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C.G. Renshaw v. Tracy Loan & Trust, a Corporation, as receiver for Walker Brothers Dry Goods Company, a Corporation : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

C. G. RENSHAW,
Plaintiff and Respondent,

vs.

TRACY LOAN & TRUST COMPANY,
a Corporation, as Receiver for
WALKER BROTHERS DRY GOODS
COMPANY, a Corporation,
Defendant and Appellant.

APPELLANT'S BRIEF

STATEMENT

Plaintiff brings his action in two counts against the defendant receiver, claiming that the plaintiff is entitled to be treated as a preferred claimant in the receivership proceedings, growing out of the failure of the Walker Brothers Dry Goods Company, a corporation. There is no distinction between the two counts; the evidence and the law is the same as to each. There is no dispute as to the facts in the case as there is no conflict in the evidence, and no evidence was introduced on behalf of the defendant. It seems also to be conceded that the plaintiff has proven all the facts alleged in plaintiff's complaint, as alleged therein, and consequently it follows that if the plaintiff's complaint states a cause of action plaintiff is entitled to recover in accordance with the prayer of his complaint.

Plaintiff as a boy eleven years of age entered the employ of Walker Brothers Dry Goods Company, and continued in its employ for a period of 38 years and until the business was wound up under the direction of the receiver.

Soon after he entered the employment, as a young boy, and encouraged by the management of the company so to do, and in accordance with the custom of other employees, Renshaw began to deposit, out of his earnings, small amounts of money with Walker Brothers Dry Goods Company, and continued so to do until November 20, 1928; that date is significant because in the latter part of November, 1928, the ownership and management of Walker Brothers Dry Goods Company changed and Mr. Dreyfous became the active manager and the controlling force in the company.

While the plaintiff and Miss Salisbury, who assigned to plaintiff the second cause of action, were making these deposits, and afterwards throughout the management of Mr. Walker and Mr. Dreyfous, and almost to the day of the appointment of the receiver, the plaintiff and Miss Salisbury were assured, through the officers of the Dry Goods Company, that they had nothing to worry about and that their money was absolutely safe; that they could draw their money at any time, and that if anything ever happened to the store they would be paid in preference to anyone.

Mrs. Chase, who had direct control over receiving deposits from the employees, testified that after Mr. Dreyfous assumed control Miss Salisbury wanted to draw some money, and Mr. Dreyfous told Mrs. Chase to tell Miss Salisbury not to worry; her money was perfectly safe and she would receive it, and that the employees were entitled to a preference and their money was perfectly safe. (Abs. 23).

The plaintiff testified that he believed the statements to be true, and relied upon these statements made to him, and that it was by reason of these statements so made that he continued to make deposits with the company and allowed his money to remain on deposit there.

During the time of these deposits by the employees and until the coming of Mr. Dreyfous, the company invested in time certificates of deposit an amount of money equal to or greater than the amount on deposit from the employees; or if the amount of the certificates did not equal or exceed the amount of such deposits, there was a special account at the Continental National Bank of an amount sufficient to make up the deficiency.

These certificates and this special account were to take care of anything in an emergency, and as testified to by Mr. Walker, the only obligations that the company had that didn't have a due date were these special accounts of employees; an employee could put money in today and draw it out tomorrow or next week, and get 6 percent interest, without notice. All the other liabilities had stated dates. Our invoices for merchandise purchased, had dating as did any other account; all had certain dating, and money from the bank, all due on a certain date. These special accounts (employees accounts) had no date whatever; all due on demand. We had those special deposits there to take care of the special accounts and other items, as I stated before. Those special accounts were the only liability we had that was due on demand. (Abs. 76-78).

Mrs. Chase testified that these time certificates were always a great deal more than the amount on deposit from employees, and that the time certificates as she was told by Mr. Walker were to cover any emergency that they needed, and by emergency was meant that she could draw out of this emergency money to pay the employee depositors if they had to do that; that if she couldn't draw it out of the checking account, that these time certificates constituted a special account out of which she could pay the employees their deposits. (Abs. 29).

Walker Brothers Dry Goods Company, until the coming of Dreyfous, kept these deposits in the general ledger under the heading first of "On Deposit" and later of "Cash Due Employees," but after Mr. Dreyfous took the management he listed in the ledger the name of each employee depositing. (Abs. 34).

At the time of the appointment of the receiver, the total amount due to the employees was $11,778.73, of which amount $11,222.74 was due to Renshaw and Miss Salisbury, and the balance of $556.04 was due to six other employees in amounts varying from

$33.76 due to one employee to $144.50, due another employee.

Plaintiff's contention is that the employees so depositing are entitled to payment in full in preference to those claiming for merchandise sold, and other creditors. The common creditors have been paid approximately 45 percent of their claims, and unless plaintiff is adjudged a preferred creditor he will receive only approximately 45 percent of the amount due him, while if he is adjudged a preferred creditor he will be paid in full the amount of his claim.

There is no dispute as to the amount of the plaintiff's claim, the claim having been approved as a common claim in the full amount.

In appellant's brief there is a more detailed statement of facts, and of such statement the respondent does not complain.

ARGUMENT

The plaintiff Renshaw, went to work for Walker Brothers Dry Goods Company when he was but eleven years of age. It was, and continued to be through two generations of the Walker Brothers, a large retail department store in Salt Lake City, and undoubtedly Renshaw as a young boy soon learned to look to his employers for advice, and when they, as was their custom at the time, advised and encouraged their employees to deposit their savings with the company, to let it accumulate and be added to, the boy was only too anxious to comply with the suggestion.

Walker Brothers in financial circles in Salt Lake City, has always been a name to conjure with on financial matters; and let us say here that for two generations Walker Brothers did not betray that confidence.

There was a fiduciary relation existing between plaintiff and Walker Brothers Dry Goods Company of a very tender and trusting nature; the boy, eleven years of age, on one side, and these master merchants in control of the company on the other side. The plaintiff looked up to, trusted and relied on the officers of the Dry Goods Company. He had absolute confidence in their integrity and fidelity, and thought rather of the good faith than the legal obligation in his dealings with them; and when this fiduciary relation exists between the parties, if a wrong arises, the same remedy exists against the wrongdoer on behalf of the principal, as would exist against the trustee on behalf of the cestui que trust. The relation may exist under a great variety of circumstances. It exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence. It arises wherever a trust continuously or temporarily is specially reposed in the skill or integrity of another.

Courts of equity have refused to set any bounds to the circumstances out of which a fiduciary relation may spring. It not only includes all legal relations but it extends to every possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other.

25 Corpus Juris, Page 1119.

In the case at bar it is peculiarly applicable by reason of the superior intelligence of the employer over the employee of tender years, and the master's superior knowledge of the facts involved in the business transaction.

A very recent case illustrating this fiduciary relation and the consequent duty of the master arising out of this relationship of master and servant, is the case of

Kimball v. General Electric Company,
23 (2d) Pac., Page 295,

before the District Court of Appeals, Third District, California, and decided June 16, 1933. The plaintiff in that case recovered damagec against the defendant company for injuries received by the plaintiff on account of the negligent act of Dean Wilson, an employee of the General Electric Company. The injuries were received by plaintiff in March, 1928 and the complaint was not filed against the defendant company until July, 1930; and the defendant interposed the defense of the Statute of Limitations. The plaintiff relied upon fraudulent acts of concealment for the purpose of tolling the statute.

At the time of the injury, the plaintiff was in the employ of the Pacific Gas & Electric Company (not of the defendant) as an electrician and general power-house workman at a particular power plant operated by said Pacific Gas & Electric Company. On the day of the injury, the defendant company was engaged in repairing a part of the power plant where plaintiff was working and had in its employ in making such repairs, Dean Wilson. Plaintiff did not know and had no means of knowing that Dean Wilson was in the employ of the defendant company, nor did he know that the defendant company was making the repairs at the power plant. If there were no other facts, it would be difficult to see how plaintiff could succeed in the action and why the plea of the Statute of Limitations would not be good. But Dean Wilson had been in the employ of the Pacific Gas & Electric Company for a long time prior to the accident, and had been a fellow-servant of the plaintiff. At the time of the accident the plaintiff believed that Dean Wilson was his fellow-servant and was in the employ of the Gas & Electric company and not in the employ of the defendant company; but the fact was, that Dean Wilson had been loaned to the defendant company under circumstances making Dean Wilson an employee of the defendant company on the day of the accident, and the injury occurred by reason of Wilson's negligence while he was thus an employee of the defendant company. The plaintiff, in his ignorance, proceeded and recovered compensation under the workman's compensation act against his employer and after so recovering and after the Statute of Limitations had run, he discovered that Wilson was an employee of the defendant company and that there had been an understanding between the defendant company and plaintiff's employer under which plaintiff might be permitted to go on with the proceedings under the workman's compensation act, recover the award, and that the defendant company should pay half of such award. Plaintiff then planted suit against the defendant company to recover for the injury, and pleaded the above facts to toll the Statute of Limitations. The court held that by reason of the fiduciary relation existing between plaintiff and his employer, the Gas & Electric Company; that the law imposed upon the master the duty when plaintiff was injured, to have disclosed to plaintiff the fact that Wilson was in the employ of the defendant company and that it was a fraud upon plaintiff for the master not to so disclose the liability of the defendant company and that the defendant company participated in the fraud, and that the plaintiff has his opportunity after discovering the fraud to bring his action against the defendant company.

The case beautifully illustrates the doctrine that the master must exercise the utmost good faith toward the servant, and the defendant entering into an arrangement with the master to breach that duty, became a participator in the fraud and could reap no advantage from the fraudulent agreement.

> "Being an employee of the Pacific Gas & Electric Company, a relation of trust and confidence existed between that company and plaintiff. It is unnecessary to cite authorities to the effect that, wherever a relation of trust and confidence exists a full disclosure of all the facts and circumstances necessary to show who was liable for the injury suffered by the plaintiff should have been made by the Pacific Gas & Electric Company. This disclosure was not made to the plaintiff nor does the record show that it was made to the Industrial Accident Commission. The record shows, through the negotiations therein set forth, that the General Electric Company was advised of what was being done by the Pacific Gas & Electric Company, and by reason of the privity shown to have existed between them, and payment of one-half of the expenses,

that the General Electric Company ratified and approved what was being done by the Pacific Gas & Electric Company. These are inferences which, from the circumstances disclosed by the record, the jury was fully warranted in drawing."

— Page 299, second column.

A petition for rehearing was filed in the case, and the opinion disposing of the petition is found in 23 Pacific (2d) at page 1075, and there the court in denying the petition for rehearing re-asserted the doctrine that the "master must exercise good faith toward the servant and make full disclosure of matters affecting servant's financial welfare arising out of, and dependent upon, the relationship."

So in the case at bar it was the duty of the management of Walker Brothers Dry Goods Company, when it began to make large expenditures in permanent improvements, thus converting liquid assets into frozen assets, to have advised these employees having money on deposit with the company to withdraw their money, and that there was danger that the company would not be in a position to pay them promptly if demand was made for the return of the deposits.

It was the duty of the master to make a full disclosure of matters thus affecting the servant's financial welfare arising out of, and dependent upon their relations; but the Dry Goods Company instead of such full disclosure, and instead of looking after the servant's financial welfare, reassured the employees of the safety of their money; that they had nothing to worry about; that they would get their money, every cent; that it was absolutely safe, because of the solvency of the company, and more than that, because their deposits had a preference over all other claims except those of a similar nature; that the plaintiff would be paid in full in preference to the wholesalers of merchandise dealing with the company; this the plaintiff relied upon and had a right to rely on the statements coming through Mrs. Chase from the management of the company.

When the company failed to make such disclosure anl failed in any way to consider the servant's financial welfare, and thought only of their own selfish aims, fraud was committed on this plaintiff and the other employees, and the defendant should be held strictly as a trustee; and plaintiff's claim should be paid in full.

A case much relied on by counsel appearing in the lower court in opposition to plaintiff's claim, but who have not appeared in this court, is the case of Tucker v. Linn, et al., 57 Atl., 1017, and cited at page 28 of appellant's brief. It was claimed that that case was on all-fours with the case at bar and that the court took a view contrary to plaintiff's position. It was before the Court of Chancery of New Jersey, and appears to be an opinion rendered orally by the Trial Court in 1904.

Let us examine the case somewhat in detail, because while the case is not at all in point, it contains a significant dictum. The bill charged that during the years 1895 and 1898 the complainant "placed the sum of $1,840.00 in the hands of the defendant, John Linn, for investment in such securities as he might deem safe, and for the care, custody, management, and control for her of such securities after the investment of the said money; that the said John Linn, acting as attorney of and trustee for the complainant, thereupon took the entire charge of said moneys and investments, until the death of the said John Linn, which occurred in the year 1898; that at the time of his death the said John Linn had in his possession, as attorney as aforesaid, and held in trust for the complainant, the said sum of $1,840.00, or the securities representing the same, together with the accrued interest or dividends thereon.

This bill clearly sets forth an express trust, and if the proof sustained the allegations there is no question whatever but what the complainant would be entitled to recover the trust property. But she entirely failed in her proof, and if she made any case that is at all to be compared to the case at bar, it was a case altogether different from the case alleged in her bill. The complainant was employed in the capacity of working housekeeper, and there was some evidence that the master had retained $840.00 under some understanding or arrangement with her. The Chancellor in his oral opinion says that in his judgment, there is an entire failure to prove the particular equitable cause of action which is set forth in the bill of complaint.

After disposing of the contention of complainant, the Chancellor says:

> "I do not find that there is any language that indicates that Mr. Linn at any time assumed any other relation than that of debtor to the complainant."

But after discussing the case set out in the bill, and various questions of an express trust, the Vice-Chancellor, apparently with something in mind very much akin to the case now before this Court, says:

> "On one point I do not wish to be misunderstood. I am not dealing with a case where

relations of trust and confidence — fiduciary relations of any kind whatever existing prior to the transaction under investigation — displace legal contracts and legal rights by equities of various kinds, and hence give rise to equitable remedies. In this case, the complainant does not set forth that she was induced to enter into a legal contract with Mr. Linn because of any such pre-existing relations of confidence, and on that ground pray that such legal contract be set aside, and her equitable rights growing out of relations of confidence enforced. The case, in this respect, seems to be substantially on all-fours with Gutch v. Fosdick, and the sole foundation of the complainant's alleged equity is to be found in the contract itself — the contract which the complainant and Mr. Linn, acting at arm's-length, saw fit to make. It is the nature of the contract itself, assuming the parties to be fully capable of contracting with each other upon terms of equality, upon which complainant's claim for equitable relief is based. Regarding the case strictly in this light, and giving the greatest possible force to the doctrine enunciated by the Chancellor, in Gutch v. Fosdick, I fail to find that these two parties in fact made any bargain which either of them supposed created any other relation than the definite legal relation of debtor and creditor."

The case can hardly be stated to be a case on all-fours against the plaintiff and in favor of the defendant. Indeed, it is a case that tells rather for the plaintiff and against the narrow contention of the defendant, that the court is without authority to grant the relief that appeals strongly to anyone's conscience. The Chancellor, when he made his comments above quoted, must have had in mind a case somewhat similar to the one at bar, of the master importuning, advising, inviting, and perhaps commanding his employees to save their wages by depositing with the master for safe keeping and increase, and in such a case the Vice-Chancellor seems to say a different situation would be created, and one that would appeal to the jurisdiction of the court of equity, and one where the court could relieve the employees dealing with the master, not at arm's-length, but almost as confiding children relying upon the superior knowlelge, capacity and wisdom of the master.

The statements of the Chancellor, after he held that there was no evilence whatever to sustain the allegations of the complaint, are dicta. All his discussion of the law with reference to tracing property is quite immaterial to the case, and so are the Chancellor's remarks as above quoted in this brief, but if we are to consider the *obiter* at all, that quotation above in this brief seems quite pertinent to the consideration of the question at bar in this case, and he seems to say that a case similar to the one we have, ought to appeal to the conscience of the Court of Chancery.

The appellant, on page 14 of its brief, seems to correctly understand our position that because the relation of master and servant existed between the plaintiff and Walker Brothers Dry Goods Company that a fiduciary, or confidential, relationship existed between them, and that we relied upon that fiduciary relationship. But immediately, on page 15, and for the following 15 pages of appellant's brief, that proposition and contention on the part of the respondent is entirely ignored and the appellant discusses the relationship as if no fiduciary relation existed; as if plaintiff and Walker Brothers Dry Goods Company were strangers and dealing at arm's-length. He quotes and inserts in capital letters on page 15 of the brief, the following:

> "A constructive trust, or as frequently called, an involuntary trust, is a fiction of equity, devised to the ends that the equitable remedies available against a conventional fiduciary may be available under the same name and process against one who through fraud or mistake, or by another means *ex maleficio* acquires property of another."

Then he proceeds to say that it is obvious that fraud is one of the necessary elements in order to enable a court to raise a constructive trust. But the quotation does not bear him out. Counsel entirely ignores the first half of the quotation, where it says that a fiction is devised to the end that the equitable remedies available against a conventional fiduciary may be available against those practicing fraud in certain cases.

The constructive trust arising out of fraud, mistake, or any ather means *ex maleficio* is created as a fiction of law in order to give to the injured party the equitable remedies available against the fiduciary an in the case at bar, by reason of the relationship of master and servant, the plaintiff and Walker Brothers Dry Goods Company held that relationship of conventional fiduciary. The whole discussion of appellant on pages 15 to 30 inclusive, is based on ignoring that fiduciary relation. Appellant does not attempt to show that a fiduciary relation does not exist and that its consequences do not follow but goes upon the assumption that as it does not exist then certain things follow and certain things must be proven. While we claim that Walker Brothers Dry Goods Company were guilty of constructive fraud by reason of its failure to disclose to the plaintiff certain things, that duty on the part of Walker Brothers Dry Goods Company existed solely by reason of the relationship, by reason of the duty of master growing out of that relationship. We do not claim that that duty was due to every person dealing with Walker Brothers Dry Goods Company, nor to a stranger dealing at arm's-length with the company. We are not claiming that the breach of the contract between strangers, would convert the legal obligation to pay for such breach into a constructive trust giving rise to equitable remedies. The plaintiff has never made any such contention so that the authorities cited by counsel are beside the question.

Upon certain questions of constructive trusts authorities are much divided, and courts might well take opposite views on some questions involved in that subject. For example, the case of Blakey v. Brinson, 52 Supreme Court Reporter 516, 286 U. S. 254, is such a case where Mr. Justice Stone very frankly states that the contrary view is not without support. But the appellant is not concerned with the doctrine involved in Blakey v. Brinson. The question there was not between master and servant nor between any other fiduciaries. It was solely a question between the bank on one side and its creditor on the other, as to whether certain false and fraudulent representations of the officers of the bank to the effect that the bank had purchased certain bonds for its depositor and had taken the pay from the depositor by charging his account, whether such a fraud created a trust on the part of the bank or whether it could be held only in an action at law for a breach of contract. Many courts would have reached the conclusion that under the facts given in that case that the bank should be held as a trustee for those bonds, or have the value of them if they were not forthcoming. But as heretofore stated the respondent in this case is not concerned with whether that case in the Supreme Court of the United States was rightfully or wrongfully determined. It has no bearing on the case at bar.

Appellant cites many cases including 46 Utah 1, and 73 Utah 404, to the effect that legal fraud must be founded on a misrepresentation of past or present facts and that promises as to future acts or conditions can not form a basis of the fraud or deceit charge. Again counsel is discussing a proposition where the parties are dealing at arm's-length and where there is no relation of confidence imposing upon the one party the utmost good faith in transactions with the other.

> "Actual or intentional fraud is not necessary, nor is it necessary that any express or conventional trust relation shall exist between the parties, or that any promise shall have been made by the one for the benefit of the other, but, as a general principle, a constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relation exists between the two, and provided the raising

of a trust is necessary to prevent a failure of justice."

65 C. J., 456.

Where persons are in a fiduciary relation, and an advantage is gained by the one over the other, by reason of such relation, it is of no consequence that no fraud was intended. Consumers Co. v. Parker, 227 Ill. App. 552.

Where two persons stand in such relation that confidence is necessarily reposed by one in the other, and an influence which naturally grows out of that confidence is abused while such confidence continues or an advantage is obtained by reason of such influence over the confiding party, the person seeking such advantage will not be permitted to retain it; and this is true regardless of the existence of actual fraud, undue influence, or coercion, and even though the transaction could not have been impeached, if such confidential relation had not existed. Pulfrey v. Wid. 173 N. E. 87, 340 Ill. 553; Housewright v. Steinke, 158 Ill. 138, 326 Ill. 398; Schaffer v. Letcher, 226 P. 384, 99 Okl. 188.

It is not the position of the respondent that the representations made through Mrs. Chase to the employees that their money was absolutely safe and that it would be paid in preference to any other claim was false, or fraudulently made, but quite the contrary our contention is and always has been that the representations were honestly made and that they were truthful and quite accurately stated to the employees. The findings of the lower court justify the position that Mrs. Chase was entirely right in making the representations and the respondent is confident that this court will vindicate her position. Respondent's complaint is that the master did not disclose to the plaintiff and to the other employees the precarious position of their deposits when the master was investing a large amount of liquid assets into improvements on the store building, when it was for the financial welfare of its employees to withdraw their money and take it elsewhere. Instead of so performing its duty the master lulled its employees into a sense of false security.

The only question, other than as to whether there was a trust relationship between the plaintiff and the Walker Brothers Dry Goods Company, discussed by appellant, is as to whether or not the trust funds have been traced or earmarked so as to entittle plaintiff to a preference; that question is discussed on pages 31 to 46 inclusive of appellant's brief and such discussion in appellant's brief is exactly the same as appellant's discussion of the same question at pages 35 to 50 of appellant's brief in the case of J. R. Walker, plaintiff and respondent, v. Tracy Loan & Trust Company, etc. case No. 5338 in this court. Mr. Moyle, in his brief on behalf of Mr. Walker in that case, beginning at page 57, effectually answers the appellant upon this question and it will not be necessary for the plaintiff in this case to repeat Mr. Moyle's argument upon this phase of the case. The court will remember that the Walker case heretofore argued and submitted in this court was tried in the lower court at the same time and made the same record as was made in the case now before this court and that the record in the Walker case and in the Renshaw case is identical. If the funds were traced in the Walker case, they were traced in the Renshaw case. There is no difference in the two cases upon this question before this court. There is a difference between the two cases as to the theory of the trust and the facts upon which the trust is predicated, but otherwise the cases are identical.

The money deposited by plaintiff was not earmarked nor kept separate and apart from all other money coming into the hands of the Walker Brothers Dry Goods Company, but it has never been the doctrine of this state that it must be. The money was regarded by Walker Brothers Dry Goods Company as a trust fund and so treated so long as the Walker family controlled the Dry Goods Company. There was always invested in time certificates a sufficient amount of money available for the payment of the deposits of plaintiff and others similarly situated, and continued to be so held by the company until the time that plaintiff ceased to make further deposits with the Dry Goods Company. Then the funds from the time deposits were converted into other assets and those other assets came into the hands of the receiver. Likewise during the time of the deposits, or at least, as far back as the memory of the employees went, the Dry Goods Company had in cash at the store from day to day continuously and up until the time of the appointment of the receiver a sufficient amount of money to pay the claims of the plaintiff and of Walker and of other preferred creditors and on the morning that the receiver was appointed there was of such money at the store, an amount exceeding $19,000.00, in cash; more than sufficient to have paid the claims of all the employees in full and also all other preferred claims against the receiver.

There is apparently no contention on the part of the appellant that the deposits made by plaintiff did not augment the assets of the Dry Goods Company coming into the hands of the receiver. There is no contention that the deposits were ever diverted from the business of the company; that it was ever embezzled, stolen or dissipated. They went into the stock in trade or other tangible assets of the company, or applying the presumptive rules of evidence established by the cases in this court, the money remained intact, and is a part of the $19.000.000 coming into the hands of the receiver; or assuming that it went into the stock in trade and that the stock in trade changed from time to time before coming into the hands of the receiver, the proof that such assets came into the hands of the receiver is a sufficient tracing of the funds of the employees.

> "Where trust funds have been invested in a business and stock in trade, it is sufficient identification to point out the business as an entity without showing that the stock and changing parts remain the same; for the integrity and identity of a stock of goods, as such, remain, so that it may be followed by the cestui que trust, although it is depleted by sales and replenished by purchases from time to time. If the trustee uses trust money with his own in carrying on his business and replenishing his stock of goods, the trust fund will be regarded as invested in the business as a whole and it may be subjected to the trust."

65 C. J. page 972, paragraph 898.

> "As a general rule the cestui que trust's equitable right of recovery is not destroyed by reason of the fact that the trustee has

so commingled the trust property with his own property that it is impossible particularly to identify the trust property; for, unless the trust property is such that it can be ascertained and separated from the rest the entire commingled fund or property will be treated as subject to the trust, to the extent necessary to make good the claim of the cestui que trust to funds traced to, and still found commingled in, the common fund, except in so far as the trustee may be able to distinguish and separate that which is his own."

65 C. J., Pages 972-973, Par. 899.

"If the trust property consisted of money, the claim of the beneficiary of the trust fund may be preferred to the claims of other creditors, to the extent of the cash found among the assets of the insolvent trustee at the time of his failure, unless it affirmatively appears that such cash assets were not part of the trust fund." State v. Bank of Commerce, 75 N. W. 28, 29, 54 Neb. 725.

Where trust money has gone into the general estate of a trustee, who afterward becomes insolvent, there is a presumption that it remains therein at his insolvency, and the court will not say that it cannot be traced or has wholly disappeared where the contrary may fairly be inferred. Lincoln v. Morrison 90 N. W. 905; 64 Neb. 822; 57 L. R. A. 885.

Where trust money is mingled with cash of the trustee, and the trustee becomes in-

> solvent, the cestui que trust is entitled to a preferential charge on cash funds remaining on hand at the time of the insolvency to the extent of the lowest amount to which the fund was reduced after the commingling, if it is not affirmatively shown that the trust funds do not constitute part of the cash assets. Crawford County v. Strawn, 157 F. 49, 84 C. C. A. 553, 15 L. R. A. N. S. 1100.
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> Proof that the trustee has mingled the trust funds with his own and made payments thereafter out of the common fund is, nothing else appearing, a sufficient indentification of the remainder of the fund coming into the hands of his personal representative, not exceeding the smallest amount the fund contained subsequent to the commingling as trust property, under the legal presumption that he regarded the law and neither paid out of the trust fund nor invested it in other property. Poisson v. Williams, 15 F. (2d) 582.

Ignoring for the time being the cash that came into the hands of the receiver at the time that he took possession of the insolvent estate and applying the rule set out in the above cited authorities, can there be any doubt as to the right of the plaintiff to have a preference adjudged in his favor? If we assume that the money went into the business and was invested in the purchase of stock of goods and the replenishing the same from time to time as the necessities of the business required the trust fund will be regarded as invested in the business as a whole and the whole of said business may be subjected to a trust. It must affirmatively appear that the trustee dissipated the trust funds as there is no presumption that he did, but the presumption is rather that he conserved the trust fund and properly invested it.

State v. Bruce, 102 Pac., 831;
17 Idaho, 1.

The evidence adduced by the defendant on cross-examination showed only that the trustee commingled the money received from the employees with its own; not that it diverted the money from the business, but used it, and the presumption is that he used it in such a way as is consistent with the trust.

But the undisputed fact is, that a sum exceeding all the claims of the preferred creditors came into the hands of the receiver on the morning that he took possession of the estate and that such an amount exceeding the preferred claims, had been kept in cash at the store from day to day continuously for many years.

Under the rule of the foregoing cases and the rule adopted by this court in a number of cases, the trust property, consisting of money, the claim of the plaintiff may be preferred to the claims of other creditors to the extent of the cash found among the assets of the insolvent trustee at the time of his failure, unless it affirmatively appears that such cash assets were not part of the trust fund. There has been no attempt on the part of the appellant in this case to show that the deposits of the plaintiff formed no part of the cash coming into the hands of the receiver at the time of his appointment. Proof that the trustee has mingled the trust fund with his own, nothing else appearing, is a sufficient identification that it is part of the cash coming into the hands of the receiver at the time of his appointment, because of the legal presumption that the trustee regarded the law and that he conserved the fund and kept faith with his cestui que trust.

Counsel for the receiver, in the lower court, was quite frank in his statement to the court that he sympathized very strongly with the position of the plaintiff in his claim of preference, but felt himself bound to protect what he deemed to be the legal rights of other creditors. What is this sympathetic feeling of counsel toward the plaintiff? It is not the fellow-feeling of one person similarly situated toward another in his own class. It is not the sympathy of the poor for the poor, nor that of the charitably inclined toward the unfortunate. It is the sympathy of those learned in the law for one, not because of his misfortune, but because the circumstances of the case appeals to the enlightened sense of justice in the mind of counsel, and arouses his enlightened sympathy for any person similarly situated to the plaintiff because a sense of justice compels him to the conclusion that the plaintiff ought, in all fairness, to be preferred in his claim to that of the ordinary creditor. What is this sympathy but the enlightened conscience of counsel and the same enlightened conscience that guided the Chancellor throughout the whole development of the rules of equity in the Court of Chancery?

Plaintiff did not deal with Walker Brothers Dry Goods Company in the same way that the wholesale merchant dealt with the company. The wholesaler dealt at arm's-length for profit, counted, as a part of the ordinary risks of his business, a percentage of loss. Presumptively he was the equal of the Walker Brothers Dry Goods Company and able to, and did, take care of himself.

But who is objecting to the judgment of the lower court in this case?

The record does not disclose at whose instance the appeal was taken. The record does not disclose any authority on the part of the receiver to prosecute this appeal. Was the appeal prosecuted by the receiver from a sense of duty toward the common creditors as a whole? Or was the appeal prosecuted at the instance of a group of merchants among the common creditors, or by some of the money lenders; or by a single common creditor on the gambler's chance of his own aggrandizement? If a single money-lender is the power behind this appeal, what sense of justice and of equity compels the conclusion that the money set aside by the lower court to protect its judgment rendered in favor of the plaintiff should be applied to increase the dividends to such money-lender, or an avaricious merchant, as the case may be, as against the claims of preference of this plaintiff and of others similarly situated?

Again the respondent calls the court's attention to the very able brief of Mr. Moyle in the Walker case, heretofore referred to, and to his discussion of the doctrine of tracing the trust fund, beginning on page 57 and continuing to the end of his brief, and adopts that brief as a part of respondent's brief.

In this case, the respondent respectfully submits that a trust relationship existed between the plaintiff and Walker Brothers Dry Goods Company, and that the trust fund held by Walker's has been sufficiently identified as among the assets of the company coming into the hands of the receiver and that the plaintiff is entitled to receive, as a preferred creditor, his entire claim as awarded him by the lower court and is entitled to an affirmance of the judgment as rendered.

Respectfully submitted,

T. D. LEWIS,

Attorney for Plaintiff
and Respondent.