1923
*Oct. 31.
*Dec. 4.

MORRIS KATZMAN (DEFENDANT) .....APPELLANT;

AND

OWNAHOME REALTY (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Statute of Frauds—Memo. in writing—Signature as owner—Evidence of agency—Admissibility.

Property was listed with a broker for sale, the listing card stating that "the owner's name is Mrs. B. Katzman." Mrs. K. who signed had no interest in the property but her husband had. A sale was effected and in an action by the broker for his commission:—

Held, that parol evidence was not admissible to contradict the statement in the document as to ownership by showing that Mrs. K. in signing it was acting as agent of her husband.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondent.

The only question for decision on this appeal is whether or not there was a memo in writing signed by the party to be charged or his agent sufficient to satisfy the addition made in 1916 to the Ontario Statute of Frauds. The trial judge allowed evidence to be admitted to show that Mrs. Katzman who signed the memo did so as agent of her husband the appellant, which would be sufficient if established. The appellant contends that such evidence should not have been received.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

F. Davis for the appellant referred to *Keighley* v. *Durant* (1); *Barry* v. *Stoney Point Canning Co.* (2).

Zeron for the respondent cited *Toulmin* v. *Millar* (3); *Stratton* v. *Vachon* (4).

THE CHIEF JUSTICE.—I am of the opinion that this appeal should be allowed. I concur in the reasons for so doing stated by my brothers Anglin and Mignault JJ.

IDINGTON J.—This is an action to recover a commission claimed by the respondent by way of remuneration for the sale of real estate.

The action falls within section 13 of the Ontario Statute of Frauds, as amended by the addition of said section in 6 Geo. V, [1916], c. 24, sec. 19, which reads as follows:—

No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized.

The only writing presented herein and claimed by the respondent to comply with said provision is a listing of the property in question, which reads as follows:—

Description of property to be sold by Ownahome Realty Construction, King George Hotel.

Price, $125.000.
Cash, $25,000.
$3,000 every 6 months.

40 Rooms.
Size of Lot, 60 by 130.
2 Stores on Sandwich, Bar on corner, 1 on Goyeau.
Rents now at $12,000.
(On back of card).
Owner's name, Mrs. B. Katzman.
Property for sale at Sandwich St. at Goyeau.
Address, 24 Hall Ave. Border Cities, 7th June, 1921.

In the event of the Ownahome Realty finding a purchaser for the property described herein, I agree to pay them a commission of 3 per cent on the selling price.

B. Katzman.

The signature is that of the wife of appellant whose full name is "Morris Katzman" and her's is "Becky Katzman."

This was given without any authority from the husband who is sued herein along with one Orechkin and the said wife of appellant.

(1) [1901] A.C. 240.
(2) 55 Can. S.C.R. 51.
(3) 58 L.T. 96.
(4) 44 Can. S.C.R. 395.

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Idington J.

It is to be observed that she therein professes to be owner and in fact contracts in no other sense.

She is clearly proven not to have been the owner of any interest therein, and her husband to have only owned an equity therein along with said Orechkin. Some expressions used in the evidence might lead one to believe that he and Orechkin were equally interested and others indicate that they were not equally interested.

It is quite clear that they had only an equity altogether of about sixty thousand dollars in said property, and that she had no interest whatever in the property.

From the fact that this action was brought, as the result of a search in the Registry Office, after the property had been conveyed to one Davis, it seems that the respondent was rather puzzled to know who had become under any such obligation as it sets up in regard to it.

I assume that, as has been held under the Statute of Frauds, a principal may, under immediately attendant or preceding circumstances leading up to the signature of such a contract as falls within the meaning of the statute as amended by the new section, be held to have signed by an agent.

But I can find, after diligent search, no decision which converts a contract made by any one pretending to sell as his or her own, as this contract clearly does, into a contract by the actual owners.

The pretence that this contract was so converted by the acts of the husband, or of him and the other joint owner, seems to me to be without any foundation in law.

And still more remote from giving any legal operation under said statute as against the appellant is the reliance by respondent upon what transpired between the respondent, the appellant and one Molley leading ultimately, respondent alleges, to a sale to one Davis.

The respondent had, some weeks after the signing of the above quoted contract with it by the appellant's wife, discovered that the said Molley lived in and owned an apartment house in Detroit, on the opposite side of the river, which he was disposed to exchange for the hotel now in question.

Respondent's managing agent, Pyne, induced the appellant and Orechkin, his joint owner, to accompany him to

look at said apartment house, and consider it on an exchange basis. Having done so they at once decided against the said proposal and all connected therewith. Some weeks or a month later Molley, who it is alleged, besides being engaged in looking after his said apartment house, ran a theatre or something of that kind, mentioned this incident to one Davis, a large real estate owner on both sides of the river who had employed Molley to assist him in his affairs.

The mention of it to Davis seems to have set him thinking that he might by trading some of his properties acquire from appellant and Orechkin their King George hotel now in question. Ultimately Davis made such a deal with them, and some months later the respondent's managing agent heard of it and conceived the idea that as result thereof he could rest an action thereon.

The said Davis had died we are told before this action came to trial and Molley was not called as a witness, and the evidence of Molley's proposal and the resultant report thereof is relied upon for the conclusions sought to bring this case within the principles acted upon in the cases of *Toulmin* v. *Millar* (1), *and Burchell* v. *Gowrie and Blockhouse Collieries* (2).

I cannot see any resemblance between the meagre facts presented herein and those respectively acted upon in said cases cited to us.

I cannot see how or why, as held by the learned trial judge herein, the agent's act in each case was, by what he did, the efficient cause of the sale, or more correctly on the facts, the mere use by Davis of the knowledge of what was going on, can be said to have been an efficient cause produced by the respondent, upon the facts presented as bringing about the exchange and entitling it to claim compensation.

Moreover I am not prepared to hold, in face of the requirements of the statute above quoted, such remote and far from being necessary results of the respondent's acts as within the meaning of the said Act's requirements, even if the above quoted contract of the appellant's wife could have been looked at otherwise than I have set forth above. Independently of a written contract by the seller with the

(1) 58 L.T. 96. (2) [1910] A.C. 614.

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agent there is nothing in all that is relied upon to render appellant liable.

I therefore am of the opinion that this appeal should be allowed with costs throughout and the respondent's action be dismissed with costs.

DUFF J.—I think Mr. Davis' point is well taken that the memorandum of the 22nd February, 1922, cannot avail the respondent in answer to the objection based upon the statute (6 Geo. V, c. 24, sec. 19). Mrs. Katzman in the memorandum describes herself as the proprietor because the property which was the subject of the arrangement is described as "my property." The respondent cannot allege that Mrs. Katzman was signing as the agent of her husband without contradicting the statement implied in this description, that she is the owner of the property for which the agent is to find a purchaser. *Formby Bros.* v. *Formby* (1).

The objection having been raised for the first time at this stage, I think there should be no costs of the appeal to the Appellate Division.

ANGLIN J.—The plaintiff (respondent) seeks to recover from the defendant (appellant), Morris Katzman, a commission on the sale for $115,000 of an hotel property in the city of Windsor to one John Davis, a resident of the city of Detroit. The property in question belonged to the appellant and one Jake Orechkin. In addition to asserting that action by the plaintiff was not the efficient cause of the sale being brought about, the defendant invokes the protection of the statute 6 Geo. V (1916), c. 24, sec. 19, as amended by 8 Geo. V (1918), c. 20, s. 58, whereby there was added to section 13 of the R.S.O. 1914, c. 102, the following clause:

> No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless the agreement upon which said action shall be brought shall be in writing separate from the sale agreement, and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

To meet the requirements of this section the appellant produces the following contract:

(1) [1910] 102 L.T. 116.

Description of property to be sold by Ownahome Realty Construction, King George Hotel.

Price, $125,000.
Cash, $25,000.
$3,000 every 6 months.

40 Rooms.
Size of Lot, 60 by 130.
Two stores on Sandwich, Bar on corner, 1 on Goyeau.
Rents now at $12,000.
(On back of card).
Owner's name, Mrs. B. Katzman.
Property for sale at Sandwich St. at Goyeau.
Address, 24 Hall Ave.

Border Cities, 7th June, 1921.

In the event of the Ownahome Realty finding a purchaser for the property described hereon, I agree to pay them a commission of 3 per cent on the selling price.

B. Katzman.

The learned trial judge held that Morris Katzman had authorized his wife, Becky Katzman, to sign the document which I have quoted, that she did in fact sign it and that her doing so was subsequently ratified by her husband. Subject to a question of law as to the possibility of ratification by an undisclosed principal of an act which his agent has purported to do not as agent but as principal, these findings of fact appear to be sufficiently supported by evidence; but in any event, in the view I take of the appeal, they need not be questioned.

It will be noted that in the contract produced and sued upon Mrs. Becky Katzman describes herself as the owner of the property—"Owner's name, Mrs. Becky Katzman." In addition to signing the document in her own name without any indication that in doing so she was acting as agent for her husband, she expressly purported to contract for payment of the commission as owner of the property to be sold, thus distinctly negativing such agency. Under these circumstances I am of the opinion that parol evidence was not admissible to shew that she was in fact contracting as agent for her husband; *Humble* v. *Hunter* (1); *Formby Bros.* v. *Formby* (2). Such evidence would necessarily tend to contradict a material statement in the writing in which the contract is embodied and upon which the plaintiff must rely to satisfy the statute. I am therefore of the opinion

(1) [1848] 12 Q.B. 310. (2) 102 L.T. 116.

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that the contract produced does not satisfy the requirements of the statute so as to enable the plaintiff to maintain this action as against the present appellant, Morris Katzman.

The action was originally brought against Morris Katzman, Jake Orechkin and Mrs. Morris Katzman. It was properly dismissed at the trial as against Orechkin, no attempt having been made to shew agency for him on the part of Mrs. Katzman. Judgment was given against the two Katzmans. In the Divisional Court the plaintiff was put to its election whether it would treat Mrs. Katzman as a principal or as an agent for her husband in making the contract for commission. Desiring to hold Morris Katzman it determined to treat his wife as agent in the transaction. The appeal of the defendant, Mrs. Morris (Becky) Katzman, was accordingly allowed and the action against her dismissed, the judgment against her husband being maintained. This may have been a misfortune for the respondent as its present failure to succeed as against Morris Katzman may leave it without redress in respect of a commission for which it might possibly otherwise have been entitled to hold Mrs. Katzman personally liable.

MIGNAULT J.—The respondent could not bring its action against the appellant claiming a commission for the sale of real property, unless there was an agreement in writing to pay it, separate from the sale agreement, and signed by the party to be charged therewith or some person thereunto by him lawfully authorized. 6 Geo. V (Ont.) c. 24, sec. 19, as amended by 8 Geo. V, c. 20, sec. 58.

The agreement on which the respondent's right to bring this action is based is however signed not by the appellant but by the latter's wife who describes herself and signs as owner of the property to be sold.

The learned trial judge nevertheless found on parol evidence that the appellant authorized his wife to sign the agreement as his agent and subsequently expressly ratified her act. He gave judgment for the respondent and his judgment was unanimously affirmed by the Second Appellate Divisional Court of Ontario.

The appellant, for the first time, raised the objection in this court that the respondent cannot by parol evidence

contradict the agreement in writing produced by it in support of its action and shew that the appellant's wife made this contract on the appellant's behalf.

To my regret, because this objection should have been made earlier, I find myself constrained to hold that it is well taken. In other words, where a plaintiff produces and relies upon an agreement which was entered into by a third person as principal, parol evidence is not admissible to shew that such person contracted merely as the defendant's agent. *Humble* v. *Hunter* (1); *Formby Brothers* v. *Formby* (2).

There is no possible doubt that the appellant's wife signed the agreement as principal, and only by contradicting it could the respondent establish its right of action against the appellant. This it cannot do.

The appeal should be allowed with costs and the respondent's action dismissed with costs. No costs to either party in the Appellate Divisional Court.

Appeal allowed with costs.

Solicitors for the appellant: *Davis & Healy.*
Solicitors for the respondent: *Zeron & McPhee.*

(1) 12 Q.B. 310.

(2) 102 L.T. 116.