69, 1930

1 OF 1930

IN THE PRIVY COUNCIL

No. 1930

On an Appeal from the Supreme Court of Canada.

BETWEEN:

THE BANK OF MONTREAL

(Original Defendant and Respondent in the Supreme Court of Canada)

APPELLANT

— AND —

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY

(Original Plaintiff and Appellant in the Supreme Court of Canada)

RESPONDENT

THE RECORD

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Attorneys for Respondent

LAWRENCE JONES AND CO.
London Agents

RECORD OF PROCEEDINGS.

IN THE PRIVY COUNCIL

No. of 1930

ON AN APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN:

THE BANK OF MONTREAL

(Original Defendant and Respondent in the Supreme Court of Canada)

Appellant,

—AND—

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY

(Original Plaintiff and Appellant in the Supreme Court of Canada)

Respondent.

RECORD OF PROCEEDINGS

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IN THE SUPERIOR COURT

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DOMINION OF CANADA

IN THE SUPREME COURT OF CANADA

(OTTAWA)

On Appeal from the Court of King's Bench (Appeal Side) for the Province of Quebec
District of Montreal

10

BETWEEN:

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY

(Plaintiff in the Superior Court and Appellant in the Court of King's Bench, in Appeal.)

20

APPELLANT

—VS—

THE BANK OF MONTREAL

(Defendant in the Superior Court and Respondent in the Court of King's Bench, in Appeal.)

30

RESPONDENT

THE CASE

PART I—PLEADINGS

40

DECLARATION

Plaintiff declares:

In the Superior Court.

No. 1. Plaintiff's Declaration, 15th May, 1924.

1.—That it is an Insurance Company carrying on, amongst other lines of insurance, that of Fidelity Guarantee Insurance;

2.—That on or about the 19th May, 1921, the plaintiff in the

In the Superior Court.

No. 1. Plaintiff's Declaration, 15th May, 1924. *(continued).*

ordinary course of its business, issued to Willis Faber Company of Canada Limited, its collective Fidelity policy No. 79076, insuring the said Willis Faber Co. of Canada Ltd. against loss or damage arising from embezzlement, theft and defalcation by certain of the employees of the said Willis Faber Co. of Canada Ltd., in specified amounts, for a period of one year from the 23rd May, 1921; the whole as more fully appears by a copy of the said policy produced herewith to form part hereof as Plaintiff's Exhibit P-1;

3.—That the names and occupations of the employees of the said Willis Faber Co. of Canada Ltd., in regard to whom the said Company was so insured, and the respective amounts of the said insurance for each employee are contained in a written schedule on the back of the said Policy of Insurance;

4.—That among the said employees was one K. V. Rogers, accountant, of Montreal, in respect of whom the said Willis Faber Co. of Canada Ltd. was insured by the plaintiff in the sum of Five Thousand Dollars ($5,000.00);

5.—That during the currency of the said policy the said Willis Faber Co. of Canada Ltd. sustained losses and damage owing to embezzlements, thefts and defalcations by the said K. V. Rogers, in an amount greatly in excess of the said sum of $5,000.00, to wit, in the total sum of $13,594.15;

6.—That the said embezzlements, thefts and defalcations were brought about by reason of the illegal, unlawful and negligent acts of the defendant in issuing to the said K. V. Rogers drafts payable to his own order, drawn upon New York Banks, and charging to the debit of the account of the said customer the respective amounts of the cheques drawn by said customer in favour of the defendant, each of which cheques amounted to, approximately, the amount of the respective drafts;

7.—That the said K. V. Rogers, who was well known by the defendant Bank to be an employee of said Willis Faber Co. of Canada Ltd., and that he had no power or authority to receive drafts payable in his own name, was in the habit of presenting the said cheques payable to the order of the defendant and representing to the defendant and its employees that he was entitled to receive the proceeds of said cheques in the form of drafts to his own order, which said representations the defendant and its employees illegally, unlawfully, carelessly, negligently and without colour of right, acted upon, with the result that having received the said drafts from the defendant payable to his own order the said K. V. Rogers was able to, and did,

use them for his own account to the loss, prejudice and damage of said Willis Faber Co. of Canada, Ltd.;

8.—That the said cheques were illegally, unlawfully and wrongfully debited to the account of said Willis Faber Co. of Canada Ltd., and could not, and did not, legally discharge *pro tanto* the debt due by the defendant to the said Company, which sustained loss and damage by said illegal unlawful, careless and negligent acts to the extent of $13,594.15. Particulars of the cheques so debited to the account of the said customer, and the drafts delivered to the said K. V. Rogers by the defendant are as follows:—

1921	June 4	Cheque		$1079.86
1921	June 6	Draft	$320.	
do	do	do	320.	
do	do	do	320.	
		Exchange	122.46	$1082.46
1921	June 14	Cheque		$1610.55
1921	June 14	Draft	$477.	
do	do	do	477.	
do	do	do	477.	
		Exchange	178.03	$1609.03
1921	July 2	Cheque		$1710.02
1921	July 2	Draft	$500.	
do	do	do	500.	
do	do	do	500.	
		Exchange	206.31	$1706.31
1921	Aug. 25	Cheque		$1334.27
1921	Aug. 25	Draft	$400.	
do	do	do	400.	
do	do	do	400.	
		Exchange	132.06	$1332.06
1921	Sept. 29	Cheque		$ 771.79
		Draft	$350.	
do	do	do	350.	
		Exchange	70.48	$ 770.48

In the Superior Court.

No. 1. Plaintiff's Declaration, 15th May, 1924.

(continued).

1921	Oct. 22	Cheque		$ 883.29
1921	Oct. 24	Draft	$400.	
do	do	do	400.	
		Exchange	72.54	$ 872.54
1921	Nov. 8	Cheque		$ 478.54
1921	Nov. 9	Draft	$441.	
		Exchange	38.05	$ 479.05
1921	Dec. 31	Cheque		$ 844.04
1922	Jan. 3	Draft	$400.	
do	do	do	400.	
		Exchange	41.04	$ 841.04
1922	Jan. 10	Cheque		$4881.79
1922	Jan. 10	Draft	$2300.	
do	do	do	2300.	
		Exchange	287.54	$4887.54

9.—That when the said Willis Faber Co. of Canada Ltd. discovered the said embezzlements, thefts and defalcations on or about the first February, 1922, it gave notice to and made a claim upon the plaintiff for payment of the sum of $5,000.00, the amount of the aforesaid policy of insurance;

10.—That the plaintiff denied liability for the said loss upon the ground that such loss was due to the fault and negligence of the defendant Bank which was legally liable therefor, and that the said Willis Faber Co. of Canada Ltd. thereupon entered action against the plaintiff, the said action bearing No. 5385 of the record of the Superior Court, District of Montreal;

11.—That by judgment rendered on the 6th November, 1923, the action aforesaid entered by the said Willis Faber Co. of Canada Ltd., against the present plaintiff, was maintained and the present plaintiff was condemned to pay to the said Willis Faber Co. of Canada Ltd. the sum of $5,000.00 with interest from the 14th July, 1922, and costs;

12.—That on the 17th November, 1923, the plaintiff by means of a letter written by Messrs. Foster, Mann, Place, Mackinnon, Hackett & Mulvena, its attorneys, notified the defendant Bank of the aforesaid judgment and required the said Bank to pay and satisfy the same, together with all costs incurred up to date, at the same time notifying the defendant Bank that in default of such payment and

satisfaction, an inscription in appeal would be made against the judgment in question, and that the defendant Bank would be held responsible for all loss, costs and damage which might result, including not only the amounts incurred to the aforesaid date, but also the costs in appeal and any further legal fees which might be incurred; the whole as appears by copy of the aforesaid letter herewith produced and filed as Plaintiff's Exhibit P-2, the original whereof the defendant is hereby required to produce;

13.—That the defendant Bank answered the aforesaid letter by letter dated 21st November, 1923, repudiating any liability; the whole as appears by the said letter herewith produced and filed as Plaintiff's Exhibit P-3;

14.—That thereupon the present plaintiff did inscribe in appeal against the aforesaid judgment, and by judgment of the Court of King's Bench, Appeal Side, rendered on the 20th March, 1924, the judgment of the Superior Court was confirmed and the present plaintiff was condemned, in addition to the prior judgment, to pay the costs of the said appeal;

15.—That the plaintiff has since paid the aforesaid judgment, together with interest thereon, and the taxable costs in both courts payable to the attorneys of the said Willis Faber Co. of Canada Ltd., making altogether the sum of $6,247.42, at the same time taking subrogation of all the right, title and interest and the recourses of the said Willis Faber Co. of Canada Ltd. in and to the aforesaid sum; the whole as appears by the aforesaid discharge with subrogation, herewith produced and filed as Plaintiff's Exhibit P-4;

16.—That furthermore, the present plaintiff incurred taxable costs and legal expenses in defending the aforesaid action, amounting to the sum of $1,318.19; the whole as appears by the statement herewith produced and filed as Plaintiff's Exhibit P-5, and that the plaintiff took transfer with subrogation from its attorneys for the aforesaid sum; the whole as appears by the said subrogation herewith produced and filed as Plaintiff's Exhibit P-6;

17.—That by reason of the illegal, wrongful and grossly negligent acts of the defendant Bank, and those for whom it is responsible, in not inquiring into the scope of the power and authority of the said K. V. Rogers, and in putting him in a position to commit the aforesaid defalcations, theft and embezzlements, by its behaviour as above set forth, the plaintiff has suffered loss, cost, damage and expense amounting to the aforesaid sums of $6,247.42 and $1,318.19, making

In the Superior Court.

No. 1. Plaintiff's Declaration, 15th May, 1924. *(continued).*

a total of $7,565.61, which the plaintiff is entitled to have and recover from the said defendant by way of damages suffered and by reason of the transfers with subrogation aforesaid;

18.—That the plaintiff has demanded payment from the defendant Bank by letter dated March 25th, 1924, signed by its attorneys, Messrs. Foster, Mann, Place, Mackinnon, Hackett & Mulvena; as appears by a copy of the said letter herewith produced and filed as Plaintiff's Exhibit P-7, but the defendant Bank has failed and neglected to pay the aforesaid sum or any part thereof;

19.—That by reason of the foregoing the plaintiff is entitled to judgment against the defendant Bank for the said sum of $7,565.61, with interest from this date and costs;

Wherefore plaintiff prays judgment against the defendant Bank for the said sum of $7,565.61 with interest and costs.

Montreal, May 15th, 1924.

Foster, Mann, Place, Mackinnon,
Hackett & Mulvena,
Attorneys for Plaintiff.

PLEA

In the Superior Court.

No. 2. Defendant's Plea, 29th May, 1924.

The defendant for plea to the plaintiff's declaration saith:—

1.—That it is ignorant as to the truth of the allegations contained in paragraphs 1, 2, 3, 4, 9, 10, 11, 14, 15 and 16 of the plaintiff's declaration.

2.—That it denies paragraphs 5, 6, 8, 17 and 19 of the said declaration.

3.—That it denies paragraph 7 of the said declaration except in so far as the allegations thereof are in accordance with this its plea.

4.—That as to paragraphs 12 and 13 of the said declaration, the letters therein referred to speak for themselves, and the plaintiff denies the said paragraphs otherwise except in so far as the allegations thereof are in accordance with this its plea.

5.—That as to paragraph 18, the letter therein referred to speaks

for itself and was promptly repudiated in the defendant's letter in answer thereto.

And the defendant further alleges:—

6.—That even if the alleged subrogation were effective (which is not admitted) the said Willis Faber Company of Canada Limited had no claim or rights against the defendant in the premises.

7.—That if the said Willis Faber Company suffered any loss or damage through the said K. V. Rogers (which is not admitted) it was not in any way due to any acts or negligence of the defendant or of any person for whom it is responsible.

8.—That in addition and prior to the drafts referred to in paragraph 8 of the plaintiff's declaration, the said Willis Faber Company issued cheques to the order of the defendant by means of which the said K. V. Rogers obtained other drafts to his own order on the following dates and for the following amounts:—

1919	Sept. 27	$250.00
	Oct. 10	260.00
1920	Mar. 19	187.50
	May 3	300.00
	May 13	550.00
	May 27	550.00
	June 7	300.00
	June 7	300.00
	Aug. 18	210.00
	Sept. 10	300.00
	Sept. 10	300.00
	Sept. 10	300.00
	Oct. 4	475.00
	Oct. 28	300.00
	Oct. 28	300.00
	Dec. 1	500.00
	Dec. 17	400.00
	Dec. 17	400.00
1921	Apr. 15	300.00
	Apr. 15	300.00

9.—That before that (in the year 1912) the defendant was furnished by the said Willis Faber Company with certified minutes naming the said K. V. Rogers as one of the signing officers of the said company with wide powers in that connection.

In the Superior Court.

No. 2. Defendant's Plea, 29th May, 1924. *(continued).*

10.—That for ten years or more before the 1st February, 1922, when the plaintiff alleges (paragraph 9 of the declaration) that " Willis Faber Company of Canada Limited ' discovered the said embezzlement thefts and defalcations ' " and gave notice to the plaintiff in that regard, the said K. V. Rogers was treated by the said Willis Faber Company as a trusted and responsible official of that company.

11.—That the said Willis Faber Company issued and signed by its qualified officers cheques to the order of the defendant covering all of the said drafts which K. V. Rogers obtained to his own order on and after the 27th September, 1919.

12.—That in addition to the large number of drafts which the Willis Faber Company's official K. V. Rogers obtained to his own order aforesaid the said K. V. Rogers also obtained for Willis Faber Company from the defendant more than eighty other drafts between the years 1910 and 1922 to the order of various persons and which were obtained by precisely the same procedure and upon precisely similar cheques to the order of the defendant.

13.—That in any event, the defendant had reasonable ground to think that the Willis Faber Company authorized and approved the actions of the said K. V. Rogers with regard to all of the said drafts and cheques throughout.

14.—That if the Willis Faber Company had not intended that the defendant should understand that K. V. Rogers was authorized to obtain drafts such as he did obtain, then the Willis Faber Company could and should have done the following things, any of which would have prevented the alleged loss and damage, namely:—

(a) The company's proper representative should have inquired from K. V. Rogers as to why he wanted the several cheques which had to be signed and surrendered to enable him to get the drafts to his own order;

(b) Those cheques should then have been marked by the company's proper representative so as to show to the defendant that they were intended only for a special purpose;

(c) The company should have ascertained promptly for the first such cheque that was issued in September, 1919, and for each subsequent such cheque what they were in fact used for, instead of furnishing the said K. V. Rogers with all of the cheques in 1919, 1920, 1921 and 1922 with which he obtained over forty similar drafts

totalling about $20,000.00, and in each case such information should have been obtained before signing and surrendering to K. V. Rogers the next subsequent cheque for a similar purpose;

(d) The company should not have waited nearly three years from the commencement by K. V. Rogers of the practices now complained of;

15.—That the defendant acted throughout in good faith in dealing with the said K. V. Rogers as the mandatory of the Willis Faber Company and under the belief that he was so.

16.—That the said Willis Faber Company as mandator gave reasonable cause for such belief.

17.—That there was no reason why the defendant should have doubted the requisition notes on which the said K. V. Rogers obtained the drafts in question, particularly as a reasonable explanation would be that the Willis Faber Company preferred to handle their foreign remittances by means of drafts obtained to the order of one of their own trusted officials and signing officers with the intention that that person should then endorse the draft over to the correspondent for whom it was intended, the whole with the purpose of avoiding any risk of their competitors or any other unsuitable persons learning the facts.

18.—That if the Willis Faber Company had exercised ordinary and reasonable care and prudence no loss or damage would have occurred.

19.—That the defendant is not indebted to the plaintiff in any amount for any cause or reason whatever.

Wherefore the defendant prays that the plaintiff's action be dismissed with costs.

Montreal, 29th May, 1924.

Meredith, Holden, Hague,
Shaughnessy & Heward,
Attorneys for Defendant.

In the Superior Court.

No. 3. Defendant's bill of particulars, 17th June, 1924.

DEFENDANT'S BILL OF PARTICULARS

The defendant for particulars in compliance with the judgment on the plaintiff's motion for particulars alleges,—

1.—As to paragraph 9 of the defendant's plea, that a copy of the minutes therein referred to is herewith filed as defendant's exhibit D-1, and the wide powers referred to are the powers granted in and by the said minutes.

2.—As to paragraph 12 of the said plea, that a statement of the said eighty-eight drafts with the particulars asked for is herewith filed as defendant's exhibit D-2;

3.—As to paragraph 13 of the said plea, the defendant's ground for thinking that the Willis Faber Company had authorized and approved the actions of Rogers consisted of the exhibits herewith filed and the facts alleged and referred to herein and in the defendant's said plea;

4.—That as to paragraph 16 of the said plea, that the defendant's reasonable cause for the belief referred to consisted of the exhibits herewith filed and the facts alleged and referred to herein and in the defendant's said plea;

5.—As to paragraph 18 of the said plea, that the ordinary and reasonable care and prudence which the Willis Faber Company failed and neglected to exercise consisted of the following,—

(a) It permitted K. V. Rogers, without other supervision or confirmation, to make out on its behalf the usual requisitions addressed to the defendant for its money orders, including the money orders now alleged to have been improperly obtained and used by him;

(b) It did not put any notation on the cheques that it furnished to K. V. Rogers or otherwise ear-mark them so as to indicate to whom it might concern and particularly to the present defendant that they were intended for any particular money orders, and therefore that K. V. Rogers was not authorized to deal with them as he thought fit as their accountant and signing officer;

(c) It did not make or cause to be made at frequent intervals suitable audits of the work done by its accountant, K. V. Rogers, and particularly of the money orders obtained by him on the cheques with which they furnished him;

In the Superior Court.

No. 3. Defendant's bill of particulars, 17th June, 1924. *(continued).*

(d) It did not take out any suitable balance sheet or take other effective steps at frequent intervals to verify and check up the cheques that it furnished to K. V. Rogers in connection with the money orders that it intended that he should properly obtain with those cheques, nor did it even ascertain what he did use those cheques for, either by inquiry from its customers or from the present defendant or otherwise.

And the defendant further alleges as to the said paragraph 18 that there may be other respects in which the Willis, Faber Company did not exercise ordinary and reasonable care and prudence in the carrying on of its business and in connection with said K. V. Rogers, of which the present defendant is ignorant but which would have served to prevent the actions of K. V. Rogers now complained of.

Montreal, 17th June, 1924.

Meredith, Holden, Hague, Shaughnessy & Heward,

Attorneys for Defendant.

In the Superior Court.

No. 4. Plaintiff's answer to Defendant's Plea and particulars thereof, 7th Nov., 1924.

PLAINTIFF FOR ANSWER TO DEFENDANT'S PLEA AND THE PARTICULARS THEREOF, SAYS:

1.—That it joins issue with the defendant on the allegations contained in paragraphs 1, 2, 3, 4 and 5 of said plea;

2.—That it denies the allegations contained in paragraphs 6 and 7 of said plea;

3.—That as to paragraph 8 of said plea Plaintiff is ignorant thereof, but avers that the said allegation is irrelevant, immaterial and in no way affects the present issues;

4.—That as to paragraph 9 and the particulars filed in support thereof, the Exhibit D-1 therein referred to speaks for itself;

5.—That as to paragraph 10 of said plea, it denies the same, except in so far as it is alleged that K. V. Rogers was treated as a trusted and responsible official of the Company;

6.—That as to paragraph 11 of said plea it denies the same;

7.—That as to paragraph 12 of said plea, and the particulars in support thereof, said Exhibit D-2 speaks for itself, but plain-

In the Superior Court.

No. 4. Plaintiff's answer to Defendant's Plea and particulars thereof, 7th Nov., 1924.

(continued).

tiff avers that the said allegation is irrelevant, immaterial and in no way affects the present issues, otherwise the said allegation is denied;

8.—That as to paragraph 14, sub-paragraphs (a), (b), (c), (d), it denies the same and avers that there was no obligation on the part of the said Willis Faber Company Limited to do the things set forth in said paragraph 14, sub-paragraphs (a), (b), (c) and (d), and the said Company had no reason to suspect the practices of the said K. V. Rogers and only discovered his dishonest acts after he had left the said Company's employment and the City of Montreal.

9.—That as to Paragraph 15 of said plea, plaintiff is ignorant as to whether defendant acted in good faith or not, but avers that it acted carelessly, negligently and without due precaution and care, and denies that it acted in the belief that the said K. V. Rogers was the agent of said Willis Faber & Company Limited;

10.—That as to paragraph 16, and the particulars in support thereof, the Exhibits referred to in said paragraph speak for themselves, but the effect thereof and the allegations of said paragraph are denied;

11.—That as to paragraphs 17 and 19 and 13 of said plea, it denies the same;

12.—That as to paragraph 18 and the particulars in support thereof, it denies the same and avers that there was no legal obligation on the part of the said Willis, Faber & Company, Limited, to do the things set forth in said paragraph 18, sub-paragraphs (a), (b), (c) and (d) of the particulars in support of said paragraph;

Wherefore, plaintiff prays the dismissal of defendant's plea, with costs.

Montreal, November 7th, 1924.

Foster, Mann, Place, Mackinnon, Hackett & Mulvena,
Attorneys for Plaintiff.

DEFENDANT'S REPLY TO PLAINTIFF'S ANSWER TO PLEA.

In the Superior Court.

No. 5. Defendant's reply to Plaintiff's Answer, 12th Nov., 1924.

The defendant for reply to the plaintiff's answer to plea saith,—

1.—That it denies paragraphs 3, 7, 8, 9 and 12 of the plaintiff's answer to plea.

2.—That it joins issue with the plaintiff on all the other allegations thereof.

Wherefore the defendant prays that the plaintiff's answer to plea be dismissed with costs.

Montreal, 12th November, 1924.

Meredith, Holden, Hague, Shaughnessy & Heward,

Attorneys for Defendant.

In the Superior Court.

PART II — EXHIBITS

Defendant's Exhibit D-1 filed with Defendant's bill of particulars. Extract from minutes of meeting of directors of Willis Faber & Co. of Canada, Ltd., held on 8th July, 1912.

DEFENDANT'S EXHIBIT D-1 WITH BILL OF PARTICULARS

Extract from minutes of meeting of Directors of Willis Faber Co. of Canada Limited certified by Secretary.

Extract from minutes of the meeting of Directors of Willis, Faber & Co. of Canada Limited, held at the office of the company in the City of Montreal, on the 8th day of July, 1912, at 11.30 a.m.

" 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 authorized to make all contracts and engagements other than the foregoing for and on behalf of the Company and that this resolution 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 moved and unanimously resolved that whereas this Company has been appointed chief agents for the Dominion of Canada for the Provincial Insurance Company of Bolton, England, that any two of the following persons, namely, Mr. Raymond, Willis, President, Mr. O. W. Dettmers, Director, Mr. E. N. Mercer, Director, and Mr. 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 this Company and that Mr. Raymond Willis, President, Mr. O. W. Dettmers, Director and Mr. E. N. Mercer, Director, and either of them singly be and they are hereby authorized to sign, make, execute, and enter into all contracts, engagements, policies, interim receipts and other documents (not being

In the Superior Court.

Defendant's Exhibit D-1 filed with Defendant's bill of particulars. Extract from minutes of meeting of directors of Willis Faber & Co. of Canada, Ltd., held on 8th July, 1912. *(continued).*

those enumerated above and required to be executed by two persons at least) for and in the name of this Company as chief agents for the Provincial Insurance Company of Bolton, England, and that this resolution 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.

I certify the above as a true copy.

E. N. MERCER,
Secretary.

In the Superior Court.

Defendant's Exhibit D-2 filed with Defendant's bill of particulars. Statement of 88 drafts.

DEFENDANT'S EXHIBIT D-2 WITH BILL OF PARTICULARS

Statement of eighty-eight drafts.

Re: Dominion Gresham Guaranty & Casualty Company

— vs —

Bank of Montreal.

List of drafts obtained by K. V. Rogers for Willis Faber Company apart from drafts payable to his own order and referred to in paragraph 12 of defendant's plea, all being drafts on New York.

Date		Favour of
1910		
Jan.	17	Johnson & Higgins
Feb.	3	Starkweather & Shipley, Inc.
May	16	Johnson & Higgins
1911		
June	20	D. B. Ten Eyck
Sept.	20	Little & Loomis
Nov.	23	Home Insurance Company
1912		
Feb.	23	Home Insurance Company
Feb.	29	Home Insurance Company
Mar.	12	Rough Notes Company

In the Superior Court.

Defendant's Exhibit D-2 filed with Defendant's bill of particulars. Statement of 88 drafts.

(continued).

1918		
Nov.	30	Johnson & Higgins
1919		
Jan.	4	United Marine Agency
Jan.	4	Johnson & Higgins
Jan.	8	Koehler & Kemp
Jan.	29	Johnson & Higgins
Mar.	12	Johnson & Higgins
Mar.	31	Johnson & Higgins
May	23	Johnson & Higgins
Aug.	12	Johnson & Higgins
Sept.	16	Johnson & Higgins
Nov.	6	Johnson & Higgins
1920		
Jan.	13	Johnson & Higgins
Mar.	2	Johnson & Higgins
Mar.	2	Dale & Company, Ltd.
Mar.	5	Johnson & Higgins
Mar.	12	Johnson & Higgins
Mar.	19	Johnson & Higgins
Apr.	3	Johnson & Higgins
May	4	Johnson & Higgins
May	8	Johnson & Higgins
June	1	Dale & Co., Limited
June	1	Johnson & Higgins
June	16	Johnson & Higgins
June	22	Johnson & Higgins
Aug.	11	Hare & Mackenzie Ltd.
Aug.	11	Can. Gov. Merchant Marine Ltd.
Oct.	19	Johnson & Higgins
Oct.	19	Johnson & Higgins
Dec.	9	Hare & Mackenzie
Dec.	9	H. M. The King represented in his Dominions by the Min. of Marine & Fisheries.
Dec.	20	Can. Gov. Merchant Marine Ltd.
1921		
Jan.	10	Johnson & Higgins
Jan.	21	Nat. Union Fire Ins. Co. Pittsburgh
Feb.	8	Hare & Mackenzie, Ltd.
Feb.	8	Johnson & Higgins
Mar.	21	B. N. Dexton & Co., Inc.
Apr.	1	Johnson & Higgins

In the Superior Court.

Defendant's Exhibit D-2 filed with Defendant's bill of particulars. Statement of 88 drafts.

(continued).

June 17		Can. Gov. Merchant Marine Ltd.
June 17		Can. Gov. Merchant Marine Ltd.
June 17		Can. Gov. Merchant Marine Ltd.
June 17		Can. Gov. Merchant Marine Ltd.
Sept. 8		Hare & Mackenzie Limited
Sept. 8		Can. Gov. Merchant Marine Ltd.
Oct. 1		Law & Ins. Lithographic Co.
Oct. 18		The Salvage Ass'n. Great Lakes
Oct. 22		Lane Bryant (Corp'n.)
Oct. 29		Can. Gov. Merchant Marine Ltd.
Oct. 29		Can. Gov. Merchant Marine Ltd.
Oct. 29		Johnson & Higgins
Oct. 29		Hare & Mackenzie Ltd.
Oct. 29		Hare & Mackenzie Ltd.
Oct. 29		Hare & Mackenzie Ltd.
Oct. 29		Hare & Mackenzie Ltd.
Oct. 31		Can. Gov. Merchant Marine Ltd.
Oct. 31		Can. Gov. Merchant Marine Ltd.
Oct. 31		Can. Gov. Merchant Marine Ltd.
Dec. 8		Hare & Mackenzie Ltd.
Dec. 8		Can. Gov. Merchant Marine Ltd.
Dec. 8		Can. Gov. Merchant Marine Ltd.
1922		
Jan. 12		Can. Gov. Merchant Marine Ltd.
Jan. 12		Can. Gov. Merchant Marine Ltd.
Jan. 23		Can. Gov. Merchant Marine Ltd.
Jan. 23		Grand Pacific Coast S.S. Co. Ltd.
Jan. 30		Grand Pacific Coast S.S. Co. Ltd.
Feb. 27		Can. Gov. Merchant Marine Ltd.
Feb. 27		Can. Gov. Merchant Marine Ltd.
Feb. 27		Can. Gov. Merchant Marine Ltd.
Feb. 27		Can. Gov. Merchant Marine Ltd.
Feb. 27		Can. Gov. Merchant Marine Ltd.
Apr. 18		Ontario Car Ferry Co. Ltd.
Apr. 18		Johnson & Higgins (Can.) Ltd.
May 11		Smith & Smyth Inc.
June 12		American Bureau of Shipping
Aug. 30		A. L. Whitby
June 2,	1921,	Can. Gov. Merchant Marine Ltd.
June 2		B. N. Eaton & Co.
May 27,	1922,	Th. Jullum
May 26		Willis, Faber & Co. of Can. Ltd.
Apr. 18		Willis, Faber & Co. of Can. Ltd.

In the Superior Court.

Defendant's Exhibit D-2 on examination of O. Dettmers on discovery. Receipt statement of Willis, Faber & Co. against Johnson & Higgins, New York, for $259.69, 27th Sept., 1919.

DEFENDANT'S EXHIBIT D-2 ON EXAMINATION OF O. DETTMERS ON DISCOVERY

Receipt statement of Willis, Faber Co. against Johnson & Higgins, New York, for $259.69

Montreal, 27/9/19

Messrs. Johnson & Higgins, New York City.

In A/C with Willis, Faber & Co. of Canada, Limited

June 30, Commercial Company, ... $259.69

Cheque herewith:

Received payment, October 30th, 1919, Am't 259.69, Johnson & Higgins, per Ez. Loaden.

In the Superior Court.

Defendant's Exhibit D-3 on examination of O. Dettmers on discovery. Receipt statement of Willis, Faber & Co. of Canada, Ltd., against Johnson & Higgins, New York, for $270.40, 10th Oct., 1919.

DEFENDANT'S EXHIBIT D-3 ON EXAMINATION OF O. DETTMERS ON DISCOVERY

Receipt statement of Willis, Faber Coy., against Johnson & Higgins, New York, for $270.40

Montreal, Oct. 10/19

Messrs. Johnson & Higgins, No. 49 Wall Street, New York.

In A/C with Willis, Faber & Co. of Canada, Limited.

Aug. 14 Commercial Company $270.40

Draft herewith.

Received payment October 15th, 1919, Am't $270.40, Johnson & Higgins, per H. F. Knox.

In the Superior Court.

Defendant's Exhibit D-4 on examination of O. Dettmers on discovery. Part of fifty documents, consisting of Willis, Faber & Co. of Canada, Ltd., cheques between Sept. 27th, 1919, and 4th July, 1921, corresponding requisition notes and New York drafts, and including a list of the cheques.

DEFENDANT'S EXHIBIT D-4 ON EXAMINATION OF DETTMERS ON DISCOVERY

Part of 50 documents consisting of Willis, Faber Coy., cheques between 27th Sept., 1919, and 4th July, 1921, corresponding requisition notes and New York drafts and including a list of the cheques.

List of cheques issued by Messrs. Willis, Faber & Co., of Canada Limited, and used by K. V. Rogers to purchase drafts on New York payable to himself.

Cheque No.	Date	Name of Payee	Amount	Buys N. Y. Draft No.		Amount
8919	27th Sept. 1919	Bank of Montreal	$ 259.69	Draft not received from Bank		
8968	10th Oct. "	do	270.40	24861		$260.00
9541	18th Mar. 1920	do	245.22	33936	J. & H.	31.47
				33937		187.50
9609	12th Apr. "	do	247.52	Draft not received from Bank		
9734	3rd May "	do	331.20	36124		300.00
9764	14th May "	do	611.87	36684		550.00
9791	27th May "	do	619.44	37366		550.00
9823	7th June "	do	676.52	37755		300.00
				37756		300.00
10040	18th Aug. "	do	237.32	41375		210.00
10156	10th Sept. "	do	1,007.85	42681		300.00
				42682		300.00
				42683		300.00
10232	4th Oct. "	do	524.89	43808		475.00
10292	28th Oct. "	do	663.02	45193		300.00
				45194		300.00
10493	1st Dec. "	do	571.27	47044		500.00
10541	16th Dec. "	do	938.86	47867		400.00
				47868		400.00
10987	15th Apr. 1921	do	678.24	53441		300.00
				53440		300.00

In the Superior Court.

Defendant's Exhibit D-4 on examination of O. Dettmers on discovery. Part of fifty documents, consisting of Willis, Faber & Co. of Canada, Ltd., cheques between Sept. 27th, 1919, and 4th July, 1921, corresponding requisition notes and New York drafts, and including a list of the cheques.

(continued).

No. 8919 Montreal, September 27th, 1919

Bank of Montreal

Pay to Bank of Montreal ..... or order
Two Hundred Fifty-Nine Dollars Sixty-Nine Cents ..... Dollars

Willis, Faber & Co. of Canada, Limited

$259.69

K. V. Rogers, accountant O. W. Dettmers, Director.

Accepted Sept. 27th, 1919, Bank of Montreal, Montreal

(Endorsement)

Draft on New York to order of Johnson & Higgins.

Bank of Montreal, Montreal, Sept. 27, 1919. 19a.

REQUISITION NOTE

Montreal, Sept. 27th, 1919,

Wanted from the Bank of Montreal,	250.00
Draft on New York,	9.71
In favour of K. V. Rogers	
Applicant, Willis, Faber & Co. of Can. Ltd.	$259.71

Rate 3 7/8 Approved.

No. 8968 Montreal, October 10th, 1919.

Bank of Montreal

Pay to Bank of Montreal ..... or order
Two Hundred Seventy Dollars Forty Cents ..... Dollars

Willis, Faber & Co. of Canada, Limited

K. V. Rogers, accountant O. W. Dettmers, Director.
$270.40

Accepted Bank of Montreal, Montreal, Oct. 10th, 1919.

(Endorsement)

Bank of Montreal, Montreal, Oct. 10th, 1919. 19a.

In the Superior Court.

Defendant's Exhibit D-4 on examination of O. Dettmers on discovery. Part of fifty documents, consisting of Willis, Faber & Co. of Canada, Ltd., cheques between Sept. 27th, 1919, and 4th July, 1921, corresponding requisition notes and New York drafts, and including a list of the cheques.

(continued).

REQUISITION NOTE

Montreal, October 10th, 1919, No. 24861

Wanted from the Bank of Montreal,	260.00
Draft on New York,	10.42
In favour of K. V. Rogers	
Applicant, Willis, Faber & Co. of Can., Ltd.	$270.42
Rate 4% Approved C.	

No. 24861 $260.00

Bank of Montreal

Montreal, October 10th, 1919

Pay to the order of K. V. Rogers

Two Hundred and Sixty ..... Dollars

A. Fowler, Manager

A. Woodson, Accountant.

To the National City Bank, New York.

(Endorsement)

Pay to the order of Royal Bank of Canada, K. V. Rogers.

The Royal Bank of Canada, Oct. 11th, 1919.

Pay to the order of any Bank or Banker, The Royal Bank of Canada, Montreal.

Received payment, Chase National Bank, New York, No. 74.

In the Superior Court.

Defendant's Exhibit D-4 on examination of O. Dettmers on discovery. Part of fifty documents, consisting of Willis, Faber & Co. of Canada, Ltd., cheques between Sept. 27th, 1919, and 4th July, 1921, corresponding requisition notes and New York drafts, and including a list of the cheques.

(continued).

No. 9541 Montreal, March 18th, 1920

Bank of Montreal

Pay to Bank of Montreal ..... or order

Two Hundred Forty-Five Dollars Twenty-Two Cents..... Dollars

Willis, Faber & Co. of Canada, Limited

K. V. Rogers, accountant O. W. Dettmers, Director.

$245.22

Accepted March 19th, 1920. Bank of Montreal, Montreal.

(Endorsement)

Bank of Montreal, Montreal, March 19th, 1920. 19a.

REQUISITION NOTE

Montreal, March 19th, 1920

Wanted from the Bank of Montreal,	
Draft on New York,	187.50
In favour of K. V. Rogers	22.50
Applicant, Willis, Faber & Co.	
of Can. Ltd.	$210.00

Rate 12% Approved C.

PLAINTIFF'S EXHIBIT P-8

In the Superior Court.

Plaintiff's Exhibit P-8 filed at Enquête. Bundle of cheques, requisition notes and drafts from June 4, 1921, to July 2, 1921.

Bundle of Cheques, Requisition Notes and Drafts from June 4th, 1921, *to July* 2, 1921.

No. 82

Montreal, June 4th, 1921

Bank of Montreal

Pay to Bank of Montreal ..... or order

Ten Hundred Seventy-Nine Dollars Eighty-Six cents ..... Dollars

Willis, Faber & Co. of Canada, Limited

E. Mercer, Director.

K. V. Rogers, Accountant

$1079.86

Accepted June 6th, 1921, Bank of Montreal, Montreal.

(Endorsement)

Bank of Montreal, June 6th, 1921, C.

REQUISITION NOTE

Montreal, June 6th, 1921

Wanted from the Bank of Montreal,	320.00
Draft on New York,	320.00
In favour of K. V. Rogers	320.00
	$960.00
Applicant, Willis, Faber & Co. of Can. Ltd.	
Rate 12¾ Approved D.	122.46
	$1082.46

In the Superior Court.

Plaintiff's Exhibit P-8 filed at Enquête. Bundle of cheques, requisition notes and drafts from June 4, 1921, to July 2, 1921.

(continued).

No. 55648 $320.00

Bank of Montreal

Montreal, June 6th, 1921

Pay to the order of K. V. Rogers

Three Hundred and Twenty ..... Dollars

John Barlow, Manager.

W. J. Ropsey, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Pay to the order of any Bank or Banker, The Royal Bank of Canada, Montreal, Que.

Received Payment Through New York Clearing House, June 8th, 1921, Chase National Bank, New York. No. 74.

The Royal Bank of Canada, June 6th, 1921, F. Dep. Montreal.

No. 55647 $320.00

Bank of Montreal

Montreal, June 6th, 1921

Pay to the order of K. V. Rogers

Three Hundred and Twenty ..... Dollars

John Barlow, Manager.

W. J. Ropsey, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Pay to the order of any Bank or Banker, The Royal Bank of Canada, Montreal, Que.

Received Payment Through New York Clearing House, June 8th, 1921, Chase National Bank, New York. No. 74.

The Royal Bank of Canada, June 6th, 1921, F. Dep. Montreal.

In the Superior Court.

Plaintiff's Exhibit P-8 filed at Enquête. Bundle of cheques, requisition notes and drafts from June 4, 1921, to July 2, 1921. *(continued).*

No. 55646 $320.00

Bank of Montreal

Montreal, June 6th, 1921

Pay to the order of K. V. Rogers

Three Hundred and Twenty ..... Dollars

John Barlow, Manager.

10 W. J. Ropsey, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Pay to the order of any Bank or Banker, The Royal Bank of Canada, Montreal, Que.

20 Received Payment Through New York Clearing House, June 8th, 1921, Chase National Bank, New York. No. 74.

The Royal Bank of Canada, June 6, 1921, For. Dep. Montreal.

No. 112 Montreal, June 14th, 1921

30 Bank of Montreal

Pay to Bank of Montreal ..... or order

Sixteen Hundred Ten Dollars Fifty-five Cents ..... Dollars

Willis, Faber & Co. of Canada, Limited

E. Mercer, Director

K. V. Rogers, Accountant.

40 $1610.55

Accepted June 14th, 1921, Bank of Montreal, Montreal.

(Endorsement)

Bank of Montreal, Montreal June 14th, 1921. 5.

In the Superior Court.

Plaintiff's Exhibit P-8 filed at Enquête. Bundle of cheques, requisition notes and drafts from June 4, 1921, to July 2, 1921. *(continued).*

REQUISITION NOTE

Montreal, June 14th, 1921

Wanted from the Bank of Montreal,	477.00
Draft on New York,	477.00
In favour of K. V. Rogers	477.00
Applicant, Willis, Faber & Co.	$1431.00
of Can. Ltd.	178.03
Rate 12 7/16, Approved WJR.	$1609.03

No. 56268 $477.00

Bank of Montreal

Montreal, June 14th, 1921

Pay to the order of K. V. Rogers.

Four Hundred and Seventy-Seven.....Dollars

John Barlow, Manager.

Z. O. Ceeny, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Received Payment through New York Clearing House, June 18th, 1921, Chase National Bank, New York. No. 74.

Pay to the order of any Bank or Banker, The Royal Bank of Canada, Montreal, Que.

The Royal Bank of Canada June 16, 1921, For. Dep. Montreal.

In the Superior Court.

Plaintiff's Exhibit P-8 filed at Enquête. Bundle of cheques, requisition notes and drafts from June 4, 1921, to July 2, 1921. *(continued).*

No. 56267 $477.00

Bank of Montreal

Montreal, June 14th, 1921

Pay to the order of K. V. Rogers.
Four Hundred and Seventy-Seven.....Dollars

John Barlow, Manager.

Z. O. Ceeny, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Received Payment through New York Clearing House, June 18th, 1921, Chase National Bank, New York. No. 74.

Pay to the order of any Bank or Banker, The Royal Bank of Canada, Montreal, Que.

The Royal Bank of Canada June 14th 1921 For. Dept. Montreal.

No. 56266 $477.00

Bank of Montreal

Montreal, June 14th, 1921

Pay to the order of K. V. Rogers
Four Hundred and Seventy-Seven.....Dollars

John Barlow, Manager.

Z. O. Ceeny, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Received Payment through New York Clearing House, June 18th, 1921, Chase National Bank, New York. No. 74.

Pay to the order of any Bank or Banker, The Royal Bank of Canada, Montreal, Que.

The Royal Bank of Canada June 14th, 1921, For. Dept. Montreal.

In the Superior Court.

Plaintiff's Exhibit P-8 filed at Enquête. Bundle of cheques, requisition notes and drafts from June 4, 1921, to July 2, 1921.

(continued).

No. 156 Montreal, July 2nd 1921

Bank of Montreal

Pay to Bank of Montreal ..... or order

Seventeen Hundred Ten Dollars Two Cents ..... Dollars

Willis, Faber & Co. of Canada, Limited

E. Mercer, Director

K. V. Rogers, Accountant

$1710.02

Accepted July 2nd 1921, Bank of Montreal, Montreal.

(Endorsement)

Bank of Montreal July 2nd, 1921. Montreal 5

REQUISITION NOTE

Montreal, July 2nd, 1921

Wanted from the Bank of Montreal,	500.00
Draft on New York,	500.00
In favour of K. V. Rogers	500.00
	$1500.00
Applicant Willis, Faber & Co. of Can. Ltd.	206.31
Rate 13¾ Approved C.	$1706.31

In the Superior Court.

Plaintiff's Exhibit P-8 filed at Enquête. Bundle of cheques, requisition notes and drafts from June 4, 1921, to July 2, 1921. *(continued).*

No. 57196 $500.00

Bank of Montreal

Montreal, July 2nd, 1921

Pay to the order of K. V. Rogers.

Five Hundred ..... Dollars

R. Emsley, Manager.

John W. Barloup, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Pay to the order of Chase National Bank. — The Royal Bank of Canada, New York City.

Pay to the order of Any Bank or Banker. The Royal Bank of Canada, Montreal, Que.

No. 57197 $500.00

Bank of Montreal

Montreal, July 2nd, 1921

Pay to the order of K. V. Rogers.

Five Hundred ..... Dollars

R. Emsley, Manager.

John W. Barloup, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Received payment, through New York clearing house, July 6th, 1921. Chase National Bank, New York. No. 74.

Pay to the order of Any Bank or Banker. The Royal Bank of Canada, Montreal, Que.

The Royal Bank of Canada, July 2, 1921, For. Dep. Montreal.

In the Superior Court.

Plaintiff's Exhibit P-8 filed at Enquête. Bundle of cheques, requisition notes and drafts.

(continued).

No. 57198 $500.00

Bank of Montreal

Montreal, July 2nd, 1921

Pay to the order of K. V. Rogers.

Five Hundred ..... Dollars

R. Emsley, Manager.

John W. Barloup, Accountant.

To the National City Bank, New York.

(Endorsement)

K. V. Rogers.

Received payment, through New York clearing house, July 6th, 1921. Chase National Bank, New York. No. 74.

Pay to the order of Any Bank or Banker. The Royal Bank of Canada, Montreal, Que.

The Royal Bank of Canada, July 4th, 1921, For. Dep. Montreal.

In the Superior Court.

Defendant's Exhibit D-5 on examination of O. Dettmers on discovery. Statement of amounts stolen by K. V. Rogers between 14th June, 1919, and 10th Jan., 1922, as prepared by Fisk Skelton & Co., auditors.

DEFENDANT'S EXHIBIT D-5 ON EXAMINATION OF DETTMERS ON DISCOVERY

Statement of amounts stolen by K. V. Rogers between 14th *June,* 1919, *and* 10th *Jan.,* 1922, *as prepared by Fisk Skelton and Company, Auditors.*

Willis, Faber and Company of Canada, Limited
Montreal, Quebec

Statement of amounts stolen by K. V. Rogers from 14th June, 1919, to 23rd May, 1920

1919.			
June 14	Cash from O. W. Dettmers A/C	57.62	
	Cash from E. N. Mercer A/C	19.05	
	Cash from L. E. Hamel A/C	15.00	
	Cash from N. W. Lyster A/C	47.25	138.92

Covered by crediting cheque received from Crum & Forster $300.97 to their A/C as $162.05 and applying balance to Credit of the above a/cs $138.92.

In the Superior Court.

Defendant's Exhibit D-5 on examination of O. Dettmers on discovery. Statement of amounts stolen by K. V. Rogers between 14th June, 1919, and 10th Jan., 1922, as prepared by Fisk Skelton & Co., auditors.

(continued).

1919.				
June 21	Cash from Canadian Express Co.	19.00		
	Cash from J. H. Aube	27.75		
	Cash from E. N. Mercer	2.05	48.80	
	Cheque received from Dom. Canners Ltd. $348.41 credited as $160.69 to their a/c and balance applied to credit of above a/cs $48.80 and to credit of Crum & Forster $138.92.			
1919.				
July 10	Can. Lime & Builders	37.50		
	Northern Assurance	99.20		
	Dom. Iron & Steel	22.00	158.70	
	Cheque received from Dom. Canners Ltd. $754.67 credited as $595.97 to their a/c and balance applied to credit of above a/cs $158.70.			
1919.				
July 16	E. N. Mercer		40.00	
	Cheque received from Dom. Iron & Steel Co. Ltd. $277.50 credited as $237.50 to their account and balance applied to credit of above account $40.00.			
1919.				
July 17	E. N. Mercer	55.55		
	Dom. Furniture Mfg. Co	45.00	100.55	
	Cheque received from Guardian Assce. Co. $1130.50 credited as $645.53 to their account and balance applied to credit of above a/cs $100.55, and Dom. Iron & Steel $40. and Dom. Canners $346.42.			
1919.				
Aug. 6	L. Legault	14.00		
	O. W. Dettmers—Travelling Expense	12.00	26.00	512.97

In the Superior Court.

Defendant's Exhibit D-5 on examination of O. Dettmers on discovery. Statement of amounts stolen by K. V. Rogers between 14th June, 1919, and 10th Jan., 1922, as prepared by Fisk Skelton & Co., auditors *(continued).*

Cheque received from Guardian Assce. Co. $99.53 credited as $73.53 to their a/c and balance applied to credit of above a/cs $26.00.
Forward 512.97

The above shortage of $512.97 in Guardian Assce. Co. A/C was transferred by Journal Entry (J 206) to debit of Willis Faber & Co. Ltd. $4.85 a/c.

1919.

Sept. 27 Cheque No. 8919 drawn to order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Johnson & Higgins and forged receipt placed on fyle. Johnson & Higgins a/c was credited and Hare & MacKenzie debited by Day Book entry (91A) 259.69

1919.

Oct. 10 Cheque No. 8968 drawn to the order of Bank of Montreal used by K. V. Rogers to purchase draft on New York to his own order charged to Johnson & Higgins and forged receipt placed on fyle. Johnson & Higgins A/c was credited and Hare & Mackenzie debited by Day Book entry (94A) 270.40

Hare & MacKenzie A/c was balanced by crediting them with $530.09 and debiting Willis, Faber & Co. Ltd. $4.85 A/c with $495.89 and debiting Brokerage with $34.20 by Day Book entry (44B).

By Journal Entry (J 215) Cables & Telegraph were debited and Willis, Faber & Co. Ltd. $4.85 A/c credited with $26.00 instead of $17.14 a difference of $8.86. This left W. F. & Co. Ltd. A/c debited with $512.97 $495.89—$8.86 a net debit of $1,000 which was covered by debiting W. F. Co. Ltd. with Provincial Re-Insurance balance for July 1919 as $2,028.28 instead of $3,028.28.

In 1920 W. F. & Co. Ltd., $4.85 A/c was debited and Provincial R/I credited by Day Book entry (4C) with claim for $1,000.00. The claim for $1,000 in W. F. & Co. Ltd. A/c was off set by omitting their credit note for £75-13-2—$366.94 from Montreal Books and by Journal entry (J.257) debiting Guardian Assce. Co. and crediting W. F. & Co. Ltd. with $633.06.

In the Superior Court.

Defendant's Exhibit D-5 on examination of O. Dettmers on discovery. Statement of amounts stolen by K. V. Rogers between 14th June, 1919, and 10th Jan., 1922, as prepared by Fisk Skelton & Co., auditors.

(continued).

1920.			
March 18	Cheque No. 9541 drawn to the order of Bank of Montreal used to purchase draft on New York for $31.47 to the order of Johnson & Higgins with exchange thereon of $3.80 and draft on New York to order of K. V. Rogers for $187.50 and exchange thereon of $22.50, all of which were charged to Johnson & Higgins, difference of .05 in exchange was apparently paid in cash by Rogers		209.95
1920.			
May 6	Cheque No. 9734 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co., Ltd.		331.20
1920.			
May 8	Cash from O. W. Dettmers	37.15	
	Cash from Rock City Tobacco Company Ltd.	10.00	
	Cash from E. N. Mercer	49.52	
	Cash from Ryan Agency	13.68	110.35
	Cheque No. 9609 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Metal Shingle & Siding Co. Ltd		247.52
			689.07
	Cheque received from Can. Govt. Merchant Marine, Ltd. $1,576.23 credited as $887.16 to their A/c and balance applied to the credit of above A/cs, cheques No. 9734 & No. 9609 made to appear as having been redeposited in bank.		
1920.			
May 14	Cheque No. 9764 drawn to the order of Bank of Montreal used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd. $ A/c Day Book entry (13B) was made debiting Guardian Assurance Co. and crediting Willis, Faber & Co. Ltd. Guardian A/c was credited by applying part of cheque received from Can. Government Merchant Marine, Ltd. for $3,509.43		611.87
	Total Shortage to 23rd May, 1920		2,553.95

In the Superior Court.

Defendant's Exhibit D-5 on examination of O. Dettmers on discovery. Statement of amounts stolen by K. V. Rogers between 14th June, 1919, and 10th Jan., 1922, as prepared by Fisk Skelton & Co., auditors.

(continued).

Willis, Faber and Company of Canada, Limited,
Montreal, Quebec.

Statement of amounts stolen by K. V. Rogers from 27th May, 1920, to 23rd May, 1921

1920.

May 27—Cheque No. 9791 drawn to the order of Bank of Montreal used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd. $ A/c Journal entry (J 236) made to debit Guardian Assce. Co. and to credit W. F. & Co. Ltd. Guardian $ A/c was credited by applying part of cheque received from Can. Government Merchant Marine, Ltd. for $3,509.43 ..... 619.44

1920.

June 7 Cheque No. 9823 drawn to the order of Bank of Montreal used by K. V. Rogers to purchase draft on New York to his own order charged to Guardian Assce. Co. Guardian A/c was credited by applying part of cheque received from Can. Government Merchant Marine Ltd. for $1,573.82 ..... 676.52

On 22nd Dec., 1920 Journal entry (J 249) was made debiting Johnson & Higgins and crediting Can. Government Merchant Marine, Ltd. with $2,596.90 to balance debits of $689.07—$611.87—$619.44 & $676.52, thus balancing Canadian Government Merchant Marine Ltd. A/c.

Johnson & Higgins A/c contained entries covering Marine & Fire premiums, Claims & Pool Commission in Sterling, U. S. and Canadian Funds, making a verification of the balance shown almost impossible.

1920.

Aug. 18 Cheque No. 10040 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to B. N. Exton & Co. Journal Entry (J. 239) debited Johnson & Higgins and credited B. N. Exton & Co 237.32

1920.

Sept. 10 Cheque No. 10156 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Johnson & Higgins 1,007.85

In the Superior Court.

Defendant's Exhibit D-5 on examination of O. Dettmers on discovery. Statement of amounts stolen by K. V. Rogers between 14th June, 1919, and 10th Jan., 1922, as prepared by Fisk Skelton & Co., auditors.

(continued).

1920.			
Oct. 4	Cheque No. 10232 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Johnson & Higgins	524.89	
1920.			
Oct. 28	Cheque No. 10292 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Johnson & Higgins	663.02	
1920.			
Dec. 1	Cheque No. 10493 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Johnson & Higgins	571.27	
1920.			
Dec. 16	Cheque No. 10541 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order charged to Willis, Faber & Co. Ltd. Journal entry (J 253) debited Guardian Assce. Co. and credited W. F. & Co. Ltd. with $712.19	712.19	
	Day Book entry (150A) debited Little & Loomis and credited W. F. & Co. Ltd. with	226.67	938.86
	This latter amount was charged against Pool Commissions at credit of Little & Loomis, which they had no means of verifying.		
1921.			
Apl. 15	Cheque No. 10987 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd. $ A/c	678.24	
	Total Shortage 27th May, 1920 to 23rd May, 1921		5,917.41

In the Superior Court.

Defendant's Exhibit D-5 on examination of O. Dettmers on discovery. Statement of amounts stolen by K. V. Rogers between 14th June, 1919, and 10th Jan., 1922, as prepared by Fisk Skelton & Co., auditors.

(continued).

Willis, Faber and Company of Canada, Limited,
Montreal, Quebec.

Statement of amounts stolen by K. V. Rogers from 4th June, 1921, to 10th January, 1922.

1921.		
June 4	Cheque No. 82 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Canadian Government Merchant Marine, Ltd	1,079.86
1921.		
June 14	Cheque No. 112 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd.	1,610.55
1921.		
July 2	Cheque No. 156 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Canadian Government Merchant Marine, Ltd	1,710.02
	Journal entry (J 281) debited Willis, Faber & Co. Ltd. $ A/c and credited Can. Government Merchant Marine, Ltd. $2,789.88 to cover cheques No. 82—$1,079.86 and No. 156—$1,710.02.	
1921.		
Aug. 25	Cheque No. 330 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Canadian Government Merchant Marine Ltd	1,334.27
	Journal entry (J 290) debited Willis, Faber & Co. Ltd. $ A/c and credited Can. Government Merchant Marine Ltd. $1,334.27.	

In the Superior Court.

Defendant's Exhibit D-5 on examination of O. Dettmers on discovery. Statement of amounts stolen by K. V. Rogers between 14th June, 1919, and 10th Jan., 1922, as prepared by Fisk Skelton & Co., auditors.

(continued).

1921.		
Sept. 29 Cheque No. 435 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd		771.79
1921.		
Oct. 22 Cheque No. 11127 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd		883.29
1921.		
Nov. 8 Cheque No. 11200 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Canadian Government Merchant Marine Ltd. debit to C.G.M.M. Ltd. covered by transfer by Journal Entry (J 293) from Johnson & Higgins of amount received from them for Pool Commission and credited on Cash Book page 252		478.54
1921.		
Dec. 31 Cheque No. 11403 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Can. Government Merchant Marine, Ltd		844.04
1922.		
Jan'y 10 Cheque No. 11452 drawn to the order of Bank of Montreal, used by K. V. Rogers to purchase two drafts on New York to his own order, charged to Willis, Faber & Co. Ltd		4,881.79
Total Shortage 4th June, 1921 to 10th January, 1922		13,594.15

In the Superior Court.

Plaintiff's Exhibit P-1 filed with return of action 19th May, 1921. Collective Fidelity Guarantee Bond of the Dominion Gresham Guarantee & Casualty Co., No. 79076, in favour of Willis, Faber & Co. of Canada, Ltd., & al., for the sum of $17,000.00.

PLAINTIFF'S EXHIBIT P-1 WITH RETURN OF ACTION.

Collective Fidelity Guarantee Bond of the Dominion Gresham Guarantee & Casualty Co., No. 79076, in favor of Willis Faber & Co., of Canada Limited & al., for the sum of seventeen thousand dollars ($17,000.00).

Collective Fidelity Guarantee Bond.

No. 79076

The Dominion Gresham Guarantee & Casualty Company

Head office: Montreal.

Whereas Willis-Faber & Company of Canada, Limited, & Willis Faber & Company of Ontario, Limited, (hereinafter called the Employer) employs or intends to employ the persons named in the Schedule hereto (hereinafter called the Employees) in the several capacities in the said Schedule stated, and has made certain statements in writing to the Dominion Gresham Guarantee and Casualty Company (hereinafter called the Company) for this Policy.

Now this Policy witnesseth that in consideration of the material statements, warranties and conditions contained in the said statements, which statements, it is agreed, shall be the basis of this contract of insurance and of the sum of eighty-five dollars, the Company insures the Employer from the twenty-third day of May, 1921, to the twenty-third day of May, 1922, in manner following, that is to say:

Within three months after proof shall have been given to the satisfaction of the Directors, that the employer has, during the continuance of this policy sustained pecuniary loss by any embezzlement, theft or defalcation on the part of any employee in connection with any of the duties of such employee mentioned in the said application, the Company will make good to the Employer such loss or damage to the extent of the amount set opposite the name of such employee in the Schedule hereto.

Provided always that this policy is granted upon the following express conditions which shall be conditions precedent to the right of the Employer to recover under this policy:

1.—That on the discovery of any such embezzlement, theft or defalcation on the part of any employee, the Employer shall immediately give notice thereof in writing to the Company.

In the Superior Court.

Plaintiff's Exhibit P-1 filed with return of action 19th May, 1921. Collective Fidelity Guarantee Bond of the Dominion Gresham Guarantee & Casualty Co., No. 79076, in favour of Willis, Faber & Co. of Canada, Ltd., & al., for the sum of $17,000.00.

(continued).

2.—That full particulars of any loss in respect of which claim is made under the policy shall be given in writing, left at or mailed in registered letter to the Company's Head Office, Montreal, Quebec, within three months after the discovery thereof, and that the Company shall be entitled to call for at the Employer's expense, such reasonable particulars and proofs of the correctness of such claim, and of the correctness of the statements contained in the application for this policy, as the directors for the time being may require, and to have the same or any of them verified by Statutory Declaration.

3.—That the policy does not cover any such loss as aforesaid, sustained more than twelve months before claim is made in respect of it.

4.—That the business of the Employer shall continue to be conducted and the duties and (except that it may be increased) the remuneration of the Employees shall substantially remain in accordance with the statements made as aforesaid, and that if during the term of the policy any circumstances shall occur or change be made which shall have the effect of making the actual facts materially differ from such statements or any of them, without notice thereof being given to the Company at its Head Office in Montreal, and the consent or approval in writing of the Company being obtained, or if any material suppression or mis-statements of any fact affecting the risk be made as aforesaid, the policy shall be void and all premiums shall be forfeited to the Company.

5.—That the Employer shall not continue to entrust any employee with money or valuable property, after having discovered any act of embezzlement, theft or defalcation on the part of such employee, and shall immediately, upon becoming aware that any writ of attachment, execution of garnishment proceedings has issued against the property or salary of any employee give notice to the Company thereof.

6.—That the policy shall not be affected by any merely temporary interchange of situations, duties or responsibility of any of the employees which the Employer may find it necessary to make, during the term of the policy (provided that the business of the Employer shall continue to be conducted in accordance with the aforesaid statements, and that the consent of the Company is to be obtained to any continued or permanent change of such duties).

In the Superior Court.

Plaintiff's Exhibit P-1 filed with return of action 19th May, 1921. Collective Fidelity Guarantee Bond of the Dominion Gresham Guarantee & Casualty Co., No. 79076, in favour of Willis, Faber & Co. of Canada, Ltd., & al., for the sum of $17,000.00.

(continued).

7.—That the Employer shall, if, and when required by the Company (but at the expense of the Company if a conviction is obtained) use all diligence in prosecuting to conviction any employee for any dishonest or fraudulent act amounting to larceny, theft or embezzlement committed by such employee, and in consequence of which a claim shall have been made under the policy, and shall at the Company's expense, give all information and assistance to enable the Company to sue for and obtain reimbursement by such employee, or his estate of any moneys which the Company shall become liable to pay.

8.—That in case the Employer carries any other policy, or is otherwise guaranteed against loss covered by this policy, this Company shall be liable only for its pro rata share.

9.—That if the Company shall so elect this policy so far as concerns liability for the future defaults of any one or more of the employees, may be cancelled at any time by refunding a proportionate part of the premium paid less the proper portion for the time the insurance shall have been in force.

10.—That if the policy be renewed the statements, warranties and conditions made as aforesaid shall except as varied by any statement in writing made at the time such renewal be deemed to be repeated and to form the basis of such renewal, and the renewal shall be deemed to be a new policy similar in all respects to this policy and made upon the faith of such statements, warranties and conditions.

11.—Any action, suit or proceeding against the Company must be commenced within six months next after the first discovery of any such act of fraud or dishonesty as claim is made in respect of under this policy.

Witness the Corporate Seal of the Company and the signature of its President and General Manager at its Head Office in the City of Montreal, this nineteenth day of May, A.D. 1921.

Fred. W. Evans,
President.

R. Welch,
General Manager.

In the Superior Court.

Plaintiff's Exhibit P-1 filed with return of action 19th May, 1921. Collective Fidelity Guarantee Bond of the Dominion Gresham Guarantee & Casualty Co., No. 79076, in favour of Willis, Faber & Co. of Canada, Ltd., & al., for the sum of $17,000.00.

(continued).

THE DOMINION GRESHAM GUARANTEE AND CASUALTY COMPANY.

Head Office: 302 St. James Street, Montreal.

Collective Fidelity Guarantee Bond.

Bond No. 79076.

Issued on behalf of Willis-Faber & Co. of Canada, Limited,

&

Willis-Faber & Co. of Ontario, Limited.

Amount of Bond, $17,000.00.

Premium, $85.00.

Date May 23rd, 1921.

Expires May 23rd, 1922.

The Schedule Hereinabove Referred to.

Name	Address	Occupation	Date of Security	Amount Guaranteed
Rogers, K. V.	Montreal, Que.	Accountant,	May 23rd-1921	$5,000.00
Robinson, H. A.	Montreal, Que.	Asst. Accountant	May 23rd-1921	$1,000.00
Grégoire, H.	Montreal, Que.	Clerk,	May 23rd-1921	$1,000.00
Wilson, J. W.	Toronto, Ont.	Joint Manager	May 23rd-1921	$5,000.00
Slater, W. H.	Toronto, Ont.	Joint Manager	May 23rd-1921	$5,000.00

In the Superior Court.

Defendant's Exhibit D-6 at trial. Letter from Willis, Faber & Co. of Canada, Ltd., to Sir Frederick Williams-Taylor, Bank of Montreal, 22nd Nov., 1922.

DEFENDANT'S EXHIBIT D-6 AT TRIAL

Letter from Willis, Faber Coy., to Sir Frederick Williams-Taylor Bank of Montreal.

Montreal November 22/22

Sir Frederick Williams-Taylor,
General Manager,
Bank of Montreal,
Montreal, Que.

Dear Sir:—

Re: K. V. Rogers

You will remember that our late Accountant, K. V. Rogers, fraudulently induced your bank to make out New York drafts payable to his own order in exchange for cheques of our Company payable to the order of the Bank of Montreal, for a total of $21,442.19, as shown by the attached list.

These drafts he deposited to his own credit in other banks in this city.

The circumstances of the case were such that we felt there was liability on the part of the Bank of Montreal, and after placing the facts before our counsel, Mr. Eugène Lafleur, K.C., he advises us that our loss has been incurred through negligence on the part of the Bank for which it is responsible.

In view of the cordial relations which have always existed between us in the past, we have thought it only proper to write you before taking the matter up in a more formal way, and should you desire to discuss it with us we shall be very pleased to see you at any time convenient to yourselves.

We may say that we have an action pending against the Dominion Gresham Guarantee & Casualty Company for $5,000.00 under a fidelity policy of insurance, covering our late accountant; and this letter is written without prejudice to our rights in this action and

In the Superior Court.

Defendant's Exhibit D-6 at trial. Letter from Willis, Faber & Co. of Canada, Ltd., to Sir Frederick Williams-Taylor, Bank of Montreal, 22nd Nov., 1922. *(continued).*

under another small fidelity policy with the Guarantee Society of London—the latter having refused to settle until the Dominion Gresham case has been decided in our favor by the Courts.

Yours very truly,

Willis, Faber & Co. of Canada Limited,

O. W. Dettmers,

Director.

D/G

In the Superior Court.

Defendant's Exhibit D-1 on examination of O. Dettmers on discovery. Letter from Defendant to Willis, Faber Co. of Canada, Ltd., with accompanying list of 125 New York drafts purchased between 17th Jan., 1910, and 30th August, 1922. 19th Oct., 1923.

DEFENDANT'S EXHIBIT D-1 ON EXAMINATION OF O. DETTMERS ON DISCOVERY.

Letter from defendant to Willis, Faber Coy., of Canada Limited with accompanying list of 125 *New York drafts purchased between* 17th *Jan.* 1910 *and* 30th *August* 1922.

Bank of Montreal

Montreal, 19th October 1923

G.C.P.

Dear Sirs,

In accordance with your verbal request, we enclose herewith 125 (One hundred and twenty-five) New York drafts purchased by your Company between the 17th January 1910 and the 30th August 1922.

We shall be glad if you will kindly sign the form of receipt on the copy of the final sheet on which the drafts are listed and hand it to the bearer.

Yours faithfully,

G. C. Pratt,

Manager.

Messrs. Willis, Faber & Co. of Canada Ltd.,

42 St. Sacrament Street,

Montreal.

Enclosures.

Received October 20th 1923.

In the Superior Court.

Defendant's Exhibit D-1 on examination of O. Dettmers on discovery. Letter from Defendant to Willis, Faber Co. of Canada, Ltd., with accompanying list of 126 New York drafts purchased between 17th Jan., 1910, and 30th August, 1923. 19th Oct., 1923.

(continued).

Number	Date	Name of Payee	Amount
44613	17th Jan. 1910	Johnson & Higgins	$ 969.27
45339	3rd Feb. 1910	Starkweather & Shipley Inc	202.50
49332	16th May 1910	Johnson & Higgins	317.99
65000	21st June 1911	H. B. Ten Eyck	65.00
68428	20th Sept. 1911	Little & Loomis	12.04
70942	23rd Nov. 1911	Home Insurance Company	18.33
74478	23rd Feb. 1912	Home Insurance Company	36.09
74711	29th Feb. 1912	Home Insurance Company	8.59
75165	12th Mar. 1912	Rough Notes Co	8.10
10243	30th Nov. 1918	Johnson & Higgins	5,671.80
11617	6th Jan. 1919	United Marine Agency	3,399.26
11618	6th Jan. 1919	Johnson & Higgins	589.15
11774	8th Jan. 1919	Koehler & Kemp	20.00
12625	29th Jan. 1919	Johnson & Higgins	3,476.75
14351	12th Mar. 1919	Johnson & Higgins	2,359.12
15137	31st Mar. 1919	Johnson & Higgins	213.75
17628	23rd May 1919	Johnson & Higgins	159.34
21672	12th Aug. 1919	Johnson & Higgins	2,563.40
23527	16th Sept. 1919	Johnson & Higgins	10.97
24861	10th Oct. 1919	K. V. Rogers	260.00
26535	7th Nov. 1919	Johnson & Higgins	64.12
30550	13th Jan. 1920	Johnson & Higgins	171.00
32999	2nd Mar. 1920	Johnson & Higgins	100.94
32998	2nd Mar. 1920	Dale & Company Ltd	1,530.00
33183	5th Mar. 1920	Johnson & Higgins	34.28
33565	12th Mar. 1920	Johnson & Higgins	2,570.40
33936	19th Mar. 1920	Johnson & Higgins	31.47
33937	19th Mar. 1920	K. V. Rogers	187.50
34642	3rd Apr. 1920	Johnson & Higgins	213.75
36124	3rd May 1920	K. V. Rogers	300.00
36224	4th May 1920	Johnson & Higgins	76.25
36406	8th May 1920	Johnson & Higgins	2,295.00
36684	14th May 1920	K. V. Rogers	550.00

In the Superior Court.

Defendant's Exhibit D-1 on examination of O. Dettmers on discovery. Letter from Defendant to Willis, Faber Co. of Canada, Ltd., with accompanying list of 125 New York drafts purchased between 17th Jan., 1910, and 30th August, 1922. 19th Oct., 1923. *(continued).*

	Number	Date	Name of Payee	Amount
	37366	27th May 1920	K. V. Rogers	550.00
	37550	1st June 1920	Dale & Co. Ltd	547.77
	37549	1st June 1920	Johnson & Higgins	1,585.45
10	37755	7th June 1920	K. V. Rogers	300.00
	38197	16th June 1920	Johnson & Higgins	49.06
	41114	11th Aug. 1920	Hare & Mackenzie Ltd	141.46
	41115	11th Aug. 1920	Can. Govt. Merchant Marine Ltd	1,497.09
	41375	18th Aug. 1920	K. V. Rogers	210.00
	42681	13th Sept. 1920	K. V. Rogers	300.00
	42682	13th Sept. 1920	K. V. Rogers	300.00
	42683	13th Sept. 1920	K. V. Rogers	300.00
20	43808	4th Oct. 1920	K. V. Rogers	475.00
	44585	19th Oct. 1920	Johnson & Higgins Ltd	713.38
	44586	19th Oct. 1920	Johnson & Higgins Ltd	1,149.34
	45193	28th Oct. 1920	K. V. Rogers	300.00
	45194	28th Oct. 1920	K. V. Rogers	300.00
	47044	1st Dec. 1920	K. V. Rogers	500.00
	47488	9th Dec. 1920	Hare & Mackenzie Ltd	294.80
	47489	9th Dec. 1920	His Majesty the King, represented	
30			in His Dominion of Canada by the Minister of Marine and Fisheries	621.94
	47867	17th Dec. 1920	K. V. Rogers	400.00
	47677	14th Dec. 1920	Can. Govt. Merchant Marine Ltd	106.60
	48924	10th Jan. 1921	Johnson & Higgins	3.10
	49533	21st Jan. 1921	The National Union Fire Ins. Co., Pittsburg	36.98
40	50461	8th Feb. 1921	Hare & Mackenzie Ltd	137.12
	50462	8th Feb. 1921	Can. Govt. Merchant Marine Ltd	659.55
	52256	21st Mar. 1921	Johnson & Higgins	1,387.50
	52735	1st Apr. 1921	B. N. Exton & Co. Inc	590.90
	53441	15th Apr. 1921	K. V. Rogers	300.00
	53440	15th Apr. 1921	K. V. Rogers	300.00
	55648	6th June 1921	K. V. Rogers	320.00

In the Superior Court.

Defendant's Exhibit D-1 on examination of O. Dettmers on discovery. Letter from Defendant to Willis, Faber Co. of Canada, Ltd., with accompanying list of 125 New York drafts purchased between 17th Jan., 1910, and 30th August, 1922. 19th Oct., 1923.

(continued).

Number	Date	Name of Payee	Amount
55647	6th June 1921	K. V. Rogers	320.00
55646	6th June 1921	K. V. Rogers	320.00
56268	14th June 1921	K. V. Rogers	477.00
56267	14th June 1921	K. V. Rogers	477.00
56266	14th June 1921	K. V. Rogers	477.00
56508	17th June 1921	Can. Govt. Merchant Marine Ltd	148.35
56509	17th June 1921	Can. Govt. Merchant Marine Ltd	1,378.64
56510	17th June 1921	Can. Govt. Merchant Marine Ltd	21,294.28
56511	17th June 1921	Willis, Faber & Co. of Can. Ltd	54.11
57196	2nd July 1921	K. V. Rogers	500.00
57197	2nd July 1921	K. V. Rogers	500.00
57198	2nd July 1921	K. V. Rogers	500.00
00662	25th Aug. 1921	K. V. Rogers	400.00
660	25th Aug. 1921	K. V. Rogers	400.00
00661	25th Aug. 1921	K. V. Rogers	400.00
01223	8th Sept. 1921	Hare & Mackenzie Ltd	1,120.12
01224	8th Sept. 1921	Can. Govt. Merchant Marine Ltd	1,909.69
02433	30th Sept. 1921	K. V. Rogers	350.00
02434	30th Sept. 1921	K. V. Rogers	350.00
02474	1st Oct. 1920	Law & Insurance Lithographic Co	26.60
03290	18th Oct. 1920	The Salvage Association, Great Lakes Dept.	38.43
03584	22nd Oct. 1921	Lane Bryant	4.19
03604	24th Oct. 1921	K. V. Rogers	400.00
03603	24th Oct. 1921	K. V. Rogers	400.00
04012	29th Oct. 1921	Can. Govt. Merchant Marine Ltd	2.78
04013	29th Oct. 1921	Can. Govt. Merchant Marine Ltd	61.88
4011	29th Oct. 1921	Johnson & Higgins	1,665.60
04014	29th Oct. 1921	Hare & Mackenzie Ltd	100.00
04015	29th Oct. 1921	Hare & Mackenzie Ltd	10.00
04016	29th Oct. 1921	Hare & Mackenzie Ltd	5.00
04017	29th Oct. 1921	Hare & Mackenzie Ltd	187.11
04071	31st Oct. 1921	Can. Govt. Merchant Marine Ltd	150.00
04072	31st Oct. 1921	Can. Govt. Merchant Marine Ltd	8,829.14

In the Superior Court.

Defendant's Exhibit D-1 on examination of O. Dettmers on discovery. Letter from Defendant to Willis, Faber Co. of Canada, Ltd., with accompanying list of 125 New York drafts purchased between 17th Jan., 1910, and 30th August, 1922. 19th Oct., 1923. *(continued).*

Number	Date	Name of Payee	Amount
04073	31st Oct. 1921	Can. Govt. Merchant Marine Ltd	200.00
04488	9th Nov. 1921	K. V. Rogers	441.00
06183	8th Dec. 1921	Hare & Mackenzie Ltd	228.36
06184	8th Dec. 1921	Can. Govt. Merchant Marine Ltd	61.88
06185	8th Dec. 1921	Can. Govt. Merchant Marine Ltd	152.00
07542	3rd Jan. 1922	K. V. Rogers	400.00
07541	3rd Jan. 1922	K. V. Rogers	400.00
7980	10th Jan. 1922	K. V. Rogers	2,300.00
07981	10th Jan. 1922	K. V. Rogers	2,300.00
08056	12th Jan. 1922	Can. Govt. Merchant Marine Ltd	48.90
08057	12th Jan. 1922	Can. Govt. Merchant Marine Ltd	187.82
08500	23rd Jan. 1922	Can. Govt. Merchant Marine Ltd	48.03
	23rd Jan. 1922	Grand Trunk Pacific Coast Steamship	100.83
09042	31st Jan. 1922	Grand Trunk Pacific Coast Steamship	41.25
10426	27th Feb. 1922	Can. Govt. Merchant Marine Ltd	35.00
10427	27th Feb. 1922	Can. Govt. Merchant Marine Ltd	298.08
10428	27th Feb. 1922	Can. Govt. Merchant Marine Ltd	116.40
10429	27th Feb. 1922	Can. Govt. Merchant Marine Ltd	7.89
912	18th Apr. 1922	Ontario Car Ferry Co. Ltd	2,742.94
913	18th Apr. 1922	Johnson & Higgins (Canada) Ltd	35.00
914	18th Apr. 1922	Willis, Faber & Co. of Can. Ltd	28.06
02525	11th May 1922	Smith & Smyth Ltd	5.00
3537	27th May 1922	Can. Govt. Merchant Marine Ltd	205.53
09060	30th Aug. 1922	A. L. Whitby	500.00
55992	2nd June 1921	Can. Govt. Merchant Marine Ltd	2,209.06
55955	2nd June 1921	B. N. Exton & Co	755.54
37756	7th June 1920	K. V. Rogers	300.00
47868	17th Dec. 1920	K. V. Rogers	400.00
03536	27th May 1922	Th. Jullum	84.00

We beg to acknowledge having received 125 (One hundred and twenty-five) drafts mentioned on sheets Nos. 1, 2 and 3, and we undertake to return these to the Bank of Montreal at their request.

In the Superior Court.

Plaintiff's Exhibit P-9 filed at Enquête. Judgment of the Superior Court, Cause 5385, Willis, Faber & Co., of Canada, Ltd., vs. The Dominion Gresham Guarantee & Casualty Co. 6th Nov., 1923.

PLAINTIFF'S EXHIBIT P-9

Judgment of Superior Court cause 5385 Willis, Faber Coy., of Canada Limited vs. The Dominion Gresham Guarantee & Casualty Co.

Province of Quebec,
District of Montreal.
No. 5385.

SUPERIOR COURT

On this 6th day of November, 1923.

Present: The Hon. Mr. Justice Martineau.

Willis Faber & Company of Canada Limited,

Plaintiff

—vs—

The Dominion Gresham Guarantee & Casualty Co.

Defendant.

The Court, having heard the parties by their counsel upon the merits of the present case,—having examined the procedure, the proof of record and deliberated;

Whereas Plaintiff declares: that on or about May 19th 1921, the Defendant issued to the Plaintiff its collective fidelity guarantee policy No. 79076 insuring Plaintiff against loss or damage arising from embezzlement, theft and defalcation by certain of Plaintiff's employees in specified amounts, for the period of one year from May 23rd, 1921 to May 23rd, 1922; the whole as more fully appears by the said policy, produced herewith to form part hereof as Plaintiff's Exhibit P-1; that the names and occupations of Plaintiff's employees in regard to whom it was so insured, and the respective amounts of the said insurance for each employee, are contained in a written schedule on the back of the said policy of insurance that among the said employees appears the name of one, K. V. Rogers, accountant, of Montreal, in respect of whom the Plaintiff was insured by the Defendant in the sum of Five thousand Dollars ($5,000.00); that during the currency of the said policy, the Plaintiff sustained losses and damage owing to embezzlements, thefts and defalcations by the said K. V. Rogers in an amount greatly in excess of the said sum of

In the Superior Court.

Plaintiff's Exhibit P-9 filed at Enquête. Judgment of the Superior Court, Cause 5385, Willis, Faber & Co., of Canada, Ltd., vs. The Dominion Gresham Guarantee & Casualty Co. 6th Nov., 1923.

(continued).

Five Thousand Dollars ($5,000.00) to wit in the total sum of Thirteen Thousand Five hundred and Ninety-four Dollars and Fifteen Cents ($13,594.15); that the said embezzlements, thefts and defalcations took the form of cheques of the Plaintiff drawn in favour of the Bank of Montreal, in Montreal, to which cheques the said K. V. Rogers obtained the signatures of the proper officers of the Plaintiff by representing to them that the said cheques were needed for the purpose of buying drafts from the Bank of Montreal to be remitted to other countries in payment of various debts due by the Plaintiff; that with the said cheques the said K. V. Rogers obtained from the Bank of Montreal drafts on New York, payable to his own order, and used the said drafts and their proceeds for his own purposes; that the said cheques were debited to the Plaintiff's account at the Bank of Montreal aforesaid, and the Plaintiff has sustained losses and damage thereby to the extent of the said sum of Thirteen Thousand Five Hundred and Ninety-four dollars and fifteen cents ($13,594.15); that particulars of the cheques so obtained by the said K. V. Rogers, of their dates and amounts, and of the accounts in Plaintiff's books to which the said cheques were falsely and fraudulently charged by the said K. V. Rogers, are as follows:—

1921 June 4—Cheque No. 82 drawn to Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Can. Govt. Merchant Marine, Ltd.	$1,079.86
1921 June 14—Cheque No. 112 drawn to Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd	1,610.55
1921 July 2—Cheque No. 156 drawn to Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Can. Govt. Merchant Marine Ltd.	1,710.02
1921 July 2—Journal entry (JJ281) debited Willis, Faber & Co. Ltd. $ a/c and credited Can. Govt. Merchant Marine Ltd. $2,789.88 to cover cheques No. 82—$10,079.86 and No. 156—$1,710.02.	
1921 Aug. 25—Cheque No. 330 drawn to Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Can. Govt. Merchant Marine Ltd.	1,334.27

In the Superior Court.

Plaintiff's Exhibit P-9 filed at Enquête. Judgment of the Superior Court, Cause 5285, Willis, Faber & Co., of Canada, Ltd., vs. The Dominion Gresham Guarantee & Casualty Co. 6th Nov., 1923. *(continued).*

Journal entry (J290) debited Willis, Faber & Co. Ltd. $ a/c and credited Can. Govt. Merchant Marine Ltd. $1,334.27.

1921 Sept. 29—Cheque No. 435 drawn to Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd. 771.79

1921 Oct. 22—Cheque No. 11127 drawn to Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Willis, Faber & Co. Ltd. 883.29

1921 Nov. 8—Cheque No. 11200 drawn to Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Can. Govt. Merchant Marine, Ltd. Debit to C.G.M.M. Ltd. covered by transfer by Journal Entry (J293) from Johnson & Higgins of amount received from them for Pool Commission and credited on Cash Book page 252 ..... 478.54

1921 Dec. 31—Cheque No. 11403 drawn to Bank of Montreal, used by K. V. Rogers to purchase draft on New York to his own order, charged to Can. Govt. Merchant Marine, Ltd. 844.04

1922 Jan. 10—Cheque No. 11452 drawn to Bank of Montreal, used by K. V. Rogers to purchase two drafts on New York to his own order, charged to Willis, Faber & Co. Ltd 4,881.79

Total 13,594.15

that Plaintiff first discovered the said embezzlements, thefts and defalcations on or about February 1st, 1922, and immediately gave notice thereof in writing to the Defendant in accordance with the terms of the said policy of insurance; that subsequently full particulars of the said embezzlements, thefts and defalcations were furnished by Plaintiff to Defendant in accordance with the terms of the said policy of insurance; that Plaintiff has complied with all the terms of the said policy of insurance, and is justified and entitled to claim from the Defendant payment of the sum of Five Thousand Dollars ($5,000.00) but Defendant neglects and refuses so to do;

Whereas Defendant has pleaded in law and to the merits of Plaintiff's action;

In the Superior Court.

Plaintiff's Exhibit P-9 filed at Enquête. Judgment of the Superior Court, Cause 5385. Willis, Faber & Co., of Canada, Ltd., vs. The Dominion Gresham Guarantee & Casualty Co. 6th Nov., 1923. *(continued).*

Whereas Defendant's inscription in law is founded upon the following grounds: (a) Because the Plaintiff's action is based upon a Guarantee Policy insuring Plaintiff against loss and damage arising from embezzlement, theft or defalcation by Plaintiff's employees from Plaintiff; (b) Because the allegations of Plaintiff's action do not disclose any such embezzlement, theft or defalcation from Plaintiff; (c) Because, on the other hand, the allegations of Plaintiff's action discloses only offences by one K. V. Rogers against a third person not protected by the said Policy, to wit:—The Bank of Montreal; (d) Because Plaintiff's declaration alleges and discloses that the said Rogers improperly and illegally procured the delivery to him of moneys belonging to the said Bank of Montreal, but neither alleges or discloses any embezzlement, theft or defalcation by the said Rogers from Plaintiff; (e) Because there is no lien de droit between the Plaintiff and Defendant arising out of the facts alleged in Plaintiff's declaration;

Whereas Defendant by its plea to the merits admits having insured Plaintiff as alleged in the declaration, but denies or declares it ignores the other allegations of the declaration and further alleges the grounds urged in its inscription in law;

Whereas preuve avant faire droit has been ordered upon the inscription in law;

Considering that Plaintiff has proven the material allegations of its declaration;

Considering that the acts of the said Rogers did constitute thefts, embezzlements and defalcations as meant by the said insurance policy;

Considering, in consequence, that Defendant's inscription in law and plea to the merits are unfounded;

Doth dismiss said pleas and Doth condemn Defendant to pay Plaintiff the said sum of $5,000.00 with interest from date of service and costs.

(Sgd.) P.M.

J. C. S.

(True copy)

T. Dépatie, Dep. C.S.

In the Superior Court.

Notes of Mr. Justice Martineau in Willis, Faber Company of Canada, Ltd. vs. The Dominion Gresham Guarantee & Casualty Co. No. 5385.

NOTES

I have read with the utmost care the authorities cited by Defendant.

The principle which they enunciate, namely: that the relations existing between a depositor and a bank are those of creditor and debtor is beyond discussion and such applications of this principle: that the depositor loses all right of ownership on the monies he deposits, that when a bank issues upon a deposit drafts upon another bank, these drafts are and remain its property so long as they have not been delivered to the depositor etc., also universally approved.

This doctrine does not, however, support defendant's theory that it is not plaintiff but the Bank of Montreal that has been robbed by Rogers. It is true, indeed, that the Bank of Montreal had paid the amount that was asked by the cheques in a manner rendering possible a theft or an embezzlement on the part of Rogers, but it is not to him that the payment has been made—the drafts have been remitted not to him personally or as agent of the bank, but in his quality of clerk of the plaintiff and for the latter, and it is for plaintiff that he has received them.

Consequently, if later on, he has converted them to his own use, it is plaintiff's property and not the bank's property that he has stolen. And these thefts were committed only either when Rogers endorsed the drafts and kept the proceeds thereof or when he entered in plaintiff's books to the debit of the foreign creditors the amounts of the drafts without sending same, or perhaps when he failed to deliver the drafts at the time he was bound to do so, but certainly not when they were handed him by the bank.

The recourse that plaintiff may have against the bank on account of its carelessness does not alter the nature of the acts of Rogers.

(Sgd.) P.M.

J. C. S.

PLAINTIFF'S EXHIBIT P-2 WITH RETURN OF ACTION.

In the Superior Court.

Plaintiff's Exhibit P-2 filed with return of action. Copy of letter from Foster, Mann & Co. to the Bank of Montreal. 17th Nov., 1923.

Copy of letter from Foster, Mann & Co., to the Bank of Montreal.

The Bank of Montreal,
St. James Street,
City.

November 17th, 1923.

Dear Sirs:—

We write you on behalf of the Dominion Gresham Guarantee & Casualty Co.

As you are no doubt already aware, our client issued a Policy in favor of Willis, Faber & Co. of Canada, Ltd., protecting them to the extent of Five Thousand Dollars ($5,000.) against loss by theft, embezzlement or defalcation on the part of certain employees, as per list attached to the Policy. Amongst these employees was one K. V. Rogers who obtained from you and appropriated to his own use funds exceeding Five Thousand Dollars in amount, which you improperly and illegally charged against the account of Willis, Faber & Co., of Canada, Ltd. By reason of this conduct on your part, Willis, Faber & Co., of Canada, Ltd. entered suit against the Dominion Gresham Guarantee & Casualty Co., in case No. 5385 of the records of the Superior Court, district of Montreal, claiming from our client the sum of Five Thousand Dollars ($5,000.00), with interest and costs. The Dominion Gresham Guarantee & Casualty Co. was advised that the amount claimed was not, under the circumstances, a loss covered by the Policy, but was a loss incurred by the Bank of Montreal, and therefore, contested the action. By judgment rendered on the 6th November instant, The Dominion Gresham Guarantee & Casualty Co. was condemned to pay to Willis, Faber & Co. of Canada, Limited, the aforesaid sum of Five Thousand Dollars ($5,000.) with interest from the 14th July, 1922, and costs.

On behalf of our client we hereby give you formal notice of the rendering of the judgment in question, and hereby put you in default to reimburse our client the amount of said judgment, to wit: $5,000.00, with interest from the 14th July, 1922, together with the taxable costs incurred, the amount of which is as follows:

To Messrs. Lafleur & Co., attorneys for Willis, Faber & Co. of Canada, Ltd.	$360.40
Messrs. Foster, Mann & Co., attorneys for Dominion Gresham Guarantee & Casualty Co.	320.85

In the Superior Court.

Plaintiff's Exhibit P-2 filed with return of action. Copy of letter from Foster, Mann & Co. to the Bank of Montreal. 17th Nov., 1923. *(continued).*

Over and above these amounts our client has incurred an obligation for legal fees due us in the sum of $500.00, which it also claims from you by way of damages.

In default of payment of all these amounts we shall inscribe in appeal against the judgment in question, and hereby notify you, on behalf of our client, that you will be held responsible for all loss, cost and damage which may result, including not only the above sums, but also the costs in appeal and any further legal fees which may be incurred, in the event of settlement not being made by you.

As our client is being pressed for a settlement and the delays within which execution may be issued expire on the 21st instant, we must request you to advise us not later than the 20th instant, otherwise our client will take such proceedings in connection with this matter as we may advise.

Kindly govern yourselves accordingly.

X/V.

Yours truly,

In the Superior Court.

Plaintiff's Exhibit P-3 filed with return of action. Letter from the Defendant, Bank of Montreal to MM. Foster, Mann & Co. 21st Nov., 1923.

PLAINTIFF'S EXHIBIT P-3 WITH RETURN OF ACTION.

Letter from Defendant, Bank of Montreal to MM. Foster, Mann & Co'y.

Bank of Montreal

Montreal, 21st November, 1923

Dears Sirs, G. C. P.

Re: Dominion Gresham Guarantee & Casualty Company and Willis, Faber Co. of Canada, Ltd.

I have your letter of the 17th instant, but I have to inform you that the Bank repudiates any and all liability in connection with the alleged losses of Willis, Faber Company of Canada, Limited and denies that the Bank has any interest in or responsibility for any litigation that you may have had or any appeal that you may think best to institute.

This letter is written under reserve and without prejudice to any and all rights and defences that the Bank may have with regard to any claims made by Willis, Faber & Company or by you.

Yours faithfully,

C. A. Dean,
Manager.

Messrs. Foster, Mann & Co.
Royal Insurance Building,
Montreal.

PLAINTIFF'S EXHIBIT P-7 WITH RETURN OF ACTION

In the Superior Court.

Plaintiff's Exhibit P-7 filed with return of action. Copy of letter from MM. Foster, Mann & Co. to the Manager Bank of Montreal, 25th Mar., 1924.

Copy of letter from MM. Foster, Mann & Co., to the Manager, Bank of Montreal.

Y/D

March 25th, 1924.

The Manager, Bank of Montreal,

Montreal.

Dear Sir,

Re: Willis, Faber of Canada, Ltd. vs.

Dominion Gresham Guarantee & Casualty Co.

Kindly refer to our letter of November 17th, 1923, and your reply of November 21st, and take notice that upon the appeal to the Court of King's Bench, sitting in Appeal, from the judgment of the Superior Court rendered in this case, the appeal has been dismissed and our clients, Dominion Gresham Guarantee & Casualty Co., condemned to pay to Willis, Faber & Co., of Canada, Ltd., the sum of $5,000, with interest from 14th July, 1922, and costs. The amount of judgment, interest and costs is made up as follows:

Judgment	$5,000.00
Interest from July 14th, 1922 to March 25, 1924	427.08
Taxed Bill of Costs in the Superior Court	360.40
Taxed Bill of Costs in Court of King's Bench	459.84
Total	$6,247.42

In addition to which, as advised you in our letter of November 17th, 1923, liability for fees and costs has been incurred by Dominion Gresham Guarantee & Casualty Co. to this firm.

We have advised our client not to further appeal from the last judgment but to pay and forthwith institute proceedings against the Bank of Montreal for all loss, costs, damages and expenses suffered by reason of the circumstances of this litigation of which you have been advised.

If you have any other views which you desire to express in respect of this matter we shall be glad to be advised.

Yours truly,

In the Superior Court.

Plaintiff's Exhibit P-5 filed with return of action. Statement from MM. Foster, Mann & Co. to the Dominion Gresham Guarantee & Casualty Co. for the sum of $1,318.19. 27th Mar., 1924.

PLAINTIFF'S EXHIBIT P-5 WITH RETURN OF ACTION

A copy of statement from MM. Foster, Mann & Co., to Dominion Gresham Guarantee & Casualty Coy., for the sum of thirteen hundred and eighteen dollars and nineteen cents ($1,318.19).

Montreal, 27 March, 1924.

Dominion Gresham Guarantee & Casualty Company,
302 St. James Street,
Montreal.

To Foster, Mann, Place, Mackinnon, Hackett & Mulvena, Dr.
Advocates, Barristers, &c.

Re-Willis, Faber & Company of Canada, Limited vs. You.

COPY

1922		
Sept.	9th.	To time spent preparing plea in this case;
	12th.	To time spent completing draft of plea;
	18th.	To time spent completing plea and inscription in law;
	26th.	To time spent in attendance at Court and arguing inscription in law;
Oct.	3rd.	To letter to you enclosing copy of defence;
1923		
Apl.	13th.	To letter to you regarding this matter;
May	4th.	To telephone interview with Mr. Starkey;
	15th.	To letter to you regarding this action;
	16th.	To time spent examining opinion given by London Solicitors of Guarantee Society of London re their liability towards Willis, Faber & Company of Canada Limited;

In the Superior Court.

Plaintiff's Exhibit P-5 filed with return of action. Statement from M.M. Foster, Mann & Co. to the Dominion Gresham Guarantee & Casualty Co. for the sum of $1,318.19. 27th Mar., 1924.

(continued).

18th. To letter to you regarding this matter;

Oct. 20th. To time spent by Mr. Mann and Mr. Place in conference regarding this matter;

22nd. To conference with Mr. W. B. Scott of the firm of Lafleur, Macdougall & Company in connection with trial of this case on the 24th instant, and discussing with him admission which may be made to obviate unnecessary evidence;

To further conference with Mr. Scott at the Court House discussing the trial of this case on the 24th;

To long conference with Mr. Welch discussing suit against you and considering with him opposition of St. John Field, English Counsel, and generally discussing the situation;

23rd. To time spent examining record of pleadings and preparing for trial (two hours);

To one and a half spent this morning at Court House Library examining authorities and preparing for trial;

To attendance at Court Library and all afternoon spent by Mr. Mann and Mr. Place examining authorities and preparing for trial;

1923

Oct. 24th. To time spent in attendance at Court all morning and also in the afternoon arguing case.

Nov. 16th. To time spent by Mr. Mann and Mr. Place in conference with Mr. Welch.

To attendance at Court obtaining judgment rendered herein and having copy of same made and letter to you enclosing same.

In the Superior Court.

Plaintiff's Exhibit P-5 filed with return of action. Statement from MM. Foster, Mann & Co. to the Dominion Gresham Guarantee & Casualty Co. for the sum of $1,318.19. 27th Mar., 1924.

(continued).

To conference with Mr. Welch in connection with appeal from judgment in Willis Faber & Company of Canada Ltd. against you.

17th. To long conference with Mr. Welch discussing appeal from judgment of Martineau, J. in this case and verbally advising you.

To drawing long written protest to the Bank of Montreal advising that we will hold it liable for all loss, cost and damage.

19th. To long letter to you discussing terms of judgment and advising re appeal.

26th. To time spent drawing inscription in appeal re this matter.

1924

June 5th. To time spent correcting proof for printing of case in this matter (two hours).

8th. To time spent drawing factum in appeal (three hours).

9th. To time spent by Mr. Mann revising and redrafting factum in appeal all evening until 11.30 p.m.

10th. To time spent at Court House Library preparing authorities and time spent revising and redrafting and completing factum in appeal.

11th. To time spent by Mr. Mann and Mr. Place in conference re factum in appeal. Time spent completing list of authorities (one hour).

15th. To time spent completing factum in appeal and correcting proof for printing (one-half day).

In the Superior Court.

Plaintiff's Exhibit P-5 filed with return of action. Statement from MM. Foster, Mann & Co. to the Dominion Gresham Guarantee & Casualty Co. for the sum of $1,318.19. 27th Mar., 1924.

(continued).

	16th.	To time spent by Mr. Mann and Mr. Place re line of argument to be adopted.	
		To letter to you enclosing copy of factum in this matter.	
	17th.	To time spent in attendance at sitting of Court of Appeal.	
	18th.	To time spent in attendance at Court of Appeal.	
1924			
Jan.	19th.	To time spent in attendance at Court of Appeal.	
	21st.	To time spent in attendance at Court of Appeal.	
	22nd.	To all day spent in Court by Mr. Mann and Mr. Place in connection with appeal.	
	23rd.	To half day spent in Court of Appeal at argument of case.	
Mar.	25th.	To long letter to you re judgment in this case, advising acquiescence in same and payment of amount.	
		To letter to Bank of Montreal advising of judgment and of your intention to make claim against Bank.	
		TO AMOUNT OF OUR ACCOUNT.....	$ 200.00
		To taxable Court Costs in Superior Court..	320.85
		To taxable Court Costs in Appeal.....	797.34
		IN ALL	$1,318.19

In the Superior Court.

Plaintiff's Exhibit P-4 filed with return of action. Receipt and discharge and subrogation from Willis, Faber & Co. of Canada, Ltd., to the Dominion Gresham Guarantee & Casualty Co. for $6,247.42. 28th Mar., 1924.

PLAINTIFF'S EXHIBIT P-4 WITH RETURN OF ACTION.

Receipt and discharges and subrogation from the Willis, Faber Co., of Canada, Ltd., to the Dominion Gresham Guarantee & Casualty Co. for six thousand two hundred and forty-seven dollars and forty-two cents ($6,247.42).

We hereby acknowledge to have received from The Dominion Gresham Guarantee & Casualty Company, the sum of Six thousand, Two hundred and Forty-seven Dollars and Forty-two cents, ($6,247.42) in full payment of all claims arising in connection with K. V. Rogers under the Fidelity Guarantee Policy No. 79076, executed by the said Dominion Gresham Guarantee & Casualty Co., in our favor, including interest to date, and also in full satisfaction of taxable costs incurred, both in the Superior Court and in the Court of Appeal in cause No. 5385 Superior Court, district of Montreal, wherein Willis, Faber Co. of Canada, Limited, was plaintiff, and the said Dominion Gresham Guarantee & Casualty Co., was defendant; and in consideration of such payment we hereby assign, transfer and set over unto the said Dominion Gresham Guarantee and Casualty Co., all our right, title and interest in and to the said sum, and subrogate and substitute the said Company in all our rights, claims and privileges in the premises.

In witness whereof we have signed at the city of Montreal, this 28th day of March, 1924.

Lafleur, MacDougall, Macfarlane & Barclay,
Solicitors for Willis, Faber & Co.
of Canada, Ltd.

Willis, Faber & Co. of Canada, Limited,
O. W. Dettmers, Director.

PLAINTIFF'S EXHIBIT P-6 WITH RETURN OF ACTION.

In the Superior Court.

Plaintiff's Exhibit P-6 filed with return of action. Receipt and discharge and subrogation from Messrs. Foster, Mann & Co. to the Dominion Gresham Guarantee & Casualty Co. for the sum of $1,318.19. 5th April, 1924.

Receipt and discharge and subrogation from MM. Foster, Mann & Co., to the Dominion Gresham Guarantee & Casualty Co., for the sum of thirteen hundred and eighteen dollars and nineteen cents, ($1,318.19).

We hereby acknowledge to have received from the Dominion Gresham Guarantee & Casualty Company the sum of Thirteen hundred and Eighteen Dollars and Nineteen cents ($1,318.19) in full payment of taxable costs and for professional services rendered in the Superior Court and in the Court of Appeal in cause 5385 of the said Superior Court, wherein Willis, Faber Company of Canada, Limited, was plaintiff and the said Dominion Gresham Guarantee & Casualty Company was defendant; the said action arising out of claims by the said Willis, Faber Company of Canada, Limited, under Fidelity Guarantee Policy No. 79076 executed by the said Dominion Gresham Guarantee & Casualty Company in favor of the said Willis, Faber Company of Canada, Limited; and in consideration of the payment aforesaid we hereby assign, transfer and set over unto the said Dominion Gresham Guarantee & Casualty Co., all our right, title and interest in and to the said sum and subrogate and substitute the said Company in all our rights, claims and privileges in the premises.

In witness whereof we have signed at the city of Montreal, this 5th day of April, 1924.

Foster, Mann, Place, Mackinnon, Hackett & Mulvena,

Per J. A. Mann.

Plaintiff's evidence on discovery. Deposition of G. C. Pratt, Examination-in-Chief. 9th April, 1925.

PART III — WITNESSES

PLAINTIFF'S EVIDENCE ON DISCOVERY

DEPOSITION OF G. COURTNEY PRATT,

A witness produced and examined on behalf of Plaintiff on discovery.

On this ninth day of April, in the year of Our Lord one thousand nine hundred and twenty-five personally came and appeared G. Courtney Pratt of the City and District of Montreal, Bank Accountant, aged 34 years, a witness produced and examined on behalf of the Plaintiff on discovery, who, being duly sworn, doth depose and say as follows:—

Examined by Mr. J. A. Mann, K.C., of counsel for Plaintiff—

Q.—Where are you employed?
A.—In the main office, Bank of Montreal.
Q.—In Montreal?
A.—Yes.
Q.—How long have you been employed there?
A.—I was in Montreal before, and then I was away in London office. I have been in Montreal continuously since the end of June, 1919.
Q.—Therefore, you appear to have been in the Bank since the beginning of the defalcations of K. V. Rogers in respect of the procuring of drafts to his own order from the Bank of Montreal upon cheques drawn by Willis, Faber and Company to the order of the Bank?
A.—Yes.
Q.—The first one of which appears to have been September 7th, 1919?
A.—Yes.

G. C. PRATT (for Plaintiff on discovery) Examination in Chief

Q.—What positions have you occupied in the Bank from June, 1919, up to and including January 31st, 1922?

A.—I was in four or five positions. From June, 1919, to October, I was looking after the cable remittances.

Q.—Just what does that mean?

A.—As a matter of fact, it was more than cable remittances. I was attending to all cables and telegrams coming in and going out, and making all the entries in connection with them.

Q.—Do you mean remittances to foreign countries by cable?

A.—Yes.

Q.—Would that include, or in any way relate to, the issuing of drafts on foreign countries?

A.—No.

Q.—What position did you occupy from October 1919?

A.—For, I should think, about eight months I was in charge of the staff at Montreal office.

Q.—Did that bring you into relationship with the Foreign Exchange Department?

A.—No, not directly. It might.

On that post I would be responsible for a certain amount of the auditing of the office—that is to say, calling over the cash book, and so on.

Q.—Only incidentally?

A.—Yes.

Q.—In the course of your duties as an employee of the Bank did you come into what I might call direct connection with the Foreign Exchange Department?

A.—Yes.

When you say "direct connection," I would have nothing to do with the entries in the Department, but when I was appointed Assistant Accountant I would have general supervision of the office.

Q.—When would that be?

A.—January, 1921.

I would like to check up those dates, in order to be definite.

Q.—What I would like to know is if you are familiar with the routine of the Exchange Department?

A.—Yes, I am.

Q.—And, are you familiar with the routine has been since September, 1919?

A.—Yes, in a general way.

Q.—Are you familiar with the circumstances which resulted

in the alleged defalcations of Rogers, in the manner which has been outlined?

A.—By enquiry, and examining the records.

Q.—To what extent has your enquiry gone in respect to this matter?

A.—I have endeavored to get all the information I could about it. I had those lists of drafts, and the requisitions, and so on brought out.

By Mr. Holden:—

Q.—I think you may safely say to Mr. Mann that you are in a better position than anyone else to speak in that regard?

A.—Yes, because each person would perhaps run across one little detail.

By Mr. Mann, continuing:—

Q.—Whereas, you have familiarized yourself with the whole situation?

A.—Yes.

Q.—Did you know K. V. Rogers?

A.—No.

Q.—I would like to ascertain who in the Bank, and particularly in the Exchange Department which issued those drafts, did know Rogers?

A.—I think the signatures will show. You will find he was attended to by a great many different people. Whoever signed the drafts (and you will find two signatures on each) would have the requisitions before them before signing the drafts.

Q.—Am I to understand from your answer that the two signatories would necessarily have to know Rogers, and who he was, before signing the draft?

A.—Not necessarily, no; although a great many of them would do so, because they would come in contact with him. He would be purchasing drafts, and they would quite possibly know him, and would see him at frequent intervals.

Q.—Will you look at the nine sets of cheques, requisition forms, and drafts; the requisition forms and drafts being attached to the respective cheques—and will you tell me what are the names of the signing officers of the drafts?

Witness:—Shall I give them by number, or just a list?

Counsel:—I want the names of the signing officers.

Witness:—You mean the name on each draft?

Counsel:—I want the names of those who signed the nine drafts.

A.—John U. Barlow, W. J. Rapsey, T. H. B. Carmen, C. J. O. Picard, R. E. Durling, K. T. Woodrow.

Q.—I make the statement to you that the nine sets of cheques, requisition forms, and drafts which you have been examining in answering my previous question are those which were produced in case No. 5385 of the records of the Superior Court, wherein Willis, Faber and Company of Canada, Limited, were Plaintiffs, and The Dominion Gresham Guarantee and Casualty Company were Defendants, and have not yet been referred to as being included in Exhibit D-4 herein.

Will you please tell me where those gentlemen whose names you have mentioned are to be found?

A.—Mr. Barlow is still in one of the City Branches here.

Q.—Which one?

A.—Sherbrooke and St. Lawrence.

I could not tell you where Mr. Rapsey is now. He is not in Montreal office.

Mr. Carmen is still in Montreal office.

Q.—In the main office?

A.—Yes.

I do not know where Mr. Picard is.

I believe Mr. Durling is with the Toronto Branch, but I would not be sure of that. I know he was in the Toronto office.

We could get this information from the staff records at head office.

By Mr. Holden:—

Q.—And, it would be safer to take it from your staff records, would it not?

A.—Yes.

By Mr. Mann, continuing—

Q.—Will you please make enquiry, and let me know when your examination is continued where those gentlemen are to be found, if you can ascertain?

A.—Yes. I think they can all be found.

Q.—And if they are not with the Bank, will you please tell me where they are, if you have the knowledge?

A.—I will.

Q.—Are you in position to obtain information and be able to advise me on behalf of the Bank as to the general knowledge the Bank Officials and Bank Clerks had of who K. V. Rogers was, and as to the extent to which they knew him generally and particularly in connection with his acquiring foreign drafts?

A.—I think you would have to ask those men whose names I have given you. You understand a man might be posted for a very short time when he would be called upon to sign one of those drafts, and he might not know Rogers at all, although the Bank officially had knowledge he was appointed accountant in 1912.

Q.—It has been shown that the Bank did know officially, by the resolution of July 8th, 1912, that Rogers was accountant, and that he was authorized to sign cheques. Are you in a position to say as to whether the Bank did know officially who K. V. Rogers was when he came into the Bank?

A.—I cannot say definitely, but I think some of those men would know him. Others would not, or might not.

Q.—What official in the Foreign Exchange Department or in the Ledger Department, or in any other Department through which those cheques, requisitions, and drafts had to pass, would be most likely to know Rogers?

A.—It is difficult to say. Those who had been on their posts longest, and had come in contact with him in the course of business would know him. The others probably would not.

Q.—You have no doubt they would know who he was?

A.—Those who would come in contact with him. Of course the ledger keeper would not pay a cheque without referring to the authority, but in the Exchange Department those who dealt with him would know him.

Q.—As far as the regulations and the general policy of management and administration of the Bank were concerned, would it be their duty to know him before delivering a draft to him? Especially one payable to his own order?

A.—Yes, it would be their duty.

Q.—Have you a letter of November 17th, 1923, addressed to the Bank of Montreal by Foster, Mann, Place and Company, a copy of which I show you and which has been filed as Exhibit P-2; if so, will you please examine the copy Exhibit P-2 and will you tell me if it is a true copy of the letter you received?

A.—Yes, we received the original. I have a copy of it on my own file.

G. C. PRATT (for Plaintiff on discovery) Examination in Chief

Q.—And the document Exhibit P-2 is a true copy of the original?

A.—Yes.

Q.—Will you please look at the copy of letter I now show you, dated March 25th, 1924, and filed as Exhibit P-7; will you please compare it with the original, and will you say if it is a true copy of the original you have on your files, and if the Bank received the original?

A.—Yes.

Q.—Will you please look at the original letter from the Bank of Montreal, dated November 21st, 1923, and produced as Exhibit P-3, and will you say if it is a letter the Bank of Montreal sent to Foster, Mann, Place and Company?

A.—Yes.

Q.—Will you look at the nine sets comprising nine cheques with attached requisition forms and drafts, the cheques aggregating $13,594.15, which were produced in case No. 5385 of the records of the Superior Court, Willis, Faber Company, Limited, Canada, vs. Dominion Gresham Guarantee and Casualty Company, and which are set forth in detail in paragraph 8 of Plaintiff's Declaration, and which I now produce as Exhibit P-8, and will you say if those are the cheques, requisition notes, and drafts issued upon the requisition notes and in consideration of the respective cheques by the Bank of Montreal at the dates they respectively bear?

Mr. Holden:—The Defendant wishes to be of record to the effect that while these particular requisitions, drafts, and cheques are produced by Plaintiff's Attorney they are no different from all of the others alleged by the Defendant, and Defendant contends cannot be dealt with separately.

A.—Yes, they are.

By Mr. Mann, continuing:—

Q.—I notice in practically all of those nine cheques there is a discrepancy between the amount required to purchase the draft plus the exchange, and the amount of the cheque. For example the cheque of June 4th, 1921 is for $1,079.86, and the requisite amount is $1,082.46. How would the Bank get the difference between the value of the draft plus the exchange and the amount of the cheque?

A.—Presumably in cash.

Q.—From Rogers?
A.—From Rogers, provided Rogers called for them.

By Mr. Holden:—

Q.—From whoever got the draft?
A.—From whoever got the draft from the Bank.

By Mr. Mann, continuing:—

Q.—And in the case where the cheque would exceed the amount required by the draft, as for example in the case of the draft of July 2nd, 1921—the amount of the cheque being $1,710.02 and the amount required being $1,706.31, what would the Bank do?

A.—It would either be credited to the purchaser's account—Willis, Faber, Canada, Limited, or be handed back in cash. If it were a small amount, the teller would probably hand it back in cash.

Q.—I would like you ascertain if there is one case in respect of those drafts in which Willis, Faber and Company were credited, or charged, with the difference?

A.—I have the statement of account here. If you look at the dates I can tell you.

Q.—Then, let us look at the one of June 4th, 1921. The cheque was for $1,079.86, and the amount required was $1,082.46?

A.—I would say that was paid in cash. There is no entry in the account within a reasonable time after. There is nothing to show there was a cheque issued by Willis, Faber and Company for the difference.

Q.—Or that the amount was debited to the account of Willis, Faber and Company?

A.—No.

Q.—On June 14th, there was a difference of $1.52.

Witness:—In favor of the company?

Counsel:—Yes. The cheque was for $1,610.55, and the amount required being $1,706.31?

A.—It is not credited.

Q.—Therefore, it would have been paid in cash?

A.—Yes.

Q.—July 2nd, the cheque being for $1,710.02, and the amount required being $1,706.31?

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A.—There is nothing to indicate the difference was debited to the account of Willis, Faber and Company of Canada.

Q.—August 25th, the cheque being for $1,334.27, and the amount required being $1,332.06, the difference being $2.21, which would be paid back to the receiver of the draft, or credited to Willis, Faber of Canada, Limited?

A.—There is no credit.

Q.—September 29th, the cheque being for $771.79, and the amount required being $770.48—a difference of $1.31?

A.—The Willis, Faber Company were not credited.

By Mr. Holden:—

Q.—You see the cheque itself charged each time?

A.—I see the cheque charged each time, yes.

By Mr. Mann, continuing:—

Q.—October 2nd, 1921, the cheque being for $883.29, and the amount required being $872.54—a difference of $10.75, which would have to go back to the Willis, Faber Company, or to somebody?

A.—It has not gone back.

By Mr. Holden:—

Q.—How do you know that?

A.—It did not go back to the Willis, Faber Company through their account.

Let us say it was settled in cash.

Q.—What you mean is there is no entry in the account?

A.—Yes.

The cash was either handed to or paid by the person who settled for the draft in every case.

By Mr. Mann, continuing:—

Q.—The situation would be the same in respect of the draft under date November 8th, for $478.54, the amount required being $479.05—a difference of 51 cents; and December 31st, the cheque being for $844.04, and the amount required being $841.04 (put through Ledger No. 7, January 3rd)—a difference of $3.00—which would be coming back to the Willis, Faber Company?

A.—It is not credited to their account in the Bank.

Q.—On January 10th, 1922, the cheque being for $4,881.79, and the amount required being $4,887.54—is there any sum debited to Willis, Faber, Canada, Limited?

A.—No.

Q.—As a result of your previous answers it is clearly indicated that the person receiving the draft, or paying for the draft if you will, either paid the difference to the Bank, or received the difference from the Bank?

A.—Yes.

Q.—To whom would he make that payment?

A.—The Exchange Teller.

By Mr. Holden:—

Q.—And he would get it from the Exchange Teller if the difference was in the other direction?

A.—Yes.

By Mr. Mann, continuing:—

Q.—Would the Exchange Teller be the party who would hand the draft to Mr. Rogers?

A.—Yes.

Q.—Are you in a position to tell me who was the Exchange Teller from September, 1919, to the end of January, 1922?

A.—No. There have been a great many different Exchange Tellers, and I could not say who they were. I am not certain our records would show now what particular teller it was, but I will endeavor to ascertain, if you wish.

Q.—Would there be more than one?

A.—Only one at a time, but they change very frequently. For instance, if a teller were ill, somebody else would step in and take the box.

Q.—What would the Exchange Teller have before him at the time he would deliver the draft to the person asking for it?

A.—He would have the draft, and the requisition, and he would receive the cheque in payment.

Q.—And the cash, if there was a difference?

A.—Yes.

Q.—In the case of one of those drafts issued by the Bank of Montreal and drawn on the National City Bank of New York (and these nine drafts are all drawn in that way) being cashed at a Bank in Montreal, would the draft be returned to the Bank of Montreal at Montreal for payment, or would it go forward to New York?

A.—The endorsements would indicate how it was handled.

For instance, in this particular instance, the Royal Bank deposited it with the Chase National Bank, New York. Here is the

endorsement of the Royal Bank. The Chase National Bank would then clear it to the National City Bank, New York. The National City Bank would charge it to our account in New York. Our New York agents would have an account with them, and it would be charged there.

Q.—Where would the paid and cancelled drafts go?

A.—Whether the paid and cancelled drafts were forwarded to Montreal periodically, or whether we got them here specially for this case, I could not tell you. I could find out, however.

Q.—In any event they would at least go to your New York agents as a voucher for the debit with which you were charged?

A.—Yes.

Q.—And it would be your New York agents who would eventually have the drafts?

A.—I would not like to answer that definitely. May I explain what happens?

We would advise the issue of this draft to the National City Bank. They are advised every day. I think the National City Bank would charge our New York agents in total, and we would credit our New York agents in total—the total of the advice every day. Whether the National City Bank would forward those drafts to our New York agents after they were paid, I could not tell you, but I will ascertain.

Q.—Will you also kindly ascertain the names and whereabouts of the Exchange Tellers who would have handled the particular nine drafts we have been discussing, from June 4th, 1921, to January 10th, 1922?

A.—I think that can be done. The Tellers' ordinary cash books would, of course, be destroyed long ago for that period; but generally speaking I think we can show who was in the box. Of course, if one were away on holidays, for example, and somebody stepped in to relieve him during that period, it would not show. However, I will endeavor to get the information for you.

Q.—I wish you would make a special endeavor to get the information, because it is very important.

A.—I will do so.

Q.—When those drafts were returned periodically to Montreal would the endorsements on them be examined?

A.—No.

Q.—What procedure would be followed?

A.—I think I should first answer the question as to whether they are returned to Montreal.

Q.—In the case where you would find of them had been returned

to Montreal, what procedure would be followed in respect to examination, if any, of them?

A.—Nothing. There would be no examination. They would just be filed away on being returned to us.

Q.—Will you please ascertain, if you do not know, who were the receiving tellers in the wicket " W " (which I take it would be the wicket to which the Willis, Faber Company's cash would go) from the month of September, 1919, to January 31st, 1922?

A.—Yes, I will.

Q.—And their present whereabouts, if you can?

A.—Yes.

By Mr. Holden:—

Q.—If one of them happened to be ill for a time, could you tell who supplied?

A.—Possibly. I am not prepared to say definitely. Those records are destroyed after a certain number of years. A thing like that is a very unimportant record in the ordinary course, and might not be available.

By Mr. Mann, continuing:—

Q.—Can you tell me who in the Bank of Montreal would have a general knowledge of who the different representatives of commercial firms are, such as was K. V. Rogers in respect of certain banking transactions?

A.—Simply the clerks dealing with those various customers. You realize we have some 2,000 current accounts on our books, and numberless savings accounts. It would just depend upon the clerks dealing with them. It is impossible for any one person to be familiar with the officers of the different companies dealing with the Bank.

Q.—Or their clerks or representatives who came in to do the banking?

A.—Yes. As an example I might cite the case of calling for the returned cheques, and verifying the amounts. We have girls doing that work who become perfectly familiar, in time, with those with whom they deal, but for the first year or so they are on the post they would have to refer to their authorities in each case before they would hand back any cheques. Eventually, they become familiar with the persons with whom they deal.

Q.—And if one of the girls whose duty it was to hand back the cheques did not happen to know the person who asked for them she would find out who he was?

A.—Yes.

Q.—What is your present position with the Bank?

A.—Accountant.

Q.—With your general knowledge of banking, which must be very extensive, have you any doubt that the general staff, including the tellers and the exchange tellers, knew who K. V. Rogers was?

A.—They would be familiar with him if they had dealt with him for any length of time. They would be familiar with him as the representative of Willis Faber Company, Canada, Limited.

Q.—And the likelihood is they would, at least, know he was Mr. Rogers?

A.—Yes. They would know him from the office boy.

Q.—And if they did not know him as Mr. Rogers, they would have somebody tell them they were entitled to give the cheques to him?

A.—Yes. They would have the authority right beside them. If he asked for the cheques, and they did not know him, they would ask his name. Naturally they would gradually become familiar with him.

The same thing would apply to the exchange teller who would hand out the drafts. The exchange teller would become familiar with him in time.

And the further examination of the witness is suspended until Wednesday, April 15th, at 2 o'clock in the afternoon.

In the Superior Court.

Plaintiff's evidence on discovery. Deposition of G. C. Pratt (recalled), Examination-in-Chief. 15th Apr., 1925.

G. C. PRATT (for Plaintiff) Examination in Chief

DEPOSITION OF G. COURTNEY PRATT

And on this fifteenth day of April, in the year of Our Lord one thousand nine hundred and twenty-five, personally came and reappeared the said witness G. Courtney Pratt and his examination was continued as follows:—

By Mr. Mann, K.C.:—

Q.—At page 6 of your deposition given on the 9th instant you were asked if you would ascertain the addresses of John U. Barlow, W. J. Rapsey, T. H. B. Carmen, C. J. O. Picard, R. E. Durling, and K. T. Woodrow. Have you those addresses?

A.—Yes.

John U. Barlow, Bank of Montreal, Sherbrooke and St. Lawrence Streets, Montreal.

W. J. Rapsey, head office, Bank of Montreal.

T. H. B. Carmen, Montreal office, Bank of Montreal.

C. J. O. Picard, care of Bank of Montreal, St. Jovite.

R. E. Durling, Bank of Montreal, Ottawa.

J. T. Woodrow, Montreal office, Bank of Montreal.

Q.—At page 18 I asked you:

" Q.—Will you please ascertain, if you do not know, who were the receiving tellers in the wicket " W " (which I take it would be the wicket to which the Willis Faber Company's cash would go) from the month of September, 1919, to January 31st, 1922?"

Have you that information?

Witness:—You are speaking of their deposits, not of any exchange transactions?

Counsel:—Yes.

A.—We have not the daily record of tellers' services—that is, who was in every day; but I have checked up the cash accounts. We make an account of every teller's cash once a month, and I have found who was in the box for a certain date, each particular month, and I think you may take it they would be in for the whole month.

Q.—Have you a statement of the names, and the dates?

A.—I think it would be better to read it into the deposition.

G. C. PRATT (for Plaintiff) Examination in Chief

In the Superior Court.

Plaintiff's evidence on discovery. Deposition of G. C. Pratt (recalled), Examination-in-Chief. 15th Apr., 1925. *(continued).*

From September, 1919, until November, 1919, Mr. J. G. Holland, care of Thomas Robertson and Company, Limited, Montreal.

November, 1919, to January, 1920, Mr. J. A. Mackinnon, Montreal office.

January, 1920, to March, 1920, Mr. Asher. He is now dead.

March, 1920, to August, 1920, Miss M. Kelly. Her address is not known. She has since left the Bank.

September, 1920, to October, 1920, Miss G. Dickson, now Mrs. Demers, 2173 Park Avenue, Montreal.

November, 1920, to January, 1921, Mr. W. R. Cooper. Montreal office.

February, 1921, to July, 1921, Miss E. E. Labrie, now Mrs. Murphy, 202 St. Joseph Boulevard West.

August, 1921, Miss L. Kerr, now Mrs. Curtin, 263 Oxford Avenue, Notre Dame de Grace.

September, 1921, and October, 1921, Miss D. Lutton, now Mrs. Carlyle Duncan, 31 Marlowe Avenue, Notre Dame de Grace.

November, 1921, to January, 1922, Miss L. Kerr, whose address you have.

Q.—You were also to ascertain for me the exchange teller who would hand out the drafts to Mr. Rogers from September, 1919, to January, 1922?

A.—I think you said from June, 1921, to September, 1922. However, I can give you the whole period.

October, 1919, to July, 1920, Miss E. D. Wilson, Montreal office.

August, 1920, Miss G. Dickson, whose address you have.

September, 1920, to June, 1921, Miss E. D. Wilson, Montreal office.

June, 1921, to January, 1922, Miss C. Austin, Montreal office.

Q.—I understand Miss Austin was really there during the whole of the period covering Exhibit P-8?

A.—Of course she might have been absent on holidays or might have been off for a few days or a week at a time. I could not tell you how many days she might be absent during that period. When she would be off, of course somebody would replace her.

Q.—Since your examination on the 9th instant, have you ascertained from any of those exchange tellers if they knew K. V. Rogers personally?

A.—I think I suggested they should be asked that. However, I have enquired from one or two of them.

Q.—Which of them?

In the Superior Court.

Plaintiff's evidence on discovery. Deposition of G. C. Pratt (recalled), Examination-in-Chief. 15th Apr., 1925. *(continued).*

G. C. PRATT (for Plaintiff) Examination in Chief

A.—I asked Miss Austin, and she remembers Mr. Rogers. I had to refresh her memory, and I asked her if she recollected taking payments of small amounts of cash, or handing back small amounts, such as $2.00 or $3.00. She then remembered the man. She described him as a thin dark man; I did not know Mr. Rogers myself. She remembers him as the representative of Willis Faber and Company. Perhaps I should not put it that way—but she remembers the man.

Q.—As coming from Willis Faber and Company?

A.—She does not remember that now, but she remembers having had dealings with him, and as she had handed him a great many drafts, she says she would be familiar with him as coming from Willis Faber and Company. The mere fact he brought a cheque would be a credential.

You also asked whether the draft would be handed over to our New York agents after being paid by the National City Bank. They would be, and they would be returned periodically to our Head Office, which would simply file them away.

Q.—I think you said without any examination or endorsement?

A.—Yes, without any examination.

Q.—I show you Exhibit D-4. What would be the procedure employed in having the drafts actually typed—because I see in some cases they are typewritten, whereas in other cases the body is in handwriting?

A.—I do not know the reason for this, unless we were afraid of our pinpoint typewriter, that it was not sufficient protection against raising.

Q.—For example, I show you the draft of October 10th, 1919.

A.—The whole thing is written. Not merely the body.

I should say the stenographer had probably gone home. It may have been drawn late in the afternoon.

Q.—And who would write in the body? The exchange teller?

A.—No. A clerk in the Exchange Department.

Q.—On whose instructions?

A.—The requisition would be handed to her by the clerk attending the counter. It would be handed back to someone to draw the draft. In the ordinary course it would be handed to a stenographer, and it would be handed with the requisition to one of the signing officers who would then check it up.

Q.—One of the signing officers whose names you gave me would have the requisition?

A.—And the draft.

Q.—Would they have the cheque?
A.—No. It would be drawn before the cheque came in.
Q.—They would have the requisition, and the draft?
A.—Yes.
Q.—And two of them would sign?
A.—Yes.
Q.—Two in each case?
A.—Yes. They would each check it with the requisition.
Q.—Then the requisition and the signed draft would be handed over to the Exchange Teller?
A.—Yes.
Q.—Who might be Miss Austin, or anybody else who happened to be in the box?
A.—Yes.
Q.—And the Exchange Teller would receive the cheque from the purchaser?
A.—Yes. The purchaser would go straight to the Exchange Teller.
Q.—If the cheque was for a small amount more than required for the draft, the teller would hand back the difference to the purchaser; and if it was a small amount short, she would get the amount requisite to make up the difference?
A.—Yes.
Q.—And then hand the draft to the person who requested it?
A.—Yes.

And further Deponent saith not.

J. H. Kenehan,
Official Court Reporter.

Defendant's evidence on discovery. Deposition of O. Dettmers, Examination-in-Chief. 9th April, 1925.

DEFENDANT'S EVIDENCE ON DISCOVERY

10

DEPOSITION OF OSMOND DETTMERS

A witness produced and examined on behalf of the Defendant on discovery.

On this ninth day of April, in the year of Our Lord one thousand nine hundred and twenty-five, personally came and appeared Osmond Dettmers of the City and District of Montreal, Insurance Broker, aged 39 years, a witness produced and examined on behalf of the Defendant on discovery, who being duly sworn, doth depose and say as follows:— 20

Examined by Mr. A. R. Holden, K.C., of counsel for Defendant:—

Q.—I do not know whether you have seen our Pleadings.

A.—No, I have not.

Q.—I will have to follow them through at some length, because we have alleged a number of facts and I want to see whether we are correct or not. Am I correct that Willis Faber and Company, of Canada, Limited, first obtained drafts on New York in 1910? 30

A.—I have a statement which was given us by the Bank, and which shows they started in 1910. I should imagine this is probably correct.

Q.—Did you buy New York drafts before 1910?

A.—I could not say.

Q.—Would you mind producing the statement the Bank of Montreal furnished you, showing New York drafts purchased from the Bank of Montreal between 1910 and 1922? 40

A.—We have not checked this list, but we will be pleased to produce the letter which the Bank of Montreal sent us, and which is presumed to be correct.

Q.—You will produce the statement and the letter as Defendant's Exhibit D-1?

A.—Yes.

Q.—I would ask you, between now and the trial to do whatever you think necessary to satisfy yourself that this Exhibit D-1 is correct; if you think it necessary to verify it. I want to have a correct list before the Court at the trial.

A.—Of course you appreciate it would mean a tremendous amount of work to go back through our books, especially back to 1910.

Q.—What I mean is I want something before the Court which you are willing to accept as being a correct list of drafts on New York obtained by your Company from the Bank of Montreal during that period.

A.—Yes.

Mr. Mann:—Subject to affirmative proof by an official of the Bank, Plaintiff will admit the list of drafts Exhibit D-1 of Defendant is a correct list of drafts purchased by Willis Faber and Company, the cheques in payment of which have been charged to the account of Willis Faber and Company, subject to the exception in respect of drafts appearing to have been purchased in favor of K. V. Rogers.

Mr. Holden:—I am afraid I will have to ignore the admission.

By Mr. Holden, continuing:—

Q.—Have you any reason to think this list Exhibit D-1 is not correct?

A.—No.

Mr. Mann:—I object to the form of the question, inasmuch as Exhibit D-1 includes a letter from the Bank of Montreal in which it is stated that the list attached consists of " New York drafts purchased by your Company . . . " etc.

The objection is reserved by consent of the parties in the absence of a Judge.

By Mr. Holden, continuing:—

Q.—You have heard the objection. Is it the case that all those New York drafts were paid for by cheques of your Company; if the list is correct?

A.—Yes. I would say, paid for by funds of the Company. They were all cheques.

Q.—By means of cheques?

A.—Yes.

Q.—Am I right that the first draft on New York which you state was fraudulently obtained by K. V. Rogers was a draft on New York for $250.00, dated September 27th, 1919?

A.—Our records show a cheque was drawn to the order of the Bank of Montreal on September 27th, 1919, and this was used by Rogers to purchase a draft on New York to his own order. The amount of the cheque was $259.69, which does not appear to be shown in the list of the Bank of Montreal, Exhibit D-1.

Q.—Am I right that this is one of the New York drafts Rogers improperly obtained?

A.—Yes.

In this case the cheque was charged to Johnson and Higgins, and a forged receipt was placed on our file.

Q.—That is Johnson and Higgins of New York?

A.—Yes.

Q.—Have you the forged receipt?

A.—Yes, I have it here. I will produce it as Defendant's Exhibit D-2.

I may say we sent this receipt to Johnson and Higgins, and asked them if they could trace having received this amount on the date shown by the receipt stamp, and they advised us that the money had not been received.

Q.—When did you send it to Johnson and Higgins?

A.—We sent it to Johnson and Higgins on March 8th, 1922, and received their letter on March 15th, 1922. I may tell you their letter says that the payments might have been made to their Montreal office. We enquired verbally from the Montreal office, and they advised us that no money had been received by them.

Q.—When was that?

A.—About the same time.

Q.—Soon after you received the letter?

A.—Yes.

Q.—What was the next New York draft improperly obtained by Rogers?

A.—On October 10th, 1919, a cheque was drawn to the order of the Bank of Montreal, and used by Rogers to purchase a draft on New York to his own order. The amount of the cheque was $270.00. This was also charged to the account of Johnson and Higgins, and a forged receipt placed on our file.

Q.—Will you please produce the receipt as Defendant's Exhibit D-3?

A.—Yes.

Q.—Does this rubber stamp on Exhibits D-2 and D-3, with the name of Johnson and Higgins, purport to be the Montreal office stamp, or the New York office stamp?

A.—We asked the Montreal office of Johnson and Higgins, and as far as I can remember it purports to be their stamp.

Q.—That is, the Montreal office?

A.—Yes.

Q.—When you say these are forged receipts, are you in a position to testify that the names under the printed words " Johnson and Higgins " are forgeries?

A.—They informed me they had no such people in their employ, and could not trace the matter at all.

Q.—That information is not in writing?

A.—No. They are in the Board of Trade Building with us, and I went to their Manager and showed him the receipts.

Q.—Would that be Mr. Walper?

A.—I cannot remember. I imagine it was. I could easily ascertain for you, if you wish.

Q.—What is the next of the improper Rogers New York drafts?

A.—On March 18th, 1920, a cheque was drawn to the order of the Bank of Montreal, and used to purchase a draft on New York for $31.47, for Johnson and Higgins, and another draft on New York for $187.50 to the order of K. V. Rogers. The first draft was a legitimate one.

The total amount of the cheque was $245.22. The difference is the exchange and the charges.

Q.—Have you still the cancelled cheques that refer to all those Rogers drafts?

A.—I think we have.

Q.—I think it would be convenient for the Court if I make you this request: will you prepare, or have prepared, and file as Exhibit D-4, all the Rogers requisition notes, New York drafts, and your corresponding cheques, with a sheet giving a list of them?

A.—I will endeavor to do so; and if any of those happen to be missing a notation will be made to give the reason, as far as possible.

Mr. Holden:—I have no objection to it being divided into two exhibits, if it suits Counsel for Plaintiff better.

Witness:—Of course we shall not be able to file those which

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are being sued upon in the other case, because they are not in our possession.

By Mr. Holden, continuing:—

Q.—Then, Exhibit D-4 will contain all the Rogers requisition notes, New York drafts, and cheques, except the nine sets of requisition notes, drafts, and cheques totalling $13,594.15 which were set up in your Declaration in your Company's action against the Dominion Gresham Guarantee and Casualty Company under No. 5385 of the records of the Superior Court?

A.—Yes.

Q.—Those documents are, I understand, in the hands of Counsel for the Plaintiff in the present action, as far as you know?

A.—Yes.

Q.—We had just mentioned the third Rogers improper New York draft, which I think you said was for $187.50, under date March 18th, 1920?

A.—Yes.

Q.—Was any receipt put in your records, or anything else of that kind done, in connection with that draft?

A.—No receipt has been found. An entry was made in our books charging the full amount of $209.95 to the account of Johnson and Higgins, New York.

Q.—What was the date of the entry in the books?

A.—I would have to turn up the books in order to tell you that. I take it it would be the same date as the cheque.

Q.—Would it be convenient to have somebody show us the entry?

A.—Yes, I will do so.

Q.—While the books are being turned up, will you please tell me what was the next improper Rogers draft?

A.—The next cheque was issued on May 3rd, 1920, drawn to the order of the Bank of Montreal, and used by K. V. Rogers to purchase a draft on New York to his own order. The amount of the cheque was $331.20.

Q.—Was there any receipt or other document put in any record in that connection?

A.—This cheque was charged to Willis Faber and Company, Limited, London.

Q.—Was there anything beyond an entry charging it?

A.—No, not that I am aware of.

Q.—When did you or your company first know that cheque

had been improperly charged to Willis Faber and Company, London?

A.—When we discovered the defalcations had been made in this manner this was one of the cheques which came to light. I cannot say the exact date on which it was actually discovered.

We discovered the first defalcation on January 31st, 1922.

Q.—In connection with this third Rogers draft to which we have already referred, namely, that of March 18th, 1920, for $187.50, do I understand rightly that the entry in your book which you are good enough to show me, reading " March 18th, to cheque $245.22 " was made at or about that date, March 18th, 1920, and that you never knew until 1922 that $187.50 of that had never gone to Johnson and Higgins, New York?

A.—Yes.

Q.—Did you ever, on or after March 18th, 1920, tell Johnson and Higgins, New York: " We have charged you $187.50, New York draft," of that date?

In answering this, or any of my questions, I would be glad if you would consult your accountant, or anybody else, and satisfy yourself upon the facts.

A.—You will understand I have no exact knowledge of all the details of those transactions.

Q.—Would you make the necessary enquiry so as to be in a position to answer yes, or no, to the question: Did you ever tell Johnson and Higgins, New York, " We have charged you with $187.50 on or about March 18th, 1920, on a New York draft "?

A.—After consulting my accountant I would say that in the ordinary course we would not advise Johnson and Higgins of the purchase of this draft.

Q.—And you did not, in fact, do so? I mean, you followed the ordinary course?

A.—In this case we did not do so.

Q.—I will complete the list, and come back to these features of it. We have dealt with the cheque of May 3rd, 1920?

A.—Yes.

Q.—What is the next one?

A.—May 8th, 1920.

Perhaps the cheque numbers would help you.

Q.—What I want to do is this: you are going to make up an exhibit to be filed as D-4, and I would like to ask you now are there any other improper Rogers New York drafts which will be in that exhibit or which are amongst the nine Plaintiff's Counsel has in hand,

in connection with which there are forged receipts, or any other documents, or anything other than an entry in your book charging up the draft?

A.—I do not think so.

There were certain other small defalcations in cash, which he covered up in the books; but his chief plan of operations was by means of the cheques and the drafts.

Q.—When was the earliest other defalcation, apart from the New York drafts we have dealt with?

A.—The first defalcation we are aware of was on June 14th, 1919.

Q.—What was the amount?

A.—He appropriated $138.92 in cash, and covered this by crediting a cheque for $300.97 received from Crum and Foster, New York, to their account as $162.05, and applying the balance, $138.92, to the credit of the accounts from which the cash was taken.

Q.—Would you mind preparing, and filing as Exhibit D-5, a list of all other defalcations you know of that Rogers was guilty of while in your employ?

A.—Yes, I will file as Exhibit D-5 our Auditors' Statement showing all the defalcations that were made.

By Mr. Mann:—

Q.—That statement shows everything?

A.—Yes. I have just been reading from it. You will get all the information regarding the cheques in it.

By Mr. Holden, continuing:—

Q.—How long was K. V. Rogers working for you?

A.—About fifteen years.

Q.—Fifteen years altogether?

A.—Yes.

Q.—What would be the date of his engagement?

A.—I think he started about 1906, or 1907. He was with us about fifteen years. I can give you the exact date he came to us, if you care to have it.

Q.—I think I would like to have the exact date.

A.—Rogers came to us in May, 1907. He was then fifteen years of age.

Q.—In what capacity did he come to you?

A.—As Junior Clerk. He worked up through the various Departments until he became Chief Accountant.

Q.—When did he become Chief Accountant?

A.—I do not think I could tell you that.

Q.—You could not give the Court, broadly, the various steps of his advancement, and their dates?

A.—I think he had been working on the books for about eight or nine years.

Q.—When was he first permitted to be one of the signing officers to the Company's cheques and bills?

A.—By Resolution of the Directors at a meeting held July 8th, 1912.

Q.—Was that the first time he was ever authorized to sign cheques for the Company?

A.—Yes.

Q.—What I wanted to make sure was this: was he permitted to sign for the Company before July 8th, 1912?

A.—No.

Q.—I would like you to have before the Court a careful and correct statement of what records your Company kept, and how it kept them, concerning:—

(1) The use made by Rogers, or anybody else, of cheques that were signed on behalf of the Company and used to buy foreign drafts;

(2) How soon after the cost of a foreign draft was charged up to somebody did you confirm to that person the fact that you had charged them up with the draft, and in what manner;

(3) What steps your Company took, beyond having an insurance policy, to audit periodically K. V. Rogers' work as your Accountant and Chief Accountant, and in what way it was done;

(4) What was done, and how often, to check back your Company's cancelled cheques when you received them from the Bank, to see that the proceeds were used for proper purposes;

(5) What precautions the authorized signing officers of your Company took to verify that cheques were going to be used for proper purposes before they signed the cheques, and what record there is in that connection;

(6) What was done to authorize or approve of the preparation and use of any requisition notes that went to the Bank from your Company for the purpose of obtaining foreign drafts.

Those are the main points I have in mind at the moment. There may be something more after you have given me the information I now ask for. You understand I do not want to hurry you in your answer, and I have no objection to your thinking it over, if you wish to do so.

Before you answer I want to make clear what I have in mind and I would like to add that I propose to argue that the Willis Faber Company, and therefore the present Plaintiff in its place, are estopped from making any claim against the Bank because the Company did not take reasonable precautions to look after, investigate, and discover the actions of K. V. Rogers from the outset, and I want to give you an opportunity for your company of explaining in what way you did do so, if that be the case.

And the further examination of the witness is suspended until Wednesday, April 15th, at two o'clock in the afternoon.

And further for the present deponent saith not.

J. H. Kenehan,
Official Court Reporter.

DEPOSITION OF OSMOND DETTMERS

And on this fifteenth day of April, in the year of Our Lord one thousand nine hundred and twenty-five, personally came and reappeared the said witness Osmond Dettmers and his examination was continued as follows:—

By Mr. Holden, K.C.:—

Q.—At page 7 of the transcript of your deposition you were good enough to say you would file as Exhibit D-4 certain documents. I understand you now file 49 cheques, requisitions and drafts, and a list of them, making 50 documents in all?

A.—I do.

Q.—At page 12 of the transcript of your deposition you said you would file, as Exhibit D-5, a copy of the Auditor's Statement, which would include the defalcations as well as the New York drafts?

A.—Yes.

Q.—And you now file that copy as Exhibit D-5?

A.—I do.

Q.—I now show you Exhibit D-1 with the Bill of Particulars. Is it a true copy of your company's certified resolution of July 8th, 1912?

A.—It is.

Q.—Am I right that your Exhibit D-4 just filed, together with the Exhibit my learned friend is filing as P-8, cover all the Rogers drafts, so far as you know?

A.—I think so.

By Mr. Mann:—

Q.—Will you look at the nine cheques with the respective requisitions and drafts attached, referred to in my examination of Mr. Pratt on the 9th instant, which cheques total $13,594.15, and will you say if those are the nine cheques issued and signed by Willis Faber and Company of Canada, Limited, for the amounts they respectively bear, and drawn in favor of the Bank of Montreal, and if the requisition forms and drafts respectively attached thereto are the documents which form the basis of the present action to the extent of the amount set out in case No. 5385 of the records of the Superior Court, Willis Faber and Company of Canada, Limited vs. the Dominion Gresham

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Guarantee and Casualty Company?

A.—They are.

Q.—Will you produce them as Plaintiff's Exhibit P-8?

A.—Yes.

By Mr. Holden, continuing:—

Q.—In looking at Exhibit D-5 on discovery I see it is divided into three periods, namely, the first three pages refer to the period between June 14th, 1919, and May 23rd, 1920; the next two pages refer to the period between May 23rd, 1920, and May 23rd, 1921; and the last page refers to the period from June 4th, 1921, to January 10th, 1922. Will you please state, so that the Court will understand the document, why it was divided in three periods?

A.—This was simply for our own convenience. The first period contained all the items for which we could not claim from any bonding company. The second period shows the items which we were partly reimbursed by a bonding company in England. The third period shows the items for which we were partly reimbursed by the Dominion Gresham Guarantee and Casualty Company.

Q.—The reason the first period could not be claimed from any bonding company, if I understand correctly, was because you had not yet taken out any insurance of that kind?

A.—We were insured during the first period, but under the terms of the bond the claim had to be made within a certain period after the expiration of the bond, and for the first period the limited period had expired.

Q.—I note the first six items on the first page of Exhibit D-5, totalling $512.97, have no reference to New York drafts. That is right, is it not?

A.—Yes, that is right.

Q.—Am I right that all the other items in the Exhibit do refer to Rogers' New York drafts?

A.—I think that is so.

Q.—At page 14 of the transcript of your deposition I asked you six questions which I intend to submit to the Court are important, and I would now ask you to answer them seriatim, as carefully and fully as you can, for the information of the Court?

A.—I have been giving consideration to those questions, and before answering them I would like to explain that we are insurance brokers, and, consequently, act as the intermediary between the

assured and the insurance company. When an insurance is effected by us, it is our duty to collect the premium and remit it to the underwriters, so that our accounts deal with the assured on one side and the insurance companies on the other.

Reference has been made to the Auditor's Statement, and you will note that practically three accounts were used chiefly by Rogers to cover up the false transactions. Those were: Willis Faber and Company, Limited, London; Johnson and Higgins, New York; and Canadian Government Merchant Marine, Limited, Montreal. Those were very active accounts, which always had large open balances, representing a mass of individual transactions. For instance, the Canadian Government Merchant Marine account had a turnover of about $2,000,000.00 each year, made up of hundreds and hundreds of entries.

I give you this information so that you may have a proper perspective of some of the transactions of our business.

Q.—Will you please state what records your company kept and how it kept them, concerning the use made by Rogers, or anybody else, of cheques that were signed on behalf of the company and used to buy foreign drafts?

A.—Perhaps the easiest way to answer this question is to explain that a large part of our business is transacted with local companies, and when it is necessary to buy drafts of foreign exchange it is usually for particular transactions.

Our custom was to telephone to the Bank, find out what the rate of exchange was then, and issue a cheque payable to the order of the Bank for the amount of the draft required plus the exchange. This would be handed to the Bank, which would, in turn, give us the required draft. The stub of our cheque book would show when the cheque was issued to the order of the Bank, and, further, to what account the amount should be charged in our books.

Q.—That does not seem to me to cover what I had in mind. Continuing on this first question, let me take the first cheque sued upon in the present action, namely, your Company's cheque for $1,079.86, dated June 4th, 1921, and referred to in paragraph 8 of the Declaration. When that cheque was signed by Mr. Mercer and by K. V. Rogers, as shown by Exhibit P-8, what record was made before the cheque went to the Bank to show for what use it was intended?

A.—When we had to remit in foreign exchange, it was usually for some particular items. The custom was for Rogers, as our trusted accountant, to present a statement of account with the cheque. That statement was supposed to be taken from our books and would show

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that the money was owing. With that statement the cheque would be signed for the purchase of the draft.

Q.—Will you please show me the statement which refers to this cheque I have just mentioned, being the first cheque on Exhibit P-8?

A.—As I stated on the 9th instant, we have the statements which were used for the first two drafts, but we have not been able to trace the statements for any other drafts.

Q.—Is this statement to which you now refer the document which should be receipted by the payee of the draft, and which purports to be receipted for the first two drafts, as shown by Exhibits D-2 and D-3?

A.—Yes.

Q.—Where is the corresponding statement for this cheque of June 4th, 1921?

A.—We cannot trace them, and can only presume they were destroyed by Rogers.

Q.—How do you know he produced a statement?

A.—It was our custom before a cheque was signed to have a document to show that the money was owing.

Q.—Apart from the first two Rogers drafts referred to in the statements Exhibits D-2 and D-3 can you say, as a matter of fact, a statement was produced with regard to any of the subsequent Rogers drafts?

A.—No. I can only assume that since it was the rule of our office the statements must have been produced. It is our custom always to pay our accounts on our own statements, because we found in practice it is much easier to keep our books right by following this method. Occasionally our correspondents send us statements, and the payments would be made on those statements.

Q.—Then what we have been calling statements are, in effect, the accounts that are to be paid by the drafts that should be bought through the use of the cheques you or your officers signed?

A.—Yes. Usually made up by us.

Q.—Still taking by way of illustration the cheque of June 4th, 1921 (the first document in Exhibit P-8) am I right that the signing officers, in that case Mr. Mercer and K. V. Rogers, according to your evidence should not sign such a cheque until they saw a statement of the kind you have described?

A.—The statement would usually be made up by Rogers, and the usual custom of the office was that Mr. Mercer and I would sign

all cheques; but in my absence Rogers was the third signing officer. He would only want to get one signature, and Mr. Mercer would sign. I am out a great deal more than Mr. Mercer is.

Q.—The only part that struck me was your statement as to your usual custom, because all of the cheques in Exhibit P-8 are signed by Rogers with Mr. Mercer, and the same thing applies to all but two of the cheques contained in Exhibit D-4?

A.—That just happens to be the case in this instance. Of all the cheques signed in the office I would imagine I have signed a great many more than Mr. Mercer.

In explanation of the signatures in this special instance, I think most of these were signed after lunch, which would be a time when I was not likely to be in the office.

Q.—Am I right, then, that the intention was that you and Mr. Mercer would sign if you were both available, but that if either of you was away K. V. Rogers would take your place?

A.—Yes. That was the whole object in having the third signing officer.

Q.—Would the two signing officers who signed any particular cheque intended to buy New York drafts also see the requisition that was to be used at the Bank to buy the drafts?

A.—By requisition I presume you mean a form similar to that attached to the various cheques on the Exhibit?

Q.—The printed form in Exhibit P-8, headed "Requisition note"?

A.—As far as I am aware we never made out any of those requisitions. Our method was simply to telephone to the Bank and enquire regarding the rate of exchange, and then advise them whatever drafts were required.

Q.—And who did the telephoning?

A.—Usually Rogers.

Q.—Then am I right that the answer to my recent question is that the officers signing the cheques would not see the requisition notes?

A.—Yes.

Q.—They would not?

A.—No.

Q.—Still connected with this first question on page 14 of your deposition (which refers to the records kept concerning the use made by Rogers, or anybody, of those cheques) in connection with any cheques that Rogers was to use to buy foreign remittances did you ever indicate to the Bank who the payee was to be, and, if so, I would like to see them?

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A.—I have no recollection of such a course being followed.

Q.—And, so far as you know, you never did?

A.—No.

Q.—So, on this first step, when, for example, Rogers was to buy a remittance by the use of the cheque of June 4th, 1921 (the first document in Exhibit P-8) what your company and its officers apart from Rogers did was to sign unidentified cheque for $1,079.86, leaving to Rogers to telephone for and approve of whatever requisition not was required at the Bank. Is that right?

Mr. Mann:—I object to the form of the question and particularly to the use of the word " unidentified " for the reason that the cheque in question, and all the cheques in Exhibits P-8 and D-4 are identified as being payable to the Bank of Montreal.

The objection is reserved by consent of the parties in the absence of a Judge.

By Mr. Holden, continuing:—

Q.—As Mr. Mann is not a witness, and I cannot cross examine him, in view of the form of his objection I would like to know whether you can show the Court anything on this cheque of June 4th, 1921, identifying it with regard to the purpose for which it was to be used. I mean, of course, at the time it was signed by your signing officers?

A.—No, other than we drew the cheque to the order of the Bank of Montreal and expected they would take the usual precautions as to whom they would dispose of those funds to. For instance we presumed if Rogers presented that cheque and asked for cash, the Bank would not give him the cash.

Q.—I would not like to leave that uncriticized. Do you mean to say to the Court that there is no difference between obtaining cash on a cheque and obtaining a draft to the order of a signing officer of the company?

A.—I suppose there is a difference, but as far as we were concerned if we had intended the draft to be made out in favor of K. V. Rogers, or the funds to go to him, we think we would have drawn the cheque to his order in the first instance.

Q.—I would like to see any cheque your company ever drew for a foreign remittance showing on the cheque who was to be the payee of the foreign draft?

A.—We have none.

I do not know how the custom started of making the cheques

payable to the Bank of Montreal, but it seems to have been followed in every case, and I presume it is the custom of the Bank to accept the cheques in that manner.

Q.—The second question on page 14 of your deposition is: how soon after the cost of a foreign draft was charged up to somebody did you confirm to that person the fact that you had charged them up with the draft, and in what manner?

A.—It was not necessary to send out advices when the cost of drafts were charged up in our books; the reason for this being that usually the money was owing, and if we did not remit we would soon receive a reminder or a demand for payment.

When the drafts were forwarded they were usually accompanied by a letter.

Q.—I would like to see the letters that accompanied any or all of the drafts contained in Exhibits D-4 and P-8?

A.—There were no letters for those drafts, because they were all fictitious; and the drafts did not come back into our hands.

Q.—I thought you meant to say by your previous answer that the fact you sent out a letter (a copy of which you would, of course, keep) relieved you of the necessity of confirming in any other way to the payee that you had charged him up with the remittance?

A.—No. The advices were not necessary because the money was usually required to be paid to insurance companies or through our correspondents. If that money was not paid to the underwriters either directly or indirectly we would very soon hear about it.

Q.—How soon did you hear about those drafts you now complain of, which were bought on and after September 27th, 1919?

A.—The first time we discovered the defalcations was on January 30th, 1922.

Q.—Your answer dealt with whether it was necessary or not. My question dealt with, or was intended to deal with, whether in point of fact Willis Faber and Company of Canada, Limited, did anything by way of a confirmation to the payee with regard to the drafts that were supposed to have been bought and sent forward by means of the cheques contained in Exhibits D-4 and P-8. Would you mind saying whether, as a matter of fact, your company did do anything in the way of confirmation of any of those remittances?

A.—No.

Q.—My third question on page 14 was: what steps did your company take, beyond having an insurance policy, to audit periodi-

cally K. V. Rogers' work as your accountant and chief accountant, and in what way was it done?

A.—I exercised a general supervision over the books, and ever since the business was established our books have been regularly audited by reliable chartered accountants.

Q.—How often?

A.—Regularly.

During the period Rogers was employed it was the custom of the Auditors carefully to check all entries made from the day book to the ledger, and from the cash book to the ledger, and also exercise a general supervision on all our books. There was no stated times for those audits to be made. They usually came into our office without notice every two or three months, and sometimes oftener. In general I would say they kept the books checked fairly well up to date.

Q.—Who were your Auditors at the time in question?

A.—A. K. Fisk, Skelton and Company.

Q.—Was it part of their duty to verify that the requisition notes upon which remittances were bought corresponded with the entries in your company's books with regard to those remittances?

A.—As far as I know those requisition notes were not made up by us, and no copies were on file in our office, so they would have no means of checking requisition notes.

Q.—I mean by going to the Bank and seeing the notes?

A.—As far as the Bank was concerned, I could not say.

Q.—Did you look to your Auditors to go to the Bank if necessary and verify in some way that the requisition notes used for your company to buy remittances corresponded with the entries in your company's books concerning those remittances?

A.—No. I think they took the cheque as a voucher, and so long as they found a satisfactory entry in the books for the amount of the cheque, they were satisfied.

Q.—I thought the entry in the books would be a charge against the intended payee?

A.—Yes.

Q.—The cheque is no voucher of that. The cheque is purely an order on the Bank of Montreal to pay money, which order was handed to Rogers and used by him to buy certain New York drafts.

I would like to ask you again, because I do not see how those cheques could be any voucher to your Auditors or anybody else as to what use had been made of the money by Rogers?

A.—Apparently they were satisfied to accept the cheque as a proper voucher.

Q.—You did not do anything to make sure they had gone to the Bank if necessary, or in some way had seen the requisition notes?

A.—The matter was never brought to my attention.

Q.—And the fact is you did not?

A.—The matter was never mentioned to me at all. The point was never brought up before.

Q.—What I wanted to cover by your deposition was whether they went to the Bank to verify the requisition notes?

A.—As far as I know, they did not.

Q.—Taking again by way of illustration the cheque of June 4th, 1921 (the first document in Exhibit P-8), did the Auditors do anything to verify that the proceeds of that cheque had been used to buy a remittance for the payee against whom the amount was charged in your books?

A.—I could not say.

Q.—As far as you know, they did not?

A.—As far as I know. I could not say.

Q.—If there was anything done in the way of verification I am entitled to know, on behalf of my clients, what was done?

A.—As a matter of fact, I could not say.

Q.—So far as you know, they did not?

Mr. Mann:—The witness does not say that.

By Mr. Holden, continuing:—

Q.—Your Counsel seems to object to the form of my question. I do not want to put into your mouth any answer you do not intend. Am I right that so far as you know your Auditors did not in any way verify the fact that the proceeds of those cheques were used to buy remittances for the persons against whom the amounts were charged in your books?

A.—You will notice that in the case of Exhibit D-2 the Auditors did see the voucher for the cheque for $259.69, which was issued on September 27th, 1919. You will note this voucher bears the stamp of our Auditors.

The same remarks apply to Exhibit D-3.

Aside from those I have no knowledge of any other cases where further examination was made.

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By Mr. Mann:—

Q.—Unless on vouchers which have disappeared?
A.—I have no knowledge of it. I can only assume.

By Mr. Holden, continuing:—

Q.—Whatever may have been the character of the auditing that was in fact done, am I right in understanding from Exhibit D-5 that the first time your Auditors knew of or suspected any thefts or dishonesty on the part of Rogers was after January 10th, 1922, although the thefts commenced on June 14th, 1919?

A.—The defalcations were discovered by our own accountant who was appointed to replace Rogers. He informed the Auditors of the defalcations, after which a very thorough examination of the books was made.

Q.—Who was the accountant?
A.—Mr. Robinson.
Q.—Can you tell me his initials?
A.—H. A. Robinson.
Q.—Rogers had then left you?

A.—He was absent from the office on the Friday and the Saturday. On the Monday morning I telephoned to his house, and, not getting any answer, I telephoned his mother.

Q.—Do you remember the date?
A.—January 29th.

She informed me he had had trouble with his wife, and that he had left the city. It was, of course, then necessary to appoint a new accountant, and Mr. Robinson was promoted to that position.

Q.—What had he been before?
A.—Assistant accountant.

Q.—How soon after he was appointed accountant did he discover there was something wrong?

A.—It was the custom of our London Office to send out a statement each month, and it happened that one of the first duties which devolved upon Robinson was to verify this balance. In the course of his checking the account he found an amount charged in the cash book which he could not understand. He went over to the Bank to ascertain what it was for, and found that it had been used by Rogers to purchase two drafts of $2,300.00 each on New York to his own order.

Q.—Was that the very day Robinson was promoted?
A.—It was the day following.

O. DETTMERS (for Defendant on discovery) Examination in Chief

Q.—You have just spoken of the monthly statements sent out by Willis Faber and Company of London. Had they been sending out those statements for several years?

A.—Yes.

Q.—Then, am I right that every month from the middle of 1919 up to January 30th, 1922, a statement was received from the London Office which, if Robinson or any other grown person had seen it, would have shown the state of affairs?

A.—No. Rogers reported each month that those accounts were balanced, and confirmed balances to London. He then manipulated the accounts accordingly.

Q.—What was the peculiarity of the statement which Robinson discovered to be wrong that differentiated it from all the previous monthly statements during those three years?

A.—As I understand the matter he found this item of $4,881.79, being the proceeds of the cheque of January 10th, 1922, used to buy the two drafts just referred to, of $2,300.00 each plus the exchange, and could not understand why the entry had been made. He, therefore, proceeded to endeavor to ascertain the reason for it; with the result that this defalcation was discovered.

Q.—Do you mean there was any more justification for making all the previous entries during the three years than there was for this last entry?

A.—No. But Robinson had nothing to do with the London account previous to the time he became accountant.

Q.—Am I right that your company left it all to Rogers, until he suddenly left you?

A.—Rogers was our chief accountant, and we trusted him in matters relating to our books.

Q.—The fourth question I asked you at page 14 was: what was done, and how often, to check back your company's cancelled cheques when you received them from the Bank, to see that the proceeds were used for proper purposes?

A.—When the cancelled cheques were returned from the Bank, it was part of Roger's work to check those with the statements supplied by the Bank, and in turn to compare or check the amount of each cheque with the amount shown in the cash book. Then this work was all done over again by the Auditors, who examined each cheque and the corresponding entries.

Q.—If you have anything to add I would like you to add it at this point, because personally I do not understand (and the Court might be in the same position) why the Auditors did not discover

what Robinson discovered the day after he got communication personally of the records.

A.—We are under the impression, although, of course, we cannot say definitely, that Rogers must have kept a very clear record, or perhaps a duplicate of some accounts. In this manner he was able to cover up the transactions, and perhaps the reason why the last defalcation was discovered so quickly was because he did not have the opportunity to cover it up as well.

Q.—Do you mean that when this cheque of January 10th, 1922, for $4,881.79, was signed by two officers of your company there was no corresponding statement to cover up the purpose for which it was going to be used?

A.—I presume there was a statement, but we have not been able to locate it; the assumption being it was destroyed or otherwise made away with by Rogers.

Q.—What bothers me is this: I understand this last cheque of January 10th, 1922, had a corresponding though false statement, the same as all the others since September, 1919?

A.—Yes.

Q.—If Robinson as soon as he got communication of the books discovered the last one, in spite of the false statement, why could he not have discovered any of the others at the time, if he had an opportunity?

A.—He did not discover our statement of $4,881.79. He found the entry in the books, and not being able to understand the meaning of it he started to examine it.

In the other cases Rogers had been carrying on the books, and it happened that no one else was called upon to balance the London account. The work was done by Rogers.

Q.—Did I understand you correctly just now that you think there was a corresponding though false statement on January 10th, 1922, when that cheque was signed?

A.—I believe so.

Since answering the above Mr. Mercer has told me that to the best of his recollection he does not believe a statement was presented for this cheque. Rogers claimed that I had given him an order to buy a draft on New York, and as it was close to three o'clock, and the Bank would close in a few minutes, he requested Mr. Mercer to sign the cheque.

Q.—On that alternative, if Mr. Mercer's recollection is right, the cheque of January 10th, 1922, for $4,881.79 was issued and signed, and no effort of any kind was made to ascertain what it was used for until after Rogers had suddenly left you, and Robinson, nineteen or

twenty days later, first got personal access to the books?

A.—I cannot say. So much happened just shortly after that cheque was issued that I really do not remember what was done, or what might have been done.

Q.—My fifth question, at page 14 of your deposition was: what precautions the authorized signing officers of your company took to verify that cheques were going to be used for proper purposes, before they signed the cheques, and what record there is in that connection?

A.—As I explained in answer to one of the former questions, the rule of our office is that all cheques for the payment of accounts must have the accounts attached to them when presented for signature; or in lieu of this signing officer should receive some satisfactory explanation as to what the cheques were being used for.

Q.—If I took each of the cheques in Exhibits D-4 and P-8, one after the other, being all the Rogers draft cheques, could you tell the Court with regard to any one of them just what was done by you or by Mr. Mercer, as the case might be, to satisfy yourselves before signing the cheque that it would be used properly?

A.—It is so long ago, and in the mass of transactions of our business, I could not pick out any one transaction and explain it at this time.

Q.—And, there is nothing of record that would enable you to refresh your memory or to ascertain the facts in this connection?

A.—As I explained previously, when those cheques were drawn notations were made on the stubs of the cheques as to what accounts the cheques would be charged to, and then the corresponding entries would be made in the cash book. Those are the only entries to which I could refer now.

Q.—Are the stubs still available?

A.—I really could not say. I do not know whether we have them or not. There would be no reason for us to keep the stubs. Of course, we keep the cheques themselves.

Q.—I would like to see some of the stubs referring to any of the cheques in Exhibits D-4 and P-8, if they are available.

A.—I will have them looked up.

Q.—In the meantime, while they are being looked up, I will proceed to something else.

I am not quite clear from the subsequent questions and answers you have given whether I have a definite, categorical answer to this

Defendant's evidence on discovery. Deposition of O. Dettmers (recalled), Examination-in-Chief 15th Apr., 1925. *(continued).*

question No. 5, as to what precautions the authorized signing officers of your company took to verify that cheques were going to be used for proper purposes before they signed the cheques, and what record there is in that connection. If you have anything to add, or if there were any precautions taken which you have not described, I would like to have it in your deposition now, before I pass on to the next question.

A.—I would think we exercised the ordinary care in regard to those cheques.

Q.—That, of course, is not much help to the Court on the facts. What I want is anything you have not mentioned, just to give you a chance to mention anything you did. If there is nothing to add, I will pass on.

A.—I do not think there is. I will leave it as it is.

Q.—My sixth question was: what was done to authorize or approve of the preparation and use of any requisition notes that went to the Bank from your Company for the purpose of obtaining foreign drafts. I would modify the question now, in view of what you said a moment ago, and instead of saying " That went to the Bank from your company " I will put it this way (inasmuch as you have explained they were not prepared by your office.) What was done to authorize or approve of the preparation and use of any requisition notes that were used to give the Bank important information as to the name and address of the payee for the foreign draft?

A.—I will repeat what I said a short time ago, that our usual custom was to telephone the Bank and give them particulars of the draft or drafts required.

Q.—Not you, or Mr. Mercer?

A.—No.

Q.—That would be done by Mr. Rogers?

A.—Yes, by Rogers.

As far as I know the Bank never asked us for any requisition form.

Reference to the Rogers' drafts will disclose that all the requisitions for the fraudulent drafts were made out by Rogers in his own handwriting, but none of those requisitions bear any signatures.

By Mr. Mann:—

Q.—Do they purport to bear signatures?

A.—None of our signatures.

O. DETTMERS (for Defendant on discovery) Examination in Chief

In the Superior Court.

Defendant's evidence on discovery. Deposition of O. Dettmers (recalled), Examination-in-Chief 15th Apr., 1925. *(continued).*

By Mr. Holden, continuing:—

Q.—When you say none of them bears any signature, just what do you mean?

A.—That they were not signed by the signing officers of the company.

Q.—They were written by Rogers, and they bear the signature "Willis, Faber and Company, of Canada, Limited." What I presume you mean is under that signature there is no signing officer's personal name?

A.—They were not signed by any of the signing officers of the company.

Q.—You have just stated they were signed by Rogers. He was one of the signing officers of the company?

A.—They were written by Rogers.

Q.—Looking at the requisition note attached to the cheque of June 4th, 1921, (the first document in Exhibit P-8) am I right the words "Willis, Faber and Company, of Canada, Limited," were written by Rogers?

A.—Yes.

Q.—He is one of the signing officers?

A.—He was.

Q.—You meant to state that none of them (and it is my recollection also) have any personal signatures under the company's name?

A.—I say none of them are signed by any of the signing officers.

By Mr. Mann:—

Q.—That is, by their respective personal signatures?

A.—Yes.

What I want to say is none of the signing officers signed any of those in the form we would sign a cheque, for instance.

By Mr. Holden, continuing:—

Q.—I did not want the Court to misunderstand you as meaning that the words: "Willis, Faber and Company, of Canada, Limited," which are found on each of those requisition notes were added by the Bank?

A.—Oh, no.

Q.—They were written there by a signing officer of your company?

A.—They were written there by Rogers.

In the Superior Court.

Defendant's evidence on discovery. Deposition of O. Dettmers (recalled), Examination-in-Chief 15th Apr., 1925. *(continued).*

Q. DETTMERS (for Defendant on discovery) Examination in Chief

Q.—Who was then a signing officer of the company?

Mr. Mann:—Do you mean, Mr. Dettmers, that applies to all of the writing on the requisition notes?

Witness:—All of the ink writing on the requisition notes.

Mr. Mann:—Was written by K. V. Rogers?

Witness:—Yes.

Mr. Mann:—And, the exchange?

Witness:—Was put in by the Bank.

Mr. Mann:—I find in one of these the Bank wrote in the exchange figures in ink.

Witness:—I think anyone looking at them would recognize Rogers' writing all the way through.

Mr. Mann:—Except here and there the total of the amount required is sometimes put in in ink by someone other than Rogers?

Witness:—Yes.

By Mr. Holden, continuing:—

Q.—Am I right in understanding that you know by the writing that the date, the payee's name, your company's name, and the amounts of the drafts, were all written by Rogers on all the requisition notes in respect of Exhibits D-4 and P-8?

A.—Yes.

Q.—Have I your complete answer to my sixth question, which was: what was done to authorize or approve of the preparation and use for any of the drafts in Exhibits D-4 and P-8?

A.—I think so.

Q.—I was looking at the Pleadings, some of which of course contain allegations of fact; I notice paragraph 8 of the Declaration alleges that your company's cheques were illegally, unlawfully and wrongfully debited to the account of Willis, Faber and Company, of Canada, Limited. Am I right that those cheques were intended to be debited to your account for the purchase of remittances, and that you left it to Rogers to arrange for and obtain the remittances?

A.—I presume you mean that the cheques were debited to our account by the Bank.

Q.—Yes: by the Bank of Montreal.

A.—If these had been legitimate transactions, it would have been left to Rogers to make the necessary entries in our books.

Q.—What I was referring to was the entries in the Bank's books?

A.—I cannot say about the Bank's books.

Q.—Your attorneys allege those cheques were illegally unlawfully debited by the Bank to the account of Willis, Faber and Company, of Canada, Limited?

A.—Yes.

Q.—And I want to know whether I am not right that they were signed with the intention of being debited?

A.—I think I should answer that by saying we signed with the intention of securing foreign exchange, and if the transaction had been a legitimate one it would be quite in order to debit them to our account.

Q.—If you or any of your company's officials had for any reason desired to obtain a New York draft to the order of one of your number in order to keep from your competitors or anybody else the information as to where that money was going in New York, am I not right you would have approved of the requisition note being made out in just the way it was made out?

A.—We never had occasion to adopt such a course and, consequently, I could not say at this time.

Q.—What my question referred to was if today you preferred that one of your authorized signing officers should obtain a New York draft in his own name with the intention of endorsing it over to the payee, am I not right that the requisition note would be made in just the way those were made?

A.—In the light of our experience we would certainly not follow that course.

Q.—I know hindsight is better than foresight, and, therefore, perhaps the form of my question is not fair. In any event, if you did decide to follow that course, the requisition note would not be different from the ones that were used?

A.—It is very difficult for me to say how the requisition or anything else would be made in a case like that. All I can tell you is, having this experience before us we should certainly be careful not to have any drafts made but in favor of the proper parties.

Q.—In other words, your answer is given in view of the experience we all know of?

A.—Yes.

Q.—What I wanted to make sure was that you do not object

Defendant's evidence on discovery. Deposition of O. Dettmers (recalled), Examination-in-Chief 15th Apr., 1925. *(continued).*

to the method adopted to obtain New York drafts to Rogers' order, but you object to their being obtained to his order at all?

A.—I think I can only give the same answer as I gave to the previous question; that is, I do not think we would have any drafts issued except they were made out in the name of the payee to whom the money was owing.

Q.—Paragraph 11 of my client's Plea is denied in your Answer to Plea, and I would like to clear up the question of fact. Paragraph 11 of the Plea is to the effect that the Willis, Faber Company of Canada, Limited, issued and signed by its qualified officers cheques to the order of the defendant (the Bank of Montreal) covering all of the drafts which K. V. Rogers obtained to his own order on and after September 27th, 1919. I do not quite understand the Pleading denying that, and I would like to ask you as a straight question of fact, is Rogers one of the signing officers on all of the cheques contained in Exhibits D-4 and P-8?

A.—Yes.

Q.—You do not state that the resolution Exhibit D-1 with Particulars had been in any way cancelled.

Mr. Mann:—No. That is an error.

It is not intended to deny Mr. Mercer's signature.

By Mr. Holden, continuing:—

Q.—What I wanted to know is whether there is anything you do deny in Paragraph 11 of the Plea, which reads:

> " The said Willis, Faber Company issued and signed by its qualified officers cheques to the order of the Defendant covering all of the said drafts which K. V. Rogers obtained to his own order on and after the 27th September, 1919."

Mr. Mann:—Plaintiff admits that the signatures to the cheques referred to were the proper signatures of the duly qualified officers of Willis, Faber and Company, of Canada, Limited, but the intention of the denial of the paragraph is that they were not signed for the purposes for which they were used by Rogers.

Plaintiff also admits that the resolution filed as Exhibit D-1 with Particulars was duly and properly passed.

By Mr. Holden, continuing:—

Q.—It is a question of fact, Mr. Dettmers, and I would like to ask you, in view of the admission you have just heard, do you mean

that Mr. Mercer or yourself, for the various cheques you respectively signed, signed them for the same purpose as K. V. Rogers signed them?

A.—I think not. Rogers no doubt had the idea in his mind of improperly using those cheques when he secured them. As our trusted employee he represented to us that they were for legitimate transactions, and on that representation the cheques were signed.

Q.—Your view is that one of the two signing officers in each case probably had in mind the purpose for which the cheques were in fact to be used, when he signed?

A.—I can only answer that question as above.

Q.—In paragraph 10 of the Declaration in your company's action against the Dominion Gresham Guarantee and Casualty Company, No. 5385 of the records of the Superior Court, it was alleged on your behalf that full particulars of the said embezzlements, thefts and defalcations were furnished by your company to the Dominion Gresham Company, in accordance with the terms of the policy of insurance. Is there anything you furnished them which has not been filed in this case? Was there anything contained in those "full particulars" which I have not obtained for my client in this case?

A.—Not that I am aware of.

Q.—Either you personally, or Mr. Mercer, along with Rogers, in each case signed the cheques which, as shown by Exhibits D-4 and P-8, total over $20,000; and you filed as Exhibits D-2 and D-3 on discovery two statements which refer to two of those cheques. Have you any voucher or statement or any other record as to why all other cheques were signed, for what purpose they were signed?

A.—I can only repeat what I have stated before, that the record is in our books, showing that the cheque was drawn, and the account was charged up, and we have no receipts or statements, and can only presume those statements were destroyed or done away with by Rogers.

Q.—I might illustrate what I have in mind in this way: I remember getting statements from auditors of companies saying: "Your account stands—so and so. Kindly verify, and return." Have you anything of that kind which you or your auditors sent out during 1919, 1920, 1921, and the beginning of 1922, with regard to any of those cheques?

A.—I do not think any of the insurance companies follow that practice, and it was not our custom.

In the Superior Court.

Defendant's evidence on discovery. Deposition of O. Dettmers (recalled), Examination-in-Chief 15th Apr., 1925. *(continued).*

O. DETTMERS (for Defendant on discovery) Examination in Chief

Q.—The present Plaintiff insured your company, as the allegations show, covering Rogers, amongst other employees. What did the present Plaintiff require from you by way of sending out such verifying Auditors' statements, or in any other way, to prevent or discover the kind of thing which happened in 1919, 1920, 1921, and 1922?

Mr. Mann:—I object to any evidence as to whether or not Auditors or others sent out requests to customers asking for verification of accounts, or as to whether the present Plaintiff required the Willis, Faber Company, of Canada, Limited, that such should be done, inasmuch as same is not alleged as one of the grounds of negligence either on the part of the present Plaintiff or on the part of Willis, Faber and Company, of Canada, Limited.

(The question is suspended for the decision of the Judge on the objection.)

By Mr. Holden, continuing:—

Q.—Perhaps if I were to put it in this form it would not be objected to.

Did the present Plaintiff, the Dominion Gresham Guarantee and Casualty Company, notify you or call upon you in any way to do anything to check up Rogers' past, or present, or future, in any way, during the time they insured you?

Mr. Mann:—I make the same objection to this as to the preceding question.

(The question is suspended for the decision of the Judge on the objection.)

By Mr. Holden, continuing:—

Q.—I am informed that throughout 1919, 1920, 1921, and 1922, as at other times, your company periodically acknowledged its balance, and received its cheques in the usual way?

A.—Yes.

Q.—Who on your company's behalf was authorized to sign the verification and obtain the cheques?

A.—I could not say at this time. I think you will have to go to the Bank's records for that information.

Q.—I am informed K. V. Rogers was the authorized official to do this, and that he, in turn, delegated to Mr. Robinson the power to get the cheques and verify the account?

O. DETTMERS (for Defendant on discovery) Cross-examination

A.—I imagine that is so.

Q.—You are good enough to show me now the stubs of your cheque books for part of 1919-1920. Looking at stub No. 9541, I see it corresponds with the cheque of March 18th, 1920, for $245.22, which included one of the Rogers drafts in question. I do not see any Auditor's stamp on that stub. Is there any indication that the Auditors passed upon that stub?

A.—The Auditors would see the cheque as their voucher.

Q.—But the cheque has no indication of the payee at all. There is nothing to show the Auditors saw this stub?

A.—I cannot tell you whether the Auditors saw the stub, but they would see the corresponding entry in the cash book.

Cross-examined by Mr. J. A. Mann, K.C., of counsel for Plaintiff:—

(Under reserve of objections.)

Q.—The policy of insurance I now show you, produced as Plaintiff's Exhibit P-1, is the policy which was issued to your company by the Dominion Gresham Guarantee and Casualty Company, and upon which you recovered in the action instituted against that company?

A.—Yes.

Q.—Mr. K. V. Rogers appears as accountant in the schedule to the policy as being one of the persons whose fidelity is insured?

A.—Yes.

Q.—The document I show you, Plaintiff's Exhibit P-4, being the receipt and subrogation for the sum of $6,247.42, was signed by yourself for Willis, Faber and Company of Canada, Limited?

A.—Yes.

Defendant admits the signature on the document Exhibit P-4 "Lafleur, McDougall, MacFarlane and Barclay," to be the signature of that firm, attorneys for Willis, Faber and Company of Canada, Limited.

By Mr. Mann, continuing:—

Q.—You are, of course, familiar with the handwriting of Rogers?

A.—Yes.

Q.—The stub you showed my learned friend in the cheque book, No. 9541, dated March 18th, 1920, for $245.22, is entirely in Rogers' handwriting?

A.—Yes.

In the Superior Court.

Defendant's evidence on discovery. Deposition of O. Dettmers Cross-Examination. 15th Apr., 1925. *(continued).*

O. DETTMERS (for Defendant on discovery) Cross-examination

Q.—Will you tell me what was the scope of Rogers' duties in respect to keeping the books—the cash book, the cheque book, and other books—relative to the receipt and disbursement of the funds of the company during the period under review, that is during the period those cheques were unlawfully misappropriated and drafts used for his own benefit?

A.—Rogers was our chief accountant, and was in charge of all our books. Of course he made the entries in certain of the books himself, and the rest of the bookkeeping was done by assistants.

Q.—He had assistants under him?

A.—Yes.

Q.—But, he was the chief accountant, and was the head of the accounting department of your business?

A.—Yes.

Q.—Would Rogers be the person who in the ordinary course during that period would see to the payment of accounts?

A.—Yes.

Q.—Up to the time you discovered the defalcations, in January, 1922, had your company or any of its officials any reason whatever to believe that Rogers was dishonest?

A.—No, or naturally we would not have continued him in that position.

Q.—Did your company at any time, under any circumstances, give any instructions to the Bank of Montreal to deliver foreign or other drafts, or any negotiable document, or order for the payment of money, chargeable against your funds, to the order of K. V. Rogers?

Mr. Holden:—I object to this, as the documents of record speak for themselves, notably the cheques without the payee of the corresponding draft being indicated, and the certified resolution filed.

The objection is reserved by consent of the parties in the absence of a judge.

A.—I think the Bank demanded we should give them authorization for the delivery of cancelled cheques, but except for that authorization I do not think any authorization was given for the delivery of other documents, and certainly no authority, either written or verbal, was ever given to the Bank at any time to issue drafts payable to any of our employees.

O. DETTMERS (for Defendant on discovery) Cross-examination

Q.—And among those employees naturally Rogers would be included?

A.—Yes.

Q.—If we take the first cheque, namely, the cheque of September 27th, 1919 (being the first in Exhibit D-4), and the corresponding draft, for $250.00 (which appears to have been mislaid by the Bank), what would have been the result had the Bank communicated with you and stated that Mr. K. V. Rogers had requested a foreign draft in favor of himself, and asked you if they were justified in giving it to him?

A.—It would have brought to our attention the fact that drafts were being issued to the order of K. V. Rogers, and enabled us to detect the fraud.

Q.—Did your company at any time, and under any circumstances, ever intend any of the cheques issued to the order of the Bank of Montreal to be used by Rogers for the purpose of getting negotiable documents to his own order?

A.—No.

By Mr. Holden:—

Q.—The cheques in Exhibits D-4 and P-8 are all signed by Rogers as one of the signing officers and variously by you and Mr. Mercer as the other. Did Rogers sign first?

A.—I cannot say at this date. Ordinarily it would not be our custom for him to sign first.

Q.—Would the cheques be put before you separated from the cheque book?

A.—Yes.

Q.—When you signed did you, as a matter of fact, ask to see the stubs?

A.—No.

And further deponent saith not.

J. H. Kenehan,

Official Court Reporter.

In the Superior Court.

Defendant's evidence on discovery. Deposition of O. Dettmers (Recalled). Cross-Examination. 22nd Apr., 1925.

O. DETTMERS (for Defendant on discovery) Cross-examination

MONTREAL, APRIL 22nd, 1925

Mr. Mann:—The Plaintiff offers as evidence, as Exhibit P-9, judgment of the Superior Court for the District of Montreal, dated November 6th, 1923, in case No. 5385, Willis, Faber Company of Canada, Plaintiff, vs. Dominion Gresham Guarantee & Casualty Company, being a judgment for $5,000, with interest and costs.

I offer also, as Exhibit P-10, judgment of the Court of King's Bench in the same case, confirming the judgment of the Superior Court.

I offer proof of Exhibit P-6, which is the subrogation of my firm in favor of the Dominion Gresham Guarantee and Casualty Company for the taxable costs in both Courts, and our account amounting to $1,318.19.

Mr. Holden:—The Defendant admits that those amounts were paid, and were reasonable as charges against the person who paid them, without admitting Defendant would be liable in any event.

J. H. Kenehan,
Official Court Reporter.

PLAINTIFF'S EVIDENCE

DEPOSITION OF ERNEST N. MERCER

A witness produced and examined on behalf of the Plaintiff.

On this twenty-second day of April, in the year of Our Lord one thousand nine hundred and twenty-five personally came and appeared Ernest N. Mercer of the City and District of Montreal, Director and Secretary, Willis, Faber and Company, Canada, Limited, a witness produced and examined on behalf of the Plaintiff, who, being duly sworn, deposes as follows:

Examined by Mr. J. A. Mann, K.C., of counsel for Plaintiff:—

Q.—How long have you been Director and Secretary of Willis, Faber and Company, Canada, Limited?

A.—Since 1912.

Q.—The signatures, other than the signatures of K. V. Rogers, on the nine cheques comprising Exhibit P-8, are your signatures?

A.—Yes.

Q.—The signatures " E. N. Mercer " on the cheques in Exhibit D-4, (consisting of fifty documents, of which fifteen are cheques and the remainder are drafts and requisition notes) other than the signatures of Rogers, are also your signatures?

A.—Yes.

Q.—Apparently with the exception of the first two?

A.—Yes.

By the Court:—

Q.—They are all signed by you, except the first two?

A.—Yes.

Mr. Mann:—The first two are signed by Mr. Dettmers and Rogers, Mr. Dettmers being a Director and Treasurer and one of the signing officers.

In the Superior Court.

Plaintiff's evidence. Deposition of E. N. Mercer, Examination-in-Chief. 22nd Apr., 1925. *(continued).*

E. N. MERCER (for Plaintiff) Examination in Chief

By Mr. Mann, continuing:—

Q.—In respect of those cheques comprised in Exhibit D-4, and the cheques comprised in Exhibit P-8, can you say the circumstances under which those cheques were signed? What I mean is, how Rogers came to procure those cheques to be signed by you?

His Lordship:—Is that of any interest to us, Mr. Mann?

Mr. Mann:—Yes, my Lord, because my learned friend's principal defence is negligence on the part of the Plaintiff in allowing the cheques to be issued.

A.—Rogers would come into my private office with a cheque in favor of the Bank of Montreal, and in most cases (I could not swear it was on every occasion) there was a document attached to the cheque. He would invite me to place my signature on the cheque, saying he wished to remit to New York.

By Mr. Mann, continuing:—

Q.—What was the nature of the document to which you refer?

Mr. Holden:—I should think if we are going to describe a document it should be filed.

Mr. Mann:—The evidence is they have all been destroyed, except the two which have been produced.

Mr. Holden:—Mr. Dettmers simply said he could not testify there were any, he supposed they must have been destroyed or lost.

By Mr. Mann, continuing:—

Q.—Have you been able to find any of the documents to which you have referred, and have you looked for any of them?

A.—The auditors and the accountant were very busy immediately after this was discovered, and they certainly looked for everything, to try to find evidence.

Q.—And, I understand you have made diligent search for any of those documents which were presented to you with the respective cheques?

A.—Yes.

Q.—And, that search has been without success?

A.—Without success.

Q.—Can you tell me from memory what was the nature of the documents presented to you with the cheques for signature?

E. N. MERCER (for Plaintiff) Examination in Chief.

His Lordship:—The witness has stated he knows in some cases there were documents, but he cannot swear it was so in every case.

By Mr. Mann, continuing:—

Q.—In respect to Rogers obtaining those cheques, what was the usual custom in regard to presenting some document with them? What was the usual custom when Rogers came in with a cheque and wanted it signed, as regards handing in some document with the cheque?

Mr. Holden, K.C., of counsel for Defendant, objects to the question as irrelevant and illegal.

The objection is reserved by the Court.

A.—There was a statement attached to the cheque.

Q.—I understood you to say you could not swear that happened in every case?

A.—Quite so.

Q.—Can you say from memory just now the number of cases in which it happened?

A.—To the best of my recollection it generally happened.

Q.—What was the nature of that document you would have before you?

A.—It would be just a statement showing a certain sum due. That we owe a certain firm, say Johnson and Higgins, New York, a certain sum of money.

Q.—Exhibit D-2, which was produced by my learned friend with his Bill of Particulars of the defence, contains a list of remittances to your different customers by draft on New York, from 1910? And Exhibit D-5 is a detailed statement of the defalcations of Rogers from June 14th, 1919. It is shown by these two Exhibits that the defalcations were invariably made in respect to the account of Johnson and Higgins, Canadian Government Merchant Marine, and Willis, Faber and Company, London. What was the nature of those three accounts on your books in respect to debit and credit balances during the whole of the period of the defalcations generally?

A.—They were quite large running accounts.

Q.—With balances in whose favor?

A.—Generally in favor of Johnson and Higgins, Canadian Government Merchant Marine, and Willis, Faber and Company, London.

Q.—Was it your custom to remit to those different companies at frequent intervals?

A.—It was quite our usual practice.

Q.—And the Exhibits before you show you were doing it frequently?

A.—Continually, yes.

By the Court:—

Q.—In other words, you paid your debts?

A.—Yes.

By Mr. Mann, continuing:—

Q.—Until after the fraudulent use of the last cheque, namely that of January 10th, 1922 (being a cheque for $4,881.79), did the Willis Faber Company at any time know or suspect that Rogers was using for his own purposes those cheques said to be for remittances to customers?

A.—They neither knew, nor suspected.

His Lordship:—How did they find it out on January 10th, 1922?

Mr. Mann:—They did not find it out then, my Lord. They only found it out about a month afterwards.

By Mr. Mann, continuing:—

Q.—When did you find out about those defalcations?

A.—About January 23rd, 1922, I think it was.

Mr. Mann:—Your Lordship will find it explained in the evidence of Mr. Dettmers.

By Mr. Mann, continuing:—

Q.—So far as your experience goes was there ever a time when Willis Faber and Company remitted funds to customers by means of foreign drafts, or New York drafts, payable to the order of any of their employees?

A.—No, I never recollect any such payment being made in that manner.

Q.—Was Rogers ever paid his salary in that manner?

A.—No. He was paid by cheque to his own order.

Q.—Were any of the other employees paid in that manner?

A.—They were all paid by cheque drawn in their respective names.

Q.—Was any authority whatever, written or verbal, given to the

Bank of Montreal at any time, authorizing it to use cheques payable to its own order by the Willis Faber and Company of Canada, Limited, for the purpose of making and delivering drafts to any of the employees of the Willis Faber Company, and payable to their order?

Mr. Holden, K.C., of Counsel for Defendant, objects to the question as illegal, inasmuch as it is a matter for the Court to interpret the documents.

The objection is reserved by the Court.

A.—No.

Cross-examined by Mr. A. R. Holden, K.C., of Counsel for Defendant:—

Q.—If Rogers had not to stay away, either through illness or whatever it may have been, is there anything to show the Court that you would have yet found out his thefts and improper actions?

A.—I cannot produce any evidence to prove it, but I can express the opinion that he had gone so far, and was getting so deep, that he would not have been able to cover up his tracks.

Q.—You speak about covering up his tracks. It strikes me as being reasonable, and I submit it as being reasonable for the conclusions of a bank clerk, or any representative of the bank, or anybody else, is this: if Willis Faber and Company, Canada, Limited, had not indicated K. V. Rogers to be its agent towards the Bank, or told the Bank to whose order the New York draft was to be made out, was there anything in the wide world to prevent Willis Faber and Company instead of giving Rogers a blank cheque, to give him a cheque "Pay to the order of the Bank of Montreal, for draft in favor of Johnson and Higgins, New York," or any such identification of the purpose for which their representative was to use the draft? Was there anything practical, or legal, or anything else you know of, to prevent Willis Faber and Company writing on that cheque the purpose for which they intended it to be used?

A.—No, there was nothing to prevent it.

And further deponent saith not.

J. H. Kenehan,
Official Court Reporter.

DEPOSITION OF REGINALD C. STEVENSON

A witness produced and examined on behalf of the Plaintiff.

On this twenty-second day of April, in the year of Our Lord one thousand nine hundred and twenty-five, personally came and appeared Reginald C. Stevenson of the City and District of Montreal, Chartered Accountant, aged 34 years, a witness produced and examined on behalf of the Plaintiff, who, being duly sworn, doth depose and say as follows:—

Examined by Mr. J. A. Mann, K.C., of Counsel for Plaintiff:—

Q.—Where are you employed, Mr. Stevenson?
A.—I am a partner in A. K. Fisk, Skelton and Company.
Q.—What is the business of A. K. Fisk, Skelton and Company?
A.—Chartered Accountants.
Q.—Were they the Chartered Accountants of Willis Faber and Company, Canada, Limited, in January, 1922?
A.—Yes.
Q.—How long had your firm been the chartered accountants on behalf of the Willis Faber Company, Limited?
A.—One of my partners, Mr. Skelton, was the auditor of Willis Faber and Company since they commenced business here.
Q.—Did you personally come into contact with the auditing of the books of the Willis Faber Company?
A.—Yes.
Q.—When?
A.—I was in charge of it for about the last six or eight years, perhaps.

By the Court:—

Q.—Are you speaking of six or eight years from now?
A.—I should say eight years from now.

By Mr. Mann, continuing:—

Q.—That would go back to about 1917?
A.—Yes.
Q.—Then, you were in charge of the auditing of the books during the time those defalcations took place?

A.—Yes.

Q.—How frequently was an audit made of the books of the Willis Faber Company?

A.—It was our custom to go into the Willis Faber Company at intermittent intervals. It was our custom to audit the books of the Willis Faber and Company at intermittent intervals. I should say perhaps every three or four months, or perhaps a little less than that.

10

By the Court:—

Q.—Four or five times a year?

A.—Easily that.

By Mr. Mann, continuing:—

Q.—And was that custom in effect during the years 1919, 1920 and 1921?

A.—Yes.

20 Q.—You were called in in the month of January, 1922, after the defalcations of K. V. Rogers had been discovered?

A.—Yes.

Q.—I mean you, personally?

A.—Yes.

Q.—Before discussing what you did then, will you please tell me what your audit consisted of during the years 1919, 1920, and 1921?

A.—We checked the postings from the day book to the ledger, and from the journal to the ledger, and from the cash book to the

30 ledger. We examined the returned cheques from the bank, and checked the cash book entries.

By the Court:—

Q.—During the eight years you examined the cheques returned from the bank?

A.—Yes.

By Mr. Mann, continuing:—

40 Q.—How frequently did those cheques come back from the Bank?

A.—I should say they came back once a month, at any rate.

By the Court:—

Q.—Would not the drafts also come in, or be returned?

A.—No, sir. The drafts would be returned to the bank.

In the Superior Court.

Plaintiff's evidence. Deposition of R. C. Stevenson, Examination-in-Chief. 22nd Apr., 1925. *(continued).*

R. C. STEVENSON (for Plaintiff) Examination in Chief

Q.—The bank would keep them as vouchers for the disbursing of the Company's money?

A.—Yes.

By Mr. Mann, continuing:—

Q.—If it be the fact that you checked up four or five times a year or so, I may fairly assume you saw those cheques in favor of the Bank of Montreal?

A.—Yes.

Q.—Which were used by Rogers?

A.—Yes.

Q.—You have verified since that you did check those cheques?

A.—Yes.

Q.—Can you explain how it happened you did not discover the funds represented by the cheques in Exhibit P-8 and D-4 were misappropriated by somebody?

A.—I am afraid I do not understand your question.

Q.—Having checked up those cheques with the cash entries, and with the other entries in the books, as you have explained (or whatever checking you did make) how does it happen you did not discover the defalcations?

A.—I thought the cheques being payable to the Bank of Montreal would be sufficient that the funds would go to the right parties.

Q.—Will you just enlarge upon that, and tell us what you mean? Just explain what procedure you followed. In the first place, you took the detached cheques?

A.—Yes.

Q.—And what did you do in order to verify the fact that the funds represented by those cheques had been properly dealt with?

A.—I checked the cheques against the entries in the cash book.

Q.—What would be the entry in the cash book?

A.—Willis Faber and Company: charged to the Canadian Government Merchant Marine, Willis Faber and Company, London, or Johnson and Higgins, or some other such account.

By the Court:—

Q.—Take the cheque of June 4th, 1921, for $1,079.86. How would that be entered in the cash book?

A.—I could not say, just offhand.

Q.—How should it be entered?

A.—The whole amount might have been charged to Johnson and

Higgins in the cash book, $1,079.86; or it might have been charged to Willis Faber and Company; or the Canadian Government Marine.

I would check the postings from the cash book into their account.

Q.—And you would find Johnson and Higgins' account on that day would be charged with that amount?

A.—Yes, sir.

By Mr. Mann, continuing:—

Q.—Exhibit D-5 filed on discovery tells the whole story in respect of each cheque, does it not?

A.—Yes, I think so.

Q.—That was part of the report which you prepared for the Willis Faber Company, dated April 18th, 1922?

A.—Yes, sir.

Q.—You told me you followed the cheque back into the cash book entry, showing it charged to one of the customers, and you checked that account to see that the charge was made?

A.—Yes.

Q.—How long have you been a chartered accountant?

A.—Since 1918.

Q.—Seven years?

A.—Yes.

Q.—How long have you been in the accountancy profession?

A.—I should say about fourteen years.

By the Court:—

Q.—Did you consider that when you had done what you have just described your duty as an auditor was completed?

A.—I did.

Q.—So an audit is not of great value except to certify that your statement is in accordance with the entries in the books?

A.—Yes.

Q.—You do not verify whether the entries are correctly made, or whether there are mis-statements, or anything of the kind?

A.—No, sir.

By Mr. Mann, continuing:—

Q.—So far as the books revealed, was there any evidence of mis-statements or fraudulent entries in them?

A.—No, sir.

R. C. STEVENSON (for Plaintiff) Cross-examination

Q.—When you made the examination in 1922, after the defalcations were discovered, had the books been balanced?

A.—Not for 1921.

Q.—During the whole of your audit, and during the period under review, was there any time when you discovered or saw anything which created any suspicion in your mind?

A.—No, sir.

Cross-examined by Mr. A. R. Holden, K.C., of Counsel for Defendant:—

Q.—It occurs to me to ask you this: was there anything at all to prevent your firm, as auditors, from sending to Johnson and Higgins, New York, or the Canadian Government Merchant Marine, or any other payee of foreign remittances, a memorandum once a month, or oftener if you wished, saying: "The books of Willis Faber and Company show you were remitted, say $1,000.00 on June 4th, and we want to verify the fact that you got it"? Was there anything to prevent that being done?

A.—No, sir.

Q.—But it was not done?

A.—No, sir.

By Mr. Mann:—

Q.—Is that a method which practically or customarily could be carried out to verify a payment?

A.—I have never thought that method was necessary, and I have never known it to be done by my firm.

By Mr. Holden:—

Q.—It is just a matter of putting in more time, and you would, therefore, charge more for your services?

A.—It could be done. Every remittance that was sent.

By Mr. Mann:—

Q.—From your experience is it customary or usual in commercial firms that customers or clients should be asked to verify remittances to them?

A.—No, I would say it was not the custom.

And further deponent saith not.

J. H. Kenehan,

Official Court Reporter.

DEPOSITION OF MISS CONSTANCE AUSTIN

A witness produced and examined on behalf of the Plaintiff.

On this twenty-second day of April, in the year of Our Lord one thousand nine hundred and twenty-five, personally came and appeared Constance Austin of the City and District of Montreal, Receiving Teller, Bank of Montreal, a witness produced and examined on behalf of the Plaintiff, who, being duly sworn, deposes as follows:—

Examined by Mr. J. A. Mann, K.C., of Counsel for Plaintiff:—

Q.—You have been employed in the Bank of Montreal for some time?

A.—Yes.

Q.—During the years 1920 and 1921, and up to the end of January, 1922, you were also employed in the Bank of Montreal?

A.—I was.

Q.—At its main office, on St. James Street?

A.—Yes.

Q.—During what period were you in the Foreign Exchange wicket?

A.—I do not know how long I was there.

Q.—Mr. Pratt informs me that you were in the Foreign Exchange wicket from June, 1921, to January, 1922?

A.—Yes. I was.

Q.—What were your duties in that wicket during that period?

A.—I was exchanging money, and I used to receive the drafts from the Exchange Department and give them upon demand to the customers.

Q.—The drafts from the Exchange Department would be like the blue documents I show you in Exhibit P-8, for example?

A.—Yes.

Q.—They would come to your wicket, would they not?

A.—Yes.

Q.—And the requisition note would be with them?

A.—Yes.

Q.—Would the payment for the draft be with it, or would you get the payment from somebody else?

A.—I would get the payment from the person who would come in for the draft.

Q.—What you would have in your wicket would be the requisition note, and certain drafts completed ready to deliver to somebody who asked for them?

A.—Yes.

Q.—And what would happen after that?

By the Court:—

Q.—You would deliver the draft to the person, in exchange for the cheque?

A.—Yes.

By Mr. Mann, continuing:—

Q.—Is there anything on any of the requisitions, or drafts, or anything else, to indicate that you were the person who delivered them?

A.—Yes. My initial is there.

Q.—Is the " A " your initial?

A.—Yes.

Q.—I find the initial " A " on all of the nine drafts from June, 1921, to January, 1922, which you say is your initial?

A.—Yes.

Q.—In fact, you delivered the respective drafts in exchange for payment?

A.—Yes.

Q.—I notice some of the cheques were for an amount smaller than that required to pay for the drafts plus the exchange, and some were larger. What would you do in those cases?

A.—I would either give back the change, or collect the difference.

Q.—Give the change in cash, or collect the difference in cash?

A.—Yes.

Q.—And then hand the draft over to the person who presented the cheque to you?

A.—Yes.

Q.—Together with the surplus, in the event of there being a small surplus?

A.—Yes.

Q.—You would hand the change back, if the cheque was for a larger amount than was required?

A.—Yes.

MISS C. AUSTIN (for Plaintiff) Examination in Chief

In the Superior Court.

Plaintiff's evidence. Deposition of Miss C. Austin, Examination-in-Chief. 22nd Apr., 1925. *(continued).*

By the Court:—

Q.—If I understand the procedure correctly, it was this: a requisition note for the draft would be handed in to your draft department?

A.—Yes.

Q.—The draft would be prepared there?

A.—Yes.

Q.—And the prepared draft, with the requisition note, would be sent to your wicket?

A.—Yes.

Q.—And you would surrender it to the party who came for it, on receiving a cheque covering the amount?

A.—Yes.

By Mr. Mann, continuing:—

Q.—I show you Exhibit D-4. I find that with two exceptions (the first and the last) the requisition notes have your initial on them?

A.—Yes.

Q.—The initial " A " is your initial?

A.—Yes.

Q.—And it appears on all those requisition notes with the exception of the first and the last?

A.—The first one is mine also.

Q.—And is the last one?

A.—No, that is not mine.

Q.—So, with the exception of the last they all bear your initial " A "?

A.—Yes.

Q.—The first of the cheques and drafts shown in Exhibits D-4 and P-8 is dated September 27th, 1919, and the last is dated January 10th, 1922; and you will notice all the drafts resulting from the proceeds of those cheques are in favor of K. V. Rogers?

A.—Yes.

Q.—Who was K. V. Rogers?

A.—I do not remember him.

Q.—Did you know the party who did the business for the Willis Faber Company?

A.—I would know the person by his continually coming in from that firm.

Q.—You have no doubt you would know him from September, 1919, to January, 1922? You would know who he was?

In the Superior Court.

Plaintiff's evidence. Deposition of Miss C. Austin, Examination-in-Chief. 22nd Apr., 1925. *(continued).*

MISS C. AUSTIN (for Plaintiff) Examination in Chief

A.—Oh, yes.

Q.—During that interval were there any other drafts required from your wicket for remittances to the United States or foreign points, except those in favor of K. V. Rogers?

Witness:—Do you mean for Willis Faber and Company?

Counsel:—Yes.

A.—Well, I do not know, because I never take notice of who a draft is made in favor of. All I know is to give the draft out, and take the payment for it.

Q.—So you would take a cheque, and take some cash, for a draft, and you would not look to see in whose favor the draft is made?

A.—No, I do not.

Q.—And I do not suppose you look at the requisition form, do you?

A.—Yes, I look at the requisition form, to see the name of the applicant, and to see that I get paid.

Q.—You look at the name of the applicant on the requisition form, and initial the requisition form?

A.—After it is paid.

Q.—And you do it while you are getting payment?

A.—Yes.

Q.—You look at it to see that you do get payment?

A.—Yes.

Q.—And you see the applicant is Willis Faber and Company, Canada, Limited, and the cheque is the cheque of Willis Faber and Company, Canada, Limited, and that somebody hands you in some cash if the cheque is not sufficient to cover the amount of the draft?

A.—Yes.

Q.—But you do not look to see in whose favor the draft is payable?

A.—No.

The only thing I notice on the draft is that it is signed by two people.

Q.—The payee of the draft does not interest you?

A.—No.

Q.—You tell me you do not remember K. V. Rogers?

A.—No, I do not remember him.

Q.—Do you remember the person who used to get the foreign

exchange drafts from wicket on behalf of Willis Faber and Company?

A.—I have a recollection there was a tall, thin, dark fellow who used to come in.

Q.—He came in continuously, did he not?

A.—Yes. I would only remember him by him coming continually. I did not even know his name. I did not even know his name was Rogers.

Q.—Then, may I take your evidence to be this: that you would get the cheque of Willis Faber and Company, Canada, Limited?

A.—Yes.

Q.—And a requisition note which was a requisition of Willis Faber and Company, Canada, Limited, for a draft?

A.—Yes.

Q.—And you would hand out the drafts without enquiring or endeavoring to identify to whom they were handed, or to whom they were payable?

A.—Yes.

Cross-examined by Mr. A. R. Holden, K.C., of Counsel for Defendant:—

Q.—Might I ask you about how many drafts you had to deliver each day, or each week, or each month, while you were in the Exchange wicket?

A.—I could not tell you that.

Q.—Were there only a few, or were there a large number?

A.—Sometimes a great many, and other days there would not be so many.

Q.—Sometimes there would be a great many?

A.—Yes.

By Mr. Mann:—

Q.—To what extent did you examine the cheques?

Did you examine them to see that they were payable to the Bank?

A.—Yes. I noticed they were payable to the Bank of Montreal, and that they were certified.

And further deponent saith not.

J. H. Kenehan,

Official Court Reporter.

Defendant's evidence. Deposition of G. C. Pratt, Examination-in-Chief. 22nd Apr., 1925.

DEFENDANT'S EVIDENCE

10

DEPOSITION OF G. COURTNEY PRATT

A witness produced and examined on behalf of the Defendant.

On this twenty-second day of April, in the year of Our Lord 20
one thousand nine hundred and twenty-five, personally came and appeared G. Courtney Pratt of the City and District of Montreal, Accountant, Bank of Montreal, aged 34 years, a witness produced and examined on behalf of the Defendant, who, being duly sworn, deposes as follows:—

Examined by Mr. A. R. Holden, K.C., of Counsel for Defendant:—

30

Q.—You are accountant in the same office in which Miss Austin is teller?

A.—Yes.

Q.—And the same office as that at which the business of Willis Faber and Company, Canada, Limited, was done?

A.—Yes.

Q.—I understand you were not accountant at the time in question, but you are now?

A.—Quite so.

40

Q.—Is there any other official than you, as accountant, who would be better able to explain any circumstances in connection with this matter?

A.—I do not think so.

Q.—About how many foreign drafts would pass through Miss Austin's hands, or the hands of any other exchange teller in that wicket, every day?

Mr. Mann, K.C., of Counsel for Plaintiff, objects to the question as being irrelevant and illegal.

The objection is reserved by the Court.

A.—I think probably 100 foreign drafts a day.

Q.—Will you please produce the first letter the Bank of Montreal received from Willis Faber and Company, Canada, Limited, with regard to Rogers' actions?

A.—I have the letter from Willis Faber and Company, Limited, dated November 22nd, 1922.

Q.—Will you produce this letter as Defendant's Exhibit D-6?

Mr. Mann, K.C., of Counsel for Plaintiff, objects to the production of the letter in question as illegal, not being covered by the pleadings.

The objection is reserved by the Court.

A.—Yes.

Q.—Is this the first letter the Bank of Montreal received in this connection?

A.—To the best of my knowledge.

Q.—From your knowledge and experience in banking, if a company is a customer of your bank under what circumstances might that company buy foreign exchange in the name of one of its officials?

Mr. Mann, K.C., of Counsel for Plaintiff, objects to the question as being illegal, irrelevant, theoretical, and as not being covered by the pleadings.

The objection is maintained by the Court.

Q.—From your experience, if Willis Faber and Company, or any other customer of your bank, wanted to prevent Rogers or anybody else from getting foreign drafts to his own order, how could they have prevented it?

Mr. Mann, K.C., of Counsel for Plaintiff, renews his objection to this question.

The objection is maintained by the Court.

In the Superior Court.

Defendant's evidence. Deposition of G. C. Pratt, Cross-Examination. 22nd Apr., 1925.

G. C. PRATT (for Defendant) Cross-examination

Cross examined by Mr. J. A. Mann, K.C., of Counsel for Plaintiff:—

(Under reserve of objections.)

Q.—If the exchange teller in the bank wanted to prevent some unauthorized person getting a draft payable to his order, what could she have done?

Mr. Holden, K.C., of Counsel for Defendant, objects to the question as being illegal.

The objection is maintained by the Court.

Q.—The letter Exhibit D-6 is addressed to Sir Frederick Williams-Taylor, General Manager of the Bank, and is dated November 22nd, 1922, and the opening phrase is: "You will remember that our late accountant K. V. Rogers fraudulently induced your bank to make out New York drafts payable to his own order." Who would be the person who would remember the circumstances in respect to the defalcations? Would it be Sir Frederick Williams-Taylor or yourself?

A.—I would be more likely to remember that.

Q.—And, do you not, as a matter of fact, remember them?

By the Court:—

Q.—Before the receipt of that letter you knew personally, or the Bank of Montreal knew through you, that Rogers had stolen from the Willis Faber Company?

A.—Yes, but I cannot say how long before that letter.

By Mr. Mann, continuing:—

Q.—But you do know that Mr. Robinson, of the Willis Faber Company, went to the Bank and informed the Bank within a very few days after the defalcation was discovered at or about the end of January?

A.—No, I do not know that.

Q.—Just what was the first knowledge you did have in regard to those fraudulently acquired drafts?

A.—I first heard it discussed in the office. Someone evidently came up from the Willis Faber Company.

Q.—You mean you do not know it was Mr. Robinson?

A.—I do not know it was Mr. Robinson, and I do not know the date.

G. C. PRATT (for Defendant) Cross-examination

Q.—But somebody did come up from the Willis Faber Company?

Mr. Holden:—We do not pretend we had not knowledge of the defalcations, but we do contend, until my learned friend proves the contrary, that this letter was the first notification claiming any responsibility on our part.

Mr. Mann:—As I understand it, my learned friend contends this letter was the first official notification the Bank had that there was a claim against the Bank?

Mr. Holden:—Yes.

And further deponent saith not.

J. H. Kenehan,
Official Court Reporter.

In the Superior Court.

Judgment of the Superior Court rendered by the Honorable Mr. Justice Duclos on the 5th day of May, 1927.

PART IV — JUDGMENT

Province of Quebec,
District of Montreal.
No. 3729

JUDGMENT OF THE SUPERIOR COURT

Montreal, this 5th day of May, 1927.

Present:—The Honourable Mr. Justice Duclos.

The Court, having heard the parties by their Counsel on the merits of the present case, seen and heard the witnesses, examined the proof and proceedings of record, and deliberated:

Whereas the plaintiff by its declaration alleges as follows: See page 1.

Whereas, for plea to the plaintiff's declaration, the defendant pleads: See page 6.

Whereas on plaintiff's motion for particulars, the defendant furnished the following among other particulars, namely: see defendant's Bill of Particulars, page 10, paragraph 5.

On the 19th day of May, 1921, the plaintiff issued to Willis Faber Co. of Canada Limited, its collective Fidelity Policy insuring it against loss or damage arising from the embezzlements, thefts and defalcations by certain of its employees in specified amounts, for a period of one year from the 23rd day of May, 1921.

Among the employees was one K. V. Rogers, accountant, in respect of whom the said Willis Faber Co. of Canada Ltd. was insured by the plaintiff for $5,000.00.

During the currency of the said policy, the said Willis Faber Co. of Canada Ltd. sustained losses owing to embezzlements by the said K. V. Rogers in an amount in excess of the said sum of $5,000.00, to wit: in the total sum of $13,594.16.

Willis Faber Co. of Canada Ltd. sued the plaintiff in this case, and by judgment rendered on the 6th of November, 1923, the plaintiff was condemned to pay to the said Willis Faber Co. of Canada Ltd. the sum of $5,000.00, with interest and costs.

In the Superior Court.

Judgment of the Superior Court rendered by the Honorable Mr. Justice Ducios on the 5th day of May, 1927.

(continued).

The present plaintiff appealed, and by a judgment dated the 28th of March, 1924, the appeal was dismissed; thereupon, the plaintiff paid Willis Faber Co. of Canada Ltd. the amount of the said judgment, debt, interest and costs and was subrogated in all the rights, titles and interests of the said Willis Faber Co. of Canada Ltd. In virtue of this subrogation, the plaintiff now seeks to recover from the defendant-bank the amounts thus paid.

It is a significant fact that, although Willis Faber Co. of Canada Ltd. suffered a loss of over $13,000.00 and recovered only $5,000.00 from the defendant, they have not sought to recover the difference from the defendant-bank.

The plaintiff stands in the place of Willis Faber Co. of Canada Ltd. and can only exercise such rights as it might have exercised. If Willis Faber Co. of Canada Ltd. could not recover from the defendant, neither can the plaintiff.

The loss arises as follows:—

K. V. Rogers had been in the employ of Willis Faber Co. of Canada Ltd. since May 1907, first as a junior clerk and eventually as its chief accountant.

By a resolution passed at a meeting of the Directors of Willis Faber Co. of Canada Ltd., held at the office of the company in the City of Montreal, on the 8th day of June, 1912, 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 Mr. 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." (Defendant's Exhibit D-1.)

In the ordinary course of its business, Willis Faber Co. of Canada Ltd. has occasion very frequently to purchase drafts on New York or London; when such a draft was required, Rogers would draw the cheque of Willis Faber Co. of Canada Ltd. on its account with the defendant-bank, payable to the order of the bank, have the cheque properly signed by the duly authorized signing officers of the Company, he would then present this cheque at the bank with a requisition note for one or more drafts as the case might be.

As an illustration, let us take the first cheque in question in this case. On the 4th of June, 1921, Rogers drew a cheque on the defendant-bank for $1,079.86 to the order of the bank; Mr. E. N. Mercer,

In the Superior Court.

Judgment of the Superior Court rendered by the Honorable Mr. Justice Ducloe on the 5th day of May, 1927.

(continued).

secretary-treasurer of the Company, another of the authorized signing officers of the Company, signed this cheque, and with this cheque Rogers went to the bank and filled out the following:

REQUISITION NOTE

Montreal, June 6, 1921	$320.00
Wanted from the Bank of Montreal	320.00
Draft on New York	320.00
	$960.00
In favour of K. V. Rogers	122.46
Applicant: Willis Faber Co. of Can. Ltd	$1,082.46

The defendant-bank was bound to honor this cheque, it was properly signed by the duly authorized signing officers of the Company and there were funds to meet it. The defendant cannot be charged with illegally debiting that cheque to the account of Willis Faber Co. of Canada Ltd.

The only question that can arise is: can the defendant-bank be charged with negligence in complying with the requisition note signed on behalf of Willis Faber Co. of Canada Ltd. by its chief accountant, and one of its authorized signing officers and entrusted with the possession of the cheque?

Is the mere fact that the requisition note requested the bank to issue the draft to the order of the Company's chief accountant sufficient in itself to put the defendant-bank upon its inquiry?

By a long course of dealing, by its resolution of the 8th of July, 1912, by his appointment of chief accountant, Willis, Faber Co. of Canada Ltd. held Rogers out to the world and particularly to the defendant-bank as its trusted agent, and the bank had every reason to believe that he was acting with authority.

By the exercise of a little elementary business precaution, the thefts complained of could have been easily prevented. The cheque issued for the purchase of these drafts could have indicated for whom the said drafts were purchased. The requisition note could have been signed by both the authorized signing officers. Some officers of the Company could have examined the drafts and ascertained that they were made payable to the proper payee and debited to his account.

The books of Willis Faber Co. of Canada Ltd. were audited several times each year, and yet the auditor never thought of going to

the bank to examine the requisition note and satisfy himself that it corresponded with the entries in the Company's books.

How easily the fraud could have been detected is shown by the fact that Rogers left on a Friday; on the following Monday, Robinson, assistant-accountant, took his place and the following day discovered the fraud by the very obvious means of going to the bank and examining the requisition note.

10 And, yet, the plaintiff would impose on the defendant-bank the duty of managing and directing the affairs of its customers more carefully, more prudently, than such customers choose to do themselves.

Rogers' first illegal operation dates back to the 27th of September, 1919, and between that day and the 4th of June, 1921, which is the first theft complained of, he had on fifteen different occasions used cheques to purchase drafts to his order (Exhibit D-4 gives a list
20 of these cheques with the requisition notes and drafts attached), all this without objection or demur on the part of Willis Faber Co. of Canada Ltd. and without any notice to the defendant-bank of any irregularity.

Even if the bank's suspicions should have been aroused on the 27th of September, 1919, when Rogers first requested it to issue the drafts to his order, this continuous dealing on fifteen different occasions spreading over a period of eighteen months, without objection or notice, was of a nature to allay any possible suspicion which might
30 have arisen on the first occasion. (Morisson against the London County and Westminster Bank Ltd., L.R., 1914, 3 K.B., page 356.) Lord Reading, at page 369, says:

" Different considerations apply, however, to the collection of the later cheques issued in 1909, 1910 and 1911. No question had been raised in reference to the cheques paid in the Abbott's account in the preceding two years, and any doubt or suspicion which the defendants ought to have had of these earlier transactions would have
40 disappeared by this time. I cannot think that the defendants were guilty of negligence in not making inquiries in reference to these cheques after their experience of Abbott's transactions with them in the preceding two years. It is true that the plaintiff owed no duty to the defendants to examine his pass-books or check his accounts with them or with Abbott, but, when we are asked to find as a fact that the defendants were negligent it is necessary to consider all the circumstances, and in my judgment, as these transactions were only

In the Superior Court.

Judgment of the Superior Court rendered by the Honorable Mr. Justice Duclos on the 5th day of May, 1927.

(continued).

repetitions of those of the previous years which had passed unchallenged, the defendants should not be deprived of the protection of the Statute."

At page 377, Lord Buckley in rendering judgment says: "Quite shortly it seems to me that, assuming as I do that when the cheques, say in 1907, two in number, were dealt with by the defendants there was enough to put them upon inquiry, the position after (say) the end of 1907 was such that any suspicion which they ought to have would have been lulled to sleep by the action of Morison himself."

Considering that the plaintiff stands in the rights of Messrs. Willis Faber Co. of Canada Ltd. and can only exercise their rights;

Considering that the said Willis Faber Co. of Canada Ltd. by its own negligence is estopped from complaining of any negligence on the part of the defendant-bank;

Considering that the said Willis Faber Co. of Canada Ltd. cannot impose on the defendant-bank a greater diligence and precaution than it exercised itself;

Considering that the said Willis Faber Co. of Canada Ltd. held out Rogers as its agent and gave the defendant-bank every reason to believe that he was acting within its authority (Article 1730 C.C.);

Considering that the mere fact that Rogers, chief accountant of the said Willis Faber Co. of Canada Ltd. entrusted with the possession of the cheque, requested the defendant-bank to issue a draft to his order, was not sufficient in itself to put the bank upon its inquiry. (Corporation Agencies against The Home Bank, 64 Superior Court, page 161; confirmed in the Supreme Court, Canada Law Report, 1925, part. 9, page 706; confirmed again by the Privy Council on the 18th of January, 1927);

Considering that, even if on the first occasion such a request might have aroused suspicion in the minds of the bank, such suspicion was allayed and lulled to sleep by the long series of similar transactions without objection or demur on the part of Willis Faber Co. of Canada Ltd., and without notice of any irregularity to the defendant-bank;

Doth dismiss the plaintiff's action, with costs.

Chas. A. Duclos,

J. S. C.

Canada
Province de Québec

In the Court of King's Bench (Appeal Side).

Jugement de la Cour du Banc du Roi. 16th April, 1928.

JUGEMENT DE LA COUR DU BANC DU ROI

(En appel)

Montréal, lundi le seizième jour d'avril mil neuf cent vingt-huit.

Présents:

Les Hons. Juges Tellier,
Howard,
Bernier,
Létourneau,
Cannon.

La Cour, après avoir entendu les parties par leurs procureurs respectifs, sur le mérite du présent appel, examiné le dossier de la procédure en Cour de première instance, et délibéré:

Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure, siégeant à Montréal, dans le district de Montréal, le cinquième jour de mai mil neuf cent vingt-sept et dont est appel, renvoie le dit appel, en confirme le dit jugement, avec dépens contre l'appelante en faveur de l'intimée.

E. E. Howard,
J. C. K. B.

In the Court of King's Bench.

Notes du l'Hon. Juge Tellier.

NOTES DU JUGE TELLIER

C'est à bon droit, selon moi, que la demanderesse a été déboutée de sa demande.

Je ne puis voir en quoi la défenderesse a manqué. On lui apportait des chèques à son ordre, signés par deux officiers de la compagnie. C'est Rogers, un des signataires, qui les lui apportait. De qui la défenderesse était-elle supposée recevoir ses instructions, pour la destination du produit de ces chèques, si ce n'est de Rogers lui-même. La compagnie s'en rapportait manifestement à lui, puisqu'elle ne jugeait pas à propos de faire tenir à la défenderesse

In the Court of King's Bench.

Notes du l'Hon. Juge Tellier.

(continued).

des instructions, autrement que par lui. Elle comptait, évidemment, qu'il ne la tromperait pas. C'était son affaire à elle. Elle aurait fort bien pu donner des instructions à la défenderesse, autrement que par la bouche de Rogers. Pourquoi, par exemple, n'inscrivait-elle pas, sur les chèques eux-mêmes, ou sur des annexes, l'emploi qui devait être fait du produit de ces chèques? Ne le faisant pas, ne faisant rien en ce sens, mais chargeant simplement Rogers d'aller porter les chèques à la défenderesse, c'est comme si elle eut dit à cette dernière: " Vous ferez ce que Rogers vous dira."

Je rejetterais l'appel, avec dépens.

In the Court of King's Bench.

Notes du l'Hon. Juge Bernier.

NOTES DU JUGE BERNIER

Le 19 mai 1921, la compagnie Willis, Faber & Co. avait obtenu de l'appelante une police de garantie sur la fidélité de ses employés et contre le vol ou le détournement que ceux-ci pouvaient faire de ses argents.

Vers le 1er février 1922, la Compagnie découvrit que son principal employé, le chief accountant, V. Rogers s'était rendu coupable de nombreuses défalcations et de vols considérables de ses argents; ces vols et ces défalcations remontaient au 14 de juin 1919, et s'étendaient jusqu'à la fin de janvier 1922, pour un montant approximatif de $22,000.00.

Sommée par la compagnie de lui payer la somme de $5,000.00, — partie afférente à l'assurance sur Rogers, — l'appelante refusa de payer; la compagnie poursuivit l'appelante pour la dite somme de $5,000.00; l'action fut maintenue en Cour Supérieure; le jugement de celle-ci fut confirmé par cette Cour d'Appel.

L'appelante paya à la compagnie le capital et les frais de l'action, le 28 mars et le 5 avril 1924; elle se fit donner une subrogation par la compagnie, et le transport de tous les droits de celle-ci, afin d'en user contre qui de droit.

L'appelante prit une action contre la présente intimée, en vertu de la subrogation susdite, en date du 15 mai 1924, pour le remboursement des dits capital et frais.

L'action est basée sur le fait que ce serait par la négligence des employés de l'intimée que les vols et défalcations de Rogers ont pu avoir lieu, et qu'en droit comme en faits l'intimée est obligée de lui rembourser ces montants.

Par jugement de la Cour Supérieure en date du 5 mai 1927, l'action a été rejetée; l'appelante appelle de ce jugement.

La Compagnie Willis Faber & Co. faisait le commerce de courtiers d'assurances; elle faisait affaires avec la banque de Montréal, la présente intimée, depuis 1912.

En date du 8 juillet 1912, la compagnie avait passé une résolution à l'effet que son président R. Willis, ses deux directeurs O. W. Dettmers et B. N. Mercer, de même que R. V. Rogers, *l'accountant,* étaient autorisés à signer, endosser, accepter les billets, les chèques et tous autres effets négociables, pourvu que deux d'entr'eux apposassent, chaque fois, leur signature conjointe.

Pour tout autre contrat quelconque cependant, le président ou l'un des deux directeurs susdits pouvaient agir personnellement et seul.

Cette résolution fut transmise à la présente intimée, avec qui la compagnie continuait à faire affaires.

La Compagnie était très souvent obligée d'acheter des traites pour être transmises à des clients à New York, et à l'étranger.

Pour opérer cet achat, elle tirait des chèques sur la banque de Montréal où elle avait ses fonds, après s'être enquis de celle-ci du taux de change.

C'était son *chief accountant,* Rogers, qui représentait au président et aux directeurs de la compagnie, qu'il y avait une dette à payer, et que l'on avait besoin d'une traite à cet effet.

Deux signatures étaient alors apposés sur un chèque de la compagnie, tiré sur la banque de Montréal et payable à l'ordre de cette banque; comme il était dans les fonctions de Rogers de faire les affaires de banque de la compagnie, celui-ci prenait le chèque et se rendait à la banque et le lui remettait; il prenait alors un blanc de requisition pour l'achat d'une traite, que la banque

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Notes du l'Hon. Juge Bernier.

(continued).

possédait, la remplissait pour le montant de la somme à payer, plus le montant du taux du change, et remettait cette requisition aux employés de la banque.

La requisition ne portait pas de signature du président, des directeurs ou de Rogers; le nom seul de la compagnie était écrit sur la requisition par ce dernier, et, il y mentionnait également le nom du bénéficiaire de la traite.

Il arrivait que Rogers, au lieu de mentionner le nom du bénéficiaire de ces traites, mentionnait son propre nom comme devant en être le bénéficiaire: la banque conservait la requisition, et remettait la traite à Rogers.

Depuis le 27 septembre 1919 jusqu'au 10 janvier 1922, Rogers obtint ainsi des traites sur lesquelles apparaissait son propre nom comme bénéficiaire, et c'est ainsi qu'il opérait ses vols et ses défalcations à l'égard de la compagnie: qu'il se faisait payer les traites tirées par la banque par d'autres institutions bénéficiaires et il en convertissait le produit à son usage personnel.

Rogers en avait usé ainsi dès avant la police de garantie de l'appelante sur la fidélité des employés de la compagnie; en effet, cette police est en date du 19 mai 1921, alors que les vols de Rogers au moyen des traites susdites avaient commencé le 27 septembre 1919.

La banque intimée est-elle en faute d'avoir donné ainsi des traites payables à l'ordre de Rogers, et peut-on reprocher à ses employés d'avoir été négligents en ne prévenant pas la compagnie du fait que les traites étaient payables à l'ordre de son *chief accountant?*

Il est à remarquer immédiatement, que l'appelante n'a que les droits de la compagnie qui a été volée par Rogers; elle est subrogée à celle-ci dans tous les droits, mais aussi dans tous les défauts de surveillance et de négligence de la compagnie elle-même.

Si la compagnie n'a pas exercé un contrôle sur son employé, elle serait en faute; partant, l'appelante a les mêmes droits que la compagnie, mais elle en a assumé, dans la subrogation, les mêmes responsabilités.

Or, la preuve révèle que Rogers était la personne qui payait les comptes, qui faisait les affaires de banque; il était le repré-

sentant de la compagnie pour toutes ces matières; il tenait lui-même tous les livres; il mettait devant le président de la compagnie les comptes, les *statements,* qu'il y avait à payer, et deux de ceux-ci signaient les chèques pour leur paiement.

Rogers en agissait ainsi depuis l'année 1912; jamais l'intimée ou ses employés n'ont eu de soupçons sur le compte de Rogers, ni reçu de plaintes à son sujet; et d'un autre côté, la compagnie semblait avoir une confiance aveugle dans son employé.

Quand Rogers s'en allait acheter des traites de l'intimée, le président et l'un ou l'autre des deux directeurs, le savaient; en effet, l'un d'entr'eux téléphonait à la banque pour connaître le taux du change, qui à cette époque variait beaucoup, et qui était parfois de 3, 4 et même de 12%.

Le président ou les directeurs n'ont jamais exigé de Rogers qu'il leur rapportât les traites qu'il avait achetées afin de les contrôler; ils n'ont apparemment pas même constaté dans les livres si le nom de la personne à qui les traites devaient être envoyées étaient mentionnés, quelle aurait été la transaction qui aurait donné lieu à cette remise, ni fait aucune véritable vérification sérieuse à ce sujet.

Dans quelques cas, on voit des documents produits au dossier et qui sont des reçus par les bénéficiaires étrangers des traites pour les montants de leurs réclamations.

Ainsi, à la page 18 du dossier, on voit deux reçus de Johnson & Higgins, l'un pour $259.00, l'autre pour $270.40.

Il n'était peut-être pas nécessaire de se faire donner de semblables reçus par les clients de la compagnie à qui celle-ci envoyait des traites; toutefois, de tels reçus auraient été un moyen qu'aurait eu la compagnie de contrôler l'existence des dettes à l'emploi du produit des traites.

Au sujet de ces traites, l'on peut résumer les transactions qui ont eu lieu entre la compagnie et la banque, comme suit:

La compagnie donnait l'ordre à Rogers d'acheter des traites de la banque; elle lui remettait l'argent nécessaire, sous forme de chèques dûment signés; Rogers allait chercher la marchandise et la payait.

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(continued).

Dans mon opinion, la formule de requisition remplie par Rogers, n'a aucune importance.

La marchandise était livrée à Rogers, comme elle aurait pu l'être pour toute autre marchandise dans un commerce différent; Rogers agissait, en tout cela, comme un commis ou un préposé chargé d'aller chercher cette marchandise; la banque savait chaque fois, par les téléphones qu'elle recevait de la compagnie, que Rogers allait chercher cette marchandise; qu'avait-elle à prendre des précautions, ou autrement s'enquérir auprès de la compagnie, si les traites devaient être faites au nom de Rogers ou au nom d'autres personnes?

Supposons qu'il y eut le nom de telles autres personnes comme bénéficiaires des traites, la banque les eût-elles plus connues qu'elle connaissait Rogers?

Evidemment non.

Les traites eussent-elles été faites payables au porteur et remise à Rogers, que je ne crois pas que la banque fût tenue à plus qu'elle n'a fait; comme je l'ai dit, pendant dix ans, Rogers allait acheter ainsi des traites payables de temps en temps à des personnes inconnues de la banque, et 41 fois payables à lui.

Bien différente aurait été la position de la banque, dans le cas où Rogers, agissant pour la compagnie, aurait signé un chèque au nom de la compagnie, tiré sur la banque, et payable à lui-même; dans l'espèce, la chose ne pouvait pas être faite, puisque des chèques devaient être signés conjointement par deux directeurs.

Mais, supposons que la clause susdite de la résolution n'aurait pas existé, comme la chose arrive souvent dans d'autres maisons de commerce, où le teneur de livres est autorisé à signer des chèques au nom de sa compagnie; si l'employé signe un chèque, comme mandataire, payable à lui-même, cela implique notification que le mandataire n'a aucune autorisation restreinte de signer, et la maison de commerce n'est liée par cette signature que si le mandataire, en signant ainsi, n'a agi que dans les limites de son mandat. (Art. 51 de la Loi des Lettres de Change).

Les dépositions produites au dossier par les deux directeurs de la compagnie, MM. Dettmers et Mercer sont à l'effet, dans leur ensemble, que s'il y a eu des négligences ou des imprudences de

commises dans les transactions entre la compagnie et l'intimée c'est bien la compagnie qui en est responsable; ainsi, on y voit que la compagnie ne vérifiait pas les comptes d'une manière suffisante de son employé; on y voit encore que jamais elle n'a dit à la banque que les traites devaient être faites d'une autre manière que celle fait par la banque; il eût été facile pour elle, en téléphonant à cette dernière, de dire au nom de qui les traites devaient être faites payables.

Voici ce que l'on trouve dans la déposition de Dettmers :

" A.—When we had to remit in foreign exchange, it was " usually for some particular items. The custom was for " Rogers, as our trusted accountant, to present a statement " of account with the cheque. That statement was supposed " to be taken from our books and would show that the money " was owing. With that statement, the cheque would be signed " for the purchase of the draft."

" Q.—Apart from the first two Rogers drafts referred to " in the statement Exhibits D-2, and D-3, can you say as a " matter of fact, a statement was produced with regard to " any of the subsequent Rogers Drafts? "

" A.—No. I can only assume that since it was the rule of " our office, the statements must have been produced. It is " our custom always to pay our accounts on our own state- " ments because we found in practice it is much easier to keep " our books right by following this method. Occasionally our " correspondents send us statements, and the payments would " be made on those statements."

" Q.—Then what we have been calling statements are, in " effect, the accounts that are to be paid by the drafts that " should be bought through the use of the cheques you or your " officers signed? "

" A.—Yes. Usually made up by us."

" Q.—Then I am right that the answer to my recent " question is that the officers signing the cheques would not " see the requisition notes? "

" A.—Yes."

" Q.—They would not? "

" A.—No."

Pour toutes ces raisons, je suis d'opinion de rejeter le présent appel avec dépens.

In the Court of King's Bench.

Notes du l'Hon. Juge Letourneau.

NOTES DU JUGE LETOURNEAU

Je serais avec l'Appelante, s'il s'agissait d'un recours pour les premiers détournements de Rogers, ceux disons, des trois premiers mois. Je crois que la Banque Intimée avait, vis-à-vis sa cliente Willis, Faber & Company, l'obligation de ne remettre les fonds ou valeurs que selon les instructions qui lui avaient été fournies; selon la résolution du 8 juillet 1912, (Exhibit D-1), ou, pour le moins, dans les limites d'un mandat véritable donné à un employé (dans l'espèce, Rogers).

Je n'ai pas besoin de rappeler les termes de cette résolution de juillet 1912: il est facile de conclure que l'Intimée n'en a pas tenu compte lorsque, pour elle, il s'est agi d'abandonner à l'employé Rogers les deniers qui lui avaient été confiés. De même également, il reste acquis que le mandat tacite donné à cet employé, était en fait limité à des traites en faveur de clients, savoir de tiers, et que, remettant à Rogers personnellement, la Banque allait au-delà de ce mandat tacite.

S'il s'agissait, je le répète, des premiers paiements ainsi faits, je n'hésiterais pas à faire porter à l'Intimée la responsabilité de son imprévoyance dans l'accomplissement du devoir qu'elle avait vis-à-vis son déposant, car outre qu'elle n'aurait pour se justifier ni les instructions formelles ni l'autorisation tacite qui s'était établie en faveur du représentant Rogers, elle ne pouvait alors démontrer quoi que ce soit qui eut pu lui " donner des motifs raisonnables de croire " que l'autorisation allait jusque-là (art. 1730 C.C.) La Willis, Faber & Company qui avait un employé malhonnête, pouvait encore compter que l'Intimée s'en tiendrait strictement à ses instructions ou au mandat tacite qui s'était établi quant à des traites en faveur de tiers: une banque ne peut s'excuser à la seule faveur de sa bonne foi; il lui faut établir une autorisation ou la trouver dans la loi.

C'est donc plutôt uniquement à raison de l'article 1730 C.C., que l'Intimée pouvait s'exonérer, puisqu'elle n'était ni dans le cas des instructions formelles ni dans les limites du véritable mandat tacite consenti à l'employé infidèle.

A-t-elle *pu croire que* cet employé Rogers était ainsi autorisé à faire faire en son nom les traites qu'elle requérait? S'il s'agissait des premières offenses, je dirais non, car je ne verrais rien qui eut encore pu raisonnablement faire croire à cette autorisation, et

l'attention éveillée par ce simple fait que l'employé préposée au paiement de tiers, se donnait soudain comme bénéficiaire, exigeait une confirmation ou un acquiescement: n'étant plus dans les limites des instructions ou du mandat tacite réellement donné, l'Intimée était réduite à démontrer à la satisfaction du tribunal compétent, qu'une circonstance lui avait raisonnablement fait croire que Rogers était autorisé jusqu'à cette limite nouvelle de requérir aussi des traites à son ordre.

Cette preuve positive d'une telle circonstance, l'Intimée l'a-t-elle faite dans la cause? Je le crois, sans toutefois nous enlevons de la discussion les premiers détournements, pour ne les utiliser que comme précédents; car, ces premières offenses de Rogers étaient en même temps des faits susceptibles de ratification.

Mais on objecte que l'on ne peut ratifier que ce que l'on connait; qu'il n'y a acquiescement que pour ce que l'on sait..... Il n'y a aucun doute à ce sujet, et j'admets même que ce n'est qu'en janvier 1922 que l'Appelante a découvert les premières fraudes, qu'elle ne pouvait faire plus que de se confier à ses auditeurs et que ceux-ci n'ont pu, avec les méthodes ordinaires, découvrir le mal.

Mais si j'admets que de fait les premiers détournements de Rogers n'avaient pu, faute de connaissance, être réellement ratifiés, on concèdera que pour quiconque croyait qu'une audition régulière devait mettre à jour toute telle irrégularité, si réellement c'en était une, le silence de la partie intéressée prolongé après coup, devait avoir une signification, pouvait donner lieu à une croyance raisonnable: la preuve établit que chez Willis, Faber & Company, l'audition se faisait en moyenne tous les trois mois, et la Banque était justifiable de penser qu'une telle audition devait se faire au moins une fois l'an: et si, à la fin de 1920, rien n'avait encore révélé qu'elle s'était trompée en faisant à ce point confiance à Rogers, n'était-elle pas dès lors en face d'une circonstance qui pouvait lui faire croire qu'en réalité le mandat de ce dernier s'étendait jusqu'à prendre des traites à son ordre (art. 1730 C.C.)?

L'audition des livres n'avait rien révélé, mais c'est à cause d'une fraude bien distincte que cette audition est ainsi demeurée ineffective; l'Intimée, elle, ne pouvait présumer une audition erronée, inopérante. Il y avait pour cela une excuse, mais cette excuse reposait sur une fraude additionnelle de l'employé de Willis, Faber & Company, et pour laquelle, cette fois, l'Intimée n'avait

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(continued).

aucune responsabilité: la falsification des livres, etc. Pour ce dernier acte et ses conséquences, la Willis, Faber & Company est seule à devoir supporter la malhonnêteté de son employé; et si, à cause de cela, elle n'a pu, comme elle le prétend, découvrir la *réalité*, rappelons que ceci importe peu pour le cas qui nous est soumis, puisque l'article 1730 C.C., que l'Intimée invoque, n'exige après tout qu'une " croyance raisonnable ", ou des motifs raisonnables de croire ".

Ainsi et puisque l'Intimée était admise à croire que l'audition chez Willis, Faber & Company se faisait complète et utile, un silence longtemps maintenu après une telle audition devait faire croire que ce qu'on avait pu craindre irrégulier, ne l'était pas en réalité, qu'il y avait confirmation ou acquiescement, puisque toute irrégularité eut contraint la Willis, Faber & Company à parler: cette dernière eut, comme dit Laurent qu'elle cite (Vol. 23, No. 17): " été touchée de quelque chose qui lui imposait la nécessité de parler."

A défaut, n'était-ce pas la satisfaction, l'acquiescement? Et cet état de choses existant ainsi pendant plus d'une année après les premiers paiements, pendant plusieurs mois après les paiements suivants, l'Intimée ne pouvait-elle " raisonnablement croire " comme l'y autorise l'article 1730 C.C.?

Or, cet état de choses était acquis à l'Intimée quand l'Appelante est entrée en scène le 23 mai 1921. La police qui a donné lieu à une subrogation et qui sert de base à l'action est pour une année à compter de cette date, et les détournements faits durant cette année et qui seuls sont couverts par cette police, n'auraient été que la répétition d'actes réputés consentis, du moins tels que la chose devait apparaître et est de fait raisonnablement apparue à l'Intimée.

Dans ces circonstances et bien qu'en fait la Wilis, Faber & Company n'ait découvert l'irrégularité commise qu'en janvier 1922, l'Intimée pouvait " raisonnablement croire " que les paiements que Rogers a soutirés à son ordre après le 23 mai 1921, n'étaient que la répétition d'actes consentis par cette Compagnie. Ceci suffit pour justifier la conduite qu'elle a tenue du 23 mai 1921 jusqu'au départ de Rogers, la seule période pour laquelle l'Appelante ait droit de se plaindre.

Pour ce motif, je confirmerais.

Sévérin Létourneau,

J. C. B. R.

NOTES OF HON. MR. JUSTICE CANNON

On the 19th of May, 1921, appellant insured the fidelity of K. V. Rogers, accountant of Willis Faber Company of Canada Limited. At that date, Rogers had already started, since the 14th of June, 1919, to rob his employers, but his defalcations were discovered only on the 31st of January, 1922. The Willis Faber Company claimed $5,000.00 from the appellant under the insurance policy which the appellant refused to pay, but subsequently paid, after Willis Faber Company had obtained judgment therefor. The appellant then sued the Respondent for $7,565.61, made up of $5,000.00 so paid to Willis Faber Company, and the legal costs incurred in the appellant's litigation with that company.

Under a subrogation from the insured the appellant sues to exercise the rights of Willis Faber Company of Canada Limited, which I will call hereafter the " Customer," against the Bank of Montreal, stating that the latter had failed in their duty and that, through the negligence of the bank officials, Rogers had been enabled to embezzle the money belonging to his employers to the extent of $13,594.15.

Plaintiff's action is based mainly on a resolution of the directors of the Customer of the 8th of July, 1912, authorizing any two of the following persons, namely: Raymond Willis, president, O. W. Dettmers, director, E. L. Mercer, director, and K. V. Rogers, accountant, to make, draw, sign, accept or endorse bills of exchange, promissory notes, cheques, orders for payment or other commercial papers on behalf of the company.

The Customer had occasion in the course of its business to obtain from the respondent drafts for varying amounts drawn on New-York and during 28 months, from the 27th November 1919 to the 10th January 1922, amongst the New-York drafts obtained from the respondent there were 41 drafts on New-York payable to the order of K. V. Rogers.

According to Mr. Dettmers, the custom was to telephone to the bank, find out what the rate of exchange was on a particular day, and issue a cheque payable to the order of the bank for the amount of the draft required, plus the exchange. This would be handed, with a requisition, by Rogers to the bank which would in turn give him the bills of exchange. Rogers had before presented to his officials a statement of account with the cheque to be signed. The signing officers

In the Court of King's Bench.

Notes of Mr. Justice Cannon.

(continued).

would not, however, before signing the drafts, see the requisition notes; this was left entirely to Rogers who filled blank forms supplied to him and signed the name of the Customer to indicate to the bank who the payee was to be.

It also appears from Mr. Dettmers' evidence that no advice was sent to the payee of the fact that a foreign draft had been charged up to his account.

It is not contended by the appellant that the cheques made to the order of the Bank of Montreal and signed by the Customer's officials were not properly debited to the Customer's account; but they claim that when, for the first time, Rogers bought drafts on New-York payable to his own order, the bank should have telephoned or inquired from the Customer whether or not Rogers, their trusted accountant, one of their signing officers, was duly authorized or not to purchase drafts on New-York payable to his own order. In other words, appellant contends that this should have been sufficient to place the bank upon inquiry to ascertain the extent of Rogers' powers.

After perusing with care the able argument of appellant's counsel, I have reached the conclusion that the trial judge was right in his appreciation of the evidence and the circumstances of the case. The whole matter can be summarized in the answer to this question: Did the Customer give the bank reason to believe that Rogers was authorized to fill on behalf of the Customer the requisition form indicating the names of the payees of the drafts the Customer desired to purchase from the bank with the duly signed cheques that were presented by Rogers?

I must answer this question in the affirmative.

For a long period the President and other signing officers of the Customer did allow Rogers to determine alone the names of the payees of these foreign drafts by filling a separate form which was handed to the bank with the cheques duly signed by two of the officials of the company in accordance with the resolution of the 8th of July, 1912. Under those circumstances the bank was entitled to consider the requisition form and the cheque as forming one single document.

The appellant contends that the bank was perfectly entitled to issue drafts, on Rogers' instructions, after this requisition, to the order of third parties, but is guilty of negligence because some of their drafts were made to the order of K. V. Rogers, the trusted

accountant of the Customer, the man who had been practically in charge of the latter's banking since 1912. I cannot agree to this proposition. This would substitute the bank to the appellant who were the insurers of Rogers' fidelity.

The appellant cannot exercise against the respondent more rights than the Customer could against the bank. The Customer selected Rogers as their employee, not the bank; the Customer sent Rogers with duly signed cheques to the bank to purchase drafts; the Customer allowed Rogers for a long period of time to indicate himself the names of the payee on the drafts so purchased; the bank simply carried out the instructions of the Customer as given in writing by their trusted employee; the Customer, not the bank, neglected to instruct their auditors to verify if the drafts purchased corresponded with the entries made by Rogers in the books; the Customer, not the bank, neglected to sign themselves the requisition blanks for drafts or to indicate on the cheques, themselves, what drafts they wanted to buy.

I quote from appellant's factum the following:

" IN RE KINGSTON COTTON MILLS (12 Times Law Reports, p. 430), Lopes L.J. at p. 431, said:—

" What is reasonable skill, care and caution must depend upon the particular circumstances of the case. An auditor is not bound to be a detective or, as was said, to approach his work with suspicion that there is something wrong. He is a watch dog, but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to incite suspicion, he should probe it to the bottom, but in the absence of anything of that kind, he is only bound to be reasonably cautious and careful.

" Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when these frauds are perpetrated by tried servants of the company and are undetected for years by the directors. So to hold would make the position of an auditor intolerable."

In the Court of King's Bench.

Notes of Mr. Justice Cannon.

(continued).

I believe that it would be unfair to exact from the bank a greater care than appellant would require from the auditors of the Customer.

I would accept as a guide in this matter the principle embodied in section 3 of the Bills of Exchange Act which reads as follows: " A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not."

For the above reasons and those given by the trial Judge, I would dismiss the appeal with costs.

Quebec, 12 April, 1928.

Notice of Appeal to the Supreme Court of Canada. 9th May, 1928.

NOTICE OF APPEAL TO THE SUPREME COURT

Take Notice that the Appellant, Dominion Gresham Guarantee and Casualty Company herein above described, appeals to the Supreme Court of Canada sitting at the City of Ottawa in the Province of Ontario from a Judgment of the Court of King's Bench of the Province of Quebec, appeal side, sitting at Montreal, rendered on the 16th April, 1928, dismissing Appellant's appeal from a Judgment of the Superior Court rendered by Duclos J., 15th May 1927, dismissing the present Appellant's (then plaintiff's) action against the present Respondent (then defendant) for the sum of $7,565.61 and costs:

And Further Take Notice that at 2.30 o'clock in the afternoon on the 10th day of May instant before the Clerk of the Court of King's Bench, Appeal Side, at the Court house in the City of Montreal the Appellant will then and there furnish good and sufficient security as required by the provisions of the Supreme Court Act and that such security shall be a sum of $500. in legal and valid money of the Dominion of Canada:—

And govern yourselves accordingly.

Montreal, 9th May, 1928.

Mann & Mackinnon,
Attorneys for Appellant.

We acknowledge to have received copy and to be duly notified of the present appeal and consent to furnishing of the security in the manner and form in said Notice provided.

Notice of Appeal to the Supreme Court of Canada. 9th May, 1929. *(continued).*

Montreal, 9th May, 1928.

Meredith, Holden, Heward & Holden,
Attorneys for Respondent.

10

BAIL-BOND

Bail Bond.

Canada
Province of Quebec

COURT OF KING'S BENCH
(Appeal side)

20

Montreal Thursday the 10th day of May, 1928.

Present in Chambers: The Honourable Mr. Justice Hall.

The said appellant has this day presented a notice of appeal to the Supreme Court of Canada from the final judgment rendered by this Court on the 16th day of April, 1928.

30 Seeing that the said Appellant has deposited the sum of five hundred ($500.) in the hands of the Clerk of this Court, as security, viz: that the said appellant will effectually prosecute the said appeal to the Supreme Court of Canada from the final judgment rendered by this court on the 16th day of April, 1928, and will pay all costs and damages as may be awarded against it by the Supreme Court of Canada;

Seeing the consent of the Respondent as to the security given

40 I, the undersigned, do accept said security and allow it as good and sufficient.

A. R. Hall,
Judge of C. K. B.

In the Superior Court.

Judgment of the Superior Court under the Winding-Up Act, authorising petitioner to prosecute appeal. 6th Aug., 1928.

Province of Quebec,

District of Montreal.

No. 32

JUDGMENT OF THE SUPERIOR COURT

" Under the Winding Up Act "

Authorizing Petitioner to prosecute appeal

On the sixth day of August, 1928.

Present: The Honourable Mr. Justice Trahan.

In re:—

Dominion Gresham Guarantee & Casualty Company, a body corporate of Montreal,

In Liquidation

&

Crown Trust Company, a body corporate of Montreal,

Liquidator Petitioner.

Seeing the petition of Crown Trust Company the liquidator to that effect containing the following allegations:

1.—That by Judgment of this Honourable Court on the 21st June, 1928, it was named and appointed Liquidator to the Dominion Gresham Guarantee and Casualty Company, the Corporation above described in liquidation.

2.—That in an Action instituted before this Honourable Court under the number 3729 entitled Dominion Gresham Guarantee and Casualty Company vs. Bank of Montreal wherein the said Plaintiff claimed from the said Defendant a sum of $7,565.61, Judgment was rendered on the 5th May, 1927, dismissing the Plaintiff's Action.

3.—That upon an Appeal by the said Plaintiff to the Court of the King's Bench for the District of Montreal, Appeal Side, Judgment was rendered on the 16th April, 1928, dismissing the appeal of the Plaintiff Appellant.

In the Superior Court.

Judgment of the Superior Court under the Winding-Up Act, authorizing petitioner to prosecute appeal. 6th Aug., 1928. *(continued).*

4.—That on the 9th May, 1928, Plaintiff Appellant gave Notice of Appeal to the Supreme Court of Canada, and on the 10th May, 1928, deposited a sum of $500.00, the security required under the provisions of the Supreme Court Act.

5.—That on the 30th May, 1928, by Judgment of this Honourable Court the said Company in Liquidation was ordered to be liquidated and wound up and, as hereinabove stated, the Petitioner appointed Liquidator on the 21st June, 1928.

6.—That the Petitioner desires to prosecute the said appeal and to be joined therein with the Company in Liquidation and at a meeting of Inspectors named and appointed to advise the Petitioner in connection with the liquidation of the above Company convened and held on the 1st day of August, 1928, the Petitioner was authorized, empowered and directed to prosecute the said appeal to the Supreme Court of Canada to all intents and purposes whatsoever as will more fully appear upon reference to copy of the said resolution herewith produced to form part hereof.

Seeing also the resolution of the Inspectors passed on the 1st day of August, 1928;

We, the undersigned Judge, do grant said petition; do authorize the Petitioner Crown Trust Company, in its quality of liquidator to the Dominion Gresham Guarantee & Casualty Company in liquidation and empower it and direct it to prosecute the appeal in the above entitled case to final hearing and judgment and that it may be joined in said appeal with the said Company Appellant à toutes fins que de droit: the whole with costs.

RC

(Signed) Arthur Trahan,

J. S. C.

True Copy

R. Aimé Tison,

Dep. P. S. C.

Consent of parties as to printing of case. 11th Aug., 1928.

CONSENT OF PARTIES AS TO PRINTING OF CASE

The Parties hereby agree that the joint case in this matter for the Supreme Court of Canada shall consist of the documents printed in the case for appeal to the Court of King's Bench for the District of Montreal, in the Province of Quebec, and also the Notes of Tellier, Bernier, Letourneau and Cannon J.J. upon the judgment rendered by the said Court and also of the judgment of the said Court, and furthermore the notice to appeal to the Supreme Court of Canada, Bail Bond and the Judgment of the Superior Court authorizing Petitioner to prosecute the appeal to the Supreme Court.

Montreal, this 11th day of August, 1928.

Mann & Mackinnon,
Attorneys for Appellant.

Meredith, Holden, Heward & Holden,
Attorneys for Respondent.

Province de Québec
District de Montréal.
No. 3729

Certificat de la Cour Superieure re: Notes de Jugement. 9 Août, 1928.

CERTIFICAT DE LA COUR SUPERIEURE

Re: Notes de jugement.

Je, soussigné député-protonotaire de la Cour Supérieure de la Province de Québec, pour le district de Montréal, certifie par les présentes qu'il n'y a pas de notes additionnelles de l'Hon. Juge Duclos, en cette cause.

Montréal, 9 août 1928.

C. E. Sauvé,
Député-protonotaire.

Certificate of Clerk of Appeals as to settlement of case, as to security and as to reasons of judgment.

CERTIFICATE OF CLERK OF APPEALS AS TO SETTLEMENT OF CASE, AS TO SECURITY AND AS TO REASONS OF JUDGMENT

We, the undersigned, Clerk of the Court of King's Bench (Appeal side), do hereby certify that the foregoing printed documents, from page one to page 153 inclusive, is the Case stated by the parties, pursuant to Section 73 of the Supreme Court Act, and the Rules of the Supreme Court of Canada, in a certain cause lately pending in the said Court of King's Bench, between The Dominion Gresham Guarantee Casualty Company, Appellant, and Bank of Montreal, Respondent.

And we further certify that the said Appellant has given proper security to the satisfaction of the Honourable Justice Hall as required by the 75th Section of the Supreme Court Act, being a deposit, a copy of which deposit is to be found on page 149 of the annexed Case.

And we further certify that we have applied to the Judges of the said Court of King's Bench, for their reasons of judgment, and that the only reasons delivered are those of the Honourable Justice Tellier, Bernier, Letourneau and Cannon.

In testimony whereof, we have hereunto subscribed our hand and affixed the seal of the said Court of King's Bench, at Montreal, this , 192 .

(L.S.)

Clerk of Appeals.

Certificate of Registrar of the Supreme Court of Canada as to contents of record. Aug. 13, 1929.

IN THE SUPREME COURT OF CANADA

BETWEEN:

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY,

Appellant,

—and—

THE BANK OF MONTREAL,

Respondent.

I, EDWARD ROBERT CAMERON, Registrar of the Supreme Court of Canada, hereby certify that the printed document annexed hereto, marked " A," is a true copy of the original case filed in my office in the above appeal; that the printed documents also annexed hereto, marked " B " and " C," are true copies of the factums of the appellant and respondent respectively deposited in said appeal; and that the document marked " D," also annexed hereto, is a true copy of the formal judgment of this Court in the said appeal; and I further certify that the document marked " E," also annexed hereto, is a copy of the reasons for judgment delivered by the judges of this Court when rendering judgment, as certified by S. E. Bolton, Esquire, the Official Reporter of this Court.

C. R. CAMERON.
Registrar.

DATED at Ottawa this thirteenth day of August, A.D. 1929.

DOMINION OF CANADA

IN THE SUPREME COURT OF CANADA

(OTTAWA)

On Appeal from the Court of King's Bench (Appeal Side) for the Province of Quebec District of Montreal

BETWEEN:

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY

(Plaintiff in the Superior Court and Appellant in the Court of King's Bench, in Appeal),

APPELLANT

— vs —

THE BANK OF MONTREAL

(Defendant in the Superior Court and Respondent in the Court of King's Bench, in Appeal),

RESPONDENT

APPELLANT'S FACTUM

This is an appeal from a judgment of the Court of King's Bench in appeal (17th April, 1928) sitting at Montreal confirming a judgment of Duclos J., 5th May, 1927, dismissing the action of Appellant (Subrogee of Willis Faber & Company of Canada Limited, the Customer) against the Respondent Bank upon a claim for $7,565.61 for conversion of the Customer's funds, and for damages.

In the Supreme Court of Canada.

Appellant's Factum.

The Facts.

I

THE FACTS

Appellant is in Liquidation but is authorized to prosecute this appeal by Judgment of the Superior Court, Montreal (Case, p. 150).

In 1922 an action was instituted by Willis Faber & Co. of Canada Limited (hereinafter called the Customer) against Appellant, the insurer to make good a claim against the Bank of Montreal (hereinafter called the Bank) for having delivered to an employee drafts on New York payable to his own order and paid for by proceeds of the Customer's checks made payable to the Bank's own order. The Appellant is the Guarantor of the Fidelity of the Employees of the Customer which carried on its banking with the Bank from about 1910. It passed a Resolution on the 8th of July, 1912, and delivered a copy to the Bank (Case, p. 14) appointing two signing officers, among them being K. V. Rogers, " 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.*"

The Customer carried on a very extensive insurance brokerage business, and was obliged continually to make remittances by foreign drafts to its London Office and to creditors in New York and elsewhere. The practice invariably followed was for its accountant, K. V. Rogers, to prepare a statement showing the Customer's obligation and issue a cheque payable to the Bank, the proceeds to be used to procure a draft in favor of the Creditor. Rogers would then take the cheque to the Bank, make out on the Bank's own form a requisition note for a foreign draft payable to the party to whom the remittance was to be sent and thereupon a foreign draft would be issued by the Bank in favor of the third party and delivered to Rogers. This procedure was carried out from the 17th of January, 1910, to the 10th of January, 1922 (Case, pp. 44-47), during the whole of which time Rogers was a trusted employee of the Customer. He began to go wrong on the 14th of June, 1919 (Case, p. 30, line 30, and pp. 31 and 32), when he appropriated cash to his own use and covered it up in the books. On the 27th of September, 1919, upon false representations and a false statement prepared by him, having by fraud procured one of the other signing officers to sign a cheque payable to the Bank for $259.69, he signed the cheque himself (Case, p. 20, line 1), delivered it to the Bank, and in his own handwriting made out an unsigned requisition note or order requesting a New York draft in his own favour for $250.00 (Case, p. 20, line 20). The Bank without enquiry made out the draft to Rogers' own order and delivered it to him, and he cashed it and used the proceeds for his own purposes.

On the 10th of October he did identically the same thing with a cheque for $270.40 (Case, p. 20, line 30), made out an unsigned requisition note or order in his own handwriting for a draft to his own order for $260.00 (Case, p. 21, line 1) and received the draft from the Bank.

Rogers was the Customer's chief accountant, he had entire charge of the books, checks, vouchers and accounts, and was a trusted servant. In respect of these two defalcations he forged receipts and put them on file (Case, p. 32, line 10; line 17). The copies of the forged receipts will be found at Case, p. 18. He then continued to carry out the same practices covering up his defalcations by the skillful method revealed in each case by the auditor's Report (Case, pp. 32 to 37, inclusive). The amounts of these defalcations are shown in the List (Case, pp. 44 to 47, inclusive). This List covers the drafts issued to creditors of the Customer in the ordinary course of business and those issued to Rogers' order upon his own unauthorized written requisition.

It is of advantage to note in almost every case of drafts in favour of *bona fide* creditors that there are odd amounts of dollars and cents, whereas with one sole exception the amounts of the drafts requisitioned by Rogers from the Bank to his own order are ~~odd~~ EVEN amounts.

In the Case (pp. 20 to 29, inclusive) will be found instances of his method of defrauding the Customer. For example: At Case, p. 23, will be found a cheque payable to the order of the Bank for $1,079.86. This, as well as all other cheques, it is admitted, were complete and regular on their face, but they were made payable to the Bank or its order, and consequently the Bank was not a holder in due course, as the original payee in such a case never is under the authority of Jones vs. Waring-Gillow Co. (Infra) and sec. 56, Bills of Exchange Act.

In order to appropriate the funds entrusted to the Bank and represented by the cheque, Rogers wrote out the requisition note or order for payment entirely in his own handwriting (Case, p. 23, line 30) in which he requested the Bank to make three New York drafts for $320.00 each to his own order. Added to this was the exchange, $122.46. As the cheque was for $1,079.86, he paid the exchange teller the difference in cash and received the drafts payable to his own order. On the other hand, when the cheque was for an amount in excess of that required to pay for the drafts and the exchange, the exchange teller gave him the difference in cash. For example: On July 2nd, 1921 (Case, p. 28), the cheque to the Bank's order was for $1,710.02. The Bank on an unsigned order, delivered to him, payable

to his own order, three New York drafts for $500.00 each, which, with the exchange, amounted to $1,706.31, and the exchange teller delivered him $3.71 in cash. The last cheque drawn by Rogers was on the 10th of January, 1922, for $4,881.79 (Case, p. 37, line 30). With this cheque and in the same manner upon an unsigned order, he procured two drafts for $2,300.00 each to his own order (Case, p. 47, line 12). In all, he stole $13,594.15.

In each requisition order Rogers falsely inserted the Customer's name as the applicant for the drafts.

The Appellant was the insurer of the Fidelity of the Customer's Employees under a Collective Fidelity Guarantee Bond (Case, p. 38), the amount covering the fidelity of Rogers being $5,000.00 (Case, p. 41, line 30). A claim was made by the Customer against the Appellant for $5,000.00, and another suit for a like amount is pending before the Superior Court against the Bank at the instance of The Guarantee Society of England under identical circumstances and for a like amount.

The Customer took action against the Appellant upon its Bond, and the Appellant resisted on the ground that the frauds perpetrated by Rogers were not so perpetrated upon the Customer but upon the Bank, inasmuch as the Customer was merely a creditor of the Bank in respect of the former's funds; that the frauds resulted not from the conversion of the cheques to the Bank's own order, but by the unsigned and informal requisition notes or orders for payment prepared by Rogers himself and upon which the Bank paid out its own funds in the form of drafts to Rogers' own order.

Judgment was rendered against the Appellant on the 6th of November, 1923, by Martineau J. (Case, pp. 48 to 52), who found as a fact that the Bank had paid out monies to Rogers rendering possible a theft or embezzlement by him, and that the recourse which Appellant might have against the Bank on account of the latter's carelessness did not alter the nature of Rogers' acts (Case, p. 52), but that nevertheless Rogers' frauds fell within the terms of the Surety Bond. The Appellant notified the Bank that it would hold the Bank liable for all loss, cost, damage and expense, and that it would appeal to the Court of King's Bench, and in the event of appeal being unsuccessful would hold the Bank liable for the full amount of condemnation, as well as all costs incurred. The appeal was dismissed, and on the 25th of March, 1924, Appellant notified the Bank that the appeal had been dismissed and that the amount of the judgment, interest and costs payable to the Customer and its Attorneys was $6,247.42 (Case, p. 55). In addition to this, the Appellant was

obliged to pay its own lawyers $1,318.19 (Case, p. 56), making its total loss $7,565.61. The Appellant took subrogation from all parties and sued the Bank (Declaration, Case, pp. 1 to 6).

II

PLEADINGS

Appellant in its Declaration set up the facts as above stated. Defendant pleaded the general issue, and among other things that Rogers had been a trusted and responsible official of the Company for ten years; that the cheques were signed by the authorized signing Officers in favour of the Bank; that Rogers from 1910 to 1922 had obtained drafts in favour of other persons by the same method; that the Bank had reasonable ground to think that the Customer had authorized the procuring by Rogers of drafts to his own order; that the Customer should have enquired from its trusted servant why the cheques were needed; that the cheques should have been marked that they were intended for a special purpose; and that the Customer should have ascertained when the first fraudulent cheque was issued what was done with the proceeds (Case, pp. 6 to 9).

Upon a motion for particulars, the Bank produced the actual authority for the signing of cheques and other orders for payment (Case, p. 14); and a list of eighty-eight drafts issued upon requisition notes prepared by Rogers (Case, pp. 15-17); and alleged that the Customer permitted Rogers to make out the requisition notes; that it put no notations on the cheques of the purpose for which the money was to be used; and that it did not make or cause to be made frequent audits, nor did it take out suitable balance sheets.

III

ARGUMENT

Appellant admits that the cheques themselves in all cases were complete and regular on their face, but they were made payable to the Bank or its order, and consequently under the circumstances the Bank was not a holder in due course. The checks were not negotiated to the Bank because Rogers had obtained them by fraud and in breach of faith contrary to the provisions of section 56 of the Bills of Exchange Act, and therefore he had a defective title apart from all

other considerations. This being the case, the Bank held the proceeds of the cheques in trust and could only deal with the funds upon an order for payment complete and regular on its face executed " on behalf of the Company " by its regular signing Officers under the authority of the July 1912 Resolution (Case, p. 14) without which the Bank had no authority to pay out the funds either in cash or in negotiable drafts or in both, as it did, except for the " purposes of the Company."

The frauds were perpetrated, not in any way by the cheques, but by the use Rogers made of them and by the orders for payment or requisition notes, which, as already stated, did not bear the signature of any signing officer of the Company or of the Company itself, but were entirely written by the hand of Rogers. Upon these informal pieces of paper the Bank permitted its Customer to be robbed by its trusted Accountant and Bookkeeper in exactly the same way as if, upon Rogers' verbal request, the Bank had given him cash over the counter for the cheques or placed the proceeds to his own credit.

The facts in this case do not in any sense resemble those in Corporation Agencies Ltd. vs. Home Bank or Cahan vs. Empire Trust Co. (infra).

The drafts found in the List (Case, pp. 44 to 47) were all procured by the same procedure and in favour of creditors of the Customer with exception of the ones designated " K. V. Rogers."

So long as the orders for payment or requisition notes demanded drafts in favour of others than K. V. Rogers himself, the Customer was bound towards the Bank. The moment, however, Rogers demanded cash or the equivalent, the Bank was immediately put upon enquiry and bound to ascertain from the Customer if the drafts to Rogers' order were to be issued " *on behalf of the Company.*"

Had the Bank enquired and ascertained on the 27th of September, 1919, no fraud ever would have been perpetrated and no loss incurred, and the Judge in the first court assumes this to be so (Case, p. 134, line 35).

The evidence reveals such gross negligence on behalf of the Bank's servants and the law applied so contrary to the established jurisprudence that we respectfully wonder how a dismissal of the action was possible.

The exchange teller was examined (Case, p. 121). She says (p. 122, line 30) that she noticed some of the cheques were smaller

than the amount required to pay the drafts and some larger, and that she would either give back the change or collect the difference (Case, p. 124, line 10):

" A.—Well, I do not know, because I never take notice of " who a draft is made in favor of. All I know is to give the draft " out, and take the payment for it.

" Q.—And, I do not suppose you look at the requisition " form, do you?

" A.—Yes, I look at the requisition form, to see the name " of the applicant, and to see that I get paid." (Line 20.)

Line 35:

" Q.—But you do not look to see in whose favor the draft " is payable?

" A.—No.

" The only thing I notice on the draft is that it is signed by " two people.

" Q.—The payee of the draft does not interest you?

" A.—No."

Page 125, line 8:

" Q.—He (Rogers) came in continuously, did he not?

" A.—Yes. I would only remember him by him coming " continually. I did not even know his name. I did not even " know his name was Rogers.

" Q.—Then, may I take your evidence to be this: that you " would get the cheque of Willis Faber & Company, Canada, " Limited?

" A.—Yes.

" Q.—And a requisition note which was a requisition of " Willis Faber & Company, Canada, Limited, for a draft?

" A.—Yes.

" Q.—And you would hand out the drafts without enquiring " or endeavouring to identify to whom they were handed, or to " whom they were payable?

" A.—Yes."

Line 37:

" Q.—To what extent did you examine the cheques?

" Did you examine them to see that they were payable to " the Bank?

" A.—Yes. I noticed that they were payable to the Bank of " Montreal, and that they were certified."

It is submitted that a financial institution could not be guilty of greater or grosser negligence than that revealed by the evidence of the Bank's exchange teller. This employee saw certified cheques in favour of the Bank, knew or ought to have known that it thereby became a trustee of funds and not a holder of the cheques in due course; saw the orders for the delivery of the drafts without there being on them any signature of the Customer's signing officers; did not even look to see whether the drafts were in favour of the person named in the order, or of someone else, and delivered them with the necessary change, without knowing to whom they were handed, or received the necessary difference in cash without knowing from whom.

We leave the evidence of the exchange teller to the appreciation of the Court except to add that this employee's behaviour was a clear dereliction of duty as appears from the admission of the Bank's own accountant (Case, p. 66, line 30).

But, says the Bank, this method was carried on for a number of years. This is true, but Rogers' frauds only began on the 27th of September, 1919, and they ended abruptly on the 10th of January, 1922, during which period Rogers, in each case, cleverly concealed his frauds by the respective methods set out in the Auditors' Report (Case, pp. 30 to 37).

The Bank was not justified in assuming that the fact the drafts were obtained by Rogers to his own order was known to and acquiesced in by the Customer, and must establish that the Customer knew of the frauds, or ought to have discovered them in the ordinary course of business and was negligent in not doing so.

During the whole of the period under review the Customer's books were audited four or five times a year by A. K. Fisk, Skelton & Company, a prominent and established firm of auditors (Case, p. 117, line 5). These auditors checked the postings from the Day Book to the Ledger, from the Journal to the Ledger and from the Cash Book to the Ledger. They examined the returned cheques from the Bank, and checked the Cash Book entries, and the stubs of the checks which falsely indicated the purpose for which the checks were issued (Case, p. 117, line 18). The drafts were never returned to the Customer, but to the Bank (line 45), and it is admitted by the Bank that they would be merely returned to it and filed away (Case, p. 76, line 18). Neither did the fraudulent orders for the drafts ever leave the Bank's

possession; so that the Customer never had a chance to detect the frauds.

The auditors checked the cancelled cheques to the Bank's order and thought, and we submit, were justified in assuming that the cheques, being payable to the Bank of Montreal, would be sufficient guarantee that the funds would go to the right parties (Case, p. 118, line 25). There was no evidence which would reveal to these skilled auditors that there were misstatements or fraudulent entries in the books (Case, p. 119, line 40), nor during the whole of the audit and period under review was there ever discovered anything which created or could create suspicion in the auditor's minds (Case, p. 120, line 4).

It was suggested by the Bank's Counsel in argument that the auditors should, each time they found a cheque payable to the Bank, have gone to the Bank and verified that the proceeds were actually used for the purposes of the Customer. Omission to do this, however, is not pleaded as negligence or proved as a custom of auditors, and the auditors themselves say that it was not the custom to verify remittances (Case, p. 120, line 37), and we submit this formed no part of an auditor's duties.

The Bank, in its defence, says (Case, p. 8, line 33) that the Customer's representative should have enquired from Rogers as to why he wanted the cheques which were signed upon the fraudulent representations of Rogers, and which were used by him to get the drafts payable to his own order. This query, we assume, applies to all cheques that were payable to the Bank's order. The evidence is that Rogers always gave the other officers the information; always true as regards the Customer's indebtedness and the necessity to remit on account of this indebtedness, but with the fraudulent intent on his part to use the proceeds of the checks for his own purposes as soon as he got the second signature.

We have seen that in the first two instances he forged receipts of the creditors and put them on the Customer's files. No other forged receipts were found, but the Customer's officials state that Rogers must have destroyed them as he had full control over the books and vouchers, and checks to be signed were invariably accompanied with a statement prepared by Rogers showing the Customer's indebtedness.

There were practically three accounts which Rogers operated, viz: Willis Faber & Company, London; Johnson & Higgins, New York; and Canadian Government Merchant Marine Limited, Montreal. They were very large accounts; had large open balances repre-

senting a mass of individual transactions. The last account had a turnover of about $2,000,000 each year, made up of hundreds and hundreds of entries (Case, p. 89, line 10). When foreign exchange had to be remitted, it was the custom of Rogers to present a statement of account with the cheque attached. The statement was supposed to be taken from the Customer's books, and would show that the amount was owing (Case, p. 89, line 42). This was the invariable custom, and the statement was always made up by Rogers (Case, p. 90, line 26). The Customer never made out or signed the requisitions or orders for the drafts; Rogers would telephone the Bank, find out the rate of exchange, make up a cheque to approximately the amount required (Case, p. 91, line 28), and write out the requisition orders at the Bank and on its forms.

Mr. Dettmers, the Managing Director of the Customer, says that the cheques were drawn to the order of the Bank, and that they expected that it would take the usual precautions as to whom it would deliver the funds to; and that, for example, if Rogers presented the cheque and asked for cash, the Bank would not give it to him (Case, p. 92, line 28); that if it was intended that a draft should be made to Rogers' own order the cheque would have been made to his order in the first instance (line 37).

Mr. Dettmers says (Case, p. 94) that he exercised a general supervision of the books and that they were regularly audited by reliable chartered accountants several times a year, but at no particular stated times; that they came into the office without notice; that no requisition notes were made out by the Customer; there were no copies in the office, and they had no means of checking them; and that the auditors took the cheques to the Bank's order as a sufficient voucher, and so long as they found a satisfactory entry in the books for the amount of the cheques they were satisfied.

The frauds were discovered on January 31st, 1922. On January 29th Rogers was absent from the office, and the Assistant Accountant, Robinson, took his place. The last fraud was on January 10th, 1922, for $4,600.00 upon a cheque issued to the Bank's order in the same way all the other cheques were made and upon an unsigned requisition note, by means of which Rogers procured two drafts for $2,300 each to his own order. The first duty that devolved on the new Accountant was to check the account of the London Office which had just come in and verify the balance. He found a debit entry in the Cash Book of $4,600.00 which he could not understand, went over to the Bank to enquire and necessarily discovered what had happened (Case, p. 96, line 35).

The reason the last defalcation was discovered three weeks after it was perpetrated was that Rogers had disappeared two days before the discovery and did not have time to cover up the last theft (Case, p. 98, line 8). It is certain, however, if he had not gone away he would have manipulated other accounts and verified the balance to London, as Rogers had always checked the cancelled cheques, approved the balances, confirmed them to London and elsewhere, and manipulated the accounts accordingly, and his frauds might easily then have remained undetected.

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The Bank, in paragraph 17 of its defence (Case, p. 9, line 13), suggests an explanation of why the Customer might want drafts payable to the order of Rogers as being for the purpose of concealing from competitors the identity of the payee. This explanation is, to say the least, far fetched, and such a procedure was never adopted by the Customer (Case, p. 103, line 18; Case, p. 104, line 7). As said by Lord Reading, C.J., in Morrison's Case (infra) that " such transactions are so far out of the ordinary course that they ought to have aroused doubts in the defendant's mind and caused it to make
20 enquiry."

Mr. Dettmers says that up to the time the defalcations were discovered, neither the Customer nor any of its officials had any reason whatever to believe that Rogers was dishonest (Case, p. 108, line 21); that the Bank never had any authority, written or verbal, at any time to issue drafts payable to the Customer's employees (line 40), and that if, on the first occasion the Bank had communicated the irregularity to the Customer, no fraud could ever have been perpetrated.

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Mr. Mercer, another Director of the Customer and a signing officer, explains the method whereby Rogers in the first place got the joint signatures to the cheques: " Rogers would come into my private office with a cheque in favour of the Bank of Montreal, and in most cases (I could not swear it was on every occasion) there was a document attached to the cheque. He would request me to place my signature on the cheque, saying he wished to remit to New York " (Case, p. 112, line 15). " This statement would show a certain sum due to, say, Johnson & Higgins, New York " (Case, p. 113, line 25).
40 " There were always large running balances in favour of that Company, the Customer's London office, and the Canadian Government Merchant Marine " (line 40). He goes on to say (p. 114) that the Customer never knew nor suspected the frauds (line 15). Both Rogers and all the other employees were paid their salaries by cheques to their own order, and no authority, written or verbal, was ever given to the Bank to deliver drafts to the order of employees.

In the Supreme Court of Canada.

Appellant's Factum.

Argument.

(continued).

To sum up: Rogers was the Customer's trusted servant for many years, its Accountant in charge of all books, cheques and vouchers; there never was or could be any suspicion in respect of his fidelity either by the Customer or its auditors; the auditors were skilled accountants who performed their duty four or five times a year. By reason of adverse exchange rates, a method was adopted of entrusting funds specifically from time to time to the Customer's Bank, which was in a fiduciary relationship to the Customer; the vouchers for these trust funds were payable to the Bank's own order; in respect of the delivery of part of the trust funds the Bank had no authority, either actual or ostensible; moreover, the Bank ignored its obligation under Section 51 of the Bills of Exchange Act, which puts it on enquiry the moment an order or requisition for money purports to be made by proxy; the Bank had no valid title to the checks except as a trustee of the funds they represented and had no authority to pay them out except on " behalf of the Company " and upon the signatures of its authorized officers.

While the procuring of drafts by Rogers in favour of third parties may have been within his ostensible authority, the obtaining of drafts to his own order was neither within his ostensible or actual authority, and the funds entrusted to the Bank were converted by the Bank's gross negligence and in violation of its duty towards its Customer to use reasonable precautions.

The frauds did not result from the making and the delivering of the cheques to the Bank. These acts could not have caused loss to the Customer, but when the trust funds representing the amount of the cheques were made available to the Customer's employee without actual or even ostensible authority, these funds were negligently converted.

IV

ERRORS IN JUDGMENTS

Appellant's Factum.

Errors in judgment.

(1) The judgment of first instance erred:—

(a) In including in the dispositif a statement that the Customer had not sought to recover any other part of its loss from the Bank.

This point is not even referred to in the evidence, in no way affects the issues, and in any event it is not a fact. This Court may, if it so desires, have before it the official record of the Superior Court

in an action against the Bank by the Guarantee Society of England for the recovery of a further sum of five thousand dollars ($5,000.00) under the identical circumstances upon which the present action is based. That record was not before the Judge *a quo* and such was not thought necessary.

(b) In finding that the Bank had every reason to believe that Rogers was acting with authority because he was held out by the Customer to be its trusted agent.

Rogers was the agent of the Customer for the purposes stated in the resolution of the 8th of July, 1912, and the ostensible agent for the purpose of entrusting funds to the Bank to pay for drafts in favour of creditors, but he was not even the ostensible agent for the purpose of procuring drafts to his own order, but was acting as a principal.

(c) In finding that by the exercise of a little elementary business precaution thefts could have been prevented, that the requisition notes could have been signed by two authorized signing officers, and that some of the officers of the Company could have examined the drafts and ascertained that they were made payable to the proper payee.

Absence of elementary business precaution is applicable to the Bank, but the Customer exercised every business precaution it could possibly have exercised, but both it and its auditors were deceived by a clever series of frauds. The requisition notes were never seen by the officers of the Company or its auditors and the drafts came back to the Bank, were filed away in bundles, and were procured from the Bank only for the purposes of the trial so that the Company's officials never had an opportunity to examine them as they were ignorant of their existence until the frauds were discovered;

(d) In finding a suggestion of negligence on the part of the Customer's auditors because they did not go to the Bank and examine the requisition notes and satisfy themselves that they corresponded with the entries in the Customer's books.

The auditors examined the Company's cancelled cheques and assumed that a responsible institution like the Bank of Montreal would not negligently dispose of the Customer's funds. They did see that the cash disbursed corresponded with the entries in the books and their duties were fully performed. Their negligence is not pleaded nor is it proved, but, on the contrary, it is the uncontradicted proof that it is not a custom of auditors to verify remittances or pay-

ments to creditors, and indeed it would be difficult to imagine how the business of a financial institution could be carried on if auditors of commercial institutions in a big city like Montreal were to be continually examining a bank's books and papers for the purpose of verifying what a bank did with the proceeds of every Customer's cheque which was made to the Bank's order.

(e) In finding that the fraud could easily have been detected because Robinson, who replaced Rogers, discovered the last fraud the very next day.

Robinson did the only thing he could possibly do. He had not been covering up fraudulent transactions for several years, and Rogers had gone away without sufficiently manipulating the books to cover up his last theft; Robinson was confronted with a statement at variance with the books and was bound to investigate immediately.

(f) In finding that the Customer did not demur to the fraudulent acts of Rogers and did not give notice to the Bank.

Neither the Customer nor the auditors either knew or suspected nor had they means of knowing or suspecting any irregularity.

(g) In finding that even if the Bank's suspicions should have been aroused on the 27th of September, 1919, that it was entitled to disregard its suspicions because there was no objection or notice on the part of the Customer.

(h) In finding that the delivering of the cheques to the Bank by Rogers and the request for the proceeds payable to himself was not sufficient in itself to put the Bank upon enquiry, and in erroneously applying the holding in CORPORATION AGENCIES LIMITED vs. THE HOME BANK (infra) to the circumstances.

(i) In finding that even if the first occasion should have aroused suspicion in the minds of the Bank that such suspicion was lulled to sleep, instead of finding that the subsequent transactions should have intensified the suspicion.

(2) The Court of Appeal erred:—

(a) In finding that the Customer gave the Bank reason to believe that Rogers was authorized to fill in the requisition forms with his own name as beneficiary.

Tellier J. (p. 135) finds that the only person that could give

instructions to deal with the funds was Rogers himself; that the Customer depended on Rogers advising the Bank and that it should have given instructions to the Bank in other ways than through Rogers; for example, by writing on the cheques the use for which the proceeds were to be applied and that by giving the cheques to Rogers it was equivalent to saying to the Bank, " you will do what Rogers tells you to do."

This may be all quite true so long as Rogers was acting within his actual or ostensible authority, but the moment that Rogers purported to act for himself as a principal different considerations applied.

Tellier J. (p. 139, line 29) refers to the fraudulent receipts (p. 18). He says that it was probably not necessary to have receipts from customers for drafts, but that such receipts would have been a means of controlling the existence of debts and the use of the proceeds of the drafts. He then assumes (p. 140, line 10) the case where payees of the drafts were other than Rogers and asks the question, " Would the Bank have known them better than it knew Rogers?" and cites the hypothetical case of the drafts having been made payable to bearer, querying that the Bank could not have been held to do more than it did (line 20).

Tellier J. then says (line 25): " Very different would have been the position of the Bank had Rogers, acting for the Company, signed a cheque in the name of the Company, drawn on the Bank, and payable to himself."

It is submitted here that if such had been the case the Bank would probably have been relieved, if the cheque had been regular on its face, under the authority of CORPORATION AGENCIES and HOME BANK. Then he goes on to say, " If the employee signs a cheque, as mandatory, payable to himself, this implies notification that the mandatory has only a limited authority to sign, and the business house is bound by this signature only in so far as the mandatory, in signing, has acted within the limits of his mandate " (line 35).

It may be observed that these two reasons alone would have justified the learned Judge in allowing the appeal.

Tellier J. says (p. 141, line 2): " We see that the Company did not verify the accounts of this employee in a sufficient manner."

This statement is entirely contrary to the evidence and is made by inference only.

He then says that (line 4) " The Company never told the Bank that the drafts would be drawn otherwise than as they were actually made out, and it would have been easy to telephone the Bank and give the name of the person to whom the drafts were to be made payable."

How could a large corporation such as the Customer possibly do otherwise than leave its banking business to a trusted employee, and why should it telephone the Bank when it had no suspicion or reason for suspicion? As a matter of fact, it did telephone the Bank for information in respect of exchange, but Rogers did the telephoning and he might, quite easily, have faithfully fulfilled what the learned Judge suggests the Company should have fulfilled through others than the Accountant himself within the ambit of whose duties the banking business came.

It is submitted that all of the reasons of Tellier J. warrant the allowance of the appeal.

Bernier J. (p. 137, line 13) quotes the actual authority contained in the Resolution filed with the Bank, but omits to include the words of the Resolution " on behalf of the Company " (p. 14). He says that the requisition notes did not bear the signature of the President or any of the Directors or of Rogers (p. 138, line 4); that it happened that Rogers, instead of indicating in the requisitions the real payee of the drafts, would mention his own name and that the Bank kept the requisitions and handed the drafts to Rogers (p. 138, line 10); that Rogers was the person who paid the accounts (line 44), did the banking business, was the Customer's representative, kept the books and put before the President and Directors of the Company the accounts, the statements that he had to pay; that the Customer never had any suspicion of Rogers, nor had it received any complaint against him, and that the Customer had absolute confidence in him (p. 139).

Letourneau J. says (p. 142, line 1): " I would be with Appellant (Customer) if it was a case of the recourse for the first embezzlements of Rogers, let us say, of the first three months' period. I believe that the Bank Respondent had, for its client, Willis Faber & Company, the obligation to deliver the funds only upon the instructions furnished them, according to the resolution of July 8, 1912, or, at least, within the limits of an actual mandate given to an employee (in this case Rogers)."

It is submitted that this finding alone also warrants the allowance of the Appeal unless there was subsequent ratification. If the circumstances of the first embezzlements should have put the Bank

upon enquiry, and failing such, be liable for conversion, should not the subsequent embezzlements have intensified the suspicion and increased its obligation to enquire?

Letourneau J. (p. 142, line 12) finds that " The Bank did not take any account of the resolution of July 8, 1912, when it surrendered to the employee Rogers the funds that had been entrusted to it. It is equally true that the implied mandate given to this employee was in fact limited to drafts in favour of clients, namely, third parties, and in remitting personally to Rogers, the Bank went beyond such implied mandate." He then says (line 22) that if it was the first payments made to Rogers he would not hesitate to place the responsibility on the Respondent, " in view of its imprudence in the accomplishment of its duty towards its depositor, as not only did it not then have to justify itself, either formal instructions or a tacit authorization established in favour of Rogers, but it could not point to anything whatsoever that could have " given it reasonable ground to believe that the authorization went that far " (Article 1730 C.C.). The Willis Faber Company, which had a dishonest employee, could yet count on Respondent strictly adhering to its instructions or to the implied mandate which had been established concerning drafts in favour of third parties; a Bank cannot excuse itself by alleging good faith " . . . " It must establish an authorization or find it in the Law " (line 35). He then says that the Bank had neither explicit instructions nor did it act within the mandate given to the unfaithful employee; that Rogers, suddenly posing as beneficiary, called for confirmation or acquiescence. Not being any longer within the limits of the explicit or implied mandate, the Bank must satisfy the Court that some circumstance had reasonably induced it to believe that Rogers' authority had been extended to procure drafts to his own order.

However, it will be seen further that the sole ground adopted by Letourneau J. in dismissing the appeal is ratification by the Customer.

It is confidently stated, and with which statement Letourneau J. agrees, that one can ratify only what one knows. He states that it was only in January, 1922, that the Customer discovered the frauds and " that it could not do otherwise than rely on its Auditors and that they were not able, with ordinary methods, to discover the trouble." He then bases his judgment (p. 143) upon the prolonged silence of the Customer and the proof that the books were audited every three months, and nothing having been discovered by the end of 1920, that the Bank was justified in believing that " Rogers' mandate extended to take drafts to his order "; that the audit of the books did not reveal anything and it was due to a fraud that the audit was ineffective, but the Bank could not assume that the audit would be erroneous and ineffective. He then says that there was an addi-

tional fraud on the part of Rogers, namely, the falsification of the books, but that the Bank had no responsibility in this respect (p. 144). " For this last act (falsification of the books) and its consequences, Willis Faber & Co. is the only one who should suffer by the dishonesty of its employee and, if due to that, it could not, as it pretends, discover the reality; let us remember that it has little bearing in the case submitted to us since Article 1730 C.C., that Respondent invokes, requires after all but ' a reasonable belief ' or ' reasonable motive to believe.' "

Letourneau J. (p. 144, line 10) then reasons that the Bank was entitled to believe that the audit was complete and useful and the Customer's silence was equivalent to confirmation and acquiescence. He concludes (p. 144) that the Bank was entitled " to reasonably believe that the payments to Rogers after the 23rd of May, 1921, were only a repetition of acts authorized by that Company. This would suffice to justify the conduct of the Bank from the 23rd of May, 1921, until Rogers left, the only period for which the Appellant has any right to complain."

It will be clearly seen that the views of Letourneau J. are that the Bank should be condemned to suffer the loss to the 23rd of May, 1921, but that the Customer ratified the fraudulent actions from and after that date. It is difficult to follow the reasons of the learned Judge in this respect or why he picks that particular date upon which ratification begins.

Furthermore, he is clearly in error in basing ratification or acquiescence on the Bank's reliance upon the audit. It is not suggested in the defence that the Bank relied on or even knew that an audit was being carried on nor is there a word in the evidence to this effect. It is merely alleged in the defence that there was not a sufficient audit; but the Bank wholly failed to prove it, nor did it even attempt to do so; on the contrary, an efficient and thorough audit was proved by the Appellant.

Cannon J. (p. 146, line 30) answers this question in the affirmative. He says that the Customer allowed Rogers alone to determine the names of the payees of the drafts and that the Bank was entitled to consider that the requisition notes and the cheques formed one document. He also finds, in holding the Bank guilty of negligence in delivering drafts to Rogers' order, that the Bank would become the substitute of the Customer in respect of Rogers' fidelity and that the Customer, not the Bank, was negligent in not signing the requisition forms (p. 147).

Cannon J. (p. 148) says: " I believe that it would be unfair to exact from the Bank a greater care than Appellant would require from the Auditor of the Customer," and he applies the provisions of Section 3 of the Bills of Exchange Act to the effect that " a thing is deemed to be done in good faith within the meaning of this Act where it is, in fact, done honestly, whether it is done negligently or not."

It is submitted that the reasoning of the learned Judge is wrong. In the first place, it is not suggested that the Bank acted other than in good faith, but it did act negligently, and the Bills of Exchange Act in no way protects it from the consequences of its negligence. In the second place, it is error to suggest that there was any ostensible authority vested in Rogers to sign requisition notes in favour of himself, when in fact he did not purport to act in this respect as agent of the Company but as a principal acting for himself, and although he may have had ostensible authority to requisition drafts in favour of third parties he had neither actual nor ostensible authority to requisition drafts for himself.

Cannon J. does not suggest ratification by the Customer.

Howard J. wrote no notes.

It is submitted that none of the reasons of the Judges in Appeal justify their conclusions, but on the contrary that the appeal should have been allowed; nor have they quoted a single authority to justify their judgment.

V

THE LAW

In all the cases cited by the Judge of first instance, the cheques were generally drawn in favour of the defaulter, returned paid and cancelled to the Customer, who had abundant opportunity to detect the frauds by a mere cursory examination of the cancelled cheques. In no case cited was the Customer making daily remittances by foreign drafts as in the present case; consequently the frauds were easily discoverable when the paid cheques were examined.

In MORRISON'S CASE (L.R. 1914, 3 K.B., p. 356), the plaintiff carried on business as an Insurance Broker, under the name of Bruce Morrison & Co. In 1888 he gave authority to one Abbott to draw cheques " for the purposes of the business " on the National Provincial Bank. In 1900 Abbott was appointed Manager of the

business for the City of London. From May 1907 to November 1911 he paid into his own private bank account with the London County & Westminster Bank fifty (50) cheques on the plaintiff's account signed by him, amounting to £1,885. The frauds were discovered in 1912 and action was brought against the London County & Westminster Bank. Lord Coleridge gave judgment for the plaintiff.

The facts in the case were that some of the cheques were drawn in 1907 and 1908, and 1909, 1910 and 1911.

In respect of the cheques drawn in 1907 and 1908, Lord Reading, C.J., at p. 368, said:—

" With reference to the earlier transactions limited to the years 1907 and 1908, I agree with the decision of Lord Coleridge J., that the defendants did not act without negligence." . . . " The defendants knew that Abbott was Manager to a firm of insurance brokers, and the signature on the cheques was express notice to them that he was purporting to act in the signing and endorsing of these cheques as agent. The most cursory examination would have shown the defendants that they were collecting payment for their customer of cheques drawn by him as agent upon the account of his principal at another bank, and that the first three of these crossed cheques were made payable on the face of the instruments to the principal or order and issued to the bank by means of the endorsement of the agent purporting to act as principal. For a firm to pay salary or commission or any debt to a manager by cheques made payable to the firm or order, and for a manager to pay cheques so drawn to his own private banking account, after himself endorsing them as agent for the payees, appear to me transactions so out of the ordinary course that they ought to have aroused doubts in the defendants' mind and caused them to make enquiry."

In MORRISON'S CASE, however, in 1908 a shortage was discovered and Abbott admitted that he was responsible for the shortage, and explained that he had been speculating. The deficiency having been ascertained in 1908, Abbott was debited with part of the deficiency and goodwill account with the other part, and he was reengaged by Morrison with the knowledge that he had been a thief, and without notice to the bank.

Abbott continued his defalcations in 1909, 1910 and 1911, and in respect of these Lord Reading, at page 369, said:—

" Different considerations apply, however, to the collection of the later cheques issued in 1909, 1910 and 1911. No question had

been raised in reference to the cheques paid in to Abbott's account in the preceding two years, and any doubt or suspicion which the defendants ought to have had of these earlier transactions would have disappeared by this time." . . . " It is true that the plaintiff owed no duty to the defendants to examine his pass books or check his accounts with them or with Abbott, but when we are asked to find as a fact that the defendants were negligent, it is necessary to consider all the circumstances, and in my judgment, as these transactions were only repetitions of those of the previous years which had passed unchallenged, the defendants should not be deprived of the protection of the Statute."

Lord Reading then goes on to discuss the discovery of the frauds in 1908, and at page 372 said:—

" In my opinion, although the plaintiff did not himself know that Abbott had been paying these monies into his private account with the defendants, the persons to whom plaintiff had entrusted the matter did know it. The plaintiff was aware on September 30th, 1909, that Abbott had defrauded him by drawing cheques on the plaintiff's banking account and applying them to his own purposes. He had received the balance sheet for the year 1908 on September 28th, 1909, and had become aware that Abbott was debited in that balance sheet for cheques wrongfully drawn and used by him in 1908." . . . " The plaintiff at this time knew of the repeated dishonesty of his servant, but thought in his own words ' that Abbott was not dishonest at heart and would go straight after a severe lesson and would retrieve his position.' If the plaintiff did not know of the details of the dishonesty, it was because he was content to leave them to the accountants. In consequence of the discovery of the dishonesty of Abbott, a new agreement between the plaintiff and Abbott was drawn up, dated November 16th, 1909, *inter alia* to regulate drawings in the future of Abbott."

The agreement also provided that Abbott was not to draw monies except as specified in it, and that the balance sheet issued as of December 31st, 1908, was to be the basis of the accounts between Abbott and the plaintiff, and certain items were debited to Abbott's account, and in respect of these facts Lord Reading, at page 373, said:—

" I come to the conclusion upon these facts that the plaintiff must be held to have ratified these transactions of Abbott, and therefore that the plaintiff's claim in respect of the cheque for 1907 and 1908 and the uncrossed cheque for 1909 fails."

The decision of MORRISON'S CASE in the House of Lords, to quote the words of Lord Buckley, L.J., at page 376, rested on:—

" First, whether there was negligence; secondly, whether there was ratification; and thirdly, whether Morrison, with the knowledge which he had, can render the defendants liable for the loss which he sustained by continuing to employ a dishonest agent."

The Court decided that there was negligence on the part of the bank, but that there was ratification on the part of Morrison and negligence on his part in continuing to employ a dishonest agent, without notification to the bank.

Lord Phillimore, L.J., speaking of the cheques, said at page 379:—

" In Abbott's hands they were still his employer's property, and Abbott could not and did not give to the defendant bank any title to them. Therefore, they were the plaintiff's cheques at the time when they came into the possession of the defendant bank."

The decision in MORRISON'S CASE is based on ratification by the customer with knowledge of the facts but it also determines that the customer never ceased to be the owner of the cheques and that the bank was negligent, but was relieved from its negligence by Morrison's knowledge and his supernegligence in continuing to employ a dishonest servant.

In the case under discussion there was no knowledge on the part of the Customer, nor was there any ratification, for, as said by Lord Phillimore at page 384: " There can be no ratification without knowledge of what you are ratifying."

Lord Buckley, at page 377, said:—

" Quite shortly it seems to me that assuming as I do that when the cheques, say, in 1907, two in number, were dealt with by the Defendants, there was enough to put them upon enquiry, the position after, say, the end of 1907 was such that any suspicion that they ought to have had would have been lulled to sleep by the action of Morrison himself."

What action of Morrison himself: His behaviour, with the knowledge that Abbott had used the cheques for his own purpose; his compromising the matter with Abbott and re-engaging him knowing

him to be a thief, and failing to notify the bank, thereby permitting it to assume that use by Abbott of the cheques was acquiesced in.

In the present case, use was made by Rogers of the cheques fraudulently procured to appropriate the proceeds to his own use; all without knowledge or means of knowledge on the part of the Customer.

If the Bank had used the most elementary precautions by making Rogers, for example, give a receipt for the drafts on the back of the cheques, the frauds would have been discovered in the first or second instance, as there were several weeks between the first fraud and the second one, and in that intervening period the auditors might have come in, as they did, unexpectedly several times a year. It is certain, however, that Rogers' practices could have continued only for a very short time if the Bank had taken the slightest precautions to enquire or even to indicate to its Customer what it had done with the funds entrusted to it.

It is submitted that the circumstances in CORPORATION AGENCIES LIMITED AND THE HOME BANK, P.C. January 18th, 1927 (L.R. 1927, A.C., 318) have no similarity to those in the present case. In that case Cahan, senior, was the Plaintiff's President; Cahan, junior, a director, and Bowler, secretary-treasurer.

In the first place the Home Bank was not the Plaintiff's banker, and, therefore, owed it no fiduciary obligation. In the present case the Respondent Bank was the Customer's banker.

The action was brought to recover Two hundred and five thousand nine hundred and sixty dollars and thirty-seven cents ($205,960.37) upon ninety-four (94) cheques drawn upon the Plaintiff's account in the Merchants Bank.

Under the Company's By-law No. 54, cheques were valid if signed by Bowler (the secretary-treasurer) jointly with any other director.

Six (6) cheques amounting to sixteen thousand five hundred dollars ($16,500.00) were made payable to the Home Bank; eighteen (18) were made payable to Cahan, junior, and cashed over the counter; the others endorsed and paid to his credit, all at the Home Bank.

Cahan, junior, had a Power of Attorney from his father to draw upon other banking accounts and at the beginning of operations the

Plaintiff's credit balance at the Merchant Bank was sixty-one dollars ($61.00).

Cahan, junior, would deposit to the credit of Plaintiff's account in the Merchants Bank cheques drawn on his father's other accounts, then procure a cheque from the Plaintiff regularly signed by himself and Bowler, deal with it as above stated, in the Home Bank, and when it was presented for payment to the Plaintiff's banker there would be sufficient funds to meet it.

The Privy Council found, as did Duclos J. at the trial, that none of the ninety-four (94) cheques were ever met by funds belonging to the Plaintiff.

Here is a clear distinction between the CORPORATION AGENCIES case and this one.

Their Lordships say:—

" The practice of the Merchants Bank was not to issue a pass-
" book but to render monthly accounts . . . Thus, the Plaintiff
" knew . . . that the March and April cheques, drawn as they were
" in favour of Cahan jr., were being accepted by the Company (the
" Plaintiff) as being on their face in order. And so matters went on
" during the subsequent months and *a fortiori* the Defendant bank
" had every reason to believe, as successive monthly accounts were
" sent and no objection raised, that the cheques were legitimate and
" not in fraud of the company."

Here, again, is a clear distinction between that case and the one under discussion.

In the case cited, the Plaintiff knew at least once a month that the cheques had been issued. In the present case, the Customer did not know nor had it any means of knowing that the funds entrusted to the Bank had been delivered, without authority, to an employee.

Their Lordships then say:—

" Moreover, the fact was that the Plaintiff's monies were not
" being appropriated and applied by Cahan jr. at all. His father's
" monies and the monies of the various companies . . . were no doubt
" being misappropriated, but so far as the Plaintiff is concerned,
" Cahan jr. was doing no more than putting into its account monies
" which did not belong to it and drawing out, to the like amount,
" monies with which the company in fact had no concern. . . . The

" company cannot repudiate . . . the one and take the benefit of the " other. It is, in fact, not concerned with either. The Plaintiff lost " nothing by the kiting transactions. If it now recovered Two hun- " dred and five thousand nine hundred and sixty dollars and thirty- " seven cents ($205,960.37) from the Home Bank, it would be making " that sum as a profit . . ., and if it were compelled by action brought " by those whom Cahan jr. defrauded to pay it over to Cahan sr. . . . " it would be giving effect to rights whose existence the Board cannot " in this proceeding investigate and determine," etc.

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" Upon both grounds, viz. that the Defendant had no notice or " knowledge, and that, in fact, the company has sustained no loss, " Their Lordships are of the opinion . . . that this appeal should be " dismissed, with costs."

An action was also instituted by Cahan senior against the Empire Trust Company upon similar facts except that in that case a Power of Attorney was involved. The first Court found for Cahan senior and the judgment was confirmed by the Circuit Court of Appeals, of
20 New York, but reversed by the Supreme Court of the United States, 31st of May, 1927 (47 Supreme Court Reporter, p. 661).

In that case, Cahan senior had a bank account with the Guarantee Trust Company. Cahan junior drew twenty-one (21) cheques, amounting to Thirty-one thousand one hundred and seventy dollars ($31,170.00), on his father's account. A few were made payable to the Empire Trust Company, others to his own order and endorsed, all drawn under an unlimited Power of Attorney and accepted prior to
30 deposit in or delivery to the Empire Trust Company for the account of Cahan junior.

The Circuit Court of Appeals of New York found that Cahan junior, because of the unlimited confidence Cahan senior had in his son, had both actual and apparent authority to draw the cheques but that the misappropriation did not lie in drawing the cheques but in what he did with them, and that the misappropriation and conversion was complete when the money was collected and deposited to the credit of Cahan junior.

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Here, again, the Defendant was not the Plaintiff's banker and owed him no fiduciary duty to see that the debt it owed him was solved for his benefit and not paid out to anybody who asked for the money without first ascertaining that the alleged representative was entitled to receive it on behalf of the customer.

In the present case the cheques were complete and regular on

their face, but they were payable to the Bank which stood in a fiduciary relationship to its Customer and thereupon became bound, as a trustee of funds, to use care in disbursing them for the purposes of its Customer only.

The Circuit Court of Appeal of New York in Cahan's case said:—

" Knowing that the money was not " (the agent's), " but that it " was payable to him as a trustee, the Bank had no authority to place " it to his individual credit."

If in Cahan's case, Cahan junior was a trustee, how much more so was the Respondent Bank a trustee, the cheques in all cases being payable to its own order. It seems impossible to say that it was not. Then, if it was, it could only deal with the trust funds upon instructions from its customer's agent, *but within the scope of his actual authority.*

In the judgment of the Supreme Court of the United States (supra) the Trust Company is termed the Petitioner and the Plaintiff the Respondent.

Mr. Justice Holmes, who delivered the judgment, after referring generally to the facts, said:—

" We are of the opinion that the Court below applied too strict a " rule to an ordinary business transaction. . . . Petitioner had notice " that the cheques were drawn upon Respondent's account, but they " were drawn *in pursuance of an unlimited authority.* We do not " perceive on what ground the Petitioner could be held bound to " assume that cheques thus lawfully drawn were required to be held " or used for one purpose rather than another."

" *In the case of cheques drawn by a corporation not likely to dis-* " *burse except for corporate purposes, there might be stronger reasons* " *for requiring a bank to be on its guard if an officer having power to* " *draw them deposited cheques for considerable sums to his private* " *account,*" etc.

" And where the two parties are father and son, both of mature " years and in good standing, secret limitations of the power are a " pure matter of speculation into which it seems to us extravagant to " expect the bank to enquire. The person reposing confidence in the " son was not the Petitioner, but the Respondent . . . and he himself " tells us that his confidence was unlimited. He put his deposits

" absolutely into his son's power, and the son, if he drew currency as " he might, could do with it what he thought fit. The notice to the " bank was notice only of this relation of the parties," etc. . .

" But we do not place our decision upon that narrow ground, for, " in addition to what we have said, the transactions went on for over " two years, and the Petitioner fairly might expect the Respondent to " find out in a month or two if anything was wrong. Careful people " generally look over their bank accounts rather frequently."

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It will be immediately seen that the view of the Supreme Court of the United States was that there was a clear cut distinction between the disbursing of corporate funds and those of an individual who had given unlimited authority to the defaulter, and that if the funds had, even in Cahan's case, been drawn upon an account of a corporation " not likely to disburse except for corporate purposes," that the Bank would have been held to have been put upon enquiry.

20 The judgment of the Supreme Court is also based upon actual knowledge on the part of the owner of the funds, or at least upon negligent want of knowledge. No such circumstances were present or can be drawn from the facts in the present case.

Further, the cheques in Cahan's case were signed by the attorney named for the purpose in the power lodged with the Bank, and the moneys were paid out upon the cheques themselves to the payee indicated in the cheques (the attorney himself); in our case the cheques were signed by two persons named by the Customer in the resolution

30 lodged with the Bank, and were payable to the Bank itself, but one signature was fraudulently procured and the other affixed with fraudulent intent.

The frauds were completed when Rogers, in the Bank's office, on its stationery, wrote out requisition notes for cash or drafts, to his own order, which were not signed by any of the persons designated in the Company's resolution, and on these unsigned, informal, irregular and illegal documents, the Bank handed over to Rogers large sums of the Company's money, in drafts and cash.

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Had these requisition notes been signed by two officials and they or the drafts returned to the Company, we might be governed by the rule laid down in Cahan's case, but, as the Bank retained the requisitions, and the drafts themselves when they came back to it, the Customer was deprived of the opportunity of checking them, and cannot be punished because it did not do that which it was not in its power to do.

Negligence was imputed to the plaintiffs, in Cahan's case, in not checking the bank books or statements and the cheques when they were received once a month, and that is the ratio decidendi. The bank books and statements of the Customer in our case, throughout the period of the defalcations, balanced perfectly with the cheques, and neither it nor its auditors could possibly have discovered the fraud by the careful checking for which Cahan and the Corporation Agencies Limited were condemned for not effecting.

In R. E. JONES LIMITED vs. WARING & GILLOW LIMITED (L.R. 1926, A.C. 670), one Boddenham, being indebted to Waring & Gillow Limited to the extent of five thousand pounds (£5,000), represented to R. E. Jones Limited, motor-car manufacturers, that he was acting for International Motors Limited which had just perfected a car known as the " Roma " and persuaded the Jones Company to take on the agency on the condition that it would buy five hundred (500) cars and make a deposit of ten pounds (£10) on each.

Boddenham, in order to inspire confidence, stated that Waring & Gillow Limited was financing the enterprise and suggested that the cheque for five thousand pounds (£5,000) be made payable direct to the latter.

The Jones Company made one cheque for two thousand pounds (£2,000) and another for three thousand pounds (£3,000) in favour of Waring & Gillow Limited exactly in the same manner as the cheques were made in favour of the Respondent Bank. These cheques were delivered by Boddenham to the payee, but there was found to be some irregularity in the signatures and were replaced by one cheque for five thousand pounds (£5,000) delivered direct.

Boddenham instructed the payee, Waring & Gillow Limited, to place the proceeds of the cheque to his credit against his indebtedness with such payee, which was done.

It subsequently transpired that Boddenham had perpetrated a fraud. There was no such company as International Motors Limited, nor was there such a thing as a " Roma " car.

The Jones Company thereupon took action against the Waring Company. The Defendant was condemned to pay the five thousand pounds (£5,000) to the Plaintiff.

The Court found that the Defendant, being the original payee of the cheque, was not a holder in due course, under the circumstances,

and therefore could not deal with the proceeds except upon actual authority from the drawer, and cites LEWIS vs. CLAY (14 T.L.R. 149), and LLOYDS BANK vs. COOK (1907, 1 K.B. 794).

Lord Shaw, at page 701, said:—

" My Lords, I am not quite sure that I quite understand from " what particular contention or in relation to what particular state of " facts it is alleged that the Plaintiffs are estopped, and if I am right " in holding that Boddenham was not the agent of the Appellants for " the purpose of handing over the cheques, I fail to see how any con- " duct can be imputed to the Appellants which could be such to have " led to an alteration in the position of the Respondents or how any " duty whatever was cast upon the Appellants which they neglected " to perform and the neglecting of which caused loss to the Respond- " ents."

Then, quoting Sargent L.J. in the original judgment (1925, 2 K.B. 645), he says:—

" In all these cases where the question is which of two innocent " parties is to suffer, one cannot leave out of consideration the ques- " tion which of the two innocent parties really has been guilty of " carelessness or negligence or want of ordinary care."

The House of Lords maintained the action and restored the judgment of Lord Darling.

The effect of this judgment is clearly to hold that the Bank, under the present circumstances, was a trustee and that before it could deal with the funds entrusted to it, it must have actual authority from its Customer, and such authority must come within the terms of the Customer's banking by-law. Therefore, while Rogers was an agent in each case that he delivered cheques to the Bank, with the request that the funds be used to buy drafts in favour of third parties, he was not an agent to deliver cheques to the Bank which were not intended to be used for that purpose; so that in fraudulently procuring the cheques and fraudulently asking for the proceeds for himself, Rogers was not an agent of the Customer under any actual or ostensible authority, but was acting on his own behalf as a principal.

The principle that where a person is known to be acting as an agent, a third party dealing with such agent is bound to enquire as to the extent of such agent's authority, is laid down in all the cases.

The Court of Review held in VICAUD & DEWERTHEMER

(35 S.C., p. 436) that a party dealing with an agent is upon enquiry to ascertain the extent of his powers, and when his authority to sign notes or cheques is limited to " certain business," his principal is not liable for those given or subscribed to by the agent outside of that business and of which he had misapplied the proceeds.

See also BRYAN vs. LA BANQUE DU PEUPLE (L.R. 1893, p. 170);

GRANDA vs. AMERICAN NOVELTY COMPANY, 29 S.C. 444;

CORPUS JURIS, Vol. 2, p. 642;

RANDOLPH on " COMMERCIAL PAPER," Second Edition, Section 1014;

COOK on " CORPORATIONS," Sixth Edition, Section 293, p. 805;

WILSON vs. METROPOLITAN E. R. COMPANY (1890, 120 N.Y. 125).

The leading case in New York is SIMS vs. THE UNION TRUST COMPANY (103 N.Y., p. 472):—

" The Defendant could have refused to receive the deposit or act " as Dr. Sims' agent in transferring the funds from one custodian to " another, but having accepted the office of so doing it was bound to " keep Dr. Sims' money until it received his directions to pay it out. " The language of the cheque making the funds payable *only upon the " order of the Defendant,* imposed upon it the duty of seeing that they " were not, through its agency, improperly distributed after it had " received them. *They could not safely pay out funds except upon " the direction of their lawful owner.*"

We submit that the holding in Dr. Sims' case is upon facts almost identical with those of the present case.

HAVANA RAILWAY COMPANY vs. CENTRAL TRUST COMPANY (204 Federal Reporter, pp. 547-550):—

" Where a bank has knowledge that an officer of a corporation " depositor is using a cheque on the corporation's funds for his per- " sonal benefit, e.g. to pay his own debt to the bank, or to deposit it " to his personal credit, the bank is then put upon enquiry, and if it

" fails to make it, pays at its peril, not because it is the agent of the " corporation, but because the bank cannot discharge its debt to its " depositor except *on the depositor's authorized order.*"

See also GRANT on " BANKING," p. 3;

FALCONBRIDGE on " BANKING," Second Edition, pp. 279-280;

10 MORSE on " BANKING," Fifth Edition, Vol. 1, p. 289, and p. 540 et seq.;

NEWTON vs. GUERIN, 279 Federal Reporter, 256;

ROSS vs. LONDON COUNTY BANK, 120 L.T.R. 636.

In UNDERWOOD vs. BANK OF LIVERPOOL & MARTINS (L.R. 1924, 1 K.B. 775), Banks L.J. said:—

22 " As, however, the Appellants are relying on a rule of law appli- " cable only to dealings with an agent, they must take the rule as they " find it, and if they have omitted to make an ordinary enquiry, they " must take the consequences. Now, what are the facts? The cheques " were plainly, on the face of them, the property of the company."

Scrutton L.J. said:—

" If, as appears to be the fact, A. L. Underwood converted the
30 " cheques of the company, I think the authorities show that the De- " fendant Bank, by collecting those cheques and placing the proceeds " to A. L. Underwood's private account, converted them as against " the Plaintiff company."

Discussing the bank's defence of apparent authority, Scrutton L.J. says:—

" In my view, the distinction between these cases and the present " is, that in the cases cited, the apparent agent was purporting to
40 " create privity between the Plaintiff 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, which he had no actual authority " to do, was immaterial as against the Plaintiff who purported to " contract with the alleged principal on the face of the agent's appar- " ent authority. . . .

" So, in the present case, if the bank were purchasing the cheques

" for value, apart from any question of the Bills of Exchange Act, on " finding from the company's documents that the sole director had " authority to endorse cheques on their behalf, it would be immaterial " whether he was using that power for his own benefit, and privity " would be created between the alleged principal and the bank, so that " the property would pass. But in the present case, A. L. Under- " wood, *in asking the bank to collect and pay the proceeds into his " private account, was not purporting in this transaction to act as " agent for his company or to create privity between them and the " bank. He was acting and purporting to act for himself as prin-* 10 " *cipal.* . . . So, in my view, you cannot rely on the apparent author- " ity of an agent who did not profess in his dealing with you to act as " agent. . . . If banks, for fear of offending their customer, will not " make enquiries into unusual circumstances, they must take, with " the benefit of not annoying their customer, the risk of liability " because they do not enquire."

Atkin L.J. said:—

" I treat the contention that in the absence of authority in Under- 20 " wood, what was done by the bank did not amount to a conversion, " as unarguable. The bank so disposed of the chattels, the cheques, " as to deprive both themselves and the true owners of the dominion " over them, and in exchange for the pieces of paper, constituted " themselves the debtors of the customer. I cannot imagine a plainer " case of conversion. . . .

" If, then, there was no actual authority, the question remains " whether Underwood was acting within the scope of his apparent 30 " authority in such circumstances that the company would be pre- " cluded from setting up lack of actual authority. I think he was " not. . . .

" It is further to be noticed that the bank cannot rely upon any " apparent authority of Underwood to deal with the cheques on behalf " of the company, for he neither purported to do so, nor did the bank " ever suppose that they were dealing with the company. The trans- " action on both sides was treated, as in fact it was, as a dealing for " Underwood's private account." 40

It is obvious that Rogers' transactions were exactly the same as Underwood's; he asked for cash and drafts to his own order, and it was conversion by the Bank to deliver such to him personally, not as agent of Willis Faber Co. but as a principal.

On the 2nd May, 1928, in LLOYDS BANK LIMITED vs.

CHARTERED BANK OF INDIA (Times Law Reports, Vol. 44, page 534), the Court of Appeal in England (Scrutton and Sankey L.JJ. and Tomlin J.) rendered Judgment confirming MacKinnon J. (44 Times L.R. 165) condemning the Bank in a case so similar to the one under consideration that it is impossible to find facts which are not identical and arguments of the Respondent Bank which are not met; and reasons for Judgment are absolutely contrary to those adopted by the learned Judges in the Court of King's Bench.

In Lloyds Bank's case one Lawson was Chief Accountant of the Bombay Branch of the Plaintiff Bank with authority to sign cheques. Between March 1922 and January 1924 Lawson drew nineteen cheques on the Imperial Bank of India payable to the Defendant Bank after having procured the signature of a second signing officer by fraud. The Defendant Bank, upon written instructions from Lawson, paid the proceeds into his private account, which proceeds he immediately withdrew. The frauds were not discovered for a long time because of a complicated series of fraudulent entries in the customer's books. Lawson was the only person who checked the Bank's pass book and the auditors only troubled themselves with totals and not items, but when the first fraudulent cheque was discovered twenty-two months afterwards, the eighteen other cheques were traced in a few days. MacKinnon J. held that the Defendant Bank had received payment for a customer in good faith but had not discharged the burden of proving the absence of negligence and that the Plaintiff was entitled to recovery. The Court of Appeal confirmed.

Scrutton L.J. stated (p. 535): " There might be thought to be " some difficulty, as there are no specific coins in a bank which are the " property of any specific customer, in treating the payment by a bank " of part of its debt to the customer to a person not authorized to " receive it as conversion of chattels; but a series of decisions binding " on this Court, culminating in MORRISON vs. LONDON " COUNTY AND WESTMINSTER BANK, LIMITED (30 The " Times L.R., 481 (1914), 3 K.B., 356) and A. L. UNDERWOOD, " LIMITED vs. BANK OF LIVERPOOL AND MARTINS (40 The " Times L.R., 302 (1924), 1 K.B., 775), have surmounted the difficulty " by treating the conversion as of the chattel, the piece of paper, the " cheque under which the money was collected, and the value of the " chattel converted as the money received under it. (See the expla- " nation of Lord Justice Phillimore in Morrison's case supra, at p. " 378.) The plaintiff's case as to conversion was rested on these " authorities and the trial Judge adopted it. Now in the present case " a subordinate official of a bank is steadily paying cheques of a bank " by which he is employed, made payable to the collecting bank, into " his own account at that collecting bank. They are not cheques which

" on their face have any relation to Lawson except that he is one of " the officers signing; and their amounts are such that they cannot be " payments of salary. The only authority to use cheques for Lawson's " benefit which on their face have no connection with Lawson is a " signature by Lawson himself. It appears to me that as in Under- " wood's case (supra) these facts put the defendant bank on inquiry. " It is very important, in my view, to maintain safeguards against em- " ployees' dealing with their master's property without authority. If " the cheque had come forward without the accompanying authority " of Lawson I do not think the defendant bank would have committed " conversion by collecting the proceeds and asking for further instruc- " tions."

It will be realized how identical the circumstances of Lloyds Bank's case are with those of the present case.

As to the negotiability of the cheques, Scrutton L.J. said (p. 536): " But the House of Lords has decided in R. E. JONES, LIM- " ITED vs. WARING AND GILLOW LIMITED (42 The Times " L.R., 644 (1926), A.C. 670) that the original payee of a cheque is not " a holder in due course."

Discussing CORPORATION AGENCIES LIMITED AND HOME BANK OF CANADA (supra), Scrutton L.J. stated (p. 536): " In CORPORATION AGENCIES LIMITED vs. HOME BANK " OF CANADA (1927, A.C. 318) the cheques drawn in fraud were " treated by the Privy Council as drawn with ostensible authority, " and the distinction between that case and JOHN AND OTHERS " vs. DODWELL AND CO., LIMITED (34 The Times L.R., 261 " (1918), A.C. 563) was made to turn on no notice. I think in this " case there was notice, as in Underwood's case (supra)."

In the present case it was argued by the Bank that the Customer was negligent in not discovering the frauds and that consequently the Bank was " lulled to sleep " and ratification of the fraudulent transactions effected. In respect of this feature Scrutton L.J. (p. 536) says: " The only remaining defence was that the defendant bank was " ' lulled to sleep ' by the failure of the plaintiff bank to detect these " frauds. The learned Judge has dismissed this on the ground that no " one from the defendant bank came to say he was ' lulled to sleep '; " their attitude was that they remembered nothing about the matter. " This is enough to dispose of the matter, but though a similar defence " succeeded in Morrison's case (supra), I am not at all satisfied as to " the grounds of such a decision. It does not seem consistent with " the decisions in BANK OF IRELAND vs. TRUSTEES OF " EVANS' CHARITIES IN IRELAND (5 H.L. Cas., 389), and

" SWAN vs. NORTH BRITISH AUSTRALASIAN CO. (10 Jur., " N.S., 102), that negligence, to act as an estoppel, must be the proxi- " mate cause of the loss. If my butler for a year has been selling my " vintage wines cheaply to a small wine merchant, I do not under- " stand how my negligence in not periodically checking my wine book " will be an answer to my action against the wine merchant for con- " version."

In respect of the Bank's argument that prior to and even during the period of the frauds there were a number of bona fide transactions, Sankey L.J. (p. 538) says: " Lawson was a rogue who has since been " convicted and sentenced to a long term of imprisonment, and the " above-mentioned nineteen cheques were fraudulently obtained and " used by him, the first fraud being in respect of a cheque of March " 31, 1922, and the last fraud in respect of a cheque of January 22, " 1924. Before he began the frauds he had a considerable number of " honest dealings, by means of which money was transferred from the " plaintiff bank to his own account with the defendants by means of " pay slips. These sums ranged from the small amount of 687 rupees " to the large one of 7,649 rupees. It is necessary to mention this fact " because one of the considerations urged by the defendants is that, " before the fraudulent transactions, Lawson had with them consid- " erable transactions which were admittedly honest.

" The first cheque was apparently handed in over the counter; " but all the others were sent by Lawson with a covering letter, ad- " dressed to the defendants, the effect of which was as follows: ' Dear " ' Sirs.—Please place the amount of the enclosed cheque for 1,100 " ' rupees to the credit of my joint account and oblige. Yours truly, " ' T. D. Lawson.' These personal letters from Lawson to the defend- " ants were in each case written upon the office paper of the plain- " tiffs. No particular ingenuity appears to have been exercised in " the perpetration of the fraud.

" There was no examination of vouchers by a senior officer, but " each member of the staff went through the vouchers daily to verify " his own signature. It was not the custom to exchange continuation " of both inward and outward accounts with the Calcutta branch, or " the fraud might have been discovered sooner. The plaintiff Bank " were undoubtedly negligent. Mr. Buckler, their district manager, " who investigated the fraud, writes on March 27, 1924: ' I cannot " ' think that had Bombay had an adequate staff, or trained men, " ' Lawson would have been able to defraud the bank over a period " ' of 23 months without detection.' "

Discussing Morrison's case (supra) Sankey L.J. says (p. 539):

" Lord Reading C.J. said, at page 364: ' The cheques were at all times, " ' until issued (i.e., by Abbott), the property of the plaintiff. They " ' never were the property of Abbott, who had no title to them.' Lord " Justice Buckley said, at page 375, that the plaintiff was the true " owner of the cheques in question; and Lord Justice Phillimore, at " page 378, said that the cheques were the plaintiff's instruments until " he chose, or until Abbott on his behalf chose, to issue them to some " outside person."

Then Sankey L.J. says (p. 539): " But he had no authority to " send the cheque, with the private memorandum above referred to, " requesting the defendants to put it to his joint account, and in doing " so he was guilty of conversion, and so were the defendants who " carried out his instructions. As Lord Ellenborough said in Mc- " COMBIE vs. DAVIES (6 East. 538, at p. 540): ' A man is guilty " ' of a conversion who takes any property by assignment from an- " ' other who has no authority to dispose of it; for what is that but " ' assisting that other in carrying his wrongful act into effect?' Both " upon this ground and upon the ground taken by the learned Judge " in the Court below, I am clearly of opinion that the defendants " were guilty of conversion of the plaintiffs' cheques. Indeed, Mor- " rison's case (supra) is a direct authority for this proposition."

Sankey L.J. discusses the nature of the written instructions from Lawson to the Defendant Bank and likens such instructions to the requisition notes in the present case (p. 540): " The defendants seek " to avoid this by referring to the pay slips above mentioned, which " were admittedly honest transactions, and to this the plaintiffs reply: " True, they were honest transactions, but the pay slips are equivalent " to cheques drawn by Lawson on his own account with the plaintiffs. " They are quite different from the fraudulent cheques, which have " nothing to do with Lawson's own account. It would be difficult for " a lawyer to come to a conclusion merely upon the argument of " counsel, but here in this case there is evidence upon which the Court " can act. For example, Mr. Curling, the defendants' manager at " Bombay, at page 23 of Document 8, said: ' I feel that the Chartered " ' Bank should have queried receiving cheques in their own favour, " ' and not in favour of Lawson, when drawn by Cox & Co. and/or " ' 'Lloyds Bank on their own account at the Imperial Bank; I also " ' feel that their attention should have been more closely drawn to " ' that, owing to the fact that one of the signatories on every cheque " ' was Lawson; I feel further, that the Chartered Bank must have " ' known that Lawson was an employee of Cox and Co., and Lloyds " ' Bank in turn owing to the fact that the memoranda which Lawson " ' sent covering the cheques for his credit were all on paper bearing " ' the title of Cox and Co. or Lloyds Bank,' and Mr. Lane, the deputy

" manager of the Bombay branch, said in the same document at page " 121 as follows: ' I consider that the defendants were negligent not " ' once but many times in accepting instructions from a private indi- " ' vidual regarding the disposal of a cheque made payable to them- " ' selves which was not signed by the individual giving instructions.'

" The items of negligence to which I am disposed to attach the " greatest importance are: (1) The fact that the defendants knew " that Lawson was an employee of the plaintiffs and was transferring " these large sums of money from the plaintiff bank to the defendant " bank, and (2) the methods by which the transfer was made.

" Who, then, is the true owner of the cheque to whom the bank " owes the duty? The defendants' contention was that they were the " true owners, and the duty in such circumstances was one which they " owed to themselves only, and therefore they could not be guilty of " negligence towards the plaintiffs. In my view this is wholly in- " applicable. The plaintiffs were the true owners of the cheques in " question. (See the judgment of Lord Justice Buckley in Morrison's " case (supra) at page 375.)

" The defendants contended that, even if they were negligent, " they were entitled to say that after a time they were, as it is put in " Morrison's case (supra), ' lulled to sleep ' (see per Lord Justice " Buckley, at p. 377) by the plaintiffs' failure to take proper precau- " tions, and, therefore, they ought not to be held liable in this case, " where the plaintiffs were themselves so negligent. This doctrine of " lulling to sleep, as it was called during the course of the argument, " must depend either upon estoppel or upon ratification, and, having " regard to the facts of the present case, I do not think that the doc- " trine is applicable or that it can be said that anything which the " plaintiffs did ratified the defendants' actions or created an estoppel " preventing the plaintiffs from succeeding in this action."

See also Tomlin J. (p. 541): " Lawson acting in his private " capacity was the sole channel of communication between the two " banks, and the only instruction to the Chartered Bank was, in one " case, a pay-in slip, and, in the other cases, a written memo signed by " Lawson in his personal capacity and purporting to direct that the " proceeds of the relative cheque should be placed to the credit of the " joint account of Lawson and his wife in the Chartered Bank.

" Now it is not admissible, in my opinion, in these circumstances " to separate the signing of the cheque from the acts whereby the " cheque and the instructions for dealing with it passed into the hands " of the Chartered Bank. The transaction must, I think, in each case

" be regarded as a whole for the purpose of determining where the " property in the cheque lay, and, upon the facts which I have men- " tioned, it remained in my judgment with Lloyds Bank."

Counsel for the defendant bank argued that if the first fraudulent transaction had created suspicion that the subsequent transactions " lulled the bank to sleep," and that the failure to discover them constituted ratification by negligence on the part of the customer. These reasons are substantially the basis of the judgment of the Court of Appeal.

In this respect Tomlin J. at page 542 says:—

" If the first cheque transaction was suspicious, I think that each " repetition of the transaction was calculated to aggravate rather than " to allay suspicion. There can be no presumption that every fraud " must be discovered or that discovery must be made within any given " time, and, except upon the basis of some such presumption, I am " unable to see why the Chartered Bank should have been entitled to " assume that the absence of complaint in respect of any one trans- " action established the regularity of that or any subsequent trans- " action."

See also Section 51, Bills of Exchange Act, as to a signature by procuration being notice of the limited authority of the agent.

The bank will probably again contend that the auditors should have examined its books in each occasion that a cheque payable to it was found, for the purpose of determining what the proceeds of the cheque were used for.

Nothing of the kind is pleaded or proved as being a custom or part of an auditor's duties and, it is submitted, is entirely impracticable.

Mr. Dicksee on " AUDITING," Fifth Edition, pages 19 and 20, lays down the principle that the auditor must not communicate with his client's customers or creditors on his own responsibility, and that the practice is undesirable except in cases of grave irregularity and where some special enquiry becomes absolutely necessary.

Mr. Dicksee at page 588 says:—

Quoting Lord Lindley in RE LONDON GENERAL BANK (Law Reports 1895, 2 Chancery, p. 673):—

" An auditor, however, is not bound to do more than exercise " reasonable care and skill in making enquiries and investigations. " He is not an insurer. He does not guarantee that the books do cor- " rectly show the true position of the company's affairs. He does not " guarantee that his balance sheet is accurate according to the books " of the company. . . .

" He must be honest, that is, he must not certify what he does not " believe to be true, and he must take reasonable care and skill before " he believes what he certifies is true.

" What is reasonable care in any particular case must depend " upon the circumstances of that case. When there is nothing to " incite suspicion, very little enquiry will be reasonable and suffi- " cient."

In RE KINGSTON COTTON MILLS (12 Times Law Reports, p. 430), Lopes L.J., at page 431, said:—

" What is reasonable skill, care and caution must depend upon " the particular circumstances of the case. An auditor is not bound " to be a detective or, as was said, to approach his work with suspicion " that there is something wrong. He is a watch-dog but not a blood- " hound. He is justified in believing tried servants of the company " in whom confidence is placed by the company. He is entitled to " assume that they are honest and to rely upon their representations, " provided he takes reasonable care. If there is anything calculated " to incite suspicion, he should probe it to the bottom, but in the " absence of anything of that kind, he is only bound to be reasonably " cautious and careful.

" Auditors must not be made liable for not tracking out ingenious " and carefully laid schemes of fraud when there is nothing to arouse " their suspicion, and when these frauds are perpetrated by tried " servants of the company and are undetected for years by the direc- " tors. So to hold would make the position of an auditor intolerable."

Mr. Dicksee, at page 61, citing Mr. Justice Holmes in RE IRISH WOOLLEN COMPANY LIMITED & TYSON, Irish Court of Appeal, 20th January, 1900, said:—

" But he is not called on to seek for knowledge outside the com- " pany or to communicate with customers or creditors."

And at page 721, citing Mr. Justice Cozens-Hardy, in RE EBE-

In the Supreme Court of Canada.

Appellant's Factum.

The Law.

(continued).

NEZER ROBERTS & SONS, Chancery Division, 28th of January, 1901, said:—

" I cannot, however, having regard to the Kingston Cotton Mills " case, hold Mr. Baxter liable for not having discovered these frauds. " He did not suspect and, so far as I can see, he had no reasonable " grounds for suspecting the integrity of his colleagues on the Board."

Lord Chancellor the Earl of Halsbury in DOVEY vs. CORY NATIONAL BANK, House of Lords (1901, A.C. 477), said, at page 486:—

" I cannot think that it can be expected of a director that he " should be watching either the inferior officers of the bank or verify- " ing the calculations of the auditors themselves. The business of life " could not go on if people could not trust those who are put into a " position of trust for the express purpose of attending to details of " management. . . ."

And Lord Davey, at page 492, said:—

" I agree with what was said by Sir George Jessel in HALL- " MARK'S case (9 Ch. D. 329), and by Mr. Justice Chitty in RE " DENHAM & CO. (25 Ch. D. 752), that Directors are not bound to " examine entries in the company's books."

In EASTLAND FORKS & STEELE (Ann. Cas. 1914, ch. 720), it was said:—

" The work of an expert accountant is of such a technical char- " acter and requires such peculiar skill, that the ordinary person can- " not be expected to know whether he performs his duties properly or " otherwise, but must rely upon his reports as to the thoroughness and " accuracy of his work."

See also " ACCOUNTING," by Sir Arthur Lowes Dickinson, 1919, and " AUDITING," by Robert H. Montgomery, 1916.

There is no contention in respect of the amount claimed. If the Bank was guilty of negligence, the sum claimed by the action must be the condemnation.

VI

Appellant's Factum.

Conclusions.

CONCLUSIONS

For the reasons above stated, the Appellant submits that the judgment *a quo* erred and should be reversed and the Plaintiff's action

maintained for the sum of Seven thousand five hundred and sixty-five dollars and sixty-one cents ($7,565.61), with interest, and that this appeal should be allowed, with costs in all Courts.

Montreal, 7th September, 1928.

MANN & MACKINNON,

Attorneys for Appellant.

DOMINION OF CANADA

IN THE SUPREME COURT OF CANADA

(OTTAWA)

On Appeal from the Court of King's Bench for the Province of Quebec (Appeal Side)
District of Montreal

BETWEEN:

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY

(Plaintiff in the Superior Court and Appellant in the Court of King's Bench in Appeal)

APPELLANT

— AND —

THE BANK OF MONTREAL

(Defendant in the Superior Court and Respondent in the Court of King's Bench, in Appeal)

RESPONDENT

RESPONDENT'S FACTUM

This is an appeal by the plaintiff in the Superior Court who was also appellant in the Court of King's Bench for the Province of Quebec (Appeal Side) from the judgment rendered by the Court of King's Bench (Appeal Side) on the 16th April, 1928, dismissing that appeal and confirming the trial judgment which was rendered in the Superior Court on the 5th May, 1927, dismissing the appellant's action against the respondent.

THE FACTS

Declaration, Case, pages 1 and 2.

In May, 1921, the appellant insured Willis Faber and Company of Canada Limited, insurance brokers at Montreal, for one year against loss arising from embezzlements and defalcations by certain of their employees, and Willis Faber and Company later claimed $5,000.00 from the appellant under that insurance on account of embezzlements by K. V. Rogers, which the appellant refused to pay but subsequently paid after Willis Faber and Company had obtained judgment therefor. The appellant then sued the respondent for $7,565.61 made up of the amount of $5,000.00 so paid to Willis Faber and Company of Canada Limited and the legal costs incurred in the appellant's litigation with that company, and it is from the judgment rendered in the Provincial Court of Appeals confirming the trial judgment dismissing that action that the appellant now appeals.

Case, page 84, line 38.

K. V. Rogers commenced to work for Willis Faber and Company of Canada Limited in May, 1907, and in July, 1912, Willis Faber and Company of Canada Limited gave to the respondent extracts from the minutes of their meetings of directors showing that K. V. Rogers (then the accountant of Willis Faber and Company of Canada Limited) was one of the four persons named by the company, any two of whom could draw and accept cheques and other bills of exchange for the company. That company had occasion in the course of its business to obtain from the respondent drafts for varying amounts drawn on New York, and during the twenty-eight months, between the 27th September, 1919, and the 10th January, 1922, amongst the New York drafts obtained from the respondent there were forty-one drafts on New York payable to the order of K. V. Rogers. It is important to note that this had been going on for more than a year and a half before the appellant issued the insurance in question. These drafts totaled about $20,000.00 and are included in the statement that was filed as Exhibit D-5, and was prepared by the auditors of Willis Faber and Company of Canada Limited to show " amounts stolen by K. V. Rogers " and which amounted to $22,065.51.

Case, page 14.

Case, page 30.

Case, page 114, line 19.

It was only in January, 1922, that Willis Faber and Company of Canada Limited discovered that K. V. Rogers had appropriated to his own use funds obtained improperly, including the proceeds of the 41 New York drafts above mentioned, and it was in November, 1923, that the appellant's attorneys wrote the respondent with regard to the judgment which Willis Faber and Company of Canada Limited had obtained against the appellant. The respondent repudiated liability and on the 15th May, 1924, the appellant sued the respondent.

Case, page 53.

For convenience of the Court the respondent has printed at the end of this factum a chronological summary of the relevant facts.

THE JUDGMENT APPEALED FROM AND THE TRIAL JUDGMENT

The judgment appealed from and the trial judgment.

The respondent submits that the judgment of the Court of King's Bench (Appeal Side) now appealed from and the trial judgment of the Superior Court which it confirmed are well founded in law and on the facts proved.

(1) The judgment of the Court of King's Bench was unanimous in confirming the trial judgment and it is necessary to bear in mind in this connection that when Mr. Justice Letourneau stated in his reasons for judgment that if the issues were concerned with the first embezzlements of Rogers, say those of the first three months, he would be in the appellant's favour, the important fact is that the embezzlements commenced in September, 1919, and that there were more than 18 months before the insurance of the present appellant came into force and there were many defalcations during that period.

Case, page 132, line 3.

Case, pages 30 to 34.

(2) The appellant merely stands in the place of Willis Faber and Company of Canada Limited and can only exercise such rights as that company might have exercised.

Case, page 131, line 13.

(3) Willis Faber and Company of Canada Limited had occasion, in the ordinary course of its business, very frequently to purchase drafts on New York, and would pay for those drafts by its cheque drawn on its account with the respondent and payable to the respondent's order, while the New York drafts would be issued in compliance and accordance with the request contained in requisition forms that were furnished to the respondent along with those cheques. The respondent " was bound to honour this cheque. It was properly signed by the duly authorized signing officers of the company and there were funds to meet it. The defendant cannot be charged with illegally debiting that cheque to the account of Willis Faber and Company of Canada Limited."

Case, page 131, line 33.

Case, page 132, line 16.

Case, page 132, line 18.

(4) The Bank cannot be charged with negligence in complying with the requisition note signed by K. V. Rogers who was the company's chief accountant and was one of its authorized signing officers and was entrusted with the possession of the cheque.

(5) The mere fact that the requisition note requested the Bank to issue the New York draft to the order of the company's chief accountant is not sufficient to put the respondent bank upon its enquiry.

Case, page 132, line 27.

(6) Willis Faber and Company of Canada Limited held out K. V. Rogers to the world and particularly to the respondent bank

Case, page 132, line 32.

Case, page 134, line 24. as its trusted agent and the Bank had every reason to believe that he was acting with authority. (Civil Code, Article 1730.)

Case, page 132, line 36.

(7) The thefts complained of could have been easily prevented by the exercise of a little elementary business precaution by the appellant. From the 27th September, 1919, K. V. Rogers had on Case, page 133, line 15. many different occasions used cheques to purchase drafts to his own order without objection or demur on the part of Willis Faber and Company of Canada Limited and without any notice to the respondent bank of any irregularity, and Willis Faber and Company of Canada Limited (and therefore the appellant) is estopped by its own negligence from complaining of any alleged negligence on the part of the respondent.

RESPONDENT'S ARGUMENT

Respondent's argument.

First. The issues raised by the action instituted by the appellant (as plaintiff in the Trial Court) depend upon a question of fact which has been decided in the respondent's favour by the trial judge and by the Provincial Court of Appeal. The appellant's contention is that the record does not show that the respondent acted without negligence and for the purposes of the present argument it is important to note that in the case of *Lloyds Bank, Limited vs. Chartered Bank of India, Australia and China* (44 Times Law Reports 534, 1928), while the facts were different the principle applied by Lord Justice Scrutton on behalf of the Court of Appeal is as follows:— (page 536).

> " I accept the measure of duty stated by Lord Dunedin in Commissioners of Taxation v. English, Scottish and Australian Bank (36 The Times L.R., 305; (1920) A.C., 683, at p. 688), where he says: ' Mr. Justice Isaacs says: " Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact." ' "

Lord Justice Scrutton then goes on to deal with the other legal principles, but the present respondent submits in the first place that the finding of the trial judge should not be disturbed upon the question of fact, particularly as it has been confirmed by the Provincial Court of Appeal.

Second. Under the legal principles involved, the respondent should succeed and the judgments below dismissing the appellant's action should be confirmed. In the same report of *Lloyds Bank, Limited vs. Chartered Bank of India, Australia and China,* Lord Justice Scrutton (following the passage quoted above) goes on to accept the following " measure of duty stated by Lord Dunedin," namely: that the legal principles are:—

"(1), that the question should in strictness be determined separately with regard to each cheque; (2), that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the banker's mind, and caused them to make enquiry. If there be inserted after the words ' given cheque ' the words ' coupled with the circumstances antecedent and present,' their Lordships think this is an accurate statement of the law. Lord Dunedin adds to it the qualification, which I entirely accept, that to require a thorough inquiry into the history of each cheque would render banking business impracticable, and that therefore there must be something markedly irregular in the transaction."

As this recent judgment of the English Court of Appeal has been referred to in connection with the legal principles therein set forth, it may be useful to point out at the same time that while the judgment on the merits in that case went against the defendant the facts in that case were emphatically more unfavourable to the defendant than in the present case. In the Lloyds Bank case the facts as explained by Lord Justice Sankey on behalf of the Court of Appeal are that the chief accountant of Lloyds Bank signed with another competent official of that bank cheques upon the Imperial Bank of India to the order of the Chartered Bank of India, Australia and China, which cheques were then crossed, and (page 538):—

" Every one of these cheques was, in fact, paid in by Lawson to his joint account with the defendants (the Chartered Bank of India, Australia and China), it was collected by the defendants from the Imperial Bank of India, and was credited by them to Lawson's joint account. The first cheque was apparently handed in over the counter; but all the others were sent by Lawson with a covering letter, addressed to the defendants, the effect of which was as follows: ' Dear Sirs,—Please place the amount of the enclosed cheque for 1,100 rupees to the credit of my joint account and oblige, Yours truly, T. D. Lawson.' These personal letters from Lawson to the defendants were in each case written upon the office paper of the plaintiffs. No particular ingenuity appears to have been exercised in the perpetration of the fraud."

The " joint account " referred to was an account that stood in the name of Lawson and his wife jointly. These facts are very different from the facts on which the present appeal is based. In the present appeal, Rogers, the chief accountant of Willis Faber and Company of Canada Limited (the appellant's insured) obtained from this Company duly signed cheques to buy drafts on New York and he

bought drafts on New York from the respondent. The appellant's complaint is that Willis Faber and Company of Canada Limited did not intend Rogers to buy drafts to his own order, but that Company did not say so to the respondent as it could so easily have done, while on the other hand the respondent knew that the Company's chief accountant, Rogers, after getting the drafts to his own order could then endorse them to any correspondent of the Company that they wished, which would serve the legitimate purpose of keeping from their competitors and other business associates any information as to their own business affairs in that connection.

Third. Under the law of this province (Civil Code, article 1730) Willis Faber and Company of Canada Limited (and, therefore, the present appellant) were liable for the acts of K. V. Rogers when he obtained the New York drafts to his own order, as that company gave the respondent reasonable cause to believe that Rogers had the company's authority in that connection, and the respondent acted in good faith. Article 1730 of the Civil Code 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."

Case, page 85, line 11.

Rogers was the chief accountant of Willis Faber and Company of Canada Limited and had occupied that position since 1912, and had been grouped with the president and two other directors as empowered, along with any one of the others, to accept and endorse the company's bills of exchange and the company entrusted to Rogers the unidentified cheques representing the payments for the New York drafts in question and continued to do so for over two years without question or limitation in that regard.

Case, page 115, line 25.

Fourth. There was no reason why the respondent's representatives should suspect or doubt the company's " requisition notes " calling for the New York drafts to the order of K. V. Rogers, as those requisition notes were followed up by the company's cheques to the Bank's order for the exact broken amounts required to purchase those New York drafts, and the cheques were signed by the duly authorized officers of the company.

Fifth. In any event the fact that New York drafts to the order of the company's accountant were asked for was not a ground for suspicion as the company might have its foreign remittances made out in that manner with the intention of having that accountant endorse the draft over to the intended payee, in that way minimizing

the risk of the company's competitors or others unnecessarily obtaining information with regard to the company's business transactions abroad.

Sixth. In any event the respondent had ample justification in the course it pursued because no objection or claim was made against the respondent for two years and ten months after the time that the first cheque was issued by the company to pay for a New York draft to the order of K. V. Rogers so that Willis Faber and Company of Canada Limited (and, therefore, the present appellant) are estopped from complaining of the payment of the cheques in question in view of that company's own actions and neglect.

THE EVIDENCE

The chronological summary that is printed at the end of this factum was compiled from the exhibit D-5 and from the evidence of record.

Case, page 30, line 35.

K. V. Rogers, whose defalcations are the cause of this litigation, had been for ten years (since 8th July, 1912) one of the four persons, any two of whom could by their signatures bind Willis Faber and Company upon bills of exchange and other commercial paper, and the company gave the respondent a certified copy of its directors' resolution to that effect.

Case, page 14.

K. V. Rogers was the company's accountant, and the other three persons named in that resolution were R. Willis, its president, and O. W. Dettmers and E. N. Mercer, directors, both of whom testified as witnesses in the present case.

It is submitted that it is clear from the depositions of Dettmers and Mercer that Willis Faber and Company held out Rogers to the respondent as being that company's authorized agent for all the purposes in question in the present case.

Dettmers, as director of Willis Faber and Company, was asked six questions, and it is respectfully submitted that his answers to those questions amply justify the trial judgment. The answers to these six questions are scattered through a large number of pages of the printed case, but the following extracts show what these questions and answers were.

Case, page 85, line 27.

1st Question.—

What records did Willis Faber and Company keep and how did it

Case, page 85, line 27. keep them concerning the use made by Rogers, or anybody else, of cheques that were signed on behalf of the Company and used to buy foreign drafts?

Answer.—

Case, page 89, line 23. A.—Perhaps the easiest way to answer this question is to explain that a large part of our business is transacted with local companies, and when it is necessary to buy drafts of foreign exchange it is usually for particular transactions.

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Our custom was to telephone to the Bank, find out what the rate of exchange was then, and issue a cheque payable to the order of the Bank for the amount of the draft required, plus the exchange. This would be handed to the Bank, which would, in turn, give us the required draft.

. . . . . .

. . . . . .

Case, page 89, line 42. A.—When we had to remit in foreign exchange, it was usually for some particular items. The custom was for Rogers, as our trusted

20 accountant, to present a statement of account with the cheque. That statement was supposed to be taken from our books and would show that the money was owing. With that statement the cheque would be signed for the purchase of the draft.

. . . . . .

. . . . . .

Case, page 90, line 23. Q.—Apart from the first two Rogers drafts referred to in the statements Exhibits D-2 and D-3, can you say as a matter of fact a statement was produced with regard to any of the subsequent Rogers

30 drafts?

A.—No. I can only assume that since it was the rule of our office, the statements must have been produced. It is our custom always to pay our accounts on our own statements, because we found in practice it is much easier to keep our books right by following this method. Occasionally our correspondents send us statements, and the payments would be made on those statements.

Q.—Then what we have been calling statements are, in effect, the accounts that are to be paid by the drafts that should be bought through the use of the cheques you or your officers signed?

40 Case, page 91, line 34. A.—Yes. Usually made up by us.

. . . . . .

. . . . . .

Q.—Then am I right that the answer to my recent question is that the officers signing the cheques would not see the requisition notes?

A.—Yes.

Q.—They would not?

A.—No.

Q.—Still connected with this first question on page 14 of your deposition (which refers to the records kept concerning the use made by Rogers, or anybody, of those cheques) in connection with any cheques that Rogers was to use to buy foreign remittances did you ever indicate to the Bank who the payee was to be, and, if so, I would like to see them?

Case, page 92, line 1.

A.—I have no recollection of such a course being followed.

Q.—And, so far as you know you never did?

A.—No.

. . . . . .

. . . . . .

2nd Question.—

Case, page 85, line 30.

How soon after the cost of a foreign draft was charged up to somebody did the company confirm to that person the fact that it had charged them up with the draft, and in what manner?

Answer.—

Case, page 93, line 10.

A.—It was not necessary to send our advices when the cost of drafts were charged up in our books; the reason for this being that usually the money was owing, and if we did not remit we would soon receive a reminder or a demand for payment.

When the drafts were forwarded they were usually accompanied by a letter.

Q.—I would like to see the letters that accompanied any or all of the drafts contained in Exhibits D-4 and P-8?

A.—There were no letters for those drafts, because they were all fictitious; and the drafts did not come back into our hands.

Q.—I thought you meant to say by your previous answer that the fact you sent out a letter (a copy of which you would of course keep) relieved you of the necessity of confirming in any other way to the payee that you had charged him up with the remittance?

A.—No. The advices were not necessary because the money was usually required to be paid to insurance companies or through our correspondents. If that money was not paid to the underwriters either directly or indirectly we would very soon hear about it.

Q.—How soon did you hear about those drafts you now complain of, which were bought on and after September 27th, 1919?

A.—The first time we discovered the defalcations was on January 30th, 1922.

Q.—Your answer dealt with whether it was necessary or not. My question dealt with or was intended to deal with whether in point of fact Willis Faber and Company of Canada, Limited, did anything by way of a confirmation to the payee with regard to the drafts that were supposed to have been bought and sent forward by means of the

cheques contained in Exhibits D-4 and P-8. Would you mind saying whether, as a matter of fact, your company did do anything in the way of confirmation of any of those remittances?

A.—No.

3rd Question.—

Case, page 85, line 34. What steps the Company took to audit periodically K. V. Rogers' work as its Accountant and Chief Accountant, and in what way it was done?

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Answer.—

Case, page 94, line 20. Q.—Was it part of their duty (the auditors) to verify that the requisition notes upon which remittances were bought corresponded with the entries in your company's books with regard to those remittances?

A.—As far as I know those requisition notes were not made up by us, and no copies were on file in our office, so they would have no means of checking requisition notes.

Q.—I mean by going to the Bank and seeing the notes?

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A.—As far as the Bank was concerned I could not say.

Q.—Did you look to your Auditors to go to the Bank if necessary and verify in some way that the requisition notes used for your company to buy remittances corresponded with the entries in your company's books concerning those remittances?

A.—No. I think they took the cheque as a voucher, and so long as they found a satisfactory entry in the books for the amount of the cheque they were satisfied.

. . . . . .

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Case, page 97, line 29. Q.—Am I right that your company left it all to Rogers, until he suddenly left you?

A.—Rogers was our chief accountant, and we trusted him in matters relating to our books.

4th Question.—

Case, page 85, line 38. What was done, and how often, to check back the company's cancelled cheques when received from the Bank, to see that the proceeds were used for proper purposes?

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Answer.—

Case, page 97, line 37. A.—When the cancelled cheques were returned from the Bank it was part of Rogers' work to check those with the statements supplied by the Bank, and in turn to compare or check the amount of each cheque with the amount shown in the cash book. Then this work was all done over again by the Auditors, who examined each cheque and the corresponding entries.

Q.—If you have anything to add I would like you to add it at this point, because personally I do not understand (and the Court might be in the same position) why the Auditors did not discover what Robinson discovered the day after he got communication personally of the records.

A.—We are under the impression, although, of course, we cannot say definitely, that Rogers must have kept a very clear record, or perhaps a duplicate of some accounts. In this manner he was able to cover up the transactions, and perhaps the reason why the last defalcation was discovered so quickly was because he did not have the opportunity to cover it up as well.

Q.—Do you mean that when this cheque of January 10th, 1922, for $4,881.79, was signed by two officers of your company, there was no corresponding statement to cover up the purpose for which it was going to be used?

A.—I presume there was a statement, but we have not been able to locate it; the assumption being it was destroyed or otherwise made away with by Rogers.

5th Question.—

Case, page 85, line 42.

What precautions the authorized signing officers of the Company took to verify that cheques were going to be used for proper purposes before they signed the cheques, and what record there is in that connection?

Answer.—

Case, page 99, line 13.

A.—As I explained in answer to one of the former questions, the rule of our office is that all cheques for the payment of accounts must have the accounts attached to them when presented for signature; or in lieu of this signing officer should receive some satisfactory explanation as to what the cheques were being used for.

Q.—If I took each of the cheques in Exhibits D-4 and P-8, one after the other, being all the Rogers draft cheques, could you tell the Court with regard to any one of them just what was done by you or by Mr. Mercer, as the case might be, to satisfy yourselves before signing the cheque that it would be used properly?

A.—It is so long ago, and in the mass of transactions of our business, I could not pick out any one transaction and explain it at this time.

Q.—And there is nothing of record that would enable you to refresh your memory or to ascertain the facts in this connection?

A.—As I explained previously, when those cheques were drawn, notations were made on the stubs of the cheques as to what accounts the cheques would be charged to, and then the corresponding entries would be made in the cash book. Those are the only entries to which I could refer now.

Q.—Are the stubs still available?

A.—I really could not say. I do not know whether we have them or not. There would be no reason for us to keep the stubs. Of course, we keep the cheques themselves.

Q.—I would like to see some of the stubs referring to any of the cheques in Exhibits D-4 and P-8, if they are available.

A.—I will have them looked up.

6th Question.—

10 Case, page 86, line 1. What was done to authorize or approve of the preparation and use of any requisition notes that went to the Bank from the Company for the purpose of obtaining foreign drafts?

Answer.—

Case, page 100, line 24. Q.—What was done to authorize or approve of the preparation and use of any requisition notes that were used to give the Bank important information as to the name and address of the payee for the foreign draft?

20 A.—I will repeat what I said a short time ago, that our usual custom was to telephone the Bank and give them particulars of the draft or drafts required.

Q.—Not you, or Mr. Mercer?

A.—No.

Q.—That would be done by Mr. Rogers?

A.—Yes, by Rogers.

As far as I know, the Bank never asked us for any requisition form. Reference to the Rogers drafts will disclose that all the requisitions for the fraudulent drafts were made out by Rogers in his own

30 handwriting, but none of those requisitions bear any signatures.

By Mr. Mann:—

Q.—Do they purport to bear signatures?

A.—None of our signatures.

By Mr. Holden, continuing:—

Q.—When you say none of them bears any signature, just what

40 do you mean?

A.—That they were not signed by the signing officers of the company.

Q.—They were written by Rogers, and they bear the signature " Willis Faber and Company of Canada Limited." What I presume you mean is under that signature there is no signing officer's personal name?

A.—They were not signed by any of the signing officers of the Company.

Q.—You have just stated they were signed by Rogers. He was one of the signing officers of the Company.

A.—They were written by Rogers.

Dettmers also testified as follows with regard to K. V. Rogers:—

Case, page 106, line 35.

Q.—I am informed that throughout 1919, 1920, 1921 and 1922, as at other times, your company periodically acknowledged its balance, and received its cheques in the usual way?

A.—Yes.

Q.—Who on your company's behalf was authorized to sign the verification and obtain the cheques?

A.—I could not say at this time. I think you will have to go to the Bank's records for that information.

Q.—I am informed K. V. Rogers was the authorized official to do this, and that he, in turn, delegated to Mr. Robinson the power to get the cheques and verify the account?

A.—I imagine that is so.

. . . . . .

. . . . . .

Case, page 108, line 1.

Q.—Will you tell me what was the scope of Rogers' duties in respect to keeping the books—the cash book, the cheque book, and other books—relative to the receipt and disbursement of the funds of the company during the period under review, that is during the period those cheques were unlawfully misappropriated and drafts used for his own benefit?

A.—Rogers was our chief accountant, and was in charge of all our books. Of course he made the entries in certain of the books himself, and the rest of the book-keeping was done by assistants.

Q.—He had assistants under him?

A.—Yes.

Q.—But he was the chief accountant, and was the head of the accounting department of your business?

A.—Yes.

Q.—Would Rogers be the person who in the ordinary course during that period would see to the payment of accounts?

A.—Yes.

The respondent respectfully submits that under the above evidence and the jurisprudence referred to below the judgments of the Trial Court and of the Provincial Court of Appeal were well founded and should be maintained.

THE JURISPRUDENCE

Corporation Agencies vs. Home Bank of Canada, Privy Council (1927).

Dominion Law Reports (1927), vol. 2, page 1.

Lord Wrenbury at page 6:—

" Thus the plaintiff knew (so far as the defendant bank had knowledge or reason to believe) that the March and April cheques, drawn as they were in favour of Cahan Jr., were being accepted by the Company as being on their face in order. And so matters went on during the subsequent months, and *a fortiori* the defendant bank had every reason to believe, as successive monthly accounts were sent and no objection raised, that the cheques were legitimate and not in fraud of the Company. The Company were, unfortunately for them, in the hands of fraudulent agents, but the defendant bank had neither knowledge nor notice that that was so, and, in fact, from the unquestioned acceptance of the monthly accounts, were entitled to believe the contrary."

Ewing vs. Dominion Bank, 35 Canada Supreme Court Reports 133 (1904), Davies J., page 153.

Killam J., page 165:—

" . . . the defendants, as men of business, would know that the bank might have discounted the note and have the proceeds still at the customer's credit, or that it might make advances upon it. They would know that an immediate repudiation would enable the bank to withhold payment of any portion of the proceeds not actually paid out or of any sums not already advanced. They knew that they had made no such note, that they had given no authority for the signature. They could at once repudiate it, and they did so in their telegram to Mr. Wallace. No further information was necessary for that purpose."

" While the bank manager placed the proceeds to the credit of the customer without inquiry, and took no precaution against their being paid out before he could hear from the defendants, the bank did act upon the defendant's silence in the sense that it did what it should properly be inferred, it would not have done if the defendants had at once denied the signature: it allowed the balance of the proceeds to be withdrawn."

In the Supreme Court of Canada.

Respondent's Factum.

The jurisprudence. *(continued).*

Metropolitan Life Insurance Company vs. Quebec Bank,
50 S.C. 214 (1916), Sir F. X. Lemieux, C.J.

Page 218:—

"Si toutefois le mandant, dans l'espèce la compagnie, a ratifié ou confirmé la conduite de Dubé, comme endosseur des chèques, de façon à faire croire à la banque que Dubé était bel et bien autorisé à ce faire, celle-ci doit être tenue indemne. La banque doit également être libérée de tout recours si elle établit qu'elle a été la victime de la négligence de la compagnie ou d'un manquement grave de la part de la compagnie à un devoir qui incombait."

Abousamra vs. Equitable Mutual Assurance Company,
27 S.C. 252, Court of Review, 1905.

Anglo American Assurance Company and LeBaron,
18 R.L. (N.S.) 377—1912, Court of King's Bench.

Talbot vs. Parc Richelieu,
51 S.C. 87, Court of Review, 1916.

Hebert vs. Larue,
19 R. L. (N.S.) 389, Lafontaine J., 1912.

Migneault, Droit Civil Canadien, Vol. 8, pages 65-68.

Warner-Scharf Asphalt vs. Commercial National Bank,
97 Fed. R. 181.

London Life Insurance Company vs. Molsons Bank,
8 O.L.R. 238, Court of Appeals, 1904.

Ross vs. Chandler,
19 O.L.R. 584, Court of Appeals, 1908.

Morrison vs. London County and Westminster Bank,
L.R. 3, K.B. (1914), page 356, see page 369.

Falconbridge "Banking," 3rd edition, page 614.

The respondent respectfully submits that the present appeal should be dismissed with costs.

Montreal, 4th September, 1928.

MEREDITH, HOLDEN, HEWARD & HOLDEN,

Attorneys for respondent.

CHRONOLOGICAL SUMMARY OF RELEVANT FACTS

8th July, 1912.	Willis Faber and Company of Canada Limited gave respondent extract from minutes showing K. V. Rogers, accountant, named (with the President and two Directors), any two of whom could draw, accept bills of exchange, etc.	
14th June, 1919.	Cash defalcations by Rogers	$ 138.92
21st June, 1919.	Cash defalcations by Rogers	48.80
10th July, 1919.	Cash defalcations by Rogers	158.70
16th July, 1919.	Cash defalcations by Rogers	40.00
17th July, 1919.	Cash defalcations by Rogers	100.55
6th Aug., 1919.	Cash defalcations by Rogers	26.00
27th Sept., 1919.	New York draft to order of Rogers	259.69
10th Oct., 1919.	New York draft to order of Rogers	270.40
18th Mar., 1920.	New York draft to order of Rogers	209.95
8th May, 1920.	Cash defalcations by Rogers	110.35
8th May, 1920.	New York draft to order of Rogers	247.52
14th May, 1920.	New York draft to order of Rogers	611.87
27th May, 1920.	New York draft to order of Rogers	619.44
7th June, 1920.	New York draft to order of Rogers	676.52
18th Aug., 1920.	New York draft to order of Rogers	237.32
10th Sept., 1920.	New York draft to order of Rogers	1,007.85
4th Oct., 1920.	New York draft to order of Rogers	524.89
28th Oct., 1920.	New York draft to order of Rogers	663.02

In the Supreme Court of Canada.

Chronological Summary of Relevant Facts.

(continued).

1st Dec., 1920.	New York draft to order of Rogers.....	571.27
16th Dec., 1920.	New York draft to order of Rogers.....	712.19
16th Dec., 1920.	Cash defalcations by Rogers.....	226.67
15th April, 1921.	New York draft to order of Rogers.....	678.24
19th May, 1921.	Appellant insured Rogers amongst other Willis Faber and Company of Canada Limited's employees.	
4th June, 1921.	New York draft to order of Rogers.....	1,079.86
14th June, 1921.	New York draft to order of Rogers.....	1,610.55
2nd July, 1921.	New York draft to order of Rogers.....	1,710.02
25th Aug., 1921.	New York draft to order of Rogers.....	1,334.27
29th Sept., 1921.	New York draft to order of Rogers.....	771.79
22nd Oct., 1921.	New York draft to order of Rogers.....	883.29
8th Nov., 1921.	New York draft to order of Rogers.....	478.54
31st Dec., 1921.	New York draft to order of Rogers.....	844.04
10th Jan., 1922.	New York draft to order of Rogers.....	4,881.79
31st Jan., 1922.	Willis Faber and Company of Canada Limited discovered frauds.	
1st Feb., 1922.	Willis Faber and Company of Canada Limited claimed from appellant $5,000.00.	
14th July, 1922.	Willis Faber and Company of Canada Limited sued appellant.	
22nd Nov., 1922.	Letter from Willis Faber and Company of Canada Limited to respondent.	
6th Nov., 1923.	Judgment of Superior Court maintaining Willis Faber and Company of Canada Limited's action against appellant for $5,000.00.	

17th Nov.,	1923.	Appellant's attorneys wrote respondent.
21st Nov.,	1923.	Respondent replied.
20th Mar.,	1924.	Court of King's Bench rendered judgment on appellant's appeal and confirmed trial judgment.
25th Mar.,	1924.	Letter from appellant's attorneys to respondent.
15th May,	1924.	Appellant sued respondent.

DOMINION OF CANADA

IN THE SUPREME COURT OF CANADA

(OTTAWA)

10

On Appeal from the Court of King's Bench for the Province of Quebec (Appeal Side)
District of Montreal

BETWEEN:

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY 20

(Plaintiff in the Superior Court and Appellant in the Court of King's Bench, in Appeal)

APPELLANT

—AND—

30

THE BANK OF MONTREAL

(Defendant in the Superior Court and Respondent in the Court of King's Bench, in Appeal)

RESPONDENT

40

DECREE AND JUDGMENT

IN THE SUPREME COURT OF CANADA

In the Supreme Court of Canada.

Decree of the Supreme Court of Canada. 27th May, 1929.

Monday the 27th day of May, A.D. 1929.

Present:—

The Right Honourable Mr. Justice Duff, P.C.
The Honourable Mr. Justice Newcombe.
The Honourable Mr. Justice Rinfret.
The Honourable Mr. Justice Lamont.
The Honourable Mr. Justice Smith.

BETWEEN:—

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY,

Appellant,

and

THE BANK OF MONTREAL,

Respondent.

The appeal of the above-named appellant from the judgment of the Court of King's Bench for the Province of Quebec (Appeal Side), pronounced in the above cause on the sixteenth day of April in the year of our Lord one thousand nine hundred and twenty-eight, affirming the judgment of the Honourable Mr. Justice Duclos of the Superior Court for the Province of Quebec, rendered in the said cause on the fifth day of May, in the year of our Lord one thousand nine hundred and twenty-seven, having come on to be heard before this Court on the nineteenth day of November, in the year of our Lord one thousand nine hundred and twenty-eight, in the presence of counsel as well for the appellant as the respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment, this Court did order and adjudge that the said appeal should be and the same was allowed,

In the Supreme Court of Canada.

Decree of the Supreme Court of Canada, 27th May, 1929.

(continued).

the said judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) should be and the same was reversed and set aside and the said judgment of the Honourable Mr. Justice Duclos of the Superior Court for the Province of Quebec should be and the same was reversed and set aside and that judgment be entered for the appellant for the amount claimed;

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said respondent should and do pay to the said appellant the costs incurred by the said appellant as well in the said Court of King's Bench (Appeal Side) as the costs of the action in the Superior Court for the Province of Quebec as in this Court.

(Sgd) ARMAND GRENIER,
Acting Registrar.

JUDGMENT

Duff J. (concurred in by Newcombe, Lamont and Smith JJ.):—

This litigation arises out of a series of frauds committed by one Rogers, the chief accountant of Willis Faber & Company, who were customers of the respondent bank. The title of the appellants to sue rests upon the fact that, in execution of the obligations under an insurance policy by which they insured Willis Faber & Company against losses arising from embezzlements and defalcations by certain employees, of whom Rogers was one, they paid in respect of the defalcations of Rogers the sum of $5,000.00, and an additional sum for legal costs, making up the total of the amount sued for. The questions in controversy relate strictly to the liability of the respondent bank in principle, the correctness of the claim as advanced, in point of amount, on the assumption that such liability exists, not being challenged.

The frauds began in September, 1919, and were not discovered until the 10th of January, 1922, and during that period Rogers procured from the bank drafts on New York, payable to his own order, in exchange for cheques payable to the bank drawn by himself and another of the properly authorized signing officers of Willis Faber & Company. The amounts of these drafts, plus exchange, were charged by the bank against Willis Faber & Company's account, and the issue in the litigation is to whether they were entitled to do so. The trial judge and the Court of Appeal decided this issue in favour of the respondent bank.

The practice of Willis Faber & Company, in respect of foreign drafts, was as follows: Rogers, who was the chief accountant, would prepare a cheque and present it for signature to the signing officers, of whom he was one, with a statement of the account to be paid. It seems to have been understood that Rogers was to be a signatory only when Mr. Dettmers, the treasurer, or Mr. Mercer, the secretary, was absent from the office; but apparently the cheques for foreign drafts usually bore the signature of Rogers. Rogers would ascertain the rate of exchange from the bank by telephone, and the cheque would be drawn, payable to the Bank of Montreal, for the amount of the account plus the exchange. The cheque itself contained no direction as to the application of the proceeds. The requisition for the draft was not drawn up in the office, or signed by the officer who signed the cheque with Rogers. Rogers, at the bank, would prepare the requisition, giving the amount of the draft, and the name of the payee, and sign it in the name of Willis Faber & Company. In the cases with which we are concerned, the signature was that of the firm only;

there was nothing except the handwriting to identify the person affixing it. Whether or not this was the practice in other cases is not stated. The draft would be drawn up in the Foreign Exchange department of the bank, and would be delivered by the Foreign Exchange teller to Rogers, who would deliver to the teller the cheque of Willis Faber & Company, which he had got certified by the ledger keeper. The teller would, as she explains in her evidence, see that the cheque was certified, but would not concern herself about the payee of the draft, and would recognize Rogers, without knowing his name or the nature of his authority, as a person who usually received drafts for Willis Faber & Company. If the amount of the cheque was slightly in excess of the draft, as it was occasionally, she would pay the change to Rogers. If there was a deficit, it would be paid to her by him in currency.

First of all, it is important to note the actual authority of Rogers. A resolution of the directors of Willis Faber & Company of Canada Limited of 1912 designates the persons authorized to execute documents on behalf of the company in these terms: " ' 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 authorized to make all contracts and engagements other than the foregoing for and on behalf of the company and that this resolution replace the resolution of Directors dealing with the same matter and passed on the 5th January, 1911, which former resolution shall hereafter be of no effect." A copy of this resolution was in the possession of the bank, and from its terms, the bank knew that Rogers was invested with no general authority to execute documents of any description in the name of the company, except as one of two signatories. In accordance with the practice above mentioned, he had authority to take a cheque signed by Dettmers or Mercer and himself to the bank, and obtain a draft on New York payable to the creditor for the payment of whose account the cheque had been drawn, if such authority could be derived from the consent of the signatories of the cheque. I shall assume that the practice of permitting Rogers to act as the intermediary to communicate the name of the payee to the bank, and to receive the draft from the bank, was ratified by the directors. But ratification cannot be extended beyond the authority which in fact was committed to Rogers—and this authority was limited to procuring a draft payable to the person to whom Willis Faber & Company

were indebted, according to the statement produced by Rogers upon which the cheque was based. He had, in fact, no general authority to direct the application of the proceeds of such a cheque.

Actual authority, therefore, Rogers had none, to direct the bank, to charge any of the moneys in dispute against their customer's account; nor had he actual general authority to do any class of acts within which such a direction would fall.

The bank's case rests upon its contention that what Rogers did was within his ostensible authority; in other words, that he was held out by the customer as having a general authority to instruct the bank concerning the application of the proceeds of such cheques in the purchase of foreign drafts, and that the bank acted in the belief that such general authority was vested in him.

There appear to be two conclusive answers to this contention. One arises out of the actual course of business in the bank, and the other out of the resolution of 1912 which had been communicated to the bank.

Let it first be observed that, as a direction to the bank for the application of moneys standing to the credit of the customer, the cheque itself was incomplete. It was a cheque payable to the bank, and such a cheque, though debited to the customer's account, was still, in the hands of the bank, held for the customer until it was applied pursuant to a direction by the customer to an authorized purpose. In the case of each of the cheques with which we are concerned, that direction consists, as the bank alleges, of a requisition for a draft on New York, payable to K. V. Rogers, which requisition was presented by and signed in the name of the customer by Rogers. In other words, the direction consists of a request by Rogers to hand to himself a draft on New York, payable to his own order. The contention is, that is to say, that by entrusting Rogers from time to time with a cheque payable to the bank, in order to obtain a draft on New York, payable to a particular payee, the customer held Rogers out as having authority to apply, or to direct the application of, the proceeds of such a cheque in purchasing, and procuring delivery into his own hands of a draft payable to his own order.

On the face of it, this does not seem very convincing; but it is not necessary to analyze the argument critically, because it is impossible to reconcile it with the fact that the bank had before it the resolution of 1912. By that resolution, cheques, orders for payment and " commercial paper " of a similar character, were to be signed on behalf of the appellants by two of four named persons, of whom

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Judgment of the Supreme Court of Canada. 27th May, 1929.

(continued).

Rogers, it is true, was one. It is impossible to suppose that any banker of ordinary judgment, with this resolution before him, could have inferred from Rogers' authorized acts that he had power to direct by his sole signature that funds standing to the credit of their customer should be paid to himself, or that those funds should be applied in the purchase from the bank of bank drafts payable to his order, and that these drafts should be delivered into his own hands. To adopt the language of Lord Cave in Australian Bank v. Perel, 1926, A.C., at 742, speaking for the Privy Council to act upon such an inference must have the effect of " neutralizing and defeating " the resolution, which, I repeat, for cheques, orders for payment and similar documents required at least two signatures. The requisition was treated by the bank as the equivalent of a cheque or an order for payment.

The bank, of course, seeks to bring its case within the principle of Article 1730 of the Civil Code, " the mandator is liable to third parties, who in good faith contract with a person not his mandatory, under the belief that he is so, when the mandator has given reasonable cause for such belief."

This principle does not in substance differ from that of the rules of the common law under the heads of " ostensible " authority, " apparent " authority and " holding out," and the decisions under those rules may usefully be referred to as illustrating the application of the principle. In Russo-Chinese Bank v. Li Yau Sam, 1910, A.C., at page 184, Lord Atkinson in delivering the judgment of the Privy Council says: " the several authorities cited by Mr. Scrutton, from Grant v. Norway down to Ruben v. Great Fingall Consolidated, establish, in their Lordships' opinion, the proposition that, in order that the principle of ' holding out ' should in any given case of agency apply, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been thereby misled."

It is argued, accordingly, that Rogers being the chief accountant of Willis Faber & Company, and their trusted employee, it might properly be assumed that his employers were taking drafts payable to his order for remittances to New York, for some convenience of their own. Evidence was offered to show that this would not be an unusual course, if the person transmitting the funds wished to avoid disclosing to the bank the name of the transmittee. This evidence ought no doubt to have been received, but the appeal does not turn upon it. It may be assumed that such a practice is not unknown and that the

bank was aware of it. Rogers, although chief accountant, and although having authority to act as co-signatory in the execution of documents requiring two signatures, had no authority under the resolution to execute any document on behalf of the company without the concurrence of one of the other three persons named for that purpose. With regard to certain documents, this authority was committed to the other three; it was not committed to Rogers. The customer, no doubt, by ratifying the practice by which Rogers was authorized to communicate the name of the payee to whom moneys were to be transmitted, had departed from the strict course laid down in the resolution of 1912; but there is a vast difference between the departure authorized, which permitted only the communication of the name of the payee, for the payment of whose account the cheque was drawn, and the receipt of the draft payable to such payee, and the departure postulated by the argument I am now considering, which would involve an authority to Rogers to place the funds of his employers (to the amount of the cheque) under his sole control; an authority the existence of which would be quite incompatible with the object of the resolution, as well as with its terms, that were carefully framed to prevent such control over the funds of the company by any one of its signing officers.

It is contended also on behalf of the bank that the customer was negligent in not sooner discovering Rogers' frauds, and that through this negligence the officers of the bank were misled, and a course of business was established according to which Rogers' directions were followed. I postpone the consideration of this contention for the present.

In truth, the doctrine of " holding out " has no application here; the bank in acting on Rogers' directions was not acting under any belief in the existence of Rogers' general authority and was not misled by any such belief. The officials of the Foreign Exchange department did not concern themselves about either the identity or the authority of the person who attached the customer's name to the requisition. This is, on the evidence, indisputable. The teller who handed the drafts to Rogers recognized him as the person who usually received the customer's drafts, but beyond the fact of his possession of the cheque, she did not direct her attention to the matter of his authority. The possession of the cheque was, as she and Mr. Pratt, who was the principal witness for the bank, both stated, regarded as a sufficient credential. From the bank's point of view—it is quite plain—the business hinged upon that.

The evidence does not permit us to proceed on the hypothesis that in acting on the latest Rogers' directions the bank officials were

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(continued).

influenced by any consideration other than that which influenced them at the inception of his frauds. Neither the terms of the resolution, nor Rogers' position, nor the course of business, was adverted to.

What I have just said seems to be also a complete answer to the contention that the bank was misled by the negligence of the appellants.

The appeal should be allowed and judgment entered for the appellants for the sum of Seven thousand five hundred and sixty-five dollars and sixty-one cents ($7,565.61), with costs of the appeal and in the courts below.

THE DOMINION GRESHAM GUARANTEE AND CASUALTY COMPANY

v.

THE BANK OF MONTREAL

Rinfret J.:—

The appellant, the Dominion Gresham Guarantee and Casualty Company, is seeking to exercise against the respondent, the Bank of Montreal, certain alleged rights of Willis Faber Company of Canada Limited, in which it was subrogated by the latter. For all purposes the case must be treated as one between the Willis Company (which I will call the company) and the Bank of Montreal (which I will call the bank). The rights asserted in this litigation are supposed to have arisen out of a series of frauds perpetrated by K. V. Rogers, the chief accountant of the company, in procuring from the bank drafts payable to his own order in exchange for cheques of the company payable to the bank's order.

In the course of its ordinary business, and since a long number of years, the company had occasion very frequently to purchase from the bank drafts on New York or London. In all cases the practice followed was the same. I will quote from the evidence of Dettmers, one of the directors of the company, and put forward by it as being the official who could give the best information concerning the inside management of its affairs:—

" Our usual custom was to telephone the Bank and give them particulars of the draft or drafts required.

Q.—Not you, or Mr. Mercer (another director)?

A.—No.

Q.—That would be done by Mr. Rogers?

A.—Yes, by Rogers."

The next move was the preparation of a cheque to pay the draft or drafts. A resolution adopted by the company was to the effect 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."

The cheque for the drafts would therefore be prepared in this way, as explained by Mercer:—

" Rogers would come into my private office with a cheque in favour of the Bank of Montreal, and in most cases (I could not swear it was on every occasion) there was a document attached to the cheque. He would invite me to place my signature on the cheque, saying he wished to remit to New York."

. . . . . .

" Q.—In respect to Rogers obtaining those cheques, what was the usual custom in regard to presenting some document with them? What was the usual custom when Rogers came in with a cheque and wanted it signed, as regards handing in some document with the cheque?

Mr. Holden, K.C., of counsel for defendant, objects to the question as irrelevant and illegal.

The question is reserved by the Court.

A.—There was a statement attached to the cheque.

Q.—I understood you to say you could not swear that happened in every case?

A.—Quite so.

Q.—Can you say from memory just now the number of cases in which it happened?

A.—To the best of my recollection it generally happened.

Q.—What was the nature of that document you would have before you?

A.—It would be just a statement showing a certain sum due. That we owe a certain firm, say Johnson and Higgins, New York, a certain sum of money."

Rogers would then go to the bank and, as to what took place at the bank, we have the testimony of Miss C. Austin, who occupied the position of exchange teller throughout the period material to the case:—

" By the Court:—

Q.—If I understand the procedure correctly, it was this: a requisition note for the draft would be handed in to your draft department?

A.—Yes.

Q.—The draft would be prepared there?

A.—Yes.

Q.—And, the prepared draft, with the requisition note, would be sent to your wicket?

A.—Yes.

Q.—And you would surrender it to the party who came for it, on receiving a cheque covering the amount?

A.—Yes."

And later on Miss Austin added:—

" Q.—To what extent did you examine the cheques? Did you examine them to see that they were payable to the Bank?

A.—Yes. I noticed they were payable to the Bank of Montreal, and that they were certified."

We have thus the outline of the whole procedure in the very words of the witnesses. Such was the course pursued between the bank and the company, so far as the evidence goes, from January 17th, 1910, to April 18th, 1922, presumably before Rogers became chief accountant and obviously for three months after his frauds were discovered and he had left the employ of the company.

It is admitted that the procedure was the same for drafts issued to creditors of the company in the ordinary course of business and those issued to Rogers' order. It is further admitted by the company that the cheques themselves in all cases were complete and regular on their face.

The contention of the company is that by issuing drafts to Rogers' own order, the bank committed " illegal, wrongful and grossly negligent acts " and the company has suffered loss which it " is entitled to have and recover . . . by way of damages."

" The well established rule is that whether or not the evidence establishes that a person acts without negligence is a question of fact." (Lord Dunedin in Commissioners of Taxation v. English, Scottish and Australian Bank, 1920 A.C. 683 at p. 688.) In the present case, both the trial judge and the Court of Appeal unanimously found that the bank acted without negligence. The bank followed towards the company the procedure it had established since a number of years as regards hundreds of foreign drafts issued daily at the request of all its customers. It is certain that no positive acts of negligence were proven. In fact, on this point, the company was content practically to rest its case on the proposition that the drafts in question being made to the order of Rogers was at least notice that he was appropriating to his own use the company's money and should have put the bank upon inquiry. That this would not necessarily

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follow would appear to be the effect of the judgment of the Privy Council in Corporation Agencies Limited v. Home Bank of Canada (L.R. 1927, A.C. 318). There are many instances where it may be found convenient for a company to adopt such a course. One of those instances is in evidence in the present case: Rogers was paid his salary by a cheque to his own order. It is conceivable that, in the ordinary course of business and consistently with the custom of trade and banking in Montreal and in the Province of Quebec, it was not an unusual occurrence for a company to ask for foreign drafts to be issued to the order of its own officials. At all events, it does not lie in the mouth of the appellant to contend otherwise when, by its own unwarranted objections at the trial, it prevented the bank from establishing such a practice in evidence.

I would therefore conclude that, on that ground, the appellant's case must fail.

But the bank is alleged to be at fault yet for another reason. The bank had a copy of the resolution of the company (already referred to) appointing certain persons therein named as its signing officers and requiring the signatures of at least two of them on its " bills of exchange, promissory notes, cheques, orders for payment or other commercial paper." On the strength of that resolution, it is argued that the bank should not have issued foreign drafts to Rogers' order except upon requisition notes signed by two of the persons mentioned.

Very respectfully, I do not think the resolution has any application to this case.

The company had its bank account with the respondent, and, through the resolution, the bank was given the company's instructions as to how moneys should be paid out of such bank account. It is admitted that the cheques presented, certified to and charged against that account were in all respects in accordance with the resolution and properly chargeable against the account.

The foreign drafts themselves were not charged to the company. They did not represent funds belonging to the company. They were orders for payment by the bank out of its own funds. The bank, under its charter powers, dealt in those drafts as a merchant with his goods. The bank sold the drafts to the company. The company purchased the drafts which were issued and delivered to it in consideration of the respective cheques. The cheques were given in payment. In my opinion, the resolution had nothing to do with that kind of transaction. The respondent, so far as it was concerned,

stood in the same position as if the cheques had been drawn upon some other bank. This view is expressed in the following passage of Mr. Justice Bernier's judgment in the Court of Appeal:—

" La compagnie donnait l'ordre à Rogers d'acheter des traites de la banque; elle lui remettait l'argent nécessaire, sous forme de chèques dûment signés; Rogers allait chercher la marchandise et la payait.

" Dans mon opinion, la formule de requisition remplie par Rogers, n'a aucune importance.

" La marchandise était livrée à Rogers, comme elle aurait pu l'être pour toute autre marchandise dans un commerce différent; Rogers agissait, en tout cela, comme un commis chargé d'aller chercher cette marchandise; la banque savait chaque fois, par les téléphones qu'elle recevait de la compagnie, que Rogers allait chercher cette marchandise."

The bank should not be held responsible for the misappropriation by Rogers of the drafts sold to the company more than, in the case suggested by Mr. Justice Bernier, the merchant would be if Rogers, after having obtained delivery of the goods, had run away with them.

Moreover, that the company never looked upon the resolution as governing its requisitions for foreign drafts is established by its course of dealing. So far from relying, for its protection against what happened, upon the assurance that, by force of the resolution, the requisition notes ought to have been signed by two of the persons named, the company, as shown by the evidence, did not even know that requisition notes were part of the procedure to obtain the drafts. Mr. Dettmers testified to that. He said:—

" As far as I am aware, we never made out any of those requisitions. Our method was simply to telephone to the Bank and inquire regarding the rate of exchange, and then advise them whatever drafts were required."

This is complete evidence that the company never expected the bank to regard the requisition notes as coming within the scope of the resolution or the resolution as having any bearing upon the request for foreign drafts. The requisition notes were no part of the method adopted by the company. So far as it was concerned, they might as well have been dispensed with. In fact, they were nothing more than an incident in the routine work of the bank. But the

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company made it understood that the cheques, properly signed, were intended to be debited to its account for the purchase of remittances, that they left it to Rogers to arrange for and obtain the remittances and, in the words of Mr. G. C. Pratt, the accountant for the bank, " the mere fact that he brought the cheques would be a credential."

I have, for those reasons, come to the conclusion that the action was properly dismissed and that the judgment of the courts below ought to be confirmed. This makes it unnecessary to examine whether, under different circumstances, the company would nevertheless have been precluded from recovering both on account of its own negligence as well as on account of the experience " of the previous years which had passed unchallenged "—two points in respect of which much could be said on behalf of the bank.

Certificate as to true copy of the reasons for judgment. 13th Aug., 1929.

Ottawa, August 13, 1929.

I hereby certify that the foregoing is a true copy of the reasons for judgment given by the Honourable Judges of the Supreme Court of Canada in this case.

(Sgd) S. EDWARD BOLTON,
Law Reporter.

In the Privy Council

No. 1930

On an Appeal from the Supreme Court of Canada

BETWEEN:

THE BANK OF MONTREAL

(Original Defendant and Respondent in the Supreme Court of Canada)

Appellant

AND

THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY

(Original Plaintiff and Appellant in the Supreme Court of Canada)

Respondent

THE RECORD

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