## THE BANK OF BRITISH NORTH AMERICA

vs.

## DAVID TORRANCE *ET AL.*

HIS Honor Mr. Justice Mackay delivered judgment in this case on Thursday last.

He stated the circumstances of the case, and read the questions submitted to the jury, which have appeared in the *Trade Review*, and then proceeded to say in substance as follows:—

On the 26th of November the Plaintiffs moved that on the verdict, pleadings and evidence, judgment be entered in their favour

On the same day the Defendants presented two motions to the Court:

1st. Inasmuch as Plaintiff's allegations are not sufficient in law to sus'ain their pretensions that (notwithstanding the verdict) judgment be rendered in favour of Defendants. (Art. 433 Code of Procedure )

The second was for judgment on the verdict, pleading, and evidence.

It is to be remarked that defendants did not move for a new trial.

If the allegations of the Bank are sufficient in law, defendants first motion must fail, but if insufficient, it must be granted, no matter what were the findings of the jury. (Tilstone Gibb, 4 jur.—Higginson *vs* Lyman, shew how those motions work).

Upon mature consideration, after reading and re-reading it, I think the plaintiffs declaration good enough in law. The verdict must, therefore, be applied, in so far as may be consistent with the nature of the action and according to the rights of the parties under it. The reference to the jury was for the purpose of particular findings by them, upon mere matters of fact. Their verdict is like a special case, and ought to have effect as one in England would have, as to what is set forth in a special case to which both parties had agreed.

We may now pass to defendants second motion, namely, for judgment in his favour upon the pleadings, evidence, and verdict. First, as to the evidence:

The relations between Defendants and Yarwood may be gathered from a letter of December 29, 1866. from Defendants to Yarwood. The latter was an agent employed by defendants upon a commission to buy grain for them. "We have to-day arranged for a "credit of $20,000 to begin with," say defendants. "We shall want regular returns and the property "insured." What passed at London is clear from the parol evidence before the jury and from the following letters from Yarwood to the Defendants:—

St. Thomas, July 19, 1867.

Messrs. D. Torrance & Co.

Gentlemen,—I wrote you on the 15th inst., and now have your letter of the 12th, and your telegram of the 17th inst., I was away from home when the telegram arrived. and only got back last night.

I wrote Mr. Cramp from Toronto. The cheque of $10,000 was drawn against proceeds of my draft on you at three months for same amount, and if you decline to accept my draft, then the cheque should not be used I would not have a draft on you if my anticipations respecting grain had been realized.

I am, Gentlemen,
Your obedient servant.
E. M. YARWOOD.

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St. Thomas, July 19, 1867.

Messrs. D. Torrance & Co., Montreal.

Gentlemen,—I have received your letter of the 17th inst. My draft on you for $10,000 was discounted by the manager of the Bank of British North America, at London, on the understanding that it was a renewal of a bill for same amount due on the 18th inst., and for which he marked my cheque.

I drew upon you because I had failed to realize, as I expected, from sales of grain, and because I had no other means at the moment of meeting the bill. and I was bound to prevent you being put to inconvenience in the matter. But if you do not accept you will not only ruin me, but seriously injure the Manager of the Bank, who acted in good faith in the matter, and discounted the draft only for the purpose of enabling me to retire that due on 18th.

I am.
Your obedient servant,
E. M. YARWOOD.

Thos. Cramp, Esq.

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St. Thomas, 20th July, 1867.

My Dear Sir,—I hope your firm will not continue to refuse acceptance of my draft The doing so will be disastrous, not only to me, but to the Manager of the British N A Bank He discounted the bill for the express purpose of enabling me to retire the draft drawn the 18th, and he had full confidence that you would accept or he would not have marked a cheque expressly intended to retire a bill of which the draft he discounted was a renewal.

If you will continue to accept for a few months I will redeem the debt as fast as I possibly can, and if I fail to realize enough from my business this fall to pay off my liability, I will dispose of them before the close of the year.

My earnest desire is to pay for the amount I owe you as quickly as possible. When I saw you in Montreal, I expected to have to draw for $25,000. I have drawn for $19,000, and have insured my life and transferred the policy.

I certainly ought to have advised you before I drew, but as I had not the means to pay the bill, I thought it better to make a draft and send you a cheque, than allow you to retire the acceptance, and put you to inconvenience.

Yours truly,
E M. YARWOOD.

Thos Cramp, Esq

The letter of Yarwood. of the 16th July, from Toronto, is not produced by the defendants, it being lost. It is certainly unfortunate such an important paper should be lost, and I feel bound to say that I never heard the loss of such a paper so poorly explained; the paper itself bearing upon such large amounts, and upon things, the like of which never happened before probably. The cheque was cashed between twelve and one on the 17th; and the plaintiffs contend that the letter of the 16th was in the possession of D. Torrance & Co. on the 17th July, before they cashed the cheque So it must have been, unless we presume several irregularities. How important it was to prove irregularities if any. If it arrived irregularly, or late, in Montreal how important it was to men of business to keep it carefully need not be discussed. On the 18th, in the afternoon, D. Torrance & Co. say:—"We cannot accept; no advices from Upper Canada;" yet surely they had this letter of the 16th. Yarwood is certain that that letter of the 16th contained more than the one of the 15th. He says:—"I think it stated my regret at having been obliged to draw; that I had no other means of meeting the draft." "I told them what I had done," he adds, on cross examination. Plaintiffs argue that it stated in like words what the letters of the 19th and 20th do; and complain that for want of that letter of the 16th, they have had to resort to the parol evidence of Yarwood, biassed in favour of defendants. It is observed in support of the plaintiffs complaint that Yarwood's position at the date of the trial was very different from what it was in July. 1867. Before the time of being examined as a witness for Plaintiffs, Yarwood had been discharged by the opposite party, the defendants. from over $10,000 on payment of 12½ cents on the dollar; that is. he was forgiven $9.625.

It is proved by Mr. Hooper that Mr Cramp called at the Bank on the 18th (the check had been cashed on the 17th) and said that Yarwood had no authority to draw. It is complained of by plaintiffs that defendants did not inform them earlier of their intention not to accept the draft. Mr. Hooper, on the 18th, went to Mr. Cramp's office, and Mr. Cramp showed him Yarwood's letter of the 15th July, saying that there was nothing to connect the cheque with his draft. But Mr. Cramp, who had Yarwood's letter of the 16th then, unless he had lost it before, said not a word about it. And this is the letter that Yarwood swears told Mr. Cramp of what he (Yarwood) had done. The plaintiffs say that Mr. Cramp was guilty artifice and reticence on this occasion. As to this letter of the 16th, from Toronto, defendants appear up the 9th of November, 1868, not to have told their own counsel of it. This is evident from the *factum* submitted to me by the defendants at the trial. Any man to whom the case might be stated, as to myself, by defendants' *factum*, without mention of the letter of the 16th, from Toronto, would form an opinion of the case very different from what he would form if fully and truly informed. Defendants say to plaintiffs, you may prove the contents of the last letter by secondary evidence, but plaintiffs' rights are greater than this; in such cases presumption may be in their favour. Yet I did not charge the jury so. In the hurry of the trial I confess to have been unprepared a little for what came out, and I left the case as one of fact to the jury, with no special advice or remark, as to whether they might presume things or not, in consequence of the loss of that letter of the 16th by defendants

Here is some law on the subject. If a man withhold the evidence by which the true nature of the facts of a case would be manifested, every presumption to his disadvantage will be adopted. (Page 163-1, Smith's Leading Cases.—Note.) If a person is proved to have destroyed any written instrument, a presumption arises that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. But if the evidence be shewn to be unattainable, the presumption sometimes ceases. (727 Broom's Leg. Mat. Kerr on Fraud—p 214 )

There is no proof here of how the letter was lost, or when, or, by rebuttal testimony, of what the contents were. As I said before, I gave no instruction whatever to the jury on this particular point. Then the eleventh finding may be based in part upon presumptions. If so, I would, nevertheless, not find fault with it on that ground. But the jury may have thought the letter of the 15th supported their eleventh finding. This letter reads:

"I have drawn on you to-day at 3 months for $10,000, and enclose cheque on Bank of B. N. America for same amount to retire bill due 18th inst."

' Suppose Yarwood had written with mere transposition of words as follows:—"To retire bill due on the 18th inst, I have drawn on you to-day at three months for $10,000, and enclose cheque on Bank B. N. A. for same amount."

Plaintiffs say that Torrance & Co. had reason to believe, from the letter of the 15th, all that the jury has found by their eleventh finding.

Here is an important part of the case. Mr. Cramp, when he called at the Bank, gave as a reason for defendants refusing to accept the new draft, that Yarwood had no authority to draw. Now, after the trial, and since the jury's eleventh finding, we may say that defendants had reason to believe before getting the cheque cashed, that the draft on them had been discounted upon the faith that they would accept it, and that the cheque was the proceeds of that discount.

It is true that Yarwood had no authority to draw upon defendants; but plaintiffs say that by using the cheque under the above circumstances and belief, defendants ratified the act of Yarwood. The plaintiffs contend that, under the circumstances, defendants ought not to be allowed to retain plaintiffs' money, proceeds of the cheque and sole consideration therefor. Plaintiffs cited no authorities, whether from compliment to the Court or not I cannot say; but I have been compelled to look for authorities, and here are some:

"As an authority may be presumed from previous employment in similiar acts, so the same presumption arises from subsequent acts of assent or acquiescence; a small matter will be evidence of such assent; and if with a knowledge of all the circumstances an employer adopts the acts of his agent for a moment, he is bound by them."—*Paley by Dunlop* 171 )

Of course there must be a knowledge of the circumstances; but the jury in this case has found enough.

Livermore Pr. & Agent, vol 1, says:—"If I make a contract in the name of a person who has not given me authority he will be under no obligation to ratify it, nor will he be bound to the performance of it. But if with a full knowledge of what I have done he ratify the act, he will be considered to have contracted originally by my agency; for the ratification is equivalent to an original authority."

Does not Yarwood say that in his letter of the 16th he told the defendants of what he had done? Here is another case from notes to Paley. Page 172:—

"The principal, after knowledge that his orders have been violated by his agent, receives merchandize purchased by him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, an inference in favour of the ratification of the acts of the agent may fairly be drawn by the jury."

Troloug, Maudat, No. 611. says:—"Si ayant recu avis de ce qui a ete entrepris pour moi a mon insu, ou en dehors de mes ordres, je garde la silence, je suis cense consentir par la a ce qui l'affaire se poursuive, j'ai tout ratifie."

When sending up the cheque the defendants ought not to have been merely silent, for so being they may be held *poursuivre l'affaire.*

Here is a case from note to p 1-11, Paley:—"Where bills were drawn by a supercargo, whose authority was doubtful, for the purpose of purchasing a cargo, the bills being drawn on the principals, who receive the cargo and dispose of it, the Court said: "Can they be permitted in a court of conscience to question the authority which the bills were drawn?"

Very like the present case, a bill is drawn to buy a cheque; the drawers are told of what has been done, and receive the cheque and profit by it,—the jury finding, as in this case, can the drawers escape by disavowing the act by which the bill was drawn?

I will first take up some of the findings of the jury particularly noticed by defendants' counsel at the final argument.

To question No. 5, the jury answered " yes." "The jury had no business to do this," said the defendants' counsel at the final argument, to which I would say " why not?" This fifth question was put to the jury, no objection being made by the defendants to it. If the answer was unwarranted by the evidence, on a motion for a new trial, it might be objected to; but not in the present motion, nor that for judgment *non obstante veredicto*.

No. 6.—"Informing them in effect, etc." "This finding is in favour of the defendant," said the counsel for defendants. It is to be observed that the 15th July is alone referred to here as the time of the actual transmission of the cheque by Yarwood with his explaining to defendants then, further than as per letter of the 15th. It is to be observed also that when this question or item was drafted. the letter from Toronto of the 16th, from Yarwood, was not known to plaintiffs.

No. 9 "is not a finding in favour of plaintiffs," said defendants' counsel at the final argument. ' After being '*so*' informed, defendants got the cheque cashed," is very different from " after defendants had been made aware of the transaction." " '*So*,' refers to Yarwood's letter of the 15th and to No. 6 of questions to jury, and to nothing else," said counsel. This latter part must be admitted. I suspect that that was all which was in the mind of plaintiffs' counsel, ignorant then of the letter from Yarwood of the 16th from Toronto.

But the eleventh finding is not confined or particular. It is submitted to by the motion for judgment *non obstante veredicto*, and judgment is now asked by defendants upon the verdict generally. What did the eleventh question involve? Had Torrance & Co. reason to believe, from anything. that the cheque represented the proceeds of the draft of the 17th July, 1867, and that the draft was only discounted upon the faith that they would accept it. That is what it involved. Reference is not made to the letter of the 15th in particular as means of knowledge possessed by the defendants. The letter of the 16th had been discovered, and its absence, and the so-called suppression of it charged, and the jury find at the end of the case this eleventh finding, viz:—" We are of opinion that the defendants had reason to believe that the cheque was the proceeds of the draft of the 15th of July, *and that said draft was discounted upon the faith that defendants would accept it.*" "The defendants are bound " says plaintiffs' counsel, "to have known of the contract with Yarwood, and by the act of cashing the cheque they bound themselves to accept the new draft." There is no inconsistency between this eleventh finding and the sixth one. No. 6 confined the jury to find as to what, at the time of the actual transmission of the cheque, Yarwood said, or explained. The cheque was only once transmitted, and No. 6 enquires as to what was said at that point of time. No 11 is not limited to that time.

As to No 13, defendants' plea stands to help it and is a confession that the legal tender notes were means gotten from the cheque.

How can the Court, upon the verdict and evidence in this case, say that defendants are entitled to have their motion for judgment granted, and plaintiffs' action dismissed. It is impossible. There is the verdict, reading fatally, as I take it, against defendants. I have to give it force I think it supported by the evidence. But supposing it not to be, how can I disregard it, upon a motion such as I have before me, no motion for a new trial being presented.

The verdict ought to be affirmative or negative. The one in point is sufficiently affirmative. It is said not