

1948

Charles Hinkson v. Carmin C. Bonanni : Brief of Appellant

Utah Supreme Court

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Richards & Bird; Attorneys for Appellant;

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**In the Supreme Court
of the
State of Utah**

CHARLES HINKSON

Respondent,

vs.

CARMIN C. BONANNI,

Appellant.

Appellant's Brief

Case No.

7210

RICHARDS & BIRD,

Attorneys for Appellant.

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SUPREME COURT, UTAH

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Appellant's Brief

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STATEMENT OF THE CASE

The respondent brought an action against the appellant and two other persons for monies alleged to be owing for commissions on sales of appellant's hosiery. The complaint is in two causes of action, the first of which seeks five percent commission on all orders of

appellant's products secured by the respondent; and the second of which seeks a commission of eighty per cent of the sales price on alleged sales of Christmas merchandise.

In their answer the appellants denied a contract of employment and admitted that respondent was entitled to a commission on all sales made upon respondent's solicitation and alleged that such commission had already been paid and that nothing was owing to the respondent. As to the second cause of action the appellant denied that there was any agreement for eighty percent commission on any sales whatever. At the close of the testimony the action was dismissed as to defendants Joseph Eugene and M. A. Patreys, and judgment was given against the appellant substantially as prayed for in the complaint, judgment being for \$1187.50 on the first cause of action, \$692.48 on the second cause of action with interest on each amount and costs.

STATEMENT OF FACTS

CHARLES HINKSON—DIRECT EXAMINATION:

- Q. (By Mr. Wright) How did you first become acquainted with the company?
- A. Through "Help Wanted" Ad in the Salt Lake Tribune and Telegram. (Tr. 67)
- Q. I want you to relate to the Court any conversation you might have had with Mr. Barton with reference to employment, with reference to your accepting employment with that company?

MR. BIRD: I object to that, it is incompetent, irrelevant and immaterial, and constituting hearsay, and not binding on the defendants.

THE COURT: Well, the objection is sustained.

MR. WRIGHT: You may step down for a moment. (Tr. 69)

(Thereupon the deposition of Carmin C. Bonnani was introduced except certain portions objected to. (Tr. 71-89) Hinkson was then recalled.)

Q. That is all right, you went in answer to an "Ad". And tell us the conversation you had with him, first who he represented, what he was, and what the conversations were.

MR. BIRD: I object to that, being beyond the agent's authority and not to be measured by the statement of the agent himself. If it is in conflict with the statements in the deposition it is beyond that authority.

THE COURT: He may answer. State what conversation was had with Mr. Barton.

A. He stated himself to be sales manager with authority to employ and make sales' plan in virgin territory for and on behalf of the Embassy Hosiery Company. (Tr. 90-91)

Q. What did he say as to the ability of the company to fulfill orders that might be received.

A. He elaborated on that point; the ability of the company to fulfill orders and supply these new accounts because it was a part of his

plan of sales strategy to open up this western territory.

He said in his elaboration that the company was so big that it could constantly be a real source of supply and therefore he was sure that the plan would succeed. (Tr. 93)

- Q. What was said as to the class of merchants you were to solicit orders from?
- A. He indicated a preference, however, he said I would have blanket judgment, or in other words as he elaborated on it further, it was up to my entire judgment in each condition in each town, to select dealerships for this long range sales planning.

The choice was to be based according to his preference, stated as a preference, to my judgment that there it was to be in a suitable location for the most volume of buyer traffic; generally the most reputable store in the town considered in observation of the city and inquire as to its popularity in that trading market; and also to have a reasonably established credit rating of approximately between five and ten thousand dollars as a minimum in credit rating reference. Or if it was not a rated account at that particular time of that particular call I was to recognize that there may be some peculiar situation of credit which didn't necessarily really reflect on the credit of that account, and I could check further, for example, with banks, hotel credit men and other merchants in the city, and upon such inquiry making notation on my orders I had checked, the company

could in turn refer to those certain credit checks.

Q. In calling on dealers trying to make sales, did you follow those instructions?

A. I did.

Q. By calling only on the better class of merchants?

A. In each instance.

Q. Do you know whether in any instance you took an order from anyone that did not have a rating as specified?

A. Yes, sir.

Q. How did you handle such accounts?

A. Where I could find no rating that seemed reliable to me in the town I sought out information on which I could base my judgment, such as in some cases I went to the banks or had them themselves give me their references to those banks and noted those references on the order as the order was signed; on other cases I checked with competitive merchants who I happened to meet in the town, who had been handling that account five years, and I made a note of that on the purchase order sent in to the company.

In other cases I asked others in other lines and in hotels.

In other cases where I could find no satisfactory credit, it was my idea to furnish the goods, the balance of cash to be on the basis of C. O. D. shipment from the company.
(Tr. 97-99)

Q. What were you to be paid for that?

A. I was to be paid at the rate of 80% of the overage fee and 5% of the normal rate. (Tr. 99)

Q. In making the sale at this premium price, or overage, did you sell to any merchant merchandise at regular price and sell to others merchandise at the extra price?

A. Not on that date. (Tr. 100-101)

Q. About the first of December, were the orders you did take sent in properly?

A. Right, sir.

Q. Will you give us the amount of sales you made to the company?

A. \$38,878.17. (Tr. 106)

CROSS EXAMINATION—HINKSON

Q. (By Mr. Bird) Now, did you have a reply on the portion of this telegram which says: "you decide and answer return wire manner of handling my commission and this bonus accounting?"

A. That is right. (Tr. 110)

Q. Will you state when the telephone conversation occurred?

A. After November 6th, being the date of this telegram.

Q. Where was Mr. Barton at this time?

MR. WRIGHT: If you know.

A. I think that was one of his calls from Newark, N. J. or Denver. (Tr. 111)

Q. So that thereafter you took it from this letter you were authorized to solicit orders on the basis of orders on Exhibit "4"?

A. Yes, sir.

Q. But Exhibit "3", the telegram, represents the prices in excess of those, doesn't it?

A. Yes, sir. (Tr. 116-117)

Q. Did you discuss how that premium was to be divided between you and the company?

A. Yes, we did.

Q. What was the conversation about that?

A. That the company was entitled to about twenty per cent; he said he would get an answer on that, and it should be, in his estimation, at least twenty per cent on the basis of handling such premium accounting.

Q. Now, didn't Mr. Barton at that time also say that whether premium price deliveries would be permitted was a matter which Mr. Bonanni would have to decide and which he, as Mr. Barton, could only refer to him, and he would give you a subsequent answer on that?

A. No, he said he had taken it up with Mr. Bonanni and that was one of the reasons for the delay.

Q. But he hadn't taken up the matter of commission?

A. He hadn't taken up the matter of commissions—there was a thought there—

MR. BIRD: Just a minute.

- Q. About a week or ten days after that, you had another conversation with reference to this matter, on which Mr. Barton and Mr. Bonanni were on one end and you were on the other end, do you remember that telephone conversation?
- A. Could you refresh my memory to the details.
- Q. The details—see if you recall this. Isn't it true that at such a conversation, about two weeks, or two weeks and three days after November 6th, Mr. Barton, with Mr. Bonanni on an extension 'phone advised you he had discussed the matter of premium sales with Mr. Bonanni and had been advised the company was not advised to make any because it would disturb dealers at list price, do you remember that conversation?
- A. There was a conversation—question about it, but not a conversation saying it would not be done.
- Q. Now, what do you rely on for saying that the company agreed to pay you eighty per cent on these overages?
- A. On Mr. Barton's say so.
- Q. When was that?
- A. In his first conversation.
- Q. You mean the first time, the very first time you met Mr. Barton?
- A. Not the first conversation about this subject; this subject even came up in September about overages.
- Q. Just when was this first conversation you are speaking of?

A. At the conclusion of our negotiations for my employment.

Q. That is before you made sales for the company?

A. Yes.

Q. You say at that time you were allowed to make sales at premium prices?

A. Yes, sir.

Q. And keep eighty percent of the Sales as commission?

A. Yes, sir.

Q. And on October 6th you say "you are developing some premium accounts at 18, 70, 13.90 and 11.75. You decide and answer return wire", that doesn't sound like the matter was settled?

A. No, sir.

Q. You said in your first conversation following the sending of this telegram Mr. Barton advised you that the sales could be made, but the matter of commission was uncertain?

A. A little thing yet in the matter of commission. (Tr. 118-120)

Q. Direct your attention to Exhibit "C" on the first page of your exhibit you refer to sales in quotes, and then your sales which you under-score?

A. Right, sir.

Q. Now, what do you understand a sale to be?

MR. WRIGHT: Well—go on.

Q. (By Mr. Bird) What did you understand in

your underscoring it here on this Exhibit "C"?

A. A sale to be a sale.

Q. That would mean an order submitted?

A. Yes.

Q. And approved by the defendants?

A. An order submitted and approved by the buyer in my mind is a sale. (Tr. 121)

Q. Did you understand you were authorized to make sales on behalf of these defendants and bind them to make shipments?

A. Right, sir.

Q. They had no right whatever to reject anything you submitted?

A. They had the reservation to reject on lines of credit.

Q. What was the question on unavailable merchandise?

A. No question on unavailable merchandise, except clearance of deliveries; on a delivery there was no question on unavailable merchandise and I was given notice, even I should have noticed some of my orders were short, but I should not worry about that because my accounts would be taken care of and balance of the shipment made in those accounts. (Tr. 122)

Q. It is your contention then, when you went to the customer and had him sign an order for a given amount of merchandise, you were authorized to bind the defendants, your employers, to ship that merchandise?

A. Right, sir. (Tr. 122)

Q. The next question you write: "II. You have listed accounts in only the amount of \$3,947.10 as awaiting credit clearance. Among these are some of our best, and practically all listed currently in D-B, or with ready references noted specifically if not listed.

II A. Question. As an example, why do you hold up such listed accounts? and even No. 2374 which is clearly noted as C. O. D.?

In that question you don't question the right of the defendants to hold up accounts which don't have good credit, do you?

A. No, sir.

Q. You only ask why hold up accounts with good credit?

A. Yes, sir. (Tr. 125)

Q. You don't think for a minute any body is going to agree to pay you commission on orders not shipped?

A. If it is a question of orders not shipped it is better for us to get together before we go much farther and see why they are not shipped.

Q. That is what I am suggesting.

A. That is the reason of my letter of November 16th.

Q. By reason of the fact the defendant, Mr. Bonanni, paid you on orders accepted and not shipped?

A. Apparently he did on that premise, but up until November 16th there was no accountable

or stated intention to indicate such limitations. (Tr. 126)

Q. Why did you take any further orders on back-order?

A. Because that order may not show on that date of account, in the second place if they were going to claim any short accounts on me for credit, I wanted a specific statement why and for what reasons, because credit was in their jurisdiction.

Q. What difference did it make whether it was refused for credit?

A. Because that is the only reason they could refuse them.

Q. What difference did the refusal make?

A. If it was a question of credit, if they could substantiate credit of my account was bad and would jeopardize continued relationship to them as buyer to seller then I would not be entitled to commission on that account.

Q. You didn't expect commission on accounts not accepted by them on account of credit?

A. Not acceptable for substantial and specified reasons. (Tr. 128-129)

Q. Now to get back to this Exhibit "3", November 6, 1947, and a week after that you say you had a conversation with Mr. Barton in which this matter was all cleared in accordance with your earlier understanding except the exact matter of commission was left open?

A. That is right.

Q. Well now, that isn't indicated by Exhibit

“B”, which reads,—dated November 16, that is ten days after,

“Refer to the subject wire dated 11/16 to quote as follows: Mailing \$3,038.00 orders and samples. Am developing some California orders at \$18.70 and \$13.90 and \$11.75. You decide and answer, manner of handling my commissions and this “bonus accounting”,—all is quoted and “what about this”?

On November 16th you had an uncertainty?

- A. Had a variable amount of thinking whether it would be ten per cent, twenty per cent, or fifty per cent of that bonus accounting.
- Q. So it wasn't decided until after November 16th?
- A. It was decided, as I said before, up to the matter of the definite percentage. (Tr. 132-133)
- Q. And Bonanni reserved the right to ship or not ship?
- A. Reserved the right with substantial reasoning on that, as far as I am concerned, in the agreement with Mr. Barton.
- Q. Then your complaint is the reasons given by the defendant are not substantial?
- A. They aren't even substantiated. (Tr. 138-139)

REDIRECT EXAMINATION

- Q. (By Mr. Wright) I am just trying to get the prices?
- A. \$12.90.

Q. \$10.50 you say?

A. \$10.75.

Q. \$10.75—

A. \$12.90 and \$14.50.

Q. And \$12.90 and \$14.50, and those are the prices you used at first?

A. Yes sir, those are the prices Mr. Barton instructed me to use. (Tr. 141-142)

WILLIAM W. BARTON—DIRECT EXAMINATION

Q. (By Mr. Bird) Is it part of your responsibility to employ salesmen?

A. It is.

Q. To sell merchandise for the Embassy Hoisery Sales?

A. Yes. (Tr. 150)

Q. Did you submit a form of agreement to him?

A. Not at that time.

Q. Did you at any time?

A. I did. (Tr. 153)

Q. I hand you document marked Exhibit "8"—is this the form of the agreement that was submitted to the plaintiff?

A. Yes it is.

Q. At the time you have stated?

A. That is correct.

Q. Except that this one is filled in as to territory and name and the one you submitted presumably was not filled in?

A. That is correct. (Tr. 153-154)

MR. WRIGHT: Where were you when this Exhibit "8" was tendered to Mr. Hinkson?

A. That was in the Newhouse Hotel on the mezzanine of the hotel.

Q. (By Mr. Bird) After you completed the four day trip?

A. That is right, and when I paid him \$40.00 for training.

Q. Was there any discussion between you and him regarding the terms of Exhibit "8"?

A. There was no discussion other than it ought to be mailed into the office, that was the company policy.

Q. State what conversation you had concerning Exhibit "8" or the form of this.

A. The base is always seventy-five a week.

MR. WRIGHT: Now—

Q. (by Mr. Bird) Just the conversation.

MR. WRIGHT: What you said to him, and what he said to you.

A. Well, it apparently follows the usual line; it is merely read this form and figure it out and send it into the mill.

Q. (by Mr. Bird) You had previously discussed the terms of employment?

A. Yes, I had the first day I met Mr. Hinkson.

Q. What happened to the form you submitted Mr. Hinkson?

A. I do not know.

Q. Do you know whether you ever tendered one?

A. There was not, we have no file on record.

Q. Have you looked for it?

A. They have in Philadelphia; of course, I haven't it.

Q. At the time this contract was tendered to Mr.

Hinkson, was it in his possession when you parted company with him?

A. It was.

Q. And all the conversation about it that you remember is what you have stated?

A. That is correct.

MR. BIRD: We renew our offer.

MR. WRIGHT: We object to it, Your Honor.

THE COURT: Well, the Court will admit it at this time. (Tr. 154-156)

Q. Do you know what the state of the market in nylon hosiery was in 1947 for the Christmas business?

A. Very severe—very severe—very short.

Q. Was there a demand in excess of the supply?

A. Yes, I had to quit work for two months because of that shortage, personally. (Tr. 159)

Q. You say you were at the offices of the company in the fall of 1947, and that you are acquainted with the ratio of orders submitted to your company with the available supply of hosiery, were you so acquainted?

A. Yes.

Q. You understand what I mean?

A. Yes.

Q. What would you say the ratio was of demand represented by orders submitted, and supply represented by stocks available?

A. The demand was approximately seventy per cent short,—or the supply was seventy per cent short of the demand at that time.

Q. Did you ever communicate that information to the plaintiff?

A. I did.

Q. When?

A. Over the telephone; in reference to the telephone conversation he stated after we received the telegram inquiring about overage which we did not accept.

Q. Was that the first time you discussed with the plaintiff the available supply of hosiery your company had?

A. No.

Q. When was the first time?

A. The first time I talked to Mr. Hinkson.

Q. What did he say about that?

A. Stated to Mr. Hinkson during the period of shortage all salesmen would receive drastic cut in available merchandise that is deliverable against orders taken. It was very easy to take a large order at that time.

Q. Did you discuss what the situation would be between that time and Christmas?

A. I did.

Q. What was the conversation about that?

A. The conversation was this; we had so much production, had so many to sell; every man was on ratio, to be on his ratio would be 180 to 210 dozen a week.

Q. Did you have a conversation with Mr. Hinkson before he was employed, before he started to work for the company with reference to approval of credit on submitted customers' orders?

A. I did.

Q. Will you state what that conversation was?

A. The conversation was that the company had

full authority to reject any order on the basis of credit, and Dunn and Bradstreets confidential reports would not be turned over to the salesmen. (Tr. 160-162)

CROSS EXAMINATION

Q. (by Mr. Wright) You say that your company never sold merchandise to anyone at a premium price?

A. That is correct. (Tr. 177)

Q. (by Mr. Wright) I want you to repeat, tell the conversation you had with Mr. Hinkson with reference to the credit standard of merchants from whom orders were taken?

A. The credit—

MR. BIRD: Now, I object to this unless you can identify it.

Q. (by Mr. Wright) The conversation you had with him at the time of his employment?

A. The agreement was this: that any orders submitted to Dunn & Bradstreets without a very accurate report and a very satisfactory report would be automatically cancelled by the company.

Q. I don't understand your answer. Did you say orders submitted to Dunn & Bradstreets?

A. That is correct, by us for investigation. We drew a special when in doubt; in that C. O. D. there is no repeat potential in that matter. (Tr. 187-188)

Q. Tell us how he was to determine then the advisability of calling on any merchant with reference to credit?

A. It cannot be done; no salesman can determine

the desirability of an account even if he goes to the bank. If a bank carrying a large loan against that company gives a good statement, and no salesman is equipped to tell except Dunn & Bradstreets, and in many cases they are wrong.

Q. Did you explain that to Mr. Hinkson?

A. We did, that is our authority, we reserve that strictly. (Tr. 188)

Q. (by Mr. Wright) Now, this written contract in this form, when did you present that first to Mr. Hinkson?

A. That was on the mezannine floor of the New-house Hotel. I also, if I remember correctly, gave him some notations on approximate sales ratio on the market for various gauges in the denirs. I believe that was a conversation and at the same time paid him \$40.00 for training, that is all at the same time.

The reason I remember it a convention was on the floor and we used their tables.

Q. I see,—was Mr. Hinkson to be allowed any lattitude whatever in opening up new accounts in respect to credit ratings?

A. He was not.

Q. Was not?

A. Was not. (Tr. 193)

Exhibit 1—(Deposition of Carmin C. Bonanni)

* * * *

(5) Q. In what capacity does the Embassy Company employ William W. Barton and in

what capacity was he employed during the period, September to December, 1947?

A. William W. Barton is and was at all times employed by me as a salesman to sell hosiery for which he receives a commission. He was also authorized to contact other salesmen to sell hosiery on which sales he would receive an override commission of $1\frac{1}{2}\%$.

(6) Q. What authority did William W. Barton have in the employment of salesmen to represent the Embassy Company in specified territories in the Western United States during the period, September to December, 1947?

A. William W. Barton was authorized to contact other salesmen in the Western United States, during the period, September to December, 1947. All orders, from either William W. Barton, or any other salesman, including Mr. Hinkson, were subject to my acceptance or rejection. My judgment was based upon the credit rating of the customers, the availability of merchandise and the use of a branded name in a particular territory. Commissions were paid only on those orders which were accepted by me.

(7) Q. Was the authority of William W. Barton in employing salesmen specific, or was it based upon business practice?

A. The authority of William W. Barton was specific and not based on business practice.

(8) Q. During and prior to November, 1947,

what was the practice of the Embassy Company in entering into employer-employee relationships with salesmen whose services were solicited by Mr. Barton?

A. Prior to November, 1947, there were two other salesmen who were solicited by William W. Barton, under the same regulations as set forth in Paragraph No. 6. William W. Barton would make the contact, notify me and from then on any dealings with the salesmen were as above stated.

(9) Q. Was William W. Barton authorized by the Embassy Company to employ Charles Hinkson as a salesman?

A. Yes.

(10) Q. Was Charles Hinkson employed as a salesman by the Embassy Company in the Fall of 1947?

A. Yes.

(11) Q. Regardless of the answers to the preceding questions, will you state what representations were made to the Embassy Company by William W. Barton or by Charles Hinkson and what statements were made by the Embassy Company or any representative thereof to Charles Hinkson concerning his services in behalf of the Embassy Company prior to the time the Embassy Company accepted the first order submitted by Charles Hinkson.

A. All of any representations to Mr. Hinkson were made by William W. Barton.

Mr. Barton engaged Mr. Hinkson as a salesman to solicit orders from customers for the sale of hosiery. A commission of 5% was paid to Mr. Hinkson on all orders accepted by me. All orders were subject to my acceptance. Commissions were not to be paid on orders which were not accepted.

* * * *

CROSS INTERROGATORIES

* * * *

(4) Q. Was there a written contract of employment between William W. Barton and Embassy Company? If so, attach a copy of the same.

A. No.

(5) Q. Was William W. Barton required to secure the approval of his employers of his selection of salesmen to represent the company?

A. Yes.

EXHIBIT 3—Western Union

T.KHA1 59 61 DL COLLECT=SALT LAKE
CITY UTAH 6 934A
EMBASSY HOSIERY CO ATTN
BILL BARTON=
2843 WEST CLEARFIELD ST PHILA=
AM MAILING \$3,038. MORE ORDERS RUSH
ORDER PAD AND MORE SAMPLES BLACK
ALSO MISTIQUE ALSO BRONZE AM DE-
VELOPING SOME CALIFORNIA ORDERS
AT 18.70 AND 13.90 AND 11.75. YOU DECIDE

AND ANSWER RETURN WIRE MANNER OF
HANDLING MY COMMISSION AND THIS
BONUS ACCOUNTING. ALSO WHERE IS MY
BALANCE DUE COMMISSION MONEY TO
DATE AND CORRESPONDING STATEMENT.
NEED IT MUCH NOW. RUSH=

HINKSON

Exhibit 4—

EMBASSY HOSIERY SALES

2843 W. Clearfield Street

Philadelphia 32, Pa.

10/22/47

Mr. Charles E. Hinkson

287 7th Ave.

Salt Lake City 3, Utah

Dear Mr. Hinkson:

15 Den 16.20 51-30 12.90 45-30 10.75 white 10.75 no extra lengths.	We are sending you a check for orders that have been cleared up to this date. The balance due you will be sent you as soon as the orders pass shipping and credit which will not take over 10 days. I will at that time send you a recap on all orders sub- mitted but to save time and get a check to you I am sending you a check without a recap. I trust this will be satisfactory for I have such a backlog of work that it is the best I can do at the moment.
---	--

To save time please give the D.

and B. rating of each account that you submit.

* * * *

kindest personal regards,
Sincerely yours
W. W. Barton

Exhibit 8—

PRELIMINARY AGREEMENT

I, Mr. H. G. Thomas, do hereby accept the
Colorado)
Wyoming) Western, to be the territories as-
Nebraska)
signed to me for coverage by W. W. Barton.

The Embassy Hosiery Mills does hereby agree to pay a comm. of 5% on all sales in the above mentioned territory, and does also agree to pay the same comm. for all orders received through the mail.

* * * *

No order will be held pending credit investigation for more than thirty days.

* * * *

All orders submitted for shipment are subject to a credit O. K.

* * * *

When a shortage exists Embassy will notify the salesmen, giving him his quota for the period of shortage. Where Mfg. Conditions do not permit the delivery of the total quantity on order Em-

bassy will have the right to alter said order to conform with the population ratio.

H. G. Thomas
W. W. Barton
Sales Manager
Embassy Hosiery

Exhibit B—

HOTEL TRAVELERS

Sacramento's
newly furnished
fireproof hotel

Sacramento 14, Calif.

Aza Mahlet, Mgr.
Fifth and J Streets
Telephone 2-9051

11/16

Attn: Mr. Barton or Mr. Bonanni:

Re: Extra Mark-up Sales @ 18.70 and 13.90 etc. Refer to the subject wire dated 11/6 to quote as follows: "Mailing \$3,038.00 orders . . . and samples . . . Am developing some California orders @ \$18.70 and \$13.90 and \$11.75. You decide and answer. . . . Manner of handling my commissions and this "bonus" accounting. . . ."

What about this?

Hinkson

Exhibit C—

HOTEL TRAVELERS
Sacramento 14, Calif.
Fifth and J. Streets
Telephone 2-9051

11/15/47

Attn: Mr. Bonanni:

Gentlemen:

Let's consider several factors deserving your business-like and surely organized thorough thought.

* * * *

II. You have listed accounts in only the amount of \$3,947.10 as awaiting credit clearance. Among these are some of our best, and practically all listed currently in DB, or with ready references noted specifically if not listed.

IIA. *Question*—As an example, why do you hold up such *listed accounts*? and even No. 2374 which is clearly noted as *C.O.D.*?

* * * *

IV. At hand I have only your one statement covering only 33 accounts, total as "pending" or "sales". Even a hasty review, without aid of my accountant, shows my record to state that I have sold and forwarded bonafide orders for 78 accounts totaling \$35,540.51. Will you accept this as evidence of substantial accurate record and accounting?—or will you kindly offer full and complete statement of your accounting to correct these figures if in error and to account for any difference which may exist *due to stated reasons specifically in each instance* such as due to "credit" or "back orders".

V. May I ask your kind and far-sighted consideration of the matter of "keeping you men advised" in such things (not only I, II, III, IV)

to our mutual advantage in the field—as—*what total quantities can be shipped to all accounts? on what dates? And what valued exceptions?*

* * * *

Sincerely,
Chas. E. Hinkson

QUESTIONS INVOLVED

The appellant filed objections to the proposed judgment in which were pointed out the errors relied on in this court (Tr. 42) These objections specifically attacked the Findings of Fact upon which the judgment rested. There was no motion for a new trial.

Three arguments are relied on in this court as ground for reversal or modification of a new trial. (104-41-23, UCA, 1943).

1. The court erred in admitting testimony of respondent of statements by appellant's agent inconsistent with and beyond the authority of the agent.

2. The court erred in making Finding of Fact No. 3 of the First Cause of Action and in giving respondent judgment for commission on orders taken rather than on orders approved by appellant.

3. The court erred in making Finding of Fact No. 2 of the Second Cause of Action and in giving judgment for respondent on the second cause of action.

ARGUMENT

1. THE COURT ERRED IN ADMITTING TES-

TIMONY OF RESPONDENT OF STATEMENTS BY
APPELLANT'S AGENT INCONSISTENT WITH
AND BEYOND THE AUTHORITY OF THE AGENT.

Respondent took the stand in his own behalf and attempted to testify as to conversations with W. W. Barton, the alleged agent of appellant. The court sustained an objection to such testimony (Tr. 69). Respondent then introduced portions of the deposition of the appellant and the appellant introduced the balance of the deposition after certain deletions had been made. (Tr. 71-89). Respondent again took the stand and testified over appellant's objections to conversations between respondent and W. W. Barton relied on as establishing a contract for commissions in excess of the authority of Barton as established by the deposition. This was error.

The court correctly excluded testimony of the respondent in the first instance, since a third party cannot establish the authority of an agent by the uncorroborated statements of the agent made out of court. Mechem on Agency, 2nd Ed. Sec. 285; C.J.S.-Agency, Sec. 322 P. 276; *ibid.* Sec. 324 (i); Ephraim Willow Creek Ins. Co. v. Olson, 70 Utah 95, 258 Pac. 216.

Thereupon the respondent introduced independent evidence of the agent's authority which was the statement of the principal and which established authority of the agent to employ a salesman on the basis of five percent commission on all orders approved by the appellant. (Tr. 72, 74, 77). This became the limit of Bar-

ton's authority which was a specific and not a general authority, and the court illogically permitted the respondent to testify to a conversation with Barton going beyond this specific authority to matters on which there was no corroboration whatever. Since respondent's testimony was admissible only upon the statement of appellant that Barton was his agent, the authority of the agent must be limited by appellant's statement, in the absence of other proof of Barton's authority.

The court's ruling in permitting respondent to testify to his understanding of the employment arrangement placed appellant, the principal, at the mercy of the third party (the respondent) with no showing of authority from the principal. Where a principal employs an agent with limited authority, this ruling of the court would permit a third party to bind the principal regardless of the limitations of authority, upon the third party's statement of what the agent said. This is contrary to the law.

In *Dohrman Supply Company versus Beau Brummel, Inc.*, 103 Pac. 2d 650, 99 Utah 188, at page 191, this court indicated the correct rule:

“One dealing with a supposed agent is under the duty to ascertain just what his capacity is. Nelson's representations could not enlarge the scope of the agency, nor did Nelson attempt to enlarge his authority. * * * The defendant company was not advised as to the contents of the telegram but it was its burden to determine just how great the agency conferred was. Glaus did

not see the telegram and Glaus acted upon the assumption Nelson had been made a general agent. There is no evidence to support this assumption. There was a limited agency."

Mechem on Agency, 2nd Edition, Sec. 285, states:

"Evidence of his own statements, declarations or admissions, made out of court therefore (as distinguished from his testimony as a witness), is not admissible against his principal for the purpose of establishing, enlarging or renewing his authority; nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise."

The Restatement of Agency supports the same view:

"A statement by an agent as to the extent of his authority is admissible as evidence of his power to bind the principal if, but only if, it is proved that it was within the scope of his agency to make the statement under the rules stated in Section 144-211, or that it has been ratified. If such proof is given, his statement becomes an operative fact creating apparent authority if the statement by him with respect to the extent of his authority is not true, and the other party to a transaction with him does not have notice of its untruth. The proof that it was within the scope of the agency to make statements as to the extent of authority must be made before the statement is admitted, except that it may be admitted tentatively, in the discretion of the trial judge, on condition that proof of authority to make the

statement is later made." Sec. 284-d.

"Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by other evidence that the making of such statement was within the authority of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the agent." Sec. 285.

"* * * On the other hand, until it is proved that the speaker was an agent and that the statement was within his power as such agent, evidence of his statements is inadmissible.* * *." Sec. 285-b.

It is admitted that if a principal empowers an agent with apparent authority a third party can rely on the apparent authority. In *Vadner vs. Rozzelle*, 45 Pac. 2nd 561, 88 Utah 162, the court made this statement.

"An insurance adjuster is ordinarily a special agent for the company for whom he acts, and his authority is prima facie co-extensive with the business intrusted to him.* * * Within the apparent scope of his authority an adjuster may bind the principal where the third party knows of no limitation of such authority.* * *".

In the instant case the principal and the agent agree that the agent had specific and limited authority, which was established by the deposition before respondent testified and was later confirmed by the agent. This was made plain from the contract of employment tendered to the respondent by the agent before respondent under-

took any work in behalf of the appellant. This was Exhibit "8". (Tr. 153-156, 191-192). This offered agreement contained these limitations: "All orders submitted for shipment are subject to a credit O.K.", and "when a shortage exists Embassy will notify the salesman giving him his quota for the period of shortage."

There is no testimony giving Barton apparent authority to go beyond the authority of his principal in employing a salesman. The evidence is uncontradicted that in the fall of 1947 unlimited quantities of hosiery could have been sold without effort because the demand far exceeded the supply. (Tr. 159-162). Here the salesman endeavors to commit the principal to commissions on orders taken regardless of whether sales were made when such a contract is on its face highly unreasonable.

Can it lie within the power of a fast talking plaintiff to bind a principal whom he has never met on alleged conversations with the principal's agent, which the agent denies, as to matters beyond the specified authority of the agent? The court was apparently prejudiced in favor of just such a plaintiff against an absent plaintiff who was said by the plaintiff to be a big concern with lots of resources. (Tr. 93).

The authorities do not permit a principal to be so mulcted by an ambitious third party who attempts to hold a principal beyond any authority or apparent authority given to his agent.

2. THE COURT ERRED IN MAKING FINDING OF FACT No. 2 OF THE SECOND CAUSE OF AC-

TION AND IN GIVING RESPONDENT JUDGMENT FOR COMMISSION ON ORDERS TAKEN RATHER THAN ON ORDERS APPROVED BY APPELLANT.

The deposition of the appellant and the testimony of his agent, Mr. Barton, plainly established the right of the principal to withhold approval on orders because of credit risks. (Tr. 74, 77, 187-188, 693, Ex. 8.) It would be strange to have a principal agree to pay a commission on orders not accepted because of excessive credit risks. However, if the respondent testified that such was the contract there is a conflict of testimony which could be resolved by the court in favor of the respondent, subject only to the rule that substantial evidence must support the court.

Respondent admitted in his own testimony that the appellant reserved the right to pass on credit risks (Tr. 98, 122, 125, 128-129). And his only argument before the court was that the rejections of the appellant for credit reasons were not persuasive with the respondent. (Tr. 138-139).

It appears, then, that respondent admitted himself that the 5% commission was subject to approval of credit and only careless, general statements of respondent support the lower court. Nowhere did he testify that appellant had not reserved right of approval or rejection for credit. The testimony was not conflicting and the trial court should not have computed commissions on orders taken regardless of credit.

3. THE COURT ERRED IN MAKING FINDING OF FACT No. 2 OF THE SECOND CAUSE OF ACTION AND IN GIVING JUDGMENT FOR RESPONDENT ON THE SECOND CAUSE OF ACTION.

At the close of the plaintiff's case and at the close of all the evidence appellant moved for dismissal as to the second cause of action as being unsupported by evidence. The argument is similar to that made under point 2. If substantial evidence supported the respondent, the court was free to give judgment either way, hard though it is to believe that a court, subjected through the business of the court to commercial practices would give credence to testimony of a salesman that he was entitled to an eighty percent commission on a common article such as hosiery while it was in short supply.

Respondent's claim is preposterous on its face. Respondent testified that the regular prices of hosiery were originally \$14.50, \$12.90, and \$10.75 per dozen for the three grades of hosiery. (Tr. 141-142, 166). On the best grade this price was increased to \$16.20 on or about October 22nd, according to the testimony of both Barton and the respondent concerning Exhibit "4". (Tr. 114, 166).

Respondent testified that under the second cause of action he was entitled to an eighty percent commission on certain premium sales which sales were alleged to have been made at prices of \$18.70, \$13.90 and \$11.75 per dozen. His concern over these prices, although there is nothing in the record except respondent's oral testi-

mony to support the claim of eighty percent commission, was evidenced by Exhibit "3" and the respondent's testimony concerning Exhibit "3". (Tr. 167, 118-120, 132-133). That exhibit stated in part:

"Am obtaining some California orders at \$18.70 and \$13.90 and \$11.75. You decide and answer return wire manner of handling my commission and this bonus accounting."

Without producing any answer to this wire the respondent claims he was entitled to an eighty percent commission on these premium sales. If this commission were paid the appellant would have received from such sales net prices of \$3.74, \$2.78, and \$2.35 per dozen pairs as against net prices of \$15.39, \$12.26 and \$11.16 on the highest regular prices with the usual five percent commission and the so-called "overage" price on the third class of hose remained unchanged at \$11.75. Such a position is utterly unreasonable and particularly when the appellant was able to sell all of its product without delay and was constantly behind his orders during the season when respondent was working. (Tr. 159-162).

The respondent's own testimony falls short of a contract for a commission on these premium sales, since he admits that the amount of the commission was left open.

Hinkson, the respondent, testified that the arrangements for the premium sales were completed except that the matter of commission was not agreed on:

"Q. Now, didn't Mr. Barton at that time also say that whether premium price deliveries

would be permitted was a matter which Mr. Bonanni would have to decide and which he, as Mr. Barton, could only refer to him, and he would give you a subsequent answer on that?

“A. No, he said he had taken it up with Mr. Bonanni and that was one of the reasons for the delay.

“Q. But he hadn’t taken up the matter of commission?

“A. He hadn’t taken up the matter of commissions—there was a thought there—”

“Q. You said in your first conversation following the sending of this telegram Mr. Barton advised you that the sales could be made, but the matter of commission was uncertain?

“A. A little thing yet in the matter of commission.” (Tr. 118-120).

“On November 16th you had an uncertainty?

“A. Had a variable amount of thinking whether it would be ten per cent, twenty per cent, or fifty per cent of that bonus accounting.

“Q. So it wasn’t decided until after November 16th?

“A. It was decided, as I said before, up to the matter of the definite percentage.” (Tr. 132-133).

Without proof of the amount of commission there was no contract for commission and the respondent would be entitled only to the reasonable value of his services. There was no testimony on reasonable value and no proof that Appellant made any sales at the overage prices of \$18.70, \$13.90, and \$11.75. (See, for example, Tr. 166, 167, 177-186).

Since respondent failed to prove a contract for 80% commission the second cause of action failed and Finding No. 2 as to that cause of action was erroneously made.

CONCLUSION

The measure of the authority of the agent is the testimony of the appellant as contained in the deposition. There was no other evidence of this authority and without proof of authority or of apparent authority the testimony of Hinkson was erroneously received and Hinkson, the respondent, should not have been permitted to testify to extra-judicial statements of the agent, Barton, as a means of establishing the authority of that agent and binding the appellant.

But even if the court consider the testimony of Hinkson it is plain therefrom that all orders submitted were subject to approval of credit by the appellant. Any other arrangement would have been unreasonable and Hinkson admitted that there was a reservation for credit. The court should, therefore, either compute the sales refused by appellant for credit reasons or remand the case to the district court for ascertainment as to those items.

As to the second cause of action Hinkson's own testimony falls short of a contract for the sale of Christmas merchandise and an 80% commission. The proposal is unreasonable on its face, and there is no testimony to support allowance of either an 80% commission or a

reasonable compensation. Since respondent failed to prove a contract for an 80% commission, finding of fact No. 2 in the second cause of action was erroneously entered and the judgment on the second cause of action cannot stand.

The judgment should be reversed as to the second cause of action and either modified or remanded for new trial to determine rejections for credit reasons as to the first cause of action.

Respectfully submitted,

RICHARDS & BIRD,
Attorneys for Appellant.