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*June 8, 9.
*Nov. 2.

CORPORATION AGENCIES LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

HOME BANK OF CANADA (DEFENDANT) ..... } RESPONDENT.

APPEAL PER SALTUM FROM THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC (*a*)

Bank and banking—Company—Power of attorney—Cheques—"Kiting"—Deposits—Possession—Right to recover—Fraud—Arts. 1031, 1047, 1048, 1049, 1050, 1051, 1143, 1704, 1706, 1727, 1803, 1904, 2268 C.C.—Arts. 77, 391, 410, 946, 1064 C.C.P.

The appellant corporation was engaged in business as registrar and transfer agent of the capital stock of joint stock companies and as trustee for the collection of mortgages, insurance and other company purposes. Its president was one C. H. Cahan, Sr., and amongst its directors were one C. H. Cahan, Jr., son of the former, and one B. F. Bowler, the latter acting also as secretary-treasurer. The appellant kept its bank account at the Merchants Bank of Canada in Montreal; C. H. Cahan, Sr., had bank accounts at the Bank of Montreal at Montreal, with the agency of that bank in New York, and with the Guarantee Trust Company in New York. C. H. Cahan, Jr., had a personal account with the respondent, the Home Bank, and another with the Empire Trust Company in New York; he was also, without the knowledge of his father, dealing in stock speculations and the promotion of companies, and had bank accounts at the Montreal branch of the Sterling Bank of Canada and with La Banque Provinciale at Montreal and several other banks. As C. H. Cahan, Sr., being extensively engaged in special work during the war, was frequently absent from Montreal for prolonged periods, he gave his son, from time to time temporary powers of attorney to transact his banking business and finally gave him a general power of attorney to draw and sign cheques upon any chartered bank with which he had an account. One of the by-laws of the appellant corporation provided that "* * * cheques * * * may be made, drawn * * * by the secretary-treasurer, acting

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(*a*) Appeal to the Privy Council.

jointly with the manager, or with any director of the company * * *." Bowler, placing himself in the hands of C. H. Cahan, Jr., signed whatever cheques the latter directed him to sign. During the absence of his father, C. H. Cahan, Jr., carried on an extensive exchange of cheques and, using all the above mentioned bank accounts, practised what is commonly known as "kiting." Amongst others, ninety-four cheques were thus drawn on the appellant's bank account in the Merchants Bank, which were presented for payment by or under the direction of Cahan, Jr., not at the office of the Merchants Bank, but at the office of the respondent bank, which credited the proceeds of the cheques to the private account of Cahan, Jr., or, in some cases, paid them to him in cash. These cheques were presented to the Merchants Bank by the respondent bank which received from the former the proceeds amounting in the aggregate to $205,960.37. The money which was requisite and available in the Merchants Bank of Canada for the payment of the cheques consisted, in addition to the appellant's small balance in its bank account, of money provided by deposits by Cahan, Jr., of cheques drawn on his father's bank accounts, and on the different other banks. When Cahan, Jr., disappeared from Montreal, and his father became aware of the condition of the appellant company's affairs, the present action was instituted for the recovery of the sum of $205,960.37. The appellant company alleged that the Home Bank received the proceeds of the ninety-four cheques wrongfully, fraudulently and in breach of trust; that these cheques on their face showed that Cahan, Jr., was using them for his own purposes; that the bank to which they were delivered took them with notice and knowledge of his defective title, or wilfully abstained from making any inquiry as to the nature and extent of the power and authority of Cahan, Jr., and Bowler, and in bad faith participated in their wrongful acts, thereby enabling C. H. Cahan, Jr., to appropriate to his personal use and benefit the funds out of which these cheques were met and paid by the Merchants Bank of Canada and which always were the property of the Corporation Agencies, Limited. The bank joined issue with the appellant and, in addition, filed a special defence to the effect that it received the cheques for value and in due course, that it became the owner and proprietor of the cheques; and further pleaded that during the whole of the period when these cheques were being issued irregularly, as alleged, Corporation Agencies, Ltd., had not assets to represent, in whole or in part, the sum which it pretends to have lost by reason of the facts set up in its declaration.

Held, Duff and Newcombe JJ. dissenting, that the appellant company was not entitled to recover from the respondent bank the amount claimed by its action; that as the funds with which the cheques were met were neither the property nor in the legal possession of the appellant company, the latter had failed to show such an interest as is requisite to entitle it to bring an action at law (Art. 77 C.C.P.); that although at the time the money so withdrawn apparently stood to the credit of the appellant company in the Merchants Bank of Canada, it cannot be considered to have been in its possession, since, according to the doctrine of the Civil Law, possession in the legal sense cannot be acquired without the volition (volonté) of the possessor; and as volition cannot exist without consent or knowledge, there never was possession by the appellant company of the funds in question. There was not the intention to possess, nor possession *animo domini.*

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Held further, Duff and Newcombe JJ. dissenting, that the appellant cannot maintain a claim for accounting for the fund which stood in its name at the Merchants Bank of Canada, as no contractual relation existed between appellant and respondent nor any obligation on the latter's part to maintain such fund; an essential condition of the action *condictio ob injustam causam,* ownership of the moneys with which the cheques were paid, is wanting; if considered as an action for damages, the only damages recoverable would be the amount of the loss of the appellant and there was no loss in fact; neither could appellant succeed, even were possession admitted, under the principle of *possession vaut titre,* since that doctrine does not apply in the case of *créances,* and moreover it affords essentially a plea which can be invoked only by the possessor while in possession and to repel an attack upon his possession; neither can the appellant's action be maintained as an *action en répétition de l'indu;* nor can it be based on a possible future claim against it by Cahan, Sr., or the other corporations whose accounts were used in the kiting operations; and, finally, the assertion by the appellant of a right to the moneys deposited by Cahan, Jr., involves its ratification of the entire fraudulent scheme of the latter.

Per Duff and Newcombe JJ., dissenting.—The respondent received the proceeds of the cheques in question from the appellant's bank account out of moneys which were in the appellant's possession and without the appellant's authority, having notice, of which the cheques themselves were *prima facie* evidence, that Cahan, Jr., the respondent's endorser, was not entitled to the cheques or to appropriate their proceeds, and in these circumstances the appellant was entitled to recover from the respondent bank the amount so received by it as money had and received by the appellant to the respondent's use, or as money of the appellant received by the respondent which was not due to the latter, (Art. 1047 C.C.); while it may be less likely that two directors would lend themselves to the fraudulent purpose of appropriating the company's money for the private uses of one of them than that the latter alone should do so, it is nevertheless, even where two directors join, *prima facie* evidence of fraud that one of them is making use of the company's funds for his own individual purposes; Cahan, Jr., and Bowler had, by the appellant company's by-laws, explicit authority to endorse cheques payable to the company's order and the proceeds of such cheques so endorsed and deposited by them in the appellant's bank account came into the appellant's possession as credits belonging to the appellant and under its control, because these proceeds were so deposited by the appellant's appointed agents in its account upon which it could have operated; if the appellant's officers, other than Cahan, Jr., and Bowler, did not know that the money had been deposited before the respondent drew it out, they had means of knowledge by the exercise of which, with ordinary diligence, they would have become aware of it, and the appellant therefore could not escape liability to the owners of the money deposited upon the ground that it was ignorant of the deposits; it was unnecessary to consider the effect of the kiting of the cheques, because independently of any cheques which represented kiting transactions there was actual money in the case to an amount in excess of that which the appellant claimed; the appellant was entitled by reason of its right and title of possessor to maintain this action as against the respondent, which was a wrongdoer, and had wrongfully deprived the appellant of its possession.

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APPEAL *per saltum* from the judgment of the Superior Court, Duclos J., province of Quebec, dismissing the appellant's action.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

E. Lafleur K.C., G. Barclay and *W. R. Henry* for the appellant.—The moment that it appeared to the respondent bank that these cheques had been drawn by C. H. Cahan, Jr., as agent, to be disposed of by such agent for his own purposes, either to pay the agent's personal indebtedness to the respondent bank, or to be credited in the agent's personal account with the respondent bank, such credits being drawn upon by the agent for his own private business and speculations, that moment the respondent bank ceased to act in good faith, and in so taking and applying the cheques participated knowingly in the wrongful acts of such agent.

There was no valid delivery of these cheques to the respondent, inasmuch as the respondent never became a holder in due course.

The authority of C. H. Cahan, Jr., to draw cheques was limited; it did not include any authority to draw cheques for his own benefit; nor did it include authority to dispose, for his own benefit, of the cheques when drawn.

The respondent was not in good faith; and even if acting in good faith, had notice of defect in the title of Cahan, Jr., to the ninety-four cheques.

Although the credits which the appellant had, from time to time, in its account with the Merchants Bank, upon which these cheques were drawn, represented, in a considerable part, funds of other persons and companies, which had been deposited to the credit of the appellant's account, nevertheless the appellant had title to the credits in its account and legal title to its cheques, or, in any event, appellant had an interest in its cheques and in the proceeds thereof, which entitled it to maintain the present action.

The respondent bank cannot, by virtue of the provisions of Art. 1031 of the Civil Code, exercise, in the present action, the rights and actions of Cahan, Jr., against the appellant, if any exist, as a defence to appellant's demand herein.

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Aimé Geoffrion K.C., and *W. K. McKeown K.C.* for the respondent.—The respondent bank was a holder in due course, and in particular had no notice of the alleged defects in the title of Cahan, Jr.

There was no defect in the title of Cahan, Jr., to the cheques sued on.

The appellant sustained no loss whatever as a consequence of the cheques sued on.

The judgment of the majority of the court (Anglin C.J.C. and Mignault and Rinfret J.J.) was delivered by

RINFRET J.—Corporation Agencies, Limited, brought suit and prayed that the Home Bank of Canada be condemned to pay to it the sum of $209,028.12.

The ground of the action was that, under the circumstances stated in the declaration, the Home Bank received the proceeds of ninety-six cheques wrongfully and fraudulently and in breach of their trust drawn in the name of the Corporation Agencies, Ltd., upon the Merchants Bank of Canada by C. H. Cahan, Jr., purporting to act as director of the Corporation Agencies, Ltd., and one B. F. Bowler, purporting to act as secretary-treasurer; that these cheques on their face showed that Cahan, Jr., was using them for his own purposes; that the bank to which they were delivered took them with notice and knowledge of the defective title, or wilfully abstained from making any inquiry as to the nature and extent of the power and authority of Cahan, Jr. and Bowler, and in bad faith wilfully participated in the wrongful acts of the latter, thereby enabling C. H. Cahan, Jr. to appropriate to his personal use and benefit the funds out of which these cheques were met and paid by the Merchants Bank of Canada and which always were and now are the property of the Corporation Agencies, Limited.

The Home Bank joined issue with the Corporation Agencies, Ltd.; and, in addition, filed a special defence to the effect that it received the cheques for value and in due course, that it became the owner and proprietor of the cheques; and further pleaded that during the whole of the period when these cheques were being issued irregularly, as alleged, the Corporation Agencies, Ltd., had not assets to represent, in whole or in part, the sum which it pretends to have lost by reason of the facts set up in its declaration.

Mr. Justice Maclennan, before whom the action was first tried, considered that the form of the cheques on their face was notice of the fact that C. H. Cahan, Jr., was appropriating to his own use the monies of the Corporation Agencies, Ltd. Thus the Home Bank was put upon inquiry as to his authority and right to issue and use the cheques; and, by refraining from making any inquiry, it participated in the wrongful act of C. H. Cahan, Jr.; it did not act in good faith and was not the holder in due course of the cheques. On the plea that the Corporation Agencies, Ltd., never had assets to represent, in whole or in part, the total aggregate sum of the cheques, he was of the opinion that the sources from which the Corporation Agencies, Ltd., received the monies out of which its bank paid them were irelevant in an issue between the Corporation Agencies, Ltd., and the Home Bank. He therefore condemned the Home Bank to pay to the Corporation Agencies, Ltd., the sum of $205,960.37. This sum is slightly under the amount of the original claim because evidence was lacking to show that two of the cheques were cleared by the Home Bank.

The Court of King's Bench (appeal side) however reversed the rulings of the trial judge which rejected evidence offered tending to show that the Corporation Agencies, Ltd., loss was less than the amount claimed, and it accordingly ordered that the record be remitted to the Superior Court and the *enquête* reopened, so that the parties might be afforded an opportunity of examining further witnesses and of adducing evidence in support of this issue.

The reasons of each of the judges sitting in appeal are worth referring to.

Chief Justice Lamothe said:—

Sans entrer dans le mérite de la cause, je suis d'avis que la motion de la banque appelante aurait dû être accordée. La dite banque a le droit de prouver que la compagnie demanderesse-intimée n'a rien perdu par suite des chèques tirés sur la Banque des Marchands, vu que l'argent provenant de ces chèques a été remis au crédit du compte de la dite compagnie demanderesse à la Banque des Marchands. Après preuve faite sur ce point, la cour sera en position de dire si, en droit, la prétention de la Home Bank sur ce point est fondée ou non. S'il est établi que les sommes ainsi remises au crédit de la compagnie intimée proviennent d'autres sources, que ces sommes sont, par exemple, le produit d'autres vols ou défalcations en tout ou en partie, la conséquence légale pourra être que la Home Bank ne peut en demander le bénéfice. Mais il faut d'abord que la preuve se fasse.

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Mr. Justice Martin said:—

While I express no opinion on the legal effect of any proof that may be made or whether or not appellant can successfully urge that the amount of its liability, if any, towards respondent should be reduced by amounts which Cahan, Jr., paid into the Merchants Bank to respondents' credit whether from moneys by him misappropriated from others or otherwise, I am of opinion that the appellant should have been allowed to amend its plea in so far as it amplifies the allegations of par. 46, and that it should have been granted an opportunity to examine the witness Bowler, respondents' secretary-treasurer, who signed the cheques with Cahan, Jr., and who must have had an intimate knowledge of all the transactions in question.

The rights and obligations of the parties must and can only be determined after full opportunity is afforded all parties in interest to allege and urge their respective pretentions and support same if they can by legal proof.

* * * * *

The learned trial judge held that the sources from which the respondent received the moneys out of which its bankers paid these cheques is irrelevant. In a restricted sense this is true, but as a practical business proposition, I should say it is wrong in principle. If Cahan, Jr., one day fraudulently obtained from respondent $10,000 of its moneys and the next day brought back and deposited to its credit $5,000, manifestly Cahan, Jr., could urge that and anyone else legally bound with him by reason of knowledge of or complicity in the fraud could also do so.

Mr. Justice Greenshields said:—

I am of opinion that the appellant, the Home Bank, should not be denied the right to endeavour to prove that the whole, or some part, of the money withdrawn upon the cheques signed by Cahan, Jr., subsequently reached the credit and control of the company respondent by being deposited to its credit, with its banker, the Merchants Bank of Canada. I freely admit that the respondent should not lose by reason of the illegal acts of Cahan, Jr., if they were illegally participated in by the appellant (if participation took place); but I am yet to be convinced that the respondent should be enabled to make a profit by these illegal acts. Without expressing an opinion on the merits, but solely for the purpose of my judgment on these rulings at enquête by the trial judge I do not believe the respondent could maintain an action for a greater amount against the Home Bank of Canada (appellant) than it could against Cahan, Jr., by reason of the dealings with these cheques.

Mr. Justice Allard said:—

L'appelante, la Home Bank, a le droit de prouver que l'intimée n'a rien perdu par suite des opérations de banque du fils de M. Cahan, et que l'argent, tiré du compte de l'intimée à la banque des Marchands, a été remis au crédit de son compte, à la dite banque. Quand cette preuve sera faite, la cour aura à décider si, en droit, la prétention de l'appelante est bien fondée.

The case was accordingly retried by Mr. Justice Duclos, who heard all the new evidence. He considered that the Home Bank obtained the cheques in question for value, in good faith and without knowledge or notice, express or constructive, of the alleged defect in the title of Cahan,

Jr., that the circumstances existing at the time these cheques were paid by the bank were of a nature to allay and lull to sleep any suspicion that might have arisen in the bank manager's mind, that the Corporation Agencies, Ltd., suffered no loss by reason of the withdrawal of funds by means of these cheques, and that the money with which they were paid was not the money of the Corporation Agencies, Ltd., but was stolen money to which it could acquire no title; and he therefore dismissed the action with costs.

An appeal is now brought directly to this court from the judgment of Mr. Justice Duclos by consent of the parties.

It is evident that the Court of King's Bench thought it material to ascertain whether the Corporation Agencies, Ltd., loss was less than the amount claimed by it, or whether it had met any loss at all. It would be unreasonable to assume that otherwise it would have remitted the record to the Superior Court for the purpose of this inquiry.

Being of opinion that the Corporation Agencies, Ltd., cannot succeed against the Home Bank, at all events unless it has shown itself to have been either the owner or the legal possessor of the monies withdrawn, and that Corporation Agencies, Ltd., never was the owner or never had possession of the kind or in the quality which might entitle it to revendicate, it is apparent that it will not be necessary to decide whether the defendant bank was a holder in due course, which would involve a difficult choice between the holdings of fact of the two trial judges on that point. To put it perhaps more precisely: if the funds with which the cheques were met were neither the property nor in the legal possession of Corporation Agencies, Ltd., it has failed to show such an interest as is requisite to entitle it to bring an action at law (C.C.P. Art. 77).

The first cheque upon which the Corporation Agencies, Ltd., now seeks to recover is dated the 29th March, 1919, and the last the 20th December, 1919. At the date of the issue of the first cheque, the balance standing to the credit of the Corporation Agencies, Ltd., in the Merchants Bank of Canada was only $61.74. For the whole period with which we are concerned, the Corporation Agencies,

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Ltd., was practically dormant. It had no business of any consequence during the years 1918 and 1919 and merely acted as registrar or transfer agent for certain other companies and as trustee for one company.

The statement of the Merchants Bank of Canada, as well as a number of other statements emanating from Corporation Agencies, Ltd., and prepared by its president himself, or at his request, were filed at the second trial. A firm of chartered accountants made an examination of them; in adition, the exhibits were placed before them. In connection with their investigation, they prepared certain schedules and made a report based entirely on the Corporation Agencies, Ltd., own figures and statements. These showed that, as a result of the transactions of C. H. Cahan, Jr., during the period of time for which the cheques in question were drawn, i.e., between 29th March and 31st December, 1919, the minimum gain in Corporation Agencies, Ltd., account was $2,887.42, and the maximum gain was $8,350.89, according as certain items are or are not charged to C. H. Cahan, Jr., or the sundry corporations which he used for the purposes of his operations.

This report takes into account the regular and legitimate business of the Corporation Agencies, Ltd., as distinguished from the irregular transactions, as they were qualified by the president of the Corporation Agencies, Ltd., Mr. Cahan, Sr., himself.

The accountants showed that, for the period covered by the ninety-six cheques, the deposits made in Corporation Agencies' account in the Merchants Bank by Cahan, Jr., were in excess of the withdrawals. During this same period, all that Corporation Agencies, Ltd., received from its clients and paid into its bank account was a sum of $5,890.34, while the amount which it paid out in the course of its legitimate business was $8,402.35, or a surplus of $2,512.01, which came out of the funds irregularly deposited by Cahan, Jr.

It was the conclusion of the chartered accountants—and this was fully borne out by the statements filed—that no money of the Corporation Agencies, Ltd., was used to meet the ninety-six cheques irregularly issued by Cahan, Jr., and Bowler. These cheques were only items in a kiting system, or an exchange of cheques carried on by

Cahan, Jr., and each of them was fully met by money provided from sources other than Corporation Agencies, Ltd.

Kiting has been described by the witnesses as a scheme "for obtaining credit for a short period by running three or four accounts" or "getting credit for the time it takes to clear cheques from one bank to another."

The evidence is overwhelming, and in fact it is not disputed, that the operations of Cahan, Jr., in connection with the cheques sued upon were nothing but kiting. To give some idea of their extent, Cahan, Jr., for that purpose, used as many as twelve bank accounts, there being, in addition to the account of Corporation Agencies, Ltd., in the Merchants Bank of Canada, the accounts of his father in the Bank of Montreal at Montreal, the Bank of Montreal at New York, the Guarantee Trust Company in New York; his own personal accounts in the Home Bank of Canada and in the Empire Trust Company, in New York; and also the accounts of several companies, such as Canadian Records Press, Ltd., Dominion Operating Company, Hotel Company of St. John, Ltd., International Exploration Company, Ltd.; and also private accounts under the name of George V. Greene and Olive Trevor. Outside of the Merchants Bank of Canada, the Home Bank of Canada and the Bank of Montreal and the New York institutions already mentioned, several other banks were used: the Standard Bank of Canada, La Banque d'Hochelaga, La Banque Provinciale, the Sterling Bank, the Montreal City and District Savings Bank and the Bank of Toronto.

Two items will suffice to show at once the volume and the nature of the transactions. A recapitulation of the deposits from March 29th, 1919, to the end of the year, shows that they amounted to $2,108,452.01, of which only $5,890.34 had to do with the regular business of Corporation Agencies, Ltd. A study of the Corporation Agencies, Ltd., account in the Merchants Bank discloses that it had no assets to represent, in whole or in part, the amount of the ninety-six cheques, and that they were fully met by money from other sources. The cheques that came in and went out always offset each other. It was not, as in *Canadian Pacific Railway Co.* v. *La Banque d'Hochelaga* (1), a case of repayment of the money withdrawn

(1) Q.R. 18 K.B. 237.

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by means of cheques; but a deposit was made in the account before each cheque was presented for the purpose of meeting it. As a matter of fact, although the Corporation Agencies, Ltd., had practically no funds and notwithstanding the large amounts irregularly withdrawn, at no time was its bank account overdrawn.

It may be true that an examination of the total operations since 1915 would show a loss by Corporation Agencies, Ltd., although that could never exceed a sum slightly over $30,000, half of which was represented by the unauthorized sale of Victory Bonds payable to bearer and has nothing to do with the case here.

As observed by Duclos J. in the course of the *enquête,*

all the assets Corporation Agencies Ltd. had to lose was $30,900. They could not lose what they had not got.

But this money had already been lost for some time when the first of the cheques here sued on was presented by Cahan, Jr. It should not be forgotten that the present action is not brought for the recovery of the amount which Corporation Agencies, Ltd., has lost at the hands of Cahan, Jr. That would entail an accounting between the Corporation Agencies, Ltd., and the latter since 1915, and with that accounting the Home Bank of Canada is not concerned. This action is limited to ninety-six specified cheques. The charge is that by means of these cheques the funds of the Corporation Agencies, Ltd., have been irregularly withdrawn. The onus is upon the Corporation Agencies, Ltd., to show that these cheques were met by its funds; and from that inquiry must be excluded funds antecedently withdrawn.

The trial judge to whom the case was remitted for the purpose of making such inquiry, found as a fact that none of these cheques were paid out of the funds of the Corporation Agencies, Ltd. They were paid out of funds provided by Cahan, Jr.

Upon the evidence, these findings are correct.

It follows that Corporation Agencies, Ltd., failed to establish what it alleged as the basis of its declaration, to wit: that the proceeds of the ninety-six cheques

always were and now are the property of the plaintiff.

The appellant had to establish the foundation of its action. It is erroneous to say that the bank cannot raise such a question because it would be tantamount to put-

ting forward a defence which belongs only to Cahan, Jr. Before the bank is required to enter upon its defence, the Corporation Agencies, Ltd., must prove its interest in the case and establish its right of action. It is significant that, at the outset, the Corporation Agencies, Ltd., relied on the ground that the monies with which the cheques were paid were its property and that this contention, after two trials, appeared so devoid of foundation that before this court it felt obliged to put its case on an entirely different footing.

It is now claimed that, even if the Corporation Agencies, Ltd., was not the owner of the funds, it is nevertheless entitled to recover them because, at the time they were withdrawn, they stood to its credit in the Merchants Bank of Canada, and should be considered to have been in its possession. It was contended that the possession of the monies which it thus had, without ownership thereof, suffices to enable it to maintain this action against the defendant bank because of their wrongful withdrawal by means of the fraudulent cheques made by C. H. Cahan, Jr., and of which the bank obtained payment as holder.

The monies were put into the Corporation Agencies, Ltd., account at the Merchants Bank mostly in the form of cheques, but, for the present purposes, cheques are not different from money, and the statement of Lord Halsbury in *The Great Western Ry. Co.* v. *The London and County Banking Co. Ltd.* (1), can be made with equal force

> the supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me absolutely illusory

in a Quebec case.

Now the deposit by Cahan, Jr., of monies or cheques which did not belong to the Corporation Agencies, Ltd., was wholly unauthorized. He was no more authorized to make the irregular deposits, than he was to make the irregular withdrawals. Even if the by-laws of the Corporation Agencies, Ltd., empowered its directors or its officers to make deposits on its behalf, clearly this must be understood of regular and legitimate deposits only. For it cannot be conceived that these by-laws anticipated the possibility of there being paid into the Corporation Agencies, Ltd., bank account monies which were illegally procured or stolen. The Corporation Agencies, Ltd., could

(1) [1901] A.C. 414, at p. 418.

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not be bound by the consequences of the irregular deposits until they had come to its knowledge and it had ratified them expressly or tacitly (Art. 1727 C.C.). Here both trial judges have found that the Corporation Agencies, Ltd., was absolutely without notice of the fraudulent transactions of Cahan, Jr., and that the monies were deposited without its consent or knowledge. Nor can the knowledge of Cahan, Jr., of the deposits which he made in fraud of Corporation Agencies, Ltd., be attributed to it for the purpose of supplying the element of volition necessary to convert its mere temporary detention of the monies so deposited into legal possession. There are no special circumstances in this case which would take it out of the general rule that notice of a fraud committed by an agent upon or against his principal and of the facts and circumstances connected with it is not imputed to the latter. Such is the well-established doctrine in English Law (Bowstead, Agency, 7th Ed., p. 336; *The Commercial Bank of Windsor* v. *Morrison* (1), and I know of no reason why it should not prevail in Quebec. See 8 Revue Légale, n.s. 297. Moreover, by paragraph 6 of its answer to the amended plea, the Corporation Agencies, Ltd., sets up as a ground why knowledge of the acts of Cahan, Jr., and Bowler should not be imputed to it, that these acts were done in fraud and were kept hidden from any officer or employee of the company. The doctrine of imputation of knowledge to the principal because of knowledge by the agent is for the benefit of third parties; to find the principal invoking it on his own behalf savours of novelty. Finally, the volition (*volonté*) requisite to legal possession implies something more than merely constructive notice or knowledge by imputation.

Quite independently of the particular character of bank deposits, which will have to be examined later, it is strictly according to the doctrine of the civil law that possession in the legal sense cannot be acquired without the volition (*volonté*) of the possessor; and as volition cannot exist without consent or knowledge, there never was here possession by the Corporation Agencies, Ltd., of the funds so deposited. There must be the intention to possess and the possession must be *animo domini*. This accords with

(1) [1902] 32 Can. S.C.R. 98.

the jurisprudence in Quebec (*Lafortune* v. *Vézina* (1); Langelier, Cours de Droit Civil, vol. VI, p. 445), and with the doctrine of the French authors which is conveniently collected in Fuzier-Herman, Répertoire du Droit Français, *verbo* Possession; nos. 3, 4, 26, 28 and 38:

3. * * * Il importe donc, pour mieux préciser la notion de possession, de la distinguer soigneusement de deux autres institutions avec lesquelles un examen superficiel pourrait amener à la confondre: la propriété et la détention. D'une part, en effet, la possession ne doit pas être confondue avec le droit (de propriété) lui-même dont elle n'est que la manifestation extérieure; comme le disent les textes romains, *nihil commune habet proprietas cum possessione* (fgt. 12, par. 1, D. *de acq. vel amitt. poss.* XLI, 2): c'est précisément dans cette distinction entre le droit de propriété et la possession que réside tout l'intérêt pratique de la théorie juridique de la possession. D'autre part, il peut se faire qu'une personne tienne de fait une chose sous sa puissance, sans avoir l'intention de la soumettre à l'exercice d'un droit réel; ce fait prend alors plus particulièrement le nom de détention.

4. La détention constitue donc une situation juridique parfaitement définie et qui est tout à fait distincte de la possession véritable; elle en diffère par l'absence de *l'animus*. * * *

26. Selon une doctrine traditionnelle qui vient du droit romain, la possession se compose de deux éléments: l'un matériel, appelé le *corpus*, l'autre intentionnel, appelé *l'animus*. Sur ce point, et notamment en ce qui concerne *l'animus domini*, les rédacteurs du code civil s'en sont tenus aux idées traditionnelles de Pothier, de Domat et de Dunod, et par conséquent il n'y a point lieu, dans une étude des textes du code civil, de se préoccuper de la question, aujourd'hui très-controversée, de savoir si, au point de vue des textes du droit romain, la possession supposait nécessairement *l'animus domini*. On ne peut en effet, interpréter notre code à l'aide de théories nouvelles qui constituent non un développement doctrinal ou jurisprudentiel, mais une critique de notre législation.

28. *L'animus* constitue l'élément immatériel de la possession. Suivant la doctrine traditionnelle, enseignée par Savigny, *l'animus* est l'intention chez celui qui possède de se comporter vis-à-vis de la chose comme un véritable propriétaire, c'est *l'animus domini*. Suivant une doctrine plus récente, exposée par Ihering, *l'animus* serait seulement l'intention de posséder, *animus rem sibi habere*. On peut définir *l'animus* sous une forme plus large, en disant que c'est l'intention chez celui qui possède d'agir pour son propre compte.

39. *L'animus* étant l'intention de se comporter à titre de propriétaire d'une chose ou de titulaire d'un droit, il ne peut y avoir d'acquisition de possession sans la volonté de posséder à un titre quelconque. Il suit de là que celui qui achète une chose et auquel on en livre une autre qu'il prend par erreur, n'acquiert la possession ni de l'une ni de l'autre; car il ne possède pas celle qu'il a achetée, puisqu'elle ne lui a pas été livrée, ni celle qui lui a été livrée, puisqu'il n'a pas eu l'intention de la posséder. De même, la volonté de posséder étant de l'essence de la possession, il s'ensuit que ceux qui sont incapables de volonté, tels que les impubères et les fous, ne peuvent acquérir la possession; mais ils le peuvent par le tuteur qui les représente. Une femme peut acquérir la possession sans l'autorisation de son mari, car la possession est une chose de fait; mais

(1) [1916] Q.R. 25 K.B. 544.

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elle ne pourrait, sans en être autorisée, exercer les droits qui résultent de cette possession.

Pothier, De la possession:

40. Il est évident qu'on ne peut acquérir la possession d'une chose, sans avoir la volonté de la posséder.

Par exemple, on me fait entrer dans le cabinet d'une personne à qui je vais rendre une visite: en l'attendant je prends un livre que je trouve sur son bureau, pour voir ce que c'est; il est évident que, quoique je l'aie entre mes mains, je n'en acquiers pas la possession; car je n'ai pas la volonté de le posséder.

Pareillement à l'égard des héritages: si, dans un voyage, je vais coucher au château de mon ami en son absence; quoique je sois seul dans ce château, je n'en acquiers pas la possession; car je n'ai pas la volonté de l'acquérir: *Qui jure familiaritatis amici fundum ingressus est, non videtur possidere, quia non eo animo ingressus est ut possideat, licèt corpore in fundo sit;* L. 41, ff. *de Acq. poss.*

De ce principe, "que pour acquérir la possession d'une chose, il faut avoir la volonté de la posséder," il s'ensuit que, si j'ai acheté de vous une chose, et que vous m'en livriez une autre, que je prends par erreur pour celle que j'ai achetée et dont j'ai intention d'acquérir la possession, je n'acquiers la possession ni de celle que j'ai acquise par erreur, parce que ce n'est pas celle dont j'ai la volonté d'acquérir la possession, ni de celle que j'ai la volonté d'acquérir, parce que je ne l'ai pas reçue: *Si me in vacuam possessionem fundi Corneliani miseris, ego putarem me in fundum Sempronianum missum, et in Cornelianum iero, non acquiram possessionem, nisi fortè in nomine tantùm erraverimus, in corpore consentiamus;* L. 34 *ff. eod. tit.*

The above doctrine is also expounded in Aubry & Rau, tome 2, paragraphs 177 and 179; Baudry-Lacantinerie & Tissier, nos. 195, 197, 203, 216; Planiol, 6th ed. tome 1, no. 2269; Laurent, 5 ed. vol. 32, pp. 273 and 276; Colin & Capitant, vol. 1, pp. 873 and seq.

The same doctrine will also be found in Dalloz, Répertoire Pratique, *verbo* Possession, nos. 7, 8, 21, 23, 25, 26, 51, etc.

Both Laurent (vol. 32, p. 270) and Fuzier-Herman (Répertoire, *verbo* Possession, no. 5) allude to Troplong's opinion that

dans la doctrine du code, les détenteurs précaires sont aussi des possesseurs, de sorte que toute détention serait une possession (and state that he has) vainement essayé de soutenir que l'article 2228 C.C. s'applique aux simples détenteurs; que ceux-ci sont des possesseurs dans le sens général du mot et que leur possession produit certains effets de droit.

They both show that he alone, of all the French authors, entertains such an opinion.

Such being the doctrine and the French law of possession, Corporation Agencies, Ltd., never had the possession because it lacked the *animus possidendi* or intention to possess, or what Saleilles calls "la volonté possessoire." Planiol, vol. 1, p. 701, points out: "Sans volonté, point de

rapport possessoire; par exemple, il n'y a pas de possession *si quis dormienti aliquid in manu ponat* (Paul, au Digeste XLI, 2 fr. 1, par. 3)."

Not only Corporation Agencies, Ltd., had not the will to possess, but it had absolutely no knowledge or notice of what was going on; and, indeed, this has been its attitude throughout this case.

It had no more possession of the monies put by Cahan, Jr., into its account in the Merchants Bank than it would have had if Cahan, Jr., had simply placed them, without its knowledge, in the vault in its office and, subsequently, had taken them out and remitted them direct to the Home Bank. In neither case could it be said that, in the course of these operations, Corporation Agencies, Ltd., had, at any moment, acquired possession of the monies.

There is this difference however between the supposed deposit in a vault and the deposit in a bank, that in the case of banking, there is no "dépôt régulier." A banker is not a depositary "bound to restore the identical thing which he has received in deposit" (Art. 1904 C.C.). The customer parts with the title to his money and loans it to the banker, the result being to make the bank the debtor of the customer with the sole obligation of honouring the customer's drafts or cheques.

This conception of banking is generally accepted, as well in the other provinces of Canada and in England as it is in France and in the province of Quebec. Falconbridge, Banking and Bills of Exchange, 3rd ed. p. 311; *Foley* v. *Hill* (1); *Robarts* v. *Tucker* (2); *In re Derbyshire. Webb* v. *Derbyshire* (3); *Marine Bank* v. *Fulton Bank* (4); Baudry-Lacantinerie, 3rd ed. *Du dépôt et du séquestre,* no. 1097; Dalloz, Répertoire, verbo Banque, nos. 3 and 4; Fuzier-Herman, Répertoire du Droit Français, verbo Banque, nos. 70-71-72 and 73; *Vanier* v. *Kent* (5).

In contradistinction to the depositary under the civil code (art. 1803), the banker is authorized to use the money deposited, and his only obligation is to remit an equal sum of money. Notwithstanding this difference, however, the customer may in the normal case be regarded as

(1) [1848] 2 H.L.C. 28.
(2) [1851] 16 Q.B. 560.
(3) [1906] 1 Ch. 135.
(4) [1864] 2 Wall (U.S.) 252, at p. 256.
(5) [1902] Q.R. 11 K.B. 373.

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in possession of the credit which results from his deposit with his banker. But there the volition essential to legal possession is present, whereas what we have in the case at bar is at the utmost a mere detention.

We may now consider the nature of the remedy which the Corporation Agencies, Ltd., is seeking.

In its factum, the appellant states that, under English law, it might sustain its right to recover under various forms of action, such as an action in trover to recover the cheques, or an action for conversion, or an action for money had and received, or an action for the restoration of property. It however encounters a difficulty in finding under the law of Quebec a principle upon which to base a right of action. That difficulty really is that, in the circumstances of this case, it has no right of action whatever.

Perhaps it is appropriate to point out here that none of the cases decided in England to which our attention has been drawn has any real application.

In the case of *North & South Wales Bank* v. *Irvine* (1), which most nearly resembles it, the cheque was signed by Irvine and "paid out of Irvine's money at his own bankers," which had been deposited by himself. Under such circumstances, the inquiry as to "where he got that money was irrelevant" and the defendants were held not

> entitled to stand in the shoes of White's trustees and claim against the plaintiff what, in effect, is a set-off, arising out of an indebtedness of the plaintiff, not to themselves but to White.

But here the cheques were not paid out of monies belonging to the Corporation Agencies, Ltd.; and that renders the *Irvine Case* inapplicable.

This action cannot be maintained, as suggested by Mr. Lafleur, as one for the restoration of the fund which stood in the name of the appellant at the Merchants Bank of Canada. The obligation to account for that fund was not upon the Home Bank, but only upon the Merchants Bank, which alone had accepted the position of a borrower. There was not and there never existed any contractual relation between the Corporation Agencies, Ltd., and the Home Bank of Canada. Assuming that the appellant's action could be considered as a *condictio ob injustam causam,* the essential condition of that action, the ownership of the monies with which the cheques were paid, is

(1) [1908] A.C. 137.

wanting here (Aubry & Rau, 5th ed. vol. 6, p. 325, par. 442 bis). If the action can be regarded as an action for damages resulting from the abstraction of the funds by means of the fraudulent operations in which the Home Bank is alleged to have participated, then the measure of such damages must be the amount of the loss of Corporation Agencies, Ltd. There was in fact no such loss; the trial judge held that there has been none; and, in our view, that finding is fully justified.

Even were possession admitted, it would not avail to enable the appellant to institute proceedings. In France, the law is (Art. 2279 C.N.): "En fait de meubles, la possession vaut titre." Nevertheless, all the commentators agree that this article applies only to corporeal moveables and not to "créances," that it merely creates a presumption of title which may be rebutted, and that the maxim it embodies only affords a defence to a person in actual possession for the purpose of repelling a revendication. See Fuzier-Herman, *verbo* Possession, nos. 290, 300, 338 and 339; Dalloz, Répertoire pratique, *verbo* Possession, nos. 45, 90, 91; Baudry-Lacantinerie, 3rd ed. De la prescription, no. 480; Laurent, 5th ed. vol. 32, nos. 562 and seq. Guillouard, tome 2, no. 847.

Dalloz, Répertoire Pratique, *verbo* Possession, no. 95, says:—

> L'effet de la règle posée par l'article 2279 est d'empêcher la revendication des meubles. Le possesseur d'une chose mobilière peut repousser la revendication intentée contre lui en alléguant seulement sa possession. (Aubry & Rau, tome 2, paragraph 183, page 158; Laurent, tome 32, n° 540; Guillouard, tome 2, n° 879; Baudry-Lacantinerie & Tissier, n° 879).

It is looked upon as being essentially a plea which can be invoked only by the possessor while in possession and to repel an attack upon his possession.

If that be true in France, with the law as it is expressed in Art. 2279 of the Code Napoléon, with how much greater force must this doctrine be held to apply here, in view of the corresponding article of the Quebec code, of which the first paragraph is:—

> 2268. Actual possession of a corporeal movable, by a person as proprietor, creates a presumption of lawful title. *Any party claiming such movable must prove, besides his own right,* the defects in the possession or in the title of the possessor who claims prescription, or who, under the provision of the present article, is exempt from doing so.

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It may be added moreover that, under the law of Quebec, mere possession can seldom be made the basis of an action.

The possessor of any immovable or of a real right, other than a farmer on shares, or a holder by sufferance, who is disturbed in his possession, may bring an action on disturbance against the person who prevents his enjoyment, in order to put an end to the disturbance and to be maintained in his possession. (The) person who has had possession of an immovable or real right for a year and a day (can bring) the action for repossession * * * against any person who has forcibly dispossessed him. Art. 1064 C.C.P.

This article is limited to the possessor of an immoveable property or a real right.

In respect of moveable property, the corresponding procedure is the attachment in revendication. But article 946 of the Code of Civil Procedure gives this remedy to the owner, to the pledgee, the depositary, the usufructuary, the institute in substitution and the substitute. As will be perceived, this enumeration does not include a mere possessor as such. The fact that the article enumerates certain classes of possessors is indicative of the intention to exclude the others. Moreover, the procedure for attachment in revendication applies to moveable property only so far as it can be identified. The appellant here does not meet the conditions required.

In the view which we take of the case, neither can this action be maintained as " l'action en répétition de l'indû " (Art. 1047 C.C.), for if Corporation Agencies, Ltd., is in a position to disregard and repudiate the cheques entirely and if the money paid out by the Merchants Bank of Canada to meet them did not belong to Corporation Agencies, Ltd., and was so paid without its knowledge and participation, it follows that the appellant has never paid anything and is therefore not entitled to be reimbursed.

It has been suggested however that the present action might be entertained as being in anticipation of a possible future claim on behalf of Cahan, Sr., or the other corporations whose accounts have been used in the kiting operations. It is urged that this would constitute the required interest in the appellant to enable it to assert its right of action. It will be sufficient to consider the suggestion with regard to C. H. Cahan, Sr., there being no difference in that respect between his case and those of the other corporations.

We are not now called upon to decide whether the appellant company is liable to C. H. Cahan, Sr., or whether the fraudulent withdrawals by C. H. Cahan, Jr., from its bank account without its knowledge or assent would afford the appellant an answer to a claim by C. H. Cahan, Sr. That is not the ground upon which the action was taken and fought out in the court below. The appellant distinctly put its claim on the ground that it was and always had been the owner of the monies with which the cheques were paid by the Merchants Bank of Canada. In fact, the Corporation Agencies, Ltd., appears to have been careful to avoid any admission of liability towards C. H. Cahan, Sr. In view of articles 1048, 1049, 1050, 1051 and 1143 of the Civil Code, the Corporation Agencies, Ltd., being in good faith, it would seem likely that its absolute lack of knowledge of the operations of C. H. Cahan, Jr., of the irregular deposits made by him and of the subsequent withdrawals of the same amounts would protect it against any liability towards C. H. Cahan, Sr. (See Laurent, 5th ed., vol. 32, page 602, no. 585, at the end; Pothier, vol. II, pp. 497 and 498.)

There are besides other circumstances which make it highly improbable that a claim of that kind will ever be lodged against the Corporation Agencies, Ltd., by its own president.

As for the other sundry corporations or subsidiary companies, where accounts were opened and used for kiting purely and simply, the withdrawals and deposits therein tally to a cent; they never lost anything and they had really nothing to lose.

But suffice it to say that in our view this ground is not open here; for Corporation Agencies, Ltd., has not placed itself in a position where it could base its right of action on such an hypothetical interest. Its very allegation that it was the owner of the funds precludes the idea that it was accountable therefor to somebody else.

And, moreover, if its intention was to claim the monies on the ground that it may have to return them to their respective owners, since it is admittedly impossible to reach any final decision on that point without the proper parties being in the case, as the action stands, we are not in a position to decide whether these other parties can

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claim from the Corporation Agencies, Ltd. If the appellant intended that to be a ground of action, it should have alleged it and should have brought all the required parties into the case so that such an issue might properly be passed upon. Whether, if the appellant be liable to C. H. Cahan, Sr., that liability would give it a right of action against the Home Bank before C. H. Cahan, Sr., asserts and establishes his right of recovery against it is, at first sight, a question admitting of the gravest doubt and which personally we would be inclined to answer in the negative (Pothier, vol. II, no. 498); but it is unnecessary to decide it until it comes up in a proper case.

Finally it would appear that the appellant cannot assert its right to the monies deposited by Cahan, Jr., without committing itself to a ratification of the fraudulent scheme of the latter, in partial execution whereof such deposits were made, and is thus precluded from repudiating the completion of the scheme by the withdrawal of such monies from its bank account. The whole course of dealing by Cahan, Jr., with the Corporation Agencies, Ltd., bank account, whether in drawing on it or in depositing funds to meet the withdrawals, was unauthorized and the principal cannot repudiate the withdrawals and take the benefit of the deposits. The logical position must be that the whole course of dealing should either be entirely repudiated or wholly accepted. The monies which went into Corporation Agencies, Ltd., account, in the course of the kiting operations, went in for the sole purpose of meeting the incoming cheques as they were issued. They were put in with no other object in view than to cover these cheques, which would not, and could not otherwise have been paid; and all this in a kiting game, where, in most instances, no real deposit was made. There was nothing more than a mere playing with paper. It would appear entirely fallacious to add up the successive deposits and permit the appellant to retain them as against the respondent, while charging to the latter the withdrawals by means of the ninety-six cheques which it was the sole purpose of the deposits to meet when they should be presented to the Merchants Bank. It seems unquestionable, notwithstanding the large aggregate amount of deposits and withdrawals, that, in the course of the kiting opera-

tions, a very much smaller amount was actually in turn deposited and withdrawn, with the net result that in the end the real balance of the appellant was in no wise impaired. The following passage from the well-known case of *Atlantic Cotton Mills* v. *Indian Orchard Mills* (1), seems to be absolutely in point and may be adopted, at least as *ratio scripta*, as correctly expressing the situation:

> The rule is general that, if one assumes to do an act which will be for the benefit of another, commits a fraud in so doing and the person to whose benefit the fraud will enure seeks, after knowledge of the fraud, to avail himself of that act, and to retain the benefit of it, he must be held to adopt the whole act, fraud and all, and to be chargeable with the knowledge of it, so far at least as relates to his right to retain the benefit so secured.

See also Demolombe, t. 31, no. 202; Dalloz, Rép. Prat., vo. Quasi-contrat, no. 53. In other words, the appellant cannot be allowed to approbate and reprobate at the same time and in the same action. The purpose of C. H. Cahan, Jr., in making the deposits was exclusively to meet the cheques which he had drawn against them. Ratification of that purpose by the appellant involves approval of the monies being used in pursuance of the object for which they were deposited.

In the result, if the appellant's contention were sound, it would receive an amount of $205,960.37 on the assumption that it may have to account for it to corporations practically brought into being for mere kiting purposes and whose bank accounts balance to the cent, or to Cahan, Sr., on the ground that part of those monies were stolen from him by Cahan, Jr., and were afterwards by the latter deposited in the Merchants Bank of Canada in the name of the Corporation Agencies, Ltd., although they were immediately withdrawn in the same manner, and although the Corporation Agencies, Ltd., had not the slightest suspicion that anything of the kind was going on.

Either the Corporation Agencies, Ltd., might never be called upon or it would be held liable to account. In the former case it would have got and would keep money to which it never was entitled; in the latter, through the instrumentality of the Corporation Agencies, Ltd., Cahan, Sr., would, to the prejudice of the creditors of the Home Bank, recover the money stolen from him by Cahan, Jr., although most of that money had already been lost before

(1) [1888] 147 Mass. 268, at p. 275.

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the first of the cheques here in question was cashed by the Home Bank. It is satisfactory that we are not constrained to a conclusion fraught with such consequences.

For these reasons, the action fails and was properly dismissed.

The formal judgment should, however, be modified by striking from it the direction that costs to be allowed defendant shall include

costs of the schedules and statements specially prepared for this case.

These expenses do not form part of the costs of litigation such as are allowed to a successful party on taxation. They are not covered by defendant's conclusion praying costs. While they might be recoverable as damages, as such they are not claimed. The award of these expenses would, therefore, seem to be *ultra petita*. Moreover, the very special circumstances requisite to justify such a recovery are not presented on the record before us.

As a rule, this court will refuse to interfere with the discretion of the provincial courts in disposing of costs. But this is a case where we think an exception ought to be made. The appeal is *per saltum* and the extraordinary disposition as to costs made by the Superior Court has not therefore received the approval of the Court of King's Bench. These seem to us to be reasons which justify our dealing with the costs as we believe the Court of King's Bench would probably have done, had it been afforded the opportunity. A well-established rule is that, though the appeal involve costs only, the Court of King's Bench will rectify the decision of the court below when the latter appears to have proceeded upon an erroneous principle. *Prowse* v. *Nicholson* (1); *Atlantic Ry. Co.* v. *Trudeau* (2); *Déchène* v. *Dussault* (3). This view was affirmed by this court in *Archibald* v. *Delisle* (4).

Now, in Quebec, costs are fixed by a tariff having the force of law, after it has received the approval of the Lieutenant-Governor in Council. The reports and statements of the accountants in this case were not the result of an investigation ordered or of a reference made by the presiding judge (Arts. 391, 410 C.C.P.), but were prepared at the ex-parte request and in the interest of the defend-

(1) [1889] M.L.R. 5 Q.B. 151.
(2) [1892] Q.R. 2 K.B. 514.
(3) [1896] Q.R. 6 K.B. 1.
(4) [1895] 25 Can. S.C.R. 1.

ant. As such, they cannot form part of the costs prayed for by the conclusions of the defence (*Laurent* v. *City of Montreal* (1); *Hickey* v. *City of Montreal* (2); *Robert* v. *Denault* (3); *Layton* v. *City of Montreal* (4). At best, they must be made the subject of a special demand (*Patenaude* v. *Edwards* (5), and authorities therein referred to).

The judgment of the dissenting judges (Duff and Newcombe JJ.) was delivered by

NEWCOMBE J.—The plaintiff company (appellant) seeks to recover from the defendant bank (respondent) the amount of 94 cheques, in the aggregate $205,960.37, which were drawn upon and paid by the Merchants Bank of Canada at Montreal, together with interest from the respective dates of payment. There is no material difference between the parties as to the facts of the case; these may be stated briefly. The plaintiff is a body corporate under the laws of Canada, having its chief place of business at Montreal, and it was engaged in business as registrar and transfer-agent of the capital stock of joint stock companies and as trustee for the collection of mortgages, insurance, and other company purposes. Prior to the war the plaintiff's business appears to have been active and prosperous, but after the war broke out it became impossible to finance further undertakings; several members of the staff undertook war service, and the business of the company was reduced to the concluding of that which it had in hand, and to the execution of its agency for some companies whose affairs were being wound up. It was in this connection, and owing to losses sustained, that the capital of the company, which was previously authorized to the extent of $500,000, was, on 25th February, 1918, reduced to $50,000. Some changes were at the same time made in the directorate, and, while C. H. Cahan, Sr., who had been serving as president of the company since 1910, continued to hold that office, his son, C. H. Cahan, Jr., and B. F. Bowler became directors, the latter also being charged with the duties of secretary-treasurer. C. H. Cahan, Sr., was a successful lawyer of considerable means. He kept a bank account at the

(1) [1915] 17 Q.P.R. 139.
(2) [1896] Q.R. 12 S.C. 195.
(3) [1902] 9 R. de J. 60.
(4) [1916] 23 R.L. n.s. 132.
(5) [1915] 17 Q.P.R. 203.

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Bank of Montreal at Montreal, another with the agency of that bank in the city of New York, and still another with the Guaranty Trust Company, also in New York, and in each of these accounts there was a large credit balance. While the permanent residence of Mr. Cahan was at Montreal, he was, during the war, very extensively engaged in special work, or professional or other duties connected with the war, and, for this and other reasons which are stated in the evidence, he was frequently absent from home for prolonged periods. Mr. Cahan therefore from time to time, on such occasions, gave his son temporary powers of attorney to transact his banking business; three such powers had been given and had expired when, on 21st September, 1916, Mr. Cahan gave to Cahan, Jr., his power of attorney authorizing the latter

> to sign, endorse, deposit, draw and deliver all such cheques and other orders for the payment of money as he may deem proper in connection with any account of funds on deposit which I may now or hereafter have with the Guaranty Trust Company of New York.

On 30th October, 1916, Mr. Cahan gave to his son a similar power of attorney to make, sign and draw cheques on his account with the agents of the Bank of Montreal in the city of New York. On 25th August, 1917, he also gave to his son his power of attorney, until 25th August, 1918,

> to draw and sign cheques upon the Bank of Montreal, including cheques creating an overdraft, and to make, draw, accept and endorse for deposit only in my account and for my credit all bills of exchange, promissory notes, cheques or orders for the payment of money or other negotiable paper.

Finally, on 11th May, 1918, Mr. Cahan gave to his son his power of attorney to draw and sign cheques upon any chartered bank in Canada with which he (Cahan, Sr.) might have an account, including cheques creating an overdraft, but without limiting the time for execution of these powers. Cahan, Jr., was thus equipped with authority from his father to withdraw, on account of the latter, the funds which were standing to his credit in the various accounts mentioned.

It appears that the young man, unknown to his father, had, since early in 1915, been engaged in stock speculations, and that he had been carrying on a personal account with the defendant bank at Montreal, and another with the Empire Trust Company in New York. It appears moreover that Cahan, Jr., also without the knowledge of

his father, was engaged, with one Geo. V. Green, B. F. Bowler, Morton and Trevor, otherwise known as Carter, and others, in the promotion of a number of companies, among others, Canadian Records Press, Ltd., Dominion Operating Company, Ltd., and Hotel Company of St. John, Ltd., the two first mentioned companies having bank accounts at the Montreal branch of the Sterling Bank of Canada, and the latter having an account with La Banque Provinciale at Montreal.

Cahan, Jr., was an advocate of the province of Quebec and was engaged in his father's office at Montreal, which was situated in the Transportation Building, where the offices of the plaintiff company and of the defendant bank also were; and, in addition to such practice or professional business as he may have had on his own behalf, he attended to minor duties for his father, receiving therefor, from the latter, salary at the rate of $225 per month.

There is in evidence by-law no. 54 of the plaintiff company, which provides that:

> 54. Contracts and engagements on behalf of the company may be made, and cheques, bills of exchange, promissory notes and other negotiable paper may be made, drawn, accepted or endorsed, by the secretary-treasurer, acting jointly with the manager, or with any director of the company, or by any two directors acting together; provided, however, that cheques, drafts, bills of exchange, promissory note or other negotiable paper may be endorsed for deposit only in the company's bank account by either the manager or the secretary-treasurer acting alone.

Previously to 29th March, 1919, the date of the first cheque upon which the plaintiff declares, Cahan, Jr., under his father's power of attorney, had, during the years 1916, 1917 and 1918, already fraudulently withdrawn, for his own purposes, from the agency of the Bank of Montreal in New York and from the Guaranty Trust Company there, substantially the whole of the deposits standing to his father's credit in these accounts; he had also, after becoming a director of the plaintiff company in 1918, turned his attention to the account of the latter as a base of operations against his father's bank account at Montreal, and involved in this fraudulent project were the accounts of the several corporations which Cahan, Jr., appears to have had under his control. At the time of the election of Cahan, Jr., as director of the plaintiff company, and subsequently, its account in the Merchants Bank was, as has already been explained, not very active. The first fraudulent draft upon

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that account seems to have been made on 1st March, 1918. At that time the balance to the credit of the account was $4,591.71; the transactions in the account which are described as regular, during the period from March, 1918, to December, 1919, inclusive, amount in deposits to $81,947.60, and in withdrawals to $79,635.20. In the interval there was also a series of fraudulent withdrawals and deposits by Cahan, Jr., which were not in fact known to the plaintiff company, nor to any of its officers, except Cahan, Jr., and Bowler, and which were not discovered until after 26th December, 1919. The first draft upon which the plaintiff seeks to recover is dated 29th March, 1919. There were 94 of these cheques drawn from time to time during the period from the last mentioned date up to and inclusive of 26th December, 1919. The earlier fraudulent transactions did not come to light until after the commencement of the action. It would appear that Bowler, who was nominally secretary-treasurer of the plaintiff company, placed himself entirely under the direction of Cahan, Jr., who was acting as the company's manager, and signed such cheques as the latter directed him to sign. The cheques upon which the plaintiff claims were drawn on its bank account in the Merchants Bank, signed by Cahan, Jr., as director of the plaintiff company, and by Bowler as its secretary-treasurer; they were presented for payment by or under the direction of Cahan, Jr., not at the office of the Merchants Bank, but at the office of the defendant bank, which credited the proceeds of the cheques to the private account of Cahan, Jr., or, in some cases, paid them to Cahan, Jr., in cash. A number of these cheques, not less than 27, including the cheque of 29th March, 1919, first drawn, served to liquidate the personal indebtedness of Cahan, Jr., to the defendant bank by covering the debit balances against him in his private account. Of the 94 cheques, 67, amounting to $146,429.87, were drawn payable to the order of C. H. Cahan, Jr., six others, amounting to $16,530.50, were drawn payable to the order of the defendant bank, the first of the cheques so drawn bearing date 14th May, 1919. The remaining cheques, 21 in number, amounting to $43,000, were drawn payable to the order of C. H. Cahan, Jr., or, in several cases, to the order

of an agent, his office boy, or Geo. V. Green, or Trevor, each of whom was acting under the direction of Cahan, Jr., or to bearer. The cheques were endorsed by Cahan, Jr., and were presented to the Merchants Bank by the defendant bank, which received from the former the proceeds amounting in the aggregate to $205,960.37, the principal amount sought to be recovered by the plaintiff in the action.

The money which was requisite and available in the Merchants Bank of Canada for the payment of these and other cheques consisted, in addition to the plaintiff's legitimate balance in its bank account, of money diverted by Cahan, Jr., through the fraudulent use of his father's powers of attorney, from the latter's bank accounts; deposits of some trust funds which were in the plaintiff's custody, and to which Cahan, Jr., had access; deposits made by Cahan, Jr., out of his private account, or, under Cahan, Jr's., direction, from the accounts in other banks of Geo. V. Green, who was an accomplice of Cahan, Jr., by means of cheques in plaintiff's favour drawn against Green's accounts in the Standard Bank of Canada, and in the Banque d'Hochelaga; cheques of the Hotel Company of St. John, drawn on La Banque Provinciale in plaintiff's favour; cheques of the Dominion Operating Company, drawn on the Sterling Bank; cheques to a comparatively small amount on the Montreal City and Savings Bank; a cheque of the International Exploration Company, Limited, drawn on the Bank of Toronto, and some small miscellaneous deposits of cheques and cash, the sources of which have not been definitely ascertained. These deposits amount in total to a sum much in excess of the amount of the drafts now in suit, and the total ascertained defalcations of Cahan, Jr., likewise greatly exceed the latter amount; but the net total amount admittedly drawn by Cahan, Jr., from his father's bank accounts by means of the fraudulent cheques, which he drew in his father's name in favour of the plaintiff, and which were paid into the plaintiff's account in the Merchants Bank is ascertained at the sum of $132,828.45. These facts appear not to be in dispute. The deposits made by Cahan, Jr., in the plaintiff's bank account may also include, so far as disclosed by the evidence, amounts in the sum of $97,184.21, not traced to any source other than

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Cahan, Jr., and which may have belonged to him. The withdrawals which Cahan, Jr., made under his powers of attorney against his father's bank accounts extended over a considerable period previous to 1919, and continued during the whole of that year down to 26th December, when Cahan, Jr., disappeared; also, during that period, large deposits were made by Cahan, Jr., to the account of his father in the Bank of Montreal. These deposits were of course made to assist or to promote and maintain the fraudulent project in which Cahan, Jr., was engaged of converting to his own use the funds belonging to his father and to the plaintiff, the immediate source of the diversion being the plaintiff's bank account in the Merchants Bank.

There seems to be no doubt that in the course of this fraudulent business there was considerable kiting of cheques, a process which is thus described by the expert accountant who testified for the defendant:

> Kiting is a term used with regard to obtaining money by cheques passed through banks without value being deposited against the cheque, that is kiting is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another, and perhaps through many more.

Bowler, who was a party to the transactions which he describes, and who was examined as a witness for the defendant, upon commission, says that kiting is a means of getting credit for the time it takes to clear a cheque from one bank to another bank; that cheques are passed from one bank account to another and

> credit is obtained at the bank into which they are paid for which they are debited at the bank on which they are drawn.

It is in this sense apparently that the word is used in the case; but, whatever may have been the nature and effect of the kiting operations, it is apparent, as I shall show, that there was, outside of these, real money involved in the deposits which went to the credit of the plaintiff's account, in addition to the credits which were the result of its ordinary legitimate transactions, to an amount greater than that of the fraudulent cheques upon which this action is brought.

On the night of 26th December, 1919, C. H. Cahan, Jr., who had up to that time been living at Montreal, disappeared. He has not since been seen by anybody concerned in the case, and none of these knows where he is to

be found. On the following morning his father learned that he had been meddling with the accounts and misappropriating money; enquiries were made, and the case was put into the hands of accountants for investigation. Soon afterwards the action was brought, the plaintiff's declaration being delivered on 7th April, 1920; the plaintiff declared upon 96 cheques, but the claim as to two of them was subsequently abandoned because it was found that these two cheques had not been cleared at the defendant bank. The ground of the action was that Cahan, Jr., fraudulently, in breach of his trust and duty as a director of the plaintiff company, drew these cheques against the plaintiff's account at the Merchants Bank; that the defendant bank to which the cheques were presented for payment cashed them upon the endorsement and at the request of Cahan, Jr., placing the proceeds to the credit of the latter's private account, often in discharge of Cahan, Jr's., overdrafts, or paying the proceeds of them to him directly in cash at the wicket, and that, inasmuch as these cheques were, with few exceptions, made payable to Cahan, Jr., personally, who, in all cases, to the knowledge of the defendant bank, also personally had the benefit of the proceeds, the latter acquired and became the holder of the cheques and received the proceeds from the Merchants Bank with knowledge or notice that Cahan, Jr., was, fraudulently and in breach of trust, acting in excess of his authority in so procuring and disposing of the proceeds of the plaintiff's cheques for his own individual use and benefit.

The defendant bank pleaded a general denial, and subsequently, by amendment, raised the defences that the cheques were authorized by the plaintiff; that the defendant took the cheques in the ordinary course of its banking business in good faith, and without notice or knowledge of any defects in the title of Cahan, Jr.; that the cheques were not taken by the defendant for collection or as an agent, but in due course and for value, and that the defendant bank, upon receiving the cheques, became the holder and owner of them in due course. Moreover the defendant pleaded that, for the whole of the period during which the cheques were drawn and paid, the plaintiff had not assets to represent the amount of the cheques, and that

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the plaintiff did not lose the whole or any part of the sum claimed in the action by reason of the cheques, the full amount thereof having been directly or indirectly accounted for, returned or paid to the plaintiff by Cahan, Jr., and that, by reason of such accounting, return and repayment, the plaintiff's claim was not maintainable, even as against the latter.

The action was tried before Maclennan J., of the Superior Court, who found that the defendant did not act in good faith, and did not not become the holder of the cheques in due course; that the defendant had notice of the defective title under which Cahan, Jr., held the cheques; that the sources from which the plaintiff received the money which was standing to its credit in its bank account in the Merchants Bank, and out of which the cheques were paid, were irrelevant to the issues between the parties; that the plaintiff had established its allegations; that the defendant had failed to establish a defence, and therefore that the plaintiff was entitled to recover the amount claimed with interest.

Upon appeal to the Court of King's Bench, this judgment was set aside; the rulings at enquête which rejected evidence offered tending to show that the plaintiff's loss was less than the amount claimed were reversed, and it was ordered that the record should be remitted to the Superior Court; that the defendant should have leave to amend; that the enquête should be re-opened, and that the parties should be accorded an opportunity to examine such further witnesses, including Bowler, as they might call in support of the issues as amended.

During the first trial the defendant had endeavoured to introduce evidence to show that, upon an accounting as between the plaintiff, Cahan, Sr., Cahan, Jr., and the other individuals and corporations concerned, the plaintiff had not, in the period covered by the cheques which are the subject of the action, funds of its own available in its bank account for the payment of those cheques; that the proceeds received by the defendant were not moneys of the plaintiff, and that the plaintiff had therefore suffered no loss. This evidence was rejected as inadmissible, the court holding that the accounts could not be taken in the absence of the parties to them, who were not joined in the action,

but intimating that it would receive any evidence of the repayment to the plaintiff of the sum claimed. After the conclusion of the evidence and while the case was under consideration, the defendant presented a petition for leave to amend the defence and to re-open the enquête. The antepenultimate paragraph of the defence, as pleaded, was in these words:

46. That defendant further pleads and puts in issue that during the whole of the period mentioned in the plaintiff's declaration it had not assets to represent in whole or in part the sum of $209,028.12, which it pretends to have lost by reason of the facts set up in its declaration, and that as a matter of fact, the plaintiff did not lose the whole or any part of the sum sued for in this cause by reason of the cheques upon which the said action is based, the full amount of the same having been directly or indirectly accounted for, returned or repaid to the plaintiff by and for the account of the said C. H. Cahan, Jr., and by reason of said accounting, return and repayment plaintiff's pretended claim upon the said cheques would not be and is not maintainable even as against the said C. H. Cahan, Jr.

The amendment desired was by way of supplement to this paragraph, with the object of setting out with more particularity that the moneys deposited in the Merchants Bank, out of which the cheques in question were paid, had been so deposited, or entered to plaintiff's credit, as a result of the cheques fraudulently drawn upon the account of Cahan, Sr., or deposited in the Merchants Bank by Cahan, Jr., for kiting purposes, and that the amounts paid out of the account by the Merchants Bank in discharge of the cheques upon which the plaintiff claims had been compensated or made good by the deposit of other cheques by Cahan, Jr. The defendant also desired leave to examine Bowler who had left the country, and whose place of abode was unknown at the time of taking the former evidence; also permission to examine further witnesses, and to re-examine C. H. Cahan, Sr. This application was refused by the learned trial judge; but upon appeal it was granted by the Court of King's Bench. It is clear I think that the judgment of the latter court, when interpreted in the light of the reasons given, was intended only to vacate the judgment of Maclennan J. in order that the defendant might plead the paragraphs supplementary to paragraph 46 of the defence, which set forth with further particulars the defence generally indicated by that paragraph, and to re-open the enquiry for the admission of Bowler's testimony, and such other material evidence as might be tendered. Nothing

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whatever was determined as to the merits of the case, or the effect of the additional evidence which the defendant desired to produce. The court seems to have been of the opinion that this evidence was of a character of which the relevancy could not be determined without hearing the testimony, and perhaps this was due to some misapprehension of the learned trial judge's reason for rejecting the evidence which is expressed in his statement

> that any evidence of accounting between the plaintiff and outsiders, who were not parties to this action, or the evidence of any moneys put into the Merchants Bank apparently tending to diminish the total losses, would not be evidence in this case. If this action is to be maintained I should think it is to be maintained for the total amount, the Home Bank having obtained $209,000 belonging to Corporation Agencies Limited. I don't think it is material to the defendant where the company got that money, or whether part of that money has been paid back through the activities of C. H. Cahan, Jr., operating on accounts which he had no right to deal with;

the learned judge did however subsequently intimate that if the defence had any evidence of repayment of the amount claimed he would receive it. It would appear moreover that the Court of King's Bench considered that the case was not ready for final determination upon the record submitted, and that the defendant should be allowed generally to enlarge its evidence, in addition to the introduction of the testimony which had been excluded at the trial.

At the second trial the case was heard before Duclos J. The plaintiff renewed its objection to an accounting with those who were not parties to the action, and to evidence of deposits which were not appropriated to reduce or satisfy the plaintiff's claim. The objection was over-ruled by the learned judge, as governed by the judgment of the Court of King's Bench, and a large volume of additional evidence was taken, including the testimony of Bowler, who had been examined in England upon commission, and the evidence of expert accountants, who had been engaged in the case on defendant's behalf, and who produced a number of statements or exhibits which they had compiled to illustrate or establish their conclusions, covering 84 pages of the third volume of evidence. In the result Duclos J. found that the defendant had received the cheques in question for value in good faith, and without knowledge or notice of the defect in title of Cahan, Jr., which the plaintiff alleged; that the circumstances existing at the

times when the cheques were received by the defendant were of a nature to quiet or lull to sleep any suspicion which the defendant bank might otherwise have entertained; that the plaintiff had suffered no loss by reason of the withdrawal of the funds represented by the cheques, and that the money with which these cheques were met was not the money of the plaintiff, but was stolen money, to which the plaintiff could acquire no title.

Finally (he says), to whom belong the moneys with which the series of cheques were paid? These moneys were stolen by Cahan, Jr., from his father C. H. Cahan, from his funds in the Bank of Montreal here, and the New York branch of the Bank of Montreal, and in the Guaranty Trust Company of New York, by means of a power of attorney which he held from his father. Being stolen money, Cahan, Jr., could not transfer the title to it to the plaintiff or to anybody else, and when he deposited these moneys in the Merchants Bank of Canada it was not intended for the plaintiff, but for himself, and he withdrew it from the bank by the legal means which the plaintiff corporation had itself placed at his disposal.

The plaintiff appealed from the judgment of Duclos J., directly to this court.

Upon the merits of the case I find myself in substantial agreement with the judgment pronounced by Maclennan J. upon the first trial, and I do not think that the evidence given later changes the aspect of the case. I have come to the conclusion that the defendant received the proceeds of the cheques in question from the plaintiff's bank account out of moneys which were in the plaintiff's possession, and without the plaintiff's authority, having notice, of which the cheques themselves were *prima facie* evidence, that Cahan, Jr., the defendant's endorser, was not entitled to the cheques, or to appropriate their proceeds, and that in these circumstances the plaintiff is entitled to recover from the defendant the amount so received by it as money had and received by the defendant to the plaintiff's use, or as money of the plaintiff received by the defendant which was not due to the latter. Art. 1047 C.C., *Sinclair* v. *Brougham* (1); *John* v. *Dodwell* (2).

There can be no doubt that Cahan, Jr., as a director of the plaintiff company, and Bowler as director and secretary-treasurer, could not lawfully exercise the authority which they had to draw cheques upon the company's bank account for the business of the company in a manner to appropriate the amounts standing to the plaintiff's credit

(1) [1914] A.C. 398, at p. 436. (2) [1918] A.C. 563, at p. 569.

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to their own purposes, or to the purposes of either of them individually. The rule is universally recognized and founded upon abundant authority that an agent, whether of a company or person, cannot be permitted so to execute his mandate as to bring his own interest into conflict or competition with that of his principal. In *Parker* v. *McKenna* (1), the Lord Chancellor (Cairns) says:—

> Now the rule of this court, as I understand it, as to agents, is not a technical or arbitrary rule, it is a rule founded upon the highest and truest principles of morality. No man can in this court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict.

In *North West Transportation Company* v. *Beatty* (2), Sir Richard Baggallay, pronouncing the judgment of the Judicial Committee of the Privy Council in a Canadian case, says:—

> A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of the several directors as to the managing or sole director.

In the application of this rule the principle has been enunciated, and it is established by conclusive authority, that when an agent gives to his individual creditor, or for his personal benefit, the paper of his principal, and thus uses the latter's credit for his private purposes, without authority of his principal, not only is he guilty of fraud, but the person who accepts the paper has, from the very nature of the transaction, *prima facie* notice that the agent is mis-applying the security or credit of his principal, and therefore acting without due authority.

In re Riches Ex Parte Darlington District Joint Stock-Bank Company (3), Lord Westbury said:—

> I may also adopt a passage which I find in a book of considerable merit, the late Mr. Smith's Compendium of Mercantile Law,—a passage which was cited with great approbation by judges of the Court of Common Pleas in the recent case of *Leverson* v. *Lane* (4), and which is as follows:—
>
> "It would seem that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the

(1) [1874] L.R. 10 Ch. App. 96, at p. 118.
(2) [1887] 12 A.C. 589, at p. 593.
(3) [1865] 4 De G. J. & S. 581, at p. 586.
(4) [1862] 13 C.B. N.S. 278, at pp. 282, 285.

security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so."

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.

In *John* v. *Dodwell & Company, Ltd.* (1), Lord Haldane spoke as follows:—

However, it is none the less clear that, innocent of fraud as the appellants were found to be, they, by the action of their clerks, took an unmistakable and grave risk in the transactions in question. On the face of these Williams was, without showing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was *prima facie* a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction.

There is a very apt statement in *Stainer* v. *Tysen* (2), where the defendant executed a broad power of attorney authorizing the attorney to draw and endorse notes for and in the name of the defendant, and in the exercise of this power the attorney made and delivered a promissory note to satisfy an indebtedness to the plaintiff of a firm of which the attorney was a member, but in which the defendant had no concern. The note was made in the defendant's name, payable to the firm, and by the firm endorsed to the plaintiff. The court, dismissing the plaintiff's action upon this note, said:—

There is no doubt that a power drawn up nakedly to do acts for and in the name of the principal negatives all idea of interest in the agent, or authority to act for the benefit of any one beside the principal. This limitation therefore, the plaintiff was bound to notice. * * * When a person sees the note of a stranger made and endorsed by one of the payees to discharge their own debt, and takes such an endorsement, he has seen enough, in connection with the power, to raise a strong suspicion, not to say conviction, that the whole is a fraud upon that stranger. It is too much to allow that he may shut his eyes and say, he supposed there were some special circumstances on which the attorney had a right thus to act. The transaction is, on its face, out of the ordinary course of business.

There is also a lucid exposition of the law to be found in the judgment of the Circuit Court of the United States for the southern division of New York in *Anderson* v. *Kissam et al* (3), a passage which was not questioned, although the

(1) [1918] A.C. 563, at pp. 568-569.

(2) [1842] 3 Hill (N.Y.), 279.

(3) [1888] 35 Fed. Rep. 699, at p. 703.

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judgment was reviewed by the Supreme Court upon another point. The senior circuit judge said:

> Therefore, if there is any significance in the fact that a bank president or cashier offers negotiable paper of his corporation, made by him in his official character, in payment of his personal debt, or to raise money for his personal use, it matters not that bankers generally do not appreciate it. If they regard the transaction as equivalent to one in which the individual comes with money in hand, they ignore its real character, because in that case he comes with what purports to be his own, having the possession which implies title and ownership, and the right to use it as he sees fit. When he comes with money obligation of a corporation, which is the contract of a corporation only because he has made it, and which is not its contract if he has made it without authority, the transaction is a very different one. Every person who takes such an obligation must ascertain at his peril that the agent who has made it was authorized to do so; and the moment that it appears that the contract has been made for the agent's own use and benefit, that moment his authority is impugned and impeached. No principle of the law of agency is better settled than that no person can act as the agent for another in making a contract for himself. Therefore it is that a bank president or cashier has no implied authority to bind his corporation to negotiable paper made for his own use; and if it appears upon the face of the paper that it is payable to the individual who has made it in an official capacity, the obligation is nugatory, and no purchaser can enforce it.

These American decisions serve to illustrate a rule which is in conformity with the judgments of final authority in England, and, as said by Cockburn C.J., in *Scaramanga* v. *Stamp* (1):

> The sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part.

The principle under consideration underlies the provisions of the Civil Code respecting mandate. By article 1704 it is provided that

> the mandatory can do nothing beyond the authority given or implied by the mandate.

By article 1706,

> an agent employed to buy or sell a thing cannot be buyer or seller of it on his own account.

The commentaries of the French authors are practically in accord. Delange, Des Sociétés Commerciales, 1843-1-255; Dalloz, Jur. Gén., Rép. 40; Société, no. 927, p. 561; Rép. 30, Mandat—no. 386, p. 741; J. Bédarride, Droit Commercial, Des Sociétes, 1857, Liv. 1, Tit. III, pp. 159 and 185.

It would be easy to multiply the references. The principle was affirmed in this court in *Creighton* v. *The Halifax*

(1) [1880] 5 C.P.D. 295, at p. 303.

Banking Company (1), where two firms were carrying on different businesses, Esson & Company, which was largely indebted to the respondent bank, and of which William Esson was a member, and Creighton & Company, of which the appellant Samuel Creighton and William Esson were also members, Creighton having no interest in the firm of Esson & Company. William Esson drew a promissory note in the name of Creighton & Company, payable to Esson & Company, without the authority of Creighton, and endorsed it in the name of Esson & Company to the respondent bank on account of the indebtedness of Esson & Company to the bank. Sir William Ritchie C.J., gave the following reasons for judgment in agreement with the other members of the court:

> We do not think it necessary to hear further argument in this case. I think the evidence and findings of the jury afford sufficient material to establish that Esson signed the note in question in the name of the firm of Creighton & Co. without the authority of his co-partners, that he endorsed it in the name of Esson & Co.—whether with or without authority is not material—and that he took it to the bank and had it discounted, and I am of opinion that the bank had a fair intimation that Esson was using the name of the firm of which Creighton was a partner, for his own private purposes, which was an illegal transaction; therefore, I think it should have put the bank on enquiry as to Esson's authority, and the facts shown threw on the plaintiffs the burthen of showing that the transaction was a right and proper one. Had they made the enquiries they should have made they would have seen that Essen was using the name of Creighton & Co. without authority, and that they should not have discounted the note. Not having made such inquiries, the loss should not fall upon Creighton, the partner whose name was unlawfully used, but upon the bank.

There seems to be no material difference between *Creighton's Case* and this one, although in the former the fraud was committed by means of a promissory note, while in the latter the money was withdrawn directly from the plaintiff's bank account by means of cheques made payable to the fraudulent director or agent.

The incapacity of an agent in such circumstances to use the credit of his principal for his own benefit seems thus to have been so well established that upon first impression it seems wonderful that a bank would pay these cheques without any inquiry or explanation to ascertain or to show that they were issued by the plaintiff's authority. A bank cashier of ordinary experience and care should have been

(1) [1890] 18 Can. S.C.R. 140.

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put on enquiry when these cheques were presented to him by a private customer, since, by the terms of the cheques themselves, it was open to doubt whether the customer had a good title to them. *Ross* v. *London County Westminster and Parr's Bank Ltd.* (1). Mr. Scott, the manager of the respondent bank, tells us, however, why it was that he took the cheques. It was because he relied upon the integrity of Cahan, Jr., and upon his ability to discharge the obligations involved in his endorsements of them and the receipt of their proceeds. Mr. Scott explains that Cahan, Jr., had kept his account in the respondent bank from the latter part of 1913 or the beginning of 1914; that the account had been absolutely satisfactory, and that prior to the disappearance of Cahan, Jr., in 1919, he had never heard anything against his character or integrity. Mr. Scott gave the following testimony:

Q. P.C.-85 is a cheque dated November 1, 1919, for $4,000; that cheque was brought to your personal notice and initialed by you?

A. It must have been, yes, initialed by me.

Q. Did you know what the capital of the Corporation Agencies Limited was at that time?

A. No, sir.

Q. That cheque was not accepted by the Merchants Bank of Canada at the time you initialed it for payment?

A. No, sir.

Q. You did not know what the financial standing of the plaintiff, the Corporation Agencies Limited, was at that time?

A. No.

Q. Then on what were you relying for protection of your bank at the time you initialed that cheque and authorized the payment of $4,000 in cash to C. H. Cahan, Jr.?

A. On C. H. Cahan, Jr's., endorsation.

Q. Did you at the time you initialed this cheque regard it as peculiar that C. H. Cahan, Jr., was drawing a cheque to his own order for so large a sum as $4,000?

A. No, sir, I did not.

And again, generally:

Q. Did it not sound a note of warning to you, Mr. Scott, when Mr. C. H. Cahan, Jr., was depositing cheques of a company of which he was director to his own personal credit?

A. Having the confidence in Mr. C. H. Cahan, Jr., that we had, it never entered our heads.

Q. And really you say you were relying upon the financial credit and stability of C. H. Cahan, Jr.?

A. Yes.

In these circumstances I see no reason for the contention of the respondent bank, founded upon the judgments in

(1) [1919] 1 K.B. 678, at p. 686.

Morison v. *London County and Westminster Bank* (1), a case which is also distinguishable upon other grounds, that its officers paid these proceeds to Cahan, Jr., because they were lulled to sleep by the fact that the payment of previous similar cheques by the bank in like manner had not at the time elicited any protest or objection from the plaintiff company. I should think that Mr. Scott, if he gave the matter the least consideration, must have realized that these cheques were *prima facie* irregular and imported absence of authority; but he appears to have had great confidence in Cahan, Jr.; he was always ready to initial the cheques and to pass them on for payment by the bank when, as sometimes happened, his attention was especially directed to them by his clerks, and evidently it was because he relied upon Cahan, Jr., and the latter's bank account, that he abstained from enquiry.

The defendant put in evidence by-law no. 22 of the plaintiff company which provides as follows:—

22. No director shall be disqualified by his office from contracting with the company either as a vendor, purchaser or otherwise nor shall any such contract, nor any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested, be avoided; nor shall any director so contracting or being interested, be liable to account to the company for any profit realized in any such contract or arrangement, by reason of such director holding that office or of the fiduciary relation thereby established, but the nature of the director's interest must be disclosed by him at the meeting of the board of directors at which the contract or arrangement is determined on, if his interest then exists, or, in any other case, at the first meeting of the directors after the acquisition of his interest.

And it is contended that inasmuch as the plaintiff company had thus allowed its directors to contract with it, and inasmuch as by-law 54, which has already been quoted, provides that contracts and engagements on behalf of the company may be made and cheques drawn or endorsed by the secretary-treasurer, acting jointly with any director, the defendant bank was entitled to assume without enquiry, upon presentation of the cheques for payment, that the director, Cahan, Jr., had received them from the company in discharge of contractual obligations to him which the company had undertaken; and moreover, that because the cheques were signed not only by the director, Cahan, Jr., who was the payee, but also by the secretary-treasurer of the plaintiff company, the au-

(1) [1914] 3 K.B., 356.

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thority for the issue of these cheques was sufficiently certified by the latter and that this fact in itself made further enquiry unnecessary. It will be remembered, however, that the defendant paid these cheques without any enquiry whatsoever, or any information, either from the plaintiff or from Cahan, Jr., as to the reason why, or the circumstances in which, he was entitled, or claimed to be entitled, to receive from the plaintiff any of the payments for which the cheques were drawn. If there were proof that Cahan, Jr., had represented to the manager of the defendant bank that he was a contractor with the plaintiff company, and that the cheques were issued to him in payment or on account of moneys payable to him under his contract, and if the company had been informed of by-law no. 22, or if Cahan, Jr., had directed attention to it, as showing that he was not disqualified to contract with the company, it may possibly be, I do not decide it, that such an explanation would be held reasonably sufficient to justify the bank in the payment of the cheques; but neither did Cahan, Jr., nor anybody on his behalf, or on behalf of the plaintiff company, inform the bank or pretend that any contract had been made in pursuance of the by-law, or that the payments were being made on that account. Moreover, in the absence of any by-law upon the subject a director's disqualification to contract with his company is not absolute; he may, disclosing his interest, contract with the company's consent, and there is thus always a possibility that payments may be due by a company to one of its directors as a contractor. That possibility I suppose existed in every one of the decided cases, but it was never suggested that it afforded any justification or excuse. A general by-law authorizing the making of such contracts may lead to the conjecture of this explanation, but it does not by any means exclude the suspicion of fraud nor rebut the *prima facie* evidence of fraud which the paper itself discloses; it does not in my opinion justify the banker to abstain from enquiry, especially when, as in the present case, it is not shown that the bank considered or was even aware of the by-law, and it is not pretended that the bank was in fact influenced thereby. On the contrary, as I have already shown, the bank took the cheques because of the endorsation of Cahan, Jr.

Then, as to the excuse that the cheques payable to Cahan, Jr., the defaulting director, were signed not only by him but also by Bowler, the secretary-treasurer of the plaintiff company, the answer is that two directors, no more than one, can authorize the misappropriation of the company's money, and that *prima facie* the payee of a cheque receives the proceeds for his own purposes, and when therefore a director, either solely or jointly with another, signs a cheque upon the company's bank account in his own favour the cheque on its face is evidence of absence of authority, or the exercise of his powers for a purpose which is incompetent to him. In *Creighton* v. *The Halifax Banking Company* (1), to which I have already referred, Strong J. quotes the following passage from the judgment of Lord Westbury in *Re Riches* (2):—

(1) 18 Can. S.C.R. 140, at p. 145. (2) 4 De G.J. & S. 581.

> If an individual partner gives directly to his private creditor the paper of his firm for his own individual benefit and thus uses the credit of the firm for his own private purposes in that case such partner is guilty of fraud.

And he adds, upon the authority of Lord Justice Lindley, that such a transaction

> is fraudulent against the firm whose name is affixed to the paper, even if the partner using it does not himself sign the name of the firm; *a fortiori* when he does sign it.

Moreover it is stated in Lindley on Partnership, 5th ed., p. 171:—

> Again, although a partner may be a *bonâ fide* holder, for his own separate use, of the paper of his firm, yet if he gives such paper in payment of a separate debt of his own, this is *primâ facie* an irregular proceeding and a fraud on his co-partners. Consequently, the creditor taking the paper must rebut this *primâ facie* inference before he can compel the firm to pay.

Therefore I conclude that, while it may be less likely that two directors would lend themselves to the fraudulent purpose of appropriating the company's money for the private use of one of them than that the latter alone should do so, it is nevertheless, even where two directors join, *primâ facie* evidence of fraud that one of them is making use of the company's funds for his own individual purposes.

The irregular or fraudulent deposits to the credit of the plaintiff's account in the Merchants Bank were made by means of cheques payable to the plaintiff's order, and thus required the plaintiff's endorsement to authorize their deposit; these cheques could therefore have come to credit

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only by the endorsement of Cahan, Jr., or Bowler, who had the plaintiff's authority to endorse cheques payable to its order.

The officers who endorsed the cheques had, by the company's by-laws, explicit authority to endorse. Thus the money found its way into the plaintiff's possession as a credit belonging to the plaintiff and under its control, because it went into the plaintiff's bank account on which the plaintiff could have operated. If the plaintiff's officers, other than Cahan, Jr., and Bowler, did not in fact know that the money was credited before the defendant drew it out, it was because they blindly trusted Cahan, Jr., and Bowler. Certainly they had means of knowledge by the exercise of which, with ordinary diligence, they would have become aware of what was taking place in the company's bank account; the plaintiff cannot, I should think, permit its bank account, for a year or more, to be made the repository of other people's money by its appointed and entrusted officers, to whom was in fact committed the management of its business, and escape liability upon the ground that it was ignorant of the deposits. *Marsh* v. *Keating* (1); *Jacobs* v. *Morris* (2), and upon appeal (3); *In re Carew's Estate* (4); *Le Neve* v. *Le Neve* (5); *In re European Bank* (6); *Rolland* v. *Hart* (7); *Boursot* v. *Savage* (8).

There can be no doubt as to the validity and binding effect of the deposits as between the plaintiff and the Merchants Bank; they were made in strict accordance with authority conferred. No question of ratification, express or implied, arises involving an assumption of responsibility by the plaintiff company for the fraudulent outgoings from its account. The plaintiff having received the money became liable for its proper application. It promptly repudiated all authority for the persons concerned with the cheques by which the money was withdrawn. I have shown that the defendant bank had no title to them. It is a part of the defendant's case that it bought these cheques from Cahan, Jr., and collected their proceeds, not as his agent or man-

(1) [1834] 1 Bing N.C., 198.
(2) [1901] 1 Ch., 261.
(3) [1902] 1 Ch., 816.
(4) [1862] 31 Beav. 39, at p. 46.
(5) [1747] 1 Ves. Sr. 64, at p. 68.
(6) [1872] L.R. 8 Ch. App. 41.
(7) [1871] L.R., 6 Ch., 679, at p. 681.
(8) [1866] L.R. 2 Eq., 134.

datory, but as the owner of the cheques and for its own benefit. Thus the defendant wrongfully converted the cheques to its own use and received their proceeds.

The defendant bank, having acquired the cheques in suit upon the faith of the endorsement of Cahan, Jr., the payee, cannot justify its claim to them except by establishing the title of Cahan, Jr.; and if, as Lord Herschell said in *The London Joint Stock Bank* v. *Simmons* (1),

> When it is said that a person is put on enquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made enquiry; he cannot better his position by abstaining from so doing,

then it must be taken that the defendant bank had knowledge, when paying the cheques, that they were unauthorized by the company, and therefore is not entitled to urge that the payment of these cheques served lawfully to entitle it to the money by which the plaintiff's balance was reduced.

The deposits in the plaintiff's bank account, out of which these cheques were paid, were not the less in the plaintiff's possession because its accountability for them, or for some portions of the blended fund, may depend upon the tracing of the money to its sources, or upon other considerations affecting its ultimate ownership. The accounting for the various amounts paid in, or the application of these sums, may be a matter of some difficulty. Questions of set off or compensation and of the imputation of the payments may arise, but these do not affect the defendant's present liability to restore the amount which it withdrew without authority. The plaintiff, accepting its responsibility to make proper application of the funds which came into its possession, is entitled to have these funds in hand. It is useless to contend that there were no assets or money of the plaintiff involved. The deposits were treated as money by the Merchants Bank which gave credit for them to the plaintiff in its bank account, and subsequently paid them out to the defendant in response to the fraudulent drafts which it presented. It seems not to be questionable that the deposits in the Merchants Bank were money in the plaintiff's hands, or that when withdrawn they actually were money in the hands of the defendant. In *Spratt et al* v. *Hobhouse et al* (2), Best C.J. said:

(1) [1892] A.C., 201, at p. 220. (2) [1827] 4 Bing. 173.

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It has been established even since the case of *Longchamp* v. *Kenny* (1) that if a party gives another what may be readily turned into money, it may be treated as such in an action for money had and received. * * * The principle in all cases is, that if a thing be received as money, it may be treated and recovered as such.

And Park J., said:

According to all the cases, that which has been treated as money by the parties must be considered as such by the court.

The defendant bank has presented a number of accounts prepared by the accountants whom it retained for the purposes of the action, covering the period from the end of March, 1919, to 26th December following, during which the cheques in suit were made and issued, with the object, so far as I can perceive, of showing that, if the plaintiff's interest in this action is, as I understand the defendant to contend, limited to the amount by which the balance in its bank account at the beginning of the period exceeded the amount which stood to its credit at the end of the period, that excess is negligible. It is said that the plaintiff's balance in its account in the Merchants Bank on 27th December, 1919, after the last of the fraudulent cheques had been paid, was not less than it was nine months previously when Cahan, Jr., made the first of the cheques which are the subject of the action. But, even if this were so, it ought not to affect the plaintiff's right of recovery, because, nevertheless, in the interval, the defendant withdrew from the plaintiff's account, with which it had no authority to meddle, the total amount claimed in the action; and it cannot of course justify this trespass, and the conversion of the deposits, either upon the ground that the money which it appropriated came into the plaintiff's account and possession in the period during which Cahan, Jr., and the defendant were illegally operating upon the account, or because the balance to the credit of the account consisted for the greater part of deposits made by Cahan, Jr. Indeed this contention is but a restatement of the argument that possession of property does not give title as against a wrongdoer who converts it, and that argument, in whatever form it is stated, must, as I shall presently show, upon principle and authority be rejected.

The results of the accounts which the defendant submits are founded very usually upon facts which are not

(1) [1779] 1 Doug. 137.

disputed; but in other respects they depend upon inferences which might or might not be found to coincide with the facts which would appear if the individuals or corporations concerned, and whose moneys are said to be represented in the deposits, were parties or represented in an accounting; and it is, I should think, obvious that the plaintiff's right to recover the possession of the money of which it was deprived by the defendant cannot be affected by a partial or *ex parte* accounting or by evidence of the character submitted. There can only be a conclusive accounting by agreement of the parties or by enquiry and judgment of the court in proceedings in which they are represented.

It is unnecessary to consider the effect of the kiting of the cheques, because it appears to be certain that, independently of any cheques which represent kiting transactions, there is actual money in the case to an amount in excess of that which the plaintiff claims. One of the defendant's exhibit shows that there were net defalcations of Cahan, Jr., in respect of securities and money which actually belonged to the plaintiff amounting to $38,961.92. McDonald, the defendant's expert accountant, testifies in effect that during the time from 29th March to 31st December, 1919, there were deposited in the plaintiff's account in the Merchants Bank $142,345.60 from Cahan, Sr's., account, and that during the same period there were deposited $97,184.21 from Cahan, Jr's., account in the defendant bank; it has been found impossible to ascertain the source of the latter amount; it is thought to represent profits derived by Cahan, Jr., from his stock speculations; that perhaps is mere conjecture; but although, in the absence of strict accounting, the origin of the deposits cannot definitely be ascertained, it seems to be a perfectly legitimate and indeed necessary inference from the evidence that an amount considerably more than that which is claimed in the action came from sources which had nothing to do with the kiting of cheques. I have already shown that according to the findings of the trial judge, the money which paid the fraudulent cheques was stolen from Cahan, Sr.

The defendant bank contends that it is entitled in this action to any relief to which Cahan, Jr., would have been

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entitled, if the plaintiff company had proceeded directly against him, and the defendant relies upon art. 1031 of the Civil Code, which provides that:—

> Creditors may exercise the rights and actions of their debtor, when to their prejudice he refuses or neglects to do so, with the exception of those rights which are exclusively attached to the person.

But, to mention only one of the answers to this contention, the defendant bank is not a creditor of Cahan, Jr., and its principal defence in the action depends upon the denial of facts out of which, in the transactions involved in the case, it could become a creditor. I am satisfied that the defendant derives no advantage for purposes of the present action from art. 1031 C.C.

In the view of the trial judge the case of "*Mr. A.*", *Robinson* v. *Midland Bank, Ltd.* (1), is decisive of this action, and he would reject the plaintiff's claim because the moneys to the credit of the plaintiff, in the Merchants Bank, with which the cheques in question were paid, were, as he says, stolen by Cahan, Jr., from his father's funds in the Bank of Montreal (Montreal and New York branches) and the Guaranty Trust Company of New York, and he applies an observation of Lord Darling's judgment, who is reported to have said:—

> This money was stolen from an Indian gentleman. If it were stolen from him, it remained his still, and nobody could give anybody else title to it, no matter what transactions were gone through.

Upon the assumption that it was stolen money, deposited by the thief in the plaintiff's account in the Merchants Bank, that the defendant bank received in payment of the cheques, it may be observed that to this extent there is a similitude between this case and that of "*Mr. A.*," in that the plaintiff here seeks, as did the plaintiff in the case of "*Mr. A.*," to recover from a bank stolen money which had found its way into the bank. But in the case of "*Mr. A.*," the plaintiff failed because the money had not been received by the bank for his account and he had no title and no right of possession, not because the money had been stolen, while in the present case the Merchants Bank held the money for the plaintiff, and the latter has at least the right and title of possessor which is sufficient to enable it to maintain this action as against the defendant which had wrongfully deprived the plaintiff of its possession.

(1) [1924] 41 T.L.R., 170.

In *Gordon* v. *Chief Commissioner of Metropolitan Police* (1), Buckley, L.J., said:—

There is no ground of public policy upon which the defendant should keep that which under no circumstances is his. It may be that the plaintiff never ought to have acquired that property, but, having acquired it, his cause of action to recover it from the person who deprives him of it arises only from the fact of deprivation.

North & South Wales Bank v. *Irvine* (2); *Kleinwort* v. *Comptoir National d'Escompte de Paris* (3); *The Winkfield* (4); *British America Elevator Co., Ltd.* v. *Bank of British North America* (5).

In *Eastern Construction Company, Ltd.*, v. *National Trust Company, Ltd., and Schmidt* (6), Lord Atkinson, delivering the judgment of the Judicial Committee of the Privy Council in an appeal from the Province of Ontario, and referring to the statement of Lord Campbell in *Jeffries* v. *Great Western Railway Company* (7), that as "against a wrongdoer possession is title," said:—

That is no new doctrine. It was decided in 1721 in *Armory* v. *Delamirie* (8), "that the finder of a jewell, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." That principle was affirmed as applicable to a bailee by the case of *The Winkfield* (9). But this case and the case of *Jefferies* v. *Great Western Ry. Co.* (10), were approved of by Lord Davey in giving the judgment of the Judicial Committee of the Privy Council in *Glenwood Lumber Co.* v. *Phillips* (11), and it must be now taken as conclusively established.

In *Moffatt* v. *Burland* (12), Dorion C.J. said:

In 1848, the Court of Queen's Bench decided, in the case of *Mills* v. *Philbin et al* (13), that although the plaintiff had admitted on *faits et articles*, that he had no interest in the note sued upon, that he only held it for the purpose of collection, and that the money when collected would go to one Malo, still he was entitled to recover judgment.

Similar decisions had already been given by the Court of Appeals, the first on the 20th of July, 1821, in the case of *Armour* v. *Main*, and the second on the 20th of January, 1838, in the case of *Ferrie* v. *Thompson* (14).

These rulings were in accordance with the well known rule of law that he who has an apparent title can enforce such title in the courts of justice as against every one except the real owner of the thing claimed, or as Troplong puts it in his *Traité du Mandat*, n° 43: Ce dernier, le prê-

(1) [1910] 2 K.B. 1080, at p. 1098.
(2) [1907] 24 T.L.R. 5, at p. 8; [1908] A.C. 137, at p. 141.
(3) [1894] 2 Q.B.D., 157.
(4) [1902] P.D. 42.
(5) [1919] A.C. 658.
(6) [1914] A.C. 197, at p. 210.
(7) [1856] 5 E. & B., 802, at p. 805.
(8) [1795] 1 Str. 505; 1 Sm. L.C. 166 and others.
(9) [1902] P.D. 42.
(10) 5 E. & B. 802, at p. 805.
(11) [1904] A.C. 405, at p. 410.
(12) [1884] 4 Dor. 57, at p. 73.
(13) [1847] 3 Rev. de Lég. 255.
(14) [1838] 2 Rev. de Lég. 303.

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te-nom, est revêtu d'un titre apparent, qui lui donne, dans ses rapports avec les tiers, tous les droits du propriétaire. Il est à leur égard, non pas un agent intermédiaire qui se meut sous l'influence de la volonté d'autrui, mais un maître qui dispose de sa chose. Sans doute entre les parties, celui dont le rôle a été réduit par une contre-lettre à la simple qualité de prête-nom n'est pas autre chose qu'un mandataire.

In *Porteous* v. *Reynar* (1), the Judicial Committee of the the Privy Council had no hesitation in adopting the reasoning and decision of Dorion C.J., in *Moffatt* v. *Burland* (2) "as consistent with reason and law."

In *Sinclair* v. *Brougham* (3), Lord Dunedin, said:

> Both an action founded on a *jus in re*, such as an action to get back a specified chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.

If I am right in the view that the defendant bank had actual notice of Cahan, Jr's., lack of title to the cheques, or to apply their proceeds for his individual benefit, or knowledge of facts which should have raised suspicion as to the validity of this title or right, and which should therefore have put it upon enquiry to ascertain or to satisfy itself that Cahan, Jr., was acting with the plaintiff's authority; and if the defendant, with this notice or knowledge, and without any inquiry or explanation, paid the cheques to Cahan, Jr., upon his endorsement, then it follows that the defendant acquired no right or title to the cheques, or to their proceeds, which the defendant received from the Merchants Bank out of the funds standing to the plaintiff's credit. Moreover it follows that, whatever may have been the legal position as between the plaintiff and Cahan, Sr., or others to whom it may have been accountable, its possession of the money as between itself and the defendant conferred a right or title, not in the nature of a limited interest, but absolute and complete. As against a wrongdoer possession is title which cannot be disturbed. The defendant bank was a wrongdoer; it had no vindicable title.

I would therefore allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Lafleur, MacDougall, Macfarlane and Barclay.*

Solicitor for the respondent: *W. K. McKeown.*

(1) [1887] 13 A.C. 120, at p. 131.
(2) 4 Dor. 57.
(3) [1914] A.C., 398, at p. 436.