

Privy Council Appeal No. 33 of 1919.

The Commissioners of Taxation - - - - - *Appellants*

v.

The English, Scottish and Australian Bank, Limited - - - *Respondents*

FROM

THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH FEBRUARY, 1920.

Present at the Hearing :

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD DUNEDIN.

LORD ATKINSON.

[*Delivered by* LORD DUNEDIN.]

On the 6th June, 1917, Mr. A. Friend, York Street, Sydney, put a cheque drawn by himself on the Australian Bank of Commerce for £786 18s. 3d. into an envelope, along with some other cheques drawn by other members of his family, and addressed the envelope to the Commissioners of Taxation, George Street North, Sydney. He gave the envelope to a clerk to deliver, and the envelope was duly delivered by being placed in a box put for the purpose of receiving such letters in the Taxation Department. The cheque was in payment of an assessment for income tax and was in the following terms:—"Pay 053 or bearer the sum of £786 18s. 3d." It was crossed with the word "Bank," that is to say, generally not specially. The figures "053" correspond with the final figures on the number of the cheque, and this method of filling up a bearer cheque seems to be a common habit in Sydney. Attached to the assessment notice sent to Mr. Friend there is the following instruction:—

"Collectors will not call for payment of taxes, but the taxpayer should
(a) pay the tax at the Taxation Office, George Street North, Sydney, in cash
or bank notes, cheques, or postal notes, payable in New South Wales: or

(b) remit the same to the Commissioners at Sydney, by bank draft, payable on demand, or cheque, crossed, and marked 'Commissioners of Taxation—not negotiable'—payable in N.S.W.; or by Post Office money order, or by postal note, marked 'Commissioners of Taxation—not negotiable.' ”

It is, therefore, to be observed that in making his payment by means of a bearer cheque delivered at the office Mr. Friend was acting in strict accordance with the instructions issued. The cheque in question was stolen by some person unknown and was never cashed by the Commissioners of Taxation.

On the 7th June, a man who gave his name as Stewart Thallon entered the head office of the respondents' bank at Sydney and stated that he wished to open an account. He was received by the accountant of the bank, who went through the usual procedure of taking his name and address, which he gave at certain well-known residential chambers in Sydney, and making him sign the signature-book. Being asked how much he wished to bank, he replied "£20," and handed that sum in bank notes to the accountant. The accountant filled up a "Paid-in" slip and handed it and the money to the teller. Thallon said he would take a cheque-book, and was given one, the charge being debited to his account. He then told the accountant that every cheque he signed for cash would be accompanied by an order to pay, and the accountant added a note to that effect to be entered in the ledger account. A ledger account was opened in the ordinary form, but no enquiry was instituted to check the authenticity of the address.

On the 8th June the cheque in question was handed in with a Pay-in slip to be credited to Thallon's account, which was done. Later in the same day the cheque was cleared in the ordinary manner and was paid by the Australian Bank of Commerce. On the 9th, 11th and 12th June, three cheques for £483 16s. 6*d.*, £260 10s. 0*d.* and £50 12s. 6*d.*, respectively, drawn by Thallon, were presented for payment by persons each accompanied with an order signed by Thallon to pay. No more was ever seen of Thallon; no person of that name lived at the address given, and it may be taken as certain that the name of Thallon was an assumed one.

The present action was raised by the Commissioners of Taxation against the English, Scottish and Australian Bank, the ground of liability being conversion of the cheque. The defence was Section 88 of the Federal Bills of Exchange Act, 1909, which enacts as follows:—

"Section 88.—(1) Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

"(2) A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

There was originally another defence that the Bank was a

holder for value, but this was decided adversely to the respondents and is not now insisted on. The appellants' reply to the plea founded on Section 88 was two-fold. They said, first, that in the circumstances Thallon was not a customer, and secondly, that the Bank had been guilty of negligence in receiving payment.

The action was tried before Pring, J., who sustained the defence, holding that in the sense of the Act Thallon was a customer and that no negligence in the circumstances had been proved against the Bank. On appeal to the Supreme Court for New South Wales the decision was upheld by a majority, Sly, J., dissenting. Appeal being taken to this Board, both the points above stated were argued by the appellants. Both the points, viz., as to, Who is a customer? and, What is negligence? were the subjects of discussion in the case of *Kendall v. The London Bank of Australia* (N.S.W. State Reports, 394), and the learned Judges in the Court of Appeal import by reference their opinions in that case, which was decided on the same day as the present case.

As regards the first point, viz., whether Thallon was a customer in the sense of the Act, their Lordships do not think it necessary to say much. As to this, there is unanimity among all the learned Judges who tried both cases, the facts in Kendall's case, so far as this point is concerned, being practically the same. Their Lordships are of opinion that the word "customer" signifies a relationship in which duration is not of the essence. A person whose money has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitué and a newcomer, but between a person for whom the bank performs a casual service, such as, e.g., cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank. Thallon was, therefore, a customer, though one of short standing. (See the opinion of Lord Davey in *The Great Western Railway Company v. The London and County Banking Company* (1901, App. Cas. 414).)

The remaining point is, Was there negligence on the part of the Bank in collecting the cheque? Their Lordships say "in collecting the cheque," because that is in a slightly different phrase what the statute says, "without negligence receives payment for a customer." It is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting a cheque. In the case of *The Commissioners of the State Savings Bank of Victoria v. Permewan, Wright & Company* (19 C.L.R. of Australia, p. 478), Isaacs, J., says:—

"Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morrison's* case and relevant to the present are, (1949—8)

(1) that the question should in strictness be determined separately with regard to each cheque: (2) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make enquiry."

If there be inserted after the words "given cheque" the words "coupled with the circumstances antecedent and present," their Lordships think this an accurate statement of the law.

The question is necessarily a question of fact. If the case had been tried by a jury, it would be for the jury to determine under proper direction whether the Bank had been negligent or not. It is true that in this case there is only the finding of a Judge, and that may be reviewed on the merits, while the criterion as to the finding of a jury is not whether it is right but whether there was evidence which could support it. None the less, a finding essentially of fact will not be interfered with unless it is shown to be wrong. This was the view held in the present case by the learned Chief Justice, and their Lordships think he was justified in the way in which he approached the question. It follows that, being a question of fact, it is really impossible to lay down rules or statements which will determine what is negligence and what is not. Each case must be determined on its own circumstances. In view, however, of what was said in the case of *Permerwan (supra)*, their Lordships feel bound to say that they cannot agree with the view of the learned Chief Justice in that case where he says that the care to be taken is not less than a man invited to purchase or cash such a cheque for himself might reasonably be expected to take. This seems to their Lordships to apply an inapposite standard, for the simple reason that it is no part of the business or ordinary practice of individuals to cash cheques which are offered to them, whereas it is part of the ordinary business or practice of a bank to collect cheques for their customers. If, therefore, a standard is sought, it must be the standard to be derived from the ordinary practice of bankers, not individuals. Their Lordships think, therefore, that the evidence of bank officials in *Kendall's case (supra)* as to the practice of banks was rightly tendered and received, as indeed the Court in that case decided.

Coming now to the reasons alleged for holding the learned Trial Judge to have been wrong in holding no negligence proved, they really amount to this, that the Bank ought not to have collected a cheque for a customer who was of such recent introduction and about whom they knew nothing. There was, however, nothing suspicious about the way the account was opened. A customer, however genuine and respectable, could hardly, assuming him to start with a deposit of £20 in cash, have opened it in any other way. Was then the fact that a cheque was paid into that account for collection two days after the account was opened a circumstance of an unusual character calculated to arouse suspicion and provoke enquiry? For if it was laid down that no cheque should be collected without a thorough

enquiry as to the history of the cheque, it would render banking business as ordinarily carried on impossible; customers would often be left for long periods without available money. Now if the cheque here had been for some unusually large sum, perhaps suspicion might have been aroused. This is really a question of degree, and their Lordships cannot say that the Trial Judge was wrong in thinking that £743 was not a sum of such magnitude as to create the duty of enquiry.

If the cheque had been in different form, things might well have been otherwise. Their Lordships cannot help remarking that to a certain extent the appellants have themselves to thank for what has happened, owing to the terms of their instructions. If they had insisted that in the case of payments made at the office, as they did insist in the case of drafts sent by post, the cheques should be made payable to the Commissioners of Taxation, then there would have been something on the face of the cheque to arouse enquiry. The fact that the cheque was to bearer distinguishes this case from the case of *Permewan*. In that case, in the case of thirty-six cheques, the cheques were drawn in favour of the Commissioners, or had such markings on them as showed that they were drawn for the purpose of paying duties. This was held, their Lordships think rightly, to be a circumstance which ought to have put the Bank on enquiry when such cheques were presented by a private individual. Their Lordships do not think it necessary to consider and decide as to whether the majority or minority were right as to the other twenty-two cheques in that case, the point being whether the markings on those cheques did or did not sound such a note of alarm as ought to have put the Bank on their guard. There was here no note of warning of any kind on the cheque, and accordingly the conditions which arose in the *Permewan* case do not apply.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

THE COMMISSIONERS OF TAXATION

v

THE ENGLISH, SCOTTISH AND AUSTRALIAN
BANK, LIMITED.

DELIVERED BY LORD DUNEDIN.

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