REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1933.

[HIGH COURT OF AUSTRALIA.]

THE AUTOMOBILE FINANCE COMPANY OF AUSTRALIA LIMITED . . . } APPELLANT;
PLAINTIFF,

AND

LAW . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 6, 9; *Nov.* 8.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Bills of Exchange — Promissory note — Alteration — Place of payment added— "Apparent" alteration—Bills of Exchange Act 1909-1932 (*No.* 27 *of* 1909—*No.* 61 *of* 1932), *secs.* 69, 93.

A printed form of promissory note made payable to a specified payee or his order was filled up, in handwriting which was not that of the maker, except that nothing was written after the words "Payable at" printed at the side of the place of signature. The payee, after the note had been delivered to him, and without the authority or assent of the maker, filled in the place of payment in handwriting which was clearly distinguishable from that in the body of the note, and in a darker ink, and then negotiated it to the appellant, who took it in good faith and for value. The appellant sued the maker on the note.

Held, by *Gavan Duffy* C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that there was no "apparent" alteration in the note, within the meaning of the proviso to sec. 69 (1) of the *Bills of Exchange Act* 1909-1932.

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Per Gavan Duffy C.J., *Rich*, *Dixon* and *McTiernan* JJ. :—To constitute an apparent alteration, within the meaning of sec. 69 of the *Bills of Exchange Act*, it should be apparent upon inspection of the bill that its text has undergone a change. The document itself must show that some revision of the text has taken place, and its appearance must be consistent with the revision having occurred after completion or issue, though it may also be consistent with its having occurred before completion. Inspection of the document must show that something has been done to it as and for an alteration of that which otherwise was, or was to become, the instrument.

Per Starke J. :—The proviso to sec. 69 (1) of the *Bills of Exchange Act* requires that the alteration be visible or apparent, as an alteration or change in the very words or figures originally written or printed in the document, upon its inspection. It is not enough to say that a prudent business man would be put upon inquiry, or that his suspicions would be aroused by the form of the document. The alteration may be by addition, interlineation, or otherwise, but it must be visible as an alteration, upon inspection.

Per Evatt J. : The unauthorized insertion of a place of payment in a promissory note amounts to a material alteration of the note, within the meaning of sec. 69 of the *Bills of Exchange Act*, because, whether the place of payment is in the body of the note or stated by way of memorandum only, one or more of the legal results mentioned in sec. 93 flows from the inclusion in a note of a place of payment.

Decision of the Supreme Court of Victoria (Full Court) : *Automobile Finance Co. of Australia Ltd.* v. *Law*, (1933) V.L.R. 360, reversed.

APPEAL from the Supreme Court of Victoria.

The Automobile Finance Co. of Australia Ltd. brought an action in the County Court at Melbourne against Samuel Law, claiming £64 principal due to it as the indorsee of a promissory note of which the defendant was the maker. Among the defences relied upon were that the issue and/or negotiation of the promissory note sued on was affected with fraud and that the plaintiff was therefore not the holder thereof for value without notice and was not entitled to sue thereon. The particulars given under this defence were that the note was delivered to the payee and/or its agent upon the condition that the payee would not negotiate the same, and, in fraud of the defendant, the payee did negotiate the same, and, further, upon the condition that the payee would not enforce the note against the defendant or demand payment thereof if the defendant returned certain goods to the payee on or before the due date of the note, which goods the defendant returned to the

payee. A further defence was taken that after delivery of the promissory note by the defendant to the payee the note was altered in a material particular without the assent or authority of the defendant, such alteration being apparent and being constituted by the addition of the place of payment to the promissory note.

The promissory note was in the following form :—" No. M.78.—£64—Due January 15, 1933.—August 12, 1932.—Five months after date I promise to pay H. Lewis & Co. or order the sum of sixty-four pounds sterling, value received. Payable at *Commercial Banking Co. of Sydney Hamilton Vic.* S. Law."

The promissory note was on a stamped printed form, the body of which was filled up in handwriting which was not that of the maker ; and in another hand, clearly distinguishable from the other handwriting appearing on the face of the note, and in a different ink, the words above in italics " Commercial Banking Co. of Sydney Hamilton Vic." appeared after the printed words " Payable at." The words " Payable at " and the words above italicised appeared below the preceding words of the note, at the side of the place of signature.

The defendant was a country store keeper and was persuaded by a salesman of H. Lewis and Co. to take £600 worth of diamond rings on sale or return. The defendant gave a series of promissory notes, of which that sued on was one, to cover the total price of the rings, upon the salesman's undertaking that they would be held by H. Lewis and Co. and would not be negotiated, and on the salesman's instructions the defendant did not fill in the place of payment.

The County Court Judge found that the note was affected by fraud, that the defendant was induced by fraud to make the note and further that the negotiation of the note by Lewis was in fraud of the maker. His Honor also found that the defendant was induced to make the note on the fraudulent representation that it would only be used as evidence that the rings still belonged to H. Lewis and Co., and only so used in such an event as his death or bankruptcy, and that the defendant was fraudulently assured, and believed, that the note would never be used for any other purpose and that it would not be negotiated by H. Lewis and Co. It was not disputed that the plaintiff gave value for the note, and his

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Honor found that the plaintiff took the note in good faith and without notice of the fraud by which it was affected, and, in those circumstances, that the plaintiff was a holder in due course. With regard to the defence that, after delivery by the defendant to the payee, the promissory note was altered in a material particular, his Honor found that, after the note had been signed by the defendant, the place of payment was filled in by a clerk in H. Lewis and Co.'s office in Melbourne, that the filling in of the place of payment was an alteration in a material particular, and that such alteration was not made with the assent or authority of the defendant. His Honor also found that, from an examination of the note itself, the place of payment was filled in by some person other than the maker or the person who filled in the rest of the note, and that both the handwriting and the ink were quite different. His Honor concluded from those circumstances that it was apparent that an alteration in a material particular had been made, and he, therefore, held that the defendant was protected by sec. 69 of the *Bills of Exchange Act*.

The plaintiff appealed to the Supreme Court, which upheld the decision of the County Court Judge. The Court was of opinion that the addition of the place of payment to the note constituted a "material" alteration, and that the alteration was "apparent" within the meaning of the proviso to sec. 69 (1): *Automobile Finance Co. of Australia Ltd.* v. *Law* (1).

From this decision the plaintiff now appealed to the High Court.

Robert Menzies, A.-G. for Victoria, *Russell Martin* and *Gamble*, for the appellant. The note was affected by fraud in that Lewis had obtained it by certain fraudulent statements made by his salesman. The defence based on sec. 69 of the *Bills of Exchange Act* raises the following matters for consideration. There were three different handwritings on the note. There was first, the handwriting in the body of the note, secondly, the signature, and thirdly, the words "Commercial Banking Co. of Sydney Hamilton Vic." as indicating the place of payment. The evidence showed that the last words were written in after the other handwriting had been filled in and after the signature. The learned County Court Judge took the

(1) (1933) V.L.R. 360.

view that because there were three different handwritings on the note—two would have led to the same result—there had been an apparent material alteration to the note. The addition of the place of payment is not a material alteration, because the contract between the parties is not altered, and the alteration is not in the body of the note. In this case the fact of the alteration was not apparent. It must appear that there has been an alteration of the note on a reasonable scrutiny by an intending holder. In other words, does the note suggest on its face that there has been an alteration ?

[EVATT J. referred to *Woollatt* v. *Stanley* (1).]

The alteration must be apparent to the holder, and must be of such a kind that it would be observed on a reasonably careful scrutiny (*Scholfield* v. *Earl of Londesborough* (2); *Leeds Bank* v. *Walker* (3)). The difference in the handwriting is not of itself sufficient to suggest such a filling in (*Bank of Montreal* v. *Exhibit and Trading Co.* (4)). This alteration was not material (*American National Bank* v. *Bangs* (5)).

[DIXON J. referred to *Suffell* v. *Bank of England* (6).

[EVATT J. referred to *Koch* v. *Dicks* (7).]

Desbrow v. *Weatherley* (8) shows that the question to be decided is one of fact upon looking at the face of the note.

[DIXON J. referred to *Sims* v. *Anderson* (9).]

The difference in handwriting is not of itself sufficient to suggest that the place of payment has been filled in (*Semple* v. *Cole* (10)). The addition of the place of payment was not in the note but appears by way of memorandum only, as it is not contained in the actual terms of the contract to pay, and constitutes only a side note to the signature (*Fulton* v. *McCardle* (11); *In re British Trade Corporation* (12); *Stevenson* v. *Brown* (13)).

[DIXON J. referred to *Trapp* v. *Spearman* (14).

[RICH J. referred to *Masters* v. *Baretto* (15).]

(1) (1928) 138 L.T. 620.
(2) (1894) 2 Q.B. 660.
(3) (1883) 11 Q.B.D. 84.
(4) (1906) 11 Com. Cas. 250.
(5) (1868) 97 Am. Dec. 349.
(6) (1882) 9 Q.B.D. 555.
(7) (1933) 1 K.B. 307.
(8) (1834) 6 C. & P. 758; 172 E.R. 1451.
(9) (1908) V.L.R. 348; 29 A.L.T. 241.
(10) (1839) 8 L.J. (N.S.) Ex. 155.
(11) (1888) 6 N.Z.L.R. 365, at pp. 369, 370.
(12) (1932) 2 Ch. 1, at pp. 8, 9 and 12.
(13) (1902) 18 T.L.R. 268.
(14) (1799) 3 Esp. 57; 170 E.R. 537.
(15) (1849) 8 C.B. 433; 137 E.R. 578.

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The meaning must be determined by reference to the expression "in the body of the note." This addition does not affect the liability of any of the parties under the contract. The distinction between *Sims* v. *Anderson* (1) and the present case is that there the question was whether the instrument became a different instrument, but here the addition of the words adds nothing to the liability of the maker and, so far as the indorser is concerned, he could not be heard to say that he was affected by it; so the addition here could not affect the rights of any of the parties to the note.

Coppel (with him *P. D. Phillips*), for the respondent. The alteration to the note was apparent. The test is that laid down by *Denman* J. in *Leeds Bank* v. *Walker* (2) and adopted by *Salter* J. in *Woollatt* v. *Stanley* (3). Whether the alteration is apparent is a question of fact for the trial Judge (*Woollatt* v. *Stanley*). If an intending holder scrutinizing the document with reasonable care would have observed the alteration, it would be "apparent." In *Scholfield* v. *Earl of Londesborough* (4) the alteration to the bill was not apparent. The fact that there are three writings on the note should indicate to a proposed taker that the note has probably been altered. At least it indicates that it is not in the state in which it was at some earlier date, and, as an addition amounts to an alteration, that it has been altered. The question is one of fact to be determined by an inspection of the note. All the Judges before whom the matter came said it was apparent to them that the note had been altered. The proviso which relates to apparent alterations was introduced for the first time in the codifying Act. The position at common law is stated by *Byles* on *Bills* 10th ed. (1870), at pp. 318, 323; and see *Simpson* v. *Stackhouse* (5). The rule as to material alteration of negotiable instruments was derived from the law relating to alterations to deeds. The alteration of the note was material. It is not disputed that this is an alteration. There must be some evidence in addition to the appearance of the note before it can be decided whether it was altered at the time of making or at a subsequent period (*Knight* v. *Clements* (6)).

(1) (1908) V.L.R. 348; 29 A.L.T. 241.
(2) (1883) 11 Q.B.D. 84, at p. 90.
(3) (1928) 138 L.T., at p. 622.
(4) (1894) 2 Q.B. 660.
(5) (1848) 49 Am. Dec. 554.
(6) (1838) 8 A. & E. 215; 112 E.R. 819.

[STARKE J. referred to *Byles* on *Bills*, 17th ed. (1911), pp. 303, 304.]

The alteration is in a material part of the note (*Macintosh* v. *Haydon* (1)). The fact that the trial Judge, acting as a jury, found that the alteration was apparent, and that the three appellate Judges who examined the note also found that the alteration was apparent, is strong evidence that it was. Having arrived at the conclusion that the writing was different and that the ink was different, a person proposing to take the note would at once observe that the bill might have been altered. The addition of a place of payment was held to avoid the bill in *Cowie* v. *Halsall* (2).

[STARKE J. referred to *Taylor* v. *Mosely* (3).]

There was no duty on the part of the maker so to frame the note that the place of payment could not be filled in (*Brown* v. *Bennett*; *Colonial Bank of New Zealand* v. *Bennett* (4)). The alteration, to be material, need not prejudice the rights of any of the parties (*Koch* v. *Dicks* (5)).

[STARKE J. referred to *Norton* on *Deeds*, 2nd ed. (1928), p. 38.]

Where a note is made payable at a specified place it is not necessary to prove an actual demand on the maker (*Saunderson* v. *Judge* (6)). The alteration of the numbers on Bank of England notes was held to be an alteration of the notes in a material part (*Suffell* v. *Bank of England* (7)). Secs. 25, 93 and 95 of the *Bills of Exchange Act* supply tests to ascertain whether the note is to be used as a negotiable instrument.

[DIXON J. referred to *Rowe* v. *Young* (8).]

That carries *Saunderson* v. *Judge* (6) a step further. This indorsement constituted a place of payment within secs. 69 and 93 of the Act.

Robert Menzies, A.-G. for Victoria, in reply. In *Sims* v. *Anderson* (9) his Honor adopted at least one passage from *Suffell* v. *Bank of England* (7) which was affected by a context to which his Honor did not refer. An alteration in the note, if it does not alter or

(1) (1826) Ry. & M. 362; 171 E.R. 1050.
(2) (1821) 4 B. & Ald. 197; 106 E.R. 910.
(3) (1833) 6 C. & P. 273; 172 E.R. 1239.
(4) (1891) 9 N.Z.L.R. 487.
(5) (1933) 1 K.B. 307, at p. 320.
(6) (1795) 2 H. Bl. 509; 126 E.R. 675.
(7) (1882) 9 Q.B.D. 555.
(8) (1820) 2 Brod. & B. 165, at p. 185; 129 E.R. 921, at p. 929.
(9) (1908) V.L.R. 348; 29 A.L.T. 241.

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affect the contract, will not have any effect. The position of the maker is completely unaffected, and the indorser could not be heard to say that he was affected by the insertion of these words, and the contract between the parties was accordingly not altered (*Hong Kong and Shanghai Bank* v. *Lo Lee Shi* (1)). It is necessary to inquire whether the contract has been altered so as to affect the rights of any person who in fact holds the note. It is not sufficient that it is a mere alteration to the piece of paper. The terms of sec. 69 indicate that the added words did not constitute an alteration which was apparent. To be apparent within the meaning of sec. 69, a scrutiny of the note must make it clear to an intending holder that there has been an alteration in the note since it was written. The mere fact that there are three different handwritings on the note does not prove that the alteration is apparent. It must be apparent that the document was altered since it was originally written. The section cannot mean merely that there was physical evidence of the document having been written at different times. It is not disputed that the document has been altered. It must be apparent that the addition has been made as an alteration.

Cur. adv. vult.

Nov. 8.

The following written judgments were delivered :—

GAVAN DUFFY C.J., RICH, DIXON AND MCTIERNAN JJ. The question in this case is whether a holder in due course of a promissory note is entitled to recover upon it from the maker although after its issue some writing was added without the maker's consent. The note was made payable at a fixed future time to a specified payee or his order. It was upon a stamped printed form which, at the side of the place of signature, bore the words " Payable at." The body was filled up in handwriting which was not that of the maker ; and, in another hand clearly distinguishable from the first, and in a darker ink, the words " Commercial Banking Co. of Sydney Hamilton Vic." appeared after " Payable at." The note in this condition was negotiated to the present holder who took it in good faith and for value. But it was established by evidence that when

(1) (1928) A.C. 181, at p. 186.

the maker signed the note and delivered it to the payee it bore no writing after the printed words "Payable at," and that the name of the bank was placed there by a clerk of the payee without the maker's authority. Sec. 69 of the *Bills of Exchange Act* 1909-1932 is as follows:—"(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

In the County Court, Judge *Macindoe* held that the promissory note thus had been materially altered and that the alteration was apparent, and, therefore, that the note was avoided even in the hands of a holder in due course. He said that it was obvious from an examination of the note itself that the place of payment was filled in by some person other than the maker, or the person who filled in the rest of the note; that both the handwriting and the ink were different, and he concluded from those circumstances that it was apparent that an alteration in a material particular had been made.

On appeal to the Supreme Court, the Full Court, consisting of *Mann* A.C.J., *Lowe* and *Gavan Duffy* JJ., affirmed this judgment. Upon the question whether the instrument bore an apparent alteration, *Mann* A.C.J. said that an alteration was apparent on the face of a bill within the meaning of the section, if a man scrutinizing the bill, which he is asked to take for business purposes, would by ordinary caution be led to question the authority of any part of it; applying that test, he thought the payee of this note, as a prudent man, should have been led at once to question the authority of this part of the note. He said the question was whether it raised a reasonable doubt of material alteration. We are unable

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to agree with this opinion. We assume that the clerk who filled up the blank after the printed words "Payable at" thereby made a material alteration in the promissory note, but we cannot think that the alteration is apparent within the meaning of the enactment. That meaning, in our opinion, requires that it should be apparent upon inspection of the bill that its text has undergone a change. The document itself must show that some revision of the text has taken place, and its appearance must be consistent with the revision having occurred after completion or issue, though it may also be consistent with its having occurred before completion. Inspection of the document must show that something has been done to it as and for an alteration of that which otherwise was, or was to become, the instrument. In *Leeds Bank* v. *Walker* (1), *Denman* J. speaks of "some incongruity on the face of the note." In *Woollatt* v. *Stanley* (2), *Salter* J. makes the test of apparency whether the alteration is of such a kind that it would be observed and noticed by an intending holder scrutinizing the document with reasonable care. This does not mean merely that what has been substituted or added should be visible to him upon reasonable examination, but that the fact that it was put there as an addition or substitution will thus be seen. The question, which was put and answered in the Full Court, namely, whether a scrutiny of the bill would lead a prudent man to question the authority of any part of it, does not seem to us to be the same thing. We cannot but think that it tends to substitute inference or suspicion as to the origin of a part of the document for its actual objective state or condition as seen on inspection. Moreover, such a test does not direct the mind to what the state or condition must show, namely, that something has been done to the document in order to alter its tenor.

In the present case all that appears is that the main part of the printed form was filled up in one hand and a subsidiary part in another hand and in different ink. We cannot see how this makes it apparent that the subsidiary part was filled up as an alteration. If a manifest difference in handwriting in parts of an otherwise regularly completed bill amount to an apparent alteration, it is difficult to see what useful operation would remain to sub-sec. 2

(1) (1883) 11 Q.B.D. 84, at p. 90. (2) (1928) 138 L.T. 620.

and the proviso to sub-sec. 3 of sec. 25. Under these provisions, if a bill is wanting in any material particular, the person in possession has a prima facie authority to fill up the omission in any way he thinks fit, and, although he exceed his actual authority, a subsequent holder in due course may enforce it according to its tenor. It is clear that, if the material particular is supplied in another handwriting, the case is not one of an apparent alteration avoiding the bill. Perhaps there is something to be said in the present case for the view that the existence of a blank after the uncancelled printed words "Payable at" operated as a prima facie authority to supply the place of payment, but, in any case, when the space was filled up, it was not, in our opinion, an apparent alteration of the note.

For these reasons we think the appeal should be allowed.

The County Court judgment should be discharged and in lieu thereof judgment should be entered for the appellant, the plaintiff, for £64 and interest from 15th January 1933.

STARKE J. The plaintiff sued, as indorsee, upon a promissory note of which the defendant was the maker. The note was in the following form :—"£64 . . . August 12, 1932.—Five months after date I promise to pay H. Lewis and Co. or order the sum of sixty-four pounds sterling, value received. Payable at Commercial Banking Co. of Sydney Hamilton Vic. S. Law." The note was partly printed and partly written. It was signed by the maker and delivered to the payee. At the time the note was delivered to the payee the words "Payable at" appeared on the document, in print, but not the words "Commercial Banking Co. of Sydney Hamilton Vic." These words were subsequently added by the payee, or by his authority, and were written in the note, as the Courts below found, "in an entirely different handwriting and obviously different ink from the handwriting and ink in the body of the note" (1). The note, after this addition, was indorsed to the appellant for value.

It was contended on the part of the maker that the addition to the note, made without his knowledge or assent, was a material alteration of the note, which avoided it (*Bills of Exchange Act*

(1) (1933) V.L.R., at p. 366.

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1909-1932, secs. 69 and 95 : see *Sims* v. *Anderson* (1) ; *Fulton* v. *McCardle* (2)). On the other hand, the appellant—the indorsee—contends that even if the addition were a material alteration of the note, yet the alteration was not apparent, and that therefore, as a holder in due course, it was entitled to avail itself of the note as if it had not been altered (see *Bills of Exchange Act*, sec. 69, proviso to sub-sec. 1).

In the view I take of the case, it is unnecessary to determine whether the note had or had not been materially altered, for the alteration, if there were one, is not apparent. The proviso to the Act, as I construe it, requires that the alteration be visible or apparent, as an alteration or change in the very words or figures originally written or printed in the document, upon its inspection. It is not enough to say that a prudent business man would be put upon inquiry, or that his suspicions would be aroused by the form of the document. The alteration may be by addition, interlineation, or otherwise, but it must be visible as an alteration, upon inspection. The alteration in the present case is not " apparent " in the sense indicated, and the appeal should therefore, in my opinion, be allowed.

EVATT J. This is an appeal from the Full Court of the Supreme Court of Victoria which dismissed the appeal brought to it from a decision given by County Court Judge *Macindoe*.

The plaintiff, who is the present appellant, sued as the holder of a promissory note made by the defendant in favour of H. Lewis & Co. The note was endorsed by the payee to the plaintiff. The trial Judge found that the making of the note was affected with fraud, but that the plaintiff was a holder in due course. But he also found that the place of payment was inserted in the note after it had been signed by the defendant, and that such insertion amounted to an alteration of the note in a material particular without the authority of the defendant. He then dealt with the question whether or not the alteration was apparent, and said :—

> " It is obvious from such an examination that the place of payment was filled in by some person other than the maker or the person who filled in the rest of the note. Both the handwriting and the ink are quite different and I conclude from those circumstances that it was apparent that an alteration in a

(1) (1908) V.L.R. 348 ; 29 A.L.T. 241. (2) (1888) 6 N.Z.L.R. 365.

material particular had been made. That being so the note itself is invalid and there must therefore be judgment for the defendant with costs to be taxed."

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The two main questions in this case depend upon the meaning and application of sec. 69 of the *Bills of Exchange Act* 1909, for, by sec. 95, the provisions of the Act affecting bills, including those contained in sec. 69, apply with the necessary modifications to promissory notes.

(1) The first question is whether the subsequent insertion of the place of payment of the note without the maker's assent is a "material alteration."

In the case of a bill, sec. 69 (2) expressly provides that the addition of a place of payment without the acceptor's consent is a material alteration. It seems to me that there is every reason for applying to notes the rule as to material alterations in bills, so that by direct force of sec. 95 (2), whereby the maker of a note is deemed to correspond with the acceptor of a bill, "the addition of a place of payment without the *maker's* assent" is a material alteration. This is the result of substituting the word "maker" for the word "acceptor" in sec. 69 (2).

Even if this is not so, and we are required to look elsewhere in order to ascertain whether the addition to a note of a place of payment without the maker's assent is a material alteration, the same conclusion must follow. By sec. 93, presentment for payment at a particular place is *required* in order to render the maker or indorser liable, where the note is, in the body of it, made payable at that place. Further, when a place of payment is indicated by way of memorandum only, presentment at that place is *sufficient* to render the indorser liable.

Therefore, whether or not the place of payment mentioned on a note is in the body of it or stated by way of memorandum only, one or more definite legal results must flow from the presence in the note of the place of payment. It would therefore appear that the insertion of a place of payment without the consent of the maker of the note necessarily changes in certain respects the rights and obligations of the parties. The insertion, if validly made, produces material consequences, and it therefore constitutes a material alteration.

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It is interesting to observe that this view is in accord with sec. 125 of the American *Negotiable Instruments Law*, which was not intended to depart from the English *Bills of Exchange Act*, and which treats "any change or addition which alters the effect of the instrument in any respect" as a material alteration.

In *Koch* v. *Dicks* (1), *Scrutton* L.J. said :—

> "It only remains therefore to consider whether an alteration which affects the rights as between the parties to a bill is a material alteration. I am of opinion that any such alteration, even though it may be prejudicial to the party making the alteration, is an alteration which renders the bill void. I think the law in that respect is the same as was expressed by Lord *Campbell* in *Gardner* v. *Walsh* (2) as follows: 'But we conceive that he (the defendant) is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice.'"

(See also *Slingsby* v. *Westminster Bank Ltd.* (3)).

On this part of the case I entirely agree with the judgment of *Cussen* J. in *Sims* v. *Anderson* (4). It seems to me that there is no answer forthcoming to the reasoning of that case, and that the more recent English cases also tend to support the conclusion he reached.

(2) The next question, and the one most debated before us, is whether the plaintiff succeeded in establishing that the alteration in the note was "not apparent."

In *Leeds Bank* v. *Walker* (5), *Denman* J. considered that the alteration would be an apparent one if *the party sought to be bound* could at once discern "by some incongruity on the face of the note," that it was not what it was.

This opinion was not followed by *Salter* J. in *Woollatt* v. *Stanley* (6). In the latter case the following test was propounded :—

> "Is the alteration of such a kind that it would be observed and noticed by the intending holder when he scrutinizes the document which he is contemplating taking and examines it as a negotiable instrument ? A negotiable instrument is an important document and a person who proposes to become holder would naturally scrutinize it with reasonable care. If the intending holder on scrutinizing the document with reasonable care, would observe that it has been altered, then that constitutes an apparent alteration" (7).

(1) (1933) 1 K.B., at p. 320.
(2) (1855) 5 E. & B. 83, at p. 89; 119 E.R. 412, at p. 415.
(3) (1931) 2 K.B. 583, at pp. 598, 599, *per Wright* J.
(4) (1908) V.L.R. 348; 29 A.L.T. 241.
(5) (1883) 11 Q.B.D. 84.
(6) (1928) 138 L.T. 620.
(7) (1928) 138 L.T., at p. 622.

Now it is obvious that a holder will seldom be able, upon mere scrutiny, to infer whether a bill has been altered or changed since it became a bill. In cases where everyone readily agrees that an alteration is apparent, it is almost impossible to tell whether the alteration was made before or after the document became a completed bill. Take the simplest case, where the amount stated is seventy pounds, but the letters "ty" in "seventy," and the figure "0" in "70" are written in ink of a different colour from that of the rest of the note. It is quite possible in such a case that the maker has inserted the additional figure and letters before signing the document, and delivering it as a note. Yet in such a case the test of *Salter* J. should apply. The alteration would be apparent although the act of alteration had been performed prior to its delivery. In such circumstances I think that any person proposing to discount the note takes upon himself the risk of recovering nothing from the maker if it should turn out that the added figure and words were not assented to by the maker but inserted by the payee. If so, an alteration may be "apparent" although the note itself preserves a sphinx-like silence upon the question as to the time when it underwent a change.

Actual decisions upon the point are few in number. One extreme type of case is represented by *Koch* v. *Dicks* (1), where an alteration of a completed bill of exchange was effected by changing the place of drawing, the word "London" being struck out, the word "Deisslingen" inserted, the word "changed" being written in, and such alteration being authenticated. At the other extreme is the case where, by microscopic examination, a skilful forgery may be detected. An intermediate case is that of *Slingsby* v. *Westminster Bank Ltd.* (2). There a cheque filled up in the handwriting of C. was made payable to "J. P. & Co." After the cheque was signed, C. inserted the words "per C. & P." in the blank space between the word "Co." and the printed words "or order." There, just as clearly, an alteration was made but it was not apparent; the handwriting was the same.

Some slight assistance is afforded by reference to the authorities decided before the passing of the English *Bills of Exchange Act.*

(1) (1933) 1 K.B. 307. (2) (1931) 2 K.B. 583.

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At that time a material alteration in a bill or note avoided it, and the holder in due course had not become possessed of the concession now contained in sec. 69 of the Commonwealth Act, which corresponds to sec. 64 of the English Act. The cases treat a change in handwriting as significant of alteration, and even as tending towards a presumption of it.

In *Bishop* v. *Chambre* (1), the promissory note sued on was upon paper which appeared to have been cut. In addition, however, the word " May " which was included in the date of the note, " was in a different writing from the rest of the note." No evidence was given of the making of the note, except proof of the defendant's handwriting. Lord *Tenterden* C.J. told the jury that it was for them to determine whether the word " May " was in a different writing from the rest of the note, as it certainly lay on the plaintiff to account for the " suspicious form and obvious alteration " of the note.

In *Knight* v. *Clements* (2) the Court held that, where a bill of exchange appeared to have been altered, the jury could not, by mere inspection of the bill and without other proof, decide that it was altered at the time of making rather than at a subsequent period. It was recognized, however, in the judgment of the Court that it was open for the jury to inspect a bill to ascertain if there had been another alteration. Lord *Denman* C.J. referred to *Bishop* v. *Chambre* (1), and said that in that case there manifestly had been an alteration.

In *Taylor* v. *Mosely* (3), where an action was brought by the indorsee against the acceptor of a bill, the bill appeared on inspection to have been altered in amount, and it also appeared that after the defendant's signed acceptance were the words " Payable at Messrs. Cockburn's," which were not in the defendant's handwriting. Lord *Lyndhurst* C.B. (4), in summing up, used Lord *Tenterden's* expression, and emphasized that it lay on the plaintiff " to account for the suspicious form and obvious alteration of the note."

(1) (1827) M. & M. 116; 172 E.R. 320.
(2) (1838) 8 A. & E. 215; 112 E.R. 819.
(3) (1833) 6 C. & P. 273; 172 E.R. 1239.
(4) (1833) 6 C. & P., at p. 280; 172 E.R., at p. 1241.

In an American case which was referred to, *Simpson* v. *Stackhouse* (1), which was decided in 1848, *Gibson* C.J. said :—

> "The principle of the English cases is, that an alteration so far apparent on the face of a bill or note as to raise a suspicion of its purity, makes it incumbent on the plaintiff to prove that it is still available, and that it is not incumbent on the defendant to disprove it."

It was determined that where the place of payment of a promissory note was in a handwriting different from that in the body of the note "the law raises a presumption that the note has been altered" (2).

In the present case the note would have been a complete and perfect note without (1) the additional words "Commercial Banking Co. of Sydney Hamilton Vic.," which were inserted after the printed words "Payable at," and also (2) without the serial number M.78 at the top left hand corner of the note. The handwriting of the maker is obviously different from the handwriting of the body of the note, but the ink appears to be the same. But both the words indicating the place of payment and the serial number are in a third handwriting of very different character, and in a different ink.

I agree with *Mann* A.C.J. when he says :—"The fact is that the words describing the place of payment are written in the note in an entirely different handwriting and obviously different ink from the handwriting and ink in the body of the note" (3).

In my opinion, a reasonably prudent person asked to discount the note would, upon perusal of it, have come to the conclusion that very probably both the serial number and the place of payment were added to the document *after* it had become a promissory note, and that such additions were made by or on behalf of the payee. And such a conclusion would have been correct. Its subsequent establishment as a fact transforms into certainty what was a probability, or at least a reasonable possibility.

Further, I think that *Mann* A.C.J. states the rule of law with substantial accuracy thus :—

> "The word 'apparent' must be given some narrower meaning than one which would limit the exception to cases in which the face of the bill shows

(1) (1848) 49 Am. Dec. 554 ; 9 Penn. 186.

(2) (1848) 49 Am. Dec., at p. 554.

(3) (1933) V.L.R., at p. 366.

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that the alteration had been made at a particular time. The way in which the question has been approached by the Courts shows that. The cases on this question show that the way to approach the matter is to regard 'apparent' as referring to a case in which the person concerned is put upon inquiry, or should have his suspicions aroused" (1).

I think that this conclusion is right. My reasons for accepting it may be summed up as follows:—

(1) The proviso to sec. 69 (1) which deals with the rights of a holder in due course, postulates that, although a bill or note is "complete and regular on the face of it" (sec. 34 (1)), it may contain an apparent alteration.

(2) A promissory note does not require the inclusion within it of any place of payment, so that its presence is not inconsistent with its having been added after delivery.

(3) Sec. 69 (2) definitely postulates that an "alteration" may consist of an "addition of a place of payment."

(4) In such a case the "alteration" would take the form of an insertion of additional words.

(5) Sec. 69 postulates that any and every kind of "alteration" to a bill or note *may* be "apparent."

(6) Therefore an insertion of words indicative of a place of payment may be an "apparent" alteration.

Leaving out such an extreme case as *Koch* v. *Dicks* (2), where the fact of alteration is openly asserted and authenticated, it would seem to follow that the typical case where an alteration by addition would be "apparent" is the case of an obvious change in handwriting. In the present instance there is the appearance not only of a very distinct change of handwriting and ink, but also of a serial number in the changed handwriting and ink. I do not think that the intention of the Code was to protect holders in due course in every case where the material alteration consisted of the addition of a place of payment. A contrary intention is to be implied from sec. 69.

I am inclined to think that, behind the suggestion that the alteration to the note in suit is not apparent, lies the assumption either that it is not an alteration at all or else that, in any event, many persons proposing to discount it would be willing to encounter the extremely slight risk of the alteration's having been unauthorized.

(1) (1933) V.L.R., at p. 367. (2) (1933) 1 K.B. 307.

But the first assumption is contrary to sec. 69 (2), and the second assumption is quite irrelevant because an alteration is apparent if always observed, whatever action may subsequently be taken by the observer.

I conclude that the plaintiff has entirely failed to prove that the "material alteration" to the note on which he sued was "not apparent," and that the appeal should be dismissed.

Appeal allowed. Order of Supreme Court and judgment of County Court discharged. In lieu thereof order that judgment be entered in the County Court for the plaintiff for the sum of £64 *together with interest thereon at the rate of* 4 *per cent per annum from* 15*th January* 1933, *to this date. Order that the defendant respondent pay the plaintiff appellant its taxed costs of the action in the County Court and of the appeal to the Full Court of the Supreme Court. Order that, pursuant to its undertaking to abide by any order this Court might make as to costs, the plaintiff appellant do pay the defendant respondent's costs of this appeal. Costs to be set off.*

Solicitor for the appellant, *Gordon Gummow.*

Solicitor for the respondent, *Sidney I. Silberberg.*

H. D. W.