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MEYAPPA CHETTY *v.* SOMASUNDRAM CHETTY.

D. C., Kandy, 13,035.

Lost cheque—Action by holder in due course against drawer—Right of defendant to plead that the cheque was not filled in by his authority—Estoppel by negligence.

S, having an account in the Kandy branch of the Mercantile Bank of India, signed a number of cheques in blank and left the cheque book in the custody of his agent with authority to fill in the cheques when required. The agent kept the cheque book in a box secured by a lock in his shop at Kandy. Some one tore a cheque out of the book, filled it in favour of A or order, and A carried it to Colombo, where plaintiff, for a consideration paid by A, cashed it for him on the day after it was drawn, and then presented the cheque for payment at Kandy. The banker not being placed in funds referred the cheque to the drawer, when it was discovered that the cheque in question had been inproperly abstracted from S's cheque book and filled in, without his or his agent's knowledge or approval.

Held, per BONSER, C.J., in an action brought by the holder against S, that the banker not having cashed the cheque, the defendant had done nothing to estop him from pleading the fact that the cheque was not filled in by his authority, direct or indirect.

Per BROWNE, A.J.—There is nothing proved against the defendant: not an estoppel by negligence in the transaction itself; nor in leading the third party into mistake; nor in neglecting some duty to the third party or the public.

The proximate cause of the fraud was not negligence on the part of the defendant, but theft on the part of an unknown person.

THE defendant in this case was sued upon a cheque said to have been granted by him to one Abdul Rahiman and endorsed by the latter to the plaintiff. The defendant pleaded forgery.

The District Judge gave judgment for plaintiff as follows:—

"This is an action on a cheque signed by the defendant for Rs. 2,800. The parties are, as their names indicate, Chetties. The plaintiff resides in Colombo and the defendant in Kandy. The facts I find are these. The defendant had an account in

the Mercantile Bank of India in Kandy. In accordance with a rule of the bank that Chetties and others who cannot sign their names in English should sign their cheques before the agent and have them initialled by him, the defendant so signed a number of blank cheques and left his cheque book, as was his wont, with his kanakapulle to be filled up and issued as occasion arises. The cheque in question was the last of several cheques so signed, and was with its counterfoil abstracted from the cheque book. There is no proof by whom it was abstracted.

" The cheque book was always kept by the kanakapulle in a cash box locked. Some person tore the cheque and counterfoil out of the book unknown to the kanakapulle. It is dated 21st January, 1899, and is in favour of K. Abdul Rahiman Saibo, or order. It was endorsed by the payee and delivered on 21st January to the plaintiff, who cashed it and received Rs. 13 as his commission. I do not believe that Abdul Rahiman Saibo received the cheque from the defendant's kanakapulle Kanapadi for the Rs. 2,800 he had given him on 10th December, 1898, for safe-keeping. Abdul Rahiman Saibo received the cheque post-dated. It was given to him, he says, on the 20 h January. The plaintiff had no account in any bank in Kandy. Not wishing to pay commission on it, he delivered it to a firm in Kandy on 22nd January. The cheque was presented for payment at the bank in Kandy on the 24th January and was dishonoured. When it was presented, Mr. Bishop, the Agent of the Bank, sent for the defendant to ask him to place his account in funds to meet the cheque. Kanapadi thereupon went to the bank and was shown the cheque. He returned and informed the defendant, and both of them returned to the bank with the cheque book and informed the agent the cheque had not been issued by the defendant. The cheque book was shown to Mr. Bishop, who found the counterfoil missing.

" It is pleaded that the defendant is not liable because he had no notice of dishonour. Notice was, in the circumstances, unnecessary. The drawer had not sufficient funds in the bank to meet the cheque. Further, he countermanded payment. He told the agent of the bank that the cheque had not been issued by him. It was unnecessary to give him notice of his own act.

" I have now to consider in the light of my findings which of the two innocent persons is to bear the loss. The plaintiff is a holder in due course. A holder in due course is a holder who has taken a bill complete and regular on the face of it under the following circumstances, namely, (*a*) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (*b*) that he

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took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it (section 29 (1), Bills of Exchange Act, 1882). The cheque was good in every respect on the face of it when plaintiff received it. It was not stale. It was the act of the defendant in signing blank cheques and keeping them which has led to the loss. He must bear it.

" I give the plaintiff judgment as claimed and costs."

Defendant appealed.

Wendt, Acting A.-G., for appellant.—The cheque sued upon was post-dated. By Ordinance No. 3 of 1890, section 20 (4), it is provided that if any person issue a cheque which shall bear date subsequent to the date on which it has been issued without being duly stamped as a bill or note, the person issuing shall forfeit a sum of money not exceeding Rs. 200; and that no person who knowingly takes such a cheque shall be entitled to recover any money thereon. Plaintiff's action must therefore fail. The cheque is proved to have been stolen, and defendant cannot be made liable thereon (*Baxendale v Bennett, L. R. 3 Q. B. D. 525*). Defendant is not estopped by any negligence from disclaiming responsibility (*Scholfield v. The Earl of Londesborough, L. R. 1 Q. B. D. 536*). Defendant did not authorize any person to put the cheque in circulation. The cheque book was in his drawer, and the cheque now in suit was abstracted, filled in, and passed on to Abdul Rahiman. He endorsed it to plaintiff. The District Judge believes that defendant's kanakapulle did not hand the cheque to Abdul Rahiman. In these circumstances, the principle conceded in the *London and South Western Bank v. Wentworth* (*L. R. 5 Exch. Div. 96*) applies, and discharges the defendant.

Sampayo, for respondent.—According to the evidence on record the cheque book was handed with the signatures duly put on by the defendant to his kanakapulle. There is nothing to show that the cheque was stolen, though the kanakapulle may suggest it for reasons best known to him. The proper verdict on this part of the case should be that Abdul Rahiman received it from the kanakapulle. But supposing the cheque was stolen, the question is, which of two innocent parties should suffer. In *Young v. Grote* (*4 Bing. 253*) it was held that that party who led the third party into mistake must sustain the loss. In *ex parte Swan, L. J. 30 C. P. 113*, the ruling in *Young v. Grote* was extended to joint stock shares. Defendant is liable for the negligence of his kanakapulle.

Wendt, Acting A.-G., replied.

Cur. adv. vult.

16th October, 1900. BONSER, C.J.—

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This is an appeal which raises an interesting question as to the rights and liabilities of drawers and holders of cheques. The facts as found by the District Judge are as follows:—

The plaintiff is a Chetty who resides and carries on business in Colombo. The defendant is also a Chetty, and he resides and carries on business in Kandy. The defendant had an account with the branch of the Mercantile Bank of India at Kandy, and as it is difficult for bank managers to recognize the signatures of their customers when they are written in Tamil characters, a practice has sprung up of the customers signing blank cheques in the cheque book in the presence of the manager, who then initials the signatures, so that there is no difficulty when a cheque drawn by a customer is presented in its being recognized as a cheque signed by that customer. The defendant had an account with this bank and signed a number of cheques in blank. The cheque book was given by him into the custody of his kanakapulle, Kanapadipulle. That kanakapulle kept the cheque book in a box in the boutique at Kandy, the key of which was kept by himself, or in his absence from the shop by his fellow-kanakapulle. The kanakapulle had authority from defendant to fill in these blank cheques if it was necessary to do so, and to pay moneys on account of an estate which belonged to the defendant. On the 21st January, 1899, a man named Abdul Rahiman Saibo presented himself at the plaintiff's boutique in Colombo with a cheque which was payable to himself, or order, for the sum of Rs. 2,800. This cheque was one out of the defendant's cheque book, which had been signed by him in blank. The man was unknown to the plaintiff, but the plaintiff cashed the cheque for him taking the commission of Rs. 13 for so doing. Fortunately for the defendant, when the cheque was presented at the bank at Kandy, there were not sufficient assets in the bank to meet the cheque. This necessitated a reference to the defendant. The defendant was communicated with, and it was ascertained that this cheque had been abstracted from the defendant's cheque book in a way which showed that the intention of the person who abstracted it was to conceal his act. The last signed cheque was abstracted, and not only was the foil taken, but the counterfoil also, so that on a cursory inspection of the book the fact that a cheque had been abstracted would not be noticed. The cheque had not been filled up by defendant or the kanakapulle, who had authority to fill it up, nor was it filled up directly or indirectly with the knowledge or approval of the defendant or his kanakapulle. So that the person who filled this

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cheque in with the date and amount committed the crime of forgery in doing so.

The question is whether, in the circumstances, the defendant is liable to the plaintiff upon this cheque. Now it seems to me that the case is governed by the principles laid down in the case of *Baxendale v. Bennett*, which was decided by the Court of Appeal in England in 1878 (*3 Q. B. D. 525*). The very case is put in argument by Lord Justice Bramwell, and he answers it in the negative. He puts this question: " Suppose the defendant had " signed a blank cheque with no payee or date or amount and it " was stolen, would he be liable or accountable not merely to his " banker the drawee, but to a holder?" He answers that in the negative, as I have said. He says that the cases of *Young v. Grote*, *4 Bing. 253*, and *Ingham v. Primrose*, *28 L. J. C. P. 294*, went a long way to support the affirmative answer to the question, but held that *Ingham v. Primrose* ought not to be followed—it was bad law—and that *Young v. Grote* only applied to cases between bankers and customers.

In the present case, if there had been sufficient assets in the bank to meet the cheque and the banker had cashed it, the position of affairs would have been different, and the case might have come within the principles of *Young v. Grote*. But it appears to me that in this case the defendant has done nothing to estop him from pleading the fact that the cheque was not filled in by his authority, direct or indirect. It seems to me that the fact that the cheque book was in the custody of his servant makes no difference. The custody of the servant is the custody of the master, and if it be the fact—as in this case it is—that the cheque was stolen from the servant, it is just the same as if it was stolen from the master direct. That being so, I am of opinion that the judgment of the Court below is wrong and should be reversed.

BROWNE, A.J.—

When a cheque, which was undoubtedly signed by the defendant in the first instance, is found in circulation, I would consider that the onus lies on the defendant to show that he is not liable thereon to a *bonâ fide* holder for value and without notice. As, however, it is contemplated of cheques that they shall be speedily presented for payment and so should not form part of the currency of the country like other bills of exchange, that onus may be of lesser degree than would be necessary in the case, if any other bill of exchange; *i.e.*, the Court in any case when there had been delay in presenting the cheque for payment or any other element of suspicion—*e.g.*, reckless discounting for

persons unknown—might question the holder as to his *bonâ fides* when he took what for any such cause would have made him act with caution, rather than require the strictest proof by the drawer that he had not made nor issued it, as the primary essential in the proof. The learned District Judge in the present case has in the conflict of evidence between the employees of defendant who had signed blank cheques in their charge and the person who cashed this cheque with plaintiff, preferred the evidence of the former that they had not issued the cheque, but that it must have been purloined from the cheque book by another employee, Meyandi, who would appear to have made himself scarce thereafter, or else by the plaintiff's endorser.

I cannot say the District Judge was wrong, for though I would have desired more evidence as to when it could have been possible for either of those two men or any other to get access to the cheque book, which was kept locked up in the custodian's strong box, still the incidents that the counterfoil also was removed from the book and that the one removed was the last in the book of those which had been signed beforehand for issue when necessary, so that the chances of detection might be lessened, prove to me that there was a criminal act which, and not negligence, was the proximate and effective cause of the fraud. (*Baxendale v. Bennett, 1878, 3 Q. B. D. 525*).

On the one hand, I would consider this case as not within *Young v. Grote, 4 Bing. 254*, for that decision depended on the contract between the customer and banker. On the other hand, a cheque not being, as I have said, so absolutely part of the currency of the country as an ordinary bill of exchange, I regard the principles of *London and Southern Western Bank v. Wentworth (1889), 5 Exch. Div. 99*, to be inapplicable in all their strictness.

The question of fact arises as in *Baxendale v. Bennett*—did the defendant issue this cheque intending it to be used? To make him liable, I would consider that intention must have been constant and absolute in him from the time he signed it, which is here disproved by, as the learned District Judge believes, first, the entrusting of it to his agents for a limited purpose; and secondly, the criminal abstraction of it from them. There is nothing in my judgment proved against him, no estoppel by negligence of the three-fold character specified in *Arnold v. Cheque and City Bank (1876), 1 C. P. D. 579*, viz., (1) in the transaction itself, (2) the proximate cause of leading the third party into mistake, and (3) the neglect of some duty owing to the third party or the public. Not negligence, but criminality, as I have said, was the proximate

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cause. If there were negligence anywhere, I would say it was rather to be attributed to plaintiff, who for the discount profit he gained thereby discounted the cheque for a person previously unknown to him without inquiry of or guarantee by any other person. He took the risk of the discounter's right and title as holder, and in my judgment he must bear that risk and have his action dismissed with all costs.