[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONERS OF THE STATE SAVINGS BANK OF VICTORIA . . DEFENDANTS, } APPELLANTS;

AND

PERMEWAN, WRIGHT & COMPANY LIMITED . . . . . PLAINTIFFS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, Oct. 2, 5, 6, 8, 9, 12, 13, 14.

SYDNEY, Dec. 18.

Griffith C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Banker—Business of banking—State savings bank—Collection and payment of cheques—Liability of banker for conversion—Receipt of payment of cheque without negligence—Bills of Exchange Act 1909 (*No.* 27 *of* 1909), *secs.* 4, 87, 88—*Instruments Act* 1890 (*Vict.*) (*No.* 1103), *secs.* 82, 83—*Savings Banks Act* 1890 (*Vict.*) (*No.* 1138), *secs.* 7, 11, 17, 41—*Savings Banks Act* 1890 *Amendment Act* 1896 (*Vict.*) (*No.* 1481), *secs.* 25, 29—*Savings Banks Act* 1901 (*Vict.*) (*No.* 1778), *sec.* 2.

The essential characteristics of the business of banking are the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required. In order to bring a banker within the provisions of the *Bills of Exchange Act* 1909 and the *Instruments Act* 1890 (Vict.) it is not necessary that he should as part of his business collect cheques for his customers and pay their cheques.

So *held* by *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. dissenting).

Held, therefore, that the Commissioners of the State Savings Bank of Victoria whose real and substantial business was of that nature are bankers within the meaning of sec. 88 of the *Bills of Exchange Act* 1909 and sec. 83 of the *Instruments Act* 1890 (Vict.), notwithstanding that under the *Savings Banks Act* 1901 repayments of deposits were only permitted on production of the depositor's pass-book with his order for payment.

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Certain cheques were drawn by the plaintiffs, who were shipping and Customs agents, on their bank for the purpose only of paying Customs duties upon goods of their customers. All the cheques were crossed and marked "not negotiable." Of twenty-two of the cheques some were payable to a number or bearer, and marked "Duty" or "Duties" and others were payable to "Duties" or bearer. The other thirty-six cheques were payable in one or other of the following manners:—to "H.M. Customs" or bearer; to "Duty" or bearer, and specially marked "for Duty only"; to a number or bearer and specially marked "H.M. Customs Duty"; to "H.M. Customs Duty" or bearer; to "H.M. Customs" or bearer and specially marked "H.M. Customs Duty." All of the cheques were fraudulently converted by a clerk of the plaintiffs and paid by him into his own private current account in the State Savings Bank of Victoria, which, without making any inquiry, collected payment thereof for him and credited the proceeds to his account. In an action by the plaintiffs against the Commissioners of the Bank for conversion of the cheques,

Held, by the whole Court, that as to the thirty-six cheques the Commissioners of the Bank had not received payment without negligence, and were therefore not entitled to the protection of sec. 83 of the *Instruments Act* 1890 or sec. 88 of the *Bills of Exchange Act* 1909; but, by *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Isaacs* J. dissenting), that as to the twenty-two cheques they had not been negligent and were therefore entitled to that protection.

By *Griffith* C.J. and *Powers* J.—The word "negligence" in sec. 83 of the *Instruments Act* 1890 and sec. 88 of the *Bills of Exchange Act* 1909 means the omission to take such reasonable care as a banker, charged with the duty of collecting a crossed cheque for a customer, ought to take for the protection of the true owner, having regard to the circumstances under which it is presented for collection, such care being not less than a man invited to purchase or cash such a cheque for himself might reasonably be expected to take. The relevant circumstances include the general character of the banking operations carried on by the banker, the nature of the account of his customer and all such information as the banker possesses as to his customer's title to the cheque, whether that information is derived from extrinsic sources or from the cheque itself.

By *Isaacs* and *Powers* JJ.—The question of negligence under those sections must be determined with regard to each cheque, and the test of negligence is whether, having regard to all the circumstances existing at the particular time, the transaction of paying in a particular cheque was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make inquiry.

By *Gavan Duffy* and *Rich* JJ.—Protection is afforded by those sections to a banker who acts in good faith when, and only when, his belief in the title of his customer is such as might in the circumstances be held by a reasonably

prudent and careful man in determining whether he would adopt that belief or not.

Decision of the Supreme Court of Victoria: *Permewan, Wright & Co. Ltd.* v. *Commissioners of the State Savings Bank of Victoria*, (1914) V.L.R., 81; 35 A.L.T., 157, varied.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Permewan, Wright & Co. Ltd. against the Commissioners of the State Savings Bank of Victoria, whereby the plaintiffs sought to recover from the defendants the sum of £1,545 11s. 11d. damages for the conversion by the defendants of fifty-eight cheques drawn by and on behalf of the plaintiffs on the Royal Bank of Victoria. Alternatively, the plaintiffs claimed the same amount received by the defendants in respect of the same cheques as money had and received by them to the use of the plaintiffs. The plaintiffs also claimed £400 as damages in the nature of interest. The cheques in question had been handed to one Charles Heath, a clerk of the plaintiffs, for the purpose only of paying Customs duties in respect of goods of their customers, but were fraudulently paid in by him for collection to his own account at a branch of the State Savings Bank; the amounts of them were passed to his credit, and that Bank received payment of them from the Royal Bank. All the cheques were crossed, and on all of them the words "not negotiable" were printed between the crossing lines. The cheques numbered 1 to 12 were payable to a number or bearer, and the word "Duty" was written between the crossing lines; Nos. 13 to 22 were payable to "Duties" or bearer; Nos. 23 to 37 were payable to "H.M. Customs" or bearer; No. 38 was payable to "Duty" or bearer, and the words "for duties only" were written between the crossing lines, the word "only" being partly erased; Nos. 39 to 41 were payable to a number or bearer, and the words "H.M. Customs Duty" were written between the crossing lines, the word "Duty" in each case being written by Heath; Nos. 42 to 50 were each payable to a blank or bearer, and the words "H.M. Customs Duty" were written between the crossing lines, the word "Duty" in each case being written by Heath; Nos. 51 and 54 to 58 were payable to "H.M. Customs Duty" or bearer, the word "Duty" being in each case written by

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Heath; Nos. 52 and 53 were payable to "H.M. Customs" or bearer, and the words "H.M. Customs" were written between the crossing lines, the word "Duty" being added in Heath's handwriting outside the crossing lines.

The action was heard by *Madden* C.J., who gave judgment for the plaintiffs for £1,545 11s. 11d.: *Permewan, Wright & Co. Ltd.* v. *Commissioners of the State Savings Bank of Victoria* (1).

From that decision the defendants now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Mitchell K.C. and *Starke* (with them *Mann*), for the appellants.

McArthur K.C. and *Davis*, for the respondents.

During argument reference was made to *Gaden* v. *Newfoundland Savings Bank* (2); *Foley* v. *Hill* (3); *In re Shields' Estate* (4); *Ex parte Coe* (5); *Morison* v. *London County and Westminster Bank Ltd.* (6); *Thomson* v. *Clydesdale Bank Ltd.* (7); *Meyer & Co. Ltd.* v. *Sze Hai Tong Banking and Insurance Co. Ltd.* (8); *Ladbroke & Co.* v. *Todd* (9); *Bissell & Co.* v. *Fox Brothers & Co.* (10); *London Joint Stock Bank* v. *Simmons* (11); *National Bank* v. *Silke* (12); *Great Western Railway Co.* v. *London and County Banking Co. Ltd.* (13); *Embiricos* v. *Sydney Reid & Co.* (14); *Bank of New South Wales* v. *Goulburn Valley Butter Co. Proprietary Ltd.* (15); *Addy* v. *Foreign and Colonial Exchange Bank of Australasia Ltd.* (16); *Akrokerri (Atlantic) Mines Ltd.* v. *Economic Bank* (17); *Bavins Junr. & Sims* v. *London and South Western Bank Ltd.* (18); *Nathan* v. *Ogdens Ltd.* (19); *Levy* v. *Commissioners of Savings*

(1) (1914) V.L.R., 81; 35 A.L.T., 157.
(2) (1899) A.C., 281.
(3) 2 H.L.C., 28, at p. 36.
(4) (1901) 1 I.R., 172.
(5) 3 D. F. & J., 335.
(6) (1914) 3 K.B., 356.
(7) (1893) A.C., 282.
(8) (1913) A.C., 847.
(9) 19 Com. Cas., 256, at p. 261; 30 T.L.R., 433.
(10) 51 L.T., 663; 53 L.T., 193.
(11) (1892) A.C., 201, at p. 221.
(12) (1891) 1 Q.B., 435.
(13) (1901) A.C., 414, at p. 422.
(14) 19 Com. Cas., 263.
(15) (1902) A.C., 543, at p. 549.
(16) 16 V.L.R., 186, at p. 190; 12 A.L.T., 22.
(17) (1904) 2 K.B., 465.
(18) 5 Com. Cas., 1; (1900) 1 Q.B., 270, at p. 272 (*n*).
(19) 93 L.T., 553; 21 T.L.R., 775; 94 L.T., 126; 22 T.L.R., 57.

Banks (1); *Davies* v. *Kennedy* (2); *Gordon* v. *London, City and Midland Bank* (3); *Capital and Counties Bank* v. *Gordon* (4); *Crumplin* v. *London Joint Stock Bank Ltd.* (5); *Paget on Banking*, 2nd ed., pp. 49, 70, 256, 262, 264, 276; *Grant on Banking*, 6th ed., pp. 27, 35, 47, 401; *Law Times Journal* (25th April 1914), p. 650.

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. Two questions are raised for decision in this case: (1) whether the defendants (appellants) are bankers within the meaning of the *Bills of Exchange Act*, and (2), if they are, whether they have by their conduct disentitled themselves to the protection of sec. 88 of that Act.

The defendants are a body corporate established and regulated by Statute. The Acts now in force are the *Savings Banks Act* 1890 (No. 1138), which was a mere consolidation of previous Acts, and the Amendment Act of 1896 (No. 1481).

Savings banks were originally established in Victoria under Acts of the legislature of New South Wales before the separation of Victoria from that Colony. Their functions were those of ordinary savings banks, namely, to receive deposits of small sums of money, for the most part representing savings, on which interest was allowed to the depositors, who were allowed to withdraw the money on short notice, the safety of the deposits being guaranteed by the Government.

The scheme expressed in the Act of 1890 was to establish separate savings banks in different localities, for each of which two trustees were to be appointed by the Commissioners, who might empower the trustees of any savings bank to open an office and, if so directed, fit up a banking house "for the receipt and repayment of deposits and the transactions generally of a savings bank" at such place as the Commissioners should name. The trustees of each savings bank were empowered to appoint

(1) (1906) V.L.R., 299; 27 A.L.T., 171.
(2) I.R. 3 Eq., 31, 668; L.R. 5 H.L., 358.
(3) (1902) 1 K.B., 242, at p. 245.
(4) (1903) A.C., 240, at p. 252.
(5) 30 T.L.R., 99.

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officers and servants, and instruct them as to the management and control of the savings bank, and give all other necessary directions, including directions for the investment and application of any funds "raised from the depositors or any other source by them in the capacity of trustees" (sec. 11).

All deposits, except such sums as the Commissioners might authorize to be retained for "repayment of the demands of the depositors," were every week to be paid to the credit of the Commissioners in "some bank in Melbourne" (sec. 17). No depositor was allowed to deposit more than £1,000 (sec. 26), or to deposit or hold money in more than one savings bank (sec. 27). Claims by depositors were to be settled by the arbitration of justices (sec. 40). On the withdrawal of money by a depositor, the party receiving it was required to sign a receipt in a form to be directed by the Commissioners (sec. 41). By Act No. 1778 (1901) this provision was modified by allowing withdrawals to be made by an order signed by the depositor in such form as the Commissioners might direct. The form in use, which I assume to be that directed by the Commissioners, is in the ordinary form of a bank cheque, but having printed in a single line at its foot the words "The pass-book must be produced with this order." By sec. 7 of the Act of 1890 the Commissioners were empowered to make regulations for carrying the Act into execution, which, having been laid before Parliament and not disallowed by the Governor, had the same force "as if inserted in the Act." Under this power the Commissioners had made a regulation by which it was forbidden to repay any deposit without production of the depositor's pass-book. It will be observed that the form of order in use was in conformity with the regulation.

Pausing here, it is clear, in my judgment, that such orders were not cheques within the definition given by the *Bills of Exchange Act*, sec. 78, since they were not unconditional orders in writing for the payment of money (*Bavins Junr. & Sims* v. *London and South Western Bank* (1)). It is, I think, immaterial whether the words requiring production of the pass-book are regarded as a direction by the drawer of the order to the savings bank, or as an intimation made by the savings bank to the

(1) (1900) 1 Q.B., 270.

depositor and agreed to by him, such agreement being conclusively shown by the use of the order in that form, that the order will not be paid except on that condition. Even if they are cheques in form, they are not negotiable in law, because the regulation, which has the force of law, forbids unconditional orders to be given, and anyone taking such an order must be held to have knowledge of that law. It follows that the savings bank accounts could not be operated upon by cheque.

The Act of 1896 provided for what was called the amalgamation of the Commissioners' Savings Banks with Post Office Savings Banks, which also existed in Victoria, and made various changes with regard to management. It provided, *inter alia*, that a branch office might be established at any post office in Victoria (sec. 5). The Commissioners were made public officers and the deposits were made Crown property (sec. 6). The repayment of deposits was guaranteed by the Government (sec. 16). By sec. 29 it was expressly provided that the accounts of friendly societies might be drawn upon by cheque in such form and subject to such conditions as the Commissioners might direct. A sum not exceeding one-tenth of the total funds held by the Commissioners was to be deposited in "banks" which "were constituted bankers of the Government," or, if there should be no such bank, in "a bank" approved by the Commissioners of Audit (sec. 25).

The Regulations provided that a sum not exceeding £20 might be withdrawn by a depositor on any one day on demand, but that notice must be given before withdrawing any greater sum.

Reference was made to the provisions of the *Evidence Act* 1890 relating to the proof of bankers' books, for the purposes of which Act the term "bank" is defined by sec. 33 to include companies engaged in the ordinary business of banking by receiving deposits and issuing bills or notes payable to the bearer at sight or on demand, and also "any savings bank established or continued under the *Savings Banks Act* 1890." This, it is said, shows that the legislature did not regard the appellants as an institution engaged in the ordinary business of banking.

The Commissioners contend that they are bankers within the meaning of the *Bills of Exchange Act*, as being a body of persons

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incorporated "who carry on the business of banking" (sec. 4). The respondents contend, and *Madden* C.J. held, that they are not. We were referred to many definitions of the term "bank" contained in dictionaries and text-books, all of which speak of the receipt of money on deposit as an important part of the business of banking, as no doubt it is. The respondents contend that the business of banking meant by the *Bills of Exchange Act* connotes something more than the mere receipt and custody of deposits, and in particular imports trading in money and negotiable instruments for profit, and necessarily includes the honouring of cheques drawn upon them by their customers. It was pointed out that there are in Australia several well-known companies who carry on financial and agency business of great magnitude, and receive large sums of money by way of loan or deposit, and also allow orders for money to be drawn upon them by their clients, but whom no one would think of calling bankers. It was contended that the whole of the provisions of the *Bills of Exchange Act* relating to the duties and privileges of bankers, particularly with regard to crossed cheques, show that the bankers intended were persons whose business includes the honouring of cheques drawn upon them by their customers and dealing with crossed cheques, both by way of paying such cheques drawn upon them and collecting cheques crossed generally or crossed specially to themselves. In favour of the affirmative proposition that the Commissioners are bankers I can find only the facts that the word "bank" is part of their name, that they receive deposits to be repaid either to the depositors in person or to persons who are for this purpose their agents, and who must prove their agency by production of the depositor's pass-book (except in the case of friendly societies, who are allowed to operate on their accounts by cheque), and that at one time in England the enterprise of a person who carried on the business of receiving money on deposit, and no other, was colloquially called a bank. But, so far as I know, the term has never been used in that sense in Australia. I am, indeed, confident that it has never been used of any Australian undertaking except to designate incorporated banking companies carrying on the ordinary business of banking, although it has been sometimes

assumed by money-lenders in order to deceive the public. No one would suggest that such persons are bankers within the meaning of the *Bills of Exchange Act.*

On the other hand, I find that the Commissioners do not trade for profit, and that, except in the case of friendly societies, they do not perform one of the most important functions ordinarily performed by bankers.

In *Halsbury's Laws of England* (vol. I., p. 568) it is said that "The business of banking, strictly speaking, is the receipt of money from or on account of a customer, to be repaid on demand or when drawn on by cheque. In the case of banks lawfully issuing bank notes such issue is a part of banking business"; and in a note it is added :—"The collection of crossed cheques, being a statutory necessity, is part of the business of banking, but is included in the above definition. The numerous other functions undertaken by modern bankers, such as payment of domiciled bills, custody of valuables, and discounting bills, do not come within the strict definition of banking business." "The judicial recognition of the banker's lien—*Brandao* v. *Barnett* (1) —implies the inclusion in banking business of the making of advances or the granting of overdrafts to customers." I do not know of any better or more authoritative definition. In my opinion an institution upon which it is not lawful to draw a cheque is not a banker within the meaning of the *Bills of Exchange Act.*

I agree, therefore, with *Madden* C.J. that the appellants are not bankers within the meaning of that Act, except, perhaps, as regards friendly societies. It may be that in transactions relating to the accounts of such societies they are entitled to the privileges of bankers, but, even so, I do not think that that fact would be enough to entitle them to claim such privileges in respect of other transactions. They may, no doubt, if they think fit, receive a deposit in the form of a cheque, and, if the cheque is crossed, may collect the money through a bank, but this is a right common to all persons who are authorized to receive money.

This would be of itself sufficient to dispose of the appeal, for it is not and cannot be disputed that the defendants' dealings

(1) 12 Cl. & F., 787.

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with the plaintiffs' cheques complained of in the action were in law a conversion of the cheques, unless they can bring themselves within the protection of sec. 88 of the *Bills of Exchange Act*.

But, as the case is of great importance and it may be sought to take it further, I will deal with it on the assumption that the Commissioners are bankers within the meaning of the Act.

The plaintiffs are a well-known joint stock company, carrying on a large business in Victoria as carriers, forwarding agents, shipping agents and Customs agents, and having their head office in Melbourne. This fact was well known to the defendants. The cheques in question were all drawn in payment of Customs duties payable in respect of goods imported by persons for whom the plaintiffs acted as Customs agents, and were all handed to Heath, a clerk in their employment, to be applied for that purpose, but were stolen by him, and paid into his account with the defendants, who collected them through their own bankers.

Sec. 88 of the *Bills of Exchange Act* exonerates from liability a banker who in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and to which the customer has no title or a defective title. The cheques in respect of which this action is brought were all payable to bearer and crossed generally, with the words "not negotiable" added. The effect of these words is that a person taking the cheque has not and cannot give a better title to it than that which the person from whom he took it had (sec. 87).

Negligence means, in my opinion, the omission to take such reasonable care as a banker charged with the duty of collecting a crossed cheque for a customer ought to take for the protection of the true owner, having regard to the circumstances under which it is presented for collection. In my opinion the care to be taken is not less than a man invited to purchase or cash such a cheque for himself might reasonably be expected to take. The relevant circumstances include the general character of the banking operations carried on by the banker, the nature of the account of the customer who asks to have the cheque collected for him, and all such information as the banker possesses as to

the customer's title to the cheque, whether that information is derived from extrinsic sources or from the cheque itself.

I have already stated the character of the operations carried on by the defendants. The account of their customer Heath was opened in October 1898 by a deposit of £8 0s. 10d. Two additional deposits of £1 17s. 6d. and £3 3s. were made before the end of July 1899, at which time he had a balance of £3 13s. 5d. On 1st August 1899 he made a deposit of £42 18s. by cheque, and before the end of the year made a further deposit of £3 10s. His balance was then £1 7s. 6d. His operations on the account during the years 1900-1906 were of a similar kind. Withdrawals were, with very rare exceptions, of round sums of small amount. The account was not in any sense an ordinary business account, by which I mean an account on which a trader operates by cheques for the purpose of his business.

On 28th November 1907 the first of the cheques in question, which was for £35 14s. 8d., was lodged with the defendants for collection. On 5th February following another cheque drawn by the plaintiffs for £94 12s. 1d. was similarly lodged. Between that date and 20th May 1912 fifty-six other cheques of the plaintiffs, making in all a total sum of £1,545 11s. 11d., were lodged. Between November 1907 and May 1912 only sixteen cheques drawn by persons other than the plaintiffs were deposited, all except two being of small amount. Withdrawals were made in the same manner as before, *i.e.*, almost entirely in round sums.

I now turn to the information disclosed by the cheques themselves. I have stated that they were all marked "not negotiable." The words were in fact boldly printed across the cheques between two lines also printed. Mr. *Starke* contended, with some courage, that these words upon a cheque made payable to bearer are negligible for the purpose of sec. 88. I cannot accept this view. In my opinion the words "not negotiable" on a crossed cheque are a danger signal held out before every person invited to deal with it, and are equivalent to saying "Take care: this cheque may be stolen." I think, further, that they indicate that the drawer of the cheque (whether, as in this case, the words are printed upon it or are written) intended that the person to whom it was to be handed or sent should apply it to some specific

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purpose and no other. A reasonably careful man to whom such a cheque is tendered should therefore examine the cheque to see whether there is anything upon its face to indicate such a purpose. If there is not, it may be that he may safely rely on the honesty of the bearer; but, if there is, it is his duty to make inquiries, and if he fails to do so he cannot claim to have acted without negligence.

To apply these principles I will take as an illustration a cheque for £50 4s. 9d., drawn on 4th November 1911. The form of the cheque was: "Pay H.M. Customs or bearer," and between the crossing lines was written "H.M. Customs Duty." I put myself in the place of an ordinary person to whom such a cheque is presented with a request to cash it or purchase it. He would see, first of all, that the person presenting the cheque might have no title to it, and would naturally ask himself whether there was anything on its face to show the purpose to which the drawer intended it to be applied, or otherwise to cast any doubt on the title of the person presenting it to him. He would find upon it words indicating *primâ facie* that the cheque was intended by the drawer to be applied in payment of Customs duty and for no other purpose. If he knew, further, as the defendants did, that the drawers were Customs agents who would in the ordinary course of their business give crossed cheques for that purpose, the inference would be almost irresistible. Under these circumstances the ordinary person would certainly feel called upon in his own interests to make inquiry as to the bearer's title. It was suggested that the defendants might, if they had considered the matter at all, have thought that the cheque represented money entrusted to Heath by the plaintiffs for disbursements in payment of Customs duties on their behalf. Having regard to the nature of his account, I do not think that they could have thought anything of the kind. But the main argument for the defendants was that bankers are not bound to have regard to anything written on the face of a cheque which is not expressly authorized by the Act to be so written, except in the single instance of such words as "Account of A.B." or "Credit A.B." or some plain statement of want of title. And all the witnesses called by them not only admitted that they followed this practice,

but insisted that they were right in doing so. They do not even pretend to have exercised any care at all. With regard to this cheque, therefore, I think that negligence is clearly established as against the defendants.

The question of negligence with regard to the other cheques depends on the same principles, although the words written upon their face were not always the same. For instance, the cheque first stolen was drawn in favour of a number "or bearer," with the word "Duty" written within the crossing lines in red ink. It was suggested that the word "Duty" was ambiguous, and could not give rise to a suspicion that the cheques were intended to be applied in payment of Crown duties. In my opinion, the word "Duty" would suggest to any reasonable person addressing his mind to the matter that the cheque was to be applied either in payment of federal Customs duty or State stamp or probate duty, which are the only Crown duties payable in Victoria, and, if he knew, as the defendants did, that plaintiffs were Customs agents, that it was to be applied in payment of Customs duties.

The writing upon the other cheques was in each case to the same effect, the drawers' intention as to the destination of the cheques being in some cases stated more emphatically than in others. I draw the same inference with respect to the negligence of the defendants as to all of them, the only difference being that with respect to some of them the evidence of negligence is overwhelming.

An argument was addressed to us to the effect that even if the defendants were guilty of negligence in respect to the earlier cheques they were excused from taking care with respect to the later ones by the plaintiffs' default in not sooner finding out Heath's fraud and warning them. If the defendants had in fact applied their minds to the point, and if the plaintiffs ought to have discovered the fraud, the argument might have some weight. But the defendants' case is that they did not, and were not bound to, examine the cheques at all, or take any notice of what they call irrelevant words written on their face. They were not, therefore, misled by any inaction of the plaintiffs. Nor is there any foundation for the suggestion that the plaintiffs ought to have discovered the fraud. In Australia it is not, as in

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England, the practice for bankers to return their customers' cheque to them with the pass-book, and the only information that the plaintiffs could derive from their pass-book was that the cheques had been debited to their account. Heath's frauds were so cunningly devised that the plaintiffs' principals obtained the goods in respect of which the duties were payable, and recouped to the plaintiffs the duties for which the cheques were drawn. This argument therefore fails.

In my judgment the defendants, even if they are bankers, have not brought themselves within the protection of sec. 88 as to any of the cheques.

In my opinion, therefore, the appeal fails as to the whole case.

ISAACS J. The first question is whether the appellants are bankers within the meaning of sec. 83 of the Victorian *Instruments Act* 1890, and of sec. 88 of the Commonwealth *Bills of Exchange Act* 1909. Both Acts are the same in this respect.

The interpretation section in each Act says:—"'Banker' includes a body of persons, whether incorporated or not, who carry on the business of banking." The same criterion as to what constitutes the business of banking, must be applied to both these Acts. That expression "business of banking," or an equivalent as "business of bankers," "business as bankers," and "business of a banker," has been of constant use in English legislation. To go no further back than 1826, I may refer to the following Acts:—7 Geo. IV. c. 46; 3 & 4 Will. IV. c. 83; 1 & 2 Vict. c. 96; 7 & 8 Vict. c. 32, and c. 113; 17 & 18 Vict. c. 83; 21 & 22 Vict. c. 20; and the phrase was continued in the English *Bills of Exchange Act* 1882, on which Australian Acts have been modelled.

This indicates a constant signification of the term "banking" as a business. The fundamental meaning of the term is not, and never has been, different in Australia from that obtaining in England. Various writers attempt various definitions, more or less discordant, and many of them referring to functions that are now very common and convenient, and even prominent, as if they were indispensable attributes. The essential characteristics of the business of banking are, however, all that are necessary to bring the appellants within the scope of the enactments; and

these may be described as the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required. These are the essential functions of a bank as an instrument of society. It is, in effect, a financial reservoir receiving streams of currency in every direction, and from which there issue outflowing streams where and as required to sustain and fructify or assist commercial, industrial or other enterprises or adventures.

If that be the real and substantial business of a body of persons, and not merely an ancillary or incidental branch of another business, they do carry on the business of banking. The methods by which the functions of a bank are effected—as by current account, deposit account at call, fixed deposit account, orders, cheques, secured loans, discounting bills, note issue, letters of credit, telegraphic transfers, and any other modes that may be developed by the necessities of business—are merely accidental and auxiliary circumstances, any of which may or may not exist in any particular case. I agree as to this with what was said by *Fitzgibbon* L.J. in *In re Shields' Estate* (1).

Bankers are not bound by law to open current accounts. They may confine themselves, if they wish, to what are known as deposit accounts, and make those deposits repayable at call or at stipulated times, and withdrawable as a whole or in part as may be agreed on. The method of withdrawal may be conditioned to be by personal application, or by written order. It is all a matter of contract. See *Marzetti* v. *Williams* (2), *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (3), and *Curtice* v. *London City and Midland Bank* (4).

For instance, a stipulation that the pass-book must be produced by the depositor, or by some person with his written authority, is a condition precedent to any right of payment (*Atkinson* v. *Bradford Third Equitable Benefit Building Society* (5)). It was argued that the relevant sections of the enactments referred to contemplate only such bankers as include in their business

(1) (1901) 1 I.R., 172, at p. 198.
(2) 1 B. & Ad., 415.
(3) 25 Q.B.D., 377, at p. 381.
(4) (1908) 1 K.B., 293, at p. 301.
(5) 25 Q.B.D., 377.

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both the collection and payment of customers' cheques. This argument was based on the repeated mention of the payment and collection of cheques by bankers; and it was rightly contended that only bankers who actually paid and collected cheques could come within all those provisions. That is true; but the answer is plain. A banker who does not collect or does not pay a cheque does nothing which requires the application of a section referring to payment or collection. The word "pay" and its derivatives, the phrase "receives payment," and the word "collection" have reference to an act done, or to be done, with reference to a given cheque in a particular instance, and do not operate to qualify the word banker, or restrict Part III. of the Commonwealth Act and the corresponding Part of the State Act to a limited section of the general class of bankers indicated by the interpretation section. Here the appellants did in fact collect the cheques—and did so as incidental to the transaction of deposit (see *Gaden* v. *Newfoundland Savings Bank* (1))—and the only question on this branch of the case is: Were they bankers as carrying on the business of banking, or, in other words, did their business possess the essential characteristics I have indicated?

If we were confined to the Act of 1890 I should have difficulty in saying the Commissioners, rather than the trustees, of savings banks, were bankers. I should have to consider whether the scheme of the Act contemplated the Commissioners as carrying on the business of any particular savings bank, or as a supervising body controlling the conditions under which and the manner in which trustees carried on the business of savings banks in Victoria. But the later enactments greatly modify the original legal position of the Commissioners; to what extent is not clear, but in this case is unnecessary to define. It may, however, be desirable to take into consideration how far the relative situation and powers of the Commissioners and the trustees should be made clear and definite, and how far the regulations, for instance, as appearing in the pass-books and relating to "Trustees" have application to the "Commissioners." There may be some general provision accommodating the terms, but we

(1) (1899) A.C., 281, at p. 286.

have not been referred to any. I pass by that aspect as immaterial in this case, because the Commissioners are treated by both sides as the proper parties, and as carrying on the business, and as included in the term "Trustees" in the regulations. On that basis it appears to me the Commissioners answer the test stated, and do carry on the "business of banking."

In the view so taken it is unnecessary to say whether the order to pay is a cheque or not. The statement that the depositor's pass-book must be produced—a condition required by law, as well as inscribed on the order—raises the difficulty. If it were necessary, I should require more consideration before deciding that the order was unconditional in the sense required to constitute it a cheque. The case of *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (1) looks against it.

Then comes the second question, whether they have discharged themselves of their *primâ facie* obligation to pay over the money claimed to the true owners of the cheques. In other words, have they established that they received payment of the various cheques without negligence? Good faith is not challenged. As to negligence, it is requisite in the first place, in view of the course the argument has taken, to get a clear conception of the relation of sec. 88 to the other sections of the Act. Its appearance in legislation is in fact a collateral necessity, arising from modifications of the law having a different object in view, namely, the extension of responsibility on the part of the paying bankers.

In 1852, when there was yet no legislation touching the crossing of cheques, *Bellamy* v. *Marjoribanks* (2) was decided. From that case it appears that the practice of crossing cheques began in the clearing house, and was a device voluntarily adopted by the bank clerks who wrote their firm's name across the cheques sent to the clearing house, so as to facilitate the making up of accounts there as between the banks themselves. Even that was a modern expedient, apparently in the beginning of the nineteenth century. Then merchants themselves adopted the practice of crossing their cheques—whether intended to go through the clearing house or not—by writing across it the name of a banker or the words "and Co."

(1) 25 Q.B.D., 377. (2) 7 Ex., 389.

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This practice became a recognized custom by 1828 to this extent, that bankers generally refused to pay such a cheque except to a banker, the known object of the drawer being to facilitate the tracing of the cheque and its payment, by relying on the probity and high regard for honourable dealing which bankers proverbially exhibit, and the consequent practical obstacle this presented to a dishonest holder of a cheque so crossed, when asking the drawee to pay it. But the crossing did not restrict the absolute negotiability of the cheque, and this is the central point of the situation. At common law a cheque was inherently negotiable. Negotiability in its full sense means capability of being transferred by delivery or indorsement so as to give a good title to the instrument to the transferee, taking *bonâ fide* and for value, thereby constituting him the true owner, notwithstanding any defect of title in the transferor. And at common law, any restriction of this complete negotiability was incompatible with the notion of a cheque.

The crossing, therefore, to which I have referred was held in *Bellamy* v. *Marjoribanks* (1) not to restrict its negotiability, and the banker drawee was entitled as against the drawer to pay it, notwithstanding any crossing. Nevertheless, said *Parke* B., the custom did impose some liability on the paying bank. The crossing was a protection and safeguard, but to *the owner of the cheque*, whoever he might be; and if the banker, seeing this crossing, were still to pay it to a private holder, the circumstance of his so paying it would be strong evidence of negligence in an action against him.

Three points must be here noted:—(1) That the duty of care was one imposed by the common law, in view of the custom of crossing cheques, recognized by bankers as indicating a desire or expectation by the drawer that the drawee would pay it only to or through a banker. (2) That this indication of desire and expectation was not a direction, restraining negotiability, for that was legally impossible. It operated as a *caution* to the banker, and he was liable for negligently failing to comply with the caution. (3) That the protection was only in favor of the true owner, whoever he might be.

(1) 7 Ex., 389.

In 1856 this view was reaffirmed in *Carlton* v. *Ireland* (1). In that year Parliament altered the common law by 19 & 20 Vict. c. 25, which made the crossing a direction. This compelled the drawee to pay through a banker, otherwise the payment was unauthorized. But, as decided in *Simmons* v. *Taylor* (2), this only meant a direction independent of the instrument itself—and not as part of it, and only as if it were on a separate piece of paper. The Court still regarded the negotiability of a cheque as incompatible with such a restrictive direction as part of the instrument itself.

Then the legislature interfered again. By Act 21 & 22 Vict. c. 79 the crossing was made part of the cheque.

Upon that arose the case of *Smith* v. *Union Bank of London* (3). There the drawee banker disobeyed the direction, and paid it to a bank other than the bank with the name of which it was specially crossed. The cheque had been stolen, and the person from whom it had been stolen sued in trover and for breach of statutory duty. The primary Court held that the plaintiff must fail, because, though the bankers had disobeyed the drawer's direction, and though that direction was now part of the instrument, the cheque was still fully negotiable, and the holder having received it *bonâ fide* and for value was in law "true owner," and the plaintiff therefore was not, and had no legal cause of complaint.

Blackburn J., however, said (4):—"There are excellent reasons why care and caution should be taken, and why the bankers on whom it is drawn should require the cheque to come through the proper banker, as affording a protection against fraud. If they do not, they incur a liability to the true holder of the cheque, whoever he may be." This was affirmed in the Court of Appeal (5), where Lord *Cairns* L.C. said that the negotiability of the cheque was not restrained, and added these material words:—"The legislature might have enacted that anyone taking a crossed cheque, should take it at his peril, and get no better title than his transferor had. It has not done so." The Lord Chancellor

(1) 5 E. & B., 765.
(2) 2 C.B. (N.S.), 528; 4 C.B. (N.S.), 463.
(3) L.R. 10 Q.B., 291.
(4) L.R. 10 Q.B., 291, at p. 297.
(5) 1 Q.B.D., 31.

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observes (1) that the effect of the Statute in enabling a payee to cross a cheque is that "it imposes caution, at least, on the bankers," and further alters the drawer's mandate as far as he is concerned.

Once more Parliament intervened in 1876 by passing the Act 39 & 40 Vict. c. 81, which codified the law of crossed cheques up to that time, and, to meet the omission pointed out by Lord *Cairns*, modified the common law still further by providing that a person taking a cheque crossed generally or specially, and bearing in either case the words "not negotiable," should not have or be capable of giving a better title than his transferor had. This did what some Judges had said was conceptionally impossible, namely, make a cheque not completely negotiable and still leave it a cheque.

The immediate object of doing that was to protect the real and rightful owner from theft and fraud by increasing the responsibility of the paying banker. But the effect of it at common law was also to make every person who wrongfully dealt with the cheque liable for conversion. Observe it required no special legislative direction for that purpose. Liability was a common law consequence, as soon as the instrument was made "non-negotiable" by law, and was proved not to have been parted with by its owner. Aimed directly at such a case as *Smith* v. *Union Bank of London* (2), so as to make the paying bank liable for a manifest breach of duty to obey the direction on the face of the cheque, it had the indirect but inevitable consequence of making a collecting bank liable for conversion, however innocent and careful it or its customer might be. The legislature therefore added—not a new duty, not a statutory obligation, as it seems to me, with very great respect to the view taken in *Paget* (pp. 257-258)—but a statutory qualification of a rigorous common law rule of absolute liability.

All persons other than a collecting banker still remained subject to that rule of liability, because they were unnamed, showing that it is not the Statute that creates the liability. The collecting banker, however, if he could show good faith and due care, was permitted to relieve himself from his *primâ facie* responsibility.

(1) 1 Q.B.D., 31, at p. 35. (2) 1 Q.B.D., 31.

The due care was necessarily referable to the same object as the primary responsibility, namely, the rights of the true owner. The rightful owner's protection was diminished in this respect for the sake of general financial business, represented by banking transactions. So far as this was necessary the exemption existed; but not beyond. And necessity went no further than honesty and ordinary care for the true owner's interests.

This law is, with one modification and some immaterial verbal changes, in force now. The conditions of exemption now are that (1) a banker alone is relieved; (2) the banker must be the banker who "receives payment," that is, the collecting banker; (3) payment must be received for a "customer"; (4) the payment must be received in good faith and without negligence; and (5) the banker must merely have received payment for the customer—which now includes crediting the customer's account with the amount of the cheque before actual receipt of payment.

In *Great Western Railway Co.* v. *London and County Banking Co. Ltd.* (1) Lord *Brampton* observed:—"If this had been the case of an obliging tradesman cashing the cheque for a friend it would have been unarguable," that is, the tradesman's liability to the appellant. The decision itself established that the receipt of payment to be protected at all, must be for a "customer"—that is, a customer in the way of banking business, meaning a customer having "some sort of account, either a deposit or a current account or some similar relation" (*per* Lord *Davey* (2)). Lord *Lindley* (3) supports that notion of "customer." Incidentally these observations help the definition of "banking business" which I first dealt with. As the Bank could not satisfy the conditions as to "customer" their common law liability—established by such cases as *Higgons* v. *Burton* (4) and *Cundy* v. *Lindsay* (5) (see *per* Lord *Davey* (6))—made them responsible to the true owner, and since the Act of 1882, reproducing that of 1876, the true owner was the appellant.

From this review of the progress of the law, I arrive at the conclusion that we have not to look for any statutory duty of

(1) (1901) A.C., 414, at p. 422.
(2) (1901) A.C., 414, at pp. 420, 421.
(3) (1901) A.C., 414, at p. 425.
(4) 26 L.J. Ex., 342.
(5) 3 App. Cas., 459.
(6) (1901) A.C., 414, at p. 420.

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care on the part of the collecting bank towards the true owner of a cheque, any more than a statutory duty of good faith; and consequently we have not to measure the duty of care which the bank in order that it may not become a convenient instrument of fraud ought to observe to protect the true owner, by any standard set up expressly or impliedly by the Act. In my opinion, much of the difficulty found in the arguments is occasioned by treating the Act instead of the common law as creating the test of that duty.

The words "non-negotiable," though restricting the negotiability of the cheque in the sense I have mentioned, are not prohibitive of payment to a person other than the "named payee or bearer"; they are consistent with such payment provided there is no bad faith or negligence. Consequently their mere presence cannot determine the question of negligence. That must depend, like every other case of negligence at common law, on the fair examination of the circumstances as they appeared at the time.

Cases have been cited, the latest of which is *Morison* v. *London County and Westminster Bank* (1). But, except for their affirmance of some principle of law, they are no precedent for any other case. Apart from the well established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison's Case* and relevant to the present are: (1) that the question should in strictness be determined separately with regard to each cheque; (2) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry; (3) that the absence of any complaint over a sufficient period may in certain circumstance be in itself a fact which, as to later cheques, outweighs other facts that in themselves are some evidence of negligence; and (4) that the third principle operates, not merely if suspicion has in fact been previously excited in the bankers' mind, but also if it ought to have been;

(1) (1914) 3 K.B., 356.

that is, as to each cheque you regard in considering the question of negligence all the circumstances existing at that time.

Those principles are found particularly in the judgments of Lord *Reading* C.J. and *Phillimore* L.J.

I now apply these principles to the circumstances here. The salient facts here are that in the first place the Bank is a savings bank and not an ordinary commercial bank. It is established largely to do business that is not usually transacted by an ordinary commercial bank. It receives deposits from the poor, and usually in small amounts that commercial financial institutions would not receive as a general course of business. A maximum is fixed upon which interest will be paid. The money deposited is supposed to be "savings" and to be or allowed to remain for a time more or less indefinite. Emergencies may necessitate withdrawal of a certain amount (£20) at any time, but withdrawals are not looked upon as they are in a regular current account in a business bank. Continuance is the primary object, withdrawal the exception. The accounts are not business accounts; they are essentially private accounts, and the moneys are also essentially presumed to be moneys that the depositor possesses as a surplus over his immediate requirements and not, so to speak, working moneys. Interest on the deposits is the attraction, not the convenience of the depositor in paying his creditors.

It appears to me, therefore, that what might in the case of an account current in a commercial bank pass as an ordinary payment in of a cheque, subject to a business adjustment between the depositor and the drawer of the cheque, might well be so far out of the ordinary course of a savings bank deposit as to excite suspicion or raise a demand for inquiry in the minds of the officials. What would be ordinary elsewhere might be extraordinary there. Consequently I am not satisfied that the appellants as to the first twenty-two cheques, which, like the rest, are all crossed "not negotiable" were, in the first instance, free from negligence.

The cheques specially crossed "Duty" or "Duties" could not well be supposed to be savings. Cheques for "duties" are not given until they are wanted for immediate payment. They had

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obviously to be accounted for; they were manifestly not accounted for in that account, as an inspection of the items clearly shows. And it is sufficiently improbable that they would have been accounted for or adjusted in some other account in some other bank, while these particular cheques were paid into this bank, to call for some inquiry. "Duties" means some liability to Government and *par excellence* Customs duties, particularly when paid in by a depositor who describes himself as "Shipping Agent." I do not forget the word "bearer"; but that does not obliterate the word "Duties," and the crossing indicates that negotiability in its full sense does not exist, and should put the Bank on the alert.

One important feature of the case in favour of the appellant bank is this—there never was any complaint by any person that Heath had improperly appropriated a single cheque. Taking the first twenty-two cheques, the defendants' position is stronger than afterwards, for the twenty-third specified "H.M. Customs" in the payee line. But the first twelve had "Duty" or "Duties" as part of the crossing, the payee being a number or bearer, the thirteenth to the twenty-second had "Duties or bearer" in the payee line, and all the cheques were crossed "non-negotiable."

Now, in view of the common law liability in favour of the true owner arising from the "caution" of mere crossing, referred to in the earlier cases, and the still more stringent endeavour to protect the "true owner," whoever he might be, by the words "non-negotiable," the presence and connotation of the word "duties," the knowledge of who and what Permewan, Wright & Co. were, and the business they did, and the manifest state of Heath's account, were not outweighed by the circumstances of the opposite scale of non-complaint. It is true that the genuineness of the cheques was vouched for satisfactorily by the knowledge that over a period of more than fourteen months no complaint had been made, and it is also true that some weight must be given to the probability that Permewan, Wright & Co., if the goods had not been cleared and paid for to the Customs, would have raised some objection. But, on the whole, the appellants have not satisfied my mind that they took care and acted with caution, or did more than take the risk, and let the true owner, whoever he

might be, look after himself and take his chance; and so, as *Blackburn* J. said in 1875 in the passage I have quoted from *Smith* v. *Union Bank of London* (1), "they incur a liability to the true holder of the cheque, whoever he may be." The respondents are the "true owner," and to them the Bank is responsible. If that is so, as to the earliest cheque, the following twenty-one are more difficult to justify, and the further subsequent ones from their more definite and stringent form, are *à fortiori* instances.

It was contended that the knowledge of the appellants' clerks, though acquired in the course and for the purpose of the Bank's business, should not be imputed to the Bank so as to make it responsible for the act of its other clerks, who had not personally that knowledge. I am unable to entertain that objection. The knowledge of a clerk acquired in the way mentioned is the knowledge of the Bank. It is his duty to communicate it to his principals; and it is certainly the duty of the principals to see that every other clerk authorized to deal with the public has the necessary information communicated to him. It is the one bank, and each agent is "an agent to know," as Lord *Halsbury* said in *Blackburn, Low & Co* v. *Vigors* (2), as well as an agent to act. Looking at the various cheques, either singly or as part of a series, I arrive at the conclusion that the appellants are justly held liable for all the cheques, and that this appeal should be dismissed with costs.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. Two questions arise for determination in this case: (1) Are the defendants bankers within the meaning of the *Instruments Act* 1890 and of the *Bills of Exchange Act* 1909 (No. 27 of 1909), and (2) In receiving payment of the cheques, the subject matter of this action, did they do so "without negligence" within the meaning of these Statutes?

We agree with our brother *Isaacs* in thinking that the first question should be answered in the affirmative, and we desire to adopt the reasons which have led him to that conclusion.

With respect to the second question the position is this. The

(1) L.R. 10 Q.B., 291, at p. 297. (2) 12 App. Cas., 531, at p. 537.

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cheques misappropriated by Heath were crossed cheques bearing upon them the words "not negotiable" (*Instruments Act* 1890, sec. 82; *Bills of Exchange Act* 1909, sec. 87), and in law he could neither deal with them himself nor authorize any other person to do so. The result is that the act of the defendants in receiving payment of each cheque was a conversion which rendered them liable to an action by the plaintiffs, the true owners of the cheques, unless the defendants could successfully invoke the protection of sec. 83 of the *Instruments Act* 1890 up to 1st February 1910, and of sec. 88 of the *Bills of Exchange Act* 1909 after that date. These provisions protect from liability a banker who in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself though the customer has no title or a defective title thereto. The expression "without negligence" in this section is somewhat ambiguous: it may mean that in order to claim protection the banker who has obtained payment must show that every act of his and of his officers in dealing with the cheque has been in fact careful and prudent even where no care or prudence could have detected the defect in the customer's title; or it may afford him protection whenever the receipt of payment was not in itself an act of negligence, and so impose on him only the necessity of showing that due care and prudence if exercised would not in fact have led him to suspect that the customer was not the true owner of the cheque. We think the latter and lighter onus is that which is imposed on him. Looking at the history of the legislation, we are satisfied that the intention of the legislature was to protect the banker who acted in good faith, when, and only when, his belief in the title of his customer was held without negligence, that is to say, was such as might have been held in the circumstances by a man reasonably prudent and careful in determining whether he would adopt that belief or not. Accordingly, the inquiry we have to make in this case is not whether the officers of the Bank did all that careful and prudent men would have done in the circumstances, but whether the circumstances which were or should have been known to them would have induced a reasonably prudent banker to suspect that Heath was not the true owner of the cheques. If such a man would

have had such a suspicion, the defendants are not protected by the Statutes; if he would not, they are protected. The defendants' officers acted in good faith inasmuch as they believed Heath to be the true owner of the cheques; we have to inquire whether that belief was reasonable in all the circumstances of the case. This is a question of fact, and it is, in our opinion, very undesirable that Judges should prescribe a course of conduct which bankers must pursue in given cases in order to secure the protection of the Statutes. Every case must be determined on its own merits, and every separate cheque transaction here must be considered separately as a case of conduct which will amount to conversion unless the protection of one or other of the Statutes is available for the defendants. The question of negligence or no negligence is always a question for the jury or Judge sitting as a jury, and we deprecate the erection on the provisions of the Statutes of a doctrine of law like the doctrine of constructive notice invented in the Chancery.

Would, then, a banker acting in a reasonably prudent manner have been led, either mediately or immediately, by the circumstances of the case to suspect that any one of these cheques was not the property of Heath? We cannot help feeling that an *ex post facto* inquiry such as we must make bears hardly on the defendants. It is much easier to find suggestions of a known fraud in circumstances of little *primâ facie* significance than to infer the existence of a hitherto unsuspected fraud from such circumstances.

Deliberating on the matter as a jury, we do not think it would be reasonable to expect that the bank officials should remember the nature of every payment from time to time into or out of the accounts of the Bank's customers, or the nature of the various customers' businesses, nor do we think that the Bank should be expected to keep a record of such matters for the information of the officers whose duty it is to obtain payment of cheques for customers; though any knowledge which the officers in fact possessed must of course be considered as the knowledge of the defendants for the purpose of determining whether they acted "without negligence," and suspicious circumstances might call on them as prudent men to acquire information. Nor do we think

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that the defendants can rely in support of their dealings with any cheque on the fact that there had been no complaint by the plaintiffs as to the defendants' dealings with prior cheques. In our opinion they would not be justified in supposing that the plaintiffs knew that any of these cheques had passed through Heath's account, or that the plaintiffs would have discovered fraud if fraud existed. The cheques would not be shown to the plaintiffs after payment unless for some special purpose they asked to see them, and frauds like those committed by Heath go long undiscovered in spite of the greatest care on the part of employers. In our opinion none of these transactions becomes substantially less negligent on the part of the defendants because of the fact that no complaint had been made by the plaintiffs with respect to similar prior transactions. Nor do we think that the defendants or their officers should have suspected deposits which did not look as if they were the result of saving or intended to add to savings; the evidence shows that a large number of the accounts kept in the defendants' bank are business accounts, as distinguished from mere savings accounts. It appears that the defendants' officers who obtained payment of the cheques knew that the drawers were carriers and Customs agents, and though it does not distinctly appear that they knew that Heath was described in one of the defendants' books as a shipping agent, the case was argued before us as if they did know that fact.

The learned Chief Justice of Victoria, who heard the case, was of opinion that payment of the first twenty-two cheques in order of date was in fact received by the defendants "without negligence," and we are of the same opinion. These are cheques payable to bearer, and two parallel crossed lines and the words "not negotiable" are printed across the face of each of them. When we remember that such cheques are crossed cheques within the meaning of the protecting sections, we have difficulty in appreciating the suggestion that the banker should *primâ facie* be more suspicious of customers paying in such cheques than of those paying in cheques crossed without the words "not negotiable," though circumstances might call for suspicion in the case of one class of crossed cheque which would not call for it in

another. In some of the twenty-two cheques the word "Duties" is written in the bodies of the cheques after the word "Pay" and in others a number is written there, apparently for book-keeping purposes, and the word "Duty" or "Duties" is written under the printed words "not negotiable" and between the parallel cross lines. In neither of these positions can the word "Duty" or "Duties" be regarded as indicating the person to whom payment should be made. If these words indicate anything they indicate the subject matter in respect of which either mediately or immediately payment is intended to be made, and whether the hypothetical prudent banker be regarded as remembering that Heath was a shipping agent, or as knowing nothing about his business, they would not in our opinion arouse his suspicions. Looking at any one of these cheques, or looking at them all together, we should have thought, had we been in the position of the defendants, that the drawers, following their usual habit (as shown by the printing of the lines and the words "not negotiable" and by the numbers of the cheques), had crossed and marked them not negotiable merely for the purposes of protecting them from theft or similar misadventure until they came into the hands of the person to whom they were intended to be paid, and that there was nothing to indicate that Heath was not that person.

With the remaining thirty-six cheques the matter is different. In every one of them, with the exception of Nos. 38 and 57, there is an indication that the drawers intended the cheque itself to be handed to the Department of Customs, and therefore not to Heath for his own purposes. In some the words "H.M. Customs" are written in the body of the cheque after the word "Pay"; in others the place for the payee's name is left blank or filled with a number, and the words "H.M. Customs Duty" are written between the parallel crossed lines; while in others again there are different arrangements and combinations of the same words. In cheque No. 38 there are erasures and interpolations which we think would have aroused the suspicion of a prudent banker and which would ultimately have led him to refuse to receive payment of it for Heath. In cheque No. 57 after the word "Pay" is written "4743 Customs Duty," and these words in the

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circumstances suggest that this cheque, like its predecessors, was intended for the Department of Customs and should not in the ordinary course of business be paid into Heath's private account. This completes the tale of cheques Nos. 23 to 58, and, without stating our reasons in further detail, we are content to say that with respect to none of them are we satisfied that the defendants received payment "without negligence." The result is that the plaintiffs are, in our opinion, entitled to judgment for the value of these cheques—£1,087 15s. 2d.

POWERS J. In this case the two questions to be decided are:—(1) Is the State Savings Bank of Victoria "a bank" within the meaning of sec. 83 of the *Instruments Act* 1890 (Vict.), and of sec. 88 of the *Bills of Exchange Act* (No. 27 of 1909) (Commonwealth)? (2) Have the appellants, the Commissioners of the State Savings Bank of Victoria, been guilty of negligence; and, if so, to what amount are they liable to the respondents because of such negligence?

The facts of this case and the evidence have been fully referred to by my learned colleagues in the judgments just delivered, and I do not propose to repeat them.

As to the first question, the definition of a banker in the Acts referred to is a person (or body corporate) who carries on the business of banking. The State Savings Bank does certainly carry on important and essential parts of the business of banking. It collects money by receiving current deposits, as a bank, and deposits upon loan repayable on demand, or at dates agreed upon; it uses the money deposited with it as a bank by lending it again at interest; it receives *deposits* of cash and cheques; it collects cheques deposited by customers; it pays on demand cheques drawn on it in the ordinary course by friendly societies; it pays ordinary depositors on cheques, or orders presented with pass-books; it is used by customers for business accounts as well for ordinary deposits; it has thousands of operating business accounts; it receives not only cash and cheques, but bills, drafts and notes for collection for customers, and makes charges for same; it charges exchange; it remits money to any part of the world by bank drafts; it receives remittances from Great Britain,

New Zealand and all Australian States for credit in its books; it receives drafts for collections drawn in any part of the world. The deposits amount to £21,000,000.

Although the State Savings Bank does not carry on all the business of a trading banking company, it is clear that it does carry on a large banking business, and as part of that banking business it collects cheques, and the only business it does is banking business.

It appears to me that the Act is intended to protect all banks that do banking business and, as part of their banking business, collect cheques. The defendant bank has collected cheques as a bank for over forty years. The Bank is a Government institution, and if the Act does not apply to it, it is not protected in any way in that important part of its business.

In the present charter of this bank (sec. 4 of Act No. 1138, Vict.) reference is made to cheques, drafts, &c., received by the Bank, and at the time of the passing of the Act in the hands of the Bank. The right of the Bank to collect cheques was not contested.

As I hold that the State Savings Bank of Victoria is a bank within the meaning of the Acts referred to, the second question must be considered. On the question of negligence generally, I agree with what has been said by the learned Chief Justice and my brother *Isaacs*, but in considering what is negligence sufficient to render the defendants liable, I hold we must consider all the facts of the case, including the following :—

1. The Bank has thousands of deposit accounts and thousands of cheques are deposited for collection. In the Market Street branch alone there were about 30,000 accounts. 2. It was admitted during the argument that it is customary for persons in Australia, to insert in the body of the cheques—payable to bearer—*figures* or *words*. These figures or words are not, I take it, intended to attract the notice of bankers, but simply for book-keeping purposes. Numbers are frequently used, but words are used, such as wages, furniture, sundries, stationery, house, stamps, rates, taxes and numerous other words of similar import. All the cheques in question in this case are crossed "not negotiable." The first twelve cheques have in the body of the cheque only

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numbers—as "Pay 1627 or bearer"—but are crossed and have either the word "Duty" or "Duties" between the crossed lines. The next ten cheques have the word "Duties" in the bodies of the cheques, as "pay Duties or bearer," without any word between the crossed lines. With two exceptions the rest of the cheques have the words "H.M. Customs" or "H.M. Customs Duty" in the body of the cheque, or are crossed "H.M. Customs Duty." Two have "H.M. Customs" in the body and are also crossed "H.M. Customs Duty." One of the two exceptions is payable to Duty or bearer crossed "for Duties only," and the other, the 57th cheque, is payable to "No. 4743 Customs Duty," but this was collected after thirty-four cheques bearing "H.M. Customs" had been collected for the customer.

I do not see my way to hold that it is negligence in a banker to collect a cheque made payable to a number or bearer even if it is marked "not negotiable" and crossed with the one word "Duty" or "Duties," or a cheque drawn "Pay Duty or bearer" or "Pay Duties or bearer" without any other word or crossing, except the word non-negotiable.

On the other hand, where crossed cheques are marked not negotiable and are made payable to "H.M. Customs" or crossed specially to "H.M. Customs" or "H.M. Customs Duty," I hold that a bank, particularly a bank whose principal business is savings bank business, is negligent if without inquiry of any sort it collects them, except for the Customs Department, and that it is liable if it does collect such cheques to the true owner of the cheque if it has been stolen.

Every banker in Australia knows that a cheque made payable to "H.M. Customs" or crossed "H.M. Customs" is intended for the Collector of Customs for the Commonwealth of Australia as certainly as if the cheque had expressly been made—in the body of it—payable to the Collector of Customs for the Commonwealth of Australia. No one not a banker would be likely to accept such a cheque without inquiry.

I agree with my colleagues and with the learned Chief Justice of the Supreme Court of Victoria, that the defendant was negligent in respect of all cheques after cheque 22—amounting in all to £1,087 15s. 2d.—but I agree with my brothers *Duffy* and *Rich*

and with the Chief Justice of the Supreme Court that the Bank was not negligent as to cheques 1 to 22 inclusive.

It was contended that there could not be negligence in the banker unless some of the special crossings mentioned in the Act were on the cheques or the special one "Pay to the account of (A.B.) in the (C.D.) Bank." In such a case, I think there would be gross negligence in collecting such a cheque, but under the Act as it stands I hold that the Bank is liable when there is negligence, and that there was negligence in this case.

The evidence given by the Bank officials clearly showed that cheques such as those referred to in this case would be passed by them for collection and collected without inquiry, but that does not disprove negligence.

I hold that the plaintiffs were entitled to a verdict for £1,087 15s. 2d. only; and, therefore, that the appeal should be allowed as to cheques 1 to 22 inclusive, amounting to £457 16s. 9d.

Judgment varied by reducing the amount of damages to £1,087 15*s.* 2*d.*

Solicitors, for the appellants, *Moule, Hamilton & Kiddle.*
Solicitors, for the respondents, *Madden & Butler.*

B. L.