

20, 1934

No. 94 of 1933.

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 Respondents Brickenden
and McCormick.**

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1. This is an Appeal by the Appellants The London Loan Assets Limited (hereinafter called The Assets Company) and The London Loan and Savings Company of Canada (hereinafter called The Loan Company) 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., Fisher J.A., Orde J.A., having died before Judgment and Magee J.A.

RECORD
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CASE FOR BRICKENDEN
AND McCORMICK.

RECORD. giving no Judgment) dismissed an Appeal from so much of a Judgment of the Trial Judge (Wright J.) dated the 8th January 1932 as was in favour of the Respondent George G. McCormick and allowed an Appeal from so much of the said Judgment as was adverse to the Respondent G. A. P. Brickenden.

2. The Assets Company was incorporated for the purpose of realising certain assets formerly belonging to the Loan Company purchased by the Assets Company from The Huron and Erie Mortgage Corporation.

p. 866.
Ex. 272.

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.

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

pp. 152-3,
227, 236,
114.

5. The Respondent Brickenden and the Respondent McCormick were at all material times before the month of February 1929 Solicitor and President respectively of the Loan Company. During the said period the Respondent Brickenden held a substantial number of shares in the Loan Company and the Respondent McCormick and his family held more than 50 per cent. of the share capital of the Loan Company.

pp. 342, 351,
153.

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6. On the 7th day of February 1923 one Green and the Respondent Morine 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.

p. 32.

7. On the 13th day of February 1923 the said Green and the Respondent Morine 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 the Respondent Morine 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 therefor. On the 8th day of June 1923 the said Green conveyed his entire interest in the said land and premises to the said Morine. The Buckingham Apartments were erected and completed upon the said land.

p. 32.

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8. The Respondent Brickenden took no part in the negotiations for either the two Mortgages or the making of either of the loans mentioned in paragraph 7 hereof. It was no part of the said Respondent's duty to advise and he was not asked or expected by The Loan Company to advise and did not advise upon whether or not The Loan Company ought to make loans on the security of the said Mortgages. The said Respondents did only the legal work on behalf of the Loan Company in connection with the said Mortgages.

pp. 344, 351,
355.

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9. Each of the loans mentioned in the last preceding paragraph was unanimously passed, sanctioned and approved by The Loan Company's Board of Directors and neither of these Respondents did anything to influence the Judgment of any member of the said Board. It was the invariable practise of the Respondent McCormick to endorse an application for a loan only after it had been unanimously approved and accepted by the Directors present at the Meeting at which the same was considered. The Respondent McCormick endorsed the application for the said loan in accordance with his said practice. At the time when the said loans were made upon information then before them these Respondents and the Loan Company's Directors reasonably believed (as was the fact) that the value of the property mortgaged made the respective mortgages adequate security for the respective loans.
10. The said mortgages to the Loan Company fell into arrears of principal and interest, and in February 1925 sale proceedings by auction under the third Mortgage 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 of each and in no way connected with either of these Respondents to purchase the mortgaged property for \$227,000 and in due course it was conveyed to the said Durno, subject to the mortgage to the Huron and Erie Mortgage Corporation and certain unpaid taxes. 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.
11. 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 of the said mortgage for \$35,000 dated the 3rd July 1925 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 said mortgages were at all material times until the commencement of this action treated and represented by the Loan Company as being lawfully discharged.
12. 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.
13. It was the policy of the Loan Company when Mortgagors fell into arrear with their payments to institute sale proceedings before suing upon the covenant in the Mortgage, and it was therefore not the practice of the

RECORD.
pp. 255, 256,
257.
p. 520.
Ex. 13 B.,
p. 527.
Ex. 13 C.,
p. 254.
p. 520.
Ex. 11,
pp. 83, 84,
125, 291,
299, 305,
315, 570.

pp. 314-364,
335, 366.
p. 602.
Ex. 216,
p. 599.
Ex. 292,
p. 54.
p. 634.
Ex. 69,
p. 631.
Ex. 13, I.,
Ex. 13, H.,
p. 357.
p. 745.
Ex. 197,
Ex. 254A,
p. 674.
Ex. 255,
p. 684.
Ex. 256.
p. 802.

Ex. 120,
p. 647.
Ex. 82,
p. 667.
pp. 233, 234.

Ex. 143,
p. 899.

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

pp. 160, 287,
330, 339.

RECORD. Respondent Brickenden to institute proceedings against Mortgagors under the Mortgage Covenant except when specifically instructed to do so. Accordingly when written instructions came into the Respondent Brickenden's Office from The Loan Company to collect the amounts due on the mortgages from the Respondent Morine and these instructions were passed on to one James McMillan (a Barrister and Solicitor in the said office) to deal with, since the Loan Company did not specifically give instructions to sue the Respondent Morine, the said James McMillan in accordance with the usual practice caused sale proceedings to be instituted under the said Mortgage for \$20,000 as aforesaid and did not proceed against the Respondent Morine personally. 10

p. 132, 330, 46.
Ex. 215, 604.

14. It was no part of the Respondent McCormick's duty to attend to the collection of amounts owing to the Loan Company and he took no part in the sale proceedings aforesaid or in deciding what course should be adopted in connection with the arrears on the said mortgage from the Respondent Morine. The Loan Company's Manager, whose duty it was to attend to the collection of amounts owing to the Loan Company, approved of and sanctioned the course of taking sale proceedings instead of proceeding against the Respondent Morine on his personal covenant.

p. 128.
Ex. 13, H, 637.
Ex. 13, I., 645.
pp. 257, 258, 259, 261, 262, 404, 405, 410.
Ex. 219, 915.
Ex. 217, 907.
Ex. 218, 912.
Ex. 197, 745.
Ex. 254A, 674.
Ex. 255, 683.
pp. 349, 350, 349.
pp. 83, 84, 125, 291, 299, 305, 315, 570.

15. The said sale to the said Durno and the subsequent discharge of the said Mortgages were carried out on behalf of the Loan Company by its Board of Directors with full knowledge of all material facts and with their unanimous approval and consent for reasons which appeared to the said Directors to be to the Loan Company's advantage, and without any influence or inducement by either the Respondent Brickenden or the Respondent McCormick. The Conveyance and the Deed of Release by the said Durno to the Trusts Corporation were insisted on by the said Directors in the interests of the Loan Company without any influence or inducement by either of the Respondents. There was no evidence that the said Durno was the agent or nominee and he was not the agent or nominee of either of these Respondents or of any other person in any transaction. The Respondent Brickenden took no part in the Durno transaction save that after it had been decided upon by the said Directors, it was communicated to him and he was requested to do and did the legal work on behalf of the Loan Company in connection therewith. Neither of these Respondents concealed anything from the said Board of Directors at the time of the Durno transaction or at all and both these Respondents, and the said Board of Directors on the materials before them at the said time reasonably believed (as was the fact) that the value of the said mortgaged lands rendered the said mortgages adequate security for the amounts advanced thereon. 30 40

16. 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.

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

17. On the 29th day of August 1929 the said Agreement was assented 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.

p.862.
Ex. 208.

18. 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 Loan Company listed in the said schedule in the said Agreement, and all rights of action arising out of or incidental or appurtenant to the assets so acquired. 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.

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

19. The only notice in writing of any of the aforesaid assignments delivered to or received by either of these Respondents before the commencement of the action (hereinafter mentioned) was the letter dated the 30th July 1929 from the Loan Company to these Respondents 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 either of these Respondents before the commencement of the said action or at all.

p. 223.
p. 865.
Ex. 272.

20. The Appellants the Loan Company and the Assets Company brought an action against these Respondents and the Respondent Morine claiming \$272,000 damages for fraud, conspiracy, breach of trust or negligence and for certain declarations. By their Statement of Claim dated the 6th April 1931 the said Appellants alleged that all the Respondents prior to February 1929 had conspired together to defraud the Loan Company, and set out certain overt acts alleged to have been done in pursuance of the said conspiracy. The said Appellants alleged (*inter alia*) that the said sale to the said Durno and

pp. 3-17.

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the discharge of the said Mortgage for \$35,000 and the Conveyance and the Deed of Release by the said Durno to the Trusts Corporation were each procured by the alleged fraudulent conspiracy of all the Respondents and that the said Durno was the agent or nominee of all the Respondents or some of them. The said Appellants further alleged that these Respondents negligently, fraudulently and dishonestly (a) advised and induced the Loan Company to advance monies on the security of the aforesaid Mortgages from the Respondent Morine, greatly in excess of the amounts which could prudently have been advanced upon the security of the said Mortgages and (b) refrained from collecting or attempting to collect from the Respondent Morine the amounts owing to the Loan Company upon the said Mortgages. These Respondents by their Defence each denied that they had been guilty of any fraud, conspiracy, breach of trust or negligence and denied that the said Appellants had suffered the alleged or any damage as alleged or at all. 10

pp. 20-22.

pp. 490, 491,
492.

21. The Trial Judge dismissed the action against the Respondent McCormick without costs finding specifically that none of the allegations in the Statement of Claim had been proved against him, and the Trial Judge found that the Respondent Brickenden had not been negligent and that the said Durno was not his agent or nominee but that he had conspired with the Respondent Morine in accordance with the allegations in the Statement of Claim (mentioned in paragraph 20 hereof). The Trial Judge found that the aforesaid Appellants had suffered no damage as a result of the said conspiracy, and he made no Order against the Respondent Brickenden save that he should pay the said Appellants' costs of the action. 20

p. 504.

p. 506.

22. The Appellate Division of the Supreme Court of Ontario on the 25th November 1932 (a) dismissed the said Appellants' Appeal from the Trial Judge's Judgment in favour of the Respondent McCormick and (b) allowed the Respondent Brickenden's Appeal from the Trial Judge's Judgment holding that the Respondent Brickenden had not been guilty of any conspiracy or misconduct. Riddell J.A., who delivered the unanimous Judgment of the said Court, said: "the evidence falls far short of proof of any impropriety on his (the Respondent McCormick's) part; no motive for wrongdoing can fairly be adduced; and, in any event, he is entitled to a Judgment unless and until fairly conclusive evidence is brought against him; and that, as I have said, I fail to find." "But I think that no misconduct of any kind has been established against Brickenden." 30

23. By an Order of Magee J.A. dated the 20th January 1933 the said Appellants' Appeals and the Appeal by the said Morine were duly admitted and consolidated.

24. The Respondents in the premises respectfully submit that the aforesaid Judgment of the said Appellate Division should be upheld and the action against these Respondents dismissed with costs for the following and other 40

REASONS.

- (1) BECAUSE the following facts were disproved by the evidence alternatively there was no evidence of the following facts or no evidence from which the following facts ought to be inferred ;
- (a) That either of these Respondents had been guilty of any conspiracy or fraud against the Loan Company or any negligence.
 - 10 (b) That the said Durno was the agent or nominee of either of these Respondents.
 - (c) That the Durno sale was procured or influenced by either of these Respondents or was a fictitious sale in fraud of the Loan Company.
 - (d) That the discharge of the said Mortgage for \$35,000 was procured or influenced by either of these Respondents in fraud of the Loan Company.
 - 20 (e) That the Conveyance or Deed of Release from the said Durno to the Trusts Corporation were executed in pursuance of or procured by the conspiracy or fraud of either of these Respondents.
 - (f) That at the date that the respective advances were made by the Loan Company upon the two Mortgages aforesaid or at the date of the Durno transaction the said Mortgages were not or were not reasonably believed by these Respondents to be adequate security for the amounts so advanced.
 - (g) That the said Appellants or either of them suffered damage as a result of any wrongful act or negligence on the part of either of these Respondents.
- 30 (2) 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.
- 40 (3) 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 an action (if any) sued on herein passed under the said assignment, the Loan Company ought not to recover Judgment in respect thereof.

- (4) BECAUSE whether or not the Loan Company did divest itself of its rights of action (if any) against these Respondents, 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.
- (5) 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 had no right of action for damages in connection therewith. 10
- (6) BECAUSE the Assets Company never had any right of action against these Respondents, since the right sued upon, being an alleged right of the Loan Company against these Respondents "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 denied), such right of action was not assignable and was not assigned by the said Corporation to the Assets Company. 20
- (8) BECAUSE no sufficient notice of the aforesaid assignments (if any) was received by or delivered to these Respondents or either of them before the commencement of the action. 30
- (9) BECAUSE neither of the said Appellants have suffered the alleged or any damage as alleged or at all.
- (10) BECAUSE the Trial Judge improperly admitted certain testimony and documents as evidence and improperly rejected evidence.
- (11) BECAUSE the said Reasons given in the Judgment of the said Appellate Division were right.

ALFRED B. MORINE.

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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 Respondents
Brickenden and
McCormick.**

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