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*May 10.
*June 4.

F. J. X. COX, J. BROCKEST, D. McLEAN AND D. E. FINCH (PLAINTIFFS) ..... APPELLANTS;

AND

THE CANADIAN BANK OF COMMERCE (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Banking—Promissory note—Special indorsement—Condition—Pledge—Collateral security—Holder in due course—Payment and satisfaction—Liability on current account.

The bank having refused further loans to a trading company until its current liability to the bank was reduced, a note by the company in favour of its directors was specially indorsed to the bank by them and handed to the company's manager, who had charge of its financial affairs, with instructions to have the note discounted, but without authority to pledge it. Without informing the bank of his restricted power to deal with this note, the manager deposited it with the bank as collateral security for the company's current liability and, in consideration of the deposit, obtained fresh advances from the bank by discounts of the company's trade paper. At maturity of the note the trade paper had been retired and an overdraft on the company's account had been covered, but the general indebtedness of the company for former loans still subsisted. In a suit by the directors for the return of the note the bank counterclaimed for the amount thereof.

Held, affirming the judgment appealed from (21 Man. R. 1), that, so far as the bank was aware, the company's manager had ostensible authority to pledge the note as collateral security for the general indebtedness of the company on its current account, that re-payment of the fresh advances by retirement of the trade paper so discounted was not satisfaction of the debt for which the note was pledged, and that the bank was entitled to enforce payment of the note as holder in due course for valuable

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

consideration within the meaning of the "Bills of Exchange Act," and to recover thereon the amount of the company's general indebtedness remaining unsatisfied.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), reversing the judgment of Mathers C.J., at the trial, in favour of the plaintiffs, dismissing the plaintiffs' action with costs and maintaining the defendant's counterclaim.

The plaintiffs were directors of the Finch Company, Limited, which was a trading company carrying on business in the City of Winnipeg and was a customer of the bank at its branch there. In the circumstances stated in the head-note, they brought the action to have an order against the bank directing it to return the promissory note in question to them and for a declaration that the bank was not entitled to enforce payment thereof. The bank counterclaimed for the recovery of the amount of the note from the plaintiffs as indorsers.

At the trial His Lordship Chief Justice Mathers rendered judgment declaring that the plaintiffs were not liable to the bank as indorsers, ordering that the note should be returned to the plaintiffs, and dismissing the bank's counterclaim with costs. This judgment was reversed by the judgment now appealed from.

J. B. Coyne for the appellants.

R. M. Dennistoun K.C. for the respondent.

THE CHIEF JUSTICE and DAVIES J. agreed that the appeal should be dismissed with costs.

(1) 21 Man. R. 1.

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IDINGTON J.—Finch, one of the appellants, was the managing director of a mercantile corporation, and the others were fellow-directors thereof. Respondent was their banker.

By resolutions of the board the manager or a director appointed, with the accountant of the company, were authorized amongst other things "to borrow money from" respondent

> on behalf of the company either by overdrawing the account of the company with the said bank or otherwise * * * and to negotiate with, deposit with, or transfer to the said bank (but for credit of the company's account only) all or any bills of exchange, promissory notes, cheques, etc., etc., * * * also to arrange, settle, balance and certify all books and accounts between the company and the bank,

I may incidentally remark that the ingenious suggestion that these powers, though given by the company do not cover the case of the personal authority to use these indorsers' signatures for another than the specific purpose they gave them for, hardly comes with a good grace from the very men who framed and passed these resolutions intending the bank to rely on them.

A copy of this series of resolutions was on file with the bank for its guidance as to the limit of authority of these officials, who, in turn, signed a general letter of hypothecation which, of course, could not enlarge the powers given by these resolutions, but was an authority within them as ample as possible thereunder to enable the bank to hold securities given

> as a general and continuing collateral security for payment of the present and future indebtedness and liability of the undersigned (*i.e.*, the company), and any ultimate unpaid balance thereof, etc.

Such were the relations between the corporate bodies when the company, in the end of August, 1907, owed the bank and was so pressed by it that the latter desired the personal guarantee of the company's direc-

tors for the payment of the latter's indebtedness when called for.

This was refused. Then the notes or acceptances of shareholders for unpaid calls on their stock was suggested. Many drafts were made on them, but few, if any, accepted before matters became so urgent that at a meeting of the board the appellants agreed to indorse the note of the company for two thousand dollars if the latter would assign them the sum so due for unpaid calls to indemnify them against such indorsements, and the board accordingly passed a by-law to carry this out.

It is clear that the purpose was that such note should, when so indorsed, be discounted by respondent.

It is equally clear that the bank-agent thereafter refused to discount it, but offered Finch, duly authorized as above, to deal with securities he had in his hands for purposes of his company in such a way as would enable him best to finance the company, to accept it as collateral for the company's account as a means of strengthening it. He says Finch assented thereto, and the banker accepted it as collateral.

Primâ facie the result of so dealing with the note in question would be to render it a security to which the bank could look for payment of any ultimate balance due by the company. And in default of any restriction as to such general application there is no answer to the bank's claim to hold it and enforce its payment.

It was, so soon as in possession of the bank, placed in the register of collaterals held against this account.

The company's accountant understood from Finch it was used as collateral.

The ledger-keeper, who was also acting account-

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ant in the bank, and the person to ask for its return, if returnable, never heard during its currency of any claim to have it returned, though meeting Finch almost daily.

The manager in effect swears it was properly so treated in accordance with his suggestion and the assent of Finch thereto and that the business done thereafter between the company and the bank proceeded on the faith thereof.

Finch denies his assent thereto, but in that is discredited by the learned trial judge.

The learned trial judge, however, not resting upon any express agreement restricting its application to overdrafts and discounts of trade notes, but, by a process of reasoning which I cannot accept, indeed hardly follow, as to the consideration for its deposit having been the granting overdrafts and discounting such trade notes, saw his way to finding such a restricted application of it as a collateral.

These might, as he suggests, be valuable considerations given by the bank and entitling it to hold the security. But, unfortunately for the appellants and the reasoning I refer to, there was no such consideration expressly agreed on as the consideration, much less as being the entire consideration.

The manager in his way of illustrating his meaning does, in a loose sort of way, in one place, refer to such subjects as being motives of action.

But, with respect, I think no banker or competent business man would be likely to attach a restriction as claimed to what he says transpired relative to and as governing the purpose of giving this collateral.

The consideration clearly was the undertaking to carry the account as a whole, and the deposit was

made a general collateral to the whole as a basis of credit for such dealings.

Now, was there anything in the way of notice to the bank of the terms upon which the appellants indorsed ?

The learned trial judge expressly finds the bank took it in good faith and without notice thereof.

The only vestige of foundation for believing otherwise was the learned trial judge's own finding that the bank-agent asked or induced Finch to believe that if he got a note so indorsed for two thousand dollars it would be discounted.

A step further in the same direction, making it clear that the bank-agent had expressly agreed to such a thing, and as Finch says, had followed it up by accepting the note as if discounting it, but later repudiating that under instructions from head-office, would possibly have made an arguable case implying knowledge in the bank that the note was got and produced pursuant to such an express agreement for its discount.

Such is not found to be the fact. What is found to be the fact falls far short thereof. In either case it is only by a train of reasoning that knowledge of what the indorsers intended to be done with their indorsement could be imputed to the bank.

Short of such express knowledge or notice, or facts upon which either could be fairly imputed to the bank, it seems to me there could not be rested any such contention as set up here.

The distinction between the indorsing for purposes of discount and collateral security is at best rather fine and, perhaps, not worth much except in exceptional circumstances. If the appellant had made as

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suggested, but not proven, a case that the securities furnished the indorsers had been abandoned as result of what the bank did, something more tangible would have had to be dealt with.

I think the appeal must be dismissed with costs.

DUFF J.—Finch had no authority in fact to deal with the note as he did. Had he ostensible authority? I think he had. I think his possession, in the circumstances, would naturally, in the view of the bank-manager, imply authority to use it on behalf of the company for the purpose of improving the status of the company's account with the bank in order to procure the advances then urgently needed. *Ex facie,* the transaction (as between the directors and the company), was simply an indorsement by the directors of the company's note for the company's accommodation. I cannot see anything in it importing any limitation as to the terms under which the bank was to hold the paper. The natural inference of third parties would be, I think, that such arrangements were left to the discretion of the company as represented by the manager.

The only other point is whether there was any restriction upon the classes of advances in respect of which the note was pledged. The learned trial judge held it was to be applied only to secure the overdrafts and certain other specified advances. There is some difficulty in taking that view on the evidence as it stands; and, while I should desire to give the greatest possible weight to the finding of the trial judge, I am disposed to think the better view is that which prevailed in the Court of Appeal. I do not, of course, in the least accede to the contention that the trial judge,

because he rejected the evidence of Finch on this point, was bound to accept, in its entirety, that of the bank manager; a variety of circumstances open to the observation of a trial judge, but excluded from that of a court of appeal might very properly determine his judgment in the rejection of one part while accepting another part of the testimony of a witness. I think, however, that the learned judge has fallen into some error in not giving sufficient weight to the course of business and to the probability that if there was a departure from it there would have been some record of that either in the bank or by Finch himself. Finch's remark to his accountant seems to give support to the view that the note was to be pledged as collateral security for the indebtedness of the company generally. On the whole I am not satisfied that on this point the Court of Appeal was wrong.

ANGLIN J.—The defendant Finch, in my opinion, held the note in question and took it to the defendant bank not as the agent or emissary of the indorsers, but as the president and accredited business representative of the Finch Company, Limited, with ostensible authority to use it as he might deem best in the interests of that company. Of whatever actual limitation there may have been upon his authority the bank had no notice. The trial judge has so found.

The learned judge says that

> Finch deposited it (the note) as collateral security on the bank's promise that such a deposit would ease up the account and that advances would be allowed as an overdraft and upon trade paper.

The company had the benefit of this consideration. Again the learned judge says

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it (the note) was pledged as collateral security only for the company's account.

The evidence warrants these findings and they have been confirmed by the Court of Appeal. A perusal of Finch's evidence has satisfied me that his statements to the contrary are wholly unworthy of belief.

Because, when the note in question in this case matured, the advances allowed on overdraft had been repaid and the trade paper discounted had been taken up (one note of $529, however, appears to be still outstanding), the learned trial judge concluded that all the liability of the defendants had ceased, although the Finch company still owed the bank some $1,900 on the general account to which the note indorsed by them had been pledged as collateral. With great respect, it would seem to me that the learned judge confused the consideration for which the note was given to the bank by Finch with the indebtedness for which it was pledged as security.

I agree with the majority of the judges of the Court of Appeal that the plaintiffs have failed to establish any ground for relief from their liability as indorsers and would dismiss this appeal with costs.

BRODEUR J. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Coyne & Hamilton.*

Solicitors for the respondent: *Machray, Sharpe & Dennistoun.*