

1887

Mar. 21, 22.

June 22.

LEWIS SPRINGER (DEFENDANT)..... APPELLANT ;

AND

THE EXCHANGE BANK OF } RESPONDENT.
CANADA (PLAINTIFF)

THOMAS BARNES, EXECUTOR, &c. } APPELLANT ;
OF GEORGE BARNES, DECEASED }
(DEFENDANT).....

AND

THE EXCHANGE BANK OF } RESPONDENT.
CANADA (PLAINTIFF)

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

*Security—Cashier of bank—Misconduct of—Illegal transactions—
Proper banking business—Sanction of directors.*

The sureties of an absconding bank cashier are not relieved from liability by showing that the bank employed their principal in transacting what was not properly banking business in the course of which he appropriated the bank funds to his own use the claim against sureties being for the moneys so appropriated by the principal and not for losses occasioned by such illegal transactions.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Ferguson J. in the Chancery Division (2) in favor of the plaintiff.

These actions are brought by the Exchange Bank of Canada against Charles Robert Murray, formerly their cashier, and Lewis Springer and Thomas Barnes his sureties.

These are separate actions against each surety but were heard and disposed of together, the contract sued upon and the pleading and evidence being substantially the same in each case.

*PRESENT—Sir W. J. Ritchie C. J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) 13 Ont. App. R. 390.

(2) 7 O. R. 309.

The action in each case was on a bond given by the said Murray as principal, and the respective defendants as sureties, such bond containing the following condition:—

“ Now the condition of the above written bond or obligation is such that if I, the said Charles Robert Murray, do and shall from time to time, and at all times hereafter, so long as I shall continue in the service or employ of the said Exchange Bank of Canada (hereinafter called the bank) in the capacity aforesaid, or in any other capacity at the said branch or agency, or at any other branch or agency of the bank, or at the chief seat of business of the bank, honorably, diligently and faithfully demean and conduct myself in such service or employ, and use my utmost endeavors for the benefit and advantage of the bank, and willingly obey all the lawful commands of the bank touching my duties therein, and shall in all instances, as well whilst in the service or employ of the bank, as after I shall be discharged therefrom, retain and keep secret, except from the President and Directors of the bank and such officers and other employees thereof as shall be entitled to the knowledge, all such transactions and matters relative to the affairs of business of the bank as in the course of such service or employ shall be entrusted to me, or shall either directly or indirectly come to my knowledge; and shall also duly, truly and regularly render and deliver to the bank or to such person or persons as the bank shall from time to time appoint for that purpose, a just, true and faithful account in writing of all such moneys, securities for money, bills, notes, bonds, deeds, writings, books, securities, goods, chattels, effects, matters and things whatsoever, as have, or shall from time to time come to my hands, custody or charge of or belonging to the

1887

SPRINGER
v.
EXCHANGE
BANK OF
CANADA.

BARNES
v.
EXCHANGE
BANK OF
CANADA.

1887
 SPRINGER
 v.
 EXCHANGE
 BANK OF
 CANADA.

“ bank or to the correspondents or depositors thereof or
 “ therein, or to any other person or persons whomso-
 “ ever wherewith the bank shall or may be charge-
 “ able.”

BARNES
 v.
 EXCHANGE
 BANK OF
 CANADA.

The bond also contained a covenant by the obligors to make good all losses occasioned by the misconduct of the said Murray, and provision for ascertaining the amount of any such loss by means of an account taken from the books of the bank. It was also agreed that such account should bear interest from the time it was delivered.

The cashier having absconded the bank claimed that he had appropriated their funds to the extent of some \$30,000 and brought these actions to recover from the sureties the amounts of the penalties of their respective bonds, namely, \$5,000 dollars each.

The defence set up in these actions was that the contract was made with the bank in the belief that Murray, the cashier, would only be employed in ordinary and legitimate banking business, and that he was not so employed but was employed in speculating in, and buying and selling, on margin and otherwise, large amounts of the stock of the bank and other stock, in the course of which improper business his defalcations occurred, and that the sureties were relieved from the obligations of their bonds by reason of the facilities for misconducting himself thus afforded by the bank to Murray.

The evidence showed that the bank had become possessed of a quantity of Montreal Telegraph stock on the security of which advances had been made. To avoid loss on this stock the usual means of affecting the market were employed, and an account was opened in the books of the bank called the “ C. R. Murray trust account ” in which these stock transactions were entered. Murray drew cheques upon this account

some of which he deposited to the credit of his private account and afterwards withdrew for his private speculations. And it was by this method of dealing with the trust account that nearly all his defalcations occurred.

On the trial before Ferguson J. judgment was given in each action in favor of the bank for the full amount of the penalty and interest on the account delivered according to the agreement in the bond. The Court of Appeal varied the judgment by deducting the amount of such interest, holding that no more than the penalty of the bonds could be recovered. The defendants then appealed to the Supreme Court of Canada.

Robinson Q.C. and *Malone* for the appellants cited following authorities: *Phillips v. Foxall* (1); *Watts v. Shuttleworth* (2); *Mansfield Union v. Wright* (3); *Sanderson v. Aston* (4); *Pearce v. Foster* (5); *The Queen v. Pringle* (6); *Morse on Banking* (7); *Corporation of Adjala v. McElroy* (8).

Bain Q.C. for the respondents referred to *Jones v. Imperial Bank of Canada* (9); *Thomson on Liability of Officers of Corporations* (10); *Morse on Banking* (11); *De Colyar on Guarantees* (12).

Sir W. J. RITCHIE C.J.—The breach of duty complained of has no connection with the dealing of the bank with the stocks taken in payment of debts with a view to saving themselves from loss, but the breach of duty complained of is based upon the alleged misapplication of the money of the bank placed in charge,

- | | |
|-----------------------------------|-------------------------|
| (1) L. R. 7 Q. B. 666. | (6) 32 U. C. Q. B. 308. |
| (2) 5 H. & N. 235; 7 H. & N. 353. | (7) 2 Ed. p. 239. |
| (3) 9 Q. B. D. 683. | (8) 9 O. R. 580. |
| (4) L. R. 8 Ex. 73. | (9) 23 Gr. 262. |
| (5) 17 Q. B. D. 536. | (10) Pp. 357-8. |
| | (11) P. 196. |
| | (12) 2 Ed. p. 285 |

1887
 SPRINGER
 v.
 EXCHANGE
 BANK OF
 CANADA.
 —
 BARNES
 v.
 EXCHANGE
 BANK OF
 CANADA.
 —

1887

SPRINGER
 v.
 EXCHANGE
 BANK OF
 CANADA.
 ———
 BARNES
 v.
 EXCHANGE
 BANK OF
 CANADA.
 ———
 Ritchie C.J.

and under the control, of Murray the cashier.

I think there is clear proof, in this case, that Murray drew cheques for his private purposes and thereby appropriated the funds of the bank to his own use to an amount greater than the penalties of the two bonds, and such appropriation was in no way authorized or sanctioned by the directors. I therefore agree with the learned Chief Justice, that the defaults of the cashier are sufficiently proved, and that no legal grounds have been shown to exonerate the sureties; and therefore the appeal should be dismissed.

STRONG J.—I am of opinion that this appeal should be dismissed for the reasons given by the court below.

FOURNIER J. concurred.

HENRY J.—I entertained some doubts on the argument, and still have doubt on the matter, but under all the circumstances of the case I am inclined to agree with the rest of the court that the sureties are not relieved from liability and that the appeal should be dismissed.

TASCHEREAU J.—Concurred.

GWYNNE J.—It is unnecessary for us to express an opinion whether or not, assuming that the evidence of Mr. Murray could be implicitly relied upon, his sureties would be released from all liability under their bonds, for I entirely concur in the opinion of the Chief Justice of the Court of Appeal for Ontario that little weight can be attached to that evidence, and apart from it there can be no doubt of the liability of the sureties. If Mr. Murray's statements are indeed true, it is unfortunate for himself and for his sureties that he should not have procured at least some evidence corroborative of his own evidence of the irregular and in some res-

pects illegal transactions which he accuses himself as having been engaged in at the instance of the directors of the bank whose trusted cashier he was, so as to bring home against the instigators of these transactions a conviction of the truth of the charges which, after having deserted his post and absconded from the country, he now makes against them.

As to the point raised by the defendant Barnes that the death of his testator terminated his contract of suretyship it is also unnecessary to express an opinion for two reasons, namely, 1st. No such point is raised upon the pleadings, on the contrary, in the only answer of the defendant Barnes which is in the case laid before us he speaks of himself as the person who and not his testator had become Murray's security, and

2nd. Because by the evidence of the inspector (which is not disputed) it appears that Mr. Murray at the time of George Barnes's death which now appears to have been on the 30th June, 1877, was a defaulter to an amount in excess of the amount recoverable under the bond; for these reasons, I am of opinion that the appeals in both cases should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Martin & Malone.*

Solicitors for respondents: *Bain, Laidlaw & Co.*

1887
 SPRINGER
 v.
 EXCHANGE
 BANK OF
 CANADA.
 —
 BARNES
 v.
 EXCHANGE
 BANK OF
 CANADA.
 —
 Gwynne J.
 —