69. 1930

CASE for the APPELLANT.

No. 1 of 1930.

In the Privy Council.

On Appeal from the Supreme Court of Canada.

BETWEEN

THE BANK OF MONTREAL (Original Defendant) ... ... APPELLANT

AND

THE DOMINION GRESHAM GUARANTEE AND CASUALTY COMPANY (Original Plaintiff) ... ... RESPONDENT.

CASE FOR THE APPELLANT.

RECORD

1. This is an appeal by special leave granted on the 5th July 1929 from the judgment of the Supreme Court of Canada dated the 27th May 1929 whereby (by a majority) the appeal of the Respondent (the Plaintiff in the action) from a judgment of the Court of King's Bench in Appeal dated 16th April 1928 was allowed and judgment was directed to be entered for the Respondent for 7,565.61 dollars with costs of the Appeal and in the Courts below. pp. 217-228 pp. 135-148

2. On 15th May 1924 an action was brought by the Respondent as Plaintiff against the Appellant (hereinafter referred to as "the Bank") as Defendant in the Superior Court of the District of Montreal in the Province of Quebec in which the Respondent claimed 7,565.61 dollars by way of damages on the ground of the alleged negligence of the Appellant as Bankers to Willis Faber and Company of Canada Limited, to the rights of which last named Company as against the Appellant the Respondent claimed to be entitled by way of subrogation. p. 1

3. In May 1921 the Respondent insured Willis Faber and Company of Canada Limited (hereinafter referred to as "the Customers") Insurance Brokers at Montreal for one year from 23rd May 1921 against loss arising from embezzlements and defalcations by certain of their employees including one K. V. Rogers, the Chief Accountant (hereinafter referred to as "Rogers") whose fidelity was insured in the sum of 5,000.00 dollars. p. 38

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pp. 60 & 61

4. Before action brought the Respondent paid the Customers the sum of 5,000.00 dollars in respect of embezzlements and defalcations of the said K. V. Rogers occurring between June 1921 and January 1922 and largely exceeding 5,000.00 dollars in amount, and paid and incurred further sums amounting to 2,565.61 dollars by way of costs in litigation between the Respondent and the Customers in which the latter established the right to be indemnified by the Respondent to the extent of 5,000.00 dollars in respect of the embezzlements and defalcations of Rogers. The Respondent became subrogated in the rights of the Customers and accordingly sued the Appellant.

pp. 30-37

pp. 48-51

5. No question has been or is now raised either as to the right of the Respondent to sue by subrogation or as to the amount of the damages claimed. The question in substance, therefore, is whether, in the circumstances hereinafter stated, the Bank is liable to the Customers for the said damages.

p. 131, l. 35

pp. 44 to 47

6. The Customers as Insurance Brokers in the ordinary course of their business had from time to time occasion to purchase from the Bank (where they had their account) bank drafts on New York in exchange for their own cheques drawn on the Bank and payable to the Bank's order. In particular there was a continuous series of such transactions between November 1918 and January 1922. In September 1919 Rogers who had been in the service of the Customers since 1907 and had been Chief Accountant from some date in or before 1912, for the first time obtained in exchange for one of the said cheques a draft payable to his own order. He embezzled the said draft or its proceeds. Thenceforward until January 1922 he obtained from time to time similar drafts from the Bank and embezzled the same or the proceeds thereof, while during the same period he also obtained drafts in other names which were duly applied in the business of the Customers. The negligence and breach of duty alleged against the Bank is in connection with the issuing of drafts payable to Rogers. The cause of action, however, is limited to drafts so issued between June 1921 and January 1922.

p. 84, l. 40

p. 85, l. 10

p. 80, l. 3

7. The course of dealing was as follows :—On 8th July 1912 the Customers passed the following resolution :—" It was moved and " unanimously resolved that any two of the following persons, namely, " Mr. Raymond Willis, President, Mr. O. W. Dettmers, Director, Mr. " E. N. Mercer, Director, and K. V. Rogers, Accountant, be and they " are hereby authorized to make, draw, sign, accept or endorse bills of " exchange, promissory notes, cheques, orders for payment or other " commercial paper on behalf of the Company " and that Mr. Raymond " Willis, President, and Mr. O. W. Dettmers, Director, and Mr. E. N. " Mercer, Director, and either of them singly be and they are hereby " authorised to make all contracts and engagements other than the " foregoing for and on behalf of the Company and that this resolution

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" replace the resolution of Directors dealing with the same matters and " passed on the 5th January 1911, which former resolution shall hereafter " be of no effect."

It was conceded that in every instance in which a cheque was drawn in exchange for a draft of the Bank, including those instances where the draft was made payable to Rogers, the cheque was drawn in accordance with the terms of the said resolution and was complete and regular on the face thereof. The uncontradicted evidence showed that it never was the practice in connection with the purchase of drafts from the Bank for the Customers to sign any other paper or document in the manner indicated in the said resolution.

p. 159, l. 40
p. 226, l. 35
p. 91, l. 40—p. 92

8. The evidence showed that the procedure in fact adopted by the Customers in connection with the purchase of drafts from the Bank was as follows :—The Customers, usually through Rogers, would telephone to the Bank to ascertain the rate of exchange, Rogers would then make out a cheque payable to the Bank's order for a sum approximately corresponding in amount, after allowing for difference in exchange, to the sum for which the Banker's draft was required. He would present such cheque to one of the said Directors, Mr. Dettmers or Mr. Mercer, for their signature, in most cases with a statement prepared in the office of the Customers showing the amount due to the Creditor, or in other cases he would give an oral explanation of the purpose for which the cheque and corresponding draft were required. The cheque would then be signed on behalf of the Customers by two of the persons named in the said resolution of the 8th July 1912. In fact almost all the cheques used in connection with the purchase of drafts were signed by the said Rogers.

p. 91, l. 30
p. 89, l. 29
p. 90, l. 46
p. 90, l. 31
p. 99, l. 13
p. 113, l. 19
p. 91, l. 4

9. As already stated the Directors signed no document giving instructions to the Bank as to the payee of the required draft although they must have known that such information would be required by the Bank, nor did the cheques themselves contain any such information, The directors invariably left it to Rogers as the agent of the Customers to instruct the Bank either verbally or in writing, as might be required, as to the payee of the drafts and as to the number and exact amount of the draft or drafts required in exchange for the cheque.

p. 91, l. 42
p. 115, l. 37

10. At the Bank the procedure was as follows :—

Rogers would obtain at the Bank and fill up a requisition note showing the amount of the draft or drafts required, the person in whose favour the draft or drafts was or were to be drawn, and the name of the applicant viz. : " Willis Faber & Co. Ltd." The said requisition notes did not purport to require any signature beyond the filling in of the name of the applicant in the space provided for the purpose. Rogers would hand the requisition note in to the draft department, where the draft would be prepared and passed together with the requisition note

p. 20, l. 20
p. 123, l. 1
p. 76, l. 40

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p. 125, l. 38 to the exchange teller. The exchange teller would then examine the cheque to see that it was payable to the Bank and that it had been certified, and on being satisfied on these points would accept it in exchange for the draft or drafts required. Minor adjustments in connection with the rate of exchange, whether in favour of the Bank or of the Customers, would be settled at the same time in cash paid by or to the said Rogers as the case might be. Specimens of the said cheques and requisition notes are printed on pages 20 and 21 and of the said drafts on page 24 of the Record. These are in fact instances of embezzlement by the said Rogers, but, except as to the name of the payee of the draft, the documents used in the case of legitimate transactions were the same.

pp. 68-70
p. 77
p. 122, l. 32
pp. 20, 21, 24

pp. 44-47 **11.** By means of the procedure indicated above between 30th November 1918 and 31st January 1922 Rogers obtained from the Bank 106 drafts in exchange for cheques of the Customers. Of these 106 drafts 41 were drawn payable to the order of Rogers, and the remaining 65 were drawn in favour of creditors of the Customers and were properly dealt with. 21 of the 41 and 29 of the 65 respectively were obtained during the currency of the policy issued by the Respondent namely between 2nd June 1921 and 31st January 1922 and the remaining 20 and 36 respectively had been obtained previously, namely between the 30th November 1918 and the 15th April 1921. The first draft in favour of the said Rogers was dated 27th September 1919. The proceeds of all the said 41 drafts were misappropriated by Rogers.

p. 80, l. 3

p. 83, l. 9 **12.** The frauds of Rogers were first discovered by the Customers on 31st January 1922. Until then the Bank had received no notification from the Customers that there was or ever had been any limitation on Roger's authority to purchase drafts on their behalf with their cheques, nor did the Customers make any complaint as to the procedure hereinbefore mentioned. Meanwhile the books of the Customers were audited about five times a year.

p. 94, l. 15
p. 117, l. 12

p. 5, l. 40 **13.** In the above circumstances it was contended on behalf of the Customers that the Bank had been guilty of illegal, wrongful and grossly negligent acts in making out in favour of, and delivering to, Rogers the 21 drafts, amounting in value to 13,594.15 dollars, between the 4th June 1921 and 10th January 1922, the proceeds of which Rogers had embezzled.

14. No evidence was adduced on behalf of the Respondent to show that the procedure and method of the Bank in relation to the sale of Bank drafts in exchange for customers' cheques was contrary to the ordinary practice of Bankers. Further, the Respondent successfully objected at the trial to the admission of evidence tendered by the Bank as to the circumstances in which a customer might buy foreign exchange in the name of one of its officials.

p. 127, l. 28

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15. Mr. Justice Duclos on 5th May 1927 dismissed the Respondent's action with costs on the ground (a) that the Customers were estopped by their own negligence, (b) that they could not impose a greater standard of care upon the Bank than they exercised themselves, (c) that the Customers held out the said Rogers as their agent and gave the Bank every reason to believe he was acting within their authority, (d) that the fact of Rogers asking for drafts to his own order was not sufficient to put the Bank on enquiry and (e) that even if the Bank's suspicion might have been aroused on the first occasion such suspicion was allayed and lulled to sleep by the long series of similar transactions without objection or demur on the part of the Customers and without notice to the Bank of any irregularity. p. 130

16. The Respondent appealed from this judgment to the Court of King's Bench in Appeal (Les Hons. Juges Tellier, Howard, Bernier, Letourneau and Cannon) who on 16th April 1928 dismissed the appeal with costs. The judgments in the Court of King's Bench in Appeal may be summarised as follows :— pp. 135-148

Mr. Justice Howard : gave no reasons for his Judgment. p. 135

Mr. Justice Tellier : held that the Bank had not failed in its duty. It received the cheques from Rogers, one of the signatories, and might well expect to receive the instructions as to the destination of the proceeds from the same source. The Customers, trusting Rogers, did not think it necessary to give such instructions otherwise than by his mouth, though they might well have given written directions on the face of the cheques or on annexes thereto. It was as if they had said to the Bank " do as Rogers tells you." pp. 135 & 136

Mr. Justice Bernier : regarded the requisition forms as being documents to which no signature was appended and as being of no importance. He held that the Customers exercised no control over the action of the said Rogers, in whom they reposed a blind confidence, that they neither insisted that he should bring back the drafts purchased nor did they check their proper application in the Books. The transactions could be summed up by saying that the Customers ordered Rogers to buy drafts from the Bank, gave him the necessary money by cheques duly signed and that Rogers went to buy the goods, as it were, and paid for them ; the Bank was always informed by telephone that he was coming to obtain drafts and the Customers could quite well have informed the Bank at the same time as to the names of the persons to whom the drafts were to be made payable. The Bank was under no obligations to enquire from the Customers whether the drafts ought to be made out in the name of Rogers or of third parties, nor would the names of third parties have meant any more to the Bank than the name of Rogers. The evidence of the Directors of the Customers showed that if there was pp. 136-141

RECORD

negligence it was that of the Customers seeing that they never sufficiently checked the accounts of their own servant or instructed the Bank to make out the drafts otherwise than as they were made out.

pp. 142-144 *Mr. Justice Letourneau* : thought that apart from the resolution of the 8th July 1912 there was a tacit limitation on the authority given to Rogers that he should only obtain drafts in favour of third parties. Had the action related to some of the earlier drafts in favour of Rogers, say during the first three months, he would have held the Bank liable since the Bank could not have justified making out drafts in his name either by the formal authority or by the tacit authority, nor could they have shewn reasonable grounds for belief that the authority went to this extent. But, while agreeing that there could be no ratification in ignorance of what was happening, he held that complete silence on the part of the Customers, after audits which might be supposed to disclose the fact that drafts were being taken in the name of Rogers, and which only failed to do so because of independent frauds for which the Bank was not responsible, did afford reasonable ground for belief on the part of the Bank that the authority extended to the taking by Rogers of drafts in his own name. This state of things was already in existence by 23rd May 1921 when the policy came into force ; and in these circumstances the Bank might reasonably believe that the taking by Rogers after that date of drafts in his own name was merely a repetition of conduct to which the Customers had assented.

pp. 145-148 *Mr. Justice Cannon* : after pointing out that it was left entirely to Rogers to fill in the blank requisition forms and that no advice was ever sent by the Customers to the payee of the fact that a foreign draft had been charged to his account, held that the Customers gave the Bank reason to believe that Rogers was authorised to fill in, on behalf of the Customers, the requisition forms indicating the names of the payees of the drafts the Customers desired to purchase from the Bank with the duly signed cheques that were presented by Rogers. The Customers selected Rogers as their employee, not the Bank ; the Customers sent Rogers with duly signed cheques to the Bank to purchase drafts ; the Customers allowed Rogers for a long period of time to indicate the names of the payee ; the Bank simply carried out the written instructions of the trusted employee of the Customers ; the Customers, not the Bank, neglected to instruct their auditors to verify whether the drafts purchased corresponded with the entries made by Rogers in the books ; the Customers, not the Bank, neglected to sign the requisition forms or to indicate on the cheques themselves what drafts they wanted to buy.

17. The Respondent appealed from this judgment to the Supreme Court of Canada who on 27th May 1929 (by a majority) allowed the appeal. The judgment of the majority was delivered by Mr. Justice
p. 217 Duff and was concurred in by Newcombe, Lamont and Smith J.J. ;
p. 223 Mr. Justice Rinfret dissented.

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18. The judgment of the majority proceeded on the ground that by the resolution dated 8th July 1912 of which the Bank had notice, the signatures of two out of four named persons were required for cheques, orders for payment and "commercial paper" of a similar character; that Rogers had no actual general authority to direct the application of the proceeds of a cheque so signed, nor had he actual general authority to do any class of acts within which such a direction would fall; that the Bank treated the requisition notes filled in by Rogers as the equivalent of cheques or orders for payment; that Rogers by what the judgment describes as "his sole signature" was purporting to direct that funds standing to the credit of the Customers should be paid to himself; that Rogers' actual authority was limited by the terms of the resolution, and that nothing had happened to lead the Bank to suppose that Rogers was acting within the scope of a wider apparent or ostensible authority; that in fact the Bank did not concern itself with the extent of Rogers' authority and was not misled by any negligence of the Customers. pp. 217-222

19. *Mr. Justice Rinfret*: was of opinion that the resolution of 8th July 1912 had no application to this case save in so far as all the cheques presented certified and charged against the account of the Customers were properly drawn in accordance with the resolution. He stated that the foreign drafts themselves were not charged to the Customers and that they did not represent the funds of the Customers; that the Bank under its charter powers dealt in the drafts as a merchant with his goods, and sold the same to the Customers in consideration of the respective cheques. He agreed with Mr. Justice Bernier that the requisition form was of no importance. In his opinion the evidence established that the Customers never regarded the requisition notes as coming within the scope of the resolution. pp. 223-228 p. 226, l. 30 p. 226, l. 40 p. 227, l. 27

He was also of opinion that no negligence against the Bank had been established, and that the allegation of negligence practically depended upon the proposition that the taking of the drafts in question to the order of Rogers was notice to the Bank that he was appropriating to his own use money of the Company and should have put the Bank on enquiry. He rejected this proposition especially as the Customers had succeeded in an unwarranted objection at the trial against evidence as to the circumstances in which it might be usual for a company to ask for foreign drafts to be issued to the order of its own officials. p. 225, l. 42

20. The Appellant will contend on the undisputed facts :—

(A) That Rogers was acting within the scope of his actual authority, which was to purchase drafts from the Bank by means of the Customers' cheques duly signed and in so doing to designate to the Bank the payees of the drafts.

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This legal principle is in accordance with Article 1727 of the Civil Code of the Province of Quebec which is as follows : –

" The Mandator is bound in favour of third persons " for all acts of his Mandatary done in execution and " within the powers of the Mandate, except in the case " provided for in Article 1738 of this title and the cases " wherein by agreement or the usage of trade the latter " alone is bound."

" The Mandator is also answerable for acts which " exceed such power if he has ratified them either expressly " or tacitly."

(B) That Rogers was acting, if not within the scope of his actual authority, within the scope of his apparent or ostensible authority. This rule of the Common Law is to be found, though somewhat differently expressed, in Article 1730 of the Civil Code of the Province of Quebec which provides that :—

" The Mandator is liable to third parties who in good " faith contract with a person not his mandatary, under " the belief that he is so, when the mandator has given " reasonable cause for such belief."

Rogers, the apparent agent, was purporting to create privity between the Bank and his principal by doing an act which it was within his apparent authority to do and the fact that he did it for his own benefit, assuming that he had no actual authority so to do, was immaterial as against the Bank which contracted with the principal on the faith of the agent's apparent authority.

(C) That there was no evidence of negligence on the part of the Bank. The only negligence suggested is that the Bank should have been put upon enquiry when it had notice that drafts were being asked for in favour of Rogers. The Bank never had notice that any part of the proceeds of the drafts was being paid into any private account of Rogers. At the most it had notice only that Rogers, the trusted officer and Chief Accountant of the Customers, and the person entrusted by the Company with cheques for the purchase of drafts, had been placed by the Customers themselves in a position where he might act dishonestly if he were so minded. No evidence was adduced to show that the practice of the Bank in relation to the sale of foreign drafts as described in the evidence in this case was in any respect contrary to the ordinary practice of Banks ; and objection was taken by the Customers to the admission of evidence as to the circumstances in which customers of a Bank may require to purchase drafts in the name of their officials.

p. 127, l. 28

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(D) That the standard of care required from the Bank must be considered in the light of the circumstances as they existed from June 1921 to January 1922. It may be true to say that negligence of the Customers in not discovering the frauds perpetrated between these dates cannot, by itself, excuse the Bank; but it is submitted that in considering the duty of the Bank in June 1921 the previous course of dealing, which had been continued from 1918 onwards without complaint and without resulting in any losses so far as either the Bank or the Customers were aware, must be taken into account before the Bank can be held to have been guilty of negligence.

(E) That the loss was caused by the Company's own negligence in entrusting to Rogers alone the duty of designating to the Bank the names of the payees of the drafts.

(F) That by entrusting to Rogers the cheques drawn in favour of the Bank for the purchase of drafts the Customers represented that he was the person entitled to receive drafts in exchange for the cheques; that the Bank acted on such representation in debiting the account of the Customers with the cheques and in issuing drafts in exchange for the same and that the Customers are estopped from complaining of the consequences.

(G) That the cheques in question being drawn in accordance with the said resolution of 8th July 1912, the Bank was acting in accordance with its duty in debiting the account of the Customers therewith.

21. The Appellant respectfully submits that this appeal should be allowed and the judgment of Mr. Justice Duclos dismissing the Respondent's action with costs should be restored or that a new trial or such further or other relief should be ordered in the premises as to His Majesty in Council may seem fit for the following among other

REASONS.

(1) That there was no negligence or breach of duty on the part of the Bank.

(2) That Rogers was acting as agent for the Customers within the scope of his actual authority.

(3) Alternatively that Rogers was acting within the scope of his apparent or ostensible authority.

(4) That the Respondent has not discharged the onus of proving that the Bank was guilty of negligence which caused the loss suffered by the Customers.

(5) That the said resolution of 8th July 1912 did not apply to the said requisition forms.

(6) That the Customers having successfully objected to the admission of evidence on behalf of the Bank as to the circumstances under which it was usual for a customer to buy foreign exchange in the name of one of its officials, cannot be heard to rely on the mere fact of the drafts being made out in the name of Rogers as constituting evidence of negligence.

(7) That the loss was caused by the negligence of the Customers.

(8) That the Customers (and consequently the Respondent) are estopped from denying the authority of Rogers or alleging negligence on the part of the Appellant.

(9) That in debiting the said cheques the Bank was acting strictly in accordance with the instructions of the Customers.

(10) That the reasons given by the Trial Judge, by the Judges of the Court of King's Bench in Appeal and by Mr. Justice Rinfret were right and that those given by the majority of the Judges in the Supreme Court were wrong.

F. B. MERRIMAN.

F. J. TUCKER.

No. 1 of 193

In the Privy Council.

On Appeal from the Supreme Court c
Canada.

BETWEEN

THE BANK OF MONTREAL ... *Appella*

AND

THE DOMINION GRESHAM GUARANTEE AND CASUALTY COMPANY ... ... *Respondei*

Case for the Appellant.

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