

such third person to occasion the loss must sustain it." Although the third party banks had credited Martineau's account with the amount of the forged cheques before they were presented for payment, that mistake or indiscretion, if I may so call it, would have been quite innocuous to them, had it not been for the subsequent mistake of defendants in honouring those cheques. This act of defendants was, I think, the proximate cause which enabled Martineau to reap the benefit of his frauds. Upon the principle established by *Lickbarrow v. Mason*, 2 T. R. 63, they must bear the loss. Upon both grounds, however, in my opinion, defendants cannot ex *acquo et bono* claim to be relieved at the expense of the third parties from the loss which they have sustained.

But, inasmuch as the third parties have, upon equitable grounds, successfully resisted defendants' claim, they must in turn do equity. While the claim made against the third parties will be dismissed with costs, the Royal Bank must pay to defendants the balance of \$250 which they appear to hold to Martineau's credit, and the Quebec Bank the sum of \$5, which they retained. The Sovereign Bank account had been closed some time before Martineau was arrested.

In *Parsons on Bills and Notes*, 2nd ed., p. 80, in *Daniel on Negotiable Instruments*, 5th ed., pp. 378-9, and 682, in *Hart on Banking*, p. 203, in *Chitty on Bills*, 11th ed., p. 431, and in *Sir John Paget's Law of Banking*, at pp. 164 et seq., will be found statements supporting several of the propositions upon which this judgment rests.

FEBRUARY 1ST, 1905.

DIVISIONAL COURT.

BAILEY v. BAILEY.

Deed—Discharge of Mortgage—Execution without Understanding or Advice—Repudiation—Setting aside—Evidence.

Appeal by defendant from judgment of MEREDITH, C.J., in favour of plaintiff, without costs, in an action for a declaration that a discharge given by plaintiff of a mortgage made by one James Bailey and assumed by defendant, was null and void, the discharge having been executed by the plaintiff without advice and without knowledge on his part of its meaning and effect.

W. H. Kingston, K.C., for defendant.

I. B. Lucas, Owen Sound, for plaintiff.