

EMMA G. LIVINGSTONE (PLAINTIFF) . . . APPELLANT;
 AND
 TORONTO WINE MANUFACTURING }
 COMPANY, LIMITED (DEFENDANT) } RESPONDENT;
 AND
 DOMENICK JANNETTA AND NICO-
 LETTA JANNETTA (DEFENDANTS).

1931
 *Nov. 11.
 *Dec. 22.

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

*Mortgage—Agency—Loan on security of mortgage on land—Loan re-
 quired to pay off prior mortgage—Lender paying proceeds of loan to
 solicitor for prior mortgagee—Authorization—Misappropriation by
 solicitor—Forged discharge of prior mortgage—Responsibility for loss
 —Validity of mortgage to secure the loan, as against the mortgagor
 and subsequent purchaser of the land.*

Appellant sued upon a mortgage assigned to her by C. to whom it had
 been made with the object of finding a person to lend the money with
 which to pay off an overdue mortgage on the land to Y. for whom C.
 acted as solicitor; said method being adopted to avoid delay when
 a lender was found, the mortgagor being away on a visit. H., who in
 the mortgagor's absence had attended for him to the business of Y's
 mortgage, interviewed appellant, who agreed to lend the money, and,
 as directed by H. (whether, in this regard, H. acted as agent for the

*Present at hearing of the appeal: Anglin C.J.C. and Newcombe,
 Lamont, Smith and Cannon JJ. Newcombe J. took no part in the judg-
 ment, as he died before the delivery thereof.

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mortgagor or for appellant was in dispute), made her cheque payable to C., and (through a solicitor, O.) took from C. and registered a purported discharge of the Y. mortgage, the mortgage in question and C.'s assignment thereof to appellant. It was found later that the discharge of the Y. mortgage was a forgery, and that Y. did not receive the money from C.

Held: Upon the correspondence and facts in evidence, C. was authorized by the mortgagor to receive the money, and H., in directing appellant to make her cheque payable to C., was acting for the mortgagor; the receipt and cashing of the cheque by C. completed the loan as between the mortgagor and appellant, and the registration of the mortgage constituted it a valid security on the land as against the mortgagor and the respondent (a subsequent purchaser of the land). Even assuming that knowledge that appellant's loan was to be used to pay off the mortgage to Y. must be attributed to appellant by reason of information conveyed by H. to the solicitor, O., who (acting, as found, for both appellant and the mortgagor) attended to searching title and putting through the loan, yet such knowledge was only that C., the authorized agent of the mortgagor to receive the proceeds of the loan, was to apply them on the Y. mortgage. While O. owed a duty, both to appellant and to the mortgagor, to see that the title was clear, yet any negligence in that respect was a question between him and them and had nothing to do with the question of C.'s right to receive the money as the person authorized by the mortgagor to receive it. The situation was the same as if the mortgagor himself had received the money; and the argument that no consideration had passed from C. to the mortgagor, and that appellant, buying the mortgage, was bound by the state of the mortgage account, was, in the circumstances, untenable.

Murray v. Crossland, 64 Ont. L.R. 403, and *Butwick v. Grant*, [1924] 2 K.B. 483, distinguished.

Judgment of the Appellate Division, Ont. ([1931] O.R. 325), reversed, and judgment of Garrow J. (*ibid*) restored.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which (reversing the judgment of Garrow J. (2)) held that the mortgage in question was not a valid and subsisting mortgage.

The mortgage in question had been made by the defendant Jannetta (his wife joining to bar dower) to one Campbell, who was acting as solicitor for Mrs. Young who held a prior mortgage on the land. The mortgage to Mrs. Young was overdue and required to be paid. Jannetta, the mortgagor, was in Italy at the time, and, to facilitate the raising of a loan from a lender to be found and paying off there-with Mrs. Young's mortgage without delay, a mortgage

(1) [1931] O.R. 325.

(2) *ibid.* at 327-331.

was made to Campbell, with the object of assigning it to the person, to be found, who would advance the money. One, Hook, had been looking after the land for Jannetta in the latter's absence and had been corresponding with him in regard to the arrears on Mrs. Young's mortgage. Hook interviewed the plaintiff (appellant) who agreed to make the advance. As found by this Court on the evidence, Hook, acting for Jannetta, told the plaintiff to make her cheque payable to Campbell, which she did; (the question of agency in this regard was in dispute and was found upon differently in the Appellate Division, which held that Hook was acting as the plaintiff's agent on this occasion, and advised her to make the cheque payable to Campbell). Campbell executed an assignment of the mortgage in question to the plaintiff and also produced a discharge of Mrs. Young's mortgage, which discharge was later (in an action brought by Mrs. Young on her mortgage) found to be a forgery. Mrs. Young never received the money. The purported discharge of Mrs. Young's mortgage, the mortgage in question and the assignment thereof from Campbell were registered. The respondent (defendant) company was a subsequent purchaser of the land from Jannetta. A fuller statement of the facts in certain respects is given in the judgment now reported.

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The plaintiff brought action on the mortgage. Garrow J. (1) held that it was a valid and subsisting mortgage, subject only to the prior mortgage to Mrs. Young, and gave judgment accordingly. His judgment was reversed by the Appellate Division (2), which held that the mortgage in question was not a valid and subsisting mortgage. The plaintiff appealed to this Court. By the judgment of this Court, now reported, the plaintiff's appeal was allowed with costs here and in the Appellate Division, and the judgment of the trial judge restored.

W. N. Tilley K.C. and *J. C. McRuer K.C.* for the appellant.

J. M. Bullen for the respondent.

(1) [1931] O.R. 325, at 327-331.

(2) [1931] O.R. 325.

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The judgment of the Court was delivered by

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SMITH J.—This is an action by plaintiff, appellant, to recover \$6,125 and interest thereon due on a certain mortgage made by defendants Domenick Jannetta and his wife Nicoletta Jannetta to one John A. Campbell, assigned by him to the appellant, and for foreclosure of the mortgage.

Prior to 1924, the defendant D. Jannetta went to Italy, leaving his affairs in reference to the premises covered by the mortgage in the hands of one Thomas Hook, a real estate agent in Toronto.

The property in question was at this time subject to a mortgage for \$6,125 to one Mrs. Georgina Chilcott Young. E. W. Owens, a Toronto solicitor, had been Jannetta's legal adviser up to the time the latter left for Italy, and in October, 1924, was in correspondence with Jannetta in reference to arrears of interest due on Mrs. Young's mortgage.

On 23rd March, 1925, John A. Campbell, the solicitor mentioned above, wrote Owens that he had instructions from Mrs. Young to put the property up for sale unless the interest was paid. Owens sent a copy of this letter to Hook, and correspondence between Hook and Campbell followed. Hook cabled Jannetta that the property was to be put up at auction, and requested that \$300 be cabled to him; and in the meantime gave Campbell his own cheque for \$200, and obtained a postponement of the sale for two weeks.

On April 20th, Jannetta wrote to Hook, requesting him to try to sell the property.

The \$300 was cabled to Hook, who subsequently paid to Campbell \$309.63 and \$2.50, the balance, after crediting the \$200, owing for interest and costs, as shewn by Campbell's statement sent to Hook on May 6th, 1925, for which amount a receipt is endorsed on the back of the statement, signed by Campbell, per "E. F."

On May 7th, 1925, Hook wrote to Jannetta, giving him full information as to the above facts, and informing him that all interest was paid up to the 24th of March, 1925, and that the next payment of interest would be due on the 24th of October next. He goes on to say that Mrs. Young now wants her mortgage paid off, and that he is trying to secure someone who will lend the necessary money on the property, and that when he succeeds, the necessary

papers will be sent, so that the new mortgage will pay off the old one. He explains that the Young mortgage is past due, so that a new mortgage is necessary.

On the 19th of May, 1925, Campbell wrote a letter to Hook, enclosing a mortgage drawn from Jannetta and his wife to himself for \$6,125, with interest at 7 per cent., which was signed by Jannetta and his wife, and which is the mortgage now in question. The letter asks Hook to send the mortgage to Jannetta with instructions to have it executed and returned, and continues as follows:

Also have him give you a letter with instructions to pay over the money received from this mortgage to Mrs. Chilcott Young so that she can be paid off at once. This matter must be completed and the money in the hands of Mrs. Young by the 15th day of June, otherwise I will continue the mortgage sale proceedings and your client will lose his property.

On the same day, Hook wrote Jannetta as follows:

Dear Mr. Jannetta:

Enclosed find a letter from Mr. Campbell who is solicitor for Mrs. Young, the mortgagee, which speaks for itself, and I also enclose you a mortgage and duplicate made out in his name for \$6,125 and the proceeds of this mortgage when sold is to be applied on the present mortgage held by Mrs. Young and this is the only way that I can see to meet the demands as the present mortgage has expired and cannot be sold.

He goes on to give instructions about the execution of the mortgage, and then continues as follows:

* * * return them to me by return mail and send the necessary written authority for the proceeds of this mortgage to be credited to the present mortgage and in this way we may get the whole matter cleaned up for another five years.

On June 11th, 1925, Jannetta cabled Hook as follows: "Mortgage is coming"; and the mortgage was received by Hook in due course.

Here we have a proposal by Hook to Jannetta that he, Hook, is trying to negotiate on Jannetta's behalf for a new loan, followed by a proposal by Campbell and Hook to Jannetta that this new loan should be obtained by the execution of the mortgage and its sale. The acceptance of these proposals by Jannetta, by the execution of the mortgage, its return and the cablegram, was an express acceptance of the whole proposition set out in these letters, that is, an express authority to Campbell and Hook to obtain a loan by securing a purchaser of the mortgage and to receive and apply the proceeds on the Young mortgage. Hook interviewed the appellant on Jannetta's behalf to get a loan in the manner agreed to by Jannetta, and we have therefore two

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parties negotiating for and finally entering into a bargain for the purchase of the mortgage, one of them being Jannetta by his agent Hook, and the other the appellant. If Jannetta had been there himself instead of Hook, the situation would have been the same. The appellant and her brother were taken by Hook to inspect the property, and Hook told them that the property was good security, a mere representation on behalf of Jannetta that Jannetta himself would have made. Hook knew the property before going to the appellant, and would not expect to get the loan otherwise than by representing it as a good one. To convince the appellant of the truth of this representation, he took her and her brother to see the property, just as Jannetta himself would have done had he been there to act for himself. If the appellant was constituting Hook her agent to value the property, and was trusting to his valuation, there was no need for her and her brother to look at the property at all.

The verbal bargain for the loan was concluded by the appellant agreeing to take it. Campbell was in fact authorized by Jannetta, as stated, to receive the money, and Hook, acting for Jannetta, told the appellant to make the cheque payable to Campbell, which she did. The receipt and cashing of the cheque by Campbell completed the loan as between Jannetta and the appellant, and the registration of the mortgage constituted it a valid security on the land as against Jannetta and the subsequent purchaser, the respondent, the Toronto Wine Manufacturing Company, Limited.

Owens had previously been solicitor for both the appellant and Jannetta; and Hook, knowing this, and with the appellant's assent, engaged Owens to look after searching the title and putting through the loan, and there is no doubt that, in attending to this business, Owens was acting for both the appellant and Jannetta, as it was Jannetta who paid him for these services. After getting the appellant's assent that Owens should act in the matter, Hook wrote to Owens the letter, exhibit no. 4, which is as follows:

79 Victoria Street,
Toronto, 24th June, 1925.

E. W. J. OWENS Esq., K.C.,
32 Adelaide St. E.,
City.

Re: No. 1682 Queen Street W.

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DEAR SIR,—

Mrs. Livingston is buying a mortgage given by Dominick Jannetta to John A. Campbell for \$6,125 for five years from the 15th May last, with interest at 7 per cent. per annum, payable half yearly, covering the above property and the proceeds of this mortgage is to be used for paying off a previous mortgage for \$6,125 given by Jannetta to Mrs. Chillcott Young, which mortgage is past due; and when the necessary papers are executed and the title found satisfactory, I will give you the necessary cheque for the said amount.

Yours very truly,

(Sgd.) T. HOOK.

P.S.—Mr. John A. Campbell, 24 King St. W. (Ad. 0246), is the solicitor with whom you can communicate.

It is argued that because of the statement in this letter that the proceeds were to be used for payment off of the previous mortgage to Mrs. Young, this knowledge, conveyed to Owens, must be attributed to the appellant, for whom he was acting. Assuming that to be so, it amounts only to knowledge on the part of the appellant that Campbell, the authorized agent of Jannetta to receive the proceeds of the loan, was to apply them on the Young mortgage. It was, of course, Owens' duty, both to the appellant, and to Jannetta, to see that the title was clear, but if he was negligent in that respect, it is a question between him and them, and has nothing to do with the question of Campbell's right to receive the money as Jannetta's authorized agent.

Mr. Bullen, in an able and exhaustive argument, presented everything that I think could be offered on behalf of the respondents, and cited a number of cases upon which he placed strong reliance. An examination of these cases, however, discloses that they have no application to the facts of this case. The argument that no consideration had passed from Campbell to Jannetta, and that the appellant, buying the mortgage, is bound by the state of the mortgage account, is surely not tenable. The appellant purchased the mortgage from the mortgagor and paid over the purchase money to the very party authorized by Jannetta to receive it, so that the situation is as if Jannetta himself had received the money.

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In the case of *Murray v. Crossland* (1), a solicitor received the mortgage moneys from the mortgagee, the intention, as found by the learned trial judge, of all parties being that the money should be paid in satisfaction of a prior mortgage. The solicitor misapplied the funds, and it was held that the mortgage was not a valid security for the amount, upon the express finding of fact by the learned judge that the solicitor did not receive the moneys as agent of the mortgagors.

Butwick v. Grant (2), is cited as authority for the proposition that an agent with authority to sell has no implied authority to receive the money. The case is authority for the proposition that a purchaser is justified in paying the purchase price of goods to an agent who sells them for a principal only when the agent has express authority, ostensible authority or customary authority; and that the question of authority must be determined from the facts of each particular case. There the agent got an order for goods by sample, and the principal shipped the goods and posted the invoice under his own name. Later, the agent called and collected the price, and it was held that under those circumstances there was no ostensible authority. The case is quite different where a principal entrusts the possession of his goods to an agent to sell and to hand them over to a purchaser. In the present case the mortgage was placed in the hands of Campbell and Hook by Jannetta for the express purpose of selling it and for the express purpose of transferring it to a purchaser and receiving and applying the money.

The appeal must be allowed, with costs here and in the Appellate Division, and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *McRuer, Evan Gray, Mason & Cameron.*

Solicitor for the respondent: *Arthur S. Winchester.*

(1) (1929) 64 Ont. L.R. 403.

(2) [1924] 2 K.B. 483.