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\*Oct. 29.

SAMUEL CREIGHTON (DEFENDANT)...APPELLANT ;

AND

THE HALIFAX BANKING COM- }  
 PANY (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Partnership—Fraud against partners—Use of firm name—Promissory note—Authority to sign—Notice to person taking.*

E. was a member of the firm of S. C. & Co. and also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E. with whom the bank had had frequent dealings. In an action against the makers of the note C. pleaded that it was made by E. in fraud of his partners and the jury found that S. C. & Co. had not authorized the making of the note but did not answer questions submitted as to the knowledge of the bank of want of authority.

*Held*, reversing the judgment of the court below, that the note was made by E. in fraud of his partners and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry the bank could not recover against C.

**APPEAL** from a decision of the Supreme Court of Nova Scotia setting aside a verdict at the trial for the defendant, Creighton, and ordering a new trial.

The action was on a promissory note. The defendant Creighton entered an appearance and pleaded that the note was made by his partner Esson without his knowledge or consent and used by Esson for his own private purposes. The evidence at the trial showed that Esson was also a member of the firm of Esson & Co., which was largely indebted to the plaintiff bank,

PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

and the note was endorsed by Esson, in the name of the firm, to the bank to reduce such indebtedness. Certain questions were submitted to the jury which, with their findings, are as follows:—

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1. Did the defendant Creighton authorise Wm. Esson to sign the note in question with the name of S. Creighton & Co.? No.

2. Where the proceeds of the note appropriated by the plaintiff bank, at the request of William Esson, to the payment of the indebtedness of Esson & Co. to the plaintiff bank? Yes.

3. Was the firm of Esson & Co., when this note was discounted, financially embarrassed, and did the cashier of the plaintiff bank know this? Yes.

4. Had the plaintiff bank, at the time this note was discounted, notice that William Esson had no authority to sign the name of the firm of S. Creighton & Co. to this note? Don't know.

5. Was the plaintiff company or its officers aware, when this note was discounted, of circumstances connected with the business transactions of the firm of Esson & Co. with the plaintiff bank which would, or ought to, raise in the mind of the cashier of the bank a reasonable doubt as to the authority of William Esson to sign this note? Yes.

6. Had the firm of S. Creighton & Co. ever given authority to William Esson or the firm of Esson & Co. to sign notes for them in the management of the business of the firm of S. Creighton & Co.? No.

7. Had the firm of S. Creighton & Co. ever given authority to William Esson or to Esson & Co. to sign notes in the name of S. Creighton & Co. and appropriate the proceeds to the credit of Esson & Co.? No.

8. Did the cashier of the plaintiff bank discount this note with the intention and purpose to appropriate the

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proceeds to the reduction of the account of Esson & Co. with the plaintiff bank? Yes.

9. Was the cashier of the plaintiff bank justified, from his former dealings with Samuel Creighton of the firm of Creighton & Co., in believing that William Esson was authorised in signing this note for the firm of Creighton & Co? No.

The following additional questions were submitted at the instance of plaintiffs' counsel:

10. Did the plaintiff bank or the manager know when the note was discounted that the firm of S. Creighton & Co. was not indebted to the firm of Esson & Co? Don't know.

11. Did the plaintiff bank in discounting the said note know that Esson, made the note in fraud of his co-partner? Don't know.

12. Did the plaintiff bank give value for the said note? They did by placing the proceeds to the credit of Esson & Co.

13. Did Esson when, or shortly before, the note was offered for discount inform the manager of the bank that the firm of S. Creighton & Co. was indebted to the firm of Esson & Co.? Don't know.

14. Did the plaintiff bank pay the proceeds of the said note to Esson or to Esson & Co.? To Esson & Co.

Upon these findings judgment was entered for the defendant. On motion to the Supreme Court of Nova Scotia this judgment was set aside and a new trial ordered, the majority of the court being of opinion that it was essential that the jury should find upon the fact whether or not the bank knew, when discounting the note, that it was made by Esson in fraud of his co-partner, and that the jury having answered "don't know" to questions involving such knowledge there was no such finding and no verdict could be entered.

The defendant appealed from the judgment ordering a new trial.

*Newcombe* for the appellant. The fact that the bank had sufficient knowledge of want of authority in Esson to make the note to put them to inquiry before discounting it is sufficiently found by the questions answered. See *In re Richards* (1); *Leverson v. Lane* (2); *Kendall v. Wood* (3).

*Russell* Q.C. for the respondents. There is a distinction between a partner ostensibly acting on his own behalf or acting as agent for a lesser firm. Ames Select Cases on Bills and Notes (4).

- The rights of a third party taking such paper will vary according to the form of the instrument. See *ex parte Bushell* (5); *Ridley v. Taylor* (6).

*Newcombe* was not called upon to reply.

SIR W. J. RITCHIE C. J.—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 inquiry 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 inquiries they should have

(1) 4 DeG. J. & S. 581.

(2) 13 C. B. N. S. 278.

(3) L. R. 6 Ex. 243.

(4) Vol. 3 p. 869, sec. 14.

(5) 8 Jur. 937.

(6) 13 East 175.

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made they would have seen that Esson 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.

The judgment of the learned Chief Justice at the trial rightly stated the law, and I cannot think there could be a doubt in anybody's mind as to its correctness. The appeal should be allowed with costs.

STRONG J.—There were two firms with two partners common to each, the firm of Creighton & Company composed of Creighton (the present appellant) Esson and Anderson; this firm carried on business as lumber merchants at Liscomb; then there was the firm of Esson & Company, composed of Esson & Anderson, which carried on business as general merchants at Halifax. The circumstance that there were in the present case two partners instead of one common to each firm constitutes the only difference between this case and those of *Leverson v. Lane* (1), and *Re Riches* (2), in both of which the facts were that the name of the firm was, in fraud of the partnership, attached by one partner to securities which he applied for his own individual benefit. The circumstances that there are here two partners who are members of each firm is, of course, wholly immaterial.

Esson made the note sued upon payable to Esson & Co. and signed to it the name of Creighton & Co. and endorsed it in the name of Esson & Co. The respondents then discounted it and placed the proceeds to the credit of Esson & Co. who kept an account with them

The law applicable to such a state of facts was laid

(1) 13 C. B. (N.S.) 278.

(2) 4 DeG. J. & S. 581.

down with great clearness by Lord Westbury L. C. in *re Riches* (1), to be as follows :—

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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.

Such a transaction, Lord Justice Lindley says (Lindley on Partnership) (2).

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.

See also Smith's Mercantile law (3); *Leverson v. Lane* (4); *re Riches* (1).

The person who accepts the paper having, from the very nature of the transaction, *primâ facie* notice that the partner in applying the security of the firm for his own private ends is acting beyond the scope of his authority as a partner, and is thus committing a fraud upon the other partners, is put upon inquiry, by which it is meant that he takes the paper at his peril and cannot afterwards protect himself by saying that he had not notice of the particulars of the fraud upon the firm. In other words, the party taking the bill or note has cast upon him the onus of establishing that no fraud was perpetrated by proving that the transaction was with the assent of the other partners or in some way for the benefit of the firm.

In the case of *The Bank of Commerce v. Moul* (5) the bank when it took the note had no notice that the partner from whom it received it was using it for his own purposes, for it was found as a fact in that case that the manager of the bank did not know that McCarthy, the fraudulent partner, was a member of the firm.

(1) 4 DeG. J. & S. 581.

(3) 10th ed. p. 41-42.

(2) 5th ed. p. 171-172.

(4) 13 C. B. N. S. 278.

(5) 36 U. C. Q. B. 9.

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It is beyond doubt in the present case that the bank through its officers, Mr. Pitcaithly and Mr. McIntyre, had notice that the signature of Creighton & Co. to this note was signed by Esson. They had had dealings with Esson and well knew his handwriting. The case on that point of evidence is as strong as it possibly could be. The bank must, therefore, when the proceeds of the discount were applied by placing them to the credit of Esson & Co., have been aware that the paper and credit of Creighton & Co. were being used by Esson, one of the partners in that firm, for the benefit of Esson & Co., a firm in which, as they knew, Creighton had no concern or interest. The case is thus brought directly within the principles laid down by Lord Westbury and by the Court of Common Pleas in the authorities already quoted; it was, therefore, for the bank, if they could, to shew that Creighton, the appellant, had assented to such a use of the name of his firm, or that the latter firm had reaped the benefit of the transaction, but this they have wholly failed to do. The judgment of Mr. Justice Townshend in the court in banc and that of the Chief Justice of Nova Scotia at the trial were, consequently, in all respects right both as regards the conclusion arrived at and the reasons assigned.

Mr. Russell has argued the appeal with great ingenuity but he has, I think, failed to establish that the case is not covered by the English authorities before referred to which, as appears from the work of Lord Justice Lindley as well from the late Edition of Smith's Mercantile Law, are now universally recognised as having established a settled principle of commercial law.

The judgment must be that the appeal should be allowed and that an order discharging the rule for a new trial be entered in the court below, and the judg-

ment for the defendant which was pronounced by the Chief Justice at the trial restored with costs to the appellant in all the courts.

FOURNIER J.—I think the judgment should be for the defendant, and that the appeal should be allowed, for the reasons given by Mr. Justice Townshend in the court below.

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TASCHEREAU and G'WYNNE JJ. Concurred.

PATTERSON J.—I also concur. I read the case with some care before the argument and do not think there is any reason for delaying the judgment.

*Appeal allowed with costs.*

Solicitor for appellant: *E. L. Newcombe.*

Solicitor for respondents: *John T. Ross.*