

IN THE MATTER OF THE PETITION OF RIGHT
OF PATRICK WRIGHT SUPPLIANT;

1914
Nov. 14.

AND

HIS MAJESTY THE KING RESPONDENT.

*Principal and Agent—Parol Contract—Right to recover—Mandate—Art. 1702
C.C.P.Q.—Art. 1233 C.C.P.Q.—Evidence.*

The suppliant who was not a registered broker, was telephoned to by the Collector of Customs at Montreal and asked to procure for the Crown an option on certain property which was required for the site of a Customs building in the City of Montreal. Acting upon such instructions the suppliant took the necessary steps to obtain the option which, after some delay occasioned by the owners, he succeeded in securing.

The Commissioner of Customs was then instructed to proceed to Montreal and arrange to secure the purchase of the property for which the suppliant had obtained the option. The suppliant and the Commissioner met at the Custom House in Montreal and the latter authorized the suppliant to effect the purchase and asked him about his commission. The suppliant replied that $2\frac{1}{2}\%$ was the customary commission, adding that he was not a regular broker and that he would leave that part of the matter with the Commissioner to deal with as he deserved. The suppliant then obtained a deed of the property from the owners to the Crown.

Held, that the mandate was not gratuitous under Art. 1702 C.C.P.Q., and that the suppliant was entitled to recover a commission on the purchase of the property in question.

2. That as the evidence established that $2\frac{1}{2}\%$ was the usual commission paid under such circumstances the suppliant was fully entitled to his claim which was at the rate of $1\frac{1}{2}\%$.
3. An admission by the Crown in its defence to a petition of right (seeking the recovery of money due upon an alleged parol contract) that suppliant was employed to act for the Crown in respect of the subject-matter of such contract although disputing the amount claimed, will constitute a "commencement of proof in writing" so as to let in oral evidence under Art. 1233 C.C.P.Q.

PETITION OF RIGHT for the recovery of money alleged to be due as a commission on the purchase of property.

The facts are stated in the reasons for judgment.

October 15th, 1914.

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The ca was heard at Ottawa, before the Honourable Mr. Justice Audette.

W. D. Hogg, K.C., for the suppliant.

F. J. Curran, for the respondent.

AUDETTE, J., now (November 7th, 1914) delivered judgment.

The suppliant brought his petition of right to recover the sum of \$6,000. as representing his remuneration, in the nature of a commission of one and one half per cent. on the purchase of a piece of land made by him at the request of and for the Crown.

In the autumn of 1907, the suppliant was telephoned to and asked to come to the Custom House, at Montreal, where he met the Collector of Customs, Mr. White, who asked him to procure for the Crown, if possible, an option for the property in question which was required for Customs purposes. The suppliant then took the necessary steps and began negotiating for the option, which after some delay occasioned by the owners, he succeeded in securing. Then the Commissioner of Customs, Mr. McDougall, after having discussed the matter with the Minister of Public Works and the Minister of Finance, was instructed by the Minister of Public Works, to proceed to Montreal and arrange to secure the purchase of the property for which the suppliant had obtained the option. He was further instructed by the Minister of Public Works before closing the transaction to secure the report of Mr. J. C. Simpson, a real estate agent, at Montreal, that the property was worth the amount mentioned in the option, and that was complied with.

Then the suppliant and the Commissioner of Customs met at the Custom House and the latter autho-

rized Mr. Wright to purchase, and asked him about his commission, and the suppliant replied that $2\frac{1}{2}\%$ was the customary commission, adding that he was not a regular broker, and that he would leave that part with the Commissioner to deal with as it deserved. Mr. McDougall says, "At that time we were anxious to secure the property and I did not say any more." However, such an interview would obviously let in a contract for remuneration, as it was at that time within the contemplation of both parties. The suppliant pursuing his negotiations with the owners, at the request of the Commissioner of Customs, had the option altered and made for \$402,000, instead of a cash transaction at \$400,000, the additional \$2,000. representing the interest on the balance, a payment of only \$10,000. being made by the Government on the passing of the deed — a matter fully explained in the evidence.

As a result of these transactions the suppliant, after a period of over six years, is seeking by his petition of right to recover the sum of six thousand dollars, as a remuneration for such services.

It has been established both by the suppliant's and the respondent's evidence, that the customary remuneration payable to a real estate broker under the present circumstances, would be $2\frac{1}{2}\%$ and the suppliant is now claiming $1\frac{1}{2}\%$.

The business was well handled and Mr. White said he sought the services of the suppliant because he knew him as having had a large experience in real estate and that it was a better policy to deal through him, than through a real estate agent; because he feared if it became known the property would go up. In that view the Collector is corroborated by witness G. Hyde, a large real estate dealer of Montreal, who said the suppliant did better than a real estate broker.

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The Crown at the trial moved to amend its statement in defence by setting up at bar the plea of prescription,—a plea which was afterwards abandoned, as will be seen by the renunciation in writing filed of record, whereby “any prescription which may have been “acquired by the King against the claim of the suppliant in this cause, was renounced.” That disposes of that plea.

The Crown further pleaded that there being a claim above \$50. it could not be proved by oral evidence without a (*commencement de preuve par écrit*) commencement of proof in writing; ⁽¹⁾ and further that mandates were gratuitous and that therefore the suppliant could not succeed ⁽²⁾:

The first objection would at first sight appear to be well taken, as this claim is not, within the meaning of Art. 1233 and the numerous decisions thereunder ⁽³⁾, a transaction concerning commercial matters, possessing the two elements which go to constitute a commercial matter, that is either a trade transaction or coming within the habitual profession of the party. What constitutes a commencement of proof in writing is an act in writing emanating from the party against whom the action is taken or from some one representing him and which gives to the alleged fact a character of likelihood and verisimilitude.

Now we have in this case on this point the pleadings of the Crown admitting paragraph 3 of the petition of right, which narrates the transaction. By this plea it is also admitted the suppliant secured the option and that no specific remuneration was ever agreed upon,—letting in, however, that some undefined remuneration should be paid, as it is added by

(1) Art. 1233, C.C.Q.

(2) Art. 1702, C.C.P.

(3) Girard vs. Trudel, 21 L.C.J.

295; Trudeau vs. Rochon, R.J. Q. 8

C.S.387; Baillie vs. Nolton, R.J.Q.

12 S.C. 534.

par. 14 that the amount claimed by the suppliant for such services is excessive and greatly exaggerated. Reference may also be had upon this point to the Crown's Exhibits "B" and "C". Upon the pleadings, following the decisions upon such matters, (1) it was found at trial that such allegations in the plea constituted a "commencement of proof in writing", and the evidence was allowed.

Dealing with the Crown's second count which is based upon Art. 1702, which reads as follows: "1702. Mandate is gratuitous unless there is an agreement "or an established usage to the contrary." It must be found that the custom has been abundantly established by all the witnesses heard in this case indiscriminately, whether on behalf of the suppliant or on behalf of the Crown, that in such a transaction a commission of 2½% is usually paid. There was protracted discussion to establish that such commission is usually paid by the vendor, but admittedly recognized that in the result it was the purchaser who paid it.

In the present instance the suppliant has taken the necessary steps and gone to the necessary trouble incidental to negotiations for such a transaction at the request of the proper officer of the Crown, duly vested with the proper authority, and who does not deny it, has accordingly a right to a reasonable compensation for such steps and trouble. (2)

There may not have been in this case an express covenant to pay a fixed commission, but from the interview between Mr. McDougall and the suppliant it must be found there was a clear understanding in the mind of both parties that a commission would be paid, and from what took place between the parties on such interview an intention and undertaking on the part

(1) *St. Pierre v. Jolicœur*, 3 R.L., N.S. 155.

(2) *Normandeau v. Desjardins*, R.J.Q. 5 S.C. 354.

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of the Crown to pay the suppliant for his services was clearly implied. The only question which really remains open is the question of *quantum*; but Mr. McDougall has admitted in his evidence that the amount claimed was right and fair,—expressing his view further upon the commendable manner in which the transaction was handled. On behalf of the Crown, even Mr. Hunter said that after hearing the evidence he thought that \$2,500. would be a liberal compensation.

In ordinary business transactions where the parties have not settled the salary of the mandatary, the salary depends upon the usage of the place where the transaction took place or upon the equitable determination of the Judge. ⁽¹⁾

On this question of *quantum* the evidence clearly establishes that 2½% is usually paid under such circumstances. The suppliant claims 1½, and the Commissioner of Customs, who is vested with all authority in respect to this purchase, looks upon that claim as fair and reasonable, and the Court agrees with this view. There are some other unimportant questions raised, which in the view the court takes of the matter it becomes unnecessary to discuss.

There will be judgment declaring that the suppliant is entitled to recover the sum of six thousand dollars and costs.

Judgment accordingly.

Solicitors for the suppliant: *Hogg & Hogg.*

Solicitor for the respondent: *F. J. Curran.*

(1) 2 Delamare et Poitevin, v. 280; Trolong, n. 631.