1930
*April 28.
*June 11.

ISABELLA STEWART AND ARNOLD E. STEWART, EXECUTORS AND TRUSTEES OF AND UNDER THE LAST WILL AND TESTAMENT OF THOMAS E. STEWART, DECEASED (PLAINTIFFS) ..... APPELLANTS;

AND

THE ROYAL BANK OF CANADA AND ROY C. FRASER (DEFENDANTS)..... RESPONDENTS;

AND

ROY C. FRASER..... THIRD PARTY.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Banks and banking—Evidence—Sums withdrawn without authority by local branch bank manager from customer's account—Suit by customer's executors for recovery—Defence of repayment—Onus—Evidence as to repayment—Evidentiary value of documents signed by customer as to bank balance and vouchers.

F., a local branch bank manager, took without authority certain sums from S.'s account in the bank. S. having died, his executors sued the bank and F. to recover these sums. It was contended in defence that F. had repaid them to S. Chisholm J. dismissed the action ([1930] 2 D.L.R. 617). His judgment was sustained, on equal division, by the Supreme Court of Nova Scotia *in banco* (*ibid*). Plaintiffs appealed.

Held (reversing the judgments below, Cannon J. dissenting), that, on the evidence, defendants had not acquitted themselves of the onus of establishing repayment, and plaintiffs were entitled to recover; that, as to certain documents signed by S. at various times as to bank balance and vouchers, these documents, having regard to their form and the meaning which a customer would, in the circumstances, probably attach to them, and having regard to the facts that the sums in question were taken without authority and there were no vouchers in respect to them, were founded upon a fundamental error, and could have no evidentiary value in defendants' favour.

Per Cannon J. (dissenting): The said documents, which were not shewn to have been obtained by any misrepresentation or fraud, were effective as corroboration and confirmation of F.'s evidence of repayment, which was also corroborated in part by other material evidence; on the whole evidence, the judgments below in defendants' favour should not be disturbed.

APPEAL by the plaintiffs from the judgment of the Supreme Court of Nova Scotia *in banco* (1), which, on equal division of the court, affirmed the judgment of Chis-

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Cannon JJ.

(1) [1930] 2 D.L.R., 617.

holm J. (1), dismissing their action. The plaintiffs were executors under the will of Thomas E. Stewart, deceased, and sued to recover certain sums alleged to have been withdrawn, during the deceased's lifetime, without deceased's authority, from the deceased's current account in the defendant bank, by the defendant Fraser, who was the local branch manager of the defendant bank. The main issue was as to whether or not the said sums had been repaid by the defendant Fraser to the deceased. The material facts of the case, as found in this Court, are sufficiently stated in the judgments now reported. The appeal was allowed with costs, Cannon J. dissenting.

Hector McInnes K.C. for the appellants.

Frank Smith for the respondent Fraser.

C. B. Smith K.C. for the respondent The Royal Bank of Canada.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.) was delivered by

DUFF J.—The action with which this appeal is concerned was brought by the executors of the late Thomas E. Stewart against the respondent, the Royal Bank of Canada, and Roy C. Fraser, who was at the time of the material occurrences, manager of the bank's branch at Middle Musquodoboit. Mr. Stewart in his lifetime was engaged in farming, contracting, cattle dealing and lumber dealing, and kept a current account of considerable dimensions, as well as a savings account, at this branch. The plaintiffs claim to recover $5,000 and interest, which they allege was wrongfully abstracted from this current account by the defendant Fraser, while manager of the branch, in two sums: $3,500 on the 28th of February, 1922, and $1,500 on the 14th of February, 1924. The testator died in November, 1924.

It is not denied by either Fraser or the bank, indeed, it is explicitly admitted by both, that these sums were taken by Fraser without any authority, and it was conceded at the trial, and the trial proceeded upon the basis, that the sole issue was whether or not these sums had been repaid by Fraser in Stewart's lifetime. Fraser, it seems, had, in

(1) [1930] 2 D.L.R. 617.

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Duff J.

disobedience to his instructions, permitted the Musquodoboit Creamery Company, a customer of the bank, to exceed its credit. The sums abstracted from Stewart's account, were, it is alleged by Fraser, advanced by him as a personal loan to the Creamery Company in order to reduce that company's credit to the limit permitted by the bank; in form, however, the advance was made as an advance by the bank, and interest upon it was paid by the Creamery Company to the bank, although appropriated by Fraser.

Fraser's story is that the sum of $5,000 was restored to Stewart by the delivery to him of bearer bonds of the Dominion of Canada. As to the sum abstracted in February, 1922, that, in his examination-in-chief, he said was restored in the manner indicated on the occasion of the first visit of Stewart to the bank after the date of the abstraction, which would be about two months later than that date. In cross-examination he endeavoured to qualify that, and to fix the date of restitution at about six weeks later than the date of abstraction. As to the item of $1,500, only general evidence is given as to restitution by delivery of bonds; no date is mentioned.

The question then is, whether restitution by the delivery of bonds has been proved. No memorandum of any description is in existence containing any record of these transactions. Fraser is unable to give any description of the bonds except that they were "Government of Canada bonds" or "War bonds"; he stated at the trial that he had segregated these bonds at the times of the several abstractions and attached a note to them indicating that they were the property of Stewart. But his evidence at the trial is not really consistent with the story he told to Mr. Melvin, who having discovered, as inspector, the irregularity in the Creamery Company's accounts, asked Fraser for an explanation. According to Mr. Melvin's account of this conversation, Fraser told him that he, Fraser, had made personal loans to the company and that the interest appropriated by him was interest upon these loans. On further inquiry the inspector eventually obtained the dates of the loans and the amounts of them. The form in which the loans were made was not consistent with the statement that they were personal loans; notes had been taken from

the company payable to the bank, and the proceeds credited to the company's account in the ledger. The inspector wished an explanation of these facts, on the assumption that these loans were personal loans, and he says that after pressing Fraser for an explanation, Fraser "eventually" told him that both amounts credited to the Creamery Company had been taken from Stewart's account. Fraser then informed the inspector that he had made restitution to Stewart by giving him his own bonds. When pressed as to the character of the bonds, and as to particulars by which they might be identified, Fraser was unable to give any information. Mr. Melvin's evidence is this: "I asked him if he could tell me what the character of the bonds was; he said he could not. Q. What reason did he give?—A. He did not remember. Q. That is all you got?—A. That is in effect all I got at any time."

It is not without significance in considering the credibility of Fraser that he dealt with two other accounts in the same manner in which he dealt with Stewart's; that, these two customers being alive, when the wrongful dealing was discovered, the bank accounted to them for the sums abstracted. It is desirable, I think, to cite verbatim Fraser's evidence on this point:

Q. I want to know if when the money was abstracted from Cole's account, whether there were bonds put aside for his account; you took money from Cole's account exactly in the same way you took it from Stewart's?—A. Mr. Cole denies me taking any money from him at all.

Q. In any event, the Royal Bank have paid Cole a $1,000.—A. I don't know about that.

Q. Did you know that the contention of the Royal Bank is that Mr. Cole—that the Musquodoboit Creameries is credited in exactly the same way from Cole's, as the $3,500 and the $1,500 from Stewart's account. Is that a fact?—A. I can't swear to that.

Q. What about Mr. P. G. Archibald's account?—A. He has given me authority to charge his account whenever I wanted it.

Q. You took money from Mr. Archibald's account in the same manner?—A. I won't swear to that.

Q. And the Royal Bank have returned to Mr. Archibald the amount that was taken from the account?—A. I will not swear to that.

Q. They were sent credit slips?—A. Not that I know of; I don't know they were sent credit slips or not.

Q. Did you know they were accounted for; both these sums were accounted for to Archibald and Cole?—A. Yes.

Q. They happen to be living and Stewart is dead.—A. Probably they are.

Fraser's conduct after his interview with Mr. Melvin must also be considered. The bank declined to accept his

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Duff J.

explanation of the transaction and required him to procure an affidavit from the personal representatives of Stewart, confirming his statement. He did succeed in procuring from the son a letter, by telling him that he had given bonds to his father and that these sums were in payment of these bonds, and suggesting that there were reasons for silence with regard to the transaction. He begged him not to disclose the matter to his mother. The bank refused to accept the letter and he pressed both mother and son for an affidavit. In order to influence the mother to execute an affidavit, he told her that the son had given him a letter, upon which he had taken legal advice, and that he had been advised that the letter was binding. I can see no reason whatever for disbelieving the evidence of the plaintiffs as to what occurred between Fraser and themselves, and, putting it in the mildest way possible, I cannot credit him with having acted straightforwardly. His entire absence of recollection with respect to the character of the bonds, the date of their delivery, and with respect to any other particular of the transaction, when he was interviewed by Mr. Melvin, gives to his whole story a doubtful hue, and his transactions in relation to the Cole and Archibald accounts throw discredit on him personally. Considering the evidence, as far as I have reviewed it, alone, I should have no hesitation in concluding that the respondents have not acquitted themselves of the onus of establishing that restitution was made to Stewart by Fraser.

There remains, however, a further point, which is really the point upon which the majority of the court below proceeded. It is this: five documents dated respectively, May 2, 1922; October 3, 1922; October 20, 1923; March 24, 1924, and July 10, 1924, are produced from the possession of the bank. The first of them is as follows and the others are in the same form:

THE ROYAL BANK OF CANADA

Incorporated 1869

MIDDLE MUSQUODOBOIT, N.S., May 2, 1922.

RECEIVED from THE ROYAL BANK OF CANADA, Middle Musquodoboit, N.S., statement of my/our account as at the close of business on April 29, 1922, showing a balance of $6,684.05 in my favour, together with vouchers for all amounts charged to the said account up to and including the said date.

For valuable consideration I/we agree to examine forthwith into the accuracy of the said statement and the regularity and validity of the said vouchers, and I/we further agree that at the expiration of ten days from the date hereof, the said statement shall be conclusive evidence of the correctness of the balance therein shown, and the bank shall be and is released from all claims by me/us in respect of any and every item shown in the said statement, save such as shall have been questioned or objected to in writing within the said ten days.

(Sgd.) T. E. STEWART.

N.B.—This Receipt and Undertaking must be signed by the Customer or his Attorney.

It is first necessary to observe that the document is a receipt for vouchers, for vouchers for all amounts charged to the "said account" up to and including the "said date." Now this is a receipt produced to the customer by the bank for signature, and there can be no possible doubt as to the meaning of the word voucher used in it; it is something in the nature of authority or some evidence or record of authority to the bank to dispose of the sums charged. Admittedly, there never was any such voucher in respect of these sums of $3,500 and $1,500; as to the sum of $3,500, there is a vague suggestion, but as evidence it is negligible. And here it must be insisted on, because it is vital, that the case has proceeded from the beginning to the end on the basis that neither the bank nor Fraser had authority to abstract these sums. Fraser's story from the beginning was that he took the money and with it made personal loans to the Creamery Company. It is perfectly plain, therefore, that this document is founded upon a fundamental error and as against the deceased Stewart can have no evidentiary weight as to the state of the account. It is to be observed that the document as drawn by the bank, and presented by the bank to its customer, is one of those documents which, being in ambiguous form, can be no protection. Read without extraordinary care by a customer, relying not only on the honesty, but upon the reasonable care of his banker, he might very well receive from it the idea: here are vouchers for all the sums charged, examine them and see whether or not they are genuine and if we do not hear from you within ten days, we are to be at liberty to assume that the balance is correct. That, I think, in the circumstances, is the meaning a customer would probably attach to this piece of paper; and the customer's signature is of no value whatever as evidence in favour of the bank or anyone else.

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Duff J.

I have come to the conclusion that the reasons given by Mr. Justice Paton are conclusive. The learned trial judge, I think, with very great respect, has misdirected himself as to the onus of proof; and so, also, again with very great respect, Mr. Justice Mellish.

One observation seems proper. In view of Fraser's stand, the bank cannot properly be censured for submitting the dispute to the courts, and nothing said above should be construed as a reflection upon their conduct.

The appeal should be allowed, and the appellants should have judgment for the amount of their claim with costs in all courts.

CANNON J. (dissenting).—The plaintiffs, as executors and trustees of Thomas E. Stewart, who died on or about the 7th day of November, 1924, sued, on the 3rd January, 1929, the Royal Bank of Canada and Roy C. Fraser. They claimed that on the 28th day of February, 1922, the sum of $3,500, and on the 14th day of February, 1924, a further sum of $1,500, were withdrawn from the current account of the said deceased at the branch of the Royal Bank of Canada at Middle Musquodoboit, in the County of Halifax, by the defendant Roy C. Fraser, or under his direction, without the knowledge, authority or direction of the deceased. No restitution or refund of said sums of money or any part thereof having been made to the deceased, or to his executors, the executors and trustees claim:

1. $3,500 with interest at the rate of 5% from the 28th day of February, 1922;

2. $1,500 with interest at the rate of 5% from the 14th day of February, 1924; and

3. An accounting with respect to all the accounts and dealings of the said deceased with the bank.

The respondents filed separate defences.

The Royal Bank admits that the amounts were withdrawn from the current bank account of the deceased, at the dates mentioned, by the defendant Fraser, or under his direction; but the bank has no knowledge, and does not admit, that the said withdrawals, or either of them, were made by the said Fraser without the knowledge, authority or instruction of the deceased. The bank further admits that no restitution or refund of the said sums of money, or

any part thereof, has been made to the deceased or his estate by the bank; but alleges that it does not know and does not admit that no restitution or refund of the said sums of money or any part thereof has been made to the deceased, or his estate, by Fraser.

The substantial defence of Fraser is found in the following paragraphs of his plea:

(*c*) He denies that the said sums of $3,500 and $1,500 were withdrawn from the current bank account of the said Thomas E. Stewart, deceased, without his knowledge, authority or instructions and he further denies that no restitution thereof in whole or in part was ever made. On the contrary he says that shortly after the said amounts were deducted from the said current account he paid and delivered over to the said Thomas E. Stewart with full knowledge of the said withdrawals and in complete discharge thereof bonds in the one case in the amount of $3,500 and in the other case in the amount of $1,500 which the said Thomas E. Stewart accepted in full and thereupon and thereafter on at least three occasions the said Thomas E. Stewart by acknowledgments in writing—having received the said bonds as aforesaid—acknowledged his current account with the defendant Bank and the balances showing to his credit to be absolutely true and correct although the said charges against his said current account remained standing on the books.

(*d*) The said defendant repeats paragraph 2 (*c*) hereof and says that the acknowledgments in writing were in the following forms *mutatis-mutandis*—

"The Royal Bank

"Received from the Royal Bank of Canada statement of my account as at the close of business on 19 , showing a balance of $ in my favour, together with vouchers for all amounts charged to the said account up to and including the said date.

"For valuable consideration I agree to examine forthwith into the accuracy of the said statement and the regularity and validity of the said vouchers and I further agree that at the expiration of ten days from the date hereof the said statement shall be conclusive evidence of the correctness of the balance therein shown and the Bank shall be and is released from all claims by me in respect of any and every item shown in the said statement save such as shall have been questioned or objected to in writing the said ten days," and that neither within ten days after the signing of the said acknowledgment nor within any other time nor at all did the said Thomas E. Stewart in his lifetime nor the plaintiffs as his legal representatives after his death nor any other person ever question or object to in writing or otherwise the said statements of account as referred to in the preceding sub-paragraph hereof and the plaintiffs are thereby estopped and precluded from now calling into question either the said statements or the absolute correctness thereof.

The appellants, in their reply to this defence, denied the delivery of bonds to Thomas E. Stewart in his lifetime, and stated that any acknowledgments as to the correctness of his balance at the bank were obtained by the fraud and

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Cannon J.

misrepresentation of Fraser; and that, at no time, was Thomas E. Stewart given a full disclosure of his correct account with the bank, and that Fraser concealed from Stewart the true facts as to the state of his account.

The action came for trial before Mr. Justice Chisholm.

The plaintiffs produced their own evidence, together with that of Willard Melvin, inspector of the bank, who explained how he discovered, in 1928, certain irregularities in the management of the branch by Fraser, and exacted from the latter that he should secure first a letter, then an affidavit from plaintiffs respecting the deceased's dealings with the bank. Plaintiffs' evidence describes the embarrassed efforts made by Fraser to secure from them, four years after the settlement of the account, and after they had destroyed all vouchers, the additional documents requested by this very cautious inspector. Another witness for the plaintiffs was one George Wilson, whom Fraser asked, when he was threatened with the present action, to see Arnold E. Stewart, in order to try and reach an amicable settlement. The plaintiffs did not produce the deceased's pass-book and claim that it could not be located.

Defendant Fraser was heard and swore positively that he had on both occasions acted under implicit instructions from the deceased and had given satisfaction or consideration to the latter, with bonds of the value of $3,500 in one instance, and of $1,500 in the other; and that, on both occasions, in 1922 and in 1924, they were accepted by Stewart and taken away by him.

This evidence, by itself, would not be sufficient under R.S.N.S., 1923, c. 225, c. 37, which provides that

> in any action, or proceeding in any court, by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall *not* obtain a verdict, judgment, award, or decision therein on *his own testimony,* or that of his wife, or of both of them, in respect to any dealing, transaction, or agreement with the deceased, or in respect to any act, statement, acknowledgment, or admission of the deceased, *unless such testimony is corroborated by other material evidence.*

The decision of this case rests entirely on the solution of the question whether or not Fraser's testimony is corroborated by sufficient material evidence to support the judgment dismissing the action. I quite agree that if we had only Fraser's evidence to support his plea of payment and

satisfaction on the two occasions above mentioned, the appeal should be maintained. But the Executors cannot have more rights before this court than Stewart himself would have been able to exercise in his lifetime, and they are bound by Stewart's signature, given on five different occasions, on the bank's verification receipts dated May 2, 1922, October 3, 1922, October 20, 1923, March 24, 1924, and July 10, 1924. This man in active business, who, according to his wife's evidence, "whenever he came home would have a statement verified at the bank", must be credited with enough intelligence to perceive that during that period his current account had been reduced on two occasions by the rather large amounts of $3,500 and $1,500; surely he must have received satisfaction or consideration for his money before he acknowledged that the balances shewn by his account at those dates were correct. His signature, and his failure to question or object to these statements within ten days from the dates thereof, unless induced by fraud and misrepresentation, bind his heirs and representatives. The latter grasped this, when, in their reply to the plea, they claimed that these receipts or acknowledgments had been secured through misrepresentations and fraud. No attempt whatever has been made by the plaintiffs to prove these allegations, so that we must accept and give their full value to these documents signed by the deceased: *mortus adhuc loquitur,* and he gives evidence for the defence. This is more than corroboration; it is confirmation of Fraser's defence.

Moreover, Robert McFetridge, who was in the employ of the bank from January 1, 1924, gave material evidence corroborating in part Fraser's version. He swore that Stewart, in the last year of his life, was frequently in the bank and asked for his balance from the ledger keeper. This witness also saw Stewart with his pass-book, which was written up and handed to him on several occasions; and he also remembers that, in the latter part of the winter of 1924, Mr. Fraser brought out his own deposit box, at a time when Mr. Stewart was in the bank, set it on witness's desk, took out some bonds and took them into his office; a few minutes later Fraser called witness to bring a large envelope; Fraser put these bonds in the envelope and handed them over to

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Cannon J.

the late Mr. Stewart. This witness was not cross-examined by the plaintiffs.

The whole of the evidence of record, except that part based on more or less suspicious circumstances which occurred four years after the death of the bank's client, favours the defendant. In presence of the five receipts and quit claims bearing the signature of the testator, and the latter's inaction from May 2, 1922, to the time of his death in November, 1924, the Executors had to prove their allegation of error through defendant's fraud and misrepresentation; this they have failed to do. The trial judge saw and heard Fraser in the witness box; and, to use his own words, he was not prepared to find his statement untrue, as it was supported by the vouchers and acknowledgments already mentioned. Two of the learned judges of the Court of Appeal have also found that the defendant had proven his plea of payment, that he had given satisfaction to Stewart in his lifetime; and I do not see any reason why this Court should decide that these findings are contrary to the facts of the case.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondent The Royal Bank of Canada: *C. B. Smith.*

Solicitor for the respondent Fraser: *James A. Sedgewick.*