1907
*April 4.
*May 7.

FREDERICK T. ANDREWS (DEFENDANT) .... APPELLANT;

AND

ANGELO CALORI (PLAINTIFF) ...... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Vendor and purchaser—Sale of land—Formation of contract—Conditions—Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission—Avoidance of contract—Fraud—Specific performance.

While A was absent abroad, B assumed, without authority, to sell certain of his lands to C and received, from C, a deposit on account of the price. On receipt of a cablegram from B, notifying him of what had been done, but without disclosing the name of the proposed purchaser, A replied, by letter, stating that he was willing to sell at the price named, that he would not complete the deal until he returned home, that the sale would be subject to an existing lease of the premises and that he would not furnish evidence of title other than the deeds that were in his possession, and requesting B to communicate these terms to the proposed purchaser. On learning the conditions, C, in a letter by his solicitors, accepted the terms and offered to pay the balance of the price as soon as the title was evidenced to their satisfaction. In a suit for specific performance,

Held, that the correspondence which had taken place constituted a contract sufficient to satisfy the requirements of the Statute of Frauds, that the words "so soon as title is evidenced to our satisfaction," in the solicitors' letter accepting the conditions, did not import the proposal of a new term and that A was bound to specific performance.

Held, also, that an arrangement, unknown to A and made prior to the receipt of his letter, whereby B was to have a commission on the transaction from C, could not have the effect of avoiding the contract, as B was not, at that time, the agent of A for the sale of the property.

Judgment appealed from (12 B.C. Rep. 236) affirmed.

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*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington and Maclennan JJ.

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APPEAL from the judgment of the Supreme Court of British Columbia(1) affirming the judgment of Morrison J., at the trial, which maintained the plaintiff's action for specific performance with costs.

The case is stated in the judgment of the court, by His Lordship Mr. Justice Maclennan, now reported.

Nesbitt K.C. and *G. H. Cowan K.C.* for the appellant. There was no concluded agreement with the plaintiff by the defendant or his agent, thereunto duly authorized, or any memorandum in writing sufficient to satisfy the requirements of the Statute of Frauds. *Hussey* v. *Horne-Payne*(2) *per* Cairns L.C., at page 849. The whole correspondence must be looked at; *North-West Transportation Co.* v. *McKenzie*(3). The letter stating his lowest price to be "thirteen thousand net" does not confer power upon the agent to enter into a contract for sale; *Hamer* v. *Sharp*(4) *per* Hall V.C., at page 55; *Ryan* v. *Sing*(5); *Wilde* v. *Watson*(6); *Wilkinson* v. *Stringer*(7) *per* Turner V.C. The unauthorized contract by a person assuming to act as an agent cannot be confirmed in part and repudiated in part, it must be confirmed as a whole; see remarks by Ellenborough L.J. in *Hovil* v. *Pack*(8), also *Cornwal* v. *Wilson*(9) *per* Hardwicke L.C.; and *Rader's Administrator* v. *Maddox* (10). The defendant was ignorant of the terms and of the parties to the contract. *Banque Jacques-Cartier* v. *Banque d'Epargne de la cité et du district de*

(1) 12 B.C. Rep. 236.
(2) 48 L.J. Ch. 846; 4 App. Cas. 311.
(3) 25 Can. S.C.R. 38.
(4) 44 L.J. Ch. 53.
(5) 7 O.R. 266.
(6) 1 L.R. Ir. 402.
(7) 16 Jur. 1033.
(8) 7 East 164.
(9) 1 Ves. Sr. 509.
(10) 150 U.S.R. 128.

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Montréal(1). The court will refuse a decree for specific performance where there is merely a treaty in view of a future contract; *Huddleston* v. *Briscoe*(2) at pages 591-2; *Stratford* v. *Bosworth*(3); *Harvey* v. *Facey*(4); and there was no unqualified acceptance, *Dyas* v. *Stafford*(5); *Holland* v. *Eyre*(6); *Honeyman* v. *Marryatt*(7); *Crossley* v. *Maycock*(8); *Culverwell* v. *Birney*(9); *McIntyre* v. *Hood*(10); *Winn* v. *Bull*(11); *Hudson* v. *Buck*(12).

There is no evidence to identify the proposed purchaser and the letter from the plaintiff's solicitors treated the matter as incomplete; parol evidence cannot avail, in such a case, to shew a completed contract; *Champion* v. *Plummer*(13) *per* Mansfield L.J. The alleged contract does not state who are the contracting parties. See also *Smith* v. *Surman*(14); *White* v. *Tomalin*(15); *McIntosh* v. *Moynihan*(16) *per* Burton J. at page 242. There could be no unqualified acceptance where the new term was proposed "subject to evidence of title being approved." *Hussey* v. *Horne-Payne*(17) *per* Jessel M.R. at page 752; *Queen's College* v. *Jayne*(18). Moreover this acceptance was written by the solicitors without authority from the purchaser; *Smith* v. *Webster*(19). Negotiations as to a completed contract were post-

(1) 13 App. Cas. 111.
(2) 11 Ves. 583.
(3) 2 Ves. & B. 341-5.
(4) (1893) A.C. 552.
(5) 9 L.R. Ir. 520.
(6) 2 Sim. & St. 194.
(7) 6 H.L. Cas. 112; 21 Beav. 14.
(8) L.R. 18 Eq. 180.
(9) 14 Ont. App. R. 266.
(10) 9 Can. S.C.R. 556.
(11) 7 Ch. D. 29.
(12) 7 Ch. D. 683.
(13) 8 R.R. 795; 1 Bos. & P. (N.R.) 252.
(14) 33 R.R. 259; 9 B. & C. 561.
(15) 19 O.R. 513.
(16) 18 Ont. App. R. 237.
(17) 8 Ch. D. 670; 47 L.J. Ch. 751.
(18) 10 Ont. L.R. 319.
(19) 3 Ch. D. 49.

poned until the defendant's return home, and the negotiations shew changed terms of payments and as to defendant being relieved from payment of rates for local improvements. *Bristol C. & S. Aërated Bread Co.* v. *Maggs*(1) *per* Kay J. at pages 624-5; *Jones* v. *Victoria Graving Dock Co.*(2) *per* Lush J. at page 223; *Jervis* v. *Berridge*(3) *per* Selborne L.C.; *Harris* v. *Robinson*(4); *Coventry* v. *McLean* (5); *Goring* v. *Nash*(6) *per* Hardwicke L.J. at page 188; *Powell* v. *Lloyd*(7).

There was still a dispute between the parties and too much uncertainty to justify a decree for specific performance; *Pearce* v. *Watts* (8); *Rummens* v. *Robins*(9); *Clowes* v. *Higginson*(10); *Griffin* v. *Coleman*(11).

The stipulation for a secret commission disentitles the plaintiff to the decree. *Panama, etc., Telegraph Co.* v. *India Rubber, Gutta Percha & Telegraph Works Co.*(12) *per* James L.J. at page 125; *Ex parte Bennett*(13) *per* Eldon L.C.; *McElroy* v. *Maxwell*(14); *Marsh* v. *Buchan*(15); *Powell & Thomas* v. *Jones & Co.*(16); *Andrews* v. *Ramsay & Co.*(17); *Kersteman* v. *King*(18).

The fact that a "net" fixed price was secured does not prevent the arrangement for a secret commission

(1) 44 Ch. D. 616.
(2) 46 L.J.Q.B. 219.
(3) 42 L.J. Ch. 518.
(4) 21 Can. S.C.R. 390.
(5) 22 O.R. 1.
(6) 3 Atk. 186.
(7) 31 R.R. 598; 2 Y. & J. 372.
(8) L.R. 20 Eq. 492.
(9) 3 DeG. J. & S. 88.
(10) 1 Ves. & B. 524.
(11) 28 L.T. 493.
(12) 10 Ch. App. 515; 45 L.J. Ch. 121.
(13) 10 Ves. 381.
(14) 101 Mo. 294.
(15) 46 N.J. Eq. 595.
(16) (1905) 1 K.B. 11.
(17) (1903) 2 K.B. 635.
(18) 15 C.L.J. 140.

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from operating as a fraud; *Fish* v. *Leser*(1); *Bartram & Sons* v. *Lloyd*(2); *Manitoba & North-West Land Corporation* v. *Davidson*(3). Plaintiff's course could only be justified by actual disclosure; *Grant* v. *Gold Exploration, etc., Syndicate*(4) *per* Collins L.J. at page 158; *Shipway* v. *Broadwood*(5).

Ewart K.C. and *Bird* for the respondent. The decision in *Hussey* v. *Horne-Payne*(6) is not in point. There the agreement was clearly conditional. That case was also disapproved in *Chippenfield* v. *Carter* (7) *per* Wright J. at page 488. See also *Hack* v. *London Provident Building Society*(8). Neither is it binding on this court in the construction of the documents now in question. *Grey* v. *Pearson*(9) at pages 106 and 108; *Rossiter* v. *Miller*(10) at page 1152.

As to the Statute of Frauds, a writing need not have as its object the attesting of an agreement. *In re Hoyle*(11) at pages 98, 99, 100. Nor need the agent's authority entitle him to sign a record of contract. It is sufficient if the agent had authority to sign a memorandum for any purpose. There is, in the cablegram and letter a description sufficiently identifying the purchaser who offered $13,000 net and paid $500 on account of purchase price. *Rossiter* v. *Miller*(10) *per* O'Hagan L.J. at page 1147, and Blackburn L.J. at

(1) 69 Ill. 394.
(2) 20 Times R.L. 281.
(3) 34 Can. S.C.R. 255.
(4) 69 L.J.Q.B. 150.
(5) (1899) 1 Q.B. 369; 68 L.J.Q.B. 360.
(6) 8 Ch. D. 670.
(7) 72 L.T. 487.
(8) 23 Ch. D. 103, at p. 111.
(9) 6 H.L. Cas. 61.
(10) 3 App. Cas. 1124.
(11) (1893) 1 Ch. 84.

page 1153. See also *Carr* v. *Lynch*(1) and *Ryan* v. *United States*(2).

As to the contention that the plaintiff's name does not appear in the contract; (1) in the receipt for the $500 the plaintiff's name does appear; (2) it also appears in the receipt given for title deeds, which carries the signature of the defendant himself.

Upon the questions of law involved the following cases are cited; *Newell* v. *Radford*(3); *Hood* v. *Lord Barrington*(4); *Sale* v. *Lambert*(5); *Commins* v. *Scott*(6); *Catling* v. *King*(7); *Sarl* v. *Bourdillon*(8); *Barkworth* v. *Young*(9); *Parton* v. *Crofts*(10).

Two papers may, by intrinsic evidence with the aid of parol evidence of surrounding circumstances, be connected to constitute a memorandum; *Ridgway* v. *Wharton*(11); Campbell on Sale(12); *Buxton* v. *Rust*(13); *Long* v. *Millar*(14); *Shardlow* v. *Cotterell* (15); *Cave* v. *Hastings*(16); *Craig* v. *Elliott*(17). The reference to production of a title satisfactory to the solicitors does not import the proposal of a new term. It is a mere matter of detail.

The rule is even more elastic where it is merely required to supplement an incomplete memorandum, signed by the party to be charged, with another also signed by him. It is sufficient here if they can with reasonable certainty be construed as relating to one

(1) (1900) 1 Ch. 613.
(2) 136 U.S. 68.
(3) L.R. 3 C.P. 52.
(4) L.R. 6 Eq. 218.
(5) L.R. 18 Eq. 1.
(6) L.R. 20 Eq. 11.
(7) 5 Ch. D. 660.
(8) 1 C.B. (N.S.) 188.
(9) 4 Drew 1.
(10) 16 C.B. (N.S.) 11.
(11) 6 H.L. Cas. 238.
(12) 2 ed. p. 309.
(13) L.R. 7 Ex. 1.
(14) 4 C.P.D. 450.
(15) 20 Ch. D. 90.
(16) 7 Q.B.D. 125.
(17) 15 L.R. Ir. 257.

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transaction. *Allen* v. *Bennett*(1); *Western* v. *Russell*(2); *Warner* v. *Willington*(3); *Baumann* v. *James*(4); *Studds* v. *Watson*(5); *Oliver* v. *Hunting* (6). It is sufficient if the name of the agent appears on the receipt for the deposit instead of that of the vendor. *Smith* v. *Brentnell*(7). The names of the parties need not all be in the same document. *Warner* v. *Willington*(3) at p. 533; *Buxton* v. *Rust*(8). The contract need not be in writing; only the evidence of the contract is required to be in writing. The documents may be written *alio intuito; Jones* v. *Victoria Graving Dock Co.*(9).

As to the arrangement for commission, there was nothing concealed in the action of the plaintiff; the defendant expressed no surprise at what he was told; he knew very well that he had himself provided for the payment to the agent; and he went on with the necessary preparations for closing the transaction after the plaintiff had told him of the payment to the agent. All cases *re* secret commission are dependent on fraud as an element of the defence. It must be proved. None here exists on the facts. Where concealment does not exist no secret about the commission can be pretended. *Cavendish-Bentinck* v. *Fenn* (10); *Corporation of Salford* v. *Lever*(11).

The following authorities are also referred to: *Panama, etc., Telegraph Co.* v. *India Rubber, etc., Co.*(12); *Ex parte Bennett*(13).

(1) 3 Taunt. 169.
(2) 3 Ves. & B. 187.
(3) 3 Drew 523.
(4) 3 Ch. App. 508.
(5) 28 Ch. D. 305.
(6) 44 Ch. D. 205.
(7) (1888) W.N. 69.
(8) L.R. 7 Ex. 1.
(9) 46 L.J.Q.B. 219.
(10) 12 App. Cas. 652.
(11) (1891) 1 Q.B. 168.
(12) 10 Ch. App. 515.
(13) 10 Vesey 381.

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The judgment of the court was delivered by

MACLENNAN J.—I am of opinion that this appeal fails. The action is by the respondent Calori against the appellant for the specific performance of an alleged contract of sale by the appellant to the respondent of a parcel of land in Vancouver.

The respondent succeeded at the trial and also in an appeal taken to the Supreme Court of British Columbia, Irving J. dissenting, and the present appeal is from the judgment of the Supreme Court.

The question in the case is whether there was any contract between the parties, and whether there was a sufficient memorandum thereof signed by the appellant to support the action.

The appellant was a business man resident at Vancouver, and owning property there, but when the material acts bearing upon the case occurred, was absent in England.

The respondent, Calori, was a hotel proprietor in Vancouver, and a firm of W. A. Clark & Co. were land agents, also in Vancouver.

On the sixth of January, 1905, Clark & Co. (whom I shall hereafter call Clark), without any authority from either Andrews or Calori, cabled Andrews inquiring lowest price for the lot in question, and received an answer on the 9th of January, "thirteen thousand net." He then went to Calori and proposed to him to buy at that price, but Calori refused, offering to give twelve thousand. Thereupon, Clark, on the same day, cabled to Andrews—"Best offer I can get $12,000 net to you; can I accept?"

To this Andrews made no reply, but between that date and the twenty-fifth of January, Clark managed

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to work Calori up to the $13,000 mark, and, on that day, Calori paid Clark $500 and obtained from him a receipt in the following terms:—

> Received from A. Calori the sum of $500, five hundred dollars, deposit on lot 24, block 8, D., 196, on purchase price of $13,000 (net to F. T. Andrews), subject to confirmation of owner. Title being satisfactory.

That was a strange, bold thing to do, inasmuch as he had no authority of any kind whatever from Andrews to do anything of the kind. I think that Calori's evidence, as well as the form of the papers, shews that Clark had no authority from Calori either, and was not his agent.

Having given Calori that receipt, he cabled to Andrews the same day, as follows:—

> Sold lot 24, block 8 196, thirteen thousand dollars net you deposit paid by client $500 confirm cable.

Up to this point, neither Calori nor Andrews had signed anything which could be called a contract, or a memorandum of a contract, nor had anything been signed by any agent on behalf of either of them. Clark had assumed to sign the receipt as if he had authority, but he had none.

Nevertheless, the effect of paying the $500, and taking the receipt which he had taken was a verbal offer by Calori to buy the land from Andrews for $13,000.

Andrews answered Clark's cable of the 25th of January, on the 27th, saying, "writing acceptance," and he followed that by a letter to Clark on the 2nd of February.

When writing this letter, Andrews knew that there was a certain person who was willing to buy, at $13,000, and also had actually paid a deposit of $500.

That person, however, had signed nothing, and even his name was not known to him. But his identity and name were not uncertain. Both were known to Clark.

The letter was as follows:—

February 2nd, 1905.

Messrs. Clark & VanHouten,
Vancouver, B.C.

Dear Sirs:—

I am in receipt of your cablegram dated January 26th, offering me $13,000 cash for my property on Hastings street, lately occupied by McKay as a hardware store. I answered your cable (writing acceptance), my reason for doing this was I wanted it understood distinctly that I could not complete the deal until I returned, which may not be until April. It would be impossible to close before as the title deeds belonging to the property were left in Toronto. I will accept the offer on the following terms, that is, the adjustments to be calculated to the first of April. After that time the purchaser can collect the rents. The premises are leased for a year from last fall.

Kindly make it known to the purchaser so that there will not be any misunderstanding, be sure and tell the purchaser that I cannot give him possession of the premises, he will simply have to accept the present tenant, of course, I accept the thirteen thousand net, cash offer with the understanding that I am not to be called upon to produce or procure any title papers other than those in my possession, no doubt you have explained all the details to your client.

I may state that the title to the Hastings street property was accepted by Davis, Marshall & MacNeill acting for Hull.

Kindly write and let me know if your client accepts these terms, as other parties have written and cabled me for price.

Your prompt attention will greatly oblige.

Yours truly,

F. T. ANDREWS.

Now this letter is a distinct offer to sell the land in question, on certain specified terms and conditions, for $13,000 net cash, to the person who had paid the deposit of $500. It was written to Clark with a request that it should be communicated to that person, and Clark is requested to inform him whether the terms are agreed to.

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The letter was received by Clark and communicated to Calori, who agreed to the altered terms, and immediately instructed his solicitors to communicate that to Clark, which they did by letter of 22nd February. Clark communicated this to Andrews by letter of the 23rd February, for the first time disclosing to Andrews the purchaser's name.

I think it is clear that, on receipt by Andrews of this letter of 23rd February, there arose a complete contract of sale and purchase between the parties, sufficient to satisfy the requirements of the Statute of Frauds, subject to a question arising upon certain words contained in the solicitors' letter of the 22nd of February.

That letter was as follows:—

> Find enclosed herewith copy of letter of F. T. Andrews to you in regard to the sale of his Hastings street property to Mr. Calori. We have retained the original letter pursuant to your kind permission and will thank you to confirm the terms suggested by Mr. Andrews to him by letter. It will be quite satisfactory to Mr. Calori to take the property over, subject to the tenancy, and so far as the question of title deeds is concerned, we accept unreservedly the stipulations made by Mr. Andrews. We are ready, at any minute, to pay this money over to Mr. Andrews as soon as proper title is evidenced to our satisfaction, and we shall be obliged if you will ask Mr. Andrews to have such title deeds as are in his possession forwarded here with a solicitor's abstract to enable us to examine into the title fully.

And it is urged that the words "so soon as proper title is evidenced to our satisfaction" are a new stipulation or condition of the contract proposed on behalf of the plaintiff, and which was never assented to by the defendant in writing.

I am unable to assent to this view of those words. The two letters must be read together.

The defendant had stipulated that the sale should

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not be completed until the first of April, after his return from England. His title deeds were in Toronto, and he is not to be called upon to produce any title papers other than those in his possession. He wants to have no trouble searching for or producing title papers not in his possession. That stipulation would clearly not oblige the purchaser to accept a bad or defective title, but, if accepted *simpliciter*, it might leave room for a contention that the purchaser had agreed to accept such title as might be shewn by the vendor's deeds and papers when produced, even if defective. To guard against any inference or contention of that kind the solicitors say, the money is ready, let Mr. Andrews send forward his deeds and the title papers in his possession. But, if these deeds and title papers do not disclose a good title, we must still be satisfied that it is good. I think the words which follow shew that is all that was meant. They ask for his deeds and a solicitor's abstract "to enable them to examine into the title fully."

The sense in which these words were used is also illustrated by the language used by the same solicitors in their letter to the defendant of the 31st January. Their words are:—

> If the title as disclosed is satisfactory, there will be no delay.

In the case of *Hussey* v. *Horne-Payne*(1), a similar question arose, the words used in that case being "subject to the title being approved by our solicitors." The Court of Appeal(1) held that these words were a new term. That was, however, dissented from in the House of Lords(1) Cairns L.C., at pp. 321-2, concur-

(1) 8 Ch. D. 670; 4 App. Cas. 311.

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red in by Lords Selborne and Gordon, and although the judgment was affirmed in other grounds, must be deemed to be overruled. *Hack* v. *London Provident Association*(1), in the Court of Appeal.

It was also contended that the parties did not regard the terms of the contract as completely settled by the letter of the 23rd of February, but entered upon a further discussion of terms.

I do not think that anything which is shewn to have occurred can be regarded as a waiver of the contract which had been deliberately made, or as having opened the negotiations *de novo*.

Some argument was also made upon the fact that Clark received a commission from Calori of $200 upon the transaction. If Clark had been the defendant's agent for sale, at that time, such a payment would have been a bribe and a fraud upon the defendant. 1 Dart on Vendors and Purchasers, page 214, and cases there cited. But Clark was not then the defendant's agent for sale, nor did he act for him at any time, until he was requested to communicate to the plaintiff his letter of the 2nd of February.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Cowan & Reid.*

Solicitors for the respondent: *Bird, Brydone-Jack & McCrossan.*

(1) 23 Ch. D. 112.