[HIGH COURT OF AUSTRALIA.]

THE LONDON BANK OF AUSTRALIA LIMITED . . . . . Appellant;
Defendant,

AND

KENDALL . . . . . Respondent.
Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Sydney, Aug. 20, 23, 27.

Isaacs, Gavan Duffy and Rich JJ.

Banker—Collection of cheque—Liability of banker—Negligence—Opening account for stranger—Duty of inquiry—Nature of inquiry—True owner of cheque—Bills of Exchange Act 1909 (*No.* 27 *of* 1909), *sec.* 88.

Practice—Appeal—Appeal from Judge without jury—Appeal on question of fact—Duty of appellate Court.

Sec. 88 of the *Bills of Exchange Act* 1909 provides that "(1) Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

In order to obtain the protection of that section a banker is bound to take such precautions, in the interest of the true owner of a cheque which he is asked by a customer to collect, as the circumstances known to the banker require. Where no precautions have been taken the test of whether the banker has been negligent is: Was the transaction of paying in the cheque, coupled with the circumstances antecedent and present, so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make inquiry? The extent of the inquiry must be measured by what in the circumstances a fair-minded banker, paying due regard to the exigencies of banking business in relation to the person depositing the cheque, would consider it prudent to do in order to protect the interests of the true owner.

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A man unknown to a banker was permitted to open an account with the bank by paying in a deposit of £5 in notes and four crossed cheques for collection, such cheques being made payable to a number or bearer, and marked "bank," or "not negotiable," or "bank, not negotiable." Without making any inquiries as to the man's title to the cheques, the banker collected them. On the following day the man, by an open cheque, drew out almost the whole of the amount to the credit of his account, and paid in for collection four other crossed cheques, including one drawn by the plaintiff payable to a number or bearer to which the man who paid it in had no title. These four cheques were collected by the banker also without inquiry. In an action by the plaintiff against the banker to recover the amount of the cheque drawn by him,

Held, that the circumstances in which the account was opened were such as to put the bank upon inquiry, that the duty of inquiry extended to the transactions of the next day, and that in the absence of reasonable inquiries the bank was guilty of negligence, and was not entitled to the protection of sec. 88.

Commissioners of Taxation (*N.S.W.*) v. *English, Scottish and Australian Bank Ltd.*, (1920) A.C., 683 ; 36 T.L.R., 305, followed and applied.

Where a creditor offers to accept in payment of his debt a cheque if it is drawn in a certain form, a debtor who sends in payment of the debt a cheque not drawn in that form remains the true owner of the cheque until it is accepted by the creditor.

Per Isaacs and Rich JJ. : On an appeal from a Judge of the Supreme Court of a State sitting without a jury, it is the duty of the appellate Court to determine for itself the true effect of the evidence so far as circumstances enable it to do so ; and it is the statutory right of an appellant to require the performance of that duty.

Dearman v. *Dearman*, 7 C.L.R., 549, followed.

Decision of the Supreme Court of New South Wales : *Kendall* v. *London Bank of Australia Ltd.*, 18 S.R. (N.S.W.), 394, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by William Allan Kendall against the London Bank of Australia Ltd. which was transferred to the Commercial Causes List for trial before a Judge without a jury, the issue being whether the defendant Bank was liable to the plaintiff in the sum of £83 8s. 9d. in respect of a certain cheque for £83 8s. 9d. drawn by the plaintiff on 5th June 1917 on the Union Bank of Australia Ltd. and subsequently paid into the defendant Bank for collection. The plaintiff had drawn the cheque in question in payment of State income tax, making

it payable to "50 or Bearer" and crossing it. At the foot of the assessment of the plaintiff for income tax there was, as the plaintiff knew, a notice that the tax might be paid at the Taxation Office or remitted to the Commissioners of Taxation by draft or by cheque crossed and marked "Commissioners of Taxation —not negotiable." The cheque was posted, but there was no entry in the book of the Commissioners kept for the purpose of showing cheques received by them that it ever reached them. On 5th June 1917 a man giving the name of Arthur Stanley Howard, and his address as Culwulla Chambers, went into the head office of the defendant Bank and said that he wished to open an account there, offering to deposit £5 in notes and four cheques for collection amounting to £204 1s. 8d. All the cheques were drawn in favour of a number or bearer, and were crossed, two of them were marked "bank, not negotiable," one "bank," and one "not negotiable." The account was opened as requested, and the cheques were collected and the amounts of them credited to the account. On 6th June the man, by an open cheque, drew out £206 from the account, and on the same day paid in for collection four other crossed cheques, including that drawn by the plaintiff on 5th June for £83 8s. 9d. One of the other three cheques was marked "Bank not negotiable," and the total amount of the four cheques was £331. They were collected, and the amount of them was credited to the account. The man, by open cheques, drew out from the account £200 on 8th June and £130 on 11th June.

Other material facts are stated in the judgment of *Isaacs* and *Rich* JJ. hereunder.

The action was heard by *Pring* J., who found a verdict for the plaintiff for £83 8s. 9d. with costs, holding that the plaintiff was the true owner of the cheque, and that, though the man Howard was a customer of the defendant Bank, it had been negligent in the collection of the plaintiff's cheque. The defendant moved before the Full Court for an order to set aside the verdict for the plaintiff and enter a verdict for the defendant or to enter a nonsuit or to direct a new trial. The motion was dismissed with costs: *Kendall* v. *London Bank of Australia Ltd.* (1).

(1) 18 S.R. (N.S.W.), 394.

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From that decision the defendant Bank now, by special leave, appealed to the High Court.

Shand K.C. and *C. E. Weigall*, for the appellant. The appellant is entitled to the protection afforded by sec. 88 of the *Bills of Exchange Act* 1909. It has acted without negligence, applying the principles for the determination of that question laid down in *Commissioners of the State Savings Bank of Victoria* v. *Permewan, Wright & Co.* (1). There are no material facts in this case which distinguish it from *Commissioners of Taxation (N.S.W.)* v. *English, Scottish and Australian Bank* (2), where the Privy Council held that the bank was not liable. There is no evidence of a general custom of bankers not to open an account with £5 and crossed cheques. Proof of such a custom would be relevant only to negligence with regard to the crossed cheques with which the account was opened and not to negligence with regard to crossed cheques subsequently paid in. Unless there was something upon the cheques or in the man himself who opened the account which should have put a careful man upon inquiry, the Bank is not guilty of negligence. The respondent was not the "true owner" of the cheque sued on within the meaning of sec. 88, and was therefore not entitled to sue upon it. The proper inference from the admitted facts is that the Commissioners of Taxation were the true owners. They were entitled to possession of the cheque, and no action for detinue could have been brought against them by the respondent (*London and County Banking Co.* v. *London and River Plate Bank* (3)).

Flannery K.C. (with him *Curtis*), for the respondent. The finding of the trial Judge that the appellant had been guilty of negligence is correct. The evidence of negligence is that there was a departure from the ordinary custom of banking by collecting cheques paid in by a man on opening his account, there being nothing on the cheques to identify him and his opening the account being consistent with his using the Bank to collect moneys to which he was not entitled. That being so, it was negligence on the part of the Bank to continue

(1) 19 C.L.R., 457, at p. 478. (2) 36 T.L.R., 305; (1920) A.C., 683.
(3) 21 Q.B.D., 535, at p. 541.

to collect cheques for him, so long as his conduct continued to be consistent with that object, without any effort on the part of the Bank to ascertain his title to the new cheques. That is the way the Privy Council treated the matter in *Commissioners of Taxation (N.S.W.)* v. *English, Scottish and Australian Bank* (1), but they held that in that case there was in fact no negligence in opening the account. The evidence of what other banks did in respect of the opening of new accounts is at least evidence as to what precautions were practicable for the appellant to have taken. If the appellant had any duty towards the respondent, there is no evidence that it in any way performed that duty.

[ISAACS J. referred to *Strathlorne Steamship Co.* v. *Baird* (2); *Dearman* v. *Dearman* (3).]

The respondent, not having filled in the cheque in the way the Commissioners of Taxation required, remained the true owner of the cheque until they had elected to accept it.

Shand K.C., in reply. In the particular circumstances of this case there was nothing to indicate to the appellant that it should do more than it generally did.

[ISAACS J. The onus was upon the appellant to establish the absence of negligence (*Souchette Ltd.* v. *London County Westminster and Parr's Bank* (4); *Paget's Law of Banking*, 1st ed., p. 196.]

The appellant was in a better position after the collection of the cheques first paid in were collected than before. There is nothing more in a cheque marked "not negotiable" to make a banker suspicious than in a crossed cheque.

Cur. adv. vult.

Aug. 27.

The written judgment of ISAACS AND RICH JJ., which was delivered by ISAACS J., was as follows:—

The respondent, Kendall, sued the appellant for wrongfully converting a cheque. The defence was twofold, namely, first, that Kendall was not the true owner of the cheque, and, next, that the

(1) (1920) A.C., 683; 36 T.L.R., 305.
(2) Mews' Dig., 1917, col. 16 ((1916) S.C. (H.L.), 134).
(3) 7 C.L.R., 549.
(4) 36 T.L.R., 195.

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cheque was collected by the Bank without negligence, and for one Howard, a customer, and therefore that the Bank was protected by sec. 88 of the Commonwealth *Bills of Exchange Act* 1909. The trial took place before *Pring J.* without a jury, and the learned Judge found (1) that Kendall was the true owner, and (2) that, though Howard was a customer, the Bank was negligent in respect of the collection of the cheque. His Honor gave judgment for the present respondent for the amount of the cheque, £83 8s. 9d., and costs. On appeal to the Full Court, the Chief Justice and *Sly* J. held that the judgment was right, and accordingly (*Ferguson* J. dissenting) the appeal was dismissed. This Court gave special leave to appeal from that decision on the ground that important questions of law and banking practice were involved.

Since then the Privy Council have decided the case of *Commissioners of Taxation* (*N.S.W.*) v. *English, Scottish and Australian Bank* (1). In that case their Lordships have definitely settled several questions of law which were previously more or less in controversy, and which arose in this case. Before us, it was contended (1) that Kendall was not the true owner of the cheque at the time the Bank collected it, and (2) that the Bank was not negligent in respect of the collection.

(1) *Duty of Appellate Court.*—We may, in passing, advert to one feature, in order to indicate the attitude we adopt in determining the case. It was pointed out during the course of the argument for the respondent that Lord *Dunedin*, in speaking for the Judicial Committee, had stated that " A finding essentially of fact will not be interfered with unless it is shown to be wrong " (2). Lord *Dunedin* added : " This was the view held in the present case by the learned Chief Justice, and their Lordships think he was justified in the way in which he approached the question." The learned counsel for the respondent urged that these observations made it incumbent on an appellate tribunal to leave a finding of fact by a Judge undisturbed unless it was so clearly wrong that no possible doubt whatever could exist. We have no hesitation in saying that that argument presses the quoted observations too far. It carries their effect practically so

(1) 36 T.L.R., 305. (2) 36 T.L.R., at p. 306.

far as to make the finding of a Judge equivalent to the verdict of a jury. But where the law says that the Court, and not a jury, is to determine the facts, and also says that an appellate Court can be asked to reconsider them, and therefore should reconsider them, it is the duty of the appellate tribunal (and it is the statutory right of the litigant who invokes it to require of it the performance of that duty) to determine for itself the true effect of the evidence so far as the circumstances enable it to deal with the evidence as it appeared in the Court of first instance. This course has been consistently declared and followed by this Court from *Dearman* v. *Dearman* (1) to the present time. It is the view that has, with supreme authoritative force, been, time after time, enunciated and acted upon by the House of Lords and the Privy Council. We shall refer to some recent examples. *Ruddy* v. *Toronto Eastern Railway* (2) was a case from Canada. Lord *Buckmaster* L.C., for the Judicial Committee, speaking of the judgment of a trial Judge, said (3) :—"From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an appeal Court will not interfere with the decision of the Judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions." Lord *Dunedin* was a member of the Board on that occasion. In *Dominion Trust Co.* v. *New York Life Insurance Co.* (4) the Privy Council had to consider a case where an appellate Court had reversed a finding of fact by a trial Judge. The Judicial Committee first considered the principle to be observed, and then applied it. Lord *Dunedin* delivered the judgment, and, if it be permissible to say so, states in language which carries conviction as well as authority the position of an appellate Court when dealing with conclusions of fact of a primary tribunal. His Lordship says (5) :—"The learned trial Judge gave a very careful and considered opinion, in which he set forth the chief considerations on the one side and on the other. The

(1) 7 C.L.R., 549.
(2) 86 L.J. P.C., 95.
(3) 86 L.J. P.C., at p. 96.
(4) (1919) A.C., 254, at p. 257.
(5) (1919) A.C., at pp. 257-258.

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learned Judges of the Court of Appeal who disagreed with him on the facts contented themselves with stating that they had come to an opposite conclusion from that reached by the trial Judge. Accordingly the learned counsel for the appellants strongly pressed on their Lordships the consideration that a finding of pure fact arrived at by the Judge who had tried the case and seen the witnesses ought not to be interfered with. Their Lordships are of opinion that there must be discrimination as to what is the class of evidence being dealt with : whether the result arrived at depends on the view taken of conflicting testimony, or depends upon the inferences to be drawn from facts as to which there is no controversy. They may cite the words of Lord *Halsbury* in the case of *Montgomerie & Co.* v. *Wallace-James* (1) : ' Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an appellate Court.' Lord *Davey*, in the same case, used much the same language. Now, that this is a case of the latter class, there can be no doubt. . . . Their Lordships, therefore, feel that they are here dealing with the opinions of one learned Judge who thought that suicide had not been proved, and of two learned Judges who thought that it had ; and the question for them is, which of these two opinions is to be preferred ? " The evidence is then examined in detail, and finally the Privy Council come to their own conclusion as to the ultimate fact in contest, and uphold the Canadian Court of Appeal which reversed the finding of first instance. Those were cases in the Privy Council. In the House of Lords, besides the case of *Montgomerie & Co.* v. *Wallace-James* quoted above, we may refer to two later cases, the reports of which are not available to us in Sydney—*Strathlorne Steamship Co.* v. *Baird* (2) and *Clarke* v. *Edinburgh Tramways* (3), per Lord

(1) (1904) A.C., 73, at p. 75.
(2) Mews' Dig., 1917, col. 16. ((1916) S.C. (H.L.), 134).
(3) 56 S.L.R., 303.

Shaw and Lord *Wrenbury*. We can see nothing whatever in the judgment in the *English, Scottish and Australian Bank Case* (1) which in any way suggests a departure from the principles so clearly stated in the *Dominion Trust Case* (2). It is simply a brief though emphatic reminder of the Court's duty as already enunciated as relative to a case where oral testimony played an important part, and in fact the rest of the judgment, we think, is a practical application of the principles referred to. In considering the facts of this case, therefore, we apply the same rules. So far as the conclusions depend on materials such as demeanour, which the learned primary Judge alone could have access to, we cannot say he was wrong. So far as the materials he possessed are equally before us, we are bound to form and express our own opinion. There is no special "local experience," for example (per Lord *Kingsdown* in *Ghoolam Moortoozah Khan Bahadoor* v. *The Government* (3)), which the learned trial Judge possessed and we do not.

(2) *True Owner*.—The facts material to the question of true ownership of the cheque are as follow:—It was proved that the plaintiff drew the cheque on 5th June 1917. It was crossed, but simply by two parallel transverse lines. His clerk enclosed it in an envelope, which was addressed "Commissioners of Taxation," and posted it in a street pillar-box. The cheque was sent as in payment of income tax, of which notice of assessment had been received. The notice stated that cheques posted should be crossed and marked "Commissioners of Taxation—not negotiable." Had that direction been followed, the cheque would have been at the risk of the Commissioners so far as the respondent is concerned, and probably would never have gone astray. But the cheque never reached the Commissioners' hands, and was never accepted by them. Not having been sent in the form directed, the sending of the cheque was a mere offer of the cheque by Kendall to the Commissioners, which, until accepted, remained his.

(3) *Negligence*.—With respect to negligence, the law has to a large extent been definitely settled. The precise point for our decision will be better understood if preliminary considerations be first

(1) 36 T.L.R., 305.
(2) (1919) A.C., 254.
(3) 9 Moo. Ind. App., 460, at p. 482.

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disposed of. Apart from sec. 88, the Bank would be liable for conversion of the respondent's property, his cheque, the amount of damage being the sum of money received in respect of it. But, in order to entitle itself to that protection, the statutory conditions prescribed must be fulfilled by the Bank. One of these conditions is that the collection of the cheque shall be "without negligence." The onus of establishing circumstances showing the absence of negligence is on the banker. It is a matter of defence, and does not give a substantive cause of action. This is plain from the tenor of the section, and was admitted by learned counsel for the Bank. It is implied in the words of Lord *Lindley* (then *Lindley* J.) in *Matthiessen* v. *London and County Bank* (1) and in *Great Western Railway Co.* v. *London and County Banking Co.* (2) and in *Capital and Counties Bank Ltd.* v. *Gordon* (3), and of Lord *Sterndale* (then *Pickford* J.) in *Crumplin* v. *London Joint Stock Bank* (4). It was decided by *Greer* J. in *Souchette Ltd.* v. *London County Westminster and Parr's Bank* (5). The "negligence" referred to in sec. 88 is in relation to the true owner. The banker is bound, in cases within sec. 88, if he desires to have the protection of that section, to take whatever precautions in the interests of the true owner the circumstances as they present themselves to the banker reasonably require (*Bissell & Co.* v. *Fox Brothers & Co.* (6); *Ladbroke & Co.* v. *Todd* (7)). The test of whether, in the absence of precautions, the banker has been negligent in any particular case is now finally settled by the *English, Scottish and Australian Bank Case* (8) to be this: Was the transaction of paying in the given cheque, coupled with the circumstances antecedent and present, so out of the ordinary course that it ought to have aroused doubts in the bankers' minds and caused them to make inquiry? As Lord *Dunedin* says (9), "the question is necessarily a question of fact." And, as we are reminded by the same judgment, "it is really impossible to lay down rules or statements which will determine what is negligence and what is not. Each case must be determined on its

(1) 5 C.P.D., 7, at pp. 16-17.
(2) (1901) A.C., 414, at pp. 424-425.
(3) (1903) A.C., 240, at p. 247.
(4) 109 L.T., 856, at p. 858.
(5) 36 T.L.R., at p. 196.
(6) 51 L.T., 663; 53 L.T., 193.
(7) 111 L.T., 43, at p. 44.
(8) 36 T.L.R., 305.
(9) 36 T.L.R., at p. 306.

own circumstances." It is very distinctly pointed out in the case just referred to (1) that "it is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting a cheque."

(4) *Need for Inquiry.*—The opening of the account in this case is a very material antecedent circumstance, and it should be carefully noted. On Tuesday, 5th June 1917, a man walked into the head office of the Bank in Sydney and saw Mr. Platts, the assistant accountant. Platts' statement is that the man said his name was Howard, that he was apparently thirty-six or thirty-seven, looked quite respectable, and had the appearance of a business man—though what that appearance is distinctively was not explained—that he spoke like an educated man, said he was an indent merchant or indent agent, that he had come from Adelaide, and wished to open an account. He entered in the signature book of the Bank a specimen signature, his occupation and his address. The address was "Culwulla Chambers," which is in the city of Sydney, not far from the Bank. The man filled in a deposit slip, depositing £5 in notes, and £204 1s. 8d. in cheques. There were four cheques as follow: A cheque dated 31st May 1917, drawn by A. Copeland on the Bank of New South Wales, Sydney, for £91 12s. 3d., payable to "No. 62 or Bearer" and crossed with two transverse lines with the words "not negotiable" between them; a cheque dated 1st June 1917, drawn by Jos. D. Wormald for £54 11s. on the National Bank of Australasia Ltd., Pitt Street, Sydney, payable to "541 or Bearer" and crossed with two transverse lines with the words "Bank, not negotiable" between them; a cheque dated 1st June 1917, drawn by George Stevens on the Bank of Australasia, Pitt Street, Sydney, for £25 17s. 10d., payable to "789 or Bearer" and crossed with two transverse lines, and the words "Bank" between them; and a cheque dated 2nd June 1917, drawn by R. Fairfax Reading on the Bank of New South Wales, Sydney, for £31 0s. 7d., payable to "1035 or Bearer" and crossed with two transverse lines with the words "Bank, not negotiable" between them. The deposit slip stated that the cheques were not to be available until collected. Platts took the

(1) 36 T.L.R., at p. 306.

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cheques to Mr. Millett, the manager, and told him the name given, Howard, and that he described himself as an indent merchant, and had given his address as Culwulla Chambers. The manager looked at them, and, as he says, "scrutinized" them, but not closely enough to see that they were crossed or that three were marked "not negotiable." Millett noticed the amounts, and knew Wormald and Stevens. He told Platts to open the account. From the fact that Millett did not remember observing that the cheques were crossed it is obvious that so far as he is concerned he was not considering the subject of protecting the interests of the true owners for the purposes of sec. 88. Platts says that he had inquired of the man whether he had had a banking account in Sydney before, and apparently the answer was No. Platts says he understood the man to say he had been banking at Adelaide—but when, or, in what bank, does not appear. Platts knew of Reading—an eminent dentist. Neither he nor Millett knew anything about Copeland, whether he was a merchant or not. But in any case, as Platts was instructed by Millett to open the account with the cheques, Platts had no further function than to carry out instructions, and after receiving them would not be expected to make further inquiries. An account was opened in the books of the Bank in which, under date 5th June 1917, A. S. Howard was credited with £209 1s. 8d. The next day, all the cheques having been collected without any objection, Howard (as we may call him) drew a cheque for £206, payable to "Cash or Bearer," and it was paid over the counter. This left the account in credit £3 1s. 8d.

We may stop there for a moment in order to estimate these antecedent circumstances, because the payment in of the Kendall cheque took place just afterwards. How did the matter present itself to the Bank, or rather how ought it to have presented itself to the Bank? Howard, as he called himself, was, at the opening of the account, utterly unknown to the Bank, and he brought no credentials. He said he was an indent merchant or agent, but produced no confirmation of his statement, and gave no further information as to the nature of his business. He said he had had a bank account in Adelaide, but he neither mentioned, nor was asked, the name of the bank, nor whether it was represented in Sydney, nor

when he closed his account there. He stated he had no bank account in Sydney, but he did not state how long he had been in Sydney. On the Tuesday he presented cheques, one of which was dated 31st May, the Thursday before, possibly reaching him about Friday—all of the cheques crossed generally, three of them containing the words "not negotiable." Those words, while not preventing transferability of the cheques, prevented negotiation; and so there was one possibility more that the person holding such a cheque was not the true owner: his transferor might not have had a title. As to how he came to have so many cheques crossed "Bank" and "not negotiable" while having no bank account, and how, having no bank account, he was carrying on his business, no inquiry whatever was made. Now, the mere fact that a cheque is crossed, even including the words "not negotiable," is not sufficient to establish negligence in the absence of inquiry. A customer satisfactorily established may well pay in such a cheque without raising any cause for doubt. But, as Lord *Sterndale* observed in *Crumplin's Case* (1), "the taking of a cheque crossed 'not negotiable' is one matter which must be taken into consideration along with all the other matters surrounding the transaction."

Was the transaction of 5th June itself so far in the ordinary course of banking business as to arouse no doubt in the mind of an ordinary prudent banker? It would be strange to us if it were. Having regard to the fact that the deposit of such cheques may take place late one day and the payment out to the depositor of the collected proceeds of the cheques may take place next day, it is very little more protection to the true owner than if the cheques were open. Sir *John Paget*, in the second edition of his work on *Banking* (p. 262), says:—"Banks have sometimes put forward, as evidence that they exercised due caution about the collection of a cheque, the fact that, before crediting it, they inquired from the paying bank whether it would be paid on presentation. It is obvious that such a proceeding affords no safeguard to the true owner. The paying banker could have no means of knowing in whose hands the cheque might be; the inquiry, so far as he is concerned, only relates to the state of his customer's account."

(1) 109 L.T., at p. 858.

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Now, if such an inquiry, followed, as it is assumed to be, by actual payment on presentation—for otherwise the question would not arise—is no safeguard, it is *à fortiori* no safeguard simply to present the cheque without any preliminary warning. That is how we view the matter, apart from direct evidence of the usual course of banking business. We are of opinion that even without such evidence, and simply testing the matter by the ordinary risks of human nature, operating on the opportunities afforded by such instruments and banking facilities, that in the circumstances as they appeared to the Bank on 5th June, the Bank would be justly put on inquiry. The account as opened was suspicious: the customer was not merely unknown, but was doing something that needed some explanation in the absence of which the Bank ran the risk of being made a necessary but unquestioning intermediary in a fraud. At that moment it must be borne in mind that "Howard" was not a customer, and that the Bank owed him no duty whatever. Up to that point there was therefore no conflict of obligation; there was simply a conflict of duty to the "true owner" and the interest of the Bank itself in obtaining a new customer. Where a customer is once properly established, his convenience and the Bank's general duty toward him are additional elements in the situation, and of more or less relative force according to the circumstances. Lord *Dunedin* gives effect to this consideration in a passage in the judgment in the *English, Scottish and Australian Bank Case* (1), where it is said: "For if it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque, it would render banking business as ordinarily carried on impossible; *customers would often be left for long periods without available money.*" Here, however, the matter was uncomplicated by any such consideration. The *bona fides* of the Bank is undoubted; but it did not give the matter sufficient consideration.

There is evidence, however, on the subject of the opening of the account. Millett says: "It is not customary to make inquiries when the customer appears to be respectable." If the word "appears" refers to outward appearances, it is plainly insufficient.

(1) 36 T.L.R., at p. 306.

If it refers to conclusions based on properly examined circumstances, it is irrelevant to the present case. Platts says: "It is not usual to make further inquiries before opening an account." But, on the other hand, there was very strong testimony given by officials of three of the most important banks in Sydney to the contrary. Mr. Sayers, assistant manager of the Commercial Bank, whose experience goes back fifty years, says that his bank would not take from a stranger desiring to open an account crossed cheques for collection without first inquiring from the drawer. They would, in the first instance, hold the cheques for safe custody or return them to the customer, as he wished. They would, of course, open a new account with cash. He also said :—"If a respectable looking person comes in and brings a number of crossed cheques drawn by well-known persons, we don't concern ourselves with the looks of a person. Our rule is inflexible." An officer from the Bank of New South Wales, with twenty-two years' experience, and an officer from the Bank of Australasia, with twenty-one years' experience, stated the practice of their respective banks not to take from a stranger who brought a crossed cheque to open an account, either the crossed cheque or even money that he brought with it. *Pring* J. believed the witnesses from the three banks mentioned, and in that respect we follow the principles laid down for such circumstances in the cases cited. Even if we had to consider for ourselves independently the evidence as it appears in cold type, we should come to the same conclusion as the trial Judge. There can be no doubt that, in any event, the opening of the account was contrary to good banking practice, and that practice is founded on a reasonable regard for the interests of persons otherwise likely to be prejudiced by the conjoint operations of strangers and the banks themselves.

Then, was this unsatisfactory state of affairs cleared up by subsequent events, or was it not darkened by them? The cheques were cleared next day, and the proceeds credited to Howard's account. "Howard" drew £206 as stated. He did not ask for a draft to send abroad; he did not give a cheque to a business firm: he simply drew out over the counter all but £3 1s. 8d. of the amount deposited the day before. This reduced the account practically to a nominal account; the Bank being made the statutory instrument of an

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unknown person to collect the cheques he brought in. Then, immediately after, a further transaction took place, involving the Kendall cheque. "Howard" deposited four further cheques. One was dated 30th May 1917, a day earlier than the earliest of the cheques deposited the day before, and in the ordinary course of events, so far as they appeared, should have been in his possession when he opened the account. It was a Sydney cheque, and therefore must, if its date were true and if he received it in the ordinary course of indent business, have been issued to him before any of the cheques deposited on 5th June. It was payable to "8 or Bearer" and crossed with two transverse lines with "Bank" between, and its amount was £62 17s. 8d., and it was drawn on the National Bank of Australasia. The second was a cheque dated 5th June on the English, Scottish and Australian Bank for £83 6s. 8d. payable to "240 or Bearer" and crossed with two lines and the words "Bank not negotiable" between. The third was a cheque dated 5th June, drawn on the Australian Bank of Commerce, West Maitland, for £102 payable to "1026 or Bearer," and crossed by two lines simply. The fourth was the cheque sued for, dated 5th June, drawn on the Union Bank of Australia Limited, Sydney, payable to "50 or Bearer" for £83 8s. 9d. and simply crossed with two lines. It is therefore seen that on 6th June we have not merely to consider the payment in of the Kendall cheque. That cheque must be considered with all the "circumstances antecedent and present." The summation is: that the transaction of paying in that cheque to an account which originated in such manner as to make its character suspicious, to begin with, which was carried on in such manner as not to dissipate but to deepen suspicion, if only the Bank had given the matter reasonable thought, and which, having been reduced to the position of a mere nominal account, was being in effect reinstated by the batch of cheques of which the Kendall cheque was one, was of such a character as to put the Bank upon inquiry.

Reference to *Crumplin's Case* (1) will show that in the opinion of Lord *Sterndale* the fact of opening an account with a small sum, or of soon drawing it down to practically nothing, is a material consideration in connection with such a question as the present.

(1) 109 L.T., at p. 858, col. 2.

We hold, then, that the Bank was put on inquiry with reference to the collection of the Kendall cheque.

(5) *Proper Inquiry.*—Learned counsel on both sides dealt with the question of what inquiry should have been made in order to test the problem of negligence. This, like the question of negligence in general, is purely dependent on the circumstances. The only guiding principle is that, where doubt is once aroused as to the nature and true ownership of the cheque, the nature and extent of the inquiry proper to allay it must be measured by what, in the circumstances, a fair-minded banker, paying due regard to the reasonable exigencies of banking business in relation to the person depositing the cheque, would consider it prudent to do in order to protect the interests of the true owner whoever he might be. The practice of the three banks mentioned indicates a very fair and efficient means where a stranger, unvouched for, proposes to create the relation of banker and customer for the first time. It was urged that to permit an unknown man to open an account with cash one day and next day to pass without inquiry a crossed cheque was not very different in effect from passing the cheque without question at the inception of the account. From the standpoint of the true owner that may be so; but from the standpoint of the bank it is not so. Once, as in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (*Thallon's Case*) (1), an account is established apparently satisfactorily, the relation of banker and customer is created, and a duty has arisen on the part of the banker towards his customer which cannot be entirely ignored. Inquiry as to the respectability of an intended customer who proposes to open an account with a protected cheque is shown to be ordinary English banking practice, and by two banks, one certainly, and the other probably, identical with banks carrying on business in Australia (*Ladbroke & Co.* v. *Todd* (2)). It is a definite step to be so far satisfied with the respectability and status of a stranger as to be willing to create the relative duties and obligations of banker and customer. Once that situation is satisfactorily created, while the bank may in a case like *Thallon's* not unreasonably consider itself free from negligence if it refrains from hampering its customer, its

(1) 36 T.L.R., 305.

(2) 111 L.T., 43.

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position is altogether different where the circumstances are as they exist here. Though the relation has been created, yet if not entirely satisfactory to begin with, time or events or both may so operate as to remove all doubt or so far to lull suspicion as to justify the bank in treating the account as reliable. (See *Ross* v. *London County Westminster and Parr's Bank* (1).) Neither time nor events have so operated here. On the contrary, as we have said, later events added to the need of caution.

Coming to the conclusions (1) that the Bank has not sustained the onus of establishing the absence of negligence and (2) that the facts affirmatively considered establish there was negligence, we hold that the appellant is not within the protection of sec. 88.

The appeal is dismissed with costs.

GAVAN DUFFY J. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *MacNamara & Smith.*

Solicitor for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

(1) (1919) 1 K.B., 678, at p. 687.