1921
May 19, 20.
June 27.

THE SAINT JOHN AND QUEBEC RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

THE BANK OF BRITISH NORTH AMERICA (PLAINTIFF) AND THE HIBBARD COMPANY (DEFENDANT) ..... RESPONDENTS

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Debtor and creditor—Assignment of claim—Notice to debtor—Constructive notice.

Notice to the solicitor of a debtor that the claim against the latter was to be paid to a third party is notice to the debtor himself that such claim had been assigned.

Per Duff J. The information given to the solicitor placed before the debtor constituted notice.

APPEAL from a decision of the Appellate Division of the Supreme Court of New Brunswick affirming the judgment on the trial in favour of the plaintiff bank.

The only question dealt with on the decision of this appeal was whether or not the appellant had notice of the assignment to the bank of the claim of the respondent The Hibbard Company. The notice to appellant's solicitor was given in the manner set out in the judgments reported.

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

W. P Jones K.C. and *T. M. Jones* for the appellant. Express notice in writing of the assignment had to be given to the appellant. *Dell* v. *Saunders* (1) 4 Hals. Laws of England, page 372, par. 790.

F. R. Taylor K.C. for the respondents. Notice to the solicitor is notice to the client. *Le Neve* v. *Le Neve* (2); *Bradley* v. *Richer* (3).

THE CHIEF JUSTICE.—After much consideration of the facts of this appeal and of the argument of counsel at bar I have reached the conclusion that the appeal fails and should be dismissed with costs.

I concur substantially in the reasons for the judgment of the Appeal Division of New Brunswick, delivered by Sir Douglas Hazen, Chief Justice, where all the material facts are stated, confirming that of Mr. Justice Chandler, the trial judge.

IDINGTON J.—The respondent sued as assignee of several choses in action owing by the appellant, and which had been assigned to the respondent by the Hibbard Company, Limited, as security for advances made to said company.

The respondent bank, by notice in writing accompanied by a copy of the said assignment, duly served by mail the Provincial Treasurer of New Brunswick and beyond doubt intended that the like notice should be mailed the appellant's secretary.

The proof of the latter mailing of notice is claimed to be rather weak inasmuch as it depends only on the evidence of the stenographer in the office of the said Hibbard Company, in which she testifies as follows:—

(1) [1914] 17 D.L.R. 279 and cases cited. (2) 3 Atk. 646.
(3) [1878] 9 Ch. D. 189.

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Idington J.

Q. Whose work did you mostly do while you were in their office?

A. Mr. Hibbard's work.

Q. Will you take communication of the document now shewn you marked No. 33, September 11th, 1914, initialed W.B.C., and state if you recognize that in any way?

A. Yes, I recognize that as a letter I wrote.

Q. What would be the date of the writing of that letter?

A. The date would be exactly the date that is on the letter.

Q. Do you know whether the letter was mailed or not?

A. Well I could not say as to the mailing of the letter.

Q. What would be the ordinary procedure in the office regarding the typing and other details concerning a letter like that?

A. The ordinary routine generally was that I would take the letter in, you would sign the letter, I would write the envelope and if there was any enclosures put the enclosures in the envelope, get the letter from you signed, and leave the envelope and the letter on the boy's desk. That was the usual procedure.

Q. Do you recall whether you followed that procedure in regard to this particular letter or not?

A. I could not positively say in regard to that particular letter, but as a general rule that was the procedure I always followed.

Q. In what way were copies of letters kept at that time?

A. Well a carbon copy such as that one would be put into the folder or claim.

Q. By whom?

A. By myself.

The boy, whoever he was, whose duty it was to do the mailing, is not called. Why is not explained.

It is however urged, and with much force, that the Provincial Treasurer was served in same way and received his copy, but I cannot see this fact attested to in such a manner as to shew that the actual writing of that letter and its mailing was concurrent with the other.

I am, therefore, unable to find that reliance on the routine of business as proof of the mailing is quite as satisfactory as I should wish, but if the courts below had clearly accepted it as such I should not feel inclined to disturb such finding.

The courts below do not seem to have relied so much thereon as upon the notice to the appellant by the knowledge of the attorney under the following peculiar circumstances.

There had been suggestions made of a meeting for a settlement between the said company and appellant. In bringing that about there certainly was on the part of appellant's officers, or some of them, a want of courtesy in failing to notify the solicitor for the respondent bank, though he had specially so requested. That has justly given rise to much suspicion and charges needless to consider herein.

The solicitor for appellant drew up a form of resolution to be passed by the directors of the Hibbard Company authorizing one Gall, who was treasurer of said company, to negotiate such settlement.

The directors, instead of adopting that form of resolution, passed one which in substance covered all that was therein essential, but varied in the essential as to signing any regular and lawful agreement respecting such claims by adding to the words

giving full and final discharge for all payments made

the following:

provided the same be paid into the Bank of British America according to its rights of transfer and subrogation.

This clearly to my mind was notice to the solicitor of the fact that respondent had a claim upon the results. The excuse of the solicitor is that he had no concern with that but to produce a resolution such as would be agreeable to his client's instructions.

I cannot attribute any meaning to this provision except that the respondent contends for in the first place, that it disclosed the rights of the respondent, or, secondly, which is much more destructive of the appellant's contentions, that it knew of the said claims having been definitely assigned to the respondent.

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Idington J.

The information to the mind of a solicitor directing his attention to it inevitably must have been that the respondent bank was entitled to receive the proceeds by virtue of a transfer. And that would in law be attributable to the appellant. If it chose, as he says, to take the matter into its own hand, sand he was impliedly directed to exclude that provision, so much the worse for the appellant. It either was submitted to his clients or it was not. If not, then the client is bound by his knowledge which to my mind is conclusive. If it was, as I suspect, anticipated by the client, so much the worse for its contentions.

In conclusion, I am of the opinion that the judgment appealed from is right.

Having considered the authorities cited on the question of notice to the solicitor, and searched further, I find *Gale* v. *Lewis* (1), and *Tibbets* v. *George* (2), worthy of consideration as of a time antecedent to our present state of the law when the equity rule has precedence, as it were.

It was urged that the men at the back of this appeal and litigation are those responsible as sureties to the bank. I am unable to find how such an issue is presented to us on the pleadings, or necessarily arises from anything therein.

We might as well speculate on what might have arisen if the Government of New Brunswick, or His Majesty, on behalf of New Brunswick, or the Attorney General therof, could have been in any form brought into the case.

We are only dealing with what is in due form brought before us.

I think the appeal should be dismissed with costs.

(1) 9 Q.B. 730. (2) 5 A. & E. 107.

DUFF J.—I am not satisfied that express notice in writing within the statute was proved. By applying the test which is now the settled test in all cases of constructive notice I think the proper conclusion is that the officers of the railway company had before them knowledge of facts which ought to have put them on inquiry and that if they had acted with reasonable business prudence they would have learned that the bank had an interest in the Hibbard Company's claim which made the assent of the bank an essential condition of any valid settlement of that claim. I may add, I think it is only fair to add, that I accept Hanson's testimony and have no doubt that he did not in fact realize what the nature of the bank's claim was.

ANGLIN J.—Mr. Jones' able argument failed to convince me that there was error in the conclusions of the Supreme Court of New Brunswick against which his client appeals either as to the sufficiency of the assignment to the respondent bank or as to the existence of constructive notice thereof to the appellant and its effect. Subsequent consideration of the evidence has not disturbed the tentative views which I had formed upon these points at the conclusion of the argument. Substantially for the reasons assigned by the learned Chief Justice of New Brunswick I would affirm the judgment *a quo*.

MIGNAULT J.—This case comes to us without a dissenting opinion in the courts below, and the finding that sufficient notice was given to the appellant of the transfer to the respondent of the claims of the

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Mignault J.

Hibbard Company, Limited, against the appellant, is a unanimous one and is supported by the very carefully prepared judgments of Mr. Justice Chandler, in the trial court, and of Chief Justice Hazen, in the Appellate Court.

The whole circumstances of the case support this holding. Mr. Hanson, the solicitor of the appellant, had prepared a form of resolution to be adopted by the Hibbard Company for the settlement of the claim it had against the appellant. This resolution was returned to him with the added words,

> provided the same be paid into the Bank of British North America according to its rights of transfer and subrogation.

In other words, Mr. Hanson was informed that the amount due by the appellant to the Hibbard Company was to be paid into the bank because the latter had rights of transfer and subrogation. This could only mean that the claim of the company had been assigned to the bank and that the latter was subrogated to the company for its collection.

Mr. Hanson objected to this and another resolution (the one originally prepared by Mr. Hanson) was adopted omitting these words, the result being that Mr. Gall, under this resolution, was able to get payment, out of moneys due to the company and assigned to the bank, of his personal claim against the appellant.

I have no doubt that Mr. Hanson acted in absolute good faith, for solicitors as a rule object to any change in resolutions drafted by them for the payment of moneys by their clients, the more so if the disposal of the moneys is, by such changes, made subject to conditions or restrictions. But the fact still remains that the addition made to the first draft of the resolution should have put Mr. Hanson on inquiry as to

what were the rights of transfer and subrogation of the bank. In plain English it stated that the bank was a transferee of the claim and was subrogated in any right of recovery of the Hibbard Company. Mr. Hanson could not close his eyes to this plain intimation and make an unconditional settlement with Mr. Gall without running the risk of the trouble that has arisen from the action of Mr. Gall in illegally paying himself out of moneys of which, even under Mr. Hanson's draft resolution, he was a trustee. The bank, at the time of the trial, was still a creditor of the Hibbard Company for more than $5,000.00, and, although it had possibly ample security, it had the right to receive any moneys due to the Hibbard Company under the transfer the latter had made to it.

I feel that I can really add nothing to the judgments in the courts below and my opinion is to dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. P. Jones.*

Solicitor for the respondents: *F. R. Taylor.*