CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

GENARO COMO (DEFENDANT) ..... APPELLANT; 1913

AND *Oct. 14, 15.
*Nov. 10.

WILLIAM STEWART HERRON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Broker—Sale of land—Commission—General employment—Principal and agent—Introduction of purchaser—Interference by principal—Quantum meruit—Variation of written contract—Evidence—(Alta.) 6 Edw. VII., c. 27.

The Alberta statute of 1906, 6 Edw. VII., ch. 27, provides that no action shall lie to recover any commission for services in connection with the sale of land except upon a contract therefor in writing signed by the person sought to be charged or by his agent thereunto authorized in writing. C. by duly signed memorandum authorized H. to sell a section and a half of land, containing 960 acres, at the named price of $35 per acre, and to pay him a commission on the sale at the rate of 5%. In attempting to make a sale H. introduced T. to C. and, after they three had inspected the land together, T. made an offer to C. to purchase the section alone at $40 per acre provided certain

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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other property should be taken in exchange as part payment. This proposition was accepted by C. and he sold the section alone to T. on those terms.

Held, that the sale effected was an entirely new contract which was in no manner referable to the written agreement respecting commission on a sale for a price in money and, as there had been no written contract respecting remuneration to the broker in respect of the transaction which took place he could not recover compensation for the services rendered by him either by way of commission or as *quantum meruit*.

The judgment appealed from (9 D.L.R. 381; 3 West. W.R. 923) was reversed, Duff and Brodeur JJ. dissenting.

Per Duff J.—The broker should be held strictly to the terms of the written agreement which was drafted by himself; it did not constitute a general authority to sell the lands therein described; he could not, therefore, recover remuneration for his services by way of commission as therein provided. Nevertheless, as such use was made of the introduction of the purchaser that the broker was prevented effecting a sale according to the terms of his agreement, the conduct of the principal in that respect entitled the agent to recover compensation by way of *quantum meruit*.

Per Brodeur J.—The broker had, under the agreement, a general authority for the sale of the lands for which he found and introduced the purchaser: therefore, he should not be denied compensation for his services on account of the conduct of the owner in carrying out the sale on terms different from those to which he had been restricted by the agreement.

APPEAL from the judgment of the Supreme Court of Alberta(1), affirming the judgment of Simmons J., at the trial, by which the plaintiff's action was maintained with costs.

The case is stated in the head-note and the questions at issue on the appeal are mentioned in the judgments now reported.

Bennett K.C. for the appellant.

Hellmuth K.C. and *G. H. Ross K.C.* for the respondent.

(1) 9 D.L.R. 381; 3 West. W.R. 923.

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THE CHIEF JUSTICE. — The plaintiff alleges an agreement in writing whereby the defendant undertook to pay him five per cent. commission on the selling price of a piece of land described as section 3, and the west half of section 11, township 20, range 28, west of the Fourth Meridian, in the Province of Alberta. The agreement produced gives the defendant general authority to sell the property and earn his commission; but, taken as a whole and construed with reference to the surrounding circumstances, it constitutes a limited mandate to sell a certain area of land of a defined acreage at a fixed price per acre and on terms of payment stipulated for in advance by the owner in view of his then financial necessities. Any departure from all or any of these special terms would amount to the creation of a new contract which would require to be in writing.

The plaintiff, fully aware of the difficulties of his position, attempted to amend the statement of claim by setting up an alternative right to compensation for introducing a buyer to the appellant "in pursuance of the said agreement." It is impossible for me to understand how it can be said that the exchange on which the respondent seeks to recover his commission can be construed to have been made "in pursuance of the agreement" or can in any way be referable thereto. After Twohey, the intending purchaser, visited the ranch with the plaintiff, Herron, and decided not to buy it, he made a direct offer to Como, the defendant, to acquire in exchange for another property a portion of the farm at a valuation per acre different from that stated in the listing contract. That offer for an object and consideration different from those covered by the contract declared upon was accepted by the defendant

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the next day in the absence of the plaintiff. Here is the way the respondent in his evidence describes what happened.

Q. Now, after going over the ranch that day, what did you do?

A. Mr. Twohey asked Mr. Como if he would sell the section without the half section and Mr. Como said, "Yes." Mr. Twohey said: "What price would you put on the section itself?" and Mr. Como replied: "$40 an acre."

Q. After you had this discussion you returned to Calgary?

A. Yes, and Mr. Como said he would come to Calgary on the following Monday morning.

Q. And did he come to Calgary on the following Monday morning?

A. Yes, he did.

Q. Did you see him?

A. He came to my house and I hitched up my rig and shewed him Mr. Wright's property and Mr. Twohey's property.

Q. What property?

A. Mr. Wright's property that I had been talking to him about before, and Mr. Twohey's property in Mount Royal.

Q. Well, then, what did you do next?

A. He looked through the house and seemed quite pleased with it. Mrs. Twohey took him through every room up stairs and downstairs and down to the basement and everywhere. Then he came back and Mr. Twohey and myself and him talked about the deal and the deal was finally closed up on the 28th of May.

Q. How do you know that?

A. It was about two or three o'clock in the afternoon I was called out to my ranch here on the telephone and had a sick mare and I got a veterinary surgeon and went out. Then, as soon as I came back, I suppose about four o'clock in the afternoon, I met Mr. Twohey and he told me.

Q. Did you see Mr. Como at all?

A. Yes, that evening.

Q. Did you have any conversation with him?

A. They both told me they had closed the deal.

This is entirely a new contract, as I have said before, which is not in any way referable to the one declared upon and cannot be enforced unless evidenced by a document in writing, and there is no such evidence forthcoming. See section 1, chapter 27, Statutes of Alberta, 1906.

In my opinion the appeal should be allowed with costs.

IDINGTON J.—The Legislature of Alberta in 1906, enacted as follows:—

1. No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land, tenements or hereditaments, or any interest therein unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing.

The appellant signed a contract with respondent pursuant thereto of which the material part is as follows:—

In the event of your selling the property described on the opposite side of this card, I agree to pay W. S. Herron a commission of 5%, and in consideration of your advertising and pushing same, I agree to list exclusively with you for a period of a month.

The land described consisted of a section and a half.

The appellant exchanged one section thereof with a third person (who was, I assume, introduced by respondent) for some equity in land in Calgary. Half a section remained undisposed of.

I cannot conceive how, in face of the statute, the respondent can found, on such facts, an action on this contract for commission only accruing to him, as the express terms of the contract specify, on a sale of the whole land.

The statute substantially adopts the language used in the Statute of Frauds, which it has been held time and again as the authorities collected in Leake on Contracts (4 ed.), pages 565 to 567 shew, do not permit any verbal variation or waiver of terms the Act requires to be in writing, as foundation for an action at law thereupon.

The appeal should be allowed with costs.

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Duff J.

DUFF J. (dissenting).—I think this appeal should be dismissed with costs. My view of the case will be best understood after a statement of the material facts. The appellant was the owner of two parcels of land (a section and an adjoining half-section) near Calgary which he desired to sell; and in May, 1912, he employed the respondent as agent to dispose of this property and signed what is called a listing agreement in the following terms:—

> In the event of your selling the property described on the opposite side of this card, I agree to pay W. S. Herron a commission of 5%, and in consideration of your advertising and pushing same, I agree to list exclusively with you for a period of a month.
>
> Signature of owner: CAPT. G. COMO.
> Address: High River.

On the back of this document there appeared a description of both the section and half-section in question and certain terms of sale. Shortly after this document was signed the respondent introduced to the appellant, a Mr. Twohey, who was the owner of some property in Calgary which he desired to exchange for farm property. Twohey in company with the respondent visited the appellant's property, where the appellant resided, and inspected it. Finding that the quality of the soil of the half-section was not to his liking he asked the appellant if he was ready to sell the section alone, and the appellant immediately informed him that he would sell it at the price of $40 an acre.

After some further negotiations an agreement was entered into between the appellant and Twohey by which Twohey's property was to be exchanged for the appellant's, the former being valued at the price of $15,000 and appellant being allowed for his property $40 an acre. The effect of this transaction was that

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it became practically impossible to sell the half-section. That was admitted by the appellant at the trial; was, indeed, put forward by him as one of the grounds on which he justified his refusal to pay the respondent his commission. In his statement of claim the respondent demanded commission under the listing agreement at the rate of 5% upon a purchase price for the section exchanged calculated at $40 an acre. At the trial an application was made upon notice for leave to amend the statement of claim by adding a statement of the facts already referred to, an allegation that the appellant had accepted the plaintiff's services and a claim to be remunerated for services as upon a *quantum meruit*. The application to amend was opposed on the ground that chapter 27 of the Alberta statutes of 1906 was a bar to any claim based upon the allegation in the amendment and the appellant offered, in the alternative, an amendment of his defence, in the event of the respondent's amendment being allowed, by which, among other things, he denied that he had accepted the respondent's services. The learned trial judge reserved his decision upon the application until, as he said, he should "see what the evidence disclosed." There was a good deal of discussion during the course of the trial touching the admissibility of evidence under the claim of *quantum meruit,* but the learned judge appears to have admitted the evidence as if the amendment had been made. We were informed on the hearing of the appeal that eventually the learned trial judge refused to allow the amendment, presumably on the ground taken by the appellant that the Alberta statute above referred to would be a bar to a recovery on the basis of the allegations the respondent proposed to add

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to his claim. The learned trial judge held the respondent entitled to recovery on the ground that the employment under the listing agreement above mentioned was a "general employment" in the sense in which Lord Watson used that phrase in *Toulmin* v. *Millar*(1); in other words, that the agreement on its true construction provides for the payment of commission to the respondent upon any sale or other disposition of any part of the lands referred to, to a person introduced by the respondent. On the whole I am inclined to think that this construction of the agreement cannot be maintained. It is not the most natural reading of it; and one must not leave out of consideration the fact that the agreement was drawn up by an agent whose business was that of land-selling, and who was accustomed to framing and entering into such contracts. I think that in the circumstances, the agent must be held to the *strictissimum jus* so far as concerns the construction of the words employed by him.

But there is another ground upon which I think the respondent was entitled to recover. There can be no question that when an owner has entered into a contract of this description (in which the agent has contracted expressly to use his best efforts for the sale of the property in consideration of receiving a commission upon introducing the purchaser) the owner undertakes an obligation not to interfere with and frustrate the agent's efforts. If the agent introduces a purchaser who is prepared to enter into negotiations for the purchase of the property, the owner would be acting in contravention of the obligations of his contract if he were to take advantage of the agent's ser-

(1) 58 L.T. 96.

vices to enter into some arrangement with the person introduced, whereby it should become impossible for the agent to earn his commission under the terms of his contract of employment. In this case the owner did take advantage of the agent's services by entering into a contract with the person introduced, the result of which was that the term of the contract requiring the sale of the whole property as a condition of the respondent's right to commission became impossible of performance — impossible, that is to say, in a business sense because impracticable. *Dahl* v. *Nelson, Donkin & Co.*(1): The principle applies which was laid down by Willes J., in *Inchbald* v. *Western Neilgherry Coffee, etc., Co.*(2), and quoted with approval by the Judicial Committee of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*(3), at page 626:—

> I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it.

In such a case the agent is clearly entitled to recover compensation for his services. The only point to be considered in this connection is whether there is anything in the Alberta statute already referred to barring such recovery. It seems to me to be clear that there is not. The foundation of the agent's right to recover in such a case is the contract of employment. The principal's conduct preventing a performance of the condition prescribed by the contract has the effect in law of precluding him from insisting upon the performance of that condition, and entitles the agent

(1) 6 App. Cas. 38. (2) (1864) 17 C.B. (N.S.) 733.
(3) [1910] A.C. 614.

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to recover compensation for his services as services rendered at the request of the principal; the request being evidenced by the written contract of employment. See precedent, Bullen & Leake, "Precedents of Pleadings" (6 ed.), page 328. The only objection to this view that I can think of is that the arrangement with Twohey was assented to by the respondent and consequently the appellant's conduct in entering into it cannot be said to have been wrongful as against him. The answer to that is this: *Primâ facie* the principal's conduct gives the agent a right to recover against him remuneration for his services. If the principal relies upon the conduct of the agent as an assent justifying his own conduct, then since this assent is to be implied from the conduct of the parties, he must accept all the implications to which this conduct gives rise. It would be ridiculous to suggest that the agent by his conduct must be taken to have assented to the appellant entering into the arrangement with Twohey except upon the terms that he should be paid for his services in introducing Twohey. Then the appellant cannot blow hot and cold, and he cannot be permitted to take advantage of the respondent's implied assent as an answer to the respondent's action without observing the conditions also implied. The appellant cannot, therefore, set up the respondent's conduct in answer to the respondent's claim to recover for his services on a *quantum meruit*.

As to the amount the respondent is entitled to recover, I think if the appellant desires it, there should be a reference to ascertain the amount, the cost of the appeal to be paid by the appellant, the costs of the reference and further directions to be reserved.

ANGLIN J.—This action is brought upon a written

contract by which the defendant agreed to pay a commission of 5% for a sale for a money price, of which a substantial part should be payable in cash, of a defined property. The transaction in respect of which commission is claimed was a disposal of part only of the property mentioned in the written contract not for a money price, but in exchange for another property. It was not a performance of the terms on which, under the written contract, the commission was to be payable. In order to succeed the plaintiff must prove a substantial variation in the terms of the written contract on which he sues. He must shew the substitution of another consideration for that upon which the defendant undertook in writing to pay the commission. That is in effect setting up a new contract. But if it should be regarded as a case of variation, that variation is in a most material element and, if made, was in parol. Under the Alberta statute, 6 Edw. VII., ch. 27, an agent, in my opinion, cannot recover upon a contract so varied.

The action is not framed and was not tried either as an action for damages for breach of the provision in the written contract for an exclusive listing, or as an action to recover upon a *quantum meruit* on the basis of an implied contract to remunerate the plaintiff for his services in consideration of his relinquishing his rights, if any, under the written contract, and in my opinion if any such cause of action exists it should not now be dealt with here.

The appeal should be allowed with costs in this court and in the full court of Alberta and the action should be dismissed with costs.

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BRODEUR J. (dissenting).—I have come to the conclusion that this appeal should be dismissed. The law in Alberta states that:—

> No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land, tenements or hereditaments, or any interest therein unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing.

That is a new provision in the law and a very wise one if we may judge by the great number of cases that come before us concerning commissions claimed by real estate agents. The contract of sale of lands could not give rise to any right of action, except when it is in writing. Now the provisions of the statute are extended to cover the relations between principal and agent.

In this case the memorandum proves conclusively that the respondent had authority to act as agent of the appellant. The respondent began to perform his duties as such agent and found an intending purchaser. He could not by himself conclude the contract of sale, because in the instructions which he had received from his employer, some conditions of the purchase price had to be determined and agreed upon by him. But the real estate agent in this case found a purchaser whom he put in relation with his principal. The vendor and the intending purchaser carried out negotiations, and as a result a sale was made of the lot in question. Now, if the vendor has found it advisable to make a sale on conditions different from those he had mentioned to the agent, he is, all the same, responsible for the services rendered to him by his agent. The services rendered by the agent give rise to a right of

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action on his part. His contract of agency is established and proved and it certainly entitles him to claim for the services rendered. Lord Watson in the case of *Toulmin v. Millar*(1), at page 97, discusses in the following terms the effect of a contract similar to the one in this case:—

> When a proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations.

For these reasons I would be of opinion that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Lougheed, Bennett, McLaws & Co.*

Solicitors for the respondent: *Short, Ross, Selwood & Shaw.*

(1) (1887) 58 L.T. 96.