McLELLAN PROPERTIES LIMITED....APPELLANTS;

AND

ANTOINE ROBERGE and L. D. ROBERGE ..... } RESPONDENTS.

1947

*May 19, 20, 21.

*Oct. 7

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executor and Trustee's discretionary power to option and sell realty of Estate delegated by Power of Attorney—Agreement to option and sell executed by attorney—Whether agreement void or capable of ratification by Trustee—Memorandum in Writing, Statute of Frauds R.S.O. 1937 c. 146 s. 4—Absolute assignment, Conveyancing and Law of Property Act R.S.O. 1937 c. 152 s. 52.

Held: The appeal should be allowed with costs and the judgment of the trial judge restored.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

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Per the Chief Justice and Taschereau and Estey JJ.:—The option here negotiated is not a contract "void" as being illegal in the strict sense. It does not therefore involve an act on the part of an attorney which cannot be ratified by the principal. The trustee had a full and complete knowledge of not only the existence but the terms and details of the option, was in possession of such before the acceptance of the option and personally instructed his solicitor from there on. It was not a breach of trust on his part to grant a general power of attorney, and if the attorney has effected an agreement, as in this case, which is not void and which the trustee in his judgment deems in the interest of the trust estate, there would appear to be nothing in reason or principle why it should not be ratified and the estate enjoy the benefit thereof.

The ratification of the giving of the option by the trustee related back to the date thereof and became his act as if he had given the same in person, and was therefore a sufficient memorandum signed by the party to be charged to satisfy the requirements of the Statute of Frauds.

Per Kerwin and Kellock JJ.:—Before the acceptance of the offer to sell, the executor took the position toward W. (the purchaser) that there was an offer which the latter could accept. The letters signed by the executor's solicitor, taken with the documents to which they refer, satisfy the Statute of Frauds.

"Absolute" is used in the Conveyancing and Law of Property Act, R.S.O. 1937 c. 152 in contradistinction to "by way of charge only." Hughes *v.* Pump House Hotel Company (1902) 2 K.B. 190.

APPEAL by the Plaintiff from the judgment of the Court of Appeal for Ontario (1) allowing the defendants' appeal from the judgment of Mackay J. (2) decreeing specific performance of an alleged agreement for the sale of land.

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

J. R. Cartwright, K.C. and *R. M. Willes Chitty, K.C.* for the appellant.

A. G. Slaght, K.C. for the respondents.

The judgment of the Chief Justice and of Taschereau and Estey JJ. was delivered by

ESTEY J.:—This is an action for specific performance on behalf of the purchaser of real property situated at Kirkland Lake, Ontario. Georgianna Roberge, late of said Kirkland Lake, owned the property in question. By her

(1) 1946 O.R. 379; 1946 2 D.L.R. 729.

(2) 1945 O.W.N. 771; 1946 1 D.L.R. 77.

will she named her son Antoine Roberge, her executor and trustee and after directing the payment of her debts she devised and bequeathed to him her property, both real and personal, in trust for the use of her husband L. D. Roberge, during his life and thereafter to sell, convert and distribute according to the terms of the will.

The will was proved on the 23rd day of August 1943. Antoine Roberge, then of Kirkland Lake, but who at all times material hereto resided at or near Flint in the State of Michigan, was appointed executor. On September 17th 1943, in the State of Michigan Antoine Roberge executed a general power of attorney to his father, L. D. Roberge, who remained at Kirkland Lake, empowering the latter to act on his behalf in his capacity as executor of his mother's estate, and empowering him to purchase, rent, sell, etc., the real estate, or any interest therein, and to execute all necessary instruments in connection therewith. Acting under this power of attorney, L. D. Roberge on May 10th 1944, entered into an agreement entitled "Option to Purchase" with A. I. Wright whereby he gave to Wright an irrevocable offer to purchase the property on or before the 10th day of June 1944.

On May 30th 1944, Antoine Roberge was at Kirkland Lake and he and his father called upon Wright. The sale was then discussed and they were informed by Wright that he was selling the property to McLellan Properties Limited on whose behalf he had arranged a mortgage and an extension of the lease to the Metropolitan Stores. He assured Antoine Roberge that they had raised the necessary money. Antoine Roberge suggested that St. Aubin was solicitor for the estate and his own personal solicitor and that they might meet at his office and give instructions for the preparation of documents. That afternoon at three o'clock they met at St. Aubin's office, and after some conversation, it was suggested that there was no use of all remaining and Antoine Roberge "instructed Mr. St. Aubin to go ahead, contact Mr. Lillico", solicitor for Wright and McLellan Properties Limited, "and get the matter closed out".

On June 7th 1944, Lillico by letter made certain requisitions with regard to the title. These were subject of

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personal discussions and correspondence extending from June 7th to June 15th, when Lillico advised that his client was prepared to waive the requisition relative to the beneficiaries executing the transfer of the property and that Wright was assigning his agreement of purchase to the McLellan Properties Limited. Then followed some correspondence between Lillico and St. Aubin relative to the transfer, the requirements of the Local Master of Titles, and details leading to the conclusion of the transaction.

On July 3rd 1944, Lillico wrote a letter to St. Aubin reading as follows:

Dear Sir: Re: Roberge.

You have advised us on a number of occasions by telephone that your clients do not intend to complete the contract for the sale of the Roberge Premises, being lot 19, plan M. 15 Temiskaming, and to confirm such telephone conversation by letter, but to date no such letter has been received by us.

This letter is to advise you that our clients are prepared to close out the contract and complete the purchase of the property, and if necessary to take action in court to enforce specific performance of the contract.

May we hear from you by return mail?

Yours truly,
L. A. Lillico.

and St. Aubin on the same day wrote the following letter to Lillico:

Dear Sirs: Re: Georgianna Roberge Estate et al.

Referring to the alleged offer to sell and acceptance thereof and the alleged assignment to McLellan Properties Limited, I am instructed by the executor of the will to notify you that he will not proceed further with this matter for the following reasons (among other reasons):

1. L. D. Roberge had no power to execute the said offer of sale on behalf of this estate, and the said offer of sale is a nullity;

or in the alternative,

2. The executor has, at this time, no power to sell the lands of this estate;

or in the alternative,

3. The vendor is unable and/or willing to remove the objections made you on behalf of the purchaser and/or his assignee. The vendor therefore rescinds the agreement herein.

Yours truly,
Alibert St. Aubin.

The correspondence was concluded by Lillico's letter dated July 4th to St. Aubin acknowledging the letter of the 3rd and including the following:

* * * that we are prepared to carry out the terms of the Agreement and to purchase your client's property, and there are no objections or requisitions on title which you have not satisfactorily answered or which we have not waived on behalf of our clients.

When at the expiration of the ten days specified by Lillico, in his second letter of July 3rd, St. Aubin did not intimate his intention to proceed with the completion of the transaction, this action was commenced by writ dated the 17th day of August, 1944.

The learned trial judge held that while as executor and trustee Antoine Roberge could not validly delegate to L. D. Roberge authority to option or sell, nevertheless, in this case Antoine Roberge by his conduct had adopted and ratified the agreement. He accordingly decreed specific performance.

The appellate court held that Antoine Roberge as executor and trustee could not delegate his powers to option or sell to L. D. Roberge, that the acts of L. D. Roberge under such authority were void, and therefore the option of May 10th 1944, was a nullity and neither the option nor the contract arising out of its acceptance could be adopted or ratified by Antoine Roberge as executor and trustee. Further, that there was no memorandum sufficient to satisfy the Statute of Frauds. The appellate court therefore reversed the judgment of the learned trial judge and dismissed the plaintiff's action.

The general rule forbidding a trustee, subject to certain exceptions, to delegate his duties as trustee is not questioned by the appellant. Its contention is rather that the option executed by L. D. Roberge, acting under the terms of the power of attorney from the trustee Antoine Roberge, was ratified and adopted by the latter. The trustee was at Kirkland Lake and became aware of and discussed the contents of the option with A. I. Wright before it was accepted on May 30th. The acceptance was by letter of the same date addressed to Antoine Roberge, and it was he, himself, who instructed the solicitor on behalf of the estate. In other words, in everything that happened after the giving of the option, the trustee took an active and dominating part. His conduct in discussing the terms of the agreement with A. I. Wright and going forward with the completion of the agreement would constitute a ratification or an adoption of what his attorney had initiated on his behalf.

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The appellate court, however, held that because what the attorney did was contrary to law, it was therefore a nullity and could not be ratified. In support of this view the appellant quotes Lewin on Trusts, 14th ed., p. 194:

> If the trust be of a discretionary character, not only is the trustee answerable for all the mischievous consequences of the delegation, but the exercise of the discretion by the substitute will be actually void.

The cases cited by the learned author support the view that such an agreement negotiated only by an attorney for a trustee cannot be enforced, but they do not justify a conclusion that the word "void" should in relation thereto be used in the sense that the attorney's act is so far a nullity that it cannot be ratified. Nor have we been referred to any authority which holds such an act to be a nullity in that sense.

In one of the cases cited by the learned author, *Bradford* v. *Belfield* (1) after refusing a decree for specific performance to compel a purchaser to take a title through a contract negotiated on behalf of the vendor by an assign from the heir of the trustee, the vice-chancellor stated at p. 271:

> But it is admitted that the defect will be cured, if the Court should be of opinion that, under the Will of N. P. Berry, the equitable fee passed to William Berry.

and at p. 272:

> * * * if it were left to me to decide, I should say that the Devise to William Berry has had the effect of curing the defect in the title. I do not, however, feel myself authorized to compel the purchaser to take the estate; but, as the question is, in fact, a legal one, it is my duty to send a case for the opinion of a court of law, as to the effect of the Devise to William Berry.

The general rule that one who accepts the position of trustee undertakes to perform personally those duties requiring the exercise of his discretion is subject to certain exceptions. A trustee by the terms of his appointment may be permitted to delegate some or all of those duties. Again, if in the circumstances it would be regarded as prudent for a person in the ordinary course of business to delegate the performance of those duties, a trustee is permitted to do so: *Speight* v. *Gaunt* (2). Further, a trustee may appoint an attorney to act on his behalf in another country: *Stuart* v. *Norton* (3); *Stickney* v. *Tylee* (4) and *In re Huntly* (5). These authorities illustrate the

(1) (1828) 2 Sim. 264 at 271 and 272.
(2) (1883) 9 A.C. 1.
(3) (1860) 14 Moo. P.C. 17.
(4) (1867) 13 Grant's Ch. 193.
(5) (1887) 7 C.L.T. Occ. N. 251.

general rule and the exceptions thereto founded upon the necessities of prudent business management. These and other authorities indicate that a delegation of authority, such as we are here concerned with, involves nothing in the nature of that illegality which renders an act void or a nullity in law. Salmond on Jurisprudence, 8th ed., 369; 7 Halsbury, 2nd ed., 147; Cheshire & Fifoot, Law of Contracts, 219. The option here negotiated is not a contract "void as being *illegal* in the strict sense": Pollock on Contracts, 12th ed., p. 254. It does not therefore involve an act on the part of an attorney which cannot be ratified by the principal within the meaning of the foregoing authorities.

It is a fair conclusion in this case, and indeed the contrary is not suggested, that the trustee, Antoine Roberge, had full and complete knowledge of not only the existence but the terms and details of the option. He was in possession of such before the acceptance of the option and personally instructed his solicitor from there on. That the option agreement is improvident from the point of view of the estate, or is in any way different from what the trustee would have insisted upon or even desired had he himself negotiated the option, is not suggested.

That certain duties may be carried out by a trustee through an attorney is well established, and therefore it was not a breach of trust on his part to grant a general power of attorney. If, however, the attorney, pursuant to that power, does something which the trustee should not delegate, it is unenforcible and in that sense invalid and it may be either void or voidable, depending upon its nature and character. If, therefore, the attorney has effected an agreement, as in this case, which is not void and which the trustee in his judgment deems in the interest of the trust estate, there would appear to be nothing in reason or principle why it should not be ratified and the estate enjoy the benefit thereof.

Every act, whether lawful or unlawful, which is capable of being done by means of an agent, except an act which is in its inception void, is capable of ratification by the person in whose name or on whose behalf it is done. Bowstead on Agency, 10th Ed., p. 33.

See also Wilshere on Law of Agency, p. 8; Lord Cranworth in *Spackman* v. *Evans* (1).

(1) (1868) L.R. 3 H.L. 171 at 194.

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Sir W. J. Ritchie, C.J., in the course of his judgment in *Merchants Bank of Canada* v. *Lucas* (1) states at p. 280:

> The Court of Appeal has since decided, in the case of *Barton* v. *London & North Western Ry. Co.* (2), that fraud or breach of trust can be ratified, but forgery cannot, and if so it is clear that this appeal must be dismissed.

The essential words in this quotation are from the language of Lord Justice Lindley in the *Barton* case and it may be suggested that the language of the learned judges in both of these cases is *obiter*. Statements, however, by such learned and eminent judges are entitled to the greatest weight, and may I add with respect that the statement appears to be in accord with both principle and authority.

The word "void" in the foregoing quotation from Bowstead on Agency is there used in the sense that what is purported to be done is in law a nullity. The illustrations selected by the learned author make this clear. In one he emphasizes the distinction with respect to what unauthorized acts on the part of a board of directors may, and may not, be ratified by the shareholders. If, though unauthorized, the act of the directors would be one which the company had power to do and which it might have done *qua* company, that may be ratified. If, on the other hand, the unauthorized act of the directors be *ultra vires* of the company, it cannot be ratified by the shareholders because if such an act had been done by the company *qua* company, it would have been a nullity.

The ratification of the giving of the option by Antoine Roberge as trustee relates back to the date thereof and becomes his act as if he had given the same in person. The trustee, Antoine Roberge, had he given the option in person might have directed L. D. Roberge as his attorney to sign the same. As Lindley, L.J. in *In re Hetling and Merton's Contract* (3), stated: "I have no doubt myself that a trustee can execute a deed by an attorney * * *". Antoine Roberge, as trustee, under the circumstances of this case ratified the giving of the option and the execution thereof by L. D. Roberge. It is therefore a sufficient memorandum signed by the party to be charged to satisfy the requirements of the Statute of Frauds.

(1) (1890) Cameron Can. S.C. Cas. 275 at 280.
(2) (1889) 62 L.T. 164.
(3) (1893) 3 Ch. 269 at 280.

Best C.J. stated in *MacLean* v. *Dunn* (1).

> It has been argued, that the subsequent adoption of the contract by Dunn will not take this case out of the operation of the statute of frauds; and it has been insisted, that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly; but the statute only requires some note or memorandum in writing, to be signed by the party to be charged, or *his agent thereunto lawfully authorized;* leaving us to the rules of common law, as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing in effect as assent at the time. *Omnis ratihabitio retrotrahitur et mandato æquiparatur;* and in my opinion, the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes.

It was contended that the vendors had not satisfied all requisitions of title made by the purchaser's solicitor. This is not established, as evidenced by the purchaser's solicitor's letter above quoted.

The view of the learned trial judge that the plea of inequality was not established is supported by the evidence. In fact, throughout the conversations and correspondence the question of inequality or that the sale from the point of view of the estate was improvident was apparently not suggested nor was it supported by any evidence.

The appeal should be allowed with costs.

The judgment of Kerwin and Kellock JJ. was delivered by

KELLOCK J.:—The facts out of which this litigation arises are undisputed and are as follows: On May 9, 1944, the respondent, L. D. Roberge who was life tenant of the lands and premises here in question under the will of the late Georgianna Roberge, deceased, and who held a power of attorney with respect thereto from Antoine Roberge, executor of the last will of the deceased, interviewed one, A. I. Wright, a real estate agent in Kirkland Lake, Ontario, with regard to the said premises. Roberge told Wright that he was in financial difficulties because of the fact that the rents from the premises, after payment of outgoings, did not leave him sufficient for his maintenance. Roberge wanted Wright to assist in obtaining a new mortgage, but he also informed Wright that his family desired him to

(1) 1828) 4 Bing. 722 at 726; 130 E.R. 947 at 949.

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sell the property. The two men discussed a possible sale and Roberge said that he would like to sell if he could get a reasonable price and that at one time when things were somewhat better in Kirkland Lake he had been offered $60,000. Roberge was informed by Wright that the latter's commission on sale would be 5%. At Wright's suggestion Roberge went away to decide whether he wanted to sell or to have Wright obtain a new mortgage. In the meantime Wright undertook to "put out a few feelers". Wright then communicated with the appellant and learned that it would be interested if Roberge decided to sell.

The following day a further interview occurred between Wright and Roberge when the latter stated he desired to sell. On this occasion Wright suggested that Roberge drop his price from the figure of $60,000 mentioned the previous day, which was subject to the commission of 5%, to a net $55,000. Wright stated at this time that he would want an option for two weeks or a month. In the result Roberge agreed to an option in Wright's favour for two months at $55,000 and the agreement which took the form of an offer to sell, was drawn up and signed by Roberge as "Attorney for the Estate of the late Georgianna Roberge". The offer could be accepted on or before June 10th. Wright questioned Roberge as to his authority to sell and was assured that he had such authority.

Wright then advised appellants of the option price and the commission he would expect over and above that and arranged with them that if he could obtain a suitable mortgage and have the tenant, who occupied the premises in question and also adjoining premises belonging to the appellants, renew its lease, appellants would buy the premises for $55,000 and pay Wright $4,000 to cover his commission on the sale and his fee for arranging the mortgage and the renewal of the lease, making a total sum of $59,000 cash. Roberge was advised on May 22nd that a sale had been made for cash to the estate and a discussion took place as to investment of the purchase moneys. It was on this occasion that Roberge advised Wright that his son, the respondent Antoine, who lived in Flint, Michigan, was the executor of the estate.

Toward the end of May both the respondents called upon one of the officers of the appellant and told him that they understood the appellant was purchasing the property and that they were pleased but were sorry appellant had not dealt with them direct.

On May 30th the respondents visited Wright when the executor inquired whether Wright was sure the necessary money had been raised. Wright assured them that this was so, and that the Canada Permanent Mortgage Corporation had approved of the loan. Wright then suggested that they go to the solicitor for the appellant and close the matter but it was arranged instead, that they should go to the office of one, St. Aubin, whom Antoine Roberge said was solicitor for the estate. This appointment was kept and the appellant's solicitor, Mr. Lillico, also attended.

At this interview, L. D. Roberge stated that apparently he had signed something he had no authority to sign but the matter proceeded without further discussion of this point and Antoine Roberge instructed St. Aubin to "go ahead and get the matter closed out". Following this and on the same day Wright accepted the offer to sell by letter to the respondent Antoine Roberge, a copy being sent also to St. Aubin on the instructions of Antoine. From then on the solicitors dealt with the matter and considerable correspondence passed between them relating to the carrying out of the sale, until July 3, 1944, when the respondents refused to proceed further. The appellants having acquired an assignment from Wright and having given notice of the assignment, commenced the present action for specific performance. This was granted by Mackay J. but this judgment (1) was reversed by the court of appeal (2) which held that the executor could not in law delegate his power to sell and that the lack on the part of L. D. Roberge of any power to make a binding contract of sale made the alleged contract of sale null and incapable of ratification by the executor. The court held further than even if there were an agreement of sale or if the respondents were estopped from setting up its non-existence there was no sufficient note or memorandum in writing to satisfy the

(1) [1945] O.W.N. 771; [1946] D.L.R. Vol. 1 77.

(2) [1946] O.R. 379; [1946] D.L.R. Vol. 2 729.

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Statute of Frauds, the court being of opinion that the executor could not lawfully authorize another to sign a sufficient note or memorandum and that there was not a sufficient memorandum to be found elsewhere.

In the course of his judgment Laidlaw J. A., who delivered the judgment of the Court of Appeal (1) said:

> Is there a sufficient writing to be found elsewhere? There are two possible sources that might be suggested: First, the letter dated 3rd July, 1944, headed "Re: Georgianna Roberge Estate et al.", from Mr. St. Aubin, purporting to be written on instructions by the executor of the will to solicitors for Mr. Wright and the respondent. That letter refers expressly to the "alleged offer to sell and acceptance thereof", and sets forth the reasons the appellant Antoine Roberge will not proceed with the matter. It concludes, "The Vendor therefore rescinds the agreement herein." The contents of this letter may be properly read with the "offer to sell" and "acceptance thereof" for the purpose of satisfying the requirements of the statute, and that may be done notwithstanding that the letter repudiates liability on the contract: *Thirkell* v. *Cambi* (2). I am disposed to think that the letter referred to recognized that a contract had been made and that its terms were correctly stated in the offer to sell. But, again, it is not necessary to decide that question because, to make that letter effective in law, the respondent must show that Mr. St. Aubin was authorized to make an admission sufficient to bind the appellant Antoine Roberge to the contract set up by the respondent: *Thirkell* v. *Cambi* (2), at p. 595. Even if the appellant Antoine Roberge could lawfully authorize his solicitor Mr. St. Aubin (or any other person) to sign a writing sufficient to satisfy The Statute of Frauds—which, in my opinion, he could not do—I think there is no evidence in this case that he had done so. There is no evidence of any actual authority given to Mr. St. Aubin, and the necessary authority cannot be implied from the form or contents of the letter. On the contrary, his instructions were to repudiate the contract. " * * * the plaintiff cannot succeed unless he has affirmatively proved that the agent was authorized to sign a memorandum of the particular contract on which the plaintiff claims": *Thirkell* v. *Cambi* (2), per Eve J., at p. 599. This the plaintiff has failed to do.

I respectfully agree that St. Aubin's letter of July 3, 1944, is to be read with the offer to sell or option and its acceptance and in my opinion the letter recognizes that a contract had been made and that its terms were correctly stated in the option. It is not contended that these documents do not contain all the terms of the bargain come to.

It has already been pointed out that the executor had expressly instructed St. Aubin to carry out the contract and in pursuance of those instructions the latter had

(1) [1946] O.R. 379. (2) (1919) 2 K.B. 590.

conducted the correspondence with Lillico, his first letter of June 8, 1944, containing answers to requisitions on title made by Lillico. The last paragraph of that letter reads as follows:

> Should the purchaser not waive the requisition last mentioned my client will unfortunately have no other alternative but to rescind the contract as provided therein and shall not otherwise be liable to the purchaser except to return the deposit made, if any.

It is quite clear that parol evidence is admissible to identify "the contract" referred to, which is "the alleged offer to sell and acceptance thereof and the alleged assignment to McLellan Properties Limited" mentioned in the letter of July 3rd; *Cave* v. *Hastings* (1). The terms of the contract are therefore to be found in the option.

In *Thirkell* v. *Cambi* (2), there was no evidence of any authority from the defendant to the solicitor to make any admission to bind his client "to the contract set up" by the plaintiff. In *North* v. *Loomes* (3), however, Younger J. used language which, in my opinion, is applicable here. He said at p. 383:

> Mr. Taylor's instructions from the defendant were to complete, not to negotiate, a contract. It was an essential implication that he should, if and when necessary, affirm on behalf of his client the existence and validity, on his side, of the contract he was so instructed to carry out.

While it is true that a trustee may not delegate his power to sell, I see no reason why a trustee may not authorize an agent to sign on his behalf documents such as the letters which are here in question in the course of carrying out a sale which he himself has already made. As stated in Williams On Executors, 12th ed. 598, while executors cannot contract to sell by attorney

> this extends merely to the discretionary act. Having once exercised such discretion they may complete the transaction by attorney. For * * * trustees and personal representatives have never been bound personally to transact such business connected with the proper duties of their office, as according to the usual course of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through agents.

See also *In re Hetling and Merton's Contract* (4), per Lindley, L.J.

(1) (1881) 7 Q.B.D. 125.
(2) [1919] 2 K.B. 590.
(3) (1919) 1 Ch. 378.
(4) (1893) 3 Ch. 269 at 280.

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It is to be remembered that the acceptance of the offer to sell was made directly to the executor who personally had previously instructed his solicitor to carry out the contract. Before the acceptance of any offer to sell, therefore, the executor took the position toward Wright that there was an offer to sell which the latter could accept. This acceptance was given and the letters signed by St. Aubin, taken with the documents to which they refer satisfy the Statute of Frauds.

It is contended in the alternative by the respondent executor that he was entitled to rescind the contract and did rescind it by the letter of July 3rd on the ground that there were outstanding requisitions on title which the purchaser was insisting on. It is said the executor was unwilling to comply with these requisitions and that he rescinded the contract on account thereof in pursuance of its terms.

By letter of July 3 1944, written before the receipt of St. Aubin's letter of that date, Mr. Lillico, on behalf of the appellant, advised Mr. St. Aubin that his client was ready to complete. In fact appellant, while it had made certain requisitions, had never refused to complete if these were not complied with. The time for closing had not arrived on July 3rd when the respondents refused to go on. Respondents must fail on this point also.

Mr. Slaght further contended for the respondents that the appellant could not bring this action for the reason that while the assignment recited it was for valuable consideration, it was in fact voluntary. He argued that therefore the assignment was not an "absolute" assignment within the meaning of the *Conveyancing and Law of Property Act, R.S.O. 1937, c. 152.* This contention is not well founded. "Absolute" is used in the Statute in contradistinction to "by way of charge only". *Hughes* v. *Pump House Hotel Company* (1).

As to the point with respect to the so called "inequality" of the parties I agree with the judgment of the learned trial judge.

(1) (1902) 2 K.B. 190.

I would allow the appeal with costs here and below and restore the judgment of the trial judge.

Appeal allowed with costs and judgment of the trial judge restored.

Solicitors for the appellant: *Chitty, McMurtry, Ganong, Wright & Keith.*

Solicitors for the respondent Antoine Roberge: *Slaght, Ferguson, Boland & Slaght.*

Solictor for the respondent L. D. Roberge: *James Cowan.*