APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1908. May 4. July 20.

THE OFFICIAL ASSIGNEE OF MADRAS (COUNTER-PETITIONER), APPELLANT,

v.

G. SMITH (PETITIONER), RESPONDENT.*

Insolvency—Banker and Customer—Fiduciary relationship, existence of between—Ordinary relation that of creditor and debtor—No fiduciary relationship when costomer pays money to banker without special directions.

The ordinary relation between a banker and customer, in respect of moneys paid by the latter to the former, is that of debtor and creditor, and no fiduciary relationship will be created in the absence of directions by the customer which convert the banker into a trustee in respect of the sums so paid.

A trust will exist when the banker is to collect and remit, but not where he is to use and repay.

Where a customer remits money to a banker with directions to receive such money in fixed deposit for a certain period together with another sum to be remitted, the banker does not, when the latter amount is not paid, hold the former sum in trust by virtue of such direction, although he cannot claim to hold it as a fixed deposit payable only after the limited period.

In re Hallett's Estate, (1879-80, 13 Ch.D., 696), referred to.

Dale's case, (1879, 11 Ch. D., 772), referred to.

Foley v. *Hill*, (2 H.L., 28), referred to.

In re Brown Ex parte Plitt, (60 L.T. Rep., 397), referred to.

Burdick v. *Garrick*, (1869-70, 5 Ch.A., 233), referred to.

THE facts are sufficiently stated in the judgment.

D. M. C. Downing for appellant.

K. Ramanath Shenai for respondent.

JUDGMENT.—This is an appeal from a decree of the learned Chief Justice sitting as Commissioner in Insolvency.

The facts of the case are as follows :—

On the 12th October 1906 Mr. G. Smith wrote to Messrs. Arbuthnot & Co., Madras, enclosing a cheque in his favour on the National Bank of India for Rs. 627 and asked them to receive the amount in fixed deposit together with Rs. 573 which he would

* Original Side Appeal No 1 of 1908, presented against the order and judgment of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of the Court for the Relief of Insolvent Debtors at Madras in Petition No. 181 of 1906.

remit on receiving their acknowledgment—the whole amount to be treated as a fixed deposit for one year payable to Mr. G. Smith and Mrs. F. Smith, either or survivor. On the 13th October 1906 Messrs. Arbuthnot & Co. wrote in reply acknowledging the cheque, and stating that on receipt of the further sum they would, as desired, place the total amount of Rs. 1,200 in fixed deposit for 12 months, and issue and send Mr. Smith their receipt therefor in favour of himself and Mrs. F. Smith, either or survivor. Mr. Smith did not at once remit the balance, and before he had done so, Messrs. Arbuthnot & Co. became insolvents. Mr. G. Smith now claims to be repaid the Rs. 627 out of the general assets in the hands of the Official Assignee, and his claim has been allowed by the learned Commissioner on the ground that Messrs. Arbuthnot & Co. held the Rs. 627 in a fiduciary capacity. Now, if Messrs. Arbuthnot & Co., received the sum in question in a fiduciary capacity and were under a duty to keep it separate from their own moneys and not to use it, then even though they in fact mixed it with their own moneys, it can no doubt be recovered out of the general assets of the insolvents on the principle explained by Sir George Jessel *In re Hallett's Estate*(1), that where a person mixes money, which it was his duty to keep separate, with his own moneys and afterwards fails, the unspent balance in his hands must be taken to include the money which it was his duty to keep separate and not to use rather than the money which he had the right to dispose of. Accordingly, it was held by the Court of appeal in that case that on the facts in *Dale's case*(2) where a cheque was sent to a bank with instructions to collect and remit the amount, and the bank collected but did not remit and afterwards failed, the proper decision would have been to allow the remitting creditor to recover the whole proceeds of the cheque out of the general assets and that the actual decision in that case was wrong. Similarly, in *In re Brown Ex parte Plitt*(3) where a banker was instructed to collect a cheque and hold the proceeds on trust and the bank failed, it was held that the full amount of the cheque was recoverable out of the general assets. It must, however, be borne in mind in considering this case that a banker who receives money as a trustee is not

(1) (1879-80) 13 Ch.D., 696. (2) (1879) 11 Ch.D., 772.
(3) 60 L.T.R., 397.

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entitled to mix it with his own and use it, and this is why it is in accordance with the principle explained in *In re Hallett's Estate* (1) In *Foley* v. *Hill*(2), Lord Brougham, at page 44, points out that, if a banker were a trustee he could not use the trust money as his own without a breach of trust, and in *The South Australian Insurance Company* v. *Randell*(3) it was held by the Judicial Committee to be an indelible principle of trust property that a trustee can never make use of it for his own benefit. Mr. Heber Hart in his book on 'Banking,' 2nd edition, page 485, quotes Cane, J., who decided *In re Brown Ex parte Plitt*(4) as having observed during the argument "where the debtor (the banker) is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand there is no trust." The question in the present case appears to resolve itself into this. Upon what terms did Messrs. Arbuthnot & Co. hold the Rs. 627 collected by them pending the receipt of the balance when the whole sum was to be placed on fixed deposit.

We think the case must be dealt with as the learned Commissioner has dealt with it on the footing that Messrs. Arbuthnot & Co. mixed the proceeds of the cheque with their own moneys, as there is no evidence to the contrary, and the statement made by the Official Assignee at the hearing that the proceeds were carried to a suspense account is not in any way inconsistent with such a mixing. We also agree with the learned Commissioner that this sum of Rs. 627 cannot be regarded as having been placed in fixed deposit so as to disentitle Mr. Smith to withdraw it before the expiry of the fixed period or to enable him to claim interest on it; but does it follow that because it was not held by Messrs. Arbuthnot & Co. on fixed deposit, they were not entitled to use it as their own, but were under a duty to keep it separate from their own moneys until they received the balance and placed the whole sum on fixed deposit so as to render the doctrine of *In re Hallett's Estate*(1) applicable? The learned Commissioner has in effect answered this question in the affirmative by finding that this money was held by Messrs. Arbuthnot & Co. in a fiduciary character, and not in such circumstances as to give rise to the ordinary relation between

(1) (1879-80) 13 Ch.D., 696.
(2) 2 H.L., 28.
(3) (1869-71) 3 P.C., 101.
(4) 60 L.T.R., 307.

banker and customer. Now, it is to be observed that Mr. Smith's letter of 12th October 1906 says nothing as to the manner in which the proceeds of the cheque were to be dealt with after collection, pending the remittance of the balance to make up the Rs. 1,200. After that time it was, of course, to be used by Messrs. Arbuthnot & Co. as their own; but even before that time it is contended for the appellant on the authority of *Foley* v. *Hill*(1), that Messrs. Arbuthnot & Co. were entitled to use it and that the relations of Mr. Smith and Messrs. Arbuthnot & Co. in respect to it were merely those of debtor and creditor. In that case, Lord Cottenham, L.C., says "money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money." In an earlier case (*Devaynes* v. *Noble. Sleech's Case*(2)), Sir William Grant, M.R., had laid it down, generally, that money paid into a banker's becomes immediately a part of his general assets and he is merely a debtor for the amount; and in the later case of *Burdick* v. *Garrick*(3), Lord Hathereley, L.C., after citing *Foley* v. *Hill*(1) observes "a mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him, and his customer does not require from him those very coins or exchequer bills which he deposited with him." The effect of these authorities which are not referred to in the learned Commissioner's judgment is, if we understand them rightly, that in the ordinary course of his trade a banker is entitled to use moneys paid into his bank as his own unless, of course, there is what amounts to a direction to the contrary as in the two cases referred to in the learned Commissioner's judgment. We cannot find any such direction in Mr. Smith's letter of the 12th October 1906, which merely says "I request you will be good enough to receive the

(1) 2 H.L., 28. (2) 1 Mer., 530 at p. 568.
(3) (1869-70) 5 Ch. A., 233 at p. 240.

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amount in fixed deposit together with Rs. 573 which I shall remit no sooner I receive an acknowldgment for the enclosed." Under these circumstances, we are constrained with great respect to differ from the conclusions arrived at by the learned Commissioner that the money in question were held by Messrs. Arbuthnot & Co. in a fiduciary capacity and we must set aside the learned Commissioner's order and dismiss the application. We also set aside the order as to costs but do not consider it necessary to make any fresh order.

Messrs. *King Josselyn & Walker*—Attorneys for appellant.

C. Vijiaraghavalu Naidu—Attorney for respondent.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Pinhey.

1908. September 10, 11.

GOVINDASAMY PILLAI (THIRD DEFENDANT), APPELLANT,

v.

RAMASAWMY PILLAI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Limitation Act XV of 1877, s. II, art. 91—Where sale tainted by fraud, property not recoverable if sale not avoided within period—Such sale, if intended to be operative not void ab initio.

A sale of property for consideration, intended to be operative between the parties, is not void *ab initio*, even though the transaction is brought about by fraud. Subsequent failure of consideration, in consequence of the purchaser refusing to perform his part of the promise, will only make the sale voidable. The title passes to the purchaser by such sale, and the vendor or those claiming to recover on his title must get the sale avoided within the period prescribed by article 91, schedule II of the Limitation Act, before they can recover.

Sundaram v. *Sithammal*, (1893, I.L.R., 16 Mad., 311), distinguished.

Janki Kunwar v. *Ajit Singh*, (1888, I.L.R., 15 Calc., 58 at page 65), followed.

Nabab Mir Sayad Alam Khan v. *Yasin Khan*, (1893, I.L.R., 17 Bom., 755), not followed.

SECOND APPEAL against the decree of I. L. Narayana Row, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 59 of 1905, presented against the decree of T. S. Gnaniyar Nadar, District Munsif of Tanjore, in Original Suit No. 559 of 1903. Suit for a declaration. The house mentioned in the plaint

* Second Appeal No. 1322 of 1905.