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 \*April 9.  
 \*April 14.  
 JANE GILMOUR (PLAINTIFF) . . . . . APPELLANT;  
 AND  
 CELESTIN SIMON (DEFENDANT) . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR  
 MANITOBA.

*Principal and agent—Sale of land—Authority to make contract—  
 Specific performance.*

The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for \$4,270, (the price being calculated at the rate of \$40 per acre on its supposed area), an instalment of \$1,000 to be paid in cash and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at \$40 per acre, \$50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments and with the privilege of "paying off the mortgage at any time." This contract was in the form of a receipt for the deposit and signed by the broker as agent for the defendant.

*Held*, affirming the judgment appealed from (15 Man. Rep. 205) that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.

*Held*, further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant.

**A**PPEAL from the judgment of the Court of King's Bench for Manitoba (1) reversing the judgment of Mr. Justice Perdue, at the trial, and dismissing the plaintiff's action with costs.

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\*PRESENT:—Sedgewick, Girouard, Davies, Idington and Mac-lennan JJ.

(1) 15 Man. Rep. 205.

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A real estate agent named Egan had an interview with the defendant, who had for sale a lot supposed to contain 106.63 acres of land, and asked him if he would take forty dollars per acre for it. The defendant replied that Egan could "sell it" for \$4,270, \$1,000 cash and the balance in one, two, three and four years, interest on the deferred payment to be at the rate of six per cent. per annum, and that he would give Egan \$125 commission to sell it, with the exclusive right of sale until the third following day. Egan arranged for the sale of the property to the plaintiff, received from her a cheque for fifty dollars and set out the terms of sale in a receipt therefor as follows:

WINNIPEG, Dec. 5th, 1903.

\$50.00.

Received from J. Gilmour the sum of fifty dollars, deposit on sale to her of the inner two miles of lot 15 in the Parish of Saint Vital, Manitoba, containing 106.63 acres more or less. Price, \$40.00 per acre. Terms, \$950.00 to be paid on acceptance of title, mortgage for about \$1,300.00 to be assumed, balance payable in 1, 2, 3, and 4 years in equal payments with 6 per cent. interest, privilege to pay off at any time, taxes to be adjusted to date.

E. C. EGAN, Agent  
 for C. Simon.

Egan then told defendant he had sold the lot, gave him the cheque and a copy of the receipt. The defendant said that there was not 106.63 acres in the lot, but only about 104, but wished to get the even \$4,270. The cheque and receipt remained in the defendant's possession for a couple of days when Egan reported that the plaintiff would not pay for more land than was in the lot, whereupon the defendant handed back the cheque and the copy of the receipt to Egan and refused to carry out the sale.

The plaintiff's action for specific performance was

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tried before Mr. Justice Perdue, who maintained the action, rendering his decision as follows:

"I find that Egan had authority from Simon to make the sale in the pleadings mentioned. If there were any variations in the terms, the defendant raised no question concerning them when they were communicated to him on Saturday evening. Simon simply wished to vary the price so as to get \$4,270 instead of the \$40 per acre, which he had asked when speaking to Egan on the 3rd, and giving the terms on which he would sell. I think Simon assented to what Egan had done but wished him to get Gilmour to vary the contract simply as to the price and pay the increased amount.

"I believe the testimony of Egan to be substantially correct. I attach no credibility to the defendant's testimony.

"I give judgment declaring that: (1). The agreement in the pleadings mentioned should be specifically performed and carried out; (2). That the plaintiff is entitled to have the agreement specifically performed, and do order and adjudge the same accordingly; (3). Abatement in price for deficiency in acreage; (4). Reference if desired by either party as to the title; (5). Liberty reserved to either party to apply to a judge as to any question that may arise in carrying out the relief given or in working out the provisions of the judgment; (6). On payment of purchase money, defendant to convey to plaintiff; (7). Defendant to pay plaintiff's costs.

The full court reversed this decision by the judgment now appealed from.

*Nesbitt K.C.* and *Coutlée K.C.* for the appellant.

*Aylesworth K.C.* and *Affleck* for the respondent.

SEDGEWICK J. and GIROUARD J. concurred in the judgment dismissing the appeal with costs.

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DAVIES J.—The question to be determined is whether, upon a reasonable construction of the plaintiff's evidence, the defendant gave Egan an exclusive right to enter into a binding contract with any purchaser for the sale of the defendant's real estate, or whether such right was a limited one, confined to procuring intending purchasers and submitting their names and offers for approval.

In deciding this question the whole of the plaintiff's evidence must be considered. In his main examination and cross-examination I understand Egan to relate the conversation between him and the defendant exactly as it took place and, as nearly as he could recollect, in the very language used. When afterwards recalled and re-cross-examined I understand his repetition of the conversation to be rather a statement of his own conclusions of the result of his conversation than an attempt to amplify or enlarge what he had already twice sworn to.

Reading his evidence as a whole, I am of the opinion that the authority given was a limited one and did not confer the power, without further consultation, of entering into a binding contract.

I am also of opinion that the additional term incorporated in the contract entered into by the agent giving the purchaser the privilege of paying off at any time that part of the purchase money to be secured by mortgage was unauthorized and could not be enforced in this action against the principal.

The appeal should be dismissed.

IDINGTON J.—I do not find in this case that clear, express and unequivocal authority given by the re-

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spondent to Egan, which would enable me to hold the appellant entitled to the specific performance claimed herein.

I think, therefore, the appeal must be dismissed with costs.

MACLENNAN J.—I concur in the judgment dismissing the appeal with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Tupper, Phippen, Tupper, Minty & McTavish.*

Solicitors for the respondent: *Bradshaw, Richards & Affleck.*

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