1917
* Feb. 14
* May 1

THE BANK OF TORONTO (PLAINTIFF) ..... } APPELLANT;

AND

M. M. HARRELL (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Fraud—Misrepresentation — Evidence — Bu den of proof — Promissory note—Renewal—Jury trial—General verdict—Specific answers—Judgment non obstante veredicto—Order 58, r. 4, Supreme Court Rules of British Columbia, 1906.

The respondent made a promissory note, upon the assurance by one Vanstone, a local manager of the bank appellant, that no part of the proceeds of it should be applied otherwise than as agreed upon between themselves. The respondent, however, with full knowledge of the violation of such assurance, but on being promised by said Vanstone that he "would take care of the loan," was induced to renew the note. In an action by the appellant for the payment of the renewal note the trial judge put certain questions to the jury which were answered, but a general verdict in the respondent's favour was also rendered by the jury.

Held, Idington and Duff JJ. dissenting, that no reasonable view of the evidence supports the conclusion that the renewal of the note sued upon was procured by fraud. That being the sole defence, the general verdict for the defendant must be set aside.

Per Fitzpatrick C.J.—Misrepresentation, such as in the circumstances of the present case, even if it amounted to what was called legal fraud, is not sufficient to found an action for deceit, but actual fraud must be proven.

Per Davies and Anglin JJ.—The general verdict in the respondent's favor being inconsistent and irreconcilable with the jury's specific answers to the questions put, must be ignored; and the verdict for the appellant as entered by the trial judge, and based on these specific answers, should be restored.

Per Idington J. (dissenting).—The dishonest expression of an intention having an important bearing upon the business which contracting parties are about may be just as gross a fraud in law as a misrepresentation of any other fact.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

Per Idington and Duff JJ. (dissenting).—The admission of the evidence of the assurances alleged to have been given by Vanstone and acted upon by respondent in executing the renewals, was not in any way in conflict with the rule which forbids the reception of parol evidence to contradict, vary or add to the contents of a written instrument which the parties have intended to be the record of a transaction.

Per Duff J. (dissenting).—The execution of renewals by respondent with a knowledge of fraud, standing by itself, is indubitably an "unequivocal act" whereby he was manifesting his intention to treat the contract as binding upon him, unless attendant circumstances justify the inference that the execution of these renewals was to be treated as a provisional measure until some future settlement might be arrived at.

Per Anglin J.—Upon the evidence, respondent's acts in renewing the note were unequivocal and amounted to communications of his election not to repudiate his liability.

Judgment of the Court of Appeal (23 B.C. Rep. 202) reversed, Idington and Duff JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Murphy J. at the trial, by which the plaintiff's action was maintained with costs.

The Rex Amusement Company, of which one D. H. Wilkie (a member of the firm of Campbell & Wilkie), was a director and treasurer, was in financial difficulties. One Vanstone, manager of a local branch of the bank appellant, induced the respondent to make in favor of the Amusement Company a note for $10,000 to be discounted by the appellant, and the respondent was to be secured by a chattel mortgage on the furniture and accessories of the company, which however were subject to unpaid vendors' liens. The firm of Campbell & Wilkie was also creditor of the Amusement Company, and the bank appellant was interested in the liquidation of their claim. The chattel mortgage security could have any value only if the claims of the lien-holders were discharged by the proceeds of

(1) 23 B.C. Rep. 202.

1917

BANK OF TORONTO v. HARRELL.

the note, and the respondent alleges that he was assured by Vanstone that it would be so and that no part of such proceeds should be applied on Campbell & Wilkie's account. But $5,000 of these proceeds were so applied. Respondent, with full knowledge of such violation of the assurance given, renewed his note, though for a smaller amount, payments having been made on account, and in his evidence, respondent alleged that he gave this renewal on the faith of a promise by Vanstone that he would protect him against liability on it.

On an action brought by the bank appellant, a trial was held, with a common jury. Answers were handed in by the jury to the questions put, and a general verdict was also given in favor of the respondent. The trial judge found the specific answers inconsistent with the general verdict and he gave judgment for the bank appellant for the amount of the note. The Court of Appeal reversed this judgment, finding that there was evidence to support the general verdict in favor of respondent.

Wallace Nesbitt K.C. and C. C. Robinson for the appellant.

Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I can find no ground on which the respondent can avoid liability on the renewal note which he signed.

The trial judge in his reasons for judgment says:—"The case went to the jury on the issue that there had been again fraud in obtaining these renewals * * * the case must now be decided on the issues as submitted to the jury."

1917

BANK OF TORONTO v. HARRELL.

The Chief Justice.

Prior to the case of *Derry* v. *Peek* (1), it might perhaps have been held that misrepresentation such as in the present circumstances amounted to what was sometimes called legal fraud. By the decision of the House of Lords, however, it must be considered to have been conclusively established that this is not sufficient, but that the law is that actual fraud is essential to found an action for deceit. The expression of an opinion honestly held, "the language of hope, expectation and confident belief," will not amount to a misrepresentation having legal consequences.

The jury have expressly negatived actual fraud and I think it must be recognized that their verdict for the defendant was given on the assumption that the misrepresentations by which, according to their finding, the respondent was induced to renew that note were sufficient for their verdict.

The learned trial judge held that if the jury intended by their answers to impute fraud to Vanstone at that juncture there was no evidence on which they could make such a finding. Perhaps, in view of this, the correct course would have been for the judge not to have left the question to the jury.

I am content to restore his judgment but reducing the rate of interest from 8% to 5%.

DAVIES J.—I think this appeal must be allowed and the judgment of the trial judge in plaintiff's favour for the amount of the note sued on restored.

The action was tried before Murphy J. and a jury. In charging them the learned judge said with respect to the questions he asked them to answer:—

There are at any rate three propositions in it and they involve some law. Therefore it will be very much in the interests of the

(1) 14 App. Cas. 337.

1917

BANK OF TORONTO v. HARRELL.

Davies J.

litigants if you will answer these questions. The questions are only put to enable you to understand what I have said to you, and bring before your minds exactly what is required to be dealt with in deciding the case,

and added:

I have been requested by counsel to tell you that it is the law of British Columbia that you need not answer these questions. I have already told you that it would be very much in the interests of the parties, in my opinion, if you would answer them, but it is the law of this province that you can bring in a verdict for the plaintiff or for the defendant without answering the questions at all.

The jury answered most of the questions put to them and added a finding of a general verdict for the defendant.

The trial judge concluded that the specific answers given by the jury to the questions asked them made their general verdict for the defendant impossible and entitled the plaintiffs to judgment.

On appeal this judgment was set aside and a verdict entered for the defendant.

Macdonald C. J. did not think the answers and the general verdict inconsistent and concluded that accepting both the defendant was entitled to judgment.

Galliher J. A. agreed that the answers and the general verdict could be read together and was of the opinion that neither the renewal in February, 1915, of the original note given by defendant induced as it was by the promise of the branch bank manager Vanstone that the defendant would not be called upon to pay, nor the facts found by the jury as to the subsequent renewal given to the manager Ball and sued upon could be regarded as an election by defendant to confirm the original contract.

Martin J. A. thought the answers to the questions should be disregarded and the general verdict alone

considered and that there was evidence to support this general verdict.

McPhillips J. A. held there should be a new trial on the ground that the verdict was not unanimous and the jury had not been out the full three hours which under the law of British Columbia must elapse before any verdict other than a unanimous one could be received.

I am not able to agree with the learned judges who held that the specific answers of the jury to the questions put to them by the trial judge are consistent or reconcilable with their general verdict or that the specific answers should be disregarded and the general verdict alone accepted.

The law of British Columbia on this question is the same as that of England. The jury have the right to find a general verdict and ignore specific questions put to them. If they do so and render a general verdict only or if no questions are asked them, then any reasons which of their own motion they may give for their general verdict may be treated as surplusage and the general verdict alone considered. There seems to be some conflict between the authorities as to whether the same result would follow answers given to questions of the trial judge as to their reasons for their general verdict, after it has been rendered in cases where they had not been asked previously to giving their verdict to give their reasons.

In this case, however, and apparently with consent of both parties and certainly without any objections, questions were put to the jury by the trial judge and they were told they were not obliged to answer them unless they chose. They however did answer most of them and added a general verdict for defendant.

Under these circumstances, I think the general

1917

BANK OF TORONTO v. HARRELL.

Davies J.

verdict being inconsistent and irreconcilable with the jury's specific answers to the questions put must be ignored and the verdict entered as was done by the trial judge on these specific answers for the plaintiffs.

The jury found in answer to the first four questions, and there was evidence justifying the finding, that the respondent was induced to sign the original note through the fraud of the appellant's branch manager, Vanstone.

Counsel for the appellant admitted that on these findings it was Harrell's right upon discovery of the fraud to repudiate his liability but contended that, although in February, 1915, he discovered the fraud he waived his right and signed a renewal note for the unpaid balance of the original note.

The jury found that he was induced to sign this renewal note "by promises in reference to his liability made by Vanstone with the intention that Harrell should act upon them," and they stated the details of such promises in answer to the 5th question by saying that they accepted Harrell's evidence and "the architect's statement that Vanstone said to him (Harrell) that he (Vanstone) would take care of Harrell's loan and would see that he was looked after. That he had taken care of Harrell so far and would still do so."

The jury further found that in signing that renewal Harrell acted upon these promises and that Vanstone's promises were not intentionally fraudulent.

A very strong argument was advanced by Mr. Nesbitt that the defendant by signing this renewal note in February, definitely elected not to repudiate the transaction on the ground of the fraud already then discovered and known to him and that Vanstone's promise made at the time that if he (Harrell) did sign

it he would not be held liable, did not release him from the liability he incurred by signing the renewal.

In other words, as I understand the contention, it was that Vanstone's promises which induced the signing of the renewal note in February were mere promises as to the future only, that they were not fraudulently made and that in so far as it was attempted to construe them as an agreement that the defendant should not be liable it must fail as such a verbal agreement would be a contradiction of the terms of the renewal note and that at any rate no such issue was presented at the trial. The trial judge says in his judgment:—

> The case went to the jury on the issue that there had been again fraud in obtaining these renewals. Possibly it might have been contended that there was at the time of the renewal an agreement not to enforce the note, but this line was not taken before the jury, entailing as it would have grave difficulties under the decisions relative to introducing parol evidence to vary the tenor of a promissory note. Whatever the reason, the case must now be decided on the issues as submitted to the jury.

I admit the great force of the contention and it does seem clear on principle that no evidence of a verbal agreement made at the time of the signing of the note contradicting its terms would be admissible.

I however prefer to base my judgment upon the specific findings of the jury with respect to the further renewal note of August, 1915, now sued on and signed by defendant at the request of the manager of the bank in Vancouver, Mr. Ball. At this interview with Ball, Harrell went fully into the whole transaction with Ball. Harrell says in his main examination:—

> I told him then what the arrangement was I had made with Vanstone, and the way Vanstone had acted in the matter—that he hadn't carried o t his agreem nt * * * and * * * that he had taken this money and applied it to Campbell & Wilkie's account when it should have gone to pay off these liens. * * * I told him the arrangement I had * * * with Vanstone * * * that he

1917

BANK OF TORONTO v. HARRELL.

Davies J.

was to carry it, and it was never to cost me a dollar, and that he would see to it. * * * I told him that I didn't owe the note. I told him all the arrangements I had with Mr. Vanstone, that I was never to pay this thing. Ball's reply was, "Yes, Mr. Vanstone has done a lot of foolish things down there. It is not the only foolish thing he has done." Ball then told him that the Amusement Company could not even pay the interest at that time, and said, "You give me a demand note and as soon as the Rex Amusement Company get this money or Wood, Vallance & Leggatt are in a position to pay you any money, they can apply it on this note, and we won't have to wait its stipulated length of time." Thinking (says the defendant) everything was all right, I simply signed the demand note and gave it back to him."

The seventh question put to the jury and their answer is as follows:—

Did Ball by word or conduct or both lead Harrell to believe that Harrell would incur no liability by signing the renewal note and thereby induced Harrell to sign the note? Ans. No.

Now it seems to me beyond reasonable doubt under this evidence of the defendant himself and this finding of the jury that the defendant signed the note sued on with full knowledge of Vanstone's broken, unfulfilled promises, and without any promise or inducement by words or conduct on Ball's part leading him to believe he was not incurring liability upon it and without any fraud practised upon him.

By doing so under the circumstances stated and found he definitely elected not to rely upon the alleged fraud in connection with the original note, and I cannot see that he has any legitimate defence to the action. As I have already said, I think the general verdict is irreconcilable with the jury's specific findings on the question No. 7 and is also contrary to the evidence and must be ignored and judgment entered upon the specific finding of the jury for the plaintiffs.

IDINGTON J. (dissenting)—I do not think we should interfere with the conclusion of the Court of Appeal relative to any question herein arising out of the rules

in British Columbia governing the time within which the jury are entitled to render a majority verdict or the right of a jury to render a general verdict.

In the broader way of looking at the case it is reduced to a question of fraud or no fraud in the representation made by appellant's agent and whether or not such fraud (if any) had been waived by the respondent, or he had not made his election in regard thereto, the general verdict is I think maintainable.

We were strongly pressed in argument by the proposition that the misrepresentation which can be held to support a defence of fraud must be of an existent fact.

Numerous cases of undoubted authority were cited to maintain that proposition but the question of misrepresentation of an intention as a fact was either brushed aside by the statement, equally undoubted in law, that honest intention honestly expressed, which in the result proved disappointing, could not be held fraudulent or, so far as the authorities are concerned, was passed by as if there could be no such thing.

I am of opinion that the dishonest expression of an intention having an important bearing upon that business which contracting parties are about, may be just as gross a fraud in law as a misrepresentation of any other fact.

It may be more difficult to prove such a fraud than one relative to the existence or non-existence of some physical object.

Nevertheless it may be established, as was held in the case of *Edgington* v. *Fitzmaurice* (1).

In that case there were some minor misrepresentations of fact as well as the main one expressing to

(1) 29 Ch. D. 459.

1917

BANK OF TORONTO v. HARRELL.

Idington J.

investors the intention on the part of the company to apply the money to be got by such representations as made, to certain named purposes which would indicate a possibly prosperous condition of the company's affairs when in truth the intention was to apply the money to other and more pressing needs which if truly stated would or might have indicated the reverse, and tended to prevent possible investments.

I think we can apply the law laid down there to the facts in this case. There is a very striking resemblance between the cases as to the nature of the intention.

The only difference I can see between these cases is that relative to the position of those there making the representations and that of the appellant's agent here.

It may be somewhat more difficult to understand why such an agent should misrepresent his intentions than it was to understand the directors doing so in that case.

The expression of Mr. Ball as to the agent in question, or his management of the dealing with respondent not being his only foolish act as an agent, when coupled with his relations with the firm, which profited by his success, in so inducing the respondent to become liable at all, helps to solve the mystery.

It is quite clear when one realizes the financial condition of the Rex Amusement Company and the position of the firm of Campbell & Wilkie as the creditors of that company, and debtors to the appellant, how such an agent might be so tempted.

And if he assented there is indubitable proof in the immediate transfer by the appellant's agent of a large part of the proceeds of the respondent's note to the said firm's account that he never in truth could

have had the intention, as he represented, that they were not to get any of the proceeds and that they should go to other purposes desired by the respondent.

It is equally clear how very important it was for the respondent, dependent upon security he had taken to indemnify himself, to be assured that the money being raised by his suretyship should not go to the said firm but be applied to liquidate liens or some of the liens on the company's buildings and thereby improve his position.

Leaving the firm to help itself in many conceivable ways might help to strengthen the respondent's position. The jury have by their verdict established the fact.

Can the respondents, however, be held entitled to the benefit of that in the action upon the renewal note now in question?

Or had the respondent not elected to waive and waived the fraud committed on him by his repeated renewals, though protesting all the time, and accepting reassurances of the agent that he would never have to pay a cent of the debt?

His doing so may not have been prudent, but I cannot hold that he thereby elected to waive his right to repudiate, on the ground of fraud, the original transaction which was the only foundation for liability at all.

To give effect to the contention that he had so elected would be but to help the successful promotion of the fraudulent purpose of him who had committed the fraud.

It seems idle to contend that to admit the evidence of these assurances was an infringement of the rule against varying by oral evidence the obligation contained in a written contract.

1917

BANK OF TORONTO v. HARRELL.

Idington J.

It is not at all in that sense that such oral evidence was admissible, but to rebut the possible presumption arising from signing renewals, of his election to abide by the contract, and forego his right to repudiate for fraud, the very basis of the transaction and hence that appellant could claim nothing upon such a promissory note for which there could be found no consideration if only founded on fraud.

The evidence, for example, admissible to prove fraud itself is not tendered to vary the nature of the written instrument itself.

Accommodation makers can often in particular circumstances shew by oral evidence why they should not be held liable, but such evidence is not adduced to suggest the slightest variation of the written instrument.

The evidence so understood was admissible and entitled to weight.

I think when so applied there is no more reason to contend the fraud had been waived, or respondent had elected not to repudiate, than there was in the case of *Clough* v. *The London & North Western Railway Co.* (1), or *Erlanger* v. *New Sombrero Phosphate Co.* (2), at 1277 *et seq.*, and still less than in *Lindsay Petroleum Co.* v. *Hurd* (3).

These three cases which suggest that the respondent might well have taken the ground that as a surety he was entitled to have come into court, and on the facts that are apparent, or at least possibly easier of establishment than that he risked on the issue raised, he was not treated as a surety should be, and asked as he does in fact to have the note delivered up to to be

(1) L.R. 7 Ex. 26. (2) 3 App. Cas. 1218.
(3) L.R. 5 P.C. 221.

cancelled. The law sought unsuccessfully to be applied in *Hamilton* v. *Watson* (1), and illustrated in cases cited therein, if followed, might have brought the result reached much easier.

The facts may all be in the pleading but are not so marshalled as we might desire to see in making such a case, or the principles of law I refer to clearly rested upon.

However, I need not pursue that, for I think in whichever way one looks at the whole of the evidence and questions tried, the general verdict is maintainable, and I have no doubt of the justice of the result, especially in view of the suggestion I have just made of the applicability of the facts found in the answers to the questions put to the jury, had we need to resort thereto.

A clearer conception on all hands of the many sided sort of case there is in evidence and possibility of it being presented from other points of view than taken, may have been desirable but in my view no new trial is needed.

The appellant cannot now be heard to complain of the learned trial judge's charge which was not against it on the issues as fought out and the evidence justifies a general verdict for the defendant.

The appeal should be dismissed with costs.

DUFF J. (dissenting)—In this appeal I think there must be a new trial although the necessity is regrettable. I agree with the Court of Appeal that there was evidence which could not be withdrawn from the jury on the issue of the voidability of the promissory note sued upon because of the alleged deliberate misleading of the defendant as to the purpose for which the bank was making the advance.

(1) 12 Cl. & F. 109.

1917

BANK OF TORONTO v. HARRELL.

Duff J.

But there was another issue raised by the pleadings in respect of which the course of the trial was so unsatisfactory as in my opinion to entitle the appellant bank to a new trial. The issue was this; the bank contends that admittedly after full knowledge of the fraud alleged the respondent executed a series of renewal notes and that this conduct constituted an election to affirm the contract as a binding contract, notwithstanding the fraud within the rule that a person entitled to avoid a contract by fraud, who, with knowledge of fraud, does some unequivocal act whereby he manifests his intention to treat the contract as binding upon him, thereby makes his election against attacking it in such a fashion as to preclude him from doing so forever.

The view of the trial judge was that as regards this issue there was in truth no question for the jury because the facts admitted by the defendant Harrell entitled the bank to judgment upon it and that is the first point to be considered under this topic.

Such an issue obviously raises two questions. First, the question of the knowledge of the person alleged to have elected to abandon the remedy he is seeking to enforce and, secondly, the significance of the act relied upon as an unequivocal act manifesting the intention to abandon his remedy. As to the first question, I gather from the charge of the trial judge that Harrell's knowledge of the fraud was not disputed at the trial, although looking at the evidence alone I should have had little hesitation in holding that there was a question for the jury whether Harrell had brought home to him before the execution of the renewals the fact found by the jury, namely, that Vanstone was deliberately misleading him as to the intention of the bank with respect to the application

of the advances—in other words, that Harrell's conduct was not only morally reprehensible but of a kind entitling him in law to rescind the contract; and one may remark in passing that it seems a little paradoxical that knowledge of the legal right to impeach the contract should, in this court, be imputed to Harrell from the knowledge of facts which the Chief Justice of this court holds conferred no such right upon him.

I proceed, however, upon the assumption founded upon the observations of the learned trial judge and strongly supported by the frame of the question submitted without objection that Harrell's knowledge was admitted.

The answer to the second question turns upon a point of law touching the admissibility of evidence. The execution of a series of renewals by Harrell with a knowledge of fraud standing by itself comes indubitably under the category of "unequivocal act" within the meaning of the rule above referred to; that is so because *ex facie* the renewal notes executed by Harrell affirmed Harrell's responsibility and affirmed his responsibility under the original contract (the promissory note first executed) since renewals given in the circumstances in which these were given do not destroy the original obligation, they merely suspend the debt. (Byles on Bills p. 257.) On behalf of the respondent, however, it is said that in order to determine whether or not the execution of the renewals with knowledge of fraud manifested an intention on Harrell's part to abandon his rights we must ascertain the circumstances known to Harrell and known to the bank and the communications which passed between Harrell and Vanstone, the bank's representative, acting on behalf of the bank in which and with reference to which the renewals were given; and it is argued since the attend-

1917

BANK OF TORONTO v. HARRELL.

Duff J.

ant circumstances justify the inference that it was understood by Harrell and by the bank, that is to say, by Vanstone, acting for the bank, that the execution of the renewals was between them to be treated as a provisional measure, all questions as to Harrell's ultimate responsibility being postponed until the affairs of the Theatre Amusement Co., for which Harrell was surety, were finally sifted, it follows that the execution of the renewals cannot be properly regarded as an "unequivocal act."

There can, I think, be little doubt that in principle the argument, up to this point, is well founded. If a letter had been written expressly embodying the terms of such an understanding, nobody would argue that the execution of the renewals amounted to an election and if the existence of such an understanding were a proper inference from facts legally admissible in evidence and proved the case could not legitimately be distinguished from the case in which the understanding was expressed in a written stipulation.

In the present case oral communications between the parties were proved, that is to say, between Harrell and Vanstone, which in themselves would support the conclusion that Harrell's execution of the renewals was not unequivocal, that is to say, that it did not convey to Vanstone the belief in a fact and was not calculated to convey to Vanstone any such belief, that Harrell was abandoning any rights he might prove to have arising out of the fraud if the bank should ultimately attempt to hold him accountable. Here emerges the point of the controversy, was evidence of these communications admissible? Broadly speaking, they consisted of assurances alleged to be given by Vanstone, and acted upon by Harrell in executing the renewals that he (it would be a question for the jury

whether Vanstone might reasonably consider Harrell's assurance to be given on behalf of the bank) would protect Harrell against responsibility. The jury has in fact found that such assurances were given, and that Harrell in fact acted upon them in executing the renewals. On behalf of the appellant bank it is contended that evidence of these assurances is not admissible as being evidence contradicting the terms of the documents which constituted the contract between the parties.

I have come to the conclusion that this contention on the part of the appellant bank is not well founded. Fraud of the kind relied upon by the respondent gives a person wrongfully affected by it a right to elect whether the contract shall be avoided or not. So long as no election takes place the contract remains on foot and especially where the contract takes the form of a negotiable instrument, the wronged person may easily lose his remedy entirely in consequence of the innocent third person acquiring rights.

The admission of the evidence was not in any way in conflict with the rule which forbids the reception of parol evidence to contradict, vary or add to the contents of a written instrument which the parties have intended to be the record of a transaction. The respondent does not attempt to contradict, vary or add to the instrument but to impeach the consideration for it, the original obligation which he alleges to be voidable by reason of the original misrepresentation, a course always held admissible and consistent with the maintenance unimpaired of the above mentioned rule. *Goldshede* v. *Swan* (1); *Morrell* v. *Cowan* (2).

The respondent's *primâ facie* right to impeach the consideration being attacked on the ground that he

(1) 1 Ex. 154.

(2) 7 Ch. D. 151.

1917

BANK OF TORONTO v. HARRELL.

Duff J.

abandoned it by executing the renewals with knowledge of the alleged fraud, it was open to him to shew circumstances from which an agreement could be inferred that his act in doing so was to be treated as done in ignorance of the circumstances pointing to the fraud, of which he was in fact aware.

Such evidence being admissible it follows, I confess I can perceive no reason for doubt upon the point, that this issue presented a question which it was the duty of the learned trial judge to leave to the jury. In view of the difference of opinion between some of my learned brethren and myself upon the point it is right to dwell a little upon it. The question was much debated in *Dublin, Wicklow and Wexford Rly. Co.* v. *Slattery* (1), and there was much difference of opinion upon it whether a trial judge might withdraw an issue of fact from the consideration of the jury where there is conflicting evidence, but where—the onus resting upon one side—there is, to use the language of Lord Blackburn, "no reasonable evidence to rebut it." The majority of the House took the view that it is beyond the province of the trial judge where there is any evidence that is anything more than a scintilla adduced by the party on whom the onus of proof lies to withdraw the issue from the jury and the distinction between "cases where there is no evidence and those where there is some evidence though not enough properly to be acted upon by the jury," is a distinction which must be recognized. (*Paguin* v. *Beauclerc* (2).) Here the incidence of the issue was as a matter of substantive law on the appellant bank. Assuming that proof of execution of the renewals with knowledge of the facts constituting the fraud alleged would, in the absence of countervailing

(1) 3 App. Cas. 1155. (2) [1906] A.C. 148, at page 161.

evidence, justify a direction to the jury to find a verdict for the appellant bank upon this issue, it is doubly clear that as against the respondent who was not supporting the burden of the issue such a direction could not after production of evidence of the assurances referred to properly be given.

The issue ought, therefore, to have been submitted to the jury. In concrete form for the purposes of this case the question for the jury was this: Did the respondent by his conduct in executing the renewals considered in the light of the communications which had passed between him and Vanstone and from the point of view of reasonable men accustomed to business, manifest on his part an intention to abandon his right to avoid the obligation he had *ex facie* undertaken in favour of the bank in such a way as to lead Vanstone, in other words, the bank, to believe that he had made that choice? This form of the question, I may say in passing, is based upon the judgment of Lord Blackburn in *Scarf* v. *Jardine* (1), at pp. 360 and 361, a case of a somewhat different character but which Lord Blackburn held to be governed by the principles expounded in the judgment of the Court of Exchequer in *Clough* v. *London & North Western Railway Co.* (2); a judgment which Lord Blackburn mentions was written by himself although delivered by Mr. Justice Mellor. In *Codling* v. *Mowlem & Co.* (3), at pp. 66 and 67, Mr. Justice Atkins applies the judgment of the Court of Queen's Bench in *Curtis* v. *Williamson* (4), at page 59, in which it is stated that "in general the question of election can only be properly dealt with as a question of fact for the jury."

This question was neither in substance nor in form

(1) 7 App. Cas. 345.
(2) L.R. 7 Ex. 26, at page 34.
(3) [1914] 2 K.B. 61.
(4) L.R. 10 Q.B. 57.

1917

BANK OF TORONTO v. HARRELL.

Duff J.

submitted to the jury as one of the specific issues on which they were asked to pass. And it cannot be contended that any decision upon it is involved in the general verdict because the learned trial judge's charge leaves it almost untouched; indeed, the one observation directly pointed to the question, namely, that the defendant was bound to elect within a reasonable time, is an observation which cannot be supported by authority (1), at p. 35.

It is quite true that the jury finds in the answer to one of the specific questions submitted that the respondent was induced to execute the renewals upon the assurances already referred to; but the ultimate question involved in the issue of election or no election, which was a question for the jury, is not dealt with.

It follows therefore that there must be a new trial. It cannot be said that the Court of Appeal was invested with authority to give judgment for either the plaintiff or the defendant and that one or the other of them has made out a case entitling him to such a judgment.

Any power possessed by the Court of Appeal to give judgment in this case is derived from Order 58, Rule 4, which enables the court on an appeal to "draw inferences of fact and to make such further or other order as the case may require." This rule has been the subject of a good deal of discussion and it must be taken as settled that it applies to the case of an appeal from a judgment after trial by a judge and jury, *McPhee* v. *Esquimalt and Nanaimo Railway. Co.* (2); *Dominion Atlantic* v. *Starratt* (not reported); and that it enables the court in cases in which, although there was some evidence for the jury (and the trial judge consequently would be obliged to give effect to the verdict), to give judgment either against or in absence of a find-

(1) L.R. 7 Ex. 26.

(2) 49 Can. S.C.R. 43.

ing on the whole case or on a particular issue involved in favour of the party on whom the burden of proof does not lie on the ground that no reasonable view of the evidence could justify a verdict in favour of the party on whom the *onus probandi* falls. That is settled by the decision in *McPhee's Case* (1) (see p. 53) and the authorities therein referred to.

But has the court power under this rule to give judgment in favour of the party on whom the law casts the burden of proof?

The discussion of this question requires some reference to the senses in which the term "burden of proof" is employed. These are conveniently indicated in the treatise on evidence in Lord Halsbury's Collection, vol. 13, at pp. 433 and 434, in the following paragraph:—

> In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him. * * *
>
> The burden of proof, in the sense of adducing evidence, on the other hand, is a burden which may shift continually throughout the trial, according as the evidence in one scale or the other preponderates. This burden rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were adduced by either side. In other words, it rests, before any evidence whatever is given, upon the party who has the burden of proof on the pleadings, *i.e.*, who asserts the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence were adduced by either side.

As regards the issue of election raised by the appellant bank in answer to the respondent's defence of fraud, the burden of proof was cast by the pleadings upon the former, but the burden of proof in the second of the two senses indicated in the passage just quoted,

(1) 49 Can. S.C.R. 43.

1917

BANK OF TORONTO v. HARRELL.

Duff J.

would have been shifted by proof of the execution of the renewals coupled with an admission of the respondent's knowledge of the fraud at the time of the execution of them. These facts, however, being coupled with further evidence, the evidence of the assurances alleged to have been given by Vanstone, the onus remained upon the appellant bank in the first sense to establish to the satisfaction of the tribunal of fact that the respondent had elected not to raise the defence he now relies upon. The jury has in fact accepted the respondent's testimony as to the assurances and I have already said sufficient to shew that, in my judgment, these assurances being treated as proved there was a question which the jury might not unreasonably find in favour of the respondent; and I am satisfied that on the same hypothesis a verdict in favour of the appellant bank if the jury had so found could not have been set aside as unreasonable.

Such being the circumstances of this particular case the Court of Appeal could not consistently with sound principle give judgment in favour either of the appellant bank or of the respondent.

I add for the purpose of avoiding a misconception that it is unnecessary to express an opinion as to the power of the Court of Appeal to give judgment in favour of the appellant bank on this issue (in respect of which the onus, in the first of the senses above mentioned, was cast upon it by the pleadings) if the correct view had been that there was no reasonable evidence to outweigh or bring to an equipoise the considerations which from the facts alone of the execution of the renewals and the respondent's knowledge of the fraud would require the inference to be drawn that the respondent had elected to abandon his remedy. I

should be disposed in such a case to apply the reasoning of Lord Blackburn in *Dublin etc. Rly. Co.* v. *Slattery*, (1) at pp. 1200 and 1202, but as the point does not arise I express no decided opinion upon it. I may add that the rule as to the burden of proof to which I have just referred is admirably illustrated in the judgments of Brett LJ. in *Pickup* v. *Thames Ins. Co.* (2), at page 599; in *Ajum Goolam Hossen & Co.* v. *Union Marine Ins. Co.* (3), at page 366; and *Lindsay* v. *Klein* (4), at page 204.

ANGLIN J.—The Rex Amusement Co. was in financial difficulties. The defendant, on being secured by a chattel mortgage on its furniture and accessories (which, however, were subject to unpaid vendors' liens) agreed, in March, 1914, to make in its favour a promissory note for $10,000 to be discounted by the plaintiff bank. In addition to the lien-holders the firm of Campbell & Wilkie were also large creditors of the company and the bank was interested in the liquidation of their claim. The value to the defendant of his chattel mortgage security would depend upon the claims of the lien-holders being discharged or substantially reduced. He asserts that as an inducement to him to give the company his note he was given by the bank manager, Vanstone, an assurance that no part of the proceeds of it should be applied on Campbell & Wilkie's account. In violation of that assurance (if given) $5,000 of those proceeds was immediately so applied. The defendant, however, was afterwards apprised of that fact and with full knowledge of it, in February, 1915, he renewed the company's note for a smaller amount to which the bank's claim had been reduced by payments in the interval. In his evidence at the trial he alleged that

(1) 3 App. Cas. 1155.
(2) 3 Q.B.D. 594.
(3) [1901] A. C. 362.
(4) [1911] A. C. 194.

1917

BANK OF TORONTO v. HARRELL.

Anglin J.

he gave this renewal on the faith of a promise by Vanstone that he would protect him against liability on it. Concurrently with the giving of this renewal, however, the defendant obtained from the company's landlords an undertaking that they would collect the company's earnings, that after making necessary disbursements for expenses and on account of lien payments and taking for themselves $1,000 a month on arrears of rent, they would hand any balance of the net receipts to the defendant to be applied on his chattel mortgage, and that after their arrears of rent should have been reduced to $6,000 they would distribute the net receipts *pro ratâ* between the two accounts—their own and the defendant's. At this time the defendant appears to have acted in reliance on the payments which he expected to receive under this arrangement sufficing to meet his liability on the note. This expectation was not realized, and in August, 1915, the company being again on the verge of an assignment, the defendant signed the renewal note sued on for $6,448. On the occasion of this renewal he saw not Vanstone but Mr. Ball, the manager of the main office of the bank at Vancouver. His own account of this interview shews that he was fully cognizant of the payment of $5,000 which had been made to Campbell & Wilkie, as he claims in breach of the original understanding which he had with Vanstone, and that he asserted that he had been thereby relieved from liability on the note. Yet he gave a renewal note payable on demand, no doubt in the hope that money to meet it would be forthcoming under the arrangement with the landlords.

Probably because the defendant's advisers appreciated the legal obstacle in the way of attempting to establish by oral testimony anything in the nature

of an agreement by Vanstone with the defendant inconsistent with the liability evidenced by his note, the only defence pleaded was that the note had been procured by fraudulent misrepresentation.

This action was tried by a jury. Under instructions that they might return a general verdict and were not obliged to answer the questions put to them (although the learned trial judge expressed his opinion that it was advisable that they should do so) the jury returned the following verdict:—

1. Was the making of the note induced by any representations made by Vanstone to Harrell? 7 in favour, 1 opposed.

2. If so, were such misrepresentations false to the knowledge of Vanstone and made with intent that Harrell should act on them? 6 in favour, 2 opposed.

3. If so, what were such representations? Give full particulars. That Vanstone intended to allow part of the money obtained by loan to be paid to Campbell & Wilkie after promising not to do so.

3a. Did Harrell sign the note relying on such representations? Not answered.

4. After Harrell became aware that such fraudulent misrepresentations had been made, was he induced to renew the note by any promises in reference to his liability made by Vanstone with the intention that Harrell should act upon them? 6 for, 2 opposed.

5. If so, give details of such promises made by Vanstone. By taking Harrell's evidence here and the straightforward manner it was given, and the architect's statement that Vanstone said to him that he (Vanstone) would take care of Harrell's loan and would see that he (Harrell) was looked after. That he had taken care of Harrell so far and would still do so.

5a. Did Harrell act upon such promises? 6 in favour, 2 opposed.

6. Were Vanstone's promises fraudulent? In regard to question 5, Vanstone's promises were not intentionally fraudulent.

7. Did Ball by words or conduct or both lead Harrell to believe that Harrell would incur no liability by signing the renewal note and thereby induced Harrell to sign the note? No.

8. If "yes," did Ball, when causing Harrell to believe this, intend to hold Harrell if the bank failed to get its money from the Rex Amusement Company?

9. Did Harrell act on such belief? 8 and 9 answered by 7.

We the undersigned jury find a verdict in favour of the defendant.

For the defendant it is contended that the answers to the questions should be ignored and effect given

1917

BANK OF TORONTO v. HARRELL.

Anglin J.

only to the general verdict in his favour, because the questions are not completely answered and because, even if they were, the general verdict must prevail.

The only question unanswered is No. 3a. It was so left, no doubt, because the jury regarded it as covered by the answer to the first question. If the defendant was induced to give the note by Vanstone's representations, it would certainly seem to follow that he did so relying on them. Questions 8 and 9 were put contingently. They were meant to be answered only if the answer to question No. 7 should be "yes." It was "no." I am, therefore, unable to accept the view that the answers are incomplete.

I am also of the opinion that inasmuch as the jury saw fit to answer the questions put to it, thus informing the court of the findings of fact upon which it based the conclusion expressed in its general verdict, those specific findings cannot be ignored. If they are inconsistent with the general verdict the latter cannot be sustained.

> They have explained what they meant by their verdict and how they arrived at it, and it is on this basis that we have to consider their verdict. We must take it as we find it.

If any judgment is to be entered upon it, it must be that which it warrants when taken as a whole. That I understand to be the effect of the decision in *Newberry* v. *Bristol Tramways and Carriage Co.* (1), and *Dimmock* v. *North Staffordshire Rly. Co.* (2).

Brown v. *Bristol & Exeter Rly. Co.* (3), cited by counsel for the respondent, was a case of refusal by a trial judge to question the jury after they had returned a general verdict in order to ascertain on what ground

(1) 107 L.T. 801; 29 Times L.R. 177.
(2) 4 F. & F. 1058, at page 1065. (3) 4 L.T. 830.

they had found it—a refusal which the court held to be within the right of the learned judge and proper. See too *Arnold* v. *Jeffreys* (1), where Bray J. stated the distinction between cases in which questions are put before verdict and are answered by a jury and cases in which no questions are put until after a general verdict has been given.

Taking the term "representations" in the first and second questions and the word "promising" used by the jury in their answer to the third question, there is perhaps room for doubt whether they appreciated the difference between a misrepresentation of fact such as would constitute fraud and a breach of a mere promise or contractual undertaking. But I shall assume in the respondent's favour that they did and that they meant to find a misrepresentation of present intention on the part of Vanstone, which would be a misrepresentation of fact amounting to fraud.

On the jury's answer to the sixth question and the facts in regard to the renewal in February, 1915, as given by the defendant himself, I think that he then waived any defence which Vanstone's former conduct might have given him and elected to abide by his liability to the bank. He was then admittedly aware of the payment to Wilkie & Campbell. Any misleading or inducing effect of the misrepresentation which he says Vanstone made when the original note was given was thus removed. He has not attempted to allege ignorance of the common and well-known legal effect of such a fraudulent misrepresentation probably because advised of the futility of such an attempt. *Carnell* v. *Harrison* (2). Had he done so

(1) [1914] 1 K.B. 512, at page 514. (2) [1916] 1 Ch. 328, at page 343.

1917

BANK OF TORONTO v. HARRELL.

Anglin J.

the burden of proving such ignorance at all events would have rested upon him. It could not be presumed. No new misrepresentation is suggested. He merely alleges some sort of promise or undertaking by Vanstone, clearly contractual and contradictory of the obligation evidenced by his indorsement. No such promise or contract is pleaded. Fraud is the sole defence and the jury's sixth finding is explicit that there was nothing fraudulent in what Vanstone said or did on this occasion.

The jury has again explicitly found that there was neither misrepresentation nor promise of any kind, by words or conduct, of the bank manager, in the obtaining of the renewal note of August, 1915, which is sued upon—obviously the only finding that could be made in view of the admitted facts and the circumstances above stated under which that renewal was given. Whatever fraud or misrepresentation may have induced Harrell originally to become an indorser to the bank did not affect this last renewal. He gave it with full knowledge of all the material facts affecting the existence of his liability and in reliance not upon any representation or promises that the liability thus acknowledged would not be enforced against him, but upon the outcome of an arrangement as to which he had knowledge and means of knowledge quite as complete as had the bank manager.

His acts in renewing the note on this and the former occasion were unequivocal and amounted to communications of his election not to repudiate his liability. *Scarf* v. *Jardine* (1). On each occasion the bank, on the faith of what he did, changed its

(1) 7 App. Cas. 345, at page 360.

position by extending the time for payment by the maker of the note.

The seventh finding of the jury like the sixth is inconsistent with a general verdict for the defendant based on fraud—the only defence raised on the pleadings or at the trial. Notwithstanding that general verdict, applying the doctrine of the *Newberry Case* (1), upon the verdict as a whole, judgment should, in my opinion, be entered for the plaintiffs.

But if the general verdict alone should be considered I am convinced that it must be set aside because there is no evidence to support it. It is also perversely opposed to the direction of the learned trial judge, who expressly instructed the jury that they could return a general verdict for the defendant only if they should find in his favour all the facts covered by the questions put to them. Upon the defendant's own story it is too clear to admit of doubt or controversy that when he signed the renewal of February, 1915, he elected to waive any defence that earlier misrepresentations by Vanstone might have given him. On his own version of his interview with Ball it is obvious to me that he then abandoned any idea of repudiating liability either because of alleged misrepresentations or of alleged promises made by Vanstone—which he says Ball had characterized as "foolish things"—and accepted the position of maker of the note liable to the bank in the hope and expectation that under his arrangement of February with the Amusement Company's landlords the bank's claim would be satisfied out of the proceeds of the company's business—thinking, as he puts it, "that everything was all right." Any other than a verdict for the plaintiff would, in my opinion, be so palpably perverse that it could not stand for a moment.

(1) 107 L.T. 801.

1917

BANK OF TORONTO v. HARRELL.

Anglin J.

Under these circumstances, having regard to the power conferred on the Court of Appeal by Order 58, r. 4, of the Supreme Court Rules of British Columbia, 1906, to give judgment *non obstante veredicto* for one of the parties where no reasonable view of the evidence could justify any other result, and it is satisfied that it has all the evidence before it—a power, no doubt, to be exercised sparingly and with caution (see *McPhee* v. *Esquimalt & Nanaimo Rly. Co.* (1), and *Skeate* v. *Slaters* (2), the proper course in the present case, in my opinion, is to order the entry of judgment for the plaintiff. Indeed, I strongly incline to the view that the learned trial judge should have directed the jury to return a verdict for the plaintiff.

I am, for these reasons, with respect, of the opinion that this appeal should be allowed with costs in this court and in the Court of Appeal and that the judgment of the learned trial judge should be restored, subject, however, to a variation reducing the rate of interest from 8% to 5%. *McHugh* v. *Union Bank* (3).

(3) [1913] A.C. 299.

Appeal allowed with costs.

Solicitors for the appellant: *Bird, Macdonald & Ross.*

Solicitors for the respondent: *Duncan & Duncan.*

(1) 49 Can. S.C.R. 43.

(2) [1914] 2 K.B. 429.