IRVIN H. HITCHCOCK AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

HIRAM SYKES AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

1913
*Nov. 28;
Dec. 1.
1914
*March 23.

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

Vendor and purchaser—Agreement for sale—Agent to procure purchaser—Agent joining in purchase—Non-disclosure to co-purchaser—Payment of commission—Rescission of contract.

H. was owner of mining land and offered S. a commission of ten per cent. for finding a purchaser thereof. H. afterwards wrote to S. stating that the mine was very rich and urging him to induce some of his friends to join in a syndicate or company to purchase and work it. S., without disclosing his agency, induced W. to take up the matter and they agreed to join in the purchase and divide the profits. A contract was entered into with H. and W. paid $20,000 on account of the purchase price on which S. was paid his commission. Default having been made in the further payments H. brought action claiming possession of the property and the right to retain the amount paid. W. counterclaimed for rescission of the contract and return of the money paid with interest and on the trial swore that he knew nothing of S.'s agency for several months after the contract was signed.

Held, affirming the judgment of the Appellate Division (29 Ont. L.R. 6), Fitzpatrick C.J. dissenting, that it was the duty of H., on becoming aware that S. was a co-purchaser with W. to satisfy himself that the latter was aware of the agency of S.; and that W. was entitled to the relief asked by his counterclaim.

Held, per Davies and Anglin JJ. (Duff J. contra), that S. by concealing from W. the fact that he was to receive a commission from the vendor was guilty of a fraud for which H. was responsible as agent.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judg-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

(1) 29 Ont. L.R. 6.

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ment of a Divisional Court which affirmed the verdict at the trial in favour of the plaintiffs.

The material facts are stated in the above headnote.

Cline, for the appellants, referred to *Coy* v. *Pommerenke*(1); Lewin on Charges (11 ed.), 1159-60, *Murray* v. *Craig*(2).

Kilmer, for the respondents, cited *Beck* v. *Kantorowicz*(3); *McGuire* v. *Graham*(4); *Grant* v. *Gold Exploration and Development Syndicate*(5).

THE CHIEF JUSTICE (dissenting).—I would allow this appeal with costs.

DAVIES J.—I concur in the opinion stated by Mr. Justice Anglin.

DUFF J.—I have come to the conclusion that this appeal ought to be dismissed with costs. The only point requiring discussion, in my judgment, is whether because of the dealings between the Hitchcocks and Sykes the respondent Webster became entitled on discovering those dealings to rescind the agreement for sale. The facts and the law have been very fully discussed in the various judgments delivered in the courts below. I do not think that among the cases cited there is one decision which exactly fits this case. But when the facts are fully seized, it appears to be well within the principle of the decisions upon the authority of which the Court of Appeal rested its judgment in *Grant* v. *Gold Exploration, etc., Syndi-*

(1) 44 Can. S.C.R. 543.
(2) 10 Ont. W.R. 888.
(3) 3 K. & J. 230.
(4) 16 Ont. L.R. 431.
(5) [1900] 1 Q.B. 233.

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cate(1). The essential feature of the case, in my view of it is one which has perhaps not been emphasized as much as its importance would justify. It lies, I think, in the letter of March 29th, 1910, written by W. R. Hitchcock to Sykes. That letter is as follows:—

Cornwall, Ont., March 29, 1910.

Hiram Sykes, Montreal.

Dear Sir,—Enclosed herewith please find map as surveyed and drawn up by Robert B. McKay, M.E., of Cobalt, Ontario. It will give you an idea of the surface work done on the Hitchcock Bros.' silver property, and I may add that since Mr. McKay visited the property in the early part of January last, a large amount of work has been done, principally in stripping veins and trenching on them to a depth from two to eight feet, until native silver, smalltite or nickelite would appear.

LOCATION: The E. ½ of N. ½ Lot 10, Concession 1, Township of Tudhope, consisting of 80 acres, being only about one-half mile from the wharf at the foot of Elk Lake, where all steamboats between Latchford and Elk City may call. The land from the mine to the wharf is level, so that a good wagon road will be inexpensive.

TITLE: The claims were staked by E. H. Hitchcock, and recorded in November, 1909, under his own license. Sufficient work has been done and recorded so that a Crown patent may now be obtained. No option has ever been given on the property, so that the title is clear with E. H. Hitchcock of Elk Lake.

While there is but a few acres of rock shewing above the level ground, I believe the bed rock is not far below the surface of the ground. There appears to be about a dozen well-defined fissure veins running parallel with each other through the exposed rock. We have stripped and blasted out rock on only seven of them and find good shewings of native silver in four of them, as well as smalltite, nickelite and a large quantity of Cobalt bloom in all veins opened. The rock formation is partly Gabro and partly fine diabase. In many places the wall rock between the veins is well mineralized with native leaf silver, Argentile and silver sulphides shew freely in many places.

In all my experience in the Cobalt country I have not seen so many large, rich-looking veins in so small a compass. Every vein worked on has the appearance of widening as depth is obtained. First-class timber in abundance is grown on the property.

Practical mining men from all the surrounding country have been to see the property and praise it most highly. I believe it will prove to be richer than anything in the Elk Lake or Gowganda Districts.

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We want a syndicate or company to operate it and are agreeable to dispose of 9/10 interests. We must get a substantial payment down of say $20,000 or $25,000, the balance from time to time to suit. As soon as payment is made we will allow the company to start operations as they may see fit. However, a fair percentage of receipts of ore shipped must be placed in bank to secure our final payments.

We have spent a lot of money, and are still spending it and we know we have a genuine silver mine, where silver in large quantities can be bagged without even using a steam plant to mine it.

If you con prevail on any of your friends to join you in a syndicate or company so that mining can be done on a thorough basis early this spring, I feel that the result will be all that you can hope for. You can safely advise your most intimate friend or client to invest their money in this proposition.

Yours truly,

HITCHCOCK BROS.,

per W. R. Hitchcock.

Pursuant to the suggestions contained in this letter, Sykes approached Webster. The result of his negotiations with Webster was an agreement of partnership dated April 7th, 1910, in which they agreed to buy the property in question and to divide the profits equally between them. The other material facts, in my view of them, are that on April 12th the agreement for sale was entered into and the initial payment made, the agreement contemplating the working of the property by the purchasers; that the commission which it was understood Sykes was to receive for procuring a purchaser on the terms mentioned in the letter of March 29th, 1910, was paid to Sykes by the Hitchcocks without the knowledge of Webster, but without any attempt on the part of the Hitchcocks to conceal from Webster the facts touching the commission to be paid to Sykes and without any knowledge or suspicion that Webster was not aware of the facts; that the Hitchcocks were aware that Sykes was a man of no means, but had had some experience as a mining

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operator and a promoter of mining companies; that the Hitchcocks were not aware of the agreement of April 10th, but they understood that the purchasers were buying and intended to work the property either temporarily or permanently as a joint venture.

On general principles I must say, with great respect, that it appears to me very clear, indeed, when one keeps in view the terms of the letter of March 29th (the existence of which is, in my view of it, the decisive fact of the case) that a duty rested on the Hitchcocks to inform Webster of the fact that they were paying Sykes a commission.

The relationship into which Webster and Sykes had entered with the knowledge of the Hitchcocks, was one of the class which imposes upon the parties to it reciprocal obligations of good faith and loyalty as regards the common interest in the common venture: *Carter* v. *Horne*(1). Among others these obligations include the duty of fully disclosing to his co-adventurers any interest one of the parties may have which is in fact adverse to the common interest or which may be of such a character as to give rise to an obvious risk of exposing him to a temptation to fall short of the loyalty he owes to that interest. It was visibly Sykes' duty to inform Webster of the arrangement he had made with the Hitchcocks respecting commission, and for the purpose of determining the rights of the parties in this case it must be taken that the Hitchcocks were aware of the existence of that duty. So far we are really on common ground. It is not disputed either that if after becoming aware that Sykes and Webster had formed a partnership for

(1) 1 Equity Abridgment 7.

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the purpose of dealing in mines generally or for the purpose of buying the property in question, the Hitchcocks had approached Sykes and offered to pay him personally a commission upon the purchase of the property by him and his partner, a duty would have rested on the Hitchcocks to disclose this arrangement to Webster. Such a transaction stands, of course, on the same footing as an arrangement by one party to some proposed business to pay the agent of the other party a commission on the completion of the business. The law casts upon the person who deals with the agent in this suspicious and questionable way the burden of seeing that the duty of disclosure is performed at the risk, if it be not performed, of becoming implicated in the agent's culpability.

The principle is not a technical one; and it appears to me to apply to the circumstances of this case for these reasons. As the letter of the 29th of March demonstrates, the Hitchcocks contemplated, when they agreed to pay Sykes a commission for procuring a purchaser that for the purpose of bringing about a sale and thereby earning this commission, he should enter into relations of confidence with other persons with whom he was to become associated as purchaser, of such a character as would impose upon him the duty of disclosing to them his existing relations with the Hitchcocks. It cannot, I think, be successfully contended that there is in principle any substantial relevant distinction between a case of that kind and those cases in which the confidential relationship exists before the arrangement for commission is made. The principle has its justification in the necessity of protecting these confidential relationships and from that point of view there is, in my judgment, no essential distinction between the two classes of cases.

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On this ground, therefore, (and I wish to make it plain that for my part I am deciding this case upon the letter of March 29th) I think a duty of disclosure rested upon the Hitchcocks.

As to the authorities — I have only a word to say upon one of them — *Grant* v. *Gold Exploration, etc., Syndicate* (1).

It is not to be disputed that Lord Justice A. L. Smith puts his judgment on grounds that are not applicable to this case. Neither is it to be disputed that if the findings of fact discoverable in the judgment of Lord Justice Collins are to be considered the basis of his judgment, then that judgment is not conclusive of the present case; moreover, there is this further distinction — it is an important distinction — between the circumstances in that case and this: Govan was not only intended to promote a company, that is to say, to bring a company into existence for the purpose of purchasing the property that Grant had to sell, but he was in fact the managing director of the company and, as such, himself decided upon and actually concluded the purchase out of which the litigation arose. Here it is admitted that Sykes did not act in a representative capacity in deciding upon or concluding the bargain with the Hitchcocks; on the contrary Webster applied his own judgment to the facts and decided for himself.

It may well be doubted, therefore, whether the decision in *Grant* v. *Gold Exploration, etc., Syndicate* (1) can fairly be held to rule the decision in this case. I am inclined to think it does not. On the other hand, while, as I have said, the opinion above indicated seems to be justified by the principle of the decisions

(1) [1900] 1 Q.B. 233.

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on which their Lordships proceeded in *Grant's Case* (1), there are observations in the judgment of Lord Justice Collins which are almost literally applicable to the facts of this case.

On this ground then I should dismiss the appeal, but I do not think I ought to take leave of the case without referring to another contention advanced by Mr. Kilmer. The contention was this: Sykes's conduct in representing himself as a person standing in the same interest with Webster, coupled with the concealment of his existing relations with the Hitchcocks was a fraud, in the carrying out of which he was acting as the agent of the Hitchcocks and in respect of which the Hitchcocks are chargeable as the principals of Sykes. The contention was not raised on the pleadings or in the courts below, or in the respondent's factum, and I am pretty certain, was advanced by Mr. Kilmer out of deference to observations made from the Bench during the argument of Mr. Cline. After considering it, I do not think there is anything in the point, and, if there were, I do not think it would be open at this stage of the proceedings. I refer to it because I think I am in a sense responsible for the discussion of it and with the object of making it clear that I am not proceeding upon any such ground in dismissing the appeal.

It is not, of course, argued that Sykes was the agent of the Hitchcocks for the selling of the property; he had no authority from them as their representative, that is to say, to bind them by any obligation as to the sale of the property. The arrangement between him and the Hitchcocks was that if he pro-

(1) [1900] 1 Q.B. 233.

cured a purchaser, at a price named, prepared to buy the property on terms acceptable to the Hitchcocks (indicated in a general way in the letter of 29th March,) he was to be paid a commission. Generally speaking, an owner of property who agrees to pay a commission to one or more persons for procuring a purchaser does not by such an agreement confer any authority upon such persons to enter into any obligation on his behalf. And, in this case, although it was contemplated that Sykes should enter into partnership arrangements with others, it would be vain to argue from any facts in evidence in this case — indeed, it is obviously not so — that it was contemplated between Hitchcock and Sykes that Sykes in entering into such arrangements was to have authority to act as the Hitchcock's agent and bind them by the obligations which he should profess to undertake with his co-purchasers. While it was contemplated that Sykes should undertake such obligations, it was never intended that he should assume them on behalf of and as the *alter ego* of the Hitchcocks; as there was no authority in fact, so also was there no ostensible authority because, of course, Sykes in all these arrangements professed to act only for himself.

Then as to the authority of Sykes to make representations on behalf of the vendors and as their agent, Sykes had been promised a commission for the introduction of a purchaser, but he was under no duty to try to procure a purchaser; he was not bound to take a single step to that end. It may be, although I should think it a disputable question, that a person having such an arrangement with the vendor would solely in virtue of that arrangement be possessed of implied

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authority to make representations as the agent of the vendor in relation to the description or value of the property. In any case such representations made professedly under the authority of the vendor might, of course, be ratified by him and (if brought to his attention while the contract was still *in fieri*) ratification would be manifested by the vendor's proceeding with the contract. But the misrepresentation complained of was not and in the nature of things could not be made professedly as the representation of the vendor and it was consequently incapable in law of ratification by him. If made without antecedent authority his responsibility for it must rest on some other principle than that of ratification. It seems equally clear that under such an arrangement as that in question whatever authority might be implied by law as to representations touching the description and value of the property, no authority could be implied or apart from special circumstances inferred by which the commission-earner would be entitled to represent himself as disinterested. Whether the circumstances of this case would justify the conclusion that Sykes had a general authority which would extend to that class of acts, must be, I think, a question of fact. If I had to pass upon that question, in this case, I should say there was no such authority. But the question does not arise because if the respondent intended to rest his case upon that ground, he should have done so at a stage of the litigation at which the appellants would have had an opportunity of meeting his allegations under this head. But the difficulties of the contention do not end here. Assuming authority established the respondent must shew that the fraud was *dans locum contractui* that he was influenced by it in whole or in

part to enter into the contract. That again is an allegation which the appellants have had no opportunity to meet. The respondent, it is true, has said, that he would not have purchased, had he known Sykes' relations with Hitchcock. But the evidence was not directed to the issue now sought to be raised and the appellants have never been called upon to answer it, and we can feel no assurance that we have before us all the evidence bearing upon the issue.

It would, therefore, be contrary to the settled practice of this court to permit the respondent to raise the point at this stage.

Therefore, there is nothing in this case to which *respondeat superior* as expounded in the judgment of Lord Macnaghten in *Lloyd* v. *Grace, Smith & Co.*(1) and the cases therein referred to, can be applied.

ANGLIN J.—The plaintiffs, vendors of mining property on which $20,000 had been paid on account of the purchase price, $167,000, for default in payment of further instalments of the purchase money claim in this action possession of the lands freed from liens, etc., and assert the right to retain the $20,000 paid as forfeited under a provision of the agreement. The defendants, Sykes and Webster, are the purchasers. Sykes was the vendors' agent for the sale of the property on a 10% commission basis, and he induced Webster to become his co-purchaser without disclosing to him his agency and commission agreement with the vendors. He received $2,000 as commission on the $20,000, which was in fact paid by Webster, who remained unaware of the agency and of the payment of

(1) [1912] A.C. 716.

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this commission until after this action was brought. Webster counterclaims for rescission of the agreement and the repayment of the $20,000 on the ground that the sale was fraudulent as against him, and for damages.

After reviewing the evidence, Hodgins J.A. summarized it as follows:—

> The fair result of the whole evidence — of which I have extracted only a few of the more important parts — I think is as follows: That the respondents arranged to pay a ten per cent. commission to Sykes to find a purchaser for, or induce his friends to join in purchasing, the mining property; that the respondents agreed that if Sykes purchased himself or induced another to purchase alone or jointly with him, the commission would be paid to Sykes, and in that sense the commission was consciously added to the purchase price; that the respondents knew, before the agreement was signed, that a relationship of partner or joint purchaser existed between Webster and Sykes, and that they were exacting a price from Webster and Sykes that they would not have exacted from Sykes alone; that they did not disclose the fact that they were paying Sykes a commission; and that the appellant did not know of it until September, and until after action brought; and that if he had known it he would have declined to purchase.

The plaintiffs obtained judgment by default against Sykes, who had absconded.

The trial judge upheld the plaintiff's claim and dismissed the counterclaim on the ground that there was no fraud or intentional concealment on the part of the plaintiffs. This judgment was upheld in the Divisional Court, because no "duty was cast on the respondents to disclose * * * to the appellant" that his co-purchaser Sykes was receiving a commission from them on the sale. To hold otherwise, said the learned Chief Justice, would be

> to set up an artificial standard of morals.

From this judgment Middleton J. dissented, holding that "the plaintiffs had been guilty of fraud both in

morals and in law." In the Appellate Division these judgments were reversed, the court holding that Sykes was in fact the agent of his co-purchaser, Webster; that this relationship was known to the plaintiffs; and that such knowledge imposed on them the duty of assuring themselves that Webster was aware of the arrangement under which Sykes was to receive a commission on the sale. Meredith J.A. dissented on grounds similar to those which prevailed in the Divisional Court. He concludes his opinion with this sentence:—

> While willing to be as vicious against vice in any form, as any one can be, I decline to chop off the heads of innocent and useful setting hens on the chance of their really being poisonous serpents.

There is no doubt upon the evidence that Webster was induced to become a purchaser by the persuasion and commendations of Sykes, in whom he placed implicit confidence because he believed their interests to be identical. He has sworn that he would not have purchased had he known that Sykes was in fact the vendors' paid agent.

Sykes was admittedly the plaintiffs' agent for sale. Indeed, it was they who suggested to him that he should prevail on some of his friends to join him in purchasing the property. In the course of his employment by the plaintiffs and to further its purpose he represented to Webster by his conduct, if not in actual words, that his sole interest was that of a co-purchaser with him. He deliberately and fraudulently concealed the fact that he had another and an adverse interest — that he was to receive a commission from the vendors of which the amount would increase in proportion to the purchase price. When the civil responsibility of the principal for fraud and misrepre-

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sentation of his agent in the course of his employment is taken into account, the present case is, in my opinion, indistinguishable in principle from one where vendors, knowing that it is necessary for a prospective purchaser to rely on the skill and advice of an expert in regard to the property which he contemplates buying and that he intends to do so, recommend to him and induce him to employ for that purpose as an independent man, in whose opinion and advice he can place implicit confidence, a person in their own pay whose remuneration is dependent upon a sale being effected and its quantum on the price obtained, and deliberately refrain from disclosing to him that person's relationship with themselves. Sykes's misrepresentation to Webster as to his true position in regard to the transaction with the plaintiffs and his fraudulent concealment of his commission interest occurred in the course of his principals' business and were, at least in part, for his principal's benefit. That a purchaser who bought under such circumstances in reliance on the advice of the person thus recommended by the vendors and in ignorance of his relations with them, would be entitled, on discovering the facts, to repudiate the transaction is unquestionable. It is not material that Sykes's fraud, since it was committed while he was purporting to act within the scope of his employment, and in the course of the service for which he was engaged, may have been committed in his own interest rather than in that of the plaintiffs. *Lloyd* v. *Grace Smith & Co.*(1). For the fraudulent misrepresentations of their agent the plaintiffs were responsible and on that ground

(1) [1912] A.C. 716.

alone the impeached contract cannot stand. *Milburn* v. *Wilson*(1); 1 Halsbury's L. of E., 211.

I also agree with the view taken in the Appellate Division that, on becoming aware of the relationship between Webster and Sykes, as they admittedly did before the contract for the sale was made, knowing that they were paying a commission to Sykes, that he then stood in a fiduciary relation to his co-purchaser, and that his interest was in conflict with his duty in regard to the disclosure to Webster of his claim to a commission, it was the duty of the vendors to have satisfied themselves that Webster was aware of Sykes's relations with them. It does not matter that when the agreement to pay commission was entered into Sykes and Webster had not yet come together. Before the contract of sale was made the plaintiffs knew that Webster was relying on Sykes in the purchase which he was making. They knew he had sent Sykes to examine and report on the property. They knew, or should have known, that it was, or might be, Sykes's interest to conceal his agency for them from Webster and they should have anticipated that he might have done so; and it was at their peril that they consummated the transaction and paid Sykes his commission without having ascertained that Webster was apprised of the true situation. The principle underlying the decision in *Grant* v. *Gold Exploration and Development Syndicate*(2) covers this case. When the agreement to pay a commission was made in that case the vendor did not know that the agent, Govan, to whom it was promised, stood in a fiduciary relation to the purchasers. But, as Collins L.J. says at p. 247:—

(1) 31 Can. S.C.R. 481.

(2) [1900] 1 Q.B. 233.

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It is, however, quite sufficient to raise the legal question in this case that he (the vendor) became aware before he agreed to sell to the defendants that Govan had been acting for them in bringing about the sale. The facts are, then, that the vendor and the buyers' agent, known to the vendor to be such, agree upon a price to be paid by the purchaser one-tenth of which is to go into the pocket of the buyers' agent.

See also the judgment of Vaughan Williams L.J., at pp. 253-4.

Indeed, while I do not rest my judgment on such a finding, from the facts established it would seem to be a legitimate inference that, when closing the transaction with Webster in the solicitor's office at Cornwall, the Hitchcocks were aware that he was ignorant of the commission to be paid to Sykes and were parties to the concealment of it from him. They knew that the arrangement between Webster and Sykes was that they should become purchasers with equal interests; they knew that Webster was buying in reliance on Sykes's report on the property and for a price which Sykes had fixed with E. H. Hitchcock when he made the inspection; they knew that the $20,000 was being paid by Webster's cheques. Instead of one cheque for $20,000 Webster had brought to Cornwall three marked cheques — one for $15,000, one for $3,000 and one for $2,000 — with a very faint hope, which proved illusory, that at the last moment, he might possibly secure some reduction in the price of the property. When the agreement of purchase was signed in the solicitor's office the Hitchcocks took the three cheques. Nothing was said about the fact that $2,000, the exact amount of one of them, was to go to Sykes for commission. When the party left the solicitor's office to go to the bank Webster dropped off on the way for some unexplained reason. At the bank, instead of

handing over Webster's $2,000 cheque to Sykes, two new cheques, each for $1,000, were drawn and given to Sykes, one being signed by E. H. Hitchcock and the other by W. R. Hitchcock. No receipts were taken from Sykes and the cheques did not state for what they were given. The explanation of this offered by W. R. Hitchcock is that Sykes was in a great hurry to catch a train. Why, if that were the case, Webster's $2,000 cheque was not endorsed and handed over to Sykes either in the solicitor's office or in the bank is not explained. If it was not designed to keep Webster in ignorance as to the commission paid to Sykes, it is difficult to understand why this course was not adopted. There was in fact no such hurry as Hitchcock suggests. Of course, if the $2,000 had been paid to Sykes in the solicitor's office Webster would have known it; if Webster's cheque had been endorsed over to Sykes and put through his bank account Webster might have learned inconveniently soon of the payment of the commission. It seems to me incredible that the Hitchcocks could have believed that Sykes had told Webster of the commission arrangement. There is no suggestion of any reason why, if Webster was aware of it, he should have allowed Sykes to have the whole benefit of the commission, which would result in his paying for the property 10% more than the vendors' actual price — for his one-half share 20% more than Sykes was to pay for his. It is utterly unreasonable to suppose that the Hitchcocks really thought that Webster was consciously entering into a transaction of that kind. That they knew that Sykes was obtaining the commission for his own benefit admits of no doubt. If they thought Webster was ignorant of the commission arrangement (as I think

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they did) their duty to have informed him of it is indubitable.

But that duty, in my opinion, arose when they obtained knowledge that their paid agent occupied a fiduciary relation in the transaction to his co-purchaser, and failure to discharge it cannot be excused by proving that they believed that Sykes had disclosed the circumstances to Webster. *Grant* v. *Gold Exploration and Development Syndicate*(1), at page 248, *per* Collins L.J.

That Webster is entitled to the relief of rescission is clear on the authority of cases such as *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.*(2). And it is not an answer that the property was good value for the price paid. *Parker* v. *McKenna*(3). The court will not enter on that field of inquiry.

On both these grounds, therefore — because Sykes, as the vendor's agent, was guilty of fraudulent misrepresentation for which they are responsible, and because they paid a commission to Sykes when they knew him to be Webster's trusted adviser and co-purchaser, without ascertaining that Webster knew that this commission was to be paid — I am of the opinion that the defendant Webster is entitled to succeed on his counterclaim.

The mechanics' liens which were registered against the property have been removed. They present no obstacle to the defendant Webster having this relief. The plaintiffs are in possession of the property. I agree with Hodgins J.A., that there is not enough in the correspondence to warrant a finding of waiver by

(1) [1900] 1 Q.B. 233. (2) 10 Ch. App. 515.
(3) 10 Ch. App. 96.

Webster of his right to rescind after he became aware of the facts which gave him that right nor has there been any dealing by him with the property which would amount to ratification of the contract.

In the judgment of the Appellate Division the plaintiffs' rights in regard to protection of the shaft sunk on the property by the defendants, or their assignee, and in regard to the ore taken from it are carefully provided for.

I would dismiss the appeal with costs.

BRODEUR J.—It is with a great deal of hesitation that I have come to the conclusion that this appeal should be dismissed.

I was unable to see that the appellants were guilty of fraud in the ordinary sense of the word or that they intended to bribe Sykes when he stipulated a commission in their letter of the 29th of March, 1910.

If I may refer to some judgments rendered in mining cases in this country, I see that it is the habit of some who deal in mining operations to become members of syndicates, to play the part of the broker and to receive from the vendor a commission upon the sale to another member of the syndicate.

Every business (says Judge Riddell in a case of *Murray* v. *Craig* (1)), has its own methods and its own code of ethics, and while the method of proceeding spoken of looks odd at first sight there is nothing improper in it, if thoroughly understood by all concerned.

But in this case, however, no such method has been proved as being prevalent in the circles of which the parties formed part and we have to apply the law as it applies to all persons.

(1) 10 Ont. W.R. 888.

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The principle of law and equity is that an agent or a partner shall make no profit to himself out of his employment other than the amount payable to him by his employer or by the partnership.

That principle is an exceedingly just one calculated to secure the observance of good faith between principal and agent or between partners and to prevent the agent sacrificing the interest of the employer and obtaining gain and advantage for himself.

It was found in this case that Sykes though a partner of Webster and though instructed by the latter to report upon the value of the mining proposition that was offered to them by the appellants was, however, in their pay and was, therefore, interested in having the purchase carried out.

It seems to me that this case is in all respects similar to the case of *Grant* v. *Gold Exploration Development Syndicate* (1), in which it was stated by Mr. Justice Collins that

> if a vendor pays a commission to a buyer's agent in order to secure his help in bringing about the sale, and does not inform the buyer of the fact, he cannot defend the transaction impeached by the buyer, who has in fact had no notice, by proving that he believed that the agent had disclosed the circumstances to his principal.

Appeal dismissed with costs.

Solicitors for the appellants: *Maclennan & Cline.*

Solicitors for the respondents: *Kilmer, McAndrew, Irving & Davis.*

(1) [1900] 1 Q.B. 233.