H. C. OF A. 1906.

LANGLEY v. FOSTER.

with liberty to apply. Respondent to pay the costs of the appeal. Case remitted to the Supreme Court.

Solicitors, for the appellant, *Perkins & Fosbery.*

Solicitors, for the respondent, *John Williamson & Sons.*

C. A. W.

[PRIVY COUNCIL.]

THE COLONIAL BANK OF AUSTRALASIA LTD. . . . . } APPELLANTS;

AND

MARSHALL AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Banker and customer—Cheque—Fraudulent alteration of amount after signature—Duty of customer to take precautions against forgery.

PRIVY COUNCIL* 1906.

July 27.

Whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that a cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation.

Decision of the High Court (*Marshall* v. *The Colonial Bank of Australasia Ltd.*, 1 C.L.R., 632), affirmed.

Scholfield v. *Earl of Londesborough*, (1896) A.C., 514, followed.

APPEAL to His Majesty in Council from the decision of the High Court. (*Marshall* v. *The Colonial Bank of Australasia Ltd.* (1).)

**Present.*—The Earl of Halsbury, Lord Macnaghten, Sir Arthur Wilson, Sir Alfred Wills.

(1) 1 C.L.R., 632.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The two respondents, Marshall and Day, and one Myers, were executors of Ann Myers. As such they opened an account with the appellant banking company in Melbourne on the 24th March 1900, when they paid in a sum of £1,596 15s. 2d.; and against that account cheques were from time to time drawn signed by the three executors. On the 25th May 1900, before any of such cheques were drawn, the three executors addressed a letter to the bank, by which they requested the bank to pay cheques signed by the three, and sent specimens of their signatures. The course of business followed by the three executors amongst themselves was this. Myers, who alone resided in Melbourne, drew each of the cheques, sent it for signature to Marshall, who signed first, then to Day, who signed second, and finally added his own signature.

Out of the total number of the cheques so drawn the present controversy relates to five cheques, which as originally drawn by Myers and signed by Marshall and Day, were for £10, £2 6s. 4d., £50, £10, and £10. But each of these cheques was so written out as to leave a space between the left hand margin and the statement of the amount of the cheque, both as given in words and as given in figures, and in that condition it was signed by Marshall and Day. Myers, by acts amounting to simple forgery, added words and figures to the left of those originally written in the cheques, so turning them apparently into cheques for £110, £32 6s. 4d., £150, £110, and £110. The cheques in their altered forms were presented to and paid by the bank. And it has been found (and their Lordships accept the finding) that the bank could not, by the exercise of ordinary care and caution, have avoided paying the cheques as altered.

When the forgeries came to light, the bank claimed to debit the executors' account with the amounts of the cheques as paid by it in their altered form; whilst the respondents contended that the debit should only be of the original amounts of the cheques. The aggregate of the differences was £450.

The suit out of which the present appeal arises was then brought in the Supreme Court of Victoria by the respondents against the bank, Myers being added as a defendant as he refused to join as

PRIVY COUNCIL.
1906.
COLONIAL BANK OF ANSTRALASIA LTD. v. MARSHALL.

a plaintiff. The statement of claim, amongst other allegations, set out in outline the facts already stated and put the plaintiffs' claim upon several alternative grounds, which need not be considered. The defence raised the whole question now material in paragraph 11, which said:—"If the said cheques or any of them were fraudulently altered and increased in amount, such cheques were, and each of them was, drawn by the plaintiffs and the defendant Myers without reasonable care or precaution, and in a manner and form so negligent, that they enabled and permitted the alterations and erasures, if any."

And it was contended that the plaintiffs were by reason of the facts so stated, "estopped from alleging that the cheques so altered and increased in amount, were not their cheques, or drawn by them, or with their authority, and from alleging that the said cheques, or any of them, were in fact fraudulently altered and increased in amount."

The case was tried before *Madden* C.J., and a jury, and at the trial the facts proved, so far as they are now material, were those which have been stated. The learned Chief Justice in charging the jury left to them the question, "Were the cheques or any of them drawn by the plaintiffs negligently having regard to what I have told you?" and he proceeded to say:—"If a customer of a bank is drawing a cheque upon that bank, it appears, according to our law (as I think it still exists), that the customer is bound to avoid such negligence in drawing out his cheque as will unreasonably expose the banker to the risk of having to pay more than the proper amount of the cheque which was drawn out by such customer."

The learned Chief Justice afterwards explained his view a little more fully by saying:—"If you draw a cheque in a manner which a jury thinks is so negligent that it induced or caused opportunity to a person who chances to be desirous of committing a forgery, to effect that forgery, so that the banker is exposed to the paying of a larger sum than you (the customer) intended when you signed the cheque, then the law is, that if a jury is of opinion that such action of the customer amounts to negligence, and negligence of such a kind as, in the opinion of the jury, ought to preclude him from complaining of the fact that the banker paid

the altered cheque, then the customer cannot complain against the bank."

The jury answered the question thus left to them in the affirmative as to all the cheques in controversy, and found a verdict for the defendant bank, upon which judgment was entered for the defendant bank with costs. And the Full Court, on appeal, approved the ruling of the Chief Justice, and affirmed the judgment.

The now respondents appealed to the High Court of Australia, and that Court reversed the decision of the Supreme Court of Victoria, and dismissed the suit, holding that the ruling of the Chief Justice was not in accordance with law, and that there was no evidence of negligence proper to be left to the jury. Against that decision of the High Court the present appeal has been brought.

In the course of the argument of the appeal before their Lordships, as well as in the Courts of Australia, much was said about the case of *Young* v. *Grote* (1), a case always cited in connection with this branch of the law. That case, however, was critically examined in the House of Lords in the case of *Scholfield* v. *Earl of Londesborough* (2), and the latter case has now become the governing authority which must prevail so far as the principles laid down in it extend.

In order to appreciate the effect of that decision, it is necessary to notice the history of the case and the manner in which it came before the House of Lords. The suit was by a holder for value of a bill of exchange against the acceptor, in which the plaintiff sought to make the defendant liable for the full apparent amount of a bill accepted by him, and subsequently increased in apparent amount by a forger on the ground that the bill, as accepted by the defendant, was drawn in a manner so negligent as to have facilitated the forgery subsequently committed. The case was tried before *Charles* J., without a jury, and the learned Judge had to deal, and dealt, with two principal propositions essential to the plaintiff's success. The first was, that the law merchant imposes upon everyone who accepts a bill of exchange with a view to its circulation the duty of taking reasonable precautions,

(1) 4 Bing., 253. (2) (1896) A.C., 514.

PRIVY COUNCIL. 1906. COLONIAL BANK OF AUSTRALASIA LTD. v. MARSHALL.

in order to prevent the possibility of its amount being fraudulently increased. That proposition the learned Judge accepted. The second principal proposition dealt with by the learned Judge was that on the facts of that case, the acceptor of the bill had been guilty of such negligence as to bring him within the operation of the first proposition. This second proposition was rejected by the learned Judge, who accordingly dismissed the suit. In order to show the connection between that case and the present, it is sufficient to say that there is no suggested ground of negligence in this case which was not present in *Scholfield* v. *Earl of Londesborough* (1).

An appeal against the judgment of *Charles* J., was brought in the Court of Appeal, and in that Court two of the Lords Justices rejected both propositions, holding not only that no such duty as alleged lies upon the acceptor of a bill of exchange, but also, that, assuming the existence of such a duty, it had not been violated. The third Lord Justice accepted both propositions as correct, and thought that the plaintiff in the case ought to succeed.

The appeal to the House of Lords impugned, therefore, the correctness of the two rulings of the majority of the Court of Appeal, and the argument proceeded on the same lines. So that both the propositions referred to were directly in question before the House of Lords.

The first proposition was expressly negatived by the House of Lords, but so far the decision does not directly affect the present case, for the contractual relation existing between a banker and his customer differentiates their case from that of the acceptor and the holder of a bill, and this was pointed out by several of their Lordships. It was recognized that there is or may be a duty on the part of the drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards the holder. It was recognized that "if . . . the customer by any act of his has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be

(1) (1896) A.C., 514.

misled." No attempt was made to define the extent of such obligation; it was unnecessary to do so in that case, nor do their Lordships propose now to attempt any abstract definition of such duty. Indeed, it would be impossible to do so, seeing that the extent of the duty may depend upon an agreed or established course of dealing between the parties.

But the duty, which, according to the ruling of the learned Chief Justice, subsists between customer and banker, is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough* (1) as existing between the acceptor and the holder of a bill. And as has been pointed out, the House of Lords had before them, on the appeal, the question whether the Court of Appeal was right in ruling that the facts found in that case (which included everything existing in the present case) did not amount to a breach of the obligation, supposing that obligation to exist.

Not one of the members of their Lordships' House appears to have expressed the slightest disapproval of that ruling, and most of their Lordships distinctly approved of it. The Lord Chancellor (2) expressed his concurrence in the opinion of *Lindley* L.J., "that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of *Bovil* C.J., in a former case, *Société Générale* v. *Metropolitan Bank* (3), that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land." Lord *Watson* (4) approved the same rulings. Lord *Macnaghten* (5) expressed the same opinion, and Lord *Davey* concurred in the judgment of Lord *Watson*.

The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilise them for the purpose of forgery is not by itself any violation of that obligation. Their Lordships therefore

(1) (1896) A.C., 514.
(2) (1896) A.C., 514, at p. 532.
(3) 27 L.T.N.S., 849, at p. 856.
(4) (1896) A.C., 514, at p. 540.
(5) (1896) A.C., 514, at p. 544.

PRIVY COUNCIL. 1906.

COLONIAL BANK OF AUSTRALASIA LTD. *v.* MARSHALL.

agree with the High Court of Australia in holding that there was no evidence proper to be left to the jury of negligence on the part of the respondents. They will humbly advise His Majesty that this appeal should be dismissed.

The appellant bank will pay the respondents' costs of and incidental to the appeal as between solicitor and client.

Appeal dismissed with costs.

[PRIVY COUNCIL.]

WILFLEY ORE CONCENTRATOR SYNDICATE LIMITED . . . . APPELLANTS;

AND

N. GUTHRIDGE LIMITED . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL* 1906.

June 27.

Appeal to the Privy Council from High Court—Special leave—No question of law—Case of great importance to parties—No question of public importance.

There being in a judgment of the High Court no question of law upon which that judgment could be objected to, the fact that the case is one of a substantial character and of great importance to the parties is not a sufficient ground for granting special leave to appeal to the Privy Council.

Petition for special leave to appeal from the judgment of the High Court in *N. Guthridge Limited* v. *Wilfley Ore Concentrator Syndicate Limited*, 3 C.L.R., 583, dismissed.

PETITION for special leave to appeal to His Majesty in Council from the decision of the High Court: *N. Guthridge Limited* v. *Wilfley Ore Concentrator Syndicate Limited* (1).

* *Present.*—Lord Davey, Sir Arthur Wilson, Sir Alfred Wills.

(1) 3 C.L.R., 583.