Foll Vic Professional Management v Surfers Aquarius Units [1991] 1 QdR 487

[HIGH COURT OF AUSTRALIA.]

TAYLOR . . . . . APPELLANT;
PLAINTIFF,

AND

SMITH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 19, 20, 21; *June* 10.

KNOX C.J., ISAACS, HIGGINS, RICH AND STARKE JJ.

Principal and Agent—Authority to sell land for net sum—Right to retain excess over that sum—Authority in writing to sell for certain sum and to retain excess—Signature obtained by misrepresentation—Principal not able to read without glasses—Non est factum—Action for money had and received—Money paid away by solicitor under mistake of fact—Recovery from payee—Ratification.

An authority to an agent to sell property for a certain sum net does not, in the event of a sale being effected for a larger sum, entitle the agent to retain any sum in excess of the amount of his commission calculated on the usual scale.

Where money is, without the authority of the principal, paid by his agent to a third party under a mistake of fact, the money may be recovered by the principal from the third party in an action for money had and received.

Holt v. *Ely*, (1853) 1 El. & Bl. 795, followed.

The respondent, who owned a certain property, signed a document in which it was stated that he gave to the appellant the sole offer of the property for a certain sum and that he agreed to allow to the appellant as bonus or commission any excess over that sum which might be obtained by the appellant from the purchaser. At the time of signing the respondent had not his reading glasses, without which he was unable to read, and he was induced to sign it by the representation that it was a mere authority to sell.

Held, that the respondent was not bound by the document.

A sum of money having, without the respondent's authority, been paid by the respondent's solicitor to the appellant under the erroneous belief that the respondent had agreed to pay it to the appellant,

Held, by *Knox* C.J., *Higgins*, *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), that in the circumstances of the case the respondent had not ratified the payment, and might recover the sum from the appellant.

Decision of the Supreme Court of Victoria (Full Court): *Taylor* v. *Smith*, (1926) V.L.R. 100; 47 A.L.T. 122, affirmed.

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APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court at Melbourne by Henry Norbert Taylor against Sydney Wentworth Smith in which the defendant, by counterclaim, claimed, (*inter alia*) as money had and received to the use of the defendant, the sum of £387 10s., being the difference between £500, part of a sum of £4,500, the price of certain flats of the defendant which had been sold through the agency of the plaintiff, and £112 10s., the usual commission on a sale for that amount. The County Court Judge found for the defendant on the counterclaim, and, on appeal to the Supreme Court, the Full Court upheld his decision: *Taylor* v. *Smith* (1).

From the decision of the Full Court the plaintiff now appealed to the High Court.

The material facts are stated in the judgments hereunder.

Owen Dixon K.C. (with him *Walker*), for the appellant. The respondent was not entitled to recover on this counterclaim unless he established that the money was received by the appellant in such circumstances as to make the receipt of it a receipt to the use of the respondent. If the respondent had himself paid the £500 to the appellant the former could not, at common law, have recovered it; for it would have been a voluntary payment. If the respondent adopts the act of his solicitor, Serle, in paying over the money, the respondent is in the same position: the payment is still voluntary. If he disavows his solicitor's authority to pay it, he may sue the solicitor for money had and received, but he cannot sue the appellant (see *Sinclair* v. *Brougham* (2)). There was no money paid over to the appellant by Serle, but merely a cheque was given drawn on Serle's account. The County Court has no equitable jurisdiction in a case like this (see *County Court Act* 1915 (Vict.), secs. 121, 68).

(1) (1926) V.L.R. 100; 47 A.L.T. 122.

(2) (1914) A.C. 398.

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[STARKE J. referred to *John* v. *Dodwell & Co.* (1); *Holt* v. *Ely* (2).]

It does not follow that because Serle might have a cause of action against the appellant, his principal (the respondent) has the same cause of action.

[KNOX C.J. referred to *Litt* v. *Martindale* (3).

[ISAACS J. referred to *Thomson* v. *Clydesdale Bank* (4).]

If there was a mutual mistake between Serle and the appellant, Serle might have recovered the money. But there is no possibility of that being so, for Serle's position was that he was authorized to make the payment. Even if the payment to the appellant was not authorized by the respondent, the evidence shows that the respondent with full knowledge of all the material facts ratified the payment. The respondent cannot rely on the plea of *non est factum* with respect to the document giving the appellant authority to sell for £4,000 and to retain as bonus or commission anything he might obtain from the purchaser beyond that sum. In order that this plea may be sustained the respondent must show that the document which he signed is of an entirely different character from that which he believed it to be. Here the respondent knew that the document was an authority to sell his property and the agent believed that he was being given an authority and a promise to pay certain remuneration. There was no suggestion of fraud. If there is the appearance of agreement, it can only be displaced by showing that there was no real agreement, but it must also be shown clearly that the other party did not suppose that there was an agreement. [Counsel referred to *Smith* v. *Hughes* (5); *Law Quarterly Review* 1912, vol. XXVIII., p. 190, as to *Carlisle and Cumberland Banking Co.* v. *Bragg* (6); *Foster* v. *Mackinnon* (7); *Howatson* v. *Webb* (8); *Hunter* v. *Walters* (9); *Lee* v. *Ah Gee* (10).]

[HIGGINS J. referred to *National Provincial Bank of England* v. *Jackson* (11).]

(1) (1918) A.C. 563.
(2) (1853) 1 El. & Bl. 795.
(3) (1856) 18 C.B. 314.
(4) (1893) A.C. 282, at p. 287.
(5) (1871) L.R. 6 Q.B. 597.
(6) (1911) 1 K.B. 489.
(7) (1869) L.R. 4 C.P. 704.
(8) (1907) 1 Ch. 537; (1908) 1 Ch. 1.
(9) (1871) L.R. 7 Ch. 75.
(10) (1920) V.L.R. 278, at p. 286; 42 A.L.T. 19, at p. 22.
(11) (1886) 33 Ch. D. 1.

Russell Martin, for the respondent. There was evidence which showed that the appellant received the £500 directly from the purchaser. If he received it from Serle, the only authority which Serle had from the respondent was to pay the ordinary commission, and the respondent might recover the excess from the appellant (*Litt* v. *Martindale* (1)). If there was no absolute misrepresentation by the appellant, the only inference is that Serle paid the £500 to the appellant believing that the document which the respondent signed was valid and entitled the appellant to recover that sum from the respondent. In that case the respondent is entitled to recover the excess from the appellant as money had and received (*Holt* v. *Ely* (2) ; *Stevenson* v. *Mortimer* (3)). As to the plea of *non est factum*, if the mind of a person does not accompany the act of signing he is not bound (*Foster* v. *Mackinnon* (4)). The distinction drawn in *Howatson* v. *Webb* (5) that, if the document deals with the property with which the person signing intends to deal, he cannot rely on *non est factum*, is not sound. If the person signing is deceived as to the actual contents of the document, the case falls within the principle (see *Bagot* v. *Chapman* (6)). The delay by the respondent in asserting his right to recover cannot affect that right (*Wall* v. *Cockerell* (7)). The evidence does not show a ratification by the respondent with full knowledge of all the facts.

[HIGGINS J. referred to *De Bussche* v. *Alt* (8).]

Owen Dixon K.C., in reply.

Cur. adv. vult.

June 10.

The following written judgments were delivered :—

KNOX C.J. The appellant having sued the respondent in the County Court to recover the amount of a dishonoured cheque, the respondent counterclaimed in the action for £387 10s. money had and received by the appellant to his use. This claim arose out of a transaction in which the appellant acted as the respondent's agent

(1) (1856) 18 C.B. 314.
(2) (1853) 1 El. & Bl. 795.
(3) (1778) 2 Cowp. 805.
(4) (1869) L.R. 4 C.P. 704.
(5) (1907) 1 Ch. 537 ; (1908) 1 Ch. 1.
(6) (1907) 2 Ch. 222.
(7) (1863) 10 H.L.C. 229.
(8) (1878) 8 Ch. D. 286.

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in the sale of a property. The purchase-money was £4,500, and commission at the ordinary rate would amount to £112 10s., but the appellant and his sub-agent in fact received £500. The difference between these two sums was the amount claimed by the respondent. The appellant claimed to retain the £500 on two grounds, namely, (a) that the respondent had instructed him to sell the property for £4,000 net to the respondent, and that under these instructions the appellant was entitled to retain any amount of purchase-money in excess of £4,000, and (b) that the respondent had agreed in writing that the appellant was to be allowed as bonus or commission any money received from the purchaser in excess of £4,000.

The learned County Court Judge decided that the verbal instructions to sell for £4,000 net gave the appellant no right to retain any sum in excess of the amount of his commission calculated on the usual scale, and on the second ground held that the respondent, not having his glasses with him at the time, could not read the document and signed it without negligence in the belief induced by the appellant's sub-agent, one Colbert, that it was merely a written authority to sell the property, and in ignorance that it contained the alleged agreement. These circumstances, he held, would support a plea of *non est factum*, and accordingly he gave judgment for the respondent on his counterclaim. The appellant applied for a new trial; this application was refused, and from that refusal he appealed to the Supreme Court. The Supreme Court dismissed the appeal—affirming the decision of the County Court Judge as to the meaning of the instructions to sell for £4,000 net, and holding, as to the other ground, that the Court could not interfere with the finding of fact of the trial Judge, who had seen the witnesses and heard them give their evidence, and that the facts so found were sufficient to support his conclusion of law. It is from this decision that the present appeal is brought.

I agree with the learned Judges of the Supreme Court in their conclusions on both points and in the reasons which they gave in support of their conclusions.

But in this Court Mr. *Dixon*, for the appellant, put forward contentions which were not raised in the Supreme Court. He said that, even if the agreement relied on by the appellant was not

binding on the respondent, the counterclaim must fail because the County Court in this action had no equitable jurisdiction and on the facts proved the amount sued for was not recoverable at common law, or at any rate not in an action for money had and received. He said also that the evidence accepted by the County Court Judge established that the money in question was paid to the appellant by the authority or with the assent of the respondent and, therefore, could not be recovered.

The facts relevant to these contentions may be stated as follows: —On 17th March 1924 appellant and respondent called at the office of Mr. Serle and told him that there was a chance of selling the property and instructed him to get in touch with the sub-agent—Colbert. On 24th March they again called, and appellant told Serle in respondent's presence that the property had been sold for £4,500 and that he had received a cheque for £500 as deposit. Serle drew up a contract, the respondent signed it, and the cheque for £500 was handed to Serle and by him paid into his trust account on the following day. On 27th March respondent signed the transfer, which was read over to him by Serle, the consideration being stated as £4,500. On 12th April Serle received a cheque for £4,000 balance of purchase-money and paid it into his account. On some date, not specified, Serle paid £500 to the appellant and Colbert. The evidence does not show how this payment was made, but presumably it was by cheque drawn by Serle on his trust account. Appellant, in evidence, said: "Of the £500 deposit I got £250 and I paid Colbert another £25 out of £250." I take this to mean that in the division of the £500 Colbert got £275 and the appellant £225. During the period covered by these transactions the respondent was negotiating the purchase of an hotel, and Serle was acting as his solicitor in that matter. This matter was completed by transfer of the licence on 14th April 1924. On 28th April Serle wrote to respondent enclosing an account and asking for payment of £38 15s. 11d. owing to him on the footing of that account and of a further sum for law costs. The account enclosed showed the payment of £500 to Taylor and Colbert as a disbursement by Serle, and the receipt by him of £4,500 as purchase-money. Correspondence followed in which Serle repeated the request for payment of the

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£38 15s. 11d., but at no time before 19th September 1924 did the respondent complain of or object to the payment by Serle of £500 to appellant and Colbert. Ultimately, in October 1924, the appellant brought this action and recovered judgment for £208 10s., execution being stayed pending the hearing of the counterclaim. There is nothing in the evidence to show why or when Serle paid the £500 to the appellant and Colbert. The facts proved warrant either of two inferences, and, so far as I can see, no other. These are that the money was paid over either because appellant told Serle that it had been agreed that he and Colbert should have any purchase-money in excess of £4,000 and Serle believed him, or because Serle was shown the document signed by the respondent agreeing to that course. Taylor had been a client of Serle for some years and introduced respondent to him. There is no suggestion in the evidence that Serle, before paying the £500, either obtained the respondent's authority to pay it or told him that he intended to do so. Colbert was not called as a witness ; appellant said no more than that he and Colbert received the £500 deposit from Serle, and Serle said no more than that he had paid it to appellant and Colbert. There was evidence that at all relevant times respondent knew that the commission payable at ordinary rates on a sale for £4,000 would amount to about £100.

The first question for decision is whether in this state of facts the respondent should be held to have authorized or assented to the payment of £500 by Serle out of the purchase-money. There is no evidence that the respondent authorized Serle to pay the amount at any time before it was paid; but it is said that by reason of his conduct subsequently he should be taken to have authorized or ratified the payment. It is said that the conduct of the respondent was such as to show that he intended to adopt or recognize the act of Serle in paying the £500 and therefore amounted to ratification of the transaction. The conduct relied on amounts to no more than acquiescence or silence on the part of the respondent; but, in the case of an agent exceeding his authority, ratification may be implied from silence or acquiescence of the principal. But the evidence does not establish that the respondent had full knowledge of all the material circumstances in which the payment was made. He knew no more than that Serle had in fact paid £500 out of the

purchase-money to Taylor and Colbert. Being told no more than this, he would be entitled to assume that Serle, who was acting as his solicitor and whose duty it was to protect his interests, had satisfied himself that Taylor and Colbert were legally entitled to the amount paid to them. There is no evidence to show why Serle paid this money. Admittedly he did so without consulting the respondent; and if he performed his duty to the respondent he must have been satisfied that the money was payable either because the respondent had verbally authorized the appellant to retain any purchase-money in excess of £4,000 or because the written agreement was signed by the respondent in circumstances which made it binding on him. In either event he made the payment under a mistake of fact, a material circumstance which is not shown to have been within the knowledge of the respondent. I think, therefore, that the evidence falls short of establishing that the payment was authorized or ratified by the respondent.

The remaining question is whether, assuming the payment to have been made without authority by Serle by cheque drawn on his bank account the amount improperly paid is recoverable at common law in an action for money had and received. I have said that the proper inference to be drawn from the evidence is that Serle paid the amount in question under a mistake of fact. He would, therefore, be entitled to maintain an action for money had and received against the appellant, and the decision in *Holt* v. *Ely* (1), in my opinion, shows that his principal, the respondent, could also maintain such an action.

For these reasons I am of opinion that the appeal should be dismissed.

ISAACS J. On the first branch of the case I agree that the special contract relied on fails. Notwithstanding the weighty circumstances to the contrary, the finding of the trial Judge cannot, having regard to well recognized principles, be displaced. Even the obvious danger of allowing a man to assert that what appears to be his clear and simple contract is void because he could not read without spectacles,

(1) (1853) 1 El. & Bl. 795.

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although he acted as if he could, does not in this case overcome Colbert's misleading description of the document he invited Smith to sign.

As to ratification—dealt with in the County Court as waiver—I have the misfortune to be unable to agree with my learned brethren. Assuming no prior obligation justifying Serle in paying the £500 commission to Taylor and Colbert, every essential circumstance appears to me to exist in order to establish ratification. Smith knew from the beginning that $2\frac{1}{2}$ per cent was the ordinary commission; he knew that £500 far exceeded it, and he knew on receipt of the letter of 28th April that the £500 had been paid out of £4,500. He certainly had not, and I entirely disclaim having myself, so much simplicity as to imagine there was any other reason than remuneration for paying the £500 to the selling agents. He knew that Serle claimed for outpockets £38 15s. 11d. on the basis that the £500 was properly expended. Under threat of legal proceedings and after two months space for consideration, during which he referred Serle to Rodda, his own solicitor, and apparently Rodda wrote to him for instructions, he paid that sum of £38 15s. 11d. with apologies for the delay. That was in itself a complete and unqualified assent to Serle's disbursement. Besides that distinct act, he took up from time to time positions with respect to other transactions inconsistent with dissent from the payment of the £500. Only after six months had elapsed did he, by his present solicitors, challenge the payment. It was a complete change of front and without further knowledge. Serle, whatever other precautions he might originally have taken, acted honestly throughout. So I believe did Taylor. Serle apparently accepted the assurance of Taylor that Smith had agreed to allow the £500 as commission, and Taylor had no reason, so far as appears, to doubt that Smith fully understood what he signed and what he must have appeared to Colbert to understand. At the settlement Smith was represented by his own banker. I personally feel no doubt that Smith fully understood the position. He told Serle in September, long after seeing the settlement statement, that Taylor should pay Serle's costs as he Taylor had had "a fine commission." What was that but the £500? I know of no feature absent from the circumstances known to Smith which was necessary

to establish his free assent to Serle's disbursements. Smith's memory, if not his veracity, to a considerable extent must be held at fault in view of the later findings of the learned County Court Judge. Smith's denial that he knew that Cotton, the purchaser, had paid £4,500 until September is astounding in view of the documents he signed and saw, including the perfectly full and frank information contained in Serle's statement of the settlement.

In my opinion Smith assented to the payment of the £500 with all its consequences; and his conduct, quite apart from its strong reflective light on his understanding of the special arrangement, assures me that it ought not now to be open to dispute. In legal terms, he retrospectively adopted Serle's payment of the £500 *ab initio*, and therefore Taylor received it without any implication of a promise to pay it over, and so the claim should fail.

HIGGINS J. I concur in the opinion that this appeal should be dismissed. I understand that the only difficulty remaining is due to the argument that the defendant ratified the action of his solicitor, Mr. Serle, in paying £500 as commission out of the £4,500 purchase-money to the plaintiff and the plaintiff's sub-agent Colbert, who had effected the sale of Wentworth Flats. No argument as to ratification is mentioned in the judgment of the County Court, or in the judgment on appeal of the Supreme Court; and ratification is not mentioned among the grounds stated in the notice of appeal to this Court. I shall assume, however, that it is open to the plaintiff to argue that there was ratification, because ground 4 states that the order of the County Court was "wrong in law and contrary to evidence."

Now, there certainly are facts which tell heavily against the defendant's version of the transaction; and if the learned County Court Judge had found, seeing and hearing the witnesses, that the defendant well understood the contents of Exhibit 1, which Colbert had got him to sign, and which purported to allow the agent to retain the balance £500 of the purchase-money, the finding probably could not be upset. In the statement of accounts rendered by Serle to the defendant, on or about 28th April, as to the purchase-money, £4,500, for Wentworth Flats and the purchase-money (payable by the plaintiff) for the Bunyip Hotel, the receipts and expenditure

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appear as follows:—"Receipts.—Purchase Dr. Cotton, £4,500; E. S. & A. Bank, Garfield, £1,000; Debit, £38 15s. 11d.: £5,538 15s. 11d. Expenditure.—Taylor & Colbert, £500; E. S. & A. Bank, £2057 10s. 4d.; Exchange, Garfield, 10s.; Kelly, £2711 17s. 10d.; Adjustment of rates, re Cotton, £18 17s. 9d.; Deposit, Kelly, £250: £5,538 15s. 11d. (Kelly was vendor of the Bunyip Hotel to the defendant; and the bank advanced the defendant £1,000.)

There was subsequent correspondence as to the £38 15s. 11d. out-of-pocket claimed by Serle, and as to Serle's costs, and as to £206 advanced to the defendant by Taylor; but there appears no protest on the part of the defendant as to the £500 paid to Taylor and Colbert until 19th September, when the defendant's solicitors, Rodda & Ballard, wrote that in the event of proceedings on the dishonoured cheque for £206, a "very much larger sum would be counterclaimed." Then, on 9th October, these solicitors set out the subjects of counterclaim, which included: "(5) Balance of price paid for Wentworth Mansions being the difference between £500 and the amount your client is entitled" to "under the scale of charges fixed by the Associated" (*sic*) "of Estate Agents for commission in respect of the sale." Moreover, on 3rd September, in a conversation between Serle and the defendant as to Serle's costs, the defendant said (according to Serle—the defendant was not cross-examined as to the statement): "Taylor ought to pay it" (Serle's account as solicitor); "he got a *fine commission* out of it, and he employed you" (the plaintiff had in fact persuaded the defendant to employ Serle as his solicitor). This evidence was all before the learned Judge in the County Court; but he found in favour of the defendant. He found that Colbert, in getting the defendant to sign Exhibit 1, represented to the defendant that the document was merely an authority to sell, to be shown to purchasers; and that the defendant, being without his glasses, could not read the document and was misled as to its nature. The Judge also found that the defendant, who had been a motor-driver, was a very dull business man; and we have no ground for rejecting such findings.

Although the point of ratification was not put before the County Court, Judge *Woinarski* did not fail to consider the statement of account of 28th April, which, if read and understood by the defendant,

disclosed the payment of £500 to the plaintiff and Colbert. His words are :—" The question is whether this shows a waiver on defendant's part disentitling him now to receive the £387 10s. There were cross-claims between the parties apart from this, and I see nothing in the circumstances to establish waiver."

I infer that the Judge's view was something like this : That the defendant, being a very dull business man, and feeling that Serle would look after his interests, did not concern himself with the details of the accounts and cross-claims ; that he did not realize, till he went to Messrs. Rodda & Ballard, that the statement of account showed Taylor and Colbert to have received £500 of his moneys ; and that the conversation as to the " fine commission " (8th September), if it occurred, may have referred to the £112 10s. which would have been the regular commission, or, if the words referred to the £500, may have been due to the dawning of intelligence in a slow mind. Whether this view is right or not, I do not think that the plaintiff has satisfied the burden of proving that the defendant ratified the wrongful payment by Serle of £500 to Taylor and Colbert. There is no sufficient proof that the defendant consciously sanctioned the act of Serle in making the payment—no proof that he confirmed or ratified this act of Serle. Apart from estoppel—and there is no pretence of estoppel here—I cannot conceive of authority being given by a principal to an agent, either prospectively or retrospectively (by ratification), unless it be given consciously. I include, of course, conscious acquiescence in the sense explained in *De Bussche* v. *Alt* (1).

But it is also necessary for ratification that at the time thereof the alleged ratifier should have full knowledge of all the material circumstances under which the act was done (*Bowstead on Agency*, 7th ed., p. 57, and cases cited) ; and here the defendant did not know that Serle had made the payment under the error—whether derived from Exhibit 1 or from conversation with Taylor, we do not know—that the defendant had contracted to pay the £500.

At the very least, we ought not to decide against the defendant on such a point as ratification under the circumstances without allowing a new trial in which the point is put directly and explicitly

(1) (1878) 8 Ch. D., at p. 314.

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in issue. But, on the rules of the game, and notwithstanding the strong facts to which my brother *Isaacs* alludes, I think the proper order to be that the appeal be dismissed.

RICH J. I confess I am not altogether satisfied with this case. It exhibits considerable conflict of testimony, but the one person —Colbert—who could have dispelled the doubt surrounding the case was not called, although ample time for doing so elapsed after Smith's evidence had been given. The question is substantially one of fact, and I agree with the judgment of the Full Court on the main point that the finding of the learned County Court Judge should not be interfered with. It was then suggested that ratification on the part of Smith had been established. After careful consideration of all the evidence and documents in the case, I cannot find that full knowledge of the facts and unequivocal adoption after such knowledge has been proved, or that the circumstances of the alleged ratification are such as to warrant the clear inference that Smith was adopting the act at all events and under all circumstances. I agree that the appeal should be dismissed.

STARKE J. The appellant Taylor was employed by the respondent Smith as his agent to sell certain property for him. Taylor met with an accident, and procured one Colbert to assist him in negotiating the sale of the property. Colbert saw the respondent and induced him to sign a document on the appellant's note-paper as follows :—"I hereby give to you the sole offer of my property situated at 43 Chapel Street, St. Kilda, consisting of 5 self-contained flats with frontage of 50 ft. by 195 ft. 4 in. for the sum of £4,000. Any moneys secured by you from the purchaser in excess of this amount I agree to allow to you as bonus or commission."

The learned County Court Judge who tried the action found, in substance, that the respondent was tricked into signing this document by a representation of Colbert's that it was an authority to sell the respondent's property, and that the respondent was unable to read the document because he had not with him his spectacles or glasses. I agree with the learned Judges of the Supreme Court that this finding cannot be disturbed. Colbert did not deny the respondent's evidence ; in fact he was not even called as a witness, and the

commission claimed pursuant to the arrangement which the document purports to record was nearly £400 in excess of the usual agent's commission on a sale such as was effected for the respondent. It would be impossible in such circumstances for Colbert to vouch the document as an authority for the payment to him of £500, and Taylor stands in no better position. In my opinion the case of *Refuge Assurance Co.* v. *Kettlewell* (1) completely covers the facts of this case.

It was argued in this Court, however, that the respondent had ratified the payment by Serle, his solicitor, of the sum of £500 to the appellant. No such contention appears to have been made before the learned County Court Judge. It is true that he considered whether the respondent's conduct amounted to a waiver disentitling him to recover the amount in dispute; but that rather suggests that the appellant was treating the authority, for the purpose of argument, as induced by fraud or misrepresentation, and contending that the respondent had not elected to repudiate it. It is clear that the argument now relied upon was never presented in the Supreme Court. I do not think that we ought to entertain it now; but in deference to the argument addressed to us I will add that it ought not, in my opinion, to succeed.

The onus of proof is here upon the appellant. The argument involves, of course, the adoption of a payment made by Serle on behalf of the respondent but without his authority. Serle, it must be observed, acted generally for the appellant as his solicitor, but, at the instance of the appellant, acted for the respondent in connection with the sale of this property and the purchase of another. Serle, so far as the evidence goes, had no instructions from the respondent as to the commission payable to Taylor and Colbert, and such information as he had must have proceeded from one or other of the latter, for it is inconceivable that he would make a payment to either without some information upon the subject. I think it probable that he acted upon the information of his client Taylor, and that he did so without any reference to or confirmation by his client the respondent.

The amount of the commission in itself called for some inquiry by Serle, but he was in a somewhat embarrassing position owing to

(1) (1908) 1 K.B. 545; (1909) A.C. 243.

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the fact that he was Taylor's solicitor. At all events, he made no inquiry from the respondent, and paid over £500 to Taylor and Colbert on account of the respondent. He forwarded an account to the respondent showing a payment of £500 to Taylor and Colbert, but without any explanation of the basis upon which this amount was paid or any intimation that it was largely in excess of the commission ordinarily payable to agents on a sale such as is before us.

We are asked to conclude that the respondent adopted the payment "with full knowledge of the character of the act," or "with intention to adopt" it in any event (*Phosphate of Lime Co.* v. *Green* (1)); and to so conclude, in face of the facts that the respondent was a dull business man, that he was under no obligation, either legal or moral, to pay an unfair charge, that his rights were never explained to him, and that his circumstances were such that he needed all the money he could raise. My view is that he relied upon Serle to protect him, and really knew nothing of the material circumstances relating to the payment. The evidence wholly fails to satisfy me that the respondent ever ratified the unauthorized payment of £500 to Taylor and Colbert, and, in fact, I do not think he ever did ratify it.

Lastly it was argued that the sum claimed by the respondent was not recoverable from Taylor upon a count for money had and received. If Serle, however, were induced, as upon the evidence I conclude he was, to pay over the sum of £500 to Taylor on his assurance that the respondent had arranged to pay him and Colbert that amount for commission, then, admittedly, no difficulty arises. Serle might recover the money on the footing that he paid it under a mistake of fact, and so, I apprehend, may the person on whose behalf he paid it (*Holt* v. *Ely* (2); *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (3)).

The appeal ought, in my opinion, to be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Serle & Piesse.*

Solicitors for the respondent, *Rodda & Ballard.*

B. L.

(1) (1871) L.R. 7 C.P. 43, at p. 57. (2) (1853) 1 El. & Bl. 795.
(3) (1885) 11 App. Cas. 84.