$3,000 had been drawn by said Pella Bank upon said National Bank of Illinois and not credited to it upon the books of said Pella Bank.

"Seventh. None of said drafts were used or intended to be used to pay off any debt or obligation of said bank, but all were used to supply the margins in the private transactions of the said Cassatt with the said firm of C. B. Congdon & Co. and said corporation of C. B. Congdon & Co., as aforesaid. Said transactions were all kept secret from the bank by said Cassatt.

"Eighth. There is no evidence from either side, other than the foregoing, tending to show that the said Cassatt was or was not a man of means, independently of his holdings in the said First National Bank of Pella. Both the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co. knew that Cassatt was president of the bank, and had access to its funds, but made no inquiry as to whether said Cassatt had means, independently of his holdings in said bank, and made no inquiry of said Cassatt, the other officers of the bank, or any one else likely to know, whether said Cassatt was using his own means in the speculative transactions aforesaid, and no inquiry looking in that direction.

"Ninth. The court finds that the avails of the drafts sued upon in this case, through the means already described, were taken purposely by the said Cassatt, without authority of law, but as an act of theft and embezzlement from the funds of said bank, and that the defendants, in receiving the avails of said drafts, were in fact receiving the moneys stolen by said Cassatt from said bank. The court further finds that reasonable and prudent men, having no selfish interests to subserve, would have been led, by the facts in possession of the firm of C. B. Congdon & Co. and of the defendant, to suspect that said Cassatt might be unlawfully using the funds of said bank to supply the margins transmitted to the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co., respectively.

"Wherefore, the court finds the issues for the plaintiff and against the defendants, and assesses the plaintiff's damage at the sum of $2,323.61, of which $2,000 is principal and $323.61 interest. P. S. Grosscup, Judge."

In No. 561 the findings, with a change of the names of the defendants, are the same, with the following exceptions:

The fifth commences with this statement: "Fifth. The said Cassatt began to have business dealings with the defendants, commission merchants on the Board of Trade, in the city of Chicago, in 1884, continuing to have such transactions down to and including a portion of the year 1894,"—and also contains the following: "The money which was sent to Milmine, Bodman & Co. to pay the losses aforesaid was in turn paid out by Milmine, Bodman & Co., for the purpose of discharging the contracts made in behalf of Cassatt by them, upon which the losses occurred, and no profit resulted to Milmine, Bodman & Co. by reason of any of the dealings with Cassatt, except the commissions which they earned as brokers in negotiating the transactions for him."

The sixth, after the first sentence, proceeds as follows: "During the period of said deals, Cassatt remitted to the defendants, on account of margins aforesaid, from time to time prior to the drafts sued on in this case, 27 drafts, each of which was exactly similar to the drafts sued on in this case; that is to say, each was signed, 'First National Bank of Pella, by E. R. Cassatt, President.' All of these drafts were collected by the defendants in the same way as the drafts in the suit. The earliest of the series of drafts, prior to the drafts in suit, was August 21, 1884, and the latest was April 6, 1891. Of these drafts, there were 5 in 1884, 8 in 1885, 6 in 1886, 2 in 1887, 1 in 1888, 1 in 1890, and 2 in 1891, and were for the amounts and bore the dates as follows: 1884: August 21st, $500; October 11th, $300; November 19th, $300; December 1st, $500; December 9th, $300. 1885: January 5th, $200; February 19th, $250; March 25th, $500; April 27th, $500; July 27th, $425; October 5th, $300; October 10th, $1,500; October 15th, $1,000. 1886: April 12th, $1,000; April 17th, $1,000; September 11th, $300; September 25th, $300; October 11th, $300. 1887: February 19th, $300; July 8th, $300. 1888: December 3d, $1,000. 1889: March 18th, $800; April 13th, $500. 1890: February 13th, $500. 1891: January 6th, $500; April 6th, $1,000. Each of said drafts was charged by the National Bank of Illinois to the First National Bank of

Pella, and monthly statements were sent by the National Bank of Illinois to the First National Bank of Pella, which were checked up by the clerks in the latter bank, but during the two years immediately preceding the failure the checking was done by Cassatt himself. Most of the drafts sent by E. R. Cassatt, as aforesaid, both those prior to the ones in suit, as well as the drafts sued upon in this case, except as hereinafter noted, were charged upon the books of the First National Bank of Pella, either to the account of E. R. Cassatt, or to the account of E. R. Cassatt & Co., which account, at the time of such charging, had an apparent credit balance sufficient to pay or offset the charge so made against it. Such of said drafts as were not charged to E. R. Cassatt, or to E. R. Cassatt & Co., were charged to some other account upon the books of said bank, which account, at the time of said charges, had an apparent credit balance sufficient to pay or offset the charges so made against it. Said drafts were all signed by E. R. Cassatt as president. The drafts sued on in this case were all drawn upon the National Bank of Illinois, payable to Milmine, Bodman & Co., and signed 'First National Bank of Pella, by E. R. Cassatt, President,' and were of dates and amounts as follows: 1891: August 20th, $1,400; August 31st, $800; September 19th, $500. 1892: June 13th, $2,000; August 27th, $1,000; September 5th, $1,000; October 22d, $1,000; October 28th, $1,000. 1893: January 30th, $1,000; February 14th, $600; February 18th, $1,500; March 13th, $600; June 21st, $2,500; November 23d, $300; December 21st, $500. 1894: January 24th, $300; February 10th, $500; February 12th, $600."

And the seventh contains the following additional statement: "The telegraphic correspondence between said Cassatt and the defendants was carried on in cipher. On one occasion the defendants failed to observe this cipher, and on a protest from said Cassatt promised that such oversight should not occur again. It is not unusual, however, for Board of Trade commission men to communicate with their customers in cipher. The cipher used in this case was the so-called 'Robinson Cipher.' Nearly every dealer in the country has a copy of this. The telegrams were neither signed nor addressed in cipher, but were addressed and signed by the correct names of the respective parties."

In No. 555 the following propositions and the authorities cited are relied upon:

(1) "There was nothing in the form of the draft sued on to create a suspicion that Cassatt was using the funds of the bank in the payment of his individual indebtedness. Goshen Nat. Bank v. State, 141 N. Y. 179, 36 N. E. 316; Claflin v. Bank, 25 N. Y. 297; Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co., 143 N. Y. 564, 38 N. E. 713; Huie v. Allen (Sup.) 34 N. Y. Supp. 577; Dike v. Drexel (Sup.) 42 N. Y. Supp. 985; Goodman v. Simonds, 20 How. 364; Bank of Edgefield v. Farmers' Co-op. Mfg. Co., 2 C. C. A. 637, 52 Fed. 98–103; Bank v. Holm, 19 C. C. A. 94, 71 Fed. 489; Kaiser v. Bank, 24 C. C. A. 88, 78 Fed. 281; Anderson v. Kissam, 35 Fed. 699; Kissam v. Anderson, 145 U. S. 435, 12 Sup. Ct. 960."

(2) "The directors of the Pella Bank were guilty of culpable negligence, which far outweighed any slight negligence of defendant."

(3) "The course of dealing between the bank and the defendant, and its predecessor firm of the same name, created a presumption, upon which defendant could rely, that the draft sued on was properly obtained by Cassatt, and that the defendant was entitled to receive its avails in payment of a debt due from Cassatt. There was implied authority for his act. Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428; Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72."

(4) "Cassatt paid for the draft by the use of the credits the bank had given him. He defrauded the bank in his obtention of the credits, but that was another transaction. So long as the credits subsisted, they could, as between the bank and the defendant, be used as they were used. Wilson v. Railway Co. (N. Y. App.) 24 N. E. 384."

(5) "Assuming, arguendo, that the form of the draft was such as ought to have created suspicion that Cassatt might be improperly using the funds of the bank in payment of his individual debt, and that the defendant was charged with the duty of inquiry, and made none, it is only chargeable with a knowl-

edge of such facts as it would have learned by the exercise of ordinary diligence. Birdsall v. Russell, 29 N. Y. 220; Woolen Mills v. Sibert, 81 Ala. 140, 1 South. 773; Knapp v. Bailey (Me.) 9 Atl. 122."

In No. 561 the following:

(1) "The defendants were under no duty to inquire into the facts of transactions anterior to, and entirely separate and distinct from, the transactions to which they were parties."

(2) "The court erred in entering judgment against the defendants, when the findings showed that Cassatt had paid the bank for every one of the drafts. Goshen Nat. Bank v. State, 141 N. Y. 379, 36 N. E. 316; Wilson v. Railroad Co., 120 N. Y. 145, 24 N. E. 384; Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72; Cowing v. Altman, 71 N. Y. 435; Railway Co. v. Sprague, 103 U. S. 756."

(3) "The fact that the bank had allowed Cassatt, for a period of seven years prior to the dates of the drafts in suit, to draw drafts in a manner exactly like the manner in which he drew the drafts sued on, established a course of dealing which estops the bank to deny that Cassatt had a right to act according to this established course. Bronson's Ex'r v. Chappell, 12 Wall. 681; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428; Merchants' Bank v. State Bank, 10 Wall. 604; Hooe v. Oxley, 1 Wash. (Va.) 19; McDonnell v. Bank, 20 Ala. 313; Martin v. Manufacturing Co., 9 N. H. 51; Weaver v. Ogletree, 39 Ga. 586; Railroad Co. v. Schuyler, 34 N. Y. 30; Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72."

(4) "One who receives a bank draft, fair on its face, signed by the officer duly authorized to sign drafts, may take it as currency, even though he receives it from the officer who signs it, and in payment of the latter's debt. Goshen Nat. Bank v. State, 141 N. Y. 379, 36 N. E. 316; Goodman v. Simonds, 20 How. 343; Railroad Co. v. Schuyler, 34 N. Y. 30; Bank of Edgefield v. Farmers' Co-operative Mfg. Co., 2 C. C. A. 637, 52 Fed. 98; Swift v. Smith, 102 U. S. 442."

(5) "Even if Milmine & Co. had inquired, they could not possibly have found out the secret reasons existing between Cassatt and the bank why it was improper for Cassatt to draw these drafts."

Per contra, for the defendant in error, the following:

(1–3) Questions of practice.

(4) "The receipt by the plaintiff in error of the drafts of the Pella National Bank, signed by Cassatt in his official capacity, to be used as margins for his personal trades, put the plaintiffs in error upon notice that Cassatt was using the bank's funds without authority, and plaintiffs in error took such drafts at their peril, and are accountable to the receiver for the avails thereof. (a) The distinction asserted in counsel's brief as to this point does not exist. Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72; Moores v. Bank, 15 Fed. 141; Id., 111 U. S. 156, 4 Sup. Ct. 345; Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797; Gerard v. McCormick, 29 N. E. 115, 130 N. Y. 261; Anderson v. Kissam, 35 Fed. 699, 703. (b) The form of these drafts put plaintiffs in error upon notice. Anderson v. Kissam, 35 Fed. 699, 703; Chrystie v. Foster, 9 C. C. A. 606, 61 Fed. 551; Moores v. Bank, 15 Fed. 141; Id., 111 U. S. 156, 4 Sup. Ct. 345; Claflin v. Bank, 25 N. Y. 293; Gerard v. McCormick, 29 N. E. 115, 130 N. Y. 261; Wilson v. Railway Co., 24 N. E. 384, 120 N. Y. 145; Shaw v. Spencer, 100 Mass. 382, 384; Bank v. Wagner (Ky.) 20 S. W. 535; Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797. (c) The defect appearing upon the face of the drafts, the doctrine of Bank of Edgefield v. Farmers' Co-op. Mfg. Co. and Goodman v. Simonds, cited by plaintiffs in error, does not apply. (d) The circumstances of the case of Goshen Nat. Bank v. State were radically different from that at bar. (e) The fact that by common usage bank drafts are treated as cash, if that be a fact, cannot be availed of by one who receives the bank's draft, signed by the president, in payment of the president's debt, to relieve the recipient from the operation of the rule that he who knowingly receives from an agent, and on the agent's account, that which belongs to the principal, does so at his peril. Anderson

v. Kissam, 35 Fed. 699, 703; Shaw v. Spencer, 100 Mass. 384; Moores v. Bank, 15 Fed. 141; Id., 111 U. S. 156, 4 Sup. Ct. 345."

(5) "Having failed to make inquiry, the plaintiffs in error are bound by the actual facts as they existed, and will not be heard to contend that inquiry would have been unavailing. Shaw v. Spencer, 100 Mass. 384; Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797; Manufacturing Co. v. Whitehurst, 19 C. C. A. 130, 72 Fed. 502."

(6) "The course of dealing between the bank and plaintiffs in error did not create a presumption, upon which plaintiffs in error could rely, that the draft sued upon was properly obtained by Cassatt, and that the plaintiffs in error were entitled to receive its avails in payment of a debt due from Cassatt. There was no implied authority for his act. Chrystie v. Foster, 9 C. C. A. 606, 61 Fed. 551; Anderson v. Kissam, supra; Wright's Appeal, 99 Pa. St. 425; Hill v. Publishing Co. (Mass.) 28 N. E. 142; Powell v. Rogers, 105 Ill. 318; Berwind v. Schultz, 25 Fed. 912; Clews v. Bardon, 36 Fed. 617; Briggs v. Spaulding, 141 U. S. 131, 11 Sup. Ct. 924; Percy v. Millaudon, 8 Mart. (N. S.) 68, 74, 75."

(7) "The court found, in effect, that the transactions on account of which these drafts were forwarded were gambling deals. Therefore the avails of the drafts could be recovered by the receiver, whether the brokers were or were not put on notice. (a) The finding is that neither party intended actual sales or purchases, but purely speculative transactions in 'futures.' The intent governs. Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160; Boyd v. Hanson, 41 Fed. 174; Insurance Co. v. Watson, 30 Fed. 653; Kirkpatrick v. Adams, 20 Fed. 287; Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776; 2 Benj. Sales (6th Am. Ed.) 828. (b) The broker is particeps criminis. Irwin v. Williar, 110 U. S. 499, 510, 4 Sup. Ct. 160. (c) The intent is a question for the jury (in this case for the court to find, as a question of fact). Kirkpatrick v. Adams, 20 Fed. 287. (d) A principal may recover moneys gambled away by his agent. McAllister v. Oberne, 42 Ill. App. 287; Smith v. Ray, 89 Ga. 838, 16 S. E. 90; Mason v. Waite, 17 Mass. 560; Corner v. Pendleton, 8 Md. 337; Caussidiere v. Beers, *41 N. Y. 198, 1 Abb. Dec. 333; Burnham v. Fisher, 25 Vt. 514; Pierson v. Fuhrmann (Colo. App.) 27 Pac. 1015."

D. M. Kirton, for plaintiffs in error Lamson Bros. & Co.

Charles H. Dupee, for plaintiff in error C. B. Congdon & Co.

Lockwood Honoré and John P. Wilson, for plaintiffs in error E. H. Phelps and L. W. Bodman.

Frank H. Scott, John H. Hamline, and Frank E. Lord, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after stating the facts, delivered the opinion of the court.

It is not important to inquire whether the court erred in admitting evidence of immaterial facts stated in the special findings. The one question upon a special finding or verdict is "of the sufficiency of the facts found to support the judgment." In determining that question, of course, every relevant and material fact found must be considered, and every irrelevant or immaterial fact rejected; and when the fact has been excluded from consideration there can remain no harm from the error of admitting the evidence by which it was established. The special findings recite many facts and circumstances which, though not irrelevant, are of an evidentiary character only. The ultimate facts on which the rights of the respective parties must be determined are few. They are comprehended in the statement that Cassatt, being president and practically in sole control of the bank, without authority, and without the knowledge of any other officer or stockholder, discharged his individual liabilities to

the plaintiffs in error, respectively, by sending them drafts of the bank, payable to their order, and drawn upon the bank's correspondent in Chicago, with which it had sufficient moneys out of which the drafts, after indorsement by the payees, were duly paid. Much discussion has been expended upon the effect of the form of the drafts, in connection with the use to which they were put, as notice to the payees that they were drawn without authority; but, before entering upon that inquiry, it will be well to dispose of minor contentions.

Assuming that the plaintiffs in error, when the drafts were tendered them, were put upon inquiry, it is asked, what would have been the subject of inquiry? and what facts would have been developed? It is not accurate to say that the inquiry would have been, "Did Cassatt pay the bank for the drafts?" Payment for the drafts, doubtless, would have been important evidence, but not necessarily conclusive upon the true point of inquiry, which was, "Did Cassatt have authority to draw the drafts?" He might have had money in the bank, or have put it there at the time of drawing the drafts, and yet have been without authority to draw them; and without money on deposit, and without present payment, his authority to draw in the form and for the purpose proven might have been beyond dispute. If, trusting to his integrity and individual responsibility, the directors authorized him to use the drafts of the bank for his individual purposes, whether paid for at the time or not, any loss resulting from a misuse of that authority ought, of course, to fall upon the bank, rather than upon a third person, who in good faith had paid value for the paper; and the question of good faith would be determined by the ordinary rules applicable to the transfer of mercantile paper. The fallacy or inapplicability of the supposed case of John Doe, living at Pella, and procuring of the bank a draft payable to the order of a distant creditor, and forwarding the draft to the creditor in discharge of the debt, is evident. It is, doubtless, a not unusual practice for debtors to obtain and send to their creditors bank drafts, drawn payable to the creditors, and, of course, in every such case the creditor knows that the money of the bank is being used to pay to him the debt of another,—in the case supposed, the debt of John Doe. But in such cases the creditor may accept the draft without inquiry, not, as counsel have said, because of a presumption that the debtor had paid for the draft, but because the draft had been drawn by the authorized officer of the bank in the usual course of business, acting without apparent or known personal interest in the transaction. The receiver of such a draft, though named as payee, and on the face of the paper apparently a party to the original execution thereof, is not so in fact, but, as against the drawer, is in effect an indorsee, affected only by vices or infirmities of which he had notice before he accepted it. He might know that the draft had not been paid for, and yet take it on the assumption of regular and proper execution upon some other consideration than payment. The inquiry, therefore, which these plaintiffs in error should have made, was whether Cassatt had authority to draw drafts of the bank upon funds of the bank in possession of its correspondents for use in his individual transactions. Such an inquiry involved no difficulty beyond communicating to the directors of the bank, other than Cassatt, the fact that such a draft or drafts had been tendered in discharge of

liabilities incurred in dealings upon the Board of Trade in Chicago, and asking whether the execution of the paper had been authorized. There can be little doubt what would have been the result of such an inquiry, accompanied with a frank and full statement of the facts as they were known to the payees of any of the drafts in suit at the time of execution. It would not have needed a discovery of Cassatt's fraudulent bookkeeping to enable the directors to say whether the execution of such paper had been theretofore authorized, or then had their approval. As contended, it was clearly no duty of the plaintiffs in error to undertake an examination of the books, which, once they commenced inquiry into the management of the bank, they would have learned had been wholly in the keeping of Cassatt, and of clerks who could not be expected to testify against him. Inquiry of Cassatt, too, it is to be presumed, would have been useless, and therefore, if made, would not have met the requirement of the law. The one thing necessary to be known was whether Cassatt had authority to make the proposed use of the bank's paper. The authority could have come only from the directors, by direct resolution or by acquiescence or implied assent, and the plain, unmistakable course was to push the inquiry, wherever begun, to the source of authority.

It is a perversion of speech to say that "the findings showed that Cassatt had paid the bank for every one of the drafts," or that if the defendants had gone to Pella, and had ascertained the facts, they would have found that Cassatt was a depositor in the bank, that he had charged each draft to his account, that he had on deposit ample funds to meet the charge, that he gave due credit on the books of the bank to its Chicago correspondent for the amount of each draft, and that no step in the transaction was hidden from the bank, but was known to it and recorded in its books, and that a statement of the transactions to the bank could have caused no surprise, because the bank knew of each as it occurred during the whole period of twelve years. The entries on the books, it may be said, tended to show the facts as stated; but the entire finding shows that Cassatt was not a depositor, and in no way made good to the bank the moneys taken from it by means of the drafts, which takings, it is expressly found, were acts of theft or embezzlement. That finding of the ultimate fact of wrongful and unauthorized appropriation cannot be overcome by proof of book entries, which, even if honestly made, would amount only to evidence tending to show the contrary. False entries took no money out of, and put none into, the bank; and it was not for the fraudulent bookkeeping, or forgeries, or any other wrong or series of wrongs which preceded the execution of the drafts, that the plaintiffs in error were held responsible. On the contrary, we agree that, if they are to be compelled to make restitution, it is because the particular sums which they received were wrongfully taken by Cassatt from the bank, and they were parties to the wrong. This proposition does not depend upon, and cannot be refuted by, the bookkeeping disclosed in the special finding. It embraces the three propositions contended for by counsel, namely:

"(1) The person from whom restitution is sought must have been a party to the particular transaction in which the wrong was accomplished. (2) The par-

ticular transaction to which such person was a party must have been hidden from the wronged party. (3) A mere statement to the wronged party of the facts of such particular transaction would have at once disclosed the fraud."

While the transactions appeared upon the books, as stated in the findings, it is a misuse of words, and inconsistent with honest thought, to say that they were known to the bank. Possession of facts, in books purposely kept in a manner to conceal the truth, is not, in law or morals, knowledge of the facts. Cassatt alone had knowledge of the truth, and, though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank.

The foregoing considerations dispose of the proposition that the bank, by allowing Cassatt to make a like prior use of drafts drawn by himself, had established a course of dealing which estops the bank to deny his authority. Of course, an estoppel may arise out of such a course of dealing, but whether, in a particular case, it has arisen is a question of fact depending upon the circumstances. It is hardly credible that in the facts here disclosed a jury, or a right-minded court, could find an estoppel; but it is enough to say that it has not been found, and that the facts supposed to point that way which are stated in the finding do not overcome the ultimate fact stated that the sums for which these drafts were drawn were wrongfully taken by Cassatt. That is equivalent to a direct finding that he had no authority to draw and use the drafts in that way. For the same reasons the proposition that the directors of the bank were guilty of culpable negligence is unavailing. There is no finding that there was such negligence, nor, if there were, that the plaintiffs in error were influenced by it to accept the drafts, of which, on the facts known to them, Cassatt was making an improper use.

These considerations of bookkeeping, course of dealing, negligence of directors, and estoppel aside, the main question is simplified: When Cassatt tendered these drafts,—each one of them to the payee named in it in payment of an individual obligation, in which the bank was not interested,—was the taker, accepting the paper in discharge of the debt, a purchaser in good faith, or was he put upon notice of Cassatt's lack of authority to draw upon the funds of his bank for his individual purposes? Upon that question our conclusion is that the opinion in Anderson v. Kissam, 35 Fed. 699, is sound in principle and in accord with the weight of authority. The judgment rendered in that case, it is true, was reversed, but upon a minor point, unconnected with the main question, which there, as here, was fundamental; and the fair inference would seem to be that if the supreme court, with the question before it, had doubted the ruling and opinion below in that respect, it would not have left the question undetermined.

The case of Goshen Nat. Bank v. State, upon which the plaintiffs in error chiefly rely, is distinguishable. The drafts in that case were drawn by the cashier, and were used to pay his individual debt; but, as the opinion is careful to state, it was "proved on the trial that the cashier had the custody and possession of the blank drafts for the claimant [the bank], and that he had the right to sign drafts drawn by the claimant on its corresponding banks, and that he had the right

to draw a draft on the corresponding bank of the claimant for himself, upon the same terms that he had to draw a draft for a stranger, * * * which means," as the court assumed, "upon payment to the bank of the amount of the draft." That this proof of special authority to draw a draft for his own use was the distinguishing point of the decision is declared in the later case of Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co., supra, where it was held that a by-law of a warehouse company, authorizing an officer of the company to sign warehouse receipts, did not authorize him to sign a receipt for his own goods. "It is an acknowledged principle of the law of agency," it was there said, "that a general power or authority given to the agent to do an act in behalf of the principal does not extend to a case where it appears that the agent himself is the person interested on the other side. If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it; for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." See, also, Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72.

It is urged, however, "that there is a clearly-defined distinction between the acts of a cashier or president of a bank, in issuing its paper, and that of any ordinary agent." There are dicta in some of the opinions cited which, without attempting to define it, assert in general terms that there is a distinction. For instance, in Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co., supra, in addition to what we have already quoted in reference to the case of Goshen Nat. Bank v. State, the court said: "And we also held, for the reason therein stated, that there was a difference in the case of bank or cashier's drafts from most cases of agency." There is a plain difference in the fact that such drafts, once they have been issued, are commercial paper, and may be accepted in trade and commerce without inquiry into the consideration for their issue. No other basis for a distinction is suggested in Goshen Nat. Bank v. State, and that difference, it is to be observed, is not in the character or extent of the agent's authority, but in the nature of the subject on which it is exercised. It is true, as there said, that "bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts, or in other commercial transactions, that they have almost acquired the characteristics of money." An officer of a bank, however, has no right to appropriate the money of the bank to his individual uses, and, though a creditor, when offered money by his debtor, ordinarily may accept it without inquiry, yet if, at the time he receives it, he is told or knows that it belongs to another, for whom his debtor is an agent or trustee, on the plainest principles he acquires no title as against the true owner. If, for instance, Cassatt had sent to the plaintiffs in error money of the bank, instead of drafts, advising them that it belonged to the bank, there could be no question of their liability to make restitution; and in what respect is their position better as presented than it would be on the facts supposed, even conceding that the drafts sent them were the same, or "almost the

same," as money? The drafts bore proof on their face that they were drawn upon the funds of the bank; and that they were not drawn in the course of the bank's business, but in discharge of individual liabilities of the president of the bank to themselves, they, of course, understood. They therefore knew that, unless there had been conferred upon Cassatt an unusual and special authority, like that given the cashier in Goshen Nat. Bank v. State, supra, to sign and issue drafts of the bank in his private transactions, the paper sent them was unauthorized, and that for the proceeds thereof they would be liable to the bank or its representatives.

It is evident, however, that the drafts in question, when offered the plaintiffs in error, were not commercial paper, capable of treatment as money, and that the considerations of public policy on which the bona fide holder of such paper is protected, even though the rights of an antecedent holder be questionable, have no application or relevancy to the case. The drafts were drawn in favor of plaintiffs in error, and until accepted by them they were not contracts, and by accepting them they did not become assignees or purchasers of existing obligations, but simply parties to the original execution thereof, into whose rights the way to full inquiry is open, unless closed by some estoppel outside of the paper itself, whatever its form. A primary party to the execution of instruments originated as these were cannot be a "bona fide purchaser," in the sense of the law merchant, and to hold the payee of such paper responsible for the proceeds received upon his own negotiation of it to a third party, who will be presumed to be an innocent purchaser, no more tends to discredit the paper, as an agency of business, than it tends to impair the value of money as a medium of exchange to hold one who receives it wrongfully accountable to the rightful owner. If a bank president or cashier, because possessed of a general power to sign drafts, may draw drafts of the bank in favor of his individual creditor, and it is to be said that "there is nothing unusual or suspicious in this way of making the draft payable to the creditor of the cashier or president who draws it," then in Claflin v. Bank, 25 N. Y. 293, for all we can see, it might just as well have been said that there was nothing unusual or suspicious in the acceptance or certification by the president of the bank of a check or draft drawn by himself. The power of such an officer to draw drafts of his bank upon others is no greater than his authority to accept the checks or drafts of others upon his bank; yet in that case it was held that the general authority of the president of the bank to certify checks drawn upon it did not extend to checks drawn by himself, and it was declared not to be necessary for the principal in such case to show that the agent had acted unfairly or that he himself had sustained an injury, but that the act of the agent is deemed to be unauthorized, and the contracts void. We agree with counsel for the defendant in error that the concern of the courts should not be to make it easy for persons in fiduciary positions to make way with that which is committed to their care, by relaxing this salutary rule, through considerations of the supposed necessities of business and commerce, and that the rule should not be suspended,

where the opportunities for breach of trust are largest, merely because they are large. The best public policy requires that bank officers be rigidly held to the ordinary and well-understood rule. There is, we believe, no good reason to the contrary.

In the first case, where there was a trial by jury and a general verdict, reference is made to Cassatt's own testimony for proof that he "had authority to draw drafts to his own or his creditor's order, upon payments by him to the bank for the same," and on this assumption, it is contended, on the authority of Hanover Nat. Bank v. American Dock & Trust Co., and like cases, that the fact of drawing the drafts was a representation, on which the plaintiffs in error had a right to rely, that such payments had been made. Whether he had such authority was a question of fact, of which the verdict is conclusive, unless material error of law occurred at the trial. The testimony referred to is quite indefinite and uncertain, but, if it affords ground for an inference that Cassatt did in fact draw drafts to his own order, or in favor of his creditors, it shows no basis whatever for a belief that he did so with the knowledge of other officers of the bank. In the case last referred to there was proof that the president of the warehouse company had issued receipts to himself before the one in question, and there was evidence of facts and circumstances, sufficient to go to the jury, tending to show that he had authority to do so. It being apparent on the face of the drafts here in question that they were drawn upon the funds of the bank, it was impossible for the plaintiffs in error to receive them in discharge of Cassatt's individual obligations to themselves without being put upon inquiry whether the president had in fact the authority which he assumed to exercise; and it was not enough to make inquiry of him, nor permissible to rely upon the implied representation deducible from the execution of the drafts. That the execution of the drafts by the president of the bank in his own interest was without authority, and that the plaintiffs in error were not, and could not have been, innocent holders, the evidence was without conflict, and so clear that the court might have directed a verdict in favor of the plaintiff; and on this view of the case the other questions discussed, which in themselves are of minor importance, lose all significance. It is said that "the question of gambling was an issue in the case," and the refusal of a special request for instruction on the subject, it is urged, was material error. No such issue appears in the pleadings, and no mention of the subject is found in the court's charge to the jury. In fact, however, by necessary implication, the question was excluded from consideration when the jury was told that the plaintiff could recover only upon proof that Cassatt, without the authority, knowledge, consent, or acquiescence of the board of directors of the bank, misapplied the moneys of the bank in question to his own use, and that the defendants had knowledge, or were aware of such facts as would amount to knowledge on their part, that he was so misapplying the money of the bank; and the statement that the defendants must have had such knowledge was repeated in substantially the same words and with equal clearness in a separate charge. In short, the controlling question was fairly sub-

mitted to the jury, and, it is clear, was rightly decided. The allowance of interest was proper.

The judgment in each of the cases is affirmed.

RUSSELL v. YOUNG et al.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1899.)

No. 630.

1. CONTRACT FOR LEGAL SERVICES — CONSTRUCTION — AMOUNT OF COMPENSATION.

   A contract between attorney and client for the rendition of legal services in connection with an estate to which the client was an heir, providing that the attorney's compensation should "in no event be more" than that received from other heirs similarly interested, nor more than a certain per cent. of the amount recovered for the client, does not fix the amount of compensation, but merely imposes maximum limits thereto, leaving the amount to be determined on a quantum meruit, within such limits.

2. SAME—EVIDENCE OF PRACTICAL CONSTRUCTION BY PARTIES.

   Evidence of a practical construction placed on a written contract by the parties is not admissible to affect its construction by a court in an action thereon, where its terms are plain and unambiguous.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This is an action at law to recover compensation for legal services rendered by the plaintiff in error under a contract in these words:

"Whereas, George L. Carlisle is the attorney at law and in fact of Cornelia T. Young in all matters relating to her interests in the estate of Silas S. Stone and Margaretta Stone, both deceased; and whereas, it may become necessary or proper for him, in the discharge of his duties aforesaid, to have the assistance of an Ohio lawyer: Now, therefore, this shows that L. A. Russell, of Cleveland, Ohio, has been, and is hereby, retained and employed by George L. Carlisle, of New York City, to appear for Cornelia T. Young in any partition or other suit or proceeding which may be commenced or taken with respect to the settlement of her interest in the estates of Silas S. Stone and Margaretta Stone, both deceased, either or both, and to do and perform all things necessary for the speedy and complete settlement of said interest. Said Russell accepts said employment, and it is mutually agreed as follows: 1st. Said Carlisle shall be consulted as the principal or employing attorney herein in any such suit or proceeding hereunder (and as often as may be prior thereto) which said Russell shall commence or take, and (as near as may be) all papers necessary and of importance for the prosecution of said interest shall be first submitted to said Carlisle; and all payments on account or otherwise of said interest shall be made to said Carlisle as the attorney for said Young. 2nd. The compensation which said Russell may charge for such services shall in no event be more than he will charge and receive from either Silas S. Stone or his brother, Frank W. Stone, for like services, nor more than seven and one-half (7½) per cent. of the net amount of whatever recovery in cash shall be made through his efforts for said Cornelia T. Young during the continuance hereof, except that if a suit in equity (other than partition) or in law, for ejectment, shall be brought in the name of said Cornelia T. Young hereunder against the personal representatives, heirs, or next of kin of said Margaretta Stone or Silas S. Stone, deceased, or any other person or persons, to recover any moneys or other property now in the possession of said personal representatives, heirs, next of kin, or any other person, under a claim of title thereto or interest therein, but in which said Young is entitled to share, or if