DAME MARIE ANNE GIRALDI, *et al.*, (PLAINTIFFS) ..... } APPELLANTS;

AND

LA BANQUE JACQUES-CARTIER (DEFENDANTS) ..... } RESPONDENTS.

1882
*Nov. 23.
1883
*May 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Creditor and debtor—Relation of—Agency—Payment—C. C. art. 1143 *—Parties.*

S. G. acquired during the life of his first wife, *M. A. B.*, certain immovable property which formed part of the *communauté de biens* existing between them. At his death, after his marriage with *H. S.*, his second wife, he was greatly involved. His widow, *H.*

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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S., having accepted *sous benefice d'inventaire* the universal usufructuary legacy made in her favour by *S. G.*, continued in possession of her estate as well as that of *M. A. B.*, the first wife, and administered them both, employing one *G.* to collect, pay debts, etc. Shortly afterwards, at a meeting of *S. G's.* creditors, of whom the respondents were the chief, a resolution was adopted authorizing *H. S.* to sell and licitate the properties belonging to the estate of *S. G.* with the advice of an advocate and the cashier of the respondents, and promising to ratify anything done on their advice, and they resolved that the moneys derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned among *S. G's.* creditors *pro rata*. *G.* continued to collect the fruits and revenues and rents, and acted generally for *H. S.* and under the advice aforesaid, and deposited both the moneys derived from the estate of *S. G.*, and those derived from the estate of *M. A. B.*, the first wife, with the respondents, under an account headed "Succession *S. G.*" A balance remained after some cheques thereupon had been paid, for which this action was now brought by the heirs and representatives of Dame *M. A. B.*

Held,—Per *Strong*, *Taschereau* and *Gwynne*, JJ., (*Ritchie*, C.J., and *Fournier* and *Henry*, JJ., *contra*,) that, as between the heirs *B.* and the bank there was no relation of creditor and debtor, nor any fiduciary relation, nor any privity whatever; and as the moneys collected by *G.* belonging to the heirs *B.* were so collected by him as the agent of *H. S.* and not as the agent of the bank, and received by the bank in good faith, as applicable to the debts of the estate of *S. G.*, and as the representatives of *H. S.* were not parties to the action, the appellants could not recover the moneys sued for.

APPEAL from a judgment rendered on the 21st March, 1882, by the Court of Queen's Bench, *Montreal*, reversing a judgment of the Superior Court, *Montreal*, whereby appellant's action had been maintained against respondents, for an amount of $9,933.01 and interest, and dismissing said action.

The facts that gave rise to the appellants' action, the the pleadings and points relied on by counsel are referred to at length in the judgments hereinafter given (1).

(1) See also Report of case 26 L. C. Jur. 110.

Mr. *Trenholme* and Mr. *Beïque*, for appellants.

Mr. *Globensky*, Q. C., for respondents.

RITCHIE, C. J. :—

It cannot be doubted that a portion of the moneys of the heirs *Bosna* was deposited in the bank under the heading "Succession *S. Giraldi*," and is still there. The amount is clearly established, and the evidence shows that Dame *Henriette Giraldi* was entirely incapable of administering the estate, that she did not do so and that the cashier of the bank with the legal adviser did administer it. The amounts belonging to the old and new succession were capable of separation and were separated property belonging to the heirs *Bosna*, and those who were acting for them must reasonably be taken to have known, and must have known had they chosen to make reasonable enquiries, and as *Louis Guimond* unquestionably did know, that the half of said revenues belonged to the heirs *Bosna*. The mere fact of these parties depositing the money in the bank under the heading they did, does not entitle the bank to retain that portion of the moneys so deposited belonging to the heirs *Bosna* in payment of the debts of the succession *Giraldi*. There is no principle of law or equity that I am acquainted with that would justify the robbing of one estate to pay the debts of another.

It is, to my mind, quite clear that in reference to the administering of this estate Dame *Henriette Senecal* was a cypher, that the collecting of the debts and rents and revenues of the immoveables, half of which belonged to the heirs *Bosna*, was, at the instance of the creditors of said *Giraldi* (the bank being the largest, in fact the principal creditor), practically and substantially taken out of her hands and confided to the attorney and cashier of the bank, with *Louis Guimond* acting under

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their directions and orders, who deposited the same in the said bank under the heading "Succession *S. Giraldi*." The bank knew full well that the creditors of *S. Giraldi* had no right to be paid out of these moneys

The parties must have known that the succession *Senecal* was only entitled to half of the revenues; that through the cashier and attorney, and *Louis Guimond*, employed by them, the revenues were collected, and that the other half belonged to the heirs *Bosna*, and could not legally or equitably be applied to the payment of the debts of the succession *Giraldi*.

This is by no means the ordinary naked case of banker and customer. It appears to me beyond all question, that from the very moment of the opening of this account the bank knew, or had the means of knowledge, and must have known but for wilful ignorance, that a portion of the moneys paid into that account arose from the rents and profits of the property of the heirs *Bosna*, and could make no arrangement with dame *Henriette Senecal* so as to be at liberty to appropriate such rents towards the liquidation of the debts of the succession *S Giraldi*, and made no such arrangement; and that no such arrangement was ever contemplated at the meeting of the 15th March, 1870, at which neither dame *Henriette Senecal* nor the heirs *Bosna* were represented.

Even supposing these amounts were paid in and received by the bank under the impression that they belonged to the succession of *S. Giraldi*, upon what principle can they, before they had been disposed of or distributed, and while still in hands of the bank, and when knowledge is brought home to them that they do not belong to the succession *S. Giraldi*, be permitted to misapply and mis-appropriate them, and apply them to the discharge of *S. Giraldi's* debts, to the loss and injury

of the heirs *Bosna*, who are in no way liable, legally or equitably, to discharge them; and the only reason the cashier gives why it should be paid to the creditors of *S. Giraldi* is to be found in his evidence, as follows:

Q. La Banque ne doit-elle pas cet argent aux créanciers, en vertu de l'autorisation à vous donnée, à l'assemblée des creanciers? R. Oui. * * *

Q. Quand vous dites que, d'après vous, la balance en depôt à la Banque *Jacques Cartier* devrait été payée aux creanciers de feu M. *Giraldi*, c'est parceque vous ne connaissez pas les droits des héritiers de *Marie Ann Bosna?* R. C'est parceque je pense tout simplement que ce serait un acte de justice: mais je ne connais pas les droits des héritiers de *Marie Ann Bosna.*

A most singular idea of an act of justice—for what possible right had the creditors of *S. Giraldi* to authorize the collecting of the revenues of the heirs *Bosna* to pay these debts?

I am of opinion the appeal should be allowed, and the judgment of the Superior Court restored.

STRONG, J.:—

I am of opinion that the proper conclusion from the evidence is that the revenues derived from all the properties, as well those belonging to the estate *Bosna*, as those belonging to the succession *Giraldi*, were paid by Madame *Giraldi*, acting through her agent *Guimond*, into the bank to be ultimately distributed amongst the creditors of the *Giraldi* succession. It does not, it is true, appear from the minutes of the meeting of the 15th March, 1870, the resolutions of which have reference exclusively to the sales of the properties belonging to the succession *Giraldi*, and the distribution of the monies arising from those sales, that the creditors came to any conclusion as to the disposal of the revenues. It is, however, a fair inference from the whole course of proceeding, as well as from the evidence of Mr. *Cotté*, that the monies were paid into the bank, not upon an

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ordinary deposit account, but as funds to be applied to the payment of the debts of the succession. Then, so far as I can see, the evidence fails to establish that *Guimond* was the agent, or mandatary, of the bank. He is not referred to in the minutes of the meeting and it is not shown that he received any express authority from the bank, or from Mr. *Cotté*, to receive the rents or to act in any manner as their agent or the agent of the creditors. He had been the agent of Mr. *Giraldi*, in his lifetime, acting as such in receiving the rents of the properties belonging to the estate *Bosna*, as well as of those belonging to Mr. *Giraldi* himself, and after the death of the latter he continued to act in the same capacity for Madame *Giraldi*, and this he continued to do after the creditors' meeting in the same manner as he had formerly done. In effect, therefore, these rents were received by Madame *Giraldi* through her agent, *Guimond*, and were by her paid to the bank, for the benefit of itself and the other creditors, as monies belonging to the estate *Giraldi*, and were by the bank received in good faith as monies properly applicable to that purpose, and the legal result must be precisely the same as if Madame *Giraldi* had personally collected the rents and paid the money to the bank. The law applicable to such a state of facts is contained in art. 1143 of the Civil Code of the province of *Quebec*. That art. (which is identical with art. 1239 C. N.) is expressed in these words:

"Pour payer valablement il faut avoir dans la chose payée un droit qui autorise à la donner en paiement.

Néanmoins le paiement d'une somme en argent ou autre chose qui se consomme par l'usage, ne peut être répété contre le créancier qui a consommé la chose de bonne foi, quoique ce paiement ait été fait par quelqu'un qui n'en était pas propriétaire ou qui n'était pas capable de l'aliéner.

There is some difference of opinion amongst the commentators as to whether this article applies at all

to the action which the true owner of the money or thing given in payment institutes for its recovery, and whether it is not confined to the case of the debtor who has unduly paid his debt with the money or property of another seeking a repetition of the payment (1). *Demolombe*, however, shows very clearly that it correctly expresses the law applicable to the action of the true owner, and is not restricted in the manner suggested by the other authorities quoted (2); and, interpreting it in this sense, it entirely agrees with the English law as expressed in the adage, that "money has no ear mark" (3).

Then, applying this article to the facts of the present case, as before stated, it is clear that the Court of Queen's Bench rightly dismissed the action, for the money was received by a creditor in good faith, it not being suggested that the bank had any knowledge of the rights of the heirs *Bosna*, unless, indeed, *Guimond* was their agent, and that he was not their agent appears to be the true conclusion from the facts in evidence.

The only other condition requisite to disentitle the plaintiffs to recover is that the money should be "consumed," and the payment of money into a bank and the mixture of it with its other funds according to the ordinary course of business, is equivalent to consumption. That the whole question turns upon the supposed agency of *Guimond* is conceded by the learned judge who dissented in the Court of Queen's Bench, Mr. Justice *Tessier*, and he only reached the conclusion that the plaintiffs were entitled to judgment by holding that it was proved that *Guimond* was the agent of the bank, a view of the facts in which I am compelled to differ from him.

(1) See Larombière, art. 1238, Aubry et Rau, vol. 4, p. 152; Laurent, vol. 17, p. 487.

(2) Demolombe, vol. 27, p. 105.

(3) See case of Market Overt, Tudor—L. C. Mercantile Law, p. 274 (3rd. Ed.)

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I am of opinion that the appeal must be dismissed with costs.

FOURNIER, J.:

Le présent appel est d'un jugement rendu par la Cour du Banc de la Reine à *Montréal*, le 21 mars 1882, infirmant le jugement de la Cour Supérieure pour le District de *Montréal*, par lequel cette dernière avait condamné l'intimée à payer aux appelants $9,933.04.

L'action des appelants est fondée sur les faits suivants : Feu *Seraphino Giraldi*, hôtelier de *Montréal*, fut marié deux fois ; la première à *Marie Anne Bosna*, décédée en 1841 ; la seconde à *Henriette Sénécal*, décédée en 1877.

Il y a eu des enfants des deux mariages. Du premier sont nées *Marie Anne Giraldi*, *Julie Giraldi* et *Eliza Giraldi*. Avec sa première femme *Giraldi* était en communauté de biens. Avec sa seconde une séparation de biens avait été obtenue en justice.

Les immeubles décrits en la déclaration en cette cause formaient partie de la communauté de biens qui avait existé entre *Giraldi* et *Marie Anne Bosna*. Ce fait est constaté par l'inventaire fait par *Giraldi* en qualité de tuteur à ses trois filles issues de son mariage avec *Marie Anne Bosna*, sa première femme. Il était encore en possession, par indivis, de ces immeubles à l'époque de son décès.

L'action est intentée par l'une des trois filles du premier mariage de *Giraldi* et par les représentants des deux autres. Il est inutile d'énoncer ici de nouveau la filiation, les titres et qualités des parties, on en trouvera un exposé complet dans les notes de l'Honorable Juge *Tessier* sur cette cause.

Lors de son décès *Giraldi* était en faillite ; cependant il avait fait un testament constituant Dame *Henriette Sénécal*, sa seconde femme, légataire universelle en usufruit, avec pouvoir de vendre ses propriétés pour payer

ses dettes. Ce legs fut accepté par sa veuve sous bénéfice d'inventaire.

Les créanciers de *Giraldi*, au nombre desquels se trouvait l'intimée pour le plus fort montant, se réunirent le 15 mars 1870, et, après avoir pris communication du testament de feu *Giraldi*, autorisant dame *Henriette Sénécal*, sa légataire, de vendre les immeubles pour payer les dettes de sa succession, s'en déclarèrent contents et satisfaits. Après quelqu'autres décisions concernant le règlement des affaires, ils adoptèrent, en outre, les résolutions suivantes:—

Ils désirent que sur le tout, ma dame *Giraldi* prenne, comme par le passé, l'avis de *F. Cassidy*, Ecuier, avocat, et *Honoré Cotté*, Ecuier, Caissier de la Banque *Jacques-Cartier*, deux des créanciers, et qui, même du temps de M. *Giraldi*, étaient ses aviseurs ordinaires, promettant avoir pour agréable tout ce qui sera fait de l'avis de ces Messieurs.

Et comme il est impossible de dire encore quel est l'état actuel et réel de la succession, les dits créanciers déclarent qu'ils sont d'opinion et désirent que les argents provenant de la vente à mademoiselle *Cuvillier*, ainsi que celle de la propriété de la rue *Dubord*, et celles des autres propriétés, après qu'autorisation suffisante aura été obtenue *soit pour les liciter volontairement ou forcément*, soient déposés dans la dite Banque *Jacques-Cartier* pour être partagés et divisés entre les dits créanciers, au *pro rata* de leurs réclamations contre la dite succession quand tout aura été réalisé, désirant dans l'intérêt de tous, que toute précaution possible soit prise pour arriver à un bon résultat, et se fiant entièrement aux dits Conseils de madame *Giraldi* et à ceux qui ont en mains le règlement des affaires de la succession. Les dettes hypothécaires et privilégiées devant être payées avant partage des dits argents, comme dit plus haut.

Et les dits créanciers ont signé.

Montréal, ce 15 Mars 1870.

Ces résolutions sont adoptées et signées par une longue liste de créanciers, dans laquelle ne figurent aucun des héritiers *Bosna*.

Conformément à ces résolutions la collection des revenus de cette succession fut confiée à *Louis Guimond*, qui avait été pendant plusieurs années le gérant d'affai-

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res de *Giraldi*. *Guimond* devait agir sous le contrôle et la direction de M. *H. Cotté*, caissier de la Banque *Jacques-Cartier* (Intimée) et de M. *Francis Cassidy*, solliciteur de cette banque.

Guimond s'est fidèlement acquitté de ses fonctions. Il a collecté tous les revenus des propriétés de *Giraldi*, tant ceux des propriétés dont il était seul propriétaire, que ceux des propriétés qu'il possédait par indivis avec les enfants issus de son premier mariage avec *Marie Anne Bosna*, demandeurs en cette cause. Ces revenus ont été indistinctement déposés par *Guimond* à la banque *Jacques-Cartier*, au compte ouvert par celle-ci sous le titre de "Succession *Giraldi*." Il est indubitable que les deniers provenant de la succession *Bosna*, de même que ceux provenant des propriétés de *Giraldi*, ont été déposés et confondus sous le même titre. La Banque (Intimée) à qui l'on demande maintenant le remboursement des deniers reçus de cette manière, et sur lesquels elle n'a aucun droit, prétend en justifier l'appropriation en alléguant qu'ils ont été déposés sous le nom de Succession *S. Giraldi*, qu'elle est créancière de *Séraphino Giraldi* pour $40,000, qu'elle n'est aucunement tenue de rendre aux héritiers *Bosna* leurs deniers ainsi reçus. Elle admet que ces deniers sont encore dans sa caisse, moins deux paiements qu'elle s'est faite à elle-même. Elle se plaint aussi que les héritiers *S. Giraldi* ne sont pas en cause.

Quant à ce dernier grief il y a été remédié par la mise en cause de *François Sénécal*, exécuteur testamentaire de feu Dame *Henriette Sénécal* et curateur à la substitution créee en faveur des enfants de feu *Z. B. Séraphino Giraldi*, légataire de la propriété. *Sénécal* n'a pas contesté les droits des *Bosna*.

Cette objection de forme écartée, il reste à savoir si le fait que les deniers des *Bosna* ont été déposés à la Banque au compte qu'elle a ouvert au nom de *S.*

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Giraldi lui forme un titre suffisant pour refuser de les rendre à ses propriétaires. *Guimond* était incontestablement le mandataire de la banque ; il a été choisi par elle, et dans tout ce qu'il a fait il a agi sous la direction de M. *Cotté*, son caissier et de *Cassidy* son solliciteur. *Guimond* savait que ces deniers appartenaient aux *Bosna*, et la connaissance qu'il en avait doit être censée remonter jusqu'à la Banque dont il était le mandataire. Indépendamment de cette connaissance présumée, la résolution citée plus haut, adoptée par les créanciers fait voir qu'on n'ignorait pas que des tiers avaient des droits de propriété dans les immeubles de la succession *Giraldi*. Après avoir ordonné le dépôt des argents devant provenir de la vente de deux propriétés mentionnées dans cette résolution, les créanciers ordonnent de plus qu'il en sera de même pour les autres propriétés, après qu'autorisation suffisante aura été obtenue soit pour les liciter *volontairement* ou *forcément*. Avec qui prévoit-on qu'on aura à liciter quelques-unes des propriétés. Evidemment, il n'est pas question là d'une licitation des propriétés appartenant à *Giraldi* seul. Pour être payés de leur dû les créanciers n'avaient qu'à la faire vendre soit en justice, soit par *Henriette Sénécal* qui y était autorisée. Il ne pouvait y avoir de licitation à moins d'un indivis entre *Giraldi* et quelques autres propriétaires dont on connaissait et admettait les droits dans quelques-unes des propriétés. Quels étaient ces co-propriétaires ? La résolution ne les nomment pas, il est vrai. Mais s'ils ne sont pas nommés, n'est-ce pas parce que l'on savait trop bien avec qui il fallait compter pour procéder à cette licitation *volontairement* ou *forcément*, comme le dit la résolution. Cette déclaration n'est-elle pas une admission formelle que l'on savait alors que *Giraldi* avait des co-propriétaires dans certaines propriétés ? La banque était donc informée et savait qu'en retirant tous les revenus des pro-

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prétés elle se trouvait à retirer en même temps des argents n'appartenant pas à son débiteur et qu'en cela elle agissait comme *negotiorum gestor* des co-propriétaires de *Giraldi*. Bien que les *Bosna* ne soient pas nommés dans cette résolution, il n'est que juste de présumer que la banque agissant par son caissier et par *Guimond*, qui avaient la direction et la gestion des affaires de la succession *Giraldi*, savait aussi que les co-propriétaires, dont elle reconnaissait l'existence, étaient les *Bosna*. C'est en vain que l'intimée essaierait de rejeter sur la succession insolvable de *Giraldi*, la responsabilité de ce qu'elle a fait faire par ses agents *Louis Guimond* et *Henriette Sénécal*. Cette dernière, surtout, n'a été qu'un instrument passif entre les mains de la banque ; la seule part qu'elle a prise à cette administration a été de faire sa marque d'une croix au bas des chèques que le caissier *Cotté* et le solliciteur *Cassidy* l'induisaient à signer dans l'intérêt de la banque. Cette femme n'entendait rien aux affaires, et n'a fait en tout ceci que prêter son nom à la banque pour faciliter le règlement des affaires.

La preuve faite par *Guimond* a établi de la manière la plus positive quelles sommes ont été retirées pour la succession *Bosna*, et quelles autres sommes l'ont été pour la succession *Giraldi*. Il ne peut y avoir d'erreur sous ce rapport. La banque ayant encore dans sa caisse ces deniers qu'elle sait ne pas lui appartenir, et les *Bosna* ayant prouvé clairement que ces mêmes deniers leur appartiennent, il n'y a pas de motif raisonnable qui puisse empêcher d'en ordonner la restitution.

Toute la preuve faite par l'intimée consiste dans une reddition de compte faite en 1872 par *Henriette Sénécal* aux héritiers *Bosna*, et dans deux actes d'acceptation de ce compte par deux des Demandeurs. Elle prétend tirer de ces actes une preuve que les héritiers *Bosna* ont approuvé et sanctionné ce qui a été fait par *Henriette*

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Sénécal pour le règlement de la succession *S. Giraldi*, que, conséquemment, ceux-ci n'ont maintenant de recours que contre *Henriette Sénécal* ou la succession insolvable de *S. Giraldi*. Il est facile de voir en lisant les actes qu'il est impossible de les interpréter de manière à soutenir cette prétention.

D'abord il apparaît à la face de cette reddition de compte qu'elle n'a aucun rapport à l'administration de *Henriette Sénécal*, elle-même, des biens de la succession *Bosna*, depuis l'adoption de la résolution des créanciers, l'obligeant à déposer les revenus de la succession *Giraldi*, à la Banque *Jacques-Cartier*. Le préambule déclare au contaire que c'est en sa qualité d'administratrice des biens de la succession de son mari, en vertu de son testament qu'elle rend compte aux héritiers de feu Dame *Marie Anne Bosna des biens et de l'administration et gestion qu'en a eu le dit feu S. Giraldi*. Cette déclaration est assez précieuse pour faire voir qu'il ne s'agit aucunement d'une reddition de compte personnellement par la dite Dame *Henriette Sénécal*. C'est comme légataire en usufruit de son mari qu'elle rend un compte que celui-ci aurait dû rendre. Elle ne prétend pas rendre un compte de son intervention personnelle dans les affaires de la succession *Bosna*. Il est impossible de voir en quoi cela peut compromettre les droits des *Bosna* aux deniers retirés par la dite Dame *Sénécal* et déposés par elle dans la caisse de l'intimée. Il est vrai que les parties ont admis que dans ce compte se trouvent mentionnés les fruits et revenus des propriétés dont il est question en cette cause jusqu'à l'époque de sa date ; c'est-à-dire qu'on en a fait une déclaration et rien de plus. La rendant compte ne s'en est pas reconnue débitrice et n'a ni payé ni promis d'en payer le montant. Tout au plus ce compte pourrait être considéré comme un simple état de ce qui était alors dû pour fruits

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et revenus à la succession *Bosna*. L'acceptation de ce compte par deux des héritiers ne tire pas plus à conséquence que le compte lui-même. Les héritiers n'ont point donné une quittance à *Henriette Sénécal* pour les dits fruits et revenus, n'ayant touché aucuns deniers lors de cette reddition de compte, ils se sont bornés à approuver les chiffres du compte sous la réserve expresse de tous leurs droits, exprimés dans les termes suivants :

> Mais la présente acceptation du dit compte est ainsi faite par les dits comparants *sans préjudice, novation ni dérogation aux droits hypothécaires* qui leur sont acquis sur les biens du dit feu M. *Giraldi* et de sa succession pour le reliquat du dit compte et *toutes autres réclamations quelconques*, lesquels ils entendent conserver en leur entier pour les exercer et faire valoir quand et ainsi qu'ils aviseront et en seront avisés.

En examinant attentivement cette reddition de compte et les actes d'acceptation, on voit que ces documents ne peuvent aucunement préjudicier aux droits des appelants ; que si, au contraire, ils font quelque preuve, c'est que dans tous les cas l'intimée a eu une connaissance positive des droits des héritiers *Bosna*, au moins à la date de cette reddition de compte produite par elle-même, savoir au 13 octobre 1872. Mais je suis d'avis qu'elle avait déjà obtenu cette connaissance par la résolution citée plus haut.

On a dit que la banque aurait eu une bonne défense si elle eût fait des avances sur le dépôt des derniers en question où si elle les eût distribués aux créanciers de la succession *Giraldi*. Je ne le crois pas ; la connaissance qu'elle a eu du droit des tiers par la résolution du 15 mars 1870, et par la reddition de compte aurait toujours été un obstacle à son appropriation de ces deniers. Dans tous les cas les deniers sont encore en caisse, à l'exception des deux paiements faits. Quant à ces paiements on doit présumer que la banque les a faits avec les deniers qui lui appartenaient,

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et non pas avec ceux qui ne lui appartenaient pas. Je crois donc pour les motifs ci-dessus exposés, que la réclamation des *Bosna* est fondée en loi et en équité et que le jugement de la Cour Supérieure aurait dû être maintenu. Pour les raisons contenues dans ce jugement, je suis aussi d'avis que l'intérêt devrait être accordé pour cinq années au moins. Le jugement de la Cour du Banc de la Reine devrait être infirmé, et celui de la Cour Supérieure rétabli intégralement avec dépens dans toutes les cours.

HENRY :—

The decision in this case does not, in my view, turn upon any delicate points of law, but upon the correct appreciation of the facts arising from two distinct successions. *Séraphino Giraldi* was married to *Mary Ann Bosna*, and between them there was a community of property during their joint lives. She died, and on her death there were two successions—the maternal one, on her side, and the paternal one, that of her husband's. Her heirs then became entitled to the rents, issues and profits of all the immoveable property. After the death of *Séraphino Giraldi*, who died intestate, *Henriette Senecal*, his second wife, became the executrix of his estates, and being incompetent to manage the business portion of the administration, a meeting of the creditors was held at the bank *Jacques Cartier*, and at that meeting the bank was represented by its solicitor and their manager. At that meeting a Mr. *Guimond*, who had previously managed the estate of *Giraldi*, was appointed to act for the creditors and for the executors. He was authorized to collect the rents, to sell moveable property, and to administer the estate of *Séraphino Giraldi*. In carrying out his duties in that respect, it became necessary, to a certain extent, to collect the rents due to the two estates from undivided property held

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by the two successions. In doing so he acted to a great extent under the directions of the bank, through their manager and professional adviser. He did so, and in collecting the monies he paid them into this bank to the credit of *Henriette Senecal*, and they could not be withdrawn from that bank, (which, to my mind, became a mere bank of deposit in the interest of the parties whose moneys were deposited there), without the cheque or other authority of the executrix. There was no difficulty in tracing this money, for *Guimond* distinctly stated the amount that was collected for one interest and for the other. That money being placed there, then, to the credit of Mrs. *Senecal* or Mrs. *Giraldi*, it was at her disposal, and she could control the payment of it by her cheque. It was not paid in there for the use of the creditors, nor for the use of the bank, and there was no appropriation made of it by her until she drew cheques for it. A certain amount was drawn and applied to the debts of the *Giraldi* succession, and the amount now sought to be recovered is the amount that was properly due to the succession *Bosna*. It was said that *Guimond*, who paid that in, was not the agent of the bank. Whose agent was he, then? Whom did he act for? In carrying out the instructions of *Cassidy* and *Cotté*, the solicitor and manager of the bank, he was virtually acting so as to bind the bank as fully as if the directors had given positive instructions what to do with the money. That money never became the money of the bank. It was placed in the bank on deposit, the same as it would be in any other bank, and dismissing from our minds the fact that the bank were creditors of *Giraldi*, how would it stand if that money had been deposited in that bank for any other estate? To whose credit was it paid in? Certainly, to the credit of the executrix, partly for the one estate and as the tutor of the other. She had the right of appropriation of that money.

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She could apply a portion of it to pay the debts due by one estate, and the other to the payment of the money due to the heirs of *Bosna*. That money being paid into the bank as a mere bank deposit, what right has the bank to retain it when the true owner of it appears to claim it, and clearly establishes his right to it? They cannot defend this action because it was not the money of the estate of *Giraldi*, that remains in the bank as its share had been withdrawn. We are told that there was no agency of the bank shown in *Guimond*. I cannot conceive how an agency can be proved in stronger terms. One party appoints another to do a certain act, and in doing it, it is necessary for him to involve the interests of a third party. It is true, he (*Guimond*) was not directly authorized to collect what was due to the succession *Bosna*, but if it became necessary in carrying out his instructions that that circumstance should arise, his acts became the acts of his principal.

Guimond paid that money into the bank to the credit of Mrs. *Senecal*, in the way mentioned, and it remains in the bank still. The bank has never attempted to use that money in any way. It is there to the credit of the executrix of the estate *Giraldi*, and of the tutor of the estate *Bosna*. No appropriation of that money has been made; the bank had no power to make any appropriation of it, but if they wished to exercise that power they certainly had many years to do it in. They never made the attempt to do so, and we have the right to conclude that they never considered themselves entitled to make such an appropriation. Under the circumstances, I entirely agree with the judgment of Mr. Justice *Tessier*, in the court below, and I have no hesitation in saying that both equity and law are in favor of these parties receiving their money. We have not in this case to strain nice legal points, and give them consider-

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ation in favor of the party against equitable rights. I maintain, however, there is nothing on the side of the defendants here as far as the law goes. We have a right then to look at the equity of the case, and see that the money of one party is not taken, as the Chief Justice says, to pay the debts of an insolvent estate to parties who are not entitled to it. I consider, under these circumstances, that the appellants have the right to recover this money. It is a principle of law that whoever receives another man's money through a third party, the owner has a right to go to the party who received it and say "That is my money; you have received it on my account, and, therefore, I have a right to recover it back," and the bank has no right, in this case, to say, "We received that money as a deposit from one who really did not own it." Under these circumstances, I am of opinion with the Chief Justice and Mr. Justice *Fournier*, that the appeal should be allowed. The bank received it merely as a holder of the money in the meantime, until it is appropriated by the party who has the right to do so by law. I consider the parties here are entitled in law and equity to recover the money that was paid in to their use.

TASCHEREAU, J.:

This most extraordinary action has been rightly dismissed by the Court of Queen's Bench. I cannot help seeing in it a conspiracy, between the *Giraldis*, the *Bosnas*, and *Guimond*, to defraud the bank of a comparatively large amount. On the simple ground alone, taken by *Cross* and *Ramsay*, JJ., that the late *Giraldi* is not represented in the cause, the judgment must be confirmed.

To say that this estate is represented by the parties

(I) 26 L. C. J. 114.

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mis en cause is an error. The estate is vacant. Evidently, the plaintiffs must be under the impression that, because *Giraldi's* succession was accepted *sous bénéfice d'inventaire*, this gave to his legatee, *Henriette Sénécal*, the right to appropriate all the revenues of the estate, without being liable for the debts. The court below rightly held that *Guimond* was not the agent of the bank. The meeting of creditors has nothing to do with these revenues, but only with the proceeds of the sale of the immoveables. This is clear on the face of the resolutions. Then it is, in itself, a perfect nullity These heirs *Bosna* were all of age in 1869, when *Giraldi* died. *Henriette Sénécal*, with their consent, for they never objected to it, took possession of the whole estate, *Bosnas'* as well as the *Giraldis'*, and had the administration of it. Acting consequently as agent for the *Bosnas*, the plaintiffs, she employed as a sub-agent or accountant a man named *Guimond*. She received $22,267.57 as revenues of the immoveables. Only $9,635.59 of this remain in the bank. Now, it is evident that, the difference, which is the amount drawn by *Henriette Sénécal* was the plaintiff's monies, and no other. It was the only money which she could draw as their agent. She had no right whatever over the *Giraldi* succession's monies. And the plaintiffs must be presumed to have known what their agent did in the matter. After allowing her to do so, after, perhaps, having benefitted themseves by these monies, they, immediately after *Henriette Sénécal's* death, (for it is remarkable that as long as she lived they never entered a claim against the bank,) contend that what *Henriette Sénécal* drew from the bank was not their monies, but the *Giraldi* monies. Their position is untenable. They may have a claim against *Henriette Sénécal's* estate, but they certainly have none against the bank.

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Then, in law, under art. 1143 C. C., the plaintiff's action must also fail.

It was held, in a case reported, that (1):

Le paiement d'un somme en argent ne peut être répété contre le créancier qui l'a reçu de bonne foi de son débiteur croyant que celui-ci en était propriétaire.

Here it is clear, by *Côtté's* evidence, that the bank was in good faith.

I am of opinion to dismiss this appeal.

GWYNNE, J.:—

An accurate understanding of the facts is necessary to the due appreciation of the point of law involved in this case, and will serve to remove the difficulties which appear to surround it. Mr. *Séraphino Giraldi* in the month of January, 1821, married as his first wife Dame *Marie Ann Bosna*, without any marriage contract, *et sous le regime de la communauté*; of this marriage there were three children born, namely:—1. *Marie Ann Giraldi*, now the wife of *Leon Chapdelaine*; 2. *Julie Giraldi*, who became the wife of one *Alexis Girard*, and is now deceased; and 3. *Eliza Giraldi* also now deceased. Dame *Marie Ann Bosna* died in the month of January, 1841, leaving her surviving and her sole heirs her said three daughters.

By an inventory duly taken at the instance of the said *Séraphino Giraldi* on the 3rd March, 1841, it appears that the assets of the community of property which had existed between him and his deceased wife, comprised three pieces of immoveable property situate in the city of *Montreal*.

Afterwards, but when in particular does not appear, save that it was prior to the year 1848, the said *Seraphino Giraldi* married, as his second wife, Dame *Henriette Sénécal*. *Julie Giraldi*, the wife of *Alexis Girard*, died

(1) Dalloz, 1867, vol. 2, p. 178.

in the month of January, 1845, leaving her sole heir a son of her marriage with *Alexis Girard*, whose name is also *Alexis*.

Eliza Giraldi, the third daughter and one of the co-heiresses of Dame *Marie Ann Bosna*, died in the month of July, 1848, after the second marriage of her father, having first duly made her last will and testament, whereby she appointed her step mother *Henriette Sénécal*, her universal legatee in *usufruct*, and *Seraphino Giraldi*, issue of the marriage of the said *Henriette* with *Seraphino Giraldi*, her universal legatee *en proprieté*.

Seraphino Giraldi, the husband of *Henriette Sénècal*, died in the month of May, 1869, having first duly made his last will and testament, whereby he made his widow universal legatee in *usufruct* of all his immoveable property of which he made their son *Seraphino* universal legatee *en proprielé*.

By the 7th article of his will he authorized his widow to sell any portion of his property for the payment of his debts upon her own sole authority without any *autorisation en justice*, or any previous valuation and without the consent of any of his legatees. Up to the time of his death the said *Seraphino Giraldi* was still in possession of the above mentioned landed property, which constituted the community of property that had existed between him and his first wife, and in receipt of the rents, issues and profits thereof.

The estate of *Seraphino Giraldi* was at the time of his death in a hopeless state of insolvency, and his widow *Henrietta*, having accepted *sous benefice d'inventaire* the universal usufructuary legacy made in her favor, a meeting of *Seraphino's* creditors, of whom the defendants were the principal, was held on the 13th March, 1870, at which meeting a resolution was adopted by the creditors, which was put into the form of a deed of deposit of an *acte sous seing privé signé et paraphé ne*

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varietur before *Jobin et Desrosiers*, notaries, to the effect following: The creditors, having taken cognizance of the last will and testament of the late Mr. *Giraldi*, made before Mr. *J. Belle et Confrère*, notaries, on the 21st July, 1868, and particularly of the 7th clause of it, by which Madame *Giraldi* is specially authorized to sell the real estate to pay the debts of the succession, declared themselves to be content and satisfied with it, and they declared themselves satisfied with a contemplated sale of property on *rue St. Denis* to a Miss *Cuvillier* for the sum of $7,200, and they authorized Madame *Giraldi* to complete that sale, and they advised Madame *Giraldi* to make sale of another property on *Dubord* street provided that it should not be sold for a less sum than $2,000.

And they desired that above all things, Madame *Giraldi* should take, as in the past, the advice of *F. Cassidy*, Esq, advocate, and *Honoré Colté*, Esq., cashier of the *Bank Jacques Cartier*, two of the creditors, and who, even in the time of Mr. *Giraldi*, were his ordinary advisers, promising to confirm everything which should be done upon the advice of these gentlemen.

"And as it is impossible to say yet what is the actual and real condition of the succession, the said creditors declare that they are of opinion, and desire that the moneys arising from the sale to Miss *Cuvillier*, as well as that from the sale of the property on *Dubord* street, and from the other properties, after obtaining sufficient authority for the voluntary or forced licitation thereof, should be deposited in the *Jacques Cartier* Bank to be apportioned and divided amongst the said creditors *pro rata*, according to their respective claims against said succession, when the whole shall be realised, desiring in the interest of all that every possible precaution be taken to arrive at a good result, and confiding entirely in the said advisers of the

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dame *Giraldi* and in those who have in their hands the regulation of the affairs of the succession; the hypothecary and privlieged debts being paid before the division of the said money as aforesaid."

Now, as regards this agreement concluded between the creditors, of whom the defendants were the chief, and Mrs. *Giraldi* as representing the *Giraldi* succession in her character of universal usufructuary legatee *sous benefice d'inventaire*, it seems to be appropriate to observe here that its object and effect was clearly, as it appears to me, to constitute the fund, when created by deposits in the bank, a trust fund, of which the bank who were parties to the agreement, and acting on behalf of all the creditors were quasi trustees, and as such having imposed upon them the duty to hold the moneys so deposited upon and for the trust purpose declared in the agreement—namely, for the benefit of the creditors generally, to be divided among them *pro rata* according to the amounts of their respective claims; and therefore that Madame *Giraldi* could not apply, and the bank should not permit to be applied, any part of such trust fund to any other purpose than it was by the agreement intended that it should be applied—namely, division among the creditors of the succession. If any moneys not derived from the property of the succession, but belonging to Mrs. *Giraldi* in her individual capacity, or moneys over which in such her individual capacity she had control, should by mistake and inadvertence be deposited to the credit of the trust fund, it should be competent for Mrs. *Giraldi* to claim the right to withdraw, and for the bank, upon being satisfied of the fact relied upon in support of her claim, to permit her to withdraw, such moneys from the trust fund account as not properly belonging to it. Hence, it follows, as it appears to me, as a clear principle of equity, that if any moneys should be withdrawn

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from such trust fund when once created by deposit in the bank, which moneys so withdrawn were not applied, or cannot be shown to have been applied, to the purposes of the *Giraldi* succession, it must be assumed that the moneys so withdrawn were the moneys not belonging to the succession and which had been, by inadvertence and mistake, deposited to the trust fund account. Where an act is done which may be rightfully performed, the person doing it cannot be heard to say that it was done wrongfully. So, here, if Mrs. *Giraldi* had deposited to the credit of the trust fund created in pursuance of the agreement with the creditors of the *Giraldi* succession, moneys either belonging to herself, or over which, as agent for others, she had control, and not arising from any property of the *Giraldi* succcession, and if she should be afterwards permitted by the bank, who, as I have said, were *quasi* trustees, having control of the fund for the benefit of all the creditors, to withdraw from the fund any money not for the purposes of the succession, she could never be heard as against the bank to assert that the money so withdrawn was not the money which, not arising from any property of the succession, had been improperly and by mistake and inadvertence deposited to the credit of the trust fund, but was money rightfully belonging to the succession, and which it had been agreed should remain in the bank for the benefit of, and to be divided among, the creditors of the *Giraldi* succession. An account kept in the books of the bank in pursuance of the said agreement between the creditors and Madame *Giraldi* would not be an account whereby, as in the ordinary course of business governing the opening of an account with a customer, the bank would simply become the debtor of the customer for the amounts deposited to his credit, but would be an account special in its character, as to which, for the protection of the

fund for the benefit of all the creditors, the bank had agreed to assume a fiduciary position.

The agreement between the creditors and Madame *Giraldi*, apparently contemplating, as it did, an early sale of the real estate of her deceased husband, provided only for the deposit of the moneys arising from such sales; but the sale of the properties constituting the *communauté* did not take place for some years, and as the estate was hopelessly insolvent and the creditors of the estate were the sole persons beneficially interested in it, and the intention of the creditors parties to the agreement clearly was that the assets of the estate should be and remain deposited in the bank for their benefit until the period of division should arrive upon the whole estate being realised, Madame *Giraldi* appears to have acted in the spirit of the agreement by causing to be deposited in the bank the moneys belonging to the estate derived from the rents of the realty and from all other sources. What appears to have been done was this: Madame *Giraldi*, immediately after the decease of her husband and the acceptance by her of the *usufructuary* legacy given by his will, *sous bénéfice d'inventaire*, being herself an illiterate person and unable even to write her name, and quite incompetent to transact business, employed one *Guimond*, who had been a confidential clerk of her husband for ten years previously to his death, to get in and receive for her the assets of the estate, and she caused to be opened at the bank *Jacques Cartier* an account in the name of the "Succession *Seraphino Giraldi*," to the credit of which account she caused to be deposited all moneys belonging to the succession coming to her hands, or received by *Guimond* for her. Upon this account she was in the habit of drawing cheques, as well to pay the expenses of management as insurance repairs and other purposes.

To this account, so opened, she continued, after the

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agreement between her and the creditors of March, 1870, was entered into, to cause to be deposited all moneys belonging to the estate coming to her hands or received by *Guimond* for her; and on the 1st of April, 1870, there stood to the credit of the succession *Seraphino Giraldi* in the bank the sum of $240.67. It appears to me to be the reasonable inference to draw from the agreement with the creditors and the facts, namely, that the estate was insolvent, and that the creditors were the sole parties beneficially interested therein, that it was the undoubted intention of all the parties to the agreement of March, 1870 that until sale of real estate, the rents therefrom, and all moneys belonging to the *Giraldi* succession, from whatever source derived, should thenceforth be deposited in the bank *Jacques Cartier* for the like purpose as was expressly declared in the agreement in relation to the moneys arising from the sale of the realty. If all the moneys belonging to the *Giraldi* succession coming to the hands of Madame *Giraldi* or of her agent, without any deduction for necessary expenses of management, insurance, &c., &c., &c., were deposited to the account in the bank, it would be just that her cheques upon the fund for moneys required to pay expenses attending the management of the estate, the collection of its assets, insurance, repairs, and such like, as well as to pay hypothecary and privileged debts, should be honored by the bank, notwithstanding the terms of the agreement entered into with the creditors, but, except for such purposes, the fiduciary position on behalf of all the creditors assumed by the bank was such as to justify it and to require it in the interest of the creditors to refuse to honor any cheque drawn upon the fund by Madame *Giraldi*, every deposit to the credit of which fund they were entitled to regard as a conclusive appropriation made for the purpose of satisfying their claims, of the benefit of

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which, when once deliberately made, she could not deprive them against their will.

It appears, however, that the bank did not exercise that strict supervision and power of restraint upon Madame *Giraldi* which I think it possessed, in virtue of the agreement between her and the creditors, to prevent her withdrawing moneys once they were deposited to the credit of the creditors' trust fund, but that the bank was in the habit of honoring her cheques upon the fund without enquiry as to the purpose for which the moneys drawn out on those cheques were required. By the books of the bank it appears that, including the sum of $240.67, standing to the credit of the fund on the 1st April, 1870, the whole amount deposited to the credit of the fund between that day and the 31st of May following was $3,258.07, and that during the said month of May the bank honored four cheques of Madame *Giraldi* made thereon, amounting in the whole to the sum of $3,338.49, one of which only, so far as appears in the evidence, amounting to $1,483, was to pay a debt of the succession. Upon the 31st of May the account opened with the bank was thus over drawn to the amount of $80.42. She appears to have been permitted to continue over drawing the account until upon the 1st of October, 1870, there appears to have been the sum of $215.54 again to the credit of the fund.

All prior deposits made by her from the time of her husband's decease in 1869, amounting to $7,410.43, with the exception of this sum of $215.54, were thus wiped out, and we have nothing to do with them in this suit. The account, therefore, which has been presented by *Guimond*, commencing in July, 1869, as a basis upon which to charge the bank is wholly misleading, and considering Mr. *Guimond's* knowledge of all the transactions of both estates, of which he appears to have had the management, seems to me, I must say, to have been

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made designedly so, for Mrs. *Giraldi* having withdrawn all sums which had been deposited by her previously to the 1st October, 1870, with the exception of this sum of $215.54 then remaining to the credit of the fund, Mr. *Guimond's* account, prepared by him expressly for the purposes of this suit, to have been honest, should not have gone behind that balance.

From that time forth deposits appear to have been made every month to the credit of the fund until the end of the month of June, 1874, when the account was closed. During this period, although there appear to have been twenty-four months, in which nothing at all was drawn from the fund, Madame *Giraldi* appears to have drawn upon her cheques the amount in the whole of $5,035.92, all other sums spoken of in the evidence as having been deposited by her in the bank and withdrawn therefrom by her cheques occurred before the agreement between her and the creditors was entered into, whereby the account with the bank was effected with a trust in favor of the creditors The balance remaining to the credit of the account at its close was $9,635.59.

The question is not now whether, in view of the agreement entered into between the creditors and Madame *Giraldi*, the bank, in permitting her to draw upon the fund as she did, acted in accordance with the duty it owed to the creditors, or properly executed the trust reposed in the bank by the creditors—that it would retain all moneys deposited to the credit of the fund, so that they should be forthcoming to be divided among the creditors *pro ratâ* when the whole of the assets of the succession should be realised. No question of that kind arises in this case which only raises the question whether, as between the heirs of Dame *Marie Anne Bosna* and the bank, the relation of creditors and debtor, or any fiduciary relation, or any privity

whatever exists, which entitles the former to recover judgment against the latter for the above sum of $9,365.59, or any, and it any, what part thereof?

It appears now by the evidence of Mr. *Guimond*, who was so, as aforesaid, appointed by Madame *Giraldi* to collect and get in the assets of the *Giraldi* estate, that she also authorised him to collect and receive the rents accruing in respect of the Dame *Marie Anne Bosna's* succession's half share in the property which had constituted the *communauté* which had existed between the said Dame *Marie Anne Bosna* and *Seraphino Giraldi*, in which *Bosna* estate she herself, the said *Henriette Sénécal,* was beneficially interested in *usufruct* to the extent of one-third, and Mr. *Guimond* says that he did accordingly collect such rents, and he now further says that the amounts collected by him for such rents were paid into the bank with the moneys which were the property of the *Giraldi* succession to the credit of the *Giraldi* succession fund, and he says further that by the books which he kept he is able to tell what amount in the whole so received by him being the property of the *Bosna* succession were so paid in, and what proportion of the amounts withdrawn are properly applicable to the *Bosna* succession, but he does not profess to be able to say what particular deposit comprised, or to what amount any deposit comprised, moneys belonging to the *Bosna* estate. He does not, moreover, profess to say that the bank had, and Mr. *Cotté*, cashier of the bank distinctly, swears that it had not, any knowledge that any moneys belonging to the *Bosna* succession constituted any part of the moneys deposited to the credit of the *Giraldi* succession fund, and upon this evidence we must take it to be established that the bank had no knowledge that such was the fact. It was argued that by reason of the agreement entered into with the creditors *Guimond* is to be considered as thenceforth employed by the bank,

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and that the bank must be affected by his acts and knowledge; but there is not, in my opinion, any ground for holding that *Guimond* was employed by the bank at all, or otherwise than by Madame *Giraldi*, in whom the creditors express their confidence, but at the same time agree to be bound only by such acts as shall be approved by Mr. *Cassidy* and Mr. *Cotté*. But even if *Guimond* is to be considered as employed by the bank, such his employment must be limited to dealing with the property of the *Giraldi* succession, with which alone the creditors of that succession had anything to do, and cannot extend to his dealings with the *Bosna* estate, with which they claimed no right of interference; upon no principle, therefore, can the bank be charged with constructive notice of *Guimond's* acts, or knowledge in relation to the *Bosna* estate, because he may have been employed by the bank in relation to the *Giraldi* estate. It may be true, as is contended, that the bank knew that the heirs of Madame *Bosna* were equally interested in the property which constituted the assets of the *Giraldi* succession, but it was only in respect of the *Giraldi* succession's interest in that property that the creditors claimed any right to interfere, and their requiring the moneys belonging to the *Giraldi* succession to be deposited in the bank to a special account for their benefit, constituted no interference whatever with the rights and interests of the *Bosna* succession in the property in which that succession and the *Giraldi* were jointly interested. If, indeed, the bank had been aware that moneys belonging to the *Bosna* estate had been deposited to the credit of the *Giraldi* succession fund, that might have afforded a reasonable explanation of its having permitted Madame *Giraldi* to draw so freely upon the fund; for in justice, no doubt, the creditors of the *Giraldi* succession would have had no right to have payment of their claims made out of the *Bosna*

estate, and any moneys belonging to that estate appropriated by mistake to the *Giraldi* succession fund in the bank it would have been reasonable that the bank should permit to be withdrawn by the depositor, upon the fact of the mistake being made clearly to appear.

It is obvious that Madame *Henrietta Giraldi* upon her husband's decease had no authority whatever, either in the character of his usufructuary legatee, or as administratrix of his property under the directions contained in his will, to collect, or receive, any of that portion of the rents of the real estate which constituted the *communauté* which had existed between him and his first wife, in which the heirs of his said first wife were interested. For the receipts of the *Bosna* estate by *Seraphino Giraldi* in his life time, the *Giraldi* succession was debtor to the heirs *Bosna*. For the receipts of *Guimond* of funds belonging to the *Bosna* heirs under the direction of Madame *Giraldi* after the decease of her husband, she alone, in her individual capacity, was liable to her co-heirs for their two-thirds, she herself being interested in usufruct to the other third part.

It appears, however, that in the month of October, 1872, in the character of administratrix of the estate of her deceased husband, she rendered an account, as well of the dealings of her deceased husband in his life time as of herself, subsequent to his decease, with the funds belonging to the heirs *Bosna*, all blended in one account up to the 15th of October, 1872. This account is upon its face said to be divided into two parts, tho first terminating on the 1st of August, 1871, and the second upon the 15th October, 1872. By the first the total amount due to the heirs of the late Dame *Bosna* on the 1st of October 1871 is shown to be $6430.34½; by the second part the sum of $435.00 is added for interest on the above to the 15th of October, 1872, making $6865.34½. The total receipts from the

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joint property which had formed the *communauté* between Dame *Bosna* and her husband between the 1st August, 1871, and the 15th October, 1872, is shown to have been the sum of $5531.12, from which is deducted for disbursements $857.73, leaving a balance of $4673.39, which being divided into two equal parts, show the sum of $2336.69½ as belonging to the *Bosna* heirs, to which $6865.34½, above mentioned being added makes $9202.04 divisable into three equal parts, namely, to Madame *Chapdelaine* $3067.34⅔; to *Alexis Girard* the like sum of $3067.34⅔; and to Madame *Henrietta Giraldi* the sum of $3067.34⅔; as the whole sum due to them respectively upon the 15th October, 1872, save that to the above share of Madame *Chapdelaine* a further sum of $1465.93, shewn to be due to her for principal received by *Seraphino Giraldi* in his life time, and interest thereon, was to be added, making the total amount due to Madame *Chapdelaine* on the 15th October, 1872, to be $4533.27⅔.

By an act of acceptance, dated the 19th of October, 1872, executed before *L. A. Desrosiers*, notary public, by Madame *Chapdelaine* and her husband and by *Alexis Girard*, Madame *Chapdelaine* and *Alexis Girard*, two of the co-heirs, (Madame *Henriette Giraldi* herself being the third,) accepted this account, without prejudice, however, to the hypothecary rights which they had acquired upon the property of the said late *Seraphino Giraldi* and of his succession for the balance of the said account, and all other claims whatsoever, which they reserved the right to retain in their entirety to exercise them and to make them available as they should be advised. At the time of the rendering of this account Madame *Chapdelaine* and *Alexis Girard* must have been well acquainted with the manner in which Madame *Giraldi* had been dealing with their property since the death of her husband, and having accepted the account

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so rendered as one undivided account after having had, as the acceptance says, knowledge and communication of the vouchers proving its correctness, they must be taken to have accepted it as it was rendered, as one undivided account, and inasmuch as, with the exception of that portion of the account which relates to the period between the 1st of August, 1871, and the 15th of October, 1872, there is no distinction drawn between the receipts of *Seraphino Giraldi*, in his life time, and those of his widow after his decease, and inasmuch as, in respect of the receipts by *Seraphino Giraldi* in his life time, the only relation which existed between his succession and the heirs *Bosna*, at the time of the acceptance by the latter of the account rendered in October, 1872, was that of debtor and creditors, so, as it appears to me, the whole account must either be taken to have been accepted in the like character, and as establishing a debt due by the *Giraldi* succession to the *Bosna* heirs as creditors, merely subject, of course, to the reservation contained in the act of acceptance, whatever the effect of that may be, of all hypothecary rights which the heirs *Bosna* had acquired upon the property of the said late Mr. *Giraldi* and his succession, and all other claims whatever, or the heirs *Bosna* must assume the position of creditors of the *Seraphino Giraldi* succession for the amounts received by *Seraphino Giraldi*, in his life time, and as entitled only to claim from Madame *Henriette Sénécal* in her individual capacity the respective amounts received by her since the death of *Seraphino Giraldi* belonging to her co-heirs of the estate *Bosna*—each of such co-heirs having a separate and distinct cause of action for the amount due to each, and for which they must each respectively pursue his and her remedies. Unless and until that account shall be avoided for fraud or error, it must, as it appears to me, prevail, to the extent of defining the amount which

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the account rendered and accepted acknowledges to be due to each of the heirs *Bosna* at the time of its having been so rendered and accepted; and even if the bank could be made liable in the present action, framed as it is, we have no occasion to refer to the account prepared by Mr. *Guimond* of the receipt by him of moneys belonging to the *Bosna* estate prior to the rendering of this account; and so, rejecting all prior receipts, we find that between the 15th October, 1872, and the closing of the account when the properties were sold, the total amount of receipts from what he calls "the *M. A. Giraldi* succession"—that is, the community property of Dame *Marie Ann Bosna* and *S. Giraldi*,—was $2,811 75, from which, according to him, the sum of $1,374.45 is to be deducted for disbursements, leaving $1,437.30, which, being divided by two, shows the sum of $718.65, the share of the *Bosna* heirs, one third of which would belong to Madame *Henriette Giraldi* herself. Then, as to the account rendered by Mr. *Guimond*, which he calls the expenditure common to the succession *M. A. Giraldi* and the succession *S. Giraldi*, it does not appear how much of this should be charged against the *Bosna* heirs. It would not, perhaps, be unreasonable to charge to them a proportion which would swallow up the whole of the above sum of $718.65, and so there would be nothing due to them by the bank, even if this action against it can be at all sustained.

It appears to me, I must confess, to be strange how Mr. *Guimond* could present to the court in this case an account so calculated to mislead as that prepared by him for the purposes of this suit, when he must have known that an account was rendered to the heirs *Bosna* up to the 18th September, 1872; when, in fact, that account must have been prepared by himself, and the vouchers and proofs of its correctness must have been

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supplied by himself. It seems equally strange if, at the time of the sale of the properties in 1874, when the heirs *Bosna* must have received their proportion of the amount arising from the sale, they had not a final settlement with the Dame *Giraldi* in respect of the moneys which they knew she had received of the rents belonging to them, as well as those contained in the account stated and accepted in October, 1872, as those received subsequently thereto; and that they should never, until after her decease, three years later, set up the claim which is asserted in the present action. It is difficult to understand why Madame *Chapdelaine* and *Alexis Girard*, aware as they were of all the facts, should have had no settlement, if they had no settlement with her during her life. To hope to arrive at the truth now is vain, when the heir of the accounting party, and those to whom the account should have been rendered, and with whom the settlement should have taken place, appear to have combined together with the assistance of the agent of the accounting party to make the demand made upon the bank in this suit, in which it is the interest of the parties so combining to suppress the truth, if, in truth,—a fact which they must know and the bank cannot,—a settlement had taken place between Madame *Giraldi* and her co-heirs during her life. The plaintiffs then are in this dilemma, that as to the receipts by *Seraphino Giraldi*, in his life time, they must present their respective claims against the *Seraphino Giraldi* succession as creditors of that succession, a proposition which the plaintiffs admit to be correct, and that unless they can claim as creditors also of that succession in respect of the moneys of the *Bosna* estate received by Madame *Henriette Sénécal* since the death of *Seraphino*, by reason of the account rendered by her in her character of administratrix of *Seraphino Giraldi's* will, they must

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look to her in her individual character only and to her succession, and not to the *Seraphino Giraldi* succession at all.

The learned counsel for the appellants relied strongly upon *Pennell* v. *Deffell* (1), as an authority in support of his contention, but the facts of that case were totally different from the present, and, properly understood, the case is rather adverse to his contention.

In applying that case to the present we must separate the claim of Madame *Henriette Giraldi* from that of Madame *Chapdelaine* and *Alexis Girard;* and first as to any claim made in the right of Madame *Henriette Giraldi* as one of the *Bosna* co-heirs, she must be regarded as having, since the death of her husband, received in her individual character all the moneys belonging to the *Bosna* succession which she did receive and which are the subject of this suit. In the third of those moneys she was herself beneficially interested and was at full liberty to deal with as she pleased. That third so, belonging to her, it may be admitted that she paid into the bank *Jacques-Cartier,* not however to her own credit, but to a special account, namely, the *Seraphino Giraldi* succession fund, in which the bank as principal creditor, and as a *quasi* trustee for the other creditors, had a special interest, and which fund was kept at that bank in pursuance of the agreement entered into between Madame *Giraldi* and the creditors of *Seraphino Giraldi's* succession for the special benefit of the latter. The moneys thus deposited to that account constituted trust moneys whereof the creditors of the *Giraldi* succession were the *cestuis que trustent.* Having thus blended her own private moneys with that trust fund, she could not withdraw any thing from the fund, unless at least she could show clearly that the money she might wish to draw out was her own private money,

(1) 18 Jur. 273.

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and if permitted by the bank to withdraw any thing from the fund without shewing that the amount was in truth her own private property, she could not afterwards, as against the creditors of the *Giraldi* succession, who are sufficiently represented by the bank, and of whom the bank was the chief creditor, be heard to say that her own moneys were still remaining in the bank to the credit of the fund and liable to be drawn out by her, and that the moneys which she had already withdrawn were moneys belonging to the *Giraldi* succession, so as aforesaid deposited in the bank for the benefit of the creditors of the succession. This is the effect which the application of the principle involved in *Pennell* v. *Deffell* would have as regards Madame *Giraldi's* own share of the *Bosna* succession moneys deposited to the credit of the *Giraldi* succession fund. The guiding principle of that decision, as stated in *Firth* v. *Cartland* (1), and in *Knatchbull* v. *Hallett* (2), is that a trustee cannot assert title of his own to trust property. A second principle involved in that case is, that if a man mixes trust funds with his own, or, which is the same thing, mixes his own moneys with moneys belonging to a trust account, the whole will be treated as trust property, except so far as he may be able clearly to distinguish what is his own—that is, the trust property comes first, and *Firth* v. *Cartland* is an authority that, as between Madame *Giraldi* and the *Giraldi* succession, the moneys withdrawn by her must be held to have been her own moneys, intentionally or mistakenly deposited to the credit of the *Giraldi* succession fund, which was a trust fund in which the creditors of that succession alone had any interest.

Now, Madame *Giraldi*, having withdrawn from the creditors' fund, with which she had mixed her own

(1) 2 H. & M. 420.

(2) 13 Ch. Div. 719.

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moneys, an amount far in excess of any moneys of her own deposited to the credit of that fund, cannot now, nor can any person in her right, assert any claim against such fund in respect of any private moneys of hers so deposited. Then, as to Madame *Chapdelaine* and *Alexis Girard*, the contention is, that in so far as their shares are concerned, Madame *Giraldi* is to be regarded as their agent in receiving their moneys, and that having thus, in a fiduciary character, as regards them, received their moneys and deposited them to the credit of the *Seraphino Giraldi* succession fund, they can follow their moneys so deposited and recover them from the bank, which is the holder of that fund.

Pennell v. *Deffell* does not support this contention; the action in that case was not brought by the person claiming the moneys as trust funds against the bank where they had been deposited. The claim was made in a suit duly instituted for the administration of the estate of a deceased trustee, who had deposited the funds of which he had been trustee to the credit of his own private bank account. The contention arose between the executors of a Mr. *Green*, who, as assignee in bankruptcy, had received large sums of money belonging to the estates of which he was assignee, which he had mixed with his own private moneys in two bank accounts which he kept, and his successor as assignee of the bankrupt estate, whose funds he had so deposited to his own private account, claiming payment of the trust funds in preference to his general creditors.

Lord Justice Sir *J. L. Knight Bruce* premises his judgment with the statement that the bank accounts were opened and kept with Mr. *Green* as a private man merely without any official designation—without any title of a trust—without anything to mark that he was not interested in the amount for the time being due to him upon it. And again he says: "There is here no dis-

"pute with either of the two banking establishments; "each is indifferent as to the contest." Proceeding upon these premises he lays down the principle which is the gist of the judgment in the case, thus: "When a trustee "pays trust money into a bank to his credit, the account "being a simple account with himself, not marked or "distinguished in any other manner, the debt thus con- "stituted from the bank to him is one which, as long as "it remains due, belongs specially to the trust as much "as and as effectually as it would have done had it speci- "fically been placed by the trustee in a particular reposi- "tory, and so remained;" that is to say, if the specific debt shall be claimed on behalf of the *cestuique trust*, it must be deemed specifically there as between the trustee and his executors and general creditors after his death, on the one hand, and the trust on the other.

Now, if Madame *Giraldi*, who, it may be admitted for the puposes of this suit, received the share of Madame *Chapdelaine* and *Alexis Girard* in the moneys of the *Bosna* succession, as their agent, had deposited those moneys to her own private account in the bank, on a claim being made by Madame *Chapdelaine* and *Alexis Girard* against her succession after her death, *Pennell* v. *Deffell* would be, it may be admitted, a conclusive authority so long as any part of the debt constituted by such deposit remained due to her from the bank; but here the facts are totally different.

Madame *Giraldi*, who, in her private character only, received the moneys of Madame *Chapdelaine* and *Alexis Girard*, did not deposit suchmoneys to her own private account; on the contrary, she deposited them to a special account impressed with a trust for a special purpose, of which trust purpose, and the fund thus constituted, the bank *Jacques Cartier* were beneficial depositaries. No debt ever became due from that bank to Madame *Giraldi*. The moneys deposited by

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her to the credit of the *Seraphino Giraldi* succession fund did not constitute a debt due from the bank to her. The moneys so deposited constituted a trust fund specially appropriated for the benefit of the *Seraphino Giraldi* succession creditors, which moneys, by agreement with the creditors, were to remain in the hands of the bank as holders of the fund until the whole of the estate should be realized, and then to be divided among the creditors, of whom the bank was the largest. Madame *Giraldi* in her private character had no right to touch any moneys deposited to that fund, at least, not without the special consent of Mr. *Cassidy* and Mr. *Cotté*. All moneys, once they were deposited to the credit of that fund, became as much the property of the creditors as if they had been paid into the hands of a trustee for them, and as much appropriated to their benefit, and removed from all power and control of Madame *Giraldi* over them, as if she had paid them to a creditor of the *Seraphino* succession in payment of a debt due by the succession, and in any proceeding taken by Madame *Chapdelaine* and *Alexis Girard* against their trustee or agent Madame *Henrietta Giraldi* personally, or her succession, (which alone since her death is now accountable to them,) such appropriation to the *Seraphino Giraldi* succession trust fund in the bank could not be recalled, that succession would have nothing to do with such a suit. The case presented in this case is, in fact, the same as if *A*, as agent of *B* and *C*, had received moneys belonging to each, and having spent *B's* money had appropriated *C's* to pay *B*. Neither *Pennell* v. *Deffell*, or any other case, is an authority that in such a case *C* could recover from *B* the money so paid to him. Upon the merits, therefore, as well as for the imperfection in the frame of the record in not being framed as against the succession of Madame *Henerietta Giraldi*, who alone in her life time was in her private character

accountable to Madame *Chapdelaine* and *Alexis Girard*, and in claiming payment out of the *Seraphino Giraldi* succession trust fund established for the benefit of the creditors of that succession without bringing a legal representative of that succession before the court, the appeal should, in my opinion, be dismissed with costs.

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Appeal dismissed without costs.

Solicitors for appellants: *Beïque, McGoun & Emard.*

Solicitors for respondents: *Lacoste, Globensky & Bisaillon.*