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*May 26, 27.

BERTRAND J. CLERGUE AND THE LAKE SUPERIOR POWER COMPANY (PLAINTIFFS)..... } APPELLANTS

AND

ELIZABETH MURRAY AND DAVID MURRAY (DEFENDANTS). } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Principal and agent—Sale of land—Authority to agent—Price of sale.

M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place "Sell if possible, writing particulars; will give you good commission." C. agreed to purchase it for $600 and the solicitor telegraphed M. "Will you sell three-quarter interest sixty-seven acre parcel, Korah, for six hundred, half cash, balance year? Wire stating commission." M. replied "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor, "Telegram received. I will accept $600, $300 cash and $300 with interest at one year. This payment I may say must be a marked cheque at par for $300, minus your commission $15, and balance $300 secured." The property was incumbered to the extent of over $300 and the solicitor deducted this amount from the purchase money and sent M. the balance which she refused to accept. He also took a conveyance to himself from the former owner paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell;

Held, affirming the judgment of the Court of Appeal, that the only authority the solicitor had from M. was to sell her interest for $585 net and the attempted sale for a less sum was of no effect.

Held further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the defendants.

* PRESENT:—Sir Henry Strong C. J. and Taschereau, Sedgewick, Davies and Mills JJ.

The material facts are sufficiently stated in the above head-note.

Ritchie, K.C., and *Marsh*, K.C., for the appellants. The solicitor was authorized to sell the fee simple of Mrs. Murray's interest and not merely the equity. *Ireland* v. *Livingston* (1).

If Mrs. Murray intended to sell subject to incumbrances she should have specially instructed the solicitor to that effect. *Torrance* v. *Bolton* (2); *Phillips* v. *Caldcleugh* (3); Armour on Titles, (2 ed.) p. 141. And see also *Cato* v. *Thompson* (4); *Gamble* v. *Gummerson* (5); *Cameron* v. *Carter* (6); Armour on Titles, (2 ed.) pp. 136-7.

Aylesworth, K.C., for the respondents. The solicitor appears to have acted more in the interest of the purchaser than in that of his client. That, in itself, is a ground for refusing specific performance. *Hesse* v. *Briant* (7).

THE CHIEF JUSTICE (oral).—It is impossible that there can be any disturbance of the decree made at the trial and affirmed by the Court of Appeal. We agree with every thing said in both courts, though the two judgments did not proceed on precisely the same grounds.

Speaking for myself and without entering into any discussion of the evidence which was fully dealt with by Meredith C.J., at the trial, and Mr. Justice Lister, in appeal, I am of opinion that Simpson had no authority to enter into any contract for sale of the land for a less sum than five hundred and eighty-five dollars net, and I agree with Chief Justice Meredith that any-

(1) L. R. 5 H. L. 395.
(2) L.R. 14 Eq 124; 8 Ch. App. 118.
(3) L.R. 4 Q.B. 159.
(4) 9 Q.B.D. 616.
(5) 9 Gr. 193.
(6) 9 O.R. 426.
(7) 6 DeG. M. & G. 623.

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thing done by him, if he did do anything, looking to the receipt of a less sum was entirely without authority. On that ground alone I would dismiss the appeal.

In the second place, I am of opinion that, in point of fact, no contract was entered into (I do not advert to the distinction between written and parol contracts). There was none by Simpson for a sale for five hundred and eighty-five dollars net, in other words, no agreement at all in point of fact for a sale at that sum.

As to part performance, I do not think the argument on that head calls for any answer. There is nothing in it.

Having regard to the decision in *Hesse* v. *Briant* (1), referred to by counsel for the respondent, I do not see how it would be possible, were we in other respects in the appellants' favour, to order specific performance in this case. Here was an agent with authority to sell for a certain price, and whose duty it was to get a higher price if he could, (and it must be remembered that he was a solicitor, whose duty towards his client was higher than that of a mere agent), and he was all the time acting as solicitor of the purchaser for whom he had made it his duty and his interest to do his best without regard to the interests of the respondent, who was in ignorance of the fact that Simpson was acting for the appellant. On that ground too, I would dismiss the appeal.

Whatever effect it may have on other litigation, which we are told is pending, I think it right to add that any conveyance made to Simpson was for the benefit of Mrs. Murray and as a trustee for her.

The appeal is dismissed with costs.

TASCHEREAU and SEDGEWICK JJ. concurred in the judgment dismissing the appeal with costs.

(1) 6 DeG. M. & G. 623.

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DAVIES J.--In this case the alleged contract, of which it is sought to enforce specific performance, is to be gathered from the telegrams and correspondence to and from one Simpson, alleged to be an agent of the plaintiffs and the defendants, Mr and Mrs. Murray, in the latter part of January, and the beginning of February, 1899. I am clearly of the opinion that the defendants' interpretation of the offer made by them in this correspondence was the correct one and that Mrs. Murray was entitled under it to receive five hundred and eighty-five dollars net for her interest in the property which she was offering to sell. From the dates above mentioned until the sixth of October, when Bradshaw, the solicitor in Winnipeg, on behalf of Mrs. Murray, wrote to Simpson the letter of that date, the offer may be said to have been open. Simpson put an entirely different construction upon this offer to sell and claimed that, under it, Mrs. Murray was only entitled to receive two hundred and seventy-five dollars and thirty-two cents, instead of the five hundred and eighty-five dollars claimed by her. The minds of the negotiating parties, therefore, never were *ad idem*.

I had doubts at first whether or not the letter of the sixth of October really amounted to a withdrawal of the offer of sale. But, on giving careful consideration to the correspondence, I have no doubt that it did, and that it was intended to end, and did end, the negotiations.

The subsequent willingness of Simpson to accede to Mrs. Murray's offer, it having been withdrawn, could not, of course, create any new contract.

On these grounds I concur in the dismissal of the appeal.

MILLS J. concurred in the judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Simpson & Rowland.*

Solicitors for the respondents: *Scott & Scott.*