DOMINION TEXTILE COMPANY, LTD. *v.* BECK.

4-3409

Opinion delivered March 19, 1934.

1. SALES—JURY QUESTION.—It was not error to refuse to direct a verdict for plaintiff, a cotton broker, for loss alleged to have been sustained in a sale of cotton where there was evidence tending to sustain a finding that defendant was not liable under the contract for any loss sustained in handling the cotton.
2. SALES—EVIDENCE.—In a broker's suit for loss alleged to have been sustained in a sale of cotton, the defendant's testimony as to what other parties to the sale reported to him with reference to the deal having been closed and the cotton delivered as agreed *held* admissible where such testimony was but a report to the seller of the closing of the contract.
3. TRIAL—INSTRUCTION CHANGING ISSUE.—In a broker's suit for alleged loss in a sale of cotton, refusal of an instruction submitting an issue not raised in the pleadings *held* not error.

Appeal from Miller Circuit Court; *Dexter Bush,* Judge; affirmed.

STATEMENT BY THE COURT.

This suit was brought by appellant company for damages for an alleged loss on a cotton selling contract, in which cotton was sold to appellant on call.

The appellant, a Canadian corporation engaged in buying, handling and spinning cotton, maintains a branch office at Little Rock, Arkansas; and the appellee is a prominent physician and surgeon and a large landowner residing in Texarkana, Texas, and owns a large plantation in Miller County, Arkansas, near Garland City.

During 1929, Brooks Montgomery, who resided in Garland City, was an agent of appellant and had previously dealt with the appellee in the buying of his cotton. In the latter part of November, 1929, Montgomery

negotiated with the appellee (and appellee contends with others also, which, however was disputed) for the purchase of 330 bales of cotton from appellee's plantation in Miller County. The sale was made and the cotton delivered to the appellant, which advanced 17 cents per pound on the cotton in drafts and checks made payable to appellee in the total sum of $29,000.

The appellant contends that the cotton was sold on call, that is, the account should be carried along with the right of the appellee "to call it" at any time at any prevailing price in the future, and if on the date said call was made the price of cotton was above 17 cents per pound appellee was to have the benefit of it, while, on the other hand, should the price be below 17 cents per pound, then appellee would have to pay the difference to appellant.

The appellee contended that there was no such sale, but that an agreement was made between appellant's agent, Montgomery, and the appellee and others that the sale price should be paid (17 cents per pound) and advanced, and in the event the price of cotton went up the appellee could call the cotton at any time and receive the difference represented between the advance and the market price, but if cotton went down in price then the appellee was not to lose anything and would not have to pay the difference to appellant.

There was much testimony introduced, together with various letters and telegrams which passed between the parties during the negotiations, and all the negotiations were fully set out showing the contention of each of the parties to the disputed contract.

The court instructed the jury, giving over appellant's objections certain instructions, which returned a verdict for appellee, from which this appeal is prosecuted.

Williams, Williams & Shaver and *Partain & Agee,* for appellant.

James D. Head and *Jones & Jones*, for appellee.

KIRBY, J., (after stating the facts). It is contended by appellant that the court erred in refusing to direct a verdict in its favor at the conclusion of the testimony, as well as in the giving and refusal of certain instructions

and in the admission of certain testimony objected to by it.

It appears from the testimony that appellee only in fact owned 28 of the 330 bales sold, the rest of the cotton belonging to other individuals with whom the deal was made; and the great preponderance of the testimony shows that the sale was made, that it was made on call, and that the appellant's agent agreed that the purchaser would hold the cotton subject to the seller's call, and, if the price advanced over the 17 cents per pound paid when the cotton was delivered, the seller had the right to call the contract and realize the difference between the price paid and the price to which the cotton had advanced when it was called; while, if the price went down, the seller could not lose more than the $5, or one cent per pound retained upon the sale, no agreement having been made to pay any greater difference should the market price go below said price advanced. The court therefore did not err in refusing to instruct a verdict for the appellant, the testimony being ample to show the contract and to support the verdict as found by the jury.

Neither was error committed in allowing the introduction of the statement by appellee of what certain witnesses, who were the other parties to the sale, told him about the deal having been closed and the cotton delivered in accordance with the agreement made before he left for the Rio Grande Valley. He knew what the negotiations were before leaving, and had authorized the others to close the deal in his absence, which was done, and the testimony was but a report to him of the closing of the contract from which he could testify that the contract had been made and closed and the cotton delivered and paid for in accordance with its terms. The draft paid for the cotton was made payable to him and put in the bank until his return, when the money was distributed by him in accordance with the amount of cotton owned by the different persons interested in the sale.

There was testimony tending to show that a different contract was made after the first one, after the sale of the cotton in fact, and that under this contract the appellee was liable to the payment of the difference between

the price for which the cotton was sold and the price to which it had declined before it was called by appellant; and it is complained that two of the instructions refused would have properly submitted this question to the jury, but the pleadings did not allege any new contract, but only the issue as already stated, and, while the court could have refused to allow the introduction of any such testimony showing a changed contract, which was not alleged, it could have as effectively refused to instruct the jury upon such issue, which it did, and no error was committed in so doing. It was within the discretion of the court to allow an amendment stating a different cause of action after the trial was begun, and there was no abuse of discretion shown in refusing the instructions on such an issue which had not been raised, and such action amounted to a refusal to allow the amendment. *Cole* v. *Branch,* 171 Ark. 611, 285 S. W. 353; *Temple Cotton Oil Co.* v. *Davis,* 167 Ark. 449, 268 S. W. 38; *Butler* v. *Butler,* 176 Ark. 626, 2 S. W. (2d) 63.

Moreover, there was no testimony showing any consideration passing for the making of the alleged new contract, or amendment of the terms of the contract of sale, which could not therefore have been valid anyway. *Cook* v. *Cave,* 163 Ark. 407, 260 S. W. 49; *Feldman* v. *Fox,* 112 Ark. 223, 164 S. W. 766.

We do not find it necessary to discuss the objections raised to the other instructions, but conclude that upon the whole case the jury was properly instructed upon the issue alleged and submitted, and that the testimony was amply sufficient to support the verdict. The judgment is affirmed.