ROBERT P. CAMPBELL.....APPELLANT;

AND

MARGARET FRASER YOUNG AND OTHERS ..... } RESPONDENTS.

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*Oct. 8, 9.
*Oct. 10.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Parol testimony — Commencement of proof in writing — Admissions — Arts. 1233, 1243 C. C.—60 V. c. 50, s. 20 (Que.)

Where a contract is admitted to have been entered into, by the party against whom it is set up, no commencement of proof in writing is necessary in order to permit of the adduction of evidence by parol as to the amount of the consideration or as to the conditions of the contract.

In such a case, the rule that admissions cannot be divided against the party making them does not apply.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, which had established a balance of $881.38 as due to the appellant on an account of his administration of the estate of the late D. D. Young, deceased, and, on the same statement of accounts, condemning the appellant to pay the respondents, as a balance due by him, the sum of $3,447.75 with interest.

The case as presented in the Superior Court involved a contestation of a number of items of the appellant's account and the respondents asked judgment for $22,772.21 against him. The questions at issue on the present appeal are stated in the judgment of the court delivered by His Lordship Mr. Justice Taschereau.

* PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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Stuart K.C. for the appellant.

L. P. Pelletier K.C. and *Hogg K.C.* for the respondents.

The judgment of the court was delivered by:

TASCHEREAU J.—This case originated by an action *en reddition de compte* by the respondents against the appellant who had acted as their agent at Quebec from March, 1893 to June, 1899. The appellant having duly rendered the account so demanded from him, the respondents filed a contestation thereof as to the amount he charged for his salary, upon which the appellant having joined issue, the Superior Court found that he had proved his claim that the respondents had agreed in 1893 to pay him as their agent a sum of $750 per annum, 5 per cent commission upon all revenue collected by him, 2½ per cent commission upon capital sums realised by him to the extent of $10,000, and 1½ per cent on all additional capital received by him over and above the sum of $10,000, upon which finding judgment was given against the respondents in favour of the appellant for a balance of $881.38. The Court of Appeal, reversing that judgment, found that no agreement as to appellant's salary had been proved and condemned him to pay to the respondents, as being the balance of the account of his administration, the sum of $3447.76, allowing him but a small sum as a *quantum meruit* for his services. That is the judgment now appealed from.

The case as submitted to us is a very simple one, and is limited to the determination of the amount of the remuneration which the appellant is entitled to as respondents' agent as aforesaid.

The judgment appealed from, if I do not misunderstand the opinion of the learned judge who pronounced it for the court, is based exclusively on this part of

the case upon the ground that the oral evidence adduced by the appellant of his alleged contract with the respondents as to the amount of his remuneration not being supported by a commencement of proof in writing had been illegally admitted and should be read out of the record. There is nothing in the case that would have justified the reversal of the findings of fact, upon contradictory evidence, of the learned judge at the trial who had heard the witnesses. And I take it that the Court of Appeal would not have interfered with his judgment had they been of opinion with him that the appellant's oral evidence in support of his contentions was admissible and had been legally received. So that the only point before us is one of law, whether that oral evidence was legal or not.

I am of opinion that the Superior Court's solution of this point was the correct one, and that its judgment in favour of the appellant should consequently be restored.

To begin with, this objection by the respondents to the admissibility of the oral evidence adduced by the appellant seems to me one which is perhaps not open to them. They themselves contested the appellant's demand for his salary upon the ground that by a special contract with him the appellant had agreed to act for them, but at a much lower price than what is claimed by him; and gave oral evidence of their said plea. But when the appellant, admitting that there was a special agreement between him and the respondents as pleaded by them, but contending that by that agreement his remuneration was to be on a much higher scale than contended for by them, proceeded to offer oral evidence in support of his contention, the respondents objected and argued that he could not bring such evidence.

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Now, if such evidence was legal when brought by the respondents, how could it be illegal when brought by the appellant? If they had the right by oral evidence to prove that his salary had been fixed by mutual consent at say $200 a year, I fail to see why he could not be allowed to prove in the same manner that it was $500 and not $200 a year that was agreed to.

Upon a contestation of this nature, elementary rules of evidence put the *onus probandi* on the plaintiff who contests the account rendered, though in this case the parties seem to have proceeded differently. Dal. 78, 1, 85, n. 4. If the case had been submitted without evidence on either side, the respondents could not have had judgment for the $22,772 they asked by the conclusions of their contestation. However, leaving that view out of the question, and assuming that the respondents are not debarred from taking the objection, I think that it cannot be maintained.

It is not a commencement of proof of a contract that is in question. There is as full a proof of it as can be. Or rather, the appellant had not to prove it, since it is admitted, pleaded by the respondents themselves. But, would argue the respondents, we admitted a contract for $200, not one for $500. That is so, but when once a contract is admitted, no commencement of proof in writing is required for the admissibility of oral evidence of the amount of the consideration thereof. The rule of the indivisibility of admissions has then no application. Art. 1243 C. C. as amended by 60 Vict. ch. 50, sec. 20 makes that clear, had there been previously any room for doubt on the question. That amendment extended to all admissions whatever the exceptions to indivisibility that were previously enacted by art. 231 of the old Code of Procedure in relation to interrogatories on

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faits et articles. Dal. 65, 1, 63; Dal. Rep. *vo.* "Obligations," nn. 4780, 5142. 8 Aubry & Rau, page 178; 5 Marcadé, page 214, last par; 30 Dem. no. 533; *Viger* v. *Beliveau* (1); 20 Laurent, par. 200; Sirey, Code Civ. Ann., under art. 1347, no. 43; under art. 1356, nn. 83, 97. The contract, in such a case, must be proved by the opposing party, *aliunde* of the admission. But the admission is sufficient as a commencement of proof in writing to legalise oral evidence of it and of its conditions. *Cox* v. *Patton* (2); *Forget* v. *Baxter* (3).

An allusion has been made on the part of the respondents to the fact that all the interested parties were not represented by the special agent Howlin, when he made the agreement in question with the appellant. But there is nothing in this; the plea is on behalf of all and every one of the respondents. As to the limitation of that special agent's authority, which has been relied upon at bar by respondent's counsel, though but faintly, there is no issue on that point on the record, and it is consequently rightly omitted from consideration in both the Superior Court and the Appeal Court.

I would for these reasons and those given by the Superior Court allow the appeal with costs and restore the judgment in favour of the appellant for $881.38 with interest and costs as mentioned therein. That judgment rests principally upon the credibility of the appellant's testimony, and the trial judge's finding as to that is conclusive.

Then that evidence so believed by the judge who saw the witness in the box is corroborated not only by the witnesses Lindsay and Rattray, but also by the entries made in the books, wherein appellant from the beginning charged his salary against the respondents

(1) 7 L. C. Jur. 199.
(2) 18 L. C. Jur. 316.
(3) [1900] A. C. 467.

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upon the scale he contends for, and left his books daily open to the inspection of the respondents and their attorney. These entries as part of the *res gestæ*, certainly go to prove the sincerity and good faith of the appellant. There was nothing to induce him to believe that his books would not be inspected by the interested parties or on their behalf.

Appeal allowed with costs.

Solicitors for the appellant: *Caron, Pentland, Stuart & Brodie.*

Solicitors for the respondents: *Drouin & Pelletier.*