Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Torrance and others v. *The Bank of British North America, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered* 11*th March* 1873.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Lord Justice Mellish.
Sir Montague E. Smith.
Sir Robert P. Collier.

THIS is an Appeal from a decision of the Court of Queen's Bench in Canada, by which they affirmed the Judgment of the Court below there, in which it was held that the Bank of British North America were entitled to recover a sum of 10,000 dollars and interest against Messrs. Torrance and Company.

The facts are set out in the declaration in the cause, and in the findings of the jury, the substance of the defence having been a denial of all the material facts alleged in the declaration, and those facts in a great number of issues having been left to the jury, and the jury having given their determination upon them. The real question to be determined is, whether, having regard to the facts alleged in the declaration, and the findings of the jury, a cause of action sufficiently appears to entitle the Bank of British North America to recover this sum of money against Messrs. Torrance.

Now, the material facts as found are these:— The Bank of British North America were the holders for value of a bill of $10,000 which had

been drawn by one E. M. Yarwood upon Messrs. Torrance. As found by the jury Messrs. Torrance were accommodation acceptors, and it was the duty of Yarwood, as between him and Torrance, to provide for the bill when it became due at Montreal on the 18th of July. On the 15th of July Yarwood applied to the Bank of British North America to enable him to renew the bill, and he represented to the bank that Messrs. Torrance would be willing to come into an agreement to renew the bill, and to accept the renewed bill, and thereupon it was arranged between Yarwood and the bank that a new bill should be drawn. A new bill was drawn on the 15th of July at three months' date. It was discounted by the bank for Yarwood, and he at the same time, in order to provide funds to take up the bill which became due on the 18th of July, drew a cheque on the bank in favour of Messrs. Torrance or order. That cheque the bank accepted, payable at par at Montreal; this transaction taking place in London. They then delivered the cheque to Yarwood, and Yarwood forwarded the cheque to Messrs. Torrance with a letter, in which he stated: "I have drawn on "you to-day at three months for $10,000, and "enclose cheque on B. B. N. America for same "amount to retire bill due on 18th inst." That letter, having been sent on the 15th of July with the cheque, arrived at Montreal on the morning of the 17th, and was there received by Messrs. Torrance. The bank at the same time sent the renewed bill of the 15th of July to their manager at Montreal to obtain the acceptance of Messrs. Torrance to the renewed bill, and the bank, on the morning of the 17th of July, left the renewed bill with Messrs. Torrance for their acceptance, it being the practice there that 24 hours are allowed before the drawee determines whether he will accept or not. That having been left for acceptance on the morning of the 17th of July, on the afternoon of the 17th

of July, Messrs. Torrance presented the cheque for $10,000 at the bank and received payment of it. Messrs. Torrance, the same day, gave notice to Yarwood that they refused to accept the renewed bill. There was a letter received the same day or the next day by Cramp, one of the partners in the firm of Torrance and Co. and another letter subsequently which fully explained the whole transaction. It is not necessary to enter into the subsequent letters because they are really not material, but Messrs. Torrance on the 18th duly paid the first bill. The material questions submitted to the jury were these :—
" Fifth, did Yarwood request the Plaintiff to
" discount said draft of the 15th day of July
" 1867, and allow him to draw a cheque for the
" full amount thereof, in order that he might
" therewith retire the said first mentioned draft,
" and upon the representation and engagement
" by him that the Defendants would accept such
" new draft, and did the plaintiff discount such
" new draft, and accept the said cheque, and
" certify it as being payable in cash at Montreal,
" on the faith of such representation, assurance,
" and undertaking, and deliver it to the said
" E. M. Yarwood for the purpose aforesaid ?"
And to that they reply "Yes." Then, the 6th asks about the contents of the letter, and on that they say, " Yarwood remitted the cheque in
" his letter of the 15th of July 1867 to cover the
" draft due the 18th instant, without explaining
" how he had obtained it." Then the 11th is,
" When they so presented the cheque for pay-
" ment did they know, or had they reason to
" believe, that it represented the proceeds of the
" draft of the 15th of July 1867, and that such
" draft was only discounted upon the faith that
" they would accept it ?" The answer to that is,
" We are of opinion that the Defendant had
" reason to believe that the cheque was the pro-
" ceeds of the draft of the 15th of July, and that

" the said draft was discounted upon the faith " that the Defendants would accept it." Those being the facts found the real material question appears to be this. Here is a bill of exchange drawn by Yarwood and accepted by Messrs. Torrance, of which the bank are the holders. There is a proposal on the part of Yarwood to renew that bill. It is obvious that the bill could not be renewed except with the consent of three persons, namely, Yarwood, the bank, and Messrs. Torrance; without the consent of Messrs. Torrance it was obvious that the bill could not be renewed. Then, Yarwood and the bank do agree to the renewal. Then the first question is, were Messrs. Torrance informed of those facts before they presented the cheque? Now, the jury have found as a fact that they had reason to believe them, which in their Lordships opinion is the same thing as finding that they had knowledge of them, and therefore the result of it is that they had knowledge at the time when they presented the cheque that both the bank of British North America and Yarwood were proposing to them to renew the bill of exchange, and they had knowledge that the cheque was forwarded to them on the assumption that they would assent to renew the bill of exchange, and with the view that for the purpose of enabling them to renew it, they should have the cheque in order that they might obtain funds with which to pay the first bill.

Then, that being so, it appears to their Lordships most clearly that Messrs. Torrance were bound either to refuse or to accept the offer that was made to them. There was an offer made to them on behalf of both parties, on behalf of the Bank of British North America and on behalf of Yarwood, that they would assent to renew the bill of exchange, and the cheque was given to them for the purpose of enabling them to carry out the renewal, if they assented to it. Therefore, it appears that they were entitled to do one of two

things, either to accept the offer that was made to them, and then they were bound to accept the bill of exchange, or else they were entitled to reject the offer that was made to them, and then if they did that they were bound to return the cheque. But, without giving any notice to the bank that they accepted or refused the offer made to them, they took upon themselves to present the cheque and get it cashed. Now, it appears to their Lordships quite clearly that they were not entitled to take advantage of the agreement which had been made between Yarwood and the Bank of British North America, to which their assent was requested by cashing the cheque, unless they meant to bind themselves to act upon the agreement by accepting the bill of exchange. That being so, the consequence is that having acted upon it, and then afterwards having refused to accept the bill of exchange, they were bound to return the money which they had obtained on what the bank must have understood to be a representation that they were going to accept the offer that was made to them, and going to accept the bill of exchange.

It does not appear to their Lordships that it is really necessary to say precisely what, if these facts had arisen in England, and it had become necessary to bring an action or to file a bill in England, would have been the precise remedy which would have been open to a person in England, whether it would have been an action for not accepting the bill of exchange, or an action for money had and received, or whether it would have been a bill in equity to recover back the moneys as having been obtained in bad faith, though if it were necessary to give an opinion upon that point, probably an action for money had and received would be the real remedy which would be open in the Courts here; that, however, is a technical question. The substantial and real question is that it was a

matter of bad faith. I do not mean to make any remark against Messrs. Torrance's character at all, but, still, under the circumstances, a matter of bad faith; that when they got the cheque with full notice that the cheque was only given to them on the assumption that they would come into the arrangement of renewing the bill of exchange, it was a matter, as it appears to their Lordships, of bad faith for them to go and cash the cheque, being determined at the very same time, and having already made up their minds, that they would refuse to accept the bill of exchange.

Then, it was contended by Mr. Benjamin, in his very able argument, that Messrs. Torrance's position was altered by the arrangement, and that he, being a surety, was thereby discharged. Their Lordships are not able to see in what respect his position was altered. Certainly no time was given, because the first bill of exchange was not due until the 18th of July, and before the first bill was due the second bill must either have been accepted or rejected; and Yarwood was not discharged from any obligation which he had, because his only obligation was to provide the funds on the 18th July. The argument seems to be that having made this arrangement with the bank, he, as a matter of fact, would not make any other efforts to obtain the funds. He was not discharged from obtaining them. His liabilities remained exactly what they were before, and if the bill had not been renewed, that is to say, if Messrs. Torrance did not accept the bill of exchange, no time would have been given, because he would have been instantly liable on both bills. Therefore their Lordships do not see that there is any ground for saying that Messrs. Torrance were discharged, because their position as surety was altered or affected by what was done. It is very difficult to say how a surety's position can be altered, because the two parties

say, "We offer to you to postpone your payment "for three months if you like to accept it, you "may either accept or reject it; but we offer to "you, if you please, to postpone your liability to "pay us for three months." It appears to their Lordships that that did no harm to the surety and could not have the effect of discharging him.

Some authorities were cited; there was the case of the Bank of Ireland *v.* Archer, the facts of which do, to a certain extent, resemble the facts in the present case; but, really, the only question that was decided in that case, the only question which was reserved by the Judge at the trial was, whether a promise to accept a foreign bill of exchange before the bill of exchange was drawn amounted to an acceptance. No question whatever was raised respecting any right to recover under money had and received, or in any other way. The other case which was cited, Key *v.* Cotesworth, appears to their Lordships to have no bearing on the present case.

On the whole, their Lordships are of opinion that they must humbly advise Her Majesty that the Judgment of the Court of Queen's Bench for the Province of Quebec should be affirmed, and that this Appeal should be dismissed, with costs.