CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

1870.
Jan. 7.

Referred Case.

THOMAS MATHEWS *et al.* .... *Plaintiffs.*
GIRDHARLA'L FATECHAND..................... *Defendant.*

Forged Government Promissory Note—Payment of Forged Note—Notice of Forgery—Delay.

A person who receives a forged currency note in payment is not (in order to entitle himself to be paid a second time), upon discovering the forgery, bound to give immediate notice of it to the person from whom he receives the forged note, the rule relating to forged acceptances on bills of exchange not applying.

Semble—that if the delay in communicating the fact of the forgery of the note were so great as to damnify the payer of it in his remedy against, or in his power of tracing, the person from whom he received the note, such delay would be a good defence in an action brought upon the original consideration.

CASE stated for the opinion of the High Court, under Sec. 55 of Act IX. of 1850 and Sec. 7 of Act XXVI. of 1864, by John O'Leary, First Judge of the Bombay Court of Small Causes:—

"In this case, which was tried before me on June 23rd, 1869, the plaintiffs claimed Rupees 1,000 from the defendant, being the balance due to the plaintiffs on certain *hundis* accepted by the defendant and at one time held by the plaintiffs. The *hundis* in question were, at the time of the trial, in possession of the defendant and produced by him on subpœna.

"The technical defence was payment.

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"The facts of the case were very clearly proved by the plaintiffs, and were hardly disputed by the defendant. They were as follows:—On the 27th of April last the plaintiffs held certain *hundis*, accepted by the defendant, amounting in all to Rupees 3,500. On that day one Jejvern Vaklamal went to the plaintiffs on the part of the defendant and paid to the clerk of the plaintiffs, named Frámji Jamsetji, what purported to be Rupees 3,500 in currency notes. He paid three notes purporting to be for Rupees 1,000 each, and ten notes of Rupees 50 each. These notes were, after careful examination, received by the plaintiffs' shroff, Frámji, and the *hundis* (or *khokhás*, as they are termed when paid and cancelled) were returned. On the morning of the next day, at about 11 A.M., the plaintiffs ascertained that one of the notes so paid to them by the defendant, and which purported to be a currency note for Rupees 1,000, was a forgery. I consider it unnecessary to state the test by which the note was proved not to be genuine; but it appears to me material to state that the forgery in this case was exceedingly cleverly executed, and, as was proved by skilled witnesses in the case, the note in question would probably be received as genuine by any firm of merchants in Bombay, and possibly would not be detected at a bank. The facts of the forgery having been ascertained at about 11 A.M. on the 28th of April, the plaintiffs sent two of their clerks in the course of that same day to the defendant's place of business. One of these clerks, Mehervánji Hormasji, thus described what took place at the defendant's:—'We went to the defendant's that day (April 28th). We said to the defendant that he had paid us one note too few on the previous day. If we had told him it was a forged note he had paid us, he would not have shown us his book. We saw the defendant's book. We saw that the numbers of the notes had not been taken by the defendant. We then went to the Commissioner of Police. We said nothing that day to the defendant about the forgery.' On the next day, April 29th, at 11 or 12 o'clock, the plaintiffs sent a notice of the forgery to the defendant.

"On this state of facts, Mr. Latham, for the defendant, con-

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tended that the plaintiffs were precluded by their lâches from recovering the amount of the forged note from the defendant; and also that the acts of the plaintiff, in receiving the notes and returning the *khokhás* cancelled, must be taken as an absolute discharge of the *hundis* as against the acceptor. Mr. Latham chiefly rested his argument on the case of *Cocks* v. *Masterman* (*a*). On the other hand, Mr. Ferguson, for the plaintiffs, argued that, in the first place, a person who has through mistake received a forged currency note in payment of a debt is entitled at any time, subject to the law of limitation, to recover the debt so supposed to have been discharged, and that he is not bound to give notice of the forgery; and, secondly, that, on the well-known rule on the subject, the plaintiffs, having given notice of the forgery on the day after they had notice themselves, were in time, even supposing notice to be necessary in such a case.

"It appeared to me, chiefly on the cases of *Camidge* v. *Allenby* (*b*) and *Robson* v. *Oliver* (*c*), that notice of the forgery was necessary in the present case. I held that the ordinary rule in such cases was that notice of dishonour must be given, if possible, on the day after the dishonour. But I held that the foundation of the rule in such cases was this:—that the holder of a dishonoured note is bound to use due diligence in giving notice to prior parties whom he seeks to make liable; that if he give notice on the day after he himself has notice, the courts will presume that he has exercised due diligence, and will not in ordinary cases inquire whether he might not have given notice some hours earlier. I was of opinion, further, that in the true spirit and meaning of the rule as laid down in *Rowe* v. *Tipper* (*d*) the essence of it is either that the plaintiff has, or is presumed to have, exercised due diligence, and that a party who, on the day he himself has notice of the forgery, does communicate with the party whom he seeks to hold liable on the subject of the forged note, and in so communicating with him purposely conceals from that party notice of the forgery, cannot be said or be

(*a*) 9 B. & C. 902; S. C. 8 L. J., K. B. 77. (*b*) 6 B. & C. 373.
(*c*) 10 Q. B. 704. (*d*) 13 C. B. 249.

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presumed to have used due diligence in giving notice. Had the plaintiffs done nothing on the day they had notice of the forgery, I should undoubtedly have held they were in time in giving notice on the following day. I find on the evidence that they did give a notice on that day with respect to the transaction to the defendant, and that the notice so given to the defendant purposely withheld from the defendant all knowledge of the forgery, and wilfully misled him as to the facts. Under these circumstances, and on the authority of *Cocks* v. *Masterman*, I was of opinion the plaintiffs could not recover."

Notice above referred to:—

"29th April 1869.

"GIRDHARLA'L FATECHAND.

"SIR,—We are instructed by Messrs. Grindlay, Groom, & Co., to call upon you to pay them the sum of Rupees 1,000, the amount of a forged note passed by you to them on the 27th of April last, in part payment of two *hundis* drawn on you. We have also to call upon you for an explanation of the reason for your uttering a forged note, and we have to inform you that unless the amount be paid before 11 o'clock to-morrow, and a satisfactory explanation given as to the matter, proceedings, civil or criminal, as may be considered advisable, will be at once commenced against you.

(Signed) "MANISTY AND HURRELL."

The case was this day argued before COUCH, C.J., and BAYLEY, J.

Marriott (with him *Ferguson*), for the plaintiffs:—The cases relied upon by the First Judge do not apply. The plaintiff was under no obligation to give notice to the defendant that the note was a forgery. The rule that notice must be given immediately when a forged acceptance is paid by mistake, as in *Cocks* v. *Masterman*, is founded upon the peculiar rule relating to notice that governs bills of exchange and other negotiable instruments of that class—that parties liable upon them are discharged if they do not receive due notice of dishonour. By reason of the fact of dishonour not being communicated to him the holder of the bill loses his remedy against prior parties to it. The plaintiff here was paid by means of a worthless piece of paper, upon which no one was liable, and the defendant has lost no remedy

against any one. In *Camidge* v. *Allenby*, relied upon by the First Judge, the judgment turned upon the fact that the defendant had, by the lâches of the plaintiff, lost his remedy against the person who gave him the note. And in the judgment of Littledale, J., it is intimated that it would have been different if the notes there had been forged.

If the plaintiff was bound to give notice, he has done so in sufficient time. [COUCH, C.J. :—It is found that the plaintiff was guilty of delay in not giving notice earlier, as he might have done. The only question appears to be—was notice necessary.] By the delay of the plaintiff the defendant in this case has not been, nor could he be, damnified; as, though he may have possibly been delayed, he has not lost his remedy against the individual who gave him the note. [BAYLEY, J., referred to *Jones* v. *Ryde* (*e*), *Woodland* v. *Fear* (*f*), and *Gurney* v. *Womersley* (*g*).] *Westropp* v. *Solomon* (*h*) was also cited and relied on.

Latham, for the defendant :—The only issue is whether notice was necessary. It is submitted that it was. Payment was here made by a forged Government promissory note, between which and any other promissory note the law draws no distinction. There is no case directly in point on either side, but the rule laid down in *Camidge* v. *Allenby* applies. That case shows that a person receiving a promissory note payable on demand is bound either to circulate it or present it for payment within a reasonable time, and, if it is found to be worthless, immediately to give notice to the person from whom he received it; if he does not do so the latter is discharged. [COUCH, C.J. :—That is because by the want of notice the rights of the holder of the bill against other parties may be lost. I can find no authority for saying that if a paper like this turns out to be worthless the receiver must give immediate notice of his discovery that it is so.] There were no rights lost in *Camidge* v. *Allenby*; it is sufficient if

(*e*) 5 Taunt. 488. (*f*) 7 El. & B. 519. (*g*) 4 Ibid. 133.
(*h*) 19 L. J. C. P. 1.

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the person giving the note in payment may have been damnified. [COUCH, C.J.:—The only way you can put your case is, that if the defendant had got an earlier notice he might have found out the person from whom he received the note, and in that way he may have been prejudiced by such notice not having been sooner given. I am not prepared to say that a party might receive a forged note and retain it, knowing that it was forged, for such a length of time that the party from whom he received it might be thereby injured, or might reasonably be inferred to be injured, in his remedies against the person who gave it to him; but that case is not made here.] There was here even more than delay; there was concealment amounting to a misrepresentation, and the defendant may have been damnified. The rule relating to the payment of forged bills and notes, though originally it may have been founded upon particular instances, seems since to have grown into a general rule, which the Court will not limit in its application.

Marriott in reply.

COUCH, C.J.:—I think that the learned Judge of the Small Cause Court was wrong in applying the rule in *Cocks* v. *Masterman* to a case like this. The rule to be deduced from that and similar cases is, I think, this:—that where a person becomes possessed of a negotiable instrument which turns out to be forged, he must not, by his negligence, deprive the person from whom he received it of his right to take steps against the parties who may be liable to pay him; for, though the instrument may be forged as regards the acceptance, there may be other rights, arising out of the transfer, either by indorsement, where that is required, or by delivery where the instrument is payable to the bearer and is transferred by delivery only. But here the only liability upon the instrument being by reason of the signature, when that turned out to be forged, it was entirely valueless. On the instrument itself there was no right which could be reserved to the defendant by giving notice to others that it was forged. In principle, this is somewhat like the case of *Cundy*

v. *Marriott* (i), in which the Court of Queen's Bench held that where a bill indorsed by a debtor to a creditor was valueless for want of a sufficient stamp, so that there could be no remedy at law on it, it was not necessary that notice of dishonour should be given; and that the creditor, though he had not given notice of dishonour, might sue for the original debt. The only way in which possibly the defendant might avail himself of any neglect on the part of the plaintiff to communicate to him the fact of the note being a forged note is to my mind what I have already suggested—there might be a case in which, in consequence of delay in informing the party who paid the forged note of the fact of its being forged, he might have lost the means of tracing the person from whom he himself received it; and if a case of that kind were made out—if it were shown there had been such negligence, on the part of the person to whom the forged note was paid, in communicating the fact of its being a forgery, that the party paying it to him had been damnified, I am not prepared to say that it would not be a good defence in a suit like this. But in this case there is nothing whatever to show that any injury was caused to the defendant by the delay that took place in communicating the fact that the note was forged. It does not appear that the defendant lost any power which he had of tracing the note, and of enforcing any right he might have against the person who paid it to him, or that he was damnified in any way. Under these circumstances, I think the rule deducible from the case of *Cocks* v. *Masterman* does not apply.

If we are to apply a rule, we must look to the reason of it, and not only whether the case to which we are asked to apply it comes within the language the Judges use when they lay it down. You must always bear in mind, what I think is sometimes forgotten in argument, that when you are dealing with language used by Judges you must consider their expressions in connection with the case before them; you are not to take, as laying down a general proposition, language which in most cases was intended to apply only to the

(i) I. B. & Ad. 696.

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particular case before the court. I cannot see that this case comes within the reason of the rule that has been applied to it. I think the learned Judge of the Small Cause Court has come to a wrong decision, and that the plaintiffs are entitled to recover the amount they claim. Judgment will therefore be given for the plaintiffs with costs, including the costs of reserving this case.

BAYLEY, J.:—I concur in the opinion just pronounced by the Chief Justice. The decisions on which the Judge of the Small Cause Court appears to have grounded his decision were of a different character from the present case. In *Jones* v. *Ryde*, where it was held that a person who discounted a forged navy bill for another, who passed it to him without knowledge of the forgery, might recover the money back, as had and received to his use, upon failure of the consideration, in the course of delivering his judgment, GIBBS, C.J., said: "A case somewhat similar very frequently occurs in practice, on which I should not rely as governing the law but that it is said by my brother Lens to be sanctioned on the authority of a case so decided at Nisi Prius by Mansfield, C.J., namely, where forged banknotes are taken. The party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes, but he is answerable for the bills being such as they purport to be." And that appears to be so, for in giving the judgment of the Court of Queen's Bench in *Woodland* v. *Fear* Lord Campbell says, "The bank did not pay the cheque as his bankers or on his credit; and if so they must have paid it on the credit of the defendant as much as if they had given him change for a banknote, both parties believing it to be genuine; in which case, if it turned out to be forged and worthless, an action might clearly be maintained to recover back the money advanced."

Now, here there was no payment at all. What was delivered in payment, and believed to have been genuine, turns out to have been forged, and so there is no answer to the action.

With reference to the necessity of giving notice in a case like this, I entirely concur with the Chief Justice in what has fallen from him on that point.

Judgment was ordered to be entered for the plaintiffs, with costs of suit and the costs of reserving the case, and consequent thereon.

Attorneys for the plaintiffs: *Manisty and Hurrell.*
Attorneys for the defendant: *Rimington, Hore, and Langley.*

Appeal Suit No. 162.

Jan. 14.

RUSTAMJI ARDESIR DA'VAR ....*Appellant.*
RATANJI RUSTAMJI WA'DIA' ....*Respondent.*

Promissory Note payable on Demand—Consideration—Interest.

A promissory note, payable on demand, given for interest due on a mortgage-deed, with interest on such interest, cannot be enforced by suit, there being no consideration for the making of such a note.

APPEAL from the decision of SARGENT, J.

The original suit (No. 414 of 1869) was brought to recover Rs. 2,055, with interest thereon at the rate of four per cent. per mensem, from the 22nd of April 1869 until payment, due on a promissory note in the usual form.

"Bombay, 22nd April 1869.

"On demand, I promise to pay to Rustamji Ardesir Dávar or order the sum of Rs. 2,055, say Rupees two thousand and fifty-five, for value received, with interest at the rate of 4 per cent., say four per cent., per month.

"Rs. 2,055.

(Signed) "RATANJI RUSTAMJI WA'DIA'."

The case came on for hearing on the 10th of August 1869. The plaintiff was called and said "I know the defendant. The signature to the note shown me is his. No money was paid at the time, but there was interest due to me on a mortgage-deed, the amount of which had been settled between us." No other evidence was given.

The defendant did not appear.