MARINE BANK *v.* FULTON BANK.

1. Money collected by one bank for another, placed by the collecting bank with the bulk of its ordinary banking funds, and credited to the transmitting bank in account, becomes the money of the former. Hence, any depreciation in the specific bank bills received by the collecting bank, which may happen between the date of the collecting banks' receiving them and the other banks' drawing for the amount collected, falls upon the former.
2. In a case where the trial has proceeded on merits, and the error has not been pointed out below, judgment will not be reversed, even though the form of action have been wholly misconceived, and to the case made by *it* a defence plainly exists.

IN the spring of 1861, the Fulton Bank, of New York, sent for collection to the Marine Bank, Chicago, two notes, one of Cooley & Co., for $2000, and one of Hunt & Co., for $1037; both due May 1–4, in that year. The currency at Chicago had become at that time somewhat deranged, and consisted exclusively of bills of the Illinois banks. The Marine Bank, just afterwards, addressed a circular to its correspondents, informing them that, in the disturbed state of the currency, it would be impossible to continue remittances with the usual regularity, and that until further notice it would be compelled to place all funds received in payment of collections to the credit of its correspondents in such currency as was received in Chicago,—bills of the Illinois Stock Banks,—to be drawn for only in like bills.

On the 1st May, the cashier of the Fulton Bank thus addressed the cashier of the Marine Bank:

"Please hold the avails of the collections I have sent you, subject to my order, and advise amount credited."

The two notes were collected by the Marine Bank, in Illinois currency, at that time *from five to ten per cent. below par*. Immediately after the notes were collected, the Chicago bank, in reply to an inquiry from the Fulton Bank how the account stood, advised the latter bank thus:

"May 1. You have credit as follows: Cooley & Co., . . . $2000."
"May 6. Your account has credit as follows: Hunt & Co., . . 1037."

Argument for the plaintiff in error.

On the 21st April, 1862, that is to say, about a year after the collection made, the New York bank made a demand of payment from the Chicago bank, which was refused, unless the former bank would accept Illinois currency, *now* sunk *fifty* per cent. below par.

The Marine Bank was a bank engaged, like other banks, in receiving deposits, lending money, buying and selling exchange, and the money collected on the two notes in question was not retained in any separate or specific form.

On suit brought in the Northern Circuit for Illinois by the Fulton Bank, the court charged that the said bank was entitled to recover the value of the Illinois currency *at the time the money was received by the defendant*, and judgment went accordingly. The question in this court was, whether this was right, and whether the court below ought not to have charged, as it was requested but refused to do, that the Fulton Bank was "only entitled to recover of the defendant the value, in coin, of such currency so received by the defendant at the *time of demand* made by plaintiff for payment with interest, and from that date,"—the only instruction asked for by the defendant's counsel.

A question was also raised in this court as to the form of action below,—trespass on the case for having wrongfully received the depreciated paper; but this point had not been raised in the court below.

Mr. Fuller, for the Marine Bank, plaintiff in error, contended that this bank, in receiving the money and passing it to the credit of the Fulton Bank, was acting as the plaintiff's agent. If this was so, and it obeyed instructions and acted in good faith, it could not be held responsible for the depreciation of the currency while in its hands; a position for which the counsel relied on the American Leading Cases.* The Marine Bank had of course mixed the currency it received with other like currency, and perhaps used a part or the whole in its ordinary banking business. In this, however, it did but follow the only course possible among banks. No de-

* Second edition, p. 691; note to Burril *v.* Phillips, &c.

positor, correspondent, or customer, when dealing with a bank, ever expects that anything else will be done. This being the settled and only practicable course of business, the plaintiff understood that when the notes were collected and the proceeds placed to his credit, they would pass into the general funds of the bank, and be used till drawn for. This intermixture, having been made in the usual course of business, the counsel contended was proper, and did no wrong to the principal. The ordinary rules of law, with regard to confusion of goods, applied, and the proprietors had an interest in common in the entire fund, in proportion to their respective shares.

The counsel also called attention to the form of action,—case for negligence in receiving the depreciated paper. In such form of action nothing was before the court but the question, whether the Marine Bank was liable for having received the paper; and to that question the bank's circular was a complete reply. The question, whether the Chicago bank was liable for one rate or for another did not arise on the pleadings; judgment had been given below on a thing not at all in issue; and was, accordingly, to be reversed.

Mr. E. S. Smith, contra.

Mr. Justice MILLER delivered the opinion of the court.

The Chicago bank was unquestionably the agent of the Fulton County Bank, up to and including the receipt of the money from the makers of the notes. If no change was made in their relation subsequent to that time, then the former bank, having obeyed instructions, should not be held liable to the latter for the depreciation of its money. The agent, however, in this case was a bank engaged in the usual banking business of discounting notes, buying and selling exchange, and receiving deposits from its customers, and some confusion may grow out of the peculiar character of the agent.

If any person not a banker had received this sum of money for an Eastern correspondent, with instructions to hold it sub-

ject to order, he would probably have locked it up in his own safe, or that of some one else, until called for; and when demanded, he would have delivered the identical money which he had received, thus discharging his whole duty as agent. If, however, instead of this prudent and safe course, he had the same day that he received it bought with it a bill on New York at thirty days, which, when matured, was worth in Chicago one-half per cent. premium, it will hardly be contended that when the principal demanded his money the agent could pay him by buying in the market other bills of Illinois banks fifty per cent. below par.

This, however, is substantially what the Chicago bank did, and what it claims the right to do. It is true that it is not in evidence what precise use was made by it of the money received for these collections. But it is proved that it was placed with other money of defendant, and used in its daily business as its own. That business was to buy such drafts, to pay its own debts to its depositors, to discount notes and bills. If it was defendant's money it was all right, because he could do as he pleased with his own. But if it was plaintiff's money, held by defendant as its agent, then this use of it by defendant would seem to be a conversion.

But here we are reminded of the banking character of the agent, who insists that it was impossible to keep plaintiff's money separate from its own, and that plaintiff knew this fact; and, secondly, that from the course of business it was understood that, when the money was collected and placed to the credit of plaintiff's account, the defendant would use it.

As to the first proposition, it cannot be admitted that there was any impossibility in keeping plaintiff's money separate from defendant's. It is every day business for bankers, who have vaults and safes, to receive on special deposit small packages of valuables, and even money, until the owners call for them. There is not only no impossibility in this, but there is no serious difficulty in it. It is simply an inconvenience, and but a slight one, as a small slip of paper around the bills, labelled with the owner's

name, would have marked their identity and their separation, without occupying any additional space. Even this inconvenience the defendant could have avoided at any time by refusing longer to hold the deposit. But the truth undoubtedly is, as stated in the second branch of the proposition, that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the money in his business. Thus the defendant was guilty of no wrong in using the money, because it had become its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers; and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation.

All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter. The parties seem to have taken this view of it, as is shown by the reply made by the Chicago bank, May 1st and 6th, to the New York bank, when inquiring how the account stood.

The counsel have argued as to the effect of mixing the money of plaintiff with that of defendant. In the view we take of the matter, there was no such admixture. It being understood between the parties that, when the money was received, it was to be held as an ordinary bank deposit, it became by virtue of that understanding the money of the defendant the moment it was received.

But let us look for a moment at the equity of defendant's

position. It receives this money when it is worth ninety cents on the dollar. It places it with its other money; and, perhaps, in the course of a week, all the specific bank bills it then had on hand are paid out by it. It uses it in paying the checks of its depositors, in other words, its debts at par. It buys with it bills on New York, which it converts into exchange worth a premium. But it continues to receive of other parties this class of paper, though constantly depreciating. There is no legal necessity that it should do this. It only does so with a view to its own advantage. When, however, it proves to be a loss instead of a profit, the bank says to the man whose money it had used profitably months before, "I claim to impose this loss on you. I insist on the right to pay the debt I owe you, not in the specific bank bills I received from you, nor in those of the same value which I received from you; but in bills of that general class, although, while I have been using the money, they have depreciated forty per cent."

If we are correct in these views, it would seem that the relation of principal and agent was changed the moment the money received was placed in the general fund of the bank, and the plaintiff credited on its book with the amount.

Does the notice of the Marine Bank to its customers, taken in connection with the other facts of the case, change the relative rights of the parties as thus stated? The obvious intent of the circular is to convey to correspondents the fact of the great depreciation in value of the Illinois currency; and to request them, if they are not willing to have their notes paid in such currency, to withdraw their collections. This was just and fair between the parties, and was what the collecting bank had a right to require. We think that it justified that bank in receiving the Illinois currency, in all cases where the notice had reached their correspondents and no contrary orders had been received. If the Marine Bank had thus received depreciated money, and kept it without using it until called for, or had sent it by express to plaintiff, it would have been relieved from further liability. In other words, as long as the defendant retained strictly the charac-

ter of agent, and acted within the principle laid down in the circular, it was protected. But, as we have already shown, the defendant changed that relation by using the money as its own, and became the debtor of the plaintiff for the sum collected.

The counsel for plaintiff in error raises the point, that the action was trespass on the case for wrongfully receiving the depreciated paper, and that the circular is a sufficient defence to such a count. This is undoubtedly true, both as to the nature of the action and as to the effect of the notice, and if it had been in any manner made a point in the court below, we do not see how we could avoid reversing the judgment. But nothing of the kind was done. All the testimony was received without objection. No instruction was asked of the court by either party as to the effect of the testimony in sustaining plaintiff's case, or as to the effect of the notice in making good defendant's receipt of depreciated paper. On the contrary, the only instruction prayed by defendant's counsel recognizes the right to recover something with interest, and only raises the question of the measure of damages.* On that subject we think the instruction asked was erroneous, and properly refused. It is too late now to object for the first time to the particular form of the action.

JUDGMENT AFFIRMED WITH COSTS.

THE VENICE.

1. The military occupation of the city of New Orleans by the forces of the United States, after the dispossession of the rebels from that immediate region in May, 1862, may be considered as having been substantially complete from the publication of General Butler's proclamation of the 6*th* (dated on the 1*st*) of that month; and all the rights and obligations resulting from such occupation, or from the terms of the proclamation, existed from the date of that publication.
2. This proclamation, in announcing, as it did, that "all rights of property" would be held "inviolate, subject only to the laws of the United

* See *supra*, p. 253.