Privy Council Appeal No. 140 *of* 1917.

The British America Elevator Company, Limited - - - *Appellants*

v.

The Bank of British North America - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF MANITOBA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
LORD PHILLIMORE.

[*Delivered by* VISCOUNT HALDANE.]

The Court of Appeal for the Province of Manitoba varied a judgment of Mr. Justice Galt delivered in this case in favour of the appellants (the plaintiffs) for $15,218. The Court of Appeal substituted for this judgment an inquiry as to what loss the appellants had sustained by reason of certain drafts set out in the statement of claim having been credited in the books of the respondent Bank to the account of one Youngberg or to the account of the firm of Youngberg and Vassie. Youngberg was an agent of the appellant company who also carried on a business on his own account and another business along with Vassie, as dealers in agricultural implements and other things required by farmers. The inquiry ordered by the Court of Appeal was further directed to the amount that the appellants had received from or on behalf of Youngberg on account of the drafts set out in the statement of claim, and the respondents were declared liable for the balance, such balance not to exceed the

sum of $12,028·10. The difference between this amount and that for which the Trial Judge gave judgment was arrived at by deducting two sums of $500 and $1,000, representing drafts for which the respondents were held by the Court of Appeal not to be liable.

The appellant company has its head office at Winnipeg and it owns a number of grain elevators in Manitoba and Sas katchewan, one among them being at Waldheim. The business carried on at these elevators was regulated by the Manitoba Grain Act, which provides, among other things, that when grain is bought by the owner of the elevator from the farmer (as distinct from being received for storage) a cash purchase ticket in a prescribed form shall be issued to the seller. Those who receive these cash purchase tickets are entitled to payment of the amounts within twenty-four hours from the time of receiving them. The elevator owner usually appoints someone to be paymaster for these tickets, and in this case Youngberg was appointed to be the appellants' paymaster at Waldheim. There was no bank there, but the respondents had a branch at Rosthern, which, it is agreed, was some 15 miles off. As the amounts on the tickets had to be paid in currency, the appellants arranged with the respondents that the latter should furnish from Rosthern to the paymaster of the appellants at Waldheim money to meet the payments that had to be made there. These arrangements, as appears from the correspondence immediately prior to a letter of the 15th September, 1911, written on behalf of the appellants to the respondents' superintendent, were in existence before that date, and they were renewed in the letter referred to (in all particulars that are material for the present purpose), by which letter the appellants requested the respondents for a certain commission to furnish currency from their Rosthern branch to Waldheim, G. A. Youngberg being the agent designated. This was agreed to. The terms of the letter are important, for they settled with precision what was to be for the future the course of business between the appellants and the respondents. The money was to be furnished from the Rosthern branch of the respondents' bank to Waldheim, where Youngberg was the appellants' paymaster, against drafts by Youngberg on the appellants. The respondents' commission was to be $1·25 per $1,000.

Youngberg and Vassie had an account with the Rosthern branch of the respondent bank, of which one Rostrup was the local manager. Youngberg had also a separate private account there. These accounts were from time to time overdrawn during the period of the transactions in question in this appeal. Rostrup, the local manager of the Bank, was pressing them to cover the overdrafts, and the head office was urging him to see to this.

It is obvious that, having regard to the terms of the letter of the 15th September, 1911, which defined what was to be the course of business, the proper procedure was that Youngberg should, as occasion required, have estimated as closely as possible the amount necessary to provide for the payments he had to

make on behalf of the appellants in respect of grain tickets, and to have drawn on the respondents only for these amounts. On presentation of the drafts at the Rosthern branch Rostrup would have sent to him or handed to him currency for the amounts drawn for, and have forwarded the drafts to the Bank's head office at Winnipeg to be collected from the appellants' head office there. Instead of doing this Rostrup allowed Youngberg to pay the amount of the drafts he presented, on behalf of the appellants and under the terms of the letter, with increasing frequency into his firm's account or his own, thereby putting these accounts, which were generally overdrawn, into credit. When this was done he drew cheques on them generally. It is not in dispute that Rostrup had full notice from the beginning that Youngberg was paying the amounts of the appellants' drafts, which could be given only in terms of the letter of the 15th September, into the private accounts of his firm and himself, and was then drawing cheques for his own purposes on these accounts.

Their Lordships think not only that it is plain that Rostrup knew throughout that Youngberg was directing him to act improperly in crediting to his firm's and his private accounts the amounts of the appellants' drafts, which were allowed to be drawn only for the purpose of currency being furnished to Waldheim to pay there the sums due under the grain tickets issued by the appellants, but that the directions given were in violation of the terms of the letter of the 15th September, 1911, a letter which prescribed the continuation of an existing practice in terms. If so, it is clear upon principle that the respondents, through Rostrup, knowingly became parties to a misapplication of what were trust funds, which they must restore to the appellants. The majority of the learned Judges in the Court of Appeal appear to have treated the action as one which must be regarded as brought simply for damages for a breach of agreement, in which the burden lay on the plaintiffs to prove the quantum of damage suffered by them. This view is quite inadequate. Possibly the learned Judges in the Court of Appeal were led to hold as they did by the fact that, instead of asking for a general declaration of liability on the ground of breach of trust, and for an account to be taken of all the sums so received, in which case the result of the account, after any proper deductions had been claimed and established on the initiative of the respondents, would have been followed by a judgment on further consideration for the balance found due, a different course was followed at the trial. The appellants claimed certain specific sums, amounting to $13,528·10, which they said had been misapplied in breach of trust, and did not persist in a further claim they made for an account of any other moneys for which the respondents might prove to be similarly accountable to them. The case was tried on this footing.

There were two sums of $500 and $1,000 respectively as to which there was special controversy in the Court of Appeal. The first of these was the subject of one of the appellants' drafts,

which was credited to Youngberg and Vassie by Rostrup on the 15th September, 1911, just before he was notified of the letter to the headquarters of the respondent Bank of that date. At this date the account of Youngberg and Vassie at Rosthern was overdrawn and the amount was applied in reducing it. This was, in their Lordships' opinion, improper, having regard to the practice which existed even before the letter of the 15th September, 1911, and to the duty of a banker who has notice that he is receiving a trust fund. It was improper of Rostrup to allow Youngberg to operate on his firm's account by treating the $500 as though it was money belonging to the firm and of which he could dispose as such. Similar observations apply to the draft for $1,000 dated later on, on the 13th February, 1912, and credited to Youngberg on the 16th of that month. It represents the amount of a cheque for part of the balance due from him to the appellants, given by Youngberg to Black, the appellants' inspector. The cheque was dishonoured, owing to the overdrawn condition of Youngberg's account, and he then drew on the appellants for the amount and sent the draft to Rostrup for payment to his own credit, and the cheque was paid. The majority in the Court of Appeal held that if the draft had not been so credited the original cheque would not have been paid, and that therefore to charge the respondents with the amounts of both the cheque and the draft would be to make them pay twice over. With this view their Lordships are unable to agree. There is not evidence before them sufficient to establish that the respondents have been charged twice with this identical amount. They think that, as the cheque was drawn to pay to the appellants their own money, being cash in hand with Youngberg, they were entitled to hold it, and that they were entitled to treat the payment of the draft to Youngberg's own account as a breach of duty on the part of Rostrup. They think that the Trial Judge and Cameron, J.A., were right in treating these items as standing on the same footing as the other items in the total claim established at the hearing, and that the majority of the Court of Appeal were wrong in deducting the $1,000. Their Lordships are unable to put this draft on a different footing from those before and after it. The respondents did not make good the contention put forward in argument, that this draft for $1,000 was given to make good the amount of a previous draft for the same amount which had been misapplied, and that this would therefore involve a payment of the same item twice over. The cash which Youngberg had in hand as the appellants' agent was not made up merely of previous drafts misappropriated, but comprised moneys received by him for his principals, his cheque was given in respect of his liability for cash in hand generally, and the application of the draft on the appellants to recoup the respondents for payment of the $1,000 cheque was a misapplication of the draft with knowledge that the agent had no right to have it so applied.

The course adopted at the trial, of treating the items making up the amount for which judgment was given as raising questions

of evidence at the hearing, may not have been the most convenient one. A full inquiry and account, based on a general declaration of liability and taken subsequently with the burden of discharging themselves lying on the respondents, would probably have been the more adequate course. It would, moreover, have enabled the appellants to go into further possible items, in respect of which they did ask for cumulative relief in the shape of an account which would have extended to these items. But this course was not taken and the appellants abandoned their further claim. The respondents set up a defence challenging the principle on which they were held liable at the trial, and alternatively they alleged that the amounts of the drafts in controversy were all discharged, having been repaid by cheques drawn on them by Youngberg or his firm in payment to the farmers who had sold grain. On the first contention the respondents were, in their Lordships' opinion, wrong. The Court of Appeal should have treated the claim as one for replacement of trust funds and not for damages. The alternative contention the respondents did not establish by the evidence they gave at the trial. Having in view the course there taken, their Lordships are of opinion that the judgment of the majority of the Court of Appeal was erroneous in principle, and that the judgment of the Trial Judge must be restored. It may be that the respondents may be entitled to some relief in possible proceedings against the appellants in the name of Youngberg or his assignee. To decide this would require an inquiry into the whole of the transactions between the respondents, the appellants and Youngberg; and the presence of the assignee of the latter in his insolvency might be required. Their Lordships express no opinion on this subject. They can only deal with the case in the form in which it has been presented and on the materials which are before them, and they do not intend to prejudge any further questions. For the reasons they have given they will humbly advise His Majesty that the judgment of the Court of Appeal should be reversed and that of Mr. Justice Galt restored. The respondents will pay the costs here and in the Court of Appeal. The petition for special leave to cross-appeal lodged by the respondents will stand dismissed, and they will have their costs of the application to postpone the hearing of the appeal, such costs to be set off against the appellants' costs of the appeal.

In the Privy Council.

THE BRITISH AMERICA ELEVATOR COMPANY, LIMITED,

v.

THE BANK OF BRITISH NORTH AMERICA.

DELIVERED BY VISCOUNT HALDANE.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.