JOHN ROSS (PLAINTIFF).....APPELLANT;

AND

WALTER HOWARD CHANDLER, JOHN A. McRAE AND THE IMPERIAL BANK OF CANADA (DEFENDANTS).....RESPONDENTS.

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*March, 27, 28.

*Oct. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Principal and agent—Partnership funds—Third party—Banks and banking—Negotiable instrument—Notice—Inquiry.

R. a member of the firm of R. M. & C. engaged on a contract for railway construction in Quebec, shortly before its completion went to Ontario, leaving his partners to finish the work, collect any balance due, pay the liabilities and divide the balance among them. M. and C. finished the work and received $56,000 and over, went to Toronto and formed a new partnership of which R. was not a member. Having undertaken another contract in North Ontario, they arranged with the head office of the Imperial Bank to open an account with its branch at New Liskeard and the cheque payable to R. M. & C. was cashed at the branch in Toronto and by instructions to the New Liskeard branch was placed the credit of the new firm then and the whole sum was eventually drawn out by the latter firm. R., later, brought an action against M. and C. for winding up the affairs of their co-partnership and, pending that action took another against M. and C. and the bank claiming that the latter should pay the amount of the cheque with interest into court subject to further order.

Held, per Fitzpatrick C.J. and Davies J., affirming the judgment of the Court of Appeal (19 Ont. L.R. 584), Idington and Anglin JJ. dissenting, that M. and C. had acted within their authority from R. by obtaining cash for the cheque; that there was nothing to shew that they had misapplied the proceeds or intended to do so by their dealing with the cheque; that in any case there

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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was no notice to the bank of any intention to misapply the funds and nothing to put them on inquiry; and that the action against the bank must fail.

Per Duff J.—The evidence establishes that M. and C. had authority to convert the cheque into an instrument transferrable by delivery only and that it was acquired by the bank in good faith in the ordinary course of business. The bank, therefore, obtained a good title to the cheque and its proceeds as against the appellant.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a Divisional Court by which the verdict for the defendants at the trial was sustained.

The facts of the case are not disputed. The action was brought by the plaintiff, Ross, to compel the Imperial Bank to pay into court the amount of a cheque made payable to Ross, McRae and Chandler, which had been placed to the credit of McRae, Chandler & McNeil at a branch of that bank. The plaintiff claimed that the bank on taking the cheque with his name on it as one of the payees was put on inquiry as to the right of the others to receive the amount. All the courts below have decided against this contention.

Lafleur K.C. and *A. W. Mason* for the appellant. The bank on taking the cheque payable to a firm from the two partners should see that it was indorsed with the concurrence of the third. *Creighton* v. *Halifax Banking Co.*(2). See also *London Joint Stock Bank* v. *Simmons*(3); *Earl of Sheffield* v. *London Joint Stock Bank*(4); *Federal Bank* v. *Northwood*(5).

(1) 19 Ont. L.R. 584.
(2) 18 Can. S.C.R. 140.
(3) [1892] A.C. 201, at p. 220.
(4) 13 App. Cas. 333.
(5) 7 O.R. 389.

Bicknell K.C. for the respondent, The Imperial Bank.

Rose K.C. for the respondents, Chandler and McRae.

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Davies.

DAVIES J.—The facts of this case material to a determination of the controversy between the plaintiff, appellant, Ross, and the defendant, Imperial Bank, are as follows:—

Ross was a partner in a firm of contractors for the construction of a short piece of railway in Quebec, the firm name being Ross, McRae & Chandler.

Before the completion of the contract work Ross left Quebec and went to Ontario to look after some private work of his own leaving his two partners to finish up the contract, collect any balance due the firm under it, discharge with such balance the liabilities of the firm, and divide what moneys remained amongst the several partners according to their several rights.

McRae and Chandler accordingly finished the work and received a cheque for $56,251.57 in payment of the balance due on the contract upon the Bank of Montreal payable to their firm of Ross, McRae & Chandler.

They came to Toronto and having entered into a new partnership for some further work with one McNeil, under the style of McRae, Chandler & McNeil, they, McRae and Chandler, went to the Imperial Bank where McRae was known and had a conversation with the assistant general manager respecting the opening of an account in the bank at New Liskeard.

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Mr. Hay stated that Chandler said:

> He and his partners, whoever they were, had completed a contract down east. I know he was speaking for McRae, and they were about to commence another contract up in the north, and as we had a branch of the Imperial Bank at New Liskeard, if it would be convenient, they would like to open an account with us.
>
> It was acceptable to us and we opened the account. I took him downstairs I think and introduced him to the manager of the Toronto office, and approved of the opening of the account and his cheque was passed in and deposited to the credit of——

Here the witness was interrupted, but subsequently finished the sentence with the name "McRae, Chandler & McNeil." The witness was not able to say whether he specially observed that the cheque was payable to Ross, McRae & Chandler, and stated that he did not make any inquiries why Ross's name was not in the new account being opened, and that it did not occur to him as an important factor, though he knew "Ross was a contractor" and "probably identified him with the man on this cheque." He said "he had no suspicions and made no inquiries with regard to Mr. Ross."

As a fact the Toronto branch received and cashed the cheque and advised their New Liskeard branch to credit it to McRae, Chandler & McNeil. Mr. Hay stated there was no doubt that as the result of the negotiations the firm of McRae, Chandler & McNeil became entitled to credit at the New Liskeard branch for the "amount of the cheque."

Evidence of the state of that account was given shewing that the whole of this credit had been subsequently paid out on the cheques of McRae, Chandler & McNeil.

No evidence was given as to the nature of these payments, whether they were in liquidation of liabilities of the old firm of Ross, McRae & Chandler or

of the new firm of McRae, Chandler & McNeil, or of the private debts of any or either of the partners of the old firm.

The plaintiff Ross subsequently brought an action against McRae and Chandler, and McRae, Chandler & McNeil, for the winding up of the affairs of the firm of Ross, McRae & Chandler, which action is now pending, and they further brought this present action against the bank and McRae and Chandler, claiming that the bank

should be ordered to pay the said sum of $56,251.57, with interest into court to the credit of Ross McRae & Chandler, subject to further order herein.

The bank pleaded that it became a holder in due course of the said cheque and had no knowledge of the state of the accounts between the plaintiff Ross and the defendants Chandler and McRae, nor as to their respective rights to the proceeds of the cheque as between themselves.

It is obvious that the claim of the plaintiff as made could not be entertained. He had authorized his partners to complete the contract; collect the balance due on it; discharge its liabilities and divide what remained between the three partners, each being entitled to one third.

The utmost he could claim would be a declaration to the effect that the bank was liable for whatever share of that $56,000 would ultimately be found to belong to Ross on the adjustment of the accounts, and any such declaration could only be made as and when it was shewn that the bank was party and privy to some misappropriation of these funds and to the extent that such defrauded Ross.

As the matter now stands the adjustment of the

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accounts is proceeding under the direction of the court in another action, and it may be for aught the court knows that no part of the amount of the cheque will be shewn to be payable to Ross. He may be shewn to have received all he is entitled to under the partnership. It struck me, therefore, forcibly that we are now being asked to decide what may in the result be a purely academical question. However, that point does not seem to have been taken in the courts below, and was not taken here, so I say nothing more about it.

The substantial question is: Had the bank notice of an intended misapplication of the proceeds of the cheque received by them, and did they become parties or privies to such misapplication so as to make them responsible to Ross for any loss he may have sustained in consequence ?

The only notice at all they had was the name of Ross as one of the payees of the cheque to Ross, McRae & Chandler, and the absence of his name from the firm to which they credited the proceeds of the cheque. Did that fact throw upon them the duty of inquiring as to Ross's rights under the cheque, and the rights and liabilities of the several partners in the payee firm ? Was it a notice to them of an intended misapplication of the funds ?

Was the money received by the bank from the cheque or any part of it money which they *applied for their own benefit ?* The answer is no. Beyond the indirect benefit which they might derive from the new firm's business they had no benefit whatever and they made no charge for cashing the cheque. Had they any knowledge that it was to be applied by McRae & Chandler for purposes other than those of

the partnership ? The answer on the evidence must again be no, they had not, unless such knowledge is to be imputed to them arising out of the facts connected with the cashing of the cheque and the placing of the funds to the credit of McRae, Chandler & McNeil.

Was there anything to arouse suspicion on the part of the bank, anything to shew an intention on the part of the two partners to defraud Ross ? Again it must be answered, nothing beyond the fact that Ross's name could be seen as one of the names of the firm to which the cheque was payable, and was not one of the names of the firm to which the proceeds were credited. If that fact alone is sufficient notice to the bank, and if it threw the duty of inquiry upon them, then it may well be argued they took the cheque at their peril and would be liable for any misapplication of the moneys by the other partners.

The trial judge says he was unable to find any negligence and further, that

> no possible imputation of fraud or unfair dealing, wilful blindness or any impropriety can successfully be made against Hay whose good faith in this transaction is above suspicion.

All the cases where a member of a partnership has in fraud of the partnership indorsed and delivered to a third party or bank in satisfaction of a private debt of his own due to the third party, bills of exchange or other negotiable securities of the partnership, the third party or bank being under the circumstances cognizant of the fraud, or having had sufficient notice of the intended misapplication, have no application in my judgment to this case.

McRae and Chandler it is conceded had a perfect right to indorse the cheque as was done for the firm

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of Ross, McRae & Chandler, and to receive the money personally either from the payee or from a third bank such as the Imperial Bank. It was part of the express mandate given them by Ross that they should collect the balance due on the contract and discharge with such collections the firm's liabilities. If they had received the money from the discount of the cheque instead of taking the course they did and then deposited it to the new firm's credit and drawn it out again by cheques signed by the new firm, I cannot see what possible difference it could make.

We are asked to determine affirmatively that the mere placing of the proceeds of the cheque to the credit of the new firm was a badge of fraud or at any rate clear notice of an intended fraud on the partner Ross, and of an intended misapplication of the moneys.

I am quite unable so to conclude. The whole transaction appears to be one of an ordinary business character which, as a fact, gave rise to no suspicions and which should not have given rise to any. The placing of the moneys to the credit of McRae, Chandler & McNeil was not for the personal benefit of the bank "designed and stipulated for"; it was not done to pay a separate debt due to the bank by McRae and Chandler, or either of them, or what was known by the bank to be a separate debt due by one or two of the partnership. It was not in any sense fraudulent or necessarily inconsistent with the express purposes for which McRae and Chandler had been authorized to collect and disburse the moneys.

I have read all the authorities cited in support of plaintiff's contention that the bank either was a party to a misapplication of the partnership funds and was

in consequence liable, or had such notice of an intended misapplication of such funds as put upon them the duty of inquiry before paying out the money and so made them liable for its proper application.

The cases chiefly relied upon by the appellant to support his contention were *Leverson* v. *Lane*(1); *Heilbut* v. *Nevill*(2); *Creighton* v. *Halifax Banking Co.*(3); *Frankland* v. *McGusty*(4); and *Ex parte Darlington District Joint-Stock Banking Co.; Re Riches and Marshall's Trust Deed*(5).

As regards the first four cases it is sufficient to say that in each of them the partnership credit or property had been given or delivered in payment or satisfaction *of a private debt* of one of the partners, and that in each case the party to whom it had been so delivered was under the circumstances of the case held cognizant of the misappropriation committed or attempted to be committed, or had under the special facts of the case the onus thrown upon him of shewing that the property or security had been given with the authority of the other partners. The controlling factors are, it seems to me, absent in the case before us, and these authorities cannot have any bearing upon the appeal unless it is held that the court is bound to infer from the evidence a knowledge on the respondent bank's part of an intended misapplication of the proceeds of the cheque to the private purposes of the two partners or to the purposes inconsistent with those of the partnership of Ross, McRae & Chandler, coupled with a subsequent actual misapplication.

The case of *Ex parte Darlington District Joint-Stock Banking Co.*(5) is a very peculiar one, and

(1) 13 C.B.,N.S. 278.
(2) L. R. 5 C.P. 478.
(3) 18 Can. S.C.R. 140.
(4) 1 Knapp P.C. 274.
(5) 4 De G.J. & S. 581.

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the observations of Lord Chancellor Westbury therein relied upon at bar must, of course, be read with reference to the facts with which he was dealing. That was a case of fraud where one partner had forged or manufactured bills of exchange to a large amount with the name of his firm appended as drawers and indorsers as also his own individual name as indorser, and had discounted these bills with the appellant's bank, which had credited the proceeds to his private account.

It was on these forged and fraudulent bills that after the death of the fraudulent partner the bank had claimed as creditors against the estate of the two surviving partners, Riches and Marshall, under the "Bankruptcy Act," and the holding of the Chancellor was that the transactions there shewed on their face a conversion by the customer of partnership property to his own purposes, and such great negligence on the banker's part in abstaining from inquiry as justified the rejection of their claim.

> All persons (he said, p. 585) may give credit to his (a partner's) acts and his authority, unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes, or on the separate account, of the partner doing it. In that case authority by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act, he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud.

This is nothing more than saying that persons giving credit to the acts and authority of a partner, but having "notice or reason to believe that what is done is for the private purposes or on the separate account of the partner doing it" gives such credit at his peril.

The question in every case is: Had the person giv-

ing credit to the individual partner such notice or must he be held under the facts proved to have had knowledge that the thing done in the partnership name was done for the private purposes of the individual partner ?

A very instructive case as to what amounts to notice and knowledge on the bank's part of the acts of individual partners being done for their own private and separate purposes is that of *Gray* v. *Johnston*(1), where it was held that:

In order to hold a banker justified in refusing to pay a cheque of his customer, the customer being an executor, and drawing a cheque as executor, there must be a misapplication of the money intended by the executor, so as to constitute a breach of trust, and the banker must be cognisant of that intention.

The existence of a personal benefit to the banker, designed or stipulated for, as a consequence of the payment, would be strong evidence that the banker was privy to the breach of trust.

The Lord Chancellor Cairns, at page 11, after reviewing the authorities, says:—

The result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, *intended by the executor*, and there must in the second place, as was said by Sir John Leach, in the well known case of *Keane* v. *Robarts*(2) be proof that the bankers are *privy to the intent* to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.

Now, as between a banker and his customer the Lord Chancellor laid down the proposition that to justify a bank in refusing to pay a demand of its customer, there must first be a misapplication of the

(1) L.R. 3 H.L. 1. (2) 4 Madd. Ch. 332, at p. 357.

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funds intended, and next, proof that the bankers were privy to such intent, and lastly, that proof of personal benefit being designed or stipulated for, would be the most cogent evidence of the banker's privity with the contemplated breach of trust. At page 14 Lord Westbury says:—

> Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer. But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit.

Having determined that the payment in that case was not intended to be for the benefit of the bankers, His Lordship goes on to say:—

> That being so, it was a payment in the ordinary way of trade in common discharge of the ordinary duty between a banker and his customer, and it is impossible for the parties interested in the estate to follow that transaction, to stamp it with the character of fraud, and to make out that the payment was any other than what it appears to have been, namely, a payment in the ordinary course of trade, and to pursue it as having a different character, the character, namely, of a payment made collusively and fraudulently by the executrix for the personal benefit of the bankers.

It appears to me that the facts of that case of *Gray* v. *Johnston* (1) were much stronger against the bank than those of this case. There the funds in question had been transferred from the credit of an estate on a cheque signed by the executor to the credit

(1) L.R. 3 H.L. 1.

of a partnership account in the same bank in which partnership the executor in its personal capacity was a partner, and the special benefit the bankers received was that the payment of the money, £850, went in diminuation of the liabilities of the firm to them of which firm the executor was a member.

In the case before us the bank derived no special benefit whatever. There was no debt due or owing to them which this cheque in dispute or any part of it went to diminish. There was not a scintilla of evidence of any personal benefit to the bank "designed and stipulated for" when the cheque was discounted.

The facts shew simply an ordinary every day business transaction. A person known to a bank as a reliable business man offers to the bank a cheque on another bank which is accepted and cashed. No charge is made because the person tendering the cheque intends opening an account with the bank and desires the money to be placed to his credit. The cheque is payable to a firm of which the person tendering it is a member. It is indorsed by the firm's name and also by the individual's name tendering it. There is not a suspicious circumstance surrounding the transaction. The bank had no knowledge of the state of the accounts between the partners or as to the respective rights of the partners to the proceeds of the cheque as between themselves. It derived no special benefit from the discount of the cheque or from the moneys arising therefrom. It had no knowledge or suspicion of any intended breach of trust or misapplication of the funds. It was an ordinary banking transaction and after discounting the cheque it placed the funds where its customer instructed it to place them to the credit of the new firm of McRae, Chandler

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& McNeil. The bank held the funds arising from the discount of the cheque to the order of McRae, Chandler & McNeil. If the latter had signed a cheque in their own favour and indorsed it to be put to their own credit, the transaction would in no sense have been different from that which actually took place when the money was placed by their verbal order and direction to the credit of the new firm. It was practically the case of a bank dealing with funds of its customer on the latter's order, and in such a case it is, "impossible," as Lord Westbury says in the case of *Gray* v. *Johnston* (1), at page 14 of the report,

> for the banker to set up a *jus tertii* against the order of the customer or to refuse to honour his draft on any other ground than some sufficient one resulting from the act of the customer himself.

McRae and Chandler were acting perfectly within their mandate when they indorsed and discounted the $56,000 cheque. The proceeds of the cheque when cashed were held by the bank at their credit. They could have taken the cash with them had they desired. They preferred putting it to the credit of the new firm of which they were partners. This indorsing and cashing of the $56,000 cheque was done in furtherance of the special mandate they held from Ross. They were to finish the contract which Ross, McRae & Chandler had, to collect what was due and payable thereon out of such contract. In cashing the cheque they were literally obeying Ross's mandate. They were further to pay and disburse out of the moneys they collected on the contract all outstanding liabilities and after that to divide the funds between the three partners as stipulated in their partnership articles.

(1) L.R. 3 H.L. 1.

To impose upon a bank discounting a cheque under such circumstances the duty of inquiring into the rights of third parties to the proceeds, to require the bank at its peril to make necessary inquiries from Ross who was in another part of the country as to his possible rights to a share of the cheque, to insist upon the proceeds being deposited only in the name of the old firm until Ross gave special authority otherwise, to impute to the bank under the circumstances a privity to a fraudulent attempt to defraud Ross in the application of the proceeds of the cheque, and simply on grounds of mere suspicion and curiosity would, in my humble judgment, be a most serious and unwarranted interference with ordinary banking business and throw great, if not insuperable, difficulties in it being carried on in this country. Most of the cases on the subject are reviewed at length by Bryne J. in *Coleman* v. *Bucks, and Oxon Union Bank*(1), where he shews the supreme importance of the factor so much relied upon by Lords Cairns and Westbury, of a personal benefit being to the bankers themselves designed and stipulated for as establishing privity with a contemplated breach of trust. At the close of his judgment Byrne J. says, page 254:—

> If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then, I think, the bankers would not be entitled to honour the cheque drawn upon the trust account without some further inquiry into the matter.

The case of the *Bank of New South Wales* v. *Goulburn Valley Butter Co.*(2) is also in point.

(1) [1897] 2 Ch. 243. (2) [1902] A.C. 543.

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The head-note of the report reads:—

In an action by a company to recover from its bankers moneys which, standing to the credit of its account, had been transferred by cheques of its managing director to the credit of his own overdrawn private account with the same bankers:—

Held, that the bank, acting in good faith and without notice of any irregularity, was not bound before honouring the cheques to inquire into the state of the account between the company and its managing director."

In delivering the judgment of the Judicial Committee Lord Davey says, page 550:—

The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque *Gray* v. *Johnston* (1); *Thomson* v. *Clydesdale Bank* (2), and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons: *Union Bank of Australia* v. *Murray-Aynsley* (3). On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account of his customer to the same customer's private account: *Ex parte Kingston; In re Gross* (4). Their Lordships are of opinion that Earle was not bound to inquire into the state of the account between the two parties. He had no materials to enable him to do so, and it is difficult to suggest any one of whom he could have made inquiry other than Ballantyne himself.

I do not think the evidence in this case warrants the inference of any agreement having been made between the bank and McRae and Chandler to discharge the latter's private debts out of the moneys arising from the discount of the cheque or that there was intended, or as a matter of fact had, any misapplication of these funds, or that the bank can under the circumstances be held liable for the disposition made of the proceeds of the cheque after discount.

I think the law is correctly stated in para. 473 of Halsbury's Laws of England, Vol. 1, page 226:—

(1) L.R. 3 H.L. 1.
(2) [1893] A.C. 282.
(3) [1898] A.C. 693.
(4) 6 Ch. App. 632.

Moreover, no agent who, being in possession of property which his principal holds in trust for another, makes on the instructions of his principal, any disposition thereof which is inconsistent with the trust, is guilty of a breach of trust, unless he had notice of the trust at the time, and was aware that the disposition made by him was in breach of trust.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The appellant and two others formed a contracting firm named Ross, McRae & Chandler, and, upon the completion of a work they had executed, Chandler got, at Montreal or thereabout, to the said firm or order, a cheque on the Bank of Montreal for $56,251.57, to satisfy the balance due on account of said work.

Without the knowledge of the appellant, or even asking his leave, Chandler took this cheque to the respondent bank at Toronto and explained to Mr. Hay, the assistant manager of that bank, that he desired to open an account for his firm of McRae, Chandler & McNeil, at a branch of said bank in New Liskeard, and shewed him this cheque which he wished to use as the basis of this new account.

The assistant general manager was only too glad to have a new account with so good a beginning, and assented to the proposal and passed Chandler on to the proper officers of the bank to carry out the details of this arrangement.

That involved an instruction to the agent at New Liskeard to open the account and give credit for the exact amount of the cheque free of charges, and a transmission of the cheque indorsed by Chandler in the name of the first-mentioned firm, and next in the name of his new firm, McRae, Chandler & McNeil, to the respondent.

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It is not denied and I think is the proper inference from the evidence, that these indorsements were made in the bank and not so made until it was known that the arrangement for opening this new account, collecting the cheque and placing the full amount to the credit at New Liskeard had been completed.

It was found by the learned trial judge that the assistant general manager acted in good faith, and that there was no negligence, and some stress is laid on this in the court below.

These are only his inferences from facts which are not in dispute. I assume that his finding from the appearance and manner of the assistant general manager, as a witness, that he was telling the truth so far as he could recollect it, must bind us here and be taken as the statement of fact so far as it goes.

But I cannot, even assuming that, draw all the inferences from this evidence, that the learned trial judge has drawn.

Let us bear in mind what Chandler and McRae were seeing the bank manager for, and the nature of the application made to him. It surely cannot be said that he was going to open an account with, and do business with and for a firm to whom the cheque belonged. On its face it plainly belonged to another firm. It was to become the basis of paying out to another firm which the bank trusted would circulate the bank bills.

It was not payable to the firm that was to be given credit.

What was proposed and done was clearly as could be the transferring of one firm's property to another firm, and the bank was to be used as a medium or part of the machinery for doing so. Its assent to the

proposal involved in its every essence the facilitating of this improper dealing with the cheque.

How could any one suppose this was not a using by Chandler of his firm's property for his own private purposes ? Or if McRae was there, taking part therein, as the manager supposes, how could it be possible for any one not to see that it was a using by them both, for their own private purposes, of that which did not on the very face of the transaction, belong to them, or them and McNeil ? And when Chandler and McRae referred to the fact that they had one contract and now were entering on another, surely there was nothing in that mode of expression to blot out Ross and substitute McNeil.

It is not an ordinary case. It is not one which might have happened by putting through an old account already established in the bank, a cheque sent in already indorsed over to be deposited in such old account, and in that way by, possibly, excusable inadvertence, procuring the execution of such an improper purpose as accomplished here.

I am not saying even that would be excusable, but assuming it might be, the cases are widely different.

Nor do I think the excuse offered of there having been cases known to Mr. Hay, where a firm of the same men have for purposes of business adopted different firm names at different times, furnishes any valid excuse. These firms ostensibly presented in their very firm names, two different sets of men and thus two entirely different business concerns.

In his evidence in his cross-examination, Mr. Hay is asked, and answers thus, in speaking of Chandler:—

Q. Had you heard anything whatever in regard to his means, or his position, until this time when McRae and he came there?

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A. I heard of the new firm having got that contract before they called on us at all.

Q. And you knew he was in that firm? A. Yes.

This shews he had present to his mind the creation of the new firm and the new contract, for he had stated just before this in his evidence, repeating from his examination for discovery, that the impression on his mind was that the three members of it had come together on the occasion in question. But speaking of this at the trial I infer he then doubted the correctness of his first impression.

I make no point of this lapse of memory, but merely wish to shew he never seems to have associated in his mind Ross as a member of the new firm.

It is found by the learned trial judge, and I think is abundantly clear that Mr. Hay never had any substantial reason for believing Ross was a member of the new firm, and without that I fail to see how his taking for the bank this cheque, on its face the property of Ross and his partners, can be upheld.

The facts seem to me to bring the case clearly within the principle acted upon in the *Darlington Case*(1) and the *Leverson* v. *Lane* case(2), referred to by the learned trial judge and cited in the various appeals and here; as well as in numerous cases referred to in the factum of the appellant.

It is not a question of mere suspicion, or something that might or ought to have put a man upon inquiry. It is the taking of that which on its face was partnership property from one of the parties for a purpose of his own, without any reason to believe or lead to the belief that the partners offering it had the authority of the other partner for so doing.

(1) 4 De G. J. & S. 581. (2) 13 C.B.N.S. 278.

I do not overlook the suggestion that he had the authority to indorse and get the money, and that the further indorsing by him for the new firm must be assumed to have taken place after the cheque had thus become payable to bearer. That momentary condition of things in this case was not the basis of this transaction; and to permit this mere theory to be set up as a line of entrenchment to protect from the consequences of a breach of faith on the part of a partner, is something which ought not to be allowed any weight in face of the palpable facts of this case.

To do so seems to be an acceptance of the shadow for the substance.

It seems equally idle to suggest the fraud might have been so easily perpetrated in another way by drawing the money. The field for the operation of fraud is wide enough already, without adding even a small bit to it.

In speaking thus of fraud, and assuming it here to have existed in law, I do not wish to be supposed as going further than what the law implies on the part of one partner so dealing with partnership property as this man did.

For aught we know the partnership account when taken may disclose a state of things that may leave the transaction a mere piece of a high-handed way of getting one's own without waiting for recovery thereof by due course of law.

Of course that reprehensible method might not, in common parlance, be considered fraud whatever it might be in law.

Section 56 of the "Bills of Exchange Act" is relied upon by respondent bank. It seems to me to oper-

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ate entirely against it. But after all this only brings the argument back to the same point of this cheque having been negotiated without notice of defect in title or in breach of faith patent to any one who read or rather was capable of reading.

I think the appeal should be allowed with costs throughout, the judgment of the trial judge be set aside and such judgment be framed as will give appellant upon a taking of accounts the relief he is entitled to which is not so very obvious, nor will be until accounts are taken.

Of course all partnership debts will have to be paid so far as this cheque extends, and interest thereon may not have been applied thereto, but beyond that it is not possible to say what actual rights the appellant has as against the bank which must be subrogated to any of the claims of Chandler and McRae on the partnership funds.

DUFF J.—The evidence appears to me to shew that the respondents McRae and Chandler had authority to convert the cheque in question into a negotiable instrument in the strict sense of the term, that is to say, an instrument transferable by delivery alone; and that it was acquired by the respondent bank in good faith in the ordinary course of business. In such circumstances the bank, I think, obtained a good title to the cheque and its proceeds as against the appellant.

The appellant Ross with the respondents McRae and Chandler had been as partners carrying on the construction of railway works between Three Rivers and Shawinigan Falls, Quebec, under contract with the St. Maurice Construction Company. The appellant was for some time engaged in superintending the ex-

ecution of the contract on the ground, but before the completion of it he left to take charge of some works in progress in Parry Sound, Ontario, in which McRae and Chandler were also interested. The completion of the St. Maurice contract and the winding up of the business of the partnership in connection with that contract was left in the hands of McRae and Chandler. This involved, of course, the collection of the moneys payable under the contract and making the disbursements necessary to discharge the partnership obligations. It seems to be indisputable that McRae and Chandler were thereby invested with authority to convert the cheque received from the construction company into cash. Some suggestion was made, though hardly pressed, during the argument that since the firm had a banking account at Shawinigan Falls their authority was limited to depositing the cheque to the credit of that account and disbursing the proceeds by cheques drawn thereon. I do not think there is any foundation for that suggestion. McRae and Chandler evidently lived in Toronto; Ross was at Parry Sound; it might very well suit the convenience of all parties, the works being finished, that any further business should be transacted in Toronto; and Ross's evidence seems to leave no doubt that he was quite content to have McRae and Chandler realize the proceeds of the cheque in any manner they might think fit so long as those proceeds were properly applied. They might convert the cheque into bank bills by presenting it at one of the branches of the Bank of Montreal, on which it was drawn; or they might by indorsing it with the name of the payees and thus making it transferable by delivery alone convert it into the equivalent of bank bills. It is perfectly

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true that it would be an abuse of their authority and a fraud upon their partner if they did either of these things for the purpose of enabling them to appropriate the proceeds of the cheque to their own purposes in violation of their partner's rights. But it would none the less enable them, it appears to me, to give to a person dealing with them in good faith an unimpeachable title either to the bank bills or to the cheque so indorsed. Their authority as between themselves and Ross was, of course, an authority to apply the cheque or its proceeds to partnership purposes alone. But having for such purposes authority to convert the cheque into currency or the equivalent of currency the rights of such persons (dealing with them in good faith) could not, I think, be affected by the circumstance that the opportunity created by the existence and exercise of that authority was being improperly used for other purposes.

In relation to third parties the situation of McRae and Chandler (who for the purpose of dealing with this cheque clearly had the authority of managing partners) appears to have been much the same as that of an agent having possession of commercial paper belonging to his principal with general authority to indorse such instruments in the course of transacting the business of the principal and for his benefit. If the agent misuse such authority by applying the paper so indorsed to his own private purposes his dealing with it is from beginning to end a violation of his principal's rights; but third parties taking the paper from him with no knowledge or suspicion of his breach of duty and for value acquire nevertheless an indefeasible title even as against the principal. This was expressly decided, if not elsewhere, at least in *The*

Bank of Bengal v. *Macleod*(1), and *Bryant Powis & Bryant* v. *Quebec Bank*(2). A passage in Lord Brougham's judgment in the first-mentioned case which has often been cited appears to be applicable to the circumstances of this case.

> But it is further said, that even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power.

The cheque in question, therefore, although in the hands of McRae and Chandler for a limited purpose, was a negotiable instrument in the strict sense when it was presented to the bank for deposit to their credit by the firm of McRae, Chandler & McNeil; its character was such that any person in possession of it could, even though acting in fraud of the true owner, convey a good title to it provided value was received for it and the person acquiring it did so without knowledge or suspicion that it was being dealt with in violation of good faith.

That value was given is not disputed. The question of good faith remains. Had the bank any suspicion that this cheque was in the hands of McRae and Chandler for a limited purpose only, and that this dealing was in breach of the terms upon which they held it? This question has been passed upon by the trial judge and he has found that the bank had no such knowledge or suspicion. The Court of Appeal as well

(1) 7 Moo. P.C. 35. (2) [1893] A.C. 170.

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as the Divisional Court, moreover, unanimously accepted that finding.

It must be admitted that superficially there does appear to be some ground for supposing the judgment of Lord Westbury in *Re Riches and Marshall's Trust Deed*(1) to be in conflict with this view. The case is distinguishable however on the ground that the bills in question there being manufactured instruments — forgeries — the partners who negotiated them had no authority limited or otherwise to indorse such documents in the partnership name; and the Lord Chancellor does not deal with the case on the footing that they were negotiable instruments. While, moreover, it may be doubted whether the Lord Chancellor's conclusions in that case involve a finding that the bank had any actual knowledge or suspicion that the customer was acting fraudulently, I agree for the reasons given by my brother Davies that applying here the criterion which was applied in that case the respondent bank's responsibility is not established. In this connection it may be observed that the appellant's position really rests upon the contention that the fact of a cheque payable to the firm of Ross, McRae & Chandler being presented for deposit to the credit of the firm of McRae, Chandler & McNeil was in itself on its face notice that the cheque was being dealt with in violation of a trust. The contention seems to ignore the circumstance that this cheque was presented by two persons (one known to the banker personally as an honest business man, the other so known to him by repute) who were members of the firm to which the cheque was

(1) 4 De G. J. & S. 581.

payable. I do not know why a breach of trust should in such circumstances have been suspected. The difference in the firm names would, I should have thought, be of no significance whatever to persons accustomed to the dealings of railway contractors; and the fact that it made no impression on the mind of this experienced banker is not without bearing on the point whether it was a circumstance likely in the ordinary course of dealing to convey a suspicion of wrongdoing. The truth no doubt is expressed by Lord Herschell in *London Joint Stock Bank* v. *Simmons*(1), at page 223:—

> I apprehend that when a person whose honesty there is no reason to doubt, offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is whether the security is sufficient to justify the advance

or the credit required.

I do not think there is anything in Lord Westbury's judgment to justify the conclusion that in his view a banker being offered money or its equivalent by a person known by him to be a partner in a firm from or through which the money has been received, should be held accountable for a higher degree of vigilance and more active suspicion than when dealing with a broker or other agent who, to the banker's knowledge, offers securities which are the property of his principal and which he has authority to deal with in the course of transacting his principal's business.

ANGLIN J. (dissenting).—The plaintiff, who was the senior member of the contracting firm of Ross, McRae & Chandler, brings this action to compel the

(1) [1892] A.C. 201.

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Imperial Bank of Canada to account to him for his interest in the proceeds of a cheque for $56,251.57, drawn upon the Bank of Montreal by the St. Maurice Construction Co. in favour of the firm of Ross, McRae & Chandler. This cheque represented the balance due to that firm in connection with a contract carried out by it at Shawinigan, Que. The firm of Ross, McRae & Chandler had been formed for the purpose of this Shawinigan contract. About the time of its completion, Messrs. McRae and Chandler entered into a new partnership with one McNeil, under the firm name of McRae, Chandler & McNeil. This firm, in which the plaintiff had no interest, secured a construction contract on the Temiskaming Railway in Northern Ontario.

The cheque in question was received by Messrs. McRae and Chandler after Mr. Ross had left Shawinigan. By arrangement made by Messrs. McRae and Chandler with Mr. Hay, the assistant general manager of the Imperial Bank, it was taken by the Toronto branch of that bank, with the understanding that the amount thereof would be *immediately* placed to the credit of the firm of McRae, Chandler & McNeil at the New Liskeard branch of the same bank, for their convenience in connection with their Temiskaming contract.

The cheque bears indorsements in blank of the firm name, Ross, McRae & Chandler, and also of the firm name, McRae, Chandler & McNeil. There is no express evidence whether Chandler, who made the indorsements, put either or both of them on the cheque before, during or after his interview with Mr. Hay. Assuming that the course which prudent business usage would dictate was followed, the indorsements

were put upon the cheque only after the arrangements for the opening of the account for the new firm had been completed. In this country, where the system of crossing cheques is little used, business men seldom take unnecessary risk of losing a cheque indorsed in blank and thus made payable to bearer. Had the indorsements been upon the cheque when it was shewn to Mr. Hay, I have little doubt that he would have said so when he was pressed by counsel for the plaintiff to state whether he had not seen the cheque and whether, if he had looked at it, he would not have seen that it was payable to the firm of Ross, McRae & Chandler. Mr. Hay is an experienced banker and as a witness was not loath to give any evidence which might put upon the case an aspect favourable to his bank. The fact that he does not say that there was any indorsement on the cheque when it was presented to him, coupled with the usual practice of prudent business men in such transactions, warrants the inference that Chandler put both indorsements on the cheque after he had arranged with Mr. Hay for the opening of the New Liskeard account and probably when he was about to hand it over to the clerk in the Toronto branch of the bank.

The plaintiff claims that the Imperial Bank is accountable to him because McRae and Chandler had not authority to deal with the cheque in question as they did, and the bank, as he alleges, took it with notice that they were diverting a partnership asset or security to an account in which their partner, the plaintiff, had no interest.

That McRae and Chandler were not authorized to use the cheque as they did is not seriously controverted. The defendants, the Imperial Bank, have been

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held not liable in the provincial courts — by the trial judge on the ground that there was no fraud or negligence on their part and that they had reason to believe that McRae and Chandler were acting within their authority; by the Divisional Court on the ground that the indorsement of the firm name of Ross, McRae & Chandler was within Chandler's authority, and that the case should be treated as if the proceeds of the cheque had been drawn from the Bank of Montreal and deposited by McRae and Chandler to the credit of the new firm; by the Court of Appeal on the ground that when Chandler indorsed the cheque for the firm of Ross, McRae & Chandler, it became payable to bearer, and when the amount of it was placed to the credit of the new firm, the bank became holders of it for value and without notice of any defect in the title; that negligence on the part of the bank would not suffice to render them liable, even if there had been negligence; that there was no evidence of fraud; and that there was nothing to suggest to Mr. Hay that he should have made inquiries. Mr. Justice Osler concurred in this judgment with doubt.

After most careful consideration I have come to the conclusion that the plaintiff's appeal should be allowed. He is, I think, entitled to succeed, not because of any fraud on the part of the bank officials, nor because of their negligence — although, with great respect for the learned trial judge and the provincial appellate courts, it seems to me reasonably clear that there was negligence on the part of Mr. Hay; *Bissell & Co.* v. *Fox Brothers*(1); *Hannan's Lake View Central* v. *Armstrong & Co.*(2); a word to Ross would have

(1) 51 L.T. 663, 53 L.T. 193. (2) 16 Times L.R. 236.

saved the situation — but on the well recognized principle of the law of agency, which is part of the law of partnership, that in the absence of actual authority or ratification, the principal is not bound by the act of his agent done out of the ordinary course of business, or outside the scope of his apparent or ostensible authority.

A partner has implied authority to deal with partnership property for partnership purposes; but it is beyond the scope of his ostensible authority to divert partnership securities to his private benefit, or to the benefit of a business in which he is interested, but which is not that of the partnership. A person acquiring an asset of a partnership from one of the partners with notice that he is diverting it to his own use, assumes the risk of establishing that such a disposition of the partnership property was sanctioned by all the other partners.

It is immaterial whether the partnership security is applied in discharge of an existing debt or whether it is used by the individual partner for the purpose of obtaining money from his own bankers to be applied for his own personal purposes. *Re Riches, and Marshall's Trust Deed*(1), at page 586.

By Mr. Hay's own evidence it is established that he was aware that it was a "new" firm which had got the Temiskaming Railway contract; he knew of the "old" firm and he probably identified the plaintiff, as a member of it, with the name "Ross" upon the cheque in question; he had no reason to believe that Ross had any interest in the "new" firm; its name indicated that Ross was not a member of it. He was informed that a contract had just been completed at Shawinigan. Although he does not in terms make the admission,

(1) 4 De G. J. & S. 581.

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the only proper inference from his evidence is that he knew that the cheque in question had been received in payment of a sum due to the contractors under the Shawinigan contract, and on the face of the cheque, which he saw, it was apparent that this payment was made to the old firm, Ross, McRae & Chandler.

Notice and knowledge means not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes. *Per* Parke B. in *May* v. *Chapman* (1), at page 361.

The cheque was indorsed in such a manner that the diversion of it from the old firm to the new firm was unmistakable. It was equally obvious that the indorsement by which this transfer was effected was made by, and was in the hand-writing of Chandler. He had placed his own signature beneath that of the old firm to indicate this fact. The design of placing the proceeds of this security of the old firm to the credit of the new firm, so that the latter would be in a position to disburse the money for its own ends, was therefore apparent. Indeed the intention of McRae and Chandler to use it in connection with their Temiskaming contract was avowed when they explained to Mr. Hay the reasons why they desired to have the proceeds of the cheque placed to their credit in the New Liskeard branch of the Imperial Bank. As put by Meredith C.J.:—

It seems equally clear that Mr. Hay, the assistant-general manager of the bank, with whom the transaction took place, had notice of the intended and of the actual application by McRae & Chandler of the proceeds of the cheque, so far as the depositing of them to the credit of the new firm was an application of them, for that they should be so deposited was the object of the transaction in which the parties were engaged.

(1) 16 M. & W. 355.

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I would add that Mr. Hay knew that it was intended that the money should be used in connection with the Temiskaming contract of the new firm.

There is nothing in the evidence, as I read it, to support the statement of the learned trial judge that "Hay supposed that the old firm were going under a new name" — Hay certainly does not say so; nothing to warrant the learned judge's conclusion that "the bank have made out they had reason to believe that Chandler was acting within his authority" — if, indeed, short of a case of estoppel, that be material when it has been established affirmatively that he acted without authority. *Kendal* v. *Wood*(1), at pages 248, 254.

Chandler no doubt had authority as a member of the old firm to indorse the cheque for the purpose of depositing it to the credit of that firm, or of drawing from the Bank of Montreal the money for which it called. But the indorsement of the name of the old firm for the purpose of transferring the cheque to the new firm was beyond the scope of his ostensible authority as a partner in the old firm, quite as much as it was beyond the scope of his real authority.

Mr. Hay knew or must be taken to have known that Chandler and McRae were not acting within such authority as may be implied from partnership agency. He trusted to their having special authority and he took the risk of its turning out that such special authority did not exist: *McConnell* v. *Wilkins*(2), at page 443.

If the agent be held out as having only limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even

(1) L.R. 6 Ex. 243.

(2) 13 Ont. App. R. 438.

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though it be an act of that particular class, because the authority being thus represented to be limited, the party prejudiced has notice and should ascertain whether or not the act is authorised. *Russo-Chinese Bank* v. *Li Yau Sam*(1), at page 184.

When the Imperial Bank accepted the cheque from McRae and Chandler and at once placed the amount of it to the credit of the new firm, it became not merely the agent of the new firm to collect the proceeds of the cheque for them, but the purchaser of the cheque. The materiality of this distinction is illustrated in the case of *Bevan* v. *National Bank*(2), at page 68 — a case concerning crossed cheques. Section 175 of our "Bank Act" corresponds with section 82 of the "English Bills of Exchange Act," 45-46 Vict. ch. 61.

I do not understand the view attributed to Meredith C.J. in the Divisional Court, that the bank was the agent of the old firm to receive payment of the cheque. As its purchaser the bank became a holder of the cheque for value ("Bank Act," sec. 56, sub-sec. 2); but, with great respect, I cannot accept the view that it had not notice of the defect in the title of the new firm which negotiated the cheque with it.

That knowledge of the fact that a partnership security is being diverted by one or more of the partners to the benefit of a business in which another of the partners is not interested puts the person taking it upon inquiry as to the actual authority of the partner or partners so dealing with it, "by which it is meant that he takes the paper at his peril," is established by many cases: *Creighton* v. *Halifax Banking Co.*(3); *Re Riches and Marshall's Trust Deed*(4); *Leverson* v. *Lane*(5); Halsbury's Laws of England, Vol. 1, p. 594.

(1) [1910] A.C. 174.
(2) 23 Times L.R. 65.
(3) 18 Can. S.C.R. 140.
(4) 3 De G. J. & S. 581.
(5) 13 C.B.N.S. 278.

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I fail to appreciate the distinction suggested between the case where, as here, the banker discounts or purchases for the benefit of an individual partner a cheque drawn in favour of his firm, and those cases where bankers, who, under similar circumstances, discounted promissory notes or bills of exchange, have been held accountable to the firm or the defrauded partner. A cheque is an inland bill of exchange drawn on a banker payable on demand. *Lynn* v. *Bell*(1).

We were pressed with the statement that, if the bank should be held accountable in the present case, banking business will be unduly hampered. I admit that weight which should be given to such a consideration. I question, however, the accuracy of the statement. But it is, in any case, of paramount importance that we should not disturb well-settled principles of the law of agency by disregarding them because in a particular instance their application may seem to result in a hardship, perhaps more apparent than real. The doctrine that a person, who deals with a partner in a matter or for a purpose beyond the scope of the ostensible authority which the partnership confers, does so at his peril, must not be jeopardized, impaired or weakened. I can discover no ground of distinction between the case of a bank which discounts a cheque drawn in favour of a partnership on another bank, and that of any other person who becomes the purchaser of such a security. Knowledge of facts indicating an excess of authority by the partner negotiating it puts both alike upon inquiry. The position of a banker who honours his customer's cheque is quite different. His primary duty to do so is a determining factor in cases

(1) (1876) 10 Ir. C.L. 487.

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such as *Backhouse* v. *Charlton*(1); *Gray* v. *Johnston* (2); *Coleman* v. *Bucks and Oxon Union Bank*(3). The distinction between the case of a person originally discounting a partnership bill and that of a subsequent *bonâ fide* holder of it for value is pointed out by Lord Kenyon in *Arden* v. *Sharpe*(4).

I accept the statement of the law, contained in the following paragraph of Mr. Justice Riddell's opinion:

> No one may with impunity take from one partner an asset of the firm "for the purpose of obtaining money to be applied for his own personal purposes," or with a knowledge that it is not to be applied for the purposes of the partnership.

That suffices to put the person taking the partnership asset on inquiry; and he ordinarily assumes the burden of shewing that the partner, from whom he received it, in so dealing with it, acted with the authority of his co-partner: Lindley on Partnership, 7th ed., p. 202.

The Master of the Rolls, delivering the judgment of the Privy Council in *Frankland* v. *McGusty*(5), at pages 301-2, says:—

> I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners. But there may be other circumstances attending the transaction which may afford the separate creditor a reasonable ground of belief, that the security so given in the partnership name is given with the consent of the other partners * * * Upon a consideration, therefore, of all the authorities, I am of opinion that the law is, that taken *simpliciter*, the separate creditor must shew the knowledge of the partnership; but if there are circumstances to shew a reasonable belief that it was given with the consent of the partnership, it lies upon the

(1) 8 Ch. D. 444.
(2) L.R. 3 H.L. 1, at p. 11.
(3) [1897] 2 Ch. 243.
(4) 2 Esp. 524.
(5) 1 Knapp P.C. 274.

partners to prove the fraud. I think that will reconcile all the cases.

Except his idea that McRae and Chandler were reputable business men, and his gratuitous statement that "it is not an uncommon thing for contractors to take the different contracts under different names" — he does not venture to pledge his oath that he believed that Ross had any interest in the Temiskaming contract or in the "new" firm — the bank manager suggests no basis for any reasonable belief on his part that Chandler was acting within his authority in negotiating the firm cheque as he did. His belief in Chandler's authority, if it existed,—(again Mr. Hay is careful not to say that he did in fact entertain this belief; he apparently gave the matter no thought, had no suspicion, made no inquiries)—based on these grounds would not, in the circumstances, be such a reasonable belief as would even shift to the plaintiff the burden of proving lack of authority on the part of Chandler. This would rather appear to be a case in which the banker had no reason to believe that Chandler's actual authority was greater than his ostensible authority as a partner — a case of taking from an individual partner, for his own benefit, a partnership security *simpliciter*. Apart from conduct on the part of the plaintiff, upon which an estoppel might be founded, *Kendal* v. *Wood*(1), at pages 251, 253, but of which there is here no suggestion, good faith and belief in the authority of the partner negotiating the security, however reasonable, will not afford the banker a defence, at all events when absence of authority and fraudulent conduct on the part of the part-

(1) L.R. 6 Ex. 243.

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ner have been actually shewn. Lindley on Partnership, 7th ed., page 201, note (*s*); Smith's Mercantile Law, 11th ed., Vol. 1, p. 35; *Hannan's Lake View Central* v. *Armstrong Co.*(1).

I am, therefore, of the opinion that, in respect of the cheque itself and its proceeds, the right of the Imperial Bank is no higher or better than that of Messrs. McRae and Chandler.

As pointed out in *Heilbut* v. *Nevill*(2), because Chandler had authority to indorse the cheque in the name of the partnership, though for partnership purposes only, there might be some difficulty in holding the bank liable for a conversion of it; but there is no difficulty in holding them accountable for its proceeds as money had and received to the use of the firm of Ross, McRae & Chandler.

The relevancy of section 96 of the "Bank Act," relied upon by Mr. Bicknell, I cannot appreciate.

It has not yet been made clear what was the amount of the plaintiff's interest in the cheque. That will appear when the partnership accounts have been taken in the other action in which a reference for that purpose has been directed. The bank might, as a matter of strict right, be required to pay into court in this action the whole amount of the cheque in question. This would be placed to the credit of the old firm and the bank would then be entitled to claim as a creditor against the partnership for so much of the proceeds of the cheque as it could shew had been expended for the benefit of the old partnership; and as to the balance, it would be entitled to subrogation to the rights of McRae and Chandler as developed upon the part-

(1) 16 Times L.R. 236. (2) L.R. 5 C.P. 478.

nership accounting. But it will be simpler, and the net result will be the same, if the bank is held accountable to the plaintiff only for whatever sum, not exceeding $56,251.57, may be found to be the balance due to him upon the taking of the partnership accounts.

The defendant bank objects to the plaintiff recovering any judgment until it is shewn by the taking of the accounts of the partnership that there is a balance due to him. But the plaintiff, on the other hand, asserts that, unless the accountability of the bank is established, it may not be worth his while, because of their financial irresponsibility, to pursue his action of account against his late partners. The liability of the bank to account to the plaintiff depends chiefly, if not entirely, upon a question of law. But whether it involves solely a question of law or also questions of fact, under the circumstances it may well be disposed of before the accounts between the partners are taken up. Ontario Consolidated Rules 259 and 531. That the plaintiff's relief must be presently confined to a judgment declaratory of his rights against the bank is not an answer to his claim. "Ontario Judicature Act," sec. 57, sub-sec. 5. Such a judgment is all that can be now given him. With it, however, he will probably have no difficulty in realizing from the bank any amount found to be due him when the partnership accounts have been taken.

The appeal should be allowed with costs in this court and in all the provincial courts.

Although no relief is asked against the defendants Chandler and McRae, they were, I think, properly made respondents on this appeal. Their peculiar dealing with the partnership cheque in question has been

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the cause of this entire litigation; they are vitally and directly interested in the accountability of their co-defendants to the plaintiff, and it was right that they should be given an opportunity to appear, if so advised, when the case against the bank was being dealt with. But as no relief was asked against them their appearance was not necessary unless they desired to contest the plaintiff's right to hold the bank accountable. That they could do only at their own risk. They should bear their own costs in all the courts.

Appeal dismissed with costs.

Solicitors for the appellant: *Macdonald, Shepley, Middleton & Donald.*

Solicitors for the respondent, The Imperial Bank: *Bicknell, Bain & Strathy.*

Solicitors for the respondents, Chandler and McRae: *Beatty, Blackstock, Fasken & Chadwick.*