Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Bank of Australasia v. *Walter Harcourt Palmer, from the Supreme Court of New South Wales; delivered* 31*st July* 1897.

Present:

LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.
CHIEF JUSTICE WAY.

[*Delivered by Lord Morris.*]

This is an appeal from an order of the Full Court discharging with costs a rule nisi for a new trial in an action brought by the Respondent Walter Harcourt Palmer as Plaintiff against the Appellants the Bank of Australasia. The Plaintiff claimed damages for the dishonour of a cheque. He alleged that the cheque was drawn in pursuance of an agreement under which the Bank were to allow him an overdraft or cash credit for six months certain and that it was dishonoured in breach of that agreement.

The only question on the appeal and apparently the only question argued before the Full Court was whether the Judge at the trial was in error in admitting evidence of a conversation which took place between the Plaintiff and Mr. Bradhurst the Bank Manager at Marrickville on the 4th of October 1894. The Appellants contended that the evidence ought to have been rejected because according to their view it was offered in contradiction of the written agreement or part of the written agreement between the parties. The Respondent's case was that the

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evidence in question was properly admitted in order to explain the circumstances under which his name was appended to a document which was no part of the agreement but which was placed before him for his signature by Mr. Bradhurst after the agreement was concluded.

The case was tried before Innes J. and a jury of four persons. The trial lasted five days. The evidence abounded in contradictions between the Bank Manager and the Plaintiff as to what was said at various interviews. In order to enable the jury to come to a satisfactory conclusion on the whole case the Plaintiff was re-called three times and Mr. Bradhurst twice. And the contradiction between them became more and more hopeless. With all this conflict on matters for the most part of little or no importance it is satisfactory to find that there was no dispute or controversy either as to the fact or the terms of the particular conversation on the alleged improper reception of which the application for a new trial was founded. The Bank Manager who seems to have been ready to contradict almost everything that anybody else said in the course of the trial was silent on this part of the case.

The material facts bearing on the present question may be stated shortly. In September 1894 the Plaintiff who was a civil engineer had on his hands an unfinished contract with the Hillgrove and Armidale Water Power and Electric Supply Company Limited. To enable him to complete the job and earn the money payable under the contract an advance of 2,000*l.* was required for six months certain. The advance would be useless to him as he says he told the Bank Manager unless it continued for six months. He applied to the Bank. He was not a customer of theirs and they declined to accede to his application.

Ultimately however according to the Plaintiff's story it was arranged that the required accom-

modation should be granted on the guarantee of his mother who had an account with the Bank, and on the deposit of her deeds as a security for the advance. The arrangement seems to have been made on the 3rd of October 1894. On the 4th of October the Plaintiff and his mother attended at the Bank to complete the transaction. Mrs. Palmer's deeds were at the time held by the Bank for safe custody. According to her Mr. Bradhurst said "I have all these deeds and "I am satisfied with the security." Then she executed two documents put before her by Mr. Bradhurst. They were printed forms in use by the Bank. One was headed "General Lien," the other "Guarantee for Existing or New Advance." At the foot of the guarantee there was a note signed by her to the effect that she understood she was "individually liable for the "amount expressed in the foregoing bond namely "two thousand pounds (2,000*l.*) and interest." It was explained to her that she would have to pay the 2,000*l.* on the 4th of April next if the Plaintiff made default. In her examination she averred that the Plaintiff "said distinctly he wanted the advance "for six months and Mr. Bradhurst agreed "to it." In cross-examination she added "It "was all settled at the time when I signed the "guarantee."

The two documents executed by Mrs. Palmer were produced by the Bank at the trial and put in evidence during the Plaintiff's examination in chief. With them the Bank also produced a printed form of application for an advance signed by the Plaintiff. It was put in at the same time. It would appear from Mr. Bradhurst's evidence that this document was not signed by the Plaintiff until Mrs. Palmer had completed her part of the arrangement. It is in the following terms and all in print except the words "an advance of 2,000*l.*" and the words "4th April 1895."

" (172 Advances Overdraft Application Letter.)

" To the Manager,

" Bank of Australasia, Marrickville.

" Dear Sir, 4th October 1894.

" Be good enough to allow $\frac{\text{me}}{\text{us}}$ an advance of 2,000*l.*

Fill in "an advance" or "renewed advance.".

" which amount or so much as may " be availed of is to be repaid to- " gether with interest at current " rates as follows: viz. 4th April 1895 or on demand at your " discretion.

" This letter supersedes any previous application made to " you for similar accommodation.

" Yours faithfully,

" W. HARCOURT PALMER.

" (Endorsed): Due 4th April 1894."

No question was asked about this document in the Plaintiff's examination-in-chief or in his cross-examination. But at the end of the cross-examination the learned Counsel for the Bank proposed to amend by pleading that the advance was repayable on demand—a defence which the learned Judge thought admissible under the plea of *non assumpsit*. And then the learned Counsel for the Plaintiff being thus put on his guard re-examined with the view of explaining the circumstances under which the document was signed. And the following passage occurs in the Judge's notes of the evidence:—

" *In re-examination.*—I signed this application (Plaintiff's " Exhibit D marked No. 1). The words and figures " '4th April 1895' is in Mr. Bradhurst's writing. 'Or on " 'demand at your discretion' is in print. Seeing the " printed words I asked Mr. Bradhurst 'Could you call up " 'the overdraft at any time?' And he said 'Certainly not.' " And he then wrote in the words '4th April 1895.' The " words at the back are I can't say in whose writing."

On the 4th of October and in the course of the next few days the Plaintiff drew on the Bank for about 880*l.* These drafts were duly honoured but according to the case of the Bank merely as a matter of indulgence. On the 16th of October the Plaintiff drew again for 300*l.* Payment was refused on the ground that as a matter of right he was not entitled to draw at all until he had complied with a stipulation on which the Bank alleged they had insisted throughout.

In the view of the Bank it was an essential part of the arrangement that the Plaintiff should give a first charge on the assets of the Hillgrove and Armidale Water Power and Electric Supply Company Limited. The Plaintiff admitted that a charge on the Company's assets was to be given but he said the stipulation was made for the protection of his mother and that the Bank was not concerned in it directly. Moreover he denied that the charge was to be a first charge. In the result the jury seem to have taken the Plaintiff's view but it is impossible not to see that there was a substantial foundation for the contention advanced by the Bank and it is obvious that the Plaintiff's alleged default in regard to the proposed charge on the Hillgrove Company's assets was the real ground for breaking off the arrangement and intended to be the real and the only defence to the action.

The learned Judge left to the Jury the following specific questions in accordance apparently with the suggestion of the Counsel for the Bank:—

1. Was the contract between the Plaintiff and the Defendant Bank one to allow an overdraft of 2,000*l.* which might be called up at the discretion of the Bank at any time before the expiration of the six months?
2. Or was the contract that the Bank should not call up the overdraft or terminate the arrangement until the expiration of the six months *i.e.* on 4th April?
3. Was it a condition precedent to the allowing of the overdraft at all that the first charge upon the assets of the Hillgrove and Armidale Water Power and Electric Supply Company Limited should be given as security for the overdraft.

The Jury retired at 10.45 a.m. At 3.50 p.m. both parties consented to accept the verdict of the majority. At 4.40 p.m. however the jury returned a verdict for the Plaintiff for 600*l*. unanimously. The specific questions put to them were answered in writing as follows:—

The contract for 2,000*l*. for six months was not terminable at the Bank's discretion at any time before the expiration of the six months.

The Bank agreed to rely on Mr. Palmer's guarantee and the deposit of the documents mentioned by the Plaintiff and the first charge upon the assets of the Hillgrove Company was not a condition precedent to the granting of the overdraft.

The argument at their Lordships' Bar did not disclose any difference of opinion between the opposing Counsel on any point of law. The learned Counsel for the Respondent admitted as fully as their opponents could desire that parol testimony cannot be received to contradict vary add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract. The difference between them such as it was turned rather on a question of fact. The learned Counsel for the Respondent pointed out that the Overdraft Application Letter Exhibit D did not purport to contain the agreement between the parties. It was indeed common ground that the real agreement was not to be found in it. It did not even purport to contain part of the agreement. Moreover the Bank did not signify their intention to accede to the application nor did they in terms comply with it. The document was not in the form of an agreement. It was in the form of a proposition; on the face of it it purports to be no more than an

application for an overdraft which had as a matter of fact already been granted on other and different terms. It was merely a memorandum of the transaction not certainly altogether accurate but one which the Bank desired to have in a certain form possibly for the purpose of facilitating future reference. Obviously the view which the jury took was that Exhibit D was no part of the agreement and that the agreement was complete without it.

It is somewhat significant and not perhaps unsatisfactory to find that neither in the pleadings nor in the correspondence between the Bank Manager and the Plaintiff when repayment of the advances was somewhat peremptorily demanded is there a suggestion that the Bank had by contract a right to recall the money at their discretion. The point seems to be an after-thought due perhaps to the ingenuity of Counsel.

The view which their Lordships take of this case in accordance with the view of the Full Court will relieve the Bank from the apprehension which they seemed to feel that the rejection of their appeal might destroy or impair the efficacy of the Ordinary Overdraft Application Letter when used as the basis of an agreement for an advance. Their Lordships however cannot help observing that if the Bank should in future contract to advance money for a definite period and at the same time desire to have the power of recalling the advance at their discretion thus making the agreement nugatory it would not be amiss to state clearly what they do mean and to take care that their meaning is understood by the persons with whom they are dealing.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The Appellants will pay the costs of the appeal.