JAMES STRATTON (DEFENDANT) .... APPELLANT;

AND

THE REVEREND HERCULE LEANDRE VACHON AND RUSSELL WILSON, EXECUTORS OF JAMES FLANAGAN, DECEASED (PLAINTIFFS) ..... RESPONDENTS.

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*March 3.
*April 3.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

*Broker—Principal and agent—Commission on sale of land—Introduction of purchaser—Efficient cause of sale—Completion of contract by owner on altered terms.*

An agent, instructed to secure a purchaser for lands, introduced a prospective purchaser who associated himself with other persons, whose identity was unknown to the agent, to carry out the purchase of the property. The individual thus introduced and his associates subsequently carried on negotiations with the owner personally which resulted in the purchase, on altered terms, of the property in question, together with other lands, by his associates alone while he retired from the transaction. The owner refused to pay the agent any commission on the sale on the ground that he had not been the efficient cause of the sale which was finally made as above stated.

*Held*, reversing, in part, the judgment appealed from (3 Sask. L.R. 286), that as the steps taken by the agent had brought the owner into relation with the persons who finally became purchasers he was entitled to recover the customary commission upon the price at which the property in question had been sold. *Burchell* v. *Gowrie and Blockhouse Collieries* ([1910] A.C. 614) applied.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), affirming the judgment of New-

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

(1) 3 Sask. L.R. 286.

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lands J., at the trial, by which the plaintiffs' action was maintained with costs and the defendant's counterclaim was dismissed.

The action was brought by the late James Flanagan to recover from the defendant, appellant, the sum of $5,578.33, the amount of a promissory note and interest, and was continued, after his decease, in the names of the present respondents as the executors of his last will and testament. The defendant deposited funds in court to abide the decision of the cause and also counterclaimed for the sum of $6,250, with interest, being his claim for a broker's commission on the price of sale of certain lands belonging to the late James Flanagan, in the City of Saskatoon, Sask., in respect of which he alleged he had rendered services, as the agent of deceased, by means of which the purchasers had been secured. At the trial, Mr. Justice Newlands found that the deceased had agreed to pay a commission to the defendant on his obtaining a purchaser for the property; that defendant had offered and recommended the property to one Moore and shewn him what was known as the "Western Hotel" (a portion of the lands sold), and that, through Moore, negotiations had taken place which resulted in the owner selling the whole property, including the hotel property, to two persons named Millar and Robinson, who had on other occasions entered into real estate transactions with Moore, and with whom Moore had associated himself in order to effect the purchase of the property in question. Moore had retired from the transaction before the completion of the sale and the owner had dealt with the actual purchasers personally and closed with them on terms somewhat different from those which he had

mentioned to the defendant when instructing him to secure a purchaser. The learned trial judge, however, considered himself bound by the decision in *Beable* v. *Dickerson* (1), and dismissed the counterclaim, holding that Moore was not an agent. This judgment was affirmed by the judgment appealed from (2) Johnstone J. dissenting.

The questions raised on the present appeal are stated in the judgments now reported.

*The appellant* appeared in person.

*Ewart K.C.* for the respondents.

THE CHIEF JUSTICE.—There can be but little doubt as to the legal principles by which the rights and obligations of the parties to the agreement declared upon are to be ascertained. If the defendant, as he alleges, was an agent to find a purchaser for the property at a price to be fixed by the plaintiff when the purchaser came forward and that he did find a purchaser who did purchase, then the defendant would undoubtedly be entitled to his commission.

The admitted facts are that the plaintiff, an owner of real estate in the Town of Saskatoon, when about to leave that place to take up his residence elsewhere, instructed the defendant, a land agent, to sell his immovable property at a price to be fixed by the owner and that a sale was subsequently made. The trial judge found that the property would not have been sold if the defendant had not spoken to one Moore and upon his connection with the transaction as completed the result of this appeal largely depends.

(1) 1 Times L.R. 654.

(2) 3 Sask. L.R. 286.

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The instructions to find a purchaser were given to the defendant towards the end of December, 1906, and Flanagan, the plaintiff, left Saskatoon about the 1st of January, 1907. On the 17th of the same month, Moore, of Lloydminster, who had entered into negotiations with the defendant for the purchase of other properties, was induced by defendant to consider the purchase of the plaintiff's property, which they visited together, and of these negotiations the plaintiff was informed. He was asked for his price, which was submitted to Moore, the latter, in the meantime, having told the defendant that he would either buy the property, which he considered very desirable, or find a purchaser for it. The conditions as to the cash deposit required by plaintiff being more onerous than Moore could assume, he introduced the property to two of his friends at Lloydminster, Millar and Robinson, who agreed to go into the venture with him and it was determined between them that negotiations would be opened up with Flanagan with a view to purchase. The chief object was to obtain a reduction in the amount required as a cash deposit. Moore, however, again found it impossible because of his financial situation to go on with the negotiations, which were, however, prosecuted to a successful issue — the difficulty as to the deposit having been got rid of — by his associates Millar and Robinson.

Could there be any doubt on these facts that if the sale had been made in the first instance to Moore alone, or in the second instance to Moore and his associates, that Stratton would have been entitled to his commission on the ground that he had executed his mandate to find a purchaser? And subsequently what happened to affect Stratton's claim ? The dis-

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appearance of Moore as a purchaser after the purchase had been decided on could not affect any right then acquired by Stratton if some of the parties who had been introduced to the property through his medium completed the transaction as originally contemplated.

I quite agree with the trial judge that on all the facts the conclusion is that the sale would not have been made had Stratton not spoken to Moore in the first instance. But I go further, and hold that the relation of buyer and seller between Flanagan and Millar and Robinson was brought about by Stratton, and that he was the *causa causans* of the sale. The property was brought by Stratton to the attention of Moore, who was instrumental in inducing Millar and Robinson to consider it with a view to a purchase on joint account. The subsequent disappearance of Moore as a purchaser before the transaction was finally completed did not operate to destroy the right acquired by Stratton through his original introduction of the property to one of the three associates, two of whom completed alone the purchase begun with and through the man to whom it was introduced originally and who had undertaken then to buy it or find a purchaser for it.

I am of opinion, therefore, that Stratton is entitled to his commission on the sale of the hotel property and the appeal, to that extent, should be allowed with costs.

DAVIES J.—This appeal involved the question of the appellant's right to recover from the deceased Flanagan commission upon the sale of certain of the deceased's properties in Saskatoon.

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The trial judge found that Flanagan

did agree to give defendant (appellant) a commission on his obtaining a purchaser for said property who would purchase the same at a price and on terms agreeable to him.

The property to which I think the above finding was intended to apply was the "Western Hotel" property, and, at any rate, I am clearly of opinion that it can only be sustained, on the evidence, with respect to that property, and that it is right as to that property.

The question which the trial judge answered against appellant was "that he was not the direct cause of the sale." The learned judge was of the opinion that

to earn his commission he (the agent) must himself bring the purchaser and vendor together and he does not earn his commission if he does this through the medium of another party who is neither his agent nor the agent of the purchaser.

Under the inference he drew from the evidence on this point he dismissed plaintiff's claim.

The majority of the court of appeal upheld this judgment on the ground, as stated by Lamont J., that when Flanagan completed the sale there was no knowledge on Flanagan's part that the defendant had been in any way instrumental in securing Millar and Robinson as purchasers and that had he been aware that such was the case he might have protected himself as to the commission in fixing his prices, and that "the circumstances were not sufficient to put Flanagan on inquiry." The Chief Justice, as he says, "after very great hesitation" reached the same conclusion as Mr. Justice Lamont, while Johnstone J. dissented, holding that the real test to be applied in cases such as this was whether "the agent was the real efficient cause in bringing about the sale."

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In the case of *Burchell* v. *Gowrie and Blockhouse Collieries Limited,* the Judicial Committee of the Privy Council held(1), that as the appellant in that case had brought the company into relation with the actual purchaser he was entitled to recover, although the company had sold behind his back on terms which he had advised them not to accept.

Lord Atkinson, in delivering the judgment of the Board, at page 625, says:

> The answer to the second contention (that the acts of an agent cannot be held to be the efficient cause of a sale which he has in fact opposed) is, that if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser, the agent has done the most effective and, possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work, and behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale.

The *knowledge* on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay commission, but the fact whether the agent's acts have really been the effective cause of the sale, and if the agent's acts have brought a person or persons into relation with his principal as an intending purchaser, and the sale is effected, the agent has done what he contracted to do and is entitled to be paid.

Now, in the case at bar there was a contract as found by the trial judge, applicable at any rate to the hotel property, which contract was still in existence at the time Flanagan sold to Millar and Robinson. I cannot doubt, under the evidence, that this sale was brought about by the negotiations which Stratton had

(1) [1910] A.C. 614.

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with Bramley-Moore, to whom he shewed the property, and who was willing to buy if he could raise the necessary cash payment. Bramley-Moore found himself unable to make the cash payment Flanagan at first required, and associated himself with Millar and Robinson as co-adventurers in the proposed purchase. He had previously intimated to Stratton that if he did not buy personally he would "place the property with friends of his." One of these latter saw Flanagan personally and agreed with him respecting the cash payment, but Bramley-Moore appears, for apparently private reasons of his own, to drop out and let his co-adventurers complete the purchase. But I cannot doubt that the action of these purchasers in buying was the direct result of the acts of Stratton in bringing the property to Bramley-Moore's attention and inducing him to associate himself with his friends Millar and Robinson as co-adventurers who were willing to buy if satisfactory terms could be arranged. Moore, it is true, did not give to Stratton the names of the friends with whom he intended to place the property if he himself was not able to purchase. He only spoke of them generally as persons with whom he "could place it." The arrangement made by these three amongst themselves acting upon the information and facts respecting the property brought to Bramley-Moore's attention by Stratton, was that the three should become joint purchasers of the property at the price stated by Stratton to Moore if a reduction in the amount of the cash payment required by Flanagan could be secured. The first suggestion as to this reduction in the amount of the cash payment was made by Stratton to Flanagan and was agreed to by the latter when he concluded the terms of sale with Millar and Robinson.

Now, surely, if Bramley-Moore had remained as one of the purchasing co-adventurers, Stratton would have been entitled to his commission, or if he had purchased without associating himself with any one else, the same result would have followed. The mere fact of his dropping out (from personal reasons of his own) from the concluded purchase, the vendees of which purchase were brought into relation with Flanagan through Stratton, cannot be a reason for depriving him of his commission. It is not so much the knowledge or absence of knowledge on Flanagan's part that Stratton had brought about the sale, as the fact itself that the sale had been effected to parties who were brought into relation with Flanagan through Stratton, that entitled the latter to commission.

The evidence of Bramley-Moore is clear that he told Stratton "he thought this Western Hotel the best proposition he knew of" and that "if he could not take it himself he could place it." That on his return to Lloydminster he

> agreed with Millar and Robinson that they should all three go into the deal together provided the cash payment was lower,

and that shortly afterwards "Robinson went to Saskatoon to investigate" (about the reduction of the cash payment I assume, as that was the only question open). That Robinson asked Moore to accompany him as he was to have been a partner, but that Moore had to go somewhere else and Robinson went by himself and completed the purchase in his own name and Millar's. Unless, therefore, the accidental fact of Moore having dropped out of the purchasing syndicate is enough to deprive Stratton of his right to re-

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cover commission, I cannot see how his claim can be dismissed.

It was suggested that the question of his right to recover commission was an afterthought of Stratton's consequent upon his being sued on a promissory note of his own by Flanagan. But Mr. Stratton has satisfactorily cleared that up and shewn by his evidence, repeated on his cross-examination, that when he drew the papers completing the sale he suspected the purchasers were Bramley-Moore's friends of whom he had spoken as possible purchasers and had inquired from Flanagan whether or not they were so, telling him that if they were he would claim his commission. Flanagan, it is true, successfully parried the inquiry, but when subsequently Stratton ascertained the fact to be as he suspected, he at once put forward his claim.

I would allow the appeal with costs in all the courts on the counterclaim for commission on the price for which the "Western Hotel" was sold, $70,000, that being the only property the sale of which was directly brought about by the acts of Stratton and with respect to which he was the efficient cause of sale.

IDINGTON J.—The only difficulty the courts below seem to have had in allowing a recovery was their inability to infer that deceased knew or ought to have known that the purchasers, Millar and Robinson, of Lloydminster, were two of the parties of whom appellant, without naming them, had informed deceased.

The learned trial judge by his findings on the disputed facts in favour of appellant has brushed aside some difficulties standing in his way up to this point, when he told deceased what he had done for him, and from which he expected a sale.

It seems that Lloydminster is about two hundred miles from Saskatoon. From what we are told it seems as if the sole business the buyers had in coming from the former place to the latter was solely relative to this hotel purchase. They closed with deceased exactly on the same terms as appellant had indicated to deceased what he thought would bring about a sale. All he wanted was a reduction of the cash payment from thirty thousand dollars to ten thousand.

Millar is described by deceased as one of his best friends, one whom he had known from childhood, but not as one that he had any reason to believe until this time of his coming to Saskatoon, at all likely to become a purchaser, nor does he suggest any other way than what appellant had told him for supposing his friend knew or might have come to know that the property was for sale.

Although much stress was laid upon the alleged fact that appellant's name was never suggested as the agent who had brought about the sale, we are not told how it did come about. We are not told anything to explain the remarkable coincidence of the coming on that mission at that time and its successful issue by deceased conceding the one point at which the progress of the purchase had stuck for a while. I infer what the courts below seemed unable to infer. I infer deceased either knew or had good reason to believe just what the evidence discloses, that these buyers were of the party appellant had spoken of to deceased.

Lloydminster is not one of those large cities in which duplicate sets of operators might suddenly be seized with the same thirst for the same property at or about the same time as appellant was waiting for them. And the deceased does not seem to have been

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lacking in worldly knowledge relative to real estate. Indeed, it seems remarkable how skilfully old friends could have avoided stumbling upon the curious fact that they had nearly closed the deal through appellant.

Of course the other deals made were not brought about directly by appellant, though incidentally the result of the $70,000 deal for the hotel.

I think the appeal should be allowed with costs here and in the Court of Appeal and of the trial of this counterclaim — and judgment be entered for appellant for $3,500 and said costs.

If the judgment against appellant has not been discharged of course this, so far as that is unsatisfied, must be set off.

DUFF J.—The legal rule governing this case is thus stated by Lord Atkinson delivering the judgment of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*(1), at page 624:

> There was no dispute about the law applicable to the first question. It was admitted that, in the words of Erle C.J. in *Green* v. *Bartlett* (1863)(2), "if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him." Or in the words of the later authorities, the plaintiff must shew that some act of his was the *causa causans* of the sale (*Tribe* v. *Taylor* (1876)(3), at p. 510), or was an efficient cause of the sale (*Millar* v. *Radford* (1903)(4)).

The material facts are that the property sold was placed in the defendant's hands to find a purchaser. Terms were mentioned, but they were not looked upon by either Flanagan or the defendant as anything but a

(1) [1910] A.C. 614.
(2) 14 C.B. (N.S.) 681.
(3) 1 C.P.D. 505.
(4) 19 Times L.R. 575.

basis of negotiation. In effect the arrangement between them was that the defendant if he got a purchaser on terms satisfactory to Flanagan was to get a commission. The defendant brought the property to the attention of one Moore, who said he would take the property himself or place it with others. The defendant then communicated with Flanagan (on the subject of terms) who put the cash payment at $30,000. Moore having been informed of this communicated with two persons in Lloydminster, Millar and Robinson, (with whom he had frequently been associated in real estate transactions,) and it was decided that they with Moore would make the purchase if the cash payment were reduced to $10,000. The first plan was that one of them should go to Vancouver to see Flanagan, but the visit was postponed for some weeks when they learned that Flanagan had returned to Saskatoon and Millar and Robinson decided to open negotiations with him there; Moore by this time having become involved in other transactions which prevented him from taking part in the purchase, Millar and Robinson proceeded to Saskatoon and in a few days bought the property for themselves alone. It appears to me on those facts to be sufficiently established that

the relation of buyer and seller was really brought about by the act of the plaintiff.

The determination of Moore and his associates to purchase if suitable terms respecting the mode of payment could be obtained was the direct and normal consequence of the introduction of the property to Moore. It is impossible to maintain the position that Moore's act in associating Millar and Robinson with him in the adventure must be regarded as *novus actus*

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*interveniens.* That a speculator in real estate having a property offered to him and thinking it likely to be a profitable purchase should associate with him others with whom he is in the habit of acting in such transactions is quite within the ordinary course of things; almost as much, indeed, as borrowing to provide the purchase money. It was, I think, hardly contended otherwise because I think it was not seriously disputed that if Moore had not withdrawn the connection between the defendant's introduction and the purchase would have been sufficiently direct. How then is the matter affected by the withdrawal of Moore? That itself is clearly not a new and independent instrumentality. Nobody suggests that the fact of his withdrawal had any effect in forwarding the transaction. There was, of course, the question of terms. But the terms mentioned to the defendant by Flanagan were, as I have said, intended only to be a basis of negotiation. There can, I think, be no doubt that the terms which Millar and Robinson proposed were terms which Flanagan from the first was willing to accept. I cannot see, therefore, on what ground it can be maintained that the sale was not "really brought about" through the defendant's introduction of the property to Moore.

ANGLIN J.—The facts are fully stated in the judgments of the Supreme Court of Saskatchewan, particularly in the very carefully prepared opinion of Mr. Justice Johnstone.

It having been found that the plaintiff's testator, James Flanagan, agreed to pay the defendant a commission if he should obtain a purchaser for his hotel property who would buy it at a price and on terms

agreeable to him (Flanagan), and there being evidence to support this finding, the right of the defendant to recover on his counterclaim depends upon his having established that he did in fact procure such a purchaser.

Had the property been bought by Moore, to whom the defendant directly introduced it, or by any syndicate in which Moore was personally interested, the defendant's right to his commission would appear to be incontrovertible. *Burchell* v. *Gowrie Blockhouse Collieries, Limited*(1). The difficulty in the defendant's way is that, although Moore was originally interested with Millar and Robinson, he did not eventually become a co-purchaser with them. That the property was brought to their attention by Moore is not questioned; that Moore became interested in it through introduction of the defendant is equally clear: the question is whether, in bringing the property to the attention of Millar and Robinson, Moore, though in one sense actuated by a wish to subserve his own personal interests, should, nevertheless, not be held to have done so under circumstances which entitle the defendant to a commission from the vendor.

The finding of the learned trial judge — the force of which is certainly not weakened by the fact that his judgment was adverse to the defendant — was that Moore had

> told the defendant he would either take the property himself or obtain a purchaser for him.

The evidence establishes that the defendant informed Flanagan of his interview with Moore and of Moore's proposal to interest friends of his from Lloydminster

(1) [1910] A.C. 614.

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in the purchase. I agree with Johnstone J. that the circumstances warrant an inference, if that be necessary, that Flanagan had constructive, if not actual notice, that his purchasers were the Lloydminster friends whom the defendant told him that Moore hoped to interest in the purchase.

Had Moore, Millar and Robinson become the purchasers — whether immediately following the defendant's introduction of the property to Moore and the latter's communication with his then undisclosed coadventurers and upon the terms then discussed, or at a later period after a break in the negotiations and upon other terms to which the vendor was subsequently persuaded to assent — the defendant's right to a commission would have been unquestionable. It would then have been too clear for controversy that his introduction of the property to Moore would have been the "efficient cause" of the vendor obtaining his purchasers. I cannot see that this introduction ceased to be the efficient cause of Flanagan obtaining his purchasers and became merely a cause *sine quâ non* simply because Moore, owing to other business entanglements, found himself unable to resume or proceed with the negotiations with Flanagan which resulted in Millar and Robinson buying the property.

In my opinion the defendant has established that his introduction was the foundation upon which the negotiations which resulted in the purchase proceeded and without which they would not have proceeded. *Wilkinson* v. *Martin*(1). The relation of buyer and seller was really brought about by him, *Green* v. *Bartlett*(2), at page 685 — that is by his introduction, *Barnet* v. *Isaacson*(3).

(1) 8 C. & P. 1, at p. 5. (2) 14 C.B.N.S. 681.
(3) 4 Times L.R. 645.

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But the effect of the defendant's intervention was confined to the sale of the hotel property, which brought $70,000. He was not efficiently instrumental in bringing about the sale of the adjacent lots for which Millar and Robertson paid Flanagan $55,000. On his own evidence the defendant is, in my opinion, not entitled to a commission on this part of the purchase.

It is not disputed that 5% is the usual commission paid in Saskatchewan and Alberta in respect of such transactions as that with which we are dealing.

The appeal should be allowed with costs in this court and in the full court of Saskatchewan and judgment should be entered for the defendant on his counterclaim for $3,500 with costs to be set off against the plaintiff's judgment for debt and costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Stratton & Jordan.*

Solicitors for the respondents: *Acheson & Shannon.*