

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Cherry and another v. the Colonial Bank of Australasia, from the Supreme Court of Victoria ; delivered 19th July, 1869.

Present :

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

LORD JUSTICE GIFFARD.

THIS was an action of assumpsit brought by the Colonial Bank of Australasia against the Defendants who were two of the directors of the Loch Fyne Quartz Mining Company (Registered).

The declaration states that in consideration that the Plaintiffs, at the request of the Defendants, would honour and pay on account of the Loch Fyne Quartz Mining Company, &c., the drafts or cheques of one Charles Ernest Clarke, to be directed to the Plaintiffs, the Defendants promised the Plaintiffs that the said Charles Ernest Clarke was duly authorized and empowered by the said Company to make drafts or cheques for them as their agent ; and that the Plaintiffs, relying on the promise of the Defendants, did honour and pay on account of the said Company, divers drafts or cheques of the said Charles Ernest Clarke, directed as aforesaid.

It also states that Clarke was not authorised by the Company to make the said drafts or cheques as their agent, by reason whereof the Plaintiffs lost the amount advanced upon them.

To this declaration defences were pleaded, in which the making of the promise by the Defendants, the drawing of the cheques, and the payment on account of the Company as alleged were respectively denied, and issue was joined thereon.

The statement of the consideration was not expressly traversed, nor the allegation that Clarke was not authorised by the Company to make the drafts or cheques as their agent. There were other pleas pleaded by the Defendants, which were demurred to on the part of the Plaintiffs, but it was conceded that it was not necessary to notice these more particularly.

It appears from the evidence given at the trial that, before the month of December 1865, the Company had opened an account with the branch bank of the Defendants at Matlock, and that cheques were from time to time drawn upon the Bank by the then Manager of the Company, which were duly honoured and paid by the Bank on account of the Company. The account was overdrawn to the knowledge of the Defendants at the time when they signed the following letter, and handed it to Clarke, who gave it to the Manager of the Bank.

“The Manager for the Colonial Bank of
Australasia, Matlock.

“ *Wood's Point,*

“ Sir, “ *December 4, 1865.*

“ We have to inform you that we as Directors of the Loch Fyne Quartz Mining Company have appointed Mr. Charles Ernest Clarke to be legal Manager of the Company and have authorised him to draw checks on account of the said Company.

“ We remain, &c.

“ THOS. CHERRY,

“ JOHN MCDUGALL,

“ *Directors, Loch Fyne Quartz Mining
Company, Registered.*”

After this letter was deposited by Clarke with the Manager of the Bank, advances were continued by the Bank on cheques drawn by Clarke, purporting to bind the Company. These cheques were duly honoured by the Bank on the faith of this letter. Under the 21st section of the Colonial Act the credit of the Company could have been pledged for advances on overdrafts, provided the borrowing had been authorised by a majority of the shareholders, but not otherwise.

No evidence was offered to prove that such authority was given. The case proceeded on the

assumption that Clarke had not authority to bind the Company by the cheques which he drew.

There was no imputation of fraud in the transaction.

It was contended by Mr. Mellish, that on the face of the letter, it appears that the Defendants acted merely as Directors of the Company, and never meant to bind themselves otherwise than as Directors ; that, therefore, they cannot be made personally liable. If the question was, whether the Defendants in fact intended to bind themselves personally, it might be admitted that such was not their intention. But it remains to be considered whether upon the view which the jury were entitled to take of the evidence, the law does not imply a warranty to the Bank, on the part of the Defendants, that Clarke had authority to bind the Company so as to make them responsible to the Bank for the advances on the cheques.

In the case of *Downman v. Williams* (7 Q. B., 111), Chief Justice Tindal, in delivering the Judgment of the Court of Exchequer Chamber, states, that where a contract appears upon its legal construction to have been entered into by an agent on behalf of his principal, the only ground on which the agent could become personally liable thereon, is that which has been stated by Mr. Justice Story in his commentaries on the law of agency.

The ground therein stated is said to be "a plain principle of justice ; for every person so acting for another, by a natural if not by a necessary implication, holds himself out as having competent authority to do the act, and thereby draws the other party into his reciprocal engagement." According to the opinion of that eminent Jurist, if a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not. "In short," says Mr. Justice Story, "he undertakes for the truth of his representation." This doctrine of an implied warranty in such cases seems to have met with the approval of the learned Judges who decided the case of *Lewis v. Nicholson* (18 Q. B., 511, 513, &c.),

although expressed with some reserve, as it was not necessary for them to decide the question.

It became necessary to decide it in the case of *Collen v. Wright*, and the decision of the Court of Exchequer Chamber in that case (8 E. and B. 647), must be considered to have settled the law upon the subject, in conformity with the view of Mr. Justice Story. The remedy by a special action, where there is fraud or deceit, is a distinct matter, upon which no question is made.

It appears to their Lordships that there was evidence upon which it was open to the jury to find that the Defendants, professing to act on behalf of the Company, had led the Plaintiffs to believe that Clarke had authority to draw cheques as the Agent of the Company and thereby induced the Bank to make advances on the cheques, on the supposition that, as between the Bank and the Company, the latter was bound. It can make no difference that the engagement into which the Plaintiffs were thus drawn by the Defendants has to be collected by inference from the evidence laid before the jury. When it has been ascertained as a matter of fact, the legal effect is the same as if it had been express.

The warranty which the law implies depends on the position of the parties, and on the nature and effect of the representation.

The representation in this case was admitted on the Record to be untrue.

Their Lordships agree with the Judges of the Supreme Court in thinking that, in this state of things, the law implies the warranty or undertaking on the part of the Defendants, as stated in the declaration, and that there was no ground for entering a nonsuit.

Their Lordships will therefore humbly recommend to Her Majesty that the Judgment of the Supreme Court should be affirmed with costs.

Each of these cases falls within the rule that no person ought to be put in peril twice on the same charge. The application of the rule is shown in detail by Blackburn, J., in *R. v. Winsor* (1 L.R., Q.B., 313), who there states, "When the Jury have been brought together, and the prisoner has been given in charge, and the trial has commenced, the right course, if practicable, is that the jury should give their verdict convicting or acquitting the prisoner. When the jury have once found a verdict of conviction or acquittal, the matter has become *res judicata*, and after that there can be no further trial." He further shows that a *venire de novo* on the same indictment would be erroneous, and a new indictment on the same charge would be defeated by a plea of *autrefois* acquit or convict. These remarks relate to a verdict returned upon a good indictment for felony before a competent Tribunal. Their Lordships cite this statement of the law to show the finality of a verdict upon a charge of felony when the indictment is good, and the prisoner has been given in charge to a jury, in due form of law empannelled, chosen, and sworn, and a verdict of conviction or acquittal has been returned.

In the present case if the prisoner should have been tried and convicted upon the *venire de novo* ordered to issue by the rule here appealed against, according to the passage just cited, a Judgment thereon would be erroneous.

The cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded have not been classified in the Digests; there are cases of defect of jurisdiction in respect of time, place, or person,—cases of verdicts so insufficiently expressed or so ambiguous that a Judgment could not be founded thereon: but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony delivered by a competent Jury before a competent Tribunal in due form of law to be a nullity by reason of some conduct on the part of the Jury which the Court considers unsatisfactory. As to the two supposed exceptions to this rule against new trial in cases of felony, *R. v. Scarfe* was noticed in *R. v. Bertrand*, and the other case of *R. v. Fowler and Johnson* (4 Barn. and Ald.), was explained to be no decision in the course of the argument on this Appeal.

2ndly. The farther grounds for sustaining the present Appeal beyond those expressed in the Judgment in Bertrand's case relate both to the form of the proceeding in the Supreme Court when exercising appellate jurisdiction under which the rule appealed against was granted, and also to the sufficiency of the evidence on which that Court acted in granting that rule.

Their Lordships are not aware of any principle either of the law of England or of this Colony by virtue whereof the Supreme Court sitting in Banco in Term, could take cognizance as a Court of Appeal of the Judgment pronounced by Mr. Justice Fawcett at the Session of Oyer and Terminer, which had come to an end before the Session in Banco began, and although the relation of the Courts to each other in respect of appellate jurisdiction has not been ascertained by us with precision, still, whatever be that relation, we find no form of proceeding analogous to that, which is required by the common law in proceedings when the aid of a Court of Error or Appeal is invoked, but the form is the form adapted to an application to the discretion of the Court for a new trial.

Then as to the sufficiency of the evidence of the facts on which the Court acted in granting the rule appealed against, their Lordships do not find any strictly legal evidence of any fact; they find nothing beyond an affidavit of mere hearsay information, obtained from a person who had been on the jury, but was then discharged, and this information, if admitted to judicial notice at all, showed possible access to newspapers, without showing that they contained matter which tended to influence the jury improperly, or that the jury ever did, as a matter of fact, read the newspapers.

There is also the further objection, that the supposed informant had been one of the jurymen, and the Courts here have at times expressed a reluctance which we consider salutary against receiving the separate statements of any of the individuals who had in combination formed a Jury, in order to impeach the verdict.

The whole of the proceedings in the Supreme Court are referred to the Judicial Committee, and as their Lordships consider that the rule *nisi* for a new trial, and the rule absolute founded thereon, were each granted on insufficient grounds, both