MARY VICTORIA BEGLEY (PLAINTIFF) . . APPELLANT;

AND

IMPERIAL BANK OF CANADA (DEFENDANT) . . . . . RESPONDENT.

1934

*Oct. 11
*Dec. 21

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

Principal and agent—Banks and banking—Power of attorney—Exercise of for agent's own benefit—Agent paying his own debt to bank with cheque drawn on principal's account— Estoppel—Acquiescence—Ratification—Conduct of principal.

The appellant, a widow, who had a savings account with the respondent bank, gave a power of attorney to one M. authorizing him "for me and in my name to draw and sign cheques on the said bank * * *" M. was indebted to the respondent bank and on being pressed for payment told the respondent's local manager that he "could borrow it from Mrs. Begley", the appellant. Shortly thereafter, after the appellant had left on a visit to Ontario, M. told the bank's accountant, who was aware of what had been said previously between M. and the manager, that he, M., wished to pay off his debt. Under M.'s instructions, the accountant made out a promissory note payable to the appellant on demand which M. signed for the amount of his debt to the bank. M. thereupon gave the bank a cheque on the appellant's account, signed by him as her attorney. The cheque was charged up against the appellant's account and M.'s indebtedness to the bank was cancelled, the note was left with the bank. The note was renewed twice by M. on July 31st, 1931, and in September, 1932. Alleging that she had not given M. authority to borrow or use her money for his own use, the appellant sued the bank respondent on December 29th, 1932. The trial judge maintained the action; but the Appellate Division reversed his judgment on the ground that the appellant's subsequent conduct in dealing with M. and her silence towards the bank constituted a complete estoppel.

Held, in accord with the judgment of the Appellate Division ([1934] 1 W.W.R. 689) and the trial judge, that the respondent bank had no right as against the appellant to retain the monies so paid over to it by M.; but

Held, reversing the judgment of the Appellate Division, Cannon J. dissenting, that, according to the facts and circumstances of this case, the appellant's conduct did not constitute estoppel or ratification.

Per Cannon J. (dissenting):—Both on the ground of ratification and of estoppel, the respondent bank's defense is well founded, according to the facts of the case.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Boyle J., and dismissing the appellant's action.

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes, JJ. and Maclean J. *ad hoc*.

(1) [1934] 1 W.W.R. 689.

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

The material facts of the case and the questions at issue are stated in the judgments now reported.

H. G. Nolan for the appellant.

E. K. Williams K.C. for the respondent.

The judgment of Duff C.J. and Crocket and Hughes JJ. and of Maclean J. *ad hoc* was delivered by

DUFF C.J.—This appeal involves a controversy concerning the rights of the appellant against the respondent bank in respect of certain moneys of the appellant paid to the bank by one McElroy, who at the time held a power of attorney from the appellant, in liquidation of his debt to the bank.

The payment was made on the 29th of June, 1929. The appellant had been a depositor and had had a savings account with the bank since 1918. At the time of the transaction we have to consider, she was a widow, her husband having died in the previous December. She had been told by her husband, just before his last illness, that in matters of business, she should seek the assistance of McElroy. They both recognized that she would require assistance, because she was ill, suffering, as she afterwards learned, from an "inward goitre." Accordingly, in January, McElroy was appointed administrator of the husband's estate, and one Moyer, McElroy's solicitor, acted as solicitor in the business of administration.

On the 21st of June, 1929, the appellant, McElroy and Moyer were in the bank, saw the manager and on that occasion, the sum of $13,000, which had been realized from the estate, was transferred from the administrator's account to the personal savings account of the appellant.

McElroy was a customer of the bank and for some years his indebtedness to the bank had been heavy; it appears that from 1924 to 1929 his "direct liability" fluctuated from fourteen to eighteen thousand dollars, while he was under an "indirect liability" for something like fifteen thousand dollars, arising out of a mortgage held by the bank as collateral security.

Weaver, the local manager of the bank of Calgary, who was called as a witness at the trial, states that, since early in 1925, he, as manager of the branch, had been trying to

get McElroy to discharge his liability. In December 1928, his indirect liability was $14,800 and his direct liability $18,690.

Some of the letters which passed between Weaver and the western head office at Winnipeg, and the head office at Toronto, are in evidence. On the 20th of December, 1927, the assistant general manager at Winnipeg, writing to Weaver, says that he is concerned about McElroy's account, and comments sharply upon a remark of McElroy's, reported by Weaver, about a " purchase of May wheat," as indicating that McElroy was gambling in wheat. This, Weaver was informed, was a very serious matter and he was directed " to get at the situation at once."

On the 23rd of November, 1928, the assistant general manager at Toronto writes to the western superintendent at Winnipeg expressing his dissatisfaction with the information in his possession respecting McElroy's account, which showed a " direct " indebtedness at that time, apparently, of over $15,000. He complains that a suggestion that McElroy was going " to place a mortgage " in order to repay the bank was vague and appeared " to be drifting."

Towards the end of December, McElroy succeeded in raising a loan of $13,000 odd, by mortgage upon his lands, reducing his direct liability to the bank to $5,289. On the 8th of January, the assistant general manager writes:

> You do not tell us how McElroy is going to pay the $5,289. Has he got sufficient money from the sale of grain and cattle to provide for it?

Weaver replies on the 15th of January informing the assistant general manager that McElroy has not sufficient grain and cattle to pay the balance owing the bank, but that he has decided " to sell out " and is negotiating with one Herron for that purpose.

McElroy's direct liability was increased to $7,296 by the 25th of March, 1929. On the following day a deposit was made reducing it to $3,423. On the 29th of June it had been increased to $8,518. By moneys transferred from the appellant's account to McElroy's account, it was paid in full on that day—the first time for at least five years when McElroy was free of debt to the bank.

In the meantime, Weaver, stimulated by the head office, had been pressing McElroy for the payment of his indebtedness. Weaver states that at the end of April, 1929, McElroy told him that

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

if the deal with Herron did not materialize, he could borrow the money from Mrs. Begley.

Again, on the 7th of June, Weaver says, he asked McElroy "in regard to paying the loan," and McElroy, he avers, told him that Mrs. Begley "had not yet got back from the states," and that "he would make arrangements with her when she came back."

The bank adduced this testimony by Chambers, the assistant manager:

Q. Prior to the 29th of June had you any reason to anticipate the withdrawal of any of the funds from Mrs. Begley's savings account and the same to be applied in satisfaction of McElroy's indebtedness to the bank.—A. Yes.

Q. Where did you get your information from?—A. From the correspondence between the branch manager and head office.

Q. Have you any duty in connection with that correspondence.—A. I have to read every letter that goes out of the office the day that it goes out.

Q. So you knew some time I take it before, or tell me whether you knew before the 29th of June that some transaction of the kind contemplated was going to take place.—A. Yes, I knew it on, I believe the date is May 14th.

Q. In May some time.—A. Yes.

The appellant, who had gone in January to stay with her sister in Spokane, returned to Calgary on the 19th of June. On the 21st, with McElroy and Moyer, she visited the bank and had a short conversation with Weaver, and, apparently, on this occasion, $13,000, the sum realized from the husband's estate, was transferred to her personal account. She visited the bank again on the 24th of June, and still again on the 25th, when she arranged with the assistant manager Chambers for the transfer of some money in Hamilton, Ontario, where she was about to pay a visit, intending to leave Calgary, as she did, on the following day, the 26th. It was three days after her departure that McElroy, purporting to act under a power of attorney in the bank's printed form, transferred from the appellant's savings account to his own account, a sum equal to his debt to the bank for the purpose of paying that debt which was so applied.

McElroy was not called as a witness, and the only direct evidence as to what occurred on the 29th of June, 1929, is that of the assistant manager, Chambers. In examination-in-chief he says:

Q. Now will you narrate in your own language, Mr. Chambers, the exact transaction as you recall it.—A. On June 29th, which was Saturday, just at the closing of the bank, Mr. McElroy came in.

Q. That would be at 12 o'clock I suppose?—A. Yes.

Q. The bank closes on Saturdays at 12?—A. Yes. He came to me and said * * *

Mr. Shaw: You have no objection to these conversations, just a moment please.

Mr. Nolan: All right, Mr. Shaw.

Q. Mr. Shaw: Well now, Mr. Chambers?—A. He said, "I wish to pay off my liability to the bank, will you please figure up how much it is I owe you." I then figured up his liability which amounted to $8,518.78. He then said I am going to borrow sufficient money from Mrs. Begley's account to pay this liability. Will you kindly make me out a note payable to Mrs. Begley. I said, "How long, when will the note be payable?" and he said, "On demand."

Q. The Court: What is that?—A. The note would be payable on demand. I asked him at what rate of interest was to be added to the note and he said, "Seven per cent." I made out this note and handed it to him and he signed it. He then said, "Will you please make me out a cheque" which I did, a cheque payable to J. W. McElroy for $8,500 which he signed "Victoria Begley per J. W. McElroy, Attorney."

Q. Is the handwriting of the note and the cheque yours excepting the signature?—A. Yes.

* * *

Q. Then what happened?—A. He then said, "I will have to put this cheque to my credit." I said, "I will make out a deposit slip," and I made out this deposit slip for, put on the $8,500 and I said, "This will not be sufficient to clean up your liability in full and he gave a further cheque for $18.78 which I added to the $8,500 deposit, made out the deposit for his account

Q. What did you do? All these documents were turned over to you, that is you had the cheque—A. I gave them all to Mr. McElroy to sign and when they were all made out and signed by him he handed them back to me.

Q. Yes, what did you do with them?—A. I took the cheque and the note, the cheque and the deposit slip and gave them to the paying teller. I put them in the paying tellers slide.

Q. That would be, your office is at the inner entrance to the bank? —A. Yes.

Q. So you simply walked down behind the counter I suppose?—A. Behind the counter and put them into the paying teller's slide. The note I put in my basket.

Before commenting upon this proceeding, it will be convenient to turn to the meeting which took place at Moyer's office between the appellant, McElroy and Moyer on the 24th of June. On that occasion the appellant executed the power of attorney, in the printed form furnished by the bank, upon which the bank relies in this litigation. The appellant remembers nothing about the power of attorney, and Moyer says it was not read over to her or explained to her. It was understood by all three, the appellant and Moyer agree, that the appellant's object in going to Moyer's office with McElroy, who accompanied her, was to make arrangements for the investment of the money in her

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

savings account; which, as already mentioned, she had received from her husband's estate. She says that she then "appointed McElroy" as her agent to invest her money, and it was arranged, she says, and with this Moyer agrees, and there is no dispute about it, that McElroy was to try to get investments at a higher rate of interest than the ordinary bank rate on deposits; and that, in the meantime, her money was to be invested in government bonds. It was agreed that any other investments were to be subject to Moyer's approval. Moyer says this:

Q. Did you read this document exhibit "4" over to Mrs. Begley?—A. No.

Q. Did you explain it to her?—A. No.

Q. Why didn't you?—A. Well, I cannot say, Mr. Nolan. She understood that the power of attorney was being given on the bank account and it was in keeping with the instructions she had given to vest authority in McElroy to operate the account for the purpose of investments she had sanctioned or agreed to.

Q. All right then, are you saying to me that finally instructions were given that for the time being at least the investment was to be in Government bonds?—A. Yes.

Q. Until such time as selected securities could be obtained, to which your approval must be given?—A. That is right, and subject to the retention of some reasonable amount in the account.

Q. For current expenses?—A. That is right.

The appellant declares most explicitly that at no time did she agree to lend money to McElroy. But the evidence goes further, and, as it is important, it will be better, perhaps, to quote a passage from it verbatim. The incident mentioned in the passage was on the occasion to which we have referred, on the 24th of June; when, as Moyer says, the final instructions were that "for the time being at least the investment was to be in government bonds." The appellant says:

* * * Mr. McElroy asked me in an undertone voice if I would not let him have some money where he would pay me seven per cent interest, where if I put it out in Government Bonds, as I asked him, he said I would only get four or four and a half or something and I ignored it, I never let on I heard him say it at all. I said I wanted my money put out in Government bonds.

Q. That was on Monday the 24th, was it, of June. Was it, Mrs. Begley.—A. Yes.

Five days after this meeting, at which Moyer deposes, the appellant declared "she trusted" McElroy and himself "to do the right thing, and she was not going to worry about it at all"—five days after this interview at which these instructions were given, McElroy entering the Imperial Bank, declared to the assistant manager, according to

the evidence of the latter, that he was going to pay off his debt to the bank; that, in order to do so, he was going to borrow from Mrs. Begley, and the assistant manager having drawn a cheque upon the appellant's account payable to McElroy's order, he forthwith attached the signature "Victoria Begley per J. W. McElroy, attorney."

In addition to the sum thus withdrawn on the 29th of June, McElroy, within the succeeding four months and a half withdrew something like $3,000, professing to act under his power of attorney, of which $2,500 seems to have been applied for his own purposes, and without Moyer's knowledge; the remaining $500 was advanced to Moyer personally as a loan.

The majority of the Appellate Division seem to have thought that the evidence left some doubt upon the point of the fraudulent character of McElroy's conduct. I regret to say I am unable to share, what I cannot help regarding, if I may say so with the greatest respect, as the somewhat indulgent view, which the learned judges consider to be admissible, of the effect of the evidence. It seems to have been thought that the appellant's attitude, in ignoring, to use her own expression, McElroy's request, might have been interpreted by McElroy as "silence" importing "consent."

The evidence of Moyer and the appellant is quite unmistakable that the power of attorney was to be used for the purpose of investing the appellant's money in accordance with her instructions. McElroy could not possibly have misconstrued those instructions in the sense suggested. If he had done so, that is to say, if he had really believed that the appellant was acceding to his request, and agreeing to give him a loan, the matter would not have been allowed to rest there; he would have had the loan effected and the business closed before the appellant left Calgary on her visit to Ontario. McElroy was a man of experience in business, and could not have failed to realize that if he delayed the matter until after the appellant's departure, and then made use of his power of attorney in order to effect a loan to himself, without further communication of any sort with the appellant, he must expose himself to the gravest risk of misunderstanding and suspicion. No honest intelligent man of business experience would have behaved so.

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

The judges of the Appellate Division, as well as the trial judge, have concurred in the view that the bank had no right, as against the appellant, to retain the moneys paid over by McElroy on the 29th of June. They all agree that if the appellant had, on becoming aware of what had occurred, demanded repayment, the bank could not have successfully resisted her demand. They agreed that the transaction in its character and in the circumstances attending it, was so far outside the ordinary course of business as to put the bank upon enquiry, and that the bank, having acted without the slightest investigation, not even so much as a question addressed to McElroy, could not, if such a demand had been made, have been permitted to keep the money.

The majority of the Appellate Division hold that the appellant is now estopped by her conduct from asserting her claim, and think, with some hesitation, that she had ratified McElroy's act in withdrawing the money from her account as a loan to himself; and that this involved a ratification also of his act in employing the proceeds to pay his debt to the bank.

With the greatest respect, I have been unable to satisfy myself that the bank has established these defences; but before considering them it is worth while, I think, to make one or two observations upon the transaction of the 29th of June.

As the trial judge observes, none knew better than the officials of the bank the financial pressure to which McElroy was subject. Apparently, he had unsuccessfully essayed every expedient, save resort to the appellant, for the purpose of providing himself with funds in order to satisfy the just and urgent demand of the bank.

On behalf of the bank, it is said, and the evidence already mentioned was offered in support of it, that they had been looking forward to payment by McElroy out of the proceeds of a loan which he expected to obtain from the appellant. He seems, as we have seen, to have informed the manager in April that he could borrow from the appellant. Then, as we have also seen, on the 7th of June, again, the manager tells us, he said that on the appellant's return "he would make arrangements with her."

It must be assumed that the local officials of the bank had more than an ordinary interest in these expectations

communicated to them by McElroy; information regarding them had, apparently, been communicated to the head office. McElroy's account, as administrator of the estate of the appellant's husband, seems to have been kept in the bank. Indeed, the evidence suggests that, during her absence in Spokane, the manager had been permitting the appellant to draw upon the moneys of the estate or upon the bank on the security of her interest in the estate.

It may properly be inferred that before the appellant returned to Calgary on the 19th of June, the officials of the bank were fully cognisant of the amount of the funds which would pass into her possession from the estate. They must have realized that to give a loan of $8,500 to a man in McElroy's circumstances without security, out of a savings account deposit of $13,000, could be no light thing for a woman circumstanced as the appellant was. It is idle to suggest that their minds did not advert to such matters. The payment of McElroy's loan was a matter of no slight moment to them. It would require an unusual degree of credulity to accept the hypothesis that the probabilities of McElroy succeeding in obtaining such a loan, and as incidental thereto the financial situation of the appellant, were not of interest and concern to them. Such being the circumstances, it is impossible to suppose that they did not look forward to receiving some information from McElroy after the appellant's return, touching the result of his endeavours to obtain the assistance of the appellant in relieving him from his embarrasments.

I cannot think it could have entered their minds antecedently that McElroy would endeavour to get rid of his difficulties by making use of a general authority under a power of attorney in the bank form without the specific consent of the appellant to a loan; but when McElroy proposed (after the appellant had returned to Calgary, and having remained there a week, going in and out of the bank, and had gone away for a lengthy visit in Ontario, and no communication had been received by the bank touching the success of his endeavours to arrange the loan he had been expecting to secure) that he should employ the power of attorney lodged by the appellant with the bank in order to effect an unsecured loan to himself of $8,500, out of the appellant's balance of $13,000, I am un-

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

able to resist the conclusion that the suspicion of any sensible person in the situation of the bank officials, with all the knowledge they possessed, and interested as they were, must have been aroused. Neither the manager nor the assistant manager says he believed a loan had been obtained, or that he did not regard the circumstances as suspicious. The manager, indeed, puts his point of view very clearly. In direct examination he says:

Q. Mr. Weaver, you have suggested that the cheque, the $8,500 cheque, first came to your attention in January, 1929, and at the time of the bank inspection, you observed the form of it at that particular time, did you? —A. Yes, that it was 30.

Q. Yes, 1930?—A. Yes.

Q. Now what did you do following that?—A. When I found it was signed under power of attorney, I inspected the power of attorney which was on file in the office and had it filed away again, that is all I did.

Q. You just investigated to find out whether or not there was a power of attorney?—A. Yes, and the power of attorney, so far as I knew, was in proper form.

Q. Had you known anything about this transaction previously, I am talking now about the cheque, the $8,500 cheque and the note?—A. Will you please be a little more clear?

Q. Here you see, Mr. Weaver, a cheque signed by, under power of attorney, now what did you do in connection with that, that put you on your inquiry did it?—A. I only inquired at the time if there was a power of attorney and if that power of attorney was in order and properly recorded and that is all I did, I did not consider there was anything further necessary.

Q. No, the Court will not allow that conversation, but what I want to know is, did you have any other source of information other than Chambers with respect to this matter?—A. I may be very stupid in this question but I do not understand exactly what you wish to get from me. I can only explain that Mr. Chambers told me about the transaction at the time it went through and when this cheque was taken out in 1930 I took the transaction up by myself and found that cheque had been signed under a power of attorney and I saw nothing to take exception to in it. Whoever the cheque was payable to, so far as I was concerned, I thought it was all right. The power of attorney was there and expressed as such the cheque would be signed in that way and I did nothing further with respect to it.

* * *

Q. Now when this money represented by this cheque which is exhibit "5" in this case, the $8,500 cheque, was credited to the account of J. W. McElroy and it was on the 29th of June?—A. Yes.

Q. Where did the money come from that went into Mr. McElroy's account?—A. He borrowed it.

Q. No, no.

The Court: No.

Mr. Shaw: You must take his answer surely.

Q. The Court: No.

Q. The Court: Whose money was it that went into his account?—A. Mr. McElroy's.

Q. Where did he get it?—A. He borrowed it from Mrs. Begley.

Mr. Shaw: My learned friend must take the answer he gets.

Mr. Nolan: I am saying this to you, Mr. Weaver, the money which went into Mr. McElroy's account that day came out of the account of Mrs. Mary Victoria Begley, that is right, is it not?—A. It may have come from the Bank of England but the fact is that so far as we are concerned it was his money. It was his money, he had borrowed it elsewhere.

The Court: That is not what you were asked, you know what you were asked, you are an intelligent man?—A. Yes, my Lord.

Q. You were asked where that money came from that paid off your bank?—A. Well, my Lord, it came from Mr. McElroy so far as we are concerned, if Mr. * * *

Q. The evidence before us now is that it came from a cheque drawn by Mr. McElroy on Mrs. Begley's account?—A. That is correct, my Lord.

Q. Is that so?—A. Yes.

The Court: Well why don't you say so frankly?

That is the manager's account of his attitude; but I find it difficult to ascribe to him or the assistant manager the degree of simplicity necessarily involved in the supposition that either of them believed McElroy's plan of obtaining a specific loan from the appellant had succeeded, or that the extraordinary method adopted by McElroy in getting possession of funds to pay the bank was not the result of something that required or called for explanation.

The legal result is plain. The relation of principal and agent does not necessarily involve the existence of a fiduciary bond between them, but it is beyond controversy that, superadded to the legal relation between the appellant and McElroy, there was another relation in virtue of which McElroy owed a fiduciary obligation to the appellant in respect of the funds entrusted to him (*Burdick* v. *Garrick* (1); *Gray* v. *Bateman* (2); *Makepeace* v. *Rogers* (3); *John* v. *Dodwell* (4); *Reckitt* v. *Barnett* (5).

In the circumstances of the present case, the burden of the fiduciary obligation to which McElroy was subject was transmitted to the bank. If McElroy had withdrawn the sum of $8,500 in cash, and paid it to the bank in discharge of his debt, the bank, in the absence of knowledge or suspicion that, in doing so, McElroy was violating a fiduciary obligation to the appellant, would have been protected. But the existence of the suspicion which, for the reasons I have given, must be imputed to the local officials

(1) (1870) 5 Ch. App. 233.
(2) (1872) 21 W.R. 137.
(3) (1865) 4 DeG. J. and Sm. 649.
(4) [1918] A.C. 563, at 569.
(5) [1928] 2 K.B. 244, at 276.

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

of the bank, is a complete answer to any defence by the bank resting upon the hypothesis that they were bona fide transferees. The cheque in McElroy's hands was held by him under this fiduciary burden and the bank cannot in the circumstances retain the proceeds of it (*John* v. *Dodwell*) (1).

I am assuming for the moment that under the power of attorney, McElroy had authority to bind the appellant in his application of the moneys in her account in such a way that she could not question his notes as against persons dealing with him bona fide; and in particular that a payment of his debt, bona fide received by the bank, would not be open to such question. I shall discuss the power of attorney later. Whatever the scope of his powers under that instrument, those powers were conferred upon him for a specified purpose—the investment of the appellant's money. Any moneys in his hands drawn from her account would be subject to the trust for investment; and in the circumstances of this case, the slightest knowledge or suspicion on the part of the bankers that McElroy was not, in paying his debt to the bank, acting loyally in the performance of his fiduciary duty to his principal would be sufficient, in the absence of enquiry, to make the bank accountable to the principal. (*Foxton* v. *Manchester* (2); *Coleman* v. *Union Bank* (3); *A. G.* v. *De Winton* (4); *John* v. *Dodwell* (1); *B. A. Elevator Co.* v. *Bank B.N.A.* (5).

I turn now to the substantive defences. And first, as to estoppel. The estoppel set up is almost entirely grounded upon acquiescence. Acquiescence strictly imports a standing by in silence while, and with knowledge that a violation of one's right is in progress by somebody who is ignorant of the right. There is nothing of that sort here. The violation of the appellant's rights was a completed act before she became aware of it, and the sole question is whether she has lost her remedy. The remedy of one who has been deprived of his property by the fraud of another who had possession or control of it under a fiduciary obligation to him is, as a rule, twofold. He has a personal remedy, and he has a proprietary remedy; that is to say,

(1) [1918] A.C. 563.
(2) [1881] 44 L.T. n.s. 406.
(3) [1897] 2 Ch. 243.
(4) [1906] 2 Ch. 106.
(5) [1919] A.C. 658.

he is entitled, under certain conditions, to follow, and require restitution of, his property. It is this latter remedy which the appellant prays, and, as I have said, her right to it, if it had been claimed without delay, is not denied.

Apart from one alleged conversation between the appellant and Chambers, the assistant manager of the bank, the basis of the bank's contention under this head is the fact that the appellant, after learning that McElroy had used the money drawn from her account to pay the bank, did not, for two years, inform the bank of McElroy's fraud.

Silence is effective as creating an estoppel only where there is a duty to speak. Was there any duty to speak arising out of what McElroy told the appellant in June, 1930? Her account of it is that McElroy, having informed her he had taken her money to pay the bank, she asked him why he had done so, and his answer was that

> Weaver told him to take it, he said I would be back and I was a widow, and I would want to marry him and he told him to take my money and pay it back.

I shall have something to say about this evidence later. I mention it here because the majority of the Court of Appeal attach some weight to it in this connection.

If the appellant believed McElroy, then the whole basis of the defence of estoppel by silence disappears, because, if Weaver had instigated McElroy's fraud, there could be no duty upon the appellant to give him information about what he already, *ex hypothesi*, knew too well.

Furthermore, it is quite plain that the bank did not act upon any supposed representation arising out of the appellant's conduct. Neither the manager nor assistant manager suggests that the bank was influenced by the appellant's silence.

I have already quoted passages from the evidence of Weaver in which he leaves us in no doubt as to the position of the bank. He had the power of attorney and the cheque, and since he considered the cheque was within the authority given, he concerned himself about nothing else. If the appellant had made a claim she would have been confronted with the power of attorney.

But the weakness of the bank's case, in so far as it rests upon estoppel by acquiescence, lies deeper. The remedy the appellant seeks to enforce is, as I have said, the pro-

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

prietary remedy. In a proceeding in a court of equity, the appellant, having, as the Alberta courts have unanimously held, established her equitable title to the moneys, cannot be denied her remedy on the ground of acquiescence unless with a full knowledge of her rights and with independent advice, she has confirmed the impeachable transaction (*De Busshe* v. *Alt* (1); *Moxon* v. *Payne* (2)).

It is quite plain, I think, from the whole of the evidence that she had no knowledge of her rights and she expressly says she did not know that the bank had done anything wrong. She knew, no doubt, that she had executed a power of attorney, and knowledge of the effect of that cannot be imputed to her in the absence of advice upon it. Moyer, to whom she took McElroy's promissory note in 1931 with the hope of getting some settlement from him, never suggested to her that she might have some remedy against the bank. Indeed, it seems probable that Moyer knew nothing about the transaction with the bank.

Chambers, the assistant manager of the bank, from whom she learned of McElroy's unauthorized withdrawals, explained the transaction to her as a loan to McElroy. Not a word was said to her by him about the purpose for which the money had been used. Down to the very eve of the present proceedings, she appears to have had no suspicion whatever that the bank was in any way accountable to her. Indeed, to me, it sems in the highest degree improbable that it would have occurred to a woman in her position, with her lack of experience in business, that the conduct of the bank could be affected by any inactivity on her part. She would, beyond question, assume, if she thought about it at all, that the bank had taken, and would take, all the necessary measures for its own protection. In this respect, the case bears no sort of analogy to such cases as *Ewing* v. *Dominion Bank* (3) where a man of business experience is informed by a bank that his signature is attached to a commercial paper, takes no steps to disabuse his informant, who, he must know, will probably act on faith of the signature. Nor has it any sort of resemblance to *Greenwood* v. *Martin's Bank* (4) where the House of

(1) (1877) 47 L.J. Ch. 381, at 389.
(2) (1873) 43 L.J. Ch. 240, at 243.
(3) (1904) 35 Can. S.C.R. 133.
(4) [1933] A.C. 51.

Lords had to consider a case in which the silence upon which the estoppel was founded was, to quote the words of Lord Tomlin (at p. 58),

> deliberate and intended to produce the effect which it in fact produced, viz., the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellants's wife.

* * *

> The course of conduct relied upon (Lord Tomlin says at p. 59) as founding the estoppel was adopted in order to leave the respondents in the condition of ignorance in which the appellant knew they were. It was the duty of the appellant to remove that condition however caused. It is the existence of this duty, coupled with the appellant's deliberate intention to maintain the respondents in their condition of ignorance, that gives its significance to the appellant's silence.

At p. 57, Lord Tomlin states the essential factors of an estoppel where it is alleged that a failure to disclose facts has deprived one of the parties of this opportunity to take proceedings against a third person. The first two of these factors are:

1. A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

2. An act or commission resulting from the representation, whether actual or by conduct, by the person to which the representation is made.

It seems little less than fantastic to ascribe to the appellant an intention to induce by her silence the course of conduct which was followed by the bank; and equally so to suggest that from her point of view, her silence was calculated to induce that course, or any other course of conduct by the bank; and once again, equally so, to say that anything the bank did was the result of an interpretation of the appellant's conduct by them as amounting to a representation of any description whatever.

Then as to ratification. It is important here to recall that there was a fiduciary bond between McElroy and the appellant as well as the legal relation of principal and agent. It is also most important to observe that the transaction was, by McElroy and the bank, given a form in which it consisted of two separable and separate acts; first, a loan by the appellant to McElroy through McElroy, her attorney; and then a payment by McElroy personally to the bank in liquidation of his debt.

I have quoted the evidence of the bank manager in which he makes it clear that the bank's interpretation of

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

the transaction was that the payment by McElroy to the bank was not an act done in his representative capacity, but a personal payment made on his own behalf out of his own moneys. The cheque was made payable to McElroy and, notwithstanding the fact that the sole purpose of drawing the cheque was to put McElroy in funds to pay the bank, the fair interpretation of what occurred is that both McElroy and the bank treated the transaction throughout as possessing the character I have indicated.

It is not entirely without relevancy to notice that in their communications with the appellant, the bank's officials admittedly presented the transaction to her as a loan to McElroy, making no reference to the application of the proceeds of the loan; implying clearly that the only phase of the transaction in which she was concerned was the first phase.

That could not, of course, in the least degree, militate against the right of the appellant to treat the moneys in McElroy's hands as funds held by him in trust for her, or against her right to enforce the trust against the bank, in the circumstances in which the fund was in fact transferred. Nevertheless, McElroy was not professing to act as her agent in paying the bank, and the bank was not receiving the money from anybody acting as the appellant's agent. This is a most important consideration because it follows that, as McElroy did not profess to represent the appellant in paying the bank, his act in doing so was not one which the appellant could validly make her own by ratification.

In this view, the issue of ratification is not of much importance because we are only concerned on this appeal, as I have already said, with the appellant's proprietary remedy against the bank. Nevertheless, it is desirable, I think, to call attention to the difficulty of holding that ratification has been established, even as between the appellant and McElroy. The acts relied upon as constituting ratification consist principally of three:

(1) Delay in taking proceedings to call McElroy to account after she became aware in June, 1930, of McElroy's withdrawals;

(2) Steps taken by her through Moyer to procure some kind of settlement from McElroy;

(3) An agreement in the autumn of 1931 to renew the note signed by McElroy on the 29th of June, and to accept security from McElroy in the form of an assignment of his rights under that agreement. Ratification must consist of words or conduct recognizing clearly the authorized act as the act of the ratifying principal. Now, I should have much difficulty in holding that the appellant really intended to recognize McElroy's withdrawal of her money from the bank as her act, or as an act rightfully done by him. Of course, a person may be bound, whatever his actual state of mind may be, by acts unequivocally evincing a recognition as his own of an unauthorized act; but I am far from satisfied, when the circumstances and the relations of the parties are all considered, that (apart from the point of knowledge of the nature of the transaction which I am about to discuss) what the appellant did falls within this category. When she was first informed of McElroy's withdrawals, it is quite evident that the information came to her as a blow. She was quite ill at the time and shortly afterwards underwent an operation for goitre. It was during her stay in the hospital, and while still ill and suffering, that she told Moyer McElroy owed her money, and that she heard from McElroy that her money had been used to pay his debt to the bank. For something like a year after this, the note signed by McElroy remained in possession of the bank. Then having for the first time had it in her hand, she handed it to Moyer. Moyer says that later she consented to accept a "renewal" of this note accompanied by a transfer of some agreement as security; but she herself says she never so agreed; and Moyer's evidence is not at all clear as to what actually took place. He says, it is true, that she assented to the proposed arrangement; but he says, also, that a day or two afterwards she revoked her assent. His instructions, I gather, were revoked before McElroy had actually executed anything. McElroy appears at all times to have been holding out promises of restitution. I repeat, it is not established to my entire satisfaction that, when all the circumstances are considered (including the relations of the parties), there was an unequivocal recognition of McElroy's misappropriation as her own act.

However that may be, the bank has not, in my judgment, established that the appellant was in possession of that

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

knowledge of the nature of the transaction and of the material incidents of it, the existence of which would be an essential condition of a binding ratification. There is nothing to indicate that she knew the actual form of the transaction. There is nothing to indicate that she was acquainted with the facts which, as I have explained, convince me that, by reason of the conduct of its local officials, to use the phrase of Mr. Justice McGillivray, the bank cannot be treated as an "innocent party." She actually knew nothing of this conduct; and, although the loan was treated by the parties as separate from the transfer to the bank, I do not think you can disregard that conduct, as immaterial, within the meaning of the rule which makes full knowledge an essential condition.

I am, of course, not overlooking the communication which she says McElroy made to her in the hospital touching Weaver's part in securing the repayment of the loan to McElroy. I think that may be put aside because the learned trial judge evidently did not think the appellant had treated the communication seriously; otherwise, he could hardly have used the language he did in discussing and rejecting the application to dismiss the action at the conclusion of the plaintiff's case. The learned trial judge, in his view of this passage in the evidence, would be much influenced by the manner in which the story was told. My impression is that nobody at the trial was disposed to treat the commuication very seriously. The manager, as might have been expected, contradicted McElroy's statement emphatically.

The bank relies upon an interview between the assistant manager Chambers and the appellant which, according to the evidence of the appellant, took place in June, 1930. Chambers says that at this interview he noticed the appellant expressed her surprise at the amount of McElroy's withdrawals saying she had not expected him to borrow so much. He also says that the appellant told him that she was confused and could not remember the arrangement she made with McElroy on her departure for Ontario. This evidence was obviously offered for the purpose of supporting a suggestion that the appellant had assented to the use of the money by McElroy. The learned trial judge, as I have already mentioned, held that she gave no such assent,

adding that counsel for the defendant did not contend that she had done so. I agree with Mr. Justice McGillivray that this evidence is of little assistance.

I should add that, in my judgment, the evidence is quite sufficient to support the findings of fact necessary to sustain the conclusion of the learned trial judge on the issues of estoppel and ratification.

I have one further observation to make upon ratification. Such acts as those relied upon by the bank as constituting ratification could, in my judgment, afford no answer in any case to the appellant's claim against the bank to recover the money as a trust fund (*John* v. *Dodwell*) (1).

I come now to the power of attorney. It is in these words:

> Know all men by these presents that I, Mary Victoria Begley, of the city of Calgary, in the province of Alberta, have made and appointed and by these presents do make and appoint James Wesley McElroy of the city of Calgary in the province of Alberta or any substitute appointed by him in writing, my true and lawful attorney to enter into, manage and carry out for me and in my name any and every financial transaction with the Imperial Bank of Canada, and particularly, but not so as to restrict the generality of the foregoing, to make all arrangements for credits, discounts and advances and the carrying of my account with the said bank, and to carry out the said arrangements, with power to vary, modify or rescind the same and to make new arrangements, and for me and in my name to draw and sign cheques, including those creating an overdraft, on the said bank or any other bank or banker, and receive the moneys thereon; to state and settle accounts; to endorse all cheques in which I am interested; to make and endorse in my name promissory notes; to draw, accept and endorse drafts and bills of exchange; to waive presentment, protest and notice of dishonour of negotiable instruments; to sign and endorse warehouse receipts; to endorse bills of lading; to pledge securities and negotiable instruments; to assign mortgages, policies of insurance, choses in action and book accounts and all moneys payable in respect thereof; to transfer shares in any company or corporation; to mortgage lands and securities upon lands or chattels; to give and agree to give security upon goods, wares, merchandise and other products and things upon which a bank may lawfully take security; and otherwise to pay or secure the payment to the Imperial Bank of Canada of any and all sums of moneys for which I may be from time to time liable to the said bank, whether directly or indirectly, with full power from time to time to make any agreement with reference to all or any of the said securities; to substitute other securities in the place of any securities relinquished by the bank; to confirm all or any securities held by the bank, and to release to the bank any right of redeeming the same or any of them, or any other right with reference thereto; and generally for me to do and transact any business in my name with the said Imperial Bank of Canada which I could transact in person, and in my name to

(1) [1918] A.C. 563.

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

bind me on any and all deeds, conveyances, assurances, convenants, contracts, assignments, transfers, agreements and guarantees in the same manner as I could do in person; I hereby ratifying whatever my said attorney shall do.

And I further covenant and agree with the said bank, in consideration of the said bank accepting the acts done under this power, that I will ratify and confirm all acts, deeds, conveyances, assurances, contracts, covenants, assignments, transfers, agreements, guarantees and other matters and things which my said attorney may make, do, sign, execute or enter into with the said bank, and will repay all moneys my said attorney or any substitute may borrow or receive from the said bank whilst acting or assuming to act under this power, and that without regard to whether the transaction in question is or is not within the scope of the authority given herein.

This power of attorney may be exercised in the names of my heirs, devisees, executors or administrators, and shall continue in force as well after as before my death, and shall be revocable only after written notice of revocation signed by me or my executors or administrators has been served upon the manager of the said bank at Calgary, Alberta, and has been acknowledged by him in writing.

And I do declare that my said attorney shall have the power from time to time to appoint any substitute or substitutes for any or all of the purposes aforesaid, and every such substitution at pleasure to revoke by notice in writing served upon the manager before mentioned.

The primary purpose of this instrument obviously is to confer upon McElroy authority to transact businness with the Imperial Bank of Canada as the agent of the appellant. Some of the phrases in the instrument are very sweeping, but it has long been settled that powers of attorney are to be construed strictly; and it was laid down by the Privy Council in *Bryant* v. *La Banque du Peuple* (1) that

where authority to do an act purporting to be done under a power of attorney is challenged, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication;

and powers given in the widest terms have been held not to extend, for example, to the making of presents, or to the granting away of the principle's property without consideration.

In *Reckitt* v. *Barnett* (2) Mr. Justice Russell (as he then was) says:

The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs.

It would require, he says, in a power of attorney,

words unambiguous and irrestible to justify the attribution to the instrument of "a meaning and intention" to enable the attorney to do what

(1) [1893] A.C. 170, at 177. (2) [1928] 2 K.B. 244, at 268.

he liked with the plaintiff's moneys, even to the extent of applying them in payment of his own personal debts.

Mr. Justice Russell refers to, and in part rests his judgment upon, the decision of the Court of Chancery Appeals in *In re Bowles* (1) in which that court had to construe a power of attorney that enabled the attorney

to act on his behalf in all matters relating to his property, and to the affairs of the company, and to mortgage, charge, or otherwise incumber all or any part of his freehold and leasehold estates, stocks, shares and effects in England, and to lease the same for any term of years, and absolutely to sell all his said estates and effects.

Purporting to act under this instrument, the attorney executed a mortgage in favour of the company, of which he was the secretary and of which the principal was a shareholder, to secure a past debt. Lord Justice James, in delivering judgment, said,

* * * the mortgage was of no value. Whatever might be the legal effect of the power of attorney under which the mortgage was executed, it was clear that it could not authorize the donee of the power to execute a deed as a voluntary gift. But this was a voluntary mortgage in consideration of a past debt, executed under a power of attorney given by a shareholder of the company in whose favour the mortgage was made. The mortgage was clearly invalid, and the Vice-Chancellor was right in dismissing the petition.

In this judgment, Lord Justice Mellish concurred. The decision is a decision of the Court of Chancery Appeals; but, in addition to that, the decision and the judgment have the weight which attaches to all the pronouncements of the two eminent judges who exercised the powers of the court on that occasion.

The power of attorney with which we are concerned does not, in express terms, or by necessary implication, authorize the making of gifts; nor do I think it authorizes the attorney to make any disposition he likes to make of the appellant's money and property, to apply such money, for example, in the payment of his own debts. While the general clauses are very sweeping, there is a specific clause which deals with the subject of the payment of debts due to the bank and the giving of security for such debts and the dealing with such securities. These provisions are very elaborate and very sweeping except as to one point; that is to say, that the liabilities to the bank which the attorney is authorized to discharge and secure, are limited to liabilities of the principal. There is, of course, the specific de-

(1) [1874] 31 L.T. 365.

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Duff C.J.

claration that the generality of the general power to transact business with the bank is not to be limited by the particulars which follow, but I do not think it is a fair construction of this power of attorney to hold that these words are sufficient to sweep away the conditions and qualifications expressed in the sentences which deal with the paying and securing of liabilities to the bank. The point, I need hardly say, is by no means free from difficulty, and I have come to this conclusion after a good deal of hesitation, but I think, on the whole, it is the right view of the effect of this instrument; and, if so, obviously, the withdrawal of the money for the sole purpose of applying it in a manner not authorized by the power of attorney was an abuse of the power of which the bank had full knowledge and, consequently, as between, not only McElroy and the bank, but also as between the bank and the appellant, an act not binding on the appellant.

In any case, it is very clear to me that this power of attorney does not invest the attorney with authority to release himself from his fiduciary obligation to the principal in respect of property of the principal's which has come into his hands, or to release the transferee of such property from transmitted fiduciary obligations. Any such a transaction would be entirely outside the contemplation of the instrument.

The appellant is, therefore, entitled to restitution of the sum of $8,500 with interest from the 29th of June, 1929. I have been unable, however, to reach the conclusion that, as regards the later cheques, the bank is responsible.

The judgment of the Appellate Division should, therefore, be set aside and the judgment of the trial judge varied by striking out the third paragraph. There should be no costs of the appeal to the Appellate Division but the appellant should have the costs of the appeal to this court.

CANNON J. (dissenting)—This is an appeal from the Appellate Division of the Supreme Court of Alberta, reversing (McGillivray J. dissenting) the judgment rendered by the trial judge in favour of plaintiff for $11,000 with interest, amount of alleged unauthorized withdrawals of her funds with the connivance of the bank.

The plaintiff is a widow. Her husband having died in December, 1928, one James Wesley McElroy, their neigh-

bour and friend, administered the estate and got his discharge as administrator on or about June 21, 1929; he then deposited the estate's money in the savings department of the defendant bank, at Calgary, to the plaintiff's personal account which had been in operation for several years past.

On June 24, 1929, the plaintiff executed a power of attorney in the office of her solicitor and lodged it with the defendant bank. This was on one of the bank's forms and authorized McElroy, *inter alia,* " for her and in her name to draw and sign cheques * * * and receive the moneys thereon."

On the 26th June, 1929, after having told the defendant that she was going east and having a portion of her money transferred to Hamilton, the plaintiff left Calgary for a visit to Ontario.

Mr. McElroy had been farming on a rather large scale in the neighbourhood of Calgary for some years; and he had been indebted to the defendant bank on both direct and indirect liabilities for comparatively large amounts varying from time to time.

On June 29th, 1929, the bank held a third mortgage on a considerable portion of his farm, which security was surrendered or destroyed when he paid the amount of his direct liability on that date. His account was not closed and it was not carried on and further advances were made to him subsequent thereto. On that 29th day of June, 1929, a Saturday, a few minutes bewore closing hour, McElroy told Mr. Chambers, the accountant of the bank, that he intended to pay off his debt of $8,518.78, which amount he was going to borrow from Mrs. Begley's funds for that purpose. He signed a note for $8,500 in her favour. He also drew as attorney a cheque against plaintiff's account for $8,500 which he deposited, with $18.78, to his own credit and thereby balanced his personal account and his direct liability. Subsequently McElroy drew other cheques as plaintiff's attorney against her account in the defendant bank, to the order of third parties, which were paid.

The plaintiff returned to Calgary about the middle of December, 1929. She had several interviews with McElroy, was in the bank and had her passbook marked up.

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Cannon J.

Subsequently thereto, on the 2nd of January, 1930, she issued a cheque to McElroy through the respondent bank for $1,400 by way of loan.

Thereafter she was often in the bank and had her pass-book written up and was also shown the $8,500 note and all the cheques that had been issued by McElroy against her account. The plaintiff said in her evidence that while she was in the hospital, in June, 1930, McElroy told her that he had paid the bank with her money. He promised to pay it back in the Fall. He had 1,600 acres in crop. While in the hospital, plaintiff told her then solicitor Moyer that McElroy had her money and changed her will leaving ing him out as executor.

Now, what was appellant's behaviour after she knew of McElroy's use of her money to pay his debt to the bank?

On July 9th, 1930, the plaintiff was in the bank, but never spoke to Chambers, the accountant, or to the manager, Weaver, about this transaction or of the transfer of her funds to McElroy's credit.

On the 10th July, 1930, the plaintiff left by motor for Spokane, driving with McElroy who remained in Spokane three days. They seemed to have been on the best of terms, although they quarrelled about these matters, but made up before he left. She was told that he would pay the bank the money that Fall.

After remaining in Spokane about a month, plaintiff returned to Calgary and was in the bank at least four times before the end of October, and never gave a hint that she disapproved of what had been done; she even took possession of and withdrew the $8,500 note from the custody of the defendant bank and took it to the Bank of Montreal.

On the 31st of July, 1931, she got the first note from the Bank of Montreal and secured from McElroy a new note dated the 1st of August, 1931, for $9,419.11, payable in one year, and stipulated an interest of 6 per cent. She then went to the Bank of Montreal and put this note in her deposit box. It was understood that McElroy would pay as much as possible out of the crop that year.

On the 24th July, 1932, plaintiff writes to McElroy referring to

Mr. McElroy's note will soon be due which he put off on an ignorant woman who was in love.

From the 1st to the 3rd September, 1932, plaintiff accepted a renewal note for $10,224, and arranged for security at the office of her solicitor Moyer who had been trying to secure protection for her claim against McElroy. The papers were prepared and signed by McElroy; but she afterwards countermanded her instructions and, having consulted with Mr. Taylor, started the present proceedings against the bank to recover the amounts of several cheques drawn by McElroy as her attorney.

The parties and the courts below seem to concur in the view that the respondent could have been compelled to reimburse the $8,500 at the moment when, in December, 1929, or January or June, 1930, the appellant first heard of what had been done, if she had, as a matter of fact, never agreed to loan to McElroy the amount in question.

The bank was certainly, to say the least, negligent at the outset. But the defendant has pleaded that the plaintiff not only authorized the issue by McElroy of the cheque but also, on the 2nd of January, 1930, and on the occasion of each and every renewal of the note, ratified the act of the said McElroy in issuing the cheque and the use thereof. The defendant also sets up that the plaintiff by her conduct has elected to waive the wrong, if any, in connection with the $8,500 cheque and to treat the transaction from the beginning as a duly authorized loan of money by her to McElroy. The defendant alleges that by reason of the authority given by the plaintiff to McElroy, and her knowledge, acts, omissions and conduct and by reason of the financial position of McElroy and the security and opportunity that have been lost to the defendant, the plaintiff is estopped and should not be heard to allege or prove the facts set forth in the statement of claim.

The learned Chief Justice of Alberta has dealt with these aspects of the case with much care; and there is hardly anything to add to his remarks. But it would be useful to insert here some abstracts from the evidence of the appellant to show the extent of her knowledge of what had taken place and her determination to accept McElroy as her debtor and shield him as against the bank:

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Cannon J.

Q. But McElroy did tell you that the money had, that he had paid the money to the Imperial Bank?—A. He told me that when I was in the hospital.

Q. I think it was at this particular time that McElroy told you that you did not need to worry about the amount, that he was going to pay it that Fall?—A. Yes.

Q. You were quite satisfied with that, were you, I mean you thought he would pay it?—A. I do not know as I was just satisfied. Well I thought he would.

Q. I asked you two questions. But you did think he would pay it that Fall?—A. Yes.

Q. You knew that that particular year he had some 1,600 acres in wheat?—A. Yes.

Q. And of course, the prospects at that particular time were favourable, I mean the crop prospects were favourable?—A. Yes.

Q. This conversation that you had with McElroy I believe, Mrs. Begley, was some four or five days before you left for Spokane, of course, you told me you had one in the hospital but you had another one four or five days before you left for Spokane?—A. I have forgotten.

Q. In any event you know at that time that McElroy had taken your money or some of your money?—A. Yes.

Q. There is no manner of question about that at all is there?—A. No.

* * *

Q Now as a result of the information which you got you knew that McElroy had taken some of your money and used it to pay his debt to the bank, didn't you?—A. Yes.

Q. You knew that before you took this trip to Spokane with Mr. McElroy?—A. Yes.

Q. Now you knew, of course, at that time that that was a very wrong thing for Mr. McElroy to do, didn't you?—A. For to take the money?

Q. Yes?—A. Yes.

Q. You knew at that time, of course, it was a very wrong thing for the bank to have used the money in that particular way didn't you? —A. I did not know that they should not, I did not know about that.

Q. You did not know about that?—A. No.

Q. Didn't you think it was improper for them at that time to have taken the money without any instructions from you to McElroy and used it for paying his indebtedness to the bank?—A. Well I do not remember just what I did think about it.

Q. You would have thought there was something wrong about it anyway, put it that way?—A. Yes.

Q. Didn't you?—A. Yes.

Q. In any event regardless of what you thought about it you were satisfied from the conditions generally that McElroy would pay it back? —A. I thought he would.

Q. And that he would pay it back that Fall?—A. He said so.

Q. Well you must have been satisfied weren't you that he would do it? —A. I thought he would all right.

Q. And so you were prepared to wait until the crop season was over? —A. Yes.

* * *

Q. As a matter of fact you got a renewal note for this indebtedness on the 1st of August, 1930, didn't you?—A. Yes.

Q. Have you got that note?—A. Mr. Taylor has it.

Q. What is this document, Mrs. Begley?—A. Well that is Mr. McElroy's note.

Q. That is the note and what is the date of it?—A. August 1st.

Q. 1931?—A. Yes.

* * *

Q. The Court: What did you say about renewing the note, how did you come to meet Mr. McElroy?—A. Mr. McElroy was to be in at ten o'clock Saturday morning to have the note fixed up and he did not come until just about a quarter to 12 and we had to rush then to get down to get it into the bank. I did not take time to look at it until I was putting it in the deposit box and I noticed then it was Nine thousand dollars and something.

Q. Mr. Shaw: Yes, now you had told McElroy before this that you wanted to get this note renewed hadn't you, it was your suggestion that you should get a renewal of this note?—A. Yes.

Q. And so he came up and the amount was figured out in your apartment, he gave you this new note which is now exhibit 23 to you and you gave him back the $8,500 note, is that not right?—A. Yes.

Q. And then he drove you down to the bank so that you could put in the bank the $9,400 note which you had, which he had just given to you?—A. Yes.

Q. I notice that the original note for $8,500 was with interest at seven per cent. I believe there was an arrangement by which that was to be reduced to six per cent?—A. Yes, he asked me, he said you are only getting six per cent from others why do I have to pay you seven? I said, "You pay me up in September and you can have it for six too."

Q. The understanding was that he was to pay, although the note was taken for a year, he was to pay as much as he could or all of it if possible within, or all of it out of that year's crop?—A. Yes.

Q. Or from any other source I suppose?—A. Yes.

* * *

Q. Did you after that date (1st of August, 1931) at any time suggest to or discuss with any of the defendant bank officers, the matter of this wrongful taking by McElroy?—A. No, I just showed that note to the manager, that was all, and he told me to go to my solicitor.

Q. You are speaking of the Bank of Montreal?—A. Yes.

Q. I am speaking about the Imperial Bank?—A. I never was in there after.

Q. You never discussed with Chambers or Weaver or Mackie—A. After I got these notes from Mr. McElroy I was never in.

Q. It would be obviously clear in your mind that you never suggested the wrongful taking by McElroy?—A. No.

Q. And I assume from the evidence we already have had that you have never discussed it with any of the officers of the bank previously either?—A. Before that?

Q. Yes.—A. About the $8,500?

Q. I mean about the wrongful taking by McElroy without your authority?—A. No.

Q. That would be a correct statement I take it, Mrs. Begley?—A. Yes.

Q. And I suppose, Mrs. Begley, that it would be fair to say your first complaint to the bank would be through your solicitor, Mr. Taylor, that would be correct would it not?—A. My complaint to the bank, about the bank, yes.

Q. Or to the bank?—A. Yes.

* * *

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Cannon J.

Mr. Shaw: And that I believe must have been about October, 1932? —A. Yes.

It is said that

it seems little less than fantastic to ascribe to the appellant an intention to induce by her silence the course of conduct which was followed by the bank towards her friend McElroy.

With due respect, I cannot ignore her own letter of January 13, 1931, and her admission that she was telling lies in order to shield the latter.

Mrs. Begley, I show you this document, what is that, is that your signature?—A. Yes.

Q. That is a letter written by you to McElroy is it not?—A. Yes.

Q. Dated Calgary, January, 13th, 1931?—A. Yes.

Q. Mr. Shaw: I am going to ask to have this letter put in. (Document in question was then marked exhibit "24" and was read to the jury by Mr. Shaw).

Q. Now in connection with that communication in your examination for discovery I asked you at question 1383

"1383. Q. So you were telling these lies for the purpose of shielding McElroy, is that what you meant by that.—A. Well, it looks that way."

You still agree with that?—A. Yes, it was not just meant in those ways but I could not just explain how it was.

In *Scott* v. *Bank of New Brunswick* (1) this court held:

If payment is obtained from a debtor by one who falsely represents that he is an agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent.

The payment may be ratified and the agency adopted, even though the person receiving the money has, by his false representations, committed an indictable offence.

In this case also, the doctrine of ratification is invoked, to use the words of Chief Justice Strong, in the above case, at page 283,

for the purpose of fixing a party, by reason of his adoption of it, with the legal consequences of an act which, whatever may have been the circumstances which attended it and brought it about has a *de facto* existence.

The payment made to the bank with appellant's money is a substantial act susceptible of ratification; and for two years after she heard what McElroy had done with the $8,500 cheque she never complained or advised the bank of her intention to deny the loan to McElroy; and, moreover, she repeatedly, by renewing the notes and exacting interest, adopted and ratified the alleged loan of her money by McElroy in order to pay the bank. It would be difficult to conceive stronger acts of ratification than those in evi-

(1) (1894) 23 S.C.R. 277.

dence in this case. Surely, to paraphrase the late Chief Justice Strong, if an agent, after converting to his own use moneys received from the principal's debtor, undertakes to pay to the principal money to the same amount that which he has received from the principal's debtor in assumed discharge of the debt, the principal could not afterwards, while retaining the money, compel the debtor to pay a second time. In such a case, the receipt of the money from the fraudulent agent would be such a recognition of the agency as to place the debtor in the same position as if the pretended agent had had full authority to keep the money at the time he received payment from the debtor. What difference, in principle, can there be between actual receipt of money and accepting notes bearing interest, as appellant did in this case? Having secured from McElroy these notes for the amount of the supposed loan, the appellant cannot keep those notes and, at the same time, ask her debtor, the respondent, to pay her a second time the amount paid to McElroy under the power of attorney, even if the latter at first did more than what he was authorized to do as her agent. These facts reveal a conduct that is only consistent with a waiver of her complaint against the bank. In this case, to hold that appellant has not waived the alleged lack of authority of McElroy would be to allow her to take up the inconsistent position of at once "approbating and reprobating."

Lord Blackburn, in the case of *McKenzie* v. *The British Linen Co.* (1), says:

> It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another.

Chief Justice Strong, in the same case of *Scott* v. *The Bank of New Brunswick* (2), said that the distinction between ratification and estoppel is well pointed out in a case of *Forsyth* v. *Day* (3), where it is said:

> The distinction between a contract intentionally assented to or ratified in fact and an estoppel to deny the validity of the contract is very wide. In the former case the party is bound because he intended to be; in the latter he is bound, notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treat him as legally bound. In one case the party is bound because the contract contains the necessary ingredients to bind him including a consideration. In the other he is not bound for these reasons but because he has permitted the other party to act to his prejudice under

(1) (1881) 6 App. Cas. 82, at 99. (2) (1894) 23 Can. S.C.R. 277.
(3) (1858) 46 Me. 176, at 196.

1934

BEGLEY v. IMPERIAL BANK OF CANADA.

Cannon J.

such circumstances that he must have known or be presumed to have known that such party was acting on the faith of his conduct and acts being what they purported to be without apprising him to the contrary.

Does justice require, as between the parties before us, that their rights and liabilities should be determined, so far as this particular transaction, the subject of our investigation, is concerned, on the assumption that a certain fact, or state of facts is true, whether in fact it be so or not? Can the bank exact from the appellant an admission that the loan to McElroy actually took place, or was at least confirmed and ratified? Was the appellant legally in duty bound, when she discovered the alleged fraud of McElroy, to tell the truth to the bank immediately? By reason of such breach of duty towards the bank, has the latter sustained damages? If so, has the bank, however negligent it may have been at the outset, been misled afterwards to believe that McElroy's representation that the money was being loaned to him by the appellant was true? In other words, are the respondents, in the circumstances of this case, entitled to set up an estoppel?

According to the plaintiff, she became aware, in June 1930, of the fact that McElroy paid his own debt to the bank with moneys drawn from her account under the power of attorney. There is no doubt that at that time she was, either from friendship or love, disposed to help and shield McElroy and did not want, by disclosing the true facts, to bring trouble between him and the bank. She deliberately refrained from speaking to the bank and did not and would not have the latter debit McElroy's account with the amount which might have been reinstated to her credit. She made a loan of $1,400 to McElroy, to the bank's knowledge. She also accepted and withdrew from the bank the promissory note which was given by McElroy as an acknowledgment of the alleged loan. Her conduct amounts, in my opinion, to a representation intended to induce the bank to believe that McElroy was truly authorized by his principal to act as he did on the 29th of June 1929 and that his debt to the bank was definitely, well and truly paid, and that, therefore, the bank had no more reason to protect their interest against McElroy.

The bank, as a result of this conduct amounting to representation, refrained from pressing McElroy and missed at least during two crop years to collect from him any claim

that they might have revived against him if the payment made out of the appellant's funds had to be set aside. The act of the bank in crediting this amount to McElroy and giving up the security they held, and their omission from that date to take any action to collect their advances to him, would, if the plaintiff could now recover against the bank, evidently cause detriment to the letter.

I find here the essential factors giving rise to an estoppel as propounded by the House of Lords in the recent case of *Greenwood* v. *Martin's Bank* (1). At page 58 Lord Tomlin says:

> I do not think that it is any answer to say that if the respondents had not been negligent initially the detriment would not have occurred. The course of conduct relied upon as founding the estoppel was adopted in order to leave the respondents in the condition of ignorance in which the appellant knew they were. It was the duty of the appellant to remove that condition however caused. It is the existence of this duty, coupled with the appellant's deliberate intention to maintain the respondents in their condition of ignorance, that gives its significance to the appellant's silence. What difference can it make that the condition of ignorance was primarly induced by the respondent's own negligence? In my judgment it can make none. For the purposes of the estoppel, which is a procedural matter, the cause of the ignorance is an irrelevant consideration.

The above remarks apply aptly to this case. The bank may have had more or less good reasons to believe McElroy's statement that he had procured a loan from the appellant; if the latter did not loan the money, she, by her conduct, induced the bank to believe that she had actually loaned the money, or, if she had not really done so before the 29th of June, 1929, that she had ratified the transaction.

I would therefore, both on the ground of ratification and of estoppel, find in favour of the bank.

As far as the subsequent cheques totalling $2,500 are concerned, the authority of *Bryant* v. *Quebec Bank* (2), is amply sufficient to justify the payments by the respondent and we must agree with the unanimous findings of the Appellate Division.

The appeal should, therefore, be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Taylor & Taylor.*

Solicitors for the respondent: *Short, Ross, Shaw & Mayhood.*

(1) [1933] A.C. 51, at 57.

(2) [1893] A.C. 170.