Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Young and Another v. *The Consumers Cordage Company, from the Court of Queen's Bench for Quebec; delivered 26th November* 1898.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR HENRY STRONG.

[*Delivered by Lord Davey.*]

The action out of which this appeal arises was commenced by the receivers in the liquidation of a Company called the National Cordage Company who are the present Appellants against a Company called the Consumers Cordage Company Limited to recover the sum of $44,144.64 for hemp sold by the National Company to the Defendants. There is no dispute as to the account for hemp but the Defendants contend that the Appellants are indebted to them in the sum of $50,000 which extinguishes the debt for hemp and leaves a balance of $5,855.56 due to them and they claim payment of this sum as incidental Plaintiffs. Mr. Justice Davidson decided in favour of the Appellants and gave judgment for the amount claimed by them. The Court of Queen's Bench of the Province of Quebec on appeal reversed this judgment and dismissed the Appellants' action and gave judgment for the Respondents on the cross demand.

The question between the parties is whether any contract was made so as to bind the National

Company for payment by the last-named Company to the Respondents of the sum of $50,000. Before considering the evidence on this point and its sufficiency in law to establish a contract by the Corporation it will be convenient to state the relative position of the two parties and the circumstances in which the dispute has arisen.

The National Company was incorporated on the 18th July 1887 in accordance with the laws of the State of New Jersey in the United States for the manufacture and sale of cordage binder twine and similar commodities and other incidental purposes. The byelaws of the Company provide (amongst other things) as follows:—

"VI. The Board of Directors shall hold stated "meetings on the first Wednesday of every "month and such other meetings as shall be "called by the President.

"X. The President Vice-President Secretary "and Treasurer shall perform such services as "shall from time to time be required of them "by the Board of Directors.

"XI. The Board of Directors shall prescribe "the manner in which all expenditures shall be "made or indebtedness incurred and as well the "method in which the accounts of the Company "shall be kept. All checks drafts and other "obligations for the payment of money or otherwise all evidence of its indebtedness or instruments creating the same shall be signed by any "two of the following officers namely: President "Vice-President Second Vice-President Secretary "Treasurer and Manufacturing Director."

On 2nd November 1891 it was resolved (amongst other things):

"That the President shall preside at all "meetings of the Board and shall have the "general supervision and management of the "affairs of the Company.

"The Secretary shall have custody of all "records and contracts of the Company: shall "attend the meetings of the Board and take and "preserve minutes thereof and shall perform "such other duties as the Board may require."

Shortly after the incorporation of the National Cordage Company the stock in that Company was acquired by the firm of L. Waterbury & Co., and three other firms associated with him. The firm of L. Waterbury & Co. consisted of J. M. Waterbury and Chauncey Marshall. Mr. Waterbury became and was during the year 1892 and until the winding up of the Company the President thereof. Mr. Chauncey Marshall was one of the directors and the other directors were representatives of the associated firms. Before they acquired the control of the National Cordage Company these firms seem to have formed an Association called the National Cordage Association and at a meeting of that body held on the 7th November 1887 it was resolved to recommend to the Executive Committee of the National Cordage Company that the firm of L. Waterbury & Co. be appointed a Committee on Finance and also a Committee on purchase of hemp. This resolution appears to have been acted on by the National Company and it is stated in the evidence that Waterbury and his partner Marshall acted as what was called the Hemp Committee with the assistance from the beginning of the year 1892 of Mr. George W. Loper one of the other directors.

The operations of the National Cordage Company were on a very large scale, and it is stated that they controlled 65 per cent. of the Cordage Mills in the United States and they also had large operations in hemp. Waterbury as President exercised supreme control over the business of the National Cordage Company except (says Mr. Loper) in matters pertaining to

the business of L. Waterbury & Co. in their transactions with the Company. One witness says that Waterbury was in fact the National Cordage Company. The formal meetings of the directors were few and far between. But a luncheon was provided every day at the office in New York of the Company at which certain of the directors resident in that city attended with some regularity and matters of business affecting the Company were informally discussed over the luncheon table but no minutes were kept of these discussions and apparently no resolutions were passed. The Company had a minute book in which there are no more than twelve entries four of which relate to dividends.

The Consumers Cordage Company is a Canadian Company established at Montreal for the purpose of making cordage binder twine and other similar merchandize. In the latter part of 1891 the entire stock in the Consumers Company was acquired by the firm of L. Waterbury & Co. on behalf of themselves and their associates. They allowed the previous directors of whom Mr. Edward M. Fulton was the chief actor in these proceedings to remain in office and supplied them with their qualification shares and with salaries upon their undertaking that the business of the Consumers Company should be managed in the interests and behalf and subject to the general direction commercially of Waterbury and his associates. Waterbury accordingly and with a view to get rid of their competition in the hemp market required the Consumers Company to purchase all the hemp they needed for their business from the National Company itself. There is one letter of the 26th May 1892 addressed by the Consumers Company to Waterbury in which that Company complained of being overcharged a cent per pound on an order for 500 bales and there are other letters

complaining of the quality and condition of the hemp supplied and asking for reduction of quotations for sisal hemp. But it does not appear from the evidence that any serious overcharges were made and Mr. Lund a hemp broker of New York says that the prices were on the whole reasonable and fair.

In the latter half of the year 1892 an arrangement was made for the transfer of $1,500,000 of the Consumers Company's stock to a syndicate (in which were included Waterbury himself and Edward M. Fulton) with a view to its sale to the public and a syndicate agreement dated 31st December 1892 was executed for that purpose. A prospectus was prepared by the directors of the Consumers Company in which a statement of the Company's affairs signed by a firm of Accountants is referred to. In that statement which purports to be as of the 1st November 1892 (the end of the Company's financial year) the profit for the year 1892 is stated as $418,124. 54 being $131,047 more than that for the previous year. This sum includes in fact an allowance of $50,000 to be made by the National Company to the Consumers but there is no other or more explicit notice in the prospectus or statement of the alleged allowance. This prospectus and statement were known to Waterbury but it does not appear whether the other directors of the National Company were cognisant of it. There is no minute note or allusion to the alleged allowance or to any agreement for making it to be found in any of the books or accounts of the National Company. The books of the Consumers Company were not produced.

On the 26th January 1893 the Consumers Company by Mr. Edward M. Fulton wrote to the National Company a letter of that date enclosing an account in which credit is taken

under date 1st November 1892 "To overcharge "on invoices $50,000" against which they debit themselves on various dates from 7th November to 31st December with sums amounting altogether to $37,237. 09 for merchandise leaving an apparent balance of $12,762. 91 in favour of the Consumers Company. The letter enclosing the account is in the following terms:—

"Referring to your telegram of the 24th "instant we enclose you our bill for overcharge "on hemp during the year closing 1st November "1892 and statement of your account by which "you will notice that there is a balance in our "favour of $12,762. 91. In reference to our "bill of 1st November either Mr. Waterbury or "Mr. Atterbury can explain it."

The telegram of the 24th is not produced. Mr. Atterbury was the attorney or counsel of the National Company. Mr. Loper at that time had charge of this department of the National Company's business and he says that on receipt of this letter he saw Mr. Waterbury and asked him about it and that he neither affirmed nor denied it and merely stated he was negotiating with Mr. Fulton regarding the matter and he told him (Loper) to allow it to remain in abeyance. Waterbury does not contradict this conversation. The National Company continued to send in their monthly accounts for hemp supplied to the Consumers Company without noticing the claim for $50,000 but no payments were made by the Consumers Company. And on the 11th March 1893 the Consumers Company wrote to the National Company as follows:—

"We notice on statement of 1st March that "you have written in November December and "January accounts still unpaid amounting to "$39,373. 31. This amount is to be deducted "from your allowance of $50,000 on sisal which "we believe is thoroughly understood."

So matters remained until the liquidation of National Company on 4th May 1893.

In their third plea the Respondents allege that by obeying the orders of Waterbury they were prejudiced by being compelled to purchase goods at inopportune times from particular persons at unfavourable prices terms and conditions and likewise by refraining from purchasing when they could advantageously have done so and they allege loss of profits thereby and damages to an amount exceeding $75,000. They did not otherwise allege overcharges. By paragraph 26 they allege that in the month of December 1892 Waterbury proposed to the other directors of the Consumers Company that they should purchase from Waterbury acting for himself and his associates a large quantity of the capital stock of the Respondent's Company and by paragraph 27 that the last mentioned directors being aware that the Consumers Company had lost the said sum of $75,000 declined to purchase unless an allowance was made by the National Company to the Consumers Company on the account current between them and by paragraph 28 that it was accordingly agreed by and between the National Company and the Respondents that an allowance of $50,000 should be made.

The principal witnesses for the Respondents were Waterbury and Edward M. Fulton between whom the agreement in question is alleged to have been made. Waterbury says that Edward M. Fulton showed him (in conversation) that owing to the Consumers Company not having independent action in the hemp market they had suffered on their hemp purchases to the amount of $50,000 that he (Waterbury) could easily see how they had so suffered and he told Fulton that if that was the correct amount it should be allowed them now that the interests of the two Companies were to be different that

as long as they were practically the same it was of no importance but that if the public were to be admitted as stockholders their statement for the year should be based on what would have been or what was their actual condition. He remembered several conversations with Fulton on the subject and says that he told him that such an allowance should be made undoubtedly before the statements (by the Consumers Company) should be put out and he added that the $50,000 represented the loss which they had made owing to their want of independence in the hemp market. He says he remembers distinctly discussing it with Mr. Wall and Mr. Marshall probably with all the others but he has no distinct recollection about it; not with Mr. Loper till a later date. These discussions took place at the lunch table and there was no dissent to it whatever. Being asked to explain why no entries were made in the books of the National Company he says:—

"No entries were made in the books of the "National Company because I told Mr. Fulton "that before the National Company made "entries I thought it would be well for him to "make a statement showing how this $50,000 "was arrived at and how independent action on "the hemp markets would have saved them "$50,000. We were both convinced that was "the fact and I thought some statement should "be made which would be a voucher as you "may say for the entry in the books; this I "repeated to him several times and he neglected "to do it and in the pressure of business I "forgot it up to the time of the failure of the "Company.

"*Q.* The allowance had been agreed upon at "this time?

"*A.* Yes we agreed upon the principle.

"*Q.* And the amount $50,000?

"*A.* Yes."

In cross-examination Waterbury says that he does not think this question of rebate was an element in the transaction of the sale of stock to the Montreal people—that Mr. Fulton had no statement or memorandum or anything to show that they had suffered to the extent of $50,000 and his statements were entirely verbal. He thinks that it was in the autumn of 1892 that the conversation in regard to the allowance began—and being pressed on the basis on which the $50,000 was arrived at he says:

"I think probably if he could have made up "a statement he might have shown even more. "But don't you see it was an imaginary state- "ment for this reason that nobody could have "shown if he had been independent or an ap- "proximate amount of what they would have "(made) if they had been left independent." And he repeats that no instructions were given to Mr. Seaward the auditor of the accounts because he was waiting for the statement from Fulton in cents and pounds and bales making the $50,000 and he gives that as his reason why he did not give some direction that the allowance should be shown or made upon the account of the Consumers Company. He declines to say that he did not see the two letters of the 25th January and 11th March already referred to. Waterbury is in some confusion as to the date of the agreement. He says in one place (p. 72) that it must have been about the beginning of 1891 (*qy.* 1892) when they first discussed the sale of the stock, in another place (p. 76) that it must have been in the autumn of 1892 that the discussions as to the allowance began and (p. 81) that it had not been discussed before the 1st November and (p. 82) his impression is that when this allowance was agreed upon they had not discussed putting any stock upon the market.

Edward M. Fulton says he had a great many conversations with Waterbury. He first claimed a much larger sum somewhere around $100,000 not alone as the loss to the Company but that Waterbury should make an allowance on account of the advantages they had given his Company by not having the market disturbed by competition. On being shown a letter of 5th November 1892 he says he visited New York after the date of that letter and had subsequent discussions with Waterbury and the sum of $50,000 was settled between them. On cross-examination he says he cannot fix the date of the agreement closer than that it was after the 5th November and before the 31st December 1892. He says that this transaction was of minor importance to the other work he was doing and it did not impress itself on his mind at the time and later he says that Waterbury looked on the $50,000 allowance as a minor thing compared with the settlement of the purchase price and in their discussions they discussed the $50,000 matter very little. He was present and heard him tell "the lunch people" that he had made the allowance. Waterbury (he adds) told them in the way he had told them everything else. He would sometimes go two or three months before telling a thing.

Chauncey Marshall (Waterbury's partner) and Elisha M. Fulton (father of Edward M. Fulton) confirms Waterbury's statement that the allowance was discussed informally at the lunch table and the directors approved of it. The value of their evidence is somewhat lessened by the leading form in which questions on the crucial point were put to them. Marshall's recollection as to dates is vague and he cannot give any idea when he first heard of the question of the rebate. According to him Fulton's request or demand for this adjustment was because the

Consumers Company had been paying higher than the market price for hemp and he (Fulton) did not consider that the Consumers could make a fair showing of the business when they were paying more than the market for the hemp and it was on that ground he made the demand. Elisha Fulton gives details as to the mode in which the sum of $50,000 was arrived at which are not mentioned by either Waterbury or Edward Fulton but it seems possible from a later answer in cross-examination that he was referring to something which his son told him. This witness however places the discussions in the summer of 1892 and puts the date when Waterbury announced the agreement for the allowance at the lunch table also "along in the summer "some time" and when further pressed says he is quite sure that the question of the allowance was settled before the 1st September 1892.

On the other hand Mr. Loper was in the year 1892 the manufacturing director of the National Company and was actively concerned in the business of the Company in New York City at the head office and it was he who gave the instructions as to the prices to be charged to the Consumers Company for the hemp shipped to them. Waterbury says that Loper was "ex- "tremely active in the affairs of the Company" and as it took a great deal of time to discuss the market with brokers that was delegated to Loper under his (Waterbury's) supervision. Marshall says that Loper must have been present at a great many of the luncheon meetings in 1892. From the nature of his duties one would have thought that Loper was the director most likely to be consulted and the one whom it was most important to consult on a question of this kind. In his evidence Loper says that he was not present at any interview between Waterbury and Fulton when the subject of the allowance was discussed

aad was not told by either of those gentlemen that such a matter had been discussed and did not know anything about the transactions between them until he instructed Mr. Seaward to get money out of the Consumers in January 1893. On Fulton's alleging that Waterbury had allowed him $50,000 he questioned Waterbury who then made the statement already referred to. He further says that this question was never brought up at any of the lunch meetings in his presence.

The only documentary evidence which is material beyond what has already been referred to is the letter of the 5th November 1892 from Waterbury to Edward M. Fulton. The letter to which it is an answer is not produced. Waterbury says in this letter :—

" As to the price charged you for sisal hemp " I will talk it over with the other directors and " see what they think about it.

" It is of course desirable that the Company " should make as good a showing as possible and " if you think they have in equity been charged " too much it is but fair that they should be " credited with an amount which would show " the actual profits they would have made if " they had been buying the hemp themselves.

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" I will write you more fully after talking " with the others."

From this letter it appears (1) that there was no agreement at the date of it (2) that the claim was made on the ground of alleged overcharges as also appears from the account of 25th January 1893 (3) that Waterbury did not treat himself as empowered to make an agreement without the concurrence of the other directors.

Their Lordships do not not doubt that it would be competent for a Company as a matter of business to make a rebate or an allowance to a customer although it could not be recovered in

an action. But the uncertainty as to the nature of the claim and the consideration for the alleged agreement viz. whether the claim was for actual overcharges in excess of the market price or in the nature of damages for being prevented buying their hemp as and when it suited them or (as one witness says) in consideration of the profits made by the National Company from the exclusion of competition, go far to throw doubt on the agreement itself. This doubt is increased by the inability of any witness to fix a date to the agreement and the contradictory statements as to the time when it was made.

The Respondents put their case in two ways. First they said that Waterbury as President and Executive Officer had power to make and did make an agreement binding on the Company. Secondly that he made the agreement with the concurrence of the other directors in such a manner as to bind the Company.

Their Lordships have no evidence before them of any law of the State of New Jersey which confers upon the President of the Company power to bind the Company by his agreement, and there is nothing in the byelaws of the Company to that effect. Indeed the byelaws quoted above seem rather to negative any such power. The so-called Hemp Committee was referred to but assuming that the resolution of the "National "Cordage Association" had been adopted by the Company that committee was appointed only for the purchase of hemp and it is difficult to see how the terms of its commission would cover an agreement like the one put forward. Their Lordships therefore hold that it is not shown by the Respondents that Waterbury had power to bind the Company.

Their Lordships are not satisfied on the evidence before them that any concluded agreement for the payment by the National Company of the allowance of $50,000 ever was made or intended to be made by Waterbury and they think he has deceived himself into believing that he did so. They have already commented on the uncertainty and contradiction as to the date of this agreement and as to the nature of the claim and the consideration for the agreement. They see no reason for not believing the important evidence of Loper and there is the fact that no communication of the alleged agreement was made to the officers of the Company and they were allowed with Waterbury's acquiescence (as their Lordships infer from his evidence) to go on sending in their monthly accounts without giving credit for the sum of $50,000 which the Consumers Company were entitled to if there had been such an agreement. Their Lordships are disposed to think on the whole evidence that Waterbury did not intend to bind the Company until the memorandum showing how the sum claimed was made out which he says he asked Edward Fulton for had been supplied to him. Fulton may have been sanguine and have believed that an agreement had been made or would certainly be made and have felt justified in acting on that assumption but this cannot bind the National Company. The evidence is of course conflicting but it is for the Respondents to make out the agreement upon which they rely and their Lordships do not think that they have done so.

In these circumstances it is not necessary to say whether there was any communication to the other directors or what was the effect of such communication as there may have been. But

as the question was much discussed at the Bar their Lordships will shortly state the opinion they have formed. They do not doubt that directors may if they think fit transact their business at the luncheon table or take their mid-day refreshment while engaged on the Company's business. Nor is it open to question that a party to an agreement with a Company cannot be deprived of the benefit of it because the directors of that Company have omitted to keep minutes of their resolutions as directed by their byelaws or articles. But if directors think fit to do their business in this informal and casual way it increases the difficulty of proof and any Court ought to be very careful to see that there was something more than loose talk and that a resolution was in fact come to though not recorded. There may have been some communication to the Board and some discussion on occasions when Loper was not present or which Loper may have forgotten but their Lordships think that the evidence before them falls far short of proof that the terms and nature of the alleged agreement were placed before the directors or that anything resembling a resolution confirming it was passed by the directors at their luncheon.

Their Lordships will therefore humbly advise Her Majesty that the order appealed from be reversed and instead thereof the appeal to the Court of Queen's Bench of Quebec be dismissed with costs. The Respondents must pay the costs of this appeal.