

HENRY HOWARD (DEFENDANT) APPELLANT;

1913

AND

*Nov. 3, 4.

*Nov. 10.

THOMAS B. GEORGE (PLAINTIFF) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Sale of lands—Agreement to pay commission—Named price—Introduction by agent—General retainer—Sale at lower price—Right of action—Alberta statute, 6 Edw. VII., c. 27, s. 1.

The Alberta statute, 6 Edw. VII. ch. 27, respecting sales of real estate, denies recovery by action, for services rendered in connection with such sales by way of commission or otherwise, unless upon a memorandum in writing signed by or on behalf of the person to be charged. In a letter to the plaintiff, signed by the defendant, the latter agreed to sell a hotel for \$40,000 and added, "I will pay you 5% commission on purchase price." Defendant subsequently, sold the property to a purchaser introduced by the plaintiff for \$34,000.

Held, affirming the judgment appealed from (10 D.L.R. 498; 4 West. W.R. 83), that "purchase price," as used in the letter, had reference to any price for which a sale might be made, and that, construed in connection with the conduct of the parties, the memorandum was sufficient, under the statute, to entitle the plaintiff to recover a commission at the rate mentioned for his services in regard to the sale made at the reduced price to the purchaser introduced by him. *Toulmin v. Millar* (58 L.T. 96), and *Burchell v. Gowrie and Blockhouse Collieries* ([1910] A.C. 614), referred to.

APPPEAL from the judgment of the Supreme Court of Alberta(1), affirming the judgment of Beck J., at the trial(2), maintaining the plaintiff's action with costs.

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

(1) 10 D.L.R. 498; 4 West. W.R. 83.

(2) 4 D.L.R. 257; 2 West. W.R. 443.

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The circumstances of the case are sufficiently set out in the head-note.

W. B. A. Ritchie K.C. and *J. Leslie Jennison K.C.*
 for the appellant.

Matthew Wilson K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion in this case that, on the facts in evidence, the trial judge was fully justified in the conclusion that the purchaser was found by George and that the appellants availed themselves of his services in that regard and also that the contract as to the commission of 5% subsisted up to the time the bargain was finally closed.

Under the terms of the agreement the respondent was entitled to his commission on the purchase price which the vendor ultimately agreed to accept. The sum of \$40,000 is mentioned, as Lord Watson says in the case of *Toulmin v. Millar* (1), merely as a basis of negotiations.

The appeal should be dismissed with costs.

DAVIES J.—The language of the agreement is somewhat ambiguous but, in view of the conduct of the parties under it, I think the construction put upon the words “purchase price” as meaning the actual price or sum at which the property was sold, one which can fairly be accepted as that within the contemplation of both parties when the memorandum was signed.

IDINGTON J.—I am of the opinion that the document signed by the appellant and relied upon by the

respondent was not a mere option to him to buy or sell at only \$40,000, but a general retainer enlisting his services to sell the property in question for either said sum or such other sum as appellant accepted.

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—

It is capable of such construction and of being read as the court of appeal has read it.

Such doubt as we might possibly have from its ambiguity has been settled by the conduct of the parties.

The appeal should be dismissed with costs.

DUFF J.—Interpreting the memorandum in question by the light of the subsequent conduct of the parties (which one is entitled to do, because it is impossible to say that the memorandum is capable of only one necessarily exclusive construction) I think the respondent's agency was a general agency within the meaning of Lord Watson's language in *Toulmin v. Millar* (1), and that he is, consequently, entitled to recover. See *Burchell v. Gowrie and Blockhouse Collieries* (2), at page 626.

ANGLIN J.—The trial judge expressly accepted the evidence of the plaintiff. On his evidence he found that the plaintiff had introduced the purchaser and brought about the sale. Those findings of fact are sufficiently supported.

On the interpretation of the contract I agree with the courts of Alberta.

The plaintiff earned his commission and he had a

(1) 58 L.T. 96.

(2) [1910] A.C. 614.

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 —
 Anglin J.
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sufficient memorandum of his contract to meet the requirements of the Alberta statute.

The appeal, in my opinion, fails.

BRODEUR J.—This is an appeal from a judgment of the Supreme Court of Alberta confirming unanimously the judgment of the trial judge.

The version of the facts, as given by the plaintiff, respondent, having been accepted by the two courts below, it would be contrary to the jurisprudence of this court to find differently.

The appellant had given the respondent a letter that he would sell his property for \$40,000, and had undertaken in that letter to pay him “5% commission on purchase price.”

The respondent found a purchaser, put him in communication with the appellant, and the result was that the property was sold for \$34,000. He is now suing for his commission on that sale. The appellant contends that he was bound to the payment of a commission on a sale of \$40,000 and that, as no sale at that price was made he owes nothing.

It is to be noted that the agreement provided for a commission not on the \$40,000, but on the purchase price. The introduction of a purchaser who was willing to enter into negotiations and who closed later with the appellant entitled the plaintiff to recover. The obligation of the plaintiff was not to find a purchaser at a certain figure; but he was entitled to a commission on the purchase price and this case is within the words of Lord Watson, in the House of Lords, in the case of *Toulmin v. Millar*(1), where he says:—

(1) 58 L.T. 96.

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 those negotiations.

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The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *L. H. Putnam.*

Solicitor for the respondent: *H. C. Moore.*
