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in the narrowest way as confined to the actual distribution of the pamphlets and assuming the actual distributor is unknown.

In my opinion this ground fails also, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *Loughrey & Douglas.*

Solicitor for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

BLACKHAM AND ANOTHER . . . . APPELLANTS; DEFENDANTS,

AND

HAYTHORPE AND ANOTHER . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *June* 1.

Isaacs, Powers and Rich JJ.

Principal and Agent—Purchase by agent from principal—Non-disclosure of material facts.

The defendants, who were land agents employed by the plaintiff to sell his land to the Crown, during the course of their employment acquired the knowledge that the Crown would in all probability give £5 per acre for the land. Before the agency was terminated one of the defendants purchased the land on his own account for about £2 10s. per acre without disclosing to the plaintiff the fact that there was such a probability and shortly afterwards sold it to the Crown for £5 per acre.

Held, that such non-disclosure was a breach of the defendants' duty, and that the plaintiff was entitled to recover from them the difference between the price received by him and that paid by the Crown.

Decision of the Supreme Court of South Australia (*Gordon* J.) affirmed.

APPEAL from the Supreme Court of South Australia.

Prior to and until 22nd May 1909 John McLoughlin was the registered proprietor of a perpetual Crown lease of land containing about one hundred and fifty-nine acres. His wife was the owner of an adjoining block of land, and the two properties were worked together. About 10th February 1909 McLoughlin employed Henry Conrad Mengersen, a land agent, to sell the two properties to the Government, and Mengersen employed Desmond O'Cahan Blackham, also a land agent, as his agent in Adelaide to negotiate for the sale. On 25th March 1909 Blackham offered the properties to the Government for £2,500, but the offer was refused. A subsequent offer to accept £2,250 and £45 for commission was also refused. This refusal was communicated to McLoughlin. On 5th May 1909 McLoughlin executed a document by which, in consideration of the sum of £1, he gave to Mengersen an option to purchase his Crown leasehold for £400, which was to remain open until 5th June 1909. On the same day McLoughlin executed a power of attorney in favour of Blackham authorizing him to enter into and enforce any agreement for the sale of the Crown leasehold, and to receive from the Crown or any person all moneys payable under any agreement made thereunder. On 6th May 1909 Blackham placed the Crown leasehold under offer to the Crown at £5 per acre, on 18th May he was informed that the offer had been recommended for acceptance, and on 14th June the purchase by the Crown was completed and the purchase money, £795, was paid. On 22nd May Mengersen exercised his option, and paid McLoughlin £399 as being the balance of the purchase money.

In 1911 McLoughlin brought an action in the Supreme Court against Blackham and Mengersen, alleging in his statement of claim, as subsequently amended (par. 13), that he was induced by the false and fraudulent representations of the defendants to execute the agreement of 5th May 1909 giving the option of purchase. Among the particulars given of these representations was (*b*) that the

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defendants, knowing that McLoughlin was an illiterate man, procured him to execute the agreement in reliance upon their agency and upon the representation that it was to the interest of McLoughlin to instruct them to sell the property to the Crown for £400 and to execute the agreement for that purpose, intending at the time to take advantage of the agreement for their own benefit. The claim made was, in substance, for an account of the moneys received by the defendants in respect of the sale of the property to the Crown and that the agreement of 5th May 1909 should be declared to be fraudulent and void.

The action came on for trial before *Gordon* J. on 25th November 1913. McLoughlin died on 28th February 1914, and the action was thereafter carried on by his executors, William Henry Haythorpe and John Andrew McLoughlin. On 28th August 1916, both parties waiving the taking of accounts, judgment was given for the plaintiffs for £395 with interest at 5½ per cent. per annum from 15th June 1909 "until payment," and costs.

From that decision the defendants now appealed to the High Court.

Other facts are stated in the judgment hereunder.

At the hearing of the appeal objection was taken that the appeal was not duly instituted, inasmuch as notice of appeal was not given within twenty-one days from the date of the judgment as required by Part II., sec. III., Rule 5 (1) of the *Rules of the High Court* 1911. But the Court on the application of the appellants granted special leave to appeal.

Sir Josiah Symon K.C. (with him *Mayo*), for the appellants. There was on the evidence no agency in respect of McLoughlin's land, and, if there was, that agency was terminated before Mengersen obtained the option of purchasing the land from McLoughlin. If the agency did exist at that time, there was no non-disclosure which would support an action. The only non-disclosure there could be was that the Government valuation of the land was £5 per acre. It is the duty of an agent purchasing from his principal to disclose all material facts, but not to give advice or to state his

expectations of the profit he will make. [Counsel referred to *Kelly* v. *Enderton* (1); *In re Coomber*; *Coomber* v. *Coomber* (2).]

[ISAACS J. referred to *Tate* v. *Williamson* (3).]

F. Villeneuve Smith and *Edmunds*, for the respondents, were not called upon.

The judgment of the COURT, which was delivered by ISAACS J., was as follows:—

This case has been very clearly put by Sir *Josiah Symon* on behalf of the appellants, and nothing would be gained by deferring our judgment. The action is one which, on the pleadings as they now stand, may be briefly described as a claim to £395 on one of two grounds. The first ground is that the money was received by the defendants as the plaintiff's agents, and the second ground is that it was received by them under circumstances which were created by their failure to discharge their fiduciary duty to the plaintiff in not disclosing to him material facts regarding the property which they had previously had for sale on his behalf. The grounds of appeal as presented to us may be condensed into two. The first is that the agency itself was not established, and the second is that, even supposing it was established, no failure to disclose has been shown.

The action itself was commenced as far back as 1911, and for a variety of reasons—no doubt imperative—judgment was not finally delivered until August 1916. One of the parties, the original plaintiff, McLoughlin, died three months after the trial commenced. The events deposed to at the trial were several years old. McLoughlin himself was at the time of the trial a very old and weak man, and it is not to be wondered at that variations occurred in the oral evidence. There is, however, a mass of written testimony which is extremely important, and on which, no doubt, the learned Judge relied very greatly in coming to the conclusions at which he arrived.

As to the first point, whether there was agency or not, learned counsel for the appellants has pointed here, as he did apparently

(1) (1913) A.C., 191.
(2) (1911) 1 Ch., 723, at p. 729.
(3) L.R. 2 Ch., 55.

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in the Supreme Court, to some answers made to him in cross-examination by McLoughlin; and if those answers stood alone he would have had a very strong case. But alongside of those answers were other answers of McLoughlin himself materially qualifying the inferences which could have been drawn from the answers relied on by the defendants. Then there is also the oral evidence of the defendants. But, in addition to that, the defence itself in pars. 4 and 5 admits the creation of the agency originally and claims that it was put an end to. And besides that, during the course of the proceedings interrogatories were administered on behalf of McLoughlin to both the defendants, and in their sworn answers they admitted the creation of the agency and that they were acting upon it. Further, on the face of the written documents which have been put in evidence, the defendants acted on the footing that they were McLoughlin's agents both in their communications to him and in their communications to the Government. Amongst other things they claimed from the Government, in addition to the price that at one time McLoughlin required for his property, the sum of £45 for commission —not commission owing to them by the Government, because they were on the opposite side to the Government in the transaction— but they asked the Government to add to the price McLoughlin was to get a sum of £45 for commission which McLoughlin would otherwise be bound to pay to them. That being so, it is perfectly hopeless to say that there was originally no agency. Then there was no formal termination of that agency in any way whatever. It was said that it was put an end to by the refusal of McLoughlin to accept the price of £2,000 for the property which had been put into the defendants' hands to sell and by the refusal of the Government to advance beyond that price and the communication of that refusal to McLoughlin. But there was no formal taking of the property out of the agents' hands, and no abandonment by them of their position as agents. The only other way in which it is said that the agency was terminated was by one of the defendants coming with his solicitor to McLoughlin and obtaining in writing an option to purchase for the sum of £400 one hundred and fifty-nine acres of land, £1 being paid for the option, which sum was afterwards returned.

The other part of the contest is as to whether in obtaining that option the defendant Mengersen, who appears to have acted on behalf of both himself and the defendant Blackham, failed in his duty to disclose material facts and circumstances to his principal, McLoughlin. It is said that the learned Judge was wrong in the view he took of the interview at which the option was given. He found upon the evidence before him, accepting as he did the evidence of McLoughlin and his daughter substantially, that McLoughlin was led to believe by what was then said that £400 was the highest price the Government would pay for that property. That was about £2 10s. per acre, roughly speaking. McLoughlin said, amongst other things, that he thought it was the Government that was offering that price. Mengersen said that it was well understood that it was he himself. If it was true, as the learned Judge believed, that McLoughlin was told that £400 was the largest sum that the Government would give for the land, it would be very remarkable if he understood that Mengersen was buying it and was going to sell it without profit. It is impossible for us sitting as a Court of Appeal, not seeing the witnesses or hearing them give their evidence, to reverse a finding which depends so much upon the credibility and general demeanour of the witnesses.

That fact being found, the substantial claim made by par. 13 (*b*) was proved. The learned Judge has found that Mengersen failed in his duty to acquaint McLoughlin with the material fact that in his opinion the land was worth £5 an acre and the Government would in all probability give that price for it. The learned Judge's finding is this: "It is proved to my satisfaction that Mengersen and Blackham actually knew on 5th May that the Government would in all probability give £5 per acre for this land." Mengersen, in a letter written on 5th May to Blackham, relates the conclusion of the arrangement between McLoughlin and himself, and said: "I think the Government should at least give £5 per acre for " the land. That statement, combined with the other evidence in the case, has led the learned Judge to believe that Mengersen, a skilled expert, who had had communications with the Government, believed—in other words, knew that there was a probability—that the Government would give £5 per acre for the land. There is evidence upon

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which that finding can be supported, and we see no reason to doubt the accuracy of the finding. That being so, Mengersen in not communicating his belief to McLoughlin was not doing his duty as agent to his principal. That is the ground upon which the learned Judge gave judgment for the plaintiffs, and we think that ground is sustained. In those circumstances the appeal should be dismissed with costs.

With regard to the notice of cross-appeal, we have dealt with it by substituting the word "judgment" for the word "payment."

We should add with regard to the allegations of fraud, that although fraud is charged and is negatived if what is left will sustain a cause of action that is sufficient for the plaintiff's case (*Nocton* v. *Lord Ashburton* (1)).

Appeal dismissed with costs.

Solicitors for the appellants, *Symon, Rounsevell & Symon.*
Solicitor for the respondents, *W. J. Denny.*

B. L.

(1) (1914) A.C., 932.