

CLUTE, J.

SEPTEMBER 29TH, 1915.

## \*McKINNON v. DORAN.

*Contract—Sale of Bonds—Principal and Agent—Purchase by Agent—Finding of Fact of Trial Judge—Statute of Frauds—Memorandum in Writing—Letters to Third Person—Evidence—Failure to Pay for Bonds—Breach of Contract—Damages.*

Action for damages for breach of a contract for the purchase by the defendant from the plaintiffs of certain railway bonds of the face value of \$223,700.

The action was tried by CLUTE, J., without a jury, at Toronto.

J. B. Clarke, K.C., for the plaintiffs.

J. S. Fullerton, K.C., and I. F. Hellmuth, K.C., for the defendant.

CLUTE, J., after setting out the facts at length, in a written opinion, said that the defendant pleaded that he was employed by the plaintiffs as an agent to sell the bonds, the plaintiffs agreeing to pay him a commission of \$2,500. The learned Judge finds as a fact that the defendant, having secured a purchaser, decided to purchase the bonds himself; the defendant treated the transaction, as in fact it was, as a sale to himself, and acted not as agent but as principal in the transaction.

There was a further defence under the Statute of Frauds, R.S.O. 1914 ch. 102. The learned Judge thinks it clear that the bonds, read in connection with the trust indenture giving a power of sale of the mortgaged property, upon default, came within the statute: *Driver v. Broad*, [1893] 1 Q.B. 539, 744. Aside from the statute, there was no question that a sale to the defendant was concluded, and what took place met the requirements of the statute. The correspondence between the parties disclosed the vendors and the terms of sale and the fact that the defendant had purchased the bonds.

The correspondence between the defendant and Daudé, his New York associate, through whom he made a sale of the bonds which was not carried out, was admissible as evidence of the bargain: see *Gibson v. Holland* (1865), L.R. 1 C.P. 1; *Sugden's Law of Vendors and Purchasers*, 14th ed., p. 139; *Welford v. Beazely* (1747), 3 Atk. 503; *Seagood v. Meale* (1721), Prec. Ch. 560; *Leroux v. Brown* (1852), 12 C.B. 801; *Rose v. Cunynghame* (1805), 11 Ves. 550; *Bailey v. Sweeting* (1861), 9 C.B.N.S. 843; *Agnew's Statute of Frauds*, p. 244, and cases there cited; and