Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bank of Van Diemen's Land v. The Bank of Victoria, from the Supreme Court of the Colony of Victoria; delivered 27th January, 1871.

Present:

LORD CAIRNS.
SIR JAMES W. COLVILE.
JUDGE OF THE ADMIRALTY COURT.
SIR JOSEPH NAPIER.

IN this case, although some criticism might be bestowed upon the form which the proceedings have taken, their Lordships entertain no doubt as to what ought to be their opinion upon the substance of the question which has been raised. That question is, whether the Court of Victoria was right in refusing a rule that had been obtained by the Plaintiffs in the action to increase the damages assessed upon certain counts, from one shilling, nominal damages, to £3000?

The action was brought by the Bank of Van Diemen's Land, who were the holders of a Bill of Exchange for £3000, drawn by one Gunn upon the firm of Goldsbrough and Company, and the Bank of Van Diemen's Land brought the action against the Bank of Victoria, to whom they had sent the Bill as their agents for presentation for acceptance and for payment at the proper time, and the first Bank, the principal, complained of the second Bank, the agent, that they had negligently performed their duty with regard to obtaining the acceptance of the Bill. The manner in which they alleged the duty and the breach of it in their

declaration was this. Passing over the first count, and taking the second, it averred, "that the Defen- "dants being the agents of the Plaintiffs as in the "first count mentioned, and having received from "the Plaintiffs the Bill therein mentioned indorsed "as aforesaid for the benefit of the Plaintiffs, pre- "sented the said Bill to the said Richard Golds- "brough and Company for acceptance, for the "benefit of the Plaintiffs, who then accepted the "same, yet the Defendants allowed the said Bill so "accepted to remain an unreasonable time in the "hands of the said Richard Goldsbrough and Com- "pany, who, after they had accepted the said Bill, "cancelled and revoked the said acceptance in the "unreasonable time aforesaid." And again, in the fourth count it is alleged that "the Defendants "allowed the said Bill so signed to remain an un- "reasonable time in the hands of the said Richard "Goldsbrough and Company, who, after they had "so signed their acceptance of the said Bill as afore- "said, and before they delivered the said Bill to "the Defendants, cancelled and revoked their said "signature in the unreasonable time aforesaid."

Now, the first question which their Lordships have to consider is, what is the meaning of the term "unreasonable time," as between persons circumstanced as the Plaintiffs and the Defendants were? The Defendants were the agents of the Plaintiffs. The law does not lay down as an absolute rule any time which is reasonable or unreasonable as between persons standing in this relation for the execution by the agent of the duty which is imposed upon him. But inasmuch as the object of the transmission of a bill of this kind from principal to agent is to obtain the acceptance and the payment of the bill, or, if it is not accepted, to guard the rights of the principal against the drawer in case recourse is to be had to the drawer, their Lordships are of opinion that the duty of the agent must be measured by those considerations, and that the duty of the agent is to obtain acceptance of the bill, if possible, but not to press unduly for acceptance in such a way as to lead to a refusal, provided that the steps for obtaining acceptance or refusal are taken within that limit of time which will preserve the right of his principal against the drawer. Now, bearing in mind that this is therefore the gist

of the action to try whether this duty was or was not performed by the Defendants, we turn to what are the facts of the case.

It appears that the bill was received by the Defendants, the Bank of Victoria, on Friday, February the 8th, 1867, at one o'clock in the afternoon. They presented it on the same day at two o'clock in the afternoon for acceptance, and left it in the usual way with the drawees for consideration. On Saturday, at about half-past eleven o'clock, the clerk of the Defendants called upon the drawees, and asked for the bill. He was told by the clerk of the drawees that the bill had been mislaid, and he was requested to call again on Monday, which he agreed to do. The hours of business on Saturday terminated half an hour afterwards, namely, at twelve o'clock. On Monday, the 11th of February, at half-past eleven, he again called. He was told that the bill was ready to be given out, but that from the absence of the person who had charge of it, or of the key of the safe where it was, he could not get it at that time, and he was requested to call on Tuesday. On Tuesday he called, and obtained the bill in a condition to which I will afterwards refer.

It is not disputed that as between the Monday, when the second call was made, and the Tuesday there was delay; and if during that interval any damage had accrued to the Plaintiffs there might have been a right of action, and a right to obtain indemnity for the damage that had so accrued. Upon that there was no dispute. Neither was there any dispute upon this, that the bill was presented for acceptance to the drawees in due and proper time,—in fact, within one hour after it was received. The whole question, therefore, arises upon the events of the Saturday, the 9th of February. Was or was it not a justifiable act in the clerk of the Defendants when he called upon the Saturday at about half-past eleven, and when he was told that the bill had been mislaid, and was requested to call again on Monday, to assent to that request, and, without demanding a distinct and positive answer at that time or re-delivery of the bill, to agree to call again on the Monday?

Now, without looking to what happened to the bill in this particular case during the interval that

it remained in the hands of Goldsbrough and Company, to which I will afterwards refer, and without looking to the particular finding of the jury, to which also I will afterwards refer, their Lordships would be prepared to hold that, it being part of the ordinary custom of merchants to leave a bill for acceptance twenty-four hours with the person upon whom it is drawn, and it not being proved that in this case there was any different usage in Melbourne, but on the contrary, there being strong evidence that the same usage prevailed there which prevails in other places, and the business hours closing at Melbourne at twelve o'clock upon the Saturday, before the twenty-four hours had expired,—if the case were disembarrassed of any difficulty, as regards the finding of the jury, there had been here no breach of duty, and that it would have been a harsh and unnecessary proceeding to have insisted upon a distinct answer on the part of the drawees or a redelivery of the bill at half-past eleven on the Saturday; and that whether the clerk called on the Saturday at half-past eleven, and was then told that the bill was mislaid, and was asked to call again on the Monday, and did so, or whether he had not called on the Saturday at all, but made his first call, asking for the bill, on the Monday morning, there would not in either case have been any failure of duty on the part of the agents who had the duty cast upon them of obtaining the acceptance of the bill.

In this particular case a somewhat singular circumstance had happened to the bill during the time that it lay with Goldsbrough and Company. It appears that Goldsbrough and Company, on the Friday—the same day on which the bill had been left—wrote their name across the face of the bill in the form of an acceptance. Of this, however, the clerk of the Respondents, when he called for the bill on Saturday, knew nothing. It appears that on the Saturday it was an accurate statement to make that the bill had been mislaid. It had been mislaid, and the clerk could not put his hands upon it. It appears that before the Monday arrived circumstances had arisen, which it is unnecessary to detail, which led Goldsbrough and Company to doubt whether the remittances, which were to have been made against this bill, would actually come forward, and

on the Monday morning before the clerk called for the bill. Goldsbrough and Company cancelled their acceptance written across the bill, and when upon the Tuesday it was delivered out, it was delivered out with the acceptance cancelled. There appears to be no reason to doubt, and in point of fact it is one of the matters which the jury have found, that if the bill could have been obtained by the Bank of Victoria on the Saturday, it would have been obtained accepted, that is to say, if the clerk could have got it when he called on the Saturday, it would have been given to him in the form in which it then stood with the name Goldsbrough and Company written across as acceptors; and of course if it had been so given, it would have been paid at maturity. Their Lordships, however, are of opinion that this, which was an accident of this particular case, cannot alter the general law upon the subject of the duty of the agent. If the agent was not failing in the performance of his duty when he agreed to adjourn his visit for the purpose of taking up the bill from the Saturday to the Monday, the accident in this particular case, that the bill had had an acceptance written across it on the Saturday, and if then delivered up at all, would have been delivered up in that form, cannot alter the duty of the agent or make that in this case a failure in duty, which if the bill had not had this acceptance written across it, would not have been a failure of duty on the part of the agent.

It is necessary now to look at the course which the action has taken with reference to the findings of the Jury. The allegations in the declaration being of the character which I have mentioned, and the pleas having taken issues, as to the second and last counts by traversing the acceptance of the bill, as to the fourth count by traversing the signature of the acceptance as in that count alleged, and generally there being a plea, of course, of not guilty, the case was tried before Mr. Justice Barry and a Jury, and these questions were put by the learned Judge to the Jury. The first question was: "Are you "satisfied that a mercantile usage has been esta- "blished in evidence as existing in Melbourne "which required the Bank of Victoria to present "the bill of exchange for acceptance on the same "day it was received, February 8th, 1867?"—and

to that the Jury answer "Yes." Upon that no question arises. The bill was presented for acceptance upon that day, and that answer we may pass over as immaterial. I pass over the second and take the third question:—"Do you think that if "the bill had been so demanded on Saturday, it "could have been obtained (by the Bank of Vic- "toria) accepted or unaccepted; and if so, which?" To which the Jury answer "Yes, it might have "been obtained accepted." Upon that also there appears to be no doubt, and the evidence justifies that conclusion of the Jury. The fourth question is—"Do you think the bill could have been ob- "tained by the Bank of Victoria on Monday, "February 11th, uncancelled?" To which the Jury answer "No." On that also there is no doubt. Then the fifth question is—"Do you think "that Saturday counts as a business day?" And the Jury answer "Yes." That also does not appear to be in dispute in any matter in which the question is whether Saturday is a *dies non* or not.

Their Lordships now come to the second question, which was this:—"Do you think that the Bank of "Victoria was guilty of negligence or of a breach of "duty in not demanding that the bill should be de- "livered up on Saturday, February the 9th, accepted "or unaccepted?" Their Lordships cannot but regret the form of that question, which appears to submit to the jury what is rather a matter of law, in place of directing their attention to the questions of fact, upon which properly a jury should express their opinion. No doubt the form of the question put to the Jury ought to have been, "Do you think that "the Bank of Victoria left the bill an unreasonable "length of time with the drawees?" However, the question being in the form that has been read, the Jury answer:—"Strictly speaking, there was "a neglect; but, considering the respectability of "the firm and Saturday being a short day, the "Bank was excusable in leaving the bill." The answer of the Jury is in a somewhat singular form, and perhaps if they had been pressed by the learned Judge so to do, they might have put their answer in a form which would have been more apposite to the question which they were asked to answer. They have given, however, an answer which, in their Lordships' opinion, substantially comes to this.

They say, paraphrasing their reply, that in strictness there was what they term a neglect, but that it was in their opinion an excusable neglect, for two reasons which they assign. If the meaning of the term "excusable neglect" is considered, it must mean this,—that an excuse, valid in law, existed for that which, *primâ facie*, and if the excuse did not exist, would in law be a neglect. We must, however, look at the grounds which are given by the Jury for saying that there was an excuse for neglect, for, if those reasons are not relevant to the case or are plainly insufficient, their Lordships are not prepared to say that the Court in banc are bound to accept them. The first reason is the respectability of the firm. That, as has been pointed out by the learned Judges below, is certainly not a sufficient reason, because the respectability of the firm would not be a justification for leaving the bill for a period longer than otherwise would be reasonable; the danger in such cases being not so much from want of respectability in the drawees, as from some accident happening to the drawer of the bill. The second ground, however, is, that Saturday was a short day, by which obviously the jury meant that Saturday was a day in which business hours terminated at twelve o'clock.

Now, their Lordships, looking to this answer, and comparing it with the evidence in the case, have no doubt that what the Jury meant to express when they used these words, was this,—that it being the ordinary course to leave a bill for acceptance for twenty-four hours, and those twenty-four hours running out upon Saturday not before two o'clock, which would be two hours after business had ceased, it was a natural and justifiable act to postpone the demand for an answer until the re-opening of the counting-house on Monday morning, and that the clerk was justified in assenting to the request that without waiting any longer on Saturday, he would return on Monday, and then apply for the bill. Their Lordships understand that to be the meaning of the jury, and that being the meaning of the jury, they assent to the view of the Jury that a fair and proper excuse was shown to them for what otherwise would have been a neglect on the part of the Bank, who were the agents to the Plaintiffs.

That being the view of their Lordships, it is obvious that a very grave question, to say the least of it, might have been raised, whether the Defendants in the action were not entitled on their part to have obtained a rule, and to have had that rule made absolute, for entering the verdict for the Defendants upon those issues upon which it was entered for the Plaintiffs. That might have been a very grave question, and their Lordships are disposed to think that such a rule might have been successful. It may, however, be that the neglect between the Monday and the Tuesday would in point of form entitle the Plaintiffs to retain the verdict upon those issues with the shilling nominal damages, but whether that be so or not the Defendants in the action were satisfied not to make an application upon this score to the Court, and they are not in a position to say that any more favourable result should accrue to them with regard to the mode of entering the verdict; but, on the other hand, their Lordships consider that they are entitled to say that the verdict should not be increased, and they are of opinion that the decision of the Court below upon that head was right.

Their Lordships will therefore humbly recommend to Her Majesty that the present Appeal should be dismissed, and dismissed with costs.