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*Oct. 13.
*Nov. 10.

JOHN ARTHUR O'NEILL HAYES (PLAINTIFF) ..... } APPELLANT;

AND

EDWARD W. DAY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Construction of contract—Findings of trial judge—Appreciation of evidence—Reversal on appeal.

In a dispute as to the nature and effect of a contract, the trial judge, on his view as to the weight of evidence, found the facts in favour of the plaintiff and gave judgment accordingly. His decision was reversed by a majority of the court *in banco*, and the action was dismissed with costs.

Held, per IDINGTON, MACLENNAN and DUFF JJ., reversing the decision of the full court, that the findings of the trial judge, who had seen and heard the witnesses, should not have been reversed.

The CHIEF JUSTICE and DAVIES J. considered that the trial judge had not made his findings as the result of conclusions arrived at by him having regard to the conduct and appearance of the witnesses in giving their evidence, and, on their view of the conflicting testimony, were of the opinion that the full court was right in reversing the judgment at the trial and that the appeal from their judgment ought to be dismissed.

APPEAL from the judgment of the Supreme Court of Alberta, *in banco,* reversing the judgment of Sifton C.J., at the trial, and dismissing the plaintiff's action with costs.

The plaintiff (appellant) alleged that the defendant, desiring his advice and assistance as an experienced land valuator and inspector, entered into an agreement with him by which he was to accompany

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

the defendant in the examination and selection of certain large tracts of land, in the country adjacent to Wetaskiwin, Alberta, and that his remuneration for doing so should be the payment, in the nature of a commission, of an amount equal to one-third of the "turn over" upon the sale of the lands so selected jointly by them. The action was brought to recover 33 1-3 cents per acre in respect of 123,000 acres of land alleged to have been so examined, selected and sold, and, at the trial before Sifton C.J., the learned Chief Justice, speaking of the testimony adduced, said: "It is rather an extraordinary case that men should so disagree in regard to a conversation as these men appear to. All of them, so far as their appearance goes and so far as anything that appears in evidence is concerned, are responsible, respectable and upright citizens. I, therefore, feel bound to accept the story of two as against one, there being nothing in their conduct or appearance to detract from the truthfulness of the story they told. Most extraordinary bargains are made and have been made, the last three or four years, in regard to real estate." In view of the evidence, the Chief Justice held that the quantity of land which could be affected was, practically, 29,000 acres, being a quarter of what had been selected, and based his verdict in favour of the plaintiff, for $9,666.66, at the rate of 33 1-3 cents per acre upon that amount of land. On appeal to the full court, this judgment was reversed and the plaintiff's action was dismissed with costs, Harvey J. dissenting, and it was ordered that the plaintiff should have leave to amend his claim by claiming upon a *quantum meruit* and, thereupon, should be entitled to a new trial upon payment of costs.

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Ewart K.C. for the appellant.

Henwood for the respondent.

THE CHIEF JUSTICE (dissenting).—I am of opinion that the action, in this case, should have been dismissed for the reasons stated by Mr. Justice Davies.

DAVIES J. (dissenting).—I am of opinion that this action should have been dismissed with costs, and to that extent would have modified the judgment of the Supreme Court of Alberta.

The action was one brought on an alleged agreement that if the appellant, plaintiff, would select certain lands containing 200,000 acres more or less *available for purchase by respondent*, the latter would pay to the plaintiff 33 1-3 cents per acre in respect of each acre of land so selected, and that as plaintiff so selected 123,000 acres he became entitled to receive $41,000, which he claimed.

The evidence relied on to support such agreement was a statement alleged to have been made by Day to Hayes when Day first visited Wetaskiwin, at the hotel there, and in the presence of one Bull, who had accompanied Day on his visit. My opinion gathered from a careful examination of the evidence as to all this conversation was that it was well understood by the parties as being quite general and not intended to bind any one to any specific agreement. Hayes would not have broken his agreement if he had afterwards declined to have anything more to do with Day or his company, and Day would not have broken his had he chosen another guide. I am the more satisfied upon this point because Bull, who is relied upon as cor-

roborating Hayes, expressly states that he did not regard or understand the parties as then coming to any definite bargain and that he supposed there would be something further done and in writing. I cannot for myself accept Hayes' remembrance of this conversation which had taken place some years before as correct, though I have not the slightest doubt some "tall talk" was indulged in at the time during the two hours' conversation alike by the would-be land purchaser and the land guide as to possible profits and otherwise. It must also be remembered that at the time of the conversation Day had not definitely selected any part of the lands which it was known were open for purchasers; at that time his idea was generally to purchase "sections" of the land. Afterwards and before Hayes went out with him he had the offer of sale from the Canadian Pacific Railway Land Co. of a specified number of townships and when he returned to Wetaskiwin and before they started out to see the lands the object was not *selection* of sections or of lands generally for sale or *selection* of one or more of the townships offered him for sale, but *inspection* of these particular townships, with a view of determining whether on the whole the offer he had to purchase them should be accepted or not.

There was no pretence that he could accept some of the townships and reject others.

To return to the conversation on the first occasion when it is said the agreement sued on was reached, Hayes says that Day asked him "if he could select a tract of land for him and that he, Hayes, asked him how I would make out—what commission I would get out of the deal. He said that I would make more money than I ever made in my life or had ever seen

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before; that he would easily make a dollar on the turnover which would be divided equally among the three of us."

Bull gave evidence which Chief Justice Sifton, who tried the case, accepted as corroborative of Hayes' statement of the agreement, which was emphatically denied by defendant. There was nothing the Chief Justice said in the conduct or appearance of the witnesses which influenced his judgment, but simply the fact of there being two against one. He admits that the profit claimed was an extraordinary one but says that "most extraordinary bargains have been made the last three or four years in regard to real estate."

While, however, accepting Hayes' version of the agreement as correct under the assumption that there was corroboration, the Chief Justice reduces the claim from $41,000 to $9,666.66 because, as he says, "I feel, although the agreement was made in that way it was made affecting whatever lands were selected *at that time* and purchased by Mr. Day." Now as a fact no lands were selected at that time or purchased by Day. The purchase made by him was made months afterwards. The Chief Justice, moreover, reduces the number of acres on which Hayes was to receive his commission from 116,000, the quantity purchased by Day for the company he represented from the Canadian Pacific Railway Land Co., to one-quarter thereof, 29,000, that being the proportion of shares or interest Day had in the company by which the land was ultimately purchased.

I am quite unable to agree to this method of construing the suggested agreement, and I cannot think that the measure of plaintiff's right was to be deter-

mined by the proportion of shares in the company, large or small, that Day might have. If the agreement was accepted by the court as proved, Hayes was surely entitled to his $41,000 either against the company Day represented, if Hayes knew he was only an agent representing a company, or against Day personally if he did not know he was such agent and treated with him personally.

I am satisfied beyond doubt that Hayes knew Day was only an agent acting for others and so dealt with him and that his remedy if any was against the company and not against Day personally.

I cannot conceive it possible to spell out of the supposed agreement a personal liability on Day's part to pay a commission only on such proportion of the land selected as represented Day's interest in the shares or stock of the company purchaser, and in this way reduce the $41,000 claimed to $9,666.66. Such an agreement as that never, I am confident, entered into the minds of the parties.

Then again I agree with the court below which reversed the judgment of Chief Justice Sifton that according to the plaintiff's own version of the agreement his remuneration was dependent upon a "turn over" of the lands at an advanced price, and that it was this turn over profit "which was on his own shewing to be divided." It was not the average profit which might be subsequently made by separate resales of the lands in farms or plots possibly extending over years which plaintiff had in his mind, but the "turn over" or secret profit which Day could make as between him and the company he represented. No such secret profit was as a fact attempted to be made by Day; he handed over the lands he had purchased

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to the company at the price he bought them. If this view as to the meaning of the "turn over" is correct it is needless to say that the courts would not lend their aid to the enforcement of any such fraudulent bargain.

There are many other fact and incidents, but I forbear enlarging further than to remark that the Canadian Pacific Railway Land Co., with which Day was in treaty for the purchase of these lands, had agreed to sell him a certain number of specified township lands west of Wetaskiwin at a certain price, and that it was to view these specified townships and determine whether or not he would purchase them that Day and his associate Harstone, accompanied or guided by plaintiff, went to see the lands. No question of selecting could arise; the lands as specified had to be accepted or rejected as a whole.

No evidence was given by Hayes of his having brought these lands to defendant's notice or knowledge, or of any *selection* having been made by him with respect to them or any of them, or of his having advised for or against the purchase of any township or done anything more than as a land guide shew the intending purchaser the location of the specified townships for the purchase of which the latter had been negotiating and which he subsequently purchased.

Hayes' evidence on the point, quite irrespective of the emphatic denials on the part of Day, is to my mind conclusive. After making the general statement in his examination in chief that during the day when not in camp he was out "sizing up the country, drawing lines, etc.," he says in his cross-examination that on the visit to the lands he used to get out and find the township mounds and section posts and that

Day and Harstone "drove in around the lines," and "drove over the land" and that *"what he* (Hayes) *did in each case was to shew them where they were on on the township exactly and tell them where they were."*

He never commits himself to a single statement of advice on his part as to selection or rejection of any lands or as to having brought any lands to their notice or done any one single thing evidencing what would be known as selecting blocks of land or advising as to the general neighbourhood where they would be found. He was simply a guide to take them to see the particular townships Mr. Griffin, the Canadian Pacific Railway land agent at Winnipeg, had offered them for sale.

Summarizing my conclusions after a close examination of the evidence I am convinced that when the conversation between Hayes and Day took place at the hotel in Bull's presence, in which the alleged agreement was made, Hayes was informed that Day was there for the purpose of purchasing land as the agent and representative of the Empire Loan Co., and that his conversation with him was as such agent; that no such agreement as Hayes sets up was really made; that so far from corroborating Hayes, Bull, the third party present, says "he did not regard what was said as the finality of the whole transaction, but thought there would be something further as to a bargain and the reduction of the bargain to writing between them;" that if such agreement is accepted as having been made it must be held to have been so made either with the Land Co. Hayes knew Day then represented, or with Day personally and not as the agent; if the former, the Land Co., and not Day personally would be liable upon it, and if the latter, the "turn over"

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mentioned in it and of which Hayes and Bull were each to have had an equal share with Day related to a secret and corrupt overcharge which Day was supposed to make as against his principals in purchasing and turning over the lands to them, which corrupt bargain is disproved and which, of course, the courts would not lend their aid to enforce even if proved; that there is not any justification for cutting down the claim if accepted as genuine and recoverable, from $41,000 to $9,666.66; that the gist and basis of the whole action was the giving by the plaintiff to the defendant for the benefit of himself or the company he represented of the skill, experience and knowledge of the plaintiff in the selection by the defendant of a large quantity of land in what was then the North-West Territories, and as the Chief Justice says was made "affecting whatever lands were selected at that time and purchased by Day;" that as a fact no lands whatever were selected at that time and purchased by Day; that, months afterwards, Day having an offer to buy certain specified townships procured Hayes' services as a land guide to shew him where they were, and that no such skill, experience or knowledge ever were asked of or utilized by the defendant or given or offered by the plaintiff to the defendant, but that on the contrary such services as the plaintiff rendered the defendant were those simply of a land guide to identify and lead defendant to these township lands, for doing which he was amply paid at the time.

IDINGTON J.—We have presented to us several judicial ways of looking at this curious case, but upon

the whole that of the learned trial judge seems to me the most satisfactory.

In adopting this view I may add that I think the respondent never needed nor supposed a special Canadian Pacific Railway Co. introduction needed, to get a man merely to find and shew him the corner posts of the prairie townships, but that he did feel he needed the Canadian Pacific Railway Co. introduction to the appellant to acquire from him, thereby freed from restraint, all the information an old experienced agent of the Canadian Pacific Railway Co. for years engaged in selling lands, could give and that he thought, when he got his introduction and as a result engaged appellant, he was buying the peculiar skill and knowledge appellant's long experience must have given him and which qualified him to be of the greatest value as a *guide in relation to the selection of lands to be speculated in.*

When appraised on such a basis I am not prepared to say that, even in case the claim had been rested on a *quantum meruit,* as the majority of the court below admit it could have been, the basis of the price for such service, as suggested by the respondent and assented to by the appellant, and accepted by the learned trial judge, should be disturbed.

It is quite possible the surmise of Mr. Justice Stuart may be correct, but with respect I submit it is mere surmise and not proven.

As to the point of uncertainty I think the learned trial judge had the material before him to apply the principle of the maxim *certum est quod certum reddi potest.*

I would allow the appeal with costs.

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MACLENNAN and DUFF JJ. concurred with Idington J.

Appeal allowed with costs.

Solicitors for the appellant: *Short, Cross & Biggar.*

Solicitor for the respondent: *George B. Henwood.*