

[IN THE COURT OF APPEAL.]

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July 2.

BAXENDALE v. BENNETT.

Bill of Exchange—Inchoate Instrument—Liability of Acceptor of a Lost Blank Acceptance—Negligence, Evidence of.

The defendant gave H. his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state in which he received it. The defendant put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without the defendant's authority, and an action was brought on it by the plaintiff as indorsee for value:—

Held, that the defendant was not liable on the bill.

Per Bramwell, L.J., on the ground that there was no estoppel between the parties, which prevented the defendant from setting up the true facts, and if the defendant had been guilty of negligence it was not the proximate or effective cause of the fraud.

Per Brett, L.J., on the ground that after the return of the blank acceptance by H. the defendant had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance intending it to be used.

ACTION commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for 50*l.* drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest.

At the trial before Lopes, J., without a jury, at the Hilary Sittings in Middlesex, the following facts were proved: The bill, dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3rd of June, 1872, and was the bonâ fide holder of it, without notice of fraud, and for a valuable consideration.

One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then

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put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled upon the authority of *Young v. Grote* (1), and *Ingham v. Primrose* (2), that the defendant was liable, and directed judgment to be entered for the plaintiff for 50*l.* and costs.

May 4. *Bittleston* (*Rolland*, with him), for the defendant. The question is whether a blank acceptance, lost by the alleged acceptor, before its delivery to any one, and subsequently filled up by a stranger and put into circulation, can be sued on by a bonâ fide holder for value. No action can be brought on such an instrument, for it is merely an inchoate bill; and there can be no implied authority to any one to make the bill complete, for it was never intended that it should be issued. In *Byles on Bills*, 11th ed. p. 87, it is said, "without the drawer's signature, a bill payable 'to my order' though accepted is of no force either as a bill of exchange or as a promissory note." *Stoessiger v. South Eastern Ry. Co.* (3), and *M'Call v. Taylor* (4), are authorities for this proposition. *Young v. Grote* (1), and *Ingham v. Primrose* (2), will be relied on by the plaintiff, but in those cases the documents were complete. *Awde v. Dixon* (5) is in point for the defendant. There is no evidence of negligence on the part of the defendant to make him liable to the plaintiff. On this point *Bank of Ireland v. Trustees of Evans' Charities* (6) applies. In that case the trustees having a common seal permitted their secretary to have it in his custody; he fraudulently affixed the seal to a power of attorney, which being presented at the Bank of Ireland certain stock were transferred from the names of the trustees.

(1) 4 Bing. 253.

(2) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.

(3) 3 E. & B. 553; 23 L. J. (Q.B.) 293.

(4) 34 L. J. (C.P.) 365.

(5) 6 Ex. 869.

(6) 5 H. L. C. 389.

It was sought to make the bank responsible for having acted on a power of attorney to which the seal of the trustees had been fraudulently attached. The judge who tried the cause told the jury that, if under the circumstances the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be for the bank. But Parke, B., in delivering the opinion of the judges in the House of Lords, said, "that the supposed negligent custody of their corporate seal by the trustees in leaving it in the hands of their secretary, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void—that the negligence which would deprive the plaintiffs of their right to insist that the transfer was invalid, must be negligence in or immediately connected with the transfer itself." So here leaving the blank acceptance in an unlocked drawer in his chambers is not that species of negligence which disentitles the defendant from insisting that the bill is invalid. In *Swan v. North British Australasian Co.* (1), Blackburn, J., explains that negligence must be the neglect of some duty cast upon the person guilty of it, and then he adds, "A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts on him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt." That passage from the judgment of Blackburn, J., is cited with approbation by Cockburn, C.J., in *Johnson v. Credit Lyonnais Co.* (2) On these authorities it is clear that the judge was wrong in ruling that the defendant was guilty of negligence and liable on the bill.

Jeune, for the plaintiff. The defendant having been guilty of negligence, the plaintiff, being a holder for value, is entitled to recover. It is clear law that it is immaterial whether the name of the drawer be added before or after acceptance: *Molloy v. Delves* (3); and it is equally clear that it is not necessary that the bill should be drawn by the person to whom it is handed by the

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(1) 2 H. & C. at p. 181; 32 L. J.
 (Ex.) at p. 273.

(2) 3 C. P. D. at p. 42.

(3) 7 Bing. 428.

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acceptor: *Schultz v. Astley*. (1) There is, however, no direct authority on the question whether the holder of a bill that has been lost before it has been issued can recover upon it; but there are dicta of learned judges on the point. In *Awde v. Dixon* (2) Parke, B., laid it down as a general proposition that a person who puts his name to blank paper impliedly authorizes the filling up to the amount the stamp will cover. In *Swan v. North British Australasian Co.* (3) Byles, J., is reported to have said "that where a man loses or parts with his name written on a piece of stamped paper he is responsible to any bonâ fide holder when it is filled up as a promissory note or bill." In *Montague v. Perkins* (4) Cresswell, J., puts the very question: "Suppose the defendant had lost his blank acceptance, would he have been liable upon it if the finder, without his authority, had filled it up?" It seems to have been conceded in the argument that he would; in that case the blank acceptance had been filled up after a lapse of twelve years, and and the jury found it had been filled up after the lapse of a reasonable time, nevertheless the acceptor was held liable. *Awde v. Dixon* (2) is no authority for the defendant, for it was apparent, on the face of the instrument, that the bill was incomplete. In Byles on Bills, 11th ed. at p. 187, the author seems to be of opinion that the writer of a blank acceptance not delivered, but lost or stolen without any negligence on his part, would not be liable; but in the present case the defendant has been guilty of such negligence as, according to *Ingham v. Primrose* (5), would make him liable. In that case the defendant gave the bill to M. to get it discounted, and M., failing to do so, returned it. The plaintiff then tore it in half and threw it into the street. M. picked it up, joined the pieces together and negotiated it. The jury found that the defendant intended to cancel the bill; he was, however, held liable on the authority of *Young v. Grote* (6), on the ground that he had led to the plaintiff becoming the holder of it for value. Williams, J., in delivering the judgment of the Court, says: "It is settled law that if the defendant had drawn a cheque and before he had

(1) 2 Bing. N. C. 544.

(2) 6 Ex. 869.

(3) 32 L. J. (Ex.) at p. 278.

(4) 22 L. J. (C.P.) at p. 189.

(5) 7 C. B. (N.S.) 82; 28 L. J.

(C.P.) 294.

(6) 4 Bing. 253.

issued it he had lost it, or it had been stolen from him, and it had found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee—see the judgment in *Marston v. Allen*.” (1) The defendant has been negligent in the custody of the bill, and the plaintiff is entitled to recover.

Bittleston, in reply.

Cur. adv. vult.

July 2. The following judgments were delivered:—

BRAMWELL, L.J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a bonâ fide holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name bonâ fide put by such person. I do not say such person could have recovered on the bill; I am of opinion he could not; but what I wish to point out is that the bill might

(1) 8 M. & W. 494.

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be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to shew this? Why is he stopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of *Young v. Grote* (1) and *Ingham v. Primrose* (2) go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland v. Evans' Trustees* (3) shews under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument.

(1) 4 Bing. 253.

(2) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.

(3) 5 H. L. C. 389.

BRETT, L.J. In this case I agree with the conclusion at which my Brother Bramwell has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a 'place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, Lopes, J., held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff.

Bramwell, L.J., says that the defendant is not liable, because if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. / The law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person. /

In this case it is true that the defendant after writing his name across the stamped paper sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover the defendant would be liable, because

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he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody and no person was his agent to fill it up.

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn, J., in *Swan v. North British Australasian Company* (1), there must be the neglect of some duty owing to some person—here how can the defendant be negligent who owes no duty to anybody—against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not owe any duty to any one, and, secondly, he did not act otherwise than in a way which an ordinary careful man would act.

As to the authorities that have been cited; in *Schultz v. Astley* (2) the blank acceptance had been filled up by a stranger and a fraud had been committed; nevertheless, the acceptor was held to be liable. There, however, the acceptance had been issued and it was intended that it should be filled up by someone; but Crompton, J., in *Stoessiger v. South Eastern Ry. Co.* (3), said that case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham v. Primrose* (4) the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street, they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable because, said the Court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing

(1) 2 H. & C. 175; 32 L. J. (Ex.)
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(2) 4 Bing. N. C. 544.

(3) 3 E. & B. at p. 556.

(4) 7 C. B. (N.S.) 82; 28 L. J. (C.P.)
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with it is to say we do not agree with it. In *Young v. Grote* (1) Young left a blank cheque with his wife and in filling up the cheque for fifty pounds the word fifty was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word fifty, the words "three hundred and" were inserted. Notwithstanding the forgery the Court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care, but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland v. Evans' Charity Trustees* (2), Parke, B., in delivering the opinion of the judges in the House of Lords remarks, with reference to *Young v. Grote* (1), "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." He then gives instances in which a person would not be liable and which govern the present case. "If a man should lose his cheque book or neglect to lock his desk in which it is kept and a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be enabled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale and so be disentitled to sue for their conversion on a demand and refusal?" Lord Cranworth, speaking of *Young v. Grote* (1), says that case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer there must be something that amounts to an estoppel or ratification—"that the plaintiff was estopped from saying that he did not sign the cheque," and then he says the doctrine of ratification is well illustrated by *Coles v. Bank of England* (3). I think the observations made by the

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(1) 4 Bing. 253.

(2) 5 H. L. C. 389.

(3) 10 A. & E. 437.

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 BAXENDALE have shaken *Young v. Grote* (2) and *Coles v. Bank of England* (3)
 v. as authorities. In the present case I think there was no estoppel,
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 to our judgment.

BAGGALLAY, L.J., concurred that the judgment ought to be entered for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *George Kirby & Millett.*

Solicitor for defendant: *G. Reader.*

[IN THE COURT OF APPEAL.]

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PORTEUS AND OTHERS *v.* WATNEY AND OTHERS.

Ship and Shipping—Charterparty—Bill of Lading—Demurrage—Liability to Shipowner of Consignee prevented from discharging his Goods by the Delay of other Consignees.

A charterparty entered into between the plaintiffs, and B. & Co. for the conveyance of grain from C. to L., stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* a day. The vessel having been loaded, one of the bills of lading was indorsed to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of the other shippers on the top of it. The bill of lading, indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Owing to the consignees, whose grain was placed on the top of the defendants', having failed to take away their goods within the lay days, the defendants were unable to obtain delivery of their grain, and three days' demurrage was incurred :—

Held, affirming the judgment of Lush, J., that the defendants were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees.

ACTION to recover 105*l.* for three days' demurrage of the steamer *Stamford* at the port of discharge.

At the trial before Lush, J., at the Hilary Sittings in London, the following facts were proved :—A charterparty was entered into between the plaintiffs, the owners of the *Stamford*, and Brand &

(1) 5 H. L. C. 389.

(2) 4 Bing. 253.

(3) 10 A. & E. 437.