RECENT DEVELOPMENTS NO. 2
TAI HING

Annexure B

To paper by Martin Kriewaldt

London Joint Stock Bank v. Macmillan [1918] A.C. 777. At p. 789, Lord Finlay L.C. with whom Lord Shaw agreed:

> "A cheque drawn by the customer is, in point of law, a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise care in drawing the cheque to prevent the banker being mislead. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty."
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> "Every day experience shows that advantage is taken of negligence for the purpose of perpetrating frauds."

and again (pp. 789-790):

> "As the customer and the banker are under a contractual relation in this matter, it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery. Crime, is indeed, a very serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description."

In his Lordship's discussion of Young v. Grote 4 Bing. 253, his Lordship says (p. 791):

> "It is obvious that the award left to the Court the question whether the arbitrator was right in thinking that Young had been guilty of gross negligence, and whether he was bound to make good to the bankers the larger sum which they had paid owing partly to his negligence. Best C.J. pointed out the negligence in the manner in which the wife had the cheque filled up, and said that it was by the neglect of ordinary

precautions that the bankers were induced to pay. I have referred, at some length, to the way in which the court, in the case of Young v. Grote dealt with the question of negligence for this reason."

"It is obvious that the position of the acceptor of a bill of exchange with reference to subsequent holders is very different from that of a customer with reference to his banker in the case of a cheque. In the latter case there is a definite contractual relation involving the obligation to take reasonable precautions." (p. 804)

"In the present case the customer neglected all precautions. He signed the cheque, leaving entirely blank the space where the amount should have been stated in words, and where it should have been stated in figures there was only the figure '2' with blank spaces on either side of it. In my judgment, there was a clear breach of the duty which the customer owed the banker. It is true that the customer implicitly trusted the clerk to whom he handed the document in this state to fill it up and to collect the amount, but his confidence in the clerk cannot excuse his neglect of his duty to the banker to use ordinary care as to the manner in which the cheque was drawn. He owes that duty to the banker as regards the cheque and it is no excuse for neglecting it that he had absolute and, as it turned out, unfounded confidence in the clerk. The duty is not a duty to have clerks in whom the customer believes to be honest. It is a specific duty as to the preparation of the order upon the banker. ... No one can be certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. If owing to the neglect of such precautions it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker." (p. 811)

Viscount Haldane similarly discussed the matter in terms of either a special duty to exercise care in the framing of the mandate p. 815 or, alternatively:

"I think, further, that the banker may alternatively say that even if the customer could otherwise prima facie be entitled to recover from him the amount paid on such cheques as I have referred to, on the footing that the latter has no voucher which justified the payment, he, the banker, must be entitled in such a case to recover against the customer for the loss sustained by a negligent act, and that, to prevent circuity of action, he must be allowed to set up a defence based on his immunity from the loss so occasioned." (p. 818)

His Lordship refers, with approval, to Swan v. North British Australasian Co. (1863) 2 H. & C. 175; 159 E.R. 73 and to the following passage in the judgment of Cockburn C.J. at pp. 189-190 which is:

> "(In Young v. Grote) it was held, not that the customer was estopped from denying that the cheque was a forgery, but that, as the loss which would otherwise fall on the banker, who had paid on the bad cheque, had been brought about by the negligence of the customer, the latter must sustain the loss. ... I am disposed to think that, technically looked at, the matter would stand thus: the customer would be entitled to recover from the bank the amount paid on such a cheque, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter."
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> "Possibly, to prevent circuity of action, the right of the banker to immunity in respect of the loss so brought about would afford him a defence in an action by the customer to recover the amount."

Lord Shaw of Dunfermline discusses the reciprocal duties of banker and customer at p. 824. In respect of the duty on the customer the observations are as follows:

> "On the other part there are obligations resting upon the customer. In the first place, his cheque must be unambiguous and must be ex facie in a condition as not to arouse any reasonable suspicion. But it follows from that that it is the duty of the customer, should his own business or other requirements prevent him from personally presenting it, to take care to frame and fill up his cheque in such a manner that when it passes out of his, the customer's, hands it will not be so left that before presentation, alterations, interpolations, &c., can be readily made upon it without giving reasonable ground for suspicion to the banker that they did not form part of the original body of the cheque when signed. To neglect this duty of carefulness is a negligence cognizable by law. The consequence of such negligence falls alone upon the party guilty of it, namely, the customer."

At a later stage, (p. 826) his Lordship says, unequivocally:

> "But the present, my Lords, is not a case of that kind. It is a case of negligence. And it is necessary to state again that in which the negligence consists.
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> The negligence consists in the breach of a duty owing by the customer to the banker. That duty is so to fill up his cheque as that when it leaves his hands, a signed document, it shall be properly and fully filled up, so that tampering with its contents or filling in a sum different from what the customer meant it to cover shall be prevented."

His Lordship makes it plain (p. 827-8) that Young v. Grote was a case in negligence and that he agreed with it on that basis.

Lord Parmoor took a similar view (p. 834):

> "Apart from special contract of some accepted course of dealing between the parties, it is the duty of a customer to use due caution in the preparation and issue of a mandate to his banker to charge his account at the bank, and if he commits a breach of this duty, and thereby misleads his banker to make payment on a forged instrument, and such payment follows in natural and uninterrupted sequence from such breach, the consequent loss falls, not on the banker, but on the customer. The principle is well established that the negligence which would deprive the customer of his right to insist at payment on a forged cheque is invalid must be negligence in or immediately connected with the actual transaction."
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> "An estoppel is created by their negligence in a duty which they owed to their bankers in the actual transaction in question, with the result that evidence is not admissible to prove that the clerk acted fraudulently and in excess of his authority." (pp. 835-836)