

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bank of New South Wales v. The Goulburn Valley Butter Factory Company Proprietary, Limited, from the Supreme Court of Victoria ; delivered the 9th July 1902.

Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR FORD NORTH.

SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

This is an Appeal from an Order of the Full Court of the Supreme Court of the State of Victoria dated the 11th October 1900 reversing the Judgment of the Primary Judge Mr. Justice Hodges of the previous 4th June in an action in which the Respondent Company was Plaintiff and the Appellant the Bank of New South Wales was Defendant. The object of the action (so far as material) was to recover from the Bank three sums of 1,022*l.* 668*l.* and 619*l.* 2*s.* 10*d.* which it was alleged had been improperly transferred from the Respondent Company's account at the Bank to the account of one Alexander Lindsay Ballantyne and so lost to the Company.

The Company was incorporated in October 1895 under the Companies Act 1890 of the State of Victoria with a capital of 1,200*l.* divided into 48 shares. The principal object of the company was to carry on the business of a creamery and butter factory and deal in butter and other

similar products and it was empowered by its Memorandum of Association to carry on its business either singly or in connection with any other corporation companies firms or persons. The Articles provided for the appointment of a managing director and the directors were empowered to delegate to the managing director for the time being such of their powers and authorities as the directors should think fit.

In and for some years prior to June 1898 Alexander Lindsay Ballantyne was carrying on business in Melbourne as a dairy farm produce merchant and kept his banking account at the Flinders Street Branch of the Appellant Bank. He was apparently in good credit and had been allowed to overdraw his account from time to time to the extent of about 4,000*l.* against the security of bills for collection and boxes of butter.

In the month of May 1898 Ballantyne arranged for the purchase of all the shares in the Company with a view to the amalgamation of his own and the Company's businesses. This arrangement was effected by two documents both dated the 3rd June 1898 and pursuant thereto all the shares were transferred to Ballantyne or his nominees and Ballantyne and two of his nominees were elected directors. Ballantyne was elected chairman of the Board and on the 6th June 1898 he was appointed managing director of the Company.

Ballantyne informed Mr. Earle, the manager of the Flinders Street Branch of the Bank, of his purchase of the shares. And on some day between the 31st May and the 9th June he called on Earle. What then took place is thus stated by Earle whom the Courts below treated as an honest and credible witness:—

“ He asked me if I had any objection to his bringing the account of the Goulburn Valley Butter Company from the Royal Bank to my bank. I said that I had no objection and

" asked him if he was going to close up his own account. He
 " said that he was not going to close it up and I asked him
 " why he did not keep one account for the whole business.
 " He said that he wished to keep his old connection together
 " and thought that some of his old customers would deal with
 " A. L. Ballantyne but would not deal with the Goulburn
 " Valley Butter Company and for that reason he would buy
 " produce from his old customers in the name of A. L. Bal-
 " lantyne and pay them with A. L. Ballantyne's cheque but
 " that the goods so bought would go into the Goulburn Valley
 " Butter Company's works to be made up by them, sold by the
 " Company and the proceeds of the sale paid into the Com-
 " pany's account and therefore the two accounts would require
 " to be adjusted and for that purpose he said that he would
 " leave me two cheques signed in blank—one by the Goulburn
 " Valley Butter Company and one by himself and I was to use
 " these cheques as I thought fit for adjustment purposes."

Ballantyne's account of the interview was as follows :—

" Q. Anything else done the same day?—A. I said to
 " Mr. Earle that as I had undertaken to pay the Company's
 " debts—about 900*l.* roughly speaking within a fortnight my
 " account might be overdrawn and that I would give him the
 " Company's cheque to hold in blank and one of my own
 " cheques to adjust from time to time as occasion might arise.
 " The Company had not any assets and were not able to pay
 " the liabilities as they became due.

" Q. Was anything said about goods?—A. I said I would
 " be supplying the Company with goods myself during the
 " whole of June and that would be a reason for my account
 " being bigger.

" Q. Did you explain to him what goods?—A. I told him I
 " was going to amalgamate the two businesses together and
 " that with the idea of holding the goodwill of both my own
 " business and the Company's business I would draw cheques
 " on both accounts—eventually I purposed trading under the
 " name of the Goulburn Company altogether so as to retain all
 " the business I could."

On the 9th June an account was opened in the name of the Company at the Flinders Street branch of the Bank and two cheques one signed by Ballantyne personally and one signed by him as managing director for the Company but both undated and blank in amount were handed to Earle. At this date Ballantyne's account was overdrawn to the extent of 667*l.* 15*s.* against security. Some point was made of this in the

Court below but their Lordships do not attach any importance to it because it is clear that applying the principle of *Clayton's case* (1 Mer. 575) the balance to his debit had run off before the 5th September. Between the 9th June and the 5th September both accounts were operated on by payment in of sums to credit and the drawing of cheques upon them.

On the 5th September 1898 Ballantyne's account was overdrawn to the extent of 1,354*l.* 15*s.* 10*d.* against security amounting to 335*l.* showing a net debit of 1,019*l.* 15*s.* 10*d.* while the Company's account was in credit to the extent of 430*l.* 1*s.* 7*d.* and security was held by the Bank amounting to 652*l.* showing a net credit of 1,082*l.* 1*s.* 7*d.* On that date Ballantyne called at the Bank and Earle mentioned to him the state of the accounts. Ballantyne then suggested that the accounts should be adjusted by making a transfer from the Company's account and by his direction the Company's blank cheque was filled up with the sum of 1,022*l.* and dated the 5th September 1898, and it was initialled by Ballantyne. The amount of the cheque was on the same day debited to the Company and credited to Ballantyne's account. This is the first sum claimed in the action.

On the 30th September 1898 a similar transaction took place. Another blank cheque of the Company which had been given to Earle in place of the previous one was filled up by Ballantyne's directions with the sum of 668*l.* and initialled by him. The amount was credited to Ballantyne's account which was then overdrawn to the amount of 667*l.* 4*s.* 1*d.* This is the second amount in question.

On the 5th November 1898 a cheque of that date of the Company for 619*l.* 2*s.* 10*d.* was paid over the counter to the credit of Ballantyne's

account in the ordinary way. At that date Ballantyne's account was overdrawn to the extent of 619*l.* 2*s.* 10*d.* against security amounting to 228*l.* This is the third and last sum claimed.

To complete the story it appears that on the 25th November 1898 Ballantyne's account was in credit and the Company's account was overdrawn. Earle without any communication with Ballantyne filled up his blank cheque in favour of the Company with the amount of 231*l.* 2*s.* 8*d.* and placed it to the credit of the Company's account. This has not been objected to.

On the 18th January 1899 the Company went into liquidation and in the following March Ballantyne's estate was placed under sequestration. Earle stated in his evidence that he had no suspicion of Ballantyne's financial difficulties until December 1898 and no attempt was made to fix him with earlier notice.

It should be mentioned as the Court below attached some importance to it that in July 1898 Ballantyne sold four of the Company's shares to a Mr. Stone and another share to a Mr. Shingler, who continued to hold them until the liquidation. In the view which their Lordships take of the transactions this circumstance does not however appear to them material.

The Respondent's case as originally pleaded was in effect that the above-mentioned sums were paid to the Appellant Bank in breach of Ballantyne's duty as managing director for the purpose of discharging his private indebtedness to the Bank and that the Bank had notice thereof but in the course of the trial the Respondent obtained leave to amend and set up the case that the transactions in question were *ultra vires* of the Company. The Primary Judge found that the Bank had acted in good faith and without notice of any irregularity and breach of trust on the part of Ballantyne and that the

transactions were not *ultra vires* of the Company. The Full Court held that the transaction entered into if carried out would have been *ultra vires* and that it was *ultra vires* as carried out whatever agreement was entered into.

It is a little difficult to see what it exactly was that is said to have been *ultra vires* of the Company. Ballantyne's proposal to work his own business in connection with that of the Company as disclosed by him to Earle was certainly not *ultra vires*. Nor was the giving of blank cheques for the purpose of adjusting the two banking accounts in itself *ultra vires*. It is not a prudent or very businesslike act of a manager of a Company or anybody else to entrust another with a blank cheque but no liability is incurred until the cheque is made use of and the fact and extent of liability will then depend on the circumstances of the case. If Earle had taken upon himself to fill up a blank cheque on the Company's account he would very likely have imposed upon the Bank the obligation of showing that the Company was at that date indebted to Ballantyne in the amount. But he did not do this. Both on the 5th September and on the 30th September the cheque was filled up under Ballantyne's direction and with an amount authorised by him on behalf of the Company. The transaction therefore was precisely the same as if the Company's cheque for the amount in favour of Ballantyne had been handed to the Bank with directions to place the amount to Ballantyne's account. This was in fact the form of the third transaction in question.

The learned Counsel for the Respondent admitted that if Ballantyne was indebted to the Company at the respective dates of the three cheques in the amounts for which they were drawn no question could be raised. The question therefore is narrowed to this : whether there was

any duty on the part of the Bank or its manager to inquire into the state of the account between Ballantyne and the Company. There is no evidence that Earle knew that the Company was not indebted to Ballantyne or that the latter was not justified in filling up the cheques for the amounts they bear and Earle states in his evidence that his belief was that any transfer Ballantyne made was simply transferring money that the Company was owing to him. The course of business as described to Earle would necessarily result in cross accounts between Ballantyne and the Company and probably in the latter becoming indebted to Ballantyne and indeed there would be no objection in the Company making advances to Ballantyne to enable him to meet his engagements for butter on their account. The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque (*Gray v. Johnstone*, L.R. 3 H.L. (E. and I.A.) 1; *Thomson v. Clydesdale Bank*, 1893, A.C. 282) and is entitled to set off what is due to a customer on one account against what is due from him on another account although the moneys due to him may in fact belong to other persons (*The Union Bank of Australia v. Murray-Aynsley*, 1898 A.C. 693). On the other hand a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account of his customer to the same customer's private account (*In re Kingston, ex parte Gross*, L.R. 6, Ch. 632). Their Lordships are of opinion that Earle was not bound to inquire into the state of the account between the parties. He had no materials to enable him to do so and it is difficult to suggest anyone of whom he could have made inquiry other than Ballantyne himself. Their Lordships therefore hold that the Bank is not affected with notice of any irregularity on Ballantyne's part.

The learned Chief Justice seems to have thought that there was some agreement and intention on the part of Earle and Ballantyne to discharge the latter's previous indebtedness to the Bank out of the Company's money. Questions were also put to Earle in his cross-examination as to his view of the propriety of the transactions in other circumstances. It is possible that Earle was imperfectly acquainted with the law relating to Joint Stock Companies and that he placed some and perhaps undue reliance on the fact of Ballantyne being sole owner of the shares. But the Bank is bound only by Earle's acts and knowledge and not by his opinions on legal questions. In their Lordships' Judgment the evidence does not warrant the inference of an agreement between Earle and Ballantyne to discharge the latter's private debts out of the Company's money and the cheques were not in fact applied (as assumed by the Chief Justice) in discharge of Ballantyne's indebtedness existing on the 9th June.

Their Lordships will humbly advise His Majesty that the Order of the Full Court of the 11th October 1900 should be discharged and there should be substituted for it an Order dismissing the Respondent's Appeal to the Full Court with costs. The Respondent will also pay the costs of this Appeal.
