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SMITH v. THE ATTORNEY GENERAL OF ONTARIO.

Mignault J.

Section 44 of the Ontario Temperance Act, allowing under certain conditions the sale of native wines, furnishes the only serious difficulty. But it must be observed that, under the Canada Temperance Act, the sale of native wines was not considered inconsistent with the prohibition of the sale of intoxicating liquor for beverage purposes (section 122 in Part II, which bears the title "Prohibition"). And the only question being what Parliament intended by the words I have quoted, I do not think that such an exception, in the Ontario Temperance Act as Parliament had itself admitted in section 122 of the Canada Temperance Act would take the provincial prohibitory law out of the class of laws which Parliament contemplated as prohibiting the sale of intoxicating liquors for beverage purposes. I need go no further, for without this express exception in the Canada Temperance Act the question might well be considered a doubtful one, and it is unnecessary to say whether or not exceptions of this nature may not, if extended, prevent the provincial law from coming within the category of prohibitory liquor legislation.

On the whole, I think the appellant fails on the preliminary objection of the respondent as well as on the merits of his action.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*
Solicitor for the respondent: *Edward Bayly.*

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*Feb. 6, 7.
*Mar. 21.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG (DEFENDANT) ..... APPELLANT.

AND

ALPHONSE E. MARTIN (PLAINTIFF) ....RESPONDENT.

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

Insurance—Fire—Agency—Draft for loss sent by company—Signature of insured procured by fraud of agent—Subsequent action by insured upon the draft—Company's responsibility—Estoppel.

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

The respondent had taken fire insurance policies in several companies, amongst which were the appellant company and The Farmers' Company, both represented by one Dace as their agent. The property insured having been destroyed by fire, the respondent received from the adjuster a memorandum shewing him entitled to $2,864.45 as against The Farmers' Company, and to $1,841.45 and $2,861.60, as against the appellant company, under two policies. Later on, The Farmers' Company, sent to Dace their cheque payable to the respondent; and Dace appropriated its proceeds by forging the signature of the respondent. The latter, pressing Dace for a settlement, accepted as an accommodation Dace's personal cheque for the amount of his claim against The Farmers' Company. On the afternoon of the same day, Dace informed the respondent that the cheque of The Farmers' Company had arrived. At that time, Dace had also received from the appellant company two drafts, payable to the order of the respondent, for the amounts already mentioned. Dace then obtained the respondent's endorsement on the larger one of the drafts on the representation that it was the cheque of the Farmers' Company, which he would use to reimburse himself for his personal cheque, and also secured the respondent's signature on the other draft on the representation that it was a receipt, the execution of which was a formality required by The Farmers' Company. Dace endorsed both drafts and deposited them to his own credit, and they were later paid and charged to the appellant's account by its bank. The respondent sued the appellant company on his policies and the defendant pleaded payment and release.

Held, Davies C.J. and Duff J. dissenting, that Dace, in the fraud practised upon the respondent, was acting within the scope of his agency so as to make his fraud that of his principals, the appellant company; and the endorsements on the drafts of the appellant company were not binding on the respondent in the circumstances in which they were given.

Per Davies C.J. and Duff J. (dissenting). Dace did not profess to act and was not in fact acting within the scope of his authority as agent of the appellant company; and as to the larger draft endorsed by the respondent, the latter was estopped from claiming upon it, as by his conduct he represented to the bank that Dace was authorized to collect it.

Judgment of the Appellate Division ([1923] 3 W.W.R. 897) affirmed, Davies C.J. and Duff J. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Tweedie J. at the trial (2) and maintaining the respondent's action.

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

Lafleur K.C. and *Ford K.C.* for the appellant.

Nesbitt K.C. for the respondent.

(1) [1923] 3 W.W.R. 897.

(2) [1923] 2 W.W.R. 32.

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Idington J.

THE CHIEF JUSTICE (dissenting).—I concur with the reasons for judgment stated by my brother Duff.

IDINGTON J.—This action was brought by respondent to recover insurance due on two policies of insurance issued by the appellant and was tried by Mr. Justice Tweedie in the trial division of the Supreme Court of Alberta who, after apparently most careful consideration, gave judgment for the respondent.

From that judgment said company appealed to the Appellate Division of the Supreme Court of Alberta, taking almost every imaginable ground of objection.

Mr. Justice Beck of the Appellate Division, in an elaborate and comprehensive judgment, concurred in by his colleagues, assigned reasons, with which I fully agree, why said appeal should be dismissed and it was dismissed accordingly.

The statements of fact set forth in said respective judgments of the court below, in my opinion, entitle the respondent to rely, as his counsel did herein, upon the decisions in the cases of *Lloyd* v. *Grace* (1), and *Carlisle & Cumberland Banking Company* v. *Bragg* (2), in appeal, which seem applicable to the facts herein presented as I read them.

I cannot, with all due respect, after due consideration, accept the interpretation of said facts adopted by counsel for appellant and pressed upon us herein.

I, therefore, see no useful purpose to be served by repeating what the learned judges in the courts below have stated as to the facts or the law, and, agreeing therewith, am of the opinion that this appeal should be dismissed with costs.

DUFF J. (dissenting).—The respondent sued the appellants to recover $1,841.45 and $2,861.60 under two policies of insurance insuring against fire his restaurant in Edmonton and its fittings and furniture. In answer to the respondent's claim the appellants produced two warrants or drafts drawn upon the Standard Bank of Canada for these amounts, payable to the order of the respondent, to each of which was appended the respondent's endorsement, and which, on faith of these endorsements, had been paid by the bank and charged to the appellants' account. The

(1) [1912] A.C. 716. (2) [1911] 1 K.B. 489.

endorsements were in fact procured by the fraud of one Dace, the appellants' local agent at Edmonton, and the questions for decision are: First, assuming that the appellants are not responsible for Dace's fraud, are the endorsements or either of them binding on the respondent in the circumstances in which they were given? and, second, if this question should be answered unfavourably to the respondent, was Dace, in the fraud practiced upon the respondent, acting within the scope of his agency so as to make his fraud that of his principals? An affirmative answer to this question would, of course, involve a decision against the appellants.

The respondent had taken insurance in several companies, only one of which, in addition to the appellants—The Farmers' Company—it is necessary to mention. After the fire, which occurred on the 28th August, 1921, the usual adjustment occurred, and the respondent received an apportionment slip shewing that he was entitled as against the Farmers' Company to $2,864.45, and as against the appellants in respect of his two policies the sums already mentioned, for which the action was brought.

On the 10th October, 1921, the Farmers' Company sent to Dace, who also acted as their agent at Edmonton, their cheque payable to the respondent for the sum to which he was entitled from them, with a form of receipt attached. To these documents Dace appended the forged signature of the respondent, and having cashed the cheque, appropriated the proceeds. Pressed by the respondent's inquiries concerning this claim against the Farmers' Company, Dace on the 26th October offered the respondent his personal cheque for the amount of this claim as an accommodation, and this proposal being accepted, the respondent received Dace's cheque upon his personal account, which was by him post-dated 27th October. In the afternoon of the 26th October, after this interview, Dace informed the respondent that the cheque of the Farmers' Company had arrived.

In point of fact, Dace had received from the appellants the two drafts in question in this litigation, and then and there proceeded to obtain the respondent's endorsements upon both.

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One of the drafts—the larger one—Martin was told was the cheque of the Farmers' Company, which he was asked to endorse pursuant to his understanding with Dace, so that, as Dace said, "he could get his money." This request Martin complied with, notwithstanding the fact that Dace's post-dated cheque had not been deposited or marked, and was, as Martin said, in his wife's possession at his house. The other draft he endorsed on Dace's representation that it was a receipt: the execution was a formality which the company required. Martin saw that the first mentioned draft was an order on the Standard Bank of Canada for the payment of the amount mentioned; and he noticed as he thought, that it corresponded with the sum payable to him by the Farmers' Company, and that it was payable only upon acceptance by the Calumet Underwriters Department of the National Union Fire Insurance Company. Martin had in his possession at the time his apportionment slip, which he had read, and on which his policies with the National Union Company were referred to under the denomination "Calumet." Nevertheless, having asked Dace for an explanation of this term in the draft, he accepted his explanation that the Calumet Department was the clearing house for paying the Farmers' Company's losses. Martin had no suspicion throughout the interview that he was dealing with Dace in any other capacity than that of agent for the Farmers' Company or that any trick of any description was being practiced upon him. He endorsed the larger draft under the absolute conviction that Dace was entitled to have him do so unless he gave up possession of Dace's personal cheque.

It is convenient to consider first the second of the questions stated above, whether, namely, the appellants are responsible for what Dace did in the proceeding just described.

The answer to this must in turn be governed by the conclusion we reach upon the question whether, to quote the language of Lord Macnaghten in *Lloyd* v. *Grace* (1), a case to be discussed later, Dace was acting "in the ordinary course of his employment," as the appellants' agent, "and not beyond the scope of his agency."

(1) [1912] A.C. 716.

Dace was professing to act in part for himself and in part for the Farmers' Company. When he informed the respondent that the cheque of that company had arrived, he was professing to perform a duty within the scope of his employment as agent of that company. So, also, when he procured the signature of the respondent to one of the documents by misrepresenting it as a receipt which the company required; so also when he produced the other document and exhibited it as a cheque in his possession as agent for delivery to the respondent in payment of the company's liability. In procuring the respondent's endorsement upon that document to enable him to cash it he was purporting to act in his own behoof. It was, moreover, essential to his plan that he should mislead the respondent by concealing from him the fact that he was holding these documents for delivery to him in his capacity as agent of the appellants.

I suggested at the argument that he was purporting to act for the Calumet Underwriters Department of the appellants: that suggestion, I am convinced, quite fails to do justice to the facts as a whole, and is quite untenable in light of a critical examination of the findings of the trial judge.

Dace was not purporting to act on behalf of the appellants; on the contrary, he was discarding his character as agent for the purpose of enabling him to cheat both his principals and the respondent. His acts, on their face, were the acts of a person who was a stranger to the appellants, and the respondent dealt with him on that footing.

I am emphasizing these facts as of cardinal importance, the significance of which I think, with great respect, was not quite fully appreciated by the learned judges of the Appellate Division.

The company, therefore, cannot be held responsible for Dace's acts on the ground that these acts were within the apparent scope of his authority as the appellants' agent. Responsibility, if it exist, must rest upon the ground that in doing what he did Dace was acting within the *actual* course of his employment and not beyond the *actual* scope of his agency. It seems to be abundantly clear that he was not acting within the course of his employment. There

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may, no doubt, be occupations in which it is contemplated that in the ordinary course of his employment, an agent, without passing beyond the scope of his authority, shall at times represent himself as acting for another. But it would be an almost fantastic suggestion that a local insurance agent, entrusted as Dace was with cheques or orders to be delivered in payment on behalf of his company of an insurance loss, would be within the course of his employment in concealing the fact that he was in possession of such orders for that purpose, with the object of obtaining the signature of the payee for the purpose of appropriating the proceeds to himself. The orders, on the face of them, fully disclosed their character and the particulars of the claims they were intended to satisfy. Dace had obvious duties in relation to them: to inform the respondent that he had received them; to give any explanations that might be necessary to enable the respondent to understand and procure payment of them (although it would be difficult to suggest any point upon which explanation could be required); and if, in the performance of that duty, while professing to act in his capacity as agent for the appellants, he had deceived or misled the respondent to his detriment, it is conceivable that there might, in special circumstances, be some responsibility on part of the appellants. But even maintaining his proper character of representative of the appellants, it would seem to be impossible to contend that he would be acting within the course of his duty in procuring the respondent's endorsement for the purpose of enabling him to apply the proceeds of the orders in payment of a debt due by the respondent to himself. Such an act could only be viewed by Dace, as well as by the respondent, as an act done by the respondent on his own behalf. In point of fact, as I have already said, the respondent could not have failed to understand that Dace, in procuring the endorsement of the order for twenty-eight hundred odd dollars, was acting for himself, to serve his own personal purpose. The principle is stated in the judgment of Blackburn J., in *McGowan* v. *Dyer* (1), in the following passage:

(1) [1873] L.R. 8 Q.B. 141, at p. 145.

In Story on Agency, the learned author states, in s. 452 the general rule that the principal is liable to third persons in a civil suit "for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent *in the course of his employment*, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them." He then proceeds, in s. 456: "But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit."

Christie, as managing director, had a most extensive authority to act for the company, and we do not at all question that the company must be bound by every act of his when acting for them within the scope of that extensive authority. But what he did here was in his private capacity, receiving payment of his own individual debt, and, extensive as his authority was, that act did not come within it. We see no principle on which the company should be liable for what he did, any more than an ordinary employer would be answerable for the act of his agent not acting within the scope of his authority.

The appeal must on this issue succeed because, as Lord Herschell said in *Thorne* v. *Heard* (1):

> If the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal;

and as Lord Lindley said in *Farquharson* v. *King* (2),

> I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist.

The court below have considered that the case in this aspect of it is governed by the decision in *Lloyd* v. *Grace* (3). As this is a point of considerable importance, it is well, perhaps, that the facts as found by the trial judge, Scrutton J., should be stated. The findings were as follows:

> It was within the scope of Sandles' employment to advise clients who come to the firm to sell property as to the best legal way to do it and the necessary documents to execute; that the appellant did rely on the representations of Sandles professing to act on behalf of the firm that the documents in question were necessary to facilitate and carry out the sale of the land to her; that she did not know she was signing conveyances to

(1) [1895] A.C., 495 at p. 502. (2) [1902] A.C. 325, at p. 341.
(3) [1912] A.C. 716.

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Sandles outside the scope of his employment, and that she was justified in relying on the representation of Sandles without reading and trying to understand the documents tendered to her.

Lord Macnaghten adds in his judgment, at p. 731:

> That seems to me a clear finding that the fraud was committed in the course of Sandles' employment and not beyond the scope of his agency.

There is hardly a relevant particular in respect of which the facts of this case present any analogy to the facts as disclosed by these findings. It is perfectly clear that the respondent did not rely upon any representation of Dace professing to act on behalf of his principal. It would be beside the question to say that the respondent did not know that Dace was doing something outside of the scope of his employment as the appellants' agent when he believed that he was dealing with Dace in a different capacity altogether. Indeed, in *Lloyd* v. *Grace* (1), the essential point in the grounds of the decision is that the clerk was held out by his employer as having, on the employer's behalf, authority to transact business of the confidential nature he was professing to transact, and as being a person upon whom clients might rely as representing his principals, not only in preparing documents and advising about them, but in explaining their contents and effect and in advising as to the manner in which such transactions should be effected. In all cases of the class to which *Lloyd* v. *Grace* (1) belongs,

> It is * * * assumed (as Lord Selborne said in the passage referred to above) in all such cases that the third party, who seeks the remedy, has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal.

The supposed credentials in the agent's possession were the last things in the world the respondent relied upon. Had he done so, his, Dace's, fraudulent designs must have been foiled.

I come now to the first of the questions stated above. And, first, of the larger draft for twenty-eight hundred odd dollars. The doctrine of estoppel, as Lord Macnaghten said in *Whitechurch* v. *Cavanagh* (2),

> is founded upon a broad principle which enters * * * deeply into the ordinary dealings and conduct of mankind

and it has been expounded many times; but the precision

(1) [1912] A.C. 716. (2) [1902] A.C. 117 at p. 130.

of Parke B's judgment in *Freeman* v. *Cooke* (1), has never been impugned, and it is that statement of it which is most opposite to the question presented by this case. I quote the passage so far as material:

> The rule in *Pickard* v. *Sears* (2), said Parke B., in *Freeman* v. *Cooke* (1), is "that where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" * * * The proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears* (3) must be considered as established. By the term "*wilfully*," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.

The second proposition laid down by Brett J., in *Carr* v. *London & North Western Ry. Co.* (3), may with advantage also be kept in mind:

> Another recognized proposition seems to be, that if a man, either in express terms or by conduct makes a representation to another of the existence of a certain state of facts, which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief in the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

There can be no doubt that the respondent did intend to invest Dace with authority to procure payment of the draft, and the critical question is whether his conduct, taken as a whole, involved a representation to the Standard Bank that he had invested Dace with such authority.

Before proceeding with a discussion of the facts immediately relevant, there are one or two subsidiary points which ought to be mentioned. There seems to be little reason to doubt that the draft, when it left Dace's hands, had all the acceptances required for presentation to the Standard Bank. It was in due course honoured, and it seems unlikely, first, that a draft which was still incomplete in this respect, would be in Dace's hands for delivery to the respondent, and more unlikely still that such a draft would

(1) [1848] 2 Ex. 654. (2) [1837] 6 Ad. & E. 469.
(3) [1875] L.R. 10 C.P. 307.

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have been paid by the Dominion Bank at Edmonton. I do not consider the question of the character of the instrument as regards negotiability at all important. Negotiability by estoppel is at best a slippery expression, and we need not concern ourselves with it here. The actual signature of the payee was, I think, a sufficient endorsement in the sense that if accompanied by delivery to a *bona fide* transferee for value it would have been sufficient to entitle such a transferee to assert Martin's rights against the appellants. "Proper endorsement" means a sufficient endorsement by the proper person, the payee, and this is not affected by the instructions on the back, the first sentence of which is couched in language of advice in contradistinction to the last, which contains an imperative direction. I do not suggest that the absence of the words, "operating as the Shasta Café," would not probably in fact have given rise to some difficulty with the bank; for the present I am speaking only of the legal position.

The respondent, as already mentioned, had agreed to repay Dace's advance by endorsing in his favour the Farmers Company's cheque when it arrived, and this understanding he thought he was carrying out by endorsing the draft in such a manner as to enable Dace to procure payment of it according to its tenour.

Did the respondent then by his conduct represent to the Standard Bank that Dace was authorized to collect this draft?

Both parties, of course, intended that Dace should be, and both thought he had been invested with this authority. Assuming, as was held in the court below, and I think rightly, that the draft was not a negotiable instrument, the respondent's action, intended as it was to have this effect, must be treated as giving Dace authority to act for him in the collection of the draft—an authority which would have been irrevocable had the transaction been what the respondent conceived it to be.

By endorsing the draft and giving it to Dace with authority to procure payment of it, he seems to have authorized Dace to make such a representation, which he, in effect did, by presenting the draft for payment through his own bank. Dace was unquestionably intended by both to have author-

ity to do this effectually, and assuming that Dace exceeded the limits of his actual authority implied from this understanding, by adding the description "operating as Shasta Café," it is difficult to see how, as against the bank, the respondent, who had by his signature accredited the endorsement, could dispute his authority.

I have refrained from speaking of estoppel by negligence, because this is a case of estoppel by representation arising from conduct or it is not a case of estoppel at all. If Martin's conduct amounted to a representation within the principle as enunciated above, that is the end of the matter; if not, that is also the end of the matter.

With respect, there is not much analogy between this case and *Carlisle* v. *Bragg* (1). Rigg's fraud was similar to Dace's and Bragg's stupidity on the same plane as Martin's; but Bragg did not execute a document, knowing it to be a guarantee, or a document of any description, which Rigg was intended to present to the bank for the purpose of obtaining money or credit upon it. In short, Bragg made no representation himself and authorized Rigg to make no representation as to Rigg's authority or as to the validity of the document Rigg produced. Consequently, the appellants could only succeed by shewing that Bragg was under some duty to them to exercise care for their protection.

The case of *Swan* v. *North British Australasian Co.* (2) also is easily distinguishable. The blank transfers in themselves amounted neither to a representation nor to authority to make one, because the clerk was not put into possession of the indicia of title. It was his felonious act in possessing himself of these which enabled him to represent himself as having authority to transfer the shares. "Estoppel by negligence" availed nothing because of the absence of any duty to exercise care owing to the people who suffered by the fraud.

It was urged on behalf of the respondent that Dace's act in adding the words mentioned to the endorsement was an independent wrongful act interrupting the chain of causation—*novus actus interveniens*—between the respondent's

(1) [1911] 1 K.B. 489. (2) [1862] 2 H. & C. 175.

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conduct and the act of the bank in paying the draft. The essential thing, it is to be observed, in applying the principle of estoppel as above enunciated, is to consider whether the conduct relied upon as constituting the estoppel has given rise to the belief upon which the person misled has acted, and that is the decisive question in this case. An analogous question has come up for consideration again and again in cases in which, like this, the courts have had to decide which of two innocent persons who have been defrauded by a third person shall bear the loss caused by the fraud. The famous dictum of Ashurst J., in *Lickbarrow* v. *Mason* (1), to the effect that he should bear the loss who has "enabled" the third party to commit the fraud is, as a general proposition, much to wide, and the question in such cases is not whether the defendant has "enabled" by his conduct the third party to commit the fraud, but whether his conduct has directly led to the deception which the defrauder has been "enabled" to practice. All such cases involve, and any general principle derived from them postulates, the intervention of a fraud in the absence of which nobody would have suffered. A reference to one or two examples may be useful. In *Brocklesby* v. *Temperance Building Society* (2), a father intrusted his son with title deeds for the purpose of raising a limited sum, the son's authority being expressed in a document delivered to him by the father. The son by an ingenious series of frauds, by concealment of the written authority and by means of forgery, succeeded in borrowing a larger sum, secured by equitable mortgage by deposit of the title deeds, and appropriated the difference between the sum borrowed and the sum authorized to be borrowed. The father was held by his conduct to be bound, following the earlier case of *Perry-Herrick* v. *Attwood* (3) where a mortgagee having permitted the mortgagor to have possession of the title deeds for the purpose of borrowing money upon them for the benefit of the mortgagor but limited in amount, was held to be bound by his license to the mortgagor and the delivery of the title deeds to recognize the priority of the equitable mortgage

(1) [1787] 2 T.R., 63; 1 R.R. 425.
(2) [1895] A.C. 173.
(3) [1857] 2 De G. & J. 21.

created by the deposit of them to secure a much larger sum than that authorized. In both these cases, of course, it was the fraud of the defrauder that was immediately responsible for the loss. In the later of the two, *Brocklesby's Case* (1), the fraud involved misrepresentation and forgery. Neither case proceeded upon the principle of agency. In *Brocklesby's Case* (1), although the son obtained possession of the title deeds as his father's agent, the fact of his agency was concealed from the parties with whom he dealt. Both decisions are based upon the ground that, the indicia of title having been intrusted to the defrauder with authority to deal with them for the purpose of raising money (though limited in amount), the responsibility for the fraud practiced upon third parties must rest upon the owner, who armed the defrauder with the instrument that enabled him to carry his criminal designs into effect. In *Union Credit Bank* v. *Mersey Docks* (2), Bigham J., had to consider a curious case, in which the bank, holding as security eighteen hogsheads of tobacco warehoused with the Mersey Docks Board, gave the person who was the owner of the goods subject to their security a delivery order complete, with the exception that a blank was left in the space for the numbers of hogsheads, the understanding being that the owner, who had repaid his advance on one of these, should fill in the number of that hogshead. Instead of doing so, he filled in the blank in such a way as to enable him to obtain delivery of the whole eighteen hogsheads. The responsibility of the bank for the owner's action was affirmed by Bigham J., who rejected an argument founded upon the language of the head-note in *Swan's Case* (3) to the effect that

> the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments.

That learned and experienced judge held that the case was one of estoppel by representation, and that the bank was bound by the representation made by the person whose representation they had accredited by intrusting him with the delivery order in blank. In *London Joint Stock Company* v. *MacMillan* (4), the House of Lords had to consider

(1) [1895] A.C. 173.
(2) [1899] 2 Q.B. 205.
(3) 2 H. & C. 175.
(4) [1918] A.C. 817.

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a question arising out a forgery by a clerk who had presented for signature to Mr. Arthur, a member of the respondent firm, a cheque which was represented to be a cheque for petty cash to the amount of £2. Mr. Arthur signed the cheque without observing the body of it. In point of fact, the space provided for stating in words the sum to be drawn was left blank, while the space for stating the sum in figures had the figure "2" in it, but so placed that the clerk was able, without exciting suspicion through the appearance of the cheque, to insert a "1" to the left and a "0" to the right of the "2," and to present a cheque to the bank for £120 accredited by a genuine signature. Their Lordships maintained the responsibility of the customer, all of them on the ground that the customer had made default in the exercise of the care which he owed to the bank arising out of the relation of banker and customer; but Lord Hardane, at pp. 817-820 of the report, deals with the questions raised by the appeal in their relation to the general principles of estoppel, and refers to *Brocklesby's Case* (1) and *Perry-Herrick's Case* (2) as illustrations of the general doctrine to be applied.

A very different situation, however, confronts us in considering the smaller of the two drafts. The respondent was not aware that this was a draft for a sum of money payable upon the authority of his signature. He believed he was signing a receipt, and, in doing so, observing a formality, connected with the settlement of the claim by the larger draft. There is no ground for saying that he intended to make any representation upon which the bank was to act, nor, I think, that he did anything which a reasonable man would have considered to be calculated to have the effect of such a representation. And he certainly had no intention to make any representation to the appellants, nor had he any reason to believe that his act would be used as a representation to them; nor can I discover any breach of any duty incumbent upon him to exercise care in respect of that particular document. Consequently I think, as regards that issue, that the appellants must fail. In the result the appellants succeed as to the larger draft and fail as to the smaller. Success, in this view, having

(1) [1895] A.C. 175. (2) 2 De G. & J. 21.

been divided throughout, I think the most just and convenient way to deal with the costs would be to award none to either party in respect of the proceedings of the action or in either of the appeals.

ANGLIN J.—I would dismiss this appeal.

The agency of Dace for the appellant company is fully established. It is a reasonable inference from all the circumstances that the procuring of Martin's signature to the documents sent by the appellant company to Dace was within the scope of his duties as its agent. His misrepresentation to Martin as to the relation of the appellant company to the Farmers' Insurance Company involved the statement to Martin that his signature was being sought for the appellant, as in fact it was. Invoking the documents signed by Martin as the basis of release from his claim under his insurance policies, the appellant cannot escape responsibility for the fraud by which its agent obtained his signature to them. Martin's failure to read the papers to which Dace asked his signature for the appellant in my opinion affords no answer to the position taken on his behalf that, as between him and the appellant company, his signature to them is wholly ineffective because of the fraud by which it was obtained.

MIGNAULT J.—This is an appeal from the judgment of the appellate divisional court of Alberta affirming a judgment of Mr. Justice Tweedie in favour of the respondent.

The respondent sued the appellant, claiming indemnity for loss by fire insured against under two policies issued by the appellant, which loss was adjusted at $1,841.45 on policy No. 11278 and at $2,861.80 on policy No. 11346. The respondent at the same time had policies of insurance in several other companies, under which his loss was also adjusted. Among these policies was one of the Farmers' Fire and Hail Insurance Co. of which the adjusted amount was $2,864.45.

The plea of the appellant was that the moneys due under policies Nos. 11278 and 11346 were fully paid and satisfied by two drafts for $1,841.45 and $2,861.80 respectively on the Standard Bank of Canada, Toronto, payable to the order of the respondent, which said drafts were properly endorsed by him and paid to him or to his order.

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On this issue the learned trial judge found that these so-called drafts were sent by the appellant company to one Thomas Dace, who represented it in Edmonton, with what instructions was not disclosed, but that it was very clear that he had received them as agent of the company; that after the losses were adjusted, the respondent frequently called at Dace's office to inquire concerning the money payable under the policies, and, on October 4th, received from Dace two cheques of the Canada Security Insurance Co. in settlement of the claims against it, and that from October 4th he made frequent calls upon Dace up to October 26th, but without results; that in the meantime Dace received from the Farmers' Company its cheque drawn on the Merchants Bank at Calgary, dated October 11th, for the sum of $2,864.45, payable to the respondent with a voucher for the above amount to be signed by the latter; that Dace forged on this cheque and on the voucher the respondent's name, and the cheque was further endorsed for deposit by Dace and deposited by him to his credit on October 18th and paid by the bank; that on the 26th of October in the forenoon the respondent again called at Dace's office and made further inquiry for the money due him under the remaining policies, whereupon Dace gave him his own cheque dated October 27th for $2,864.45, which he said was in anticipation of the cheque which he was to receive from the Farmers' Company, the respondent accepting Dace's cheque as he was in urgent need of the money to re-establish his business.

The finding of the learned judge as to what was done, on October 26th, after the respondent had received Dace's personal cheque, with respect to the two drafts of the appellant company, had better be given in his own words:

> At noon Dace telephoned the house of the insured and left a message to the effect that he had received the cheque from the Farmers' Insurance Company and asked to have him come in and endorse it. Without knowledge of this request plaintiff went to the office of Dace, shortly after noon of the same day when Dace informed him that the Farmers' cheque had arrived and asked him to endorse it so that he could get the money which he had advanced to him. For this purpose they both sat at a table, the plaintiff sitting to the right of Dace. The documents were presented, the one relating to the claim of $2,861.80 being face up with Dace's hand upon it was visible to a very large extent to the plaintiff. He admits having read the words "Upon acceptance by the Calumet Agency Department" as his own name and the amount ($2,861.80) two thousand eight

hundred and sixty-one dollars eighty cents, and may have read the words "National Fire Insurance Company" and "The Standard Bank of Canada, Toronto." He paid particular attention to the amount which was within two or three dollars of the amount of the claim which he had against the Farmers' Fire and Hail Insurance Company, which undoubtedly he believed to be the correct amount of that claim and induced him to believe and rely upon the statements of Dace made in explaining the nature of the documents which he was signing. When the plaintiff made inquiries of Dace as to the opening words of the documents which referred to the Calumet Underwriters' Agency and which immediately preceded the "National Union Fire Insurance Company" he was informed by him that this company were the underwriters of the Farmers' Insurance Company and that its losses were cleared and paid through it, which statement the plaintiff accepted. All this time Dace kept his hand upon the document and turned it over after which he kept his hand upon the back of it and I am satisfied never released control or custody of it. When he turned the document over he directed the plaintiff where to endorse it, which he did. He then presented the second document for $1,841.45, the face of which the plaintiff did not see and explained that that was a receipt which was required by the insurance company whereupon the plaintiff wrote his name on the back. The words "Operating as Shasta Cafe" which form part of the endorsement on each of the documents were not written by the plaintiff nor at his request, nor with his authority, nor did he subsequently approve the same.

On October 26th the day upon which the plaintiff endorsed the two documents Dace subsequently endorsed each of them "For deposit T. Dace, Real Estate and Insurance" and deposited them to his credit at a branch of the Dominion Bank in which he did business. The bank credited his account with the proceeds, cleared them on the 27th and they were accepted and paid by the Standard Bank of Canada at Toronto on October 31, 1921, and charged to the defendant's account. The defendant subsequently acknowledging the correctness of its account.

It may be added that the respondent continued to press Dace for payment of the insurance due him by the appellant and finally threatened suit, whereupon shortly afterwards, Dace absconded from Edmonton and has not since been heard from.

The appellant relies on the endorsement on these drafts as conclusive evidence against the respondent that he was paid the amounts due under the policies of insurance. The respondent answers that this endorsement having been obtained by the fraud of Dace, the appellant's agent, for which fraud the appellant is liable, it cannot set it up as evidence of a payment which was never effected. To this the appellant replies that by a mere inspection of the documents which Dace tendered him for endorsement, the respondent could have discovered that these drafts were not those of the Farmers' Company but of the appellant, and that by

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reason of his negligence the respondent is estopped from denying that he had been paid the amount for which these drafts were issued.

That Dace was the appellant's agent for some purposes was not disputed. It was stated in the policies that they would not be valid until countersigned by the duly authorized agent of the company at Edmonton, and Dace countersigned them as such. However the drafts in question were sent to Dace to be by him handed over to the respondent. Unfortunately we have not the covering letter from the appellant to Dace which no doubt accompanied the drafts. But I think we are entitled to assume from all the circumstances that it was within the scope of Dace's agency to hand over the drafts to the respondent and to see that they were properly endorsed by him. On the back of the drafts were instructions for the endorsement to be made by the payee as described on their face, and no doubt the appellant sent these drafts to Dace and not to the respondent, in order to ensure their proper endorsement. I therefore conclude that Dace was acting as the appellant's agent when by his fraud he obtained the signature of the respondent on the back of these drafts.

But it was argued that Dace in his dealings with the respondent, having represented these drafts to be those of the Farmers' Company, did not purport to act as agent for the appellant but as agent for the Farmers' Company. Dace undoubtedly received the appellant's drafts as its agent and was within the scope of his agency when he obtained the endorsement of the respondent. His representation that the larger of these drafts was that of the Farmers' Company—which the respondent was willing to endorse over to Dace who had given him his personal cheque for the amount of the payment—was a fraudulent misrepresentation in the course of the carrying out of Dace's agency for the appellant. And it seems clear that the appellant which relies on the endorsement so obtained as acknowledgment of payment of its debt towards the respondent cannot take benefit of this endorsement and repudiate the fraud by which it was obtained (Kerr, on Fraud and Mistake, 5th edition, p. 94, and cases cited).

The appellant's plea of estoppel by reason of the respondent's negligence—and that is the only estoppel set up as I read the pleadings—cannot in my opinion be entertained. Through the fraud of the appellant's agent the suspicion which came to the mind of the respondent when he read on the face of the larger cheque the words " upon acceptance by the Calumet Underwriters Agency Department of National Union Fire Insurance Company " was dispelled by Dace's assurance that this was the clearing house for the insurance company and that the Farmers' claim was being paid through this clearing house. The respondent's attention was chiefly directed to the amount of this draft, which was within two or three dollars the same amount as that of the Farmers' Company. And assuming that he was somewhat careless in endorsing the larger draft, for no estoppel can be asserted as to the smaller one the face of which was concealed from the respondent, I cannot see how the appellant being liable in law for the fraud of its agent can set up as a ground of estoppel against the respondent, a negligence induced by the very fraud for which it is responsible. In so far as these fraudulent representations of its agent are concerned the appellant is not an innocent third party entitled to set up estoppel.

The contention of the appellant in the courts below that these drafts were negotiable instruments was not repeated before this court and need not be discussed.

I would dismiss the appeal with costs.

MALOUIN J.—I would dismiss this appeal for the reasons for judgment of Mr. Justice Beck in the Appellate Division of the Supreme Court of Alberta.

Appeal dismissed with costs.

Solicitors for the appellant: *Ford, Miller & Harvie.*
Solicitor for the respondent: *P. G. Thomson.*