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*May 25, 26.
*June 17.

MONTREAL AGENCIES LIMITED (PLAINTIFF) ..... APPELLANT;

AND

L. E. KIMPTON (DEFENDANT IN SUB-WARRANTY) ..... RESPONDENT;

AND

THE BANK OF NOVA SCOTIA (PRINCIPAL DEFENDANT AND PLAINTIFF IN WARRANTY);

AND

F. D. WATERMAN AND ANOTHER (DEFENDANTS IN WARRANTY AND PLAINTIFFS IN SUB-WARRANTY).

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Principal and agent—Real estate—Sale—Commission—Agent the efficient cause of the sale effected—Practice and procedure—Principal action and actions in warranty and sub-warranty—Judgment maintaining them—Appeal by defendant in sub-warranty—Res judicata—Appellate court reversing judgment—Appeal to this court—Plaintiffs in warranty and sub-warranty not parties to either appeals—Right of the Supreme Court of Canada to restore judgment of trial judge—Supreme Court Act, s. 51—Art. 1084 C.C.

A real estate agent who brings his principal into relation with the actual purchaser is the effective cause of the sale, although the principal sells "behind the back of the agent and unknown to him" (*Burchell*

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

v. *Gowrie* [1910] A.C. 614); and he is entitled to his commission, although the price paid by the purchaser is less than the sum at first demanded by the principal.

Even when actions in simple warranty are joined to the principal action for purposes of hearing and of judgment, they remain distinct from it and are not merged by the joinder; if the defendant in sub-warranty, who intervened in the principal action, alone appeals from a judgment maintaining the principal action and the actions in warranty, confining his appeal to his intervention, this judgment becomes *res judicata* as to the principal defendant and the plaintiffs in warranty and sub-warranty, and the judgment of the appellate court, reversing it as to the parties who did not appeal, is *ultra vires* and quasi non-existent as to them.

Upon an appeal to this court between the same parties who were before the appellate court, although the principal defendant and the plaintiffs in warranty and in sub-warranty were not made parties to it, the whole judgment appealed from is open for discussion and disposal; and this court can deal with that decision as irregular and *ultra vires* and give the judgment which should have been given by the appellate court, so as to leave its full effect to the judgment of the trial court, thus reversed illegally and without right. (*Supreme Court Act*, s. 51.)

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, at Montreal, Lane J. and dismissing the principal action and the action in warranty and sub-warranty.

The material facts of the case and the questions at issue are stated in the judgment now reported.

G. H. Montgomery K.C. and *E. Cate* for the appellant.

A. Wainwright K.C. for the respondent.

N. A. Belcourt K.C. for the Bank of Nova Scotia.

The judgment of the court was delivered by

RINFRET J.—The Bank of Nova Scotia, being the owner of a certain immovable property on St. James street, Montreal, agreed, if the sale of that property were effected by the appellant The Montreal Agencies Limited, to pay it a commission of 2½ per cent. on the sale price. The bank fixed that price at $300,000.

The respondent, L. E. Kimpton, approached the Montreal Agencies and intimated that he had a prospective purchaser. The company promised that, in the event of his being able to bring this sale to a successful issue, it would divide its commission of 2½ per cent. equally with him. Whereupon Kimpton disclosed the intended pur-

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chaser as being The L. E. Waterman Company Limited, and submitted the latter's offer to the Montreal Agencies, which in turn placed it before the bank. The offer however was only for $250,000, partly cash and partly in deferred payments and, for the moment at least, did not prove acceptable to the bank. The parties went on negotiating through the Montreal Agencies, to which the bank wrote, on the 25th September, 1916:—

> In any event, if you will keep us advised of how the matter goes, we will do everything possible to strengthen your hands.

On October 4, Kimpton notified the Montreal Agencies that the Waterman company had withdrawn its offer "on account of it not being acceptable to you" and that the negotiations in connection with the same should be considered cancelled.

This was not, in fact, true. Lane J., who tried the case, found—and we agree with him—that Kimpton wrote this letter to the Agencies company in bad faith, for the purpose of carrying the deal through on his own account and of securing for himself the whole instead of one-half only of the commission. He sought, at the trial, to explain that Kissock, the assistant manager of the Montreal Agencies, had deceived him by falsely telling him that his company held an exclusive right of sale. This was denied by Kissock; no such reason was assigned by Kimpton in his letter of the 4th October and the trial judge disbelieved his story.

In reality, the offer of the Waterman company to the bank was never withdrawn. The very next day after his notification to the Montreal Agencies, Kimpton wrote to the bank about the matter. Although without the participation of the Montreal Agencies, the negotiations continued and their outcome was an agreement of sale between the bank and the Waterman company signed on the 7th March, 1917, for $250,000 cash.

On this state of facts, Lane J. held the Montreal Agencies entitled to its commission from the bank and we think rightly so. No doubt the Waterman company was originally Kimpton's client. But Kimpton agreed that it should be introduced to the bank by the Montreal Agencies. That he, Kimpton, would "bring this sale to a successful issue" and that, in consideration for same, he would expect his remuneration not from the bank but from the Mont-

real Agencies, was precisely the bargain he made on the 19th May, 1916. So far as the bank was concerned, the appellant found the purchaser and brought the parties together as buyer and seller. This was done not only with the full consent of Kimpton, but as part of the agreement which he had made with the Montreal Agencies.

Against the bank, therefore, that company is entitled to the commission. The agent who brings his principal into relation with the actual purchaser is the effective cause of the sale, although the principal sells "behind the back of the agent and unknown to him." (*Burchell* v. *Gowrie* (1). The commission is due even if the price paid be less than the sum at first demanded by the principal, especially if the price finally accepted by him is that which he had originally refused, when the buyer was introduced by the agent. It would not lie within the power of the principal, by his initial refusal, thus to prevent the agent from receiving his commission (Art. 1084 C.C.).

In the deed of sale, the Waterman company assumed payment of all commissions. Both the company and F. D. Waterman personally undertook to indemnify the bank against any such charges, if asserted. The Waterman company obtained from Kimpton a guarantee against the payment of any remuneration other than to him.

Upon learning of the sale, the Montreal Agencies claimed its commission and, the bank having refused to pay it, the present action was brought. The bank called Waterman and the Waterman company in warranty and they, in turn, called Kimpton in sub-warranty. No plea was fyled by the bank, sole defendant in the principal action; nor did Waterman and the Waterman company contest the action in warranty. But Kimpton intervened under Art. 186 of the Code of Civil Procedure, which reads as follows:—

> 186.—In cases of simple or personal warranty, the warrantor cannot take up the defence of the defendant, but can merely intervene and contest the principal demand, if he thinks proper.

The judgment of the Superior Court dismissed the intervention and maintained the principal action together with the actions in warranty and in sub-warranty.

Kimpton alone appealed from this judgment and only upon his intervention. The consequence was that the

(1) [1910] A.C. 614 at p. 625.

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judgment declaring the action well founded as against the bank became absolute. So did the decision on the actions in warranty and in sub-warranty. This situation is well explained by Glasson (Précis de Procédure Civile, 2e éd., vol. I, no. 875):—

* * * de même encore l'acquiescement d'une partie au jugement n'empêche pas l'intervenant d'interjeter appel de son chef, et ainsi il pourra arriver que le jugement acquière chose jugée vis-à-vis de l'une des parties et soit réformé sur l'appel de l'intervenant ou réciproquement.

Nevertheless, by a majority of three to two, the Court of King's Bench reversed the judgment of the Superior Court *in toto*. It dismissed the principal action against the principal defendant (who had acquiesced) with costs against the plaintiff and also the actions in warranty and in sub-warranty with costs of both actions against Waterman and the Waterman Company. This the Court of King's Bench clearly could not do. There was no appeal on those issues. The judgment of the Superior Court, to that extent, had become *res judicata*. Moreover, the bank, Waterman, and the Waterman company were not parties to the appeal and were not before the court. Even when they are joined to the principal action for purposes of hearing and of judgment, the actions in simple warranty remain distinct from it and are not merged by the joinder.

This doctrine is expounded with great lucidity by Japiot (Traité de Procédure Civile, p. 631, no. 1024):—

Supposons qu'en première instance figuraient plusieurs demandeurs ou plusieurs défendeurs, originaires ou intervenants. La question se pose alors de savoir si l'appel, interjeté par l'une des parties qui ont succombé, va produire son effet et permettre de réformer le jugement vis-à-vis de la partie seulement qui l'a interjeté, ou, en outre, vis-à-vis des autres parties qui sont dans la même situation qu'elle.

Par exemple, à l'égard de quelques-uns d'entre eux, le délai d'appel est expiré; ils ne peuvent plus personnellement interjeter appel; mais le délai court encore à l'égard de l'un d'eux. Celui-ci interjette appel en temps utile. Les autres demandeurs ou défendeurs vont-ils être relevés de la déchéance par eux encourue, en ce sens qu'ils pourront figurer dans l'instance d'appel, y conclure et demander la réformation du jugement dans leur intérêt?

Le sens commun indique que celui-là seul sauvegarde son droit et le met à l'abri des causes d'anéantissement, qui l'exerce avec les formalités prescrites et dans les délais impartis par la loi: *Jura vigilantibus subveniunt, non dormientibus*. Chacun des plaideurs, en principe, ne sauvegarde par ses actes que son propre intérêt. En règle générale,

l'appel ne profite qu'à l'auteur de l'appel; le jugement ne peut être réformé qu'à son profit. Voilà une première règle.

The author then points out that there are exceptions to this rule in cases where the obligation is joint and several or indivisible. The exception does not apply here.

We also find the same doctrine in Dalloz, Répertoire Pratique, verbo *Appel en matière civile,* no. 322:—

L'application des règles qui précèdent a donné lieu à certaines difficultés dans le cas où l'instance s'est trouvée compliquée par une demande en *garantie.* Il y a lieu, pour les résoudre, de distinguer suivant que le demandeur originaire a obtenu gain de cause ou a perdu son procès contre le garanti.

Si le demandeur originaire a obtenu gain de cause contre le *garanti,* il est certain que celui-ci peut et doit appeler contre lui. Il en est ainsi, tant en matière de garantie simple qu'en matière de garantie formelle, et, dans ce dernier cas, alors même que le garanti se serait fait mettre hors de cause, en vertu de l'art. 182 C. proc., car, en pareil cas, bien que n'étant pas resté dans l'instance, il a intérêt à appeler, puisque la condamnation doit s'exécuter contre lui (Chauveau et Carré, t. 4, q. 1581 *quater;* Boitard, Colmet-Daage et Glasson, t. 2, n° 672; Garsonnet, t, 5, n° 694).

The Court of King's Bench also maintained the intervention, which was the only matter properly involved in the appeal.

We have already indicated that, in our opinion, the intervenant was wrong and, on that point, the judgment of the Superior Court ought to have been confirmed. The difficulty lies in the fact that the Montreal Agencies alone appealed to this court and its notice of appeal was only against Kimpton. At first, we had some doubt whether, under these circumstances, without having the bank and the other parties before us as respondents, our view being in favour of restoring the judgment of the Superior Court on the intervention, we could deal with that part of the judgment of the Court of King's Bench which dismissed the principal action against the defendant as well as the action in warranty (save for costs) and the action in subwarranty.

We have come to the conclusion that we can.

The judgment of the Court of King's Bench was rendered upon an appeal exclusively between Kimpton and the Montreal Agencies. This judgment is *ultra vires,* so far as the bank, Waterman and the Waterman company are concerned. It is therefore quasi non-existent and cannot

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affect them, as they were not parties to the appeal. This judgment can neither avail against them, nor can they claim any right under it. We have before us the same parties who were before the Court of King's Bench and as to whom alone the appeal was heard and could be decided. We think therefore the whole judgment open for discussion and disposal by us. By force of section 51 of the *Supreme Court Act,* this court may

> give the judgment and award the process or other proceeding which the court whose decision is appealed against should have given or awarded.

The decision appealed against was the outcome of an appeal to the Court of King's Bench, in which the Montreal Agencies Limited and Kimpton alone participated. Upon the appeal to this court between the same parties, we can deal with that decision as irregular and *ultra vires* and give the judgment which should have been given by the Court of King's Bench, so as to leave its full effect to the judgment of the Superior Court, thus reversed illegally and without right.

The judgment of the Court of King's Bench will therefore be set aside with costs against Kimpton and the judgment of the Superior Court will be restored.

The result is that the Montreal Agencies Limited is declared entitled to the full amount of the commission it claimed from the bank and the actions in warranty and in sub-warranty are maintained. The appellant may yet have to account to Kimpton for half of the commission. This question does not arise now and will be left for decision upon an issue properly raised between the Montreal Agencies and Kimpton. The issue here was, and could only be, whether the bank owed that commission to Montreal Agencies.

As regards the position of the warrantors, had the intervention been successful in this court, while the judgment of the Superior Court had been allowed to become *res judicata* on the actions in warranty and in sub-warranty, we refer the parties to *Archibald* v. *Delisle* (1), where it was held that actions to enforce simple or personal warranties issued before judgment upon the principal action,

(1) 25 Can. S.C.R., 1.

are brought at the risk of the warrantees, and fall if the principal action be subsequently dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Wainwright, Elder & McDougall.*

Solicitors for the Bank of Nova Scotia: *Atwater, Bond & Beauregard.*