JOHN MAZUR (*Defendant*) .....APPELLANT;

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*Jan. 23
May 1

AND

IMPERIAL INVESTMENT CORPORATION LTD. (*Plaintiff*) .... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Bills and notes—Promissory note signed in blank—Authority given holder to complete—Holder in due course—Bills of Exchange Act, R.S.C. 1952, c. 15, ss. 31, 32.

K told S, the manager of a car sales agency, that he wished to raise money on a truck of which he was the owner. S inquired of the plaintiff finance company, who informed him that K was not a suitable risk. S then suggested the use of an accommodation party and K asked the defendant M to let him use his name and credit to obtain a loan. The latter so agreed and signed a blank form of conditional sale contract and a blank form of promissory note which were presented by S to the plaintiff. The conditional sale contract purported to sell the truck for a price of $18,500, with a down payment of $6,500, leaving an unpaid cash balance of $12,000. Finance charges were added, bringing the total up to $14,326.96, which was to be paid in specified instalments. S filled in the first part of the document down to the $12,000 balance on the purchase price, and the rest of the document was filled in by the plaintiff who also filled in the promissory note. The plaintiff discounted the note and paid S $8,000 by cheque and retained $4,000 in S's holdback account.

After M had signed the documents, K found that he could raise the money from another finance company and thereupon told S to call off the deal with M and the plaintiff. However S fraudulently retained the moneys received from the plaintiff and concealed this fact from both M and K. In an action brought on the promissory note, the plaintiff obtained judgment at trial and this judgment was affirmed on appeal with an increase in amount. The defendant appealed to this Court.

Held (Cartwright and Hall JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Martland and Judson JJ.: The plaintiff took the note for full value and was a holder in due course. It was not open to this Court to draw inferences of a conditional delivery and failure to fill in the document in accordance with the authority given, in the face of the evidence and the unanimous findings which were at the basis of the judgments of the trial judge and the Court of Appeal. Nor was there any substance in the defence that the documents were delivered conditionally upon the understanding that K would get the proceeds. This was the understanding, but it presupposed use of the documents as honest documents; S converted the money after they had been used for the purpose for which they were intended.

Per Cartwright and Hall JJ., *dissenting:* While the matter was not spelled out in detail, in any one sentence in the evidence, a reading of all the record made it clear that M entered into the deal on the stated under-

*PRESENT: Cartwright, Fauteux, Martland, Judson and Hall JJ.

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standing that (i) the liability to the plaintiff which he would be assuming would be secured by a lien on K's truck, (ii) that the proceeds of the deal would be paid to K, and (iii) that the total amount raised was to be $10,000. The third of these items was alone decisive of this appeal. The note was filled up for $14,326.96, which was the amount required to yield not $10,000 but $12,000. Accordingly, the note, not having been filled up strictly in accordance with the authority given (contrary to the requirements of s. 32 of the *Bills of Exchange Act*) but actually in contravention of that authority in respect of the amount to be raised, never became an enforceable note at all.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], dismissing an appeal from a judgment of Riley J. Appeal dismissed, Cartwright and Hall JJ. dissenting.

J. W. K. Shortreed, Q.C., for the defendant, appellant.

J. E. Redmond, for the plaintiff, respondent.

The judgment of Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—Imperial Investment Corporation Ltd., which is a company engaged in financing the purchase of cars, sued the appellant John Mazur on a promissory note. The finance company obtained judgment at trial and this judgment was affirmed on appeal[1] with an increase in amount. The maker of the note now appeals.

The defences submitted on behalf of the maker were (1) that the finance company was not a holder in due course, and (2) that the note was signed in blank, delivered subject to conditions which were not fulfilled, and was not filled in in accordance with the authority given.

Mazur signed the note as maker for the accommodation of one Karraja. Karraja was the owner of a 12-ton Mack tandem truck. Early in 1958, he told one James Sheddy, who operated a company known as A. C. Car Sales & Service Ltd., that he wished to raise money on this truck. Sheddy inquired of the finance company, who informed him that Karraja was not a suitable risk. It does not appear from the evidence what legal arrangements were to be made to put through this proposed loan. Sheddy then suggested the use of an accommodation party and Karraja asked Mazur to let him use his name and credit to obtain a loan.

[1] (1962), 39 W.W.R. 149, 33 D.L.R. (2d) 763.

The finance company approved of Mazur as a suitable risk. Mazur then went to Sheddy's office where he signed a customer's statement giving particulars of his assets, a conditional sale contract and a promissory note. Mazur said, on discovery, that he did not recollect whether there was any writing on the conditional sale contract when he signed it. On cross-examination at the trial, he said there was nothing on it. As to the promissory note, he said at the trial that it was in blank, that he did not read it but just signed on the line for his signature. He did admit that he knew what he was signing. He was in the transport business himself and had had many dealings with finance companies.

Sheddy presented the conditional sale contract and the promissory note to the finance company. The conditional sale contract purports to sell the truck for a price of $18,500, with a down payment in cash of $6,500, leaving an unpaid cash balance of $12,000. The finance charges are then added, bringing the total up to $14,326.96, which was to be payable in 17 instalments of $797, and a final instalment of $777.96. I do not think that there is any doubt that Sheddy filled in the first part of the document down to the $12,000 balance on the purchase price, and that the rest of the document was filled in in the office of the finance company. The promissory note is filled in in typewriting in accordance with the conditional sale contract, and everything points to this having been done in the office of the finance company.

Mazur said in evidence:

> Q. In your discussions with Mr. Sheddy when you were at his office to sign whatever it was that you signed, did you tell Mr. Sheddy what you wanted him to do with those documents?
>
> A. No I did not.
>
> Q. Did he tell you what he was going to do with them; that is, did he tell you anything about where he would take them or what he would write on them, anything of that sort?
>
> A. No.

On discovery he had said:

> Q. That was not the question, the question was did you know that this transaction was set up to describe you as purchaser of this vehicle from A. C. Car Sales and Service?
>
> A. I will answer yes to that.

Nowhere in the record is there any evidence of any attempt to have these documents conform to reality. These documents appear to indicate a *bona fide* sale but the sale

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was entirely fictitious to the knowledge of all three participants in a scheme to induce the finance company to discount a note. The fraud of all three is obvious but, in addition, Sheddy kept the proceeds of the discount for his own use.

The learned trial judge spoke harshly of Sheddy and refused to believe his evidence when he said that the finance company knew that it was an accommodation transaction. But willingness to engage in this trickery is an equal reflection on the other two. The note was discounted on January 20, 1958. Mazur said that about three weeks later he received a booklet from the finance company showing the payments to be made and that he made the first three payments with money supplied by Sheddy. He knew exactly how the documents had been used when he received this booklet and he did nothing about it for three months. Then he went to Sheddy, who said that he would cancel the contract. Mazur then produced his copy of the contract, which contained all the details, including the finance charges, and Sheddy then wrote the word "cancelled" on Mazur's copy.

Karraja had no further interest in the transaction. He did not sign anything and he had not parted with his truck. He says that he had told Sheddy that he was no longer interested in this transaction because he was making arrangements to get the money elsewhere. Sheddy says that he was only told this after the transaction had gone through. There is no evidence that Karraja ever communicated with Mazur to tell him before the documents were used to get them back because they were not needed. There is evidence from Sheddy that his company had no money to acquire the truck from Karraja and it is to be remembered that he had a substantial equity in his truck. It is clear that he never intended to part with it.

The learned trial judge made very clear findings of fact which, in my respectful opinion, are fully supported by the evidence. He said[1]:

> The evidence of the defendant was that he gave no instructions to Sheddy as to what should be done with the note, nor did Sheddy tell him what was to be done with the note. There is no evidence that anything which may have passed between Sheddy and Karraja at the time of execu-

[1] (1962), 37 W.W.R. at p. 402.

tion of the documents or later was communicated to Mazur, and there is every indication that it was not. Therefore, the *prima facie* authority to complete the note given by sec. 31 must operate in this case.

The Court of Appeal came to the same conclusion[1]:

I have given consideration to the question of whether it was established by the filling in of material parts of the conditional sale agreement by the plaintiff that the conditional sale agreement became void to the knowledge of the plaintiff. If it did so become void to the knowledge of the plaintiff, it would be necessary to consider the application of the decision in the Supreme Court of Canada in *Traders Finance Corp. v. Casselman,* 22 D.L.R. (2d) 177, [1960] S.C.R. 242, in the facts of this case to the question of whether the promissory note is enforceable. I have considered such cases as *Tayler v. Great Indian Peninsula R. Co.* (1859), 4 De G. & J. 559, 45 E.R. 217; *Société Générale de Paris v. Walker et al.* (1885), 11 App. Cas. 20; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, 159 E.R. 73; and *Wilson & Meeson v. Pickering,* [1946] 1 K.B. 423. I have reached the conclusion that the defendant impliedly authorized the filling in of the conditional sale agreement for the purpose of assisting in the raising of money for Karraja, and that therefore it cannot be found that that agreement became void to the knowledge of the plaintiff by reason of the filling in of particulars which the defendant must have known would have to be filled in.

Nowhere can I find that these conclusions lack foundation and that Mazur's signature of the documents was conditional upon the finance company having a lien on the truck and that the total net amount was to be limited to $10,000. The figure of $10,000 was mentioned, according to Karraja, in his first conversation with Sheddy. Sheddy says that the figure mentioned was $10,000 or $12,000. Mazur said that he understood that the figure was $10,000 but, against this, he was in possession of the completed contract and the booklet of payments showing that the figure was $12,000 and he made no protest.

I do not think that it is open to this Court to draw inferences of a conditional delivery and failure to fill in the document in accordance with the authority given in the face of this evidence and the unanimous findings which are at the basis of the judgments of the trial judge and the Court of Appeal. Nor is there any substance in the defence that the documents were delivered conditionally upon the understanding that Karraja would get the proceeds. Of course this was the understanding but it presupposes use of the documents as honest documents. Sheddy converted the money after they had been used for the purpose for which they were intended.

[1] [1962] 33 D.L.R. (2d) at p. 770.

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The finance company took this note for full value. It paid Sheddy $8,000 by cheque and retained $4,000 in Sheddy's account, called a holdback account. At the time of the transaction, Sheddy was overdrawn in this account by $1,362.02. After the $4,000 was credited, he had a credit balance of $2,637.98.

Much of the evidence at trial was directed to show that the finance company did not take this note in good faith because it knew that the transaction was fictitious or had sufficient knowledge of the facts to bring home to it knowledge of its nature. With a note taken for full value and the rejection of Sheddy's evidence, any attack on the judgment on this ground must fail.

The judgment of the trial judge awarded the finance company only $5,600, namely, $8,000 less the 3 payments of $800 made. The plaintiff cross-appealed and asked that its judgment be increased to $9,600. This cross-appeal was allowed and, in my opinion, correctly. Why the plaintiff did not cross-appeal for judgment for the face value of the note, namely, $14,326.96 less the 3 payments, I do not know.

The plaintiff is a holder in due course of this note. I would affirm the judgment of the Court of Appeal and dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a unanimous judgment of the Appellate Division of the Supreme Court of Alberta[1] dismissing an appeal from the judgment of Riley J. and allowing a cross-appeal whereby the judgment was increased from $5,600 to $9,600 together with interest and costs.

The facts are not complicated. The learned trial judge has stated that Sheddy is unworthy of belief, but he has made no similar observation as to either Mazur or Karraja and, after a careful perusal of the whole record, I am unable to find any reason that the evidence of these two witnesses where it is uncontradicted, unshaken on cross-examination and not inherently improbable should not be acted on.

In January 1958, one Karraja approached James Sheddy, the manager of A. C. Car Sales & Service Ltd. seeking to borrow $10,000 on a 12-ton truck owned by Karraja.

[1] (1962), 39 W.W.R. 149, 33 D.L.R. (2d) 763.

Sheddy asked the respondent whether it would make the advance requested and, after the respondent had made some investigation as to the credit of Karraja, he was advised that it would not. Sheddy suggested to Karraja that if he knew anyone whose credit rating was good and who was willing to assist him the matter could be arranged.

Karraja then asked the appellant if he would allow his name to be used to enable Karraja to obtain the advance and the appellant consented.

Following this Mazur and Karraja went together to Sheddy's office. Karraja stated that he wanted $10,000 "to himself", that is to say, clear after payment of financing and other charges.

It was agreed that Sheddy would prepare a conditional sale agreement under the terms of which A. C. Car Sales & Service Ltd. would sell Karraja's truck to Mazur. Mazur would sign this agreement as purchaser and would also sign a promissory note for the balance due under the agreement. The conditional sale agreement and the note would be transferred to the respondent and it would make the necessary advance to A. C. Car Sales & Service Ltd. which in turn would pay it over to Karraja. Both Mazur and Karraja were familiar with the practice of purchasing trucks under conditional sale agreement.

There was nothing either fraudulent or unlawful in this proposal and it could have been carried out by Karraja transferring the title to his truck to A. C. Car Sales and by that company, in turn, making the sale to Mazur, it being agreed as between Mazur and Karraja that Mazur would not in fact be called upon to pay as the payments would be made by Karraja. But for the other arrangement made by Karraja, to be referred to later, there is no reason to suppose that it would not have been carried out.

While the matter is not spelled out in detail, in any one sentence in the evidence, a reading of all the record appears to me to make it clear that Mazur entered into the deal on the stated understanding that (i) the liability to the respondent which he would be assuming would be secured by a lien on Karraja's truck, (ii) that the proceeds of the deal would be paid to Karraja, and (iii) that the total net amount raised was to be $10,000. While each of these three

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items was no doubt of importance to Mazur it is the third which, in my opinion, is decisive of this appeal and which alone requires further consideration.

On this understanding Mazur signed a printed form of conditional sale agreement and a printed form of promissory note. I agree with the finding of Smith C.J.A. that:

> It seems probable that the conditional sale agreement and the promissory note were entirely blank when they were signed by Mazur.

On the argument before us it was conceded that the promissory note was signed in blank and that all the blanks were later filled up by employees of the respondent.

Sheddy inserted in the form of conditional sale agreement which Mazur had signed the description of the truck, a figure of $18,500 as sale price, a figure of $6,500 as cash payment and an apparent unpaid cash price balance of $12,000.

Sheddy then took the documents to the respondent.

The respondent inserted in the conditional sale agreement the cost of insurance, the registration fee and the "finance charge" and added these to the unpaid cash price balance, making a total of $14,326.96. The respondent also filled in blanks so as to provide for payment of seventeen instalments of $797 each and a final instalment of $777.97, the first being payable on February 20, 1958, and the remainder on the 20th of each successive month. In the promissory note the respondent filled in $14,326.96 as the sum payable, and inserted the same dates and amounts of instalments.

A. C. Car Sales Ltd. assigned the conditional sale agreement and endorsed the promissory note to the respondent which then issued a cheque to A. C. Car Sales & Service Ltd. for $8,000 and placed $4,000 to its credit in a "holdback" account.

When he had been advised by Sheddy that the respondent would not make the advance to him Karraja had commenced negotiations with another finance company and after Mazur had signed the forms referred to above Karraja found that this company would advance $10,000 on his truck. He thereupon told Sheddy to call off the deal with Mazur and the respondent. Sheddy says that at this time, he had already turned over the documents to the respondent and received the $8,000; whether or not this is so does

not appear to me to be of importance. Sheddy, as has been found, fraudulently retained the moneys received from the respondent and concealed this fact from both Mazur and Karraja.

The action is brought on the promissory note. It was blank in all material particulars when received by the respondent and the blanks were filled in by the respondent. In my view, the respondent can succeed in the action only if it was entitled to fill in these blanks under ss. 31 and 32 of the *Bills of Exchange Act,* which read as follows:

> 31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.
>
> 32. (1) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given; but where any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.
>
> (2) Reasonable time within the meaning of this section is a question of fact.

It is clear that Mazur placed his signature on the blank printed form of note and delivered it to Sheddy in order that it might be converted into a promissory note. It is also clear that Mazur became a party to the note prior to its completion and consequently he is liable on it only if it was filled up within a reasonable time and "strictly in accordance with the authority given". It was, no doubt, filled up within a reasonable time but it seems to me that the authority given by Mazur to Sheddy was limited to filling it up (and also filling up the conditional sale agreement which Mazur had signed in blank) for such amount as was necessary to yield $10,000 to Karraja. In fact the note was filled up for $14,326.96, which was the amount required to yield not $10,000 but $12,000.

The note, not having been filled up strictly in accordance with the authority given but actually in contravention thereof in the respect just mentioned, never became an enforceable note at all.

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The situation would, of course, have been different if Sheddy had filled that note up and then negotiated it to the respondent. Had that happened, the finding of the learned trial judge concurred in by the Court of Appeal that, whether or not it was negligent, the respondent acted honestly and took the note in good faith and for value, would have entitled it to succeed.

In the case at bar, however, the respondent itself filled up the note. In doing so, I will assume that it was acting honestly in the sense that, relying on Sheddy, it believed that it was entitled to fill up the note as it did but this does not assist it when, in fact, the note was filled up in a manner which was not in accordance with the authority given by Mazur.

I do not find it necessary to review the authorities which were discussed in the full and helpful arguments addressed to us by both counsel. Once it is established that all the blanks in the note were filled up by the respondent itself the only question requiring decision is whether they were filled up strictly in accordance with the authority given. If there has been a *de facto* exceeding of the authority that is an end of the matter. Authority to fill up a note for the amount of $10,000 plus incidental charges, is exceeded when the note is filled up for the amount of $12,000 plus incidental charges.

For these reasons I am of opinion that the appeal should be allowed, the judgments below set aside and the action dismissed with costs throughout.

HALL J. (*dissenting*):—The facts have been set out in the reasons for judgment of my brother Cartwright which I have had the advantage of reading and with which judgment I concur. However, I would like to comment on an important aspect of the case which I think influenced the learned trial judge and the Court of Appeal and was absent in this Court, and which, accepting the findings of the learned trial judge as to credibility, brings me to a conclusion opposite to that reached in the Courts below. The crucial fact in this case, in my judgment, is that the promissory note sued on bore only the signature of the appellant, Mazur, when it came into the possession of the respondent. It is obvious from reading the judgment of Riley J. that he predicated his finding that the respondent became the

holder in due course of the note upon the view that the appellant had not satisfied the onus of proving that the note was not complete and regular on its face when delivered to the respondent, for he says in part:

> The Defendant has not satisfied the onus of proving that the note was not complete and regular on its face when delivered to the Plaintiff. The only evidence of the condition of the note when delivered to the Plaintiff is that of Sheddy, who says that he did not do the typewriting. Sheddy was a most unsatisfactory witness. In cross-examination he admitted retaining the moneys advanced by the Plaintiff although he had promised Karraja that he would obtain money for him. He also admitted numerous other falsehoods, including his statements to Karraja that he would cancel the arrangement, his promise to Mazur that he would cancel the arrangement, along with numerous other similar representations. These admissions establish that Sheddy was not a credible witness, that his evidence should not be believed, and that therefore in the absence of evidence satisfying the court that the note was not complete and regular on the face of it when delivered to the Plaintiff, the Defendant has failed to satisfy the onus and the Plaintiff must be found to be a holder in due course of the note entitled to recover upon it.

There was still an element of uncertainty on this very point when the case was before the Court of Appeal which the Chief Justice of Alberta dealt with as follows:

> It seems probable that the conditional sale agreement and the promissory note were entirely blank when they were signed by Mazur.

On the argument before this Court, it was conceded that the document bore only the signature of the appellant when it came into the possession of the respondent. It is perhaps because this outright admission was not made to Riley J. and to the Court of Appeal that both Riley J. and the Chief Justice of Alberta relied so strongly on s. 31 of the *Bills of Exchange Act* and not on s. 32(1) which reads:

> 32. (1) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, *and strictly in accordance with the authority given;* but where any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given. (The italics are mine.)

While Riley J. disbelieved Sheddy and said that Sheddy was not a credible witness, he made no adverse findings as to the credibility of Karraja or the appellant. Their evidence establishes, as my brother Cartwright has pointed out, that when the appellant put his signature on the blank

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promissory note form he did so on certain conditions, one of those being that a loan to yield $10,000 to Karraja was to be obtained. The note was actually filled in to yield $12,000 and not $10,000 and therefore not strictly in accordance with the authority given. Riley J. appears to have dealt with the appellant as an innocent party as well as the respondent. He quotes from *London and South Western Bank v. Wentworth*[1]:

> This language [i.e., the term 'estoppel'] might be not improperly applied to the present case, but, for our own part, we should prefer not to use the word 'estoppel', which seems to imply that a person by his conduct is excluded from showing what are the true facts, but rather to say that the question is whether, when all the facts are admitted, the acceptor is not liable upon the well-known principle that where one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the third person to commit the fraud.

indicating he did not consider the appellant in the same category as Sheddy or a party to Sheddy's fraud.

Appeal dismissed with costs, CARTWRIGHT *and* HALL JJ. *dissenting.*

Solicitors for the defendant, appellant: Shortreed, Shortreed, Stainton & Enright, Edmonton.

Solicitors for the plaintiff, respondent: Bishop, McKenzie, Jackson, Latta, Redmond & Johnson, Edmonton.