A Bank's Liability

House of Lords Judgment in Captain Banbury's case.—Majority held that Bank of Montreal could not be held responsible

The Times Law Report of June 25 contains the report of the House of Lords judgment in the appeal of Banury vs. the Bank of Montreal. The committee consisted of the Lord Chancellor, Lord Atkinson, Lord Shaw, of Dunfermline, Lord Parker of Waddington, and Lord Wrenbury.

Their Lordships dismissed by a majority the appeal from a decision of the Court of Appeal setting aside a verdict and judgment in favor of the plantiff (the appellant) at the trial of the action before Mr. Justice Darling, and a special jury. The appeal raised a question of great commercial interest—namely, as to the liability of a bank to a customer for giving unsound advice as to investments.

The appellant, Captain Cecil Edmond Banbury, claimed damages from the Bank of Montreal for alleged negligence and breach of duty while acting as his bankers in advising him on the merits of an investment. The case had been twice tried, on the first occasion before the Lord Chief Justice and a special jury, when the jury were unable to agree and were discharged. The appellant's case was that in 1912 he was travelling in Canada looking for profitable investments, that on his arrival at Victoria, B.C., he called at the local branch of the Bank of Montreal, of which he was already a customer, and that he presented a letter of introduction which he had been given by the general manager, Sir Edward Clouston, when visiting Canada in the previous year. The letter was as follows:—

July 6, 1911.

"The Manager, Bank of Montreal:

Dear Sir,—I take pleasure in introducing to you Captain Banbury, of London, England, who is visiting this country on pletsure. Should he apply to you for assistance or advice you will be good enough to place yourselves at his disposal.—Yours faithfully, E. S. Clouston, General Manager."

The appellant's evidence was that he was advised by Mr. Galletly, the local branch manager at Victoria, to invest $125,000 in a loan on mortgage to the Westholme Lumber Company, of British Columbia to assist it in performing a contract for the supply of water to the city of Victoria. He did so, but owing largely to the failure of the city authorities to find further moneys the investment turned out a heavy loss, and he brought this action for damages for negligence by Galletly in not warning him that the investment was highly speculative. Alternatively he said that the defendants did not invest his money on mortgage as arranged, but allowed part to be used to pay off another mortgage already given by the Lumber Company to Messrs. Leiser & Co., of British Columbia.

The respondents (the defendants), said that Galletly had not given the appellant any advice, but merely supplied him with information as to the Westholme Lumber Company, and that he exercised his own judgment in making the investment. If, however, he had given the appellant such advice he was acting outside the scope of his authority as manager of a branch bank and the respondents were not liable for anything that he had done. In any case, any such advice was given honestly and in good faith. The questions left to the jury at the second trial and their answers were as follows:—

"(1) Had Mr. Galletly authority as the manager of a branch of the defendant bank to advise the plaintiff to invest $125,000 on mortgage to the Westholme Lumber Company?—Yes.

"(2) Did Mr. Galletly advise the plaintiff—(a) that the investment was perfectly safe?—Yes; (b) that the mortgage would be a second mortgage ranking only behind the first mortgage held by the defendant bank?—Yes; (c) that the money was required and would be used only for the purpose of completing the water contract with the city of Victoria?—Yes; (d) that with such loan the Westholme Lumber Company would be able easily to carry out their contracts without further borrowing.—Yes.

"(3) Did the plaintiff rely on such advice?—Yes.

"(4) Did he invest his money on the strength of such advice?—Yes.

"(5) Was the advice (if any) given by Mr. Galletly to the plaintiff negligently and unskilfully given by him?—Yes.

"(6) Did the defendant bank act negligently or in breach of their duty to the plaintiff in allowing a part of the plaintiff's money to be used in paying off the mortgage of Lester and Co.?—Yes."

The jury found accordingly for the plaintiff damages £25,000, on payment of which the securities were to be returned by the plaintiff to the bank, and Mr. Justice Darling entered judgment accordingly.

The Court of Appeal (Lord Cozens-Hardy, Master of the Rolls, Lord Justice Warrington, and Lord Justice Crutton) set aside the judgment and ordered judgment to be entered for the respondent bank. They held, first, that section 6 of Lord Tenterden's Act applied and afforded a complete defence to the appellant's claim, and, secondly, that there was no evidence that Galletly had authority to advise the appellant so as to bind the bank.

LORD CHANCELLOR'S JUDGMENT.

The Lord Chancellor said that the decision of the Court of Appeal proceeded on two grounds—namely, that Lord Tenterden's Act barred any action for negligence in advising, and that there was no evidence which could in point of law support the appellant's case on either head of claim. The defence under Lord Tenterden's Act, after argument before Mr. Justice Darling, was overruled by him. He was reversed by the Court of Appeal. He thought that Mr. Justice Darling's judgment on that point was right and ought to be restored. The provision in Lord Tenterden's Act (9 Geo. IV., c. 14) on which the Court of Appeal relied was Section 6, which enacted that:

"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, ability, trade, or dealings of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon (sic) unless such representation or assurance be made in writing signed by the party to be charged therewith."

The action was brought on the allegations that the respondents, as bankers, advised their customers as to Canadian investments, that the appellant was a customer, that the respondent bank through their local manager at Victoria advised the appellant that $125,000 might be prudently lent to the Westholme Lumber Company, that the apellant, in reliance on this advice, made the loan, that the advice was negligent, and that the money was wholly lost. In his Lordship's opinion an action of this nature did not fall within Section 6 of Lord Tenterden's Act at all. The action was for the breach of the duty which it was alleged that the bank had undertaken of advising the appellant, and not for misrepresentation.

His Lordship then stated the facts and reviewed the evidence. Referring to the letter of introduction from Sir Edward Clouston, he said that even if that letter had stood by itself it would have been possible to withdraw the case from the jury, but it must also be taken in connection with the whole course of business of the bank with regard to the Westholme Lumber Company. The letter, of course, would not be read by any bank manager as authorizing him to give advice on any matter of business whatever, but if the advice related to a matter which had passed through the manager's hands in the course of his business and with which he was thoroughly conversant, the letter did authorize him to give advice to the appellant upon it, of course subject to limitations as to interest and information obtained in confidence.

While it was not part of the ordinary business of a banker to give advice to customers as to investments generally, it appeared to him to be clear that there might be occasions when advice might be given by a banker as such and in the course of his business.

His Lordship referred to a circular dated March 7, 1913, which showed that it had been the long-established custom of this bank to supply Canadian and other friends with any advice or information in its power. If a question arose as to investments with regard to which a banker had special means of knowledge, it would not be out of the ordinary course of business for the banker to advise a customer who asked for his counsel. Of course, if the banker's familiarity with the subject arose from the fact that he had himself a pecuniary interest in it, he would be bound in advising the customer to make full disclosure to him of this circumstance, but as long as the full disclosure was made he might, if he pleased, advise, and in doing so, he would not be stepping outside the business of a banker; and it might be noted in passing that the case made by the bank at the trial was that Mr. Galletly had told the appellant everything.

It was possible that the banker might be in possession of information obtained in confidence from other customers which he was not at liberty to disclose, and in such circumstances it might be his duty to refuse to advise, as his hands would be tied with regard to the material parts of the transaction on which he was consulted. Subject to these considerations a banker might, as such, give advice on investments to a customer who consulted him, or indeed to anyone who came to him for advice and whom he chose to advise. If he undertook to advise he must exercise reasonable care and skill in giving the advice. He was under no obligation to advise, but if he took on himself to do so he would incur liability if he did so negligently.

Exactly the same considerations as to giving advice applied to the case of the manager of a branch bank with regard to the business which was immediately under his care as manager. It was noteworthy that throughout the correspondence which followed on the appellant's complaint against the bank when the loss occurred the position taken up by the bank was a denial that Mr. Galletly had in fact advised. It was never suggested in this correspondence that it was beyond the scope of his duties to advise the appellant as alleged.

It was a fallacy to argue that because the bank was interested in the matter the manager could not on behalf of the bank advise. That circumstance threw upon him the duty of making a full disclosure of the interest of his employers. If he failed to do so he would be guilty of a breach of duty to his employers, but that would not prevent liability of the employer to those to whom negligent advice had been given. His employer would be liable on the familiar principle on which the employer of a chauffeur was liable for his negligence in driving, though the negligence was a breach of duty to the employer and contrary to his instructions.

It was strenuously contended on behalf of the bank that the matter on which Mr. Galletly was said to have advised the appellant was as to the sufficiency of the mortgage which it was proposed he should take, and that this was a matter not for a banker, but for a lawyer and a valuer. That argument involved a total misconception of the nature of the transaction. The jury accepted the evidence that the bank, through Mr. Galletly, undertook to advise the appellant, and he was eminently qualified to do so from the attention he had paid to the contract in the interests of the bank.

These considerations were quite enough to render it necessary to leave to the jury the question whether Mr. Galletly was acting in the course of his employment in giving the advice which the jury have found he gave. The case made for the bank at the trial was that Mr. Galletly had not advised at all, but had simply brought the matter to the attention of the appellant and left him to form his own conclusions. The jury accepted the evidence of the appellant on this question of fact, and it was not questioned that there was ample evidence on which they might come to that conclusion.

It was argued on behalf of the respondents that even if authority from the bank to Mr. Galletly was assumed, as the advice to be given was gratuitous, no liability in law could follow from an undertaking to give such gratuitous advice. It was beyond dispute that on a gratuitous bailment the bailee might be made liable for want of ordinary care. But it was said that the consideration there consisted in his being entrusted with the property of another. The consideration really was the confidence reposed in the person who undertook the duty. He need not undertake it at all, but if he did he must exercise due care in dischargin it. That consideration applied just as much to the case of gratuitous advice as to that of gratuitous bailment. Indeed, it was admitted in argument, or at least it was not denied, that a physician, who undertook to treat a patient gratuitously would be liable for negligence, but it was sought to distinguish such a case on the ground of the important and responsible public duty which such a profession involved. There was in point of law no difference between the case of advice given by a physician and advice given by a solicitor or banker in the course of his business. By undertaking to advise he made himself liable for failing to exercise due care in discharging it. That consideration applied who had trusted him, and the fact that he undertook it gratuitously was irrelevant. But in truth, it was a mistake to treat the present case as one merely of advice, or of merely gratuitous advice. The bank was to undertake the receipt and application of the money if advanced, and this, apart altogether from the bank's interest in the success of the contract, showed that the whole transaction was a purely business one. It could not be put in the same

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