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*March 16.
*April 6.

ALEXANDER GIBB (PLAINTIFF) ..... APPELLANT;

AND

THOMAS FRANCIS McMAHON, WILLIAM WALSH AND LOUIS P. WALSH, TRUSTEES OF THE ESTATE OF THE LATE MARY FURLONG (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trust—Co-trustees—Joint action—Delegation of trust.

A trustee in Toronto wrote to a co-trustee in St. Mary's stating that an offer had been made to purchase a portion of the trust estate for $12,000 and giving reasons why it should be accepted. The co-trustee replied concurring in said reasons and consenting to the proposed sale. The Toronto trustee afterwards had negotiations with the solicitors of G. and at their suggestion offered to sell the same property to G. for $13,000 but without further notice to his co-trustee. The offer was accepted by the solicitors whereupon the party who had offered $12,000 raised his offer to $14,000 and the trustee notified the solicitors of G. that the sale to him was cancelled. In a suit by G. for specific performance:—

Held, affirming the judgment of the Court of Appeal (9 Ont. L.R. 522) that the letter written by the co-trustee in St. Mary's contained a consent to the particular sale mentioned therein only and could not be construed as a general consent to a sale to any person even for a hi gher price. Even if it could there were circumstances which occurred between the time it was written and the signing of the contract with G., which should have been communicated to the co-trustee before he could be bound by said contract.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of a Divisional

*PRESENT:—Sedgewick, Girouard, Davies and Idington JJ.

(1) 9 Ont. L.R. 522.

Court and restoring that given at the trial in favour of the defendants.

T. F. McMahon and William Walsh, of Toronto, and Louis P. Walsh, of St. Mary's, Ont., were trustees of an estate and on Sept. 1st, 1903, McMahon wrote the following letter to Louis P. Walsh:

My Dear Lou:—

According to the terms of the will of the late Mary Furlong, we are obliged to sell all her property on or before February, 1905. As times are so good here at present and as there is a possibility of further temperance legislation Mr. Walsh and I thought it wise to sell the hotel only now. We advertised the hotel for sale early in August, but received only one bid, namely, from the present tenant, William Hammill, for $11,500. We interviewed all the brewers and have not succeeded in getting another bid. H. H. Williams made a valuation and valued it at $9,600 as a going concern having a license, or $6,600 without a license. Hammill will give us $12,000, and we think it is a good price and think of accepting the offer. Of course, the property is paying better at present, as we now get $1,100 a year. We tried to get permission to hold it until the youngest heir is of age, but both our solicitors and the official guardian tell us that no judge would relieve us of responsibility, and that if any loss resulted from holding it we might be held responsible. Mr. Power objects to selling it, but he has no authority in the matter, and we think his judgment is bad, in fact we think we have an excellent offer, and there is danger of not getting nearly so much a year or more from this time. Will you kindly let me know your opinion at once? Are you willing that we should accept $12,000? Hoping to hear from you promptly, and with kindest regards.

On the 7th of September, 1903, Louis P. Walsh replied as follows:

Dear Doctor:—

Yours received *re* the Furlong estate. Taking everything into consideration I think that it would be wise to accept Hammill's offer. As you say that further temperance legislation is possible, that house is as likely to be cut off as any, in which case, as you say, it would not be worth nearly as much. Another proof of its value is the fact of your having advertised it and receiving no offers, even from the brewers; if there was a snap in it they would soon grab it. Under the circumstances I think it would be better to accept. The reason that I did not answer sooner is that there was

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a friend of mine, living in this neighbourhood, who, a while ago, thought of going to Toronto to buy out a hotel. I saw him Saturday and he has changed his mind.

The third trustee, Wm. Walsh, was a consenting party to the above and to what was done by his co-trustee McMahon afterwards.

Before these letters were written an agent of the appellant Gibb had made some inquiries about the Wheat Sheaf Hotel from McMahon, and on Sept. 14th the latter, having ascertained by telephone that Gibb would consider an offer for the property, wrote the following letter to his (Gibb's) solicitors:

Gentlemen:—

In reply to your request to quote for your client our price for the property, known as the Wheat Sheaf Hotel, corner King and Bathurst Streets, we beg to say that we are prepared to accept thirteen thousand dollars ($13,000) for the same.

This offer lapses after 24 hours.

This offer the solicitors accepted by letter, which was personally delivered to McMahon on the same day.

McMahon did not notify his co-trustee Louis P. Walsh of his intention to make a sale of the property to Gibb, but relied on the letter of Sept. 7th as his authority to sell to any person for $12,000 or more.

On Sept. 19th the solicitors of the trustees wrote the following letter to the appellant's solicitors:

Dear Sirs:—

Dr. T. F. McMahon, of Bathurst Street, has called on us with regard to this matter and instructed us to write you. When he wrote you on or about the 14th inst. offering to take $13,000 for the property he acted in good faith and still desires to do so, but unfortunately the devisees to whom the property belongs have entered a very strong protest against the property being sold, on the ground principally, that the income from the purchase money would not amount to half of the income from the property itself by way of rental. It appears that Mr. Hammill has agreed to rent the property for a number of years at $1,100 per year and he pays the

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taxes. The result is that our client's co-trustees have refused to join in the deal with him, and hence he is powerless, as you know one of several trustees cannot act alone in a matter of this kind.

Our client regrets very much the position matters have assumed as above related, but there is no help for it. Our client is, therefore, obliged to declare the deal off, which we hereby do on his behalf.

Yours very truly,

Hearn & Slattery.

P.S.—Under the circumstances our client feels that he should pay you your taxable costs which you have lawfully incurred in this matter. If you will kindly let us have the bill of these costs we will have them paid at once. H. & S.

The appellant then brought an action for specific performance of the contract by McMahon to sell to him. The trial judge dismissed the action holding that the letter of Louis P. Walsh only authorized a sale of the hotel property to the person mentioned therein and was not an authority to sell to any other. The Divisional Court reversed his judgment and decreed specific performance. The Court of Appeal restored the judgment at the trial.

C. H. Ritchie K.C. for the appellant.

Aylesworth K.C. and *Delamere K.C.* for the respondents.

SEDGEWICK J.—I agree with Mr. Justice Davies.

GIROUARD J.—This appeal involves only a question of fact settled by two courts. Did the three trustees agree to sell the land in question? Two certainly did so, but has the third, Louis Walsh, also consented? There may be reasons for doubt upon this point. But I am certainly very far from being clear that he did not consent. For that reason, I do not feel disposed to disturb the judgment appealed from.

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DAVIES J.—This is an action to enforce specific performance of an agreement alleged to have been made by the three defendants, who were trustees for certain infant children, with the plaintiff for the sale to him of an hotel property in Toronto for $13,000.

The agreement was in the form of a letter to the plaintiff from and signed by one of the trustees. It was common ground that the offer had been made with the authority of another of the trustees. It was at once accepted by the plaintiff and if the two trustees making it did so with the authority of their co-trustee it would, of course, be binding. This third trustee lived at St. Mary's, in Ontario; the other two in Toronto.

The authority to the Toronto trustees to act for the trustee living in St. Mary's was, it was contended, contained in a letter written by the latter to one of the former in answer to one asking his opinion and judgment on a proposed sale to the tenant of the property, one Hammill.

The questions to be decided are whether that letter contained a general authority from Walsh, the trustee living in St. Mary's, to his co-trustees to sell for $12,000 or anything they could get over, or whether it was to be limited to the facts and conditions set out in the letter to which it was an answer; and, secondly, whether any new facts or circumstances happened after the 1st September when Louis Walsh was asked for his opinion as a trustee which should have been submitted to him before any new contract was entered into with other parties by his co-trustees purporting to bind him.

The Court of Appeal, unanimously reversing the unanimous decision of the Divisional Court and re-

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storing that of the trial judge, dismissed the action, and I agree with that disposition of the case.

The letter from Louis Walsh to his co-trustee must not be construed as a letter from a principal to his agent would be and the case of *Ireland* v. *Livingston* (1), in 1872, relied on by the Divisional Court has therefore no application to the facts before us.

These letters were those of consultation between independent trustees, the judgment of each one of whom the *cestuis qui trustent* had a right to. Louis Walsh's letter of the 4th Sept. to his co-trustee, which is relied upon as authority for the agreement alleged to have been entered into with plaintiff, must be construed with strict reference to the facts contained in the letter of his co-trustee to which it was an answer. He expresses his opinion that in view of the facts and circumstances stated to him the offer of Hammill for $12,000 should be accepted. These were "the possibility of further temperance legislation," the call for tenders resulting in only one being put in, namely, the tenant Hammill for $11,500, the fact that his co-trustees had "interviewed all the brewers without succeeding in getting a bid," the valuation by Williams (a real estate valuator) of the hotel as a "going concern" at $9,600 and Hammill's advance upon his tender to $12,000, which the Toronto trustees thought should be accepted.

Now looking at the two letters together as a written consultation between two trustees as to the exercise of an independent judgment or discretion vested in each of them I cannot construe Louis Walsh's letter as in any sense an attempt to delegate such a trust as he held.

That, of course, he could not do unless in cases of

(1) L.R. 5 H.L. 395.

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moral necessity arising from the usages of mankind to employ an agent.

Speight v. *Gaunt*(1) at page 19; *Re Gasquoine* (2); *Re Weall* (3).

Neither reasonableness nor necessity required any such general delegation or even such limited delegation as is contended for in the present case. The trustees in Toronto were in a position directly to communicate with their co-trustee in St. Mary's by either telephone or telegraph, and when circumstances occurred which satisfied them they should not sell to Hammill, but to another person for a higher sum, they were bound to submit these circumstances to him for his consideration.

A material change of circumstances occurred which convinced the two resident trustees that there were other and better probable purchasers, one of whom at least was considering an offer of $13,000 made to him by William Walsh, one of the trustees, He was the now plaintiff, a person described as "one who was accustomed to buy and sell hotel property."

Without consulting their co-trustee they make him a written offer which he, through his solicitor, promptly accepts and now seeks to enforce a specific performance of on the ground that Louis Walsh's previous letter of 4th Sept., with reference to the facts submitted to him re Hammill's offer of $12,000, bound him to agree to this subsequent sale.

I agree with the Court of Appeal and the trial judge that it did not and that the changed circumstances demanded that he should be consulted and should concur before another sale was made or the estate as such bound to another sale.

(1) 9 App. Cas. 1. (2) [1894] 1 Ch. 470.
(3) 42 Ch. D. 674.

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The first intimation Louis Walsh had of any negotiations or attempted sale subsequent to those with Hammill for $12,000 was when the latter and a friend waited upon him urging his ratification of an agreement they had made with Wm. Walsh, his co-trustee, for $14,000. He afterwards learned of the alleged sale to plaintiff for $13,000. He promptly and properly refused to do anything until he had time for inquiry and consideration and so far as he is concerned it is agreed he is without blame.

The plaintiff knew that Dr. McMahon, who wrote him the offer of sale and signed on behalf of the estate, was only one of several trustees. He took the risk of his being authorized to make the offer. It now turns out that he was not so authorized to act for Louis Walsh, who never was consulted with regard to it, and who before he knew of it knew also that others were willing to give more money. Unless Louis Walsh, therefore, was bound by his previous letter he would be guilty of a breach of trust in selling for a less price to the plaintiff than he knew others were willing to pay. Not being so bound, in my opinion, the action must fail and the appeal be dismissed.

IDINGTON J.—I think the Court of Appeal rightly restored the judgment of Mr. Justice Street. I accept his reasons. I share his regrets. The defendant McMahon and William Walsh treated plaintiff unfairly. McMahon's action deserves stronger language to describe it. Plaintiff's solicitor explained to him that plaintiff refrained from making an offer lest it should be hawked about to raise the price on another, and he asked for an offer which his client could accept or reject and end the matter.

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McMahon made an offer which he now says he had no authority to make.

Gibb, trusting his good faith and that he had not neglected his duties as a trustee to be armed with authority before offering, accepted, and McMahon thereby got just what Gibb desired to withhold from him and no doubt used it.

He neglected to inform his co-trustee, Louis Walsh, of all this, when the plain duty of one in McMahon's position was not only to have informed his co-trustee, but also to have got from him, if he were willing to give it, his assent to the proposal. It is not often a man can accomplish so much within so narrow a compass.

If I could see my way clear to the application here of the purely agency case of *Ireland* v. *Livingston*(1), at page 416, I would, considering these peculiar actions of McMahon, be much puzzled to find or to be assured of the element of good faith in McMahon's conduct so necessary as an essential part of the legal proposition formulated in that case.

Had McMahon lost instead of gained by the course of events he would have had to make good such loss to the estate. It would not mend matters, however, as I construe Louis Walsh's letter to McMahon, to declare as law that such a letter is such possible authority to any man in the position McMahon was in as co-trustee or co-owner as to enable him to enlarge its effect beyond what it says. The indirect motive in a future case might be found operating the other way to the detriment of honest men. It would, I say it with great respect, be better not to add another to the long list of hard cases making bad law.

(1) L.R. 5 H.L. 395.

I think the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Ritchie, Ludwig & Ballantyne.*

Solicitors for the respondents: *Hearn & Slattery.*