LOWENBURG, HARRIS & CO. (DEFENDANTS) ..... } APPELLANTS;

AND

CLIVE PHILLIPS WOLLEY (PLAINTIFF..... } RESPONDENT.

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*May 13.

*Dec. 9.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Principal and agent—Negligence of agent—Lending money for principal—Financial brokers—Liability for loss—Measure of damages.

Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest though their remuneration may come from the borrower.

An agent who invests moneys for his principal without taking proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby.

The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land. Taschereau and Gwynne JJ. dissenting.

APPEAL from the decision of the Supreme Court of British Columbia affirming the judgment for plaintiff at the trial.

The facts of this case, which are fully set out in the judgments delivered on this appeal, may be briefly stated as follows:

The plaintiff, Wolley, having money to invest, took the advice of one of the members of defendants' firm who offered him an investment, which was described as "gilt-edged and first-class." The security offered was a mortgage on farm property at some distance from Victoria, British Columbia, where the brokers carried on business. The member of the firm with

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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whom plaintiff dealt was not personally acquainted with the borrower and knew nothing of the property, but he acted on the valuation made by two business men of Victoria who did not appear to be experts in valuing land.

The plaintiff lent $5,500 on this property and received only one year's interest from the borrower who proved to be a very unreliable person, and in endeavouring to realize on the security he was unable to sell it. He therefore brought an action against the brokers alleging in his statement of claim that he was induced to lend his money on the representation of one of them that the borrower was a steady, thrifty farmer and the property worth over $7,000, both of which representations were untrue. He obtained judgment in this action for the amount loaned with interest. The defendants appealed.

Robinson Q.C. for the appellants.

Moss Q.C. for the respondent.

THE CHIEF JUSTICE:—Three questions are raised by this appeal. First, was there sufficient evidence for the consideration of the jury that the appellants were the agents of the respondent in the mortgage transaction which has given rise to this litigation? Secondly, were the appellants, as such agents, guilty of negligence? Thirdly, did the respondent by reason of such negligence suffer loss and to what amount?

In answer to the first and tenth questions submitted to them by the learned judge, the jury have found the agency to be established. That there was sufficient evidence for the consideration of the jury on this head cannot be doubted. Mr. Snowden, the member of the appellants' firm by whom the business was managed, being examined as a witness for himself and his com-

pany at the trial, upon cross-examination gave the following evidence:

Q. Then do you think that as the agent of Mr. Wolley you were justified in advising him to make that investment? A. Yes, I do at that time.

Q. Why do you think so? A. Because I considered the property fully worth it at that time.

Q. I will put the question in this way. Do you think that as a financial agent you would be justified in advising a client to make that investment then? A. Yes.

Q. You do. And that would be the way upon which you would have advised Mr. Wolley if you had been acting for him, that would have been the basis upon which you would have given him the advice? A. I would recommend him to take the loan, I did recommend him to take it.

Q. You did recommend him to take it? A. Yes.

Q. How did you recommend him to take it? A. I thought it was a good loan.

Q. You thought it was in his interest? A. Yes, from the valuation I thought it was a good loan.

Q. You thought it was in his interest to take it? A. He had the same opportunity of judging as I had.

Q. No, but a minute ago you said you recommended him to take it. Would you have recommended him to take it if you had not thought it was in his interest? Would you? Do you mean to say that you would deliberately recommend him to do a thing that you thought he would make a loss on? A. No, of course I wouldn't.

Q. Then, if you did recommend him to do it, didn't you hold yourself out to him as acting for him and his interest?—A. I suppose I did at the time.

Q. Of course you did.

In the face of this clear, unequivocal admission by Mr. Snowden, it is quite out of the question to say that the learned judge could have withdrawn the case from the jury and nonsuited the respondent.

There is nothing inconsistent with this admission of the existence of the relationship of principal and agents, in the fact that Hodge, the borrower, paid the appellants their commission of one per cent, for it is proved that the usual practice in carrying out loans at

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Victoria was, that the borrower paid the commission of the lender's agents. Again, the circumstance that the respondent paid the appellants nothing does not negative the existence of agency, for it is shown, as I have just said, that their commission was paid by the mortgagor. Moreover, the attitude of Mr. Snowden in the controversy which arose as to whether the interest should be paid annually or otherwise, was adverse to the borrower and entirely in the interest of the respondent, shewing that he was at all events acting for him, if not for him exclusively. Then, as the appellants through Snowden well knew, the respondent was relying on them alone to protect his interests, making no inquiries himself and employing no other broker or agent. All these circumstances go to show, by the admission of Mr. Snowden, that his firm were acting as the respondent's agents, and in my opinion were not only proper matters for the consideration of the jury, but entirely justify their findings as expressed in the answers to the first and tenth questions put to them by the learned judge.

That there was ample proof of negligence by the appellants in the performance of their duties as agents is equally clear. Mr. Snowden was content to assume that this parcel of land situate in the Delta of the Fraser River, consisting of eighty acres, with a house and barn, was worth $7,000 upon the mere production of a certificate to that effect, procured by Hodge, the borrower, signed by Messrs. Shotbolt and Baker, two gentlemen living at Victoria, one a druggist, the other a grain dealer, who are not shown to have had any experience as valuers of land, or to have been in any way competent to make the estimate they did. Satisfied with this valuation the appellants made no independent or further inquiry, but acting on it advanced the loan of $5,500. They might, in my opinion, just

as well have acted on the mere bare statement of the mortgagor himself. Then the evidence shows that this property, the assessed value of which was only some $2,000, was at the time of the loan not worth more than $40 per acre, the buildings, consisting of a house and barn, being at the utmost of the value of some $1,500. Now this being, as I think, what the evidence establishes as a fair valuation, what amount would any prudent investor advance upon such a security? The rule which the Court of Chancery has laid down as governing investments by trustees on loans on real security, is that on agricultural lands not more than two-thirds, and on buildings not more than one-half, of the actual value should be advanced. This, I think, is the proper test to ascertain what a prudent owner would have advanced in the present instance. And what a prudent owner would have advanced, and no more than that, it was the duty of the appellants in the present case to have advised the respondent to advance. Then, on the basis of the valuation I have mentioned, this property on which the appellants induced the respondent to lend $5,500, was not a good security for more than $2,900. It is plain, therefore, that there was evidence of negligence, and I should say very gross negligence, to go to the jury.

Then, it is urged that the learned judge at the trial misdirected the jury and assumed the decision of the question of agency, as well as the fact of negligence, himself. This ground of appeal is, in my opinion, entirely unfounded. No doubt the learned judge, in his long and exhaustive charge, did strongly comment on the evidence, but that he had a perfect right to do, and I must add, considering the nature of the case and of the evidence adduced, I should have been surprised if the learned judge had not spoken forcibly, but that he either directed the jury absolutely to find for the re-

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spondent on these questions of fact, or in any way sought to impose his view of the evidence upon them, is a proposition to which I cannot agree. In the course of his charge the learned judge most distinctly told the jury that these questions were for them; thus we find him saying:

> Now, if you find—because I do not decide it, it is for you to decide it—if you find that there was an agency, the next thing you have to find is: Were they negligent? Now the word "negligent" is a harsh word. The proper term to use in a case of this kind, and it comes to the same thing, is this—or the proper question to put to you, is this—and you will answer it according to the evidence: Was there due skill, or were there due skill and diligence used by the defendants, if you find that they were agents for the plaintiff in making this loan?

Upon the heads I have already dealt with, I am therefore entirely of accord with the Divisional Court in refusing a new trial.

There remains, however, another objection to which Mr. Justice McCreight, dissenting from the other members of the court, thought effect should be given. The jury were not called upon to assess the damages as they must have been in an ordinary common law action for negligence under the old practice, and the judgment entered by Mr. Justice Walkem upon the findings of the jury did not pronounce for any definite sum to be recovered by way of damages, but ordered the appellants to repay to the respondent the full amount of his advance with interest at eight and a half per cent from 28th October, 1891, (the first year's interest having been paid to the respondent by the mortgagor) until judgment, and it further directed that upon payment of this sum the respondent should assign the mortgage to the appellants. I am of opinion that this was not a correct disposition of the case. The effect of this judgment would be to make the appellants not only responsible for such damages as were caused by the negligent performance of their duty as the respondent's

agents, in over-valuing the mortgaged property, but also for any depreciation (if any there has been) in the actual value of the property subsequent to the loan. It is manifest that any loss in this respect should be borne by the respondent himself inasmuch as it cannot be attributed to the neglect of the appellants. All that the appellants can possibly be liable for is the loss occasioned by the over-valuation adopted and acted on by them. The damages should have been assessed in the regular way, and that not having been done, the cause must be remitted to the Supreme Court of British Columbia to have the error in this respect rectified. This was the view of Mr. Justice McCreight and I concur in his conclusion. Under the British Columbia Rule, 436, the court is empowered to direct a new trial as to part only of the matter in controversy. This rule should, I think, be acted upon in the present case. It would be open to this court, under British Columbia Rule 446, itself to assess the damages, but I think this can be more satisfactorily done by the court below, which may in its discretion either assess the damages itself, send it down for trial before another jury for that purpose only, or direct a reference to ascertain the amount the respondent was entitled to recover. The judgment should be confirmed as to the general liability of the appellants, but varied in the way I have mentioned as regards the damages. This point was not specifically taken either in the notice of motion for a new trial or in the notice of motion to discharge the judgment, though it is to be presumed that it was discussed on the argument in the court below, since Mr. Justice McCreight's judgment proceeds upon it. The appellants, having been compelled to appeal to have the judgment set right in this respect, and having succeeded in part of their contention, ought not to be ordered to pay costs, though,

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having failed in other respects, they are not entitled to recover any. There should, therefore, be no costs of this appeal and the cause must be remitted to the court below with the directions already indicated.

The Chief Justice.

TASCHEREAU J.—On the question of agency, as well as on the question of negligence, there was, in my opinion, sufficient evidence to support the verdict; and that verdict having been approved of by the learned judge who presided at the trial, and by the learned judges before whom the case was heard in banco, I do not see that we would be justified in interfering. I would dismiss the appeal.

GWYNNE J.—It must be admitted that the learned judge before whom this case was tried, in his exhaustive charge to the jury, in plain terms expressed his own opinion upon the evidence, but it must also, I think, be admitted that while he did so, he also told the jury, (a special jury of mercantile men) that they were to render their verdict upon their own opinion of the facts in evidence uninfluenced by his opinion, for that they were the judges of the facts and not he.

Moreover, after the long discussion at the end of his charge upon the several points upon which the learned counsel for the defendants took objection to his charge, and before the questions which he submitted to the jury were submitted, it must be admitted, I think, upon the report which we have of what then took place, that the learned judge took pains to impress upon the jury that it was their duty to determine the case and to answer the questions he was about to submit to them upon their own unbiassed opinion of the evidence discarding from consideration what he had said as to his views of the evidence.

Under these circumstances, and inasmuch as the evidence in support of the plaintiff's contention, if

believed, and that it was believed by the jury there can be no doubt, was abundantly sufficient to support the findings of the jury upon the questions submitted to them, I do not think that we should be justified in remitting the case to another trial.

The main point urged on behalf of the defendants at the trial was, that the defendant Snowden was employed by the borrower Hodge as his agent to effect a loan for him, and that he as Hodge's agent and only in that capacity applied to the plaintiff for the loan, and that he did not give the plaintiff any reason for thinking that he was acting as his agent in the matter, but I think this is not the correct view to take of the evidence, and that the view taken by the jury is the correct one, namely, that the defendants, of which firm Snowden was a partner, were acting in the matter as the plaintiff's agents. The evidence is that Hodge applied to a Mr. Pooley not to employ him as Hodge's agent to procure a loan for him, but as a person who acting for others, his clients, had before lent him money on mortgage asking him to lend a further sum to Hodge upon the land already held by him under a mortgage. Mr. Pooley informed Hodge that he had no money to lend, and Mr. Pooley says that he does not recollect whether he told him to go to the defendants, that they might have money to lend, but he says that he was in the habit when he had no money himself to lend, to send persons applying to him for loans to the defendants, and in point of fact it appears that Hodge did go to the defendants and saw the defendant Snowden, and told him that Mr. Pooley had sent him to the defendants and that he wanted to obtain a loan of $5,500. It is plain that Hodge's application to the defendants was as brokers who were in the habit of investing their own or their clients' money, as Mr. Pooley was, on mortgage. Snow-

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den then applied to the plaintiff, for whom he had on previous occasions invested money, and obtained from him a cheque payable to the order of the defendants, authorizing him to lend the money to Hodge upon the security, as it was represented by Snowden, to be a first-class or "gilt edged security," upon Mr. Pooley being satisfied as to the legal sufficiency of the title; this being done, the defendants handed the money to Mr. Pooley, who handed to Hodge what remained after paying the mortgages already on the land, a commission of 1 per cent paid to the defendants, and the costs of preparing the mortgage. Much was tried to be made of the commission of 1 per cent paid to the defendants, as being a commission paid to them by Hodge for their services as his agents, but in truth that commission was that which is paid ordinarily by every borrower to the lender's agent through whom the loan is effected, the practice being, in all such cases, to charge all expenses, including the commission of the lender's agent, to the borrower.

I can see no ground for finding fault with the findings of the jury, and under the circumstances I do not think the parties should be put to the expense of another trial.

As to the amount of the judgment of the court below I can see no just ground of interference with it, except as to the amount of interest allowed. I did not understand the learned counsel for the appellants to complain of the amount if we should be of opinion that the plaintiff was entitled to recover in the action. However, it is established, I think, that the plaintiff was betrayed into advancing the money which the defendants loaned upon the security of the mortgages taken in the plaintiff's name by representations, which were untrue in point of fact, made to him by the defendant Snowden, who had no justification for making

them, and since the discovery by the plaintiff of the deception so practised upon him he has repudiated the mortgage so taken as one which, under the circumstances, was never authorized by him; his true measure of damages is therefore, in my opinion, the amount which he was so wrongfully induced by Snowden to advance, together with interest thereon at six per cent, he transferring all interest vested in him by force of the mortgage; whatever may be the real value of the security can only with certainty be ascertained upon a sale of the premises to realize the amount purported to be secured by the mortgage. I can see no justice whatever in compelling the plaintiff to adopt any such proceedings, or in putting him to the delay and expense incident upon any proceeding for determining the real value of premises comprised in a mortgage, all interest in which he repudiates as having been imposed upon him by the false representations of the defendants.

The defendants, having procured the plaintiff to advance his money upon such representations, must reimburse him to the full amount of the principal advanced and six per cent interest, and must themselves look to the mortgage security for their indemnity. The wrong to be redressed was theirs, and the burthen to reinstate the plaintiff in the position in which, but for their wrong he would be, lies upon them. The judgment being varied as to the interest the appeal should, in my opinion, be dismissed with costs.

SEDGEWICK and KING JJ. concurred in the judgment of the Chief Justice.

Appeal dismissed with costs, but judgment varied.

Solicitor for the appellants: *Robert Cassidy.*

Solicitors for the respondent: *Bodwell & Irving.*