Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James T. Burchell v. The Gowrie and Blockhouse Collieries, Limited, from the Supreme Court of Canada; delivered the 29th July 1910.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD MERSEY.

[DELIVERED BY LORD ATKINSON.]

This is an Appeal by special leave from a Judgment of the Supreme Court of Canada, dated the 5th day of October 1909.

By that Judgment the Supreme Court affirmed by a majority a Judgment of the Supreme Court of Nova Scotia *in banco*, dated the 23rd day of January 1909, which by a majority reversed a Judgment of the Official Referee dated the 6th day of April 1908, to whom the case had been referred by an Order of the Supreme Court of Nova Scotia made on consent.

The Appellant is a mining engineer residing at the town of Sydney in Cape Breton Island in the Province of Nova Scotia, and has been for the past 25 years engaged in the coal mining business in Cape Breton Island.

The Respondent Company is a Company registered under the Companies Acts in England and is now in voluntary liquidation. All its directors live in England.

J. 9. 100.—7/1910. E. & S. [43].

The Appellant was employed by the Respondent Company to sell its property in Cape Breton Island on commission, and the question raised by this Appeal is whether the Appellant is entitled to his commission on the sale of the said property under the circumstances hereinafter mentioned.

The facts are substantially admitted.

In the year 1901 the Respondent Company was the owner of certain submarine coal areas at Port Morien off the coast of Cape Breton Island called the Gowrie Blockhouse Collieries.

The Appellant was manager of property for the Company, having been in the month of February 1902 appointed to that position in succession to a Mr. MacDonald. He went immediately after his appointment to reside at a place called Sydney, about 20 miles from Port Morien, and proceeded to develop the mine. Other subaqueous coal seams abutted upon or lay near the mines of the Respondents. In the year 1903 a Company named the North Atlantic Colliery, Limited, was formed to acquire and work these latter. Of this Company, a gentleman named the Hon. B. F. Pearson, a successful Company promoter, was the leading spirit. The Respondents had expended a large sum of money, amounting up to May 1902 to 64,000*l.*, in acquiring and developing the Port Morien Mine. In the year 1905 they were in great financial difficulties, were unable to raise money to continue the work further, and were apprehensive that to stop working the mine and shut it down would diminish its selling value. They determined accordingly to sell it, and with that view their chairman, Mr. Lindsay, on the 15th of August 1905, wrote to the Appellant a letter containing the following passages :—

" You asked me some time ago if I would be prepared to " sell, and my object in writing the present is to say that I

"am authorised to instruct you to make a sale on the "following conditions:—125,000*l.* with 3 per cent. com- "mission to you. In case of need 120,000*l.* less 2½ per cent. "commission to you. I realise that we are not able to "spend sufficient additional capital on this undertaking to "make it the success it deserves, and I hope you will "manage to find a buyer for me."

* * * *

"I hope you will manage to find a buyer, as I am beginning to be very much inconvenienced at having such a large sum locked up in the Colliery on which I am getting no interest."

Mr. Lindsay went on to suggest the names of three different persons and one Company as possible purchasers. The name of Mr. Pearson or of the North Atlantic Colliery was not amongst them.

On the 30th of August following Lindsay wrote to the Appellant a letter containing the following passage:—

"I am not able further to stand the drain [*sic*] of this "worry of finding further monies, and in order that you "might have a chance of tempting a buyer I have cabled "you that in case of need you could agree 105,000*l.*"

The Appellant looked around to find a purchaser, but without success. He wrote many letters to Mr. Lindsay urging him to send money to keep the mine open. While Lindsay wrote to him urging him to endeavour to sell it. On the 14th of September the latter writes to the Appellant:—

"I am really in a tight corner, and don't know where "to turn, so that I hope it will be quite possible with "your assistance to find a buyer for the property. I am "prepared to make a considerable sacrifice, as I feel my "health will not stand the strain of this burden much "longer."

The Appellant met Mr. Pearson, whether by accident or by arrangement does not matter. He brought Pearson over the Respondents' mine, showed him the workings, and pointed out that he had discovered in his development work, that the best way of approaching the subaqueous

coal beds of the North Atlantic Colliery was by working through the mine of the Respondents at the South Head instead of from the North Head as had been previously contemplated by Pearson and his Company. Pearson was apparently convinced of the superiority of the suggested means of approach. They spent the day together, when Burchell informed him that he, Burchell, had authority to sell the mine, at the same time stating the terms.

On the 17th of December 1905 Burchell telegraphed to the Respondents :—

"Prospects good selling property. Promise three "months. Do you authorise? In the meantime must "have funds. Quick action is imperative."

And on the following day wrote a letter to Lindsay containing the following passage :—

"The proposed purchasers this time are the owners of the "MacDonald property, South Head. . . . B. F. Pearson "is the ablest promoter we have in Canada. . . . I would "like to be in a position to give him our terms. As I under- "stand from our conversation and correspondence, your best "figures are 105,000*l*., and if necessary half of this you "would be willing to take in stock and half cash. Of "course I will get as much as possible, but I want your "lowest offer, and it may be they would prefer to buy "outright without giving any stock. But you must put "me in a position to act promptly."

On the 21st of December Pearson wrote to the Appellant asking for an option to buy this property within three months at the price of $625,000, on the terms of paying for the option $5,000. This offer was communicated by Burchell to his employers, approved of by them, and accepted by him. The last telegram from Lindsay runs thus :—

"Both your telegrams received. Agree to 1,000 times "$625, ten per cent. Commission 1,000*l*., paid immediately. "One month option. 'Three.'"

This telegram was duly confirmed by letter from Lindsay of the 27th of December. Pearson

apparently experienced some difficulty in finding money to carry out this purchase. Burchell went to Halifax to interview him on the subject, and on the 1st of January wrote to Lindsay a letter containing the following passage :—

"So far we are talking cash, but if they have a difficulty " in securing all the money we must be in a position to take " part stock in a company they are forming.

Many communications subsequently passed and many interviews took place between Pearson and Burchell.

In the latter end of January and beginning of February 1906 Burchell spent a week at Halifax engaged in negotiating with Pearson a modification of the terms of payment for the Respondents' mines, payment in cash having been found impossible. In his letter of the 5th of February 1906 to Lindsay, Burchell set forth the proposed changes in the following passage :—

"They want that we should take half stock, or rather " bonds, in a new company that is being formed. As far " as we have gone, it is like this, $325,000.00 cash as " follows :—$5,000 to be paid for thirty days' option. At " the end of thirty days $45,000 to be paid on purchase and " $50,000 every sixty days until the full amount of $325,000 " is paid. Balance of purchase money to be taken in stock " or bonds at market value, or purchasers to have the " option of substituting a smaller amount of cash in place " of bonds. This latter payment may possibly have to be " changed after the expert arrives, but if there is any " change in these values it will have to be in the latter " payment, as I am insisting on $325,000 cash. All this " will probably have to be arranged by cable, as I hope to " have it fixed before you can receive this letter, which " should leave Halifax by to-morrow night's mail. Of " course, if we make these alterations, the sale will be " subject to the same commission as sanctioned by you in " our previous agreement. I have every reason to believe " that the purchase will go through, and am making every " effort in your interest to complete a satisfactory sale."

The thirty days option was changed to sixty, and with this alteration Pearson's offer was accepted. The letter of Lindsay to Burchell in

reference to the matter is most significant. It runs thus:—

"Newcastle-on-Tyne,
"20th February 1906.

"We are in receipt of your two favours of the 5th "instant, and have also exchanged telegrams with you as to "varying the terms of agreement of sale of the colliery.

"We have agreed to the terms of your letter of 5th "instant, with the exception that 60 days' option (from the "5th instant) is substituted for the 30 days, and we "stipulated that $5,000 should be paid at once, and that the "remaining $300,000, after deducting $325,000 to be paid "in cash, should be paid by bonds of the new company. We "are glad to have your cablegram announcing that the "buyers have paid the $5,000 deposit, and that you have "arranged us fully on the 16th instant.

"We trust that you have arranged that the commission "payable shall be paid by cash and bonds in proportion to "the amount of each received by the company. We would "rather have the entire amount of $625,000 in cash, and "would be willing to concede a discount (in case of need) "up to 10 per cent. on the $300,000, and probably it may "suit the buyers to fall in with this proposal."

This option was in consideration of $10,000 extended to the 16th of May 1906, but ultimately fell through like the previous one. Burchell, however, insisted upon being paid, and was paid his commission of 10 per cent. on the sum forfeited under both. On the 22nd May 1906 Lindsay wrote to Burchell in a letter in which the following passage occurrs "of course we are "now free to dispose of the property elsewhere "should another opportunity offer, this however, "at the moment we don't anticipate." Things dragged on. On the 17th of August 1906 Lindsay wrote to Burchell a letter in which the following passage occurs:—

"From our letters received ere this you will have seen "that we are leaving the matter of the sale of the colliery in "the hands of Pearson and yourself. Sir Montague Allan "won't pay anything for options, and we think with you "that Pearson has the most feasible scheme."

The negotiations with Pearson, however, were continued. A Mr. Richardson, a mining

engineer, was, on the 28th of December 1906, sent out by the Respondents to inspect the mine and report for the information of the shareholders. Pearson became aware of his arrival, and on the 17th of January 1907 wrote to Burchell that it would be well for Richardson to consider " the advisability of an amalgamation " with the North Atlantic Collieries and make " a larger deal." On the 21st of January, Burchell wrote to Lindsay that Richardson had thorougly inspected the mine, and that he would bring Pearson and him together and talk over the situation, and on the 8th of February 1907, Lindsay wrote to Burchell informing him that " we, [the Company], hope Mr. Richardson may " have seen Mr. Pearson and have something " definite to tell us as to this gentleman's " prospects of being able to sell [presumably buy] " the mine."

Richardson while in Canada came into contact with MacDonald, now become a Director of the North Atlantic Collieries Company, and a Mr. McCurdy, the son-in-law of Pearson. They crossed to England in the same ship.

On the 27th of February 1907 Lindsay on behalf of the Respondents, behind the back, and without the knowledge, of Burchell, entered into an agreement with MacDonald and McCurdy (described as the grantees), to sell to them the Port Moren Mines for the following considerations, $300,000 par value, first mortgage 6 per cent. bonds of North Atlantic Collieries, Limited, $350,000 Preferred 7 per cent. Stock of the same Company, and $450,000 Common Stock of the same Company. The grantees to pay the defendant Company's debts amounting to $12,500.

Before MacDonald came over to England he had been brought into privity with the negotiations between Burchell and Pearson.

Discussion had taken place between McCurdy, and Pearson and him as to the merger of the North Atlantic Collieries, the Gowrie and Blockhouse, and the Cape Breton and Broughton Company, and before MacDonald left for England with McCurdy, Pearson had given him an option on his, Pearson's, interest to enable the former to carry through the arrangement for amalgamation, as it is called, which MacDonald contemplated endeavouring to negotiate with the Respondents. It is impossible to contend, in the face of the telegrams which passed between McCurdy and MacDonald and Pearson on the 26th and 27th of February 1907, that Pearson was not the dominating personality in the negotiations which culminated in the agreement of the 27th of February 1907. Everything was done with his privity and consent. His consent was indeed apparently considered to be essential. MacDonald and McCurdy were but Pearson's agents or co-adventurers in the transaction, and the common object of each and all of them was to secure for the company in which they were all interested—the North Atlantic Colliery—the special benefits and advantage which Burchell had shown Pearson the ownership of the Respondents' mine would confer.

In that condition of things the Appellant brought his Action, claiming in his writ of summons $111,200 damages for breach of contract, and in the alternative one-tenth of each class of the securities which formed the consideration for the sale, and $1,200 cash, one-tenth of the cash given. In a second alternative he asked for a declaration that he was entitled to these latter things. No pleadings were delivered, but by consent it was ordered by the Court that the whole of the cause should be tried before the Official Referee who should have all the powers of certifying and amending of a Judge

of the Supreme Court, and should direct judgment to be entered and otherwise deal with the whole Action pursuant to Order 34 of the Rules of the Supreme Court.

It was admitted before the Referee that by deed dated the 27th of June 1907 the Respondents' mine was conveyed to the North Atlantic Collieries, Limited. It was not contended before their Lordships, as it was at the trial and in the Courts below, that no "sale" of the Respondents' property had taken place. That point, which was quite untenable, was most properly abandoned by the Respondents' Counsel; but the finding and judgment of the Referee was impeached on two grounds, (1) that the acts of the Appellant, Burchell, were not an "efficient" cause of the particular sale which, in fact, took place; and (2) that even if they were such a cause, and that he was entitled to some damages, or some commission on a *quantum meruit*, he was not entitled to the full commission awarded.

There was no dispute about the law applicable to the first question. It was admitted that if, in the words of the Erle, C.J., in *Green* v. *Bartlett*, 14 C. B. N. S. 681—

> "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 show that some act of his was the *causa causans* of the sale (*Tribe* v. *Taylor*, 1 C. P. D. 505, 510); or was an efficient cause of the sale (*Millar* v. *Radford*, 19 T. L. R. 575).

Upon the question of fact, however, whether the acts of the Appellant were in this case an efficient cause of the actual sale, much reliance was placed upon the contents of two letters of the Appellant dated the 1st and 21st of March 1907 respectively. In the first of these, after cautioning his principals against having anything to do

with MacDonald and McCurdy and the suggested amalgamation, he wrote—

"I have resisted every effort of my friend Mr. Pearson "to allow your property to be drawn into this alliance on "any terms other than a cash basis, and even then I "would not tie the property up to these people unless they "were prepared to pay a reasonable forfeit. Failing with "me I suppose they are now trying to work direct with "you."

And in the second of these letters, written after Burchell had become aware of the deal which had taken place, he wrote as follows:—

"As I wrote you, these people's proposals that have been made to you had been offered to me repeatedly, and seeing that I turned them down on every occasion they sought to work direct, and I should judge by your letter with some success."

In reference to these passages it was contended (1) that the Appellant should not have taken it upon himself to "turn down" these proposals, but should have communicated them to his principals; and (2) that the acts of an agent cannot be held to be the efficient cause of a sale which he has, in fact, opposed.

The answer to the first contention is that there is not a suggestion from beginning to end of this long correspondence that less than one half of the consideration for the sale of the mine should be paid in cash. On the contrary, ready money, at least, to that amount was the great desideratum. The lowest price which Lindsay would in December 1905 consent to take was, as appears from the correspondence, $105,000, half in cash and half in stock.

In September 1906, he informed Burchell that he had rejected Sir H. Montague Allan's proposals, and that his (Lindsay's)

"Directors did not see their way to join any scheme which did not provide for part of the purchase money being paid in cash."

Their Lordships do not think that any duty lay upon an agent, such as Burchell was, to

communicate to his principals proposals which those principals had theretofore in effect informed him could not and would not be accepted.

The answer to the second contention 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.

There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent.

Pearson acting with his associates in the interests of the North Atlantic Colliery, was the purchaser introduced. Pearson with his co-adventurers acting in the same interest was the actual purchaser, in fact nothing was in reality altered but the consideration to be paid. Stock was to be given in a larger proportion than Burchell was authorised to accept. In all other respects, the sale made and the sale authorised to be made by Burchell, were in effect the same.

On this question of fact there was, their Lordships think, ample evidence to sustain the conclusion at which the Referee presumably arrived, namely, that the Appellant's acts were an effective cause of the sale which actually took place. In their Lordships' view it was the right conclusion, and the finding to that effect ought not, they think, to be disturbed.

There only remains the question of damages. The Referee found that "the power of sale was a

" continuing power of sale." By that presumably he meant that the agent's employment was " a " general employment " in the sense in which Lord Watson, in his judgment in *Toulmin* v. *Millar*, 58 L. T. R. 96, uses those words. This means, however, that Burchell's contract was that should the mine be eventually sold to a purchaser introduced by him, he, Burchell, would be entitled to commission at the stipulated rate, although the price paid should be less than, or different from, the price named to him as a limit. The secret sale deprived him of the benefit of that contract. He lost his chance of earning this commission.

In *Inchebald* v. *The Western Neilgherry Coffee, &c., Co.*, 17 C. B., N. S. 733, Willes, J., thus lays down the rule of law applicable to such cases: " I apprehend that wherever money is " to be paid by one man to another upon a " given event, the party upon whom is cast " the obligation to pay, is liable to the party " who is to receive the money if he does any " act which prevents or makes it less probable " that he should receive it." The negotiations for sale carried on by Burchell extended over two years.

From the correspondence it is clear they cost him much in time and labour, and something in money. It was quite open to the Referee to take, as the measure of damages, what would have been Burchell's commission at the stipulated rate, 10 per cent. on the consideration actually received for the sale. This is apparently what he did. In their Lordships' view, therefore, the conclusions at which the Referee arrived on the nature and limits of the Appellant's employment, as well as on the amount of damages to be awarded, are not only sustainable upon the evidence, but are in themselves right. The Appeal, in their opinion, should therefore be allowed, the Judg-

ment appealed from reversed, and the Judgment of the Referee restored. And they will humbly advise His Majesty accordingly. The Respondents must pay the costs here, including the costs of the Petition for special leave to appeal which were by their Lordships' Order reserved, as well as the costs in the Courts below.

In the Privy Council.

JAMES T. BURCHELL

v.

THE GOWRIE AND BLOCKHOUSE COLLIERIES, LIMITED.

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