HENRY HECHLER (DEFENDANT) ..... APPELLANT; 1893

AND *Nov. 21, 27.

GEORGE E. FORSYTH (PLAINTIFF).....RESPONDENT. 1894

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA. *Feb. 20.

Debtor and creditor—Goods sold—Person to whom credit was given—Assignment in trust—Power of attorney by trustee—Authority of attorney to use principal's name—Evidence.

A., doing business under the name of J. A. & Sons, assigned all his property and effects to H. for benefit of creditors. H., by power of attorney, authorized A. to collect all moneys due his estate, etc., and to carry on the business if expedient. A. continued the business as before and in the course of it purchased goods from F. to whom on some occasions he gave notes signed "J. A. & Sons, H. trustee per A." All the goods so purchased from F. were charged in his books to J. A. & Sons, and the dealings between them after the assignment continued for five years. Finally, A. being unable to pay what was due to F. the latter brought an action against H. on notes signed as above and for the price of goods so sold to A.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau J. dissenting, that the evidence at the trial of the action clearly showed that the credit for the goods sold was given to A. and not to H.; that A. did not carry on the business after the assignment at the instance or as the agent of H. nor for the benefit of his estate; that A. was not authorized to sign H.'s name to notes as he did; and that H. was not liable either as the person to whom credit was given or as an undisclosed principal.

Held further, that if H. was guilty of a breach of trust in allowing A. full control over the estate that would not make him liable to F. in this action.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

One James Allen carried on business in Halifax under the firm name of John Allen & Sons and being

*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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unable to meet his engagements assigned all his estate and effects to his brother-in-law, the defendant Hechler, in trust for the benefit of his creditors. Hechler after the assignment gave to Allen a power of attorney authorizing him, among other things, "to sign, draw, make and indorse my name as such trustee as aforesaid to any cheques or orders for the payment of money, bill or bills of exchange, or note or notes of hand, in which I am or shall be interested or concerned as such trustee as aforesaid and which shall be requisite." The trust deed provided that the trustee might employ Allen to carry on the trade if thought expedient.

Allen continued after the assignment to carry on the business as before and in doing so continued to purchase goods from the plaintiff, giving him in some instances promissory notes signed "John Allen & Sons, Hechler trustee, per James Allen." This went on for five years when, Allen having again become embarrassed and unable to meet his engagements, the plaintiff brought an action against Hechler on notes signed as above and for the price of goods sold to Allen.

The facts of the case are more fully stated in the judgment of the court delivered by Mr. Justice Sedgewick, who also sets out the material part of the evidence at the trial.

An action had been brought in the county court by one Anderson who had also sold goods to Allen after the assignment against Allen and Hechler, in which the Supreme Court of Nova Scotia, on appeal from the judgment in the county court, had held Hechler liable (1). On the trial of the present action judgment was given against Hechler, the trial judge holding that the case was governed by the decision in the county court action.

(1) 25 N. S. Rep. 22.

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Borden Q.C., for the appellant referred to *Smethurst* v. *Mitchell* (1); *Scarf* v. *Jardine* (2); Evans on Agency (3).

Harrington Q.C., for the respondent cited *Watteau* v. *Fenwick* (4), as stating the law as to an undisclosed principal.

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—On the 2nd of January, 1886, the firm of John Allen & Sons, composed of one James Allen only, being in financial difficulties made an assignment of its estate to the appellant Henry Hechler upon the trusts usual in such cases. It was by the assignment declared that the trustee Hechler might employ Allen or any other person in carrying out the trusts, and in carrying on the trade if thought expedient, and to pay Allen if thought expedient out of the trust moneys any sum not exceeding $100 per month. On the following day Hechler, by power of attorney, appointed Allen his attorney, giving him authority "to sign, draw, make and indorse his name as such trustee as aforesaid, to any cheque or cheques, or orders for the payment of money, bill or bills of exchange, or note or notes of hand, in which he was or should be interested and which should be requisite." These two instruments were filed with the registrar of deeds in the city of Halifax where the business was carried on. It would appear that upon the execution of the assignment and power of attorney, Hechler, the trustee, left the whole conduct of affairs to James Allen, assignor, and that for several years afterwards, in fact until he was threatened with legal proceedings, he never in any way examined into the condition of the

(1) 1 E. & E. 622.
(2) 7 App. Cas. 345.
(3) 2 ed. pp. 179-182.
(4) [1893] 1 Q. B. 346.

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estate, or ascertained to what extent Allen, as his attorney, had administered the estate. In fact I infer from the evidence that previous to the assignment in question the firm of John Allen & Sons, being insolvent, were being sued, and the assignment was made with a view of preventing the institution of further legal proceedings, and that Hechler (who was Allen's brother-in-law) permitted his name to be used as trustee, trusting to Allen's honesty in his faithfully administering the trust, and practically giving himself no concern about the matter. Up to the time of the commencement of this suit the estate had never been wound up nor, so far as appears, had any creditor interested in the trust found fault in any way with Hechler's administration of it.

At the time of the assignment the plaintiff, George E. Forsyth, a wholesale supply merchant in Halifax, was a creditor of Allen in the sum of $100. After the assignment it would seem that Allen continued carrying on business of the same character in the same place and under the same firm name as previously. When the assignment was made, according to the testimony of the plaintiff's chief clerk, Allen promised to pay him the $100 in full and the account was "carried over" from the date of the assignment in 1886 and charged in the usual way to the Allen firm. The plaintiff continued until September, 1891, more than five years, to sell goods to the firm of John Allen & Sons in the ordinary way, these goods for the most part being delivered upon orders signed by the Allen firm and charged in the plaintiff's account books to that firm without reference of any kind to the trustee Hechler. According to the evidence of the plaintiff's book-keeper the plaintiff never read or saw the power of attorney above referred to and could not tell when first he knew of its existence. Until about the commencement of these proceedings the defendant Hechler

never received any account from the plaintiff nor did he ever receive any intimation from him that he was considered as liable in connection with any of Allen's transactions subsequent to the date of the assignment. The original debt of $100 was paid by Allen as agreed shortly after the assignment, so that the transactions in question in this suit are all transactions subsequent to the date of the assignment. It would appear that sometime thereafter Allen began giving notes to the plaintiff, not in connection with any specific purchase of goods but generally in connection with his indebtedness. These notes were signed as follows:—"John Allen & Sons, Henry Hechler, trustee, per James Allen;" and it is upon one of these notes so signed, and for the price of goods sold and delivered, that this action is brought.

Two questions only, I think, arise upon this appeal First, to whom was credit given, Allen or Hechler? Secondly, did Allen in the dealings in question act as the agent of Hechler or did he act on his own account? In reference to the first question I am of opinion that the plaintiff gave credit to Allen only. There is not a scintilla of evidence to show the contrary, the evidence in my view conclusively demonstrating that Forsyth contracted with Allen alone. The plaintiff himself did not give any evidence at the trial, nor is his absence in any way accounted for. It is, I suppose, upon the testimony of James Billman, his chief clerk, that he relies in order to make out a case against Hechler; yet he testifies that "the account before the trust was charged against John Allen & Sons; about $100 then due. It was carried over. Allen promised to pay in full and it was just carried on; the account was continued with the same heading, John Allen & Sons, after the trust deed." I can gather no idea from the phrases "carried over" and "carried on" except that of con-

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tinuing the same kind of business between the same parties. There is not even a suggestion by Billman that Hechler was in any way responsible for purchases subsequent to the trust deed. It is true that in one case Billman thinks he sent an account to Hechler, but Hechler testifies that he never received it and I think it extremely doubtful if he did. It must have been present to the minds of both Forsyth and Allen when the promise to pay in full was made that Allen was to continue to carry on business. He had divested himself of all his property. It was understood that subsequent to the assignment there was to be a continuance of their old dealings, and as a matter of fact these old dealings did continue in precisely the same old way for more than five years when it appears Allen again got into difficulties, and then, for the first time, Hechler was sought to be made liable for Allen's account. In addition to these facts there is the undisputed evidence of Allen himself, and of his chief clerk, that Hechler had no connection whatever with any dealings in question after the assignment. So much in regard to the first question.

It might be, however, that even although the plaintiff gave credit to Allen alone yet, if as a matter of fact Allen was acting throughout as the agent of Hechler in carrying on the business for the benefit of the trust estate, Hechler would, under such circumstances, be liable as an undisclosed principal for the claim in question. In my view, however, the evidence does not point to any such conclusion. It is true that under the assignment the trustee had power, at his own discretion, to employ Allen or any other person in carrying on the trade if thought expedient, and to pay Allen a salary for that purpose. The onus of showing, first, that it was thought expedient to carry on the trade for the benefit of the trust, and secondly, that Allen was

employed by Hechler for the purpose of carrying on that trade, is on the plaintiff. He has, of course, proved that Allen did carry on that business, but has signally failed in proving that he carried it on either at the instance and as the agent of Hechler or for the benefit of his estate. The sworn testimony is undisputably the other way. That testimony it is sought to overcome by inferences of the most doubtful and ambiguous character. It must be borne in mind that Allen's status, his right to trade, to buy and sell, his capacity to contract on his own account and for his own benefit, remained precisely the same after as before the assignment. His was not the position of an undischarged bankrupt or insolvent. Had that been his position there might have been some ground for the inference that he was carrying the business on as an agent and for the benefit of his estate, but I myself am at a loss to understand how that inference can be drawn from the facts in the present case. Hechler himself swears that he never authorized Allen to purchase goods; that he never received anything out of the estate or any profits from the business; that although he knew he was doing business of some kind (as I suppose every person in business in Halifax knew as well), he did not know what business he was doing; that he seldom went there, even although he was his brother-in-law, and that he never looked at the books until 1891, after proceedings seeking to make him liable for Allen's subsequent debts were instituted against him. All this evidence is corroborated by the testimony of Allen and Russell, his book-keeper, and there is not any evidence whatever pointing in a contrary direction except the giving of notes signed by Allen in Hechler's name. It would seem that some time after the assignment—it does not appear how long after, it may have been years—Allen began to give notes to Forsyth, signed as

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above mentioned. These notes, as I have stated, were signed in the manner indicated above by Allen himself without the knowledge or special authority of Hechler. In order to make Hechler liable upon them it was necessary to show agency or authority. The only authority, apart from inference, was the power of attorney put in evidence; that power of attorney authorized Allen to sign Hechler's name, as trustee of his estate, to any notes of hand in which Hechler was interested or concerned as trustee. If, as a matter of fact, the business was not being carried on by Hechler, then he was neither interested nor concerned as trustee in these notes, and Allen was acting in bad faith, to say the least of it, in signing them. The evidence, as I have shown, is all the other way. Forsyth never made any inquiries in regard to Allen's authority, wanting, I suppose, to use the notes, as it would appear from the evidence he did for the purposes of discount. The question of liability on these notes depends altogether upon the question: Was the business being carried on by Allen, on Hechler's account, for the benefit of his estate? If so then Hechler was liable, if otherwise he was not liable. I have unhesitatingly come to the conclusion that the business was Allen's alone; Hechler's liability upon the notes, therefore, has not been established.

It would appear that in the case of *Anderson* v. *Allen* before the Supreme Court of Nova Scotia, on appeal from the County Court, the court held, under circumstances similar to those in the present case, that Hechler was liable. I understand that it was solely in consequence of that ruling that Mr. Justice Graham, the trial judge, here decided the case in favour of the plaintiff. I regret that I have not had the benefit of a perusal of the judgment of the appeal court in that

case, no public report of it having as yet reached me (1).

I entirely concur in the opinion of Mr. Justice Townshend in this case. I wish to add, that the question here is not whether any breach of trust has been committed by Hechler ; he may in that event be called upon to account and make good the consequences of his confidence in Allen (his brother-in-law.) By no process of reasoning known to me can I conclude that for such failure of duty he is to be made responsible for all debts which Allen may happen to have contracted after he took upon himself the trust in question.

In my view the appeal should be allowed with costs and judgment should be entered for the defendant Hechler with all his costs in the cause, including the costs of the appeal to the Supreme Court of Nova Scotia.

TASCHEREAU J.—This appeal involves nothing but a question of fact namely, to whom was credit given ? I do not think that the appellant has made the clear case necessary to justify our interfering with the finding of the trial judge, approved of as it has been by the court in *banco*. I would dismiss the appeal.

Appeal allowed with costs.

Solicitor for appellant: *Fred. T. Tremaine.*

Solicitor for respondent : *John M. Chisholm.*

(1) Since reported in 25 N. S. Rep. 22.