1934

*May 10, 11
*Dec. 12

M. A. HANNA COMPANY (PLAINTIFF) APPELLANT;

AND

THE PROVINCIAL BANK OF CANADA (DEFENDANT) ..... RESPONDENT.

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

Banks and Banking—Trusts and trustees—Agency—Negotiable instruments—Estoppel—Coal shipped to dealer under consignment agreement—Proceeds of dealer's sales paid into dealer's bank account—Application of moneys in account towards payment of dealer's indebtedness to bank—Claim by original consignor against bank—Relationship between dealer and its consignor—Course of dealing—Conduct of the parties—Knowledge, bona fides, and rights, of bank.

E. Co., a coal dealer, was allowed a revolving line of credit by respondent bank, which held security by way of hypothecation under s. 88 of the *Bank Act* on its coal and a general assignment of book debts. Appellant company shipped coal to E. Co. under a consignment agreement whereby (*inter alia*) the title to and ownership of the coal should remain in appellant until sale thereof by E. Co., E. Co. was to keep appellant's coal separate and apart from other coal, E. Co. was to pay certain freight, insurance and other expenses, it guaranteed the payment for all sales made by it remaining unpaid for 120 days, its compensation for its services and expenditures consisted solely of surplus realized on its sales over appellant's regular circular of prices, and it was to account, with particulars, to appellant at specified times, and make payment in accordance therewith within 7 days thereafter, interest being chargeable on amounts not so paid. By the agreement as finally made, a clause, contained in an earlier document, that appellant's share should be collected first and the funds should not be confused, mixed or commingled with other funds of E. Co., but should be held separately and should immediately be deposited to appellant's account in a bank designated by appellant, was "cancelled and annulled." In practice E. Co. deposited the proceeds of sales of all coal, including appellant's coal, in one account in respondent bank, and made its payments to appellant by cheques upon its general checking account in that bank. Certain moneys and negotiable instruments (drawn or taken in E. Co.'s name) received by E. Co. from sales of appellant's coal and deposited in the bank during a time immediately preceding E. Co.'s going into bankruptcy, were applied by the bank against E. Co.'s indebtedness to it. Appellant claimed that the bank was not entitled to these as against appellant; that the moneys, etc., were in E. Co.'s hands subject to a fiduciary obligation to appellant, that this fiduciary obligation was transmitted to the bank with the moneys, etc., the bank having, it was alleged, received them with notice of the obligation and with knowledge that the application thereof by E. Co. in liquidation of its debt to the bank would be a breach of that obligation.

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes, JJ.

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Held: Appellant's claim failed.

Per Duff C.J. and Crocket J.: Even assuming that the proceeds of sales of appellant's coal were, as between E. Co. and appellant, held subject to a fiduciary obligation to appellant, that the bank had knowledge that the deposits of such proceeds were earmarked, and that the bank manager knew of the existence of a "consignment agreement," yet appellant's conduct precluded it from claiming the moneys as trust moneys; from disputing that, as to the proceeds of sales, the relation between it and E. Co. was that of creditor and debtor and not of *cestui que trust* and trustee. Appellant, in consenting to the deposit of the proceeds of the sales of its coal in E. Co.'s account, mixed with E. Co.'s moneys, combined with E. Co. in representing to the bank that these proceeds, so deposited, were not subject to any trust, but were moneys which E. Co. was authorized to deal with on the footing of moneys loaned to it by appellant. There was nothing in the evidence to displace the presumption that the bank followed the natural course in such circumstances, and treated the moneys as any reasonable person in appellant's position must have expected them to be treated, viz., as moneys placed at the disposition of E. Co.

Per Rinfret J.: The agreement between appellant and E. Co. allowed E. Co. to deposit the proceeds of sales in E. Co.'s general account and to use such proceeds (and dispose of them as its own) between the settlement dates, subject only to the obligation of remitting payments to appellant at the specified times; therefore E. Co.'s relation to appellant, as to such proceeds, was not that of agent or trustee, but the relation was that of debtor and creditor. On this ground alone appellant failed. But further, on the evidence in the case, there were no circumstances likely to arouse the bank's suspicion that E. Co. was depositing appellant's money or using its funds without right.

Per Cannon J.: Under the agreement E. Co. could, and did, mix with its own moneys the proceeds of sales of the coal supplied by appellant and use such proceeds for the purposes of its own business, provided it made the periodical payments under the agreement. In respect of such proceeds E. Co. was not a trustee but merely a debtor. Therefore, even had the bank been put upon enquiry and become fully acquainted with the arrangement between appellant and E. Co., it could have said that there was no trust which it was bound to recognize. And the evidence did not show any bad faith on the part of the bank.

Per Hughes J.: On the evidence it must be taken (and the findings at trial were not sufficient in their extent to contradict) that the bank took the money and negotiable instruments in good faith and for value, and with no knowledge of unauthorized application thereof by E. Co.; and therefore—regardless of whether E. Co. was a debtor or trustee of appellant in respect of the proceeds of sales of appellant's coal—in view of the established rules of law with regard to dealings in money and negotiable instruments between parties in such a position as E. Co. and the bank, the appellant's claim against the bank could not succeed.

Henry v. *Hammond,* [1913] 2 K.B. 515; *London Joint Stock Bank* v. *Simmons,* [1892] A.C. 201; *Thompson* v. *Clydesdale Bank,* [1893] A.C. 282; 62 L.J.P.C. 91; and other cases, cited.

Judgment of the Appeal Division of the Supreme Court of New Brunswick, 8 M.P.R. 138, affirmed.

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APPEAL by the plaintiff from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1) which reversed the judgment of Hazen C.J. (2) who held (as expressed in the formal judgment):

that all moneys received by the defendant from the Eastern Coal Docks, Limited, from March 3rd, 1932, to the date of the bankruptcy of the Eastern Coal Docks, Limited, in the form of money, cheques, promissory notes and bills of exchange by way of deposit, discount and collection, and which were the proceeds of the plaintiff's coal sold by the Eastern Coal Docks, Limited, were the property of the plaintiff, for which the defendant must account and pay to the plaintiff.

The Appeal Division allowed the defendant's appeal, with costs, and ordered entry of judgment dismissing the plaintiff's claim, with costs.

The material facts of the case are sufficiently stated in the judgments now reported. The plaintiff's appeal to this Court was dismissed with costs.

C. F. Inches K.C. for the appellant.

A. N. Carter for the respondent.

The judgment of Duff C.J. and Crocket J. was delivered by

DUFF C.J.—I have come to the conclusion that the appeal should be dismissed. The ground upon which that conclusion is based can be stated briefly.

The Eastern Coal Docks, Limited, were acting as factors for the appellants in the sale of their coal during a period which, I shall assume, lasted from May, 1931, until the Coal Docks went into bankruptcy in the spring of 1932. A draft agreement was drawn which is dated the 1st of May, 1931, the pertinent clauses of which are these:

The Factor agrees to receive as full compensation for all its services and expenditures such surplus amounts as the Factor may obtain and collect in excess of the Principal's regular circular of prices in effect at the time of shipment f.o.b. shipping point as aforesaid and to look for payment solely to such surplus so realized and collected from such sales made by the Factor. Such compensation shall not be deducted by the Factor until the Principal's share of such sale has been collected and paid to the Principal.

The Factor agrees to collect, as agent of the Principal, all accounts for coal sold by the Factor hereunder, it being understood that the Factor shall acquire no right to any such moneys so collected or to become due on such accounts, except as to said surplus.

(1) 8 M.P.R. 138; [1934] 2 D.L.R. 471.

(2) 6 M.P.R. 426.

The Principal's share shall be collected first as aforesaid, and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the or such other bank or banks as the Principal shall designate.

Every four weeks the Factor shall notify the Principal the amount of such collections and deposits and also the amount of any and all accounts remaining unpaid.

The Factor hereby guarantees the payment of all sales of coal made by it hereunder, and agrees that any account for coal sold hereunder which shall remain unpaid for a period of one hundred and twenty (120) days, shall be deemed uncollectible, and the Factor shall thereupon make return and pay to the Principal on such account in the same manner as if collection had actually been made.

* * *

The Factor will keep said anthracite coal separate and apart from all other coal and commodities, * * *

* * *

The title to and ownership of all the coal shipped hereunder shall be and remain in the Principal until sale thereof by the Factor.

This agreement does not appear to have been executed by the Coal Docks. On the 24th of April, 1931, it was sent by Blizard, the President of the Coal Docks, to the appellants. On the 19th of June, 1931, it was returned to Blizard with some changes which are not material signed by the appellants. On the 11th of November, 1931, the formal agreement governing the relations of the parties at the material times was executed. It is convenient to reproduce it textually:

Agreement, made this 11th day of November, 1931, by and between the M. A. HANNA COMPANY, a corporation duly organized and existing under and by virtue of the laws of the state of Ohio, one of the United States of America, and having its head office at the city of Cleveland, in the state of Ohio, party of the first part, hereinafter called the "Principal," and EASTERN COAL DOCKS LIMITED, a corporation duly organized and existing under and by virtue of the laws of the province of New Brunswick and having its head office in the city of Saint John in said province, party of the second part, hereinafter called the "Factor."

WITNESSETH:

Whereas, under date of May 1, 1931, the parties hereto entered into a certain factor's agreement with reference to the sale of coal by the Factor as agent for the Principal,

Whereas, through inadvertence, the said factor's agreement provided that it was to run from date thereof, to wit, the first day of May, 1931, until the 31st day of March, 1932, although the intention of the parties was that said factor's agreement should cover all coal shipped by the Principal to the Factor after November 1st, 1930, and certain coal was delivered prior to May 1, 1931, and

Whereas, it is desired to amend said factor's agreement with respect to the manner of accounting by the Factor to the Principal for the proceeds from coal sold.

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Now, therefore, it is agreed by and between the parties hereto that said factor's agreement of May 1, 1931, shall be and the same is hereby amended as follows:

The term of said agreement shall be from November 1, 1930, to the thirty-first day of March, 1932.

In lieu of making payments to the Principal as in said factor's agreement provided, the Factor shall account to the Principal regularly in periods covering four (4) weeks' operation, giving kinds, sizes and amounts of all coal sold and delivered and the total sales money value thereof, also the amount in dollars of the collections made, and the amounts by periods of all customers accounts receivable representing sales made less than one hundred and twenty (120) days prior to the end of said period.

Of the amounts so collected the Factor shall remit to the Susquehanna Collieries Limited, Montreal, on behalf of the Principal, a remittance determined in the following manner:

Value of all coal shipped hereunder at Principal's regular circular of prices in effect, at time of shipment f.o.b. shipping point, as in said factor's agreement provided or such other value as may from time to time be mutually agreed upon	$	
Plus freight paid by Principal from shipping point to vessel	$	
Total		$
Less previous remittances		$
Balance		$
Less value of Principal's coal on Factor's dock calculated as follows: (each size and grade to be calculated separately)		
Average value of Principal's coal per ton, in effect at the time of shipment, as shown on consignment memorandums	$	
Freight rate per ton	$	
Marine insurance per ton	$	
Steamer rate per ton	$	
Customs duty per ton	$	
Stevedoring per ton	$	
Total per ton value	$	
Inventory.....tons at $....per ton		$
Accounts receivable representing sales made within one hundred and twenty (120) days		$
Total		$
Amount of remittance		$

The Factor shall make payments of such accounts and remittances in time for them to arrive in Montreal not more than seven (7) days after the last day of each accounting period. The Principal shall be entitled to interest at the rate of six per centum (6%) per annum on the amount so due from said seventh day until paid.

All bills covering coal sold hereunder by Factor shall be invoiced by Factor, "EASTERN COAL DOCKS, LIMITED, agent for the M. A. Hanna Company."

That part of said agreement dated May 1st, 1931, which reads:

"The Principal's share shall be collected first as aforesaid and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the.....or such other bank or banks as the Principal shall designate."

shall be and the same is hereby cancelled and annulled.

Except as herein specifically amended said factor's agreement of May 1, 1931, shall be and remain in full force and effect.

The Coal Docks proceeded to sell coal under this arrangement. They kept one account with the respondent bank in which they deposited their own moneys and the moneys of the appellants received from the sale of their coal. Returns and remittances were made pursuant to the agreement down to the 15th of March, 1932. On that date the final remittance was made, and it appears to have covered everything to which the appellants were entitled up to the 3rd of March, 1932. During the months of March and April, the Coal Docks paid into their account moneys received from the sale of the appellants' coal and these moneys were applied by the respondent Bank in liquidation of the indebtedness of the Coal Docks.

On behalf of the appellants, it is contended that these moneys were in the hands of the Coal Docks subject to a fiduciary obligation to them, that this fiduciary obligation was transmitted to the Bank with the moneys; the Bank having, it is alleged by the appellants, received the moneys with notice of the obligation and with knowledge that the application of these moneys by the Coal Docks, in liquidation of their debt to the Bank, would be a breach of that obligation.

By the agreement of the 1st of May, it was provided, as we have seen, that the appellants' share in moneys due upon sales "should be collected first," and that these funds should "not be confused, mixed or commingled with other funds" of the Coal Docks, but should "be held separately and * * * immediately be deposited to the account of" the appellants at a bank to be designated by them.

By the agreement of November 11th, this last mentioned clause was explicitly "cancelled and annulled." In lieu thereof, these two clauses appear:

In lieu of making payments to the Principal as in said factor's agreement provided, the Factor shall account to the Principal regularly in periods covering four (4) weeks' operation, giving kinds, sizes and amounts of all coal sold and delivered and the total sales money value

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thereof, also the amount in dollars of the collections made, and the amounts by periods of all customers accounts receivable representing sales made less than one hundred and twenty (120) days prior to the end of said period.

* * * *

The Factor shall make payments of such accounts and remittances in time for them to arrive in Montreal not more than seven (7) days after the last day of each accounting period. The Principal shall be entitled to interest at the rate of six per centum (6%) per annum on the amount so due from said seventh day until paid.

It is not disputed that, in agreeing upon the terms of the contract of the 11th November, the parties contemplated that the Coal Docks should follow the course they did actually pursue, in depositing moneys received from sales of the appellants' coal with their own moneys in the same account.

I do not think it is necessary to determine whether or not the moneys so deposited, which were the proceeds of the sales of the appellants' coal, were, as between the Coal Docks and the appellants, held subject to a fiduciary obligation to the appellants. It is not necessary for the purposes of this appeal, in my judgment, to decide whether or not, in an action between the appellants and the Coal Docks, for example, the Coal Docks could have set up the Statute of Limitations in answer to the action. I have come to the conclusion that the conduct of the appellants precludes them from disputing that, as regards the proceeds of the sales, the relation between them and the Coal Docks was that of creditor and debtor, and not the relation of *cestui que trust* and trustee.

I accept, for the purposes of this judgment, the finding of the learned Chief Justice, in which he imputes knowledge to the Bank that the deposits of the proceeds of the sale of the appellants' coal were earmarked. I accept his finding also that the manager knew of the existence of a "consignment agreement." The appellants, in my judgment, in consenting to the deposit of the proceeds of the sales of their coal in the Coal Docks' account, mixed with the Coal Docks' moneys, combined with the Coal Docks in representing to the Bank that these proceeds, so deposited, were not subject to any trust, but were moneys which the Coal Docks were authorized to deal with on the footing of moneys loaned to them by the appellants. I have carefully examined the whole of the evidence, and,

accepting the finding of the learned Chief Justice, there is, I think, nothing in the evidence to displace the presumption that the Bank followed the natural course in such circumstances, and treated these moneys as any reasonable person in the position of the appellants must, I think, have expected them to be treated, viz., as moneys placed at the disposition of the Coal Docks.

I do not think it is necessary to consider whether or not the reasoning followed by Lord Selborne in *Towle* v. *White* (1), by Lord Justice James and by Lord Justice Mellish in the same case (*Ex parte White; In re Neville* (2)), would, in view of the explicit provisions of the documents, apply to this case, and govern the reciprocal rights of the parties themselves. It is sufficient, for the disposition of this appeal, that the appellants by reason of their conduct are precluded from claiming these moneys as trust moneys.

The appeal should be dismissed with costs.

RINFRET J.—The appellant's contention that it is entitled to claim as its own certain bills of exchange, promissory notes and money received by the respondent bank from Eastern Coal Docks, Limited, (hereinafter called the Docks Company) is professedly based on two written documents dated May 1st and November 11th, 1931.

The document dated November 11th was really the final outcome of the negotiations between the appellant and the Docks Company initiated by the document dated May 1st. On the evidence, there is abundant justification for the statement of Grimmer, J., speaking for the majority of the Appeal Division, that

> As a matter of fact, though the consignment agreement was executed by the Eastern Coal Docks Ltd. at an earlier date, yet the correspondence between these parties and their principals shews that it was not intended to take effect without alterations which were not finally made until 11th November, 1931.

Moreover, the transactions between the Docks Company and the respondent bank, which are put in question by the appellant, all took place on and after March 3rd, 1932. This was several months after the execution of the second document which, to all appearances, would be the governing agreement during the material period of time.

(1) (1873) 29 L.T. 78.

(2) (1871) 6 Ch. App. 397, at 399, 400, 404-5.

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It is, however, interesting—and it seems to me very important for the purposes of this case—to compare the May document and the November document. In November, the parties, instead of drafting a new document, proceeded by the more complicated method of inserting in their agreement some of the provisions of the earlier document by mere reference thereto and of setting out in full only the amendments they had definitely agreed upon as a consequence of their negotiations. And the result of the case depends upon the true effect of these amendments on the contract finally arrived at.

Long previous to the 1st of May, the appellant had been supplying coal to the Docks Company on a buy and sell basis.

The proposition contained in the May document was that the appellant would undertake to furnish anthracite coal to the Docks Company f.o.b. vessels at certain coal piers at Philadelphia or New York City. The Docks Company was to pay all freight, transportation and discharging charges on the coal, including cargo insurance and also all the assessments, licences, rent, storage and sale expenses and all charges of whatsoever nature incurred within the Dominion of Canada. It was further to insure the coal in the name of the appellant.

The Docks Company was to use its best efforts to sell the coal; and, until the sale thereof, the title to and ownership of all the coal shipped was to remain in the appellant.

The company was to receive as full compensation for all its services and expnditures such surplus amount as it might obtain and collect in excess of the appellant's regular circular of prices in effect at the time of shipment, and to look for payment solely to such surplus so realized and collected from the sales made by the company.

The company guaranteed the payment of all sales of coal made by it remaining unpaid for a period of 120 days; the company agreeing thereupon to make return and pay to the appellant on such sales in such manner as if collection had actually been made.

There were numerous other provisions mainly concerned with the relations of the parties at the termination of the agreement and which are not material here.

But special attention must be given to the clauses of the agreement dealing with the collection of moneys and the remittance thereof by the Docks Company to the appellant. That question had been the main subject of discussion between them from May to November; and the amendments brought into the agreement definitely executed on November 11th were accepted on both sides as defining these matters about which up to that time the parties were not *ad idem*.

In the May document, the proposition was, to quote verbatim:

> The Factor agrees to collect, as agent of the Principal, all accounts for coal sold by the Factor hereunder, it being understood that the Factor shall acquire no right to any such moneys so collected or to become due on such accounts, except as to said surplus

(that is to say: the amount obtained in excess of the appellant's regular circular of prices already mentioned above).

> The Principal's share shall be collected first as aforesaid, and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the.....or such other bank or banks as the Principal shall designate.
>
> Every four weeks the Factor shall notify the Principal the amount of such collections and deposits and also the amount of any and all accounts remaining unpaid.
>
> * * *
>
> The Factor agrees upon receipt thereof immediately to endorse, assign and deliver to any bank chosen by the Principal and operating in the City of Saint John any and all promissory notes or other evidences of indebtedness representing and based upon such sales of coal to be held by said bank for collection subject to this agreement and as collateral to the sale price of said coal due the principal.

The agreement executed on November 11th departed from this system in a radical measure. In lieu of making payments to the appellant as was provided in the May document, and that is to say: by immediately depositing the funds to the account of the appellant at a bank which it was to designate; and in lieu of simply notifying the appellant every four weeks of the amounts of collection and of the deposits so made, the Docks Company was to account to the appellant in periods covering four weeks' operations

> of all coal sold and delivered and the total sales money value thereof, also the amount in dollars of the collections made, and the amounts by periods of all customers accounts receivable representing sales made less than 120 days prior to the end of said period.

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Of the amount so collected, the company was to remit to the appellant or on its behalf, only a portion thereof in a certain specified manner, into the details of which it is unnecessary to enter, except to note that it was not to include the accounts receivable representing sales made within 120 days, and that the company's equity in the coal (i.e. freight, insurance, steamers, customs duty, stevedoring and other charges paid by the company) was to be deducted.

The amount of the remittance was calculated in that way at the end of each period of four weeks' operations; and it was provided that the company

shall make payments of such accounts and remittances in time for them to arrive in Montreal not more than seven days after the last day of each accounting period.

The appellant was entitled to interest at the rate of 6 per cent per annum

on the amount so due from said seventh day until paid.

Finally, it was specially agreed that that part of the May document which read as follows:

The Principal's share shall be collected first as aforesaid and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the.....or such other bank or banks as the Principal shall designate.

" shall be and the same is hereby cancelled and annulled."

In my view, these were modifications going to the very essence of the relations between the appellant and the Docks Company. They were brought about through the negotiations extending from the 1st of May until the agreement was executed on the 11th of November.

In the meantime, the appellant's auditors had been in Saint John several days in an endeavour to find a working mode of operation; and the officials of both companies had had conferences with a view to obtaining arrangements satisfactory to each side. The method of calculating the remittances and also the method in which the funds collected would be dealt with by the Docks Company during the periods preceding remittance time were the methods recommended by the appellant's auditors and fully understood and accepted by the officials of the appellant.

The understanding was and the effect of the agreement was, more particularly in the light of the changes agreed to in November, that there was to be no special and sep-

arate account at a bank designated by the appellant and into which the funds were to be deposited, or to which the promissory notes and other evidences of indebtedness were to be endorsed, assigned or delivered, to be held by the said bank for collection. This is further confirmed in that, as a matter of fact, no such bank was ever designated by the appellant; and, as a matter of practice, the operations were never carried out in that way.

Under the agreement, both upon its construction and upon the way it was understood and carried out by the parties, the funds were not to be held separately, but they were allowed to be confused, mixed or commingled with the other funds of the Docks Company, and they were to be deposited or delivered, not at a special bank or into a special bank account, but into the general bank account of the Docks Company. The result is that in the meantime, that is, during the interval between periodic remittances, the Docks Company had the use of the funds as if they were its own and the appellant trusted to the company's ability to reimburse them in due course.

The appellant went into that agreement with complete understanding of its purport. The report of the appellant's auditors recommending the mode of operations adopted in the November agreement had drawn the attention of the appellant to the fact that this system of settlement would give the Docks Company the use of certain amounts from collections which would otherwise immediately be payable to the appellant. The appellant also knew, through the same report, that, as collections were made, they were deposited in a general bank account of the Docks Company. In point of practice, all remittances to the appellant without exception were made by means of cheques drawn by the Docks Company on this general account. The company never opened a special bank account, nor were they asked by the appellant to do so. No commercial paper was ever taken in the name of the appellant. The bills of exchange were drawn and the promissory notes were made in the name of the Docks Company. Consequently, of course, the appellant never received any. I repeat that each and every remittance the appellant received from the Docks Company was made in the form of a cheque drawn upon that company's general account. All these circum-

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stances showing how the agreement was carried out are strong indications of how the parties understood the agreement and support the view already expressed as to its intention and its meaning.

I, therefore, come to the conclusion that the agreement of November 11th allowed the Docks Company to deposit the proceeds of the sale of the appellant's coal in the Docks Company's general account and to use the proceeds thereof between the settlement dates, subject only to the obligation of remitting to the appellant a sum of money equivalent to the collections at the end of the remittance period agreed upon between the parties.

As a consequence, the relation of the Docks Company towards the appellant in respect of the funds collected was not that of agent or trustee, but the relation between them was that of debtor and creditor (*Henry* v. *Hammond* (1)). The Docks Company had the use of the funds and could dispose of them as its own; and, in that aspect of the question, it is, of course, immaterial whether they disposed of it in favour of the bank respondent or in favour of other persons.

On this ground alone, I think the appeal would fail; and it makes it unnecessary to discuss the further question whether the circumstances of the case were such that the bank was put on inquiry; for, in the words of Lord Herschell, in *The London Joint Stock Bank* v. *Simmons* (2):

> When it is said that a person is put on inquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from so doing. On the other hand, his position cannot be worse than it would have been had he made inquiry and been in possession of the result of it.

I feel, however, like Lord Macnaghten, in that same case (at p. 224), and I am unwilling to pass by in silence the question whether in the premises the bank was bound to inquire, lest I should seem to intimate a doubt for which, in my opinion, there is no occasion.

It should be remembered that, as far back as December, 1930, the bank and the Docks Company had entered into an agreement whereby the bank agreed to loan and advance to the company the moneys required for the purpose of enabling it to carry on and finance its coal business. In

(1) [1913] 2 K.B. 515.

(2) [1892] A.C. 201, at 220.

consideration of a revolving line of credit of $50,000 to be opened by the bank, the company agreed to give and did give the bank security by way of hypothecation, under sec. 88 of the *Bank Act*, and an assignment of all book debts due or thereafter to become due to the company. This was done on the security of all coal, coke and firewood then owned or which might be owned by the Docks Company, from time to time while any advance made under said credit remained unpaid, and which then or might thereafter be in or on the wharves, and warehouses, railway cars, freighters or property of the Docks Company or adjacent thereto in the city of Saint John. The agreement was duly filed in the office of the registrar of deeds, and, pursuant to it, the Docks Company transferred and assigned to the bank all debts, demands or *choses in action* then due or thereafter to become due.

Ever since December, 1930, as between the bank and the Docks Company, the business of the latter was conducted under the terms of the agreement so entered into and so registered. From the inception, in December, 1930, and, in my view, for the whole period extending up to November 11th, 1931, the Docks Company's business was placed on the basis that they purchased their coal from the wholesale dealers, and they were strictly the owners thereof. The appellant, no doubt, attempted in the November agreement to make its terms retroactive from November 1st, 1930; but it is needless to say that it was not within the power of the parties to that agreement to make those terms effective against the respondent and thus summarily set aside the rights already vested in the bank.

In July, 1931, the bank was approached by the Docks Company with a view of finding out upon what terms it would be willing to finance a plan of business whereby the appellant would ship its coal to the Docks Company on a consignment basis. As a result of the interviews had and the correspondence exchanged between the company and the local manager of the respondent at Saint John, the company was told that the bank did not approve the plan and that, pursuant to express instructions from the bank's head-office, if the company entered into the proposed agreement with the appellant, it would have to transfer its account to another bank.

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I do not think anything can be made out of the fact that, in his last letter of instructions to the local manager in Saint John, the bank's general manager finally yielded to the idea that a trial of the proposition might be made for a few months, as it is not shewn that this suggestion was ever communicated to the officials of the Docks Company. In point of fact, no understanding of any kind in connection with shipments of coal on a consignment basis is proven to have been arrived at between the manager of the local branch and the Docks Company. As between them, upon the evidence, matters were left where they stood when the company was told that, if they went into the consignment agreement with the appellant, they would have to take their account to another bank.

The bank was never shown either the document of May 1st or the agreement of November 11th; and it was never made aware of its contents. Matters went on as between the bank and the company in the same way as they had been going on before. Moneys were deposited as usual in the same general account. Bills of exchange and promissory notes were drawn or made exclusively in the name of the Docks Company. There was nothing to bring home to the bank that anything had been changed in the company's business, or that they had entered into a factor's agreement. And this is true of the whole dealings up to the very end.

The appellant laid much stress on the fact that for a certain time, in 1931 and 1932, the Docks Company was in the habit of making two deposits daily accompanied by two separate deposit slips on which certain notations appeared. There were also certain markings on the bills and promissory notes discounted by the bank. It was strongly urged that this was of a nature to arouse suspicion.

I confess my inability to agree with the suggestion. The two daily deposits were made in the general bank account in existence from the beginning of the operations, and the practice of making the notations on the deposit slips had started long before the date of the consignment agreement with the appellant. These markings or notations were not brought to the attention of the responsible officials of the bank. When heard at the trial, they testified that they had not noticed them; and all witnesses having a knowl-

edge of banking practice stated these markings or notations were usual; they were made by customers for office records and they conveyed no meaning to the bank. No attempt was made to shake that testimony by adducing evidence to the contrary. It was rather the other way, the Docks Company's officials and employees all stating that they did not attach any importance to these markings and they were put there merely for office checking purposes.

Such were therefore the circumstances. Never at any time was the bank told that the Docks Company were in fact operating on consignment for anybody. After the consignment agreement, there was no apparent change in the company's usual method of banking. The president of the company had told the bank, indeed had written to the bank that, if the proposed arrangement was effected, the receipts would be deposited in another bank, or, at least, in a separate bank account and notes or drafts would be endorsed over to that bank or to that account; also that the drafts and notes would be made by the Docks Company as agents. Nothing of that character was ever done.

The bank had told the Docks Company that, in case the consignment agreement was executed, the company would not be allowed to mix the funds and it would have to carry its account to another bank. There is no evidence of any subsequent interview having taken place after that between the company's officials and the bank's local manager. As late as September 29th—and, therefore, more than two months after the last letter exchanged or the last interview between the president of the Docks Company and the bank manager—the monthly statement sent by the company continued to show the anthracite coal as being still subject to the bank's lien. The coal was not sold by the Docks Company ostensibly as agent. The commercial paper was not dealt with in such a way as to indicate that there was a principal. Everything pointed to the fact that the proposed arrangement had fallen through. Why should the bank become suspicious? Up till then, it had no reason to suppose it was not dealing with honest people. From these people the bank was receiving, as it had been in the habit of receiving for a long time before, moneys and negotiable instruments and it was taking them in the ordinary way to cover its current advances (See Lord Macnaghten in *Lon-*

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don Joint Stock Bank v. *Simmons* (1)). The bank had no reason to doubt they had full authority to dispose of these moneys or securities as belonging to them or as being at their disposal, or to pay them into their bank account. (*Thompson* v. *Clydesdale Bank* (2), *per* the Lord Chancellor at p. 288, *per* Lord Watson at p. 289). It need hardly be remembered that we are in the field of mercantile operations having to do with currency and with negotiable instruments, where "it is expedient and necessary that reasonable and safe facilities should be afforded" (*per* Lord Herschell in the *Simmons* case (3); and see *Union Investment Company* v. *Wells* (4)). Furthermore, we are discussing commercial transactions in moneys, bills and notes deposited or presented for discount by a company against whose goods, accounts, book debts, commercial paper and *choses in action* the bank held a general assignment. The bank was not to be expected to inquire into the source of the moneys deposited or into the authority of the Docks Company to draw the bills or to take the notes in its own name. In that respect, it could safely trust that the company's customers would not accept the bills or give the notes in that form if these bills or notes were not strictly in accordance with the true character of the transactions thereby represented.

The bank held its general assignment which, on its face, covered exactly the same kind of property in April, 1932, as in December, 1930, at the beginning of its operations with the Docks Company. It had every reason to assume that if the Docks Company went into any agreement with some outside party of a nature in any way to affect the comprehensive rights it held under the assignment, this would not be done without its consent and even its participation. In addition, there was the fact that the proposition had been actually submitted to the bank and turned down by it; and the further fact that, the proposition having been so turned down, the bank heard nothing about it subsequently.

The appellant points to an odd sentence in a vague conversation, and, of course, to the notations and the marks

(1) [1892] A.C. 201 at 225.
(2) [1893] A.C. 282.
(3) [1892] A.C. 201 at 217.
(4) (1908) 39 S.C.R. 625, at 636.

already adverted to and also to the fact that at a certain time the monthly statements sent by the Docks Company to the bank failed to show anthracite coal. I do not see that these facts had any real significance, more particularly having regard to the general trend of events proved in this case. " It is easy enough," as was said by Lord Herschell in the *Simmons* case (1),

> to make an eleborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations.

And, in my view, the same thing may be said of the respondent. I cannot find, in the present case, evidence of circumstances likely to arouse the suspicion that the Docks Company was depositing the appellant's money or using its funds without right—far less, if such a condition be required for the appellant's success, evidence of circumstances reasonably giving rise to " a suspicion of something wrong combined with a wilful disregard of the means of knowledge " (*per* Willes, J., in *Raphael* v. *Bank of England* (2)), or evincing " a design or fixed purpose to avoid knowing " (*per* Lord Selborne in *The Agra Bank* v. *Barry* (3)).

All this discussion, however, in my view of the case and as already stated, is only supplementary. I have felt that I should express myself on the subject because of the argument addressed to us by the appellant, but my view is that, in respect of the funds in dispute, the true relations between the appellant and the Docks Company were those of debtor and creditor, with the consequence that the appellant has no just and valid claim against the respondent.

I conclude that the appeal ought to be dismissed with costs.

CANNON J.—This is an appeal from the judgment of the Supreme Court of New Brunswick reversing the decision of the trial judge, Hazen, C.J., who declared the title to certain moneys and negotiable instruments paid to and discounted with the respondent by the Eastern Coal Docks, Ltd., and being the proceeds of retail sales of hard coal shipped in wholesale lots by the appellant to the Eastern

(1) [1892] A.C. 201, at 223. (2) (1855) 17 C.B. 161, at 174.
(3) (1874) L.R. 7 E. and I. App. 135.

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Coal Docks Ltd., to be in the appellant, and ordered a reference to determine the amount of damages. The Court of Appeal held that these moneys and negotiable instruments belonged to the respondent, (1) as transferee from the Eastern Coal Docks Ltd. when owner, and (2) as a *bona fide* holder for value.

In December, 1930, the Eastern Coal Docks Ltd., while carrying on a hard and soft coal business in Saint John, N.B., buying coal from wholesale dealers, including the appellant, and selling it locally, made an arrangement with the respondent under which it was granted a revolving line of credit of $50,000 for its fuel business on the security of a hypothecation under s. 88 of the *Bank Act* on all its coal and also on a general assignment of its book debts and various powers in connection with the loans and security.

Two accounts were opened by the respondent under the arrangement: (*a*) The company's checking account into which the respondent paid the loans made under the credit and on which the company could draw cheques; (*b*) The bank's security account, against which the Eastern Coal Docks Ltd. could not draw cheques, but in which it deposited the proceeds of its sales of coal, whether cash, notes or drafts, which were taken by the respondent and deducted from the loan then outstanding.

When the Eastern Coal Docks Ltd. made this banking arrangement, it was purchasing and continued to purchase anthracite coal outright from the appellant.

In July, 1931, the company informed Mr. Harper, the respondent's manager at Saint John, that they contemplated an arrangement to sell appellant's coal on consignment.

After corresponding about this proposal with the general manager in Montreal, Harper wrote Blizard, the President of the Coal Company, that the bank would have to call all loans made to the company and close their account if the company entered into the arrangement as disclosed. They intimated, however, that, if the company would segregate the consignment coal from that subject to the bank's lien, would place drafts for the consignment coal for collection only and remit the proceeds only upon payment and not by way of discount, the bank might consider the proposal; otherwise not.

Thereupon, on July 25th, Blizard undertook, in the event of the proposal being acted upon, to deposit the receipts in a separate bank account and to endorse the notes or drafts to the bank for collection only and deposit after payment.

After further correspondence, the head office in Montreal was willing to make a trial of the proposal outlined in Harper's letter of July 27th to Mr. Roy, which said:

> We will have a separate account on our books, in which moneys received from the sale of this coal will be deposited, * * * [The drafts] will be placed for collection only, and our customers will make these drafts as agents.

It is clear that no consignment arrangement had then been made with the Eastern Coal Docks Ltd., as on that same date, August 12th, the coal company sent a list of accounts to be paid to the bank and wrote:

> In addition to the above, we have a stock of American anthracite here, approximately $51,500, which will become part of the consignment agreement * * * *if we go into that deal with them.* On this basis M. A. Hanna Company would have an equity in this coal for its invoice value $42,728.03, but at the present time this $42,728.03 stands as an Account Payable and the stock of coal as part of your security under Section 88.

In August also Mr. Robinson, the Assistant Manager of the respondent at Saint John, under Mr. Harper's instructions, told Mr. Thompson, the Secretary Treasurer of the company, that the bank could not allow them to mix the Hanna funds with their own; and Thompson promised that he would not.

The suggested proposal, so far as the bank was informed, was not acted upon. The statement forwarded by the Eastern Coal Docks Ltd., under date of September 29, showing 2,320 tons of American anthracite on hand on September 17th, and therefore subject to the bank's lien, would confirm the fact that the proposed consignment arrangement had not yet been effected. It was only on November 11th that a definite arrangement was made with regard to the sale on consignment of coal by the appellant to the Eastern Coal Docks Ltd. The radical changes made to the proposal bearing date May 1st were to the following effect:

(*a*) The Eastern Coal Docks was to account to the appellant regularly in periods covering four weeks' operation, giving amounts of coal sold, amounts in dollars of the collections made, and the amounts by periods of all customers'

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accounts receivable representing sales made less than one hundred and twenty (120) days prior to the end of said period;

(*b*) Of the amounts so collected, the Eastern Coal Docks Ltd. were to remit to the Susquehanna Collieries Limited, on behalf of the appellant, a remittance made up according to a certain schedule which included as a deduction accounts receivable made within 120 days and certain charges;

(*c*) The Eastern Coal Docks was required to make payments of the account and remittances in time to arrive in Montreal not more than seven days after the last day of each accounting period;

(*d*) The Eastern Coal Docks was required to pay 6 per cent interest on all overdue amounts;

(*e*) The following very important clause in the draft agreement dated May 1st, 1931, was cancelled:

> The Principal's [appellant's] share shall be collected first as aforesaid, and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the
> or such other bank or banks as the Principal shall designate.

From the foregoing facts, it is fair to say that up to and after November 11th, 1931, the appellant had allowed the Eastern Coal Docks to use the proceeds of the sale of the coal and to deposit them in the latter's general account, without restriction or complaint. The settlement of accounts between the appellant and its client gives the latter the use of an equivalent amount from collections which would otherwise be immediately payable to Hanna. The memorandum accompanying the report indicates that, at least up to the 17th September, 1931, the appellant allowed collections from customers to be made by the Eastern Coal Docks and deposited in their general bank account, and not in the appellant's name; and I believe that the agreement of November 11th approved this arrangement, as it relieves the Eastern Coal Docks of any obligation to deposit moneys in a separate account in the appellant's name and requires them only to remit every four weeks, not including accounts receivable representing sales made within 120 days.

Appellant's witness E. G. Thompson swears that either Mr. Baile, President of the Susquehanna Collieries Ltd., or Mr. Scott, the attorney of the appellant, said to Mr.

Blizard, when the agreement was completed in November, that the Eastern Coal Docks was to have the use or possession of the money between the settlement dates; and that the only gamble they were taking was the amount of one month's remittance. It would appear that the appellant was then quite content to permit its customer to collect the proceeds of the consignment coal, deposit the money in its own account and use it for its own purpose, provided that it made a remittance every four weeks calculated on the basis contained in the agreement of November 11th.

Between October, 1931, and March, 1932, The Eastern Coal Docks, in its own name and on its own account, drew cheques against the respondent in favour of Susquehanna Collieries, a subsidiary of the appellant, and representing remittances aggregating over $68,000. These cheques were positive notice to the appellant that the Eastern Coal was paying the proceeds of the consignment coal to the respondent and discounting drafts for its price with the respondent. As the appellant did not object to this procedure, or give the respondent notice that it objected to the payments so made, it would show the inanity of any suggestion that the Eastern Coal Docks in paying the moneys and cheques or negotiating the drafts and notes was doing so improperly or with a defective title.

The appellant, at page 21 of its factum, after discussing the situation, says:

> If these are the facts, there may have been no breach of trust in the Factor depositing the moneys in the general account in the first instance, but they were put there for an express purpose, with the knowledge of the bank manager, and the bank manager, who was undoubtedly watching the account, with knowledge of the beneficial ownership of the moneys in the plaintiff, was guilty of breach of trust in refusing to allow the Factor to remit to its principal at the end of the month; it converted the money to its own use with knowledge of the trust, and refused to allow the Factor to remit to its principal.

The trial judge found that the bank manager must have known that these moneys were the appellants' property, while the Court of Appeal found that the plaintiffs had failed to prove this essential element of their claim.

The remittances were made, through advances made by the respondent, until, in March, 1932, a representative of the Consolidated Coal, which had been selling to the Eastern Coal Docks soft coal, told the respondent's manager that

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they owned an unpaid claim of $28,000; and as Mr. Harper had learned shortly before that an English coal company had also a claim, he refused to make further advances, except for wages, after March. Early in May, 1932, the Eastern Coal Docks went into liquidation owing the bank about $7,000 above its securities.

In their statement of claim, the plaintiffs allege that on the 12th May and June 1st, 1932, by two letters, they notified the defendant that the moneys and securities deposited with them by the Eastern Coal Docks from March 3rd to May 8th, 1932, were the property of the plaintiffs and demanded the return thereof; and they allege that the defendant knew or should have known that said moneys, bills of exchange, promissory notes were the property of the plaintiffs.

Have the appellants proven their exclusive ownership and the knowledge which would deprive the respondent of the protection which it claims from the following sections of the *Bills of Exchange Act?*

3. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

53. (1) Valuable consideration for a bill may be constituted by

(*a*) Any consideration sufficient to support a simple contract;

(*b*) An antecedent debt or liability.

56. (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

* * *

(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

74. The rights and powers of the holder of a bill are as follows:

* * *

(*b*) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

It appears from the above quotation from the appellant's factum that the parties take the common ground that the Eastern Coal Docks Company committed no breach of trust in depositing the moneys and securities in their general account. Have the appellants proven their allegation that the respondent, through their manager's knowledge, became trustees and are now bound to pay

to the appellants the proceeds of the hard coal sold by their customer under their agreement?

To completely constitute a trust, four elements are required: (*a*) A trustee; (*b*) A beneficiary; (*c*) Property the subject-matter of the trust; (*d*) An obligation enforceable in Court of Equity on the trustee to administer or deal with the property for the benefit of the beneficiary. There must be an equitable interest based on a conscientious obligation which can be enforced against the legal owner of the property alleged to be the subject-matter of the trust. Otherwise there is no trust.

Appellant does not contend that an "express trust" was created by express terms. Can they contend that an "implied trust" existed from the conduct of the parties to this transaction? It is difficult for the court to consider that it was the intention of the parties that a trust should be created because, as pointed out above, the course of action of the appellant and the coal company in dealing with these securities and in accepting advances from the bank show that the latter had no intimation whatsoever that the deposit of these moneys and bills receivable to the credit of their customer was in any way objectionable to the appellants. Can it be said that a "*constructive*" trust arises in this case? Do we find a trustee having received in his capacity as trustee property which, though not composing an express trust, he is not entitled to retain for his own benefit? Or is this the case of a stranger to a trust having received property belonging to the trust in circumstances which do not entitle him to retain it as against the beneficiary? If either of these questions must be answered in the affirmative, such property would be held subject to a constructive trust for the beneficiaries under, and on the terms of, the original trust.

But, is there evidence of an original trust? Under the agreement, the coal company could and did mix with their own moneys the proceeds of the coal supplied by the appellant and use the proceeds for the purposes of their business, provided they made a payment to the appellant every four weeks. These facts, taken with the provision for the payment of interest on overdue remittances, which was subsequently (Jan. 21, 1932) insisted on by the appellant, and the form of the accounts accompanying the remit-

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tances, go far to show that the relation existing after, as well as before, November 11, 1931, was that of debtor and creditor. See *Henry* v. *Hammond* (1):

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he *is a trustee* of that money and must *hand it over to the person who is his cestui que trust.* If on the other hand *he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor.* All the authorities seem to me to be consistent with that statement of the law.

Halsbury's Laws of England (2nd Ed.), Vol. 1, p. 247, s. 420, says:

> Where money is intrusted to an agent by his principal or *received by him* on his principal's behalf, it depends upon the terms of the agency whether the agent is bound to keep the money separate or is entitled to mix it with his own. *In the former case the agent will be a trustee, in the latter a debtor.*

This case is distinguishable from *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co.* (2), because the money sought to be recovered did not come into the possession of the respondents owing to an unauthorized and improper use of the appellants' property. I would be inclined to find that we have here a mere debt arising out of transactions in respect of property, namely, coals, as to which property, no doubt, it may possibly be said that the coal company was in a sense a trustee. They were employed to sell the coals, and to receive the money for them; but they were under no obligation to keep the money so received as a separate fund, but were entitled to mix it with their own moneys, and they were merely debtors for the amount of the ultimate balance due, at the end of each period, as above detailed.

It cannot be said that the coal company fraudulently converted to its own use or fraudulently omitted to account, under the terms of article 355 of the *Criminal Code,* because it was agreed between the parties that the proceeds of the coals would form an item in a debtor and creditor account between the coal company and the appellant; and the latter relied only on the personal liability of the company as its debtor. The proper entry of the

(1) [1913] 2 K.B. 515, per Channell, J., at 521.

(2) [1912] A.C. 555.

proceeds of the coal in the accounts, according to the forms prepared by the appellant, was a sufficient accounting, and in such case no fraudulent conversion of the amount accounted for can be deemed to have taken place.

Therefore, even if the respondent had been put upon inquiry and had become fully acquainted with the arrangement between the appellant and the coal company,

it could have said that there was no trust which it was bound to recognize, for none was created by the instrument. So even if the [respondent's] manager was wilfully shutting his eyes to that which was visible to him, yet, had he looked at it, it would have done the [Bank] no harm.

I agree with the above quoted views of Grimmer and Richards, JJ., on this point and rely also on the authorities quoted by them.

Now then, if the idea of an original trust be eliminated, how can the appellant succeed? Is the constructive notice relied upon by the trial judge sufficient to make the respondents liable?

Their manager, Harper, was never informed that the Eastern Coal Docks had actually entered into a consignment agreement; their returns for August 12 and September 29 plainly showed that they had not; and no such agreement was in fact made until November 11th. There is no evidence that the draft or final agreement was ever communicated to the respondent. Harper, some time after November 11, became aware that the Eastern Coal Docks were receiving consignment coal when he noticed the segregation of the hard and soft. It may be said that he should have inquired at this stage into all particulars as to the consignment agreement. But he had the promise of both Blizard and Thompson and had made his own position quite clear. He was surely entitled to rely on their honesty and integrity without laying himself and the respondent open to a charge of fraud for having done so.

Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery.

per Bowen, L.J., in *Sanders* v. *Maclean* (1).

I agree with Grimmer, J., who observed also that

The learned Chief Justice has not found that Harper was acting in bad faith but has simply pointed out the things which he infers that he

(1) (1883) 11 Q.B.D. 327, at p. 343.

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knew or must have known. I cannot find in the evidence anything to convince me that the bank manager was acting *mala fide*. Had the learned Chief Justice found actual fraud or wilful shutting of the eyes of the manager I would have considered that it proceeded from his observation of the demeanour of the witness on the stand and would not have felt at liberty to interfere with it. But he simply finds knowledge of certain facts, which knowledge is not incompatible with good faith. The burden of establishing *mala fides* rests upon the plaintiff. I do not think that it has been discharged.

Mr. Harper may have been negligent in not distrusting Blizard and Thompson, but this falls far short of dishonesty which alone would affect the bank. See *Raphael* v. *Bank of England* (1). In *Agra Bank, Ltd.* v. *Barry* (2), Lord Hatherley said at pp. 154-155:

> To say that a suspicion of this sort must have crossed his mind, and that if he did not act upon this suspicion he is to be held guilty of a wilful determination not to have his eyes opened, would be to say what is not warranted. It would be perfectly monstrous to hold any doctrine of that sort. He is amply relieved from that by what had previously taken place.

Moreover, the appellant had been trusting Blizard and Thompson throughout, not even troubling to inform the bank of their alleged claim of ownership to the proceeds of the coal. The suggestion that Harper acted fraudulently because he did not distrust Blizard cannot avail.

> Kekewich, J. seems to have been under the impression that relying on the broker's honesty, did not alter the result. But to my mind it makes the whole difference.

per Lord Halsbury in *London Joint Stock Bank* v. *Simmons* (3).

> The only consideration likely to engage his [i.e. the bank manager's] attention is whether the security is sufficient to justify the advances required.

(*ibid*) per Lord Herschell at p. 223. Even if the bank manager knew that the hard coal came from the appellant, under some sort of consignment agreement entered into at a date that was ignored by him, that the company continued to make two bank deposits as had been their practice since June 1st, 1931, long before the alleged consignment agreement, this would not be sufficient to establish any bad faith in the respondent.

I also believe that the notations on the deposit slips and the prefacing of the ledger references on the requisition slips, drafts and notes in some instances with the let-

(1) (1855) 17 C.B. 161.

(2) (1874) L.R., 7 E and I. App. 135.

(3) [1892] A.C. 201, at pp. 210-211.

ters S (for Susquehanna) and H (for Hanna) are not sufficient to dispel the presumption of good faith of the manager, supported as it is by the sworn evidence of all witnesses heard on both sides. On their face, none of these notes were payable to the company as agents for the appellants. It would be very difficult to hold as a fact that these letters, used for the purpose they were, fixed the respondent with notice that they represented the proceeds of Hanna or Susquehanna coal. It would be contrary to the rule that constructive notice is not extended to commercial transactions. A person taking a negotiable instrument in good faith and for value obtains a title valid against all the world. And I believe, after reading carefully the record, that it discloses no evidence of bad faith; the appellant failed to satisfy me that there was anything that actually excited the suspicion in the bank manager's mind that there was something wrong in his transactions with the coal company, or in the latter's dealing with the appellant. Because of this absence of suspicion, the taker of these negotiable instruments cannot be said to be in bad faith, to have deliberately shut his eyes to the facts or to have put any suspicions aside without further inquiry. See *London Joint Stock Bank* v. *Simmons* (1), per Lord Herschell at p. 221.

In *Union Investment Co.* v. *Wells* (2), Duff, J., now Chief Justice of Canada, said at p. 648:

> The doctrine of constructive notice is not applicable to current bills and notes transferred for value, but in all cases when the good faith of the holder is in issue the question is a question of fact to be determined on the circumstances of the particular case;

The following statement of the rule by Lindley, L.J., concurred in by Lopes and Rigby, L.JJ., in *Manchester Trust* v. *Furness* (3), was recently adopted by the English Court of Appeal in *Greer* v. *Downs Supply Co.* (4):

> As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to

(1) [1892] A.C. 201.
(2) (1908) 39 Can. S.C.R. 625.
(3) [1895] 2 Q.B. 539 at 545.
(4) [1927] 2 K.B. 28

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investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country.

This rule as to constructive notice applies, if its application were required, equally to the notations on the deposit slips, to the cheques drawn on the respondent and to the ledger references on the requisitions, drafts and notes.

It may be said with fairness that the appellant, knowing, as it did, the imperative need of the coal company for banking accommodation, and receiving, as it was every month, very large remittances by cheques drawn on the respondent, refrained from informing the respondent of its claim to own the proceeds of the coal, either because it was treating in fact the account as a debtor and creditor account, or because it did not think it expedient to embarrass the coal company in its banking arrangement. Whatever may have been the appellant's motive, while prepared to take advantage of its failure to notify the respondent that it claimed ownership of moneys which it knew the Eastern Coal Docks was paying to the respondent, it now seeks to make the respondent responsible for a situation which was due to its own default. In such circumstances, it is clearly inequitable that it should succeed, for

> whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

per Ashhurst, J., in *Lickbarrow* v. *Mason* (1), a statement approved and adopted by the Privy Council in *Commonwealth Trust* v. *Akotey* (2).

It is too late now to try to bolster their claim by saying that the instrument established in their favour the ownership of the coal and of the proceeds thereof—this instrument may be binding between the parties, but does not bind the bank unless it knowingly acted contrary to it. The so-called "factor" was entitled to retain out of the proceeds of the sales a considerable equity, the transportation and insurance charges, the cost of unloading, storage and his profit. Was the bank called upon to investigate and make in each case a division of these proceeds between the appellant and the coal company? Evidently nothing of the sort could be reasonably expected. As pointed out by the Court of Appeal, although the parties employ the word

(1) (1787) 2 T.R. (Dunford & East's Reports) 63, at 70.

(2) [1926] A.C. 72, at 76.

"factor" in the agreement, yet, it is difficult to say, in point of law, that the coal company was a "factor" in the true sense. They have allowed the use or possession of the moneys received from their sales, and therefore the language of Cozens-Hardy, M.R., in *Weiner* v. *Harris* (1), is applicable:

It is quite plain that by the mere use of a well-known legal phrase you cannot constitute a transaction that which you attempt to describe by that phrase. Perhaps the commonest instance of all, which has come before the Courts in many phases, is this: Two parties enter into a transaction and say "It is hereby declared that there is no partnership between us." The Court pays no regard to that. The Court looks at the transaction and says: "Is this, in point of law, really a partnership? It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is."

Nothing has been placed before us to weaken the strength of the following part of the judgment of Grimmer, J.:

Had the bank been put upon inquiry as to the existence of this agreement more than its actual contents could not be presumed against them. Per Lord Herschell in Simmons case (2) at p. 732. The agreement provides that the company "guarantees the payment of all sales of coal made by it hereunder." It was to pay the plaintiff for any coal sold and unpaid for 120 days which was to be deemed uncollectable "as if such collection had actually been made." The company was to receive the difference between the plaintiff's circular of prices and its actual receipts as its compensation. That of itself would not prevent the relation of factor and principal from being established but nowhere in the agreement do we find that the company is to sell the coal ostensibly as agent. The few instances of sales given in evidence shew unmistakably that they sold in the name of the company and that commercial paper was not taken in the name of the plaintiff or in such a way as to indicate that there was a principal. Suppose that there were accounts uncollectable as defined by the agreement. If the company paid the plaintiff as if those accounts had been collected would not the moneys from a delayed collection belong to the company? Besides they were carrying on a soft coal business and it seems to me that if the bank had had full knowledge of the agreement each deposit would have required an audit to ascertain whether or not the plaintiffs had any interest in it. Besides the plaintiffs never required the clause of the agreement as to delivery "to a bank chosen by the principal of all promissory notes and other evidences of indebtedness representing and based upon the sales of coal," to be acted upon. They never named a bank and it is quite possible, judging from the correspondence, that this clause was intended to be deleted. At all events it never was acted upon. Then we have the four weeks' credit. The plaintiff recognized that that was, as one of the officers called it "a gamble." It is easy to apply the language of James L.J. in *Ex parte White: In re Nevill* (3), at p. 75. He says—

"Mr. Nevill was not to pay immediately. Even if he sold for cash Towle & Co. had no right to say 'you have sold the goods for cash, therefore hand over the moneys to us at once' for Nevill would have justly said,

(1) (1909) 79 L.J. K.B. 342, at 346.
(2) (1892) 61 L.J. Ch. 723.
(3) (1871) 40 L.J. Bank. 73.

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'No; the *bargain between us is that I am to give you an account at the end of the month and to pay you at the end of another month.* My selling for cash does not alter the nature of the bargain between you and me, or entitle you to call upon me to hand the *moneys over to you,* or to put the money *in medio* and keep them for you.' The proceeds of sale in fact were his own moneys and not trust moneys, and he was at liberty *to deposit them with a* banker or deal with them as he pleased."

See also same case, *sub nom, Towle & Co.* v. *White* (1), where Lord Selborne L.C. says—

"It was argued that this was the account of Towle & Co. and that the balance was to be treated as a trust fund belonging to them. When we trace back the sums brought into the account to their source, it appears that they were the proceeds of sales in the market to outside purchasers, effected by Nevill, of goods which he had received, under the circumstances presently mentioned, from Towle & Co. Now, if these contracts were all contracts made by Nevill as agent for Towle & Co., then, of course, the consequence would follow that the proceeds of these sales coming into this account would be the moneys of Towle & Co. But if these contracts were between the purchasers and Nevill, Nevill's contracts, contracts in which he was the person interested, then the proceeds of those sales were Nevill's, whatever liabilities he might be under to Towle & Co. in respect of the terms arranged between him and them."

I, therefore, reach the conclusion that the knowledge and conditions necessary to constitute the trust alleged by the appellant did not exist in fact; and, therefore, this appeal should be dismissed with costs.

HUGHES J.—This action was brought by the appellant against the respondent to recover the amount of certain sums of money and the proceeds of certain bills of exchange deposited by Eastern Coal Docks, Limited, in the account of the latter in the respondent bank. Eastern Coal Docks, Limited, for some years previous to its bankruptcy in May, 1932, had carried on a retail coal business at Saint John, New Brunswick. The appellant company was a coal dealer which in the latter part of the year 1930 began to sell hard coal to Eastern Coal Docks, Limited. The coal in question was called Susquehanna anthracite.

In December, 1930, Eastern Coal Docks, Limited, began its banking business with the respondent. A line of credit of $50,000 was arranged, the respondent receiving from Eastern Coal Docks, Limited, security under section 88 of the *Bank Act* covering all coal on hand, and also a general assignment of book debts.

Subsequently a memorandum in writing dated May 1st, 1931, was drawn up between the appellant and Eastern

(1) (1873) 29 L.T. 78.

Coal Docks, Limited. By this memorandum, the appellant undertook to supply Eastern Coal Docks, Limited, called the Factor, with anthracite to March 31st, 1932, on the understanding that Eastern Coal Docks, Limited, should be a selling agent only and that the property in the coal and the proceeds thereof, less the agent's expenses and compensation as selling agent, should remain and be respectively in the appellant. The memorandum further provided that the proceeds should not be confused, mixed or commingled with the funds of the agent, but should be deposited immediately to the account of the principal. The agent further agreed to notify the principal every four weeks of the amount of the collections and deposits and the amounts of accounts unpaid. The agent further agreed to endorse, assign and deliver to any bank chosen by the appellant and operating in Saint John, all promissory notes and other evidences of indebtedness representing and based upon such sales of coal to be held by said bank subject to the agreement.

The arrangements contemplated by the memorandum did not, however, go into effect on May 1st, 1931. On June 19th, 1931, the appellant sent the memorandum to Eastern Coal Docks, Limited, with certain corrections and with the following request:—"When you have agreed upon a bank, will you please insert the name in your copy and then advise me and I will correct our copy?" On July 6th, 1931, the appellant sent to Eastern Coal Docks, Limited, the memorandum rewritten and amended by the addition of three new paragraphs for the consideration of the agent. About this time, Eastern Coal Docks, Limited, approached D. W. Harper, manager of the respondent bank at Saint John, and on July 11th, 1931, Mr. Harper wrote to C. A. Roy, General Manager of the respondent at Montreal. In this letter, Mr. Harper stated that the Susquehanna Red Ash Company or the company producing that brand of coal was requesting the Eastern Coal Docks, Limited, to act as a distributing agent for their coal on the terms that the principal should retain the property in the coal and have an assignment of book debts arising from the sales. Mr. Harper suggested it would mean another account and asked for instructions. On July 18th, 1931, Mr. Roy replied that the bank should not run risks of the coals being mixed and

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the book debts confused. On July 20th, 1931, Mr. Harper advised the Eastern Coal Docks, Limited, of the instructions of the General Manager, and added that arrangements could not be made unless the Eastern Coal Docks, Limited, wrote the respondent a letter that the coal would be segregated and the book debts kept distinct to the satisfaction of the bank. Mr. Harper went on to state that the respondent would be pleased to continue the account on the old basis, but that if Eastern Coal Docks, Limited, was determined to go on with the new proposal without satisfying the bank as above set out, the account would have to be closed and all indebtedness to the bank paid. On July 25th, 1931, Eastern Coal Docks, Limited, wrote Mr. Harper stating that if Eastern Coal Docks, Limited, should operate under the proposed consignment agreement with the appellant, the only anthracite would be Susquehanna anthracite from the appellant, that this coal would be kept separate, that a separate set of books would be kept and the receipts would be deposited in a "separate" bank account, and that notes or drafts would be endorsed to "that Bank" for collection and deposited to that account, and that the "section 88 loans" would be secured by all the bituminous coal and all the book debts of Eastern Coal Docks, Limited. On July 27th, 1931, Mr. Harper again wrote Mr. Roy stating that if the arrangement proposed by Eastern Coal Docks, Limited, was entertained, the respondent would have a separate bank account for the proceeds of the Hanna coal. On August 3rd, 1931, the appellant wrote Eastern Coal Docks, Limited, asking that the consignment memorandum of May 1st, 1931, should be signed and returned. On August 12th, Mr. Roy wrote Mr. Harper that he was not impressed with the method of financing of Eastern Coal Docks, Limited, but that he was willing that Mr. Harper should try out the proposal for a month or two according to the policy outlined in the letter from Mr. Harper to Mr. Roy of July 27th. On August 12th, Eastern Coal Docks, Limited, wrote Mr. Harper in part as follows:

> On this basis M. A. Hanna Company would have an equity in this coal for its invoice value $42,728.03, but at the present time this $42,728.03 stands as an Account Payable and the stock of coal as part of your security under section 88.

A separate bank account for the proceeds of Hanna coal as proposed in the letter of Eastern Coal Docks, Limited,

to Mr. Harper dated July 25th, was never opened by Eastern Coal Docks, Limited, nor was the separate account referred to in the letter from Mr. Harper to Mr. Roy dated July 27th ever opened.

On October 9th, 1931, W. B. Wright, an auditor of the appellant, went to Saint John and remained there until October 13th. He did not make any inquiry as to where the bank account of Eastern Coal Docks, Limited, was kept or as to the nature of the banking arrangements between Eastern Coal Docks, Limited, and its bank. But on October 24th, he sent to Eastern Coal Docks, Limited, a copy of his report to the appellant. Part of the report is as follows:—

> Memorandum as to balance $11,213.70 remaining in Factor Bank Account to Sept. 17th, 1931.
>
> As collections from customers are made by Eastern Coal Docks, Ltd., they are deposited in a general bank account of Eastern Coal Docks, Ltd., but to distinguish collections as made for Anthracite sales and collections as made for bituminous sales separate deposit tickets are now being used covering all deposits.

On Nov. 11th, W. C. Scott of Cleveland, Ohio, office attorney of the appellant, and John D. Baile of Susquehanna Collieries, Montreal, agent of the appellant, went to Saint John in behalf of the appellant. They agreed with Eastern Coal Docks, Limited, that a separate bank account would not be necessary and that the proceeds of the Hanna coal should be deposited in the bank account of Eastern Coal Docks, Limited. Accordingly, an agreement in writing was prepared and executed by the appellant and Eastern Coal Docks, Limited. This agreement amended the agreement of May 1st by providing for remittances by the agent every four weeks instead of "immediately," for a further seven days to transmit the funds to Susquehanna Collieries Limited at Montreal, for six per centum per annum interest for delay, for the cancellation and annulment of the following provision of the agreement of May 1st:

> The Principal's share shall be collected first as aforesaid, and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the or such other bank or banks as the Principal shall designate.

Messrs. Scott and Baile do not appear from the evidence to have examined the banking arrangements of Eastern Coal Docks, Limited, any more than did Mr. Wright, and no person connected with the appellant interviewed or wrote

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the respondent about them until after the respondent had formally advised Eastern Coal Docks, Limited, on March 26th, 1932, that no more cheques should be issued against the account and that no further advances could be made.

It is not necessary, in the view I take of the case, to consider whether the appellant, in order not to disturb the banking credit of a large agency, refrained from formally warning the bank before the crash that it had a claim against the bank for the net proceeds of the sales of Hanna coal not accounted for by the agent. Nor is it necessary to consider whether the appellant after Nov. 11th, 1931, was actively assisting in the financing of the general coal business of Eastern Coal Docks, Limited, by extending the time for remittances, by permitting the agent to confuse, mix and commingle the funds now claimed by the appellant with the funds of the agent and by permitting the use of one bank account for both the Eastern Coal Docks, Limited, and the appellant.

The appellant urged before us that Mr. Harper knew that the appellant and the agent had entered into the consignment agreement. As a matter of fact, the principal and agent never entered into the consignment proposal of May 1st, nor into the arrangement which was discussed with Mr. Harper in the summer of 1931, but into a new and different arrangement as set out in the agreement of Nov. 11th, 1931, the contents of which were never formally communicated to Mr. Harper as far as the evidence shows. It is true that, in the latter part of the year 1931, Mr. Harper saw that the coal was segregated and came to the conclusion that Eastern Coal Docks Ltd. had entered into some arrangement for the handling of anthracite on an agency basis because the monthly reports did not show anthracite on them. Harper said he thought they must have some other bank account or a new arrangement. Harper, in fact, told his assistant manager, Robinson, to tell the officials of Eastern Coal Docks, Limited, not to put the money from the sale of anthracite into the bank, and Robinson did so tell them according to the evidence. It may here be observed that the appellant sought, through Harper and others, to fix the respondent with knowledge of a banking arrangement which they on Nov. 11th, 1931, confirmed and continued in operation. The appellant also endea-

voured to fix the respondent with notice that the net proceeds of the sales of anthracite were their property by shewing that from May or June, 1931, two deposits each banking day were made by the agent, that many of the deposit slips had figures or letters or words on them such as "1112" or "S 187" or "Susq. deposit" or "Eastern deposit" or "Hanna account." Several experienced bank employees or former employees were called and testified that such figures and words were common on deposit slips and were not regarded where the name of the account to which the deposit was to go, Eastern Coal Docks, Limited, in this case, was set out and the items and additions were correct.

The appellant also urged that the respondent had notice because many cheques were passing through the bank to Susquehanna Collieries Limited, and pointed out to us that the learned trial judge had found that Mr. Harper had sufficient knowledge to put him on inquiry and that he must have known that the moneys received on deposit from Eastern Coal Docks, Limited, were partly the proceeds of coal consigned by the appellant to the factor.

> Where money is entrusted to an agent by his principal or received by him on his principal's behalf, it depends upon the terms of the agency whether the agent is bound to keep the money separate or is entitled to mix it with his own. In the former case the agent will be a trustee, in the latter a debtor.

Halsbury's Laws of England, 2nd Edition, Volume 1, page 247. In *Henry* v. *Hammond* (1), Channell J. said, page 521:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his *cestui que trust*. If on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law.

Ex parte White; In Re Nevill (2). In this case T. & Co. were in the habit of sending goods for sale to N., who was a person in the firm of N. & Co., to be received on his private account. The course of dealing between T. & Co. and N. was that the goods were accompanied by a price

(1) [1913] 2 K.B. 515. (2) (1871) L.R. 6 Ch. App. 397.

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list. N. sold the goods on what terms he pleased and each month sent to T. & Co. an account of the goods he had sold, debiting himself with the prices named for them in the price list, and at the expiration of another month he paid the account in cash without any regard to the prices at which he had sold the goods or the length of credit he had given. He paid the moneys which he had received from the sales into the general account of his firm, and made his payment to T. & Co. through his firm with whom he kept an account of moneys paid in and drawn out by him in respect of moneys unconnected with the partnership, which account included many items wholly unconnected with the goods of T. & Co. N. & Co. executed a deed of arrangement with their creditors. T. & Co. sought to prove against the joint estate for the amounts standing to N.'s credit with his firm on the ground that the same arose from moneys belonging to T. & Co. and improperly placed by N. in the hands of his firm. It was held that such proof could not be admitted, because the course of dealing showed that, although both parties might look upon the business as an agency, N. did not in fact sell the goods as an agent of T. & Co. but on his own account, upon the terms of paying T. & Co. for them at a fixed rate if he sold them, and the moneys he received for them were therefore his own moneys which T. & Co. had no right to follow.

It may here be observed that under the agreement of Nov. 11th, 1931, the agent agreed to remit to the appellant's agent at Montreal the "value" of all coal shipped at the appellant's regular circular of prices in effect at the time of shipment, or such other "value" as might from time to time be mutually agreed upon. The same agreement incorporated a provision of the memorandum of May 1st, 1931, that the agent should guarantee the payment of all sales of coal and should account therefor in cash at the end of one hundred and twenty days.

In the view, however, that I take of this case, it is not necessary to decide whether Eastern Coal Docks, Limited, was a trustee or a debtor of the appellant. In *London Joint Stock Bank* v. *Simmons* (1), a broker was in the habit of pledging his customers' securities *en bloc* with the

(1) (1892) 61 L.J. Ch. 723.

appellant bank as security for advances to himself. Among these were mortgage bonds belonging to the respondent which were transferable by delivery. The bankers had no notice, and no reason to suspect, that the broker had no right to pledge these bonds for his own purposes. The broker failed and absconded. It was held in the House of Lords that the bankers, having acted in good faith and without notice of the broker's fraud, were entitled to retain and realize the bonds to repay themselves the amount due by the broker. Lord Halsbury said, page 726:

> Mr. Justice Kekewich seems to have been under the impression that relying on the broker's honesty did not alter the result. But to my mind it makes the whole difference. If there is £10,000 borrowed, and ten different clients' securities, what is there to tell the bank, or to suggest to the bank, that the ten clients had not each either a joint interest in the £10,000, or a several interest, which their several property justifies the broker in pledging?

Lord Herschell, in the same case, said, page 729:

> The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments. Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them.

At page 731, Lord Herschell referred to the view of Baron Parke in *Foster* v. *Pearson* (1), that it was long considered as firmly established that the holder of bills of exchange endorsed in blank, or other negotiable securities transferable by delivery, could give a title which he did not himself possess to a person taking them *bona fide* for value and that the rule should not be qualified by treating due care and caution as essential to the validity of his title besides and independently of honesty of purpose. Lord Herschell went on to say, page 731, that the view of Baron Parke was applied by Willes J. in *Raphael* v. *Bank of England* (2), where it was treated as undoubted law that negligence did not invalidate the title of a person taking a negotiable

(1) (1835) 1 Cr. M. & R. 849. (2) (1855) 17 Com. B. Rep. 161.

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instrument in good faith and for value. In the same case Lord Macnaghten said, page 734:

Lastly, did the bank take the "Cedulas" in good faith? They took them, with other securities, from a firm of stockbrokers, who were, at the time, of unblemished reputuation. They took them in the ordinary way of business, to cover their current advances. In regard to this question the difficulty is to see what there was in the transaction to suggest a shadow of suspicion that there was anything wrong with the deposit. The only objection alleged is that securities of different customers of the stockbrokers were pledged for one entire advance, and it is said that the bank ought to have known it. But, even so, if the bank had no reason to suppose that the stockbrokers were not at liberty to pledge each and all of the securities for their full value, I cannot see in what the supposed want of good faith consists. As was pointed out in *Foster* v. *Pearson* (1), such a practice—and the practice prevails in the case of stockbrokers as much as in the case of billbrokers—has advantages for the customers as a body, though it may occasionally operate hardly on an individual.

The rule is tersely stated by Lord Herschell in the same case, page 730:

I defer entering upon the inquiry whether it has been proved that the bank had either notice or knowledge that Delmar's title to the bonds was that of an agent only. Assuming for the moment that this was proved, what is its effect? It is contended on behalf of the respondent, as I understand, that it put the bank upon inquiry as to the title of the person with whom they dealt, and as to the authority which he possessed; and that having made no such inquiry, they obtained as against his principal no better title than he had. It was admitted that any one buying from Delmar would have obtained an unimpeachable title, notwithstanding his knowledge that Delmar was a broker, and that the bonds were the property of his principal. What ground is there for the position that in regard to a pledge the case is different; that one may safely take a negotiable instrument by way of sale from an agent without inquiry, but cannot so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled in order to secure a good title to yourself to inquire into the nature of his title or the extent of his authority.

Thomson v. *Clydesdale Bank* (2). In this case, it was held that a person who takes money from another in discharge of a debt is not bound to inquire how the money is acquired, and is entitled to retain it in discharge of the debt, and that the knowledge that the money has been received by the person paying it on account of other persons is not sufficient of itself to prevent the payment from being a good payment in discharge of the debt. Lord Herschell said, pages 92 and 93:

I cannot assent to the proposition that, even if a person receiving money knows that that money has been received by the person paying

(1) (1835) 1 Cr. M. & R. 849. (2) (1892) 62 L.J. P.C. 91.

it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment and properly discharging the debt due to the person who receives the money. No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money.

Lord Watson said, page 94:

> The onus of proving that they acted in *mala fide* rests with the appellants. It is not enough for them to prove that the respondents acted negligently; in order to succeed, they must establish that the respondents knew, not only that the money represented by the cheque did not belong to the broker, but that he had no authority from the true owner to pay it into his bank account.

And in the same case Lord Shand said, page 95:

> I am of opinion that the same principle which applies to third parties generally is equally applicable to the case of dealings between stockbrokers and their bankers, and that the only circumstances in which money misapplied by a broker in payment to the banker of a debt due to him can be recovered from the banker by the principal to whom the money belonged, is where it can be shown directly, or by inference from the facts proved, that the banker or his representative in the transaction knew that the money was being misapplied.

Regardless of whether Eastern Coal Docks, Limited, was after Nov. 11th, 1931, a debtor or a trustee of the proceeds of the sales of the appellant's coal, the appellant has no sufficient finding by the learned trial judge and no sufficient evidence to bring its case, either before or after that date, within the rule of law discussed in the authorities last cited.

The appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John C. Belyea.*

Solicitors for the respondent: *Lewin & Carter.*