Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ogilvie v. *The West Australian Mortgage and Agency Corporation, Limited, from the Supreme Court of Western Australia; delivered 20th March* 1896.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Respondents in this appeal are a corporation with limited liability, carrying on business at Perth, in Western Australia, as stock and station agents, brokers, bankers and financial agents. Their only interest in this suit being in their capacity of bankers, they will be hereinafter referred to as the Bank. The Appellant, a sheep farmer in the Murchison district of the same colony, was, in 1891 and previous years their customer, keeping a current account with them, and occasionally obtaining advances in account upon the security of his wool clip. The present action was brought by him in August 1892, in order to recover, or obtain credit in account for a sum of 1,587*l.* 13*s.* 6*d.*, with interest, upon the allegation that, prior to May 1891, cheques to the amount of the principal sued for, forged in his name by one Armstrong, a clerk in their employment, had been cashed by the Bank and wrongly charged to his debit.

88948. 100.—4/96. [14.] A

That the cheques in question were forged by Armstrong, who fraudulently received and appropriated their proceeds, has not been disputed in this appeal. The only defence relied on by the Bank is, that the Appellant is estopped from alleging that the cheques were forged, by reason of his failure to communicate to them the fact of the forgery after it came to his knowledge, until their opportunities of bringing the forger to account had been altered for the worse. The Appellant denies the allegations upon which the plea of estoppel is founded; and pleads in replication that the Bank, subsequently, and in the knowledge of the fraud which had been committed by Armstrong, undertook and agreed to correct his account by omitting from the debit side the sums which they had paid upon the forged cheques.

The case went to trial before Chief Justice Onslow, who non-suited the Appellant upon the evidence led by him, being of opinion that it raised an estoppel against him, according to the law recognised by the House of Lords in *Mackenzie* v. *British Linen Company* (6 Ap. Ca. 82). The non-suit was set aside by a Full Bench, and a new trial allowed.

On the second trial, Mr. Justice Hensman, who presided, at the close of the evidence, proposed to submit nine questions to the jury. He communicated these questions to the counsel for both parties, who approved of them; and, on the suggestion of counsel for the Bank, a tenth question, being No. 5A, was added by him.

Their Lordships need not notice the first of these questions, which relates to matters which are no longer in dispute; or the second, which was not referred to in the argument before them. The remaining queries, and the answers returned to them by the jury, were as follows:—

3. Did the Plaintiff arrange with the forger

to withhold information of the forgeries from the Defendants and to accept payment from the forger?—*A.* No.

4. Was Edmund Canning held out to the public by the Defendants as an agent or officer of the Defendants? If so, had he knowledge of the forgeries before the Plaintiff had such knowledge?—*A.* Yes.

5A. Did the Plaintiff at and by the request of Edmund Canning keep silence to the Defendants with regard to the forgeries for six weeks in order that the forger might go to England and send the amount of the forged cheques to the Defendants?—*A.* Yes.

5B. Did the forger leave the colony, if so when?—*A.* Yes, about 23rd May 1891.

6. Did the Plaintiff act honestly and with a view solely to the benefit of the Defendants or did he act with a view to his own benefit or interest?—*A.* Solely for the benefit of the Defendants.

7. Was the conduct and silence of the Plaintiff the cause of prejudice to the Defendants? If so to what extent and in what way?—*A.* No.

8. Assuming that the Plaintiff acted wrongfully towards the Defendants or that there was negligence on the Plaintiff's part did the Defendants waive such wrongful conduct or negligence?—*A.* Yes.

9. Did the Defendants ratify or adopt the action of Edmund Canning in permitting the forger to go to England as aforesaid?—*A.* Yes.

Upon that verdict Mr. Justice Hensman, on the 16th May 1893, entered judgment for the Appellant for the sum of 1,462*l.* 8*s.* with such interest thereon as might be found to have been charged by the Defendants upon an account

being taken by the Registrar, and that the Defendants' book be rectified accordingly; and as to 124*l.* 5*s.* 6*d.*, directed that an account be taken by the Registrar as to whether such amount or any part thereof has been wrongly charged to the Plaintiff in the Defendants' books. Thereafter the Bank gave notice of motion to set aside the verdict and judgment, and to have judgment entered for them or a new trial allowed.

Their Lordships find it necessary, in this case, to advert to the specific objections stated against the verdict in the notice of motion. It is trite law that these objections must be the measure of the right of the party objecting to impeach the findings of the jury; and that the findings of the jury, in so far as not objected to, are conclusive and binding upon him. The Bank, in their notice, objected to the verdict upon two grounds. In the first place they alleged mis-direction by the Judge, inasmuch as there was no evidence to go to the jury upon the 8th and the 9th of the questions submitted to them. In the second place, they alleged that the answers made by the jury to the 7th, 8th, and 9th questions were against the weight of evidence and perverse. They stated no objection whatever, either in law or fact, to any of the findings of the jury in reply to the first six questions.

The motion was heard before a Full Court, consisting of Chief Justice Onslow, with Justices Stone and Hensman, who (Mr. Justice Hensman dissenting) not only set aside the 7th, 8th, and 9th findings of the jury, but proceeded to set aside the judgment entered by the presiding judge, and, in lieu thereof, to enter judgment for the Bank, and to condemn the Appellant in costs. In these circumstances, it became unnecessary to dispose formally of the Bank's objection that the 8th and 9th questions ought not to have been submitted to the jury; but Justices Stone

and Hensman indicated the opinion, in which their Lordships agree, that the Bank were precluded from taking the objection, by the fact that both questions were sent to the jury with the consent and approval of their counsel.

In the judgments delivered by the majority of the Full Court, the course which they took in disposing of the case was justified on these grounds. The Chief Justice said: "The Court "is fully possessed of all the facts, and in my "opinion the judgment of the Court should be "that the judgment entered up for the Plaintiff "should be set aside, and that judgment should "be entered for the Defendants." To the same effect Mr. Justice Stone observed, "I think as the "Court has all the proper materials before them, "and nothing can be gained by sending the "case again before a jury, the most economical "course will be to enter judgment in accordance "with the view taken by the Court."

Their Lordships do not wish to suggest that, in the circumstances of this case, a final decision upon the materials before the Court, without remitting for new trial, would either have been contrary to law or inexpedient. Order XXXVI., No. 10, of the rules which were framed in pursuance of the Supreme Court Act of the Colony, (44 Vict. No. 10), provides that "upon a motion for judg-"ment, or for a new trial, the Court may, if "satisfied that it has before it all the materials "necessary for finally determining the questions "in dispute, or any of them, or for awarding any "relief sought, give judgment accordingly." The rule is a salutary and useful one, if it be kept within its proper limits. But it does not empower the Court, when and because it has set aside one or more findings which have been made matter of objection, to disregard or negative other findings of the jury which have not been objected to. In this case the findings of the jury in answer to questions 8 and 9 relate to

issues of fact which are not involved in the first six questions. The answers returned to the latter appear to their Lordships to exhaust the issues of fact upon which these two questions turn,—(1) whether the cheques were forged by a bank clerk, and were therefore not chargeable to to the Appellant's account; and (2) whether if they were forged, the Appellant was, by his own conduct estopped from asserting that fact, in a question with the Bank. The findings in answer to the 8th and 9th questions relate to an issue which does not arise unless the previous findings of the jury, which have not been challenged, are sufficient to raise an estoppel against the Appellant.

It is not improbable that the learned judges who constituted the majority of the Full Court relied upon Order XXXVI., rule 10., as warranting the course which they adopted in giving judgment; but, if that were so, they appear to their Lordships to have been under a grave misapprehension as to the import and effect of the rule. In dealing with the question of estoppel, they altogether ignore the findings of the jury, and they decide against the Appellant, upon their own view of the facts, which it is impossible to reconcile with these findings.

Before discussing the effect in law of the first six findings of the jury, their Lordships will refer to certain facts appearing from the evidence, and not disputed in the argument upon this appeal, not for the purpose of contradicting these findings, which would not be legitimate, but in order to explain the nature of the issues to which they were directed.

The evidence does not afford any information as to the constitution of the Bank, beyond what may be collected from an extract of six of its articles of association, and a power of attorney by the corporation, under its seal, dated the 14th May 1889. By the latter document, very

ample powers for the administration of its business in Western Australia, are conferred upon three gentlemen, one of whom, Alfred Canning, was appointed as the managing director. All ordinary business between the Bank and its customers was transacted by Mr. Canning in that capacity. Mr. Canning had a son, Edmund, who had a separate office of his own, in the same tenement in which the Bank had its premises. Canning junior had acted as secretary of the Bank during his father's absence from the Colony, but his employment ceased upon the return of the latter to the colony in June 1890. After that date he continued to be the confidential agent of his father; and the evidence shows that he was frequently employed by his father to transact business, on his behalf as manager with customers of the Bank including the Appellant.

The Appellant, who resides at a great distance from Perth, went there in the beginning of May 1891, and called at the Bank, for the purpose of getting a pass book brought down to date. He was informed that the manager, for whom he asked, was engaged at the time; but Canning junior, who gave him that information, undertook to have his pass book made out, assisted in making it up, and subsequently gave it to him. On examination of the book, the Appellant discovered that cheques were entered to his debit which had not been drawn by him, and he communicated the fact to Canning junior, who, a day or two after, told him that these cheques had been forged by Armstrong, and exhibited to him a confession of guilt written by Armstrong, which was dated the 6th May 1891. The Appellant then said that Canning junior "ought to make the matter known to "his directors, and have the man prosecuted." Canning junior thereupon asked him not to make the matter public, assuring him that, if he did so, "the Corporation would lose all chance of

" getting the money back,"—that " the man " would be arrested, and they would lose the " money." He also said to the Appellant, that " it would nearly kill his old father if I told " the directors." Upon these representations, the Appellant said nothing about the matter to any one.

The jury have found, in answer to Question 4, that Canning junior was held out to the public by the Bank as their accredited agent, and that he had knowledge of the forgeries before the Appellant. These findings have never been objected to, and are now conclusive against the Bank. It is obvious that the question of estoppel arising in these circumstances differs widely from the question which was discussed in *Mackenzie* v. *British Linen Company* (6 Ap. Ca. 82), and similar cases. The ground upon which the plea of estoppel rested in these cases, was the fact that the customer, being in the exclusive knowledge of the forgery withheld that knowledge from the Bank, until its chance of recovering from the forger had been materially prejudiced. Here, an agent of the Bank had earlier and better information as to the forgeries than the customer himself. Had Canning junior's statement to him been confined to the fact that the cheques had been forged by Armstrong, it is hardly conceivable that the Appellant would have been under any duty to re-convey to the Bank the information which he had received from their own agent. In that case, the customer could not have been reasonably held responsible for a failure on the part of the Bank's officer to impart his information to the Bank, unless he had good cause to suspect that such a breach of duty was contemplated by the officer and assisted in its concealment.

In their Lordships' opinion the only question which it is open to the Bank to raise upon the terms of the fourth finding of the jury is this,—whether the request for silence, which accom-

panied the information given to him by Canning junior with respect to the forgeries, was in itself sufficient to impose upon the Appellant the duty of taking the unusual step of informing the directors of the course which their agent meant to pursue, professedly in the interest of the Bank. If that request had been calculated to create, in the mind of a person of ordinary intelligence, a suspicion or belief that the agent, or the ordinary managers of the Bank's affairs, meant to betray its interests, their Lordships think it would have been the duty of the Appellant to lay the whole matter before the directors for their consideration. But any imputation of that kind is excluded in this case by the sixth finding of the jury, which is also unchallenged, to the effect that the Appellant acted honestly and with a view to what he believed to be the interest of the Bank. The Respondents' Counsel were unable to refer to any rule of law which, in the absence of any such suspicion or belief, imposed a duty upon the Appellant to carry the information which he had received to the directors of the Bank; and it does not appear to their Lordships that any such duty was required of him by the rules of fair dealing between man and man.

Their Lordships have accordingly come to the conclusion that, upon the first six findings of the jury, which stand unimpeached, the Bank's defence of estoppel fails, and the Appellant is entitled to the judgment which was entered for him by the learned Judge before whom the case was tried. That result cannot be affected, either by the answers which the jury returned to the remaining three questions, or by any answer which, in the opinion of the Full Court, the jury ought to have given to these questions, which were only designed to raise a replication, on behalf of the Appellant, to the Bank's plea of estoppel, in the event of its being sustained. But, in view of the arguments which were

addressed to them from both sides of the bar, their Lordships think it right to make some observations upon the three questions, with the responses made to them by the jury, which were brought under review of the Full Court.

Having regard to the previous findings of the jury, their answer to the 7th question is in strict logical sequence. If the conduct and silence of the Appellant did not constitute a legal wrong, upon which the Bank could rely by way of estoppel, there could be no damage or prejudice to the Bank. But the answer was treated by the Appellant's counsel as affording complete immunity to him, even if the previous findings were construed as raising an estoppel. If the true import of the previous findings had been, that, by keeping silence and allowing the forger to escape from the Colony and the jurisdiction of its Courts, the Appellant had violated his duty to the Bank, their Lordships are of opinion that these circumstances would in themselves have been sufficient to show prejudice entitling the Bank to have their plea of estoppel sustained to its full extent notwithstanding the answer given by the jury to the 7th question. It was argued for the Appellant, that under the 7th question, it was open to the jury to find the amount which the forger could have paid under compulsion of law, and to assess the damage sustained by the Bank at that sum; and also that the Appellant would not have been estopped from alleging forgery of the cheques, except to the extent of the damage so found. Their Lordships can only say, that, in their opinion, no such finding could have been of the least benefit to the Appellant if there had been facts sufficient to raise an estoppel. There are some *obiter dicta* favouring the suggestion that, in a case like the present, where the amount of the forged cheques is about 1,500*l*., the estoppel against the customer ought to be restricted to the actual sum which

the Bank could have recovered from the forger. But these *dicta* seem to refer, not to the law as it was, but as it ought to be; and, in any view of them, they are contrary to all authority and practice.

The 8th and 9th questions practically involve the same issue of fact under different legal appellations, that issue being, whether the Bank, after the date of those circumstances which are said to create an estoppel, undertook and agreed to rectify the Appellant's account, by deleting the forged cheques from the debit side of it. Their Lordships are of opinion that the answers made by the jury to these two questions are fully supported by the evidence, and ought not to have been set aside by the Court below. Canning senior, who was in reality the Bank, received from the Appellant on the 25th August 1891, a telegram in these terms "Did you "receive a letter from me relative to my account "last month? Have received no reply." The letter referred to has not been produced, but, according to the evidence of the Appellant, it complained of the forged cheques having been debited to his account, and demanded its rectification, a statement which is entirely consistent with the telegram and with the reply which was sent to it. The reply, which was wired on the same day, the 25th of August, in name of the Managing Director, was as follows "Yes "account now all right." It acknowledges receipt of the Appellant's letter, and plainly implies knowledge of the request which was made in that letter; and it must not be forgotten that these communications took place long before there was any suggestion that the Appellant was estopped from complaining of the forged debits. The explanations given by Canning senior with respect to these telegrams are simply humiliating, and obviously unworthy of credit. He denies having received

any letter from the Appellant referring to the forgeries, before the receipt of the Appellant's telegram of the 25th August, which he "does not "recollect." He admits that he may have told his son to send the reply telegram of the same date; and then he proceeds to explain what he meant by the terms in which the reply was couched. The impression which their Lordships derive from his testimony is, that on the 25th August 1895, the Manager of the Bank was cognisant of the whole matter, and deliberately undertook that the Bank would rectify the Appellant's account by withdrawing the forged cheques from his debit. He does not venture to deny explicitly, either that he did authorise the telegram in reply, or that he was cognizant of its contents; although he endeavours to evade these conclusions. Their Lordships will only add, that, in their opinion, the jury in all probability did not believe the evidence either of Canning senior or of his son; and that, upon their evidence, the jury would have been warranted in coming to the conclusion that the father was in the knowledge of Armstrong's forgeries, before that fact was known to the Appellant.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the Full Court, to restore the judgment entered for the Appellant by the Judge who presided at the trial, and to order the Respondent Corporation to pay to the Appellant the costs incurred by him in the Courts below, from and after the date of the judgment so restored. The Respondent Corporation must also pay to the Appellant his costs of this appeal.