

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Henry J. S. King v. Alfred Pinsoneault, from the Court of Queen's Bench, Quebec (Appeal Side); delivered 2nd March, 1875.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

IN order to make this case intelligible a short narrative is necessary. General Napier Christie Burton, who possessed property in England and in Lower Canada, made his will on the 20th December, 1834, the provisions of which material to the cause are as follows:—He gave and bequeathed the lease of the house in England, in which he then resided, and all his household furniture, plate, &c., and all his other effects, together with all cash in the house at the time of his decease, together with all moneys due to him, in his own right, as well as representative and heir-at-law of his late father General Gabriel Christie Burton, to three Trustees (George Burton Hamilton and William Henry King, gentlemen residing in England, and Edmé Henry, described as of La Prairie near Montreal, Lower Canada) in trust for investing the moneys collected and the proceeds of the sale of the furniture, &c., in Government stocks, and accumulating such stocks and dividends, “until,” in the words of the will, “Christiana Harmar, the only child of my natural

daughter, Mary Harmer, shall attain the age of 21 years, or day of marriage, whichever shall first happen, and then I do direct my said trustees, or the survivors or survivor of them, or the executors of the survivor, to assign and transfer the whole of such accumulated principal fund or stock, and all dividends thereon, unto the said Christiana Harmer for her absolute use and benefit . . . . but in case the said Christiana Harmer should die before attaining the age of 21 years, or being married, or the transfer of the accumulated stock being made to her, then I do give and bequeath the same unto Henry John Styring King, the eldest son of the said William Henry King, his executors, administrators, and assigns absolutely for his or their use and benefit," and he directed his trustees to assign the same accordingly.

In a subsequent part of the will he bequeathed the residue of his estate and effects to Christiana Harmer absolutely on her attaining the age of 21 years, but in the event of her dying under age to Henry John Styring King.

By a codicil dated the 23rd of December, 1834, he directed Edmé Henry to sell his dwelling-house and land adjoining in Lower Canada, to deduct out of the purchase money all that may be due to Henry for the expenses of the sale, and his trouble in collecting the rents of the house and of the real estates and seignories of the testator in Canada, and then to pay over to the other trustees "the balance of such purchase money, and of all other moneys and rents due to me which have or may come into the hands of the said Edmé Henry or his heirs in manner aforesaid, in order that the balance may be invested in Government stock in England, upon and for the same trusts and persons to whom I have in the said will bequeathed the rest and residue of my estate and effects."

The testator died in January, 1835.

Christiana Harmer died in April 1847, at the age of 22 years, unmarried.

On the 31st December, 1839, Edmé Henry, the Canadian executor, with the consent of his English co-executors, sold, by deed of that date, to Pinsoneault, the Defendant, a relative of his, the uncollected rents of the seignories of the testator in Canada for a sum of 1,999l.

On the 18th of December, 1869, nearly 30 years after the above-mentioned transaction, Henry John Styring King filed a declaration in an action against Pinsonneault and George Burton Hamilton, the last surviving executor and trustee of the testator, in which he set out the will without the codicil, averred that Christiana Harmer had died under age and unmarried, and before any transfer to her; that Edmé Henry had fraudulently concealed from his co-executors the amount of the uncollected rents due to the testator, which amounted to 50,000*l.*; that by false representations of Henry and Pinsonneault the other executors were induced to agree to the sale to Pinsonneault; he prayed that the deed of December 31, 1839, should be cancelled, that Pinsonneault should account for all the arrears with interest and profits, or in default should pay to him 480,000 dollars. On the filing of the declaration a burial certificate was filed with it, wherein it is stated that, at the time of her death, Miss Harmer was aged 22.

This action was brought when the Defendant and his family were in Europe, intending to take a lengthened tour. The statement that Miss Harmer died under age is admitted by Mr. Laflamme, the Advocate and Attorney of the Plaintiff, to have been false to his knowledge, and inserted in the declaration by him to prevent its being demurrable. If the Plaintiff's right to sue, as it is now contended for had been stated, viz., that notwithstanding Miss Harmer attained her majority, nevertheless the gift over to the Plaintiff took effect because no transfer had actually been made to her, the declaration might have been met by a demurrer, upon the argument of which the Plaintiff's right to sue could have been decided without an *enquête* being necessary if the decision had been against him, and the Defendant's presence in Canada might not have been required. It has been suggested that the object of this false statement was to compel the Plaintiff's return to Canada, to work on his fears by the prospect of an inquiry into transactions thirty years old, and to drive him to a compromise. Be this as it may, Mr. Pinsonneault when he heard of the action hastened to Canada, and arrived at Montreal on the 25th of May, 1870. Communications took place between his legal advisers and

those of the Plaintiff, in the course of which a proposition for settling the action for 30,000 dollars was discussed. Mr. Pinsoneault, however, states that on Saturday the 4th of June he had determined to plead to the action, and had given instructions for that purpose. On that same 4th of June Mr. Laflamme obtained a foreclosure of the pleadings in the suit. The Defendant, probably more alarmed than he need have been at this procedure, went to Mr. Laflamme (who had been a personal friend of his) on the Sunday morning without consulting his Attorney or Counsel, and in the course of the day the following document was drawn up by Mr. Laflamme :—

“ Henry J. S. King, Plaintiff, and Alfred Pinsoneault, Defendant.

“ *Memorandum.*

“ It is agreed that this case is to be settled upon the following terms, viz. :—

“ 1. The Defendant is to pay to the Plaintiff thirty thousand dollars in full settlement of the action, which is to be at once desisted from, the Defendant paying costs to the amount of fifty dollars.

“ 2. Of the above sum of thirty thousand dollars, fifteen thousand dollars shall be paid immediately, and the remaining fifteen thousand dollars shall be invested in hypotheques, or other approved securities, in the joint names of H. Cotté and Thomas W. Ritchie, Esquires, in trust to pay the interest upon such investment during the period extending from this date to the thirty-first December, one thousand eight hundred and seventy-seven, to the Plaintiff, at the rate of five per cent. per annum, payable semi-annually, and to transfer the capital to him (the Plaintiff) or his representatives at the expiration of that time, provided no action shall have been brought by the representatives of the late Christiana Harmer against Mr. Pinsoneault or his representatives for or in respect of any of the rents, monies, or matters or things mentioned in the Declaration of this cause, or under and in virtue of the will of the late General Christie; and provided any such action has been brought that it shall have been finally dismissed or disposed of; and if any such action is instituted, then Mr. Pinsoneault shall pay the interest of five per cent. to the said Trustees, who shall deposit the same under the above trust to await the final decision of this action.

“ 3. If at the expiration of the said time (on the thirty-first December, one thousand eight hundred and seventy-seven) such an action shall be pending, the capital shall only be paid upon the same being finally dismissed.

“ 4. If such action shall be brought within the said period of seven years, and shall be finally decided against Mr. Pinsoneault, the investment of the said sum of fifteen thousand dollars shall be transferred to Mr. Pinsoneault, together with the interest added thereto.

"5. If Mr. Pinsonneault prefers it, the sum of fifteen thousand dollars may be desposited in any chartered bank of this city selected by him, in the names of Mr. Cotté and Mr. Ritchie, subject to the foregoing trust.

" *Montreal, June 4, 1870.*

"(Signed) ALFRED PINSONNEAULT.  
R. LAFLAMME.

"*Attorney for the said J. S. King.*"

This agreement, which, in the language of the Canadian law, is termed a "transaction," though made on the 5th of June, is dated on the 4th. Mr. Laflamme, after the signing of the agreement, gave the Defendant a letter addressed to Mr. Cassidy, his counsel and attorney, to the effect that the cause was stayed and the foreclosure removed "jusqu'à nouvel avis."

Mr. Laflamme deposes that he had authority from the Plaintiff to enter into this agreement, and that he so informed the Defendant; and it is manifest that the Defendant at the time supposed that he had such authority.

On the next day the Defendant's legal advisers satisfied him that the agreement he had made was an improvident one, and intimated their opinion that the Plaintiff had no cause of action.

On the 10th of June the Defendant executed a notarial instrument revoking the agreement on the ground (among others) that it had not been accepted by the Plaintiff, which instrument was served on that day on Mr. Laflamme.

On the 11th of June the Plaintiff wrote and sent a letter to the Defendant, notifying that he was prepared to carry out the agreement and to desist from the action on the payment of the 30,000 dollars as therein provided.

From this time the Plaintiff attempted to enforce the compromise, and the Defendant to resist its enforcement, by all means in their power.

The Defendant sought to put in pleas to the action, and succeeded in spite of the Plaintiff's opposition on the ground of the settlement.

The Plaintiff prayed for judgment in the action in the terms of the compromise, but this was refused on the ground that the Defendant had been admitted to plead.

In January 1871 the Plaintiff commenced a fresh action on the agreement or "transaction" of the

5th of June, 1870, averring his own readiness to perform it, and offering to perform it, and praying that the Defendant might be compelled to perform it. This action is the subject-matter of the present appeal.

The main grounds of defence raised by the Pleas to the action were in substance—

1. That the action was not maintainable during the pendency of the original action, because they were for substantially the same cause; or, if that were not so, that the discontinuance of the first action was a condition precedent, under the "transaction," to the bringing of the second.

2. That the proceedings by which the Defendant had been admitted to plead in the original action, and the motion of the Plaintiff for judgment in terms of the compromise had been rejected, were, in effect, a judgment adverse to the Plaintiff's right to enforce the "transaction."

3. That the "transaction" was not intended to be final, but to be conditional on its ratification by the Court.

4. That Mr. Laflamme had not authority to make it.

5. That the Defendant was entitled to be relieved from it on the ground of mistake or surprise or fraud.

The three last, with some other grounds, were taken by the same (the third) plea.

These questions, after a multiplicity of pleadings and interlocutory proceedings which it is needless to particularize further, came before the Superior Court, when Judgment was pronounced by Mr. Justice Beaudry.

That Judgment is to the effect that the pendency of the first suit is not a bar to the maintenance of the second, and that the defence in the nature of *res judicata* raised by the second plea also failed, but that the suit should be dismissed on the ground that Mr. Laflamme had not sufficient general authority, as Attorney and Counsel in the case, to bind his client by the agreement in question, and that no special authority had been proved, and that the ratification by the Plaintiff of the 11th of June, after the Defendant's repudiation of the 10th, was too late.

On appeal to the Court of Queen's Bench that Court held—

1. That the second action was not maintainable as long as the first was pending.

2. That although the Plaintiff might have enforced the "transaction" in the first action, he had not done so by the proper pleading.

The reasons of this Judgment are thus stated by Chief Justice Duval,

"I express no opinion on the validity of the settlement pleaded, but I hold that no separate action can be brought on it *pending* the first action instituted. King ought to have discontinued his first action brought, before instituting the present, or to have pleaded this as an *incident* to the first."

The Court thereupon confirmed the Judgment of the Court below, but not for the reasons therein alleged, "reserving liberty to the Defendant to resort to any means he may be advised for the purpose of putting in force the transaction."

In giving this Judgment the Court was far from being unanimous.

Judges Taschereau and Monk dissent from it, holding that the action was maintainable, and that the Plaintiffs were entitled to succeed upon the merits. The Judgment is that of Chief Justice Duval, Judges Polette and Badgley, the latter of whom, though subscribing to the Judgment, and holding that the action was not maintainable pending the former action, doubts whether "the transaction" was not properly pleaded in the first action, and, expressing a regret in which their Lordships sympathize, that the Court having all the evidence before them for deciding the merits should feel themselves unable to do so, gives his own opinion in favour of the Defendant.

Their Lordships concur with the Superior Court and with Judges Taschereau and Monk that the pendency of the first action was not a bar to the institution of the second.

The actions were not for the same cause. The first action was brought against Pinsoneault and Hamilton, for the purpose of setting aside a deed of 1839, and obtaining an account of the full amount of the sums received by Pinsoneault with payment thereof; or, in default of such account and payment, for damages. The second action

was brought against Pinsonneault alone to enforce an agreement of 1870, and not only to obtain payment of a sum of money, but to enforce the settlement of another sum upon trusts wholly outside of and collateral to the first action. Nor was the discontinuance of the first action a condition precedent under the agreement to enforcing that agreement by action. The performance by the parties of their parts of the agreement respectively, were, in their Lordships' opinion, concurrent conditions, and this being so, it was sufficient for the Plaintiff to aver in his declaration that he had been and was ready and willing, and that he offered to perform his part, viz., discontinuance of the first action on the Defendant performing his part of the agreement. Their Lordships are further of opinion that he has taken no step inconsistent with this averment, and they find that it is proved in fact.

Although the forms of procedure differ in England and Canada, some observations of the Vice-Chancellor Turner in *Askew v. Wellington* (9 Hare, 65) are applicable in principle and in reason to the present suit. The Vice-Chancellor observed that some cases which he referred to "appear to establish that, at least in cases where the compromise goes beyond the ordinary range of the Court in the existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings, and I think that *à fortiori*, this must be the case where the agreement itself is disputed." It may be collected that the putting an end to the original suit in that case was not deemed a condition precedent to instituting the second.

It becomes, therefore, unnecessary to decide whether or not the Plaintiff could have enforced the "transaction" in the first action, or whether, if he could, he has taken the proper steps for doing so.

For these reasons their Lordships are of opinion that the Court of Queen's Bench were wrong in declining to give Judgment on the validity of "the transaction;" it becomes, therefore, their Lordships' duty to determine this question, and to give the



Judgment which ought to have been given by the Court of Queen's Bench.

The objection that the "transaction" was not intended to be final, but was subject to some act of confirmation by the Court, is not noticed by Mr. Justice Beaudry, who seems to have thought his finding on the want of authority sufficient to establish the third plea and to dispose of the suit. Their Lordships have no doubt that it was intended to be final.

The next important question that arises is whether or not Mr. Laflamme had authority to bind his client by it.

This question again divides itself into two:—

1. Had Mr. Laflamme such authority by reason of his being counsel and attorney (*avocat and avoué*) in the case?

2. If not, had he express authority from the Plaintiff?

Their Lordships do not consider it necessary or desirable for the determination of the first of these questions, to inquire into the extent of the authority to settle causes of Counsel, Attorneys or Proctors, in this country, founded, as it is, upon laws and customs in a great degree peculiar to ourselves. The law on this subject must be looked for in the Canadian Code, interpreted, if its provisions are obscure, by the aid of what light can be thrown upon them by the French law.

Mr. Justice Badgley, in his learned judgment, intimates an opinion (as their Lordships understand him) that the "transaction" was invalid because it was not given effect to by a "*jugement d'expédient*," and in support of this view he quotes the following passage from Pigeau (1 *Procédure Civile*, pp. 9 and 359):—

*"On peut transiger en justice en passant un jugement de concert qui ordonne ce dont les parties sont convenues; cela se fait très fréquemment au Châtelet de Paris où l'on appelle cette voie expédient. On dresse le dispositif du jugement sur papier ordinaire, les procureurs le signent et le font signer à leurs clients, lorsqu'ils n'ont pas de pouvoir de ceux-ci, et ne veulent pas prendre sur eux de signer sans pouvoir, à cause de l'importance de l'affaire."*

The "transaction" by "*jugement d'expédient*," with its formalities, which was only one form of "transaction" according to the French law, has not been

adopted or recognized in the Canadian Code, which does not require that a "transaction" shall be in any particular form, even if it consists in assenting to a judgment. The passage from Pigeau, however, is not unimportant as bearing on the general authority of Procureurs—for if they have not authority to consent to a judgment, it may be argued that they cannot have the power to settle a cause, and to abandon or compromise the rights of their clients without one.

Mr. Lafamme was both "avocat" and "avoué." It does not appear, however, that the law gives him any greater authority in his former than he had in his latter capacity. If he had any power analogous to that of a Counsel in England, to settle a cause "in Court," it is enough to say that it was not this power which he exercised; his power was merely that of an "avoué."

No French authority has been cited which goes the length of asserting that an "avoué" has a general power to bind his client by a "transaction" such as the present, and some French authorities have been cited which it is contended establish the negative of this proposition.

Much reliance has been placed by the Counsel for the Defendant on a passage from Dalloz's "Repertoire de Jurisprudence" (Transaction, Art. 4, s. 57), which runs thus:—

"Un mandataire a-t-il le droit de transiger au nom de son mandant? La négative résulte clairement de l'Article 1988, Code Nap., à moins que la procuration ne confère expressément ce pouvoir au mandataire. Le mandataire chargé pour une seule affaire ne peut transiger sans un pouvoir exprès."

Article 1988 of the "Code Napoléon" is almost identical with Article 1703 of the Canadian Code, which is in these terms:—

"The mandate may be either special for a particular business, or general for all the affairs of the mandator. When general it includes only acts of administration. For the purpose of alienation or hypothecation, and for all acts of ownership other than acts of administration, the mandate must be express."

It has been argued that if the inability declared by the French Code to alienate and hypothecate without express powers carried with it the inability

to "transact," the same words in the Canadian Code must have the same effect.

The Plaintiff seeks to explain this passage as referring only to the powers of ordinary mandatories, and having no reference to "avoués," who are mandatories with extraordinary and exceptional powers. If, however, a class of mandatories so well known do possess this exceptional power, the omission of all notice of it in the place where notice of it would have been appropriate, or, indeed, in any part of the exhaustive treatise of Dalloz concerning "transactions," is not a little remarkable.

The same doctrine is laid down in other books of authority.

In Guyot's "Repertoire de Jurisprudence" (Vol. 17, transaction, p. 235) this is said:—

"Un procureur ou mandataire peut-il transiger au nom de son commettant? Il le peut sans difficulté, si la procuration lui eût donné expressément le pouvoir; mais dans le cas contraire toute espèce de transaction lui est interdite."

The same doctrine is laid down by Troplong ("Droit Civil Expliqué," sec. 295), and by other writers on French law, without the supposed exception being ever noticed.

Undoubtedly "avoués" possess some powers beyond those of ordinary mandatories of binding their principals, unless their acts are expressly disavowed.

This subject is treated of at some length in Dalloz's "Repertoire de Jurisprudence" (Désaveu, Section 3, Article 25), where many instances of such powers are given, not, however, including the power "to transact." It is also treated more succinctly in Dalloz's "Dictionnaire de Jurisprudence," tit. Désaveu. It is there said that in general every act of a mandatory is void which exceeds the bounds of his mandate, but that it is otherwise with mandatories *ad litem*, who are in some sense officers of justice representing citizens before the Tribunals in the exercise of their profession. He thus sums up the law: "en effet, jusqu'à désaveu tout acte de ministère de l'avoué, mandataire *ad litem*, quelles que soient les conséquences qu'il entraîne, est réputé fait en vertu du pouvoir de sa partie."

It appears to their Lordships that full effect may

be given to the meaning of these expressions by treating the "avoué" as able to bind his client (until "désaveux") by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition. The Plaintiff is assumed to have authorized every claim made on his behalf in the declaration, the Defendant every plea pleaded for him; for example, a plea of the statute of limitations, or a plea justifying a libel—though he may have prohibited their being pleaded. An illustration of this doctrine is afforded in the present case, where the Plaintiff must be taken to have authorized his claim being based on a false statement of the age at which Miss Harmer died, although he may possibly have disapproved of it. Such would appear to be the view taken of this subject by the framers of the Canadian Code of Procedure, Article 194 of which is in these terms:—

"A disavowal can only be made by the party himself or his attorney, under a special power, and the party himself must declare that he did not authorize the *act of procedure* which he repudiates."

Their Lordships are of opinion that to enter upon an agreement such as "the transaction" in question, which was in a great measure collateral to the cause, and was capable of being made the subject-matter of a separate suit, cannot be properly termed an act of procedure in the cause.

Their Lordships have not discovered in the Canadian Codes any provision conferring upon "avoués" the power of entering into transactions if they did not before possess it. The subject of "mandate" is treated of under the 8th title in five chapters.

Article 1703, which has been above referred to, applied to all mandatories general and special.

Article 1704 is in these terms:—

"The mandatory can do nothing beyond the authority given or implied by the mandate. He may do all acts which are incidental to such authority and necessary for the execution of the mandate."

And the application of this rule to professional

men of various classes, including "avoués," is provided for by Article 1705—

"Powers granted to persons of a certain profession or calling to do anything in the ordinary course of the business which they follow need not be specified, they are inferred from the nature of such profession or calling."

The only mention of "avoués" in the chapter is contained in Article 1732:—

"Advocates, attorneys, and notaries are subject to the general rules contained in this title ("mandat") in so far as they can be made to apply. The profession of advocate and attorney is regulated by the provisions contained in an Act intituled 'An Act respecting the Bar of Lower Canada.'"

It has been admitted that the power contended for is not to be found in this Act.

There are nine Articles in the Code under the head "transaction," none of which appear to have any material bearing on the subject now under discussion.

It does not appear to have been the intention of the framers of the Code to invest "avocats" or "avoués" with any new or exceptional powers, but rather to apply to them the general law with respect to mandatories as far as it was applicable.

In their Lordships' opinion Mr. Laflamme had not authority, by reason of his being "avocat" and "avoué," to bind his client by this "transaction."

If this be so, the next question is, whether any special authority to make this "transaction" has been proved? It has been admitted that such special authority need not have been in writing.

The evidence relied upon by the Plaintiff on this subject is to be found in an affidavit made by Mr. Laflamme in the original suit, which may be referred to, inasmuch as it has been put in evidence by the Plaintiff, in which Mr. Laflamme states:—  
"The Defendant then and there signed the same (the transaction), together with this deponent, on behalf of Plaintiff, *by whom he was fully authorized.*"  
And in his deposition as a witness for the Defendant, "Je lui dis alors ce que mon client consentirait à accepter, que j'étais autorisé à régler sur ces bases." No questions were put to Mr. Laflamme by the Plaintiff.

In their Lordships' opinion these allegations are consistent with a belief which Mr. Laflamme may have *bond fide* entertained, that his character of "avoué" gave him authority to conclude the "transaction." Mr. Laflamme must have been aware of the importance to his client of proving a special authorization, and if such had been given, he might and probably would have been called by the Plaintiff to prove it. Called by the Defendant, he might still have proved it by putting in the written authority, if the authority were in writing, or, if it were given by a verbal communication, by stating the effect of that communication, and where and when it was made. But Mr. Laflamme makes no mention of any special authority, and in absence of such mention their Lordships cannot assume it.

There being no evidence of special authority it becomes unnecessary to deal with the argument on the part of the Defendant, that, although the special authority need not have been in writing, still that the proof of it, or, at all events, the commencement of proof, must have been in writing, and that no such commencement has here been shown.

It has been contended further, on the part of the Plaintiff, that even assuming Mr. Laflamme not to have been authorized, still the Defendant, having treated him as authorized, could not resile from his agreement, until a reasonable time had elapsed for the ratification of Mr. Laflamme's act by his principal; and, in support of this proposition, a passage from Toullier has been quoted. It is enough to say that, assuming this to be Canadian Law, of which their Lordships are by no means satisfied, in their opinion more than a reasonable time for ratification of the "transaction" by the Plaintiff had elapsed, before it was repudiated by the Defendant.

The decision which their Lordships have come to on the question of authority disposes of the case. It therefore becomes unnecessary to determine the further question which would have arisen had their decision on this point been otherwise, whether the Defendant is entitled to relief from the agreement on the ground of mistake, surprise, or fraud, and their Lordships are spared a somewhat painful

investigation into many circumstances which it has been unnecessary to notice.

Their Lordships will humbly advise Her Majesty to reverse the Judgment of the Court of Queen's Bench, except so far as it affirms that of the Superior Court, and condemns the Appellant in the costs of the Appeal ; and to direct that that Appeal do stand dismissed and the Judgment of the Superior Court affirmed in all respects with the costs of this Appeal.

