Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Union Bank of Australia, Limited, v. *Hugh Percy Murray-Aynsley and Fulbert Archer, from the Court of Appeal of New Zealand (Canterbury District); delivered 22nd June* 1898.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Respondents, who are the Plaintiffs in this action, are trustees under an ante-nuptial settlement executed by Mr. and Mrs. Harris in August 1866. Mr. Murray-Aynsley was one of the two original trustees, and on the death of his co-trustee, the Respondent, Mr. Archer, was appointed to the office, on the 3rd May 1887. At that date, both these gentlemen were partners of a firm of agents and general merchants, who carried on business at Christchurch, and elsewhere in the Colony of New Zealand, under the name of Miles & Co. Mr. Murray-Aynsley retired from the firm in 1892; and, on the 20th February 1893, its business was transferred to a joint stock company, incorporated under the name of "Miles & Co., Limited," and was carried on by that Company until it stopped payment on the 11th of January 1895. Mr. Archer was a member of the Company, and was also one of its directors.

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The firm of Miles & Co., and their successors, Miles & Co., Limited, were customers of the Appellant Bank. For their convenience, the Bank kept two accounts, No. 1, which was the general account, and No. 2, which was known as the stock account of the concern. In September 1891, at the request of the late Mr. Banks, then the managing partner of Miles & Co., a third account, known as No. 3, was opened for the firm, and was continued down to the stoppage of the Company which succeeded them. The question involved in this appeal depends upon the object with which the Account No. 3 was opened, and its true character, as between the Company and the Appellant Bank.

During the existence of Miles & Company, the Respondents had invested 1,800*l.* of the trust funds under their administration, through the agency of the firm, upon two loans, one of 1,600*l.* to the Loyal Volunteer Lodge of Oddfellows, at Sydenham, in the Colony of New Zealand, and another of 200*l.* to a person of the name of Kemp. The Lodge of Oddfellows repaid their loan by two instalments, of 200*l.* on the 26th October, and of 1,400*l.* on the 6th of December in the year 1894; and on the 27th November 1894, his loan of 200*l.* was repaid by Kemp. All these sums were received on behalf of the Respondents by Miles & Co., Limited, who paid them, as they were received into the Appellant Bank, to the credit of account No. 3; and they stood at the credit of that account, when the Company failed.

Their Lordships do not find in the record any satisfactory evidence of the terms upon which these trust monies were allowed by the Appellants to pass into the hands of Miles & Co., Limited, and to remain so long in a Bank account of which that Company had the control, and upon which it received interest from the Bank

at the rate of seven per cent. In the course of the argument upon this appeal, it was stated by the Appellants', and it was not disputed by the Respondents' Counsel, that, so long as the monies remained in that account, Miles & Co., Limited, by the directions and with the authority of the Appellants, regularly paid to Mr. Harris 5 per cent. upon their amount, the Company retaining, for its own purposes, the difference of 2 per cent. The Respondent Murray-Aynsley, who was examined as a witness on his own side, was naturally somewhat reticent as to these points, which might involve his personal responsibility. Speaking of his firm of Miles & Co., he says "There might be large "sums of money waiting investment on which "we were paying interest. Long time might "elapse before getting investment. I think we "gave 5 per cent." Again, he says, "As long as "we paid interest direct, the loan was to us, and "we treated it as firm's money." With regard to the trust moneys, received by Miles & Co., Limited in the end of the year 1894, he states, "I knew that these amounts were in the "No. 3 before I signed the discharge to the "Insurance Company." These statements appear to their Lordships to come to no more than this, that, whilst the witness knew that the trust monies were in the hands of the Company as agents, and, in a certain sense, under their control, he believed that they were sufficiently earmarked as trust funds to ensure their safety, by their having been paid into account No. 3.

The present action was brought against the Appellant Bank by the Respondents, in July 1895, claiming decree for payment of 1,800*l.* out of the moneys standing to the credit of Miles & Co., Limited, with interest at the rate of 6 per centum per annum from the 4th February 1895, when the Company went into liquidation. The case was tried on the 16th July 1896,

without a jury, before Mr. Justice Denniston, who, on the 11th August 1896, gave judgment sustaining the Respondents' claim with costs. An appeal, at the instance of the present Appellant against that judgment, was dismissed by the majority of the Court of Appeal, consisting of Williams, Conolly, and Edwards, J.J., Prendergast, C.J., dissenting.

At the time when Miles & Co. Limited, went into liquidation, the Company owed a large balance to the Appellant Bank, who claim the right to retain and apply all sums standing in their books at the credit of the Company towards extinction of that balance. No objection is taken to their so dealing with the accounts No. 1 and No. 2. But the Respondents aver and maintain that the account No. 3 was, at the time when the sums for which they sue were paid into it, and thereafter continued to be, "to the knowledge of the Defendant Bank, "and by arrangement between the said Miles & "Company Limited and the Defendant Bank, "a trust account of the said Miles & Company "Limited." There is not on the face of the account No. 3, anything to show that, in so far as concerned the relative position of the Bank and its customers, it stood on any different footing from the other accounts kept by the Company, or to indicate that it was opened or kept open for the purpose of receiving trust funds which were in the hands of the Company. It was therefore incumbent upon the Respondents to prove that the monies for which they now sue were, in the knowledge of the Bank, trust funds; and the only question arising in this appeal is, whether the Respondents have discharged themselves of that *onus*. Although there is a considerable amount of evidence, very little of it has any bearing upon the real point at issue; and that little is, in their Lordships' opinion, decidedly adverse to the Respondents'

contention. Notwithstanding the preponderance of judicial opinion in favour of the Respondents in the Courts below, their Lordships have found it impossible to differ from the conclusions of the learned Chief Justice, the dissentient member of the Court.

It appears that, in consequence of the death of Mr. Banks, who was an active partner of the firm of Miles & Co., and who, in 1891, made the arrangement with the Bank for opening the account No. 3, the Respondents have been deprived of any advantage which they might have obtained from his testimony. It is proved by Bolton, a clerk who was in the employment of Miles & Co., Limited, that, on the Company succeeding to the business of the firm, the account No. 3 was simply transferred to them, along with Nos. 1 and 2. There is also evidence to the effect that monies received for investment were generally paid into account No. 3; but that circumstance is not in the least calculated to suggest that No. 3 was a trust account, in the sense for which the Respondents contend. It might, for many reasons be convenient, for the firm or the Company, to have these monies kept in a separate account, and not mixed up with their other transactions; but there is not a tittle of evidence to show that these monies received for investment belonged to trustees, or that they were held by the firm or company in trust, and not simply as agents for the real owners, their principals.

Apart from the evidence bearing upon the opening of the account, and the terms of the arrangement which is said to have been then made between the Bank and the firm of Miles & Co., there is nothing to prove, or even to suggest that any notice was subsequently conveyed to the Bank of the trust character of the funds which the Respondents are claiming in this

action. The only witness who speaks to the arrangement of 1891 is Samuel Hallamore, the manager of the Bank, who was called by the Respondents. He says, in his evidence-in-chief, "Mr. Banks saw me about opening No. 3 "account. He said he wished to open a separate "account. That he had received a large amount "of money which was to be invested or remitted to "London, and he asked me if I had any objection "to open a separate account, and treat it in the "same way as No. 2 in regard to the general "overdrawn account. I understood him to mean "with regard to interest. I told him he was at "liberty to open as many accounts as suited his "convenience. He did not say whom these "moneys belonged to, said nothing about a trust "account. I had no idea whom they belonged "to."

Their Lordships do not think it necessary to make any observation upon these statements, beyond this, that, if believed, they directly disprove the allegation that No. 3 was in any sense a trust account. If not believed, the Respondents are in this dilemma that they have no proof whatever relating to the allegation upon which their claim is founded. It is right to say that Mr. Justice Denniston, who tried the case gave "credit to Mr. Hallamore for perfect honesty in "his evidence." But the learned Judge, instead of accepting his evidence, and construing it according to the plain meaning of his words, adopts what appears to their Lordships to be the dangerous course of first assuming that his statement must very imperfectly represent his conversation with Mr. Banks, and then building upon that assumption a series of speculations and conjectures, arising not out of but outside the evidence, resulting in the conclusion of fact that "the manager must have known, or have "had strong reason to believe, that the moneys

" referred to were not the moneys of the firm." The same species of fallacy pervades the reasoning of the learned Judges of the majority of the Appeal Court, who do not appear to their Lordships sufficiently to appreciate the broad legal distinction between the relation of an agent, habitually entrusted with the disposal of their money by his principals, to his own bankers, and his relation to the principals themselves.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the action, with costs to the Appellant Bank in both Courts below. The Respondents must pay to the Appellants their costs of this appeal.