difficult to sift, but which I by no means dismiss as altogether unfounded.

In these circumstances it seems to me that it would be not only the right, but the duty of a wise parent acting for the true interests of the children to withdraw them from the plaintiff's custody. This is also the standard to which, as already pointed out, the Court is bound to conform as far as it can, and subject of course to the possibility of making suitable provision for the future custody of the children. On the facts which have been proved, I have no hesitation in holding that the plaintiff by his conduct has disentitled himself to the custody of these children, and that the present motion must be dismissed with taxed costs, the defendant Mr. Rouse undertaking to send them back to Australia before the 23rd instant in the charge of Mr. Counsell and Miss Thom.

Messrs. *Short* & *Bews*—attorneys for defendant.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 16. September 29.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE PROPERTY AND CREDITS OF ARBUTHNOT AND COMPANY, INSOLVENT DEBTORS (APPELLANT),

v.

D. RAJAM AIYAR (RESPONDENT).*

Banker, payment to, with instructions as to disposal, effect of.

When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B*, held :—

Per MUNRO, J.—That the bank became the debtor of *B* in respect of such money.

Per ABDUR RAHIM, J.—That the relationship between the bank and *B* was not that of debtor and creditor and that the bank held the money in a fiduciary capacity as bailee or agent.

Official Assignee of Madras v. Smith, [(1909) I.L.R., 32 Mad., 68], dissented from.

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* Original Side Appeal No. 26 of 1908.

MUNRO AND ABDUR RAHIM, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. RAJAM AIYAR.

APPEAL from the order and judgment of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of this Court for the Relief of Insolvent Debtors at Madras in Petition No. 181 of 1906.

The facts are stated in the judgment.

D. M. C. Downing for appellant.

The respondent was not represented.

JUDGMENT (MUNRO, J.).—This case cannot be distinguished on the facts from *Official Assignee of Madras* v. *Smith*(1). I would therefore set aside the order of the learned Commissioner and dismiss the application with taxed costs throughout.

As my learned brother takes the opposite view the appeal is dismissed.

ABDUR RAHIM, J.—The facts of the case are that the cashier of the Madras Railway Company paid into Arbuthnot and Company's bank a sum of Rs. 461-3-5 to be paid to Mr. D. Rajam Aiyar who had no account with the bank. Arbuthnot and Company thereupon wrote to Rajam Aiyar the following letter :—

"Dear Sir, We have the pleasure to advise you of our having received the sum of Rs. 461-3-5 on your account from the cashier, Madras Railway Company, which we hold in suspense pending receipt of your instructions as to disposal of the same. Should you wish to open an account with us, please fill in, sign and return to us the slip attached to the enclosed memo. of our banking terms.

We are, Dear Sir, etc., etc."

Before D. Rajam Aiyar gave any instructions in reply to their letter, Arbuthnot and Company became bankrupt. Upon these facts I would, having regard to what I have already said, hold that Arbuthnot and Company held the money from Rajam Aiyar as trustees. They could not open an account with respect to this money until they received instructions to that effect from Rajam Aiyar and so they held it "in suspense" till then. No evidence has been taken in this case as to what the phrase holding money "in suspense" means as used among bankers. But apparently the parties did not think that the meaning of the expression which is an expression in common use in banking business in this country admitted of any dispute. As admitted at the bar the person whose money is held in suspense is entitled to withdraw it any moment he likes, he neither gets a pass book nor is entitled

(1) (1909) I.L.R., 32 Mad., 68.

to draw any cheques or to be paid interest in respect of the amount. In short that money is not held either in current or deposit account. The inference therefore clearly is that a banker holding money of a person "in suspense" does not treat it like an ordinary customer's money and the general rule that a banker is entitled to use his customer's money because it is money really advanced to him cannot apply to such money. In *Great Western Railway* v. *London and County Banking Company*(1). Lord Davy lays down that "there must be some sort of account, either a deposit or a current account or some similar relation, to make a man a customer of a bank." That shows that if a person who does not stand in the relation of a customer pays money to a banker he does not become by that fact alone without anything more a customer of the bank. A banker as is well known often acts as bailee or factor and why should it be presumed that money paid to or held by a banker pending instructions was intended to be appropriated by the banker as his own money when there is no previous course of dealings between the parties to raise such a presumption. In such a case there is no reason why the law should treat the banker on a different footing from any other person into whose custody property belonging to another person has come in a lawful way but without his having acquired a right to it. In those circumstances the law regards the custodian of the property as a quasi-trustee standing in fiduciary relations towards the owner of the property and is there any authority for saying that bankers are exempted from the application of such a well-established doctrine of equity? I think not. I am however confronted with a recent decision of this Court in Smith's case arising out of this very insolvency where a contrary view has been taken (see *Official Assignee of Madras* v. *Smith*(2).

In that case, the facts of which, it must be admitted, were very similar to those of the present, Benson and Wallis, JJ., lay down broadly that money placed with a banker whether by a customer or by a person who has had no previous dealings with the banker, without any specific instructions as to its application at once becomes money of the banker. The learned Judges rely in support of that proposition on *Foley* v. *Hill*(3) and on certain passages

(1) (1901) A.C., 414. (2) (1909) I.L.R., 32 Mad., 68.
(3) (1848) 2 H.L., 28.

MUNRO AND ABDUR RAHIM, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. RAJAM AIYAR.

which they cite from the judgments in *Slechi's case*(1) and *Burdick* v. *Gavrick*(2). But the rule laid down in these cases is with express reference to money paid into a bank by a customer and the general observations are clearly not intended to extend to payments by persons who are not customers. The foundation of the common law rule relating to dealings between a banker and his customers is, as I understand it, a contract which the law implies to the effect that the banker shall be entitled to treat money lodged with him in account as a loan made to him so that he may use it in any way he chooses for purposes of profit because this is essential to all banking business and were it otherwise no banking business could be carried on in the way it ordinarily is. And this, a person who becomes a customer of a bank is supposed by the law to know and to agree to. But the basis of the rule is gone if the customer paying in a sum of money directs it to be applied in a particular manner. In that case if the banker accepts the money he must hold it as agent or bailee just as if he was not a banker at all. In the case of a stranger who places money in the hands of a banker there being no reason for inferring that he made the payment by way of a loan to the banker, there seems to be no reason why in the absence of any instructions as to how it is to be applied it must be taken that he authorized the banker to treat the money as his own and not that he was to hold it as trustee, or as *quasi*-trustee for the use of the payer or as agent or bailee for some purpose to be named by him. The proper enquiry with respect to money paid to a banker by a person who is not a customer for the purpose of ascertaining whether the banker held the money in a fiduciary capacity or not, is not whether the payer gave any specific instructions as to the manner in which the money is to be disposed of, but whether there is anything to show what the understanding between the parties was, whether the banker was to treat the money in the same way as his ordinary customers' money or hold it either as bailee or agent or as trustee for the payer's use. I may observe that the case must be rare in which a banker should receive a stranger's money without something to indicate how he was to treat the money. However that may be, as in this case and also in Smith's case it appears that Arbuthnot and Company held the money in

(1) 1 Merivale, 530. (2) (1870) 5 Ch. App., 233.

suspense pending further instructions, in expectation that the person for whom they so held the money would either become their customer or instruct them as to how else they were to dispose of the money, the intention of the parties was perfectly clear that Arbuthnot and Company were not to acquire a right to the money turning themselves into mere debtors of the payer. Then the only other alternative, as I have already pointed out, is that they held the money in a fiduciary character for the person entitled to it and the money must be regarded as kept apart from the general funds of the bank. It may be that in common practice such moneys are mixed up by the banker with his own funds just in the same way as he customarily mixes up moneys received by him as an Agent for a specific purpose as pointed out by Cave, J., in *In re Brown Ex parte Plitt*(1). Such mixing may be technically a breach of trust as pointed out by Branwell, L.J., in *Ex parte Kelly & Co.*(2) or it may not be a breach of trust at all so long as there are sufficient funds in the bank to cover the amount as suggested by Cave, J., in the above case. But the real test of the right to follow is not whether the sum in question has been rightfully or wrongfully mixed with other moneys, but whether the banker was authorized or not to use the sum in question for his own purposes. If he was not, then all his drawings from the mixed fund will be attributed to moneys which he was entitled to use and not to moneys which he was not entitled to use. With the utmost deference therefore to the learned Judges who decided Smith's case I am unable to take the same view of the law on this point and in my opinion D. Rajam Aiyar is entitled to recover his money as held by the learned Commissioner and I would dismiss the Official Assignee's appeal.

Messrs. *King & Josselyn*—attorneys for appellant.

A Letters Patent Appeal No. 143 of 1909 against the above judgment was preferred with the result that the judgment of the learned Commissioner was affirmed. ED.

(1) 60 L.J.N.S., 397.

(2) (1879) 11 Ch.D., 308.