ELIZABETH MURRAY (DEFENDANT) ..... APPELLANT;

AND

THOMAS K. JENKINS (PLAINTIFF)...RESPONDENT.

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*May 3, 4.

*June 14.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Vendor and purchaser—Principal and agent—Mistake—Contract—Agreement for sale of land—Agent exceeding authority—Specific performance —Findings of fact.

Where the owner of lands was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her and under the mistaken impression that the offer was for the purchase of certain swamp lots only whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her and was set aside by the court on the ground of error, as the parties were not *ad idem* as to the subject matter of the contract and there was no actual consent by the owner to the agreement so made for the sale of her lands.

APPEAL from the judgment of the Supreme Court of Nova Scotia reversing the judgment of Henry J. in the trial court by which the plaintiff's action had been dismissed with costs.

The action was brought to recover damages for breach of a contract for the sale of twenty-six lots of land in the city of Halifax, N.S. The special circumstances under which the controversy arose are as follows:—

The defendant, an old lady, who resided with her son-in-law, J. F. Forgan, in Chicago, Ill., was owner of twenty-six lots of land in Halifax, N.S., of which ten

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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were known as the "swamp lots," the adjoining sixteen lots being high and dry. She placed the property in the hands of a real estate agent in Halifax to be sold and after some correspondence on the subject between the agent and Forgan, who usually attended to the defendant's business affairs for her, the agent telegraphed Forgan that he had been offered $1,000 for the lots mentioned in a letter referred to. Forgan understood that the lots referred to were the swamp lots only and upon informing the defendant that the offer was for these lots he obtained her consent to send a telegraph to the agent at Halifax directing him to accept the offer. The offer actually applied to the whole of the lots and on receipt of this telegram the agent made a contract with the proposed purchaser for the sale of the twenty-six lots at the price offered by accepting a deposit on account of the price and granting a receipt in writing therefor. This is the contract upon which the action was based.

The case was tried before Mr. Justice Henry without a jury and His Lordship found that the defendant's agent, Forgan, had no authority to bind her in respect of sixteen of the lots which are the subject matter in dispute; that there was not sufficient evidence that she held him out as her agent to bind her in respect to these lots; that the plaintiff had not shown that she delegated Forgan to send the telegram in answer to plaintiff's offer to purchase certain lots in Halifax, relied upon by him, so as to bind her in respect to the lots in question; that in communicating this offer to defendant, Forgan told her that the offer was for ten swamp lots only, and that he was authorized by her to sell these ten lots only, and therefore judgment was ordered to be entered for the defendant with costs. On appeal to the full court this judgment was reversed and it was ordered that judgment should be entered

fer the plaintiff against the defendant for damages to be assessed before the trial judge. The defendant now appeals against this decision of the full court.

Newcombe Q C. for the appellant. Whether or not Forgan had the requisite authority to bind defendant is a matter of fact upon which the finding of the trial judge should be upheld. Defendant never authorized Forgan to sell anything but the ten swamp lots and Forgan also understood that that was what he was selling; he erroneously supposed at the time that the sixteen lots on Acadia and Brussels Streets were the swamp lots which were to be sold. Plaintiff intended to buy twenty-six lots, worth not less than $3,000; he was on the spot and familiar with the ground; he saw all the correspondence and must have known from Forgan's letter referring to the offer of "one thousand dollars for the swamp lots," and his subsequent enumeration of the lots as only eighteen in all, that Forgan was under a complete misapprehension as to what he was selling. The absurd inadequacy of the price to the value must have told him the same thing. The particularity with which plaintiff wrote twenty-six lots into the receipt which he took shews that he knew there had been a mistake, and that he snapped at it,—an exactly similar case to *Webster* v. *Cecil* (1), to which James L.J. refers in *Tamplin* v. *James* (2) at page 221. We also rely upon *Garrard* v. *Frankel* (3). A contract entered into by mistake by one party cannot be enforced against him by the other if the latter is aware of the mistake and seeks to take advantage of it; *Hamer* v. *Sharp* (4); *Wilde* v. *Watson* (5); *Prior* v. *Moore* (6). See also Leake on Contracts, pp 511,

(1) 30 Beav. 62.
(2) 15 Ch. D. 215.
(3) 30 Beav. 445.
(4) L. R. 19 Eq. 108.
(5) L. R. Ir. 1 Eq. 402.
(6) 3 Times L. R. 624.

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512, and cases there cited, particularly *Collen* v. *Wright* (1); *Richardson* v. *Williamson* (2); *Cherry and McDougall* v. *Colonial Bank of Aastralasia* (3). We contend that the memorandum in writing is insufficient under the statute of frauds; *Williams* v. *Jordan* (4); Agnew, Statute of Frauds, p. 258.

Borden Q.C. for the respondent. The statute of frauds cannot be relied upon by the appellant, as it has not been pleaded; *Filby* v. *Hounsell* (5), and cases there cited; *Commins* v. *Scott* (6), at page 16. The memorandum is sufficient. The land, the parties and the price are all distinctly expressed, and an agent for signing a memorandum of sale of lands may be appointed without writing; Agnew, Statute of Frauds, 287; Story, Agency, secs. 73, 126, 127, and note to Brown, Statute of Frauds (5th ed.), sec. 370; *Beaufort* v. *Neeld* (7) at pages 273-274 and 290; *Commercial Bank of Canada* v. *Merritt* (8), at pages 358, 363, 364.

The defendant authorized the telegrams which directed the acceptance of the offer of one thousand dollars for the twenty-six lots and all the business of the defendant with reference to these lots had been transacted by her for some seven years through Forgan, who was her son-in-law. All the correspondence was carried on by Forgan. In May, 1894, he gave directions as to the sale of two of these lots and the agreement was carried out by the defendant. When inquiries were made of Forgan as to the price which the defendant would accept for the remaining twenty-six lots he submitted the letter to her, read it to her, and obtained her authority to fix a price, and did fix a price

(1) 7 E. & B. 301.
(2) L. R. 6 Q. B. 276.
(3) L. R. 3 P. C. 24.
(4) 6 Ch. D. 517.
(5) [1896] 2 Ch. 737.
(6) L. R. 20 Eq. 11.
(7) 12 C. & F. 248.
(8) 21 U. C. Q. B. 358.

for these lots. There could be no misapprehension in the mind of any reasonable person. Then on receipt of the telegrams offering $1,000 for the twenty-six lots mentioned in the letter of inquiry, the telegrams were communicated to the defendant and both replies by telegraph were sent after communication with her and by her authority. The law judges of an agreement exclusively from the mutual communications which have taken place and the defendant is bound, in the absence of fraud or warranty, by his acceptance of the proposal however clearly she may afterwards make it appear that she was laboring under a mistake. She cannot escape by merely showing that she understood the terms in a different sense from that which they bear in their grammatical construction and legal effect. If she did not take reasonable care to ascertain what she was doing she must bear the consequences. Kerr, Fraud and Mistake (2 ed.) 479; Leake on contracts (3 ed.) 265, 277; *Scrivener et al.* v. *Pask* (1); *Smith* v. *Hughes* (2); *Tamplin* v. *James* (3) at p. 217; *Alvanley* v. *Kinnaird* (4) at page 7, per Cottingham L.J.; *Griffiths* v. *Jones* (5) per James L.J. at page 281; *McKenzie* v. *Hesketh* (6); *Ireland* v. *Livingston* (7); Evans' Principal and Agent (2 ed.) 583.

TASCHEREAU J.—For the reasons given by Mr. Justice Gwynne I would allow this appeal and restore the judgment of Mr. Justice Henry rendered at the trial.

GWYNNE J.—This appeal should, in my opinion, be allowed, and the judgment of the learned trial judge restored with costs.

(1) L. R. 1 C. P. 715.
(2) L. R. 6 Q. B. 597.
(3) 15 Ch. D. 215.
(4) 2 M. & G. 1.
(5) L. R. 15 Eq. 279.
(6) 7 Ch. D. 675.
(7) L. R. 5 H. L. 395.

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Gwynne J.

The defendant, an old lady, who formerly lived at Halifax, Nova Scotia, has since 1887 been living at Chicago with her son-in-law, a Mr. Forgan, a cashier of a bank there. She was the owner of several small town lots within the limits of the city of Halifax or in the immediate vicinity. In some she was interested merely as executrix of her deceased husband's estate, and of others she was seized in her own right as her own property. In the month of May, 1894, her son-in-law communicated to her that a Mr. Naylor, a land agent in Halifax, had made to him an offer of two hundred and fifty dollars cash for two of those lots which had belonged to her husband and formed part of his estate in her hands as executrix. She authorized her son-in-law to accept this offer which he did by telegram to Mr. Naylor, and at the same time directed him to prepare a deed and to send it to Chicago for signature. Besides these two lots she had ten other similar lots which were situate on low swampy ground, and which were called and known as swamp lots. These lots also constituted part of her husband's estate, and she also herself owned sixteen other small lots situate near the swamp lots, but upon higher ground and of varying values. Upon the 7th June, 1894, Mr. Naylor enclosed to Mr. Forgan a deed for execution by the defendant of the *two* lots above mentioned to a Mr. Miller, which the defendant executed, and when executed was forwarded by Mr. Forgan to a bank at Halifax, as an escrow until the two hundred and fifty dollars should be paid therefor. In a letter accompanying the deed so sent by Mr. Naylor, to Chicago for execution, he inquired of Mr. Forgan what he would take for the ten swamp lots, and the other sixteen. While depreciating the lots, he mentioned a sum which he said that he thought he could sell them for. While it is strange that Mr.

Forgan should have misconceived the contents of this letter it cannot be doubted for a moment, I think, upon the evidence that he construed the letter and carried it in his mind as relating to the swamp lots only, and that he communicated it to the defendant as relating to these swamp lots only, which formed part of her husband's estate. Some correspondence then passed between Mr. Forgan and Mr. Naylor in relation to the lots of the nature of which the defendant knew nothing.

Upon the 19th or 20th of June Mr. Forgan received a telegram from Mr. Naylor as follows:

> Offered thousand dollars lots mentioned in my letter of the 7th instant—wire.

Mr. Forgan labouring under the impression and belief, which although *bonâ fide* entertained by him was nevertheless erroneous, that the letter of the 7th of June related to the swamp lots only, informed the defendant of this offer as being an offer of $1,000 for the swamp lots and advised her to accept it and, both of them so understanding the offer, he replied to Mr. Naylor by telegram

> accept offer if better cannot be done

to which Naylor replied that he did not care to take the responsibility of deciding, and Mr. Forgan having communicated this reply to the defendant she, who had never heard of any other offer than that as communicated to her by her son-in-law, namely $1,000 for the swamp lots, authorised him to accept that offer which he did thus by telegram to Mr. Naylor on the 21st June:

> Accept offer. We sail by Parisian from Montreal Saturday morning, in Quebec over Saturday night.

Mr. Naylor having received this telegram entered into the contract which is the subject of the present action in the words following:

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HALIFAX, 23rd June, 1894.

Received one hundred dollars being deposit on purchase of 26 lots of the Murray lands, in Trider's field, for the sum of one thousand dollars, title guaranteed.

JOHN NAYLOR,
Agent.

MR. THOS. K. JENKINS.

The defendant and her son-in-law went to England in June, 1894, shortly after Mr. Forgan's telegram to Naylor of the 21st of that month, and they did not return until October when the defendant having been called upon to execute a deed in fulfilment of Naylor's contract, Mr. Forgan discovered the mistake he had made and immediately entered into a correspondence with the plaintiff and Naylor acknowledging the mistake to be, as it in point of fact was, wholly his own and offering the plaintiff to make to him any reasonable compensation for the loss occasioned to him by his, Forgan's, mistake. The plaintiff, however, having declined to come to any arrangement which Mr. Forgan considered reasonable, and the defendant having wholly repudiated the contract as one which she had never authorised or contemplated authorising or had in fact ever heard of, the plaintiff has brought the present action in which he claims $1,500 as damages by him sustained by reason of his loss of the benefit which he expected to realize from his purchase of the lots for which he had offered $1,000, but which by his own evidence were well worth $2,700, and the sole question is—whether or not the defendant is bound by the contract, the terms of which she had never heard of and which she never in point of fact authorized. The learned trial judge has found, as matter of fact, 1st: That the only offer communicated to the defendant was one of $1,000 for the swamp lots only, and that the only authority she ever gave to her son-in-law was to sell those swamp lots only, ten in number for $1,000; 2ndly:

That in point of fact Mr. Forgan had no authority whatever from the defendant to bind her in respect of the sixteen lots which were the subject matter in difference; and 3rdly: That there is not sufficient ground for holding that she held him out as her agent to bind her in respect of the lots in question. That these findings of the learned trial judge are in precise accord with the evidence cannot, I think, admit of any doubt.

As to the third of the above findings there was no evidence whatever offered unless it was the evidence that the sale to Miller had been made through the plaintiff as Miller's agent, and that the defendant had accepted the offer in that case through her son-in-law by telegram from him to Naylor. Well, as a matter of fact, the defendant authorized her son-in-law to accept it in the precise terms in which it was communicated to her. Then certain passages of the defendant's evidence are relied upon as supporting a contention that the defendant's son-in-law had general authority from her as her agent sufficient to bind her by the contract entered into by Naylor through her son-in-law contrary to the express finding of the learned trial judge upon that point. The evidence so relied upon is to this effect—the defendant said that her son-in-law was a very capable man, as cashier of a bank in Chicago he no doubt was; that she trusted in him in relation to her business; she was willing he should make any bargains he thought advisable but never gave him any authority to close a bargain without her sanction. There can be no doubt, I think, that all she meant to convey by this, and that she was so understood by the learned trial judge was—that as her son-in-law she had the utmost trust and confidence in him that he would advise her judiciously, and that he took such an interest in her affairs that she would willingly let him if he was so pleased initiate bargains for

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her, well knowing that he could not, and from her confidence in him, that he never would attempt to, close any bargain so initiated without communicating its terms to her, and advising with her as to it, and obtaining her authority to close it. These private and confidential trusts and good understandings existing between such near relations are natural and highly commendable and to be encouraged and held sacred, and it would shake all such trusts and confidences to their foundation and instead of confidences breed dissensions in families if out of such trusts and confidences could be inferred authority conferred by the parent upon the son to bind the parent to the contract of which he or she had never approved nor had ever heard. Then again it was argued that as the defendant had not called upon her son-in-law to shew her the letters and telegrams which he received from Naylor, it should be assumed, notwithstanding the fact to the contrary proved and found by the learned trial judge, that the offer she authorised him to accept was the one *in fact* contained in the telegrams and letters and not the one which he had in point of fact communicated to her as being the offer. I fail to see any principle upon which such assumption could be made contrary to the actual fact as conclusively proved in evidence. The not asking to see those letters and telegrams is in perfect consistence with that trust and confidence which the defendant had in her son-in-law. In fine the judgment of the learned trial judge cannot, in my opinion, be reversed without subjecting the defendant, contrary to every principle of law, to a contract which in point of fact she had never contemplated, and the terms of which had never been communicated to her, and to make which she had never given to any person any authority whatever.

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SEDGEWICK J.—The appellant, an old lady residing with her son-in-law, James B. Forgan, in Chicago, was the owner of twenty-six lots in the city of Halifax, sixteen in her own right and ten as executrix of her husband. The former were situated on Acadia and Brussels streets, and were upon good dry ground, while the other ten were to a greater or less extent situated in a swamp and were always known as the swamp lots. The land of which the lots are composed is an open field, and there are no streets laid out upon the ground. On the 7th of June, 1894, one John Naylor, a real estate agent in Halifax, wrote a letter to Mr. Forgan asking him what he would take for the whole twenty-six lots stating he thought he could sell the lots mentioned for about $1,300. On the 12th June, Forgan in reply stated that Mrs. Murray was very desirous of disposing of those lots, and proceeded as follows:

> If you can sell them between now and September 1st for $1,300 or more, she will give you a commission of $100, and ten per cent on whatever you may get in excess of $1,300.

In writing this letter Forgan made a mistake, a most grievous mistake, as he himself says, in regard to the extent of the land referred to. He was under the impression that the letter of the 7th June, referred not to the whole of the twenty-six lots but only to what was known as the swamp lots. His evidence is conclusive upon that point. The trial judge so found, and it was stated at the argument that he was labouring under the misapprehension when he wrote the letter of the twelfth. There is no question that all the lots were worth much more than $1,300. Jenkins himself states that he expected within three months from the purchase to make a profit out of the transaction of $2,000 to $2,500, thereby admitting the land to be worth over $3,000, although in his sworn evidence he values it at $2,700, and Mrs. Murray valued it at

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the same figure. After the receipt of Forgan's letter, Naylor began negotiating for the plaintiff for the price of the twenty-six lots, and on the 19th of June telegraphed to Forgan as follows;

Offered thousand dollars lots mentioned my letter 7th inst. Wire.

On the following day, 20th of June, he answered:

Accept offer if better cannot be done.

On the same day Naylor replied:

Do not care take responsibility, decide.

And he replied:

Accept offer.

On the 23rd of June Naylor made a contract for the sale of the lots with Jenkins, the contract being in these terms:

HALIFAX, 23rd June, 1894.

Received $100 being deposit on purchase of twenty-six lots of the Murray lands in Trider's field, for the sum of $1,000, title guaranteed.

JOHN NAYLOR,

Mr. THOMAS JENKINS. *Agent.*

and received from him the $100 therein mentioned. The deed having been sent to Mr. Forgan for execution by the defendant he for the first time became aware of the misapprehension as to the quantity of land sold, and the deed so tendered was consequently not executed. This action was thereupon brought to recover damages for the breach of the alleged contract. At the trial, the trial judge, Mr. Justice Henry, made the following findings:

That James B. Forgan had no authority from defendant to bind her in respect of the sixteen lots which are the subject matter of dispute in this action:

That there is not sufficient ground for holding that she held him out as her agent to bind her in respect to these lots:

That it has not been shown that she delegated him to send the answer to plaintiff's offer relied upon by plaintiff so as to bind her in respect to the lots in question:

As to this I find that in communicating plaintiff's offer to defendant, Forgan told her that the offer was for the ten lots spoken of as

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the swamp lots, and that he was authorized by her to sell these ten lots only:

and judgment was entered for the defendants in pursuance of such findings. Upon appeal to the Supreme Court of Nova Scotia this judgment was reversed and it was referred back to the trial judge in order that the plaintiff's damages might be assessed. I am of opinion that the judgment of the trial judge should be restored, his finding being, to my mind, in perfect accord with the evidence. It is, as already stated, manifest that Forgan, in conducting the correspondence which he did, was labouring under a fundamental mistake in regard to the subject matter of the proposed contract. He never intended to offer for sale any more than the swamp lots, nor had he any authority from Mrs. Murray saving in respect to the swamp lots, and if he exceeded his authority through ignorance or negligence clearly the defendant is not to be allowed to suffer.

The judgment appealed from apparently proceeds upon the hypothesis that the present case is the same as if Forgan had owned the land and on his behalf had authorised Naylor to make a contract with the plaintiff. It might not be proper to say that even upon this hypothesis whether there being a unilateral but fundamental mistake on his part he would be held bound, but I fail to see upon what principle the defendant is bound. Forgan was the old lady's agent to do only what he was instructed to do, viz.: to offer for sale the swamp lots. He knew that was the extent of his authority and if through ignorance or negligence on his part he exceeded that authority, he not being an agent held out by Mrs. Murray as such, she cannot suffer for his acts. If she is to be held to this bargain it can only be by virtue of some principle of estoppel, but there is no evidence of that in this

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case. The leading case of *Foster* v. *Mackinnon* (1) following *Thoroughgood's Case* (2) contains a luminous exposition of the law upon this point.

It seems plain on principle, and on authority, that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

In that case the defendant indorsed a bill upon the understanding that it was a guarantee and not a bill, and upon the trial the learned Lord Chief Justice instructed the jury that if the signature was obtained upon the fraudulent representation that it was a guarantee, and if the defendant signed it without knowing that it was a bill and under the belief that it was a guarantee, and if he was in ignorance and there was no negligence in so signing the paper, the defendant was entitled to the verdict. The Court of Common Pleas in sustaining this statement of the law says:

In the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and if he were guilty of no negligence it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make

(1) L. R. 4 C. P. 704. (2) 2 Rep. 9b.

the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature, for two reasons, first, that he never in fact signed the writing declared on, and secondly, that he never intended to sign any such contract.

This case was lately followed by Lord Russell of Killowen in the recent case of *Lewis* v. *Clay* (1). The cases of *Hickman* v. *Berens* (2), and *Wilding* v. *Sanderson* (3), are cases in which courts have refused to enforce a compromise upon the simple ground that the parties were not *ad idem*, one of the counsel being under a misapprehension as to the subject matter of the agreement.

For these reasons I am of opinion that the appeal should be allowed.

KING and GIROUARD JJ. concurred.

Appeal allowed with costs.

Solicitor for the appellant: *Hector McInnes.*

Solicitor for the respondent: *Joseph A. Chisholm.*

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(1) 14 T. L. R. 149.

(2) [1895] 2 Ch. 638.

(3) [1897] 2 Ch. 534.