Present: Fisher C.J., Schneider and Garvin JJ.

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THE IMPERIAL BANK OF INDIA *v.* ABEYESINGHE.

329—D. C. Colombo, 17,824.

Condictio indebiti—*Payment of a forged cheque—Claim by bank—Money paid under mistake of fact—Estoppel.*

The defendant, a Proctor, received a cheque in part payment of the consideration on the transfer of a land, which he attested as Notary Public. The cheque was drawn in defendant's favour by the alleged purchaser and was presented by the defendant personally at the Bank. On receiving payment the defendant handed the money to the vendor. It transpired that the signature on the cheque was a forgery and that the land transaction was entirely fictitious.

In an action brought by the Bank against the defendant for the recovery of the proceeds of the cheque,—

Held per FISHER C.J. and SCHNEIDER J. (GARVIN J. *dissentiente*), that the Bank was entitled to recover the money as paid under a mistake of fact.

Per GARVIN J.—The payment of the cheque on presentation is a representation by the Bank that it believed it to be a genuine cheque of its customer, and the defendant having been induced by this representation to pay the proceeds in accordance with his instructions, the money is not recoverable from him.

THIS was an action for the recovery of a sum of Rs. 2,000 and interest, being the proceeds of a cheque paid by the plaintiff Bank to the defendant in the mistaken belief that it was a genuine cheque drawn by D. S. P. Abeyewardene, one of its customers. The defendant, who is a Proctor and Notary, received a visit from one John Perera who represented himself as the owner of a land which he wished to sell to D. S. P. Abeyewardene. A few days later defendant received a letter dated November 2, 1924, signed by D. S. P. Abeyewardene. The writer instructed the defendant to prepare a conveyance of the land belonging to John Perera in favour of his uncle and informed him that he would send a cheque in part payment of the consideration due to John Perera. The defendant then received a letter dated November 3, 1924, enclosing a cheque for Rs. 2,000 in his favour drawn on the plaintiff Bank and signed D. S. P. Abeyewardene. On the day he received the cheque the defendant went to the Bank and presented it. On receiving payment he paid the money to John Perera and obtained

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a receipt. It was arranged that John Perera should come with the purchaser to complete the transaction a few days later. As they did not appear, the defendant set inquiries on foot and as a result it was ascertained that the cheque was a forgery and that the land transaction was fictitious.

The learned District Judge gave judgment in favour of the Bank, holding, *inter alia*, that there was no negligence on the part of the Bank and that the Bank was not estopped from claiming payment on account of any loss suffered by the defendant.

Hayley, K.C. (with Rajapakse), for defendant, appellant.—A holder of a bill of exchange is entitled to know on presentation or at the latest before the day of presentation is out, whether the bill of exchange will be honoured or dishonoured. (Vide *Cocks v. Masterman*[1]; *The London and River Plate Bank, Ltd. v. The Bank of Liverpool* [2] ; *Smith v. Mercer.*[3]

The duty is cast on a bank of ascertaining whether a signature on a cheque is a genuine one or not. This principle is borne out by the fact that on endorsement this duty is at an end. Then the bank is not liable even if the endorsement is a forgery. The reason for this is that although the bank has a register of the signature of its clients, it has no such register of endorsements. (Vide *the Imperial Bank of Canada v. Bank of Hamilton.*[4])

The bank is estopped by conduct. In paying the money due on the cheque in question the bank made a representation to the payee that the signature was in order. It will be noted that if a bank pays money on a cheque when there are no funds in the bank to meet it, the bank has no action. The act of the bank in honouring the cheque amounts to a representation that there are funds. (Vide *Pollard v. Bank of England.*[5])

Counsel also cited *Deutsche Bank v. Beriro* [6]; *Holt v. Markham* [7]; *Hart on Banking, at p. 429;* and *Addison on Banking, at p. 429.*

Bartholomeusz, for plaintiff, respondent.—No title can be conveyed on a forged signature (Section 24 of the *Bills of Exchange Act, 1882, Paget 466*). The ruling of the Privy Council in the *Imperial Bank of Canada v. Bank of Hamilton* (*supra*), it is submitted, entirely governs the case. Here too there was no third party to whom the defendant had to give notice, on failure of which he lost his right of action on the bill. However, apart from this, the bank is entitled to recover the money as paid under a mistake of

[1] *(1829) 9 B. & C. 902.*
[2] *(1896) 1 Q. B. 7.*
[3] *(1815) 6 Taunton 76.*
[4] *(1903) A. C. 49*
[5] *6 Q. B. 623 and Grant on Banking 85.*
[6] *(1895) 1 Commercial Cases, 123.*
[7] *(1923) 1 K. B. 504.*

fact. The money was not paid to the defendant as agent. *Kelly v. Solari*[1]; *Oates v. Hudson*[2]; *Snowdown v. Davies*[3]; *Newall et al. v. Tomlinson et al.*[4]; *Buller v. Harrison*[5]; *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* [6]; *Kerrison v. Glyn Mills Currie & Co.*[7]; *Jones, Ltd. v. Waring & Gillow, Ltd.*[8]

The cases cited by the other side have been considered in the Imperial Bank of Canada case. The doctrine that a banker should know his customer's signature has been swept away for the reason that the cleverer for forgery the more difficult is it for the banker to discover it.

Hayley, K.C., in reply.

September 27, 1927. FISHER C.J.—

The history of this case is as follows: In October, 1924, the appellant, who is a Proctor of some 32 to 34 years' standing, " was instructed by the person who had agreed to purchase a land called Uswatta to prepare a deed of transfer in respect of the said land and to pay a sum of Rs. 2,000 to the vendor one John Perera, and the said person sent the said cheque No. E 000207 to the defendant for the said purpose " (see paragraph 2 of the answer). In this way the defendant in the action, the present appellant, became an unconscious and unwilling participant in a scheme to defraud the respondent bank. The transaction in which the appellant believed himself to be involved, and there is no suggestion but that he acted with perfectly good faith throughout the matter, was a fairly substantial one involving purchase money of the amount of Rs. 10,000. He was retained by both parties to the transaction and had apparently very little, if any, previous knowledge of either of his new clients. Of the proposed vendor he says in his evidence, " I do not know John Perera. He brought me the first letter and therefore I knew he was the man concerned." Of the proposed purchaser, Abeyewardena, he said that at the time he first heard of the proposed purchase he had not had any communication with him and did not know him, and that he never saw him before he cashed the cheque.

At 2 o'clock on the same day that he received the " cheque " (November 3) the appellant took it to the bank, endorsed it, and received cash for it and paid over " the said sum as instructed by the said person to the said John Perera " (*see* paragraph 5 of the answer) whom he never saw again. On November 5 he wrote to the alleged purchaser to inform him of what he had done but he received no reply and the letter was eventually returned to him through the Dead Letter Office. On November 12 the appellant went in search

[1] *(1841) 9 M. & W. 54.*
[2] *6 Exch. 346.*
[3] *1 Taunton 359*
[4] *(1870-1) 6 L. R. C. P. 405.*
[5] *(1877) 2 Cowper 565.*
[6] *(1907) L. T. 263.*
[7] *102 L. T. 674.*
[8] *(1926) A. C. 670.*

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of Perera without success, and on November 13 he found the real Abeywardena who disclaimed all knowledge of the transaction. Next day he went to the Criminal Investigation Department, and on the 17th he went to the bank. The forger of the cheque was found and prosecuted to conviction, and on October 8, 1925, this action was begun.

The action came on for trial on July 5, 1926, and on July 9 the learned Judge of the District Court gave judgment in favour of the bank, holding *inter alia*, (1) that there was no negligence on the part of the bank; (2) that there was a representation on the part of the appellant that the " cheque " was genuine; (3) that there was no delay on the part of the bank in intimating to the appellant that the cheque was not genuine; and (4) that the bank was not estopped from claiming repayment of the money on account of their negligence or on account of any loss suffered by the appellant. The learned Judge found also, though there was no special issue as to negligence, that the " real negligence " was on the part of the appellant and that he had been " guilty of gross negligence."

This is a case of a document which is not a cheque at all. It has no shred of genuineness in it. It is a document bearing a signature which purported to be that of a person having an account at the bank, and the first question is whether the bank *qua* bank is in any special position with regard to it and in relation to the appellant.

It is said that a bank is bound to know its customer's signature. I do not think that there is any authority to support the application of that proposition to the circumstances obtaining in this case. The utmost that can be taken as established is, I think, that the proposition is good as between a bank and its customer, but in the absence, at all events, of any negligence in actually honouring the signature I do not think that any duty or obligation towards a third party in the situation of the appellant can be founded upon it.

It is contended further that in honouring the " cheque " the bank must be taken to have made a representation to the payee that the signature was genuine and is therefore liable for any action taken by the appellant on the faith of that representation.

The appellant received a document in the form of a cheque in which his name figured as that of the payee. He may have had no reason to suspect it was a forgery. On the other hand he had no definite reason for relying on its being authentic. He himself apparently had no doubts as to its genuineness. Under such circumstances can it be said that in cashing the document the bank must be taken to have represented to him that the document was genuine or to have guaranteed the authenticity of the documents? In any case, presumably, the inference of such a representation is not absolute and must in some degree be dependent on whether the holder of the document has any information or knowledge, or want

of information or knowledge, as to the origin of the document which he ought to disclose to the person to whom he presents it for payment. But a passage from the judgment of Mr. Justice Matthew in *The London and River Plate Bank v. The Bank of Liverpool* [1] was relied on in support of the contention. That passage runs as follows :—

> " It seems to me the principle underlying the decision (*Price v. Neal* [2]) is this: That if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine he could not afterwards withdraw from that position."

In *Price v. Neal* (*supra*) Lord Mansfield said :—

> " It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was in the drawer's hand before he accepted or paid it ; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills ; and then found out that they were forged ; and the forger came to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill from the plaintiff having without any scruple or hesitation paid the first ; and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendants fault or neglect."

The facts of that case show that the words " so conducted himself " in the passage quoted from Matthew J's judgment refer, as might be inferred from the words themselves, to something considerably beyond the mere honouring of the forged documents, and cannot therefore be taken to support the contention that simply and solely by paying the money in the ordinary course to the person whose name appeared as payee the bank must be taken to have represented to him that the document was genuine.

I cannot see therefore that this contention is established by any authority, and in default of authority I am not prepared to say that merely cashing the document is in itself conduct which amounts to a representation that the document is genuine.

With the question of what induced the appellant to part with the money I will deal later.

[1] *(1896) 1 Q. B. 7.*

[2] *3 Burr. 1355 ; E. R. 871.*

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The question then arises, what circumstances are there to prevent the payer from recovering the money back as money paid under a mistake of fact ? It seems to me clear that they (the bank) dealt with the appellant as principal and not as agent. He was not really an agent at all ; he was a dupe. The idea of agency was part of the scheme to which the appellant had unwittingly been made a party, but it is not suggested that he in any way made the bank acquainted with the circumstances under which he was drawing the money. He says in his evidence. " when I handed the cheque D 1 to the bank to be cashed I said nothing to the bank." No duty therefore can be imputed to them on that basis and I see no other relationship between them in consequence of which it could be said that the bank owed a duty to the appellant which they failed to perform. That being so the opinion of Lord Atkinson in *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* [1] is in point. He says:—

> " They (the authorities) seem to establish that whatever may in fact be the true position of the defendant in an action brought to recover money paid to him under a mistake of fact he will be liable to refund it if it be established that he dealt as a principal with the person who paid it to him."

And in the judgment of Lord Esher (then Brett J.) in *Newall v. Tomlinson* [2] the same view is indicated. He says:—

> " The defendants were originally liable because under a mistake they received money which they were not entitled to. They cannot get rid of that liability, unless they bring themselves within the rule as to an agent who has received money on account of his principal and has paid it over to him. It seems to me that they have failed to bring themselves within that rule. They did not receive the money for their principals. They stood with regard to the plaintiffs as original contractors."

Then it was urged that the appellant having altered his position for the worse by paying away the money it cannot be recovered. Under what circumstances has he paid away the money ? The mistake of the bank was not the proximate cause of his paying it away. He paid it away " as instructed " under a supposed but non-existent duty which came into being in his mind before he presented the cheque. The money was obtained from him by a false pretence ; he was still a victim of the original fraud and as such he pad away the money. I do not see on what principle the bank can be made to hold him harmless from the effects of the deception practised on him. He seems to me to be in much the same position as he would have been if on leaving the bank he had had the money stolen from him or if he had paid it to the forger himself.

[1] *97 L. T. 65*

[2] *(1871) L. R. 6 C. P. 405*

But there is authority for saying that the fact that he has parted with the money is not under the circumstances of the case a good answer to the demand for repayment. In *Standish v. Ross* [1] Baron Parke says :—

> " We think these circumstances form no impediment to the right to recover if the money was paid over under an ordinary mistake of fact; it could not be any bar to the recovery of it that the defendant had applied the money in the meantime to some purchase which he otherwise would not have made, and so could not be placed *in statu quo*."

Another decision in the same direction is *Durrant v. The Ecclesiastical Commissioners* [2] in which the plaintiff was held entitled to recover the money paid by him under a mistake notwithstanding that owing to lapse of time the defendants had been placed in a worse position as regards the money claimed since the payment was made. Baron Pollock in his judgment in that case says: " *Cocks v. Masterman* [3] and other similar cases proceed upon the ground of some mutual relations between the parties creating a duty on the part of the plaintiff, breach of which disentitles him from recovering."

In my opinion, therefore, inasmuch as there has been no breach of duty arising from mutual relations between the parties, no negligence on the part of the bank, no express or implied representation by them, there is no reason why they should not recover this money on the ground that it was paid by them to the appellant under a mistake of fact.

As regards (1) of the findings which I have set out above—the question of negligence on the part of the bank was not seriously raised in this court.

As regards (2) I do not think that mere presentation of the document on the part of the appellant can be taken to be a representation on his part that the cheque was genuine. He merely presented himself as the reason who was in fact designated as payee on the document.

As regards (3) the appellant found out for himself ten days after the receipt of the money that the document was not a genuine cheque. Moreover it is not contended that he was prejudiced by any want of notice.

I have already dealt with the points raised by finding (4).

As regards the finding as to negligence on the part of the appellant there is, in my opinion, some foundation for it, inasmuch as the appellant, an experienced Proctor, dealng with two strangers who were both apparently quite accessible seems to me to have rather rashly jumped to the conclusion that the matter was an ordinary *bona fide* piece of business, and if it were necessary to decide this case

[1] *3 Ex. 527. 534.* [2] *6 Q. B. D. 234.* [3] *9 B. & C. 902.*

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by applying the test of which of two innocent parties had enabled a third party to cause loss it seems to me that the appellant must bear the responsibility.

One other question was raised by Mr. Hayley for the appellant, and that was in any event his client was not liable for interest. I do not think he is liable to pay interest from the date on which the money was paid to him, but I think he is liable from the date when repayment was definitely demanded. It does not appear from the evidence that there was any definite demand until letter (P 7) which I think must be taken to have reached the appellant on March 19, 1925. I think therefore that interest should run from that date.

In my opinion this appeal should be dismissed with costs.

SCHNEIDER J.—

This appeal has come before this Bench of Three Judges, as My Lord the Chief Justice and my brother Garvin before whom it was originally argued fully were unable to agree as it its decision. My Lord the Chief Justice has kindly afforded me the opportunity of reading his judgment after the argument before this Bench. With the narrative of the circumstances of the case given by him and with his conclusions, and reasons for those conclusions I respectfully agree. I further respectfully agree with him that the money was paid by the respondent Bank to the appellant under a mistake of fact. All the authorities cited before us, with the exception of a few passages from text books on banking to show how the cases had been regarded, were decisions of the Courts of England. I presume upon the assumption that they were applicable. I accept that assumption as correct. If the question involved in this case be regarded as one in respect of a matter connected with a cheque, section 2 of the Ordinance No. 5 of 1852 would make the law of England applicable. So would the Ordinance No. 22 of 1866 if the question be regarded as one in respect of the law of Banks and Banking or Principal and Agent. But if the provisions of neither of these Ordinances have any application the authorities cited would still be applicable for the reason that this is a case according to the English law, for money had and received and is founded on the same principle of equity as the Roman-Dutch law action of *condictio indebiti*. Speaking of the English law case, said Lord Mansfield in Lady Windsor's case [1]: "It is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money." And Rolfe B. said in *Kelly v. Solari* [2]: "Wherever it (money) is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it." Grotius [3] says that the obligation upon

[1] *Sadler v. Evans—(1766) 4 Bur. Rep. 1985—1987*
[2] *(1841) 9 M. & W. 54–59.*
[3] *Introduction to Dutch Jurisprudence, bk. III. chapter 30.*

which the *condictio indebiti* is founded is closely allied to natural law and give rise to a right of reclamation of that which a person has through ignorance paid as a debt when not actually due. He proceeds to explain that within debts not due were included " what was due by anyone to a third person and not paid to the right party." Both actions being founded on the same principle, the decisions of the learned Judges of the English Courts based upon the application of that principle to cases which have arisen in modern or nearly modern times should be regarded by us not only as guides but even as binding authorities in appropriate circumstances. I would therefore accept the English decisions cited to us as authorities in deciding this case. Not one of those decisions can be said to be precisely in point, but the facts of this case appear to me exactly to meet all the requirements of the principle set forth in 1841 in Solari's case (*supra*) which was approved and followed by the House of Lords in *Jones, Ltd. v. Waring & Gillow, Ltd.*,[1] cited to us by Mr. Bartholomeusz, counsel for the respondent. In the latter case Lord Shaw differentiated the class of cases ruled by *Watson v. Russel* [2] from that class of cases decided upon the principle of refund on account of mistake of fact as expounded by Parke B. in Solari's case (*supra*). He cited with approval the following passage from the judgment of Parke B.:—

> " I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is proved, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that that fact was untrue, an action would lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, is not availing himself of the means of knowledge in his power, seems from the cases cited to have been founded on the dictum of Mr. Justice Bayley in the case of *Milnes v. Duncan* [3] and with all respect to that authority I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the facts the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally

[1] *(1926) A. C. 670.* [2] *3 B. & C. 34 ; 5 B. & C. 968.*
[3] *(1827) 6 B & C . 671.*

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speaking, he recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, not intended to have it."

Speaking of Solari's case (*supra*), Lord Shaw said:—" Since its date in 1841 it has, I believe, remained of paramount authority as part of the law of England." More recent cases have affirmed the general principle, and I refer in particular to the judgment of Lord Sumner (then Hamilton J.) in *Kerrison v. Glyn Mills Currie & Co.*[1] Taking the view that I do that the present case comes within the principle of Solari's case (*supra*) I do not think it necessary to discuss any of the other cases cited by Mr. Hayley, who argued his appeal fully and ably. Those cases can be differentiated from the present case on one ground or another. Considerations arising from the presence of agency, negligence, negotiation of an negotiable instrument or circumstances importing a duty, or that the payment had been made under a condition not communicated to the receiver, tend to differentiate them.

I did not understand Mr. Hayley to argue that there was either negligence or agency in the present case. I entirely agree, if I may say so with all respect, with the observations of my Lord the Chief Justice on those points.

The ground upon which the respondent Bank seeks to recover is that the money was paid under a mistake of fact, that is to say, that the respondent believed that the document presented by the appellant was a genuine cheque drawn on the respondent by Abeyewardene who had an account with the respondent Bank. Whereas, in fact, the signature of the drawer on the document was a forgery and the document was not a cheque at all. Upon the authority of the two cases already mentioned above and several of the other cases cited there can be no doubt as to the right of the respondent to succeed on this ground but for the special defence raised by the appellant. The substantial defence offered by Mr. Hayley was this:—The appellant is in the same position as the holder of a bill of exchange, being the payee named in the document in question which must be regarded as a cheque. He did not argue, nor could he in the face of *Jones, Ltd. v. Waring & Gillow, Ltd.* (*supra*) that he was a holder in due course. He argued that the position of the appellant when he presented the cheque for payment was identical in all respects to that of the holder of a bill of exchange as that position was described by Dean Ames of Harvard, which description was cited and adopted by Pickford L.J. in *Guarantee Trust Company of New York v. Hamey & Co.*[2]:—" The attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainer. By presentment for payment he

[1] *15 Com. Case I.*

[2] *(1918) 2 K. B. 623-631.*

does not assert expressly or by implication that the bill is his or that it is genuine." He in effect says: " Here is a bill which has come to me, calling by its tenor for payment by you. I accordingly present it for payment that I may either get the money or protest it for non-payment." Mr. Hayley stated that the respondent Bank by its conduct in paying the cheque represented that it was genuine and the appellant was induced thereby to part with the money. It would be to his detriment to be required to repay it now. I think this argument is unsustainable. The signature of the drawer on the document in question is admitted to be a forgery by which both parties to this action were deceived. Under section 24 of the Bills of Exchange Act, 1882, that signature is " wholly inoperative " and " no right can be acquired through or under it " unless the respondent " is precluded from setting up the forgery." Now he can be so precluded only if he by some act or omission intentionally caused or permitted the appellant to believe that the signature was not a forgery and to act upon that belief. (Section 114, Evidence Ordinance, No. 14 of 1895). It cannot be said that the respondent was guilty of any omission to do something he was bound to do in honouring " the cheque." Although as between the Bank and its customers the law imposes a duty on the Bank to know the signature of its customer and thereby debars the Bank from pleading as a defence to a claim by a customer that a payment had been made in *bona fide* ignorance that a signature was a forgery, I am not aware of any law which imposes that duty on a bank to all persons who present cheques for payment. No authority was cited to support that proposition and in the absence of any authority I am not prepared to accept the contention that it was the duty of the bank, even as regards the appellant to have discovered before payment was made that the signature was a forgery. There is authority to the contrary.

In the passage cited above from Solari's case (*supra*) Parke B. observed that the position that a person paying under the influence of a mistake is precluded from recovering by laches, in not availing himself of the means of knowledge in his power could not be sustained in point of law. It would seem therefore that it is not correct to say that the respondent was guilty of an omission in that the respondent did not disclose to the appellant that the signature was a forgery before the appellant parted with the money. Nor does it seem to me to be correct to say that the mere fact of payment of the money upon presentment of " the cheque " was an act on the part of the respondent by which the respondent had intentionally caused or permitted the appellant to believe that the signature was not a forgery and thereby induced the appellent to part with the money. No doubt the money was paid intentionally, but that fact alone will not disentitle the respondent to claim a refund. As pointed out in the passage cited above, if it were paid under the

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impression of the truth of a fact which is untrue it is, generally speaking, recoverable back unless it was paid without reference to the truth or falsehood of the facts, the respondent meaning to waive all inquiry into it, and that the appellant shall have the money at all events whether the fact be true or false. It is not possible to regard the money as having been paid in these circumstances, nor can I regard the statement as correct that the appellant was induced to pay the money to a third person by the fact that the respondent paid the money to the appellant. It may be that if the appellant had not received the money from the respondent he would not have paid the money to that third person probably because he would then have not had the money wherewith to pay. The facts seem to be that he paid the money because of the request that he should do so, contained in the letter which he had received, which letter was also a forgery. If there had been no such request made to him, it is obvious the appellant would have retained the money. Unless the respondent is estopped from denying that the signature on the document in question is a forgery the appellant cannot be regarded as the holder of a cheque and therefore as being in the same position as the holder of a bill of exchange as described by Dean Ames. The facts of that case are distinctly different. The document that was being considered there was a genuine bill of exchange, and the element of forgery was confined to a bill of lading which was the security for the bill of exchange. If the appellant had not parted with the money there can be no question, upon the authorities, that he would be obliged to refund the money to the respondent unless the respondent by some representation had induced him to part with the money. As I have already said, it cannot be held that the respondent had made any such representation.

I agree that the order on this appeal should be the one indicated in the judgment of My Lord the Chief Justice.

GARVIN J.—

This is an appeal from a judgment condemning the defendant to pay to the plaintiff a sum of Rs. 2,000 and interest. The principal sum of Rs. 2,000 represents the proceeds of a cheque paid by the plaintiff bank to the defendant in the mistaken belief that it was a genuine cheque drawn on them by D. S. P. Abeywardene, one of their customers. The cheque has been proved to be a forgery.

The defendant is a Proctor and Notary who has been in practice for over 33 years. Towards the latter end of the year 1924 he received a visit from a person calling himself John Perera who represented himself as the owner of an allotment of land for which he produced a Crown grant. John Perera informed the defendant that he wished to sell the property to D. S. P. Abeyewardene and

inquired whether he had received a cheque from him. The defendant said that he has received no cheque. A few days later a letter dated November 2, 1924, signed " D. S. P. Abeyewardene " reached him. The writer instructed him to prepare a conveyance of the land belonging to John Perera in favour of his uncle and said that of the sum of Rs. 10,000, which was the consideration for the transfer, he would send a sum of Rs. 6,000 or Rs. 7,000 the next morning for John Perera who was in a hurry " to enable him to attend to his emergencies."

John Perera called again and was again told that a cheque had not been received. The letter P 2, which had apparently been left at his house by a messenger next reached the defendant. This letter is dated November 3, 1924, and is signed D. S. P. Abeyewardene. A cheque for Rs. 2,000 in defendant's favour drawn on the plaintiff bank and signed D. S. P. Abeyewardene was enclosed with an expression of regret at the inability of the writer to send any more and the assurance that he would be ready with the balance by the end of the week or early the next week.

The defendant went to the bank about 2 P.M. on the day he received the cheque, which was presented and paid in the usual course. That evening about 8 P.M. the defendant in accordance with the instructions contained in the letter earlier referred to paid the money to John Perera and obtained a receipt. It was arranged that John Perera should come with the purchaser in two or three days time to complete the transaction. Neither John Perera nor Abeyewardene came to see him, and on November 12 the defendant who had to pay a business visit to Negombo took the opportunity to inquire for John Perera. He failed to find him. On the next day he went to see Abeyewardene, but did not find him at the addresses given by him. Finally he went to Hill street, where he met D. S. P. Abeyewardene and was told by him that he had not issued such a cheque and knew nothing of the matter. The defendant then gave information to the Criminal Investigation Department. In company with an Inspector of Police he went to the bank on November 17, and placed the officers of the bank in possession of the facts. But for the defendant's information the bank would have continued under the impression that the cheque was genuine.

The inquiries thus set on foot resulted in proof of the fact that the cheque was a forgery, and that it had been forged by one Zoysa.

The cheque was forged on a leaf issued by the bank and the number on the leaf had been altered to correspond to one of the numbers of the series of cheque leaves issued to D. S. P. Abeyewardene.

This exceptionally cunning scheme was conceived and contrived by a Proctor's clerk of the name of Zoysa.

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The defendant, M. Abeyesinghe, and the plaintiff bank have both unwittingly played the parts assigned to them in the scheme for obtaining this sum of Rs. 2,000. Throughout the defendant acted perfectly *bona fide*.

The learned District Judge in combating a defence of estoppel set up to the claim of the bank has denied the defendant the benefit of the plea on the ground that he was guilty of gross negligence.

No allegation of negligence was made and no issue was raised nor does the evidence appear to me to justify the conclusion that the defendant acted with gross negligence or even carelessly. He was the victim of a very unusual elaborate and cunningly contrived deceit practised on him by a person who has skilfully employed his intimate knowledge of the routine and course of business in a Proctor's office to perpetrate this fraud. Short of refusing to act for the writer of the letter unless formally introduced it is difficult to imagine any more effective method of obtaining information as to the position of the writer than the one employed by the defendant. He presented the cheque at the bank on which it was drawn by the writer of the letter. The inference which would ordinarily be drawn from the fact of payment by the bank is that there was such a person as D. S. P. Abeyewardene, that he had an account in the bank which was in funds and that the cheque bore his signature.

Now it is beyond question that the defendant presented this cheque for payment in perfect good faith.

The bank paid it in the belief that it bore the signature of their customer, D. S. P. Abeyewardene. The defendant received the money and a few hours later parted with it in accordance with what he believed to be Abeyewardene's instructions. The money is irretrievably lost.

The plaintiff and the defendant are both innocent and to neither can any actual negligence be ascribed. It is the case of one of two innocent parties seeking to shift his loss on to the shoulders of the other.

Both under the English law and under the Roman-Dutch law relief is given from the consequences of his mistake in certain circumstances to a person who has paid money under a mistake of fact.

The remedy under the English law appears to be based on the broad ground that a person who has thus mispaid money should be permitted to recover his money from the person to whom it was paid where it would be " unconscientious " of that person to resist the claim, *Price v. Neal.*[1] The action for money had and received, which was the remedy in such cases, is referred to by Lord Mansfield in the case of *Saddler v. Evans:* [2]

" It is a liberal action founded upon large principles of equity where the defendant can not conscientiously hold the money."

[1] *(1762) 3 Burrows 1355.*

[2] *(1766) 4 Burrows at p. 1987.*

The principle upon which the *condictio indebiti* is granted to a person who pays money under a mistake of fact is that no one is to be enriched at the expense or to the prejudice of another. *Maasdorp, vol. 3, page 390.*

The Roman-Dutch law commentators deal very generally with the subject and nothing which is directly applicable to a case such as this is to be found in their writings. Indeed, none of the numerous decisions of the English Courts referred to in the course of argument is directly in point.

The cases appear to fall into two classes:—(*a*) Those which refer to payments made on negotiable instruments; (*b*) Other cases of payment under a mistake of fact.

The series of cases consisting of *Price v. Neal* (*supra*), *Smith v. Mercer*,[1] *Cocks v. Masterman*,[2] and *The London and River Plate Bank, Ltd. v. The Bank of Liverpool*,[3] all relate to documents which possess some negotiability by reason of the presence thereon of two or more genuine signatures. It is contended for the respondent that the existence of this quality of negotiability is the foundation of the judgments which are only an authority for the proposition that where such " bills " are paid in the mistaken belief that they are genuine and not forgeries the money if received in good faith may not be recovered when there is an interval of time in which the position of the holder may be altered.

The case under consideration differs in that the payment was made direct to the payee and there is the further distinction that whereas in the cases referred to credit was given before the bill was presented for payment and the money received remained in the possession of the person to whom it had been paid, the defendant in this instance gave no value for the cheque and merely presented it for payment in accordance with the instructions in the forged letter referred to earlier and has parted with the money in accordance with those instructions.

The case of *The London and River Plate Bank, Ltd. v. The Bank of Liverpool* (*supra*) and the other cases of that series are relied on by counsel for the appellant as establishing that whether a banker who pays upon the forged signature of his customer be guilty of actual negligence or only of a technical falling short of an absolute standard expected of him he does by the fact of payment represent to the holder of the document that it bears the genuine signature of his client. In some of the earlier of this series of cases there are in the judgments references to negligence and the duty of a banker to know the signature of his customers. But in the case of *The London*

[1] *(1815) 6 Taunt 76.*

[2] *(1829) 9 B. & C. 902.*

[3] *(1896) 1 Q. B. 7.*

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and River Plate Bank, Ltd. v. The Bank of Liverpool (*supra*) Matthew J. expressed the view that the true principle underlying these decisions is—

> "That if the plaintiff . . . . so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine he could not afterwards withdraw from that position."

Later on in the judgment he says:—

> "In *Cocks v. Masterman* (*supra*) the simple rule was laid down in clear language for the first time that when a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once it may be the money can be recovered back; but if it be not, and the money is paid in good faith and is received in good faith and there is an interval of time in which the position of the holder may be altered the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own and if he is subsequently sought to be made responsible to hand it back."

The document with which we are concerned is a forgery and not a negotiable instrument even in the special sense in which a forgery which bears a number of genuine endorsements is sometimes referred to as a bill. It is impossible therefore to equiparate the facts of this case to the facts of any of the cases in the series referred to.

But the document was presented for payment and paid by the bank, and the money was received in good faith. There was a representation by the bank that it believed the signature to be that of their customer and whereas the question of prejudice was in the cases referred to largely a matter of conjecture, there can here be no question that as a direct result of the representation implied by payment the defendant parted with the proceeds in accordance with what he believed to be the instructions of a client. This is the extent to which reliance is placed on this series of cases.

The case of *The Imperial Bank of Canada v. Bank of Hamilton*,[1] was referred to in the course of argument. In so far as it is an authority for the proposition that the rule in *Cocks v. Masterman* (*supra*) should not be extended to other cases in which no loss had

[1] (*1903*) *A. C. 49.*

been sustained by reason of want of notice of the mistake under which money was paid it is sufficient to observe that it is not contended that this is a case to which that rule is applicable. The facts of *The Imperial Bank of Canada v. Bank of Hamilton* (*supra*), however, bear no resemblance to those with which we are here concerned. The alteration of the defendant's position in that case was in no sense influenced or occasioned by the fact of payment—it had taken place before the cheque was presented for payment—nor was any prejudice sustained by the absence of prompt notice of the discovery of the mistake.

The respondent's contention is that in the case of money paid under a mistake of fact the money was always recoverable unless where it was paid on a negotiable instrument the case falls within the rule in *Cocks v. Masterman* (*supra*), and in other cases of money paid under a mistake unless it was paid to and received by the payee as agent and the agent had paid the money over to his principal or otherwise materially altered his position to his prejudice in reliance on the payment before he received notice of the mistake.

With the first part of this contention we are not concerned. This is not a case to which the rule in *Cocks v. Masterman* (*supra*) is applicable.

The latter part of the proposition appears to be too wide a statement and takes no note of the money cases in which the action has failed though the money was paid to a person who received it for himself and as principal.

It purports to be based on the following passage in the judgment of Atkinson L.J. in the case of *Kleinwort, Sons & Co. v. Dunlop Rubber Co.*[1]:—

> " They (the cases cited) seem to establish that, whatever may in fact be the true position of the defendant in an action brought to recover money paid to him under a mistake of fact he will be liable to refund it if it be established that he dealt as a principal with the person who paid it to him."

This passage must, I think, be read as a statement of the law applicable to the special state of facts with which their Lordships were concerned. There was no suggestion that the plaintiff had been guilty of any breach of duty or that any representation had been made nor were any special circumstances relied on by way of defence material to this aspect of the case beyond the allegation of a payment over before notice. When this case went up in appeal the Lord Chancellor (Loreburn) in a judgment, in which Lord James of Hereford concurred, declined to deal with the contention that the defendants were really principals and were therefore liable to repay whether they had paid the money over or not. His Lordship preferred to rest his decision on the indisputable ground " that it

[1] (*1907*) *97 L. T. 263.*

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money is paid under a mistake of fact and is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received."

As Sir John Paget says in his work on the Law of Banking: "It is somewhat difficult to justify the negation to the man who takes as principal of any such protection as is afforded the agent by alteration of position."

There undoubtedly are cases in which money paid by mistake has been held to be irrecoverable though the money was received in the character of principal or when the recipient was in fact an agent though the fact of agency was not known to the person who paid the money.

It is sufficient to instance *Skyring v. Greenwood* [1]; *The Deutche Bank v. Berio* [2]; and *Holts v. Markham*.[3]

The position of the defendant in this case is akin to that of an agent. He did not receive this money with the intention of keeping it for himself. He collected the proceeds of this cheque to be passed on to John Perera in accordance with what he believed to be the instructions of D. S. P. Abeyewardene.

He believed that the cheque bore the genuine signature of Abeyewardene and the bank passed it as the genuine cheque of their customer Abeyewardene.

It is contended that *Skyring v. Greenwood* (*supra*) *and Deutsche Bank v. Beriro* (*supra*) proceeded upon a breach of duty on the part of the person who mispaid the money. But in the later case of *Holts v. Markham* (*supra*) where no breach of any duty was alleged both these cases were relied on as authority for the proposition that where the plaintiff by his conduct induced a belief in the mind of the defendant that he might treat the money as correctly paid he was estopped from pleading that it was paid under a mistake where the defendant acting on the belief had parted with the money.

In the *Deutsche Bank v. Beriro* (*supra*), Lindley L.J. after holding that the plaintiffs would be entitled to recover if it were not for the other facts, observes:—

> "We have to see whether it would be just to compel the defendants to return the money which they had received and to do what we have to consider what has taken place."

His Lordship then proceeded to discuss the question of the admissibility of certain correspondence which he held to be admissible and proceeded as follows:—

> "If the correspondence is admitted, it is quite obvious that the defendants accounted to Benatar for the money *bona fide* before they were informed of the mistake and

[1] *(1825) 4 B. & C. 281.* [2] *(1895) 1 Com. Case 255.*
[3] *(1923) 1 K. B. 504.*

> that he paid it away to his principals, or vendors— it is not clear which they were. The defendants, therefore, cannot recover the money back from Benatar. It would be the reverse of justice, equity, and good sense to make the defendants responsible for the plaintiffs' blunder . . . . ."

Where a cheque or a bill is paid by a bank under the mistaken belief that the customer's account is in funds to meet them, the money so paid cannot be recovered from the payee who on the facts of their representation has been induced to part with it (*Chambers v. Miller*,[1] and *Pollard v. The Bank of England*[2]).

The ground upon which the judgment in *The London and River Plate Bank, Ltd. v. The Bank of Liverpool* (*supra*) and the earlier cases of that series proceeds is that the banker or other payer has made a representation that they considered the bill to be genuine, and where such a representation has been made to an endorsee whose rights against previous endorsees may be prejudiced by want of notice of dishonour, the Court will not inquire whether or not any actual loss was sustained.

In this case both parties were deceived into the belief that the cheque bore the genuine signature of D. S. P. Abeyewardene. In this belief the defendant presented it for payment and received the money not for himself but to be disposed of in accordance with his instructions. There can be little doubt that the fact that it was paid confirmed him in his belief and induced him to dispose of the money in accordance with those instructions. The money is irretrievably lost and that loss would not have been sustained but for the mistake of the plaintiff in paying the cheque and thereby inducing in the mind of the defendant the belief that the cheque was genuine and that it was paid out of the funds to the credit of his correspondent.

In presenting the cheque to the plaintiff bank he did no more than an endorsee who presents a bill to those upon whom it is drawn as in the cases of *Price v. Neal* (*supra*) *and Cocks v. Masterman* (*supra*). It cannot be said that he did anything which induced the belief that the cheque bore the genuine signature of D. S. P. Abeyewardene.

These being the circumstances the plaintiff who has by his mistake sustained a loss should not in my judgment be permitted to shift that loss on to the defendant. The money paid under a mistake was received in good faith and in good faith paid out to John Perera.

It was urged that *Durrant v. The Ecclesiastical Commissioners*,[3] was conclusively in favour of the plaintiff's right to succeed. But the facts and circumstances of that case are in material particulars different. There was a common mistake, but it was a mistake for

[1] *(1862) 13 C. B. N. S. 125.* [2] *(1871) L. R. 6 Q. B. 623.*
[3] *(1880) 6 Q. B. D. 234.*

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which the defendants were primarily responsible, and there is nothing to show that the plaintiff had any reason to suppose that the amount demanded of him as tithes included a sum as tithes of a land of which he was not in possession. Moreover there was " no conduct on the part of the plaintiff such as would disentitle him from recovering."

Whereas in this case though the result of a mistake it was the implied representation that the cheque was genuine which induced the defendant to pay over the proceeds.

The facts of this case cannot be equiparated with those of any of the cases reviewed above; nor is there a single case which can fairly be said to be an authority decisive of the case under consideration.

It is the simple, and I assume not unusual case, of a business man who receives in the course of business a letter from a person with whom he has had no previous dealings seeking to employ him or entrust some commission to him and enclosing a cheque on a local bank the proceeds of which are to be applied in connection with the business proposed. Before acting as suggested in the letter he takes the precaution of presenting the cheque at the bank. It is paid and the money thus received is applied in accordance with instructions. It would not have been so applied had not the bank represented that it considered the cheque to bear the genuine signature of its customer. It is found later that the letter as well as the cheque are forgeries and that the money applied in terms of the letter is irretrievably lost. The recipient of the latter neither has the money in his possession nor has he had the benefit of the money. As matters stand it is the bank upon whom the loss has fallen.

Upon what principle is the loss which the bank has sustained through its mistake to be passed on to the payee of the cheque ?

It is said that the broad principle upon which such questions should be decided is that which is enunciated by Parke B. in *Kelly v. Solari*[1] in the following terms:—

> " I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is proved, which would entitle the other to the money, but which fact is untrue, an action would lie to recover it back, and it is against *conscience to retain it:* though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake."

But there is no question here of an unconscientious claim to retain money paid by a mistake. The money paid by the bank is not in the possession of the defendant nor has he derived any benefit directly or indirectly from the money so paid.

By the cunning contrivance of the forger the money paid out by the bank has passed into his possession or that of his accomplice

[1] *9 M. & W. 54–59.*

and is irrecoverable. A loss has been sustained; which of these two innocent parties is to bear it? As between the bank and the defendant, the latter has done nothing beyond presenting the cheque for payment or dishonour. In so acting he has done no more than any endorsee of a cheque does when he presents a cheque for payment. He has done nothing to induce the bank to accept the signature on the cheque as the genuine signature of its customer. Nor was it of any concern to the defendant whether it was paid or dishonoured. Indeed it would have saved him much, had it been dishonoured. As a result of its own mistake the bank has sustained a loss. I am unable as at present advised to see why or upon what principle the defendant should be called upon to relieve the bank of that loss or how it can be considered unconscientious in him to claim that the loss should remain where it now lies and not be shifted on to his shoulders.

For these reasons I think this appeal should be allowed and the plaintiff's action dismissed with costs to the defendant both here and in the Court below.

Appeal dismissed.