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J. E. CHARLEBOIS (DEFENDANT) APPELLANT;

*May 18, 19.
*May 26.

AND

L. S. BARIL (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC*Contract by correspondence—Offer—Acceptance—Delivery of offer by messenger—Mailing of acceptance of communication to party—Presumption.*

The defendant, on the 14th of August, 1924, made an offer in writing to the plaintiff to purchase a certain property and handed the document to one B. representing the plaintiff for delivery to the latter. On the 25th of August, the plaintiff deposes he wrote a letter of acceptance which, duly addressed to the defendant, he gave to his son to post and it was mailed the same day. The defendant denied receipt of this letter. On the 6th of September, the plaintiff received from the defendant a letter withdrawing the offer of the 14th of August. The action is to compel the defendant to carry out the transaction.

Held that the decision of this court in *Magann v. Auger* (31 Can. S.C.R. 186), holding that the mailing of the plaintiff's letter of acceptance to the defendant constituted communication of it to him, has no application to a case where the offer is communicated, as in the present case, not by mail, but by other means. The *Magann Case* was one of contract by correspondence; and, the offer having been sent by mail, that was held to constitute a nomination by the sender of the post office as his agent to receive the acceptance for carriage to him. To make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended or to his authorized agent.

Judgment of the Court of King's Bench, (Q.R. 43 K.B. 295) reversed.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1), varying the judgment of the Supreme Court at Montreal, de Lorimier J., and maintaining the respondent's action.

The material facts of the case are stated in the judgment now reported.

L. E. Beaubien K.C. and *D. L. Desbois K.C.* for the appellant.

E. Lafleur K.C. and *D. Baril* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The defendant, on the 14th of August, 1924, made an offer in writing to the plaintiff to purchase a

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

certain property. He handed this document to one T. E. Baril, a representative of the plaintiff, for delivery to the latter. On the 25th of August, the plaintiff deposes, he wrote a letter of acceptance which, duly addressed to the defendant, he gave to his son to post and which was mailed the same day. The defendant denies receipt of this letter. On the 6th of September the plaintiff received from the defendant, mailed the previous day, a letter withdrawing the offer of the 14th of August. Evidence was given designed to raise a presumption of actual receipt by the defendant of the plaintiff's acceptance in due course of mail, i.e., on the 26th of August. The present action is to compel the defendant purchaser to carry out the transaction.

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Other questions arise as to undisclosed encumbrances affecting the property and the sufficiency and terms of the deed tendered to the purchaser for acceptance and as to the power of the court to amend the deed so tendered to make it conform to the plaintiff's offer. But these it is not now necessary further to consider.

The courts below, while they undoubtedly cast serious doubt on the defendant's denial of the receipt of the plaintiff's acceptance, refrained from making a finding on this question of fact, no doubt deeming it unnecessary because they regarded the judgment of this court in *Magann v. Auger* (1) as determining that the mailing of the plaintiff's letter of acceptance to the defendant constituted communication of it to him.

With great respect this is an erroneous view of the scope and effect of the decision of this court. That case was one of contract by correspondence, i.e., the offer was sent by mail and that was held to constitute a nomination by the sender of the post office as his agent to receive the acceptance for carriage to him. The civil law of Quebec was held to be the same in this regard as the law of England (p. 193). But this decision has no application to a case where the offer is communicated, as here, not by mail, but by another means. To make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended, or to his authorized agent.

(1) 31 Can. S.C.R. 186.

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Here there was nothing to constitute the post office the defendant's agent and a finding of actual receipt by him of the plaintiff's acceptance was, therefore, essential. The burden of procuring such a finding was upon the plaintiff. Without it he cannot succeed.

We are not in a position to pass upon this question of fact. Its solution depends upon the credibility of the defendant and that, in turn, largely upon the view taken of his demeanour as a witness—thus presenting a question eminently for the tribunal which sees and hears him give his testimony.

But, under all the circumstances, we think that the plaintiff should, as a matter of indulgence, be given another opportunity to obtain, if he can, a finding that his letter was actually received by the defendant. Upon payment to the defendant of his costs of the appeals to the Court of King's Bench and to this court within one month, the plaintiff may have a new trial, the costs of the former trial to be in the discretion of the trial judge. In default of such payment, the appeal will be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *D. L. Desbois.*

Solicitors for the respondent: *Baril & Tousignant.*
