S. W. RAY AND C. W. JARVIS (PLAINTIFFS) ..... } APPELLANTS;

AND

A. H. WILLSON (DEFENDANT) ..... RESPONDENT.

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*Nov. 16.
*Dec. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Signature to blank note—Authority to use—Condition—Bonâ fide holder—Bills of Exchange Act, ss. 31 and 32.

W., residing at Newmarket, owned property in Port Arthur and signed some promissory note forms which he sent to an agent at the latter place to be used under certain circumstances for making repairs to such property. The agent filled in one of the blank notes and used it for his own purposes. In an action by the holder W. swore, and the trial judge found as a fact, that the notes were not to be used until he had been notified and authorized their use. He also found that the circumstances attending the discount of the note by the agent were such as to put the holder on inquiry as to the latter's authority. The first finding was affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (24 Ont. L.R. 122), Fitzpatrick C.J. *dubitante,* that secs. 31 and 32 of the "Bills of Exchange Act" did not apply and the holder could not recover.

Held, per Davies and Anglin JJ.—The finding of the trial judge that the circumstances never arose upon which the agent had authority to use the note was not so clearly wrong as to justify a second appellate court in setting it aside.

Held, per Idington J.—The finding of the trial judge that the holder was put on inquiry as to the agent's authority was justified by the evidence and bars the right to recover.

Held, per Duff J.—The evidence establishes that the agent had no authority to use the note.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial in favour of the defendants.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 24 Ont. L.R. 122.

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The facts of the case are stated in the above head-note.

Bicknell K.C. for the appellants. *In Smith* v. *Prosser*(1) the note was negotiated before completion. That case, therefore, does not apply here.

The defendant is estopped from denying his agent's authority. See *Ewing* v. *Dominion Bank*(2); *Lloyd's Bank* v. *Cooke*(3).

Choppin for the respondent.

THE CHIEF JUSTICE.—I grant that a man in his dealings with those in whose honesty he has reason to repose confidence is not expected to take such precautions as make the commission of a crime, which he has no reason to anticipate, impossible; but, on the other hand, all men are under the obligation to exercise, in their relations with their fellow men, the care and caution of "an average prudent and intelligent man," which is equivalent to saying that we are all subject to "a duty to take care." In the special circumstances of this case, the nature and extent of that duty "to take care" must be considered with reference to the provisions of the "Bills of Exchange Act," to which I refer later, passed to protect the commercial public against the reckless carelessness of men in the management of their affairs and to facilitate business intercourse. The question to be decided here is whether, in view of that Act, the respondent should escape liability as the signer of the note which is the basis of this action on this, among other grounds, that, though his

(1) [1907] 2 K.B. 735. (2) 35 Can. S.C.R. 133.
(3) [1907] 1 K.B. 794.

carelessness may have caused the appellants harm, he was guilty of no breach of duty towards them.

The respondent, a man of some education and means and, if we may judge by his answers to the questions put on his examination as a witness, with considerable knowledge of the "Bills of Exchange Act," living at Newmarket near Toronto, purchased some built on property at Port Arthur, through one Thompson, who, after the purchase, continued to manage it for him. Anticipating the probability that some repairs would be necessary to his houses, the respondent signed several ordinary lithographed bill forms with blank spaces for names, amounts, etc., and delivered them to Thompson with instructions to fill up the blanks and issue them as completed notes if and when it became necessary to procure money to pay for the anticipated repairs. After some time, Thompson filled up one of the blank forms for the sum of $1,000, making of it a note payable on demand, and, in breach of his duty to the respondent, issued it in its completed form; the appellants are now holders in due course of that note. I believe the majority of the court are agreed that there is no evidence to support the finding of the trial judge that the appellants did suspect, or had any reason to suspect, fraud. The sections of the Act upon which the appellant relied at the argument are sections 31 and 32:—

31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit.

32. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior

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to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

On the whole evidence it is apparent that the authority to fill up and issue was given contemporaneously with the delivery of the signatures on the blank forms and there is no clear finding to the contrary. To bring this case within the decision in *Smith* v. *Prosser*(1) an evident attempt was made throughout the examination of the respondent to shew that the express authority to fill up and issue the bills was not to be exercised by Thompson until the respondent was communicated with for further instructions; but that the latter tacitly acquiesced in the fraud practised by his agent on the appellant, with full knowledge of all the facts, cannot be doubted. The respondent was also guilty of gross negligence when he placed Thompson in possession of the blank bills with the knowledge which he must be presumed to have had that possession carried with it *primâ facie* authority to fill up the blanks for any amount. In so doing the respondent was guilty of a clear breach of duty towards any one who might subsequently become a holder in due course, if the proviso to section 32 does not cover the case. The only material finding of fact is that the condition subject to which the express authority to issue was given never arose.

Does the fact that the express authority to fill up and issue, given contemporaneously with the delivery of the instrument, was conditional destroy the *primâ facie* authority vested by the statute in the person to

(1) [1907] 2 K.B. 735.

whom it was delivered to convert it into a bill enforceable in the hands of a holder in due course against the maker ? I am strongly inclined to doubt that it does on the facts of this case. By the evidence of the respondent seeking to escape liability, in the absence of Thompson to whom the notes had been delivered, the presumption is rebutted to this extent only. The authority to fill up and issue is admitted to have been given contemporaneously with the delivery of the instrument; but the respondent says the note was not to be used until the necessity arose to make provision for the payment of such sums as might be required to make repairs to the houses in Port Arthur, which were in the discretion of the agent Thompson. I would have been disposed to hold that in issuing the note the agent did not act in accordance with the authority given to him, but that the instrument was originally delivered that it might in his hands form the basis of a negotiable instrument; that the statute gave him *primâ facie* authority to fill it up as a complete bill and, as a consequence, the proviso to section 32 would operate to protect the appellant. Otherwise what is the effect of that proviso ? In every case hereafter the banker, instead of being able to rely upon the *primâ facie* presumption resulting from possession, will be put upon inquiry and, if it appears that the note offered for discount was signed or indorsed in blank, it will be his duty to ascertain whether in fact the maker or indorser authorized the filling in or the issuing of the note absolutely and without any secret restrictions at the time it was delivered to the person in possession. The *primâ facie* presumption created by the statute will be no longer of much, if of any value; because it may be destroyed

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by the evidence of the maker or indorser seeking to escape liability in the absence or death of the party to whom the instrument was originally delivered, on the ground that the authority to issue was conditional upon an event which never happened. The proviso will cease to be of any practical use because the note is not valid and effectual and cannot be enforced by the holder in due course, notwithstanding the statutory presumption, if the authority to issue was given subject to an unfulfilled secret condition. It may embarrass the ordinary commercial man to distinguish between limited authority, which would be covered by the proviso, and authority which is conditional upon the happening of a future event. I presume that the theory is that, failing the event, authority never existed. I would have adopted the judgment of Mr. Justice Meredith; but out of deference to the opinion of the majority of my colleagues who hold that this case is governed by the judgment in *Smith* v. *Prosser* (1), I do not enter a formal dissent.

DAVIES J.—If the findings of fact of the learned trial judge confirmed as they are by the Court of Appeal for Ontario, are not disturbed by this court, it is difficult to see how in the face of the judgment of the Court of Appeal in the recent case of *Smith* v. *Prosser* (1), this appeal could be allowed.

The trial judge found as a fact "that the defendant never intended nor authorized the paper sued on to be filled up as a promissory note; that the circumstances never arose upon which only the agent Thompson was authorized to fill the same up, and that what

(1) [1907] 2 K.B. 735.

was done by Thompson was without authority and in fraud of the defendant, and that the paper sued on never in fact by the defendant's authority became a promissory note."

These findings of fact were based upon the trial judge's acceptance of the evidence of the defendant. He was a very old man in feeble health and with a somewhat impaired memory and his evidence, owing to his inability to stand the fatigue of travelling to attend and give evidence at the trial had been taken by commission. While there were very many facts connected with his dealings with Thompson generally and especially with respect to the note sued on which he had signed in blank and given to Thompson upon which his memory failed him, the old man was singularly clear and emphatic upon the crucial point that he had delivered it to Thompson to retain in his custody until he had notified the witness, respondent, that monies were required by Thompson to pay for the repairs of some houses in Port Arthur belonging to the witness, for which Thompson was agent, in which case, if the witness had not the money to send Thompson then the latter could fill up and use the note, but not otherwise. The note was deposited with Thompson, so respondent gave evidence, for safe-keeping and was only to be filled up and used by him if and when he received information from respondent Willson that he could not provide and send the monies required by Thompson for the repairs of the houses. The note was one of several so deposited by Willson with Thompson, but the one sued on was the only one Thompson attempted to use.

This crucial finding of the trial judge has been confirmed by the Court of Appeal, Meredith J. dis-

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senting. I confess I have strong doubts whether I should have made the same finding on the somewhat unsatisfactory evidence produced. At the same time I have not such a clear conviction that it is erroneous as would justify me in reversing it. In a late case in the House of Lords of *Johnston* v. *O'Neil*(1), Lord Macnaghten, at page 578, stated the rule which governed that House with respect to two concurrent findings of fact as follows:—

> In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong.

In a Scotch case, *Gray* v. *Turnbull,* in 1870(2), where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither court saw the witnesses, Lord Westbury, after referring to the practice in courts of equity to allow appeals on matters of fact, makes this observation: "If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever." In an English case, *Owners of the P. Caland* v. *Glamorgan Steamship Co.*(3), Lord Watson expressed himself as follows:—

> In my opinion it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at — I will not say a certain because in such matters there can be no absolute certainty — but a tolerably clear conviction that these findings are erroneous, and the principle appears to me especially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability.

We have adopted and followed in this court of last

(1) [1911] A.C. 552. (2) L.R. 2 H.L. Sc. 53.
(3) [1893] A.C. 207.

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resort in Canada the rule substantially as Lord Watson states it.

Accepting, therefore, the findings of fact on the question of the intention with which the blank note signed by respondent Willson was left with Thompson is the case concluded by *Smith* v. *Prosser*(1) above cited ? The facts with regard to the intention with which the signed blank notes were left in the hands of a third party as custodian were substantially the same in that case and this, and in each case the custodian had filled up and negotiated the blank note with a third party, who for the purposes of my argument may be held to have been a "holder in due course" without any instructions from the defendant authorizing him to do so.

Sections 31 and 32 of our "Bills of Exchange Act," R.S.C. 1906, ch. 119, are practically transcripts of the 20 and 21 sections of the English Act. The only difference is that the latter only applies to paper bearing a stamp which has been signed in blank.

The criticism of Mr. Bicknell upon the case of *Smith* v. *Prosser*(1) was that it was a decision upon a question of fact only and that the court there held the provisions of the "Bills of Exchange Act" inapplicable and decided the case upon the common law doctrine of estoppel. It is true that the court did hold the sections of the "Bills of Exchange Act" inapplicable because the note in that case was not stamped when negotiated, but they also held that the passing of that Act which codified the then existing law

did not alter in any respect material to that case the law as laid down in the prior authorities.

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Vaughan Williams L.J. says, at page 744:—

I do not desire to rest my judgment on that ground—(that is, that the holder of the note had notice that Telfer, the party who negotiated the note with him, was acting under a power of attorney, and that the plaintiff ought to have made inquiries)—nor do I rest it on the ground that there was no stamp, impressed or adhesive, on the note when Telfer assumed to negotiate it.

The learned Justice then goes on:—

I propose to deal with the case in this way. Here is a document which was in an incomplete state at the moment of its negotiation. If that note, being in that condition, had been handed to Telfer (and I leave out of consideration for this purpose the fact that Telfer and Wilson were joint attorneys) for the purpose of his making use of it, and for the purpose of its being issued as a negotiable instrument, I am of opinion that *primâ facie* the defendant would have been responsible to a ***bonâ fide*** holder for value who had purchased the note from Telfer as the plaintiff did. In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such.

Fletcher Moulton L.J., after first holding that under the special circumstances of that case the action must fail, said, p. 752:—

I am also of opinion that the same conclusion will follow if it be considered upon the broad grounds upon which Vaughan Williams L.J. has based his judgment, in which I entirely concur. The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument.

And at page 753:—

The essential fact which is necessary to enable the plaintiff to establish his case is, therefore, absent. The defendant never issued the documents with the intention that they should become negotiable instruments;

and—

In my opinion section 20 is based upon the doctrine of common law estoppel as it existed at the date of the Act, and, therefore, the

presence of the condition as to its operation shews that the legislature realized that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable.

Buckley L.J. bases his judgment on the same ground, namely, at page 755, that

the promissory notes never became negotiable instruments, the reason being that the defendant never issued them nor authorized any one else to issue them as negotiable instruments.

The true construction, therefore, of sections 31 and 32 of the "Bills of Exchange Act" so far as the protection of third parties holders in due course is concerned, limits that protection to cases where the signer intended the instrument signed by him to become a bill or note, and authorized its issue for that purpose. Where that intention is proved it matters not whether his instructions to the person he delivered it to were exceeded or not. He is liable upon it. If on the contrary that intention is disproved and it is shewn the instrument signed was not intended to be issued or became a bill or note, but was left for safe custody in some agent's hands to await further instructions as to its issue he is not liable if the bill or note is fraudulently issued by the agent or holder without such further instructions.

Our duty is to expound the law as we find it, and doing so, I am of opinion that on the findings of fact in this case which I am unable to conclude are clearly wrong, the appeal must fail and be dismissed with costs.

IDINGTON J.—I am not entirely free from doubt regarding respondent's version of the facts which led him to entrust his signatures to Thompson.

It is difficult to understand why such an expedi-

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ent should have been resorted to merely to anticipate repairs on his buildings.

My doubt, however, is not of such a nature as to entitle me to reverse the findings of fact by two courts below. I am clear the respondent was trying to tell the truth. And though possibly in error in assigning possible repairs as the subject-matter he had in view, it is extremely improbable that he is entirely mistaken in saying Thompson had no right to use the signature for his own purposes.

Taking the view of the facts that the courts below have done it seems impossible to hold otherwise than they have done without discarding the reasoning upon which the judgments in *Smith* v. *Prosser*(1) proceed.

It is to be observed, however, that the reasoning adopted was entirely unnecessary on the facts presented for the decision of that case and hence binds no one save so far as the reasoning adopted may. I do not think, however, this case requires us to adopt or discard the reasoning.

The exact shade of fraud involved in Thompson's misconduct is not to my mind so clearly and accurately determined as to apply or rather say we must apply the reasoning adopted in *Smith* v. *Prosser*(1).

All I am here, however, concerned with is, whether or not there is ground for finding a fraudulent use of the respondent's signature. I do so find. Whether the fraud is exactly of the kind dealt with in *Smith* v. *Prosser*(1), or more akin to the class of case needing the application of such reasoning as adopted in the case of *Lloyd's Bank* v. *Cooke*(2), matters little. The appellants are on such finding of fact bound to shew

(1) [1907] 2 K.B. 735. (2) [1907] 1 K.B. 794.

that they are holders in due course, which, I think, involves both good faith and valuable consideration.

And assuming that but for want thereof they would have on any ground been able to claim to recover on the note Thompson made out of his improper use of respondent's signature, I fail to see how they can succeed here or hope to succeed here in face of the finding of the learned trial judge.

He finds as fact that the plaintiffs "had reason to suspect and did gravely suspect the *bonâ fides* of Thompson as the holder of the note." At least two of the learned judges in the Court of Appeal accept this finding as well founded.

Care in taking a negotiable security is surely not too much to exact from those asking and in proper cases enjoying immunity as holders thereof. And I may add that bankers ought to preserve some record of such transactions where they in the course of such business can hardly be expected to remember every detail of their every day dealings.

The onus of proving they are holders in due course and in the sense I attribute thereto rests on them taking the security.

The appellants are not able to shew satisfactorily where they got this note or what they paid for it, or what it in fact was collateral to if taken as collateral at all.

The appellants were both on the witness stand. The only one who professes to know the details of the transaction professes it was got as incidental to the needs of Thompson to pay a hundred dollars to the Union Bank, which held it as security therefor and was pressing for its payment.

The court adjourned the case for some hours to en-

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able him to produce his books and papers and I infer if he had chosen he could have brought the officers of that bank as well as his own books and papers to establish the facts.

When the books were produced he could not put his finger on anything to clearly corroborate his story or fix the time or fact of payment which he alleged he had made.

There is no record indeed of his having the note except an entry made two months at least after the Thompson account seems to have been closed, and that is an entry in his register of bills for collection, of this and two notes of another party upon which he seems to have placed according to his evidence little, if any, value.

His story of how they came to be there recorded suggests rather he had found himself possessed of things he had forgotten.

He says he had continued to press Thompson for payment, but it never seems to have occurred to him to demand payment of this note (a stale security when got by him) from the maker for four months after getting it and for two months after it was placed among bills for collection. Why? What was he afraid of? It was a demand note, a class, he admits, they would not deal in usually.

He admits he knew the Union Bank might have demanded it and thus rendered it an overdue bill when he got it, yet he never inquired as to the fact.

Why did he so shut his eyes? He seeks to claim it as collateral. He tells three times over the story of how he got it.

The first time he says:—

I told him if he would go to the Union Bank and bring the note in

I would pay the Union Bank and hold it against everything he owed us.

Not a word in this as to future advances, yet he thinks it was on the 18th of May and, after more dealings meantime the account closed the end of June.

We have no explanation beyond the ledger debiting after the 18th of May of items amounting to a total of four to five hundred dollars and discounts crediting to amount of eight hundred dollars and yet a gradually rising debit balance.

What right could he have on such a statement of how he was to have held it to apply it to these dealings ?

Besides, it is rather curious he does not venture there to swear Thompson agreed to what he said. It is left in a case of this kind to mere inference or surmise which might be most misleading.

On the second version of the story in reply to the learned trial judge interrogating him as to what took place, he is still more vague and does not refer to holding it as collateral to anything.

If this version, as it stands, is the true statement, then he had no right to hold it for anything but the advance proposed to redeem it by the Union Bank.

It is quite consistent with the idea of a mere hope that something more than expressly stipulated for might come from its collection.

On a third attempt to explain the transaction in answer to the learned trial judge asking him to state what took place when Thompson delivered the note, he repeats the story of Thompson's having been pressed by the Union Bank and wanting money to pay it off and take the note, and then adds: "I asked him if he would give it to me as collateral for all he owed

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me and he said yes," and proceeded to speak of a lot of things to remember, etc.

I have compared this statement with the answer given to the identical question some time before.

They do not look much alike. The learned judge saw the witness, and was in an infinitely better position than I am to draw the proper conclusion to be drawn from variations of the story.

There was a statement also made by the witness between his first statement to his own counsel and the first statement to the learned trial judge in which he refers to a note of another party for which Thompson was responsible and he says. speaking of what he held this note for: "there was a note of a man named Williams whom I did not consider good and I told him so, and I told him I wanted collateral for that."

This is not introduced in any of the other three statements I have referred to.

I cannot help observing that in each of these three versions which I have specially referred to, the witness uniformly states the facts relative to the Union Bank holding the note for a hundred dollars and pressing for payment, and Thompson needing funds to pay it off, in substantially the same terms, but where, speaking of the question of holding the note for collateral purposes, the story varies most remarkably.

Again the whole business is in one place alleged to have taken place in one day. He did not know Willson. He says one place as follows:—

Q. Did you make any inquiries as to who Willson was, when you took this note ?

A. Yes.

Q. Did you know beforehand who he was ?

A. I don't know that I did; I don't remember whether the question ever came up.

Q. So you knew of no transaction with Willson until this came up ?

A. That's all.

The desperate financial condition in which Thompson was, he admits knowing all about, from Thompson's telling him in confidence.

It was hopeless to have expected anything from him and yet this stale demand note is not demanded until after Thompson had made an assignment for the benefit of his creditors to this witness, and as I infer, had left the country or at all events that part of the country.

The exact date of his leaving is not fixed, but the witness says:—

Q. Or whether it would become due upon demand ?

A. When I presented it at the Bank of Montreal at Port Arthur, I protested it.

Q. How long after Thompson went away was it you deposited it at the Bank of Montreal ?

A. I could not say; a short time afterward.

The estate realized about three cents on the dollar. The note was a demand note filled up by Thompson and was about a year old when appellants got it, then stamped on its face with the Union Bank, "B.C." stamp.

I cannot hold, under such circumstances as shewn throughout in the evidence I have referred to and other evidence in the case, that the learned trial judge erred in his finding, from which I have quoted above. I, therefore, think the appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed on the ground that the instrument sued upon was a simple forgery and that the appellants are not

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within the protection of sections 31 and 32 of the "Bills of Exchange Act."

I agree with the trial judge and the majority of the Court of Appeal that Thompson had possession of the paper entrusted to him by the respondent *as custodian only and that he had no kind of authority to convert it into a negotiable instrument for any purpose whatsoever.* I think sections 31 and 32 of the "Bills of Exchange Act" have no application to such a case; that their operation is confined to those cases in which there is a limited or conditional authority to convert a signature attached to a blank paper into a negotiable instrument or to convert an incomplete instrument into a complete instrument and that authority has been exceeded or abused.

The design and effect of the sections in question are, I think (if I may say so with respect), stated with accuracy by Fletcher Moulton L.J. in *Smith* v. *Prosser*(1), at pages 753 and 754, in these words:—

> In other words, both the common law and the statute realized the possibility of two rival dangers — on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being a maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and put it in circulation and thereby injure innocent persons. They, therefore, drew the line as regards the protection of third parties in the following very reasonable and intelligible way: If the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had signed it as an autograph. There would, in that case, be no *animus emittendi*, and he would, therefore, not be liable for the act of a bailee who turned the document into a negotiable instrument.

(1) [1907] 2 K.B. 735.

The present case sharply raises the question of the line of demarkation, and, as I think that the signed forms were in the possession of Telfer as custodian only, and not as the defendant's agent with an intention on the defendant's part that he should issue them as promissory notes, the defendant is not estopped from saying that he was not the maker of the notes sued upon.

Mr. Bicknell, in his able argument, naturally invoked the famous dictum of Ashurst J. in *Lickbarrow* v. *Mason*(1). But that dictum can be safely made the ground of decision in particular cases only in so far as it has taken shape in the form of a definite principle of law. *Farquharson Brothers & Co.* v. *King & Co.* (2), at pages 712 and 713, and in the House of Lords (3), at pages 336 and 337; *Rimmer* v. *Webster*(4), at page 169; *Scholfield* v. *Earl of Londesborough*(5), at pages 521 and 522; *Colonial Bank of Australasia* v. *Marshall*(6), at page 565; *Imperial Bank of Canada* v. *Bank of Hamilton*(7), at page 54.

"My Lords," said Lord Cairns, in *Cundy* v. *Lindsay*(8), at page 463,

you have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty, your Lordships can do no more than apply rigorously the settled and well known rules of law.

Two further points require notice. First, as to estoppel, it is very clearly shewn in the judgment of Mr. Justice Maclaren that the appellants suffered no prejudice in consequence of the respondent's silence after becoming aware of the forgery, and the appellants, therefore, cannot succeed on that basis.

(1) 6 T.R. 131.
(2) [1901] 2 K.B. 697.
(3) [1902] A.C. 325.
(4) [1902] 2 Ch. 163.
(5) [1896] A.C. 514.
(6) [1906] A.C. 559.
(7) [1903] A.C. 49.
(8) 3 App. Cas. 459.

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Secondly, as Thompson was not, in committing the forgery or in negotiating the forged instrument, acting for the benefit of the respondent, nor professing nor intending to act in his behalf, the doctrine of ratification by acquiescence alone has no application. *Hébert* v. *La Banque Nationale*(1); *Keighley, Maxsted & Co.* v. *Durant*(2), pages 246 and 247.

ANGLIN J.—The material facts of this case and the substance of the evidence bearing upon them are fully and satisfactorily set out in the judgments of the learned Chief Justice of Ontario and Maclaren, J.A. (3). The evidence is most unsatisfactory on the two principal questions of fact involved—the one, whether the blank note form with his signature upon it was handed by the defendant to his agent Thompson merely as a depositary or custodian, with instructions not to fill it in or use it in any way until directed to do so by the defendant, or whether, without any further assent of the defendant, he had some authority to fill it in and to use it on the defendant's account; and the other, whether the plaintiffs took the note with serious suspicions of Thompson's good faith, which they made no effort to clear up, thus failing to discharge the burden cast upon them by section 58 of the "Bills of Exchange Act." It would perhaps be difficult to say upon which point the evidence is less convincing. The observations upon it of the learned judges of the Court of Appeal are fully justified.

But on the question of the nature of Thompson's mandate in respect of the paper signed in blank which

(1) 40 Can. S.C.R. 458. (2) [1901] A.C. 240.
(3) 24 Ont. L.R. 122.

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was entrusted to him, although as a trial judge I should probably have found against the defendant, for the reasons given by Moss, C.J.O., and Maclaren, J.A., I am of the opinion that the finding of Clute, J., that Thompson was a mere custodian of it with no authority to use it until directed to do so by the defendant was rightly affirmed in appeal. Moreover, where such a judgment has been affirmed by a provincial appellate court it is the settled practice of this court to decline to interfere unless the appellant clearly demonstrates that the conclusion reached is absolutely wrong. *Weller* v. *McDonald-McMillan Co.* (1); *Mayrand* v. *Dussault*(2); *George Matthews Co.* v. *Bouchard*(3). See, too, *Johnston* v. *O'Neil*(4), at p. 578, *per* Lord Macnaghten. In their attempt to perform that difficult task the present appellants have not succeeded.

As a mere custodian of the paper, Thompson, in fraudulently filling it in and using it, did not merely abuse or exceed his authority; he acted without any authority. In either case at common law the defendant could be made liable only by estoppel: *Nash* v. *De Freville*(1). But the estoppel against the principal which arises in a case of abuse or excess of authority by his agent — of which *Lloyd's Bank, Limited* v. *Cooke*(2), furnishes a recent instance — lacks its essential basis where the alleged agent, entirely without authority, disposes of a non-negotiable security or *fills in* and disposes of a document thus converted by his wrongful act into what is in form a negotiable instrument. In order to sustain the confidence of the

(1) 43 Can. S.C.R. 85.
(2) 38 Can. S.C.R. 460, 465.
(3) 28 Can. S.C.R. 580.
(4) [1911] A.C. 552.
(5) [1900] 2 Q.B. 72, at p. 89.
(6) [1907] 1 K.B. 794.

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commercial community in the title obtained by the *bonâ fide* holder of a negotiable instrument, it has been conclusively established that, if the maker or owner of it entrusts it in complete and negotiable form to a broker or agent, a person taking it from him for value and in good faith — although in parting with it he acts without any authority or in breach of express instructions — acquires an incontestable title and right of property. *London Joint Stock Bank* v. *Simmons*(1). But the person who merely deposits with a custodian a blank form of note bearing his signature does not issue it "intending it to be used." *Baxendale* v. *Bennett*(2). The deposit is in fact of a non-negotiable document and, therefore, does not "contain any invitation to any other member of the community to do any act from which a duty to him can be inferred." *Lloyd's* v. *Grace, Smith & Co.*(3), at pages 509-10.

It is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument and with the intention that it should be issued as such. *Smith* v. *Prosser*(4), at page 744, *per* Vaughan Williams L.J.

The promissory notes never became negotiable instruments, the reason being that the defendant never issued them nor authorized any one else to issue them as negotiable instruments.

Ibid. per Fletcher Moulton L.J., at page 753.

If we are to measure the estoppel by the physical possibility of deception, section 20 of the "Bills of Exchange Act" (our section 31), would contain something which would be absolutely irrelevant, and which yet is made a condition of the section being applicable. That section commences with the words: "Where a simple signature on a

(1) [1892] A.C. 201.
(2) 3 Q.B.D. 525, at pp. 531-2.
(3) [1911] 2 K.B. 489.
(4) [1907] 2 K.B. 735.

blank stamped paper is delivered by the signer in order that it may be converted into a bill"; in other words, the intention that it shall be converted into a bill is made a condition of the operation of the section. In my opinion section 20 is based upon the doctrine of common law estoppel as it existed at the date of the Act, and, therefore, the presence of the condition as to its operation shews that the legislature realized that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable. In other words, both the common law and the statute realized the possibility of two rival dangers — on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being the maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and put it in circulation and thereby injure innocent persons. They, therefore, drew the line as regards the protection of third parties in the following very reasonable and intelligible way: if the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had merely signed it as an autograph. There would in that case be no *animus emittendi* and he would, therefore, not be liable for the act of a bailee who turned the document into a negotiable instrument.

Although *Smith* v. *Prosser*(1) might undoubtedly have been disposed of on other grounds, we must accept it as an authority for the propositions of law on which the Lords Justices have seen fit to rest their opinions. *New South Wales Taxation Commissioners* v. *Palmer*(2).

Apart from the effect of the proviso to section 32, upon which great stress was laid in argument, the case against the defendant fails.

Assuming the plaintiffs to be "holders in due course," I agree with the construction put upon that proviso by Maclaren, J.A., who said:—

(1) [1907] 2 K.B. 735. (2) [1907] A.C. 179, at p. 184.

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It is argued that here the plaintiff can recover as a holder in due course under the proviso of section 32, which provides that "if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given." It will be observed that this applies only "to any such instrument," that is, to such instrument as is mentioned in section 31, and one which has been "delivered by the signer in order that it may be converted into a bill," and does not apply to an instrument like this, delivered to a bailee or custodian merely to be held until further instructions are received from the signer. It is not pretended that such instructions were ever given, so that the instrument never became a note for want of a proper delivery.

I concur in the opinion of the majority of the learned judges of the Court of Appeal that "there is nothing in the subsequent conduct of the defendant to create liability," either by ratification or by estoppel.

The appeal, in my opinion, fails.

BRODEUR J.—I concur in the views expressed above by Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellants: *J. E. Swinburne.*

Solicitor for the respondent: *T. H. Lennox.*