

the decree of the latter is against Kashinath, and it is the decrees and not the orders passed in execution which form the test for a rateable distribution under section 295 of the Code. The present application must therefore fail. I agree, for these reasons, in holding that the rule must be discharged.

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Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

MOWJI SHAMJI AND OTHERS (PLAINTIFFS), v. NATIONAL
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October 4.

Bank — Banker and customer — Pass-book — Cheque lodged by customer for collection — Effect of entry in customer's pass-book of such cheque as if collected — Estoppel.

Early in March, 1900, the Hope Mills Company purchased 600 bales of cotton from the plaintiff at Rs. 278 per *candy*, but, being unable to accept and pay for them, it was arranged between the Company and the plaintiffs that one Shridhan should take them over from the plaintiffs at Rs. 243-8-0 per *candy* (the price having fallen in the meantime) and that the Company should pay the plaintiffs the difference of price. In fulfilment of this agreement the Company sent to the plaintiffs a cheque for Rs. 9,500 drawn by them on the Commercial Bank, being approximately the amount of the difference. This cheque was given to the plaintiffs on the 23rd March, 1900, but was post-dated the 3rd April. It was sent by the plaintiffs for collection to the defendant Bank (with which the plaintiffs had an account) on the next day (the 4th) at about 12 o'clock together with the plaintiffs' pass-book. The pass-book was asked for by the plaintiffs and was returned to them at about 4-30 o'clock on the same day with the Rs. 9,500 duly credited therein and initialled by one of the Bank's officers. On that same afternoon the plaintiffs delivered 100 of the bales to Shridhan. On the next day (the 5th April) another 100 bales were delivered by the plaintiffs to Shridhan, and after the delivery had proceeded thus far the plaintiffs at about 1-30 o'clock on the 5th April received notice from the defendant Bank that the Company's cheque for Rs. 9,500 had been dishonoured. Subsequently to the receipt of this notice the plaintiffs delivered the remaining 400 bales to Shridhan. The plaintiffs now sued the defendant Bank to recover the sum of Rs. 9,500, alleging that it was impossible to recover the amount from the drawers of the cheque (the Company), and contending that the defendant Bank

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by entering the said amount in the plaintiffs' pass-book and delivering the said book to them had led them to believe that the cheque had been duly honoured and the amount paid into their account, and they alleged that they would not have delivered the said bales to Shridhan if it had not been for the said representation by the Bank. They contended that the Bank was estopped from alleging the dishonour and non-payment of the cheque.

Held, that the returning of the pass-book to the plaintiffs by the Bank and the noting and initialling of the entry of Rs. 9,500 therein was a representation by the Bank that it had received payment of the cheque and was prepared to give the plaintiffs' credit for the amount. But

Held, upon the evidence that the delivery of the bales by the plaintiffs to Shridhan was not made on the faith of such representation by the Bank.

Held, further, that the plaintiffs were not entitled to recover and that the Bank was not estopped by the entry in the pass-book from alleging the non-payment of the cheque. The cheque having been lodged by the plaintiffs for collection on the 4th April, the Bank in the ordinary course of business had until the next day to give notice of its dishonour and the entry in the pass-book made on the 4th was not intended to be an acknowledgment of cash received. The Bank never intended the plaintiffs to act upon the entry in the pass-book made on the 4th upon the faith of its being an entry of cash actually received, and further, the cheque was a post-dated cheque, and the plaintiffs when lodging it clearly had doubts as to whether it would be honoured or not, while the defendant Bank had no knowledge of any circumstance justifying doubts as to its payment. The parties thus did not deal on equal terms and the defendant Bank was therefore not bound by the entry in the pass-book as a receipt—(*Martin v. Morgan*⁽¹⁾).

SUIT to recover Rs. 9,500. The question raised in this case was whether the defendant Bank was bound by an entry made by one of its officers in a customer's pass-book crediting the customer with the amount of a cheque lodged by him with the said Bank for collection from another Bank.

The plaint stated that early in March, 1900, the plaintiffs who were cotton merchants trading under the name of Shamji Ludha & Co., contracted to sell to the Hope Mills Company six hundred bales of cotton at a certain price. The Company, however, failed to carry out the contract, and it was consequently agreed between them and the plaintiffs that the plaintiffs should dispose of the cotton to another buyer at a less price than the Company had agreed to pay under their contract, and that the Company should pay to the plaintiffs the difference between the said prices.

(1) (1819) 1 Bro. & B. 289.

Accordingly, on the 4th April the Hope Mills Company sent to the plaintiffs a cheque for Rs. 9,500 drawn by their agent on the Commercial Bank of India. This cheque was sent in payment of the said difference.

About 12 o'clock on the 4th April the plaintiffs sent the said cheque for collection to the defendant Bank with which they had banked for some years and to which they were in the habit of sending cheques drawn in their favour and at which they had an account.

At about 4-30 o'clock on the same day the plaintiffs received from the defendant Bank their pass-book in which the amount of the said cheque, *viz.* Rs. 9,500, appeared duly entered to their credit, the said entry being duly initialled by one of the officers of the defendant Bank.

After the receipt of the said pass-book the plaintiffs delivered the cotton to the new purchaser to whom it had been sold as abovementioned. The plaintiffs alleged that it was in the belief that the cheque had been duly honoured and that the amount had been received by the defendant Bank on their account that they delivered the cotton to the said purchaser.

On the next day (the 5th April) the defendant Bank returned the said cheque to the plaintiffs with a memorandum dated the 4th April, intimating that the said cheque had been dishonoured.

The following paragraphs of the plaint set forth the plaintiffs' case :—

4. The plaintiffs say that the defendant Bank by making the said entry as aforesaid and delivering the said pass-book to the plaintiffs led the plaintiffs to suppose that the said cheque had been duly honoured and the amount thereof paid in their account. And they submit that they were justified in believing that the said moneys had been so received ; the plaintiffs thereupon, on the same evening and after the receipt of the said pass-book, delivered the cotton to the purchaser thereof. The plaintiffs say that they would not have delivered any of the cotton if they had not believed that the said cheque had been duly honoured and if it had not been for the representation of the defendants by their entry in the said pass-book that the same had been honoured and the said moneys received in their account.

5. On the 5th April, 1900, the defendants returned the said cheque to the plaintiffs with a memorandum dated the 4th *idem* intimating that the said cheque had been dishonoured.

6. The plaintiffs say that it is impossible to recover the amount of the said

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cheque from the drawers thereof. The plaintiffs submit that under the circumstances aforesaid the defendants are liable to pay to them the amount of the said cheque. On the 13th June, 1900, the plaintiffs drew upon the defendants a cheque for the said sum of Rs. (9,500) nine thousand and five hundred, which the defendants refused to pay.

The plaintiffs thereupon sued to recover the said sum of Rs. 9,500 from the defendant Bank.

In their written statement the defendants admitted that the plaintiffs had an account with them and were in the habit of sending cheques to them for collection, but they did not admit that the amounts of such cheques were only credited to the plaintiffs in their pass-book *after collection*. They alleged that the plaintiffs were always aware that the cheques sent to the Bank had to be passed through the clearing-house, and that it was impossible to tell until the day after they had been sent to the clearing-house whether they had been honoured or dishonoured.

The defendant Bank further admitted that the abovementioned cheque upon the Commercial Bank had been sent to them (the defendants) on the 4th April for collection and that the amount of the cheque had been entered to the plaintiffs' credit in the plaintiffs' pass-book which was sent to the plaintiffs in the afternoon of the same day, but they alleged that the plaintiffs had sent their servant for the said pass-book, well knowing that it was impossible at that time for the defendant Bank to have passed the said cheque through the clearing-house, and that the credit entry of Rs. 9,500 did not imply that the said money had been received by the defendant Bank to the plaintiffs' credit.

The following paragraphs of their written statement state the substance of their defence :

4. The defendant Bank denies that by making the said entry and delivering the said pass-book to the plaintiffs it led the plaintiffs to suppose that the said cheque had been duly honoured and the amount thereof paid to their account. The defendant Bank does not admit any of the other allegations in the fourth paragraph of the plaint contained.

5. The defendant Bank says that at the time the plaintiffs sent for their pass-book as aforesaid, they well knew that the said cheque was likely to be dishonoured.

6. The defendant Bank says that on the 13th June, 1900, the plaintiffs had no funds with the said Bank from which the amount of the cheque for Rs. 9,500

drawn on that day could be met, and the said Bank was therefore justified in refusing to pay the same.

At the hearing the following facts appeared in evidence. On the 10th March the Hope Mills, through their agent Rangildas Bhukhandas, bought the abovementioned six hundred bales of cotton, at Rs. 278 per *candy*, for March delivery (*i.e.* from 15th to 25th March). The Mills, however, were in difficulties, and could not carry out the contract, and accordingly one Shridhan Gopinath agreed to take over the cotton at Rs. 243-8 per *candy*, and on the 22nd March it was arranged that the plaintiffs should give delivery to him at that price and that the difference should be paid to the plaintiffs by the Hope Mills. On the next day (23rd March) the Agent of the Mills (Rangildas) sent the plaintiffs a cheque for Rs. 9,500, which, however, was post-dated the 3rd April. This cheque was for the amount of the difference (approximately) between Rs. 278 for which the cotton had been sold to the Mills and the Rs. 243-8 for which it had been subsequently sold to Shridhan.

It appeared that on the 29th March the Agent of the Mills (Rangildas) drew another cheque for Rs. 5,000 on the Commercial Bank in favour of Shridhan, and that this cheque was handed over to the plaintiffs by Shridhan on that day in part payment under the contract, and on the same day was lodged in the defendant Bank and was credited to the plaintiffs.

On the 4th April the cheque for Rs. 9,500, which had been given to the plaintiffs on the 23rd March, was sent to the defendant Bank by the plaintiffs and was credited in the pass-book which was received back from the Bank by the plaintiffs at about 4-30 o'clock in the afternoon.

One hundred bales of the cotton were delivered by the plaintiffs to Shridhan in the afternoon of the 4th April and the rest were delivered the next day.

On that day the plaintiffs were informed by the defendants that the cheque for Rs. 9,500 was dishonoured. The plaintiffs then wrote to the Bank stating that they (the plaintiffs) had relied on the initialled entry in the pass-book and on the faith of it had delivered goods. Other letters passed between the plaintiffs and the Bank, and on the 21st April the plaintiffs wrote

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stating that they would hold the defendant Bank responsible for the Rs. 9,500.

Accordingly on the 13th June, 1900, the plaintiffs drew a cheque in their own favour on the defendant Bank for Rs. 9,500, and gave notice that unless it was paid, they would take legal proceedings against the Bank. The defendant Bank refused to pay this cheque, and the plaintiffs filed this suit.

The following issues were raised at the hearing :

(1) Whether the defendants were bound to honour the cheque drawn upon them by the plaintiffs on the 13th June, 1900 ?

(2) Whether the allegations in paragraph 3 of the plaint other than those admitted by the defendants in their written statement are correct ?

(3) Whether the returning of the plaintiffs' pass-book by the defendants and the noting and initialling the amount of the original cheque therein was not a representation that the defendants had received payment of the said cheque or were prepared to give the plaintiffs the credit for the amount thereof ?

(4) Whether the plaintiffs acted on such representation to their detriment as alleged ?

(5) Whether the defendants are not bound to make such representation good to the plaintiffs ?

(6) General issue.

Lang (Advocate General) and *Raike*s for plaintiffs.

The Bank is liable for the money claimed by the plaintiffs. The cheque for Rs. 9,500 was duly handed to the Bank for collection and its officer entered the amount to the plaintiffs' credit in his pass-book and sent the pass-book back to them. They acted on this representation by the Bank, and, assuming that the money had been received for them by the Bank, he delivered the goods to Shridhan. The Bank led the plaintiffs to suppose that it had received the money on their account. It cannot now deny that it did so. Grant on the Law of Banking (5th Edition), page 196 ; Encyclopædia of English Law, Vol. I, page 480. The entry is not shown to have been made by mistake. It was made in the ordinary course of business. *Shaw v. Picton*⁽¹⁾ ; *Skyring v. Greenwood*⁽²⁾ ; *Hume v. Bolland*⁽³⁾ ; *Commercial Bank of Scotland v. Rhind*⁽⁴⁾ ; *McCaul v. Straus & Co.*⁽⁵⁾ ; *Emanuel v. Roberts.*⁽⁶⁾

(1) (1825) 4 B. & C. 715.

(2) (1825) 4 B. & C. 231.

(3) (1832) 1 C. & M. 130.

(4) (1860) 3 Macq. (H. L. C.) 643.

(5) (1883) Cababe & Ellis. 106.

(6) (1868) 9 B. & Sm. 121.

The defendants are estopped. *Carr v. London & N.-W. Railway Company* ⁽¹⁾; *Seton v. Lafone* ⁽²⁾; *Sarat Chunder Dey v. Gopal Chunder Laha* ⁽³⁾; Casperz on Estoppel, p. 273; *Simson v. Ingham* ⁽⁴⁾; *Deutsche Bank v. Beriro* ⁽⁵⁾; *Martin v. Morgan*. ⁽⁶⁾

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Scott and Robertson for defendants.

This suit is based upon a supposed estoppel. But there is none in this case. An estoppel does not of itself give rise to a cause of action. *Seton v. Lafone* ⁽⁷⁾; *Carr v. London and N.-W. Railway Company* ⁽⁸⁾; Bigelow on Estoppel, pp. 550, 563. The plaintiffs therefore have no cause of action on the ground of estoppel.

Then have they a claim for damages? They must prove damages; and they have not done so—*Hume v. Bolland*. ⁽⁹⁾ The Bank was not guilty of any negligence. On the evidence it is plain that when the cheque was given it was thought doubtful whether it would be cashed. The plaintiffs were bound to inform the Bank of that. *Boyd v. Emmerson* ⁽¹⁰⁾; *Timmins v. Gibbins*. ⁽¹¹⁾

RUSSELL, J. :—The question in this case, put shortly, is whether the defendants, the National Bank, are liable to the plaintiffs in respect of a cheque for Rs. 9,500, drawn on the Commercial Bank, Bombay, by one Rangildas Bhukhandas (which was crossed and payable to bearer, and was delivered to the plaintiffs by the said Rangildas Bhukhandas on the 23rd March, 1900, but was post-dated the 3rd April, 1900), by reason of the defendant Bank having returned to the plaintiffs their pass-book on the 4th April, 1900, with the entry duly initialled by a European officer of the Bank, "Rupees ninety-five hundred, Rs. 9,500," although the cheque was dishonoured on the 4th April, and notice thereof given to the plaintiffs on the 5th.

The question is a novel one and of importance, inasmuch as the decision in this case will, in any event, necessitate the alteration of the practice whereby several Banks in Bombay have for

(1) (1875) L. R. 10 C. P. 307.

(6) (1819) 1 Bro. & B. 289.

(2) (1837) 19 Q. B. D. 68.

(7) (1887) 19 Q. B. D. 68.

(3) (1892) 20 Cal. 296.

(8) (1875) L. R. 10 C. P. 307.

(4) (1823) 2 B. & C. 65.

(9) (1832) 1 Cr. & M. 130 p. 138.

(5) (1896) 73 Law T. 669.

(10) (1834) 2 Ad. & Ell. 184 at p. 202.

(11) (1852) 17 Jur. 378.

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some years past been in the habit of crediting their customers with cheques paid in as cash, and initialling such entries by their European officers. (His Lordship then read the plaint and the written statement.)

Upon the plaint it is difficult to know what is the cause of action. Is it a breach of duty on the part of the defendant Bank, or is it a breach of contract, or is it a suit for money had and received, as contended by Mr. Raikes, in his reply? Mr. Robertson, for the defendant Bank (feeling this difficulty), raised the first issue in very general terms as follows:—

(1) Whether the defendant Bank was bound to honour the cheque drawn upon them by the plaintiffs on the 13th June, 1900.

Mr. Raikes thereupon, for the plaintiffs, raised the following issues:

(2) Whether the allegations in paragraph 3 of the plaint other than those admitted by the defendant Bank in their written statement are correct.

(3) Whether the returning of the plaintiff's pass-book by the defendant Bank and the noting and initialling the amount of the original cheque therein was not a representation that the defendant Bank had received payment of the said cheque or were prepared to give the plaintiff credit for the amount thereof.

(4) Whether the plaintiffs acted on such representation to their detriment as alleged.

(5) Whether the defendant Bank is not bound to make such representation good to the plaintiffs.

(6) The general issue.

My view of the plaint is that it intends to allege that the defendant Bank being the plaintiff's bankers, had had and received to the plaintiff's account the sum of Rs. 9,500, or had represented to the plaintiffs that they had had and received such sum in such a way that they are estopped from denying the fact, and thereupon were bound to honour Messrs. Nanu and Hormusjee's cheque of the 13th June, 1900. Mr. Robertson objected to issues 3 and 4 as not arising on the pleadings, but I could not say they did not, and at all events they were the issues the plaintiffs came to trial upon.

Before dealing with the legal questions involved it is important

to ascertain the facts of the case which, though somewhat detailed, are not complicated, and for the sake of clearness I shall put them into separate paragraphs numbered in their order. I would premise that the firm of Rangildas Bhukandas are the agents of the Hope Mills.

1. On the 10th of March, 1900, the plaintiffs' firm sold to the Hope Mills 600 bales of Broach cotton at Rs. 278 per *candy* for the March *vaida*, 15th to 25th March, and six delivery entries in due course addressed to the plaintiffs' *mukadam* were given by the plaintiffs in favour of the Hope Mills. On the 19th March a survey of the cotton was held, and the Hope Mills put their stamp on the bales. It is not quite clear whether the contract was that of the Hope Mills or of Rangildas Bhukandas their agents. Rangildas says it was his own contract. This point is not really material, for both the Hope Mills and Rangildas (as he says) were in difficulties, and are so still. Probably, if profitable, the contract would have been that of the agent of the Mill.

2. The plaintiffs demanded payment from the Hope Mills, and on the 20th March wrote to them the letter Exhibit G. No reply was sent thereto.

3. From the evidence of Shridhan Gopinath it appears that he was assisting Rangildas at first in getting the cotton surveyed, as he, Rangildas, had told Shridhan's firm to get it sold, and he (Shridhan) says that he had the delivery orders in his possession from the 19th March, the date of the survey. Subsequently, however, *i.e.* on the 21st or 22nd March, Shridhan bought the 600 bales from the Hope Mills at Rs. 243-8. No written contract was, however, executed as he says the cotton was bought ready.

4. On the 22nd March the plaintiff Mowji says he saw Rangildas at the plaintiff's *pedhi* in Hornby Road in the Fort, and this is his account *verbatim* of the interview :—

We came to an arrangement. He said he would send Rs. 10,000 just then, and as to the rest we should give delivery to Shridhan and Co. at Rs. 243, and take the rest of the money at that rate from them. I said I could do this, provided he paid Rs. 10,000. He sent a cheque on the 23rd March for Rs. 9,500. The cheque in question was dated the 3rd April, *i.e.* D-1. I sent a man to tell him I could not accept a post-dated cheque like that, and I must have cash. Rangildas could not be seen after that; on inquiry at the office we were told he was at Bándra. I told my attorneys to write a letter to the Hope Mills.

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The cheque for Rs. 9,500 was therefore to be the approximate difference between Rs. 278 and Rs. 243-8 on the 600 bales of cotton.

5. On the 23rd March, 1900, the following memorandum was sent by the Hope Mills Company to the plaintiffs :

We send you herewith a cheque for Rs. 9,500 on the Commercial Bank as arranged with your Mr. Mowji by our Mr. Rangildas yesterday. Please accept the same.

On the 28th March a letter was written by Messrs. Nanu and Hormusjee, plaintiff's attorneys, to Rangildas Bhukandas in reply. The terms of that letter are very important, and I read it at length. I draw special attention to the words at the close of that letter "*if cashed.*"

Bombay, 28th March, 1900.

MESSRS. HOPE MILLS, LIMITED.

DEAR SIRs,

We are instructed by Messrs. Shamji Ludha and Co. to acknowledge the receipt of your letter of the 23rd instant and the cheque for Rs. (9,500) nine thousand and five hundred that accompanied the same.

Our clients find that the cheque is one signed by the Agent's firm and bears date the 3rd April next, and that it is not payable until that date. Our client will not accept a cheque payable on the 3rd. They want a cheque payable to-day. Please therefore send us another cheque or alter the date of the present cheque, and have the same initialled by your Agents or send us moneys in cash.

Please make arrangements for immediate delivery. If the bales are not paid for and taken delivery of within 24 hours from the receipt hereof, please note that the goods will be sold on your account and at your risk, either by public sale or private contract. There is already a demand for the goods at Rs. (230) two hundred and thirty per *candy*, discount as per Colaba usage. Please inform us whether our client is to sell the goods at the rate offered. If we do not hear from you we shall conclude that you are unwilling to accept this offer and our clients will proceed to sell without further notice. The cheque is for the approximate amount of difference which our clients will give you credit for if cashed and if your proposed purchaser will pay them and take delivery.

6. It is not clear upon the evidence in what way the plaintiff came in contact with Shridhan directly, for the plaintiff Mowji puts it on the evening of the 28th March, while Shridhan puts it on the 29th March. But I find that on the evening of the 28th March an interview did take place between Mowji and Shridhan. As to what happened Mowji and Shridhan, as might perhaps be

expected, are directly at variance. Shridhan's account of it in examination-in-chief is as follows:—

Rangildas drew a cheque in my favour for Rs. 5,000 on the Commercial Bank, Bombay, on the 29th March, 1900. He handed it to his *mehta*. The *mehta* went with me to Shamji Ludha and Co. I saw the plaintiff there (Mowji). Then the *mehta* told the plaintiff to give delivery to me at Rs. 243 per *candy*, and handed over the cheque to him, and told him to give credit to me for the Rs. 5,000. The Rs. 5,000 have to be credited to me on a previous account. When we got delivery from Shamji Ludha we had to pay Rs. 243 per *candy* less Rs. 5,000. Mowji agreed to that. The arrangement was that we were to pay Rs. 243 per *candy*, and Shamji Ludha was to deliver 600 bales at that price provided the cheque for Rs. 5,000 was honoured. There was some talk about my price and Shamji Ludha's price. The *mehta* said something about an arrangement going on between Shamji Ludha and his master as to the differences which Rangildas had to pay. The cheque was handed over, and Shamji said he could get the cheque cashed and could deliver. All this took place on the 29th March.

Then he says in cross-examination :

On the 29th March I had my first interview with the plaintiff Mowji at Colába. Rangildas' *mehta* and Runchordas were present also. I don't know the name of Rangildas' *mehta*. This was at Shamji Ludha's *jutha*. Rangildas' *mehta* talked with him about the delivery of the 600 bales, and offered him a cheque for Rs. 5,000 and to deliver the cotton to us at Rs. 243 and give us credit for Rs. 5,000. I was to get credit for Rs. 5,000 as the market had gone down, and about Rs. 30,000 to Rs. 35,000 were due to us by the Hope Mills. The cheque was not given direct to us by Rangildas, because he feared we might keep the Rs. 5,000 against the old account and not take delivery of the cotton. On the 29th I knew the Hope Mills had bought the cotton at a higher price than I had agreed to give for it. On the 29th I knew the plaintiff had then received a post-dated cheque. I did not know that I was not to get delivery of the cotton till the post-dated cheque was paid.

7. On the other hand, the plaintiff says he first saw Shridhan as to the arrangement that he was to buy the cotton on the evening of the 28th March :

I saw Shridhan Gopinath himself. It was not then arranged that Shridhan and Co. were to buy at Rs. 243-8 and Rangildas to pay Rs. 5,000. The arrangement was that money for 600 bales at Rs. 243 was to be received from Shridhan and Co., provided we got Rs. 9,500 from Rangildas in respect of the cheque. That was the only arrangement that was made, and that the cotton was to be delivered to Shridhan after the receipt of the Rs. 9,500. That was the whole arrangement. If the money was not received no delivery was to be given to Shridhan: Rs. 5,000 was to be credited on account of the transaction.

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Rangildas and Shridhan's man had come to deliver the Rs. 5,000 cheque which had been drawn by the Hope Mills in favour of Shridhan. It was to be in part payment of the Rs. 243-8 per *candy*. I was not to deliver the cotton unless the Rs. 9,500 cheque was honoured.

In his examination-in-chief Mowji says that Shridhan did not know it was a post-dated cheque.

8. On the 29th March the cheque for Rs. 5,000 was duly credited to the plaintiffs in the pass-book and was duly honoured.

9. The cheque for Rs. 9,500 which had been given, as I have stated, to the plaintiffs on the 23rd March, but was post-dated the 3rd April, was not sent to the defendant Bank on that day, but was so sent on the 4th April. According to the evidence of Mowji, Gopaldas Raghoji (the second plaintiff) and the plaintiffs' *mehla* Lukmichund, the *mehla* took it to the defendant Bank at between 12 and 12-30 on that day with the pass-book and slip book and slip (No. 8). Together with it was sent another cheque for Rs. 1,24,470-12, which was duly honoured, having been drawn on the Yokohama Specie Bank. Lukmichund brought back the counterfoils of both slips duly initialled in the slip book (K). The slip was, as usual, left with the Bank.

10. After it had been so sent the first plaintiff went to Colába at about 3-30 p.m. when Shridhan's man Ramchund pressed him for delivery of the cotton, whereupon the first plaintiff says he told him to wait a little, and then went to the Cotton Exchange Room to telephone to his partner to find out whether the pass-book had been returned or not with the Rs. 9,500 credited therein. The first plaintiff says he got an answer: "Wait a little. Our man has gone to the Bank to get the pass-book. As soon as he returns you will get the answer." The second plaintiff was the man at the other end of the telephone who sent the above answer. Lukmichund, the *mehla*, was the man who was sent to the Bank for the pass-book, and he says he went to the Bank at 3-30 or 3-45 p.m.; and was handed the pass-book with the Rs. 1,24,470-12 credited and initialled therein. He says that he noticed that only one cheque had been credited, and thereupon gave back the pass-book to "the Hindu" at the Bank, who went inside with the pass-book, and returned after some time, and handed the pass-book to him, and he found that the Rs. 9,500 had been credited therein,

whereupon he took back the book and gave it to the second plaintiff.

11. The Rs. 9,500 are thus credited: "Rupees ninety-five hundred"; then come the initials of Mr. Jas. Noble Johnstone, an assistant in the defendants' Bank, and then the figures Rs. 9,500.

12. The second plaintiff says it was 4-10 P.M. when Lukmichund returned with the pass-book, but I believe it was (as stated in the plaint and in the plaintiffs' attorney's letter, which is part of Exhibit C,) 4-30 P.M. The second plaintiff says that he then telephoned to Colába that the *mehta* had brought the pass-book from the Bank, and the cheques, which had been sent, had been credited therein. The first plaintiff says that when he got that message he gave orders to his man to let Shridhan begin to take delivery of the 600 bales, and it is admitted that 100 bales were delivered on that day and Rs. 12,000 paid by Shridhan to the plaintiffs.

13. On the next day, *i.e.* 5th April, the first plaintiff says he delivered another 100 bales to Shridhan, after which he got the slip B from the defendant Bank giving him notice of dishonour of the cheque D-1, which he says he got at 1-30 that day. After the notice of dishonour the other 400 bales were delivered.

14. It appears that the plaintiffs have not called on Rangildas to pay the Rs. 9,500, but on the 5th April their attorneys wrote the following letter to the Hope Mills:

DEAR SIRs,

In continuation of our letter to you of the 28th March last, written on behalf of our clients, Messrs. Shamji Ludha and Co., we are instructed to inform you that the cheque therein mentioned which our clients were persuaded to keep and present on due date was on presentation dishonoured. Our clients have already delivered 100 bales to your purchasers, and will of course deliver the remaining 500 bales to them, but we hereby require you at once to pay up Rs. (9,500) nine thousand and five hundred, the amount of the cheque. They will send you their final account in due course, but they insist upon the amount of the cheque being paid forthwith.

"Yours truly,

(Signed) NANU AND HORMASJI, Solicitors.

On the same day the correspondence with the plaintiff's attorneys and the defendant Bank began. Their first letter was as follows:

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TO THE NATIONAL BANK OF INDIA, LIMITED.

DEAR SIRS,

Our clients, Messrs. Shamji Ludha and Co., have asked us to write to you this letter.

Our clients yesterday at about 12 noon presented to your Bank a cheque, dated 3rd instant, drawn by Rangildas Bhukandas and Co. on the Commercial Bank of India, Limited, for Rs. 9,500 for collection and to be credited to their account with yourselves.

At about 4-30 P.M. yesterday our clients' pass-book was returned to their man with the amount of the cheque duly credited to them, the entry being duly initialled. Relying upon the credit entry that the cheque was honoured, our clients handed over certain goods to the order of Rangildas Bhukandas and Co. after 5 P.M.

Our clients are surprised to receive from you your memo. of date returning the aforesaid cheque. Please note that our clients hold your Bank responsible for the amount of the cheque.

Yours faithfully,

(Signed) NANU AND HORMASJI.

The subsequent correspondence is annexed to the plaint.

On the 26th April the defendant Bank wrote the letter of that date to the plaintiffs, enclosing the cheque D-1 and dishonour slip (D-2). On the 13th June the plaintiffs' attorneys sent to the defendant Bank a cheque for Rs. 9,500 drawn by the plaintiffs on the defendant Bank of which they demanded payment. The defendant Bank declined to pay.

15. From the evidence in the case it appears that there is a clearing-house at the Bank of Bombay to which cheques are sent up till 2 o'clock, and there exchanged between the various Banks in Bombay, and from the clearing-house the cheques come to the Banks upon which they are drawn at or about 3 P.M., and if dishonoured are returned to the Bank from whom they were received at or about 4 P.M. Crushnarao Sadashiv Pittak, clerk in the Commercial Bank, says that the cheque D-1 came to them at 3 P.M., and would in the ordinary course have been returned to the National Bank at 4 P.M. It also appears that if cheques are paid into a Bank after 2 P.M., they are not sent to the clearing-house till next day, but may be sent to the Bank direct for collection. I am by no means satisfied that the plaintiffs, who are men of very considerable business experience in Bombay, were not aware of the practice of the clearing-house.

16. A considerable amount of evidence as to the practice of

Banks with regard to initialling pass-books was given before me, which, although objected to, seemed to me to be relevant, and I accordingly admitted it upon the authority of *Mackenzie v. Dunlop*⁽¹⁾ and section 13 of the Evidence Act. From that evidence it appears to have been the practice of several Banks in Bombay for a number of years to enter in their customers' pass-books cheques of other Banks paid in by their customers, and to initial them by a European officer as cash, whether the cheques have been honoured or not. In the event of the cheque being dishonoured, what is called a reversing debit is entered, debiting the amount to the customer. The Bank of Bombay, however, wisely have not adopted this practice, and the sooner the other Banks alter it the better. It can very easily be altered, for all that a Bank has to do in such a case would be, initial the counterfoil slip as being receipt of a cheque, enter the cheque as a cheque for the amount thereof in the pass-book, but not initial the pass-book until the cheque has been cashed in due course. Notice of this practice should be given to the customers of each Bank, and in my opinion no Bank should issue any pass-book to its customers without having its rules printed in each book in English if the customer knows English, and in the vernacular if the customer does not. In the present instance I see no reason to believe that the plaintiff ever had his attention drawn to the rules of the defendant Bank, or if he had, would have understood them. I confess I do not agree with Mr. Henry S. Johnstone when he said, *inter alia*, that the customer must not depend upon the pass-book at all. The case I put during the argument seems to me to be in point. Supposing a person sells a horse to a friend or a stranger of whose pecuniary position he has doubts, a not uncommon circumstance, he is paid by a cheque drawn upon a Bank A in the morning which he pays at once into his Bank B. He sends for his pass-book after the Bank have had time to cash the cheque, or to ascertain if it had been dishonoured to see if that cheque has been honoured, and sees it credited to him as cash, and the entry initialled by a European officer of the Bank. Relying upon that representation he delivers the horse to the purchaser. Under these circumstances I am of opinion that the

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(1) (1860) 3 Macq. H. L. C. 22.

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Bank clearly would be liable. Under such circumstances the Bank is the agent to collect—what? Surely cash. When they say they owe so much cash to the customer, what does it mean but that they have collected the cash? If they have collected the cash, how could they enter it *except* in the way that has been done in the present case?

17. But the present case is not one of such a simple character, and I proceed to deal with the legal aspects of it.

18. In the first place Mr. Scott was right in his contention that estoppel does not give rise to an action of itself. Pollock on Contracts, pages 505, 506 (6th Ed.), in dealing with estoppel, says: "The rule is not a rule of substantive law, in the sense that it does not declare any immediate right or claim. It is a rule of evidence, but capable of having the gravest effect on the substantive rights of parties;" and Bowen, L.J., in *Low v. Bouverie*,⁽¹⁾ says (page 105): "But we must be guarded in the way in which we understand the remedy where there is an estoppel. Estoppel is only a rule of evidence; you cannot found an action on estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said." I apprehend, therefore, that the question I must put to my mind is—Are the circumstances of this case such that the defendant Bank ought not to be permitted to deny that they received the Rs. 9,500 to the use of the plaintiffs?

19. The first point I shall consider is what was the relation between the plaintiffs and the defendant Bank when the cheque for Rs. 9,500 was sent to them on the morning of the 4th April. I am of opinion that the plaintiffs constituted the defendant Bank their agent for collection, for a banker receiving a cheque becomes the agent for presentment of the man from whom he receives it, even when the presentment has to be made to himself as banker—*Bailey v. Bodenham*.⁽²⁾ This being so, what is the effect of the Rs. 9,500 being credited to the plaintiff in the pass-book? Surely the effect of that is that the Bank acknowledge themselves to be the debtors of the plaintiffs for that amount, and they constitute themselves holders for value of the cheque, for when a customer

⁽¹⁾ (1891) 3 Ch. 105.

⁽²⁾ (1864) 33 L. J. C. P. 252.

pays a cheque to his banker, intending that it should be paid to his credit, and it is so placed, the bankers become immediately holders of the cheque for value, even though the customer's account is not overdrawn. *Ex parte Richdale*⁽¹⁾; *National Bank v. Silke*⁽²⁾; *Royal Bank of Scotland v. Tottenham*.⁽³⁾ The law of Scotland is the same—*M'Lean v. Clydesdale Banking Company*.⁽⁴⁾

“It is generally considered that if the transferee presents the cheque and procures it to be certified, or the banker promises to place it to his credit ‘or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received the money in cash, and the Bank's indebtedness to him will be equally full and irrevocable’—Morse on Banks, page 321, quoted and approved in *National Bank v. Burkhardt*⁽⁵⁾.” See 3 Ruling Cases, page 762.

20. What a pass-book is is too well known to need description here, but it will be found correctly described in Grant on Banking (5th Edition), page 194. At page 196 of the same book it is stated: “Credit given in a pass-book binds the banker, if on the faith of such credit the customer has altered his position, as by drawing on the credit &c., for, by entering the sums to the customer's credit, they lead him to suppose that they have received them on his account. When, however, there has been no such alteration, the banker is allowed to show that the entries were made by mistake; for the pass-book is only *prima facie* evidence against him” (see the cases there cited). For this purpose the entries in the pass-book, I am of opinion, are the same as receipts and acknowledgments, with regard to which Lord Tenterden said in *Graves v. Key*⁽⁶⁾ (page 318): “A receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it, and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his position—*Straton v. Rastal*, 2 T. R. 266; *Wyatt v. Marquis of Hertford*, 3 East 147; *Herne v.*

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(1) (1882) 19 Ch. D. 409.

(2) (1891) 1 Q. B. 435.

(3) (1894) 2 Q. B. 715.

(4) (1883) 9 A. C. 95.

(5) (1879) 100 U. S. 688.

(6) (1832) 3 B. & Ad. 313.

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Rogers, 9 B. & C. 586." To the same effect is *Gaden v. Newfoundland Savings Bank*,⁽¹⁾ upon which Mr. Scott relied. That case on the facts is distinguishable, for there the defendants were a Savings Bank "whose duty was only to receive money in deposits" (page 286).

21. This being so, the next question to consider is whether the facts as above set out bring the case within section 115 of the Evidence Act. Since the case of *Sarat Chunder v. Gopal Chunder*,⁽²⁾ it must, I think, be taken as settled that that section does not differ from the English law. Mr. Raikes argued that both the third and the fourth propositions in the well-known case of *Carr v. L. & N. W. Ry.*⁽³⁾ applied. (Admittedly the first and second proposition in that case do not apply.) The third proposition is "that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as so represented." I deal with this proposition first. I think that the words "in the ordinary course of business" should be added after "a reasonable man" in the above proposition. See per Lord Esher, M.R., in *Selon v. Lafone*⁽⁴⁾ (considered hereafter in the fourth proposition).

22. "An estoppel must be clear and non-ambiguous," per Kay, L.J., in *Low v. Bouverie*, *ubi supra* page 113. It must also be "free, voluntary, and without artifice"—Bigelow on Estoppel, page 563. In the present case it is clear upon the evidence of Messrs. H. & J. Johnstone that the defendant Bank never intended the plaintiffs to act upon the faith of cash for the cheque having been actually received. In the next place it is shown that according to the ordinary course of business the defendant Bank would have till the next day to give notice of the dishonour of the cheque, if it was dishonoured; and, according to the system adopted by at least three of the Banks in Bombay, the acknowledgment

(1) (1900) A. C. 281, 286.

(3) (1875) L. R. 10 C. P. 907.

(2) (1892) 20 Cal. 296.

(4) (1887) 19 Q. B. D. 72.

in the present form was not intended to be an acknowledgment as of cash, clear and unambiguous. Further, and this to my mind is most important, the cheque was a post-dated cheque, which had been with the plaintiffs since the 23rd March. The plaintiffs had very great reason to doubt the solvency of the Hope Mills and Rangildas. Paragraph 5 of the plaint is well founded, which says "that at the time the plaintiffs sent for their pass-book they well knew that the said cheque was likely to be dishonoured." It therefore appears to me that the principle stated in *Martin v. Morgan*,⁽¹⁾ by Richardson, J., applies, when he says: "It is sufficient that the parties did not deal on equal terms. The defendants knew that Burmester and Co. were in a state of probable insolvency, and concealed this from the plaintiffs, who were ignorant of it. This brings the case within the rule of law that a party paying money in ignorance of circumstances with which the receiver is acquainted is not on equal terms with him, and therefore entitled to recover it back." The expressions in the letters Exhibits H. and I. "if cashed" and "were persuaded" tend strongly to show that the plaintiffs had every reason to doubt the solvency of the drawer of the cheque. The plaintiffs were principals liable to indemnify the Bank for any loss incurred by them or their agents by reason of the principal's default, and therefore the estoppel was not so clear and unambiguous as to justify the plaintiffs in relying upon it. I am therefore of opinion that under the particular and peculiar circumstances of this case, if the plaintiff, the principal, intended to make the defendant Bank his agents liable for the representation in the pass-book, it was incumbent on him to ascertain whether the estoppel on which he intended to rely was clear and unambiguous.

23. The next question is whether the plaintiffs acted upon or changed their position in consequence of the representation of the Bank. Mr. Scott argued that the contract with Shridhan was a novation of the original contract. Mr. Raikes said this was not so, but that there was one continuous contract dependent on the honouring of the cheque for Rs. 9,500, and in consideration of

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(1) (1819) 1 Bro. & B. 289.

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the cheque for Rs. 5,000 and due payment for the rest of the 600 bales. And in support of his argument Mr. Raikes rightly relied upon the Exhibits Nos. 6 and O, P, Q, and R, showing how the plaintiffs in their books dealt with the moneys received for the 600 bales of cotton. There are difficulties in the way of accepting either view. In the way of the novation theory there is the admitted fact that no delivery was made till the afternoon of the 4th April. I do not believe Shridhan when he said that he was waiting to arrange for insurance and loans from the Bank (*i.e.* of Bombay) before he took delivery. I do not believe the plaintiff (Mowji) when he says that Shridhan was pressing him continually to give delivery. No letter to that effect is produced, and a rapidly falling market, as a rule, is not one in which a purchaser presses for delivery. On the other hand, if the contract was one contingent on the payment of the Rs. 9,500 cheque, it is an extraordinary thing that after notice of dishonour on the 5th April by 1-30, the plaintiffs should have gone on delivering to Shridhan. There was no obligation on them to do so if the contingency existed. The first plaintiff's view of the contract is peculiar when he says "Shridhan was bound to take delivery, but I was not bound to give delivery till the Rs. 9,500 had been received." The plaintiff (Mowji) swears that Shridhan did not know that the cheque for Rs. 9,500 was post-dated. This I cannot believe. Shridhan swears he did know of it, and the probabilities were all in favour of that being so. Again, I have held it proved that the pass-book was not returned to the plaintiffs by the defendant Bank till 4-30 P.M. on the 4th April. But the plaintiff is very precise in his evidence when he says "that Shridhan at 4 P.M. asked for the delivery of the 600 bales. He asked at 4 P.M. if I was bound to deliver to him. I said Yes, we are bound." In the face of this evidence, how can I find that the delivery by the plaintiffs to Shridhan was made by reason of a representation by the defendant Bank, which was not made to the plaintiffs till 4-30 P.M. at the earliest? The true position I believe was this. The plaintiffs no doubt, having got the post-dated cheque, were desirous of not delivering till after the 3rd April. Shridhan, with the market going down rapidly, was not anxious to take delivery. Both of them knew that the cheque

for Rs. 9,500 was post-dated, and consequently that Rangildas (or the Hope Mills) was in a shaky pecuniary condition, but might possibly be put in funds before the 3rd April, and under no circumstances would the cheque be honoured before that day.

24. Looking at all the circumstances of the case, and the position of the parties and the evidence given, I am not satisfied that in delivering the 600 bales of cotton to Shridhan the plaintiffs were *bona fide* relying on the representation made by the defendant Bank in their pass-book. I am supported in this opinion by the fact that the plaintiffs went on delivering the cotton to Shridhan, although they knew by 1-30 o'clock on the 5th April that the cheque was dishonoured. How are the plaintiffs entitled to say to the defendant Bank, "You are liable to pay me Rs. 9,500, for you represented to me you had that money of mine in your hands, and thereupon I delivered 600 bales of cotton," when the evidence shows that before delivering 400 of the 600 bales they knew that the representation of the defendant Bank was incorrect. Why after 1-30 on the 5th April, if the contract was contingent on payment of the Rs. 9,500 cheque, did they not stop further deliveries to Shridhan, giving notice to the Bank of the position and claim damages. Because they could not have proved any damages, and as to the 400 bales, preferred to rest upon the doubtful question of estoppel, and the undoubted solvency of the National Bank. That the plaintiffs were extremely anxious to make the defendant Bank liable is shown by their attorney's letter of the 5th April (the first was in Exhibit C), and in their conduct towards the defendant Bank the plaintiffs, I think, showed a considerable amount of "artifice."

25. Next comes the question whether the case falls within the fourth proposition in *Carr v. L. & N. W. Railway Company*, which is: "If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist." Together with this must be taken the judgment of Lord Esher,

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M.R., in *Seton v. Lafone*,⁽¹⁾ where at page 72 he says: "It is alleged there was no negligence, because there was no duty. I protest that, if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge, and, further than that, I think there is a duty to take reasonable care that the statement shall be correct." The words "ordinary course of business" here used ought, I think, to be included in the third proposition in *Carr v. L. & N. W. Railway*, and I included them there. Does the conduct of the defendant Bank come within the proposition? Now in the first place I do not think the defendant Bank made a statement in which it was probable that the plaintiffs in the ordinary course of business and in the circumstances of this case would act. The plaintiffs are men of business, and for over twenty years had had an account with the defendant Bank and another Bank, in which the same system of crediting cheques in the customers' pass-book was carried on. I feel great difficulty in believing that the plaintiffs were entirely ignorant of the practice of the clearing-house in Bombay. In any event the plaintiffs must be taken to have known that the Bank would have reasonable time to give them notice of dishonour of the cheque.

27. On the other hand, I am of opinion that the defendant Bank in this case, in stating as they did that cash had been received for the cheque, did state a thing that was false to their knowledge, and they also were guilty of a breach of their duty to take reasonable care that that statement should be correct within the judgment of Lord Esher above cited, but as I have above intimated, the plaintiffs have not satisfied me that they *bona fide* acted upon that statement. They certainly did not act on it in delivering the 400 bales.

28. Apart from the special circumstances of the present case which I have dealt with above, the case of the *Deutsche Bank v. Beriro*,⁽²⁾ relied upon by Mr. Raikes in reply, would have strongly supported the plaintiffs' claim. There A, the endorsee

(1) (1887) 19 Q. B. D. 68.

(2) (1895) 73 L. T. 669.

of a bill of exchange resident abroad, endorsed it to the defendants his agents in London for collection. The defendants endorsed it to the plaintiffs, and sent it to them for the same purpose, and they forwarded it to their agents. The plaintiffs, under a misunderstanding, informed the defendants that the bill had been paid, and sent them a cheque for the amount. Thereupon the defendants intimated the same to A, and credited him with the amount of the bill. Mathew, J., decided on the authority of *Skyring v. Greenwood*,⁽¹⁾ that as the plaintiffs had wrongfully informed the defendants that the bill had been paid, they could not recover the amount of the bill when the defendants had nothing to do with the mistake of fact; and also that the plaintiffs were estopped by the representation which they had made to the defendants, and upon which the defendants had acted. The Court of Appeal upheld Mathew, J. I should add that in the present case it was not suggested, nor was it part of the plaintiffs' case that the initialling officer, Mr. J. N. Johnstone, had by mistake initialled the entry, *i. e.* after noticing that the cheque had been dishonoured.

29. Considerable argument was addressed to me upon the question that the plaintiffs by delivering the 600 bales to Shridhan, having regard to the state of the market, not only sustained no loss by the delivery, but were benefited thereby, but I am of opinion that Mr. Raikes' answer to it was correct, when he said that in a case of this nature the Court will not consider the question of detriment, for in any case the unpaid vendor who has got his goods is in a better position than the unpaid vendor who has parted with them. Moreover, as I have pointed out, the claim is for money had and received and not for damages.

30. If it is material (though I do not think that it is) I find that the allegations in paragraph 6 of the plaint: "The plaintiffs say that it is impossible to recover the amount of the said cheque from the drawers thereof" have not been proved to my satisfaction. No real effort has been made by the plaintiffs to recover the amount from Rangildas or the Hope Mills, and since

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the 4th April their only object of attack has been the defendant Bank.

31. I need only mention one other matter, and that is that Mr. Robertson, in cross-examining the plaintiff Mowji, asked him whether he had not presented the cheque to the Commercial Bank on the 3rd April before he paid it into the defendant Bank. This point was not suggested in the written statement or the issues, and as it involved what would have been distinct fraud on the part of the plaintiffs, I ruled that a supplemental written statement setting it up must be put in, which was not done.

32. Upon the whole, therefore, I have come to the conclusion that the plaintiffs' case fails. I accordingly find on the issues as follows:—(1) The defendant Bank was not bound to honour the cheque drawn upon them by the plaintiffs on the 13th June, 1900. (2) I find the allegations in paragraph 3 of the plaint to be correct. (3) I find that the returning of the plaintiffs' pass-book by the defendants, and the noting and initialling the amount of the original cheque therein, was a representation that the defendant Bank had received payment of the said cheque and were prepared to give the plaintiffs credit for the amount thereof. (4) I am not satisfied that the plaintiffs acted on such representation. It is not necessary, as I have above pointed out, to say whether they acted to their detriment as alleged. (5) I find that the defendant Bank are not bound under the circumstances of this case to make such representation good to the plaintiffs. (6) I find that plaintiffs are not entitled to the relief claimed or any part thereof, and accordingly dismiss the suit with costs.

Suit dismissed.

Attorneys for plaintiffs:—*Messrs. Nann and Hormusji.*

Attorneys for defendants:—*Messrs. Little and Co.*