

From admissions made to the defendant by Thompson who visited Newmarket shortly after these notices were received by the defendant, and from the evidence of the plaintiff Jarvis, it appears that Thompson had fraudulently filled up one of the blank notes for \$1,000 payable on demand, dated the 20th June, 1908, to himself as payee and endorsed and gave it to the Union Bank at Fort William as collateral to his own indebtedness there. In March, 1909, he opened an account with the plaintiffs and soon falling behind was being pressed for payment. He told Jarvis that the Union Bank held a demand note of the defendant's as collateral security for over \$100 due by him (Thompson), and were pressing him for payment. Jarvis agreed to advance the necessary money, and Thompson brought the note now in question to Jarvis and gave it to him as collateral security for his then indebtedness of over \$600 and for any future indebtedness.

The trial Judge held, on the first point, that as the defendant had delivered the note to Thompson merely as a custodian, and not to "be converted into a note," section 31 of the Bills of Exchange Act did not apply, and on the authority of *Smith v. Prosser*, [1907] 2 K.B. 735, he dismissed the plaintiffs' action.

The plaintiffs did not in their reasons of appeal or in the argument before us question the evidence of the defendant as to the terms upon which the note was delivered to Thompson, or the fact that he had fraudulently filled it up and used it for his own purposes, and they could not very well have done so. This ground was fully set out in the statement of defence, and in the evidence of the defendant taken as above stated some days before the trial, and it does not appear that the plaintiffs took any steps to procure the evidence of Thompson at the trial to contradict him, nor did they bring any other evidence to contradict or discredit the defendant as to any other portions of his evidence, which might have been disproved if untrue. While on some other points the memory of the defendant did not serve him, yet as to the terms of the delivery of the blank notes, his memory was quite clear and his several answers, repeated both in his examination-in-chief and in his cross-examination, were uniformly consistent and emphatic that Thompson was given no authority to fill up or issue the note unless he, the defendant, on receipt of the bills for the repairs should not have the money to pay them and should so inform Thompson, which brings the case fully, so far as the facts and terms of delivery are concerned, precisely within the case of *Smith v. Prosser*. While in that case it was said that the Act did not apply, on