W. H. FRASER (PLAINTIFF) ..... APPELLANT; 1912

AND

*Oct. 10.
*Nov. 26.

THE IMPERIAL BANK OF CANADA AND OTHERS (DEFENDANTS) ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Banking — Security for advances — Assignment — Chose in action — Moneys to arise out of contract — Unearned funds — Equitable assignment to third party—Notice—Evidence—Priority of claim—Estoppel—Construction of statute—R.S.M., 1902, *c.* 40, *s.* (*e*), *"King's Bench Act"—R.S.C.*, 1906, *c.* 29, *s.* 76, *"Bank Act."*

An assignment of a future chose in action, to arise out of a contract, operates as an agreement binding on the conscience and, when the subject-matter of the assignment comes into existence, creates a trust. *Tailby* v. *The Official Receiver*, (13 App. Cas. 523,) followed.

Where a bank, in order to secure present or future advances to a customer, has taken from him an assignment vesting in it the legal title to a chose in action arising out of a contract and, subsequently, receives notice of another assignment thereof for valuable consideration by the customer to a third person, before moneys have been advanced upon the security held by the bank, the claim of the bank for advances made after notice is postponed to that of the other incumbrancer. *Dearle* v. *Hall* (3 Russ. 1); *Hopkinson* v. *Rolt* (9 H.L. Cas. 514); *Bradford Banking Co.* v. *Briggs* (12 App. Cas. 29), and *West* v. *Williams* ((1899) 1 Ch. 132), applied.

Where an assignee of a chose in action with knowledge that the same chose in action has also been assigned to another person for valuable consideration permits the other assignee to rely upon his security by acting on the faith of his assignment, without giving him notice of the former charge, the claim of the latter is entitled to priority over that of the assignee by whose conduct he has been thus misled. *Russell* v. *Watts* (10 App. Cas. 590), and *Stronge* v. *Hawkes* (4 DeG. M. & G. 186), applied.

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

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Per Fitzpatrick C.J. dissenting.—The circumstances of the case do not justify the finding that there was an equitable assignment of the chose in action to the appellant and there is no sufficient evidence of notice to the bank that there was any assignment to him; consequently, the assignment to the bank, which was duly notified to the debtor, gave the claim of the bank priority in respect of the advances made by it on that security. *Mutual Life Assurance Co.* v. *Langley* (32 Ch. D. 460), referred to.

The judgment appealed from (22 Man. R. 58) was reversed, Fitzpatrick C.J. dissenting.

Quære.—Whether, in consequence of the provisions of section 39(*e*) of "The King's Bench Act," R.S.M., 1902, ch. 40, the rule in *Dearle* v. *Hall* (3 Russ. 1) governs the rights of parties under an assignment taking effect by virtue of the statute?

Quære.—As to the effect of section 76 of "The Bank Act," R.S.C., 1906, ch. 29, on the assignment of moneys not yet earned under a construction contract as security for present or future advances ?

REPORTER'S NOTE.—Cf. *Deeley* v. *Lloyds Bank* ((1912) A.C. 756).

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers C.J., at the trial, dismissing the plaintiff's action with costs.

In the circumstances stated in the judgments now reported, the action was brought by the plaintiff, appellant, to recover moneys which he claimed as due to him for work performed and materials for the same furnished by him in the construction of a number of buildings for the Canadian Pacific Railway Company under a contract entered into between one William Garson, deceased, and the railway company, (alleging that the moneys arising out of that contract had been assigned to him by Garson,) and for a declaration that the moneys in question belonged to him and were not affected by an assignment of the same funds made by Garson to the bank. The action was against the

(1) 22 Man. L.R. 53; *sub nom. Fraser* v. *Canadian Pacific Railway Co.*

bank and the railway company for the recovery of $7,830, part of the moneys earned under the contract which had been received and retained by the bank, and for the balance of $8,433.70 still owing by the railway company. The company deposited the latter amount in court to be disposed of in such manner as the judgment might direct. At the trial, the claim against the railway company was abandoned and the case proceeded against the bank alone. The plaintiff's action was dismissed by the learned Chief Justice of the King's Bench, and his judgment was affirmed by the judgment now appealed from.

M. G. Macneil for the appellant. No special form of words is necessary to constitute an equitable assignment, and it is clear that the appellant had such an assignment from Garson. Leake on Contracts (6 Can. ed.) 857; *Hughes* v. *Chambers*(1). A verbal assignment is good against a subsequent written assignment. *Heyd v. Millar*(2); *Molsons Bank* v. *Carscaden*(3); Pollock, Contracts (8 ed.) 232.

The evidence clearly shews that the bank had knowledge of the assignment to Fraser, and notice thereof to the railway company is not necessary. As Garson had previously assigned the moneys to arise out of the Outlook contract, it cannot be said that he intended to assign or could assign the same funds to the bank. The reasons in the court below dealing with the question of non-assignability are quite beside the issue. *Burck* v. *Taylor*(4), and *Re Turcan* (5), have no application. Notice of assignment is

(1) 14 Man. R. 163.
(2) 29 O.R. 735.
(3) 8 Man. R. 451.
(4) 152 U.S.R. 634.
(5) 40 Ch. D. 5.

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necessary only for the protection of the debtor and, where that protection is not required, the date of the assignment prevails. See *In re Miller*(1), *per* Wetmore C.J., at page 96. This decision was under a statute exactly similar to the provisions of sec. 39(*e*) and (*f*) of the Manitoba "King's Bench Act," R.S.M., 1902, ch. 40. In *Newman* v. *Newman*(2), and *Dearle* v. *Hall*(3), there was an element of fraud; consequently, notice affected the priority. The rule in *Dearle* v. *Hall*(3) cannot apply in view of the provisions of the Manitoba "King's Bench Act," referred to. *Gorringe* v. *Irwell India Rubber Works*(4); *Jones* v. *Jones*(5); *Rochard* v. *Fulton*(6); *Scott* v. *Lord Hastings*(7); *In re Richards*(8); *Ward* v. *Duncombe* (9), *per* Herschell L.C., at page 378, and *per* Lord Macnaghten, at pages 391-394.

C. P. Fullerton K.C. for the respondent. We rely upon the reasoning of the judges in the court below (10). There is no evidence of record that there was an equitable assignment by Garson to Fraser and all that took place between them, as well as the conversations and correspondence with the officials of the bank at Winnipeg, are consistent with Fraser being an employee of Garson, or a sub-contractor for the works on the Outlook branch. Indeed, this is the irresistible conclusion to be drawn from all the facts and the absence of any proof whatever of express or implied notice to the bank that there had been an assignment

(1) 1 Sask. L.R. 91.
(2) L.J. 54 Ch. 598.
(3) 3 Russ. 1.
(4) 34 Ch. D. 128.
(5) 8 Sim. 633.
(6) 7 Ir. Eq. 131.
(7) 4 K. & J. 633.
(8) 45 Ch. D. 589.
(9) (1893) A.C. 369.
(10) 22 Man. R. 58.

of any kind by Garson to Fraser. At the same time, to the knowledge of both these parties, the bank had given notice of their assignment to the debtor, the railway company, and obtained its assent thereto, signified in various ways and, particularly, by the actual payment of the amounts of all the progressive estimates, up to the time of Garson's death, by the company directly to the bank. Even assuming the evidence established an equitable assignment, the respondent, by giving notice to the railway company obtained priority. *Dearle* v. *Hall*(1); *Loveridge* v. *Cooper*(2); *Foster* v. *Cockerell*(3); *Re Freshfield's Trust*(4); *Montefiore* v. *Guedalla*(5); 4 Halsbury, Laws of England, p. 379; *In re Lake*(6); Pollock on Torts (5 ed.), p. 209; *Marchant* v. *Morton, Down & Co.*(7).

THE CHIEF JUSTICE (dissenting).—In April, 1910, William Garson had two contracts from the Canadian Pacific Railway Co.; one to build roundhouses at Calgary, and the other, to erect six stations on what is called the "Outlook Branch" of that railway. The appellant's claim is for the price or value of work done by him in and about the erection of these six stations. Both contracts provide, amongst other things, that all the work should be proceeded with

under the personal supervision of Garson until completed,

and that the agreements

should not be assigned or the work sub-contracted without the written assent of the company's engineer.

A short time after the contracts were made, Garson had some conversation with the appellant, as the re-

(1) 3 Russ. 1.
(2) 3 Russ. 32.
(3) 3 Cl. & F. 456.
(4) 11 Ch. D. 198.
(5) [1903] 2 Ch. 26.
(6) [1903] 1 K.B. 151.
(7) [1901] 2 K.B. 829.

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sult of which, it was agreed between them that the latter should take over the building of the six stations on the Outlook Branch. It is admitted on this appeal that the company had no knowledge of that arrangement.

Subsequently, on the 24th June, 1910, Garson, for valuable consideration, assigned in writing and under seal to the respondent bank

> all his claim and demand against the C.P.R. Co. for moneys then due or thereafter to accrue due to him from the said company.

Of this assignment the railway company was duly notified. At the time this action was brought the company had paid (of the moneys earned under the contract) to the respondent, as assignee of Garson, in all the sum of $14,850 and a balance of $8,433 was still owing. The bank made advances to Garson on the faith of the assignment to the extent at least of the amount due under the contract and how much more does not appear. Garson died in February, 1911.

The railway company, sued originally as joint defendant with the bank, denied all knowledge of the arrangement between Garson and the appellant and brought the balance due under the contract into court to be disposed of as the rights of the parties might appear. The company was not made a party to the appeal either below or here. The issue, therefore, is narrowed down to the contest between the appellant and the bank, and the result depends chiefly upon the legal effect of the arrangement made between Garson and the appellant under which the latter built the stations in question.

The appellant's case on the pleadings was novation; his contention then was that by virtue of his arrangement he took the place of Garson on the con-

tract, with the assent of the company, and that the moneys were his from the beginning. On the evidence this position could not be maintained. It was abundantly proved that the railway company only knew Garson in the transaction and dealt with him alone throughout. The moneys paid Fraser as the work progressed were paid by Garson's cheque on the respondent bank in which both Garson and Fraser kept their accounts.

On this appeal two questions arose for consideration; 1st. Did the arrangement between Garson and Fraser under which the latter carried on the work constitute an equitable assignment of the moneys earned ? 2ndly. Did the assignment to the bank, duly signified to the railway company, give the bank priority ? In case the first question is answered in the affirmative, the second becomes important.

It has been assumed throughout the argument here that the trial judge found there was an equitable assignment from Garson to Fraser, as the result of the arrangement made with respect to the stations. I prefer to quote the language of that learned judge; he says(1) :—

> I think it is fairly clear that he (Garson) intended to have the plaintiff take his place under this contract in so far as it was possible for that to be done without the knowledge or consent of the railway company. I think the real arrangement was that the plaintiff should construct the stations in the place and stead of Garson and that the latter would turn over to him the progressive payments as and when they were received from the company. The moneys were Garson's as between him and the railway company and what took place between Garson and the plaintiff at most amounted to an equitable assignment of these moneys to the plaintiff.

In appeal it was held, by Howell C.J.(2) :—

> I think it would be unsafe from the evidence to find as a fact that there was an equitable assignment of this chose in action. For

(1) 22 Man. R., at p. 64. (2) 22 Man. R., at p. 67.

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all that appears in the evidence, the bargain might have been (and indeed it seems to have been) that the plaintiff was to do the work for the deceased for the same sum which the latter had contracted for, and that he would be paid for the same from time to time as the deceased received the money therefor from the company. This would not be an assignment of the chose in action.

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The first question, was there an equitable assignment by Garson to Fraser, must, I think, be answered in the negative. The railway company recognized in Garson no right to part with any portion of his contract. He was under an obligation to personally supervise the work contracted for, and no attempt was made to prove that, to the knowledge of the company, Fraser ever occupied with respect to the work any position other than that of an employee of its contractor. The arrangement between Garson and Fraser, said to have been reduced to writing at the time, is not now forthcoming, and we are obliged to rely upon the appellant's recollection of what occurred, Garson having died before these proceedings were instituted. I cannot find in Fraser's evidence an intention on the part of Garson to transfer the money payable under the contract. Fraser's failure to notify the railway company of his agreement, Garson's assignment of the same fund to the bank a few weeks later, the way in which the parties dealt with the money after it was paid over to the bank as assignee, all convince me that Garson never intended, when the agreement was made, to part with his control over the moneys and that Fraser relied for his payment upon Garson's general business credit.

It is quite true that no particular form of words is required to operate an equitable assignment, but there must be proof of an engagement to transfer the right, here the claim to the money, or to provide for the payment of that money out of a particular debt or

fund. A mere agreement to hand over work to be done does not operate an assignment of the money to be earned if the agreement is silent as to this. There must be evidence of an intention to assign the very fund which will be created by the execution of the work or to give a charge upon it. I cannot find any evidence of an intention on Garson's part to assign the money to be earned under the contract, although he undoubtedly undertook to pay Fraser the same price that he was to receive for the work. They are both presumed to have had present to their minds the conditions of the contract with the company; Garson remained liable at all times for its complete and exact fulfilment by Fraser and it does not appear probable that Garson would abandon all control over the payments made on the progress estimates so long as his liability under the contract remained. On the other hand it is not to be lightly assumed that Fraser, if the money as earned was available to him, would have neglected the very elementary precaution of notifying the railway company of his assignment, which he now swears was in writing.

I will briefly examine Fraser's testimony, having in mind his interest, the form in which his claim was first presented, and the finding in appeal that his evidence is "conflicting and unsatisfactory."

In answer to his own counsel Fraser says

> he took over the construction of the six stations from Garson.

Being pressed to tell all that took place between himself and Garson at the time of the arrangement in question, he says

> the latter 'phoned over to him if he would take them off his hands, that he would turn them over to him if they were any good,

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and being pressed repeatedly by his own counsel for a more favourable reply, he says

that he was to do the work at the same price as Garson;

finally he says, in answer to the question,

> Go on and tell us what was said, what took place and what was said ?
>
> A. Well, we arranged to meet, and it was either that day or the next day that he came over, and he brought the plans with him, and the specifications, and I estimated, and I told him that I would take them over at that price, that is, the price that he had for them, and he agreed to it, *and there was nothing more said about it.* So we used to meet occasionally and speak over it.

What does all this mean if not as found in appeal that the appellant undertook to do the work for Garson for the price the latter was to receive for it, without reference to a special fund out of which he was to be paid ?

As I have already said, the case turns entirely upon the effect of Fraser's evidence and I cannot find in it sufficient to justify me in reversing the judgment below. The appellant's version of the agreement with Garson, as I understand it, is at most evidence of a promise by the latter to pay for the work when he received the funds from the railway company, but not to pay over the moneys when and as received. There is no evidence of a distinct unequivocal agreement, such as is necessary to constitute an equitable assignment, that the particular funds received should be appropriated to the payment of Garson's liability to Fraser under the contract. Read in its entirety his evidence points to the conclusion that Fraser relied upon Garson's credit; and I am much impressed by the absence of notice to the company. Such a notice, it is true, was not necessary to complete the arrangement, but it is, in the circumstances, an ingredient in considering the effect of the evidence. If he relied upon

the payments made under the contract he would have taken steps to protect himself. All the facts of the case point irresistibly to the conclusion that Fraser must have known the money earned was paid when and as due to the bank and he never made any inquiry or protest. He nowhere says that he was to have the benefit of the fund as and when created. When examined as a witness at the trial he tells us that "nothing was said as to who was to pay him," and on discovery he says

> that he did not expect the moneys would be paid to him, but to Garson direct.

I must confess to some doubts on this branch of the case. The law on the subject as Brett J. said,

> is brought to such an exquisite degree of refinement that it is by no means easy to understand it,

but I certainly do not feel justified in reversing the unanimous judgment below.

Dealing now briefly with the second branch, I agree with the learned trial judge, who says: "But if notice was material I could not find that the bank had notice of what the plaintiff's claim to those moneys actually was until after the commencement of this action." The assignment to the bank was made to secure past and future advances to Garson and there is no evidence to justify the assumption that at the time it was made the bank had knowledge of the previous arrangement between its assignor and Fraser. The fact from which we are asked to draw the inference of notice is connected with a conversation that Fraser says he had with two of the bank officials on the subject of advances he required and during the course of which he pretends to have given them a list of his contracts, including the one now in question. He does

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not pretend to say that he intended to give the bank notice of his assignment, but we are asked to draw from this casual conversation the inference that the bank knew of the arrangement between Garson and Fraser and this notwithstanding the positive denial of the two bank officials who were believed by the trial judge. I cannot go that far and I respectfully urge that to do so would be to establish a precedent which would seriously disturb the business of banking so largely dependent upon good faith and plain straightforward dealing. The bank took the assignment, notified the company and made the advances as agreed, and to defeat its claim upon such flimsy evidence as is relied upon here is, I repeat, to create a dangerous precedent. Why did Fraser not say plainly that he had an assignment instead of leaving that fact to be inferred, and further, why, with the knowledge of such an assignment, should the bank have undertaken to make advances to Garson on the credit of the same fund ?

The same observations apply to the subsequent alleged conversation with Garson during the course of which he is supposed to have told the bank officals that money received on the progress estimates belonged to Fraser. If it was Fraser's why not have paid it to him instead of depositing it to Garson's credit to be drawn against for his general liabilities ? I quote Leslie's version of the incident from which we are asked to draw the inference of notice :—

Q. Now, when did you first become aware of the fact *that Mr. Garson had transferred* the Outlook Branch contracts to Mr. Fraser ?

A. Never knew it.

Q. You never knew it ?

A. No.

Q. When did you first become aware of the fact *that Fraser was building* these Outlook Branch stations ?

A. I don't know the date. Mr. Garson and Mr. Fraser came in

and Mr. Garson said, "I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser," and that is the only interview or knowledge I have of the matter.

Q. Can you fix the date at all ?

A. No.

Q. You say it would be after the assignment ?

A. Yes, it was some time in the summer.

Q. Some time in the summer ?

A. Yes.

Q. Apart from that, did you know the arrangements, or anything about the arrangements between Garson and Fraser ?

A. None, nothing whatever.

In any event the rights of the parties cannot be affected by anything that happened after the assignment was executed and when advances had actually been made on the faith of it. The law surely is that the subsequent assignee must know of the prior assignment at the time he takes his security. *Mutual Life Assurance Society* v. *Langley* (1886) (1).

This may be in some of its aspects a very hard case, but in the general shipwreck the "Tabula" is, in my opinion, with the bank — *"Durum est sed ita lex scripta est."*

I would dismiss with costs.

DAVIES J.—This was an action brought by the appellant to recover from the bank and the Canadian Pacific Railway Company certain moneys claimed by the appellant as the unpaid balance of the contract price of six railway stations known as the Outlook Branch stations constructed by the appellant.

The contract for the construction of these stations had been entered into on the 11th of April, 1910, between one William Garson and the railway company, and the appellant's case was that some days after entering into the contract Garson offered Fraser that if he would take these stations off his hands he, Gar-

(1) 32 Ch. D. 460.

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son, would turn them over to him. That Fraser after examining the plans and specifications agreed to take them and to take over his contract with the Canadian Pacific Railway Co. for their construction, and that the agreement between them which was verbal only was then settled and concluded. That Fraser afterwards completed the buildings according to contract and became entitled to the contract price.

So far as the railway company was concerned there was practically no contest. They had not received any notice of any assignment of the contract to Fraser, but had been notified by the bank on the 24th of June, 1910, that Garson had assigned to it

> moneys now due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Company,

and had in consequence paid over to the bank the different instalments as earned under the contract for the construction of the Outlook stations and some extras amounting in all to the sum of $14,850, leaving a balance of $8,433.07 still owing. This balance the railway company brought into court to be paid over as directed by the court.

So far as the railway company is concerned they practically drop out of the case, and the contest is one between Fraser and the Imperial Bank as to the moneys paid by the railway company for the construction of these Outlook stations.

There seems to be two questions on the determination of which the rights of the contestants rest, first: Whether there was an equitable assignment from Garson to Fraser of the former's contract with the Canadian Pacific Railway Co. for the construction of these stations. If so, was the notice of such assignment given to the bank before they made the advances to Garson which the bank's assignment was intended

to cover and secure. The trial judge, Chief Justice Mathers, held, as I understand his judgment, that there was such an equitable assignment, but that

when the bank took its assignment from Garson (on the 24th June, 1910) it had no notice of any interest that the plaintiff had acquired in any Garson contract with the railway company or of any arrangement that had been made between Garson and the plaintiff with respect thereto. That as soon as the bank took its assignment it perfected it by notice to the railway company and thus gained priority over the plaintiff's assignment of which no notice was ever given.

For these reasons he dismissed the plaintiff's action. So far as advances made by the bank to Garson up to the time of the assignment to it are concerned these reasons might be good. I cannot see their application to subsequent advances made by the bank after notice of Fraser's assignment.

The Court of Appeal for Manitoba dismissed the appeal to it on the ground that it

would be unsafe from the evidence to find as a fact that there was any equitable assignment.

The facts of this case are somewhat unique. There was, of course, at the time of the alleged equitable assignment from Garson to Fraser of the former's contract, no fund in existence to assign, there was simply Garson's contract rights which were as and when he built the stations to receive the contract price as stipulated for. There never was any work done nor materials supplied by Garson under the contract and the work done and the materials supplied were done and supplied by Fraser. There was not any assignment from Garson to the bank of any specific moneys to accrue due to the former under the contract relating to the Outlook stations. It was a general assignment of

all my claim and demand for moneys due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Co.

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The consideration for the assignment was $1 and its object and purpose as explained by the manager of the bank was to secure the bank for any then existing or future advances made to Garson. So far as advances made by the bank to Garson at the time it took this assignment and before it had notice of the equitable assignment to Fraser are concerned, of course, no question arises. With regard, however, to any subsequent advances made by the bank *after* such notice it would be plainly unjust and inequitable to permit the bank to hold these moneys received from the Canadian Pacific Railway Co. as the price of construction of the Outlook stations as against the equitable assignee who had done the work and notified them of his assignment. And so with regard to the balance due by the Canadian Pacific Railway Co. on the contract and brought into court the bank would, in the event of its being held to have had notice of the equitable assignment from Garson to Fraser, only be entitled to claim this balance to the extent of the advances made prior and up to the receipt of the notice.

I entertain grave doubts whether the words of the assignment to the bank, construed in the light of the manager's evidence as to its object and purpose, cover moneys earned by the assignee of the contract, Fraser, after the bank had notice of his assignment. Technically they may be said to be moneys "accrued due to Garson," in whose name the contract was made and remained, but really and equitably they were not, but accrued due to the assignee who by the expenditure of his time and money had earned them. Assuming the equitable assignment and the notice to the bank as proved, then the bank receiving the money legally enough from the Canadian Pacific Railway Co. would

hold it in trust for its real owner, the assignee. All it could claim would be the right to have any advances made by it, before it received notice, repaid out of the moneys it received.

Now, was there an equitable assignment to Fraser of Garson's Outlook contract ? I agree with the trial judge that there was. No form of words is necessary to create such an assignment. It is always a question of fact and of the intention of the parties to be gathered from what they said and did and from all the surrounding circumstances. Garson died before the suit began and the only direct evidence of what took place between Garson and Fraser is that of the latter. Reading it as I have done several times over and applying it to the admitted facts of this case I cannot doubt that if believed, and the trial judge who saw Fraser and heard his evidence believed it, the intention of both parties was that the entire contract and Garson's rights under it should, as expressed, be "taken over" by Fraser at the price Garson had for the stations to be built and that Fraser should supply all the materials, do all the work and become entitled as between him and Garson to the contract price. As a matter of fact he did supply all the material and did all the work and in equity as between Garson and Fraser no doubt could arise as to his being entitled to the moneys to be paid by the railway company therefor.

We are not left, however, to Fraser's evidence alone on this point. We have the conduct and actions afterwards of Garson before his illness and his conversations and correspondence with and to the bank's officials. Mr. Leslie, the manager of the bank, himself says that Garson and Fraser came in together to see him at one time and that Garson said: —

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I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser,

which stations Mr. Leslie understood as the Outlook stations. If Garson was only subletting to Fraser there would be no reason in his giving the bank notice of it. He gave notice because he was assigning and ceasing to have further interest in it. As to when Garson made this statement Mr. Leslie seems very uncertain and hazy. He seems clear that it was before the $3,000 advance made in November, 1910, but how long before he could not say. It might be, he thought, a month, could not say whether it was two months, and the nearest he could get to the time was that it was *sometime during the summer* after the assignment to the bank. Mr. Leslie evidently did not pay much attention to this statement of Garson's relative to the turning over of the Outlook stations to Fraser, because at the time the bank took the assignment from Garson the only contract that he knew definitely that Garson had with the Canadian Pacific Railway Co. was for the roundhouse at Calgary. While the words of the assignment may be, and doubtless are, large enough to embrace these Outlook stations contract it seems clear alike from Garson's conduct in assigning it over to Fraser and from the bank officials' conduct and attitude towards it that they themselves did not intend the general words of the Garson assignment to include in them moneys becoming due on a contract standing in his name it is true, but which he had turned over to another contractor without investing a dollar either in labour, materials or otherwise, and which moneys only became due at all by the labour and expenditure of his assignee. That was doubtless one of the reasons why the manager of the

bank paid little attention to the express notice Garson gave him in Fraser's presence that he had handed over this contract to Fraser and was unable to fix the time he received it more accurately than that it was sometime during the summer after the assignment. I conclude that as between Garson and Fraser it was not a mere subletting of the Garson contract, but a complete equitable assignment of it and that when Leslie swears that Garson told him he had called to tell him that he had handed over his Outlook contract to Fraser, who was then present, all parties understood that by handing over the contract he meant assigning it over. But the knowledge brought home to the bank of the assignment of this contract does not rest here. Fraser swears, though on this point he is contradicted by Morris, the assistant manager, that some two weeks or so after taking over from Garson these Outlook stations he went to the bank, saw the manager and assistant manager and gave the latter a memo. of the contracts he had, including the six Outlook stations, stating he wanted some financial assistance. He said he was told to call again, that he afterwards did so and was told by Mr. Leslie, the manager, that "perhaps when he got those stations well through" the bank could advance the money. If Fraser's evidence on this point is accepted following Garson's admitted notice to the manager the question of notice to the bank might be well determined in his favour. But apart from this evidence I think the dealings Fraser had with the bank respecting the moneys paid to it by the Canadian Pacific Railway Co. under the Outlook contract, shew clearly that it had full notice of the assignment of the contract to Fraser. It is urged that the conduct of the bank officials is consistent with their belief that

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the work was being done by Fraser as a sub-contractor under Garson merely and not as an assignee. I do not think so. First we have Fraser on August 25th, 1910, going to the bank, as he says, with reference to the payment of the first estimate on his work. The bank had not received the money, but Morris, the assistant manager, filled up a ten day note for $800 which Fraser signed, and received the amount less discount. Fraser swears that this was an advance on the first estimate of $1,620, which was then discussed between them, and that it generally took about 30 days to get the money after the estimate passed. Morris denies that this $800 was advanced on the $1,620 estimate or had anything to do with it and says that he first learned Fraser was building the stations or had taken them over from Garson *when this action first started.* I am not, however, able to reconcile this denial and this statement of Morris's with his actions respecting the cheque for the $1,620 estimate when received by the bank or with his correspondence referring to the subsequent estimates on the same contract.

On August 22nd, 1910, Garson drew a cheque in Fraser's favour on the bank for $1,620, expressing on the face that it was for "payment of first estimate Outlook contract, C.P.R." On the 9th of September the bank received and credited Garson with the amount of the estimate and marked the cheque "Accepted, Sept. 9th, 1910, Imperial Bank of Canada." Fraser indorsed the cheque and the bank put it to his credit. Morris, the assistant manager, initialled the cheque himself, and it would seem idle for him now to say that he *first learned* Fraser was building the stations or had taken them over from Garson

when this action first started. Fraser on the 24th of August drew a cheque for $700 in favour of his foreman, Simmons, who was erecting the stations, and in the body of it stated that it was "A/C stations." He says that he told Morris that it was for the building of these stations that he was sending the money. The bank with Morris's knowledge remitted the money to Simmons at Keeler, where he was erecting one of the stations, and the cheque itself contains a memo. indorsed in Morris's handwriting, "Keeler, Sask." There were other cheques given by Fraser for the same purpose and remitted in the same way. On October 6th the bank received the second instalment of $5,400 on these stations contract. Before that, however, on September 20th, 1910, Garson had written the bank from Calgary, saying:—

As C. P. August estimate is now overdue I enclose a cheque in favour of W. H. Fraser with *amount blank*, which you will oblige by *filling in for the sum returned in the August estimates for the stations he is building and hand same to him* as soon as the cash comes in.

This blank cheque on its face read: "*Aug. estimates Outlook stations,*" and when a few days later the blank was filled in with $1,000, the abbreviation "a/c." was placed before the words "Aug. estimates Outlook stations." Mr. Morris received and, on the 24th, answered this letter, enclosing this blank cheque, as follows:—

Referring to your letter of the 20th instant *re* W. H. Fraser we are advised by Mr. Fraser that *his* August estimates amount to about $5,400. We have filled in your cheque in his favour for one thousand dollars ($1,000) in the meantime. Yours truly, M. Morris, Assistant Manager.

In the face of this correspondence it is clear that Morris's memory must have failed him when he stated that he first learned when this action began that Fraser was building the stations or had taken them over from Garson.

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Fraser swears that he was advised by Garson of his having sent the bank a blank cheque for the second estimate and that he went to the bank, saw Morris, who told him the money had not up to that time been received and asked him to fill in the blank with $1,000. As Morris himself writes Garson that Fraser then advised him that his August estimates amounted to about $5,400, it would seem there was no room for doubt that at that date at any rate the bank had full knowledge not only that Fraser was building the stations, but that he was building them under an arrangement with Garson which entitled him to receive the estimates as they were passed and paid in by the Canadian Pacific Railway Co. On October 8th on another cheque being received by the bank from Garson in favour of Fraser the balance of their estimates, namely, $4,400, was paid by the bank to Fraser's credit and this cheque again on its face expressed that it was "estimate No. 2, Outlook stations."

Later on, in November, Fraser states that he became aware the third estimate for $7,800 had been passed, but not paid and that he and Garson went to the bank to see about getting an advance. Fraser got the advance on a note signed by both Garson and himself on the 21st of November, payable on demand. Morris again denies that this $3,000 was being advanced "in anticipation of the estimate." It is worthy, however, of note that some days previously, namely, on November 9th, Garson wrote a letter to the bank on his general business matters, which contained the following sentence:—

> It is likely the C.P.R. estimate in Outlook work will be paid in shortly. *It belongs to W. H. Fraser.* When it comes let him draw on me at sight for the amount and transfer it to him,

and in another paragraph:—

> Let me know if you approve of my keeping the money in your bank here.

To which letter Mr. Morris signing himself "assistant manager" replies on the 14th November as follows:—

> I am in receipt of your letter of the 9th and *note your advices.* There is no objection to your retaining money in Calgary for your Calgary contracts providing that proceeds of your C.P.R. contract will be sufficient to protect advances in this office.

Not a single word throwing a doubt upon Garson's statement that the November estimate on the Outlook work belonged to W. H. Fraser and was to be transferred to him. Surely if any doubts existed as to the bank's knowledge that Fraser was the real contractor for the Outlook stations and entitled to receive the estimates as they were paid into the bank, this letter should have set them at rest. This third estimate was for $7,800. $3,000 had been advanced on Garson and Fraser's note to the bank and $1,000 of the three forwarded by the bank by express on the same day to Fraser's foreman, Simmons, on Fraser's cheque expressing that its "A/C. Simmons, C.P.R. stations." This cheque was initialled by Morris and indorsed by Fraser with the words, "Glenside, Saskatchewan," indicating the place where the money was to be spent, that being one of the places where he was erecting a station. There were also cheques drawn by Fraser on the bank, one for $1,002.50 on October 18th, 1910, favour of "Dfts. Moose Jaw and Keeler," the other for $1,003.25 on October 28th, favour of "cash," each of which contained in the margin the words and figure "C.P.R. 6 S.," which I conclude meant the 6 Outlook stations being built by Fraser and the amounts of each of which cheques were forwarded by the bank at the places indicated, the latter cheque being accom-

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panied by a requisition from Fraser, "Required a draft on Broderick in favour of J. H. Simmons. Applicant, W. H. Fraser." "Broderick" was the name of one of the stations and Simmons the name of Fraser's foreman building them. Sometime after the 21*st November,* 1910, when the $3,000 were advanced to Garson and Fraser on their note taken "on demand," the $7,800, being amount of the third estimate, was received by the bank. The exact date of its receipt I do not find, but Garson was then ill in the hospital at Calgary and his account at the bank in an unsatisfactory condition. Fraser made repeated applications to the bank for this money, which were rejected and ultimately he went to Calgary and, Garson being sick in the hospital and not able to be seen, obtained from his foreman or manager a cheque for the amount of $7,800 expressed as "Transfer *re* C.P.R. Outlook stations," and signed "pp. Wm. Garson, John Sweeny, attorney." This cheque the bank refused to honour. Garson subsequently died, and this action was brought in which the Canadian Pacific Railway Co. was joined, inasmuch as they had not paid the balance of the contract into the bank. That balance, $8,503, remaining unpaid in respect of the contract for the Outlook stations the railway company brought into court, claiming no interest in it other than for costs and leaving it for the disposal of the court between the contestants Fraser and the bank.

The Canadian Pacific Railway Co. or their interests, are, therefore, in no wise concerned in the result of this case. Their stations were admittedly built for them by Fraser. The money contracted to be paid became due. Whether they had notice or not of the assignment to Fraser by Garson or whether they did or did

not waive the clause in the contract prohibiting its assignment without the written consent of the engineer cannot have anything to do with the issues as between the bank and Fraser. The money had been paid in part, $7,800 to the Imperial Bank, who still claim to hold it presumably for advances due them by Garson, and the $8,503 is in court payable to the bank if their legal contentions are maintainable, and if there is still that amount due them for advances to Garson, or payable to Fraser if he was the equitable assignee of Garson's Outlook contracts and if the bank had notice of such assignment before making the advances.

As I have previously stated I do not myself think there can be any doubt as to what was meant by the parties, Garson and Fraser, when after the former had asked the latter to take over this contract and Fraser having first examined the plans and specifications and made his own estimates told Garson he would take them over at the price he had for them and Garson agreed to it. By "taking over" the contract the parties meant that Fraser should stand with respect to it and its obligations and rights in Garson's shoes. If there was any doubt as to what "taking over" at his tender price meant, the subsequent conduct and actions of the parties sets that doubt at rest. Garson never claimed a cent of the estimate paid on the work by the Canadian Pacific Railway Co., but, on the contrary until his fatal illness occurred, the contract standing in his name, gave Fraser cheques, one of them in blank, for the amount of these estimates as they were paid into the bank and in his letters to the bank used language which could only have one mean-

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ing, and that was that the contract was entirely Fraser's, who did the work, supplied the material and became entitled to the moneys earned under it for his own benefit. As to the bank having notice I think they had full and ample notice in the summer of 1910.

I do not know whether an earlier date than August is necessary to maintain the plaintiff's contentions as the bank's account with Garson is not in evidence and we do not know the dates when they made the advances to Garson, but I see no reason for refusing to accept Fraser's statement that within two weeks after his taking over the contract he was seeking financial assistance from the bank and left the list of the contracts he had, including the one now in question, with them, and that he then gave them the necessary notice. If there is doubt with respect to that then, in my judgment, the evidence of their having had notice in August and the early part of September, when the first estimate was passed to his credit is sufficient to fix the date and the cumulative evidence which follows in the correspondence between the bank and Garson and in the dealings of the bank with Fraser, is overwhelming. I cannot myself see how in the face of this correspondence and these dealings, so corroborative of what Fraser has sworn to, the bank could for a moment seek to appropriate the fruits of Fraser's labours and expenditure towards the payment of advances made by them to Garson, which advances it cannot be seriously contended were in any wise made on the strength of the assigned Outlook contract.

The appeal should be allowed with costs in all courts against the bank. Canadian Pacific Railway Company's costs to be paid out of money in court.

Judgment to be entered for Fraser for $7,830 admitted in the 6th paragraph of the bank's defence to have been received by it, with interest at statutory rate, from the date of its receipt, and also for the moneys paid into court by Canadian Pacific Railway Co., less its costs.

IDINGTON J.—The late Mr. Garson tendered to the Canadian Pacific Railway Co. by separate tenders put in at the same time, for the construction of its round-house at Calgary and also six stations on its Outlook Branch, and was awarded the contracts therefor. The former was a large contract and Garson seems to have thought there was not enough in the latter to render it worth his while distracting thereby his attention from the former and other contracts he had undertaken, and hence offered the appellant to take the latter off his hands, do the work, supply the material and receive the entire amounts named in the tender therefor or accruing under the contract. Appellant accepted his proposal. Garson being alone known to the company had of necessity to sign the contract. As between him and the company he was the contractor responsible for the execution of the work. As between him and the appellant the contract being non-assignable he was bound to appellant to see that he got all moneys accruing thereunder in respect of work done by appellant.

The learned trial judge held rightly that there was thus created an equitable assignment of said moneys.

Two months later and after the appellant had entered upon the work pursuant to this understanding the respondent obtained from Garson an assignment

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dated 24th June, 1910, of which the operative part is as follows:—

Know all men by these presents that William Garson, of the City of Winnipeg, in the Province of Manitoba, for and in consideration of the sum of one dollar paid to the said William Garson by the Imperial Bank of Canada (the receipt whereof is hereby acknowledged) doth hereby sell, assign and transfer unto the said Imperial Bank of Canada all my claim and demand against the Canadian Pacific Railway Company for moneys now due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Company.

There follows this a power of attorney to collect the moneys referred to for the use of the bank absolutely as its own forever.

It is to be observed that on its face this assignment is only in consideration of one dollar.

Obviously on the evidence this document does not tell the whole of what it was intended for. The bank manager who witnessed its execution says in his discovery examination

it was given as security for the advances made from time to time to Garson,

and proceeds as follows:—

Q. Was it for advances already made or for future advances ?

A. It was both.

Q. Did you know at the time of taking that assignment what contracts he had with the C.P.R. ?

A. No.

Q. What moneys were owing to him ?

A. Not definitely.

Q. Why do you say "not definitely" ?

A. I knew that he had contracts with the C.P.R., but I knew nothing as to the amount definitely coming to him.

Q. Did you know what kind of contracts he had ?

A. No, not — I knew that he had — nothing definitely. The only thing I can remember that he had was some contract for roundhouses or something of that kind.

Q. Do you remember him stating that he had contracts for stations and roundhouses ?

A. Not definitely; the only thing I can remember that he had some contract for roundhouses at Calgary; that is the only definite contract that I——

Q. He told you that he had tendered ?

A. Yes.

Q. And you remember that distinctly, and you remember definitely about the roundhouse at Calgary ?

A. Yes, I am pretty sure that that is right. But we never made any inquiry as to the nature of his contracts or where they were.

In his examination-in-chief at the trial to the question put thus: "Q. Under this assignment from Garson to yourselves — the bank — was any money advanced by the bank ?". he answers, "No, not at the time." And later the question was repeated with the added words, "on the strength of this assignment." "A. Why, I can't remember just now. It strengthened Garson's credit." And he continues:—

Q. It was advanced on the strength of Garson's credit ?

A. Yes.

Q. After this assignment was made were moneys advanced to Garson ?

A. Yes; that is my recollection, at least.

Q. Would all the moneys in question in this action be sufficient to pay off Garson's indebtedness to the bank?

Mr. Elliott: I object to the question.

His Lordship: I will allow it.

A. No.

Q. You say no ?

A. Yes — I am not positive about that. Yes, I think I can say no.

Q. You say no ?

A. Yes; that is the moneys coming from here would not be sufficient.

In other parts of his evidence he indicates inquiries were sometimes made of the Canadian Pacific Railway Co. respecting the amounts due on specific contracts on faith of which or to subserve the purposes of which advances had been asked by Garson.

The bank cannot, therefore, claim that it ever knew of and as result of definite knowledge relied upon this alleged assignment of the Outlook stations contract as security for either past or future advances.

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There appears in the letter of September 20, 1910, from Garson to the bank, which I will deal with presently, a report, as it were, of the progress he was making in his several contracts, and I think it fairly inferable from that and other evidence that the bank from time to time relied upon similar reports from Garson as well as answers of the Canadian Pacific Railway Co.'s officers for information as to the progress of his contracts when making advances either to help out the execution of such contracts or make the money earned therein the basis for further advances or security for past indebtedness.

I cannot find a single instance of such inquiry or report relative to the Outlook stations contract, save when the facts relative thereto were, as I am about to shew in detail, so coupled with respondents' rights as should have put it on inquiry and have destroyed any right to claim reliance on the proceeds from said contract for any advances made to Garson outside of the scope of said contract.

Such is the nature of the claim set up by respondent to deprive the appellant of his equitable assignment and to despoil him of his labour, his money and his property spent in reliance thereon.

Having regard to the express non-assignability of the contract between Garson and the Canadian Pacific Railway Co.; to the want of definiteness in the form of assignment respondent relies upon; to the non-existence, at the date of the assignment, of any debt due or known to the respondent to be accruing due as arising out of this contract now in question; to the want of proof of any debt due from the assignor Garson to the respondent at the said date and remaining due when the assignment could have acquired any con-

ceivable operative effect; and in short to the entire history of legal assignments of choses in action, including the "King's Bench Act" of Manitoba, section 39, and the effect thereof I submit that the said assignment, if anything, cannot be treated as any higher or stronger than an equitable assignment and that the rights of respondent and respective rights of the parties hereto must be determined by the principles of law governing equitable assignments and the equities between them as will be developed presently.

It is said respondent must succeed by virtue of notice to the Canadian Pacific Railway Co. within the rule laid down in *Dearle* v. *Hall*(1), and a long line of cases of a like kind ever since. But I cannot find such a case as this in all that long and varied line.

The only notice given the debtor, the Canadian Pacific Railway Co., was a delivery of the assignment accompanied by a letter as indefinite as the instrument itself.

The language used by Lord Cairns in *Shropshire Union Railways and Canal Co.* v. *The Queen*(2), at page 506, and quoted with approval by Lord Macnaghten in *Ward* v. *Duncombe*(3), at page 391, is so comprehensive and forceful and expresses so much better than I can exactly what I feel should not be lost sight of in dealing with so remarkable a claim as respondent presents herein, that I cannot forbear quoting the entire passage as presented by Lord Macnaghten. He says:—

> The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in *Shropshire Union Railways and Canal Company* v. *The Queen*(2), at p. 506: "A pre-existing equitable

(1) 3 Russ. 1.
(2) L.R. 7 H.L. 496.
(3) [1893] A.C. 369.

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title," said Lord Cairns, "may be defeated by a supervening legal title obtained by transfer" — he was there speaking of an equitable title to shares. Then he goes on: "And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced."

How can such a requirement of the law thus defined be held to have been complied with by the delivery of such an assignment as this now before us ?

The further expressions of Lord Macnaghten himself on pages 392 to 394 of latter case criticizing the expressions so usual as to "perfecting" or "completing the title" of an assignee and constituting the debtor in a contract or the holder of a fund "a trustee" for the assignee and the duties or rights of a trustee in such a position are worthy of note in the same connection.

The assignment if purely voluntary could not acquire, even with notice, priority over an earlier one for valuable consideration. See *Justice* v. *Wynne* (1860) (1), which is the only express authority on the point, cited in the text-books, but I take the principle of law involved therein to be undoubted, when regard is had to the doctrine, speaking generally, that courts of equity will not aid a mere volunteer in any case to enforce a gift failing in anything essential to its completion. I shall advert to this principle later when I come to deal with the respondent's claim as presented

(1) 12 Ir. Ch. R. 289.

on the evidence outside this instrument. I am only concerned here just now with the bare question of the effect of notice when resting on such a foundation as presented here.

This assignment on its face is purely voluntary. How can it be that such notice as that carried should be converted into something higher than it seemed by its terms to express? If it had purported to be by way of security as now claimed, then this might have been of less consequence, but it appears from its contents as if an absolute gift. The alleged basis of the principle upon which notice is given such effect as it has is said by Lord Lyndhurst in *Foster* v. *Cockerell* (1), at page 475, to have been founded on the reason

> that if a contrary doctrine was allowed to prevail, it would enable a *cestui que trust* to commit a fraud, by enabling him to assign his interest, first to one and then to a second incumbrancer, and perhaps, indeed, to a great many more; and these later incumbrancers would have no opportunity of ascertaining, by any communication with the trustees, whether or not there had been a prior assignment of the interest, on the security of which they were relying for provision of their claims.

And he adds later on:—

> In a case of this sort it is necessary that a party claiming advantage from a title, should do everything that is requisite to complete that title before he sets up a claim in respect of it.

Such being the purpose of the rule as to notice, how can it operate when the reason for its application ceases, and it is sought to so extend its application as to enable the assignee in a kind of case without precedent, to rake in not only the whole or part of an ascertained fund, but of one to be created by the prior assignee's own labour and material? When and how does this fraud then appear? And when and how can we find in this notice a doing of everything requisite to complete title?

(1) 3 Cl. & F. 456.

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Giving the doctrine full force and effect one would imagine that a thing so very important should be true and not as false as the notice relied upon herein. Again, in every one of the authorities the respondent sets forth in its factum in this regard the notice given was clear, specific and related to a well-defined claim or fund existent or to arise from another source than at the prior assignee's expense.

In the case of *Marchant* v. *Morton, Down & Co.* (2) the facts suggested to Mr. Justice Channell a feature that might possibly, on a slight variation of fact, have raised a question remotely resembling this relative to sources to feed the fund.

But a somewhat diligent search has failed to discover for me a single authority of an assignment and notice thereof substantially failing in these characteristics yet having been upheld.

In this case there is nothing specific, definite or clear in the notice which is the assignment itself. How could a debtor or trustee of a fund if such had existed be held bound to trouble himself with such a notice of a voluntary assignment? And how much less so in a case where he was not bound to recognize any assignment and had reserved the right to himself to resist and discard any assignment?

Surely the paymaster, or trustee if you will, in such a case had a right to discard as notice that which might have entitled him, if set forth truly and at length, to elect to declare the whole contract, which is to produce the fund assigned, void and ended forever. Of what value, moreover, could a notice be, which neither pointed to one contract nor another? Is it possible to argue this one in question is wide enough

(2) (1901) 2 K.B. 829.

in its terms to cover all past and possible future relations between the assignor and the Canadian Pacific Railway Co. during the entire lifetime of the deceased? I think not.

Let us then examine its terms closely and see if we can find anything definite.

The singular number is used in describing the thing assigned. It is not several claims, but Garson's single claim that is assigned. We know he had more than one claim, but from the evidence of the respondent's manager, who was the witness to this assignment, we find he only knew of one claim and the appellant is not concerned with that. If we must, as the language requires, restrict respondent to one claim, then that of which respondent had some knowledge or notice must be the one, rather than one absolutely unknown. Surely this ought, if the notice is not definite, to end the contentions set up. If not good notice then as appellant's equity is prior respondent must fail.

I wish also to draw attention to the very peculiar language of this assignment.

How did the assignment get its very peculiar wording? It begins in the third person, but when it describes the claim it changes and takes the unusual form in the peculiar phrase, "my claim," etc.

It looks as if Garson had orally or in writing referred to "my claim" in some instructions he had given to distinguish that to be assigned from claims merely standing in his name as trustee in effect, as he did in subsequent letters to respondent, not only in the reference made to the appellant's rights, but as he did in that of the 20th of Septemebr, 1910, when he refers to a Minnedosa account and says,

this really belongs to Snyder. I have sent him a cheque accordingly.

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I think this alleged notice of an equitable assignment held in the courts below as sufficient to give respondent priority fails for the reasons I have given. And I may add that the same reasoning is destructive of the assignment itself as covering the contract in question, whatever other contract it may cover.

I have combatted thus far that line of argument which prevailed below, but incidentally have noted as relative thereto other facts and circumstances which in another light are equally fatal to the respondent's claim.

A perusal of the entire evidence in this case has deeply impressed me with the conviction that Garson never intended by this assignment to pass to respondent, for its own benefit, or deprive appellant of, what he had undoubtedly promised him, and that he had made this clear to some one in such manner as to render respondent's officers indifferent regarding the stations contract in question.

The respondent's manager was applied to by appellant shortly after his agreement with Garson to furnish financial assistance in case of his making further arrangements with Garson for other work, but was refused.

Both are agreed appellant was then asked for a statement of his affairs. Whilst the manager admits he saw such a statement he denies hearing then of this Outlook stations contract. The appellant distinctly says he then told him of his arrangement with Garson for that contract.

It may be that the manager attached so little importance to the contract that he had forgotten it. I see no reason for disbelieving appellant's version which seems highly probable. It was part of the very

business both agree was considered and must have concerned them both in the consideration thereof.

At all events the appellant, who was refused on that occasion, was a short time after given accommodation and later on several occasions further accommodation and each was, curiously enough, connected with the estimates for the work done under the very contract now in question. These estimates were the property of respondent if it ever had a claim; yet its manager and assistant manager let them be so dealt with by the appellant or by him through Garson as if they belonged to appellant.

The documents themselves in these transactions by the very language used therein seem to earmark the first two estimates so dealt with as appellant's property; the figures involved therein seem to fit in with and, as it were, to emphasize these facts, and taken therewith the letter of the 20th September from Garson to the respondent's manager clearly demonstrated appellant's claim to the eyes of respondent's officers; and the letter of the 24th September in reply thereto from the assistant manager to Garson conclusively proves that demonstration of fact had reached him. It must be presumed from all these and other facts, to have so reached the understanding of all concerned on behalf of respondent, that we can safely say these moneys were being treated to their knowledge by both Garson and appellant as the money and the property of the latter.

Then the letter of the 9th November from Garson to the respondent's manager as to the third estimate after dealing with a variety of his contracts and the moneys earned thereon expressly states:—

> It is likely the C.P.R. estimate on Outlook work will be paid in shortly. Belongs to W. H. Fraser. When it comes let him draw on me at sight for the amount and transfer it to him.

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The answer to this last letter fails to repudiate such a suggestion, and in the first sentence says:—

> I am in receipt of your letter of the 9th instant, and note your advices,

but makes no remonstrance in answer to such a claim. That claim ought by this time, if the pretension now set up by respondent is well founded, to have been repudiated in no uncertain terms, but it was not. It was acquiesced in.

Throughout the whole of these dealings the respondent never, either to appellant or Garson, disclaimed the grounds for such pretensions as implied therein.

This silence on the part of respondent's officers, and this manner on the part of all concerned of treating the claim of appellant, is consistent with the truth of his statements relative to what had taken place between him and the manager, and hardly consistent with any other theory than its truth; save and except a theory of the entire ignorance of the officers of respondent of any claim it had under the assignment and want of reliance by the respondent on any claim to, or to charge, the fund in question. It is absolutely inconsistent with a proper realization by respondent's officers of the legal and moral duty resting upon them under the circumstances which had transpired under their eyes, if their present pretensions herein were well founded.

I cannot agree with the view of the learned trial judge that what transpired after the date of the assignment can have no effect on the light in which it is to be considered.

Respondent's mode of treating what transpired after that is cogent evidence corroborative of what

appellant states had taken place relative to his rights in the premises and of the notice he claims respondent had.

Besides it could not be permitted to any one claiming under an equitable title the moneys in question to maintain under such circumstances such silence relative to such a claim, if it ever had existed, and then to try to set up such a claim as now set up by respondent as against him whose labour and money were creating and had at the institution of these proceedings created the fund now claimed by respondent.

But there is another ground yet which to my mind should bar the respondent's claim. It sets up by evidence I have quoted above, that the assignment was in truth not what it expresses, but was taken by way of security for advances to be made as well as for past advances.

No past advance is shewn to have existed unpaid when this suit began, and hence, as already stated, it cannot be held as security for that. No specific advance ever was made on the faith of this security. And no further advance was made before appellant's equity had to the respondent's knowledge, clearly intervened.

If this claim relative to later advances is to be treated, as I think it can well be treated in such case as the like advances were treated in the case of *Hopkinson* v. *Rolt*(1), as between a first and second mortgagee then the claim of what respondent had acquired by reason of its advances on the faith of its bargain and charge must be subject to the claim of the appellant for his labour and expenses which created the fund in dispute.

That was a case as between first and second mort-

(1) 9 H.L. Cas. 514.

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gages in which the first was held good only as to advances made when it was taken, or before the second was acted upon, but as to future advances which the first was intended to secure, they were held, so far as made after the advances on the second mortgage had intervened to be subject thereto. Assuming that by the assignment and notice to the Canadian Pacific Railway Co., the respondent had obtained in form a first mortgage to secure future advances then applying the principle involved in said case it was incumbent on it to have shewn it had made such future advances in priority to those of the appellant. This mode of dealing with equitable claims to secure future advances was followed in the case of the *Bradford Banking Company* v. *Briggs*(2), where the facts were as stated in the head-note as follows:—

> The articles of association of a company registered under the Companies Act, 1862, provided that the company should have "a first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due and to become due on his current account, and the bank gave the company notice of the deposit. The certificates stated that the shares were held subject to the articles of association.

It was held the moneys which became due to the company after notice of the deposit of share certificates could not take priority over the equitable claim of the bank for its advances of which the company got notice.

Holding, as I do, that if the respondent had not before its alleged assignment, it had at least shortly thereafter notice of the appellant's claim, then in any event the appellant obtained priority over it in respect of any later advances.

(2) 29 Ch. D. 149; 12 App. Cas. 29.

It may be said the case was not so treated below as to call for a determination of the exact facts that might have to be investigated if we had to decide on this ground alone.

It was, however, I submit, respondent's own course of dealing with the case and contentions at the trial that led to this situation and hence its own fault.

As I have come to a decided view on the other grounds taken, I need not enlarge on this latter ground. Though it falls in line with the main argument taken to shew, in any view, what a hopeless case respondent in truth had, yet if the case had to turn exactly on this ground alone an opportunity should be given to shew that in fact the future advances were made before what I hold to have been notice.

This I say, however, is only in deference to the finding of fact by the learned trial judge as to anterior notice for my own impression does not quite coincide therewith. I should imagine it is the case of the man having only one thing of the kind to remember and so remembering it as against the man having possibly scores of the same sort to pass upon and dismiss and not quite so sure to remember.

I would allow the appeal with costs throughout and award judgment against the respondent for the moneys in question come to its hands and interest thereon and judgment for the moneys paid into court and direct the costs of the Canadian Pacific Railway Co. to be fixed as between solicitor and client, and to be paid by respondent to the company, or if already deducted to be recouped by the respondent so that appellant get from the funds or moneys what he would have got but for respondent's wrongful interference.

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Since writing foregoing I have agreed to the variation thereof as to costs embodied in memorandum prepared by my brother Mr. Justice Davies.

Duff J.

DUFF J.—This appeal arises out of an action in which the appellant, Fraser, as plaintiff, and the respondent bank, as defendant, each claimed to be the owner of two certain sums of money. These sums had been earned under a contract to which the parties were the Canadian Pacific Railway Company and one Wm. Garson, by which Garson was to build six stations on the "Outlook" Branch of the Canadian Pacific Railway. Under an arrangement with Garson the stations were in fact built in the summer and autumn of 1910 by the appellant Fraser entirely at his own expense and the moneys in question formed part of the price payable under the contract for this work done by Fraser. Fraser's claim is based upon an alleged term of his agreement with Garson by which the moneys paid to Garson under the contract were (it is said) to be paid by him to Fraser as and when they should be received by Garson. The bank's claim rests upon an assignment dated 24th June, 1910, by which Garson professed to assign to the bank

all his claim and demand against the railway company then due or thereafter to accrue due to him from the railway company,

of which assignment the railway company was immediately notified by the bank and by which Garson also appointed the bank his attorney to receive such moneys from the railway company. One of the sums in controversy ($7,830) was paid by the railway company to the bank, the other ($7,020) was paid into court. The trial judge held that:

The real arrangement was that the plaintiff should construct the stations in the place and stead of Garson and that the latter would turn over to him the progressive payments as and when they were received from the company.

But he held also that the bank having given the railway company notice of its assignment before having any knowledge or notice of the arrangement between Garson and Fraser had the better title to the moneys in question; and allowed the claim of the bank in its entirety. The Court of Appeal held that the appellant must fail on the ground that he had not satisfactorily established an assignment from Garson. I have gone over the evidence repeatedly with care and I am quite satisfied that the appellant has established his title to these moneys as between himself and Garson and that the rival claim of the bank is without substance. The case has been beset with confusion from the beginning of it, but when the facts, either admitted or established almost indisputably, have been grasped the rights of the parties fall to be determined by the easy application of one or two well established principles of law.

It was in April, 1910, that Garson entered into an agreement with the Canadian Pacific Railway Company by which he was to construct for them certain roundhouses at Calgary and the six stations already referred to and to finish them by the 1st September. Shortly afterwards Garson proposed to Fraser that he should take over the contract so far as it related to the stations; to this Fraser agreed and a memorandum signed by Garson and Fraser was indorsed upon a document which Garson had in his possession and which appears to have contained the terms of an intended formal contract between Garson and the railway company providing for the construction of both

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these sets of buildings. This document apparently never went into effect for the reason it seems that the company's engineers wished the contract with respect to each set of buildings to be embodied in a separate instrument. At the trial Fraser was unable to produce the memorandum signed by Garson and himself, and although he proved that the document on which it was written was not to be found at any of Garson's places of business the learned trial judge refused to allow him to state the purport of it. It is, I think, immaterial whether or not this ruling of the trial judge was right. Garson unfortunately died before the action was begun; but it is clear that Garson and Fraser both acted upon the footing that these moneys were Fraser's and that such was the understanding between them; and that on the faith of that understanding the contract was performed by Fraser will abundantly appear from the evidence to which I shall have to refer in discussing the claim of the bank. The appropriate principle of law is stated by Lord Macnaghten in *Tailby* v. *The Official Receiver*(1), at page 546:—

> Long before *Holroyd* v. *Marshall*(2) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust:" *Legard* v. *Hodges*(3).

This arrangement, therefore, constituted Garson trustee for Fraser of any sums which should be paid to

(1) 13 App. Cas. 523. (2) 10 H.L. Cas. 191.
(3) 1 Ves. 478.

him under the contract in question; and the real point in controversy is whether the bank did or did not by virtue of what subsequently occurred acquire a superior right to them. Before proceeding to discuss the facts specially bearing upon the bank's position it is convenient to refer to one of the provisions of the contract between Garson and the railway company which was the subject of some discussion on the argument here as well as in the courts below. It is as follows:—

(4) This agreement shall not be assigned, nor shall the said work or any part thereof be sub-contracted without the written consent of the engineer to every such assignment or sub-contract.

This conditional prohibition against assignment is susceptible of being read as a prohibition against the assignment of any of Garson's contractual rights arising out of this contract, including, for example, the payment of moneys earned and payable. It is also open to a construction which would disable Garson from vesting in another (without the prescribed consent) the right to perform the obligations which Garson had undertaken and by which such moneys were to be earned, but which would not disable him even in the absence of such consent from vesting in another the right to claim such moneys after they had become due in consequence of Garson by himself or his agents or servants having performed his obligations under the contract. There is something to be said in favour of the first mentioned construction, but it is not necessary to decide the question whether it is or is not the true construction.

I shall assume in favour of the bank that the other view which is the view most favourable to its claim is the correct one. The required consent does not appear to have been obtained to the substitution of Fraser for

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Garson as contractor and, as between the railway company and Garson, Garson continued to be treated as the contractor responsible to it, although the evidence of Simmons makes it clear enough that the officials of the railway on the ground knew the work was being done by Fraser. Under the terms of the contract there was to be an approximate estimate of the value of the work done at the end of each calendar month, the amount of which was to be paid on the 20th of the next ensuing month less 10% which was retained as security. The railway company was apparently not notified of Fraser's title to those moneys (except as to the sum paid into court) and saving that sum all the moneys payable under the contract were paid by the railway company to the bank for the credit of Garson's account under the authority of the assignment to the bank mentioned above, of which notice had been given by the bank. The railway company apparently never disputed its accountability for these moneys either to Garson or to the person who as against Garson should prove to be best entitled to them.

Fraser then having an arrangement with Garson by which the moneys earned under the contract (though payable to Garson as between him and the railway company) were to be subject to a trust in favour of Fraser, we come to consider the effect upon Fraser's rights of Garson's subsequent dealings with the bank.

In discussing this question, I proceed as if the bank were not in respect of any of its transactions with Garson under any of the disabilities affecting a bank deriving its power to carry on business from the provisions of the "Bank Act," but had in respect of these matters all the powers of a natural person who is

sui juris. I do this because an examination of what restrictions such a bank may be subject to by virtue of section 76 of the "Bank Act" in respect of advances upon the security of a transfer of the borrower's contingent right to moneys not yet owing or to moneys owing, but not yet payable under a contract such as that between the railway company and Garson might lead us into the consideration of points of some nicety and considerable practical importance upon which we have not had the benefit of argument; and since in my view of the case it is unnecessary to pass upon any such points it is, I think, altogether desirable to refrain from any discussion of them.

It was argued on behalf of the appellant that by virtue of the Manitoba statute (the "King's Bench Act," R.S.M., 1902, ch. 40, sec. 39, sub-sec. (*e*)) an assignment of a future chose in action by itself vests in the assignee a legal title to the subject of the assignment as soon as it comes into existence and that notice to the debtor is unnecessary to perfect the title of the assignee; and it was said that as a consequence of this the rule in *Dearle* v. *Hall*(1) does not govern the rights of the parties under an assignment taking effect by virtue of the statute. Assuming all this to be true, it can have no application to the arrangement between Garson and Fraser if the real intention of the parties was (as it seems to have been) that the moneys should continue as between the railway company and Garson to be payable to Garson, who was to receive them as trustee for Fraser. On the other hand, the assignment from Garson to the bank appears to have been in conformity with the statute and quite sufficient (in the view of

(1) 3 Russ. 1.

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the statute just indicated) to vest in the bank the legal title to the moneys dealt with as soon as they should become payable and the fact of the bank's notice to the railway company having been given before the moneys were earned (which was pressed upon us in argument) would appear in that view to be beside the question. I shall proceed on the assumption that the appellant's title was an equitable title only, and that on the other hand the bank under its assignment acquired by force of the statute a legal title to the moneys as soon as they were earned, the real point in issue being whether the bank has a title to the beneficial interest in them which is superior to the appellant's.

The bank's contention at the trial was that its assignment had been taken without notice of Fraser's rights and that this circumstance alone gave it priority. The learned trial judge, as I have mentioned, accepted this — holding that the effect of the assignment to the bank followed by notice of it to the railway company was to give the bank a right to intercept the ultimate fruits of the appellant's exertions in performing Garson's contract and that an indefeasible title to appropriate those fruits when realized became forthwith vested in the bank. Early in the trial the learned judge ruled that nothing which occurred after its notice to the railway company could prejudicially affect the position of the bank, and it was by this ruling as a guide that his judgment against the appellant was finally determined.

This ruling might be capable of support if it had appeared that the assignment had been taken as security for debts contracted at the same time or anterior thereto and that these debts to the amount of the

moneys in dispute were still unpaid, and if we leave out of view the effect of the bank's subsequent conduct in giving rise to an equitable estoppel. But assuming at the time the assignment was taken the bank had no notice of the appellant's rights — then the bank's priority must rest on one of two foundations: 1st, the present existence of some debt which was incurred at the time of or prior to the taking of the assignment and for which the assignment was to stand as security, or, 2ndly, the present existence of some debt incurred on the security of the assignment and subsequent to the taking of it without notice of the appellant's rights. And, of course, the limit of the interest in respect of which the bank can in any case maintain its priority must depend upon the extent to which debts belonging to one or other of these classes remain still unpaid. This is so rudimentary that the citation of authorities ought to be superfluous. It may be observed, however, that there is an interesting application of the principle involved in *West* v. *Williams* (1), at page 143.

In this case the facts in evidence seem to be sufficient to establish, 1st, that the bank had notice of Fraser's rights before any debt was incurred for which the assignment was to stand as security and which is still unpaid; and, 2ndly, even if any such debt remained unpaid the conduct of the bank would preclude it from asserting as against Fraser any title to the moneys in question.

The first point to consider is: When did the bank receive notice of an understanding between Fraser and Garson by which Fraser was to build the stations and to be entitled to the proceeds of the contract?

(1) [1899] 1 Ch. 132.

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The learned trial judge found that the bank was aware of such an arrangement as early as the beginning of September and that finding alone seems sufficient to entitle the appellant to judgment in his favour. It seems, however, not open to dispute that they had this knowledge as early as the month of July; and there are certainly powerful considerations in support of the view that they had it before the execution of Garson's assignment to the bank. Fraser himself says that shortly after making his arrangement with Garson he applied to Mr. Leslie, the bank's manager at Winnipeg, for an advance and gave him a list of his contracts. Leslie admits that the application was made and that Fraser gave him a statement of his affairs, but declares that nothing was said of the Outlook contract. There are grave difficulties in the way of accepting Leslie's recollection upon the point. Fraser had been a customer of the bank for some years; he was a man of limited means, and while the Outlook contract was not the only work he had in view for the ensuing season, it is obvious from an inspection of his bank account (which is in evidence) that it must have been by far the most important one. Why, in making an application for financial assistance largely with a view to enable him to carry out this contract, he should have omitted all mention of the contract does not appear to be easily explained.

Evidence of notice, however, at a date not later than July is supplied by the testimony of Leslie himself. Garson had a number of contracts to execute in the summer of 1910 in or in the vicinity of Calgary; and some time in July he left Winnipeg for Calgary and remained there until late in November. It is clear that before Garson left Winnipeg he had a conversation

with Leslie in the presence of Fraser, the substance of which Leslie professes to state. In effect Leslie's account of the interview is that Garson with Fraser called at the office of the bank and said to him, "Mr. Leslie I have come to tell you that I have handed over my stations to Mr. Fraser."

Leslie's evidence on his *vivâ voce* examination for discovery touching this conversation is as follows:—

A. He came in. Oh, I don't know when it was; some time in the fall, or later on, he came in with Mr. Garson and wanted some money and we gave him three thousand dollars, but Garson signed the note.

Q. At that time when the three thousand dollar note was arranged, you conducted the negotiations with the plaintiff ?

A. Yes.

Q. Your assistant took no part in it ?

A. Oh, he may have put it through.

Q. But you had the conversation ?

A. Yes.

Q. And you say at that time that you had *no knowledge of what the indebtedness* of Garson to Fraser was ?

A. No, none whatever. *About that time Fraser and Garson were here, and Garson told me that he had handed over the C.P.R. station work to Fraser.*

Q. *He told you that ?*

A. *That was the first intimation I knew of the connection, just about the time that note went through; it may have been a little before, or it must have been a little before or a little after; it was about that time.*

Q. It was not at the time that this note went through ?

A. No, it isn't at the time. *It may have been a little before that —it must have been a little* before that time.

Q. A little before ?

A. Yes.

Q. Did he say ——

A. He just came in and he said: *"I wish to tell you that the C.P.R. station work is to be handled by Fraser."*

At the trial he said:—

Q. When did you first learn that Mr. Fraser had any business relations with Mr. Garson ?

A. *Well, I can't give you the date definitely, the interview was so short, and there was nothing resulted from it that would lead me up to the time as to when it did take place.*

Q. Do you mean the interview between *Mr. Garson, Mr. Fraser and yourself ?*

A. Yes.

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Q. Do you know when that took place ?

A. No, I don't know.

Q. Was that the occasion when you authorized the discounting of the $3,000 note ?

A. Well, it might have been about that time, and it might have been before.

Q. It might have been before the 21st day of November, 1910 ?

A. Yes.

Q. *Was it an occasion when Mr. Garson was here in the city ?*

A. *Yes.*

Q. *Do you know whether Mr. Garson was here during the summer at all ?*

A. I could not say.

Q. Did you see him during the summer ?

A. *I couldn't swear definitely.*

Q. Could you tell me how long prior to the 21st of November it would be when you had the conversation with Mr. Garson ?

A. The time Mr. Garson and Mr. Fraser were in ?

Q. That was the date the note was discounted, was it ?

A. Well, no, I am not sure that it was. I had a conversation with Mr. Fraser at the time that this note went through, but I think the other conversation *I refer to must have been before that.*

Q. Who would that be with ?

A. *Mr. Garson — and Mr. Fraser was there.*

Q. *Mr. Garson and Mr. Fraser were there ?*

A. *Yes.*

Q. You say you think that would be before *November 21st ?*

A. I think, probably, about that time.

Q. Can you give me any idea how long before November 21st ? Can you give me any idea how long before that — *a month ?*

A. It may be.

Q. Would it be two months ?

A. *Well, I couldn't say; some time during the summer.*

Q. Some time during the *summer ?*

A. Yes.

Q. Was it before or after you had taken this assignment from Garson of the 21st of June ?

A. Oh, I suppose *it would be after that.*

Q. *It would be after that ?*

A. *Yes.*

* * * * * *

Q. When did you first become aware of the fact that Fraser *was building these Outlook Branch stations ?*

A. I don't know the date. *Mr. Garson and Mr. Fraser came in and Mr. Garson said, "I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser," and that is the only interview or knowledge I have of the matter.*

Q. Can you fix the date at all ?
A. No.
Q. *You say* it would be after the assignment ?
A. *Yes, it was some time in the summer.*
Q. *Some time in the summer ?*
A. *Yes.*

The nature of the conversation alone suggests the improbability of its having occurred in November when the work referred to had been almost, if not entirely, completed; and there can be no doubt that Leslie is quite right in his impression that it took place not later than some time in "the summer." The conversation must, therefore (since Garson was absent from Winnipeg from July until November) have taken place as early at least as July. Morris also says that he knew in August that Fraser was building these stations and that he must have learned of it from conversation with Garson.

It seems probable, indeed, that the conversation between Garson and Leslie took place shortly after Garson's arrangement was made with Fraser. Fraser wishing to obtain financial assistance from the bank, it is natural to suppose that Garson and Fraser would inform the bank of what had occurred between them and do so without delay. Then as we shall see it is clear that Garson never concealed from the bank the fact that he regarded these moneys as Fraser's and it seems unlikely that he would give a formal assignment of moneys coming from the Canadian Pacific Railway Co. without informing Leslie of Fraser's interests in the proceeds of the Outlook contract.

Leslie's evidence upon this point is so vague and hesitating, so self-contradictory even, as to suggest an entire want of such recollection on his part as would entitle him positively to affirm that this con-

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versation occurred at a time subsequent to the assignment rather than anterior to it; and I think it would not be quite fair to read his language as involving such an affirmation. For all these reasons I am far from satisfied that we should not be entitled to disregard the finding of the learned trial judge that the assignment was taken without notice and give effect to the great weight of probability which favours the opposite view. We have, however, the indisputable fact that the conversation occurred at least as early as July, and that is sufficient for my purpose.

That conversation, accepting Leslie's account of it, must, I should have thought, have apprised Leslie as a business man of the fact that Garson had in a practical sense no further interest in the contract for the construction of the stations — at least as between himself and Fraser. I do not suppose the attention of Leslie or Garson or Fraser would be directed to the point of the technical legal position created by the arrangement Garson and Fraser had made; but I should have thought such a statement as that reported by Leslie must have left him with the idea that Fraser was to execute the contract and was also to have the benefit of the payments under it.

The interview was no casual talk. From Leslie's account of it, it appears that Garson and Fraser called upon him with the express purpose of informing him of their arrangement; and one at least of their objects in doing that undoubtedly would be — if the interview took place after the assignment — to instruct Leslie that moneys due under the Outlook contract and paid to the bank under the authority of the assignment were to be treated as Fraser's. But whatever construction might be placed upon Garson's words as re-

ported by Leslie when taken by themselves — their subsequent conduct shews conclusively the view all parties took of Fraser's rights. On Garson's side, his cheques and his letters written to the respondent bank unmistakeably treat the moneys paid under this contract as Fraser's moneys. On the side of the bank, the conduct of Leslie and Morris in respect of transactions either between the bank and Fraser or between the bank and Garson, or between Garson and Fraser themselves taking place directly under the observation of those officers of the bank, during the months of July, August, October and November, establishes, I think, beyond controversy these facts: Leslie and Morris knew that Fraser (whose business, to their knowledge, was that of a contractor) was building the Outlook stations, and that he was providing the means for doing so out of his own resources quite independently of Garson; they knew, moreover, that the moneys received by Garson from the Canadian Pacific Railway Co. on account of Outlook stations were scrupulously treated by Garson as Fraser's moneys. Leslie and Morris, moreover, acquiesced in this treatment of these funds as if in accordance with a course of business perfectly well understood among all parties concerned. Interpreting the conversation between Garson and Leslie by the light of these facts, I see no escape from the conclusion that it conveyed to Leslie's mind the idea that, in the sense I have mentioned, Garson's interest in the contract had passed to Fraser.

Let us look at the evidence a little more closely. The bank became aware in July that Fraser was drawing on his own resources for funds to build the Outlook stations. Fraser remained in Winnipeg and

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early in July sent forward his foreman Simmons to Moose Jaw to begin work on the Outlook Branch. Fraser, as I have mentioned, had for some years been a customer of the respondent bank and kept his account in the Winnipeg branch. From time to time during the months of July, August, October and November remittances were forwarded by or through the bank to Simmons in order to provide him with money to pay wages and other bills requiring payment in cash. The first of these remittances was expressed (in blank bills) to Simmons by Morris on the 30th or 31st July. Morris admits that he assumed these moneys were to be used in connection with the Outlook contract. To provide for one of these remittances (on the 25th August) it was necessary, as appears from the state of Fraser's bank account, to make arrangements for an advance from the bank. The advance was made, the bank taking Fraser's promissory note at ten days. This note was filled in by Morris personally; and the cheque for the amount of the remittance is expressed to be made on "account stations," and was initialled by Morris, who also in a memorandum on the back of the cheque noted the destination of the remittance. Such remittances continued (as I have said) during the ensuing four months in circumstances shewing conclusively to the knowledge of Morris that they were being provided by Fraser from his own capital. There is not a suggestion anywhere in the case that it occurred to anybody that in making these remittances Fraser was acting in any way on behalf of Garson.

Then as to the payments under the Outlook contract. Under the contract "approximate estimates" as they were called, were made at the end of each

calendar month and the amount of each such estimate (less 10% which the company retained as security for the due completion of the work) became payable on the 20th of the next ensuing month. The sum ascertained to be payable under the estimate for July became payable on the 20th of August. This sum was, in fact, paid into the bank on the 9th September. It does not appear in the record whether the railway company's cheque was made payable to the bank or to Garson, but at all events the amount was by the bank placed to Garson's credit. Garson's account with the Winnipeg branch was at that time overdrawn, but the amount of the estimate ($1,620) was immediately transferred to Fraser's credit upon the authority of a cheque drawn by Garson. This cheque was expressed to be in "payment of first estimate Outlook contract" and was initialled by Morris, Garson being at this time in Calgary. It does not clearly appear how the cheque reached the bank, but the bank produced no communication from Garson in the month of August. Either then the bank had some explanation from Garson which is not now forthcoming, or Garson's cheque transferring the estimate to Fraser was honoured as a matter of course in consequence of information the officers of the bank already had touching the title to these moneys. But there is a little more. Garson's cheque is dated 22nd August. That was two days after the day on which the July estimate was due (20th August) under the contract with the railway company, and Garson had been informed as to the amount, for the cheque is drawn for the exact sum afterwards paid. On the 24th, two days later, Fraser applied for an advance. He says he asked for the advance on the strength of this estimate. Leslie,

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in examination for discovery, in effect admitted the advance was made in the expectation of a payment being made under the Garson contract. All this points to the existence at this time of a common understanding among all concerned that these moneys, although nominally Garson's, were really the property of Fraser.

The conduct of the parties in respect of the August estimate is yet more significant. This estimate was, under the terms of the contract, payable on the 20th September. On that date Garson wrote from Calgary the following letter:—

Manager, Imperial Bank,
Winnipeg.

Dear Sir,—Yours of the 17th received O.K. As C. P. August estimate is now overdue, I enclose a cheque in favour of W. H. Fraser with amount blank, which you will oblige by filling in for the sum returned in the August estimate for the stations he is building and hand same to him as soon as the cash comes in. I also enclose a cheque in favour of the Guerney Foundry Co., also in blank, on account Kenora Bank. The balance accruing due to them on this account is $909.80. Fill the cheque out for this or any part of it the Kenora special account will stand and send it to them, the balance of August will keep for a time. I have Kenora practically finished and quite a lot coming yet. I understand a payment has come in on Minnedosa account; this really belongs to Synder. I have sent him a cheque accordingly. I have given a cheque to Ashdown here for $500 on account. Kindly honour it. Work going well. Weather fine. Have broken all records for Calgary in reinforced concrete construction by putting in 152 cubic yards in a 6-inch floor in one run.

Yours truly,
WM. GARSON.

And on the 24th September Morris sent him this reply:—

Dear Sir,—Referring to your letter of the 20th instant *re* W. H. Fraser, we are advised by Mr. Fraser that his August estimates amount to about $5,400. We have filled in your cheque in his favour for one thousand dollars ($1,000) in the meantime.

Yours truly,
M. MORRIS, *Assistant Manager*.

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The cheque referred to as actually filled in by Morris is in the following form:—

Calgary, Alta., Sept. 20, 1910.

IMPERIAL BANK OF CANADA.

Pay W. H. Fraser or order one thousand dollars ($1,000.00).

A/c. Aug. Est. Outlook Stations.

WM. GARSON.

On the 8th October the estimate was received by the bank and on the same day the balance, after deducting the $1,000 already transferred, was transferred to Fraser's account by a cheque of Garson's marked "Estimate No. 2, Outlook stations." In this instance also both on the occasion of the transfer of the first sum of $1,000 and afterwards of the second sum of $4,400, Garson's account at the Winnipeg branch appears to have been overdrawn. Comment upon this transaction seems superfluous. Garson's letter and the action of the bank upon it shew that both parties regarded the estimate for August, whatever might be the amount of it, as belonging to Fraser. Morris's language: "We are advised by Mr. Fraser that *his* August estimates amount to $5,400" is no slip of the pen; it expressed in words the conception of Fraser's rights which, as these transactions shew, was acted upon by everybody.

There is still another exchange of letters. On the 9th of November Garson writes to the bank about the September estimate; and he uses these words:—

It is likely the C.P.R. estimate on Outlook work will be paid in shortly. It belongs to W. H. Fraser. When it comes let him draw on me at sight for the amount and transfer it to him.

Let me know if you approve of my keeping the money in your bank here. I know it would make your account look better if I sent it to Winnipeg, but it looks rather awkward to send you the money one day and have you wire it back the next. As it is, if you

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take the balances of both accounts into consideration I have had my slate cleaned again on this transaction. And will probably repeat the clean up again this month.

Yours truly,
WM. GARSON.

P.S.—I have just been advised that the Strathcona Post Office contract has been awarded to me.

In reply Morris, on the 14th, writes:—

Imperial Bank of Canada,
Winnipeg, Man., 14th November, 1910.

Wm. Garson, Esq.,
Dominion Hotel,
Calgary, Alta.

Dear Sir,—I am in receipt of your letter of the 9th instant, and note your advices.

There is no objection to your retaining money in Calgary for your Calgary contracts, providing that proceeds of your C.P.R. contracts will be sufficient to protect advances in this office.

Yours truly,
M. MORRIS, *Assistant Manager.*

The sum received by the bank under the estimate referred to forms part of the moneys in dispute. To appreciate the significance of these letters it is necessary to recall the fact that the bank had been receiving moneys from the Canadian Pacific Railway Co. for Garson's credit in respect both of the Calgary and Outlook contracts. The latter moneys, as we have seen, had been appropriated to Fraser; the others had been applied in satisfaction of the bank's advances to Garson. Garson's letter was a reminder to the bank that the moneys coming under the Outlook contract were Fraser's; and this statement is accepted without a word of comment by Morris. The phrase "proceeds of your C.P.R. contract" obviously refers to the Calgary contract. The inference seems irresistible. It was understood by everybody that the bank had no interest in or claim upon the Outlook moneys.

From all this I conclude that Leslie and Morris, as well as Fraser and Garson understood, at least from the time of the interview mentioned by Leslie (which must have occurred, as we have seen, not later than July), that under that arrangement Fraser was to build the Outlook stations and was to be entitled to the moneys thereby earned, or in the words of the learned trial judge, in 22 Man. R., at p. 66: "These payments (under the Outlook contract) were to be handed over to the plaintiff."

The bank's knowledge, however, of Fraser's rights would not in itself prejudice its claim to have the moneys assigned applied in liquidation of any debt incurred before that time (for which the assignment was to stand as security) which is still unpaid. The exact particulars regarding the bank's advances to Garson have not been put in evidence. There is, however, sufficient, I think, to enable us to say with confidence that no such debt is now in existence.

It is stated by Leslie that no advance was made on the security of the assignment at the time it was executed; and that his intention in taking it was not to make advances on the security of Canadian Pacific Railway moneys generally, but only from time to time on the security of some specific sum known to have been earned and to be payable at a definite time.

The following passages from Leslie's evidence at the trial make this very clear:—

Q. Under this assignment from Garson to yourselves — the bank — was any money advanced by the bank ——

Mr. Elliott: I object to that. It is not an issue here.

Mr. Fullerton (continuing the question): To Mr. Garson?

A. No, not at the time.

Mr. Fullerton: I will say this, if we had not set up all that I had proposed to ask for an amendment to that record, that on the strength of the assignment we advanced moneys from time to time, and our position was prejudiced.

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His Lordship: I think I will allow it, because it seems to me that it ought to be material.

Mr. Elliott: That changes the whole nature of the case. That changes the whole nature of this case, and it should not be gone into now on amendment.

His Lordship: I will allow it, subject to your objection, in the meantime. What is your question again ?

Mr. Fullerton: What do you say as to that ? Were any advances made, were any moneys advanced by the bank on the strength of this assignment ?

A. Why, *I can't remember just now,* it strengthened Garson's credit.

Q. *It was advanced on the strength of Garson's credit ?*

A. *Yes.*

Q. *After this assignment was made were moneys advanced to Garson ?*

A. *Yes; that is my recollection at least.*

Q. Would all the moneys in question in this action be sufficient to pay off Garson's indebtedness to the bank ?

Mr. Elliott: I object to the question.

His Lordship: I will allow it.

A. No.

Q. You say no ?

A. Yes — I am not positive about that. *Yes, I think, I can say no.*

Q. *You say no ?*

A. Yes; that is the moneys coming from here would not be sufficient.

Q. Let me ask you this question: Did you take any steps from time to time to ascertain what moneys were coming from the C.P.R. ?

A. *Yes.*

Q. *You did that ?*

A. *Yes.*

Q. And did the question of the advances that you were making from time to time depend to any extent upon your inquiry ?

Objected to by Mr. Elliott.

His Lordship: I don't think you should ask the question in that way.

Mr. Fullerton: What practice did you follow with regard to making advances to Mr. Garson ?

Mr. Elliott: That is not a material fact here, as to what his practice or habit was, and I object to that.

His Lordship: I don't think so.

Mr. Fullerton: I want to shew that he would come along for the advances, and they would ask the C.P.R. if an estimate were passed, and if the estimate were passed they would advance the money on the strength of that estimate being passed, and that is the question I want to ask.

Mr. Elliott: That does not concern us.

His Lordship: I don't know.

Mr. Fullerton: It depends upon that, whether on the strength of these estimates being passed money was advanced, and I want to shew that really when an advance was asked for the C.P.R. would be asked as to whether there was any estimate passed or to be passed, and on the strength of the inquiry, or the answer received to it, the advance was made.

His Lordship: You can probably get at it without putting a leading question to him. He says that he did take steps from time to time to find out if there were any moneys coming from the C.P.R., and if you ask him why he did that you may get at it.

Mr. Fullerton: Why did you do that ?

Mr. Elliott: I object again to that. His object and purpose in doing that would not, surely, affect us.

His Lordship: It may.

Mr. Elliott: How ?

His Lordship: If it does not, it will not do you any harm.

Mr. Elliott: I object to it, my Lord.

His Lordship: I will allow the question.

Mr. Fullerton: You made inquiries from the C.P.R. from time to time as to moneys coming from them to Garson ?

A. Yes.

Q. Why did you make those inquiries ?

A. Well, to ascertain whether we would be justified in paying his cheques.

This is the evidence given by Leslie at the trial. On his examination for discovery he had made the following statement:—

Q. I see, Mr. Leslie, you witnessed this document. Just tell us all the circumstances and your reasons for taking that ?

A. *This assignment was given to us as security for the advances made from time to time to Garson.*

Q. Was it for advances *already made or for future advances ?*

A. *It was both.*

Q. Did you know at the time of taking that assignment what contracts he had with the C.P.R. ?

A. No.

Q. What moneys were owing to him ?

A. Not definitely.

Q. Why do you say "not definitely" ?

A. I knew that he had contracts with the C.P.R., but I knew nothing as to the amount definitely coming to him.

Q. Did you know what kind of contracts he had ?

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A. No, not — *I knew that he had — nothing definitely. The only thing I can remember that he had was some contract for roundhouses or something of that kind.*

Q. Do you remember him stating that he had contracts for stations and roundhouses ?

A. Not definitely; the only thing I can remember that he had *some contract for roundhouses at Calgary; that is the only definite contracts that I* ——

Q. He told you that he had tendered ?

A. Yes.

Q. And you remember that distinctly, and you remember definitely about the roundhouses at Calgary ?

A. Yes, I am pretty sure that that is right. But we never made any inquiry as to the nature of his contracts or where they were.

Q. Why ?

A. *We could find out how much was coming from the C.P.R. before we would lend him any money.*

Q. Did you find out in this case ?

A. *I must have found out in this case what he said was due, and had it corroborated to some extent.*

Q. What amount did he say that was due ?

A. Oh, I don't know. We generally figure on keeping a good margin.

Q. Did you call up the C.P.R. after you got this ?

A. No, I wouldn't say that I did. I wouldn't state positively — at the time.

Q. Was all the conversation with regard to this assignment made with you ?

A. Well, I think it was. I would say, "Here, if you are dealing with the C.P.R. and moneys are coming from there, we need an assignment of all the moneys coming from there, in a general way." *Garson would come in and when he was in need of money would say: "Now there is so much due me by the company." We would endeavour* to have that verified in some way or other, and telephone down to the depot, or engineers, and if they said "Yes," why we would take that for granted.

Moneys advanced in this way would, in the ordinary course, be repaid as soon as the bank received the payment in anticipation of which the advance had been made; and the natural inference from this course of business seems incompatible with the supposition that any debt remains unpaid which was incurred as early as July, 1910. The evidence afforded by Garson's pass-book and correspondence with the bank

is also inconsistent with it. So are the dealings with the July and August estimates already discussed and the correspondence between Garson and Morris in November. It is almost impossible to believe, for example, if Leslie regarded the moneys payable under the August estimate as security for an existing debt owing by Garson that he would have made an advance to Fraser in anticipation of these moneys being paid to Fraser as he admitted he did; or that the dealings with the July and August estimates already discussed could have taken place. And perhaps still more difficult to believe that Leslie and Morris would have abstained from comment upon Garson's statement in his November letter that the overdue estimate under the Outlook contract was Fraser's.

The only difficulty I have felt with regard to this matter of advances is this. I have not been altogether free from misgiving that the learned trial judge's ruling to which I have referred may be accountable for the lack of explicit evidence as to the dates of the bank's advances to Garson and I have carefully considered the question whether if the appeal should turn upon this point the bank ought not to have an opportunity of supplying such evidence. In a case which has been marked by so much misconception as to the legal principles governing the rights of the parties one naturally hesitates to proceed upon any merely technical rule as to the burden of proof. I am satisfied, however, that we have before us all the relevant facts that could lend support to the claim of the bank. The facts touching the matter of advances were all, of course, within Leslie's knowledge. On Leslie's *vivâ voce* examination for discovery the bank's solicitor took the position and adhered to it that the appellant

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was not entitled to any information touching Garson's indebtedness to the bank. In the affidavit of discovery Leslie states that the only book or document in the bank's possession containing anything relating to the controversy is the assignment itself. The bank's position, in a word, was that Fraser was a stranger having no interest in the moneys in question and the bank's relations with Garson had, of course, no bearing upon the issue thus raised. At the trial Fraser's counsel objected to evidence shewing advances by the bank on the ground that the bank by assuming and maintaining the position above mentioned had defined the issue and limited it to the single question whether or not Garson had assigned these moneys in question. With this counsel for the bank appeared to agree and there was some suggestion about an amendment. The learned trial judge eventually permitted, as appears from the extract quoted above, an examination of Leslie upon the subject of advances; but notwithstanding the fact that such evidence was permitted to be given, none was offered to shew when the debts were incurred which the bank claims the right to have paid out of the moneys in question. Indeed, while Leslie's evidence was explicit that no advance was made at the time the assignment was given, there was not a suggestion that any debt remains unpaid that had been incurred as early as July, 1910 — a suggestion which, as I have pointed out, is not easily to be reconciled with the inference to be drawn from Leslie's account of the course of business.

In point of fact that suggestion was not put forward, even in argument on behalf of the bank; and from the circumstances I have mentioned I think we are entitled to conclude that there is, in fact, no foundation for it.

But there is another ground upon which the appellant is entitled to succeed.

> Where one man induces another to alter his position by active misleading, or by silence, where there is by contract, usage of trade, or otherwise, a duty to speak, or in an equitable case, one may say, where the circumstances are such as to make it against conscience to be silent, his rights must be regulated by what he has himself brought about.

In these words Lord Blackburn (*Russell* v. *Watts* (1)), at p. 613) states a familiar principle of law; and in *Stronge* v. *Hawkes* (2), at p. 196, a great equity judge, Turner L.J., gives an illustration of the application of that principle to a particular class of cases in these words:—

> It has long been settled that where a party having a charge upon an estate, encourages or even permits another to advance money upon the security of the estate without giving notice of the charge, the party who has thus been encouraged or permitted to make the advance is entitled to priority over the party who has thus encouraged or permitted the advance to be made. The fact of the party having the charge standing by and permitting the further advance to be made, without giving notice of the charge, is alone sufficient to support this equity on the part of the subsequent incumbrancer.

The circumstances of this case already mentioned fairly bring it within both the general doctrine and the particular rule expounded in these passages. I assume for the purpose of applying this principle that when Garson and Fraser had their interview with Mr. Leslie and informed him of their arrangement, Garson was indebted for advances secured by the assigment which advances are still unpaid. If I am correct in my interpretation of that interview and of the subsequent conduct of Leslie and Morris, Leslie as a result of the interview was aware that Fraser had taken the Outlook contract off Garson's hands on the

(1) 10 App. Cas. 590. (2) 4 De Gex. M. & G. 186.

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understanding that the moneys earned were to be his. He knew that both Garson and Fraser assumed that Garson was entirely free to make that arrangement. He subsequently became aware that Fraser was proceeding with the performance of the contract on the faith of that arrangement. During the months of July, August, September, October and November while, to Leslie's knowledge, Fraser was devoting his time and his capital to the completion of the contract, he and Morris co-operated with Garson and Fraser in treating the moneys arising from the contract as Fraser's. It was only after the contract had been completed by Fraser's exertions and at his own cost and Garson was in his last illness that the claim to appropriate the reward of Fraser's work under the bank's assignment was, for the first time, suggested. It would be something of a reproach upon the law if in such circumstances such a claim could be allowed to prevail in a court of justice.

To summarize for the sake of clearness these rather lengthy reasons for disagreeing with the court below. The evidence, and notably that which discloses the conduct of the parties, conclusively justifies the finding of the trial judge that there was in April an arrangement between Garson and Fraser by which Fraser was to assume the building of the stations on the Outlook Branch in performance of Garson's contract with the Canadian Pacific Railway Co. and that by the same arrangement the moneys paid under that contract by the railway company to Garson were by him to be paid over to Fraser. It is, moreover, established that the bank had notice that an arrangement of this character had been made between Fraser and Garson at least as early as July. The proper infer-

ence from the facts in evidence (including the course of the bank in the conduct of its defence) is that no obligation from Garson to the bank which came into existence as early as July, and for which the assignment was to stand as security, is still unsatisfied. It follows that assuming the assignment of June to have been taken without notice of the appellant's rights and to have the effect of vesting in the bank the legal title to moneys (as soon as such moneys should be earned) which should become payable to Garson under the Outlook contract — still the bank having had notice of Fraser's rights before any debt was incurred for which it is now entitled to hold the assignment as security, cannot on well-known principles successfully assert any claim upon those moneys as against Fraser. Moreover, the conduct of the bank in not only standing by and permitting Fraser to proceed, but in effect encouraging Fraser to proceed with the work of performing the Outlook contract on the faith of his arrangement with Garson that he was to have as his own the proceeds of that contract when realized (without disclosing its own claim to retain those proceeds until after they had been earned by Fraser's exertions), disqualifies the bank on equally well-known principles as against Fraser from enforcing rights which otherwise might have been permitted to take effect.

ANGLIN and BRODEUR JJ. concurred with Duff J.

Appeal allowed with costs.

Solicitor for the appellant: *George A. Elliott.*

Solicitors for the respondents: *Aikins, Fullerton, Foley & McWilliams.*