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*Feb. 14.
*Mar. 3.

EDMOND D. C. THOMSON (DEFENDANT) ..... APPELLANT;

AND

THE MERCHANTS BANK OF CANADA (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Principal and agent—Trust—Money deposited by agent—Cheque sent to payee—Right of payee to fund.

C. bought from the assignor of M. a parcel of land, the purchase price being payable in instalments and transferred half of his interest to E. Later E. sent to C. his accepted cheque for half of the amount of an instalment falling due, which cheque was deposited to the credit of C.'s account in the Bank of Montreal. Then C. drew a cheque of the same amount on the above account and sent it to M. with a statement that it was for his own share of the instalment. Payment of the cheque was refused by the Bank of Montreal on the ground that C. was in the hands of a receiver. M. brought an action asking that it be declared that the money standing to the credit of C. in the Bank of Montreal was the property of M., as being trust money in the possession of C. for the specific purpose of paying E.'s indebtedness to M.

Held, Davies C.J. and Idington J. dissenting, that the transaction was not impressed with a trust in favour of M.

Per Anglin and Brodeur JJ.—C. merely assumed, as agent of E., a personal liability towards M. whose right of action is one of damages against C. for breach of contract.

Per Anglin and Brodeur JJ.—The receipt of C.'s cheque by M. and its presentation, upon which it should have been accepted and paid, is not equivalent to a payment of the money itself to M.

Per Mignault J.—The money paid by E., being due by him to C. and not to M., was the property of C. and was not trust money in the possession of C. for a specific purpose.

Judgment of the Appellate Division, 39 D.L.R. 664; [1918], 1 W.W.R. 972, reversed, Davies C.J. and Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 39 D.L.R. 664; [1918], 1 W.W.R. 972.

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judgment of the trial judge, Hyndman J., and maintaining the plaintiff's action. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

W. N. Tilley K.C. and *H. C. Macdonald* for the appellants.

S. B. Woods K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—The reasons for the judgment of the Appeal Court in this case stated by Justices Beck and Stuart, from which judgment the present appeal has been taken, so fully and fairly represent my own views that I feel there is little or nothing I can add to them. I am satisfied to adopt these reasons as my own and would dismiss this appeal.

Mr. Tilley, however, for the appellant, pressed very strongly the argument that both Evans and Cairns paid these moneys in dispute before they were compellable to pay them and that their only liability was to the Canadian Agency and not to the Merchants Bank, the assignee of the Eby agreement. He contended there was no evidence of any trust having been created, or of any intention to create a trust, on the part of the agency in receiving the moneys.

I am of opinion that this argument is based upon an incorrect appreciation of the evidence and of all the facts. We should not look to the form but rather to the substance of the transaction, and I think in so doing we must reach the conclusion that a trust was created when the moneys of Evans and Cairns were paid over to the Canadian Agency before they were due under the agreement, and that trust was to transmit these moneys to the plaintiff respondent, the Merchants Bank, in payment of their share of the

instalment of the purchase money of the lands Eby had sold to Biggar and which instalments of purchase money had been assigned by Eby to the bank and one of which fell due the following day.

Biggar had executed a declaration of trust that he had purchased in trust for the agency, but as a fact there was no assignment of the agreements of sale to Canadian Agency, Limited.

The Canadian Agency, on whose behalf Biggar had purchased these lands, had assigned 50% of their interest in them to one Cairns, who in turn assigned 10% interest to Evans subject in each case to payment of a proportionate share of the purchase-price.

During the years 1911, 1912 and 1913, payments of principal and interest were made by the Canadian Agency to the vendor Eby and his assignee the respondent bank, and Evans and Cairns (the latter through the Western Mortgage Company) had paid through the Canadian Agency their 10% and 40% respectively of these instalments.

In 1913 Eby assigned his vendor's interest in the lands and unpaid purchase moneys to the bank respondent. On the 7th June, 1914, an instalment of principal and interest, $8,554.90, was due to the respondent bank by Biggar, the purchaser from Eby.

Evans at the time filled the dual positions of manager of the Canadian Agency in Alberta and of president of the Canadian Mortgage Company, and on 6th June, the day before the above instalment fell due, he made out his own personal cheque for $855.49 in favour of the Canadian Agency, being his 10% share of the instalment and interest, the cheque stating on its face that it was for

share Eby payment due 7th June, 1914,

and as president of the Western Canada Mortgage

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Company directed its cheque to be drawn and issued in favour of the Canadian Agency for the sum of $3,421.09, the cheque stating on its face

that it was in payment of 40% due to S. Eby on the 7th June.

The two together made up $4,277.45, the 50% of the instalment due the following day on the Eby agreement. Instead of forwarding these two cheques to the Merchants Bank direct indorsed by Canadian Agency, Evans sent that bank a cheque of the Canadian Agency for the whole sum of $4,277.45 enclosed in a letter which misrepresented the true facts, and two days later the personal cheque of Evans and that of the Canada Mortgage Company were deposited in the Canadian Agency's general account in the Bank of Montreal to its credit.

When the cheque in favour of respondent was presented for payment the Bank of Montreal refused payment on the wrongful ground that a receiver for the assets of the Canadian Agency had been appointed in England by the court.

Under the state of facts proved at the trial beyond dispute, I do not doubt that the Canadian Agency received the two cheques, Evans' personal one and the Canada Mortgage Company's cheque in trust to forward them to the plaintiff the Merchants Bank, the assignee of the Eby agreement, and to whom the instalment of the purchase money was payable.

The fact that the general manager of the security company misrepresented the facts for the purpose of concealing the critical financial position of the Canadian Agency Company, Limited, is established.

But that misrepresentation cannot in any way alter or change the substance and essence of the transaction as proved by the oral and written evidence at the trial which were that the moneys were paid to the Canadian

Agency, Limited, the day before an instalment of the purchase money due on the Eby agreement fell due, by the Canadian Mortgage Company on behalf of Cairns and by Evans personally to transmit to the Merchants Bank, the assignee of the Eby agreement, in payment of 40% of that instalment due by Cairns and 10% due by Evans and for no other purpose.

For these reasons I would dismiss the appeal and confirm the judgment of the Appeal Court.

IDINGTON J. (dissenting).—The Canadian Agency, Limited, rested under a double obligation to pay respondent the money in question. First, as the purchaser bound to pay the entire purchase money for lands bought by others as its trustees, and secondly, as the actual recipient from Evans and Cairns, to whom it had resold a half interest of their shares, of the half of the instalment of purchase money then falling due, and which shares in the respective proportions of 10% and 40% had been so paid it for the express purpose of the transmission thereof to respondent as the assignee of the obligation that the Canadian Agency, through its trustee, had given Eby, the vendor in question.

Moreover, it owed a duty to its own trustee who had so bought for it and had been indemnified by it against the covenants he had on its behalf entered into with the vendor Eby.

Not one of these several parties thus concerned ever interposed to prevent the payment of the cheque in question unless the dubious letter of Evans can be said, on his behalf, to savour of such interposition.

The cheque, however, was for the exact sum of the total which was paid the agency for the express purpose of remitting to respondent in order to discharge such obligations, and became the property of respondent

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upon and by virtue of which it was entitled to receive the money from the Bank of Montreal.

No matter how much of falsehood the letter accompanying it may have contained, the agency had parted with the symbol of control of property which entitled the respondent thereby to get the money, and it was entitled to have the agency and all others enjoined from executing any fraudulent purpose that may have been involved in the attempted misdirection and misappropriation of the money.

If the money had been received by the respondent on its presentation of the cheque, as admitted now, it should have been, and applied as originally destined, could the agency company or any of its creditors have insisted on the terms of such a letter being observed under all the circumstances in question?

On such a state of facts as disclosed in the evidence I have no doubt the judgment below is right.

And quite apart from the view I thus present, even if there had never been any cheque sent, there exist in the maze of interrelated obligations so many grounds upon which the respondent could, as assignee of Eby, have enforced some of the several obligat ons of trusteeship which constituted the fund a trust and bound the Canadian Agency to apply the money in the way it was destined to be applied, the moment it was received by it, that I have no doubt it could not, nor could its liquidator, lawfully apply it otherwise than by paying it to respondent.

The appeal should be dismissed with costs.

ANGLIN J.—Mr. O. M. Biggar, nominally on his own behalf, but in reality as trustee for Canadian Agency, Limited (as evidenced by a declaration of trust), bought a parcel of land from one Eby, the purchase

money being payable in instalments. Eby assigned his interest in the agreement to the plaintiff, the Merchants Bank (Battleford branch). Canadian Agency transferred 40% of its interest to one Cairns, and 10% to one Evans, who was its Alberta manager and was also president of the Western Canada Mortgage Company. Cairns and Evans undertook to furnish money as required to meet, or to recoup Canadian Agency for their proportion of Biggar's liability to the vendor, and the Western Canada Mortgage Company agreed to make advances to meet Cairns' payments.

An instalment of purchase money with interest, amounting in all to $8,554.90, fell due on the 7th of June, 1914. Of this sum, while Canadian Agency owed it all, it was entitled to be recouped by Cairns $3,421.96 and by Evans $855.49. In the case of earlier instalments the whole amounts thereof had in fact been paid by Canadian Agency, Cairns and Evans recouping it for their shares. In June, 1914, Canadian Agency was short of money. Evans' personal cheque for $855.49, and a cheque on the Western Canada Mortgage Company's account for $3,421.96, both good, were handed to Canadian Agency on the 6th of June in order that it should pay these sums by its own cheque to the Merchants Bank to cover Cairns' and Evans' shares of the instalment due on the 7th. The two cheques were deposited, as undoubtedly was intended, to the credit of Canadian Agency's current account in the Bank of Montreal at Edmonton on the 8th of June. On the 6th, a cheque of Canadian Agency drawn on that account for $4,277.45 was sent to the Merchants Bank at Battleford, but accompanied by a letter written by Evans stating in unmistakable terms that it was a payment on behalf of Canadian Agency itself and intended to cover its share of the instalment due

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on the 7th and that its co-owners had not provided funds to meet their shares of that obligation. Whatever may have been the purpose of this falsehood, it at least does not lessen the difficulty in which the Merchants Bank and Cairns and Evans now find themselves.

On presentation by the Merchants Bank payment of Canadian Agency's cheque was refused by the Bank of Montreal on the ground that a receiver had been appointed in England of the assets of the company; and, so far as this record shews, it still remains unpaid. An order for the winding-up of Canadian Agency has since been made and the liquidator defends this action, to which the Bank of Montreal is also a party defendant. But for some reason not disclosed the trial proceeded against the liquidator alone, and he as appellant and the Merchants Bank as respondent are the sole parties to this appeal.

The liability of Canadian Agency to the plaintiff as payee of its dishonoured cheque is not questioned. The object of this action, however, is to obtain the fund itself in the hands of the Bank of Montreal, the relief prayed for being

> a declaration that of the sums now standing to the credit of the defendant, the Canadian Agency Limited, No. 1 account, in the defendant, the Bank of Montreal, at Edmonton, $4,277.45 is the property of the plaintiff.

The evidence establishes probably with sufficient clearness that the $4,277.45 on deposit with the Bank of Montreal, at the time that the dishonoured cheque was presented, to the credit of the account on which it was drawn, was the proceeds of the Cairns' and Evans' cheques, and I shall assume that payment of it was wrongfully refused. *Re Maudslay Sons and Field* (1).

(1) [1900] 1 Ch. 602.

The plaintiff's claim on the fund is based on two grounds—that the money was impressed with a trust of which Canadian Agency was the trustee and it (the Merchants Bank) the *cestui que trust*; that, since the Bank of Montreal should have paid Canadian Agency's cheque on presentation and equity will treat that as done which ought to have been done, the position is the same as if the proceeds of the Cairns' and Evans' cheques had actually reached the Merchants Bank through the Bank of Montreal or had been sent to it directly by Canadian Agency.

On the second hearing of this appeal Mr. Tilley strongly pressed the argument, not before presented, that, having regard to the terms of the agreement of the 25th of May, 1911, between Canadian Agency, Cairns and the Western Canada Mortgage Company, the payments in question by Cairns and Evans to Canadian Agency should be regarded not as payments of money by principals to their agent to be forwarded on their account but as payments by debtors to their creditor actual or about to be. If this view be correct, the case of the appellant is, in my opinion, unanswerable. But facts which militate against it are that Evans was not a party to the agreement of the 25th of May, 1911, that he knew the financial position of Canadian Agency when he handed the cheques for the Cairns' and Evans' payments to it, and that the agreement contains no express covenant by Cairns, and, of course, none of any kind by Evans, who was not a party to it, to pay respectively 40% and 10% of the instalments of purchase money due to Eby. This much, moreover, seems to be clear—that it was contemplated by the parties that Canadian Agency should place the Cairns' and Evans' cheques to its own credit and should make the payment in question to Eby (the

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Merchants Bank) on its own account and in fulfilment of the contractual obligation of its trustee, Biggar, against which it was bound to indemnify him. Cairns and Evans were under no contractual obligation either to Eby or to Biggar. Payment was made by them, not as Eby's debtors, but under a contractual obligation with Canadian Agency to make it.

I prefer, however, to deal with the question on the assumption that Evans intended, when he gave to Canadian Agency the cheques for his own 10% and Cairns' 40% of the instalment falling due to Eby, to put that company in funds to pay Cairns' and Evans' share of the instalment as their agent. Mr. Woods' contention, as I understand it, was that Canadian Agency received the Cairns' and Evans' cheques in the capacity of their agent to forward the proceeds, with Canadian Agency's own share of the instalment due, to the vendor's assignee, the Merchants Bank. How did this initial agency for Cairns and Evans develop into the trust for the Merchants Bank which Mr. Woods argued it became, and which he must establish in order to succeed? There is not a vestige of intention on the part of Cairns and Evans or either of them to create a trust, or on the part of Canadian Agency to assume the position of trustee. That an agent directed by his principal to pay to a third person money sent to him for that purpose (the direction or authority not amounting to an assignment of or charge upon the fund), is not, in general, responsible to such third person should he fail to execute his mandate is trite law. He may become so by assenting to the direction and communicating his assent to the intended payee or by undertaking with him to pay the money to him or to hold it for him. The law on these points is conveniently collected in 1 Hals. L. of E., par. 469; see, too, cases

cited in Bowstead on Agency, 5th ed., 426, and Godefroi on Trusts, 4th ed., pp. 62-3. But even then the agent does not become a trustee for the intended payee nor the latter a *cestui que trust*; nor is the fund impressed with a trust so that it becomes in equity the property of the intended payee as it would be if the relation of trustee and *cestui que trust* were established. The prayer of the statement of claim that the fund be declared the property of the plaintiff recognizes this to be the necessary result of the creation of a trust. But the agent so undertaking merely assumes a personal liability to the intended payee. His obligation is contractual or quasi contractual. The payee's right is legal, not equitable. In the event of default by the agent the payee's right of action against him is not to recover the fund but for damages for breach of contract.

The distinction between trusts for the payment of the settlor's creditors *generally* and trusts for the payment of one or more named creditors, properly insisted upon by Mr. Woods in distinguishing the authorities cited by counsel for the appellant (*Johns* v. *James* (1), and *Synnot* v. *Simpson* (2)), is well established. See Underhill on Trusts, 7th ed., p. 36. *New, Prance and Garrard's Trustee* v. *Hunting* (3), is a comparatively modern illustration of the application of the rule stated by Turner V.C. in *Smith* v. *Hurst* (4), that a trust for *particular* creditors is effective and irrevocable without communication to or assent by them. But the foundation of a trust, whether expressly so termed, or arising from the apparent intention to create a trust, as distinguished from a mere contractual agency, is present in both classes of cases alike. The trust for creditors generally is sometimes compared to an agency, Lewin

(1) 8 Ch.D. 744.
(2) 5 H.L. Cas. 121.
(3) [1897] 2 Q.B. 19.
(4) 10 Hare 30, at p. 47.

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on Trusts, 12th ed., 607. It resembles agency in that it is revocable until communication and that such communication is essential to give the creditor a status to make a claim against the agent in the one case, or against the trustee and upon the trust fund in the other. But in the absence of any evidence of intention to create a trust, I find nothing to support the respondent's contention that what was clearly established as an agency became a trust.

Nor can I regard the giving to, or the receipt of, the cheque by the Merchants Bank, followed by a presentation upon which it should have been accepted and paid as equivalent in legal or equitable effect to a transfer or payment of the money itself to that bank. To do so would be, in my opinion, to give to the dishonoured cheque the effect and operation of an assignment of money in the drawee's hands belonging to the drawer, or at least of a charge upon it. It has neither. Its wrongful dishonour gives no right of action to the payee against the drawee either for the money itself or for damages for such wrongful dishonour. *Schroeder* v. *Central Bank* (1); *Hopkinson* v. *Forster* (2). There can be no charge in equity without an intent to charge. The cheque is merely a bill of exchange payable at the banker's. The giving of it implies neither an intention to assign the drawer's money in the banker's hands nor an intention to charge it. Unless the cheque be treated as amounting to an assignment of, or constituting a charge upon, these moneys, I cannot understand on what footing it can be successfully urged that its receipt and presentation and dishonour would produce the same legal situation as would result from the receipt of the money itself by the payee or a declaration

(1) 34 L.T. 735. (2) L.R. 19 Eq. 74.

by the banker that such money would be held in trust for him.

The maxim that

> equity looks upon that as done which ought to have been done,

though of very extended, is certainly not of universal application. Equity will not thus consider things in favour of all persons, but only of those who have a right to pray that the thing should be done. *Burgess* v. *Wheate* (1); Story's Equity, 13th ed., p. 68. The Merchants Bank was not in that position. The Bank of Montreal owed no duty to it out of which there might arise an equity entitling it to pray that the Bank of Montreal should be made to accept and pay the dishonoured cheque. The banker's only obligation in respect of a cheque drawn on him is to his customer, the drawer, and it arises out of their contractual relations. The drawer alone, if interested in collateral consequences and incidents, may invoke the maxim under consideration. *Re Anstis, Chetwynd* v. *Morgan* (2); *Re Plumptre's Marriage Settlement* (3). With deference, wholesome and useful as this doctrine of equity undoubtedly is within the sphere of its legitimate application, it cannot be invoked here. If it could the money in the Bank of Montreal to the credit of the drawer must be deemed to have become the property of the Merchants Bank just as if it had been actually paid to it on the presentation of the cheque, which would thus be given the effect of an assignment of that money by the drawer to the payee—which it certainly cannot have. *Schroeder* v. *Central Bank* (4). Another equitable maxim, which, although likewise by no means of universal application, may not be ignored, is

(1) 1 Eden 177, at p. 186.
(2) 31 Ch. D. 596, at pages 605-6.
(3) [1910] 1 Ch. 609, at p. 619.
(4) 34 L.T. 735.

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that "equity follows the law." It is not a consequence of the dishonour of the Canadian Agency's cheque having been wrongful that the payee's rights in equity are the same as if that cheque had been paid.

That neither Canadian Agency nor the Bank of Montreal was a trustee, that there was no trust fund and that the Merchants Bank was not a *cestui que trust* is, I think, indubitable. Neither did the latter ever attain a position in any sense equivalent to what it would have occupied had the money itself actually reached its hands whether on payment by the Bank of Montreal of Canadian Agency's cheque or directly from that company.

Whatever rights of control Cairns and Evans may have as principals over the disposition of the fund to their agent's credit in the Bank of Montreal, the Merchants Bank has none. Cairns' and Evans' rights, too, are subject to all equities of set-off as between them and the Canadian Agency and its creditors. These rights are not in question here.

I would for these reasons, with respect, allow this appeal and dismiss this action as against the liquidator with costs throughout.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—So far as they need be stated, the pertinent facts are as follows:—

In June, 1911, Mr. O. M. Biggar purchased from one Eby certain lands in the Province of Saskatchewan for the price of $47,134.50 on account of which he paid $11,783.62, and the balance was payable by instalments of $7,070.17 on the 7th June, 1912, 1913, 1914 and 1915, and the remaining balance in 1916, with interest at 7 per cent. to be paid with each instalment. This purchase was made by Mr. Biggar on behalf of

the Canadian Agency, Limited, a corporation having its head office in London, England, which furnished the cash payment made to Eby, and Mr. Biggar, on 15th July, 1911, executed a declaration of trust in its favour.

The rights of Eby under his sale to Mr. Biggar now belong to the respondent to whom they were assigned by Eby.

At some date subsequent to this purchase an agreement, incorrectly dated of the 25th May, 1911, was entered into between the Canadian Agency, Limited, one J. F. Cairns of Saskatoon, and Western Canada Mortgage Company, Limited, a corporation having its head office in Edmonton, Alberta, whereby it was stated that it had been agreed between the Canadian Agency, Limited, and Cairns that the latter should take and hold an undivided one-half interest in the lands purchased from Eby and in some other lands acquired from other individuals, Cairns to pay one-half of the costs thereof and of the expenses incurred in connection with the same. It was also stated that Cairns had conveyed one-fifth of his one-half interest to Mr. H. M. E. Evans, who was the manager at Edmonton of the Canadian Agency, Limited, and also the president of Western Canada Mortgage Company, Limited. The agreement was that the Canadian Agency, Limited, should hold the lands in trust for the owners thereof as follows: the Canadian Agency, Limited, an undivided five-tenths interest; Cairns, an undivided four-tenths interest; and Evans, an undivided one-tenth interest in the said lands. It was further agreed that the Canadian Agency, Limited, should on its own behalf pay one-half of the cost of the said lands and of the expenses of surveying, grading, improving, advertising and developing, and all taxes

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and assessments, and should collect from Evans 10% of the cost of the said lands and of such expenses, Cairns being bound to pay or cause to be paid 40% of the cost of the lands and expenses. It was also stipulated that the Canadian Agency, Limited, should do all acts, matters and things required for the improving, developing, advertising and placing upon the market of the said lands and should, on behalf of itself and Cairns, advance all moneys that should be required and should immediately apply to the Western Canada Mortgage Company, Limited—which was financing the venture for Cairns—for the 40% share thereof payable by Cairns.

The instalments and interest on the purchase price were paid in 1912 and 1913, these payments, as I read the evidence, being made by the Canadian Agency, Limited, Cairns and Evans paying, or causing to be paid, their shares to the latter company. On 7th June, 1914, another instalment of $7,070.17 and of $1,484.73 of interest, in all $8,554.90 came due, and it is in connection with this payment that the controversy has arisen.

Taking now the different documents relating to the 1914 payment in the order in which we find them in the case, there is first a cheque, dated 6th June, 1914, to the order of the Canadian Agency, Limited, for $855.49, signed by Mr. Evans, for his tenth share of the 1914 payment.

Next there is a cheque dated 6th June, 1914, of the Canadian Agency, Limited, to its own order, for $3,421.96, drawn on its account No. 3, which is said to have been the account of Western Canada Mortgage Company, Limited. Both of these cheques were deposited to the credit of the Canadian Agency, Limited, in the Bank of Montreal at Edmonton.

An order dated 6th June, 1914, was addressed to the accountant of the Canadian Agency, Limited, for the issue of a cheque signed "Western Canada Mortgage Co., per H. M. E. Evans."

Then there is a letter to the Merchants Bank of Canada, Battleford, Sask., dated 6th June, 1914, and signed by the Canadian Agency, Limited, per H. M. E. Evans. This letter is as follows:—

The Merchants Bank of Canada, 6th June, 1914.
Battleford, Sask.
Dear Sirs:—

Re W. S. Eby.

Enclosed please find our cheque for $4,277.45. This is just half the amount which is due to Mr. Eby on June 7th and which you have given notice to Mr. O. M. Biggar has been assigned to you. It is really a syndicate that is interested in this property and the owners of the half interest in that syndicate have not yet put us in funds to meet their share of the payment. We presume you will grant us a reasonable extension while we are communicating with them on the subject.

Yours faithfully,
THE CANADIAN AGENCY, LIMITED,
Per H. M. E. EVANS.

Then we have the cheque here in question, drawn on 6th June, 1914, by the Canadian Agency, Limited, on its account No. 1 (which was the account of its own moneys), to the order of the Merchants Bank of Canada, Battleford, for the sum of $4,277.45, one-half of the payment of $8,554.90 due to the Merchants Bank as assignee of Eby. Payment of this cheque was refused by the Bank of Montreal, a receiver having been named in England to the Canadian Agency, Limited.

Finally, there is an exhibit dated 8th June, 1914, purporting to be a receipt by the Canadian Agency, Limited, to the Western Canada Mortgage Company for $3,421.96, "40% of payment due W. S. Eby."

The questions now to be decided are: (1) whether the cheque for $4,277.45, sent by the Canadian Agency, Limited, to the respondent represents moneys belong-

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ing to the Canadian Agency, Limited, in so far as the funds drawn on and the proceeds of the cheques of Evans and the Western Canada Mortgage Company are concerned? Or (2) whether these funds are funds belonging to Cairns, or the Western Canada Mortgage Company, Limited, and Evans personally, and subject, in the hands of the Canadian Agency, Limited, to a trust in favour of the respondent? The judgments rendered by the two courts below amount to an affirmative answer to the second question and to a negative answer to the first question.

With all possible respect, and inasmuch as there is no dispute as to the facts, and the only question is with regard to the inference to be drawn therefrom, the judgments of the Alberta courts are open to review —I think the answer should have been in the negative to the second question and in the affirmative to the first. There is certainly no express trust here and, in my opinion, no trust can be implied from the circumstances I have stated above. The letter written by Mr. Evans to the appellant, above quoted, no doubt contained a false statement, but it certainly would shew that Mr. Evans did not treat the cheques of $855.49 and $3,421.96 as having been given to the Canadian Agency, Limited, for a specific purpose or as trust moneys, although the former cheque mentioned that it was for "share Eby payment due 7th June, 1914." Moreover, the instalment of $8,554.90 due to the appellant on that date, was the debt of the Canadian Agency, Limited. The latter had sold an undivided one-half interest in the Eby lands to Cairns, and Cairns had sold one-fifth of his interest to Evans. Whatever Cairns or Evans paid to the Canadian Agency, Limited, on account of these lands was money due by them to this company and not money due by

them to Eby or to his assignee, the respondent. Therefore the moneys paid by them to the Canadian Agency, Limited, and represented by these cheques, were moneys belonging to this company and not trust moneys which came into its possession for a specific purpose.

The appeal should consequently be allowed with costs throughout, and the respondent's action dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Short, Cross, Maclean Ap'John & Macdonald.*

Solicitors for the respondent: *Woods, Sherry, Collison & Field.*