WILLIAM L. MACKENZIE AND ARTHUR B. LEE (PLAINTIFFS)... APPELLANTS;

AND

HENRY F. CHAMPION, DAVID E. SPRAGUE, SAMUEL TROTT AND WILLIAM J. MITCHELL (DEFENDANTS)..... RESPONDENTS.

1884 *Dec. 2.

1885 *June 22.

ON APPEAL FROM THE COURT OF QUEENS BENCH FOR MANITOBA.

Agent—Sale by—Duty of, under instructions to sell lands—Vendor and purchaser—Contract not binding under Statute of Frauds—Commission—Mis-trial.

McK. *et al*, the appellants, real estate brokers at Winnipeg, received verbal instructions from the respondents to sell certain lands of theirs at a certain price and terms of payment. McK. *et al.* sold the land at the price named, receiving from the purchasers the sum of $5,000 as a deposit on account of the purchase money, and giving therefor a receipt. Prior to the expiration of the delay within which the balance of the purchase money was to be paid, the purchasers refused to complete their purchase for want of title in the respondents to a certain portion of the land, and contended that from the absence of writing signed by them they could not be compelled to do so. The appellants

*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and Taschereau JJ.

(1) 31 Ch. D. 120.

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then brought an action for commission upon the entire purchase money. The respondents set up the defence that the appellants promised to sell the said lands and to complete such sale by preparing the necessary agreement in writing to make a binding contract with the purchasers.

The case came on for trial before a jury who followed the charge of the Chief Justice, and found a verdict in favor of the appellants for the full amount of their claim, thereby giving them 2½ per cent. upon the entire purchase money of both parcels of land. The jury were not asked by the judge to pronounce upon the nature of the terms upon which appellants were employed, upon the question whether the sale went off through the neglect of the appellants to take a writing binding the purchasers, or whether it went off by reason of the vendors not being able to complete the title, or because they were unwilling to do so. In review before the full court a judgment was rendered directing that the verdict should be reduced to $125, being commission at the rate of 2½ per cent. on the $5,000 actually paid, or in the alternative, that there should be a new trial.

Held, affirming the judgment of the court below, Strong J. dissenting, that there been a mis-trial, and therefore the order for a new trial should be affirmed, appellants to have the alternative of reducing his verdict to the $125.

Per Henry J.—It was the duty of the appellants to take from the the purchasers a binding agreement under the statute, and having neglected to do so, they were not entitled to any compensation.

APPEAL from a judgment of the Court of Queen's Bench for Manitoba, making absolute a rule to reduce the verdict of $1,365 obtained by the appellants to the sum of $125, or, in the alternative, that there should be a new trial without costs.

The material facts of the case are as follows:

1. About the first day of January, 1882, the appellants, who were real estate agents or brokers in the city of Winnipeg, received verbal instructions from the respondents to sell part of the south half of lot 12, in the parish of Kildonan, containing 145 acres, at $275 an acre, the whole price amounting to $39,875: on the terms of $5,000 cash, $12,000 on a mortgage then exist-

ing on the property, and the balance cash in twenty days from date of sale.

On the 13th day of said month of January, the appellants sold the land at the said price, receiving from the purchasers the sum of $5 000 as a deposit on account of the purchase money, and giving therefor a receipt.

On the day the appellants sold the said land and received the said $5,000 from the purchasers, Henry F. Champion, one of the respondents, called at the office of the appellants, who informed him of the sale, and the said Champion then demanded and received from the appellants the $5,000, and then gave to the appellants a receipt therefor.

On the 14th day of said month of January, the appellants received instructions from the respondents to sell 10 acres, being another part of said south half of lot 12, parish of Kildonan, east of Main street, in the city of Winnipeg, at the price of $1,500 per acre.

On the 15th day of January, the appellants as such agents of the respondents, sold the said 10 acres to one F. W. Barrett (acting for the syndicate who had purchased the 145 acres), who agreed to purchase at the price at which the appellants had been authorized to sell, but the formal agreement was closed by said Barrett with Henry F. Champion, one of the respondents, to whom Barrett paid $1,500 on account of the purchase money of $15,000, and Champion gave to said Barrett a receipt for the amount so paid.

Prior to the expiration of the twenty days, within which the balance of the purchase money on the 145 acre parcel was to be paid, the purchasers discovered that the patent for 75 or 80 acres thereof (being what is known as the outer two miles thereof) had not been issued, and the respondents were without title to such portion; and on account of this want of title in the respondents the purchasers refused to complete their

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purchase.

The appellants having brought their action for commission upon the entire purchase, the respondents pleaded *inter alia* as follows:

3rd. And the defendants, by way of set-off and counter-claim to the plaintiff's declaration, say:—That (in consideration that the defendants would employ the plaintiffs as their agents, to sell certain lands and premises, being all and singular the lands and premises in respect of which the plaintiffs' claim for commission and services is made, and to properly complete such sale as they might make, by preparing and having executed a sufficient agreement or memorandum to satisfy the statutes in that behalf, for reward to the plaintiffs), the plaintiffs promised the defendants to sell the said lands, and to complete such sale by preparing the necessary agreement in writing to make a binding contract with such person or persons as should become purchasers of said lands, and the defendants employed the plaintiffs, and the plaintiffs accepted the said employment and on the terms aforesaid; that the plaintiffs pretended to sell the said lands, but so negligently and carelessly and unskilfully conducted the transaction necessary to effect the same that no binding or proper agreement was drawn up or prepared in form sufficient to bind the proposing purchasers, as it was the duty of the plaintiffs to have done, and the said proposing purchasers afterwards repudiated the said purchase, and refused to carry out the same and to pay the purchase money for the said lands, whereby the defendants have suffered great loss and damage, owing to said sale having fallen through, and owing to their being unable to effect a sale of the said lands, owing to the existence of the said abortive sale, and owing to their having incurred great expense in defending suits at law in respect of said sale, by reason of the plaintiffs' negligent,

careless and unskilful conduct in their employment as defendants' agent. And the defendants claim ten thousand dollars.

The appellants having joined issue upon the 1st and 2nd pleas by their replication to defendant's third plea, said they did not promise to complete such sale by preparing the necessary agreement in writing as alleged, and that they did not accept said employment on the terms alleged.

After issue joined upon the appellants replications to the defendant's third plea, the issues were tried by a jury. The questions submitted to the jury by the learned Chief Justice, who tried the case, and answers thereto are as follows:—

1st. Did the plaintiffs make a sale for the two parcels of land, viz., the 145 acre parcel or the 10, both or either of them? A. Yes, both.

2nd. Did the plaintiffs undertake the sale of the property under any special agreement? A. Generally

3rd Did Montgomery, Davis, Horseman and Thompson actually agree to buy, and pay their $5,000 on account? A. Yes.

4th. Did Champion receive this money from Mackenzie & Lee, and did he so receive it as the money paid by Montgomery and others to Mackenzie & Lee? A. Yes.

5th. Is the price—2½ per cent.—the ordinary price charged by real estate agents? A. Yes.

6th. Have the defendants yet in their possession the $3,500 or the $5,000 of the very money raised by the plaintiff's efforts? A. $5,000.

His Lordship—Now, if any of you wish me to put any other questions to them, I will try to do it.

Mr. Howell—I will ask you to put this question: "Under all the circumstances was it the duty of Mackenzie to bind the defendants as well as the purchaser?"

His Lordship—I answer that is a matter of law, and for me to decide, and I have decided it.

Mr. Howell objects to his Lordship's charge where it was stated that the vendor can make time the essence

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of the contract by letter or notice.

Mr. *MacMahon* Q.C. for appellants relied on the following authorities as to appellants' right to recover their commission under the circumstances, viz :—*Prickett* v. *Badger* (1); *Mansell* v. *Clements* (2); *Rimmer* v. *Knowles* (3); *Green* v. *Lucas* (4); *Fisher* v. *Drewett* (5); *Bailey* v. *Chadwick* (6); *Wilkinson* v. *Alston* (7); *Harris* v. *Pethick* (8); *Doty* v. *Millar* (9); Wharton's Agency (10).

Mr. *D. McCarthy* Q.C. for respondents cited Story on Agency (11); *Bain* v. *Fothergill* (12); and contended that the question submitted to the jury and answers thereto, do not justify a verdict for the appellants, and that the learned Chief Justice should have complied with the request of defendants' (respondents') counsel to leave the question to the jury "under all the circumstances was it the duty of Mackenzie to bind the purchasers as well as the defendants?" This was a question of fact to be determined from all the evidence given as to what were plaintiffs' instructions and what they undertook to do in the transactions between defendants in this suit and the purchasers.

Sir W. J. RITCHIE C.J.—This is an appeal from the Court of Queen's Bench of Manitoba. The action was brought for commission on a sale of lands, or rather an attempted sale, which went off. A deposit of five thousand dollars had been made, and the plaintiff brought his action to recover the whole commission, as if the sale had been completed. I have gone over the evidence carefully and I think certain questions of fact raised by the

(1) 1 C. B. N. S. 296.
(2) L. R. 9 C. P. 139.
(3) 30 L. T. N. S. 496.
(4) 33 L. T. N. S. 584 affirming S. C., 31 L. T. N. S. 731.
(5) 48 L. J. N. S. Ex. 32.
(6) 39 L. T. N. S. 429.
(7) 48 L. J. N. S. Q. B. 733.
(8) 39 L. T. N. S. 543.
(9) 43 Barb. (N. Y.) 529.
(10) Sec. 323.
(11) 9 Ed. Secs. 183, 331, 332.
(12) L. R. 7 H. L. 158.

pleadings, which ought to have been submitted to the jury, were not so submitted by the judge.

I think the jury should have been asked to find what the contract was between the plaintiff and the defendant; that is, what defendants were employed to do, and then what they did do; whether plaintiff was to make a valid and binding sale of the property? If so, did plaintiff fulfil the contract and make such a sale; if he did he would be entitled to his commission, otherwise not.

If a sale was made, was the same not completed by reason of want of title in or default of defendants? If such was the case, the plaintiff would be entitled to his commission. Or, in other words, was plaintiff merely to find a purchaser willing to purchase; if so, did he fulfil his contract, and was the purchaser ready and willing to complete his purchase, and did the sale fall through because defendant could not or would not complete the sale by reason of want of title or otherwise, and so the non-completion of the sale was the fault of the principal, and not that of the agent? If so, plaintiff would be entitled to his commission, because he substantially performed what he undertook to do. And whether the plaintiff should have bound the purchaser by a writing or not, did the sale go off by reason of the purchaser not being so bound or by reason of the defendant's refusal or inability to complete it?

All these matters should have been submitted to the jury with proper directions. The question, therefore, in this case turned rather on questions of fact than of law, and I am of opinion that the court below in granting a new trial did right, and that the judgment should be affirmed.

I observe that a condition was annexed to the judgment that a new trial was granted unless the plaintiff was willing to reduce the verdict, which was for the

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full commission on the whole amount of the purchase money, to the amount of the commission on the deposit of five thousand dollars. This is not objected to by the defendant, who seems to be willing that the matter should stand in that way If the plaintiff is willing to reduce this verdict in that way it can stand; otherwise I think a new trial should be ordered. The appeal dismissed with costs.

STRONG J.—I have no doubt whatever as to the disposition of this appeal, except such as arises from finding myself differing, not only from the court below, but from the majority of this court. I think the appeal should be allowed.

The plaintiffs were real estate brokers at Winnipeg, not lawyers or professional conveyancers, but persons whose business it was to find purchasers for owners of land desiring to sell during a season of great speculation in such property. They were instructed generally, as the jury found, by the defendants to sell certain lands of theirs at a certain price and upon certain terms of payment. No special agreement was come to, either as to their own remuneration, or as to the special terms of the bargain or agreement they were to make with a purchaser. This fact the jury also found. Further, no instructions were given to the plaintiffs as to the nature of the defendant's title. Upon this state of facts I am of opinion that the proper inference, whether as matter of fact or matter of law was that the only duty undertaken by the plaintiffs, was to find a purchaser for the price and on the terms to which they were limited by their instructions, and that it was not incumbent on them to do more than to bring the parties together, which they did and thereby earned their commission and are entitled to receive the amount which the jury found, namely, two and a half

per cent. on the price—amounting to $1,365, the sum for which the verdict was entered. Strictly speaking the nature and scope of the plaintiffs' authority was as a conclusion of fact a proper matter for the consideration of the jury; but the rule being that a new trial will not be granted in order merely to leave to the jury a question which, upon the evidence, they can only answer in one way, the omission of the learned Chief Justice to leave this question precisely to the jury is not a ground for a new trial. In saying that the question could only be answered by the jury in favor of the plaintiffs, by finding that the authority of the plaintiffs was merely to act as brokers to find purchasers and bring them and the vendors together, and that it was no part of their undertaking or duty to prepare a contract and procure it to be signed, and that any conclusion to the contrary would be so manifestly contrary to evidence that the court would have granted a new trial on that ground alone, I rest upon what appears to me, the irresistible conclusion, that it could not have been the duty of these unprofessional agents to prepare a document which required professional skill and for the preparation of which they had never received the proper and indispensable instructions as to the state of the title. In other words, I proceed upon the same reasoning, not as leading to a conclusion of law, but to an inference of fact, which led Vice Chancellor Hall, who was also dealing with the question as one of fact, to the same conclusion in the case of *Hamers* v. *Sharp* (1).

Then as regards the receipt of the deposit or part payment by the plaintiffs which was handed over by them to one of the defendants—that I consider makes no difference, if the foregoing conclusion is the proper one. The plaintiffs had not authority, in my opinion,

(1) L. R. 19 Eq. 108.

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to accept this money, but having received it, and given an acknowledgment or voucher for it, their act in so doing, although not originally authorized, was ratified by the defendant Champion's adoption of it by receiving and appropriating the money. As regards the receipt, to which considerable importance has been attached as indicating that the plaintiffs recognized it to be their duty to procure a signed agreement, I am of opinion that it was entirely immaterial. It was manifest upon the evidence that the plaintiffs had no authority to enter into an agreement, and if, having no authority, they had innocently and without fraud even assumed to sign a contract, that could not have prejudiced the defendants, and being a mere nullity as regards them, could not have disentitled the plaintiffs to receive their commission. But I maintain that the receipt, the signing of which is relied on as such strong evidence against the plaintiffs, is entirely ineffectual as a contract for another reason than that of want of authority. It does not constitute a binding contract either at law or at equity in consequence of the uncertainty of its terms. This is perceptible at a glance. No Court of Equity could decree specific performance on the basis of any contract contained in this receipt. According to this document the price was to be $39,875, of which $12,000 was to be secured by mortgage and the balance paid in cash in 20 days from the date of the receipt. As to the terms of the mortgage with respect to the length of time for which the deferred payment of $12,000 was to be continued on the security of the property, whether for six months or 20 years, or for a reasonable time the receipt is silent. No court could of course supply such terms without making a contract for the parties. The conclusion, therefore, is that the receipt was only intended to operate according to its form and tenor as a voucher for the money paid and

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not as a contract or agreement binding on the plaintiffs' principals. Then the receipt of the money, though originally unauthorized, was an act adopted and ratified, and this adoption and ratification included the incidental act of giving the voucher for it.

I conclude therefore that the plaintiffs did all they were bound to do and earned their commission by finding the purchasers and that they did nothing and omitted nothing which amounted to misfeasance or non-feasance disentitling them to the commission which they thus earned.

The judgment on the motion for a new trial should therefore in my opinion be reversed and the rule *nisi* discharged.

FOURNIER J. concurred with Sir W. J Ritchie C.J.

HENRY J.—I am of opinion that the plaintiffs are not entitled to recover at all. They commence their action under the common counts, for money payable by the defendants to the plaintiffs for the work, journeys and attendances of the plaintiff, by him done, performed and bestowed, as agent for the sale of lands of and for the defendants, and otherwise for the defendants at their request, and for commissions due from the defendants to the plaintiffs in respect thereof. The other common counts follow, but there is no evidence given except under this portion of the plaintiffs' demand. It is in evidence that Mackenzie did not make a sale, that is, he did not make a legal sale. He made an arrangement to sell for a certain amount, but took no accountable document to complete the sale. I take it that in law he was bound to make a sale, and that he was entitled to charge only for a complete sale. I think, therefore, that he has failed in making out a case.

Then there is a counter claim set up by the defendants for damages occasioned by the failure of the sale, owing

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to the plaintiffs not taking a written agreement. If we desired to enter into that we should, I think, require to send back the case to a jury in order to ascertain what the defendants are entitled to under the counter claim, and (if the plaintiffs were entitled to recover anything on their claim for commission) to see on which side the balance would lie. That, however, does not come before us, in consequence of the court below not having considered the question. They seem to have considered only the plaintiffs' claim, and they have allowed them the commission on the sum which they received in part payment of the consideration money on the sale of this land. At the trial the jury, under the direct n of the Chief Justice, gave a verdict for the amount of the commission on the whole amount. The court said to the plaintiffs, "No, you are not entitled to that; but if you consent to reduce it to a commission of $2\frac{1}{2}$ per cent. on the amount received, we will allow the verdict to stand to that extent." The plaintiffs refused, and appealed to this court.

The plaintiff Mackenzie, it is to be observed, does not state that he was employed to enter into negotiations for a sale; but he charges that he was entitled to get remuneration for a sale. If he did not complete that sale, he is not entitled to get remuneration for anything. In his evidence we find the following;—

Q. Did they give you any instructions about the sale? A. Yes, they told me to sell it for $200 an acre, with outer two miles west of Main street, and four miles back.

Q. What were you authorized to sell at? A. At first I was authorized to sell at $200 an acre.

Q. Do you remember when it was given to you for sale in the first place? A. About the beginning of January.

Q. Was there any change made in your instructions? A. Not until after I had got a purchaser for it for $200, by a man named Fanning; I went over to them and told them the man was there waiting to take the property, but I did not close with him until it was verified. It was not concluded; they would not take the $200.

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Now to complete that sale, it was his duty to take a binding contract from the party to whom he sold; otherwise he does not perform his agreement.

The Statute of Frauds requires that the sale shall be in writing to bind the parties; but it is not necessary that the instructions of an agent should be in writing, therefore the plaintiff had verbal authority to bind his principal, and if he had taken a written agreement from the purchaser the sale would be completed. In default of this, I do not think he is entitled under his contract to recover any compensation whatever. I think the question is one of law and not of fact, and therefore I think the verdict should be set aside, and judgment given for the defendants.

TASCHEREAU J.—I am of opinion that there should be a new trial for the reasons given by the Chief Justice.

Appeal dismissed with costs.

Solicitors for Appellants: *MacMahon and Dunbar.*

Solicitors for Respondents: *Archibald, Howell and Vivian.*