

on merely reading the evidence might come to a different conclusion, yet the court, following the principles laid down in *The Glannibanta*, 1 P.D., at p. 287, and *Ball v. Parker*, 1 A.K. 603, would not undertake to say that the trial judge was wrong in believing the statement of Turner who was before him, and whose demeanour could only be observed by the trial judge.

Allcroft v. Bishop of London, (1891) A.C. 666, followed.

Appeal dismissed with costs.

Howell, Q.C., and *Darby* for the plaintiffs.

Ewart, Q.C., and *Elliott* for the defendant.

Full Court.]

[July 27.]

CONFEDERATION LIFE ASSOCIATION *v.* THE MERCHANTS BANK OF CANADA.

Money paid in mistake—Recovery of, from agent.

This was an action to recover back money received by the defendants from the plaintiffs under the following circumstances: The plaintiffs had agreed to advance to Bell Bros. the sum of \$18,000 upon mortgage of land in Brandon, upon which they were erecting a \$29,000 building. The money was to be paid out on progressive estimates during the erection of the building and upon architect's certificates, and the plaintiffs were always to retain in their hands enough of the loan to complete the building.

Bell Bros. had given an order to the defendants' manager at Brandon entitling the bank to receive the several sums to be advanced by the plaintiffs as soon as payable, in order to secure the bank for advances to be made to Bell Bros., and the bank manager was made aware of the manner in which the plaintiffs were to pay out the mortgage moneys.

In pursuance of the above arrangements, the plaintiffs made several payments, amounting, in all, to \$15,400, prior to February 1st, 1893, when they received an architect's certificate showing that \$1,500 was yet required to complete the building. Upon receipt of this certificate, the mortgage clerk in the plaintiffs' office at Toronto, who had charge of the matter, overlooking the last of the prior advances, a \$1,500 cheque, which had not been posted up in the ledger account, issued a new cheque for \$2,000 on account of the loan and sent it to the defendants. The defendants' manager, as well as Bell Bros., expected to receive only \$500 at that time, as they knew of the architect's certificate then sent, and, in fact, the manager advanced to Bell Bros. only \$500 on the strength of it. On receipt of the \$2,000 the manager of the bank, suspecting that a mistake had been made, kept the extra \$1,500 in a special account, awaiting events.

On the morning of February, the 20th, the plaintiffs' agent informed the bank manager that a mistake had been made and that too much money had been sent, and later on the same day the latter appropriated the \$1,500 to making payment *pro rata* on notes given by Bell Bros. to various persons which had been discounted by the bank. A telegram from the plaintiffs' Toronto office requesting the bank to return the money was received the same day, but after banking hours.

The plaintiffs then sued for the return of the \$1,500.