1903
*Dec. 1, 2.
1904
*Feb. 16.

THE CONFEDERATION LIFE ASSOCIATION (PLAINTIFFS)..... } APPELLANTS;

AND

FREDERICK W. BORDEN AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Order for new trial—Weight of evidence—Discretion—New grounds on appeal.

Where the court whose judgment is appealed from ordered a new trial on the ground that the verdict was against the weight of evidence:

Held, that this was not an exercise of discretion with which the Supreme Court of Canada would refuse to interfere and the verdict at the trial was restored.

The argument of an appeal to the Supreme Court of Canada must be based on the facts and confined to the grounds relied on in the courts below.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside the verdict for the plaintiff and ordering a new trial.

The following statement of the facts of the case was prepared by Mr. Justice Killam.

This action was brought upon a bond of indemnity given by the defendant Brown, as principal, and the defendants, Borden and Kirk, as sureties, to secure the faithful accounting for and payment over of all moneys received by Brown for the plaintiff association and the performance of Brown's duties and obligations under his agreement of service with the plaintiff as its agent.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

(1) 35 N. S. Rep. 94 *sub nom. Conf. Life Assoc.* v. *Brown.*

The statement of claim alleged the receipt by Brown of a large number of sums of money on the plaintiff's account, amounting in the aggregate to $1,262.75, and failure to account for or pay over the same.

Brown did not defend the action, but the sureties did. By their statements of defence, besides generally denying the allegations in the statement of claim, they set up the following defences :—

1. Dishonesty of Brown while employed by the plaintiff prior to the giving of the bond, known to the plaintiff and fraudulently concealed from these defendants when the bond was given ;

2. Large indebtedness of Brown to the plaintiff arising in the course of such prior employment fraudulently concealed from these defendants ;

3. Material change in Brown's remuneration as fixed by his agreement with the plaintiff, made after the giving of the bond without the knowledge or consent of the sureties ;

4. Similar material alteration of the nature of Brown's employment ;

5. Failure of Brown, from the first month of his employment after the bond, to remit moneys monthly as required by his agreement, under which plaintiff had a power of dismissal for such default, and retention of Brown ;

6. Practically a repetition of the 5th, with allegations that it was the plaintiff's duty to notify the sureties of the default and omission to do so ;

7. Systematic failure by Brown to remit, and neglect to notify sureties ;

8. Dishonesty and misconduct of Brown, prior to defaults sued for, entitling plaintiff to dismiss, and retention of Brown, and connivance of plaintiff with him in the continuance of dishonesty ;

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9. Similar dishonesty and misconduct, and fraudulent concealment from sureties.

The action was tried before Mr. Justice Meagher, with a jury, and upon the answers of the jury to certain questions judgment was directed to be entered for the plaintiff. The sureties moved to set aside the findings of the jury and the order for judgment, and to have judgment in their favour or a new trial.

The Supreme Court of Nova Scotia set aside the findings and the order for judgment and directed a new trial.

The plaintiff association carries on the business of life insurance.

The defendant was employed by the plaintiff from 1891 to September, 1900. One contract of service, made in 1895, terminated at the end of 1897. After some negotiations during the months of January, 1898, a new contract was made, in writing, dated 1st January, 1898, by which Brown was to act as agent of the association for five years from that date at such places as the association should from time to time designate. By the terms of this instrument Brown was to canvass for new insurance; to collect premiums when instructed by the association or its authorized officers; to well and faithfully account to the association for all moneys, securities, &c., which should be received by him as such agent or come into his possession for or on account of the association; to remit to the association all such moneys or securities collected by him at least once in each month, or as often as might be required by the association; "to obey and carry out any lawful order or instructions given to or received by him from the managing director or other constituted authority of the association respecting the operations of the said association, and conform to the rules of the association;" not to neglect the

business of the association or misconduct himself in the conduct therof; "before entering on his duties as such agent to give a bond, with sureties satisfactory to the said association, for the faithful performance by him of the foregoing agreements, stipulations and conditions, for the sum of one thousand dollars."

By the instrument the association agreed to pay to Brown certain remuneration. "Upon the first year's premiums, as collected, under policies issued through his instrumentality," various rates of commission were provided for, according to the system. "Upon all renewal premiums, as collected, under policies secured through his instrumentality, which are now in force or shall hereafter be secured by him a commission of 5 per cent" was to be paid. These commissions were to be subject to deductions of those paid to local agents, the rates of which were limited.

The agreement further provided that the association might terminate and cancel it at any time for breach of any of the conditions, stipulations and agreements on Brown's part, and, also, that it might be terminated by the association at any time upon one month's notice.

The bond sued on bore date the 3rd day of February, 1898. It began with the recital of Brown's appointment as agent under the agreement mentioned, "which agreement forms the basis of this obligation," and that these defendants had "agreed to become sureties for the faithful carrying out of the said agreement." The condition was that Brown should account for and pay over moneys received, and well and truly "perform, observe and discharge all duties and obligations contained in the said agreement and on his part to be performed," and indemnify and save harmless the association from loss and damage by reason of any act,

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matter or thing done or omitted to be done by him contrary to the agreement.

The plaintiff association was represented in Nova Scotia by Frederick W. Green, general manager for the Maritime Provinces, with headquarters in Halifax. Brown's headquarters and place of residence were at Wolfville, but his field occupied several counties and he had four sub-agents in different places. Brown's instructions were to send monthly returns to the Halifax office. These were to be made by the 10th of each month in respect of the business of the preceding month. His financial reports were made upon forms supplied to him from the Halifax office, partly filled up. He remitted by his own cheque, unaccepted, upon a bank in Wolfville. Remittances received in Halifax were frequently held, undeposited, for some days, pending the checking of returns. On a few occasions Brown requested that particular cheques be held over as long as possible. On the 10th July, 1900, Brown's report for the preceding month was received at the Halifax office, showing a balance of $781.93 to be remitted, and with it a cheque for that amount. After a few days this was deposited in a bank and sent to Wolfville for collection when payment was refused, and on the 18th July the cheque was protested for want of funds. Notice of protest reached the Halifax office on the 20th July in Green's absence and came to his knowledge a few days later.

Under date of 27th July Green wrote Brown asking for a remittance of the amount of the protested cheque and referring to a prior letter on the same subject, not produced. On the 2nd August Brown replied, with a remittance of $450, explaining that he had failed to properly check his bank account and asking for an advance against the balance for a few days. On the 14th Aug. Green notified the defendant Kirk of the

shortage and of Brown's explanation, and on the 21st August he gave formal notice to both sureties that Brown had failed to account for moneys received to the amount of $1,469.18, and that they would be held liable to the amount of the bond. On the 6th September Green dismissed Brown after getting from him a final report showing the shortage to be $1,262.76.

Brown was called as a witness for the defendants, and gave direct evidence of having on several occasions prior to the defaults sued for expressly admitted to Green that he was short of funds to make his remittances.

In 1899 Brown asked for and obtained from the association a loan of $400 upon the security of property belonging to his wife. According to his account he first asked for this loan in March or April. It was finally made in June. It was in interviews with Green about this loan that Brown claimed he made some of the admissions mentioned, and his statement was that the advance was directly applied by Green to cover the shortage in June, 1899.

In the early part of 1900, Green made advances to Brown on account of commissions upon premiums for which the association held notes or acknowledgements, but on which commissions only would be payable when the premiums should have been actually paid. Brown testified to having made similar admissions to Green upon obtaining these.

The defendant Kirk testified to admissions by Green to himself of having long known of Brown being in arrear and to having lent him money to keep him in good standing with the company.

Green directly contradicted both Brown and Kirk upon these points, and both Green and the Halifax cashier expressly denied any knowledge of Brown

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being in default until after the protest of the cheque of July, 1900.

To account for the requests to hold the cheques, Green stated that Brown sometimes included sums not actually paid to him in money, for some of which he might hold cheques of policy holders or of sub-agents which might turn out worthless. Brown admitted that occasionally he did return as paid small sums which he had not received, and that, in one case, he had done so with reference to a note of the defendant Kirk for over $200.

Brown's returns of July, August and September, 1900, were put in evidence. Upon each was printed the following:—

"NOTE.—All drafts or cheques for remittances (to be on chartered banks) must be payable at par in Toronto, or at some place where the Canadian Bank of Commerce, the Ontario Bank or the Imperial Bank has a branch."

At the close of the portion of each account relating to the credits to Brown was printed "By Draft, Marked Cheque, P. O. Order, to balance."

Upon the June report was a printed form of "Instructions to the Manager or Agent," having at the foot of the printed signature "J. K. Macdonald, Managing Director." These instructions were partly as follows:—

"5. Commissions are to be charged only on the premiums ACTUALLY COLLECTED and remitted to the head office. * * * * *

7. Your remittance for balance due must be made either by chartered bank draft, marked check, post office order, or by express.

8. The payment of premiums not actually received by you is done at your own personal risk, and the association will not, UNDER ANY CIRCUMSTANCE, be

responsible to return the same upon the non-receipt by you."

Under Brown's engagements with the association before 1898, considerable advances had been made to him for travelling and other expenses. In his former agreement there was some provision for these being secured upon, or repayable by the application of, commissions on renewal premiums.

Green stated in evidence, "at the time agreement of '98 was made we had an understanding with Brown that his old commissions would go in reduction of old account, and his new commissions would be paid him in cash. He received his commissions on new premiums until discharged. Some paid in cash and some through his returns by treating them as equal to cash. * * About spring of 1898 or may be later the old arrangement with Brown was varied by allowing him the commision in cash on old business which he was collecting himself in place of using it to reduce old account. The old understanding was that advances should cease, and that the commission on old business should be applied to reduce the balance in his commission account prior to 1898. Don't allow him any commission at all since discharged. Commissions on business secured since 1898 by him would be about $40 to $60 a year, depending on the continuance of the business."

The learned judge before whom the cause was tried instructed the jury that "it was the duty of the plaintiff company to disclose as promptly as possible to the sureties any notice or knowledge they received or had of any breach of duty, misconduct or dishonest act on the part of Brown"; that the knowledge of Green or notice to him in these respects would be the knowledge of or notice to the association; and that the burden was upon the defendants to prove, to the rea-

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sonable satisfaction of the jury, that the association had such notice or knowledge some considerable time before its communication to the defendants.

The learned judge pointed out the conflict between Green's evidence and Brown's upon this question of notice, and left it to them to determine as to the weight to be given to Brown's. He told the jury that it was for them to give such effect to Green's story,—regarded in the light of the protested cheque, and the notice thereof to Green, and the effect these ought reasonably to have had upon his mind in the matter of notice—as they thought it was under the circumstances reasonably entitled to.

He also adverted to three contentions made, as he stated, by the defendants' counsel:

"1. That the mortgage loan of itself conveyed notice to the defendants that Brown was in default to them;

2. That his reports in themselves necessarily conveyed notice of his default to them; and

3. That his request to hold over his cheques, and Green's compliance therewith, was in itself a confession of default, especially when regarded in the light of the report which preceded or accompanied such cheque."

He left to the jury four questions, which, he stated, had been prepared and agreed upon by counsel.

These questions and the answers of the jury were as follows:

"1. Had the plaintiff company during the negotiations for the loan on mortgage, or at the time the mortgage was given, knowledge that Brown had received moneys on account of the company which he used for his own purposes? No.

2. Had the plaintiff company knowledge that Brown had received moneys on account of the plaintiff and which he had not paid over as required by his agree-

ment, when Brown's cheques were held over and not deposited in the regular course of business by the plaintiff? No.

3. On July 20th, 1900, had the plaintiff company knowledge that Brown had received moneys on plaintiff's account and which he had failed to pay over as required in the regular course of his employment? No.

4. Did Green at Dorchester admit to Kirk that he had had knowledge of defaults by Brown at several times prior to July 1st, 1900, and that he, Green, had been helping him from time to time to keep him in good odour with the company? No."

The majority of the Supreme Court of Nova Scotia were of opinion that the answers to the second and third questions were against the weight of evidence.

Mr. Justice Townshend based his opinion upon the disobedience, on Brown's part, of the printed instructions as to the methods of remitting moneys, considering that compliance with such instructions was so material a part of the agreement forming the basis of the sureties' obligation that the association should have dismissed Brown therefor.

The court therefore ordered a new trial on the ground that the verdict was against the weight of evidence. The plaintiffs appealed.

W. B. A. Ritchie K.C. for the appellants. Permitting the agent to depart from the terms of the instructions given him will not discharge the sureties; *Mayor of Durham* v. *Fowler* (1); but there must be conduct amounting to fraud. *Dawson* v. *Lawes* (2); *Caxton* v. *Dew* (3); *Hamilton* v. *Watson* (4); *Town of Meaford* v. *Lang* (5); *Exchange Bank* v. *Springer* (6); *Niagara Dist. Fruit Growers Stock Co.* v. *Walker* (7).

(1) 22 Q. B. D. 394.
(2) Kay 280.
(3) 68 L. J. Q. B. 380.
(4) 12 Cl. & F. 109.
(5) 20 O. R. 42, 541.
(6) 13 Ont. App. R. 390; 14 Can. S. C. R. 716.
(7) 26 Can. S. C. R. 629.

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The findings of the jury should not have been disturbed. *Metropolitan Railway Co.* v. *Wright* (1); *Fraser* v. *Drew* (2); *Commissioner for Railways* v. *Brown* (3). An order for a new trial may be reversed on appeal. *Solomon* v. *Bitton* (4); *Webster* v. *Friedeberg* (5).

Newcombe K.C. for the respondents. The court below ordered a new trial on the ground that the verdict was against the weight of evidence, which exercise of discretion will not be interfered with on appeal. *Eureka Woolen Mills Co.* v. *Moss* (6).

The retention of Brown in the company's employ after he had made default in remitting monies as instructed discharged the sureties. *Phillips* v. *Foxall* (7); *Sanderson* v. *Aston* (8); *Holme* v. *Brunskill* (9); *Pidcock* v. *Bishop* (10).

Ritchie K.C. in reply. As to interference with discretion of the court below see *London Street Railway Co.* v. *Brown* (11); *Pidcock* v. *Bishop* (10) was distinguished in *Mackreth* v. *Walmesley* (12).

THE CHIEF JUSTICE.—Upon the authority of *Black* v. *The Ottoman Bank* (13), in the Privy Council, and of *The Niagara District Fruit Growers Co.* v. *Walker* (14), in this court, I would allow this appeal.

The attempt by the respondents to raise here questions of fact which they did not raise at the trial must fail; *Lyall* v. *Jardine* (15). I agree with Mr. Justice Killam on all the points.

(1) 11 App. Cas. 152.
(2) 30 Can. S. C. R. 241.
(3) 13 App. Cas. 133.
(4) 8 Q. B. D. 176.
(5) 17 Q. B. D. 736.
(6) 11 Can. S. C. R. 91.
(7) L. R. 7 Q. B. 666.
(8) L. R. 8 Ex. 73.
(9) 3 Q. B. D. 495 at p. 505.
(10) 3 B. & C. 605.
(11) 31 Can. S. C. R. 642.
(12) 51 L. T. 19.
(13) 15 Moo. P. C. 472.
(14) 26 Can. S. C. R. 629.
(15) L. R. 3 P. C. 318.

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SEDGEWICK J. dissented from the judgment of the court for the reasons stated by His Lordship Mr. Justice Girouard.

GIROUARD J. (dissenting.)—This is an appeal from a judgment of the Supreme Court of Nova Scotia granting a new trial. The action is upon a fidelity bond signed by the respondents in favour of the appellant for $1000. Four questions were submitted to the jury by consent and answered in favour of the company. Thereupon the trial judge (Meagher J.) directed judgment to be entered upon said findings and referred the determination of the amount of the defalcations to a special referee who fixed it at $909, for which amount judgment was entered with interest and costs. The respondents appealed to the full court which set aside the verdict and ordered a new trial. The learned judges did not agree as to the reasons of judgment. Townshend J. held that the agreement of engagement of Brown had been violated by the company in many essential particulars and that the sureties were thereby discharged. Weatherbee and Graham J.J. considered the verdict as being contrary to the weight of the evidence. All came to the conclusion to order a new trial.

I do not see that the course taken by the court *in banco* can cause any real injustice to the appellant, if the action is well founded; it is not dismissed, it is merely submitted to a new test. A new trial may however relieve the respondents from liability, especially if the questions to the jury are framed so as to exhibit before the trial judge and the jury the true position of the parties, as disclosed by the evidence of Green, the general manager of the company in the Maritime Provinces, and other witnesses. It is partly set forth in paragraphs 7 and 8 of the statement of defence; but it

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may be necessary for the defendants to amend the pleadings so as to agree with the facts proved. They should fully lay before the jury the breaches of contract on the part of the company pointed out by Mr. Justice Townshend, and also the past defalcations of Brown (not merely his indebtedness to the company) as local agent of the company, and the secret agreement made by Green with him with regard to the same, which were concealed from the sureties when they signed or delivered the bond, and according to the best authorities were sufficient to void their obligation.

In *Railton* v. *Mathews* (1) decided by the House of Lords, one George Hickes was re-appointed the agent in Glasgow of a Bristol firm, Mathews & Leonard, drysalters, he finding security for his fidelity. He offered his brother and one Railton; they were accepted by the Bristol merchants, who caused a proper bond to be prepared and transmitted to the agent in Glasgow where it was signed by him and his two sureties without having any communication with either of them, and without making any arrangement with Hickes as to the payment of the balance standing against him as agent during the two previous years. Hickes being denounced as a defaulter to the sureties, they made inquiry and discovered that in the course of his previous employment the Bristol firm knew that he had appropriated the funds of the firm, and that at the time the bond was demanded he was a defaulter. Lord Cottenham said:

> I find several facts appearing as having passed between the party who was the subject of the suretyship and those by whom he had been previously employed; and I find the matter stated in these terms: That the parties totally failed to communicate the said circumstances, or either of them, or the existence of any balance on the agency accounts then standing against the said George Hickes, to the pursuer or to the said Henry William Hickes; and, on the con-

(1) 10 Cl. & F. 934.

trary, while they accepted and took possession of the said bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the said George Hickes, &c.

It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of *Smith* v. *The Bank of Scotland* (1) that a case may not exist in which a mere non-communication would invalidate a bond of suretyship. Lord Eldon states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party requiring the bond; and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the non-communication, or, as he uses the expression, the concealment of those facts would invalidate the obligation and release the surety from the obligation into which he had entered.

Lord Campbell, page 942:

The question really is: What is the issue which the court directed in this case? Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them? The material words are, "undue concealment on the part of the defenders." What is the meaning of those words? I apprehend the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond; there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial.

And as the trial judge had misdirected the jury to the effect that a concealment to be undue must be wilful and intentional, a new trial was ordered.

I take it for granted that this decision is binding upon us notwithstanding what has been said or held to the contrary by other courts.

(1) 1 Dow 272, p. 292, *et seq.*; 7 Ct. Sess. (1 Ser.) 244, 248.

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It has been contended that *Railton* v. *Mathews* (1) cannot be reconciled with another decision rendered a year or two after by the same tribunal in *Hamilton* v. *Watson* (2). But *Hamilton* v. *Watson* (2) was a very different case, for it applied only to a suretyship to a banker for a cash advance.

There is a great difference between the credit of a man and his character, his solvency and his honesty. The suretyship does not stand upon the same basis in both cases. The credit surety had a right to expect that the cash advance would be made, and in fact it was made, in that case, by the banker according to the usages of banking business. The principal debtor or borrower or his sureties have nothing else to expect from the banker.

In the case of a fidelity bond, the surety has a just and legal expectation that the creditor will not trust his money or his property to a man known to him to be dishonest and that the commissions earned by the agent during the existence of the bond would help him at least to discharge his liabilites incurred in the course of his agency. I think therefore there is a vast difference between the two cases. If this distinction did not exist, Lord Campbell who pronounced the judgment in both cases would have placed himself in a contradictory position, within a very short time, without any expression on his part of intending to do so. This cannot reasonably be presumed. The difference between a fidelity contract and a credit guarantee is pointed out in *Lee* v. *Jones*, (3)

Shee J. said:

There is a wide difference as respects what might naturally be expected to be the actual state of the account of one man with another, between the case of a suretyship for a man requiring and applying for a cash-credit to bankers with whom he had had previous deal-

(1) 10 Cl. & F. 934.
(2) 12 C. & F. 109.
(3) 14 C. B. N. S. 386; 17 C. B. N. S. 482, at p. 501.

ings, and whose business is to lend capital to penniless persons on the security of sureties, and the case of a suretyship for a surety for others.

Hamilton v. *Watson* (1) is not therefore inconsistent with *Railton* v. *Mathews* (2). It is moreover a strong authority for the contention of the respondents that an agreement, such as is admitted by Green, is fatal to their suretyship. The argument on the part of the surety was that the circumstances of the case showed the "probable existence" of a secret agreement that the fresh credit was to be applied to the payment of an old debt. Lord Campbell said:

> Now, in this case, assuming that there had been the contract contended for, and that had been concealed, that would have vitiated the suretyship. There is no proof nor is there any allegation that there was any such contract. There is, therefore, neither allegation nor proof, and what then does the case rest upon? It rests merely upon this, that at most there was a concealment by the bankers of the former debt, and of their expectation, that if this new surety was given, it was probable that the debt would be paid off. It rests merely upon non-disclosure or concealment of a probable expectation. And if you were to say that such a concealment would vitiate the suretyship given on that account, your lordships would utterly destroy that most beneficial mode of dealing with accounts in Scotland.

And the Lord Chancellor concluded:

> If there was a stipulation that it was to be so applied, and these were the conditions upon which the money was advanced, it might have effected the transaction. But, in order to raise that question, there should have been an averment upon the record that such an agreement had been entered into.

The principles laid down in the above cases have been applied in many cases, more particularly in *Stone* v. *Compton* (3); *Lee* v. *Jones* (4); *Phillips* v. *Foxall* (5); *Sanderson* v. *Aston* (6). *See* also *Davies* v. *London & Provincial Marine Insurance Co.* (7)

(1) 12 Cl. F. 109.
(2) 10 Cl. & F. 334.
(3) 5 Bing. N. C. 142.
(4) 17 C. B. N. S. 482.
(5) L. R. 7 Q. B. 666 at p. 672.
(6) L. R. 8. Ex. 75.
(7) 8 Ch. Div. 469.

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In this case the plaintiff is charged with fraudulent concealment of past dishonesty on the part of the agent; the secret agreement is not alleged; probably it was unknown to the defendants till it was admitted by Green at the trial but it was proved beyond any question.

Black v. *The Ottoman Bank* (1) does not conflict with the above decisions; it was a very different case; it was not one of continued employment and of anterior defalcations; there was no secret agreement injurious to the interests of the surety; in fact it refers to a state of affairs happening after the bond had been entered into. *Niagara Fruit Growers Stock Co.* v. *Walker* (2), is clearly distinguishable, for in that case there was no secret agreement as to the payment of old accounts; none was necessary, as the agent, Walker, had in each previous year settled with his own means and in a manner satisfactory to the principals, the balance due from him in respect of his agency for every preceding season. In the present case no such settlement had been effected; only advances had been made by Green acting for the Company to cover up the deficiencies, and at the time of his re-engagement, on the 1st January 1898, he stood in default for a large sum of money, about $2,000, and likewise when the bond of the respondents was subsequently obtained in February following. He should not have been re-engaged by Green, but if re-engaged at all, it should have been at the risk of the company, as was done previously, and not of the sureties unless informed of the fact. The exacting of a fidelity bond after the agent had acted for years without any, satisfies me that it was a scheme on the part of Green to throw the loss upon some outsiders. The sureties cannot lawfully be used

(1) 15 Moo. P. C. 472. (2) 26 Can. S. R. C. 629.

to make good past deficiencies, unless willing to do so. Can it be supposed that they would have signed the bond if they had been acquainted with his previous dealings with the Company? Green says in his evidence:

> At the time agreement of '98 was made we had an understanding with Brown that his old commissions would go in reduction of old account, and his new commissions would be paid him in cash. * * The old understanding was that advances should cease, and that the commission on old business should be applied to reduce the balance in his commission account prior to 1898.

This is a plain admission by the appellant of past defalcations and of a secret arrangement to satisfy the same out of current earnings of Brown, a material fact which was undisclosed to the sureties and amounted to a fraud in law and in fact.

This evidence would perhaps be sufficient to dismiss the action but it was not passed upon by the jury. The defendants did not move for the dismissal of the action. They only applied for a new trial which was granted to them by the full court, which is the best judge of its own procedure. The evidence of Green may possibly be explained or supplemented; and to avoid any surprise, it is reasonable to submit it to the appreciation of the trial judge and jury with the other circumstances of the case. The point of the secret agreement was taken in the Court below, as appears from the report of the case (1). If standing alone it would probably not be sufficient to allow a new trial, as it was not pleaded, but this new trial has been ordered for other reasons which I approve in a certain measure and I think it is in the interest of justice that the whole case should be re-opened. I quite agree with the majority of the judges that the verdict is contrary to the weight of evidence.

(1) 35 N. S. Rep. 94, 96.

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I am not prepared to say that the reasons of judgment advanced by Mr. Justice Townshend are unfounded. The proper time to decide the nice points of law the learned judge elaborately discusses will be when the case will come back for adjudication after all the facts have been passed upon by the jury.

The appeal should be dismissed with costs.

DAVIES J. concurred in the judgment allowing the appeal for the reasons stated by Killam J.

KILLAM J.—I am of opinion that this appeal should be allowed, and the judgment for the plaintiff restored.

The questions submitted to the jury were directed solely to the acquisition by the plaintiff association of knowledge of Brown's defaults. The answers to the first and fourth depended upon the relative credibility of Brown's and Kirk's evidence respectively, on the one side, and Green's, on the other. The jury might well have discredited Brown, and they probably considered that Kirk misunderstood Green. No serious objection is made to the propriety of the answers to these two questions.

It being fairly open to the jury to disbelieve Brown's evidence of his express admissions to Green, the objections to the answers to the remaining questions must be confined, as they were by the majority of the court below, to the inferences which should be drawn from the clearly ascertained facts. Those inferences again were for the jury to draw, and their findings upon them should not be disturbed unless they were such as, reasonably viewing the whole of the evidence, the jury could not properly reach. *Commissioner of Railways* v. *Brown* (1); *Council of the Municipality of Brisbane* v. *Martin* (3); *Australian Newspaper Co.* v. *Bennett* (3).

(1) 13 App. Cas. 133. (2) [1894] A. C. 249.
(3) [1894] A. C. 284.

Green testified to circumstances which show that the including in Brown's monthly statements of moneys as being received did not conclusively establish their actual receipt by him. Green's evidence received some corroboration from Brown's own. In a letter of 8th July, 1899, Brown wrote Green:

> Have remitted some which have not received money for as yet; so do not send cheque till you have to.

The printed instructions from the head office recognized it as not improbable that agents would make such remittances. A man in Green's position would have a knowledge of the practice in these respects which might well make him hesitate to conclusively adopt the view that a request for delay in forwarding a cheque was necessarily attributable to misappropriation of funds. The questions put to the jury were as to the plaintiff's *knowledge* of Brown's receipt of moneys not paid over. They were not as to knowledge merely of facts calculated to lead to inquiry, not as to negligence in failing to ascertain what the apparent facts were calculated to suggest. It appears to me that the answer to the second question was not merely such as could reasonably be given, but probably also the correct one.

The third question was, apparently, directed to the knowledge to be imputed through receipt of the notice of protest of the cheque. Green states that he was out of town then. It does not appear when the notice was first seen by any person conversant with the circumstances. So far as dishonour of the cheque is concerned, the association was bound by the bare receipt of notice; but its receipt in the office did not of itself constitute knowledge that Brown had received moneys on the plaintiff's account which he had failed to pay over as required in the regular course of his

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employment. For this purpose an inference from circumstances was required.

The notice of dishonour is not put in evidence. If in the form given by "The Bills of Exchange Act, 1890," it merely stated that the cheque had been presented and protested for non-payment. Its contents and the fact of dishonour might well be consistent with a case of a slight insufficiency of funds, which might be due to Brown's not having received some of the moneys covered by the cheque or to some unintentional error which could be satisfactorily rectified and explained. Still the presumption would be that a large part of the moneys had been actually received by Brown, and to any one in Green's position there would be conveyed the information that Brown had received some moneys on the plaintiff's account which he had in fact failed to pay over within the time required by the regular course of business. But if, in strictness, this is the knowledge contemplated by the question, still it cannot be said that the jury erred in finding that the company had not that knowledge on the 20th July. The onus was upon the defendants to show knowledge in some person empowered for that purpose to represent the company. In my opinion, the jury were fully justified in finding that this onus had not been discharged as regards the particular date to which they were confined by the question.

The case was very much stronger for finding that Green had positive knowledge that Brown was a defaulter when he received the latter's letter of 31st July, or when he wrote on the 27th July notifying him that further collections would not be sent to him, or even on the preceding Wednesday—the 25th—when they had the conversation to which that letter refers. But the latter is the earliest date at which, in my opinion, there can properly be imputed to the company

such knowledge as cast upon it any duty to terminate the risk or obtain the sureties' consent to its continuance.

But whatever the exact date in July at which the knowledge was acquired, it would affect the quantum of liability only. Unless otherwise discharged, the sureties were responsible for the prior shortage. It has been argued before us that they were entirely relieved from liability on three grounds :—(1) Concealment by the plaintiff, when the bond was given, of an agreement or arrangement for the application of a portion of the commissions upon the previous advances to Brown; (2) Disobedience by Brown of instructions as to the times and methods of remitting moneys, and his retention in the plaintiff's employ thereafter without the knowledge or consent of the sureties; (3) Variation of the terms of the contract of service by advances on account of commissions before they were strictly due, without the knowledge or consent of the sureties.

No questions relating to any of these points were left to the jury; none of the facts affecting them have been found by the jury; none of them were set up in the pleadings.

The statements of defence did allege prior indebtedness of Brown to the association and fraudulent concealment of this, but nothing as to any agreement for the application of commissions. They alleged a duty to remit at least once in each month and continuous defaults; but nothing as to instructions or their disobedience, nothing as to the methods or precise dates prescribed. They alleged a material change in Brown's remuneration, but nothing about the times of payment.

The decisions in *Hamilton* v. *Watson* (1) and *The Niagara District etc., Co.* v. *Walker* (2), shew that the mere

(1) 12 C. & F. 109. (2) 26 Can. S. C. R. 629.

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existence of prior indebtedness is not a fact which must necessarily be communicated, though under some circumstances its concealment might be fraudulent as against the surety. In *Hamilton* v. *Watson* (1) it appeared that advances made upon the security in question had been used to discharge a former liability to the lender. Lord Lyndhurst L. C. there said:

> The mere circumstance of the parties supposing that the money was to be applied to a particular purpose, and the fact that it was intended to be so applied, do not appear to me to vitiate the transaction at all. If there was a stipulation that it was to be so applied, and these were the conditions upon which the money was advanced, it might have affected the transaction. But in order to raise that question, there should have been an averment upon the record that such an agreement had been entered into.

In the present case, it came out incidentally, during Green's cross-examination, that there was some "arrangement" or "understanding" with Brown for the application of commissions on renewal premiums under former insurance policies upon the previous advances. If an agreement to that effect had been alleged, this language might have afforded such evidence of it as to warrant the inference of an agreement; but under the circumstances, it does not seem to me proper to take hold of these expressions, where no inquiry was made or called for respecting the real terms and nature of the "arrangement" or "understanding", and act upon them as shewing a definite agreement. There may have been a suggestion to that effect by Green, an expression of intention, hope or expectation by Brown. If indebtedness need not be disclosed, the debtor's expressions of his hopes and intentions respecting its liquidation must stand in the same category. The fact of the subsequent application amounts to no more than appeared in *Hamilton* v. *Watson* (1).

(1) 12 Cl. & F. 109.

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No specific dates or methods of accounting and remitting were provided for by the contract of employment or the bond of indemnity. By the former Brown was to remit at least once in each month, or as often as might be required by the association, and he was to obey and carry out lawful orders and instructions. The bond was conditional upon Brown's performance of all his obligations under the agreement. No specific instructions were referred to or embodied in either. Whether any, or, if so, what instructions on these points were in force when the agreement or bond was entered into, we are not informed. The instructions to which reference is specially made are those which were printed upon the back of Brown's report for June, 1900. Mr. Justice Meagher says that these were presumably in use when the agreement and bond were given. Mr. Justice Townshend proceeds upon this inference and treats the instructions as practically embodied in the agreement. With all respect, I conceive the inference to be wholly unwarranted. No case of the kind being set up in the pleadings, it would be unsafe to make any inference whatever from the appearance of this printed matter on the back of this report. They may not have been issued as instructions. There may have been others which varied them. The forms may have been old ones in use at some time, whether under Brown's former employment or under that in question, but long before disregarded by mutual consent even if not by express direction. There being no issue upon the question we cannot assume any state of facts. As the association was not bound to give any particular directions in these matters, it was free to cancel or alter any that were given.

As laid down by the Judicial Committee of the Privy Council in *Black* v. *The Ottoman Bank* (1).

(1) 15 Moo. P. C. 472.

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The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty.

There was no change of remuneration, but payments were made in advance of the times when they were strictly due. The association held notes and other securities which might not be realized. Brown had performed the services necessary to entitle him to commission upon them if they should be paid. There was no express stipulation against paying the commissions in advance. The association had guarded itself against being obliged to pay commissions on premiums which might never be received. It chose subsequently to take the risk that a portion at least would eventually be paid, and gave Brown commissions which they could safely assume that he had earned.

No authority is cited for the proposition that such a course produces a change of position which discharges the surety. In my opinion it does not.

On all of these points, if raised by the pleadings, there would naturally have been issues for the consideration of the jury. There is no evidence of any concealment from the sureties of anything whatever. For all that appears they may have been fully informed of the prior debt, of the alleged arrangement for its discharge, of the variations in the methods of remitting and of the advances on account of non-matured commissions. These matters were not in issue and we can make no assumption of concealment from the want of evidence upon them. Concealment of the prior indebtness not being of itself fraudulent, the plaintiff was not called upon to give proof of knowledge or of circumstances relating thereto. Neither in their pleadings, nor by evidence, nor otherwise, have the defendants asserted any concealment or want of knowledge or consent on the points now sought to be raised.

At the trial no question was raised as to the execution of the bond or the existence of defaults within its terms. *Primâ facie* the liability of the defendants was established. The onus was thrown upon the defence. The questions to be submitted to the jury were settled by counsel. They were directed to points on which the defendants relied to negative liability. If other facts were relied on for the purpose, they should have been put forward then.

When the case came up on motion for judgment, the only course open was to give judgment for the plaintiff. There being still a question of amount raised, this was left to a referee. The defendant's counsel had picked on certain particular times as those on which knowledge of defaults was acquired and, having succeeded as to none, no limitation as to time was made in the reference. It is to be noticed, however, that the amounts charged as received after the 25th July constituted a comparatively small portion of the alleged shortage, and as against these should be placed all the credits given Brown for August. The amount for which judgment went against the defendants falls short of the claim by more than the difference.

It appears to me that, under such circumstances, the judgment could not properly be disturbed. The answers of the jury were, in my opinion, amply warranted by the evidence. The judgment directed by the trial judge was the only one he could direct under the circumstances. There was no error on the part of judge or jury. Every defence sought to be raised was tried and disposed of. To allow a new trial for the purpose of inquiring whether there are other defences would be against all precedent.

In *Browne* v. *Dunn* (1), Lord Halsbury said :

(1) 6 The Reports, 67.

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My Lords, I cannot but think that this case, although the amount involved is small, raises very important questions indeed. Amongst other questions I think it raises a question as to the conduct of the trial itself and the position in which the people are placed when, apart altogether from the actual issues raised by the written pleadings, the conduct of the parties has been such as to leave one or more questions to the jury, and those questions being determined they come afterwards and strive to raise totally different questions because upon the evidence it might have been open to the parties to raise those other questions. My Lords, it is one of the most familiar principles in the conduct of causes at *nisi prius*, that if you take one thing as the question to be determined by the jury and apply yourself to that one thing, no court would afterwards permit you to raise any other question. It would be intolerable and it would lead to incessant litigation if the rule were otherwise. I think Dr. Blake Odgers has with great candour produced the authority of *Martin* v. *Great Northern Railway* (1) which lays down what appears to me a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you on the evidence if you have deliberately elected to fight another question and have fought it, and have been beaten upon it.

See, also, *Martin* v. *Great Northern Railway Co.* (1); *Clough* v. *London & Northwestern Rway. Co.* (2); *The Tasmania* (3); *Connecticut Fire Ins. Co.* v. *Kavanagh* (4); *Nevill* v. *Fine Art & Gen. Ins. Co.* (5); *Karunaratne* v. *Ferdinandus* (6); *Star Kidney Pad Co.* v. *Greenwood* (7).

These cases shew that the same principle prevails under the present practice as at common law. It was acted on by the Supreme Court of Nova Scotia in *Davis* v. *The Commercial Bank of Windsor* (8).

Under the Act 54 & 55 Vict. c. 25, s. 2, an appeal now lies to this court "from the judgment upon any motion for a new trial." The decision of the *Eureka Woollen Mills Co.* v. *Moss* (9), was before that enactment.

(1) 16 C. B. 179.
(2) L. R. 7 Ex. 26, 38.
(3) 15 App. Cas. 223.
(4) [1892] A. C. 473.
(5) [1897] A. C. 68.
(6) [1902] A. C. 405.
(7) 5 O. R. 28, 35.
(8) 32 N. S. Rep. 366.
(9) 11 Can. S. C. R. 91.

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The majority of the court below proceeded upon the view that the findings of the jury were against the weight of evidence. In *Commissioner of Railways* v. *Brown* (1); *Council of Brisbane* v. *Martin* (2), and *Australian Newspaper Co.* v. *Bennett* (3), the Judicial Committee of the Privy Council reversed the orders of Australian courts granting new trials on this very ground. In the case of *The Metropolitan R. Co* v. *Wright* (4), the House of Lords affirmed the order of the Court of Appeal reversing a similar order of a Divisional Court. These cases show that a grant of a new trial on this ground is not an exercise of discretion with which an appellate court will refuse to interfere. In my opinion there was no ground whatever for interfering with the original judgment and it should be restored.

Appeal allowed with costs.

Solicitor for the appellants; *H. C. Borden.*

Solicitor for the respondent, F. H. Borden; *W. H. Fulton.*

Solicitor for the respondent, J. A. Kirk; *A. MacGillivray.*

(1) 13 App. Cas. 133.
(2) [1894] A. C. 249.
(3) [1894] A. C. 284.
(4) 11 App. Cas. 152.