1921

*May 3, 4.
*June 7.

THE STANDARD BANK OF CANADA (DEFENDANT)..... } APPELLANT;

AND

FRANCIS J. FINUCANE (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Debtor and creditor—Banks and banking—Whole output hypothecated to bank—Part given as security for outside loan—Bank's approval—Liability to account.

The R. Co., pulp manufacturers, being indebted to the appellant bank, had hypothecated to it their whole output. Respondent made a loan to R. Co. of $5,000; and, as security, R. Co. undertook to pay him "$10 per ton from the proceeds of each ton of pulp manufactured and sold." This agreement was marked approved by the bank. All the proceeds of pulp sales were deposited in the appellant bank to the credit of R. Co. Certain sums were paid to respondent by the bank, pursuant to this agreement; but later the bank refused to honour cheques drawn by R. Co. in favour of the respondent who brought action against the bank.

Held, that the appellant bank was liable to account to the respondent for $10 per ton from the proceeds of pulp sales actually received by it from R. Co.

Per Duff J. and *semble* Anglin J.—Such agreement was an equitable assignment to the respondent of $10 per ton of the proceeds of pulp sales received by the appellant bank.

Per Anglin and Mignault JJ.—This agreement created an equitable charge on such proceeds to the extent of $10 per ton.

Judgment of the Court of Appeal ([1921] 1 W.W.R. 456) affirmed.

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

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Morrison J. at the trial (1) 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.

E. A. Lucas for the appellant.

E. P. Davis K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal fails and should be dismissed with costs. I do not consider that the construction of the agreement in question admits of any reasonable doubt. The bank was liable under it to account to the Holley Mason Hardware Co. in consideration of that company's advancing $50,000 to the Rainy River Pulp and Paper Company, for $10 of the proceeds of each ton of pulp deposited with it by the Rainy River Pulp and Paper Company. All the output of that company was hypothecated to the bank as security for the advances made by the bank to this company from time to time. The bank instead of recognising and acting upon its liability under the above agreement with the Holley Mason Hardware Co. paid out the whole of the proceeds of the pulp deposited with it by the Rainy River Pulp and Paper Company to third parties on the cheques and orders of the Rainy River Co. and now disputes its liability to the Holley Mason Co. for that $10 per ton of the proceeds of the pulp deposited with it.

(1) [1921] 1 W.W.R. 456.

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The Chief Justice.

I cannot doubt their liability so to reserve and account to the Holley Mason Hardware Co. for this $10 per ton of pulp received by it and so would dismiss the appeal.

IDINGTON J.—I would dismiss this appeal with costs.

DUFF J.—The appeal should be dismissed with costs. I can have no doubt that the instrument in question operated as an equitable assignment and that it affected the funds which came into the hands of the bank.

ANGLIN J.—I would dismiss this appeal.

The document executed by the Rainy River Pulp and Paper Company and assented to and approved by the appellant bank, if not an equitable assignment to the plaintiff's assignor of $10 per ton of the proceeds of its product hypothecated to the bank and received by it (as I incline to regard it) was at least an equitable charge to that extent on such proceeds. It was well understood by all parties when the document was executed that the bank would handle, as it did in fact, all the proceeds of the Rainy River Company's output. The purpose of the document given by that company to the plaintiff's assignor was to give the latter effective security on those proceeds for the sum of $50,000 which it was advancing to improve the financial position of the Rainy River Company. In order to make that security effective it was essential that the part of those proceeds intended to go to the plaintiff's assignor should be held for it; and that fact was of course well known to the bank. By its assent to and approval of the instrument the bank, in my

opinion, impliedly undertook that out of the monies to be received by it as proceeds of the output of the Rainy River Company there would be withheld from other disposition by that company sums sufficient to satisfy the security on those proceeds given to the plaintiff's assignor. The bank, with full knowledge of what was being done, became a party to the fund so appropriated being diverted, while in its hands, by the Rainy River Company to third parties. The bank probably benefitted indirectly from such diversion. But apart from deriving benefit therefrom, the fact that it became a party to the diversion renders it liable to the plaintiff. Its officers knew that money in its hands belonging in equity to the plaintiff's assignor or which it was entitled to have held for its benefit was being misapplied by the bank's customer and the bank participated in that misapplication by honouring the cheques by which it was made.

MIGNAULT J.—The judgment of the first court contains the following admission of the parties:—

> It being admitted and agreed in lieu of an accounting that 844 tons of pulp were manufactured and sold by the Rainy River Pulp and Paper Company during the months of November and December, 1918, and January, 1919, and that the proceeds of the sale of 724 tons thereof were deposited in the defendant bank to the credit of the Rainy River Pulp and Paper Company, and that the proceeds of the balance, 120 tons, were paid to the assignee of the said Rainy River Pulp and Paper Company.

On this admission of facts, the learned trial judge, instead of ordering an accounting, condemned the appellant to pay the respondent $10.00 per ton on 724 tons, in all, $7,240.00.

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The question whether he was right in so doing—and his judgment was affirmed by the Court of Appeal, Mr. Justice McPhillips, dissenting—stands to be determined on the construction of the letter of the Rainy River Pulp and Paper Company, to the Holley-Mason Hardware Company (now represented by the respondent), dated May 13th, 1918.

By this letter, the former company promised to repay $50,000 loaned to it by the latter company, and as security to pay $10.00 per ton from the proceeds of each ton of pulp manufactured and sold by it from the 1st of June, 1918, until full re-payment. The letter added (I copy textually from the plaintiff's exhibit No. 1):—

> It is understood that our bankers, the Standard Bank of Canada, to which all our output is hypothecated for advances from time to time, has full knowledge of this arrangement and approves of it, and will waive its security to that extent.

At the foot of the letter the approval of the appellant is given by the word "approved" followed by the signature of the bank per G. C. Perkins, manager.

Mr. Perkins was replaced as manager of the Vancouver Branch of the appellant bank on October 1st, 1918, by Mr. J. M. Sutherland, who, in his examination on discovery, states that so far as he knows every cent of the money that was received on account of sales of pulp went into the account, in the appellant bank, of the Rainy River Pulp and Paper Company. The latter company issued drafts against the sale and shipment of pulp and discounted them with the appellant, to whom it was indebted and remained so for large advances. One draft appears to have been sent to another bank, the Bank of Kentucky, but this is immaterial in so far as the issues here are concerned. The whole output of the Rainy River Company was

hypothecated to the appellant, so that the security obtained by the Holley Mason Hardware Company required the consent of the appellant, and this consent was given no doubt because the loan of $50,000 was for the advantage of the Rainy River Company and presumably also of the bank, its creditor, where the proceeds of the loan were deposited. I may add that the Rainy River Company made monthly returns to the Holley Mason Hardware Company of its sales of pulp, accompanied by its cheques for the 10 per cent, and, although in one instance at least no sufficient funds stood to the credit of the Rainy River Company, these cheques were accepted and paid by the bank until December 1918, when, on the instructions of Mr. Sutherland, further payments were refused, the Rainy River Company not having sufficient funds to meet the cheques issued by it in favour of the Holley Mason Hardware Company.

The material facts are therefore, that the proceeds of pulp sales were deposited in the bank to the credit of the Rainy River Company, that the latter was allowed by the bank to draw out these proceeds, that for some months the ten per cent on the pulp sales was paid to the Holley Mason Hardware Company by cheques drawn on the bank, and accepted by the latter, although in one instance at least there were not sufficient funds to the credit of the Rainy River Company, and that from December, 1918, the bank refused to pay any further cheques issued in favour of the Holley Mason Hardware Company, although the Rainy River Company continued to discount its drafts and draw cheques on its account. It does not appear that the debt due the bank was reduced by

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means of these discounts. I may add that all drafts discounted were charged in the usual course to the Rainy River Company and their payment credited to it.

Neither of the parties referred us to section 96 of the "Bank Act," the effect of which is to exempt a bank from liability by reason of a trust affecting a bank deposit, although the bank has notice thereof, and the receipt of the depositor is declared to be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit.

I am disposed to think that unless the approval given by the bank to the transaction between the Rainy River Company and the Holley Mason Hardware Company is more than a mere acknowledgment of notice of the trust affecting the deposit of the proceeds of the pulp sales, this approval would not give a cause of action to the assignee of the Holley Mason Company against the bank. But this approval seems to me much more than an acknowledgment of notice of this trust. In terms, it waives the bank's security to the extent of ten per cent, and not only this waiver but the approval of the whole transaction in my opinion takes the matter out of the terms of a general provision like section 96. It seems unquestionable that an equitable charge was created on the proceeds of the pulp sales to the extent of the ten per cent, and when these proceeds were deposited in the bank, the latter, in view of its assent to the letter of the 13th of May, 1918, could not, either by asserting its own lien, or by allowing the Rainy River Company to draw on the proceeds, defeat the claim of the Holley Mason Company to the ten per cent. In other words when the bank received these proceeds of pulp sales on deposit it took them subject to the charge

affecting them and became a trustee towards the Holley Mason Hardware Company for the payment to it of the ten per cent. On that ground I think the trial judge and the Court of Appeal rightly held the appellant liable for the ten per cent of the proceeds of pulp sales actually received by it from the Rainy River Company.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lucas, Lucas & Richmond.*

Solicitors for the respondent: *Zennie & Clark.*