

20, 1934

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No. 94 of 1933

CASE FOR MORINE.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

BETWEEN

H. A. MORINE (Defendant) - - - - - *Appellant*

AND

10 LONDON LOAN ASSETS LIMITED and THE LONDON
LOAN and SAVINGS COMPANY OF CANADA
(Plaintiffs) - - - - - *Respondents*

AND BETWEEN

LONDON LOAN ASSETS LIMITED and THE LONDON
LOAN and SAVINGS COMPANY OF CANADA
(Plaintiffs) - - - - - *Appellants*

AND

G. A. P. BRICKENDEN and GEORGE G. McCORMICK
and H. A. MORINE (Defendants) - - - - - *Respondents*

Case for the Appellant Morine and the Respondent Morine.

20 1. This is an Appeal by H. A. Morine (hereinafter referred to as this Appellant) from a Judgment of the Appellate Division of the Supreme Court of Ontario which on the 25th November 1932 by a majority (Latchford C.J.A., Riddell J.A., and Fisher J.A., Orde J.A. having died before Judgment and Magee J.A. giving no Judgment) dismissed the Appeal by this Appellant from so much of a Judgment delivered by the Trial Judge (Wright J.) on the 8th January 1932, as was against this Appellant and in the Respondent Companies' favour. This is also an Appeal by the said Companies from that part of the said Judgment of the said Appellate Division that upheld so much of the Trial Judge's said Judgment as adjudged that the said Companies were
25 not entitled to any damages against this Appellant.

(16652A)

RECORD

x. 272,
866.

2. The Respondent, the London Loan Assets Limited (hereinafter called The Assets Company), was incorporated for the purpose of realising certain assets formerly belonging to the Respondent The London Loan and Savings Company (hereinafter called The Loan Company) purchased by The Assets Company from the Huron and Erie Mortgage Corporation.

3. The Loan Company transacted business for a number of years, with head offices in London, Ontario, under the provisions of the Loan and Trust Corporation Act, R.S.O. 1927, Cap. 223.

p. 152-3,
27, 236.
. 114.

4. The Consolidated Trusts Corporation (hereinafter called The Trusts Corporation) was a subsidiary of the Loan Company, which owned \$249,000 in the capital stock of \$256,000 of the Trusts Corporation. Five directors of the Loan Company were also directors of the Trusts Corporation. 10

. 391.

5. This Appellant is a financial agent or broker, residing in the City of Toronto, who has for many years carried on business in the said City, chiefly in the borrowing of money on the security of real estate, from companies, institutions and private investors generally, for all persons who apply to him, receiving compensation therefor by commission and frequently by bonuses, from the applicants, and sometimes from the lenders. He also acts as agent for insurance companies.

p. 133, 843
x. 257.

. 229.
p. 391-2.
x. 197.
. 742.
x. 224.
. 620.

6. The Loan Company was one of the companies from which from time to time this Appellant obtained loans for applicants. He never had an appointment from the Loan Company as agent for loans, or received any salary, or any compensation other than percentage on accepted applications ordinarily given by the Loan Company to brokers. He had at no time any authority to pledge the Loan Company for loans, and did not set himself up to occupy the position of agent to the Loan Company in respect of loans or generally. He was not recognised by the Loan Company as its agent and was in no fiduciary relationship to the Loan Company, nor was it alleged by the said Respondents in their Statement of Claim (hereinafter referred to) that this Appellant was an agent of or in any fiduciary relationship to the Loan Company. 20 30

. 32.

7. On the 7th day of February 1923, one Green and this Appellant obtained a first mortgage loan of \$150,000 from the Huron and Erie Mortgage Corporation, and as security therefor executed a mortgage upon land jointly owned by them.

. 32.

8. On the 13th day of February 1923 the said Green and this Appellant obtained \$35,000 from The Loan Company and executed a mortgage upon the said land as security therefor. On the 23rd day of May 1923 this Appellant and the said Green obtained from the Loan Company a further sum of \$20,000 and executed a mortgage upon the said land as security 40

therefor. On the 8th day of June 1923 the said Green conveyed his entire interest in the said land and premises to this Appellant. The Buckingham Apartments were erected and completed upon the said land.

9. The said mortgages to The Loan Company fell into arrears of principal and interest, and, in accordance with The Loan Company's usual practise in such cases, in February 1925 sale proceedings by auction under the said mortgage for \$20,000 were taken by The Loan Company, but no bid was made. In June 1925 The Loan Company accepted an offer by one Robert S. Durno, who was entirely independent from and in no way connected with this Appellant, to purchase the mortgaged property for \$227,500 and in due course it was conveyed to the said Durno, subject to the said mortgage to the Huron and Erie Mortgage Corporation and certain unpaid taxes. The said Durno's liability was substituted for that of this Appellant's in respect of the Buckingham Apartment Property and the said Durno assumed liability for the balance due on the said mortgage of \$150,000. The said Durno gave a mortgage to The Loan Company for \$77,000 being the balance due on adjustment, including the amounts due under the said two mortgages to The Loan Company.
10. The sale to the said Durno was made under the provisions of the said mortgage for \$20,000, which was thereby discharged, and a discharge under seal dated the 3rd July 1925 of the said mortgage for \$35,000 was duly executed by The Loan Company and duly registered by their Solicitor in that behalf one M. W. Wilson, to clear the title upon the Registry of Deeds, and thereafter the said mortgages were at all material times until the commencement of this action, treated and represented by The Loan Company as being lawfully discharged.
11. By request of the Loan Company a conveyance of the said lands to the Trusts Corporation, in trust, for the Loan Company and a Quit Claim Deed or Deed of Release of all the said Durno's interest therein to the said Trusts Corporation in trust, dated respectively the 26th June 1925 and the 8th July 1925, were executed and delivered by the said Durno at the time of the sale to him.
12. All the transactions mentioned in paragraphs 9-11 hereof (inclusive) were carried out on behalf of the Loan Company or procured by its Board of Directors with full knowledge of all material facts and with their unanimous approval and consent, and for reasons which appeared to the said Directors to be to the Loan Company's advantage, and without any influence or inducement by this Appellant. There was no evidence that the said Durno was the agent or nominee and he was not the agent or nominee of this Appellant or of any other person in the transaction hereinbefore referred to or in any transaction. At the time of the said transaction, the said Directors and this Appellant, on the materials then before them, reasonably believed (as was

pp. 314, 364,
365, 366.
Ex. 216,
p. 602.
Ex. 292,
pp. 599, 160,
237, 330.

p. 54.
Ex. 69,
p. 534.
Ex. 13, H. & I.,
pp. 637, 645.

p. 357.
Ex. 197,
p. 745.
Ex. 254A,
p. 674.
Ex. 255,
p. 684.
Ex. 256,
p. 802.

Ex. 120,
p. 647.
Ex. 82,
p. 667.
pp. 233 &
234
p. 899.
Ex. 143,

pp. 317, 337,
349, 350,
355, 408.
Ex. 119,
p. 639.
Ex. 298,
p. 650.
Ex. 254A,
p. 674.

pp. 128, 133,
257-8-9, 261,
262, 321,
404, 405,
410,
pp. 349, 350.
Ex. 215,
p. 604.
Ex. 13, H. &
I., p. 637.
Ex. 13, H. &
I., p. 645.
Ex. 217.
p. 909.
Ex. 218,
p. 912.

Ex. 219,
p. 915.
pp. 83, 84,
125, 291,
299, 305,
315, 570.

the fact) that the value of the said mortgaged lands rendered the said mortgages adequate security for the amounts advanced thereon.

pp. 401-2.

13. After the said sale to and Deeds by the said Durno, the said Buckingham Apartments were operated and the rents collected by the Trusts Corporation through their accredited agent in that behalf one Dyas to the month of February 1929, and payments of net rental were duly made by the said Trusts Corporation to the Loan Company from time to time. As a matter of convenience only, the said rents were paid into a Bank Account named H. A. Morine Buckingham Trust Account and accordingly the said payments of net rental were made by this Appellant's cheques. From 1926 10 onwards the Buckingham Apartments were treated and intended by The Loan Company and carried on its books and in its Annual Report as Real Estate owned by The Loan Company.

pp. 402, 902.
Ex. 220,

pp. 220-222,
226.
Ex. 143,
p. 899.

p. 73.
Ex. 147,
p. 812.

14. In February 1928, The Loan Company paid the principal money and interest due and three months' further interest on the said mortgage to the Huron and Erie Mortgage Corporation, as provided by R.S.O. (1927) Cap. 140, sec. 16, and caused the said Mortgage to be assigned to it, and thereafter treated the same as being and intended the same to be extinguished.

pp. 354-355.

15. By an agreement, dated the 3rd day of July 1929, The Loan Company agreed to sell and assign, and the Huron and Erie Mortgage Corporation to purchase the entire assets and undertaking of the Loan Company. The consideration was that the purchaser should assume all debts of the Loan Company, pay \$720,000 in cash, and assign 20,000 shares in the Assets Company. No schedule of assets was made, or separate value attached to each or any asset, but the sale was *en bloc*. The said \$720,000 in cash was distributed *pro rata* amongst the shareholders of The Loan Company, and the 20,000 shares in The Assets Company were transferred to Trustees for the benefit of the shareholders in the Loan Company, who surrendered their shares therein to the Trustees. 20

pp. 120-123
Ex. 208,
p. 857.

Ex. 208,
p. 862.

16. On the 29th day of August 1929 the said agreement was assented 30 to by the Lieutenant-Governor-in-Council, as provided by R.S.O. (1927) Cap. 223, sec. 60, and all the provisions of the said agreement and of the law in respect of such a sale as aforesaid were duly complied with, and thereupon The Loan Company was dissolved, by operation of section 63, s.s. 5 of the said Statute, except in so far as was necessary to give full effect to the said agreement.

Ex. 208,
p. 858.
Ex. 208A,
p. 865.

17. By part 2 of the said Agreement, the Huron and Erie Mortgage Corporation agreed to sell and assign, and the Assets Company to purchase the assets acquired by the former from The Land Company listed in the Schedule to the said agreement, and all rights of action arising out of or incidental or 40

appurtenant to the assets so acquired. The said Schedule included the Durno mortgage to the Loan Company for \$77,000, and the said mortgage to the Huron and Erie Mortgage Corporation for \$150,000 assigned to the Loan Company as aforesaid, but did not include either the mortgage for \$35,000 or the mortgage for \$20,000 or make any reference to them. The consideration for the said sale was, that the purchaser should assign 20,000 shares of its capital stock (being the whole thereof) to the Huron and Erie Mortgage Corporation, and pay \$720,000 in cash by instalments, with interest.

18. The only notice in writing of any of the aforesaid assignments
 10 delivered to or received by this Appellant before the commencement of the action (hereinafter mentioned) was the letter dated the 30th July 1929 from The Loan Company to this Appellant enclosing a copy of the said Agreement dated the 3rd July 1929. At the time when this letter was posted and received none of the said assignments were absolute but were each subject to and conditional upon the assent of the Lieutenant-Governor-in-Council and of the Loan Company's shareholders. There was no evidence in the said action that any written or other notice of any of the said assignments, at the date when or after the same became absolute, was delivered to or received by this Appellant before the commencement of the said action. p. 223. Ex. 272, p. 865.
19. The Respondents, The Loan Company and The Assets Company
 20 brought an action against this Appellant and one McCormick and one Brickenden claiming against this Appellant \$272,000 damages for fraud, conspiracy, breach of trust or negligence and the amount due and owing on the three mortgages aforesaid and certain declarations. By their Statement of Claim therein dated the 6th April 1931 the said Respondents alleged that this Appellant, prior to February 1929, entered into a conspiracy with the said McCormick and the said Brickenden to defraud the Loan Company, and set out certain overt acts alleged to have been done in pursuance of the said conspiracy. The said Respondents alleged (*inter alia*) that the sale to the
 30 said Durno and the discharge of the said mortgage for \$20,000 and the conveyance and Deed of Release by the said Durno to the Trusts Corporation were each procured by the alleged fraudulent conspiracy and that the said Durno was the agent or nominee of this Appellant. The said Respondents further alleged that the said discharge although executed under The Loan Company's seal was not binding upon the Loan Company inasmuch as the Loan Company's Officers who affixed the seal and their signatures thereto had no authority from the Loan Company so to do. This Appellant by his Defence denied that he had been guilty of any of the said wrongful acts alleged against him and denied that the Respondents had suffered the alleged or any damage as
 40 alleged or at all. pp. 3-17.
20. The Trial Judge gave Judgment in favour of the said McCormick and dismissed the action as against him, but gave Judgment against this Appellant and the said Brickenden with costs on the ground that they had pp. 476-493.

conspired and been guilty of fraud as alleged in the Statement of Claim, and the Trial Judge ordered and declared that this Appellant was bound under each of the said three mortgages and entered Judgment against this Appellant for the amount due and owing on each of the said mortgages, but found that the Respondent Companies had suffered no damage as a result of the fraudulent conspiracy and awarded no damages against either this Appellant or the said Brickenden. The Trial Judge based his Judgment on the following findings :—

- (a) That this Appellant was the agent of and in a fiduciary relationship to the Loan Company at the time of the Durno sale. 10
- (b) That the said Durno was the agent or nominee of this Appellant in the sale proceedings.
- (c) That the sale was " fictitious " and carried out pursuant to a fraudulent conspiracy on the part of this Appellant and the said Brickenden to deprive the Loan Company of their rights against this Appellant under the two said mortgages to the Loan Company.
- (d) That the discharge of the said mortgage for \$35,000 was invalid inasmuch as it (i) was procured through the conspiracy of this Appellant and the said Brickenden in fraud of the Loan Company and (ii) was not executed by an official of the Loan Company properly authorised to execute the same. 20
- (e) That although the Loan Company might be precluded as against " outsiders " from denying the validity of the said discharge by reason of the fact that its seal had been affixed thereto by one of its Directors, yet this Appellant, since he was an agent of the Company " was not entitled to take the attitude that he was not bound by defects in the indoor management." pp. 486, 7.
- (f) That the said Conveyance dated the 26th June 1925 from the said Durno to the Trusts Corporation " was taken in pursuance of the conspiracy between this Appellant and Brickenden in order to relieve the former from his covenant contained in the mortgage to the Huron and Erie Mortgage Corporation." p. 487.
- (g) That the said Deed of Release or Quit Claim Deed from the said Durno to the Trust Corporation dated the 8th July 1925 was not " authorised, accepted or recognized " by the Trust Corporation or by the Loan Company, and that if genuine, this Deed was " undoubtedly prepared by this Appellant " in an attempt to avoid his liability under this covenant in the mortgage to the Huron and Erie Mortgage Corporation. pp. 487, 8. 40

21. On the 25th November 1932 the Appellate Division of the Supreme Court of Ontario allowed the appeal of the said Brickenden with costs, holding that he had not been guilty of any conspiracy or any misconduct, but dismissed the appeal of this Appellant with costs and the appeal to which this Appellant was the Respondent, and dismissed with costs the appeal of the Respondents The Loan Company and the Assets Company from the Trial Judge's Judgment in favour of the said McCormick. pp. 507-10.

22. By an Order made by Magee J.A. dated the 20th January 1933, this Appellant's appeal and the Appeals herein of the Loan Company and 10 The Assets Company to His Majesty in Privy Council were duly admitted and consolidated.

23. This Appellant, in the premises, humbly submits that the judgment of the said Appellate Division dismissing his Appeal should be reversed, and that the judgment of the said Appellate Division dismissing the appeal to which this Appellant was the Respondent should be upheld, and the Action against him should be dismissed with costs for the following and other

REASONS.

- (1) BECAUSE the following facts were disproved by the evidence 20 alternatively there was no evidence of the following facts or no evidence from which the following facts ought to be inferred—
- (a) That this Appellant was guilty of any conspiracy or fraud against the Loan Company or any negligence.
 - (b) That the said Durno was the nominee or agent of this Appellant or of any other person in the transactions between the Loan Company and the said Durno.
 - (c) That the sale under the said mortgage for \$20,000 was procured or influenced by this Appellant or was a fictitious sale in fraud of the Loan Company.
 - 30 (d) That the discharge of the said mortgage for \$35,000 was procured or influenced by this Appellant in fraud of the Loan Company.
 - (e) That the discharge of the said mortgage for \$35,000 was executed without the authority of the Loan Company.
 - (f) That this Appellant was the agent of or in any fiduciary relationship to the Loan Company.
 - 40 (g) That the Conveyance or Deed of Release from the said Durno to the Trusts Corporation were executed in furtherance of any conspiracy or fraud.

- (2) BECAUSE a man cannot conspire with himself and the Court of Appeal was right in finding that no conspiracy or impropriety had been proved against the said Brickenden or the said McCormick, and no allegation save one of conspiracy with one or other or both of these persons was made against this Appellant, and no wrongful act was proved against this Appellant.
- (3) BECAUSE the two mortgages for \$35,000 and \$20,000 respectively are and had been before the commencement of this action validly discharged. 10
- (4) BECAUSE the Loan Company ratified the respective discharges of the said mortgages or is precluded by its seal and/or by its conduct from denying the validity of the said discharges or either of them.
- (5) BECAUSE the Assets Company is a holding Company for the former shareholders of the Loan Company, and ought not to recover, as though an independent purchaser without notice, in respect of claims for which the Loan Company could not itself have recovered.
- (6) BECAUSE the Deed of Release or Quit Claim Deed from the said Durno to the Trusts Corporation in Trust was authorised, accepted, recognised and indeed insisted upon and procured by the Loan Company at the time of the sale to the said Durno. 20
- (7) BECAUSE the Trusts Corporation became liable by implication of law to pay the said mortgage for £150,000, when all the interests therein except those of the mortgagee were united in the Trusts Corporation, and because the Loan Company, which was in equity the owner of the property held in trust for it by the Trusts Corporation and liable for the obligations of the Trusts Corporation in respect thereof (including the obligations on the said mortgage) paid to the mortgagee in 1928 the amount of principal money and interest due on the said mortgage and three months further interest, and the same was thereupon assigned to the Loan Company, and thereby merged or became extinguished and in 1929 did not exist and could not be sold or assigned to the Huron and Erie Mortgage Corporation or to the Assets Company. Further and alternatively because the Loan Company agreed to accept the liability of the said Durno in lieu of this Appellants' liability under the said mortgage. 30 40
- (8) BECAUSE before this action was commenced, the Loan Company assigned all rights of action capable of assignment to

the Huron and Erie Mortgage Corporation and accordingly, if the right of action (if any) sued on herein passed under the said assignment, the Loan Company ought not to recover Judgment in respect thereof.

- 10 (9) BECAUSE whether or not the Loan Company did divest itself of its right of action (if any) against this Appellant, the Loan Company was dissolved before this action was commenced and had no power to bring and did not exist for the purpose of bringing this action.
- (10) BECAUSE the Loan Company consolidated the amounts due to it under the said two mortgages for \$35,000 and \$20,000 respectively and accepted a mortgage for \$77,000 by the said Durno in lieu thereof, which mortgage together with all the other mortgages and assets then owned by the Loan Company, were in 1929 sold and assigned by the Loan Company to the Huron and Erie Mortgage Corporation for their full face value and were acquired and are now held by the Assets Company, and accordingly the Loan Company suffered no loss and after 1929 had no right of action in connection therewith.
- 20 (11) BECAUSE the Assets Company never had any right of action against this Appellant, since the right sued upon, being an alleged right of the Loan Company against this Appellant "ex delicto" could not lawfully be and was never assigned by the Loan Company to the Huron and Erie Mortgage Corporation and accordingly the said Corporation never had the said right of action (if any) to assign to the Assets Company. Alternatively if such right of action (if any) was assignable by the Loan Company to the Huron and Erie Mortgage Corporation by virtue of the Statutory powers conferred by R.S.O. (1927) Cap. 223, sec. 55, (which is 30 denied) such right of action was not assignable and was not assigned by the said Corporation to the Assets Company.
- (12) BECAUSE no sufficient notice of the aforesaid assignments (if any) was received by or delivered to this Appellant before the commencement of the action.
- (13) BECAUSE the Trial Judge seriously misdirected himself as to the Law and the evidence and further improperly admitted certain testimony and documents as evidence and improperly rejected certain evidence.
- 40 (14) BECAUSE neither the Loan Company nor the Assets Company have suffered any damage as alleged or at all.

ALFRED B. MORINE.

CYRIL SALMON.

In the Privy Council.

ON APPEAL

*From the Supreme Court of Ontario
(Appellate Division)*

BETWEEN

H. A. MORINE (Defendant)

Appellant

AND

LONDON LOAN ASSETS LIMITED and THE
LONDON LOAN AND SAVINGS COMPANY
OF CANADA (Plaintiffs) - - Respondents

AND BETWEEN

LONDON LOAN ASSETS LIMITED and THE
LONDON LOAN AND SAVINGS COMPANY
OF CANADA (Plaintiffs) - - Appellants

AND

G. A. P. BRICKENDEN and GEORGE G.
McCORMICK and H. A. MORINE (Defendants).

Respondents

**Case for the Appellant
Morine and
the Respondent Morine.**

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