CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

HORACE B. FORMAN (PLAINTIFF).....APPELLANT;

AND

THE UNION TRUST COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

1926

*Nov. 4, 5.
*Dec. 1.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Evidence—Letter signed intended to embody terms of deposit of money —Inadmissibility of parol evidence to contradict, vary or explain— Evidence received without objection at trial put aside by appellate court.

Plaintiff deposited with defendant $20,000 to be held and paid out on certain terms. At an interview between plaintiff and defendant's manager there was drafted in the latter's handwriting and signed by plaintiff the following letter from plaintiff to defendant, which was intended to embody plaintiff's full instructions to defendant: "There will be paid to you * * * $20,000 * * * This payment is in connection with the Hayes-Lorrain Syndicate. You will please hold these funds until such time as you are instructed by [G.] that it is proper for you to pay same out and you will pay same to such persons, firms or corporations as [G.] may direct and this shall be your sufficient authority." The moneys were (as found by the court) paid out by defendant according to G.'s directions.

Held, that parol evidence was not admissible to show a stipulation, alleged by plaintiff but denied by defendant, that, as a term of the deposit, the moneys were not to be paid out by defendant unless the sum of $50,000 should be received by the defendant under the provisions of an earlier document known as the "Hayes-Lorrain Syndicate agreement." The reference in the letter to the Hayes-Lorrain Syndicate, on its face, merely identified the matter for which the money was to be held and used, and did not cover such a stipulation as alleged by plaintiff; and extrinsic evidence of the intention of the parties in making it was not admissible.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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The rule of law that extrinsic evidence is not, in general, admissible to contradict, vary or explain written instruments must be enforced in cases that fairly come within it.

Although the plaintiff's evidence of the antecedent conversation, at said interview, as to the terms of his deposit was received without objection and acted upon by the trial judge, the appellate court, upon being satisfied that a writing had been agreed to which was meant to embody those terms, rightly put that evidence aside and decided the case upon the evidence properly admissible. (Jacker v. International Cable Co., 5 T.L.R., 13).

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing an appeal from the judgment of Kelly J. in favour of the plaintiff (2).

The plaintiff's claim was to recover the sum of $20,000 and interest for moneys alleged to have been paid to the defendant upon certain trusts, and alleged to have been paid out by the defendant otherwise than in accordance with the said trusts. The defendant denied any indebtedness to the plaintiff, stating that the moneys were paid out in accordance with the plaintiff's instructions. The material facts of the case are sufficiently stated in the judgment now reported.

The appeal was dismissed with costs.

J. A. Worrell K.C. and *R. H. Sankey* for the appellant.

W. N. Tilley K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff sues to recover a sum of $20,000 deposited by him with the defendant. The deposit of the money and that it was held on some terms is common ground. The plaintiff complains that the moneys were wrongfully paid out by the defendants in contravention of the terms of deposit.

One of the two terms alleged by the plaintiff is denied by the defendant. The existence of the other is common ground and the question is as to its fulfilment, the defendant maintaining and the plaintiff denying that it was in fact observed.

(1) 29 Ont. W.N. 448. (2) 28 Ont. W.N. 331.

The learned trial judge, Kelly J., upheld the plaintiff's contention on both grounds (1). The Appellate Division unanimously accepted the view put forward by the defendant on both points (2).

The terms of deposit alleged by the plaintiff were

(*a*) that the moneys were not to be paid out by the defendant " unless the full $50,000 (referred to in the Hayes-Lorrain Syndicate agreement) was actually paid into the Trust Company; and

(*b*) then not to pay it out except on instructions by Mr. Gallagher and to whom Mr. Gallagher might direct, all for the purposes of the Hayes-Lorrain agreement."

Whether the existence of term (*a*), which was not observed, is established by evidence legally admissible is one question; and, if not, whether term (*b*) was complied with is the other. A decision of either in the plaintiff's favour would mean the allowance of his appeal.

It may be as well to say at once that consideration of the evidence has fully satisfied us that on the second question the conclusion reached by the Appellate Division, that payment was made by the defendant with Gallagher's approval, is right and cannot be disturbed. It is true that Forman did not advise Gallagher of the fact that he had made his (Gallagher's) approval a condition of the Trust Company's payment out of the $20,000 and also that he did not authorize Gallagher to give such approval; but Lang (the defendant company's trust manager) communicated these instructions to Gallagher on the 23rd of May —both he and Gallagher say so—and Gallagher with knowledge of them undoubtedly authorized the payment over to the vendors by the Trust Company of all the moneys held by it in connection with the purchase of the properties in question. The Trust Company was fully justified in concluding that such payments were sanctioned by Gallagher and had no reason to suspect that such sanction had not been authorized by the plaintiff.

The question whether the Trust Company held the plaintiff's money subject to the condition that before payment of it out $50,000 should be actually in its hands in pay-

(1) 28 Ont. W.N., 331. (2) 29 Ont. W.N., 448.

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ment of subscriptions under the Hayes-Lorrain Syndicate agreement must now be considered.

The arrangement for the deposit with the defendant company of the $20,000 was made at an interview on the 22nd of May, 1923, between Mr. Lang and the plaintiff, no other person being present. There is direct conflict between them as to the $50,000 stipulation, the plaintiff deposing that it was distinctly made by him and assented to by Lang and the latter that nothing of the kind took place. Both are, however, agreed that Lang during the interview expressed the desire that the plaintiff's instructions as to the deposit should be put in writing, and that the plaintiff acceded to this request. On this point the plaintiff says:—

Mr. Lang stated that he understood me perfectly in the matter but would prefer to have it in writing over my signature so he called in a typist and dictated what is known as my letter of instruction to the Trust Company of May 22.

Q. Is that the letter signed by you?—A. No, I do not think this is it; it looks like my signature, but I thought it was typed; he called in somebody who typed it, I am almost sure.

Q. That is your signature?—A. It appears to be my signature, yes.

And on cross-examination he said:—

Q. I also understood you to say that as soon as you started to mention conditions upon which your money might be paid out, Mr. Lang at once said: "We must have written authority from you, Mr. Forman"?—A. Yes; written authority over my signature.

Q. And this letter (Exhibit 14) was then signed by you?—A. Yes.

Lang explicitly denied that there was any allusion by the plaintiff at the interview of the 22nd of May to the Hayes-Lorrain Syndicate agreement or to the retention of his money by the Trust Company until it should have received $50,000 under that agreement. His account of the interview, so far as material, is as follows:—

Q. I want you to come to this interview which the plaintiff had with you on the 22nd of May, 1923, and I would like your account of that interview in as much detail as you can give it to me?—A. Well, Mr. Forman came into the office without any introduction at all, and told me who he was, and that he wanted to give us some money.

Q. Yes?—A. I am pretty sure that I told him that we had title deeds there in connection with these mining claims he talked about, which were being held by us against payment.

Q. Of the purchase price?—A. I do not recollect that I told him the purchase price; I cannot be sure of that.

Q. Yes?—A. The next thing, as I recollect it, was his mention of Mr. Gallagher's name, and the greater part of that interview consisted of him telling me about Mr. Gallagher, and asking me what I knew

about him, and his statement that he was going to leave it entirely to Mr. Gallagher, and whatever Mr. Gallagher did was going to be all right. Following that I told him if he wanted to give us any money he should give us instructions in writing as to what we were to do with it. He agreed to that, and I pulled a sheet of paper out of my drawer and proceeded to take down his instructions.

Q. Had he or had he not before this time outlined his instructions —before the paper was produced?—A. The first part of the conversation was very general as far as I know. We did not get down to business until I pulled this paper out of my desk and started to write down what he wanted me to do. So far as that letter was concerned, I wrote it, it is in my handwriting.

Q. That is the letter of May 22nd, 1923, which has been put in as Exhibit 14?—A. Yes.

Q. Yes?—A. That letter, I would say, was really at Mr. Forman's dictation; he did not dictate the words I should use—I did that myself because I was writing it—but he undoubtedly told me what he wanted put in that letter, and that is the way it was written.

Q. Was there some discussion during the drafting of that letter as to the various points which it mentions?—A. I do not think so; the letter was written without any difficulty at all as to instructions.

Q. Was the letter signed, the first draft of it, or were several drafts required?—A. It was signed immediately without any change.

Q. Did the interview continue after the signing of the letter for some time, or did it end shortly afterwards?—A. I would not be sure, but the interview was short, in any case; it did not last very long.

Q. About how long?—A. Not more than ten to fifteen minutes at the outside.

Q. Have you given me your account of the interview as fully as you can?—A. Except this, that most of our talk was about Mr. Gallagher, in my office, and his reliance upon Mr. Gallagher; I cannot emphasize that too much.

Q. Was that mentioned once or more than once?—A. Mentioned repeatedly.

Q. Mr. Forman has said that the interview was opened by his producing a copy of the syndicate agreement, as he calls it, and that you glanced at that agreement and told him it was unnecessary for you to read it, because the Trust Company had a copy. What do you say to that?—A. I cannot recollect that at all.

Q. You have no recollection as to that conversation taking place? —A. Absolutely not, none at all.

* * *

Mr. Thomson: As I understood Mr. Forman's evidence he said that he told you clearly and in a way not capable of being misunderstood by you that he was paying this sum of $20,000, or the additional sum of $15,000—I have forgotten which—under the syndicate agreement? —A. No, that is not my recollection of it at all.

* * *

His Lordship: Give us his instructions as you say he gave them to you?—A. His instructions were that he was to give us this money and we were to pay it out when Mr. Gallagher said it was all right to do it.

Mr. Thomson: Q. And Mr. Forman said very definitely that in addition to the stipulations which are covered by the document, Exhibit 14, he made a further stipulation not covered by the document, to this

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effect: "My money is not to be paid out until $50,000 has been subscribed to the syndicate agreement." What do you say as to that?—A. I say that he is absolutely mistaken about that, that it is not correct.

Q. At any rate I suppose you endeavoured to cover in the writing (Exhibit 14) and to cover accurately Mr. Forman's instructions to you? —A. Undoubtedly so.

Q. Do you think you did?—A. Yes.

The letter written by Lang in his own hand, and not by a typist as Forman thought, reads as follows:—

UNION TRUST COMPANY,
TORONTO.

The Union Trust Company, Limited,
Toronto, Ont.

DEAR SIRS,—There will be paid to you in the course of a few days a total of $20,000 sent for my account from Bioren & Co., of Philadelphia. This payment is in connection with the Hayes-Lorrain Syndicate. You will please hold these funds until such time as you are instructed by Mr. Ziba Gallagher that it is proper for you to pay same out and you will pay same to such persons, firms or corporations as Mr. Ziba Gallagher may direct and this will be your sufficient authority.
Dated May 22, 1923.

HORACE B. FORMAN, Jr.,
Haverford, Pa., U.S.A.

Witness: D. W. Lang.

Kindly send draft for the premium on these funds for my credit at Bank of Montreal, Gananoque, Ont.

HORACE B. FORMAN, Jr.

Both Forman and Lang agree that this letter was intended to embody the plaintiff's full instructions to the Trust Company as to the terms on which the latter should accept and hold the $20,000. As to the disputed term the plaintiff says he understood it to be covered by the sentence: "This payment is in connection with the Hayes-Lorrain Syndicate." Lang says this reference was merely to identify the matter for which the money was to be held and used. The reference does not *ex facie* import what the plaintiff says he understood it to cover; its apparent significance is what Lang attributes to it. Extrinsic evidence of the intention of the parties in making it is not admissible.

Moreover, if, as the plaintiff suggests, it was meant thereby to recognize the existence of the so-called syndicate agreement and to subject the holding of the plaintiff's money by the defendant to its terms, it must be borne in mind that the 30 days during which, under that agreement, the Trust Company was to hold the plaintiff's

money had already expired and there is no hint of any other period having been substituted, so that, if the $50,000 were not paid to the Trust Company it might have been obliged to hold the plaintiff's money indefinitely. This syndicate agreement had not been executed by anybody except the plaintiff and by him only as to his original $5,000 subscription. When he agreed to put up the extra $15,000 he entered into an arrangement with Kemmerer, one of the vendors to the syndicate, that he should become interested with him (Kemmerer) in the transaction and bargained for a share of Kemmerer's promotion stock. Gallagher, who had been apprised of these facts on the morning of the 22nd of May, then understood that the syndicate agreement had been abandoned and was no longer to be taken account of. These considerations, however, rather bear upon the question whether the story told of the interview of the 22nd of May by the plaintiff or that told by Lang is the more probable and would scarcely suffice to outweigh the explicit finding of the learned trial judge that Forman's testimony rather than Lang's was entitled to credence.

But it seems clear that any parol evidence of the conversation during which the letter of the 22nd of May, 1923, was written is not admissible to add to or vary the instructions which it contains. That letter, according to the plaintiff's own story, having been written to formulate the terms and conditions of the Trust Company's authority in regard to the $20,000 deposit, it was, to quote the language of Judge Taylor (Taylor on Evidence, 11th ed., p. 776): "intended finally to embody the entire agreement between the parties." The admission of parol evidence in such a case would be fraught with all the dangers to obviate which it has been established as a rule of law that extrinsic evidence is not, in general, admissible to contradict, vary or explain written instruments. (Best on Evidence, 10th ed., p. 208). This salutary rule affords the best, often the only, protection against mistakes arising from treacherous memory, and courts must enforce it in cases that fairly come within it. The consequences of allowing it to be frittered away would be deplorable.

Although Mr. Forman's evidence of the antecedant conversation as to the terms of his deposit was received with-

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out objection and acted upon by the trial judge, the Court of Appeal, upon being satisfied that a writing had been agreed to which was meant to embody those terms, rightly put that evidence aside and decided the case upon the evidence properly admissible. *Jacker* v. *International Cable Co.* (1).

For these reasons the appeal fails and will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Worrell, Gwynne & Beatty.*

Solicitors for the respondent: *Tilley, Johnston, Thomson & Parmenter.*