[HIGH COURT OF AUSTRALIA.]

MICHAEL JOSEPH RYAN . . . . APPELLANT;
PLAINTIFF,

AND

HENRY HORTON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

SYDNEY, *April* 19, 20, 21; *May* 5.

Griffith C.J., Barton and O'Connor JJ.

Principal and agent—Sale of land—Commission on sale—Revocation of authority—Agreement by purchaser with principal to buy stock and take lease of land with option of purchase—Right of agent to commission on subsequent purchase—Statement by purchaser that agent had not induced him to purchase.

New trial—Misdirection—Point not raised at the trial.

The defendant and S. were the owners of adjoining station properties, and the question of the purchase by S. of the defendant's land had been discussed between them. The defendant subsequently employed the plaintiff as his agent to sell this property to S., and asked him to endeavour to induce S. to offer £5 per acre for the land. The plaintiff endeavoured to do so for some 15 months, but could not induce S. to offer more than £4 10s., which the defendant refused to accept. The defendant afterwards told the plaintiff that he had decided to sell the property as a going concern, and that the question of the sale had been left to S. to consider. S. subsequently wrote to the plaintiff and informed him that he had decided not to buy any more land for a time. The plaintiff, however, continued to endeavour to induce S. to purchase. Shortly afterwards the defendant and S. met together, and S. bought the defendant's stock, and agreed to lease the land with an option of purchase at £5 5s. per acre, at which price he afterwards bought it. S. was called as a witness by the plaintiff, and stated that the plaintiff's efforts had not influenced him in making the purchase. *Held*, that there was evidence on which the jury could find that the plaintiff was entitled to commission on the sale of the defendant's land.

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Where counsel for both parties have agreed as to the issues to be submitted to the jury, and no objection has been taken to the Judge's direction at the trial, a new trial will not be granted upon a new point, not taken at the trial, as to the effect of the evidence given.

Decision of the Supreme Court, 31st October 1910, reversed.

APPEAL by the plaintiff, by special leave, from the decision of the Supreme Court, granting a new trial, and setting aside a verdict for the plaintiff, upon the grounds: 1. That no new trial could be granted on the ground of misdirection, as the direction of the presiding Judge had been assented to. 2. That the direction given was correct. 3. That the Supreme Court were in error in deciding that the verdict was against evidence.

The action was for commission due upon the sale by the plaintiff, a stock and station agent at Molong, of the Boomey Estate of about 10,000 acres to Major Smith at £5 5s. an acre.

The defendant and Major Smith were neighbouring land owners near Molong, and the question of a sale of this property by the defendant to Major Smith had been occasionally discussed between them. In May 1908 the plaintiff was instructed by the defendant to get an offer for this property from Smith. On 11th May 1908 the plaintiff telegraphed to the defendant, "Major offers £4 for property, will you accept." The defendant replied, "No, £5 10s. lowest." Smith told the plaintiff he thought this was too high. The plaintiff then saw the defendant and told him he thought he could induce Smith to increase his offer, and the defendant said, "Very well, do so." Smith then increased his offer to £4 10s. The plaintiff told the defendant of this offer, and the defendant instructed him to get Smith up to £5 or thereabouts and he would probably be talking business, and that he would not sell under £5. Subsequently in September or October 1908 the defendant told the plaintiff that he had wired Smith to say he would see him at Nandilyan (Smith's property), and finally put Boomey before him to purchase; that he wanted to sell it as a going concern, stock and all, a walk in and walk out sale, and there was some conversation about the commission which the plaintiff would expect on such a sale. The plaintiff saw Smith the same day, and he said if he agreed to the price it would suit him to buy it as a going concern. A few days later

the plaintiff told the defendant the question of the sale had been left under Smith's consideration for an unlimited time. On 4th October 1909 Smith wrote to the plaintiff as follows:—"Since seeing you I have decided not to buy any more land for a time. I will let Mr. Horton know to save you going out." Previously to this the plaintiff had arranged with Mr. Miller, a stock and station agent at Molong, to assist him in inducing Smith to make the purchase. Subsequently in the same month Smith met the defendant and bought the stock, and on 21st October Smith agreed to lease the property with the option of purchase, at £5 5s. per acre, in 12 months. In November 1909 Smith exercised his option of purchase and the lease was never drawn up. The stock, machinery and plant came to £5,000. Smith, who was called by the plaintiff, in cross-examination said:—"The plaintiff tried to sell to me, but I should say his efforts had not influenced me at all. I do not remember speaking to Miller after the letter of 4th October. I cannot remember any time I spoke to Miller, because I did not consider he had anything to do with it. He spoke to me with reference to it a good many times."

At the close of the plaintiff's case the defendant applied for a nonsuit, which was refused.

Evidence was given for the defendant in contradiction of the evidence given by the plaintiff.

The defendant in his evidence stated that on 15th October 1909 he had a conversation with the plaintiff at Boomey, in which he said:—"Is it a fact that you were trying to bring Major Smith on to Boomey? How dare you attempt to bring anybody on to Boomey without my authority, which you have not got?" and that the plaintiff replied:—"I admit I have got no authority, but I thought if I brought the Major over I would get some, and we have to take all points in our line of business."

Upon the new trial motion, counsel for the defendant contended that the Judge should have directed the jury that they could regard this as evidence of revocation of the plaintiff's authority, and that as he had omitted to do so the case had not been properly presented to the jury.

Sly J. directed the jury in accordance with *Green* v. *Bartlett*

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(1), that the issues for their determination were: 1. Was the plaintiff employed by the defendant? 2. Was the relation of buyer and seller brought about by the plaintiff? No exception was taken to the learned Judge's direction. The jury found a verdict for the plaintiff for £770 16s., being full commission on the sale of land only.

The Supreme Court ordered a new trial upon the grounds: 1. That the verdict was against evidence. 2. That the amount of the verdict was excessive. 3. That, in view of the evidence of the purchaser Smith that the efforts of the plaintiff had no effect in bringing about a sale, a verdict should have been found for the defendant.

Owen K.C. and *Windeyer*, for the appellant. The Supreme Court granted a new trial upon the ground that the jury's attention was not properly drawn to the question of revocation of the plaintiff's authority. That is not a ground for a new trial. The issues left to the jury were consented to by counsel for both parties. The parties are bound by the course taken at the trial. The defendant cannot afterwards raise some new ground which was open to him on the evidence: *Mutual Life Insurance Co. of New York* v. *Moss* (2); *Rowe* v. *Australian United Steam Navigation Co. Ltd.* (3); *Seaton* v. *Burnand* (4). There was sufficient evidence to warrant the jury in finding that the plaintiff was employed by the defendant, and that the plaintiff brought about the purchase: *Green* v. *Bartlett* (5); *Prickett* v. *Badger* (6); *Wilkinson* v. *Martin* (7); *Burton* v. *Hughes* (8); *Steere* v. *Smith* (9); *Re Beale* (10).

Loxton K.C. and *Rolin*, for the respondent. Assuming there is evidence of employment, the plaintiff must show performance of conditions precedent, or exoneration and discharge by the wrongful act of his principal. The plaintiff was never at any time a general agent for sale. He was engaged for a particular

(1) 14 C.B.N.S., 681, at p. 685.
(2) 4 C.L.R., 311.
(3) 9 C.L.R., 1.
(4) (1900) A.C., 135, at p. 142.
(5) 14 C.B.N.S., 681; 32 L.J.C.P., 261.
(6) 1 C.B.N.S., 296; 26 L.J.C.P., 33.
(7) 8 C. & P., 1.
(8) 1 T.L.R., 207.
(9) 2 T.L.R., 131.
(10) 5 Mor., 37.

purpose, to bring Smith up to £5 10s., or later, £5. If the principal considers that sufficient time has elapsed to allow the agent to effect the special purpose, he is free to discharge the agent and effect that purpose himself, provided he does so *bonâ fide* and without an intention to defraud the agent of the commission he has earned: *Sibbald* v. *Bethlehem Iron Co.* (1). In this case the plaintiff had failed to effect the purpose for which he was employed. Smith told the plaintiff he had decided not to buy. The defendant then discharged the plaintiff, and induced Smith to take a lease with an option of purchase. The plaintiff must show a complete chain of causation from his efforts to the completion of the sale. Unless there was a trick on Smith's part on 4th October, and there is no evidence of it, the plaintiff's case fails, because he was *bonâ fide* discharged. The taking of the lease was a complete break in the chain of causation. The purchase of the station "lock, stock and barrel," was something quite different from what the plaintiff was employed to effect, namely, the sale of the land only. Smith stated that Ryan's efforts did not influence him at all.

[GRIFFITH C.J.—That would be a question for the jury.]

If the evidence is as consistent with the defendant's as with the plaintiff's case, the plaintiff must be nonsuited. Smith's evidence is called by the plaintiff, and it is not open to the jury to disregard it, as if it were evidence for the defence. There is no law or custom binding the vendor to leave his property in the agent's hands for any fixed or any reasonable time: *Hardie* v. *Brown* (2). When an agent is employed to get a known purchaser up to a certain figure, he is not entitled to any commission unless he proves that he has succeeded in doing so, or that he was prevented from doing so by the wrongful act or default of the vendor: *Laws of England*, vol. I., p. 194; *Toulmin* v. *Millar* (3); *Barnett* v. *Isaacson* (4). The plaintiff did not introduce the purchaser to the defendant. The sale had been discussed before the plaintiff's employment. It is quite consistent with the evidence that the sale was brought about by the defendant's own efforts.

[GRIFFITH C.J.—The question is what were the operations of

(1) 83 N.Y., 378.
(2) 7 N.S.W.L.R., 303.
(3) 58 L.T., 96.
(4) 4 T.L.R., 645.

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Smith's mind. The jury were not bound to believe him. It is by no means clear that no commission was to be paid unless £5 was obtained. It was for the jury to find what the agreement was.]

It was for the plaintiff to give evidence that the sale was due to his efforts.

[They also referred to *Groom* v. *Kindellan* (1); *Millar* v. *Radford* (2); *Green* v. *Mules* (3)].

Owen K.C., in reply.

GRIFFITH C.J. We have had an opportunity of fully considering the facts of this case since the last adjournment, and we do not think it is necessary to reserve judgment. The action was for commission, claimed to have been earned by the plaintiff as an agent, for bringing about a sale of the defendant's estate to Major Smith. The defence was a denial of the plaintiff's authority, and of the allegation that this sale was brought about by his instrumentality. At the trial before *Sly* J., that learned Judge directed the jury in accordance with the case of *Green* v. *Bartlett* (4), that there were two questions for their decision, whether the plaintiff was employed by the defendant, and whether the sale was brought about by the instrumentality of the plaintiff. Counsel for both parties agreed that these were the only questions for decision. The jury answered both questions in favour of the plaintiff, and, as I understand the judgment of the learned Chief Justice, he thought that the jury were justified in coming to that conclusion, but the Supreme Court ordered a new trial upon a ground as to which I think there must have been some misapprehension of the facts. There was a fragment of evidence given by the defendant which, if believed, might have been taken as pointing either to a revocation of the plaintiff's authority, or to a denial of any original authority. The Judges of the Supreme Court thought that the effect of this evidence as showing a revocation of the authority given to the plaintiff had not been sufficiently brought to the attention of the

(1) 16 A.L.T., 20,
(2) 19 T.L.R., 575.
(3) 30 L.J.C.P., 343.
(4) 14 C.B.N.S., 681, at p. 685.

jury, and that therefore a new trial should be granted. But, with all respect, that question was involved in the second question left to the jury, whether the sale was brought about by the instrumentality of the plaintiff. If his authority had been revoked before the work done by the plaintiff had produced any result, then the sale was not brought about by him.

The plaintiff had to establish a chain of causation between his efforts and the result. If his efforts had been interrupted, and the agency determined, before any result had been achieved, he could not recover. The real questions in issue between the parties were left to the jury, and the real objection was that the learned Judge did not lay sufficient stress upon a particular part of the evidence. But that is not a ground for a new trial. A Judge's direction is not open to objection merely upon the ground that he did not give equal emphasis to every part of the evidence. What is due emphasis may depend to a large extent upon the way in which the case is conducted at the trial. When certain issues have been put before the jury with the consent of both parties, and are finally left to the jury, they cannot afterwards apply for a new trial upon a new point not taken at the trial.

The only real question in the case, therefore, is whether there was any evidence upon which the jury, as reasonable men, could find that the sale of the defendant's land was brought about by the plaintiff's instrumentality. There was abundant evidence that the defendant retained the plaintiff as his agent to try and induce Major Smith to buy the land; possibly he fixed a minimum price of £5 per acre, possibly he did not. After the plaintiff had done a good deal of work in trying to bring about the sale, Major Smith agreed to take a lease of the land from the defendant, with an option of purchase at five guineas an acre, and very shortly afterwards bought the land at that price. The point was taken that a lease with an option of purchase is quite a different thing from a purchase. That is a question of fact. It may be in substance part of the transaction of sale or it may be in substance a different transaction. The transaction may be in effect a conditional sale or it may be really a lease with an option added as something extraneous to it. In any view the agreement was a step towards purchase. All these were ques-

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tions of fact and degree, and they were all involved in the question whether the sale was brought about by the instrumentality of the plaintiff. He was negotiating with Major Smith for more than a year. He had induced him to raise his price to £4 10s. per acre, and Major Smith had given the plaintiff to understand that he would probably be willing to give £5. While the matter was in that position Major Smith told the plaintiff that he had determined not to buy for the present. Two or three days afterwards, however, he resumed negotiations directly with the defendant, and in two or three weeks the whole transaction was concluded. There was evidence that in the meantime the plaintiff's sub-agent was still in communication with Major Smith, pressing him to buy instead of taking a lease. If that evidence was believed—and the jury apparently did believe it—they could reasonably infer that the sale was in fact brought about by the instrumentality of the plaintiff, and I understand that the learned Judges of the Supreme Court were also of that opinion.

I therefore think that the appeal should be allowed and the verdict of the jury restored. The point upon which the verdict was set aside and a new trial granted seems, as I have already said, to have been based on a misapprehension of the facts.

BARTON J., and O'CONNOR J., concurred.

Appeal allowed.

Solicitors, for appellant, *McLachlan & Murray.*
Solicitors, for respondent, *Iceton, Faithfull & Maddock.*

C. E. W.