CHARLES MILLAR (DEFENDANT) .....APPELLANT; 1893

AND *Mar. 21, 22.

*June 24.

ALFRED EDWIN PLUMMER (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Accommodation—Bad faith of holder—Conspiracy.

P. indorsed a note for the accommodation of the maker who did not pay it at maturity but having been sued with P. he procured the latter's indorsement to another note agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount who took it to M. a solicitor, between whom and the broker there was an agreement by which they purchased notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note and an arrangement was made with the broker by which the latter was to delay paying over the money so that proceedings could be taken to garnishee it. This was carried out ; the broker received the proceeds of the discounted note and while pretending to pay it over was served with the garnishee process and forbidden to pay more than the balance after deduction of the amount of the judgment and costs ; and he offered this amount to the maker of the note which was refused. P., the indorser, then brought an action to restrain M. and the broker from dealing with the discounted note and for its delivery to himself.

Held, affirming the decision of the Court of Appeal, that the broker was aware that the note was indorsed by P. for the purpose of settling the suit on the former note ; that the broker and M. were partners in the transaction of discounting the note and the broker's knowledge was M.'s knowledge ; that the property in the note never passed to the broker and M. could only take it subject to the conditions under which the broker held it ; that the broker not being the holder of the note there was no debt due from him to the maker and the garnishee order had no effect as against P. ; and that the note was held by M. in bad faith and P. was entitled to recover it back.

*PRESENT :—Sir Henry Strong C. J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

1893

MILLAR v. PLUMMER.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court in favour of the plaintiff.

The material facts of the case are sufficiently set out in the above head-note and are fully stated in the judgment of Mr. Justice Sedgewick.

Donovan for the appellant.

Beck for the respondent.

The judgment of the court was delivered by :—

SEDGEWICK J.—The plaintiff, Plummer, a responsible gentleman living in Toronto, indorsed a note for the accommodation of one Charles Lowe, a person of no means or credit, of which note the firm of John Fisken & Co. were the holders. Lowe did not pay the note and Fisken & Co. commenced an action against Plummer and Lowe for its recovery. After the suit was commenced and on the first day of April, 1891, Lowe drew a note for $230 payable to the order of Plummer, went to Plummer and obtained his endorsation and agreed with him that from its proceeds when dis counted, if he could succeed in discounting it, he would pay the note in suit held by Fisken & Co Lowe then applied to the defendant Coldwell, who is a bill broker, to discount the note. Coldwell did not discount it but a day or two afterwards, meeting Lowe on the street, he asked him for the note and obtained possession of it for the alleged purpose of seeing what he could do about it ; he thereupon went to the appellant Millar, a solicitor in the city of Toronto, between whom and Coldwell there was an agreement under which they purchased notes for their mutual profit. Millar agreed to discount the note. Now it so happened that the legal firm of which Millar was a member and of which one Levisconte was also a member had an un-

satisfied judgment in the Division Court, for clients of theirs, C. P. Reid & Co. against Lowe, and upon Millar applying to his partner Levisconte for a check with which to discount the note, the idea struck the mind of Levisconte that in some way or other he might get a portion of this money for the purpose of satisfying their judgment against Lowe, and the scheme resolved upon was to bring Coldwell into their confidence, pay him the proceeds of the note but get him to delay paying over the money in the meantime, then to commence garnishee proceedings in the name of Reid against Coldwell as a debtor of Lowe, and attach in Coldwell's hands the amount of that claim, and to pay over only the balance to Lowe. The scheme was partially successful; Millar and Levisconte paid to Coldwell $205 (the discount charged was only at the rate of 45 per cent per annum): garnishee proceedings were issued; Coldwell went to Lowe with the money and while he was pretending to pay it over to him Levisconte walked in with his garnishee process, served it on Coldwell and forbade him paying over $111.20 the amount of money attached with costs. Coldwell then offered Lowe the balance which he refused to take. This suit was then brought by Plummer for the purpose of obtaining an order restraining Millar and Coldwell from dealing with the note in question and for its delivery to the plaintiff. Mr. Justice McMahon who tried the case held in effect that Millar was the holder of the note in due course and dismissed the action. The Divisional Court unanimously, and the Court of Appeal with Mr. Justice Burton dissenting, reversed the judgment of the trial judge and ordered a decree for the plaintiff as prayed; and on this appeal we are asked to restore the original judgment.

1893

MILLAR v. PLUMMER.

Sedgewick J.

I think the following facts are established by the evidence. (1) Lowe obtained the note from the plaintiff with his endorsation upon it, not for the purpose of accommodation generally, but for the purpose of discounting it and with the proceeds paying the Fisken's claim; (2) Millar never became the holder of the note; no definite agreement had been come to between him and Lowe in reference to it and no property passed to him; (3) Coldwell was aware of the circumstances under which Lowe obtained Plummer's endorsation; (4) there was a joint conspiracy to which Caldwell, Millar and Levisconte were all parties, its object being to divert the proceeds of the note from its proper channel and to dishonestly obtain a benefit for Millar and Levisconte's clients at the expense of Plummer; (5) Plummer was not in any way a party to the garnishee proceedings. This suit was instituted and an interim injunction obtained before any final garnishee order had been made, and the amount of Reid's claim was paid by Coldwell to Millar and Levisconte as solicitors for Reid before a final garnishee order had been passed directing payment.

The contention of the appellant's counsel is that Millar is a holder of the note in due course; that it was discounted by him, and the proceeds paid to Coldwell in good faith; and that whatever may have been the character of the dealings as between Plummer and Lowe, and Lowe and Coldwell, he is not in any way affected by them, and is entitled to hold the note against both Plummer and Lowe. I do not so view it. Both Coldwell and Millar admit that the note in question was one within the purview of their agreement; that agreement was, substantially, that Millar was to loan to Coldwell one half of the moneys which he might require in the discounting of notes; that Coldwell should give his own notes to Millar for that

half, as well as transfer to him the securities themselves; that Millar was to be Coldwell's attorney irrevocable in connection with the securities; and that the profits in connection with these transactions were to be equally divided between them. It is true that the agreement provided that neither party was to be an agent of the other, except as therein expressly set out, but that, I think, does not in any way affect the relationship of partnership or *quasi* partnership created between them under the agreement. I am strongly of opinion that, in consequence of the agreement, Coldwell's knowledge was Millar's knowledge; Coldwell could not give Millar a better title than he had himself. It is clear that Coldwell was not a holder in due course of the note; the title had never passed to him at the time of the alleged discounting; and although, upon the authorities, he might have conveyed the title to a purchaser for value without notice, so as to have bound Plummer and Lowe, yet his relationship to Millar was such that Millar could not take it from him except subject to the conditions under which he himself held it. If Coldwell was not the holder of the note there was no debt due from him to Lowe, and the garnishee order had no effect as against Plummer. The result necessarily is that the note now in Millar's hands is held by him in bad faith; it is not his property, and the plaintiff is entitled to recover it back. The appeal is therefore dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *Joseph A. Donovan.*

Solicitors for respondent: *Beck & Code.*