JOSHUA CALLOWAY (PLAINTIFF).....APPELLANT;

AND

STOBART SONS AND COMPANY (DEFENDANTS).....RESPONDENTS.

1904

*Nov. 3, 4.

*Dec. 1.

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

*Principal and agent—Broker—Sale of land—Commission for procuring purchaser—Company law—Commercial corporation—Contract—Powers of general manager.*

A land broker volunteered to make a sale of real estate owned by a trading corporation and obtained, from the general manager, a statement of the price, and other particulars with that object in view. He brought a person to the manager who was able and willing to purchase at the price mentioned and who, after some discussion, made a deposit on account of the price and proposed a slight variation as to the terms. They failed to close and the manager sold to another person on the following day. The broker claimed his commission as agent for the sale of the property having found a qualified purchaser at the price quoted.

*Held*, affirming the judgment appealed from (14 Man. Rep. 650) Taschereau C. J. and Girouard J. *dubitante*, that the broker could not recover a commission as he had failed to secure a purchaser on the terms specified. Under the circumstances, as the owner did not accept the purchaser produced and close the deal with him, there could be no inference of the request necessary in law as the basis of an obligation to pay the plaintiff a commission.

*Per* Taschereau C.J. and Girouard J. That the general manager of a commercial corporation could not make a binding agreement for the sale of its real estate without special authorization for that purpose.

APPEAL from the judgment of the Court of King's Bench for Manitoba, (1), affirming the trial court judgment by which the plaintiff's action was dismissed with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

(1) 14 Man. Rep. 650.

1904

CALLOWAY v. STOBART SONS AND CO.

The plaintiff is a real estate broker in Winnipeg, Manitoba, and the defendants are a commercial corporation carrying on the business of wholesale dry goods merchants there. The defendants had built a new warehouse for the purposes of their business and it became generally known that their old premises were to be sold as soon as the new building was ready for occupation. Several real estate brokers were looking out for purchasers and the plaintiff applied to the general manager for the defendants and obtained from him a memorandum of the price asked for the property, the terms for payment, and probable date when the old premises would be vacated by the owners. Up to this time the corporation had not given the manager special authorization to offer the property for sale. The plaintiff found a person willing to purchase at the price stated, $70,000, and with the necessary means to do so and brought him to the manager to settle about the purchase of the property. They met in the manager's office and had some conversation about the rentals and so forth, when the purchaser deposited $5,000 on account of the price, proposed some modification as to the date of delivery of the premises and they separated without closing the transaction. Shortly afterwards the defendants sold the property to another person for $71,000 and the deposit of $5,000 was returned. The plaintiff then brought an action against the corporation and the general manager to recover a broker's commission on the price of the sale. The action was tried before Killam C.J. without a jury, who found that the general manager gave the plaintiff particulars of the terms on which the property would be sold, knowing and expecting that the plaintiff asked for them with a view to finding a purchaser for a commission to be paid; that he assented that the plaintiff should try to do this; that he knew that the

plaintiff was so trying; that the plaintiff brought his purchaser and the manager together. He refused to find that the manager agreed to sell to this person on any terms, or that he settled with him on the terms proposed as those on which he or his company was willing to sell. The trial judge would not imply from the circumstances a request to the plaintiff to give his services for reward, or an agreement to pay him merely for finding and introducing a person who was ready and willing to purchase on the terms mentioned, or on those or other terms to be settled. The action was, accordingly, dismissed with costs. On an appeal by the plaintiff, the full court, Perdue J. dissenting, affirmed the decision of the trial judge by the judgment (1), from which the present appeal is asserted. Upon the appeal in the court below the plaintiff abandoned his claim against the general manager and, consequently he is not now made respondent.

*Ewart K.C.* and *Pitblado* for the appellant. Under the contract, as found by the trial judge, all that the plaintiff had to do in order to earn his commission was to find a purchaser able and willing to buy the property at the price quoted and he did so. The purchaser, thus found, proceeded so far as to make a verbal contract as to the special terms of payment and delivery of the premises. There was no revocation of the plaintiff's authority until after he had earned his commission. In fact, as there were several brokers employed, the completion of the work by the plaintiff was a revocation of the authority of all others. Addison on Contracts (10 ed.) 888.

The commission was earned; see Hart on Auctioneers (2 ed.) 321, 337, 371; *Simpson* v. *Lamb* (2); *Prickett* v. *Badger* (3); Bowstead (2 ed.) 189-190; *Roberts* v.

(1) 14 Man. Rep. 650.
(2) 17 C. B. 603.
(3) 1 C. B. N. S. 296.

1904

CALLOWAY v. STOBART SONS AND CO.

*Barnard* (1); *Green* v. *Lucas* (2); *Fisher* v. *Drewett* (3); *Wilkinson* v. *Alston* (4); 4 Am. & Eng. Encyl. pages 967, 975; *Bird* v. *Phillips* (5); *Kock* v. *Emmerling* (6); *Doty* v. *Miller* (7).

The premises were a part of the plant or machinery of the business. The manager had absolute power in regard to the affairs of the company and entire control of them. See sec. 64, "Manitoba Joint Stock Companies Act." His acts are binding on the company without the company's seal. The other directors were, in fact, consulted individually and gave their approval. The sale actually made was effected by the manager, without any resolution by the directors. The manager as agent of the company, had power by the by-laws, under the circumstances of the case, to enter into a contract for the sale of the land in question, without a formal resolution of the directors. However, the contract sued upon is not one for the sale of the property, but to find a purchaser for property belonging to the company, which it intended and desired to sell, and such a contract would come directly within the scope of the authority from the company to the manager giving him "the entire control and management of the affairs of the company," and would be binding on the company. *Howarth* v. *Singer Mfg. Co.* (8); *South of Ireland Colliery Co.* v. *Waddle* (9); *Wilson* v. *West Hartlepool Harbour Co.* (10); *Biggerstaff* v. *Rowatt's Wharf, Limited* (11).

*Howell K.C.* for the respondents. There was no promise by the respondents or by their manager to pay any commission and, as the proposed purchaser was

(1) 1 Cab. & Ell. 336.
(2) 33 L. T. 584.
(3) 39 L. T. 253.
(4) 48 L. J. Q. B. 733.
(5) 87 N. W. Rep. 414.
(6) 22 How. 69.
(7) 43 Barb. (N. Y.) 529.
(8) 8 Ont. App. R. 264.
(9) L. R. 3. C. P 463; L. R. 4 C. P. 617.
(10) 34 Beav. 187.
(11) [1896] 2 Chy. 93.

not accepted, none can be inferred. In any event, the company did not authorise a sale through the plaintiff's agency and the manager of the company, a trader in dry goods, could not presume to deal in such a manner with its real estate as part of the ordinary administration of its affairs. Masten's Company Law pp. 237-238; *Balfour* v. *Ernest* (1). A broker to be entitled to a commission must be actually employed by the principal as broker. Bowstead on Agency, 176-9; 4 Am. & Eng. Encly. 970, and note; *Cook* v. *Welch* (2); *Smith* v. *McGovern* (3). He must establish his employment either by previous authority or by acceptance of his acts. *Keys* v. *Johnson* (4).

The plaintiff did not find a purchaser ready and willing to buy on the terms stated by the manager. See *Grogan* v. *Smith* (5), per Esher L. J. at p. 133; and *Hamlin* v. *Schulte* (6). The plaintiff was a mere volunteer to whom the company had assumed no responsibility. They were not obliged to accept any purchaser he might introduce, although he might be willing to subscribe to all the terms. If they had accepted the purchaser, and thus taken advantage of plaintiff's labour, then and only then would they become liable to remunerate him.

We also refer to *Soper* v. *Littlejohn* (7); *In re Marseilles Extension Railway Co.* (8); *D'Arcy* v. *Tamar, Kit Hill and Callington Railway Co.* (9); *Re Haycraft Gold Reduction and Mining Co.* (10); *Moody* v. *The London, Brighton and South Coast Railway Co.* (11); per Cockburn C. J. at page 292; *Garland Mfg. Co.* v. *Northumberland Paper and Electric Co.* (12); *Curran* v. *The*

(1) 5 C. B. N. S. 601 at p. 624.
(2) 9 Allen, 350.
(3) 65 N. Y 574.
(4) 68 Pa. St. 42.
(5) 7 Times L. R. 132.
(6) 18 N. W. Rep. 415.
(7) 31 Can. S. C. R. 572.
(8) 7 Ch. App. 161.
(9) L. R. 2 Ex. 158.
(10) [1900] 2 Ch. 230.
(11) 1 B. & S. 290.
(12) 31 O. R. 40.

1904

CALLOWAY v. STOBART SONS AND CO.

The Chief Justice.

*Rural Municipality of North Norfolk* (1); *Keighley Maxstead & Co.* v. *Durant* (2); *Toulmin* v. *Millar* (3).

THE CHIEF JUSTICE.—I am not quite convinced that the view of the case taken by Mr. Justice Perdue in the court below on the evidence of the agreement between the parties and the legal results therefrom is not the correct one. However, in my view of the case, that is immaterial for the determination of the appeal. I am of opinion that it must be dismissed upon the ground that Stobart had no authority to bind the company by an agreement to pay Calloway a commission of over $1700 for introducing a purchaser whom the company might not accept and whose services might therefore be fruitless to them. Calloway knew very well that he was dealing with an officer of limited authority. And he must be assumed to have known that selling the company's real property is not within the usual powers of its president or manager.

I would dismiss the appeal with costs.

SEDGEWICK J.—I agree with my brother Nesbitt.

GIROUARD J.—I agree with the Chief Justice.

DAVIES J.—I take the same view of the facts proved by the evidence in this case as that taken by the trial judge, Chief Justice Killam. There was no actual contract of hiring but it is argued one must be implied. I cannot on the findings of the learned judge do so. The plaintiff was at the utmost a mere volunteer. He applied to defendant for the terms on which his property was for sale and defendant gave them to him. It is said defendant knew plaintiff obtained them with

(1) 8 Man. Rep. 256. (2) [1901] A. C. 240.
(3) 3 Times L. R. 836.

the object and hope that he would find a satisfactory purchaser. The facts are so found. But these facts did not of themselves constitute plaintiff the agent of the defendants to sell the property nor from them can there be implied a contract to pay him for his services as a land agent.

I agree that if the owners had, under the circumstances, accepted a purchaser produced to them by the plaintiff and thus profited by the plaintiff's volunteered services, the case would be different and the plaintiff might recover. But that is not the case here. The owners declined to enter into a contract with the purchaser introduced by the plaintiff. They did not therefore profit by any work or services performed by the plaintiff. Under the facts as found, I cannot infer a contract to pay the plaintiff a commission and concur in the dismissal of the appeal.

NESBITT J.—Had the finding of the trial judge relied upon by the appellant stood alone I should have differed from him as to the legal conclusion. The finding was as follows:

> Stobart gave the plaintiff particulars of the terms on which the property would be sold, knowing and expecting that the plaintiff asked these with a view to trying to find a purchaser for a commission to be paid. I infer that he assented that the plaintiff should try to do this. I find that he knew that the plaintiff was so trying.

I would infer from this an implied contract of agency entitling the plaintiff to be paid on production of a purchaser on the terms demanded by the defendant. See Bowstead on Agency, (2 ed.) pp. 15 and 177. I adopt the statement of law to be found in 4 Am. & Eng. Encyl. of Law, (2 ed) p. 967:

> Where several brokers are employed independently about the same transaction, the accomplishment of the object of the agency by one operates as a revocation of the authority of the others, and third persons subsequently dealing with them do so at the risk of such

1904

CALLOWAY v. STOBART SONS AND CO.

Nesbitt J.

revocation; and no action for damages will lie in such case against the principal unless the nature of his contract with the broker is such as to estop him from setting up the revocation.

This avoids the difficulties suggested by Dubuc C. J. in the court below.

In this case, however, the Chief Justice (Killam) further found

> the plaintiff brought Mr. Hespeler and Mr. Stobart together. I cannot find that Mr. Stobart agreed to sell to Mr. Hespeler on any terms or that he settled with Hespeler on the terms of the latter's letter as those on which he or his company was willing to sell.

And while Mr. Hespeler swore he was ready to purchase on the Stobart terms his letters introduced terms which no doubt he thought were a substantial offer to purchase in accordance with the memo. handed by Stobart to the plaintiff, but which could not be treated as an unqualified acceptance of them and, therefore, a purchaser was not found in the precise terms of the memo. relied upon as taken with the finding I have quoted as entitling the plaintiff to his commission. See *Fuller* v. *Eames* (1) where the cases referred to by Mr. Ewart are collected.

It is therefore unnecessary to discuss the other questions raised as to the authority of Stobart or how far the company could afterwards ratify.

I would dismiss the appeal with costs in all courts.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Campbell, Pitblado & Co.*

Solicitors for the respondents: *Howell, Mathers & Howell.*

---

(1) 8 Times L. R. 278.