THOMAS C. MORGAN (DEFENDANT) . . APPELLANT;

AND

THE DOMINION PERMANENT LOAN COMPANY (PLAINTIFFS) . } RESPONDENTS.

AND

CAROLINE MORGAN (DEFENDANT) . . . . . } RESPONDENT ON CROSS-APPEAL.

1914

*Oct. 13-15.
*Nov. 30.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Covenant in mortgage — Married woman — Signature procured by fraud—Pleading—Non est factum—Estoppel.

M., intending to apply for shares in the respondent loan company, pursuant to the proposal, made through her husband, of one L. (the agent of the company for obtaining such applications) was induced through the fraud of L. to sign, without reading it, a document which she believed to be an application for shares but which, in fact, was a mortgage for securing a supposed loan to her and contained a covenant to re-pay the amount of the loan. M. was an intelligent woman capable of reading and understanding the document.

Held, reversing the judgment appealed from (17 B.C. Rep. 366), the Chief Justice and Davies J. dissenting, that as M. was under no duty to exercise care to protect the company against the possible frauds of their agent, L., she was not guilty of negligence estopping her from setting up the plea of *non est factum* which, in the circumstances, was a good defence to the company's action on the covenant.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of

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

(1) 17 B.C. Rep. 366.

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Gregory J. at the trial, and cross-appeal from the same by the company, respondents.

The judgments now reported contain a full statement of the circumstances of the case and the questions raised upon the present appeal.

Nesbitt K.C. and *Christopher C. Robinson* for the appellant and the respondent on the cross-appeal.

A. C. Macdonnell and *J. A. Ritchie* for the respondents and appellants on the cross-appeal.

THE CHIEF JUSTICE (dissenting).—I agree with Sir Louis Davies. In his judgment will be found the facts of the case as they are spread out in the record.

I will be content to state very briefly the ground of my concurrence and hope in so doing to avoid unnecessary and tedious repetitions.

There can be no doubt that a gross fraud was committed upon the company respondent when the loan in question was obtained. No attempt was made to deny this, and it is also very clearly established that the fraud could not have been successfully carried out, as it was, without the co-operation of Morgan, the appellant, and of his wife. Their co-operation may have been either innocent, guilty or merely negligent.

I am of opinion that Morgan was a party to the fraud and that it was made possible by, putting the most favourable construction upon her conduct, the gross negligence of his wife, the respondent on the cross-appeal.

As Sir Louis Davies points out, the loan was secured by a mortgage on a property the title to which was vested in Mrs. Morgan by deed of January, 1895,

duly registered. To obtain that loan it was necessary to have Mrs. Morgan's signature on the application for the loan and to a subscription for shares in the company, and I have no doubt that, as found by all the judges in appeal, her signature was attached to each of these documents by her husband. The certificate of shares issued in due course to Mrs. Morgan and was assigned to the company for the purpose of the loan by a memorandum of assignment indorsed thereon and executed by Mrs. Morgan in the presence of one Yarwood, a practising solicitor in good standing. Subsequently a mortgage on the property was executed in the presence of the same Yarwood, who certifies on his oath of office as notary public that the mortgagor, Mrs. Morgan, appeared before him and,

being first made acquainted with the contents of the mortgage, its nature and effect, acknowledged that she was the person mentioned in the instrument as the maker and that she understood the contents, nature and effect of it.

Upon the same occasion she also made and signed before Yarwood a declaration that she was the sole and absolute owner in fee simple of the property then registered in her name, and authorized the payment of the proceeds of the loan to Leighton. It is not disputed that the signatures to those documents are genuine and that they were necessary to the fraudulent obtaining of the money from the company. Three years afterwards, in October, 1898, Mrs. Morgan executed in the presence of another witness an *agreement for an extension of the mortgage* to which is annexed a certificate of one Norris, a notary public, *to the effect that she was made acquainted with the contents and understood the nature and effect of the instrument.* Norris is dead, but there is no suggestion

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

The Chief Justice.

that he was a party to the fraud. Yarwood was examined as a witness at the trial and his evidence, in the last degree unsatisfactory, establishes at least that Mrs. Morgan was in his office on the day the documents first above mentioned were executed and that she acknowledged her signature to them in his presence. Examined as a witness, Mrs. Morgan admits her signature to the documents in question and says that they were read to her and that she signed them, her contention being that the documents purported to be executed for the purpose of buying shares in the Dominion Loan Company. There is no evidence that any document except those produced was signed on that occasion by Mrs. Morgan, and Yarwood's evidence goes at least far enough to establish that if any documents were read to Mrs. Morgan it must have been those that she signed. It is difficult to read her evidence without being impressed by her capacity and intelligence and it is impossible for me to believe that if, as she admitted, the document was read to her she would ever have misunderstood its meaning and effect.

In any event, I am clearly of opinion that if she signed and delivered those formal documents at various times during a period of three years under the circumstances described, even in ignorance of their contents, if that is conceivable, she must be held liable for having, through her culpable negligence, made it possible for her husband and his associates to successfully carry out this nefarious transaction.

It is said that the agents of the company are alone responsible for the fraud and that they alone benefited by it. I am satisfied, on the whole evidence, that Morgan knew of the project to obtain the money from the company from the beginning and actively co-operated

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

The Chief Justice.

with the agents of the company in carrying it out. I am not sure as to whether he had a share in the swindle. As to him I cannot see any reason why the judgment of the Court of Appeal should be reversed. I am unable to agree that Mrs. Morgan should be relieved of responsibility for the consequences of her grossly negligent conduct.

I have felt it to be my duty to say at least this much because of the important principle involved in the judgment of this court. It will hereafter behoove all those who are concerned in making investments either for themselves or as trustees for others to take notice that little credence or faith is to be attached to the declarations of fact made by a notary public under his oath of office in connection with the execution of formal documents such as those in question in this case.

I would dismiss the appeal and allow the cross-appeal, both with costs.

DAVIES J. (dissenting).—I agree with Mr. Justice Gallihier that this case "reeks with fraud, carelessness and incompetence."

I also agree with him that Thomas Morgan, one of the defendant appellants was a party from the very beginning to the fraud practiced upon the company. That fraud consisted in obtaining from the company a loan of $1,500 upon the security of some 15 shares of its stock applied for and standing in the name of Catherine Morgan, his wife, the other defendant appellant; and the further security of a mortgage from Catherine Morgan to the company on lots 1 and 4, block 1 of Newcastle suburban lots, addition to City of Nanaimo,

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Davies J.

with the buildings thereon, which lot she was represented to be the owner of in fee.

I am unable, however, to reach the charitable conclusion which induced the learned judge to give her the "benefit of the doubt" as to her personal participation in or liability for the frauds or to hold that proof of deceit as against her failed.

I have come to the conclusion, after reading all the evidence, that it is impossible to doubt her complicity with her husband in the fraud from its very beginning.

I do not think she herself signed the application in November, 1894, for the shares in the company. Her name to that application was, in my judgment, either signed by Morgan, her husband, or by Williams, the clerk of Leighton, the secretary of the local board of the company in Nanaimo. The judges in the Court of Appeal, from an examination of his wife's signature written during the trial by Thomas Morgan and in evidence thought the signatures "Catherine Morgan" to the two applications, in August, 1894, were written by Thomas Morgan, her husband — and it may well be that they were right. There is a marked resemblance between the said signatures and the signature written by Thomas Morgan when on the witness stand. I am, however, of the opinion that these signatures to these applications were written by Williams, the man who filled up the applications and who was a clerk in the employ of Leighton, the agent in Nanaimo of the local board of the loan company. To my mind, it matters little which of them wrote the signatures. They were certainly written either by Morgan or by Williams; and, if by the latter, at Morgan's instance and request. That Mrs. Morgan well knew of the application and

was a direct party to its being made, I cannot, after reading the evidence, entertain any doubt whatever.

It is important to remember that these applications by Mrs. Morgan consisted one of an application for 15 shares of the plaintiff company's stock and the other for a loan of $1,500 on the security of those shares which she agreed to assign to the company and of a first mortgage upon the lot of land referred to, the title to which was represented in the application as in her name. On this land it was represented there were some buildings worth $1,900 with "$1,000 incumbrance due on the house for lumber," to pay which and to improve the lots the loan was applied for.

Williams, the witness to these applications, who was then employed by Leighton, the secretary of the local board of the loan company, subsequently got into difficulties, left Canada and his whereabouts is unknown. At the time, Catherine Morgan was not the owner of the real estate described and there were no buildings upon the land.

In due course, the application for the shares was granted and, in the following March, Catherine Morgan, at her husband's request, went to the office of Yarwood & Young, solicitors, and executed to the company (1) the mortgage in question of the lots of land, (2) an assignment of the 15 shares, (3) a statutory declaration of her sole and absolute ownership of the real estate, etc., and (4) an order to the company to pay the $1,500 to Leighton.

Yarwood witnessed her signature to each and all of these documents, took her statutory declaration and gave the usual certificate of the execution of the mortgage by a married woman apart from her husband. Everything on the face of the documents was perfectly regular and proper.

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Davies J.

Mrs. Morgan, however, while not denying the authenticity of any one of her signatures to these four documents, puts herself forward as the victim of a fraud by others and says she never signed them with knowledge of what they really were, but believing them to be shares in the company her husband was selling to Leighton, the agent. She further absolutely denies that she ever signed any papers before Yarwood at all, either in March, 1895, at his office, or at any other time and place. She insists in her main examination and repeats persistently in her cross-examination that she only signed one paper at Yarwood & Young's office and that was not before or in presence of Yarwood, but before Young, Yarwood's partner, now Judge Young.

Being faced with the four several documents containing her name, she admits that they are her signatures, witnessed and certified to by Yarwood and not by Young; she still, over and over, repeats her statement that she only signed one document and that one she signed before Young and never signed anything before Yarwood. That single document she alleges was an assignment of her shares to Leighton who, her husband told her, was buying them and would repay them the money they had up to then paid the company on account of the purchase of the shares.

She admits that in the light of the facts her story seems "perfectly ridiculous" to use her own language.

Yarwood was called and gave his testimony which, judging from the stenographer's report, was about the usual kind of evidence a witness called to prove the execution of documents years before would give. There is no suggestion whatever that he was in any way a party to the fraud or acted otherwise than any

reputable practitioner would have done under the like circumstances.

No attempt was made to support Mrs. Morgan's testimony by calling Judge Young before whom she said she signed a single paper, not four papers. No such paper witnessed by Young was produced and Mrs. Morgan admitted her explanation seemed foolish and ridiculous and yet in a matter where her honesty was at stake as well as her oath, she neglected to call the only witness who could substantiate or explain her statements.

It seems to me quite clear that she has confounded two different occasions. She may and probably did on one occasion sign some document before Judge Young and she has in some way got that incident mixed up with the execution of the mortgage, the assignment of her shares, the statutory declaration and the order for the payment of the money. Her signatures to each of these four documents are admittedly genuine. They are properly witnessed and certified by the notary public who is called and examined with respect to their execution. She herself admits not once, but many times, that the paper she did sign was read over to her. All attempts to make her deny this were in vain and at length, in answer to a question put by the trial judge, who seemed to be under the impression that she had not intended to admit the document she signed was read over to her, she repeats her statement that there could be no doubt about it that it was read over.

Under such circumstances as these to hold that Mrs. Morgan was the innocent victim of a vile conspiracy concocted to rob a mortgage loan company of $1,500 is taxing my credulity unduly.

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Davies J.

Some years after the execution of the mortgage and other documents before Yarwood, Mrs. Morgan went, at her husband's request, 1st June, 1898, to the office of Leighton and there signed before A. E. Planta a long agreement under seal with the respondent company for the extension of the time given in the mortgage for the repayment of the $1,500.

With respect to the mortgage she signed in March, 1895, Catherine Morgan suggests that she thought the document read to her was to the effect that she was *buying* shares in the Dominion Loan Company while her husband says that he sold the shares in the spring of 1895, which he had purchased the previous November and on which, in the meantime, he had been paying up $9 a month to the company and that he sold them because he was hard up and could not go on paying the monthly instalments and asked his wife to go down to Yarwood & Young's and sign the necessary papers.

The two stories are quite irreconcilable and as Mrs. Morgan admits knowing all about the monthly payments made on the shares by her husband, it is quite clear that she could not think she went down at that time to purchase shares. And so it seems to me her story about going to Leighton's office in June, 1898, more than three years after the mortgage was executed, and signing the agreement for the extension of the time for the payment of the mortgage money before the clerk Planta as a witness is as "perfectly ridiculous," as she admitted she thought her story about signing the mortgage papers was. She said she thought she was signing over the shares to Leighton, whereas as a fact they had been signed over to him by her some three years previously, and they had been

receiving back from Leighton, in the meantime, payments on account of his purchase of the shares from Morgan.

The fact is that her statement, surmise, reason or what you may choose to call it, for signing the extension of time for paying the mortgage that she thought she was signing over the shares which Leighton had bought, seems as "perfectly ridiculous" in the light of all the facts as her version of the execution of the mortgage.

Planta, who witnessed the extension, could not remember the circumstances connected with the execution of the document, but identified his signature as a witness and testified in the ordinary way to its execution. Mr. Norris, the notary public, who certified to the execution of the extension by Mrs. Morgan and that she knew its contents and understood its nature and effects, is unfortunately dead.

One or two controlling facts ought to be borne in mind. All of the documents, mortgage, solemn declaration of Mrs. Morgan, assignment of shares to company by way of security for loan and order to the company to pay the money to Leighton as well as the agreement to extend the time for payment bear the genuine signature of Mrs. Morgan, the defendant. The only signatures that are disputed are those to the application to the company for shares and the application for a loan, which are signed in her name either by Williams, the clerk, at her husband's request or as found by the Court of Appeal by the husband himself. In either case, it seems clear she knew all about it from her husband. The execution of the first four documents are witnessed and authenticated by Yarwood, an attorney and notary public, who testifies to

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Davies J.

the facts. The other document, the extension, is witnessed by a clerk, Planta, who also testifies and by a notary public now dead. The documents were by her own admission on oath read to Catherine Morgan before she signed them. She never appears to have seen Leighton, the agent, personally in connection with any of these transactions.

No one made any misrepresentation to her of the contents of any one of the documents.

All of the books kept by Morgan during the time when these transactions took place and which presumably would throw light on the transactions, have been destroyed.

The conclusions I drew after hearing the argument and reading the evidence and the judgments below, were that both Morgan and his wife were parties to the conspiracy to defraud the company respondent and that Mrs. Morgan's story of the facts connected with the signing of the mortgage and the other papers, in March, 1895, before the attorney and notary public Yarwood and the extension, in 1898, before Planta and Norris, the notary public, are pure creatures of her fancy, or to use her own language when giving her evidence, "perfectly ridiculous" in the face of the proved and admitted facts.

As to Morgan's complicity in the fraud, I have not the slightest doubt. Agreeing with the Court of Appead on this point, I would confirm their judgment and dismiss this appeal, but not being able to accept their "charitable judgment" giving Mrs. Morgan the benefit of the doubt and holding her equally guilty with her husband of the conspiracy to defraud, I would allow the cross-appeal and hold both liable for the amount due upon the mortgage and amend the judgment below accordingly.

IDINGTON J.—The respondent is a building society which was incorporated in 1890 under the Ontario Act respecting building societies and has since carried on its business in Toronto and shortly after its incorporation created a branch board in Nanaimo, in British Columbia, through which certain dealings in question herein were had upon which this action by respondent against Caroline Morgan, wife of the appellant Thomas Morgan, and said Thomas Morgan is founded.

The statement of claim alleges that Caroline Morgan made an application in writing, on 9th August, 1894, to said company for an advance of $1,500 to be secured by mortgage on certain real estate in Nanaimo falsely and fraudulently representing that the said land was worth $1,200 and buildings thereon were worth $1,900 and that she had paid $1,200 for said land though she well knew the said land was under $500 in value and had no buildings thereon.

It is further alleged therein that, on the 28th of March, 1895, she signed a statutory declaration by which she falsely and fraudulently represented to the plaintiff:—

(*a*) That she had been in continuous and undisputed possession of the said lots and every part thereof since on or about the 1st day of November, 1894.

(*b*) That the various buildings described in her said application for a loan were erected wholly upon the said lands.

(*c*) That the said lots and building (house) were only charged or encumbered by an amount of $1,000 due for lumber on or used in such house and to be paid out of such loan of $1,500 — from plaintiff, whereas the facts were that the defendant, Caroline Morgan, never had been in possession of said lots nor was there any building erected thereon or any money due or accruing due by the said defendant for lumber in connection with any building or otherwise in relation to said lots.

Then Thomas Morgan is charged with being well aware of the making such false and fraudulent repre-

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

sentations and purpose thereof and for the purpose of participating in the moneys to be advanced was a party to all said false and fraudulent representations.

It is further charged that they for the purpose of carrying out their fraudulent scheme procured one John Daniel Foreman, the appraiser of the respondent, to make the false and fraudulent statement in a statutory declaration of 10th August, 1894, that

> the said lots were worth, exclusive of buildings, in cash $1,200, and that the buildings then completed were worth in cash $1,900, and that the property would bring at a forced sale in cash at that time $3,000, both of said defendants well knowing that the said land was worth less than $500 and had no buildings whatever erected thereon.

The statement of claim alleges respondent advanced the sum of $1,500 and has thereby suffered damages.

It is further alleged that Caroline Morgan executed a mortgage on said land and thereby covenanted to pay the mortgage.

Relief is prayed against both Morgans on the ground of fraud, and alternatively against Caroline Morgan on her covenant in the mortgage.

These charges were denied by the statement of defence and it was further alleged therein that:—

> In or about the year 1894 she purchased from William K. Leighton, agent of the plaintiff company, at the city of Nanaimo, in the Province of British Columbia, certain shares in the plaintiff company and signed or believed she signed applications for or other documents in connection with the purchase of these shares. If the signatures of Caroline Morgan appended to the alleged mortgage and relative statutory declaration were made by her (which the defendants deny) they were made in mistake or fundamental error, under the belief that she was signing documents in connection with the purchase of these shares and with no purpose or intention of signing the alleged mortgage or relative statutory declaration.

On the issue thus raised the parties went to trial before Mr. Justice Gregory, who accepted the evidence

of the defendants as substantially correct and, by his opinion judgment, reports most favourably on the demeanour, integrity and intelligence of Caroline Morgan, but less favourably upon the intelligence and manner of Thomas Morgan yet accepting him as a truthful witness.

He accordingly dismissed the action with costs.

Thereupon the respondent appealed to the Court of Appeal for British Columbia. That court, Mr. Justice Irving dissenting, allowed the appeal as against Thomas Morgan, but dismissed it against his wife and he now appeals here and respondent cross-appeals as against them both.

The appellant Thomas Morgan was asked in the witness box to write his wife's name and he did so. There was no other specimen of Morgan's handwriting placed before the court. There was no expert evidence of any kind called. No expert opinion of any kind was given by any of the witnesses called.

The application which the statement of claim makes the basis of the action charging fraud against Mrs. Morgan was produced and shewn him and he denied ever having seen it or signed the name "Caroline Morgan" thereto.

The application for shares in the respondent company was also shewn him and he also denied ever having seen same or signed the name of Caroline Morgan thereto.

The Court of Appeal using and acting upon their own knowledge of handwriting as a result of the comparison of that single specimen of Morgan's writing of the name "Caroline Morgan," with the signature to said applications, has come to the conclusion that he signed his wife's name to said applications.

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

The only extended opinion of those concurring in the result is the judgment delivered by Mr. Justice Galliher, who deals with the matter as follows:—

> As to the husband, Thomas C. Morgan, I entertain no doubt whatever that he signed the name "Caroline Morgan" to Exhibit 1, Application for Loan; and Exhibit 2, Application for Shares; and that he was from the beginning a party to the fraud practised against the company.
>
> Considering that he swears that he never saw any of these papers until years afterwards, I place no credence whatever in his testimony.
>
> Looking at Exhibit 1, Application for Loan, we find some twenty questions answered, including value of building, description of buildings, amount due on same, rental value, etc., buildings which never existed on the premises. One would indeed need to be credulous to assume that he signed this document and knew nothing of its contents. It is as deliberate and brazen a piece of fraud as could be perpetrated and I find the evidence fully connects Thomas C. Morgan with it.

Mr. Justice Martin in a brief note suggests it is only after some hesitation he allows the appeal. The Chief Justice gave no written opinion.

Considering that the claim made is based upon the allegations of false and fraudulent misrepresentation of this man's wife as above set forth, and that he is only charged with knowingly aiding her therein, and that she is exonerated by the Court of Appeal; that there was no application to amend the pleading so framing the action, and no suggestion of amendment; that the notice of appeal gave as one of the grounds thereof that the learned trial judge should have found both defendants party to the fraud alleged in the statement of claim, I most respectfully submit the foregoing conclusion is erroneous in law.

If the charge had been made that he had conspired with others than his wife to commit the alleged frauds or that by forging and use of the forgery of his wife's name he had accomplished same, I might be able to

understand such a conclusion of law, but as the record stands, I cannot.

I also submit, for the reasons I am about to give, that, in law and fact, the conclusions reached are quite unwarranted.

The learned trial judge, who heard the evidence and saw and heard these defendants and gave credit to their story, ought not to have been reversed, especially in such a case as this, involving thereby a finding of gross fraud and perjury, where there are no collateral facts or circumstances or fundamental facts regarding matters in dispute upon which the appellate court so reversing can with absolute confidence and assurance rely and feel they are not mistaken. I respectfully submit mere skill in comparison of handwriting when used upon a single bit of handwriting, where a man failed to spell his wife's Christian name correctly, is hardly such a stable foundation to build upon.

Let us, only dealing just now with the appeal of Thomas Morgan, look first at broad, salient features of the story with which we have to deal and see whether in it there is any inherent probability of its justifying such a finding as the Court of Appeal has reached, and later deal with the minor details relied upon in argument for respondent.

The local board of respondent was organized with one Leighton (who seems to have done a mixed sort of business of insurance, brokerage, and in short general agency) as secretary. He later is spoken of as treasurer, and sometimes as agent. He no doubt managed or was the active man in managing all the business of the respondent in that Nanaimo district.

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

It would seem from a book produced which he was given by respondent to keep therein track of subscriptions for shares and payments thereon, that he got subscriptions for shares in the respondent company from a great many people and received money thereon and no doubt transmitted much, if not all, as in duty bound, to the respondent.

This seems to have been opened in the end of 1890, shortly after the local board was constituted, and a number, if not all, of the directors on that board were among the first subscribers for shares.

The appellant says he was solicited by one Williams, a clerk of Leighton, to take shares in said company, and that he finally, but when he is unable to say, assented and told him to have them "taken out" as his expression is, in his wife's name. Williams, some years later, left for parts unknown and (up to the trial) had not since been found. Leighton, still later, is sworn by a clerk of his, who succeeded Williams, to have been much worried over some crooked dealings he had got into, either through Williams or otherwise, and ultimately died of brain disease in an asylum.

One cannot help suspecting that the terse description sworn by Morgan to have been used by one Andrews in respondent's employment, when investigating this matter and hearing Morgan's story, fits the office managed by Leighton:—

Andrews says, according to this:—

> That is a rotten combination over there.
>
> There is another case just similar to that happened George Thompson, and they can't find George Thompson.

Andrews, who was in court, and heard what Morgan swore to, was not called to contradict him.

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

I assume Leighton and Williams were both most dishonest men and given to practices such as this case indicates beyond a shadow of doubt they were guilty of in relation to the loan in question.

The applications for shares and for loan were apparently filled up by Williams. Mrs. Morgan's name is signed thereto in a handwriting clearly not hers.

I should say it was signed by this man Williams — if I were to permit myself to use my impression received from a comparison of hand-writing.

They were dated 9th August, 1894. At that time Leighton had a vacant lot which he had acquired in the previous June from one Roberts, who had mortgaged same to another company for $300.

It was the description of this lot which was inserted in the application for loan. The application represented it to be improved in the manner set forth in the statement of claim.

Neither the appellant nor his wife had then, or at any previous time, any real estate of any kind.

An appraiser's certificate of valuation of this property was made at the foot of the application for loan by one John D. Foreman, a member of the said local board from its beginning, representing its value as stated in the application and certifying to the good character and credit of Caroline Morgan, the applicant.

This was in the form of a statutory declaration taken before said A. S. Williams, a notary public, who had also subscribed as witness to the signature "Caroline Morgan" signed to the said applications.

These applications, so supported, were at once forwarded to the respondent at Toronto, and a stock certificate for fifteen shares, dated 1st November,

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

1894, was issued, but never delivered to Mrs. Morgan, or any one for her.

The payments therefor were to begin 1st December, 1894. Whether she paid from that date as contemplated by this certificate, or when, is not clear. It is clear, however, that Leighton in whom was the title to the vacant lot to the extent of an equity of redemption therein subject to the mortgage for three hundred dollars, by deed purported to transfer the lot as if free from mortgage to said Williams on the 7th January, 1895, in consideration of $350.

One Peto, who witnessed this deed, I imagine possibly another employee of Leighton, seems to have made the affidavit of execution only on 28th March, 1895, before E. M. Yarwood, of whom we will hear more presently.

What purpose this conveyance to Williams was intended to serve puzzles one, for on the 18th January, 1895, he conveys by deed of that date to Caroline Morgan for the consideration of $225 same land, but subject to a mortgage of $300 to the British Columbia Land and Investment Agency made 8th February, 1893.

The deed is witnessed by Leighton, who makes the affidavit of execution before the same Mr. Yarwood on the 28th March, 1895. That seems to have been a busy day for Mr. Yarwood, for it was on the same day Mrs. Morgan is alleged to have called and executed the mortgage in question, the transfer of her shares aforesaid as a further security for the loan, and the order upon respondent to pay Leighton the proceeds of the loan; taken the statutory declaration by her that she was the absolute owner of said lands and had been in possession since 1st of Decem-

ber, 1894; and testified to a number of other curious palpable lies as facts. All these instruments are of that date and subscribed by Mr. Yarwood as the attesting witness or notary public taking them.

And there is still another thing he is supposed to have done the same day, as a notary public, that is to certify that she appeared before him and being first made acquainted with the contents of the annexed instrument (*i.e.*, the mortgage) and nature and effect thereof, acknowledged same, etc., and that she executed without fear or undue influence of her husband, etc.

Then on the 6th April, 1895, the deeds from Roberts to Leighton, from Leighton to Williams and Williams to Mrs. Morgan, were, I infer from the account of Yarwood & Young rendered Leighton, and other evidence, registered by that firm.

Why the registration was delayed till that time is unexplained. But it does appear by the report of Mr. Yarwood to Leighton that he must have had entrusted to him the completion of the title and must have either paid no attention to what he was doing when taking the alleged declaration of Mrs. Morgan and certifying as he did as to her execution of the mortgage, or he would, as solicitor for the respondent, have found ample reason for further inquiry as to a good many things, for example, how the company could be making a loan of fifteen hundred dollars on a property passing from one party to another at such prices as evidenced by the deeds, and that no one had in fact paid off the prior mortgage, though a discharge had been got and withheld from registration.

As he ventured as witness to explain this first, by saying he did not read or observe that, and had noth-

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

ing to do with it, and further, by saying it was a building society loan, I may, parenthetically as it were, remark that this attitude of Mr. Yarwood towards his duty and the facts suggest how easy it was for him to fall a victim to the fraudulent arts and devices of Leighton, a practised master of fraud.

But above all he certainly should not have permitted Mrs. Morgan to have taken the statutory declaration of which as the solicitor concerned on behalf of respondent he may be supposed, indeed presumed to have known the import and purpose and the consequences of its falsity.

And applying the test of the account he made out against her, yet never sent her but delivered to Leighton, he was her solicitor and owed her a special duty as such. I am far from assuming that he was intending at any time to make himself a party to a deliberate fraud, but I do think the fair inference from all he says and the contents of these documents is that he simply signed because of his confidence in Leighton. If he had discharged his duty, she never could have been induced or trapped into signing these documents.

It is quite possible though attesting the documents by his signature, he merely took the word of Leighton that they were all right, and signed accordingly. She says she never saw him but saw his partner (who is not called), and signed in his presence what she was told was an application for shares. She never was told, she says, anything else. Though she refers to Mr. Young as reading the documents, I do not think any one of experience will take this in its literal sense. No one seems to have at the trial pressed her to explain exactly what she meant by his reading and we

must use our common sense. She was entirely without experience in business matters. And, though a woman of education and intelligence, as the learned trial judge reports, any one of experience knows how little many such persons appreciate what they are doing in dealing with business matters entirely foreign to the limited sort of education unfortunately given too many of her sex.

We must then ask ourselves if it is really conceivable that she could knowingly have made a false statutory declaration, as Yarwood is made to certify she did take before him, if she had really had the document read to her. The learned trial judge who had the best opportunity, by seeing and hearing her, and thus of knowing whether she was likely or not to make such a false declaration, has decided in no uncertain terms that in his opinion she would not.

I have read her depositions on examination for discovery and her evidence at the trial and come to a similar conclusion. We must bear in mind that she was giving evidence some fifteen years after all this had transpired and may be mistaken in many details, but she knew she never had any such property or any dealings for a loan of this character, and had but one thought in regard to any business relations with Leigthon and respondent and that was the subscription for shares in respondent company to be paid for in small monthly instalments, and that after paying for some years thereon, she had agreed to transfer same to Leighton and he was to repay by similar small monthly payments $200 therefor, in consideration of her so transferring.

This, she says, led her to signing another document in the presence of Mr. Planta. A document is pro-

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

duced which seems to bear her signature and of the date she indicates as about the time when she supposed she was transferring her shares to Leighton. This document is an agreement for the extension of time for payment of the mortgage and is attested by Planta, then a clerk in Leighton's office. Again we have one Norris, now dead, a brother-in-law of Leighton, and a notary public, signing a certificate of her having acknowledged it in her presence. She says she never saw him on any such occasion, and never heard of any such mortgage or proposed extension. She does say, however, that from about that time till some time after she had moved to Vancouver, which would be the same year I think, Leighton continued to make his payments to her which were sometimes collected by her brother in Nanaimo.

Planta, who is called by the respondent, seems to have no definite recollection of this extension agreement, but identifies his signature as witness thereto. He, however, corroborates her as to the collection by her brother from Leighton of the monthly payments just referred to. That seems to me a very strong circumstance corroborative of her whole story. Indeed, twist and turn the case round in any way, it seems fatal to respondent's contention of her knowingly joining in a fraud. Then we find the duplicate copy of the extension agreement turns up, not in her hands, but where Leighton's custody of it left it to be found and whence it was produced and given her or some one for her shortly before the trial.

Now in all these years there is only one communication from the respondent company to her, and that is a brief note of 9th March, 1898, which she denies ever getting and which is as follows:—

Your policy for $1,500 expires on April 9th, and must be renewed with the company selected by this Association. Kindly call on Mr. W. K. Leighton for complete application form and pay him the premium.

Instead of the insurance being renewed by her going to Leighton, or he to her, we are told by Planta of its having been renewed by an application not signed by her, but by him for her when he was in Leighton's office and would have done so under his instructions though evidently suspecting or having reason to suspect its fraudulent character. It is hardly likely with this sort of suspicion of his master that he would have forgotten seeing Mrs. Morgan in relation thereto if any occasion therefor as the notice indicates.

The Morgans were still living in Nanaimo when this was done. Can we in face of her sworn denial and a not impossible explanation by her, fairly and properly assume that because she signed the declaration of 28th March, 1894, she must be held to have committed a deliberate fraud? And as a necessary consequence hold that her whole story is a tissue of perjury? If she deliberately and knowingly took that false declaration she must have done so for a fraudulent purpose and if she committed such a fraud, she could not forget it and must be following it up now with perjury, and all that for a share in a sum of eleven to twelve hundred dollars to be divided amongst three or four, for that would be all that was left after paying the prior mortgage and expenses.

Sometimes one gets so disgusted with the standard of truth and honest dealing too often adopted by some passing as reputable people as to be possessed of wide awake suspicions. I am not prepared for my part to carry it so far as to brand this woman to be presumed

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

to be from all we can learn, most highly respectable and honest, as guilty of gross fraud and perjury. It would be my legal duty if trying her for such offences with no more evidence than there appears here to at once direct her discharge.

As to whether she was so negligent as to be liable, I will deal with that presently. But before leaving this subject of her being guilty of fraud, I must point out it is all based on what if anything is mere negligence. What should we think if Mr. Yarwood, for example, had been joined as defendant, and a trial judge had found him, because of obvious oversights a party to the fraud which might have been averted by greater care? For my part I think the one proposition is just as monstrous as the other and both unfounded. And when we reflect that he and all others, save possibly the clerks in his employ, had unbounded faith in Leighton, it is easy to comprehend how such bold swindles as involved here were accomplished. Such a man, eager and bent upon his fraudulent purpose, watches his opportunity, day by day and month by month, to seize the occasion when those to be dealt with, are, by over-confidence in him, lulled into security and as it were, put asleep, and put off, or seized when off, their guard.

Those inclined to doubt the feasibility and success of such ventures unless helped by the criminal connivance of those claiming to be mere victims and thereby led to charge them with being accessories to fraud, should reflect for a moment upon the innumerable cases of patent-right swindles which led to a change in the law governing notes founded on the consideration of an interest in a patent; and the well known syndicate swindles; and perhaps above all on

the too common cases of those wretched breaches of trust on the part of those doing a business that controls the money of other people. Inexperienced people at each new disclosure of such cases, marvel at the boldness and adroitness of him perpetrating the fraud and the incredible, or almost so, stupidity of those enabling the swindler to secure signatures to almost anything. But we know, if experienced, that all such victims are by no means stupid or ignorant, indeed are often keen business men.

Again, we must use our common sense and accept the assistance of the trial judge in all such cases.

It seems to me for the foregoing reasons that the claim against Mrs. Morgan on the grounds of fraud taken in the statement of claim must fail and with it must fall the claim against the alleged accessory.

But the Court of Appeal finds he signed the applications and, though she did not, she is in some way to be held guilty of being a party to the fraud.

Is there any tangible ground upon which that can rest ? Why should he even if to be presumed a rascal, deliberately contrive to put his young innocent wife into such a position ? I pressed counsel for respondent on this and got in reply no suggestion that will for a moment in light of other facts wear even a plausible appearance.

It is said he was under some obligation to Leighton.

He denied in his examination for discovery signing said applications and told what that obligation to Leighton was. He gave details of how the latter came about. He had sometime before these occurrences got Leighton to indorse his paper for $2,790 at the bank, to be paid off by monthly payments of $103 a month,

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

and says he paid accordingly and gave Leighton $400 for this use of his name as surety.

I have no doubt the respondent's solicitor, who heard this story, accepted it as perfectly true, or we should have found some effort to discredit it by producing evidence from the bank to destroy it.

The statement of claim alleges that his motive was to participate in the proceeds of the fraud and there was thus afforded a fine opportunity to have investigated and if true, proven it at the trial with the double effect of shewing he did participate and that he was not truthful in his story as to his relation with Leighton.

It is urged he was a tailor in narrow financial circumstances. Granted that, for argument's sake, is every tailor under such conditions to be presumed a rascal ? Or that he is ready to become such and so stupid in his rascality as to bring quite needlessly into his scheme his wife and thereby, whilst using her as a tool thereof, to multiply the dangers of discovery.

Why should the deed of this vacant lot owned by Leighton not have been made to Morgan and he give the necessary mortgage ? I can conceive of Leighton not desiring to proffer such a loan in his own name, but why must he use Mrs. Morgan's ? Again, why if Morgan's financial needs were the mainspring of these acts now in question, should the negotiations have dallied along from the 9th of August till the latter half of April ?

Counsel at first suggested in answer to this inquiry there must be three monthly payments of instalments on stock before a mortgage could be taken. But his junior, also general solicitor for respondent, better conversant with the usual mode of dealing, frankly

and properly admitted this was not an obstacle, for these small payments could be made at one time in advance and the borrower be recouped by proceeds of the loan. Indeed, there is no explanation possible for this delay upon the theory that Morgan's necessities were the moving causes or one of the chief parts thereof.

It is quite conceivable that Leighton having an unregistered deed of the lot, hesitating how to use it to his best advantage, could frame such a scheme and be very uncertain step by step, just how he was to accomplish his purpose, and thus might, hesitating, delay and bide his opportunity of proceeding safely, and hence let the matter drift along. We have not that data furnished us to do more than surmise, though I fancy respondent ought to have got and presented much of it to see how this man's surroundings shaped his actions.

We have enough proved in this case to establish conclusively that Leighton was, from the start which began with inducing Foreman to certify to a false report of valuation and the rest of the board or three of them recklessly to stamp it with approval, a somewhat accomplished adept in fraudulent practices.

Even if the man be dead, no sentiment should restrain or restrict us in our purely scientific inquiry. The honour of the living is at stake.

It is said we have no other instance proven against him. Do we need any? No one as a rule goes to pieces (to use expressive slang) morally speaking in a day. The internal evidence in this case demonstrates the process of moral decadence had progressed very far in his case before his undertaking the work of the 9th and 10th of August, 1894. His character is

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

indelibly disclosed in the preparation of the applications of the former date now in question, and the Foreman report and indorsement thereof of the latter date. The court was not sitting to investigate his career, and it might have been difficult under the pleadings for defendants to have got in general evidence relative thereto, but we have the curious side light given by Mr. Andrew's statements to Morgan already adverted to as given by the latter and allowed by respondent to go uncontradicted or unexplained.

Then to complete Leighton's connection with the matter, we find a sham sale by the respondent company to a relative of his under the power of sale in the mortgage without serving the usual notice or even sending a letter to the mortgagor.

The mortgage provided this could be done, but it also provided for the inexpensive service of a notice by registered post.

One cannot help thinking it was a very harsh and ill-considered proceeding. But it is very obvious it was all contrived by Leighton, who represented he had a man ready to buy at the price needed to realize the debt.

All this is but another illustration of the strange power this man Leighton exercised over all he came in contact with.

That brings me to consider the claim made alternatively to hold Mrs. Morgan liable on the covenant in the mortgage.

That is presented in two ways. In the first place it is said her ignorance of what she was doing was not of that character which would entitle her to succeed under a plea of *non est factum*.

I think the evidence of herself and husband, if be-

lieved (as the learned trial judge and I believe it), is just of that kind which has many times been held as a complete answer by way of such plea to the action upon the deed. I have already written at such length demonstrating my view of the facts of which I conceive a right understanding of the utmost importance herein, that I do not propose to labour with the law bearing thereupon. That is in such a case well settled unless we are to re-open the question and limit as has been suggested by high authority, such a defence under such circumstances as set up here to the illiterate, and deprive the literate and educated people entirely of such a defence in cases where they could have read what they signed, but failed to do so.

With great respect, I submit, the doing or trying to do so would start anew a dangerous discussion and help the rascals to prey upon honest people.

The next way in which the claim is presented on this basis of liability independent of active fraud is that Mrs. Morgan was negligent and thereby misled respondent.

It seems to me that if she was negligent, that negligence, if any, was induced solely by the acts of those representing the respondent and ostensibly in the course of executing the business of respondent; and that in such case it cannot be heard to complain.

Certainly Leighton was held out by respondent, whatever it choose to call him, as its agent, and so also were the solicitors who procured by the direction of Leighton the execution of the documents she signed.

Under such circumstances respondent can have no recourse against her.

The very document upon which reliance is placed shewed upon its face, when regard was had to the

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Idington J.

deeds under which she claimed, that it was palpably false and should have misled no one.

If she trusted too implicitly to others, then those others seem to have been as blindly trusted by the respondent. I think it has no ground to complain.

In parting with this case I may be permitted to say that in all cases of this character it is generally possible to demonstrate, by reference to collateral facts and attendant and surrounding circumstances, when thoroughly investigated, whether the accused has been guilty of fraud as charged or not, and I regret that so many clues, leading to such disclosures and light as such circumstances and collateral facts might afford, have been entirely neglected.

I have already pointed out one of these in relation to the charge of appellant's hope of participation in the fruits of such frauds as committed and there are many of minor import in the path of such an inquiry.

The facts that no steps were taken to adduce expert evidence in relation to the disputed signatures though they were denied in the examinations for discovery, and thus respondent warned in time, suggests a grave suspicion that those then concerned for respondent certainly did not think it worth while as likely to maintain respondent's contention.

It may be answered respondent had a right to rely on the rule of law entitling judges at trial to compare the writing of the genuine with the disputed. Experience teaches that such a proceeding is most hazardous. Even when the most scientific means have been applied by expansion of the letters and measurement of the angles and all implied therein mistakes are not unknown. When the facts of the case tend to render it extremely probable that the writing denied is

genuine, and the denial is rather a mere obstruction in way of completing proof, it is convenient and beneficial that a judge may dispose of such a contest by relying upon the rule. But to invoke and rely upon the rule alone against the sworn testimony of those accused, seems to me, I most respectfully submit a denial of justice and what is not generally expected of a learned trial judge, and especially so, when the party, asking the court thus to act upon its own expert knowledge, has not exhausted many other most obvious means of testing the veracity of those who have pledged their oath in denial.

I think the frank manner in which counsel for the Morgans invited every probing of matters bearing upon the conduct of his clients, whether technically admissible or not, might have been relied upon to have facilitated the investigation of the bank accounts of Morgan, even without forcing the bank to exhibit its books at the trial.

The facts that no one ever asked him to vote or pay taxes in respect of the property ought alone to have stood as a barrier in plaintiff's way of claiming any benefit therefrom in absence of more investigation than mere books in a municipal office.

The appeal ought to be allowed with costs here and in the court below, the cross-appeal of respondent dismissed with costs and the judgment of the learned trial judge restored.

DUFF J.—I think the respondent company fails on both the appeal and cross-appeal. First, as to the cross-appeal. The learned trial judge finds that Mrs. Morgan never knew that the property comprised in

1914

MORGAN v. DOMINION PERMANENT LOAN CO.

Duff J.

the instrument signed by her had been conveyed to her by Leighton and never knew until the action was brought that she had signed a mortgage or applied for a loan; that she had never intended to enter into such a transaction, but had supposed that she was merely signing documents incidental first, to an application for, and afterwards, to a sale of shares.

Although the facts in the aspect they assumed under Mr. Ritchie's advocacy seemed, at first sight, to point to another conclusion, I think no good reason has been advanced for reversing this finding of the trial judge concurred in by the Court of Appeal.

The appellant's contention must rest upon the proposition that Mrs. Morgan had agreed to permit herself to be used as the recipient of the title to the property and as mortgagor for the purpose of obtaining a loan for the benefit of Leighton or that she knew she was engaging in a transaction of some such character. The fact that she actually paid for the shares points the other way; but the controversy in this aspect of it, is essentially a dispute about Mrs. Morgan's credibility and upon that question this is pre-eminently a case in which a Court of Appeal ought to be guided by the conclusion of a competent and painstaking trial judge who has heard the witnesses.

The finding is clearly sufficient to support a plea of *non est factum*. As to estoppel, I think there is no evidence of negligence. Mrs. Morgan supposed she was signing an application for shares presented by a person who was clearly the company's agent to take such applications. She did so in the presence of a reputable solicitor. She was acting under the direction of her husband, who, she supposed, understood the nature of the transaction.

In these circumstances, I do not think she owed any duty to the respondent company which she can be fairly charged with having neglected. The *fons et origo mali* was *the dishonesty of the company's agent.* I think she was under no duty to them to take steps to protect them against his possible frauds.

As to the appeal, there are some things in the evidence, no doubt, calculated to excite one's suspicion as to Morgan's complicity in or knowledge of Leighton's real design; still in the last analysis the question whether he was or was not implicated in Leighton's fraud must be decided as a question of credibility. All the facts were before the trial judge and I see no reason to suppose that any of the considerations which led the majority of the Court of Appeal to reverse him were overlooked by him. I am unable to find in the specimen of the handwriting produced evidence of sufficient weight to justify the reversal of his finding.

I think the cross-appeal should be dismissed with costs, the appeal allowed with costs here and in the Court of Appeal and on this branch of the case the judgment of the trial judge restored.

ANGLIN J.—I concur in the judgment of Mr. Justice Duff.

Appeal allowed with costs; cross-appeal dismissed with costs.

Solicitors for the appellant: *Livingston, Garrett, King & O'Dell.*

Solicitors for the respondents: *Cowan, Ritchie & Grant.*