

15th April

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the European Assurance Society v. The Bank of Toronto, from the Court of Queen's Bench for Lower Canada, in the Province of Quebec; delivered Thursday, ~~18th~~ March 1875.

Present :

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR HENRY S. KEATING.

THEIR Lordships do not think it necessary to call upon the counsel for the Respondents.

In this case we are called upon to reverse the judgments of two Courts, namely, the Court of Review and the Court of Queen's Bench, who gave judgment for the Plaintiffs. It must be admitted that there was one judge in the first Court (the superior Court), Mr. Justice Monk, who held a contrary opinion, holding that the Defendants were not liable; and that in the ultimate appellate Court in Canada, the Court of Queen's Bench, Mr. Justice Badgley, one of the judges, differed in opinion from the majority; so that in fact there were two judges out of seven in favour of the Defendants, against five who were in favour of the Plaintiffs. The question is whether the loss sustained by allowing the over-drafts of Messrs. Nichols and Robinson was a loss within the meaning of the policy of assurance which the Bank of Toronto had obtained from the Defendants, the European Assurance Society. That policy

insured the Plaintiffs, the Bank of Toronto, against such loss as might be occasioned to the bank by the want of integrity, honesty, or fidelity, or by the negligence, defaults, or irregularities of the said Alexander Munro, whilst, subsequent to the date of the policy, he should be employed as agent of the Bank of ~~Montreal~~. And it has to be considered whether Munro, in allowing Messrs. Nichols and Robinson to overdraw their account in the manner, to the extent, and under the circumstances in which he did so, was guilty of a want of integrity, honesty, or fidelity, or of any negligence, default, or irregularity. Four of the judges of the Courts below have held that Mr. Munro was guilty of fraud in allowing the over-drafts. It is alleged in the declaration that he had no authority whatever to allow any over-drafts, but their Lordships cannot come to that conclusion upon the evidence in the cause. They think that he had a discretion to allow over-drafts, and indeed the Defendants contend that he had such a discretion. If he exercised it honestly and fairly, and was guilty of no default, irregularity, or want of fidelity, then the European Assurance Society, the Appellants, are not responsible. But if, on the contrary, in allowing the over-drafts he did not exercise his discretion honestly and *bonâ fide* for the interest of the Bank, then the European Society are liable under their policy. The question then comes, are there any circumstances in this case to show that there was a want of honesty or fidelity in the exercise of his discretion? Mr. Justice Monk in his judgment says that if he had authority to grant over-drafts at all, the amount of them was in his discretion. He said, "If he could " without censure advance 50 dollars without " security, the advance of 50,000 is within

“ his functions.” Perhaps that is so as a matter of law, but as a matter of fact if an agent having a power to exercise a discretion acts in such a way as no reasonable man would act, you may infer from his conduct that he was influenced by improper motives, regardless of the interests of his employers, and that he was guilty of fraud or wanting in fidelity. We must consider then what were the circumstances under which Munro allowed Messrs. Nichols and Robinson to overdraw their account. It appears from the evidence that Messrs. Nichols and Robinson were large customers of the Bank. They were brokers, and had large gambling speculations in time bargains in gold and bills. It was alleged that Munro was jointly interested with them in these speculations ; it was proved that he was not connected with them to this extent, but that he employed them as brokers to enter into speculations of a similar nature for him, and that he allowed or induced them to make deposits for him, called margins, for the purpose of enabling him to carry on those speculations. It also appears that Messrs. Nichols and Robinson used the money which they obtained by their over-drafts partly for the purpose of paying up the margins on Munro's speculations, and that latterly his speculations were carried on under the fictitious name of McDonald.

Munro stated in his evidence that he had granted Messrs. Nichols and Robinson facilities by permitting them to overdraw their account at the branch at Montreal for about 12 months ; that he required the over-drafts to be made good at the end of each month. That he had instructions from the Bank to have all monies that could be collected made good at the end of the month, as they wished their gold as strong as possible then, when they made returns to Govern-

ment, and that they gave instructions to their managers to attend to this; that the better the depositors accounts were at the end of each month, the larger would be the amount of gold represented as in the possession of the Bank. (p. 400.) Now when we come to investigate the deposit ledger account for 1865, we find that after the first few days in February down to the middle of May, Messrs. Nichols and Robinson had, with one or two exceptions, always overdrawn their account at the Bank, and never had a balance to their credit. It is not necessary to go much into detail, or to examine very minutely the account for the months of February or March; but when we come to the month of April there is clear evidence that on the 29th of that month Messrs. Nichols and Robinson had overdrawn their account to the extent of 47,000 odd dollars; that they had credit given to them for 42,554 dollars, and also for a sum of 4,060 dollars, apparently reducing the balance against them at the end of that day to 200 dollars 16 cents. So that on this account, when the returns for the month were sent up to the head office at Toronto, it would appear that Messrs. Nichols and Robinson had overdrawn their account at the end of that month only to the extent of 200 dollars and 16 cents. But that sum of 42,554 dollars, for which they had credit given them, was not cash or equal to cash, but was made up in the manner pointed out by the witnesses. The account of that transaction is marked AA at page 105 of the Record, and that document is explained by Mr. Dallas in his evidence at page 314. He was asked to state what constituted the items making the total sum of 42,554 dollars 59 cents therein mentioned; and in answer he said, "In the first column to the left hand and headed 'Montreal bills,' the first six items are cheques

“ or drafts drawn by parties other than Nichols
 “ and Robinson upon New York banks. The
 “ seventh item represents a draft for 15,000
 “ dollars American currency, drawn by Nichols
 “ and Robinson on ‘G. D. Arthur and Co.,
 “ ‘New York.’ The eighth item represents a
 “ draft drawn also by Nichols and Robinson on
 “ ‘G. D. Arthur and Co.’ for 12,000 dollars
 “ gold. The ninth represents a similar draft
 “ for 6,000 dollars gold. In the third column
 “ headed “dollars and cents,” the first two
 “ items represent the amounts in Canada
 “ currency placed at Nichols and Robinson’s
 “ credit as the proceeds of the previously
 “ enumerated nine items. In the same column,
 “ the 3rd, 4th, 5th, 6th, and 8th items
 “ appear to represent cheques on other banks
 “ of Montreal, probably drawn by other parties.
 “ The 7th item in that column is an amount of
 “ 8,000 dollars which I believe to represent
 “ Nichols and Robinson’s cheque on the Mer-
 “ chants Bank, Montreal.”

It is true that the draft for 15,000 dollars
 currency and the two gold drafts for 12,000
 and 6,000 dollars drawn by Nichols and Robin-
 son on G. D. Arthur and Company were duly
 honoured, but they were not forwarded by
 Munro to the National Bank of Commerce
 at New York for credit until the 2nd of May
 (Record, p. 317), and between the 1st and 3rd
 inclusive Nichols and Robinson were allowed
 to overdraw to the extent of 67,655 dollars,
 and would thus be enabled to meet them. As
 to the cheque for 8,000 dollars, it appears that
 Messrs. Nichols and Robinson had not assets
 at the Merchants Bank of Montreal sufficient to
 take it up, and that on the following 1st of May
 they were allowed to overdraw their account
 at the Bank of Montreal to the extent of 10,000
 dollars, of which 8,000 were used for the purpose

of retiring that cheque. Now if Mr. Munro was aware of the circumstances, and in order to make Nichols and Robinson's account appear good at the end of the month of April gave credit to them for the bills and cheque which he knew would not be honoured except by funds to be obtained at the commencement of the following month by over-drafts on the Bank at Montreal, he must have known that he was misleading his employers, and was guilty of a gross irregularity and of a want of fidelity. It was said on the part of the Defendants that the books were kept correctly; that Mr. Munro did not keep them, but that they were kept by a clerk in the office. Still, if Mr. Munro knew that the bills and cheque were not to be presented in due course, but to be held over until the following month, in order that they might be provided for by fresh over-drafts on the Bank, it appears to their Lordships that he was equally guilty in allowing the clerks, who were ignorant of the true nature of the transaction, to credit Nichols and Robinson with the amount of those bills and cheque as if they had been realized.

Now that Munro did intend not to present the bills and cheque in due course is proved by the fact that they were held over by him; that the cheque was never presented, but was paid on the 1st of May by means of the 10,000 dollars raised by the over-draft on the bank of that date, and was withdrawn. The bills were not sent to New York for presentation until the 2nd of May, when they were forwarded in Munro's letter of that date (p. 317). It appears also from the ledger account that on the 1st and 2nd of May Nichols and Robinson obtained cash from the Bank by over-drafts to the extent of 56,489 dollars, an amount which, excluding the 8,000 dollars applied to the purpose of taking up the

cheque, was more than sufficient to provide for the three bills of 15,000, 12,000, and 6,000 dollars. Robinson stated in his evidence that in making up the monthly balances they deposited gold drafts on New York, which were usually held a day or two, until they provided funds in New York by overdrawing at Montreal and remitting, and this was done by Munro's instructions and at his request. He was asked for what object was this done? His answer was—"I presume it was to make the account look correct at Toronto, where he was obliged to send monthly statements of the state of accounts then kept in Montreal. When the amount of debit was not very large the balance would be made up by giving cheques on other banks where we had no funds at the time. These cheques would be accepted as cash to make up the balance, and next morning we would withdraw these cheques by drawing on the Bank of Toronto, where we also had no funds. This was done on the last day of the month, and was carried on for two or three months previous to the first of May last, and from the first day of the month to the last we were allowed to overdraw our account."

Munro denied this, but Robinson's evidence was corroborated by the evidence of Nichols (pp. 280-281), and by the transaction of the 29th of April, and the over-drafts of the 1st and 2nd of May; and Munro himself admitted that on one or two occasions he did retain their drafts for a day or two (p. 402).

It was urged by the learned counsel for the Appellants that even if there was an irregularity, still no loss was proved to have resulted from it; but if the monthly accounts were intentionally rendered in such a manner as to mislead the directors of the Bank, that fact throws light on the other parts of Munro's conduct, and must

be taken into consideration in determining whether, in allowing the over-drafts, he was acting honestly or was guilty of a want of fidelity to the Bank in forwarding the interests of Nichols and Robinson.

But assuming that the deposit ledger contained a correct representation of the accounts of Nichol and Robinson, the over-drafts of Messrs. Nichols and Robinson was reduced to 200 dollars and 16 cents on the 29th of April, or if the amount of the cheque for 8,000 dollars be added, upon the ground that Munro believed that it would be honoured, which in fact it was not, the debt amounted to 8,200 dollars. It is not very material however what was the amount of the over-drafts on the 29th of April, as they were reduced to 28 dollars and 84 cents on the 4th May. Then why did Munro allow the overdrawings to take place on and after the 4th of May to the extent of 47,844 dollars, an amount exceeding all securities deposited with the Bank by the sum of 28,206 dollars? He was asked what in his opinion was the cause of Nichols and Robinson becoming unable to meet their engagements, and when to the best of his knowledge they or he first become aware of that inability. He stated that the rapid and heavy decline in gold was the cause of their being unable to meet their engagements, and that he was not aware of it until very early in May 1865; and that from what Mr. Nichols told him he was of the opinion at that time that they were still able to meet their engagements. He said "It was in the beginning of May that I began to suspect that they could not meet their engagements, and I ascertained it for a fact early in the second week of May, when I made up my mind to go to Toronto, and went there to place the matter before the Bank." He was asked

"Do you remember a conversation you are
 "alleged to have had with Nichols and Robinson
 "in the beginning of April to the effect that
 "with your resources, coupled with those of the
 "firm, they might get out of difficulty?—*A.*
 "I could have had no such conversation in
 "April, as I then supposed the firm could meet
 "its engagements; some such remarks may
 "have passed between us in May.—*Q.* For
 "what reason did you contemplate using your
 "funds to assist Nichols and Robinson in paying
 "their debt to the Bank, if that be the intention
 "conveyed by your last answer?—*A.* I owed
 "Nichols and Robinson something. I intended
 "to release some property I had, and to pay
 "the amount I owed them into the Bank on
 "account of their liabilities.—*Q.* Do you mean
 "by the foregoing answer to state that the
 "intention only was that you should contribute
 "to the extent of your liability to them, or was
 "it that you should contribute more than your
 "liability to them?—*A.* My intention was
 "merely to pay the amount of my indebtedness
 "to them." So that according to his own
 account he knew early in May of the difficulties
 which Nichols and Robinson were in.

Mr. McCulloch in his evidence, at page 311,
 stated "That Munro about ten days before he
 "went to Toronto in May last to inform the
 "bank of his trouble, told him confidentially,
 "with the view of taking his advice as the
 "oldest customer of the agency, as also as a
 "personal friend, that he had got into trouble
 "in connection with MM. Nichols and Robin-
 "son's account owing to their losses in gold."

Now he went up to Toronto on the 10th May,
 and if Mr. McCulloch was right it was about
 10 days before that, which brings the time at
 which he actually knew that he was in trouble
 to about the 1st May. Their Lordships have no

doubt that before the 1st of May, and certainly by the 4th, Munro knew that Nichols and Robinson were in difficulties, and that their circumstances were not such as to render it safe to allow them to overdraw their account.

Now if the over-drafts of Nichols and Robinson were reduced at the end of April to the sum of 200 dollars, and on the 4th of May to 28 dollars and 84 cents, was Mr. Munro exercising an honest discretion in allowing the over-drafts on and after the 4th of May?

It appears from the representation upon which the policy was effected—and there is no dispute on the part of the Bank that the representation was true—that the average amount of cash in hand at the Montreal Branch of the Toronto Bank would not exceed 100,000 dollars; and we are asked to believe that Mr. Munro in the exercise of a sound and honest discretion, knowing of the circumstances of Nichols and Robinson probably in April and certainly in May, allowed them to increase their debt to the bank from 200 dollars at the end of April, and 28 dollars 80 cents on the 4th of May, to 47,844 dollars on the 8th of May, being nearly half the amount of the average cash balance at the Montreal branch of the bank, and upwards of 28,246 dollars in excess of any securities held by the Bank.

Looking then to the extent of those over-drafts, the state of the affairs of Messrs. Nichols and Robinson at the time, and the knowledge which Munro must then have had, it is impossible to come to any other conclusion than that in allowing Nichols and Robinson to increase their debt to the Bank between the 4th and 8th of May from 28 to 47,844 dollars, Munro was not exercising an honest discretion, but was guilty of a breach of fidelity to the Bank. The circumstances under which Mr. Munro was connected with Nichols and Robinson at the

time, also induce to the conclusion that he was not acting honestly and faithfully towards the Bank and with the object of promoting their interests, but that he was acting under the influence of Nichols and Robinson, and in consequence of the connection which existed between him and them. At the time also when these advances were made, between the 1st and 8th of May, Munro was indebted to Nichols and Robinson. There has been a good deal of discussion as to the amount in which he was indebted, and it was urged by the learned counsel for the Appellants that looking at the whole of the evidence, it could not be said that he was indebted in a larger sum than 8,000 dollars. It is not very important whether his debt exceeded that amount or not. It is clear that he had not the means to discharge it. He says that at that time he had about 4,000 dollars worth of property. He says at page 408, "I owed Nichols and Robinson some-
" thing. I intended to realize some property I
" had"—he had not got the cash, but he intended to realize—"and to pay the amount I owed
" them into the Bank." Then at page 415 he says the amount of his property was somewhere about 4,000 dollars. If he had not allowed the over-drafts Nichols and Robinson might have called upon him to pay his debt to them. He knew that he was unable to do so, and that the whole of his transactions with them might be disclosed. He was therefore completely under their influence. In another part of his evidence he said, "I had about 4,000 dollars, it might be
" a little more. I offered to pay the Bank my
" own indebtedness to Nichols and Robin-
" son." Why should he pay to the Bank his own indebtedness to Nichols and Robinson? The fact is he knew that Nichols and Robinson had used for his benefit part of the funds of the Bank which they had obtained

by over-drafts with his sanction. It is clear that if Nichols and Robinson had been persons wholly unconnected with him in business, persons through whom he had had no gambling transactions, persons to whom he was not indebted, he would not have allowed them under the circumstances, knowing that they were scarcely able to meet their liabilities, to have increased their debt to the bank to that amount during those four days, not a week before he was obliged to go up to the bank and confess the whole matter.

Their Lordships are of opinion that it was an act of infidelity to the Bank to allow the debt to be increased between the 4th and 8th of May from 28 to 47,000 odd dollars.

It was contended that these over-drafts were allowed by Munro honestly for the benefit of the Bank; that he wanted to keep the business of Nichols and Robinson, who were good customers of the Bank, and to make the profit in the way of exchange upon their bills. But did he believe between the 4th and 8th of May, that Nichols and Robinson were or were likely to be such good customers to the Bank that he ought or could honestly allow them to increase their debt from 28 to 47,844 dollars in order to retain their business. There was no profit from their account. The only profit the Bank could derive was the exchange on the bills which were paid in, and for which they had credit. Can any one believe that for the sake of the small profit which the Bank might derive from the exchange on those bills, they would run the risk of allowing the debt of Nichols and Robinson to be increased by over-drafts to the extent of 47,844 dollars, nearly one half of the average cash balance of the Bank, at a time when it was doubtful whether they would ever be able to meet their liabilities.

Robinson when examined for the Defendants said (Record 395), "Mr. Munro assisted us in tiding over the settlement of our account at the end of April, in the hope, which we ourselves also entertained, that we should be enabled to get through by the stoppage of the fall of gold, or by the improvement of the gold market." After the 1st of May however gold continued to fall, and their affairs became more desperate; yet they were allowed to continue their over-drawings. It is admitted that the balance due to the Bank, after allowing for the securities which they held, amounted to upwards of 28,000 dollars, and there can be no doubt that through the want of Munro's fidelity the Bank sustained a loss to the full amount of the sum insured.

Their Lordships therefore agree with the majority of the judges, who have come to the conclusion that the Plaintiffs are entitled to recover from the Defendants the 16,000 dollars for which they insured the Bank against loss.

With regard to the second plea, it was argued that there was a condition in the policy that the guarantee should become void as to future claims, upon its being made known to the directors of the Society in Canada by the employers that the party whose honesty was guaranteed had committed or omitted any act which gave a right to make a claim under the policy.

By the first portion of the condition, if the Bank gave notice to the insurance company that they had got a claim by reason of some act or omission on the part of Munro, then from that date the policy was to cease, and they were not to be responsible to the Bank for any negligence or dishonesty after that time, the reason being that if the Bank had a claim against the insurance company on the ground of the

acts or omissions of Munro, from that time they might dismiss him, and the insurance company were not to be responsible. The condition goes on to say, "And that the employers are bound, immediately upon discovering or having notice of the commission or omission of any such act, to forward a written intimation of the same, and, so far as circumstances will permit, of all particulars attending the commission or omission thereof by the directors." It may be questionable whether the condition means such an act or omission on the part of Munro as would give a claim for a loss arising from it, or such an act from which a loss had actually arisen. But it is unnecessary to decide that point. It may be assumed for the present purpose that the meaning was that notice should be given of such an act or omission as would give a claim if a loss should be caused by it. If the mere fact of making advances amounted to an act for which the insurance society were to be responsible, then the policy was at an end as soon as the Bank discovered that advances had been made, and failed to give the required notice; but if fraud or infidelity in making advances were necessary in order to render the society liable to make good the loss occasioned by them, the society would not be exonerated unless the Bank failed to give notice after they became aware of the fraud or infidelity. The condition goes on, "And that by wilfully or knowingly omitting or neglecting so to do for two months after such discovery or notice, the policy becomes absolutely void, both as to existing and future claims thereunder."

Now there is no evidence to show that the Bank was aware that Munro was acting unfaithfully or dishonestly towards them until the matter was disclosed to them on the 10th May. If they

had known it no doubt they would have dismissed him. They would never have allowed him to remain at the Bank from the 1st to the 10th of May, allowing over-drafts to the extent proved, if they had believed that Munro was acting dishonestly or with want of good faith towards them. It is only upon the construction that the mere fact of allowing over-drafts was a matter insured against, that the condition would apply to the present case. The Defendants do not contend, but expressly deny in their plea, that the allowing of over-drafts was per se an irregularity within the meaning of the policy.

Their Lordships are of opinion that the policy was in force, and that there was no breach of the condition which rendered it void; and under all the circumstances of the case they will humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, with the costs of this Appeal.

