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*May 18.

*May 22,

JOAN OLIVE DUNSMUIR (DEFENDANT) ..... APPELLANT;

AND

LOEWENBERG, HARRIS & CO., (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract — Penal agreement — Evidence—Withdrawal of questions from jury—New trial.

D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned and agreeing to pay a commission of 5 per cent on the selling price, such commission to include all expenses. H. failed to effect a sale.

Held, affirming the judgment appealed from, that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to show that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought to have been submitted to the jury.

APPEAL from a judgment of the Supreme Court of British Columbia *en banc* (1), which reversed the judgment at the trial and directed a new trial.

As the result of correspondence between the appellant and a member of the respondent's firm named Harris, the latter undertook to effect a sale, if possible, of a coal mine for the appellant, in consideration of a commission on the selling price of five per cent, which

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

(1) *Sub.-nom. Harris* v. *Dunsmuir*, 6 B. C. Rep. 505.

commission was to include all expenses. The attempts at sale proved abortive on account, as alleged, of interference by the appellant, and the respondents brought suit to recover remuneration for services rendered and reimbursement of expenses incurred, relying upon the correspondence which had taken place, and also upon an alleged verbal agreement for compensation for his services and outlay, contending that this verbal agreement was collateral to the main contract, inasmuch as the payment by commission was contingent upon a sale being made whereas the verbal agreement was to indemnify the agents in case of failure. The admission of evidence of such an arrangement was objected to as inconsistent with the contents of the writings which, it was contended, became a written agreement as soon as acted upon. At the trial a ruling was made against the admission of the evidence, and, the plaintiff having refused a non-suit, the jury, under the direction of the court, found a verdict for the defendant, and judgment was entered accordingly. The plaintiff moved against this judgment before the full court, and, on the ground that there was evidence upon which a jury might reasonably have found for the plaintiff, a new trial was ordered.

Aylesworth Q.C. for the appellant.

S. H. Blake Q.C. for the respondents.

THE CHIEF JUSTICE.—After having heard the appellant's case very fully and ably argued, the court relieved the learned counsel for the respondents from answering it, for the reason that we were all of opinion that the appeal failed inasmuch as there was evidence which ought to have been left to the jury, and that therefore the order of the court below granting a new trial was not erroneous.

1900

DUNSMUIR v. LOEWENBERG, HARRIS & CO.

The Chief Justice.

In my opinion there was legal and admissible evidence in the deposition of the respondent Harris of a parol agreement supplemental to both the commissions to sell—to that of the 18th of January, 1892, as well as that of the 18th of September, 1890—making provision for a case which the written memoranda or letters signed by the appellant on the dates mentioned did not contemplate. Those letters only fixed the respondents' remuneration in the event of a sale being effected, in pursuance of the authority conferred upon Harris. Nothing is contained in them relating to the repayment for services and outlay for expenses in the event of a sale not being effected. It was not therefore in any way to vary or contradict the written evidence that there should have been a verbal agreement providing for indemnity to the respondents for the labour and disbursements of Harris in the event which has happened of failure to make a sale. The learned Chief Justice who presided at the trial seems to have considered that the terms of the letter from the respondent to the appellant of the 20th June, 1893, were so inconsistent with the existence of any claim of payment as a matter of right, that it neutralised the oral evidence given in the witness box and left nothing to be submitted to the jury. I cannot assent to this. The utmost that can be said is that the letter in question was a basis for contending before the jury, the proper tribunal, that they ought not to give credit to the testimony of the respondent Harris, but it was not a ground for withrawing the case altogether from the consideration of those who alone have the legal right to pass upon the credit of witnesses.

The appeal is brought before us without the amendment of the record ordered at the trial having been actually made. This ought to be done before the re-trial. There will then be presented by the plead-

ings two alternative cases, that originally made and the additional case founded on the alleged verbal agreement to indemnify the respondent for his services and money expended.

Speaking only for myself, I am unable to agree that there was any evidence whatever of the original case made by the respondents that of undue interference with the respondents in their efforts to make a sale.

The order for a new trial in the court below proceeds upon this ground exclusively. Had there been nothing else in the case I should have thought the appeal ought to have succeeded; as it is it must be dismissed and with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Davie, Pooley & Luxton.*

Solicitors for the respondents: *Bodwell & Duff.*