[HIGH COURT OF AUSTRALIA.]

ALFRED GEORGE SMITH . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMERCIAL BANKING CO. OF SYDNEY LTD. } . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 24, 25. *Dec.* 6, 7, 15.

Griffith C.J., O'Connor and Isaacs JJ.

Banker and customer—Bill payable to order on demand—Forged indorsement—Payment in good faith and in the ordinary course of business—Negligence of banker—Liability of banker—Bills of Exchange Act 1887 (*N.S.W.*), (51 *Vict.*, *No.* 2), *sec.* 60—*Bills of Exchange Act* 1909, (*No.* 27 *of* 1909), *sec.* 65.

Bill of Exchange—Acceptance of bill—Signature of officer of bank—Acceptance on behalf of company—Evidence of promise to pay—Communication to payee—Bills of Exchange Act 1887 (*N.S.W.*) (51 *Vict.*, *No.* 2), *sec.* 17—*Bills of Exchange Act* 1909 (*No.* 27 *of* 1909), *secs.* 17, 22—*Companies Act* 1899 (*N.S.W.*), (*No.* 40), *sec.* 244.

The appellant, who was about to proceed from England to Sydney, obtained a draft for £30 issued in two parts, and payable to his order. He retained the first of exchange in his possession, and posted the second of exchange to his own address at the G.P.O., Sydney. On arrival at Sydney he found that the second of exchange had been delivered by the Post Office to some other person, to whom, on presenting the first of exchange at the bank, he was informed that the £30 had already been paid by the bank. The appellant sued the bank as acceptors of the draft. The bank denied acceptance, and claimed the benefit of sec. 60 of the *Bills of Exchange Act* 1887, by which a banker is protected where he pays in good faith and in the ordinary course of business, on a forged indorsement, in the case of a bill drawn on the banker and payable to order on demand.

It appeared at the trial that the thief had presented the draft at the bank, representing himself to be the payee, and that in order to prove his identity

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he was asked to write his signature for the purpose of comparison with a specimen signature of the payee sent to the bank by the drawers. The thief accordingly wrote his name twice on the back of the draft, and an officer of the bank then wrote his name "John Bull" on the draft as authority for its payment, and it was paid accordingly. The draft when produced in Court bore on its face the name of the bank, impressed with a circular rubber stamp, over the signature of the drawers, with the word "paid" within the circle.

Held, that sec. 60 protects a banker only when a bill has been negotiated by indorsement before it comes to him for payment, and that the signature of the thief on the back of the draft did not relieve the bank from its liability to the appellant.

Per O'Connor J. and *Isaacs* J.—Negligence, *per se*, does not disentitle the bank to the protection of sec. 60.

But, *held*, also, that neither the signature of the bank's officer on the draft, nor the bank's name impressed on the face of the draft, constituted an acceptance by the bank, so as to comply with the statutory requirements of sec. 17 of the *Bills of Exchange Act* 1887, and sec. 244 of the *Companies Act* 1899.

Per Griffith C.J. and *O'Connor* J.—The evidence of acceptance would have been sufficient at common law.

Per Isaacs J.—(1) There was no evidence of acceptance at common law; (2) Under sec. 244 of the *Companies Act* the intention to make the signature that of the company must be found upon the face of the document.

Decision of the Supreme Court: *Smith* v. *Commercial Banking Company of Sydney*, 10 S.R. (N.S.W.), 386; 27 W.N. (N.S.W.), 82, affirmed, but on different grounds.

APPEAL by the plaintiff, by special leave, from a decision of the Full Court, setting aside a verdict for the plaintiff, and entering a verdict for the defendants.

The facts are stated in the judgment of *Griffith* C.J.

Perry, for the appellant. First, the signature John Bull was evidence of acceptance by the bank. By sec. 17 of the *Bills of Exchange Act*, 51 Vict. No. 2, the signature of the drawer is evidence of acceptance.

Sec. 244 of the *Companies Act* 1899 provides that a bill shall be deemed to have been accepted (*a*) in the name of the company by any person acting under the authority of the company; or (*b*) by or on behalf or on account of the company by any person

acting under the authority of the company. Under (*b*) the signature would not be in the name of the company, and it need not appear in the document that it was signed on behalf of the company. The signature by Bull was a signature on behalf of the bank by a person acting under its authority: *O'Kell* v. *Charles* (1); *Lindus* v. *Bradwell* (2). Marking a cheque may amount to an acceptance: *Robson* v. *Bennett* (3). The stamp of the bank on the bill is *primâ facie* evidence of acceptance. [He also referred to *Paget on Banking*, 2nd ed., p. 93.]

Secondly, the bank cannot claim the protection of sec. 60 of the *Bills of Exchange Act*. The indorsement protected by that section is limited to an indorsement which is made for the purpose of negotiation. The bank did not pay the thief because of the indorsement, but because they thought he was the payee, and they asked for his signature as evidence of his identity. The learned Judge at the trial found that the signature was put on the bill for this purpose. Such an indorsement does not come within sec. 60: *Paget on Banking*, 2nd ed., p. 46; *National Bank of South Africa* v. *Paterson*, referred to in vol. 18 of the New South Wales *Bankers' Journal*, p. 349. [He also referred to *Hart on Banking*, 1st ed., p. 304; *Keene* v. *Beard* (4).]

Thirdly, the bill was not paid in the ordinary course of business, which must be shown to bring the case within sec. 60. That means in accordance with the practice which an ordinary prudent banker would follow in his business. The ordinary specimen signature was practically disregarded.

A bill paid negligently is not paid in the ordinary course: *Hart*, p. 286; *Paget*, p. 123; *Strange* v. *Wigney* (5); *Scholey* v. *Ramsbottom* (6).

Knox K.C. and *Russell*, for the respondents. Evidence of acceptance is a condition precedent to the defendants' liability: *Byles on Bills*, 15th ed., p. 251. Sec. 17 (2) (*a*) of the *Bills of Exchange Act* provides that the signature of the drawee is sufficient to constitute an acceptance. Sec. 23 negatives this, where it is not signed as such, that is with the intention of accepting.

(1) 34 L.T., 822.
(2) 5 C.B., 583.
(3) 2 Taunt., 388.
(4) 8 C.B.N.S., 372.
(5) 6 Bing., 677.
(6) 2 Camp., 485.

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Here the signature of the bank appears nowhere on the bill. The drawee's name only appears on the bill as part of a statement that he has paid the bill. Bull's signature is not the signature of the drawee, and he does not sign *per proc.* A company cannot be made liable as acceptor under sec. 244 of the *Companies Act*, except when its name appears on the bill, as this would conflict with secs. 67 and 68 of that Act: *Atkin* v. *Wardle* (1); *Lindley on Companies*, 6th ed., p. 278. The bill must show on its face an acceptance by the drawee. The signature John Bull is not connected with the name of the company, and he wrote his name on this bill *alio intuitu*. The stamp on the bill is a mere memorandum of payment. "Paid" cannot mean "I promise to pay." The only proof of acceptance is the payment. The plaintiff cannot adopt the payment to prove acceptance, and then say there has been no payment. The plaintiff says, you have paid the bill, therefore you have accepted it, therefore you are liable to me, therefore you have not paid it. An acceptor need not sign with his own hand, but "his signature" must be written on the bill: sec. 91. In the case of a bill payable on demand, the bank cannot postpone payment for the purpose of making inquiries as to the identity of the payee. They must either pay the bill or dishonour it. The intention of sec. 60 was to put the bank in the same position with regard to cheques drawn to order as with regard to open cheques: *Hare* v. *Copland* (2). The section requires a signature, not a signature which is an indorsement: *Charles* v. *Blackwell* (3). If the thief in this case had endorsed the cheque in the bank, and then gone outside and given it to somebody else to cash, admittedly the bank would have been protected by sec. 60. But it is said that, because he wrote his name on it when he demanded payment, the section does not apply. It is a contradiction in terms to say that a forger could ever indorse *animo indorsandi*. The whole object of sec. 60, so far as the banker is concerned, was to make cheques drawn to order pass by delivery. Unless signature is equivalent to indorsement, the banker gets no protection.

Perry, in reply.

Cur. adv. vult.

(1) 5 T.L.R., 734. (2) 13 Ir. C.L., 426. (3) 2 C.P.D., 151.

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GRIFFITH C.J. The appellant, who was about to sail from England to Sydney, obtained a draft upon the respondents for £30, issued in two parts and payable to his order. He retained the first of exchange in his possession, and posted the second of exchange to his own address at the G.P.O., Sydney. On arrival he found that it had been delivered to some other person, to whom, on presenting the first of exchange at the bank, he was informed that the money had been paid. He then brought this action in a District Court against the respondents as acceptors of the draft, adding a claim for money had and received, but unfortunately did not add a claim for conversion of the draft. If he had done so it is difficult to see what answer could have been made to his claim, except under sec. 60 of the *Bills of Exchange Act* of New South Wales, to which I will afterwards refer. The defendants denied acceptance, and claimed the benefit of sec. 60. It appeared at the trial that the thief presented the draft at the bank, representing himself to be the payee, that he was invited to prove his identity, and for that purpose to write his signature to be compared with a specimen signature of the real payee which had been sent to the bank by the drawers. He accordingly wrote his name on the back of the draft, but, the signature being quite unlike the genuine one, he was invited to write it again. His second attempt was more like the genuine signature, and the proper officer of the bank, being satisfied, wrote his name "John Bull" on the face of the draft, which was an authority to the cashier to pay it, and it was paid accordingly. The draft, when produced in Court, bore on its face the name of the bank, evidently impressed with a circular rubber stamp, over the signature of the drawers, with the word "Paid" within the circle, also another rubber stamp with the word "Paid" and a date, apparently the date of payment, and also the word "Paid" marked by perforations. The signatures of the thief were not written across the back of the draft, but parallel with the longitudinal edges. The learned District Court Judge found that the draft had been accepted by the bank, and that they had not brought themselves within the provisions of sec. 60. He also found specially (upon ample evidence) that the signatures of the thief on the back of the draft were written for the purposes of

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identification and receipt, and were not indorsements, except in the literal sense of being writings placed on the back of a document. He also found that the signatures were palpable forgeries, plain to anyone exercising due care, and that there was gross negligence on the part of the bank in the acceptance of the thief as the real payee.

On appeal to the Supreme Court the judgment was reversed. The learned Judges thought that there was sufficient evidence of acceptance, but that the bill was indorsed, and that the defendants were entitled to the benefit of sec. 60 of the *Bills of Exchange Act.*

That section provides that:—"When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course although such indorsement has been forged or made without authority and such indorsement shall be deemed to give as valid an authority to the banker to pay the bill as though it were genuine and made with due authority."

That Act has now been repealed, and its place is taken by the (Commonwealth) *Bills of Exchange Act* 1909. As the questions raised in this case are of general importance I will refer to the several relevant sections of the Act by their numbers in the Commonwealth Act. Sec. 60 of the New South Wales Act stands as the first part of sec. 65.

The only decided case on the construction of this section to which we were referred was a case of *National Bank of South Africa* v. *Paterson* before Chief Justice *Sir J. Rose Innes* in the Supreme Court of the Transvaal Colony, of which a report appears in the *Journal of the New South Wales Institute of Bankers,* Vol. 18, Pt. 9, of 30th September 1909. That learned Judge was of opinion that the section protects the banker only when the bill has been negotiated by indorsement before it comes to him for payment. In my judgment this is the true construction. The existence of an indorsement is assumed by

the words "the indorsement," which, as applied to the case of a bill payable to order or on demand, import that it has become payable to bearer, which can only be by indorsement (secs. 36 (3), 39 (1)). A bill expressed, as this was, to be payable to the plaintiff's order was payable to him or his order at his option (sec. 13 (5)). Upon the facts found by the learned Judge it is clear that both the bank and the thief treated the draft as payable to the payee, and not as payable to bearer. In my opinion the reasoning in *Sir John Paget's* book on this point is conclusive. The result is that the draft has not been paid, and is still an unpaid draft in the hands of the appellant. But he cannot sue upon it unless he can establish a contract between himself and the respondents.

The respondents therefore rely on the defence of non-acceptance. This depends entirely upon the Statute. At common law the evidence of acceptance would, in my opinion, have been complete.

The Statute declares (sec. 22 (1)) that the acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. If there were no other relevant provisions it would be clear that there could not be better proof of the assent of the drawee to the order of the drawer than the fact that he has obeyed it by payment. The same section provides (22 (2)) that an acceptance is invalid unless it is written on the bill and signed by the drawee, and that the mere signature of the drawee without additional words is sufficient. The appellant's counsel contended that the signature of the bank's officer, "John Bull," was a sufficient compliance with this provision, and relied upon sec. 244 of the New South Wales *Companies Act* (No. 40 of 1899) which is as follows :—

"A promissory note or bill of exchange shall be deemed to have been made, drawn, accepted, or endorsed by any company registered under this Act, if made, drawn, accepted, or endorsed—

"(*a*) in the name of the company by any person acting under the authority of the company ; or

"(*b*) by or on behalf or on account of the company by any person acting under the authority of the company."

He also referred to the observations of *Jessel* M.R. and *Kelly*

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C.B. in the case of *Okell* v. *Charles* (1). I am unable to accept this argument. I do not think that the signature "John Bull" can be regarded as the signature of the bank within the meaning of the Statute, although at common law it would have been abundant evidence of acceptance. It was then contended that the bank's name impressed upon the face of the draft in the manner already stated was a sufficient signature. It might in my opinion have been a sufficient signature if all other provisions of the Act were complied with. But sec. 26 provides that every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto. In the case of acceptance this implies delivery of the instrument completed by the signature of the acceptor. If it could be inferred from the evidence that the signature in question had been placed upon the draft before it was handed to the thief to be presented for payment, I think that this provision would be complied with. It was suggested that delivery to the thief would not enure for the benefit of the owner. In *Chitty on Bills* (11th ed.), it is said (p. 195):—"Presentment for acceptance should in general be made by the rightful holder. But it is said that, if a wrongful holder should present for acceptance, the drawee ought nevertheless to accept the bill, and may do so without risk; and that if he refuse, a valid protest for non-acceptance may be made, which will enure to the benefit of the party entitled to the bill," for which the learned author cites *Pardessus*. In my opinion this is good sense and good law. Then it was suggested that if the plaintiff adopted the presentment of the bill by the thief for acceptance, he also adopted and ratified the whole transaction, including payment. Here there is an obvious fallacy. The acceptance of the mandate of the drawer necessarily precedes, in order of thought, the obedience to it, although they are practically contemporaneous. The assent was given on the faith of the drawer's signature, and the fraud of the thief was quite irrelevant to it. That fraud was only relevant to the subsequent payment. There is therefore no question of approbation and reprobation with regard to a single transaction.

It was also suggested that drafts payable to order on demand

(1) 34 L.T., 822.

are never presented for acceptance. This argument also involves an obvious fallacy. It is not usual to present such drafts for formal acceptance antecedently to the demand of payment, but the assent to the drawer's order, as already shown, must always be asked for and given before it is obeyed.

The only question, therefore, which is left for determination is whether there was any evidence upon which the learned District Court Judge could find that the bank's signature had been placed upon the draft before it was handed to the thief to be presented for payment. There is no direct evidence on the point, but the burden of proof was on the plaintiff. In the absence of any express evidence I think that it might be inferred that that signature was put on the draft as a record both of the fact of acceptance of the drawers' mandate and of obedience to it. As to obedience it is incorrect and irrelevant. But I am unable to find any ground for a finding that that signature had been put on the draft before it was handed back to the thief to enable him to obtain payment. For this reason, and this reason only, I am reluctantly compelled to the conclusion that the appeal must fail.

O'Connor J. There being no privity of contract between the plaintiff and the defendant bank, it was a first essential of the plaintiff's case to prove an acceptance making the bank a party to the bill.

The *Bills of Exchange Act* of 1887 (N.S.W.)—which is in this respect in the same terms as the Commonwealth Act on the same subject—has enacted in definite terms the requirements necessary for "acceptance," and the plaintiff must establish that the acceptance on which he relies fulfils those requirements. Sec. 17 defines acceptance of a bill as the signification by the drawee of his assent to the order of the drawer. The assent must be signified on the bill, and for that purpose the mere signature of the drawee without additional words is sufficient (sec. 17 (2) (*a*)). The acceptance must be completed by delivery of the bill, that is to say, by transfer of possession, actual or constructive, from one person to another (sec. 2). Finally sec. 21 (1) declares that every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto.

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The plaintiff was confronted at the outset with a difficulty in proving that the bank as drawee had signed the bill. In strictness a corporation can sign a document only by properly affixing its seal.

But in the case of companies registered under the New South Wales *Companies Act* 1899 there is a special provision in sec. 244 that notes or bills shall be deemed to have been made drawn and accepted or indorsed in the name of the company by any person acting under the authority of the company, or by, or on behalf, or on account of the company by any person acting under the authority of the company.

Several English decisions upon the corresponding section of the English *Companies Act* were cited during the argument. None of them deal with a state of facts analogous to that which has arisen in this case. But they all concur in this that compliance with the section must appear on the face of the document. In other words, whatever is necessary to constitute a signing by the company must appear on the interpretation of the bill itself. The word "accepted" is not on the bill, but the signature of John Bull, the proper officer of the bank to accept on its behalf, is written on the face of the bill and across the top of it. At the bottom of the bill the bank's official stamp has been placed across the signature of the makers. Inside that stamp is the word "paid." The same word has been impressed by another stamp alongside the first, and also by perforation on the top of the bill. Having regard merely to the signing by the bank, I am of opinion that sufficient evidence appears on the face of the bill. The stamp of the bank cancelling the makers' signature, and the signing by the officer deputed to accept bills, is certainly *primâ facie* evidence of a signing by the bank. But something more is required in proving signing necessary to signify acceptance of a bill.

It is in my opinion an essential requirement of the sections of the *Bills of Exchange Act* which I have quoted that the acceptor's signature should be on the bill at the time when the acceptance is completed by delivery, or, to use the words of sec. 21, at the time of "delivery of the instrument in order to give effect thereto." It was therefore a necessary part of the plaintiff's

proof that when the bill was handed over by Mr. Bull to the forger in completion of the bank's acceptance it bore the stamp of the bank. In that respect the plaintiff's evidence entirely fails. The fair inference from the facts proved is that the bank stamp was not on the bill when Mr. Bull delivered it for payment. Mr. Bull says that his signature alone was sufficient authority to the cashier to pay, and the stamp bears on its face *primâ facie* evidence that it was put on either after, or concurrently with payment. Regarding the evidence in the most favourable light for the plaintiff, he has left it in doubt whether the bank stamp, that is to say the bank's signature, was or was not on the bill when it was delivered to the forger in signification of the bank's acceptance. Under these circumstances, I am of opinion that there was no evidence on which the learned District Court Judge could have legally found that the bank had accepted the bill and that he ought therefore to have nonsuited the plaintiff. That is sufficient to support the judgment of the Supreme Court.

But another question of great importance was raised, and upon that I wish to shortly express my view.

The bank claimed that even if it had accepted the bill it was protected from the ordinary consequences of payment to a forger by the provisions of sec. 60 of the *Bills of Exchange Act*. I see no reason to doubt on the evidence that the bill was paid in good faith and in the ordinary course of business. The finding of the learned District Court Judge as to the defendants' negligence is in my opinion irrelevant to any issue of fact which can be raised under that section. The objection insisted on by Mr. *Perry* in the course of his able argument was that the section could have no application to the bill under consideration having regard to the circumstances under which the forger's signature was written on the back of the bill. It is obvious from the language of the section that it is not dealing with any bill payable to order on demand, but with a bill in respect of which, but for the section, it would be incumbent on the banker to show that the indorsement of the payee was made by the authority of the person whose indorsement it purports to be. The only case in which it could be incumbent on the banker to give such evidence is where the right to demand payment arises by virtue of the indorsement. I

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entirely concur in the view expressed by the Chief Justice of the Transvaal in construing a similar section in the legislation of the Transvaal (sec. 38 of the Bills of Exchange Proclamation in *Johannesburg Star*, 14th April 1909, quoted from *Journal of the Institute of Bankers of New South Wales*, 30th September 1909, p. 351). He says:—"Now I am quite clear that the word 'indorsement' was used in sec. 58 in the legal or technical sense, because an indorsement made, not *animo indorsandi*, but for the purpose of identifying the person who actually received money, could have no legal consequences beyond those which would follow the signing of an ordinary receipt. And the use of the word in that sense is quite incompatible with the general frame of the section."

The reason of the protection conferred by the section is the obligation of the banker to pay on indorsements which come to him in the ordinary course of business under circumstances in which it is in most cases impossible to test their genuineness. Where payment is made to the holder, as holder, and not as indorsee, where he is not bound to indorse before obtaining payment, and he is asked to put his name on the back merely as a receipt, or as test of identity, the reason for the protection is at an end. In such a case the bank pays because it is satisfied as to the identity of the payee, and not because it is satisfied as to the genuineness of the indorsement. It is quite clear on the evidence that the bank did not pay or intend to pay on the indorsement of the forger. It treated him as a holder entitled to demand payment, under sec. 8 sub-sec. 5 of the *Bills of Exchange Act*, as if the bill had been made payable either to himself or to his order. His signature was obtained merely for the purpose of identifying him as the payee,—the payee named in the bill whom he fraudulently represented himself to be. The special finding of the learned District Court Judge as to the real nature of what the respondent counsel now claims to be an indorsement is entirely in accordance with the evidence. In the face of that finding it is impossible, in my opinion, that the bank can successfully claim the protection of sec. 60. For these reasons I am of opinion that the learned District Court Judge ought to have nonsuited the plain-

tiff and that the judgment of the Supreme Court upholding that view, though for other reasons, must be affirmed.

ISAACS J. The first question is whether any contractual relation between the parties to the action has been established. The appellant says there has been created such a relation, because the writing of the words "J. Bull" on Exhibit B. was an acceptance of that part and consequently of the whole set, and at all events, the fact of acceptance has been found in his favour and should stand. I am of opinion that the signature cannot be regarded as an acceptance by the bank, and that the finding cannot be supported. The appellant's main reliance was placed on sec. 244 of the *Companies Act* 1899 (No. 40), and certainly this section puts his case at least as high as it can possibly be put.

He says that paragraph (*b*) of that section is satisfied because the bill was accepted on behalf of the company by J. Bull, he being in fact a person having the authority of the company to accept such a bill: *Okell* v. *Charles* (1) was cited in aid. But in the first place and underlying the whole of that argument there is one fundamental requisite which must be examined first, namely, that Bull's signature, supposing it to be equivalent to the bank's signature, amounted to an acceptance of the bill within the ordinary mercantile meaning of the term. If it did not, there is an end of the appellant's case, and I am of opinion it demonstrably did not. Sec. 17 (1) of the *Bills of Exchange Act* 1887 defines acceptance as "the signification by the drawee of his assent to the order of the drawer."

The order of the drawers was to pay to the appellant's order, which by virtue of sec. 8 (5) meant to pay to him or his order at his option.

And therefore the question resolves itself into this, should the signature of J. Bull upon the bill handed back to the person who presented the part signed be regarded as the signification by the bank within the meaning of the Act that it undertook to pay the money to the appellant or to his order at his option? The appellant says, and *Sly* J. has held, that it should, because sec. 17 (2) enacts "The mere signature of the drawee without additional

(1) 34 L.T., 822.

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words is sufficient." But sufficient for what? Plainly to state the fact of assent as well as to append the signature: *Hindhaugh* v. *Blakey* (1) in 1878 decided that as the law then stood it was "impossible that a mere signature of a name can be held to fulfil the double requirement that the acceptance shall be in writing on the bill, *and* signed by the acceptor" (*per Denman* J.). The provision relied on was simply to alter that state of the law.

But it was never designed to convert and does not convert a signature, which to the knowledge of both parties was written *alio intuitu*, into an acceptance, nor does it satisfy the condition of the first sub-section that the assent of the acceptor must be signified, that is, communicated.

We must have recourse to general principles of contract, and particularly to the well known rules of mercantile contract law to ascertain the effect of the signature "J. Bull" and of the circumstances in which it was affixed. An acceptance is universally understood to be a promise by the acceptor to the payee and every lawful holder of the bill to pay it according to the terms of the acceptance. That it is a "promise" by the drawee is recognized by the words of the third sub-section of sec. 17, and his contract by the proviso to sub-sec. (1) of sec. 21, which I shall presently read.

There may, of course, be a contract between the drawer and the drawee that the latter will accept the draft, but even in the days when an acceptance could arise otherwise than by writing it on the bill itself, such a contract, or any promise to the drawer to accept his bill, did not enure to the benefit of the payee unless the promise was communicated to him. Lord *Mansfield* in *Pierson* v. *Dunlop* (2), said:—"It has been truly said as a general rule, that the mere answer of a merchant to the drawer of a bill, saying 'he will duly honour it' is no acceptance; unless accompanied with circumstances which may induce a third person to take the bill by indorsement: But if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." This statement narrowed by a necessary qualification the apparently wider rule deducible

(1) 3 C.P.D., 136, at p. 141.

(2) 2 Cowp., 571, at p. 573.

from the earlier case of *Pillans* v. *Van Mierop* (1), and the rule so qualified was approved by *Le Blanc* J. in *Johnson* v. *Collings* (2) in 1800, and by *Marshall* C.J. in 1817 in the case *Coolidge* v. *Payson* (3).

In 1822, in *Cox* v. *Troy* (4), a powerful Bench held that a drawee, having once written his acceptance with the intention of accepting, may change his mind, and validly obliterate his signature before communicating to the holder or the bill delivered back to him. *Abbott* C.J. puts it on the ground that the holder is not prejudiced because he is in precisely the same position as if no acceptance was given. That is very much to the point here. *Bayley* J. says (5):—"The question is, when the drawee comes under an engagement, whether by the act of writing something on the bill, or by the act of communicating what has been written to *the holder*, and I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor; for the making a communication is a pledge by him *to the party*, and enables the holder to act upon it." *Holroyd* J., referring to the old books, said they contained statements that anything which amounts to an assent to pay the bill, whether in writing or otherwise, is in point of law an acceptance—a doctrine he rejected.

Best J. said (6) a person might by mistake have written an acceptance on the wrong bill, and, "not meaning to accept that bill, he does that which shows, that it was *his intention not to enter into such a contract.*"

He adds further: "Nobody can be injured by it. When the bill goes back it is in as good a state as it came. The party is still placed in the same situation."

The bill the subject matter of that action was dated 1820, and in the next year, by the Act 1 & 2 Geo. IV., c. 78, sec. 2, it was provided that acceptances of inland bills must be in writing on the bill, or if there were more than one part of the bill, on one of the parts. This was extended to foreign bills in 1856 by 19 & 20 Vict., c. 97. Since 1821, however, there has been no decision

(1) 3 Burr., 1663.
(2) 1 East., 98.
(3) 2 Wheat., 66, at p. 69.
(4) 5 B. & A., 474.
(5) 5 B. & A., 474, at p. 479.
(6) 5 B. & A., 474, at p. 481.

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which lays down any new rule regarding the necessity of communication of assent to the payee or a subsequent holder of the bill. On the contrary, the doctrine of *Cox* v. *Troy* (1) was at the root of *Bank of Van Diemen's Land* v. *Bank of Victoria* (2) in 1871, and the case itself was expressly acted on, with the added comment by Mr. Justice *Byles* in his work on bills, that the acceptance could be withdrawn "at least before the fact of acceptance is communicated to the holder," as appears from pp. 537 and 538 of the report.

This law, to which it would have been unnecessary to refer but for the argument as to the construction of the Act, has now been embodied in the Code, sec. 21, sub-sec. (1), which is in these terms: "Every contract on a bill, whether it be the drawer's, the acceptor's or an indorser's is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

"Provided that where an acceptance is written on a bill and the drawee gives notice to or according to the directions of *the person entitled to the bill* that he has accepted it, the acceptance then becomes complete and irrevocable."

See *Byles*, 16th ed., at p. 266, and *Lord Halsbury's Laws of England*, vol. II., at p. 481.

It can hardly be imagined that delivery to a person not being the person entitled to the bill or according to his directions can be of greater efficacy than notice to such person of acceptance.

No change in the law has therefore been worked in this respect, and but for the strenuous contention of the appellant, I should have thought no doubt could have existed.

With these considerations before us, I proceed to inquire upon the facts, whether Bull's signature can in any case be regarded as an acceptance and, if so, whether it was properly signified. I should say at the outset I attach no importance to the various "Paid" stamps. They cannot be regarded in themselves as acceptances, nor were they so treated by the learned Judge of first instance or the learned Judges of the Supreme Court. In conjunction with Bull's evidence as to the way he wrote his signature, the "Paid" stamps were regarded by one learned Judge as sufficient evidence of acceptance—which is different. And by

(1) 5 B. & A., 474. (2) L.R. 3 P.C., 526.

the other Judge actual payment together with sec. 17 (2) was considered conclusive evidence of acceptance. But the "Paid" stamps themselves were of course not the actual acceptances—and if they were, they clearly so far as the evidence goes were never signified as such to anybody. The whole case of acceptance in fact then rests on the signature, "J. Bull."

The first observation I would make is that the learned primary Judge makes no specific finding as to the reason why Bull wrote his name. *Pring* J. apparently was satisfied that he did so as an authority to the cashier to pay cash for the draft on presentation. There is therefore no finding of fact on this point adverse to the respondents, and in any case the evidence is all one way. To begin with, the bill is one payable on demand and drawn upon a banker. Such a bill is really a cheque (see sec. 73 of the Act), and is not ordinarily accepted, see *Byles on Bills*, 16th ed., p. 256, note (*b*), and *Lord Halsbury's Laws of England*, vol. II., p. 463, note (*a*). No presumption of acceptance can therefore be drawn from the mere fact of payment, or the presence of "Paid" stamps. Then the evidence is that the thief came into the bank for the purpose, not of procuring an acceptance from the bank—which would have been an absurd act on his part—but to get immediate payment without such an unusual and unnecessary formality as a preliminary contract to pay. When he produced the part he had stolen—that is the second part of the set—Bull endeavoured to satisfy himself as to the presenter's identity, and then marked it off, signing it to pay cash. He wrote "J. Bull," and that meant, to the teller, it had to be paid, which was of course instant payment. Bull says: "I handed it back to the payee; he took it to the teller. I suppose he left the bank. He went to the teller. I do not know where he went to then. He went straight to the teller and got the money. My signature is the authority to the teller to pay cash." After referring to the plaintiff, he says: "The other man who brought the second to me for payment *did not say anything about acceptance.* . . . The other man did not say he presented it for acceptance." Neither Bull nor the impostor could have imagined that an "acceptance" was intended by the signature, or anything more than a mark of internal administration or voucher, by which a superior officer authorized

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another officer bound to obey his directions to pay out the cash instanter.

I therefore hold that there was no reasonable evidence of acceptance. See also *Steele* v. *M'Kinlay* (1).

As for signification, if established, it appears to me fatal to the appellant. The appellant gravely adopts the unauthorized act of the thief in presenting the bill for payment to himself—for there is no pretence he even presented it for acceptance—and adopts the intimation to him that it would be paid to himself, and after treating him as the appellant's agent to so present the bill and receive the intimation, suddenly drops him in the very middle of the transaction, disavows the receipt by him of the money and the payment to him by the bank, and asks the bank to pay the second time. In my opinion that is not competent to the appellant. If he adopts the act of presentation at all, supposing he is in a position to do so, he must adopt it in its entirety, because authority to present for immediate payment implies necessarily the authority to the bank to make and the messenger to receive payment on the spot. Either the appellant must forego signification and fail to establish "acceptance," or adopt it with its consequences, and admit payment.

Even if the two operations could be separated, and assuming an agreement amounting to acceptance otherwise established, I should be prepared to hold on the principle of *Cundy* v. *Lindsay* (2), and of *Lewis* v. *Clay* (3), that the bank's mistake as to the identity of the person to whom the promise was made, his identity being a most—perhaps the most—material circumstance, would prevent a binding contract arising. So far I have assumed Bull was authorized to sign for the company in his individual name. But there is no evidence that he was, and consequently there is no evidence that the name "J. Bull" was the drawee's signature required by sec. 17 (2) (*a*) in the paragraph relied on by the appellant.

In *In re Adansonia Fibre Co.* (4), *James* L.J. said:—"Now it is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless

(1) 5 App. Cas., 754, at pp. 783, 784.
(2) 3 App. Cas., 459.
(3) 67 L.J.Q.B., 224.
(4) L.R. 9 Ch., 635, at p. 643.

his name, or the name of some partnership or body of persons, of which he is one, appears either on the face or on the back of the bill. That is the clear law of this country." And the Court upon the evidence came to the conclusion in that case that the names on the bills by certain individuals were not intended to represent the company, and accordingly the company was not liable on the bills. Again in *Yorkshire Banking Co.* v. *Beatson* (1), *Thesiger* L.J. in delivering the judgment of the Court said: —"a name which in itself indicates an individual is, notwithstanding the effect of any legal presumption, ambiguous, and there are likely to be few if any cases where the decision of the jury or of a Court will be rested upon the presumption alone." And so the Court felt called upon to decide whether the signature to the bills, upon which the dispute arose, was intended to denote and did denote the partnership of which the defendant was a member.

No doubt sec. 26 (2) would assist in many cases, but not in such a case as this. It is admitted that Bull did not intend to accept in his personal capacity; the only question of fact on this part of the inquiry is whether the signature intended to bind the bank was the bank's signature.

Seeing that the company's name is not used in the acceptance, and that there is another good reason in fact for the presence of the signature, a reason which is not controverted, the burden of showing that the words "J. Bull" were intended to mean "Accepted, The Commercial Banking Company of Sydney Limited" rests in my opinion on the appellant, and has not been discharged. He has not shown any authority express or implied to sign for the bank without using the bank's name.

On general principles, therefore, I hold that the facts afford no evidence of any intent to accept in the statutory or mercantile sense.

With respect to sec. 244 of the Act, I am of opinion, notwithstanding any argument that can be drawn from *dicta* in *Okell* v. *Charles* (2), that the intention to make the signature that of the company in order to satisfy the section must be found in some way upon the face of the document. The most recent case,

(1) 5 C.P.D., 109, at p. 125. (2) 34 L.T., 822.

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and in it *Okell* v. *Charles* (1) was cited, is *Chapman* v. *Smethurst* (2), which is adverse to the appellant. I think, therefore, the appellant entirely fails to sustain acceptance, and there being therefore no promise by the bank to pay him, the judgment for the defendants should stand.

With respect to sec. 60 I agree with the appellant, the case is not within it.

One observation may advantageously be made at the outset. Sec. 32 provides with respect to negotiation by indorsement—"The simple signature of the indorser on the bill without additional words, is sufficient."

There is no doubt that in one sense indorsement means writing the name of a party on the bill (see *per Alderson* B. in *Marston* v. *Allen* (3). If, however, the appellant is correct as to the corresponding words of the Statute in sec. 17 with respect to acceptance being all sufficient, then, by parity of reason, the words of sec. 32 would be a complete answer to his objection under sec. 60. But the same considerations as apply to acceptance apply to indorsement. The latter like the former is a well understood term in mercantile law. It is always used—when technically employed—in connection with negotiation or transfer for collection. Its meaning is a secondary one. Lord *Campbell* C.J. in *Lloyd* v. *Howard* (4) says:—"An indorsement requires that there shall be a delivery of the bill with an intent to make the person to whom it is indorsed owner of the bill; *a party to the bill*; a transferee of the property in it." And he gives examples of writing that is not an indorsement because there is either no authorized delivery, or delivery without the intent to transfer the property in the bill. In *Ex parte Yates* (5), *Knight-Bruce* L.J. and *Turner* L.J. held a signature on the face of a note to be an indorsement because intended to add a new person to those already liable. The former said (6):—"It is clear that a signature having the effect of indorsement, and according to a secondary sense of the term called an indorsement, may be written on the face of the note, and, if written with the same

(1) 32 L.T., 822.
(2) (1909) 1 K.B., 927.
(3) 8 M. & W., 494, at p. 504.
(4) 15 Q.B., 995, at p. 999.
(5) 2 DeG. & J., 191.
(6) 2 DeG. & J., 191, at p. 193.

intention and effect as if written on the back, will have the same effect. It would be very absurd if it had not." This clearly indicates that the intention and purport of the signature must be part of the composite operation called indorsement. It is never complete without delivery, and so the Code defines it (sec. 2). And consistently with what has already been said, there never can be delivery to the drawee, in the sense required. See Lord *Halsbury's Laws of England*, vol. I., p. 610, note (&c.).

Reading sec. 60 by the light of these considerations it appears to me clear that the present case does not fall within its protection. It is suggested in the note to Lord *Halsbury's* book just quoted that the terms of sec. 60 as to "indorsement of the payee or any subsequent indorsement" point to the indorsement being for negotiation, or at least collection, and those as to the banker being deemed to have paid the bill in due course, notwithstanding the forged indorsement, imply payment made to an ostensible holder under the indorsement. And that appears to me to be right, and to follow from the principles already adverted to.

Sec. 8 (5), as previously mentioned, enables the payee of a bill payable to order to do either of two things at his option. He may request payment to himself personally, or he may order the drawee to pay another. That is the meaning of "order." It is in contradistinction to personal receipt. If the payee requires payment to himself, and at the request of the drawee writes his name on the back of the document, that is not an order, it is evidence of identity. He needs no order to pay himself; the Statute itself gives him that right, just as the common law did before *Smith* v. *M'Clure* (1). In that case Lord *Ellenbrough* C.J. said:—"A bill payable to a man's own order was payable to himself, if he did not order it to be paid to any other."

The payment, therefore, in this case was not made upon the order of the person who received the money, and the name he wrote was not in the nature of an indorsement. The conclusion I have reached is very much supported, though arrived at quite independently by the history of sec. 60, as stated in *Capital and Counties Bank Ltd.* v. *Gordon* (2). It is there said by Lord *Lindley* to have been introduced to protect banks from the risks

(1) 5 East, 476, at p. 477.

(2) (1903) A.C., 240, at p. 251.

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of forged indorsements on cheques drawn payable to order. It is not any protection to a bank paying immediately to the wrong person, who comes direct for payment, but to cases where the bank has to act upon nothing but what appears to be a regular and honest indorsement to the person presenting the instrument. We have been referred to the case of *National Bank* v. *Paterson*, (*Journal of N.S.W. Institute of Bankers*, 30th September 1909), (officially reported (1)), where *Innes* C.J. and *Curlewis* J. held upon the same words in the Transvaal *Bill of Exchange Proclamation* in accordance with the views above expressed.

There was a question of fact as to payment in the ordinary course of business, which ought to be determined in the bank's favour. There was also a question, one of law, as to whether negligence *per se* disentitled the bank to the protection of the section. In this respect also the answer should be against the appellant, because good faith covers the bank so long as the transaction is in the ordinary course of business, and the argument advanced would annihilate that provision. In the result I think the views of the Supreme Court on the respective branches of acceptance and indorsement should be reversed, but as success upon either is sufficient to support the defence, the judgment appealed against was right and should stand.

Appeal dismissed.

Solicitor, for the appellant, *P. K. White.*

Solicitors, for the respondents, *Cape, Kent & Gaden.*

C. E. W.

(1) (1909) Transvaal Sp. Ct. R., 322.