

ROBERT SCOTT (PLAINTIFF).....APPELLANT;

1894

AND

*May 8, 9.

*May 31.

THE BANK OF NEW BRUNSWICK }
(DEFENDANT).....} RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Debtor and creditor—Payment to pretended agent—False representations as to authority—Ratification by creditor—Indictable offence.

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

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

APPEAL from a decision of the Supreme Court of New Brunswick affirming the verdict at the trial for the defendant bank.

This case was first tried in 1891, and resulted in a verdict for the plaintiff, which was set aside and a new trial ordered (1). The plaintiff appealed from the order for a new trial to the Supreme Court of Canada, but his appeal was not entertained (2). The second trial resulted in a verdict for the defendant, which was affirmed by the full court, from whose decision the present appeal is taken.

The facts of the case are fully set down in the judgment of the court.

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

(1) 31 N.B. R. 21.

(2) 21 Can. S.C.R. 30.

1894 *McLeod* Q.C. and *Palmer* Q.C. for the appellant, referred to *Williams v. The Colonial Bank* (1); *Barton v. London and North-western Railway Co.* (2); *Jones v. Broadhurst* (3).
 THE BANK OF NEW BRUNSWICK. *Blair*, Attorney General of New Brunswick, cited *McKenzie v. The British Linen Co.* (4); *Stone v. Marsh* (5); *Leather Manufacturing Bank v. Morland* (6); and *Viele v. Judson* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The facts of this case, which is an action to recover the sum of \$1,000 and interest, may be stated as follows:—The appellant was the master of a vessel in which he and Charles E. Robinson, a merchant of St. John, were jointly interested. Robinson had managed the appellant's private business affairs at St. John. On the 29th September, 1883, the appellant deposited with the respondent \$1,000, for which he received a receipt in the words and figures following, namely:—

BANK OF NEW BRUNSWICK,

St. John, N.B., 29th Sept., 1883.

Received from Robert Scott the sum of one thousand dollars, for which we are accountable, with interest at the rate of four per cent per annum, on receiving thirty day's notice; interest to cease at the expiration of the notice, and no interest to be allowed unless the money remain in the bank three months.

THOMAS GILBERT, *President*.

W. GIRVAN, *Cashier*.

The appellant being about to go to sea, and not wishing to take the receipt with him, handed it to

(1) 38 Ch. D. 298.

(2) 38 Ch. D. 144.

(3) 9 C. B. 173.

(4) 6 App. Cas. 82.

(5) 6 B. & C. 555.

(6) 117 U. S. R. 113.

(7) 82 N. Y. 32.

Robinson (as he alleges) to place in his "safe" for secure keeping.

The appellant says he gave the receipt to Robinson in the bank at the time he received it in the same condition it was in when he received it himself, without indorsing his name on it; that he never wrote his name on it, and that the name "Robert Scott" which now appears on it is a forgery. Robinson, in his evidence (taken in the United States under a commission), does not state clearly when he received the receipt, but he denies getting it from Scott in the bank, although he admits that when Scott received it he, (Robinson) was present in the bank. Robinson's account of the matter is that Scott gave it to him afterwards in an unsealed envelope, and when he looked at it some days subsequently the appellant's name was indorsed on it. The jury, in answer to a specific question, have found that the appellant's account as regards the indorsement is the true one, and that his name was indorsed without his authority after the delivery to Robinson. They have not, however, explicitly found that the name of the appellant was forged or even written by Robinson, although it may be inferred that such was their opinion.

Robinson subsequently deposited the receipt with the respondents as a security for an advance, and after it had remained in the respondents' hands for some time it was, at the suggestion of the respondents' manager, exchanged for a new receipt for the sum of \$1,044 (being the \$1,000 and interest), made directly in favour of Robinson, which receipt the bank retained, and Robinson making default in the payment of the advance to him the respondents subsequently charged the amount of the advance (a note which had been discounted) against the deposit.

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The appellant did not return to New Brunswick until some time in 1887, about July, when he came to St. John to endeavour to get a settlement with Robinson who was indebted to him on an open account, independently of this transaction connected with the receipt, to the amount of some \$2,650. Being unable to obtain a satisfactory settlement he demanded the deposit receipt when, as the appellant swears, Robinson confessed to him that he had used the receipt in the way mentioned, and had applied the money obtained by means of it to his own use. The appellant says Robinson besought him not to prosecute him; and then gave him a draft on one George Bell, of Dublin, for £250 and agreed to give him and did subsequently give him a mortgage for \$2,500 on some interest which, as Robinson stated, he had in his father's property. It does not appear from the evidence and has not been found by the jury that the appellant ever agreed not to prosecute Robinson. The jury have specifically found that this mortgage was taken by the appellant to secure the amount improperly withdrawn by Robinson from the bank. They have also found that the giving of this security by Robinson induced the appellant to leave St. John without notifying the bank of the fraud which had been practised upon him. The jury have further found that the appellant by accepting the mortgage did not intend to waive his claim against the bank. The appellant left St. John in 1887, on getting the mortgage and draft, and did not again go to that city until 1889, when he informed the bank of Robinson's fraud and demanded payment which the bank refused. Robinson had then left the country for some time. In addition to the findings already mentioned the jury found that the bank were not prejudiced by the delay to inform them of the fraud from 1887 to 1889. Further, that the bank when they originally took

the receipt, as well as when they changed the receipt, and also when they finally appropriated the deposit by charging against it the loan to Robinson, had reasonable grounds to suspect that Robinson was not the owner of the money and had not the right to control it. Lastly, the jury have found that the appellant purposely avoided informing the bank of the alleged forgery from July 1887 to 1889 on a promise by Robinson to pay.

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At the trial before Mr. Justice Hanington the jury having found as before stated in answer to specific questions left to them by the learned judge a verdict was entered for the respondents, leave being reserved for the appellant to move to have the verdict entered for him. A motion having subsequently been made in term to enter the verdict for the appellant that motion was refused, against which decision the present appeal has been brought.

I am of opinion that the judgment of the court below was entirely correct and is sustained by the highest authority. I do not think the doctrine of estoppel has any application to the case, the decision of which must be governed by legal principles of a different order. The receipt was not a negotiable instrument and although the fabricated indorsement might be by statute a forgery yet, even if genuine, it would of itself have constituted no authority to the bank to pay the money to Robinson as being himself entitled to the money as the transferee of the appellant, but the receipt with the appellant's name written on the back was used by Robinson in such a way as to indicate to the bank that he had authority from the appellant to demand payment of the money specified in it; Robinson's conduct was therefore equivalent to a distinct verbal representation of his authority to receive the money and to deal with the receipt as he did. The case before us is therefore the case of a pretended agent

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obtaining the payment of money belonging to his assumed principal by false representations and pretences as to his authority made to the debtor of the latter. Then I think the law is clear that if the payment of money is obtained from a debtor by one falsely representing to the debtor that he is the agent of his creditor, from whom he in fact has no authority, and thereby a fraud upon the debtor is committed, yet if the creditor afterwards ratifies and confirms the payment so made he thereby adopts the agency of the party who has received the money and it becomes equivalent to a payment made by the debtor to a person having proper authority to receive it. And it makes no difference in the application of this principle that by his false pretences the party receiving the money has committed an indictable offence.

For the latter proposition I rely on the judgment of Lord Blackburn in the House of Lords, in the case of *McKenzie v. The British Linen Co.* (1), as a conclusive authority. The difference between the case put by Lord Blackburn and the present is this, that the present case is the ratification not of a feigned contract, which was in itself a forgery, but of an act, the receiving of money, the payment of which was evidenced by fraudulent representations, which amounted to the offence of obtaining money by false pretences, whilst the case put by Lord Blackburn is the ratification of a pretended contract the fabrication of which constituted the crime of forgery. What Lord Blackburn says in the case cited, is this :—

But even though it was not made out that the signatures were authorized originally, it still would be enough to make McKenzie liable if knowing that his name had been signed without his authority he ratified the unauthorized act. Then the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, would apply. I wish to

guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person, whose name was without authority used, chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another.

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This is *a fortiori* applicable to a case like the present, where the doctrine of ratification is invoked, not for the purpose of giving vitality to an assumed contract which was in truth non-existent and void *ab initio*, but for the purpose of fixing a party, by reason of his adoption of it, with the legal consequences of an act which, whatever may have been the circumstances which attended it and brought it about, had a *de facto* existence. Upon principle there does not seem to be any good reason, upon grounds of public policy or otherwise, why such an act should not be susceptible of confirmation by a party whose conduct is free from any taint of illegality in favour of another party equally blameless, provided the adoption does not involve any agreement or undertaking on the part of either to forbear from a criminal prosecution.

The judgment of the Court of Exchequer in the case of *Brook v. Hook* (1) does, no doubt, contain observations to the opposite effect, but that case, so far as it proceeds on reasons at variance with Lord Blackburn's deliverance in *McKenzie v. The British Linen Co.* (2), must be considered as overruled by the latter case, and the judgment of Martin B., who dissented in *Brook v. Hook*, (1) must now be taken to be an accurate statement of the law. The decision of *Brook v. Hook* (1) may, however, be ascribed to a ground which would take it out of the doctrine enunciated by Lord Blackburn in

(1) L. R. 6 Ex. 89.

(2) 6 App. Cas. 99.

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*McKenzie v. The British Linen Co.* (1), and would also make it inapplicable as an authority to govern the present case. It was there determined that the agreement for ratification itself was based upon the condition that the party receiving the benefit of the ratification would not prosecute the forger, a consideration which rendered it illegal and void. Martin B., before whom the action had been tried, reported the evidence to have been as follows :—

The plaintiff said it must be a forgery of Jones and that he would consult a lawyer with a view of taking criminal proceedings against him ; that the defendant begged him not to do so and said he would rather pay the money than that he should do so ; that the plaintiff then said he must have it in writing and that if the defendant would sign a memorandum to that effect he would take it ; and that the defendant then signed the memorandum relied on as a ratification.

Upon this the Chief Baron says that the verdict could not be sustained :

And this first upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and become liable upon it in consideration that the plaintiff would forbear to prosecute his brother-in-law Jones ; and that this agreement is against public policy and void as founded upon an illegal consideration.

And subsequently to this in the same judgment the Chief Baron adds :

I am of opinion that the true effect of the paper taken together with the previous conversation is that the defendant declares to the plaintiff, "if you will forbear to prosecute Jones for the forgery of my signature, I admit and will be bound by the admission that the signature is mine." This therefore was not a statement by the defendant that the signature was his and which, being believed by the plaintiff, induced him to take the note or in any way alter his condition ; but on the contrary it amounted to the corrupt and illegal contract before mentioned.

This places the decision in *Brook v. Hook* upon principles so obvious and plain (always assuming that

the court took a correct view of the facts) that there is no need of resorting to the second ground advanced in its support.

That second ground is in the language of Chief Baron Kelly as follows :—

The paper in question is no ratification inasmuch as the act done—that is the signature to the note—is illegal and void ; and that although a voidable act may be ratified by matter subsequent it is otherwise when an act is originally and in its inception void.

This last *ratio decidendi* is clearly inconsistent with Lord Blackburn's enunciation of the law in *McKenzie v. The British Linen Co.* (1), and can no longer be considered authority. Moreover the reasoning on which it proceeds would be inapplicable here, for granting that the payment of the money for which the receipt in the present case was given was obtained by Robinson by false and fraudulent pretenses, and that any agreement so brought about would be illegal and void, there would still remain the fact that the money was actually paid over to him by the bank, and it is to this payment that the respondents seek to have the ratification applied. A contract or a pretended contract, like a forged note, may be void in law *ab initio* or non-existent so that there may be nothing to ratify, but a fact like a payment cannot be got rid of in that way. The payment was therefore clearly a substantial act susceptible of ratification, and the passage last quoted from the judgment in *Brook v. Hook* (2) does not apply to the facts before us in this appeal. Further it appears from the authorities that the distinction between a void and voidable contract or act does not apply at all to the ratification of the act of a pretended agent.

I find American authorities emanating from courts of the highest authority, and anterior in date to the case of *McKenzie v. The British Linen Co.*, (1) in entire

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accord with the law of ratification as laid down by Lord Blackburn in that case.

In the case of *Greenfield Bank v. Crafts* (1) the Supreme Court of Massachusetts says:

It is, however, urged that public policy forbids sanctioning a ratification of a forged note as it may have a tendency to stifle a prosecution for the criminal offence. It would seem, however, that this must stand upon the general principle applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offence.

Again in *Bartlett v. Tucker* (2) the same court says:

If either of those names was that of a real person, then, although no agency was expressed on the face of the note, and whether the signature was affixed under a mistaken belief of authority or fraudulently, or even if it was a forgery, it was, so far as regards the liability to a civil action upon the notes, a mere case of signing without authority, and the signature might be adopted or ratified by that person, and such adoption or ratification would render him liable to be sued as maker thereof.

In *Wellington v. Jackson* (3) Gray C. J. speaking for the court propounds the law in these terms.

Although the signature of Edward H. Jackson was forged, yet if, knowing all the circumstances as to that signature and intending to be bound by it, he acknowledged the signature and thus assumed the note as his own, it would bind him just as if it had been originally signed by his authority even if it did not amount to an estoppel in "pais."

From the judgment in *Merrifield v. Parritt* (4) I extract the following passage which has particular reference to the question whether an act or contract void for illegality is susceptible of adoption or ratification. The court there says:

It was argued that according to that doctrine the act of A was void and then it was said that a void act cannot be ratified. But if it be admitted that A exceeded his authority by writing P's name without more it would not follow that P could not adopt or ratify the act. Whatever may be the meaning and extent of the rule that a void act cannot be ratified the rule does not apply to the acts of persons assuming without authority to be agents, nor to the acts of acknowledged agents which exceed their authority.

(1) 4 Allen (Mass.) 447.

(2) 104 Mass. 341.

(3) 121 Mass. 159.

(4) 11 Cush. 590.

These authorities, selected from a great number of American cases to the same effect, coming as they do from a court of the highest authority on all questions falling to be decided by the common law of England, are entitled to great weight as regards a question upon which we find English courts at variance.

The law therefore appears to be clear that although the obtaining payment by Robinson from the bank was obtaining money by a false pretense it was, nevertheless, susceptible of ratification by the appellant in such a way as to bind him for all the purposes of civil justice and to debar him from recovering the money from the respondents.

As I said before our judgment proceeds upon the principle of ratification or adoption and not on the doctrine of estoppel. The distinction between ratification and estoppel is well pointed out by the Supreme Court of Maine in a case of *Forsyth v. Day* (1) where it is said :—

The distinction between a contract intentionally assented to or ratified in fact and an estoppel to deny the validity of the contract is very wide. In the former case the party is bound because he intended to be ; in the latter he is bound, notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treat him as legally bound. In one case the party is bound because the contract contains the necessary ingredients to bind him including a consideration. In the other he is not bound for these reasons but because he has permitted the other party to act to his prejudice under such circumstances that he must have known or be presumed to have known that such party was acting on the faith of his conduct and acts being what they purported to be without apprising him to the contrary.

Next arises the question : Did the appellant ratify the payment to Robinson when, according to the finding of the jury, he accepted the mortgage from Robinson as security, and on the strength of that security left the province and remained away two years without in any way notifying the bank of the fraud which had been practised ? Granting that ratification is possible and

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that no objection on the ground of public policy is sustainable, which I have already shown to be the result of the authorities, I am at a loss to conceive a stronger act of adoption than that here in evidence and established as a fact by the finding of the jury. Surely if a pretended agent, on being charged with the fraud by the creditor, pays over to him money to the same amount as that which he has received from the debtor in assumed discharge of the debt the creditor could not afterwards, whilst retaining this money, compel the debtor to pay a second time. In such a case the receipt of the money from the fraudulent agent would be such a recognition of the agency as to relate back and place the debtor in the same position as if the pretended agent had had authority at the time he received payment from the debtor. This is too clear to need further demonstration. Then what difference in principle can there be between actual receipt of money and accepting security for it as the appellant did here? The answer must be, none that can make any difference in the application of the principle. This is a ground entirely different from that of estoppel upon which I altogether disclaim placing any reliance.

Any little doubt I had was as to whether the defrauded debtor must not be privy to the ratification. But this doubt is also dispelled by the last paragraph in the quotation I have given from *McKenzie v. The British Linen Co.* (1). Lord Blackburn there says:—

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

This appears to me to be conclusive. The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for appellant: *C. A. Palmer.*

Solicitors for respondents: *Barker & Belyea.*