Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Michael Kelly and another v. *C. H. Enderton and others, from the Court of Appeal for Manitoba* (*P.C. Appeal No.* 82 *of* 1912), *delivered the* 17*th December* 1912.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD ATKINSON.
LORD MOULTON.

[DELIVERED BY LORD DUNEDIN.]

The Appellants in this case, Messrs. Kelly, were proprietors of some ground in the City of Winnipeg. They were approached by a person of the name of Russell, one of the Defendants to the action, with a view to procuring an option of the purchase of the property. Russell at first made a proposal for an option in favour of a person called Bell on certain terms. The negotiations were abortive. He subsequently procured from the Kellys a document which has been called Exhibit 2, and which was in these terms:—

"We, Martin and Michael Kelly, of the City of Winnipeg, "gentlemen, in consideration of one dollar, for which we "hereby acknowledge receipt, agree to give C. H. Enderton "& Co., the option to purchase Lot eight hundred and "eighty-nine (889), Block 3, according to a map or plan "of part of Lot (One) 1 of the parish of Saint John, being "in the City of Winnipeg, in the Province of Manitoba, "registered in the Winnipeg Land Titles Office as Plan "No. 129, for the sum of seventy thousand four hundred

" (70,400.00) dollars on the following terms :—Twenty-five
" thousand dollars cash on completion of Title Papers, and
" the balance, forty-five thousand four hundred ($45,400)
" as follows: Thirteen thousand two hundred dollars
" ($13,200) in two consecutive payments on the fifteenth
" day of March 1912 and 1913, and the balance the
" purchaser to assume in a mortgage which is now on the
" property, dated on or about the first of October 1910,
" which is payable twice yearly; One thousand dollars of
" principal and interest at six per cent. (6%) per annum.
" This mortgage expires on the first day of October 1915.
" Deferred payments to bear interest at 6 per cent. per annum.
" Taxes and rents to be adjusted to date of purchase. We
" hereby agree to pay one thousand dollars commission
" to C. H. Enderton & Co. on sale of above described
" property on the above described terms. This option is to
" expire at six o'clock in the afternoon of Wednesday the
" fifteenth day of March 1911. We hereby agree to close
" this sale by deed and mortgage."

This was signed by the Kellys on 11th March.

On 15th March, the day of the expiry of the option, Messrs. Kelly received a letter from Messrs. Andrews, a firm of solicitors in Winnipeg, in the following terms :—

" We beg to advise you that Messrs. C. H. Enderton &
" Co. have placed in our hands $24,000.00 cash in order to
" carry out the terms of the option given by you to them
" expiring at six o'clock p.m. this day, for the sale to that
" firm of Lot 889, block 3, according to a map or plan of part
" of Lot one (1) of the parish of St. John, being in the City of
" Winnipeg, in the Province of Manitoba, registered in the
" Land Titles Office as Plan No. 129; said firm of C. H.
" Enderton & Co. have also placed in our hands the necessary
" funds to make the adjustments of taxes and rents as pro-
" vided in the option, and we now notify you on behalf of
" the said firm of C. H. Enderton & Co. that they are now
" ready and willing to make the purchase of the said
" property on the terms set out in the said option, and that
" they are ready to close the matter out with you at any
" time to-day that you may be ready. We are now preparing
" the mortgages from the purchaser, and will have same
" ready for delivery over in exchange for deed of transfer.
" If you have any solicitor acting for you in the matter,
" kindly advise us, so that no delay may occur in having the
' matter closed out."

Following upon this, the money, so far as due, was duly paid, and the name of one Simpson was given as the person in whose favour the conveyance was to be made. The conveyance was executed and the mortgage by the purchaser was executed.

The Plaintiffs allege that they subsequently discovered that Simpson was a clerk in Enderton's office, and that the true purchasers were the Endertons themselves. They bring this action to set aside the conveyance and recover the property upon the ground, 1st, of false representations by Russell, and 2nd, upon the ground that the sale being truly to Endertons, which fact was concealed from them, was bad, in respect that no agent to sell can bind his principal to sell to himself, the agent.

As regards the first ground of action, the false representation is said to consist in this, that in the course of the negotiations the Plaintiffs asked Russell whether there was anything doing in Portage Avenue, meaning thereby whether there were any other property transactions going on in the neighbourhood where this property was situated, and that he said, "No," whereas in point of fact he knew that the Endertons, for whom he was really acting, had been buying other pieces of property there.

It is enough as to this to say that the Trial Judge came to the conclusion that the false representation, which was denied by Russell, was not in fact made; and that, as this depends solely on the credibility of Kelly on the one hand and Russell on the other, their Lordships would be slow to come to a different conclusion. Even if the question had been so asked and so answered, they think that a general communication of this sort between parties at arm's length,

and where there was no duty of disclosure, would fall short of that specific misrepresentation *dans causam contractui* which would be ground for rescission. They say " between parties at arm's length " because, be it observed, in this branch of the case, the Plaintiffs must treat Russell as the agent of Enderton & Co. to obtain the contract contained in Exhibit No. 2.

As regards the second ground of rescission, the Defendants deny that Simpson was a mere *prête nom* for Enderton & Co., but the enquiry whether that is so is needless unless the contract contained in Exhibit E. is a mere contract of agency and not a contract under which Enderton & Co. had a right to purchase for themselves. It therefore becomes necessary to consider first of all what is the true import of the document Exhibit 2.

Now, *primâ facie*, the undertaking is exceedingly clear. The Kellys bind themselves to give Enderton & Co. the option to purchase on certain terms. The only argument that can be found in favour of this being anything but an option is the clause near the end :—" We hereby agree to pay one thousand " dollars commission to C. H. Enderton & Co. " on, sale of above-described property on the " above described terms." It is said that this shows that the agreement is not an agreement for sale on option, but is a mere agency agreement.

Their Lordships are unable to accede to this contention. The option to Enderton to buy is given in plain and unequivocal terms, and it would require to be shown that the subsequent clause as to commission was necessarily inconsistent with an option to buy to induce them to construe the clause in other than its natural way. But where is the inconsistency ? It seems quite a natural thing to say : " You are to have an

" allowance of commission of one thousand dollars
" for finding a purchaser who is able to pay the
" twenty-five thousand dollars cash and come
" under the further obligations, and that whether
" you are yourselves the purchasers or you give
" the benefit of the option to another purchaser."

Their Lordships are referred to the case of *Livingstone* v. *Ross* (1901, A.C. 327), where an agreement was held to be a mere agreement of agency and to give no right to the agent to enact himself as purchaser. Obviously each agreement must be judged of according to its own terms, and they think the distinction between the agreement in that case and in this is obvious and vital. In that case no option in favour of Livingstone was expressed; and the opinion of the Board is expressly rested on the fact that, if sale on option and not agency had been intended, such option would have been expressed by the insertion of the words " to you " after the words " We offer to sell." The expression " to " you " was indeed employed in an ancillary clause dealing with timber on the ground; but it was held that this could not supply the crucial omission just mentioned. In this case, as already mentioned, the offer to sell to Endertons by name stands in the forefront of the contract. Further, in that case, the moment that Livingstone assumed to accept, Ross at once repudiated that view of the agreement. Here there is neither challenge nor repudiation of the letter of the 15th March, and the conveyance for which the only warrant was the offer contained in Exhibit 2, and the acceptance in the letter of the 15th March, was duly executed in favour of Enderton & Co.'s nominee.

This being their Lordships' view of the construction of the contract contained in Exhibit 2, it becomes unnecessary to consider whether Simpson is really an independent assignee

of Enderton & Co., or whether he truly holds as a trustee for them. Their Lordships are therefore of opinion that the result to which the Trial Judge and the Court of Appeal came was correct, and they will humbly advise His Majesty that this Appeal ought to be dismissed.

The Respondents, Enderton & Co. and Russell, will have their separate costs of the Appeal, and the Respondent Simpson will have such costs as he may be entitled to.

In the Privy Council.

MICHAEL KELLY AND ANOTHER

v.

C. H. ENDERTON AND OTHERS.

Delivered by LORD DUNEDIN.

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