

It was argued that, by reason of the negotiation which followed after plaintiff ascertained that defendant had without authority given to McDougall a receipt for money on a pretended sale of 34, a settlement was arrived at. McDougall gave up any claim to 34, and got the half of 35, at \$100 a foot. The answer to that satisfactory to me is; (1) McDougall did not really then give up 34. He gave it up subsequently as the result of an action brought by plaintiff against him. This action was commenced by writ issued on 30th March, 1910, and (2) whatever plaintiff did, he did in complete ignorance of the part defendant was playing, until the examination of McDougall for discovery in the action last mentioned. Until that examination the plaintiff did not know that defendant was acting all for himself while pretending to act as agent for plaintiff.

It was argued that in an action of this kind, the measure of damages is not the difference between what plaintiff got from McDougall and what defendant got from Stubbs, but the difference between real value on date of sale to McDougall and the price paid by defendant for the McDougall transaction.

The cases cited by counsel for defendant are, I think, distinguishable, but it is not unfair to the defendant to say that the real value even at the time of McDougall deed was about the sum that Stubbs paid. I would rather accept a real transaction such as sale to Stubbs than the evidence of real estate agents as to the real value. The defendant did not give evidence on his own behalf. It may well be that defendant knew the real value at time of McDougall deed was practically what Stubbs paid a little later on.

In any event the defendant should not complain if asked to pay only what he received.

The defendant's profit was \$60 a foot for 55 feet, \$3,300 as against the small cost of carrying this property from December, 1910, to June 29th, 1911, the defendant may be allowed the $2\frac{1}{2}\%$ commission. If sold in ordinary course by an agent, the owner would have to pay that. This would amount to \$82.50 and would leave \$3,217.50.

It appeared upon the trial that the plaintiff was pecuniarily interested only to the extent of an undivided half of the part of lot 35 in question. Then Mr. Hearst was in equity the owner of and entitled to the other half. Mr.