

MANITOBA AND NORTH-WEST }
 LAND CORPORATION (DEFEND- } APPELLANTS;
 ANTS) }

1903

*Nov. 17.

*Nov. 30.

AND

GEORGE DAVIDSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR
 MANITOBA.

Principal and agent—Breach of duty—Secret profit.

D. represented to the manager of a land corporation that he could obtain a purchaser for a block of its land and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy but wanted time to arrange for funds. D. gave him time for which the purchaser agreed to pay \$500. The sale was carried out and D. sued for his commission not having then received the \$500.

Held, reversing the judgment appealed from (14 Man. L. R. 233) that the consent of D. to accept the \$500 was a breach of his duty as agent for the corporation which disentitled him from recovering the commission.

APPEAL from a decision of the Court of King's Bench, Manitoba (1), affirming the verdict at the trial in favour of the plaintiff.

The material facts are stated in the above head-note and more fully in the judgment given on this appeal.

Aylesworth K.C. for the appellants. The plaintiff in obtaining a secret profit from the purchaser forfeited his commission. *Andrew v. Ramsay & Co.* (2); *Clergue v. Murray* (3).

George A. Elliott for the respondent cited *Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha and Telegraph Works Co.* (4).

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

(1) 14 Man. L. R. 232.

(3) 32 Can. S. C. R. 450.

(2) 19 Times L. R. 620.

(4) 10 Ch. App. 515.

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The judgment of the court was delivered by

NESBITT J.—This is an action for the recovery of a commission for the sale of land. The defendants are a company incorporated in England for the purpose of holding and selling real estate in the Province of Manitoba, and one Fry was the manager at Winnipeg with full authority to make contracts with reference to the sale of the company's lands. It appears by the evidence that the plaintiff represented to Fry that he had been in St. Paul, in the United States, and in communication with parties for buying land in Canada, and contemplated going back there shortly to effect sales to them. Plaintiff says that on the 21st January, 1902, Fry reserved or set aside some eighteen thousand acres of land near Churchbridge giving the plaintiff the exclusive right to sell the land until the 6th February. This was necessary in order to enable plaintiff to see the parties he had in view and give them time to examine the land and make up their mind as to purchasing as otherwise they might have their trip from St. Paul to the lands and after inspection come back to Winnipeg to find them sold to some other parties. This was on a Tuesday. On Friday, 24th January, one Grant came to the company's office and wanted to buy some land and eventually purchased ten thousand acres and thereupon stated to Mr. Fry that he would like to secure the other eighteen thousand acres, but he was not then in a position to deal. Mr. Fry then informed him that he could not deal with him as he had reserved the eighteen thousand acres for Mr. Davidson to have the opportunity up to the 6th February to make sales to parties in St. Paul. Grant inquired where Davidson was and Fry went to the telephone and found that he was in Winnipeg and had not gone to St. Paul, and

stated to Grant that he would probably meet Davidson on the train going to St. Paul. On the evidence it was argued that this was in order to excite Grant to the belief that unless he closed at once the lots would be immediately put up to \$4 per acre instead of \$3.60, and as soon as the reservation to Davidson expired the instructions were to put up the price of the land to \$4.00 per acre. On the following morning Davidson and Grant met in the Railway Securities Co's office and Fry, who happened into the room and immediately withdrew, stated that Davidson then informed him that the parties interested were the parties he had been in communication with in St. Paul, and gives this as a reason why he did not himself make the sale which was subsequently effected to Grant instead of stepping aside and allowing Davidson to take up the negotiations with Grant and complete the sale to Grant of the 18,000 acres. This is denied by Davidson, and the trial judge did not find that it was proven; and while the circumstances of the case would rather lead one to believe that Fry's conduct was otherwise unaccountable, I do not think it is necessary for the disposition of this appeal to deal with that phase of the question. Davidson stated that he ascertained in the Railway Securities office that Grant had already been buying real estate from Fry and that Grant wanted to buy 18,000 acres more; in fact he says 'I knew that he was very anxious to secure the 18,000 acres.' He says that Grant wanted time in which to make financial arrangements and to look over the lands, and Davidson then stated that he would not deal with any one else before the following Friday, 31st January, and what occurred is best said in Davidson's own language:

Q. What did you get for giving him this time?—A. From Mr. Grant?

Q. Yes?—A. \$200. I didn't get anything.

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Q. Which do you mean?—A. You say what did I get?

Q. Yes. You say you got \$200?—A. Yes. I didn't get anything.

Q. You really mean you got a promise of \$200?—A. Put it in that way.

Q. You asked for that \$200 did you?—A. Well I will give you the conversation if you wish.

His Lordship—That will be the most satisfactory way.

Mr. Ewart—What was it?—A. When he spoke of the fact that they were not yet, or he was not yet, in a position to know definitely whether he could carry it out or not, and requested a sufficient time in which to go south and complete his organization, I told him that that was cutting off a large portion of my time-limit on the option I had to sell these lands, and if at that time they did not purchase why I might possibly fail in carrying out my negotiations with other people, and lose my sale. It was cutting off part of my time, and for that reason I thought it was worth something.

Q. The risk of losing a purchaser? A. The risk of granting that much of the time out of my time to negotiate with somebody else. And he said yes. He said yes it is, and he says I will just add \$300 to that, and make it \$500. I told him I thought it was worth \$200. That was my suggestion, and he said, yes it is reasonable enough, I will just add \$300 to that and make it \$500. He said yes to my proposition of \$200, that is reasonable enough; I will make it \$300 more; that will make it \$500 in all. He was very anxious to get the lands and secure them at that time.

Q. What did you say to that?—A. I said well it is purely optional with you. If you wish to give me the \$500 why it is all right.

Q. Now you saw Mr. Fry the next day didn't you?—

Mr. Wilson.—The next day was Sunday.

Mr. Ewart.—Did you see Mr. Fry the same day?—A. Yes.

Q. Where?—A. At the office.

Q. Did you tell him about this \$200?—A. No.

Q. Thought better not?—A. I did not consider the thing at all. I thought it was purely a matter between me and Mr. Grant.

Q. You told him about giving Grant the time?—A. Yes because he was interested in that feature of it.

Q. But you think that he was not interested in the \$200?—A. No I could not see how he was.

Q. You never told him anything at all about it until he found it out?—A. I never told him, no.

Grant bought the land and paid the price \$3.60 per acre. Davidson did not ask for his commission at the time of the closing of the sale, and if he had Fry says

that he would have paid it without demur. Fry was subsequently told by Mr. Grant about the \$500 which had been referred to. I think that the non-receipt of the money makes no difference; the bargain was that he should get the money and it is that which would affect the mind of Davidson; he expected to get the money at the time and the question is: Does such a transaction as this disentitle him to the payment of his commission assuming that he is otherwise entitled to such a commission? I think the test is: Has the plaintiff by making such an undisclosed bargain in relation to his contract of service put himself in such a position that he has a temptation not faithfully to perform his duty to his employer? If he has, then the very consideration for the payment for his services is swept away. I think that the making of such a bargain necessarily put Davidson in a position where it was to his interest that Grant should become the purchaser, in which case he would receive not only the commission but \$500 commission as a secret profit. It put him in a position where he was getting pay for the very time which the company were agreeing to pay him for while securing the purchaser, and his duty as agent was to get the highest price possible for his employer; and it is perfectly evident from his own statement that Grant was a person who was willing to pay at least \$500 more for the property and probably a considerable advance on that. I cannot do better than quote the language of Lord Justice Cotton in *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1).

It is suggested that we should be laying down new rules of morality and equity if we were to so hold. In my opinion if people have got an idea that such transactions can be properly entered into by an agent, the sooner they are disabused of that idea the better. If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as

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regards the contract. any sum, whether by way of percentage or other wise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to show that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer.

And also in the same case Lord Justice Bowen says:

Now, there can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.

And in a very recent case of *Andrew v. Ramsay & Co.* Lord Chief Justice Alverstone says:

This case turns on the broad principle that where a person was not entitled to say, "I have been acting as your agent and doing the work you have employed me to do," he cannot recover the commission promised to him. I consider that a principal is entitled to have an honest agent and that only an honest agent is entitled to receive his commission. If it turned out that a man was not acting entirely as agent for his principal, but was directly or indirectly working for the other party to the contract, in such a way as possibly to sacrifice, in whole or in part, the interests of his principal, he is not entitled to his commission.

I think that a person acting in a position of trust and confidence cannot too well understand that the above rules will be rigidly enforced.

The appeal should be allowed with costs in all courts.

Appeal allowed with costs.

Solicitors for the appellants: *Bradshaw, Richards & Affleck.*

Solicitor for the respondent: *George A. Elliott.*