Supreme Court of Canada

The Merchants Bank of Halifax *v*. Whidden (1891) 19 SCR 53

Date: 1891-05-12

The Merchants Bank of Halifax (Plaintiff)

Appellant

And

Charles B. Whidden (Defendant)

Respondent

1890: Oct. 28, 29; 1891: May 12.

Present.—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

ON APPEAL FROM THE SUPREME COURT OF NOYA SCOTIA.

Bank—Agent of—Excess of authority—Dealing with funds contrary to instructions—Liability to bank—Discounting for his own accommodation—Position of parties on accommodation paper.

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank which he discounted as such agent and, without indorsing the drafts, used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty as creating a debt due to it from his firm, the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment.

*Held*, affirming the judgment of the court below, Gwynne J. dissenting, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.

Per Ritchie C. J.—K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm and when the firm received that money they became debtors to the bank for the amount.

Per Strong and Patterson JJ.—That the agent being bound to account to the bank for the funds placed at his disposal he became a debtor

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to the bank, on his authority being revoked, for the amount of these drafts as money for which he had failed to account Whether or not the bank had a right to elect to treat the act of the agent as a tort was not important as in any case there was a debt due.

Per Gwynne J.—The evidence does not establish that these drafts were anything else than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper and were not obliged to look to any other for payment.

Appeal from a decision of the Supreme Court of Nova Scotia affirming the judgment for the defendant at the trial.

The defendant is assignee for a firm called King Bros. & Co. under a deed of trust for the benefit of creditors in which the plaintiff bank is first preferred creditor and the defendant one of the second. The suit was brought to compel the defendant to carry out the trusts created by the deed.

Thomas M. King, a member of the firm of King Bros. & Co., was agent of the plaintiff bank at Antigonish, N.S., at which agency the firm had a line of discount. The said T. M. King obtained from the defendant his indorsement to certain drafts on one Thompson, and without said drafts being indorsed by him or his firm the said King, as agent of the bank, discounted them and applied the proceeds to the use of his firm, although their line of credit at the agency of the bank had for some time prior to this been exceeded. It is in respect to these accommodation drafts that the contest in this case has arisen.

The assets of the estate of King Bros. & Co. were not sufficient to pay the bank as first preferred creditor even if these drafts are not included in the bank's claim. It is contended, therefore, for the plaintiff, that the drafts do not constitute debts due from King Bros. & Co. to the bank, the name of the firm not appearing thereon, and the transaction on its face being an

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ordinary discount for the benefit of the defendant. The contention against this is that King Bros. & Co. having received the money of the bank procured by the discount of the drafts are liable to repay it as a debt due from them. The sole question, therefore, was: Did this transaction create a debt due from King Bros. & Co., or any member of that firm, to the plaintiff bank for the amount represented by these drafts?

The learned judge before whom the case was heard decided this question against the contention of the bank and gave judgment for the defendant. His decision was affirmed by the Supreme Court of Nova Scotia sitting *en banc.* From the decision of the full court the plaintiff brought this appeal.

*Henry* Q. C. and *Ross* Q.C. for the appellant. There was no contract between King and the bank. *Bank of Upper Canada* v. *Bradshaw[[1]](#footnote-2)*.

If King committed a wrong against the bank defendant must prove damages. In such case, also, to compel the bank to treat the transaction as a contract would be to deprive them of the right to treat it as a tort.

The bank never exercised their option of treating it as a debt due from King. *Brewer* v. *Sparrow[[2]](#footnote-3)*; Story on Agency[[3]](#footnote-4).

The remedy of a *cestui que trust* against the trustee, or of a principal against his agent, for breach of duty must be by an equitable action for an account.

*W. Cassels* Q.C. and *W. B. Ritchie* for the respondent. King always treated these drafts as debts due to the bank and the indorsements as collateral.

The deed provides for payment of all debts due the

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bank. As to construction of word "debts" see *Flint* v. *Barnard[[4]](#footnote-5)*; *Gwatkin* v. *Campbell[[5]](#footnote-6)*.

The bank has dealt with the drafts as King's paper. See *Oriental Financial Corporation* v. *Overend, Gurney & Co.[[6]](#footnote-7)*.

The defendant was only a surety for King to the bank. See *Bechervaise* v. *Lewis[[7]](#footnote-8)*.

The question of election does not arise in this case *Phillips* v. *Homfray[[8]](#footnote-9)*.

The learned counsel also cited *Gray* v. *Seckham[[9]](#footnote-10)*; *Ex parte Twogood[[10]](#footnote-11)*; *Ex parte Rhodes[[11]](#footnote-12); Dudley Bank* v. *Spittle[[12]](#footnote-13)*; *Dresser* v. *Norwood[[13]](#footnote-14)*; *Ramshire* v. *Bolton[[14]](#footnote-15)*; *Holt* v. *Ely[[15]](#footnote-16)*; *Bishop* v. *Bayly[[16]](#footnote-17)*.

*Henry* Q.C. in reply. Defendant cannot be treated as a surety. King simply borrowed the money from defendant using the bank funds for the purpose.

As agent of the bank King never assumed to lend money to himself.

The bank had a right to treat the matter as a wrong committed by King of which right they would be deprived by regarding it as a debt.

Sir W. J. RITCHIE C.J.—King being agent of the plaintiff, the Merchants Bank, and also a member of the firm of King Bros. & Co., discounted for the benefit of that firm certain accommodation drafts which he obtained! from defendant. Whidden for the express purpose of having them discounted at the plaintiff's agency of which he had charge, and on the understanding that he should indorse them, which,

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however, he never did; the firm of King Bros. & Co. had a line of discount at the bank which the discounting those notes would exceed and by not endorsing them he wished to make the transaction appear on the books of the bank as a discount, not for King Bros. & Co., as in fact it most certainly was but for Whidden. King Bros. & Co. having failed, and being largely indebted to plaintiff and others, made an assignment to defendant on 31st December, 1883, of certain real estate and personal property to have and hold same

in trust to convert into money all and singular the premises and everything hereby conveyed, and as soon as practicable to collect in all and singular the debts and sums of money aforesaid, and after deducting the costs, charges and disbursements of the trusts before mentioned and of these presents and all matters incidental thereto, to pay and apply the moneys arising therefrom in manner following, that is to say: All debts by the said assignors or either of them due and owing or accruing or becoming due and owing—

1st. To the Merchant's Bank of Halifax.

2nd. To Charles B. Whidden, C. B. Whidden & Sons, and Payzant and King, the last named debt not to exceed in this connection three thousand dollars.

The other provisions do not bear on the question in this case which simply is: Are these drafts so discounted by King the agent for the use of King Bros., and by King Bros., of which King the agent was a partner, applied to and used in their business by that firm, covered by the words

all debts by the said assignors or either of them due and owing or accruing or becoming due and owing to the Merchants Bank of Halifax?

I am of opinion that when King, the agent of the bank, deposited in the bank this accommodation paper and in lieu thereof took out of the bank the amount thereof, and appropriated that amount to the purposes of the firm of King Bros., it was a loan by the bank through him to his firm secured by the deposit of the accommodation paper, and therefore became a debt due

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by him and his firm to the bank, the liability for which he could not escape by withholding his indorsement The withholding his indorsement did not alter the transaction which simply was that he obtained this accommodation paper for one purpose, and for that one purpose alone, viz., to enable him through its instrumentality to borrow for his firm from the bank the amount this paper professed to represent, and the moment King Bros. received that money they became debtors to the bank for the amount they so received.

There is not the slightest pretence for saying that the money raised by King on this accommodation paper was money raised by the makers of this paper and by them loaned to King Bros. as was contended before us, the evidence showing that the very reverse was the case. Whidden & Co. had no transaction whatever with the bank; they simply gave King this accommodation paper and he used it in the manner I have indicated. Supposing King Bros. had remained solvent and the parties on this accommodation paper had failed and become utterly and entirely unable to pay, could King be allowed, in order to escape liability, to say, "I discounted this paper *bonâ fide* on the strength of the names on it whom I believed perfectly good, and, therefore, no liability ever attached to me on it?" Surely the answer would be "the transaction was not that of the accommodation drawer or endorser, but unquestionably your own; the accommodation parties having become utterly unable to pay as accommodation parties they could have no claim on you except for indemnity, and if they never paid or never could pay anything they never did and never could lose anything, and therefore never had or could have any claim for indemnity against you. Are you therefore to keep this money you got out of the bank (I say borrowed from the bank) and pay nobody, and so

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the bank lose its money and you retain it on such a flimsy pretext that you did not put your name on the paper as you ought to have done?" In other words can King say: True, my firm got your money and used it in their business here; the accommodation parties can't pay, and so can have no claim for indemnity against me or my firm. But because I did not indorse the paper, but simply deposited it as security for the money advanced by you to me, you have no claim against me or my firm, so I am not liable to you or any body else; I will, therefore, set you at defiance, keep your money and pay nobody? Could such a contention be tolerated? I certainly think not. It seems to me too absurd to be mentioned except to be scouted as inconsistent with law, justice and common sense. It is clear the bank has some ulterior object in view. How very different would the contention of the bank be if the parties to this accommodation paper were worthless and the estate of King Bros. fully sufficient (as it is said to be) to meet all debts "due, owing or accruing, or becoming due and owing to the bank," and this claim was resisted by the other creditors on the ground that it was not a debt covered by the trust deed. I have no doubt whatever that this appeal should be dismissed with costs in this and all the courts.

STRONG J.—This appeal depends on a single question, viz.: Whether a debt from King to the appellants was constituted by the application of the funds of the bank by King for his own use, as being the proceeds of discounts of the four drafts on Thompson drawn by the respondent for King's accommodation, and of Cunningham's note endorsed by the respondent also for King's accommodation. If this is to be answered in the negative then so much of the decree made by Mr. Justice James as declares that such a debt did

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arise was wrong and ought to be struck out, otherwise the decree is right and the appeal must fail.

The solution of this question appears to depend on the application of ordinary principles of the law of agency to the undisputed facts disclosed by the evidence.

That King was the agent of the appellant's bank at Antigonish, and that as such agent he was intrusted with the appellant's monies to be used and applied in the business of banking, and that he did, in fact, apply part of these funds, to the extent of the amount now in question, to his own use by purporting to discount the paper before referred to, cannot be disputed. Neither can it be, nor is it, denied that the bills and note in question were all accommodation paper drawn and indorsed by the respondent for the benefit of King and procured to be so drawn and indorsed by King for the sole purpose of enabling him to get into his own hands for his own use or for that of his firm funds of the bank equivalent to the proceeds of the bills on a discount of the same; nor that the discount of such paper by King for the purposes mentioned was in direct contravention of the express orders and instructions of his principal, the present appellant.

Then upon this state of facts it is manifest that without resorting to the device of waiving a tort in order to be able to sue on contract, a device and fiction of which it may be remarked in passing that however applicable it was in a proper case before forms of action were abolished it can be of but little practical use in the present system of pleading and procedure, the bank could at once without awaiting the maturity of the paper have sued King, had they thought fit to do so, for the recovery of the money he had so, in breach of his duty, appropriated.

The legal proposition upon which this depends is

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simply this: An agent entrusted with the funds of his principal with instructions limiting him as to the application of these funds is liable to have his authority revoked at any time, and upon such revocation of authority becomes bound to account for the moneys of which he has had the disposition, and in respect of any amount which he cannot show to have been duly applied in accordance with the instructions he has received he is a debtor in the ordinary sense of the word of his principal. No one can gainsay this as an elementary rule of the law of agency.

Then, to apply it here, King was originally a debtor of the bank in respect of all moneys placed in his hands and so remained, save as regards so much as he had applied in the ordinary course of the business of banking carried on in compliance with the appellant's instructions. If this were not so there would be no such thing as control of the agent's conduct by the principal's instructions. No question of a third party's rights intervening arises in the present case; the question is to be regarded as one purely between principal and agent. It follows that when the business was taken out of King's hands and his agency was revoked he remained a debtor for the amount now in question which had been applied to his own use in defiance of the prohibition of his principal.

I should have thought that the only question open in the case was one which does not seem to have attracted much attention either here or in the court below, namely, whether there had been such an adoption of these discount transactions by the bank as to amount to a confirmation of them as loans upon the paper alone and exclusive of any personal liability of King.

The evidence, however, wholly fails to establish any waiver or discharge of King's original liability, for

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there is no inconsistency in the bank retaining the liability of the parties to the bills and also holding King liable as being, what he most undoubtedly was, the real though fraudulent borrower and debtor. The appeal must be dismissed with costs.

FOURNIER J.—Concurred.

TASCHEREAU J.—I would dismiss this appeal for the reason given by Mr. Justice Weatherbe in the court below.

GWYNNE J.—(His Lordship set out the pleadings in the case, the decree of the court below and a summary of the facts, after which he proceeded as follows): The evidence shows the drafts to have been handed to Thomas M. King to be used by him in such manner as he should think fit or should have occasion to use them. As between him and the parties to the drafts he had the fullest power to deal with them as he should think fit, subject only to his promise that he would retire them as they should become due. As between him and the bank all that the evidence shows is that he would be acting in disobedience of his instructions if he should discount the paper of King Bros. & Co., or of himself. He does not appear to have been forbidden to discount good paper, although it should be accommodation paper, for persons whose names did not appear upon the paper. No evidence to that effect was offered. He himself says in his evidence that it was his practice as agent of the bank to discount paper for parties whose names did not appear on the paper, and he said that it was not for the purpose of preventing the inspector of the bank from knowing that King Bros. & Co. had received the proceeds thereof that he discounted the drafts without

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endorsing them; that he did not consider the application of the proceeds was a matter with which the inspector had anything to do. No one but himself knew anything of the application of the proceeds until the 29th December, 1883, when the making of the trust deed and its terms were under consideration. What he says upon this point upon his examination-in-chief as a witness called by the defendant is:

I told Mr. Knight about two days before the execution of the deed, there was reference made to paper drawn by C. B. Whidden & Sons upon A. C. Thompson, about two days previous to the execution of the deed, when I said to the inspector of the bank, Mr. Knight, that that paper was in the interest of King Bros. & Co., and included these four drafts. Mr. Whidden said in this conversation that "it would be some time before we could realize from the estate, it will be inconvenient for me to take up this paper." Mr. Knight replied "we will allow this paper to remain as past due bills until you have an opportunity of realizing from the estate."

And on cross-examination he says:

I had conversation with Mr. Knight in reference to these drafts, at the office of Mr. Bligh, on the 29th December, 1883. Mr. Knight, the defendant, Mr. Bligh and myself were present. I informed Mr. Knight that there was certain paper in the bank drawn by C. B. Whidden & Sons on A. C. Thompson, the proceeds of which were used in the interest of King Bros. & Co. He expressed surprise; the defendant said that he received no part of the proceeds of the said drafts, and Mr. Knight then engaged that when these drafts should become due, they should remain as past due bills till the defendant could have opportunity of realizing from the insolvent estate.

And he says further that Mr. Knight refused to recognize the drafts as being paper upon which King Bros. & Co. were liable to the plaintiff, and insisted that the plaintiff would look to the parties on the paper for the payment thereof, subject only to his promise as above stated that as the drafts should become due they should be held as past due bills till the defendant could have an opportunity of realizing from the insolvent estate, but that they were not, nor should they be deemed to be, liabilities of King Bros. & Co. to

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the bank, or within the provisions of the trust deed in its favor.

Now, without impugning the right of the plaintiff to have disavowed the transaction when brought to its notice, if it was a transaction in excess of the agent's authority, or its right to look to Thos. M. King to make good any loss it might sustain by the paper proving to be bad upon the principle that he had no right to suffer his interests as a member of the firm of King Bros. & Co. to conflict with his duty to the plaintiff as its agent, it cannot be doubted that the bank had the right to treat the drafts when discounted as its property, and that no person whose name appears on the drafts could question the bank's right to hold them as its absolute property, and to recover thereon against all the parties thereto in the character in which their names appear on the paper as debtors of the bank, in respect of the amounts secured thereby. By delivery of the drafts to Thos. M. King in the manner in which, and for the purpose for which, they were made, accepted and endorsed, the parties to the drafts authorized Thos. M. King to make whatever use of them, and of the proceeds thereof when discounted, as he should think fit; whether he should or not have discounted them at his own agency was a matter with which the parties to the drafts were not concerned, that was a matter between the plaintiff and its agent whose act the plaintiff had a perfect right to adopt if it should think fit; it was for the bank to determine how they should deal with the agent's conduct; as matter of fact it has always insisted upon its right as owners of these drafts to recover against the parties thereto as its debtors. There has never been any doubt raised as to the solvency of the parties to the drafts, nor has the bank ever called in question or had occasion to call in question the right of Thomas

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M. King to have discounted them as he did. Whether Mr. Knight, as inspector of the bank, had any power by any undertaking of his to alter the position of the bank and to deprive it of the rights it had against the parties to the drafts, and to change the transaction into a debt primarily due to it by persons whose names were not on the paper at all, for the payment of which debt the drafts should be deemed to be collateral security only, we need not inquire, for the evidence utterly fails to establish that any undertaking of the kind had ever been given by Mr. Knight. It would have been very strange for him to have given such an undertaking, and equally strange for the bank to have recognized and affirmed it if given after King Bros. & Co. had become insolvent, and while the parties to the drafts remained solvent. But it is quite clear, I think, that the bank never did agree to regard the monies secured by the drafts as constituting debts due to it by King Bros. & Co. The promise of Mr. Knight, which was a naked promise without any consideration, that the drafts as they should fall due should remain over as past due bills until the defendant should have an opportunity of realizing the trust estate, was quite consistent with the claim of the plaintiff to look to the parties to the drafts as the only persons liable to it, and, indeed, the evidence sufficiently shows that it was made at the request of the defendant, and in case of the liability of the parties to the drafts without any prejudice to the plaintiff's claim against them, as the only persons liable in respect thereof, and to give the defendant an opportunity to protect himself under the provision in his favor contained in the second paragraph of the clause prescribing the order in which the trust funds should be applied. This is the fair construction to put upon the evidence, and that it was so understood by the defendant

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as a business man appears, I think, from certain questions submitted by him to the bank before he realized the trust estate and from his conduct upon receiving the answers of the bank to those questions. In the month of January, 1884, the defendant submitted to the bank the questions following:—

1. What paper in the head office and agencies do they (the bank) claim to rank under the first preferential clauses in the assignment?

2. Will they use all legitimate means to collect the paper in said offices as it matures or in the very near future (either as promisor or endorser) other than the paper lying in the Antigonish agency known as the Antigonish paper?

3. Will they allow all such Antigonish paper lying in the Antigonish agency, amounting to some $19,000, to lie as past due bills as per a well understood arrangement with the inspector, Mr. Knight, at the time the assignment was being made, or do they require such portion of said paper as does not bear the name of King Brothers & Co., or either of said firm, to be retired as it matures?

4. If they require such paper to be provided for as it matures, about $8,000 of the same being the paper either of C. B. Whidden or of C. B. Whidden & Sons, are they prepared to give the same like banking facilities as in the past?

5. Are they prepared to say that they will claim for such paper as lies in the head office at Halifax, and some of which has already matured, before I can claim in payment of my own paper as under the 2nd clause of the deed of assignment?

To these questions the cashier of the bank addressed and sent to the defendant, on the 25th January, 1884, the following answer:—

Dear Sir,—At a meeting of the board of directors of this bank held yesterday your list of questions with regard to the King paper and other business was considered. I am directed to inform you that this bank claims to rank on the King estate under the first preference clause for any paper held at this office or any of the agencies on which advances have been made.

Every means, however, will be used to collect from all promisors on the paper held by the bank, and instructions will be issued at once to its agents to give this matter their best attention.

With regard to your third question, any paper at Antigonish agency bearing the names of King Brothers & Co. will be charged to past due bills as it matures on the understanding and promise of

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yourself that funds will be paid in at once and from time to time as you may realize against such paper. In reference to the balance of the paper proceeds of which are said to have been used for the benefit of King Brothers & Company, the directors would have no objections after having received the concurrence of all parties concerned to allow this class of notes to remain on as past due bills provided satisfactory security was given.

Referring to your fourth question, the directors will be prepared at all times to afford yourself and C. B. Whidden & Sons the usual banking facilities. I need hardly mention that any paper offered by you for discount would be subject to approval.

With regard to your fifth question, the directors cannot decide on the legal effect of the clause in the assignment, but think it covers all the notes in the bank. The bank, to preserve its claim on endorsers, must claim on all the notes it holds, and if there is any dispute it must be settled between the assignee and the endorsers. The bank will, in all cases, look to the endorsers of the notes the assignee does not pay.

Upon receipt of these answers the defendant was made fully aware that the bank's claim was, that it covered all paper having upon it the names of King Bros. & Co., or of either of the partners, which paper they agreed to allow to lie over as past due bills, conditional upon the defendant promising to retire that paper as he should realize out of the estate. And as to all paper which, like the drafts in question, had not on them the names of King Bros. & Co., or of either of the partners, but which are said to have been used for the accommodation of King Bros. & Co., they too might lie over as past due bills, provided all the parties on such paper should consent, and that satisfactory security should be given.

Now the defendant, as to the four drafts in question drawn by C. B. Whidden & Sons, upon and accepted by Thompson, says that instead of giving the security thus asked for he preferred himself retiring, and that he did retire, those drafts as they matured.

These drafts, therefore, having been so paid by the defendant in discharge of the liability of C. B. Whidden & Sons, according to the tenor of the

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drafts, the plaintiff had no further claim in respect of them, and what is now asked by the person who, in discharge of his liability upon the drafts, retired them, in effect, is that such payment of the drafts shall be disregarded, and that the plaintiff shall be compelled to disavow against its will the act of its agent in discounting the drafts which hither to they had not disavowed, and that it shall now be compelled to treat the transaction in a light in which it was never entertained by it, namely, as a loan by the bank to Thomas M: King, for which therefore he became the debtor of the bank, either as sole debtor, or as principal or primary debtor for whose debt the parties to the drafts were only sureties to the bank, and that in the taking of the accounts of the trust estate the defendant shall be allowed now to get credit for the monies paid by him in discharge of his liability on the drafts as if they had been paid in discharge of a debt which, at the time of the execution of the trust deed, was due and owing or accruing due by King Bros. & Co., or by Thomas M. King to the bank, and provided for in the first preferential clause in the trust deed in favor of the plaintiff. Thus compelling the bank to accept King Bros. & Co. or Thomas M. King as its debtor for the amount of the drafts in lieu of the parties whose names are on the drafts, and who are the only parties whom, up to the time of the drafts having been paid by one of the parties thereto, the plaintiff has regarded as its debtors in respect of the monies represented by these drafts. The object of the defendant plainly being thus to get for himself and C. B. Whidden & Sons the benefit of the first preferential clause in the trust deed, which is in favor of the plaintiff, to secure payment thereby of so much of its claim against the assignors of the trust deed as is represented by the drafts retired by the defendant,

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instead of having recourse to the trust estate under the second preferential clause of the trust deed in their favor.

For such a contention there is, in my opinion, no foundation in law or equity. The plaintiff never entered into any such obligation, nor can any such be forced upon it against its will by a court of justice. None of the cases referred to by the learned counsel for the defendant support any such pretension. In answer to it it is sufficient to say that the plaintiff itself is the only person competent to determine whether it should disavow or adopt an act of its agent, even though it should be an act done in disobedience of the instructions given to him, and that it has always recognized the title vested in it by the act of its agent in discounting the drafts in question, and that it never recognized the transaction in relation to these drafts and to its interest therein in any other light than as the liability and debt of the parties whose names are upon the drafts according to their tenor and effect. No court has any jurisdiction to declare that, under the circumstances attending the discounting of the drafts and the plaintiff acquiring title to them, King Bros. & Co. or Thomas M. King became and were accepted by the bank as its debtors in respect to the amounts of the drafts, or to compel the bank against its will to accept and treat them as the debtors to the bank in respect of such amounts.

The appeal, therefore, in my opinion must be allowed and the decree varied so as, in addition to the declaration therein as to the demand note for $1,350, to declare that at the time of the execution of the trust deed no part of the amount represented by the four drafts in question constituted or was a debt due and owing or accruing due and owing to plaintiff by the assignors of the trust estate in the trust deed mentioned, and

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that upon the taking of the accounts of the trust estate the moneys paid to the plaintiff in retiring those drafts cannot, therefore, be applied and charged as a payment to the plaintiff under the first preferential clause in the trust deed in its favor, and declare further that the promissory notes of King Bros. & Co. in the statement of claim mentioned are payable out of the trust estate under the said first preferential clause in favor of the plaintiff. Reserve further considerations and costs, but the costs of this appeal should be paid by the respondent. Allow appeal with costs to be paid by the respondent as the claim set up by him was in the interest of himself and his firm, and his defence was not merely that of a trustee asking directions of the court in a matter wherein he was indifferent.

PATTERSON J. — On the 31st December, 1883, Thomas M. King and Charles R. King assigned in trust to Charles B. Whidden, the present respondent, their real and personal property. The deed recited, amongst other things, that

the said assignors are, or one of them is, indebted to the said trustee and the other creditors hereinafter made preferential for cash advanced and loaned, moneys held in trust, and liabilities incurred otherwise than for goods sold and delivered in the ordinary course of trade, which advances and loans so made, moneys so held, and liabilities so incurred as aforesaid were appropriated to the payment of the ordinary commercial liabilities of the said assignors.

The trusts were to convert the estate into money, and, after paying costs and disbursements, to pay

All debts by the said assignors or either of them due and owing or accruing or becoming due and owing—

*First.*—To the Merchants' Bank of Halifax.

*Second.*—To Charles B. Whidden, C. B. Whidden & Sons, and Payzant and King, the last named debt not to exceed in this connection three thousand dollars.

*Third.*—To [5 named creditors], and any balance still clue or owing

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the said Payzant and King over and above the sum of three thousand dollars aforesaid. *Fourth.*—To [23 named creditors].

*Fifth.—*All other private debts of the said Thomas M. King due on promissory notes to parties in the County of Antigonish incurred for the benefit of the said business of King Brothers and Company, and all other debts of the said Charles R. King or King Brothers and Company for cash advanced or for accommodation paper on behalf of said firm, and out of the residue to pay and discharge in equal proportions the respective debts of all the other creditors who shall, within six weeks from the date hereof, execute these presents.

Then followed a release by the creditors of

All and every their and each of their respective debts due and to grow due, and all claims, actions and demands whatsoever against them or either of them which they, the said creditors or any of them, may or can have against the said assignors or either of them from the beginning of the world to the present time, provided always that no surety at law or in equity shall be released or discharged by anything contained in these presents or by the execution thereof by any creditor or creditors.

Thomas M. King was partner of his brother Charles R. King in a mercantile business at Sydney, C. B., which business was conducted by Charles, and he was himself agent at Antigonish for the Merchants' Bank of Halifax, the present appellant. T. M. King or his firm were debtors to the appellant for large sums of money, chiefly upon paper to which they were parties. The dispute upon this appeal is whether the amounts of four drafts discounted at the Antigonish agency of the bank, on which the name of T. M. King or of his partner or firm did not appear, are to be reckoned as debts entitled to rank under the first preference as due by the assignors to the bank.

These drafts were drawn by the respondent's firm of C. B. Whidden & Sons on and accepted by one Thompson for the accommodation of King. They were indorsed by C. B. Whidden & Sons and handed to T. M. King, with the intention that he should indorse them and negotiate them for the benefit of his firm.

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He did negotiate them by discounting them as agent of the bank and applying the proceeds to his own use or that of his firm, but without indorsing them.

By what may at first sight appear like an inversion of interests the struggle on the part of the bank, the first preferred creditor, is to maintain that these four drafts, or more properly speaking the money advanced on them, do not come within the first preference as debts due by King. This arises from the insufficiency of the estate, the bank preferring to look to the parties whose names are on the paper; and the defendant, whose firm are liable as indorsers and entitled to rank on the estate only after payment of the first preferred debts, having a very direct interest in bringing this debt within that class.

The action is in form for the execution of the trusts of the deed, the plaintiff claiming payment of a number of notes of King Bros. & Co., to which the defendant is not a party. The defendant shows that he has paid to the plaintiff out of the trust moneys received by him upwards of $30,000, which includes the amount of a number of notes indorsed by him or his firm, the four disputed drafts among the rest, as well as a number of debts for which he was not personally liable.

If he can properly charge the amounts of these four drafts against the estate there will not be enough to pay the debts now claimed by the plaintiff.

If he is not entitled so to charge them then he and the other parties to the paper must provide for it. Hence the struggle.

We are not troubled, as I understand the evidence and the pleadings, with any question of subrogation, as we might be if the indorsers had paid the drafts to the bank and were now asserting a right, as sureties for a debt of King to the bank, to take the place of the

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bank in the first preference distribution. The defendant who is sued as the trustee happens to be one of the indorsers, but the other parties to the paper are not before us, and the payment which the plaintiff has received was not from the indorsers, but was made by the defendant individually out of the trust funds, or perhaps in anticipation of funds afterwards received. I have no means of knowing how that was, but I find in the evidence that, when the bank authorities required security as a condition of holding the drafts as past due paper until money could be realised from the estate, the defendant says that rather than give security he paid the money. I do not know how the estate accounts stood at the time, but knowing that the paper which it was proposed to hold over included many other notes of King, and finding the amounts of these four drafts and the interest upon them included in the $30,000 statement of payments on account of the estate, I take it that the payments were by the defendant acting or assuming to act as trustee, and not on behalf of the indorsers or the acceptor of the drafts.

It is said that King's motive in omitting to indorse the drafts was to avoid the appearance of their being discounted on behalf of himself or his firm. There seems to have been some irregularity in his method of dealing in such matters. His right to discounts from the Merchants' Bank was limited, according to Mr. Whidden's account of what King told him, to $5,000 at the Sydney agency and $10,000 at Antigonish. Mr. King was asked: "Had the firms of which you were a member limits of credit with the Merchants Bank? And if so, state what these limits were;" and he answered "I was only in connection with one firm, viz., King Brothers & Co.; the limit of the firm's credit at Sydney, Cape Breton, with the Merchants Bank was

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$5,000" saying nothing of any limit or any line of credit at Antigonish. In answer to another cross-interrogatory he states that at the time the drafts were discounted his firm had advances and discounts up to their limit. Then we have this question and answer.

6. If you state that your firm received part of the proceeds of these drafts, give your reasons for discounting them without indorsing them?

To the Sixth Cross-Interrogatory I say the firm of King Brothers & Co. had no account at the Antigonish Agency where these drafts were discounted, the account having been closed more than a year prior by the direction of the head office of the bank, after which, as agent, I refused their indorsement.

This reason would be more satisfactory if we found that the transaction went to the account of C. B. Whidden & Sons. in the books of the bank, but in place of that the proceeds of the notes were received directly by King. Nor is the answer easily reconciled with what appears in a statement prepared by King at the time of making the assignment, setting out the notes held by the bank with Antigonish names. There are seventeen notes amounting in all to over $17,000. Nine of them have the name of King Bros. & Co.; one has the name of T. M. King; four of the others are the drafts now in question; and the dates range from that of the earliest till after that of the latest of the drafts.

But there is no doubt left of the fact that these four drafts represent moneys of the bank applied by King to his own purposes, and that his indorsement, which under ordinary circumstances would have been there, was omitted because, in advancing or appropriating to himself the bank moneys under color of discounting the paper, he was exceeding his authority and acting in violation of his duty as agent.

The essence of the transaction was not altered by the form in which it was put. It was an appropriation by King to his own uses of funds entrusted to him by his

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employers. It was argued that it ought to be regarded as a loan from the bank to C. B. Whidden & Sons, and a loan of the same money by that firm to King Bros. & Co. There might be no legal or technical difficulty in so treating the transaction as against the respondent if the interest of justice or the rights of third parties required us to do so, particularly as the respondent put it in the power of T. M. King to negotiate the paper without becoming a party to it. That would, however, be giving more effect to the form in which the thing was done than to the proved intention of the parties, and, after all, the form of a discount on account of C. B. Whidden & Sons was not consistently carried through, because the proceeds of the drafts were not passed to their credit but were directly applied by King to his own purposes. It was well remarked by the learned Chief Justice in the court below, that if King had taken the money without security he would be liable to repay it, and that his wrongful dealing with the security placed in his hands does not do away with his liability. The technical character of his liability would be the same whether he borrowed from the bank or from C. B. Whidden & Sons. It would be for money lent or money had and received. Whose money was lent or was received by him to his own use? That the answer must be the money of the bank seems to me plain from the whole evidence, an important part of which is the explanation given by Mr. Whidden that he had no idea when he indorsed these drafts that King had exhausted the credit allowed him by the bank.

The case of *The Bank of Upper Canada* v. *Bradshaw[[17]](#footnote-18)*, which was cited for the appellants rather tells against them. It was sought to charge Bradshaw, who was a local agent of the bank, with moneys which he had

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advanced in alleged excess of his authority, but the moneys had not been advanced in form or effect for his own use and benefit, and he was held on that ground not to be liable in the action. One sum had been advanced to a corporation in which he was a shareholder. The corporation was the customer of the bank, and the fact that Bradshaw as a shareholder was distinct in point of law from the company itself was given as one reason, amongst others mentioned in the judgment delivered by Lord Cairns, which placed that charge on the same footing as the others.

It has been urged on behalf of the appellant that King's unauthorized dealing with the bank moneys was a wrong which did not create a debt unless the bank elected so to treat it, and it is said no such election has been made.

The former of these two propositions assumes, I think without sufficient warrant, that the bank could have proceeded against King in an action *ex delicto.* But even if that were so, there was at the same time a debt created by the receipt of the moneys. Of course only one action could be maintained. If an action of tort were brought it would not be competent to sue in debt for the same cause of action, and *e converso.* That, however, is not the point. The question is: Was there a debt created from King to the Merchants' Bank within the meaning of the first trust of the deed? Conceding for argument's sake that the taking of the money was a tortious act, it would all the same create a debt. Many cases may be cited as express authorities for this. I lately examined several of them in *Molson's Bank* v. *Halter[[18]](#footnote-19)*, viz., *Chowne* v. *Baylis[[19]](#footnote-20)*; *Emma Silver Mine Company* v. *Grant[[20]](#footnote-21)*; *Cooper* v. *Prichard[[21]](#footnote-22)*; *Evans* v. *Bear[[22]](#footnote-23)*; *Cobham* v. *Dalton[[23]](#footnote-24)*; *Ex parte Kelly[[24]](#footnote-25)*. Others

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referred to in the respondent's factum are *Dudley and West Bromwich Bank* v. *Spittle[[25]](#footnote-26)*; *Ramshire* v. *Bolton[[26]](#footnote-27)*; *Holt* v. *Ely[[27]](#footnote-28)*; *Neate* v. *Harding[[28]](#footnote-29)*.

Thus the proposition which asserts the necessity for the bank to elect to treat King's liability as a debt is beside the question even if it were sound in law. But if such election were important it is, as I apprehend, sufficiently shown by the release to which the bank is a party. The release plainly covers this liability. In this respect it is consistent with the recital, and if the aid of those parts of the deed were required to give the widest possible comprehension to the word "debts" as used in the trust clauses they would have that effect. I believe, moreover, that the fair result of the evidence (even leaving out that of King through whom the bank acted when he received the money) concerning the negotiations connected with the making of the assignment is to show a recognition on the part of the bank of this debt as a debt of King, though when the state of his affairs began to be understood a different tone may have been adopted. So little depends, however, in my opinion upon the attitude taken on the part of the bank that it would be useless to discuss the evidence at length.

Upon the grounds I have attempted to explain, and for the reasons given in the court below by the Chief Justice and Mr, Justice Weatherbe, I am of opinion that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitor for Appellant: Thomas Ritchie.

Solicitor for Respondent: W. F. Parker.

1. L. R. 1 P. C. 479. [↑](#footnote-ref-2)
2. 7 B. & C. 310. [↑](#footnote-ref-3)
3. 9 ed. sec. 291. [↑](#footnote-ref-4)
4. 22 Q.B.D. 90. [↑](#footnote-ref-5)
5. 1 Jur. N.S. 131. [↑](#footnote-ref-6)
6. 7 Ch. App. 142, affirmed in L.R. 7 H.L. 348. [↑](#footnote-ref-7)
7. L.R. 7 C.P. 372. [↑](#footnote-ref-8)
8. 44 Ch. D. 694. [↑](#footnote-ref-9)
9. 7 Ch. App. 680. [↑](#footnote-ref-10)
10. 19 Ves. 231. [↑](#footnote-ref-11)
11. 3 Mont. & Ayr 218. [↑](#footnote-ref-12)
12. 1 J. & h. 14. [↑](#footnote-ref-13)
13. 17 C.B. N.S. 466. [↑](#footnote-ref-14)
14. L.R. 8 Eq. 294. [↑](#footnote-ref-15)
15. 1 E. & B. 795. [↑](#footnote-ref-16)
16. 3 M. & S. 362. [↑](#footnote-ref-17)
17. L. R. 1 P. C. 479. [↑](#footnote-ref-18)
18. 18 Can. S.C.R. 88 [↑](#footnote-ref-19)
19. 31 Beav. 351; 8 Jur. N. S. 1028. [↑](#footnote-ref-20)
20. 17 Ch. D. 122. [↑](#footnote-ref-21)
21. 11 Q.B.D. 351. [↑](#footnote-ref-22)
22. 10 Ch. App. 76. [↑](#footnote-ref-23)
23. 10 Ch. App. 655. [↑](#footnote-ref-24)
24. 11 Ch. D. 306. [↑](#footnote-ref-25)
25. 1 J. & H. 14. [↑](#footnote-ref-26)
26. L. R. 8 Eq. 294. [↑](#footnote-ref-27)
27. 1 E. & B. 795. [↑](#footnote-ref-28)
28. 6 Ex. 349. [↑](#footnote-ref-29)