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*Feb. 18, 19.

THE COMMERCIAL BANK OF WINDSOR (PLAINTIFF)..... } APPELLANT;

AND

ANGUS J. MORRISON (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Banking—Bills and notes—Conditional indorsement—Principal and agent —Knowledge by agent—Constructive notice—Deceit.

A promissory note indorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the indorser where the condition has not been fulfilled. *Pym* v. *Campbell* (6 E. & B. 370) followed.

The principal is affected by notice to the agent unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the holder to shew that the agent had an interest in deceiving his principal. *Kettlewell* v. *Watson* (21 Ch. D. 685), and *Richards* v. *The Bank of Nova Scotia* (26 Can. S. C. R. 381) referred to.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc*, affirming the judgment of the trial court against the defendant, Morrison, present respondent, and ordering a new trial of issues submitted to the jury by the fourth question and by questions answered by their sixth and eleventh findings at the trial.

The action was for the recovery of the amount of three promissory notes for $1,000, $4,000 and $4,000 respectively, given to the bank as collateral security for the debt of one Smith, and was defended by the respondent, Morrison, an indorser on one of the notes and joint maker with Smith on the others. On the answers to questions submitted to the jury the learned

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

trial judge (Graham J.), ordered judgment for the plaintiff to be entered for the amount with interest, of the two first notes, and for the defendant on the last note.

The questions involved on appeals by the plaintiff and by the defendant Morrison from the trial court judgment arose principally upon the findings of the jury on the 3rd, 4th, 5th, 6th, 9th, 10th, 11th, 14th, 15th and 16th questions submitted to them which, with the answers, were as follows:

3rd. Did A. E. Lawson, the agent of the plaintiff bank at Middleton present to George Smith for payment the note for $1,000 sued on herein on or about the 16th day of November, 1897, at the office of the Commercial Bank of Windsor, Middleton?—Ans. No.

4th. Did Morrison put his name on the $1,000 note upon the condition that before it was delivered to Marshall, the agent of the bank, Smith would obtain the additional signature thereon of Robert Smith and that it was not to be used until then?—Ans. Do not agree.

5th. If so, had Stuart Marshall, the agent of the plaintiff bank at Middleton, while he was such agent, knowledge and notice of the said condition?—Ans. Yes, according to evidence.

6th. If he had such knowledge and notice of the said conditions, was it in the course of the business of the said agency at Middleton and at the time or before the said note was delivered to him as such agent for the plaintiff?—Ans. Eight say no.

9th. Did Morrison put his name on the note for $4,000 of 20th February, 1896, upon the condition that before it was delivered to Marshall, the agent of the bank, Smith would obtain the additional signature thereon of C. S. Harrington and that it was not to be used until then?—Ans. Eight say yes.

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10th. If so had Stuart Marshall, the agent of the plaintiff bank at Middleton, while he was such agent, knowledge and notice of said condition?—Ans. Yes, according to Andrew's evidence.

11th. If he had such knowledge and notice of the said condition, was it in the course of the business of the said agency at Middleton and at the time or before the said note was delivered to him as such agent for the plaintiff?—Ans. Eight say no.

14th. Did Morrison put his name on the note of $4,000 of 4th December, 1896, upon the condition that before it was delivered to Marshall, the agent of the bank, Smith would obtain the additional signature thereon of C. S. Harrington and that it was not to be used until then?—Ans. Eight say yes.

15th. If so, had Stuart Marshall, the agent of the plaintiff bank at Middleton, while he was such agent, knowledge and notice of the said condition?—Ans. Yes, according to evidence.

16th. If he had such knowledge and notice of the said conditions, was it in the course of the business of the agency at Middleton, and at the time or before the said note was delivered to him as such agent for the plaintiff?—Ans. Yes, according to the evidence.

The plaintiff's appeal was so far as the third note was concerned and to set aside the 5th, 9th, 10th, 14th, 15th and 16th findings; and that of the defendant, Morrison, as to the first two notes, and to set aside the 3rd, 6th and 11th findings.

On these appeals, the Supreme Court of Nova Scotia dismissed the application of the plaintiff to set aside the 5th, 9th, 10th, 14th, 15th and 16th findings, and confirmed the order as to the third note; it also dismissed the application of the defendant, Morrison, on appeal from the order for judgment of the first two notes and ordered that the 6th and 11th findings

should be set aside, the 3rd of the findings to stand and a new trial of the issues submitted to the jury by the questions answered in the said 6th and 11th findings, and by the 4th question, and that the judgment for the plaintiff for the two first notes should be set aside with costs.

The present appeal is asserted on behalf of the bank against the latter judgment.

J. J. Ritchie K.C. for the appellant. The agent, in order to cover up his breach of duty to the bank in respect to the credit without adequate collateral security, took part in obtaining the note so that he could report to the head office that he held it, and did not disclose its date to the bank. If there was a condition attached, it is evident that the agent must have been a party to it to save himself with the bank for having given credit to such an extent without adequate security, and there is ground for the jury finding as they have done. *Richards* v. *Bank of Nova Scotia* (1); *In re Hampshire Land Company* (2); Bowstead on Agency, p. 335. Under the circumstances the ordinary rule as to constructive or imputed notice, if applicable at all to commercial transactions, does not apply. This is a well recognized exception to the general rule. The agent is party or privy to the commission of a fraud or misfeasance, or irregularity upon or against his principal, and his knowledge of such fraud, misfeasance or irregularity, and of the facts and circumstances connected therewith, are not to be imputed to the principal. It would be a presumption contrary to truth, and which the judge knows to be contrary to the truth. Notice to an agent is not notice to the principal, where it would be quite certain that the agent would not disclose the matter. *In re Fitzroy*,

(1) 26 Can. S. C. R. 381. (2) [1896] 2 Ch. 743.

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Bessemer Steel Co. (1); *Cave* v. *Cave* (2); *Ex parte Oriental Commercial Bank* (3); *Kennedy* v. *Green* (4); *Espin* v. *Pemberton* (5); *Dovey* v. *Cory* (6).

The courts do not now extend the artificial doctrine of constructive or imputed notice, but restrict it, particularly in regard to commercial matters as distinguished from real estate transactions. *Manchester Trust* v. *Furness* (7); *London Joint Stock Bank* v. *Simmons* (8); *Allen* v. *Seckham* (9); *English and Scottish Mercantile Investment Co.* v. *Brunton* (10).

Both on the pleadings and evidence the case has been dealt with on a wrong basis, and the authorities cited in the judgment of Ritchie J. have, therefore, no application. The sole point is whether or not the knowledge of the agent can, by means of the artificial doctrine of constructive or imputed notice, be fastened upon the bank, and this point is not dealt with.

The 9th and 14th findings, in respect to the special agreement or condition, should have been set aside as, in view of the inherent improbability of the evidence, the findings should not stand. The 6th and 11th findings should not have been set aside. The jury had ample evidence from which they could draw the inference that the information was not obtained by the agent in the course of the business of the bank.

Roscoe K.C. for the respondent. In granting a new trial the court had ample power to give judgment on the issues properly found by the jury and to send back the remaining issues improperly found or undetermined for a new trial without ordering a new trial as to all the issues. Order 37, Rule 6, N. S. Jud.

(1) 50 L. T. 144.
(2) 15 Ch. D. 639.
(3) 5 Ch. App. 358.
(4) 3 My. & K. 699.
(5) 3 DeG. & J. 547.
(6) [1901] A. C. 477.
(7) [1895] 2 Q. B. 539.
(8) [1892] A. C. 201.
(9) 11 Ch. D. 790.
(10) [1892] 2 Q. B. 700.

Act. *Nash* v. *The Cunard S. S. Co.* (1); *Marsh* v. *Isaacs* (2); *McGuiness* v. *Dafoe* (3); *Hesse* v. *St. John Railway Co.* (4). Where a material issue is left undetermined by reason of a disagreement of a jury the case must go back for a new trial of that issue. *Imperial Loan Co.* v. *Stone* (5).

The note indorsed for accommodation upon the condition that it should not be used or issued as such until another person became a party thereto as additional surety is at best a mere escrow and not a complete instrument, and a payee or indorsee with notice of such condition cannot enforce payment in default of fulfilment of the condition. Byles on Bills (15 ed.) 113; Chalmers Bills of Exchange (5 ed.) 56; McLaren on Bills (2 ed.) 117; Daniels on Negotiable Instruments (2 ed.) 60; *Bell* v. *Ingestre* (6); *Daggett* v. *Simonds* (7); *Awde* v. *Dixon* (8); *Chandler* v. *Beckwith* (9).

The agency of the bank has no separate existence, as a bank, but simply is agent of the principal and the person in charge is the agent conducting the business of the corporation. *Prince* v. *Oriental Bank Corporation* (10).

Notice to an agent in the course of the principal's business and knowledge of an agent in the course of the principal's business is the knowledge of the principal. *Atlantic Bank* v. *Merchants Bank* (11); *Blackburn, Low & Co.* v. *Vigors* (12); *Boursot* v. *Savage* (13); *Innerarity* v. *Merchants' National Bank* (14); Bowstead on Agency, 335; Byles on Bills (15 ed.) 143. This is so, even if the agent makes representations to his

(1) 7 Times L. R. 597.
(2) 45 L. J. C. P. 505.
(3) 23 Ont. App. R. 704.
(4) 30 Can. S. C. R. 218.
(5) [1892] 1 Q. B. 599.
(6) 12 Q. B. 317.
(7) 173 Mass. 340.
(8) 6 Ex. 869.
(9) 2 N. B. Rep. 423.
(10) 38 L. T. 41.
(11) 10 Gray (Mass.) 532.
(12) 12 App. Cas. 531.
(13) L. R. 2 Eq. 134.
(14) 139 Mass. 332.

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principal at variance with his knowledge and a contract is made on such representations. *Bawden* v. *London, Edinburg and Glasgow Assurance Co.* (1); *Re Weir*; *Hollingworth* v. *Willing* (2).

It was the agent's duty to communicate the circumstances as to the condition on which he held the notes to his principal and the court should hold that he did communicate it. *Kettlewell* v. *Watson* (3), per Frye J. at p. 705; *Allen* v. *South Boston Railroad Co.* (4). It must be made out that distinct fraud was intended in the very transaction so as to make it necessary for the agent to conceal facts from his principal in order to defraud him; *Rolland* v. *Hart* (5); and this must be made out independently of the transaction itself; *Cave* v. *Cave* (6). The mere fact that the agent has an interest in suppressing his knowledge is not sufficient to prevent such knowledge being imputed to the principal if it is the duty of the agent to communicate it. *Thompson* v. *Cartwright* (7); *Bradley* v. *Riches* (8). When a bank acts through an agent the bank must be deemed to know what the agent knows. *Atlantic Cotton Mills* v. *Indian Orchard Mills* (9); *Bank of United States* v. *Davis* (10); *Blackburn, Low & Co.* v. *Vigors* (11); *Barwick* v. *English Joint Stock Bank* (12); *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (13); *Mackay* v. *Commercial Bank of New Bruswick* (14); *Collinson* v. *Lister* (15); *Re Halifax Sugar Refining Co.* (16); *National Security Bank* v. *Cushman* (17); *Twenty-Sixth Ward Bank* v. *Stearns* (18).

(1) [1892] 2 Q. B. 534.
(2) 58 L. T. N. S. 792.
(3) 21 Ch. D. 685.
(4) 150 Mass. 200.
(5) 6 Ch. App. 678.
(6) 15 Ch. D. 639.
(7) 33 Beav. 178.
(8) 9 Ch. D. 189.
(9) 147 Mass 268.
(10) 2 Hill (N.Y.) 451.
(11) 17 Q. B. D. 553.
(12) L. R. 2 Ex. 259.
(13) 18 Q. B. D. 714.
(14) L. R. 5 P. C. 394.
(15) 7 DeG. M. & G. 634.
(16) 7 Times L. R. 293.
(17) 121 Mass. 490.
(18) 148 N. Y. 515.

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The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—The only title that the bank had to the notes in question was through Marshall, its agent, and it is impossible that they can be used by the bank except subject to the terms upon which the notes were delivered to the agent through whom it derived its title. It was known to Marshall that it had been agreed between Morrison and Smith that the notes should be available only upon condition that some other responsible person should also become surety. The agent took the notes subject to this condition and it must be assumed that the bank also agreed to these terms. So far as the pleadings are concerned, they are sufficient to raise this issue. The case is governed by the principle laid down in *Pym* v. *Campbell* (1).

Of course, it has been decided that the principal is not affected where the agent has been guilty of fraud, but it is not sufficient for the bank to show merely that the agent had some interest in deceiving his principal. It must be shown that the agent was actually implicated in a fraud on his principal. Marshall could not have recovered upon the notes if he had sued in his own name as he accepted them conditionally and it is not sufficient to show that he was interested in not communicating this condition to his principal. I refer to the remarks of Mr. Justice Fry in the case of *Kettlewell* v. *Watson* (2), and also to those of Mr. Justice King in the case of *Richards* v. *The Bank of Nova Scotia* (3) decided by this court.

So far as the facts of the case are concerned they are sufficiently settled by the findings of the jury to the questions put to them, except as regards the fourth,

(1) 6 El. & B. 370.
(2) 21 Ch. D. 685.
(3) 26 Can. S. C. R. 381.

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sixth and eleventh questions as to which a new trial has been ordered.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. G. Parsons.*

Solicitor for the respondent: *O. T. Daniels.*