Plaintiff thereupon informed Mr. Bonas that the acceptance had arrived too late (see S. W. 105). Mr. Bonas requested him to inform London, and thereupon on April 10 (S. W. 91) plaintiff cabled defendant: "Acceptance received late, goods now unprocurable." On April 13 defendant wrote to plaintiff (see S. W. 105): "We received on the 11th your following cable: 'Acceptance received late, goods now unprocurable.' Contents of which we note with regret. Luckily no harm is done beyond the needless incurring of cable expenses, as we made this sale subject to your confirmation." This letter is quoted in plaintiff's letter to Mr. Bonas of September 7, 1916 (S. W. 105), but was apparently overlooked in argument.

Mr. Bonas appears to have taken upon himself to be much concerned at the failure to complete this transaction. He went

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to Mr. Mather, plaintiff's agent in Calcutta, complained of the loss which he alleged his principal had sustained, and asked him to write the plaintiff to "try the market again and anyhow place the order" (see S. W. 81). He appears to have written and telegraphed in similar terms to plaintiff (see S. W. 105) last paragraph but one. On April 17 both Mr. Mather and Mr. Bonas wrote to plaintiff urging him to book the order (see S. W. 105 and S. W. 121). In the latter letter, Mr. Bonas observed that Mr. Mather informed him that he might be able to procure the 150 tons for him in Calcutta. He concluded: "I hope you are still trying to procure 150 tons of oil, and that you will let London know as soon as you are able to get same." One would naturally conclude that in bringing this pressure to bear Mr. Bonas was acting under the express instructions of his London principal, but defendant seems to imply that this was not the case. No such instructions have been produced, and it must, I think, be taken that Mr. Bonas was acting in supposed interpretation of his principal's wishes.

Mr. Bonas, however, appears to have taken a further step, which it is quite impossible to explain. During the Easter holidays of 1916 (Easter Sunday in that year was on April 23) he took upon himself to offer defendant on account of plaintiff 150 tons of coconut oil. There is no doubt about this, though the circumstance was entirely overlooked in the argument (see S. W. 51). "Coconut oil: Mr. Bonas kindly offers us on your account 150 tons, immediate shipment, at £57 10*s*. This offer reached us during the holidays, and the market has not yet recovered from its holiday feeling, buyers have quite withdrawn for the present. The price is right, and we therefore cabled Mr. Bonas to obtain your renewal of the offer, when we hope to put the business through." This passage in the argument was treated as referring to the previous offer telegraphed defendant on April 6 (S. W. 90), but, as I have shown above, defendant had previously acknowledged and dealt with that offer. It occurs to me as a possibility that the oil thus offered may possibly have been procured by Mr. Mather locally. It seems more likely that Mr. Bonas took upon himself to make the offer in the expectation that the pressure he had already put upon plaintiff to procure the oil would have had the desired effect. In reply to Mr. Bonas' telegram, defendant cabled to him to Calcutta on April 25 (S. W. 92) "Oil holidays. You cable Alim renew."

Meanwhile, the pressure exerted by Mr. Bonas upon plaintiff had in fact the desired effect. On April 29 (P 18) plaintiff cabled "*Vide* letter seventeenth, bought with great difficulty 150 tons coconut oil, pounds fifty-seven, May-June, shipment Calcutta . . . . inform London confirm." Before he replied to this telegram, Mr. Bonas had received on May 1 his principal's telegram of April 25 (S. W. 92) "You cable Alim renew."

The delay in this reaching him must be due to the fact that he was away at Madras, whereas the cable was sent to Calcutta. He did not know what to make of the cable, and forwarded it to plaintiff (P 19) "Received cable to-day as follows: 'Oil holidays. You cable Alim renew. Weiss.' Telegraph me what this means." Plaintiff at once correctly interpreted the telegram, and replied (P 20) "Cannot understand. Did not cable anything Weiss. Presume requires renewal oil offer." At the same time he asked Mr. Bonas to reply to his telegram of April 29 (P 18), which had, in fact, contained the very offer that defendant seemed to desire. Immediately on receiving this answer, or possibly before he received it (the time at which the telegram was handed in at the Madras office is somewhat obscurely indicated), he replied (P 21): "Accept 150 tons, May-June, fifty-seven half. Have cabled London. Arranging freight. Writing." The following day he confirmed this by a letter (S. W. 120): "Please note that Samuel Weiss & Co., London, have bought 150 tons coconut oil, May-June shipment at £57 10*s.* per ton c.i.f. London, less 3 per cent. . . . . Please prepare and pack at your earliest convenience and send to Calcutta as soon as possible." At the same time he cabled to London (S. W. 83): "Have accepted 150 tons oil from Alim, May-June, fifty-seven half. Confirm."

To all appearances, therefore, the transaction was concluded. Defendant, however, telegraphed to Mr. Bonas on May 2 in code (S. W. 94): "We do not confirm the purchase. There are no buyers at present for oil . . . . if matters improve, we will telegraph." On May 4, in a telegram not produced, Mr. Bonas telegraphed to plaintiff requesting a cancellation of the contract; plaintiff replied on the same day (P 28): "Goods bought already, impossible cancel contract, arranged part shipment for sixth." Mr. Bonas entirely accepted this position, and on May 8 (S. W. 97) cabled: "Alim refuses, cancel contract. Shipping 75 tons immediately. Written full explanation. Going Calcutta Thursday." These 75 tons were Mr. Bonas' imaginative interpretation of plaintiff's telegram of May 4 (P 28): "Arranging part shipment for sixth." He accordingly proceeded to arrange for a credit at Colombo for these 75 tons, and on May 11 the National Bank of India at Colombo informed plaintiff that they had received the following wire from their Calcutta office (D 4): "You may advance up to Rs. 45,000 to Alim against full shipping documents 75 tons coconut oil to Calcutta." The oil referred to was accordingly shipped from Colombo in the course of the month of May by the ss. Dupleix. Its subsequent history will be discussed later.

It will be convenient to pause at this point and to discuss the question whether defendant is bound by the contract which Mr. Bonas purported to make on his behalf. There can be no question that when Mr. Bonas received the instruction "You cable Alim

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renew," he interpreted it as meaning that, if the offer was in fact renewed, he had authority to accept it. It is equally clear from defendant's letter of April 27 (S. W. 51) that all that defendant intended was that on an offer being made he would try to find a buyer in London. As far as plaintiff is concerned, there can be no question whatever that, in view of the insistent pressure put upon him by Mr. Bonas, purporting to speak on behalf of defendant, to obtain the oil, and from defendant's cable asking for a renewal of the offer which Mr. Bonas purported to communicate to him, he had every reason to suppose that Mr. Bonas, in urging him to procure the oil and in accepting the offer, was acting with the full authority of his principal. But in view of the fact that Mr. Bonas was not, in fact, so expressly authorized, what we have to consider is, not what were the representations made by Mr. Bonas, but what were the express or implied representations made by the defendant as to the authority of Mr. Bonas. If Mr. Bonas were sued on a warranty of authority, he would have had to answer to the action. But the question for us is, What was the nature of the authority which Mr. Bonas was held out by defendant as possessing on his behalf?

Mr. Bawa experienced some difficulty in presenting any express authority which seemed to bear on his case, and, indeed, it is very difficult in such a case to find an authority in point, as each case is really a question of fact. The ostensible authority of such a commercial agent as Mr. Bonas must depend partly upon the status which he is represented as possessing, and partly on the previous course of business between the parties. Defendant insists that all previous transactions had taken place direct between himself and plaintiff, and that no bargain was deemed complete until it was confirmed by both principals. This is no doubt true, but it must be borne in mind that previous transactions of this character had only been two in number, and that since they were concluded, a change had taken place in the course of business. Plaintiff had intimated that in future transactions he would make proposals to defendant through his representative, Mr. Bonas, in Calcutta. This intimation was acquiesced in, and such a proposal was made, when this proposal came to nothing, and he was thereupon approached again with a request that it should be repeated, first by Mr. Bonas, and then by a cable from defendant himself sent through Mr. Bonas. It seems to me that plaintiff, in all the circumstances of the case, might justly treat Mr. Bonas as an intermediary having the full authority of his principal to accept the offer. The fact that these communications had taken place through Mr. Bonas must be considered in connection with the further fact that Mr. Bonas had been held out to him as "our representative" and as "our Madras house." The use of note-paper headed "Samuel Weiss & Co.," and purporting to give

the telegraphic addresses, both in England and in India, and the three visits of Mr. Bonas to Colombo on defendant's behalf, were calculated to enhance the impression thus produced that Mr. Bonas was a trusted agent of the firm with considerable authority to speak on its behalf. The question in every case must be, Would a reasonable business man dealing with an agent in the circumstances of the case think himself justified in accepting the assurance of the agent that in the transaction in question he was acting with the authority of his principal? If that question is put in the present case, I think it must be answered in the affirmative.

I may here remark incidentally that both the plaintiff in his evidence and the learned District Judge in his judgment seem to think that the only material question is, whether Mr. Bonas was held out as an actual partner of the defendant. The learned Judge thus treats the question from too restricted a point of view. Partnership is after all only a form of agency. The question is not so much was Mr. Bonas a partner, but what was the extent of his ostensible agency.

But there is another way in which the question may be regarded. As I have said above when Mr. Bonas received his principal's telegram "You cable Alim renew," there is no question that he supposed that it was intended that, if Alim did renew the offer, he was to accept it. That this was a reasonable interpretation of this message it is very difficult to deny. We know, in fact, that this was not the intention, and if the cable is strictly interpreted according to its exact words, it cannot be said to contain a direction to accept the offer. But cables are necessarily curt and leave something to be supplied. It may well be said at least that the intention of the sender of the telegram might seem to be dubious. Now, there is a well-known chain of authorities which lay down the principle that where instructions to an agent are so worded as to be capable of two interpretations, and where the agent fairly and honestly assumes it to bear one of those interpretations and acts on that assumption, the principal cannot be released from his contract on the ground that he intended it to bear the other; and not only is the agent entitled to insist upon the authority so conveyed, but the other principal is also entitled to insist upon the contract. (See *Ireland v. Livingstone*,[1] *Loring v. Davis*,[2] *Weigall v. Runciman*.[3]) It cannot be said in this case that the telegram was ambiguous, but it can be said in the circumstances of the case that the direction contained in the telegram was one from which a further direction might reasonably be thought to be implied. The case, therefore, seems to come within the principles of those cases, though not within the precise formula in which that principle has been stated. It carries the principle a step further, but it appears to me that it

[1] *(1872) L. R. 5 H. L. 395.* [2] *(1886) 32 Ch. D. 625*
[3] *(1916) 85 L. J. K. B. 1187.*

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is a logical step, and that on this ground also the plaintiff is entitled to judgment on the issue under consideration.

But there is a further question to be considered, the question of ratification, and with regard to that the facts are as follows. When defendant telegraphed to Mr. Bonas declining to confirm the purchase, he also wrote a letter to plaintiff regarding this and other matters, and referring to this transaction in the following terms (see S. W. 79): "We regret that the business Mr. Bonas proposed us this week at £57 10*s.* could not go through. The oil and similar trades are in a stagnant condition, and no business whatever is taking place . . . . We have cabled Mr. Bonas to that effect, and that we will let him know when there is an improvement." This was the only communication which defendant sent plaintiff on the subject. When on May 8 Mr. Bonas cabled to him (S. W. 97) "Alim refuses cancel contract," he appears to have sent no reply to Mr. Bonas and to have addressed no remonstrance to plaintiff. We have a certain difficulty in deciding this question of ratification, because it is quite clear that defendant has not produced all his documents bearing on the question. He says that some of Mr. Bonas' cables were lost, and that he has had to obtain duplicates from the cable company; but there is no question that in an office whose correspondence was so carefully managed as that of defendant many more documents could have been produced which would throw light upon the subject. Nevertheless, if defendant had addressed any peremptory remonstrance to Mr. Bonas, it seems difficult to believe that Mr. Bonas would not have further communicated with plaintiff. So late as May 10 Mr. Bonas appears to have written to Mr. Mather (see S. W. 103) "I simply asked Alim whether he would cancel the contract . . . . However, I am willing to keep to the contract, and have telegraphed to the National Bank to arrange about the advance." Defendant is thus informed that plaintiff declined to cancel the contract, and that a part of the goods are being shipped, and takes no steps to prevent this; and in the course of the month of May some 48 tons of coconut oil under this contract were shipped to Calcutta, and remained in Calcutta under Mr. Bonas' control till July 20.

In a letter of June 7 (see S. W. 105) Mr. Bonas appears to have written to plaintiff that he was shipping the first shipment of the 150 tons of oil, and that he was trying to sell the balance 12 tons of oil in Calcutta, and that as soon as the 48 tons of oil and the 5 tons of fibre were shipped, he would remit plaintiff the balance. It is clear, therefore, that up to this point defendant had taken no steps to instruct his agent to disclaim responsibility for the 48 tons of oil.

A few days later Mr. Bonas appears to have sent a cable to defendant with reference to these 48 tons of oil. The terms of it are unfortunately not disclosed to us. We have only the reply

(S. W. 83): "Oil 48, arrange fibre first." All we can gather from this is that defendant knew that the 48 tons of oil delivered under the contract was at Calcutta in Mr. Bonas' hands. A week later, June 21, Mr. Bonas arrived at Colombo, and proceeded to negotiate with plaintiff and his suppliers with regard to the disposal of the oil. Plaintiff gives an account of these negotiations in his correspondence, and as Mr. Bonas is not called to contradict it, it must be taken as representing at least the main lines of what took place.

On June 26 Mr. Bonas cabled to his principal: "Oil declining, can still probably sell six hundred loss. Cannot induce Alim sellers wait any longer." Plaintiff subsequently threatened to sell the oil by auction, and on July 10 (P 14) Mr. Bonas telegraphed to plaintiff: "Cabling London about oil. You must stop proceedings until answer received." Whereupon the proceedings in question were stopped for three days.

In this state of affairs, about July 20, the 48 tons of oil were shipped by Mr. Bonas from Calcutta by the ss. City of Poona (see S. W. 24), and the defendant took delivery of these in London. How can such a proceeding be considered otherwise than as a ratification of the contract? Defendant affects to believe, though he accounts for the oil at the contract prices, that this oil was shipped to him under no contract at all, but the transaction cannot be legally regarded in that light. It appears to me that the facts come within the principles of the old case of *Cornwall v. Wilson*,[1] the headnote of which is as follows: "Plaintiff, a factor abroad, having exceeded the price limited for a purchase of hemp, the defendant, who objected to the contract, but afterwards re-shipped and disposed of some of it on a new risk, was ordered to account for the whole at the cost price."

It seems to me, therefore, that, quite apart from the question of Mr. Bonas' authority, defendant must be taken to have ratified this contract.

. . . . . .

DE SAMPAYO J.—Agreed.

Sent back.

[1] *(1870) 1 Vesey Sr. 510.*