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WILLIAM EWING AND J. H. DAVIDSON (DEFENDANTS)..... } APPELLANTS;

*May 31.
June 8.

AND

THE DOMINION BANK (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Estoppel—Forgery—Promissory note—Discount—Duty to notify holder.

E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co., for $2,000 would fall due at that bank on a date named and asking them to provide for it. The name of E. & Co. had been forged to said note which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees.

Held, affirming the judgment of the Court of Appeal (7 Ont. L. R. 90). Sedgewick and Nesbitt JJ. dissenting, that on receipt of said notice E. & Co. were under a legal duty to inform the bank, by telegraph or telephone, that they had not made the note and not doing so they were afterwards estopped from denying their signature thereto.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiffs.

The facts of the case are stated in the judgment of the Court of Appeal delivered by Mr. Justice Osler as follows:

"The plaintiffs are indorsees of a promissory note for $2,000, dated 14th August, 1900, purporting to be made by the defendants, payable four months after date to the order of the Thomas Phosphate Company, and indorsed by them to the plaintiffs.

* PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 7 Ont. L. R. 90.

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"The defendants deny the making of the note and allege that if it purports to be signed by them the signature is a forgery.

"The plaintiffs reply that, even if the signature is a forgery, the defendants are estopped from denying that it is in fact their signature.

"The facts may be very briefly stated.

"One Wallace was the manager of, and perhaps interested in, a business carried on by Walter C. Bonnell under the name of the Thomas Phosphate Company, which previous to the 14th August, 1900, had done some banking business with the plaintiffs. On the 15th August, Wallace procured the note now sued on to be discounted by the bank for the Phosphate Company and the proceeds were placed to the company's credit. On the 15th and 16th August checks were issued by the company against the proceeds of the deposit and other small deposits, payment of which left a balance to their credit at the close of business on the 15th of $1,611.55; on the 16th of $1,355, and on the 17th of $84.

"On the 15th the bank sent a memo. to the defendants, who reside in Montreal, in the following terms: 'Toronto, August 15th, 1900. You will please take notice that your note for $2,000, to the Thomas Phosphate Company falls due at this bank on the 17th December, 1900, and you are requested to provide for the same. A. P., Assistant Manager. To Messrs. Ewing & Co., Montreal.'

"This was received by the defendants on the 16th August. To the bank they made no response and took no notice of the memo., but between themselves and Wallace an active correspondence by telegram and letter was kept up, beginning on the 16th August and ending on the 5th of December; on the defendants' side at first asking for an explanation 'before

advising the bank,' and then urgently insisting on the note being taken up; while Wallace's letters are filled with the usual regrets and excuses for his conduct, and vain promises to settle the note and relieve the defendants' anxiety.

"The defendants appreciated the gravity of the situation, warning Wallace by telegram and letter on the 16th August that 'the Phosphate Company have no note of ours,' and that 'before advising the bank of this thought it better for you that we should ask you what it means,' and that 'we have to act promptly and to advise the bank at once to save ourselves.' On the 21st, that 'the only way out of it is for you to take it—the note—up, and that at once,' and that 'contrary to advice received we have held off for a day before notifying the bank.' On the 23rd, that 'our lawyers told us distinctly that we ought at once to advise the bank, in fact to do so the night we wrote to you. We are now going against their advice. For God's sake fix it at once, else we don't know how the thing will end.' And on the 25th in a similar strain, repeating the warning they had received from the lawyers and adding, 'what can we do? We want to protect ourselves. So far we have only been protecting you, and to-morrow we must know something definite, as we cannot longer run the risk we are doing.' On the 22nd October: 'By our silence we may now be responsible, but this responsibility we should certainly dispute, and you know the only way we could dispute it—but it would be a vile job.' On the 4th December the plaintiffs wrote defendants a formal letter advising them that they were the holders of a note made by them dated 14th August, 1900, and payable at their branch office on the 17th instant, and requesting defendants to provide for the same. The defendants wrote to Wallace on the 5th December

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enclosing a copy of this letter, 'which we certainly cannot let go unanswered. We have protected you as long as was possible, but must now protect ourselves. We have decided, however, not to reply to this till Monday the 10th instant, thus giving you as long a time as possible, but on that day unless, &c., we will certainly write the bank denying the note.'

"On the 10th they did so and advised Wallace, 'We have replied to the bank that we have not given such a note.'

"The bank manager said that the note came into the bank's possession on the 14th August, 1900; the discount was not agreed upon till the 15th; that Wallace, *i.e.*, the Phosphate Company, was at once entitled to draw against the proceeds which were placed to his credit before the memo. of the 15th was sent to the defendants; the bank did not treat that as a letter to which they required or expected an answer before giving credit; they sent the letter of the 4th December in consequence of Bonnell having come in and asked them to find out if the note was all right. If they had received on the 17th August such a letter as the defendant wrote them on the 10th December they would have refused to do 'any further business with the account.'

"He said that Wallace had left the country 'about the time the note matured,' but whether before or after he did not know. The action was not brought until the 23rd of November, 1901.

"The learned trial judge found that the note was a forgery by Wallace, but that the defendants were estopped by their conduct from setting this up, and he gave judgment against them for the full amount of the note."

The Court of Appeal affirmed said judgment and the defendants appealed to this court.

H. S. Osler K.C. for the appellants. When the notice was received on August 16th, the appellants were under no legal obligation to notify the bank as they then could only suspect forgery. When they knew it for a fact the proceeds had all been paid out and the bank was not prejudiced by their silence, Bigelow on Estoppel (5 ed.) p. 595 : *Viele* v. *Judson* (1) ; *McKenzie* v. *British Linen Co.* (2).

Aylesworth K.C. and *Milliken* for the respondents, referred to *Richardson* v. *Dunn* (3) ; *Wiedemann* v. *Walpole* (4).

SEDGEWICK J. (dissenting)—On Thursday, 16th August, 1900, Ewing & Co. (a Montreal firm), received through the post office from a Toronto bank, a notification as follows :

TORONTO, Aug. 15, 1900.

You will please take notice that your note for $2,000, to the Thomas Phosphate Co. falls due at this bank on the 17th December, 1900, and you are requested to provide for the same.

A P., Asst. Mgr.

The firm had not made any such note, had not authorized it, knew nothing of it, and had no connection or dealings with the Thomas Phosphate Company ; and the question presented for decision is : What legal duty towards the bank was imposed upon Ewing & Co., by the receipt of the notification ?

It is contended that the firm ought immediately to have correctly conceived the whole Toronto situation, —to have divined that the bank had discounted the note (although all they were told was that it was *payable* at the bank) ; to have surmised that although the note had been acquired by the bank yet that some of the proceeds were still in hand ; and to have infer-

(1) 82 N. Y. 32.
(2) 6 App. Cas. 82.
(3) 1 G. & D. 417.
(4) [1891] 2 Q. B. 534.

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red that an immediate letter or telegram to the bank would enable it to retain some of the money.

Upon such fact and assumption is based the assertion of a legal duty to send the letter or telegram, and a breach of that duty has by the judgment appealed from been declared to have the same effect as if Ewing & Co. had actually signed the note.

It is not proved that a letter would have been of any service to the bank. Ewing & Co. received the notification on Thursday, but at what hour of the day I do not know. Mr. Pepler (the bank officer) says that he would "reasonably have expected an answer to his notification on the morning of Friday", but he evidently assumes (1) the infallibility of the course of post, (2) prompt delivery at the Montreal end, and (3) the continued presence in their office of one or both of the members of the Ewing & Co. firm. From a question put to the witness by counsel for the bank I would gather that under certain circumstances a letter mailed in Montreal would not "in course of post" arrive in Toronto until the second day thereafter.

We do not know at what hour the mail ought to have arrived in Montreal; at what hour it did arrive; at what hour the notification was received at the office of Ewing & Co., or at what hour it was opened and read. We are uninformed, too, as to the time of day at which the Montreal mail for Toronto closed. And we are therefore unaware of the amount of time which the firm had within which to determine its course of action with reference to circumstances so unusual as to be outside the experience of almost every business man.

I am not prepared to say that a merchant must be held (by estoppel) to have signed a promissory note, merely because seeing amongst his letters a notification of a transaction with which he has nothing to

do, he does not instantly withdraw attention from his own affairs, no matter how pressing they may be, estimate correctly the danger that somebody else may be in, and fly to the rescue. It has been urged that as a letter might have been too late to save the bank, Ewing & Co. should have sent a telegram, and we have been invited to declare the law to be that without knowing the existence of any pressing necessity for electrical activity, without even knowing that the bank owned the note, Ewing & Co. must pay it because they did not send a telegram, the cost of which the bank would probably have refused to provide had the necessity for it not been apparent to them, that is had the circumstances been at all less peculiar than they happened to be.

Moreover, although Mr. Pepler tells us that he would have expected an answer on Friday morning, he does not say at what hour, and 11 o'clock might have been too late to be of any use to him or his bank. Four cheques of the Phosphate Company's were paid on that day, and the first of them completely exhausted the discount of this note.

I find it, therefore, impossible to say that Ewing & Co. neglected the performance of any duty; or that if they had, even within a few hours, replied to the bank's notification, the reply would have been of any avail to the bank.

For the present I express no opinion upon the question of duty to make any reply whatever to such a notification as we have here; but I desire to say that I am not satisfied that any such duty exists. If it does, then a breach of it would result not only in estoppel, but (in the alternative) in an affirmative action for damages for breach of the duty, and such an action has never yet been heard of.

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What precisely is this duty to warn of impending danger? I am not under a legal obligation to tell a man that his house is on fire, or that there is gunpowder in a keg upon which he is knocking out his pipe ashes; I am not bound to tell him that there is a gold mine on the farm which he is selling to me at a farm price; or that the machinery which he is bargaining for will not do the work which he expects of it. I am under no duty to tell a banker that the note which he is discounting is a forgery, if my name does not appear upon it. And I am not convinced that the law is otherwise, or that there is any good reason why it should be otherwise, merely because it is my signature and not that of some other person which has been forged. No doubt the remedy by estoppel would be available against me in the latter case and not in the former, but I am not speaking now of remedy, but of legal duty to warn against danger or damage, and I see as much duty in the one case as in the other.

There is this distinction between the two cases (and in my view the confusion in the law arises from its neglect) that when it is my signature that is on the note my conduct may amount to an *adoption* of it, (I would not say a ratification, but an adoption of it,) whereas such a contention would be almost impossible (as against me) were the signature that of some one else.

I would suggest, therefore, omission (in such cases as that in hand) of the idea of duty and fix the attention upon the question of adoption, as in the case of adoption by a company of an agreement made in its name but prior to its incorporation. And I would scrutinize the proved conduct with a view of ascertaining, not whether there has been a breach of admittedly very ill-defined duty, but whether there has been an adoption of the signature.

The more satisfactory of the cases in which estoppel to deny signature has been affirmed will yield the same result by the method which I suggest, and there is here and there in the authorities a recurrence to adoption as the true effective principle. For example —Lord Colonsay said in *Boyd* v. *Union Bank* (1) (quoted) in *McKenzie* v. *British Linen Co.* (2),

> when a party is shewn a bill and makes no objection, and allows the creditor to remain in the belief that it is his signature, he has incurred a ground of liability through the loss incurred by that *adoption*. That principle might apply even though he was not shewn the bill which is the subject of discussion.

See also pp. 92, 99, 109, 110 of the *McKenzie Case*, (2) where the same principle is appealed to; although I must say that the whole case does not leave an impression of any very clear appreciation of the distinction between estoppel, ratification, and adoption.

In the present case I see nothing which can be construed into adoption. Clearly Ewing & Co. had no intention of becoming liable on the note, although they seem to have had grave doubts as to what the law would make of the matter. And it is equally clear that the bank did not rely upon the adoption, but upon the genuiness of the signature.

Although, therefore, I would allow the appeal altogether yet I think it proper to add that in no case would I agree that the bank should recover from Ewing & Co. more than it had lost through the firm's neglect.

Admitting, for the moment, the existence of duty to repudiate, the damages for breach of that duty are surely the amount which the bank lost by the absence of the repudiation. But it is said that because the bank sued upon the note and succeeds upon the breach of duty, it is very much better off than if it had sued

(1) 17 Ct. of Sess. (2 Ser.) 159. (2) 6 App. Cas. 82 at p. 111.

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directly for the breach of duty. I cannot agree to that. (I refer to Ewart on Estoppel ch. 16, where the subject is treated at length). The bank admits that $645, out of the $2,000, was gone before they could, by the first possible mail, have received warning from Montreal, but nevertheless they have recovered against Ewing & Co. that amount as well as the remaining $1,355.

Upon the same principle if they had only lost one dollar through Ewing & Co. they would have made them pay the other $1,999.

Judgment for the whole sum would have been quite unobjectionable if Ewing & Co. had adopted the signature; but it cannot be right when their liability proceeds upon breach of duty.

It is said, with a show of reason, that the whole amount ought to be adjudged because the holding is that Ewing & Co. are estopped from denying that the note is theirs; that it is therefore theirs; and that they must of course pay it. Estoppel is always based upon change of position, and I do not see why it should be enforced further than necessary to re-establish the *status quo ante*. Estoppel shuts out the truth in order to do justice. Beyond that it should not go. In some cases no doubt, the previous situation cannot be reproduced, for example where the estoppel effects change of ownership in property. Even in these the law may eventually work out some method of making legal awards correspond to damage done. But there can be no difficulty in such cases as the present, nor any necessity for adding to legal anomalies one which would declare that the amount to which a plaintiff shall be entitled depends entirely upon the form of his pleading: Sue upon a note, when your real cause of action is breach of duty to warn of danger, and you will get $2,000.00. But sue

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for the breach of duty directly, and you will get $1,355.00 only.

Lord Lyndhurst in *Hume* v. *Bolland* (1) at page 138 said:

> If your situation is not altered you cannot maintain an action. If it is altered must not the amount of dmages to be recovered depend upon the extent to which it is altered ?

Any other doctrine would be anomalous and mischievous. (See the question discussed in Ewart on Estoppel, pp. 194-5)

I think the appeal should be allowed and the action dismissed with costs.

GIROUARD J.--We have given to this case all the attention which its importance demanded. It was fully discussed and the written opinions pro and con were duly considered. It has no precedent in this country and it can hardly be said that the few decisions rendered abroad are exactly in point. They are fully reviewed by my learned colleagues, and in the few remarks I propose to make I do not intend to refer to them. The question involved is one altogether of law. The fact that we have not been able to give an unanimous assent to the judgment of the two courts below shows that it is not free from difficulty.

Speaking for myself, I cannot satisfy my mind that when a business man, familiar with banking operations, their meaning and scope, is informed, according to banking usages, that his name is being used as maker of a note in a bank, evidently for cash credit either already made or to be made, he is under no obligation to reply promptly, at least within a reasonable time, that it is used without his authority, or even that it is a forgery. It is argued that there is no business relation between him and the bank to create

(1) 1 Cr. & M. 130.

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such a duty. I believe, on the contrary, that business relation exists, created without his knowledge, it is true, by force of circumstances, but the introduction of his name, even if unwarranted or forged, brought him into contact with the bank and created business relationship which can end only by repudiation or payment in due time. In such a case every merchant or business man owes some duty to his fellow members of the commercial community. Is he not under obligation to cause no damage by his fault or negligence, either by acts of commission or omission? I have always been under the impression that this elementary principle was held sound in every country, in England as well as everywhere else. I cannot conceive that the appellants ought not to be punished for the omission to do something which a fair and reasonable man, guided by those considerations which regulate the conduct of commercial and even ordinary human affairs, would do. This punishment may in some cases, and always in countries governed by the civil law, consist only in the payment of damages, but according to English law forms an estoppel, which prevents the wrongdoer from disputing his liability for the full amount of the claim, for he is presumed to have acquiesced in it. The rule may look harsh and arbitrary, but I must confess that it is highly moral and eminently healthful and salutary. The appellants at least have no excuse for complaining of the severity of this law. They knew that their duty was to give a prompt reply, namely, on the 16th August, and I should say both by letter and by telegraph or telephone, even if it would cost them a few cents, for the law does not take notice of trifles. *De minimis not curat lex.* The evidence shows that if they had done so, the loss would have been only partial. Not only were they in fault for not answering the

bank, but also, and perhaps more so, for concealing what they knew of the forgery. Their lawyer advised them at the very first to repudiate their signature. They themselves, by telegraph and letter, informed the forger on the 16th of August that they would act at once. They did not do so for a few months; they kept silence with the bank till a few days before the maturity of the note Why they broke it at such a late hour, when nothing could be done by the bank to protect its position, it is impossible to imagine, if the contention of the appellants be correct that there was no duty for them to speak. They had some reason to expect that the forger would be able to make the loss good; the Thomas Phosphate Company might materialize and come to his assistance, and consequently they limited their exertions to save him, if possible; but, as is usual in similar cases, they were doomed to disappointment and became the victims of their misplaced confidence and exaggerated kindness. They must suffer for the consequences of their conduct, which amounts to fraud in law, for their inaction or action—either word meets the case—is a fraud in law. With the judges of the two courts below, the majority of this court have come to the conclusion that they are estopped from setting up the forgery of their signature, and that they must pay the full amount of the note.

DAVIES J.—I would have been well content to rest my judgment in this appeal upon the able and clear reasons given by Osler J. in delivering the judgment of the Court of Appeal from which the appeal is taken. As, however, there is a difference of opinion amongst the members of this court I have thought it well to add a few observations of my own. The facts of the case are not in dispute and are stated by Osler J. as follows:

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One Wallace was the manager of, and perhaps interested in, a business carried on by Walter C. Bonnell under the name of the Thomas Phosphate Company, which, previous to the 14th August, 1900, had done some banking business with the plaintiffs. On the 15th August, Wallace procured the note now sued on to be discounted by the bank for the Phosphate Company and the proceeds were placed to the company's credit. On the 15th and 16th August checks were issued by the company against the proceeds of the deposit and other small deposits, payment of which left a balance to their credit at the close of business on the 15th of $1,611.55 ; on the 16th of $1,355, and on the 17th of $84.

On the 15th the bank sent a memo. to the defendants, who reside in Montreal, in the following terms; "Toronto, August 15th, 1900. You will please take notice that your note for $2,000 to the Thomas Phosphate Company, falls due at this bank on the 17th December, 1900, and you are requested to provide for the same. A. P. Assistant Manager. To Messrs. Ewing & Co., Montreal."

This was received by the defendants on the 16th August. To the bank they made no response, but between themselves and Wallace an active correspondence by telegram and letter was kept up, beginning on the 16th August and ending on the 5th of December ; on the defendants' side at first asking for an explanation "before advising bank" and then urgently insisting on the note being taken up ; while Wallace's letters are filled with the usual regrets and excuses for his conduct, and vain promises to settle the note and relieve the defendants' anxiety.

On these facts two questions arise; first, was there any imperative duty on the part of the appellants, Ewing & Co., on the morning of the 16th August, when they received the above letter or notice from the bank, to at once notify the bank that the note was not genuine? And, if not, did such imperative duty arise at any time afterwards, and, if so, when ? The appellants strongly contend that at no time did such imperative duty arise but that if they were wrong and it did arise it did not do so until after the 20th or 21st August when they had a personal interview with Wallace who then practically confessed the forgery to them. I am quite at a loss to follow the reasoning which, assuming the duty to exist at all, would postpone it

till the 20th or afterwards. It seems to me that if there is a duty at all that duty arose immediately on receipt of the notice from the bank of the 15th August. If, under the circumstances, there was any room for reasonable doubt as to the genuineness of the signature, or any reason to believe that a mistake had been made in the notice which inquiries would clear up, the appellants would have been entitled to the necessary time to make proper inquiries. But it does not appear to me that any such doubts or room for doubts existed. Both William Ewing and James H. Davidson, the only members of the firm of Ewing & Co., were examined at the trial and they both state that they neither of them ever authorized any other person to sign the firm's name to any note; that they never used or gave any accommodation paper in their business or signed any blank notes, and that the note in question was a forgery. They knew they had never given or authorized the giving of such a note as the bank had advised them of, and the only reason given for not immediately notifying the bank was that given by Mr. Ewing, that he thought it might be a draft made on them and not a note. I cannot myself accept this as the true explanation. The notice says nothing about a draft and does not use any language from which a business man could fairly believe a draft was intended. If it was a mere draft that was intended and not an acceptance of a draft, a notice would not have been sent by the bank but the draft itself would have been forwarded for acceptance. The appellants knew it could not be an acceptance any more than a note for they had never signed nor authorized the signing of either, and the fact that in the telegram sent by them that day to Wallace, the managing clerk of the Phosphate Company, and also in the letter confirming that telegram, they make no reference to any draft or to the pos-

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sibility of there having been any such mistake made' but speak of the document held by the bank as a *note*, and repudiate the fact that the Phosphate Company held any note of theirs, satisfies me that they were not under any doubts or delusions on the subject at all. However, be that as it may, they got a telegraphic answer from Wallace that evening at 6.14 p.m., which could leave no possible doubt in their minds that the document was a note and not a draft, and that it was in the hands of the bank and was, as they knew, a forgery. Assuming for the sake of argument that Ewing & Co. were justified in waiting till they had received Wallace's answer, they knew on its receipt that the bank, respondent, was in possession of a note of theirs which they must have known was forged for $2,000, and which they had been formally "requested to provide for" at maturity. A whole day had been lost in making a useless inquiry. But even assuming that the duty to notify the bank of the forgery did not arise until the receipt of Wallace's telegram, what was to have prevented this notice being then sent either by telephone or telegraph. The counsel for the appellant contended that assuming the duty existed or arose on the receipt of the telegram from Wallace, it would have been discharged by the writing of a letter in the ordinary course of mail on the following day the 17th, which could not if written and posted in business hours reach its destination until the 18th when it would be useless as all the proceeds arising from the discount of the forged note had then been paid out by the bank. But I cannot accept any such proposition as that put forward by the appellants' counsel. Given the existence of an imperative duty; given the fact that it did not arise till after the receipt of Wallace's telegram, after business hours on the evening of the 16th; I ask on what principle can it be

discharged or fulfilled by mail alone. Is there any magic in the "mail" which makes it alone the proper vehicle for transmitting business information? Is there any reason why, the ordinary mail or post having been missed, resort should not be had to the telegraph or in some circumstances the telephone? Between the cities of Montreal and Toronto there existed telephonic and telegraphic communication as well as mail. Is it to be held by the courts that in the present day, where such a proportion of business is carried on by means of the telephone and telegraph, that, in a matter of urgency and moment involving some thousands of dollars, and where a few hours delay might be fatal, resort must not be had to one or other of the speedier methods of communication but must be confined to the mail alone? Is it reasonable that business customs and habits in a matter of this kind should be ignored? I do not think so and am satisfied that if the imperative duty existed at all it should have been discharged on receipt of the bank notice and if delay was sought to get information from the suspected forger then, at the expiration of that delay, notice should have been given to the bank, either by telephone or telegraph, which would have reached them on the morning of the 17th and while the larger part of the proceeds of the note were still lying in the bank and subject to its control.

Mr. H. S. Osler, in his argument for the appellant, laid much stress upon the form and character of the notice sent by the bank to Ewing & Co. and urged that too much importance had been attributed to it by the Court of Appeal. I pass by all technical criticism as to its form and looking at its substance I find it furnishes Ewing & Co. with all possible information they could require as to date, amount, due date, payee, maker, etc., of the note, winding up with a request that they should provide for the same.

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Nothing is wanting to inform them that a note professing to be theirs was in the hands of the bank and was being treated by them in the ordinary business way as a genuine note, and that the bank looked to them for payment. They knew it was a forgery. As between them and the bank their knowledge was exclusive. Instead of imparting it to the bank on receipt of its letter or notice they enter into prolonged telegraphic, written and personal communications with the forger lasting up to within a few days of the note falling due, when, in reply to the usual notice requesting payment, they, for the first time, repudiate the note. From their silence after the first notice sent them the bank naturally assumed the genuineness of the note and acting on that very natural assumption paid out the larger portion of the proceeds of the discount of the note, all of which would have been saved to them had Ewing & Co. on the 16th, or on the beginning of the business hours of the 17th, given them the information they should have given.

Again it is said that this is a suit to prevent a man from speaking the truth and to compel him to pay a note he never made nor authorized. But the answer is simple. The very basis of the doctrine of estoppel is that a man may by his representations or by his silence or his conduct towards his fellow man, if followed by the latter's consequent loss, prevent himself from setting up that to be true which he had induced another to believe was false or *vice versâ*. There would be no wrong in compelling a man to pay a note he had never signed or authorized if he by his representations, or silence, or conduct had led another to part with his money in the belief that the note was genuine.

Then comes the important question whether there was any duty in the matter at all on the part of

Ewing & Co. to give information to the bank of the forgery when they received the notice of the 15th August. It is argued that as there was no business relationship existing between the bank and Ewing & Co. at the time such as that between a bank and one of its ordinary depositors or customers so there was no duty to respond to the bank's notice. It is true that such a relationship did exist between the parties in the case of the *Leather Manufacturers' Bank* v. *Morgan* (1). In that case it was laid down by the Supreme Court of the United States that where cheques had been drawn by the plaintiff, a customer in the bank, and after having been fraudulently altered had been paid by the bank and charged up against the plaintiff, if the alterations might have been discovered by the latter by the examination of his pass book and advised of in time to enable the bank to take certain action which might have prevented it sustaining loss and this had not been done he would be estopped from claiming for the sums paid out on the altered cheques. The basis on which the doctrine of estoppel rests is discussed in this case at great length and the rule laid down by Parke B. in *Freeman* v. *Cooke* (2), approved of, namely that

> if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth ; and *conduct, by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.*

Both parties profess to rely upon this rule in this case though I cannot find that any one of the limitations mentioned in it express or suggest the existence of the relationship of banker and customer or similar relationship as necessary to create the duty the

(1) 117 U. S. R. 96. (2) 2 Ex. 654 at p. 663.

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neglect of which imposes the liability. It speaks of a *neglect of duty cast upon a person by the usage of trade or otherwise to disclose the truth.* I fail to appreciate the argument which would confine this duty to cases where such relationships already exist as those between banker and customer or seller and buyer. It does seem to me that in a country like Canada where such a large proportion of its business is carried on by credit evidenced by drafts and notes which are discounted by one or other of the chartered banks of the country the usages of trade which create the duty apply to all persons engaged in trade who are notified of the holding by one of these banks of a note or draft professing to be theirs. I cannot believe that such a duty would exist as between the bank and Ewing & Co. if the latter was a regular customer of the former and would not exist otherwise. It seems to me the duty naturally arises out of the usages of trade as they exist. Banks do not confine their discounts to those of their own customers only. It is known to every one engaged in trade that a large part of the bank's business consists in the discounting for its customers of commercial paper professing to be that of other merchants or traders. And when a business man receives such a notice from a bank as Ewing & Co. did in this case, if such notice contains information of a forgery and fraud being practised upon a bank, in the unauthorized use of the name of the person or persons notified, the latter are bound by every principle of justice and right dealing between man and man, and in accordance with the usages of trade, within reasonable time to give the bank notice of the fraud. Any other rule would seem to me to be fraught with grave danger; would generate want of confidence in the ordinary business relations of life and would offer a premium upon gross business negligence. I think

Lord Campbell has expressed the true rule to be followed in *Cairncross* v. *Lorimer* (1), at p. 830, in the following terms:

> I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act, to their prejudice, than he would have had if it been done by his previous license.

Reason and common sense would convince me, if positive authority was wanting, that as between commercial men and banks or other kindred institutions there exists duties with respect to business notices and conditions which have no application to, and are not governed necessarily by, the principles and rules which control in the cases of other letters and notices on private or personal subjects. An example of such letters is to be found in the case of *Wiedemann* v. *Walpole* (2). But the law which justifies and approves of a man ignoring impertinent or threatening letters relating to his private life or moral character, to which he is under no moral or legal obligation to give any answer, necessarily adopts a different rule with respect to ordinary business letters on business matters. Mere silence *per se* on the part of one who should speak is not, I grant, sufficient as an admission or adoption of liability or as an estoppel to prevent him denying his signature. But such silence coupled with material loss or prejudice to the person who should have been informed and which prompt and reasonable information would have prevented will so operate. Such a person under such conditions comes within the rule that where a man has kept silent when he ought to have spoken he will not be permitted to speak when he ought to keep silent.

(1) 3 Macq. H. L. 827. (2) [1891] 2 Q. B. 534.

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The case of *McKenzie* v. *British Linen Co.* (1) is one where no previous direct business relationship existed between the parties and has been appealed to by both parties as authority for their respective contentions. The actual decision in that case was that McKenzie, who had been sued as an indorser of a note on which his name had been forged, was not liable, though he had remained silent for a fortnight after he had received notice of his name being on the note. But the reason of the House of Lords for so holding was, that the position of the bank was in no way prejudiced or altered during the time McKenzie had remained silent. I think it is quite clear that in the judgment of all of the law lords who delivered opinions in that case that had the position of the bank been materially prejudiced or injured during the time of McKenzie's silence he would have been held estopped from denying his signature and liable to the bank. The language of Lord Watson, at page 109 seems very clear. He says:

> It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so the bank was in no worse position than it was at the time when it was first within his power to give the information.

The reasoning adopted by all of these Law Lords in coming to the conclusion they did in that case convinces me first, that in all such cases the imperative duty of promptly giving notice and repudiating a liability wrongly attempted to be placed upon a man does arise whenever he is informed of the facts; secondly, that failure to discharge it will not necessarily involve

(1) 6 App. Cas. 82.

liability unless there is also proved the material prejudice which compliance with the duty might have prevented; and thirdly, that where both conditions co-exist, namely, the silence of the person whose duty it is to speak and the material loss or prejudice of the bank or person who should have been notified which might or would have been averted had the notice been promptly given, then the party neglecting his duty is estopped from denying his signature and his liability follows. The extent of that liability has been determined by the Judicial Committee in *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (1) as not limited to the actual amount of the loss sustained by the holder of the note but to entitle him to have his plea of estoppel sustained to its full extent. By this decision we are bound however strong the argument may be as to limiting the amount recoverable to the actual loss sustained through the neglect of the party to give the bank notice of the forgery. This case is also most important as determining that the material loss or injury which the bank or holder of the note sued on must shew he has sustained need not necessarily be shewn to be the direct and necessary consequence of the defendant's act or silence. The Judicial Committee there determines, p. 270, that

> if by keeping silence and allowing the forger to escape from the colony and the jurisdiction of its courts the appellant had violated his duty to the bank, these circumstances would in themselves have been sufficient to shew prejudice entitling the bank to have their plea of estoppel sustained to its full extent.

There silence of the person whose duty it was to speak and the loss which might arise to the bank by reason of the forger's escape had no necessary relation or connection. The escape of the one party was not a

(1) [1896] A. C. 257, at p. 270.

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necessary consequence of the silence of the other, and yet the Judicial Committee maintained the liability arising from estoppel. Here it is argued that there is no necessary relation or connection between the silence of Ewing & Co. and the paying out of the $1,300 or $1,400 on the 17th. And yet if they had broken their silence and discharged their duty the bank would not have lost the money. I can see no distinction between losing the money in the one case and losing the opportunity of taking proceedings against the forger either civilly or criminally or both in the other. The loss in either case could hardly be said to be the direct and necessary result of the neglect of duty of the defendants. The most that can be said is that if the duty had been discharged the loss would or might have been prevented or averted.

I think the appeal must be dismissed with costs.

NESBITT J. (dissenting).—The question which the court is here to decide is one of very great importance, and it is this, whether a person is to be liable to pay a note which he never signed. The facts are practically undisputed. The bank has its head office in Toronto. One Bonnell carried on business in Toronto under the name of the Thomas Phosphate Company. A clerk called Wallace, in the employ of Bonnell, forged the name of the defendants, William Ewing & Co., doing business in Montreal, Quebec, to a promissory note for the sum of $2,000 and discounted it with the bank in Toronto. Wallace had formerly had business relations with the firm of Ewing & Co., and had been discussing with them the formation of a company to take over the assets and good-will of the Thomas Phosphate Company, he, Wallace, hoping to obtain a substantial share of stock in the new company. As I gather from the evidence Ewing & Co. had declined to take stock

in the proposed company. On the 15th August the note was discounted at the bank, and the transaction is best stated in the language of the manager:

Q. The moment you as manager on the 15th agreed with Wallace to discount the note, Wallace could draw against it?—A. Yes.

Q. So that he was entitled to draw against the note. That is to say, credit was given to him on that cheque so that he might draw against that note before this notice, exhibit 2, was sent out by the bank?—A. Yes, before it would leave our office.

Q. The discount having gone to his credit?—A. Having gone to his credit.

Q. That exhibit 2 you do not treat in any way as a letter in respect of which you wait for an answer before taking any step?—A. No.

Q. It is simply a notice?—A. Simply a notice.

Q. And you did not wait for an answer before giving credit?—A. No.

Q. You did not communicate with Ewing & Co. before discounting the note?—A. No.

The notice referred to is in the following language:

DOMINION BANK,

TORONTO, Aug. 15th, 1900.

You will please take notice that your note for $2,000 to the Thomas Phosphate Co. falls due at this bank on the 17th Dec., 1900, and you are requested to provide for the same.

To Messrs. WM. EWING & Co., Montreal.

A. P., Asst. Mgr.

On the morning of the 16th August, 1900, Ewing & Co. received by mail this slip and being aware that no note had been given to the Phosphate Company by way of accommodation or otherwise and knowing that Mr. Wallace was connected with the Phosphate Company telegraphed him asking him for an explanation. The telegram is in the following terms:

G. N. W. Tel. Co., MONTREAL, Aug. 16th, 1900.

T. C. WALLACE,

Board of Trade, Toronto.

Phosphate Company have no note of ours and before advising bank thought best ask you what it means remember have to act promptly, writing

WILLIAM EWING & CO.

To which Wallace answered as follows:

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G. N. W. T. Co. 16th August, 1900.

To Mr. EWING, from Boston, Mass.

Telegram in reference to note just received here. I am coming Montreal and will explain why bank has it. Kindly await my return from New York.

T. C. WALLACE.

This telegram was sent from Boston and is marked as not having been delivered in Montreal until 6.40 p.m. on the 16th, and Wallace did not arrive in New York until Sunday, the 19th, when he confessed that the note was a forgery. Wallace threw himself upon the mercy of Ewing & Co. at that time and induced them not to notify the bank, and the bank never were notified until the 10th December, a week before the note fell due, when, in answer to a letter dated December 4th which is in the following terms:

DOMINION BANK.

TORONTO, December 4th, 1900.

Messrs. WILLIAM EWING & Co.

Montreal P. Q.

DEAR SIRS,—I beg to advise you that we are the holders of a note made by you, dated 14th August, 1900, at four months, in favour of the Thomas Phosphate Co., for $2,000, which is payable at this office on the 17th instant, and shall oblige if you will kindly provide for the same.

Yours truly,

A. PEPLER,

Register. *Assistant Manager,*

they replied as follows:

MONTREAL, December 10th, 1900.

DOMINION BANK,

Toronto,

GENTLEMEN,—We have your letter referring to a note for $2,000 in favour of the Thomas Phosphate Company falling due on the 17th inst, and we beg to inform you that we have not issued the note described.

Yours truly,

To the Manager. (Signed) WILLIAM EWING & Co.

Wallace remained in the country for a week or two after the maturity of the note and then went to the

United States. There seems to be no question raised that the bank had plenty of opportunity after it obtained knowledge of the forgery to have had him arrested before leaving the country if they desired to do so. The trial judge and the Court of Appeal have held the defendants estopped on the ground that they were under a legal duty to immediately communicate with the bank upon receipt of the slip and that their silence until a week before the maturity of the note operated as an estoppel. The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. Mr. Bigelow in his work on Estoppel, 5 ed. speaking of estoppel arising from silence says :—

> In like manner, it is settled law that standing by in silence will not bar a man from asserting a title of record in the public registry or other like office, so long as no act is done to mislead the other party ; there is no duty to speak in such a case. Thus, a patentee is not bound to warn others whom he may see buying an article which is an infringement on his patent ; and this even when he urges the persons to buy his own article in preference as something better. And of course there can be no duty to speak without a knowledge of the existence of one's own rights, or of the action about to be taken. Nor can pure silence (i. e. silence without fraud) operate as an estoppel to assert one's rights over property when the party supposed to be estopped was at the time in possession, for the possession is notice. If it be a case of property sold, the person assuming the right to sell should ordinarily at least have the property in hand.
>
> These and many other cases to the same effect proceed upon the ground, of course, that the silence of the party supposed to be estopped to assert his rights was no breach of duty to the person who asserted the estoppel. The latter had not in contemplation of law been misled by the former's silence. It follows that it is not enough to raise an estoppel that there was an opportunity to speak which was not embraced, there must have been an imperative duty to speak. Nor is any duty generated by *the mere fact that a man is aware that some one may act to his prejudice if the true state of thing is not disclosed.* To use an apt illustration of one of the judges, a man may become apprised of the fact that his name has been forged to a negotiable instrument, and so become aware that some one may be led to purchase the paper by supposing the signature to be genuine, and yet he is not bound to

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proceed against the forger or to take any steps to protect the interests of others whose claims he may know nothing of. So long as he is not brought into contact with the *person about to act* and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction *which is not due to his own conduct, as the natural and obvious result of it;* if the party is present at the time of the transaction it *may* be necessary for him to speak, if speaking would probably prevent the action about to be taken ; if absent, his silence (or other conduct) must at least be of a nature to have an obvious and direct tendency to *cause* the omission or the step taken. Only thus can a duty to speak arise.

In this case it is to be observed that there is no pretence upon the part of the manager of the bank that he relied upon anything in the representation by defendants that the note was genuine. He distinctly avers that the slip was not intended as an inquiry as to the genuineness of the note, and also avers that he did not expect an answer to the slip, so that the bank so far as the discount itself of the note is concerned were not misled into such discount by the silence, and it remains to be seen whether the silence of Ewing & Co. misled them to their prejudice in any action which they took after the sending of the slip. The manager had put the proceeds to the credit of the Phosphate Company to be chequed out in the ordinary course and regardless of the sending of the slip and the receipt of any answer to it, and, as I have said, it is not pretended that the paying out of the money subsequently in any sense was affected by not receiving an answer to the slip or a notice from Ewing & Co. as to whether the note was genuine or not. It remains to be seen, then, whether Ewing & Co. were under any legal duty to communicate with the bank either upon receipt of the notice or at any time before the demand was made upon them by the bank as holders of the note for payment on the 4th December, 1900.

In the consideration of the question aid will be derived from the examination of some of the cases in which the doctrine of estoppel by silence has been defined and applied. As stated by Lord Ardmillan in *Warden* v. *British Linen Co.* (1):

> If a party be sued on such a bill, and do not defend himself, that affords a strong presumption of adoption. If he be charged on the bill and do not resist, that is stronger still. If there be an express demand for payment of the bill and no answer is given ; *if the bill be shewn and the* party *do not deny his acceptance.* * * *
> I see no case in which silence was construed into adoption, where there *was no charge, or action, or demand for payment,* no question *directly put as to the genuineness of the subscription, no shewing of the bill.* * * *

And in 1880 the New York Court of Appeals in the case of *Viele* v. *Judson* (2), in dealing with the doctrine of silence, after citing *Pickard* v. *Sears* (3) and reviewing a number of English and American cases says :

> These cases, and those of similar character, have been recently reviewed in this court and do not need a detailed examination. In all of them the silence operated as a fraud *and actually itself misled.* In all there was both the specific opportunity and apparent duty to speak. And in all *the party maintaining silence knew that some one was relying upon that silence and either acting or about to act as he would not have done had the truth been told. These elements are essential to create a duty to speak.*

A great number of cases are reviewed in *Leather Manufacturers' Bank* v. *Morgan*, (4). At page 108 the court says :

> "The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." *Morgan* v. *Railroad Co.* (5) In *Continental Bank* v. *Bank of the Commonwealth* (6), it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration, or doing an act to mislead the one who is induced to rely

(1) 1 Ct. of Sess. Cas. (3 ser.) 402, at p. 405.
(2) 82 N. Y. 32.
(3) 6 A. & E. 469.
(4) 117 U. S. R. 96.
(5) 96 U. S. R. 720.
(6) 50 N. Y. 575, 583.

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upon it. "Indeed, (said Folger, J.), it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose."

And again on page 115, speaking of the prejudice, the court says:

As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it.

The two recent leading cases in England are *McKenzie* v. *British Linen Co.* (1), and *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (2). In the *McKenzie Case* (1) Lord Blackburn, dealing with the judgment of the Lord President of the court below, after pointing out that he agreed with the language of the Lord President so far as the ratification was concerned, when he comes to deal with the question of estoppel by silence says:

But when Lord Deas says: "In cases of this kind where he has peculiar means of knowledge whether his signature is forged or not, he is not entitled by saying or doing something, or not saying or doing something, to lead his neighbour to think that his signature is genuine to his neighbour's loss," he goes further than I am inclined to follow in the words "by not saying and doing something." And when he says, "there was here not only a moral but a legal duty on the part of the suspender to have informed the bank that his signature to the first bill was a forgery, and if he had done so there would not have been a second bill," I not only doubt his position that there was a legal duty then to have informed the bank, but I deny his conclusion of fact. As I have already pointed out, the second bill was uttered to the bank before McKenzie, with the utmost diligence, could have informed the bank that the first was forged. It would be a quite different thing if it were proved that McKenzie knew that the bank had put the second bill with his name on it to Fraser's credit, *and knew that at the time when he had reason to believe that he would* be permitted to draw against it. His silence then would certainly prejudice the bank, and would afford very strong evidence indeed that McKenzie for Fraser's sake thus ratified Fraser's act for a time; *and a ratification for a time*

(1) 6 App. Cas. 82. (2) [1896] A. C. 257.

would, I think, in point of law operate as a ratification altogether. But if McKenzie (as his case is) first knew that the bank had taken the second bill in the face of his forged signature on receiving the intimation of the 19th of July, he knew that the bank were not going to give further credit to Fraser on the faith of that signature, and that all the mischief was already done. I cannot think that even if McKenzie *had gone so far in his endeavours to shield* Fraser from the *consequences of his criminal act as to make himself liable to criminal proceedings for an endeavour to obstruct justice,* that would bar him from averring against the bank that the signature was not his.

And Lord Watson in dealing with the Scotch cases expressly adopts the decision in *Warden* v. *British Linen Co.* (1) to which I have referred, and points out that mere silence of the defendants in reference to a letter addressed to them by the bank and informing them of the existence of the bill before it was due did not create any estoppel, and he proceeds to say:

> None of these decisions appear to me to give the least support to the doctrine that mere silence after intimation or even after demand for payment of the forged bill necessarily implies adoption of a bill by one whose subscriptions to the bill are a forgery,

and, as I understand, the court distinctly affirmed the doctrine that silence, after mere intimation of the existence of a forged bill, did not, unless there were other circumstances, as I have pointed out, create an estoppel, and even with these circumstances in existence there was no estoppel unless there was prejudice arising to the estoppel asserter.

I think that in this case there could not be said to be any duty created by the mere intimation which was given by the slip; no question was asked nor was there anything in it which would indicate that the bank were likely to be prejudiced by silence other than the probability of arresting the forger. I think if the bank had written asking for information or in any way intimating that the proceeds were not already paid out, or if Ewing & Co. had any reason to know that the proceeds were not already paid out, that a duty would have arisen, but I adopt the language of Mr. Bigelow

(1) 1 Ct. of Sess. Cas. (3 ser.) 402.

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nor is any duty generated by the mere fact that a man is aware that some one may act to his prejudice if the true state of things is not disclosed.

I think it was incumbent upon the bank now asserting the estoppel to have given some reason to Ewing & Co. to suppose that they would be prejudiced by their silence. I adopt the language of the Lord President in the *Warden Case* (1).

> I can find no instance of the plea of adoption being sustained where there had not been a demand made on the party charged for payment, nor any in which mere silence, apart from any other evidence, was held equivalent to adoption. I think the rule of adoption has gone as far as it should go and that this is not a case for extending it.

I think that, in any event, until the interview on Sunday 19th Ewing & Co. were not bound to assume a crime had been committed and that their explanation which was adopted by the Court of Appeal that, although they knew that they had not made a note, the slip by mistake or error on the part of the clerk in the bank might refer to an advice of a draft intended to be drawn upon them was reasonable and they were not bound to suppose a crime had been committed; and Wallace's telegram would certainly lead them to suppose he had a reasonable explanation and that they were justified in waiting until Sunday the 19th, and at that time any telegram or other notice at the bank would have been quite ineffective. It was not pretended that the bank was in any worse position as to arrest by not receiving notice until the 10th December.

I refer also to the definition of estoppel and the necessity for a person asserting it to bring himself within the strict doctrine of it to *The Peoples' Bank of Halifax* v. *Estey* (2). It seems to me that even the extreme altruistic view referred to by Mr. Ewart in his work on Estoppel, page 38, does not justify acourt in making

(1) 1 Ct. of Sess. Cas. (3 Ser.) 402. (2) 34 Can. S. C. R. 429.

a man pay a note which he did not sign when the person who discounted the note relied entirely for the genuineness of the signature upon the representation of the party discounting it and did not communicate, in any way intending or relying upon such communication, with the party sought to be charged.

I would allow the appeal with costs.

KILLAM J.—In my opinion this appeal should be dismissed.

For the reasons so well stated by Mr. Justice Osler the case appears to me to come directly within the principle upon which silence under certain circumstances gives rise to an estoppel.

It was not a case in which the defendants had merely learned of the existence of a note on which their signature had been placed without authority, and had cause to apprehend only that some unknown person might possibly advance money without notice of the falsity of the signature, which is the case put in Mr. Bigelow's work.

The bank directly notified them that their note would fall due at its office on a certain date and requested them to provide for the same. This distinctly implied that the bank had an interest, either of its own or on behalf of some one else, in the payment of the note and in its genuineness.

While there was no intimation that the bank had acquired or was proposing to acquire the note for value, the defendants, as men of business, would know that the bank might have discounted the note and have the proceeds still at the customer's credit, or that it might make advances upon it. They would know that an immediate repudiation would enable the bank to withhold payment of any portion of the proceeds not actually paid out or of any sums not already ad-

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vanced. They knew that they had made no such note, that they had given no authority for the signature. They could at once repudiate it, and they did so in their telegram to Mr. Wallace. No further information was necessary for that purpose.

While the bank manager placed the proceeds to the credit of the customer without inquiry, and took no precaution against their being paid out before he could hear from the defendants, the bank did act upon the defendants' silence in the sense that it did what, it should properly be inferred, it would not have done if the defendants had at once denied the signature; it allowed the balance of the proceeds to be withdrawn.

The decision in *McKenzie* v. *British Linen Co* (1), proceeded distinctly upon the view that all the mischief was done before either bill could have been repudiated. But I think that sufficient appears to show that the learned Lords would have been of the opposite opinion if the proceeds had remained at the customer's credit sufficiently long to have enabled the repudiation to be communicated before their withdrawal. Lord Selborne, L C., said, (p. 92):—

> There is no principle on which the appellant's mere silence for a fortnight, *during which the position of the respondents was in no way altered or prejudiced*, can be held to be an admission or adoption of liability, or to estop him from now denying it.

Lord Blackburn said (p. 101):—

> Certainly I think that his not telling the bank on the 15th of July nor till the 29th of July that it was a forgery, and so letting them continue in the belief that it was genuine, if he had not induced it, could not so preclude him if, as I think was clearly the fact here, *the bank neither gave fresh credit in the interval nor lost any remedy which if the information had been given earlier they might have made available.*

And Lord Watson said (p. 109):—

> It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill to lie by *until he saw that the position of the bank was altered for the worse.*

(1) 6 App. Cas. 82.

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In the interests of business morality, I think that the conclusion of the Court of Appeal upon this point should be supported. It is well warranted by the doctrines laid down in *Freeman* v. *Cooke* (1). It does not appear to me to be opposed to any previous judicial decision or even to judicial opinion directly applicable.

As the appellant's counsel has expressly abstained from questioning the conclusion that the estoppel, if existing, must apply to the full amount of the note, I say nothing upon that point.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for the respondents: *Mulock, Mulock, Thomson & Lee.*

(1) 2 Ex. 654.