1928
*Nov. 19.
1929
*May 27.

THE DOMINION GRESHAM GUARANTEE & CASUALTY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE BANK OF MONTREAL (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Bank and banking—Guarantee—Company—Insurance—Defalcations by employee of insured—Drafts, payable to himself, obtained by employee from the bank in exchange for cheques signed by insured—Liability of the bank—Ostensible authority—"Holding out"—Negligence.

The appellant company sued the respondent bank for the recovery of the sum of $7,565.61 ($5,000 being the amount of a guarantee policy and $2,565.61 for legal costs), which the appellant was condemned to pay to the insured, Willis, Faber & Co., in respect of the defalcations of one Rogers, chief accountant of the latter company. The frauds committed by Rogers began in September, 1919, and were not discovered until the 10th of January, 1922, and during that period Rogers procured from the respondent 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 the latter's account. The appellant company contended that the respondent was not entitled to do so, the appellant exercising in this action the rights of the insured, to which it was subrogated by the latter. In 1912, a resolution of the directors of the insured company, a copy of which was in possession of the respondent bank, directed that any two of four officers therein designated, Rogers being one of them, were "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 respondent bank submitted that what Rogers did was within his ostensible authority; and it also argued that the insured was negligent in not sooner discovering Rogers' frauds and through this negligence the officers of the bank were misled. The judgments of the trial judge and the Court of King's Bench were in favour of the respondent bank.

Held, Rinfret J. dissenting, that, upon the evidence, the respondent bank was not entitled to charge against the insured company's account the drafts obtained from it by Rogers. The respondent's contentions cannot be upheld in view of the evidence as to the actual course of business followed in the bank and of the terms of the resolution of 1912; and the doctrine of "holding out" has no application in this case: the bank in acting on Rogers' directions was not acting under any belief in the existence of Rogers' assumed general authority and

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

was not misled by any such belief or by any act of negligence of the insured company.

Per Rinfret J. (dissenting).—There is a well established rule that the question "whether or not the evidence establishes that a person acts without negligence is a question of fact." ([1920] A.C. 683, at p. 688); and, in this case, both the trial judge and the appellate court unanimously found that the bank acted without negligence. The bank followed towards the insured company the procedure the latter had established for many years, and no positive acts of negligence were proven. Moreover, the cheques charged against the insured company's account were in accordance with the resolution of 1912 and properly charged against that account; the foreign drafts were not charged to the insured, but they were really sold and delivered to Rogers for the insured in consideration of the respective cheques, and the respondent bank cannot be held responsible for the subsequent misappropriation of those drafts by Rogers.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, at Montreal, Duclos J., and dismissing the appellant's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

J. A. Mann K.C. for the appellant.

A. R. Holden K.C. for the respondent.

The judgment of the majority of the court (Duff, Newcombe, Lamont and Smith JJ.) was delivered by

DUFF J.—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, 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.

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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 King's Bench 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 and 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.

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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 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 analyse 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 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 adapt the language of Lord Cave in *Australian Bank* v. *Perel* (1), 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* (2), Lord Atkinson in delivering the judgment of the Privy Council says:

> the several authorities cited by Mr. Scrutton, from *Grant* v. *Norway* (3), down to *Ruben* v. *Great Fingall Consolidated* (4), 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 employ-

(1) [1926] A.C., 737, at p. 742.
(2) [1910] A.C., 174, at p. 184.
(3) (1851) 10 C.B. 665.
(4) [1906] A.C. 439.

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ers 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 each of 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—a general authority, which would involve an authority in 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 of Rogers' directions, the bank officials were influenced by any consideration in addition to those 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.

RINFRET J. (dissenting).—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.

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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. 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 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 Johnston 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. Aus-

tin, 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?

Q. 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 17, 1910, to April 18, 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*) (1).

In the present case, both the trial judge and the Court of King's Bench 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 re-

(1) [1920] A.C. 683, at p. 688.

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quest 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 follow would appear to be the effect of the judgment of the Privy Council in *Corporation Agencies Limited* v. *Home Bank of Canada* (1). 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 pre-

(1) [1927] A.C. 318.

sented, 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 King's Bench:

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 réquisition 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.

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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 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.

Appeal allowed with costs.

Solicitors for the appellant: *Mann & Mackinnon.*

Solicitors for the respondent: *Meredith, Holden, Heward & Holden.*