[SMITH, C.J. AND MIDDLETON, J.]

QUEEN'S ADVOCATE *Plaintiff,*

v.

J. R. VAN MILLINGEN *Defendant.*

Dec. 17.

BANKER—FORGED CHEQUES—NEGLIGENCE—MISLEADING REPRESENTATIONS—SCRUTINY BY CASHIER—PASS BOOK—SETTLED ACCOUNT—OTTOMAN LAW—ENGLISH LAW—"FOREIGN ACTION"—GENERAL PRINCIPLES—ACKNOWLEDGMENT—ESTOPPEL—EMANET—MEJELLE, ARTICLES 762-832 AND 1589—THE COMMERCIAL CODE, ARTICLES 101 AND 102—THE CYPRUS COURTS OF JUSTICE ORDER, 1882, CLAUSES 21, 22, 23, 24 AND 25.

Where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it.

Where a banker takes the money of a customer and undertakes to pay it away on the production of an order signed by two of the agents of the customer, the banker is *prima facie* liable if he has paid away the money of the customer on forged orders, *i.e.*, which have not, in fact, been signed by those two agents; and the onus is cast on the banker of shewing the existence of circumstances which free him from this liability.

Where the banker seeks to free himself from the liability so cast on him, on the ground of negligence on the part of the customer, it must be shewn, that such negligence is not only negligence in the transaction itself, which is the proximate cause of the loss, but a neglect of duty owing by the customer to the banker.

Negligence on the part of the banker by his cashier in not carefully scrutinising shaky signatures and unusual endorsements purporting to be those of the customer's agents, and in paying cheques over the counter, contrary to the usual course of business between the Bank and the customer, is sufficient to disentitle the banker from relying on negligence on the part of the customer in the matter of keeping and checking his own accounts.

The fact that certain of the cheques presented for payment were actually signed by one of the customer's authorised agents, does not amount to a representation on the part of the customer of the genuineness of the other signature, nor does it absolve the banker through his cashier from making a careful scrutiny of the other signature.

A banker cannot be said to have been misled by a customer into cashing cheques bearing the forged signatures of the customer's agents by the known fact, that the customer was a trustee for other persons and might thereby be supposed to have taken reasonable precautions to guard against fraud, which would render the customer liable to those persons, nor by the fact that the customer placed implicit confidence in the clerk entrusted with the management of such trust funds.

Neither the return to the banker, without objection, of the customer's pass book containing entries of sums debited to the customer owing to the forgeries, nor written acknowledgments

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by the customer that the amounts standing to his credit were correct, made in ignorance of the fact that the amounts of forged cheques were included, amount to an account stated between the banker and the customer, nor do they estop the customer from asserting that in consequence of certain unauthorised payments by the banker the amounts standing to the credit of the customer ought to be greater.

It would, moreover, be open to the customer, under Article 1589 of the Mejellé, to dispute the correctness of these acknowledgments and the onus is thus cast on the banker of shewing that they are correct.

APPEAL from the District Court of Nicosia.

The action was brought by the Government of Cyprus against the Imperial Ottoman Bank to recover the sum of £832 13*s.* which the Bank had paid away out of the Orphans' Trust Fund, standing to the credit of the Government, on certain cheques purporting to be drawn by the agents of the Government, but in reality forged by one, Etienne Vitalis, a clerk in the service of the Government and employed in the office of the Receiver-General.

Upon the case coming on for hearing in the District Court it was contended for the plaintiff, that English Law should be applied to the solution of the matters in dispute, while the defendant maintained that Ottoman Law could alone be resorted to.

The District Court after a reserved consideration of the arguments addressed to them on this point by counsel on both sides, came to the conclusion that the action could not be considered to be a foreign action, inasmuch as the defendant Bank was in reality a Societé Anonyme, owing its existence to a Charter or Firman from His Imperial Majesty the Sultan, granting it authority to carry on business in the Ottoman Empire, and although some of the shareholders might, in fact, be non-Ottoman subjects, yet the Bank itself, which was the real defendant, being an Ottoman corporation, an action brought against it could not be considered a foreign action in the sense attributed to those words in the Cyprus Courts of Justice Order, 1882.

The District Court, therefore, elected to try the action itself, refusing to declare at that stage of the case what law they should apply in the solution of the matters in dispute but declaring their intention of hearing the evidence and adjudicating thereon in conformity with the law as laid down in Clause 23 of the Cyprus Courts of Justice Order, 1882.

After hearing the evidence on both sides, the following judgment, which sets out, practically, all the facts of the case, was delivered by the District Court.

Judgment · This is an action brought by the Government of Cyprus against the Imperial Ottoman Bank in the person of Mr. Julius Van Millingen, the manager of the agencies of that Bank in Cyprus.

At " settlement of issue " on the 15th January, 1895, an order was assented to, amending the title to the action, the title now standing as :

The Queen's Advocate—representing the Government of Cyprus for and on behalf of the Orphans' Trust Fund, *v.* the Imperial Ottoman Bank—represented by J. R. Van Millingen, Esq., Manager of Cyprus Agencies of said Bank.

Some exception was taken by the defendant to the claim as it appeared in writ of summons, and ultimately on the 17th January, 1895, the parties appeared before the Court and consented to an order issuing setting forth the claim clearly ; such order declares the claim to be :

" The repayment by the defendant as manager and " representative of the said Bank to the said Orphans' Trust " Fund of certain monies amounting to the sum of £832 13*s.* " with interest thereon, which monies have been wrong- " fully paid out of, and deducted from, the said Orphans' " Trust Fund by the said Bank."

The issues settled on the 15th January last, to which counsel for both sides gave their consent—such consent being then and there recorded—were these :

1st Issue.—Have the monies (alleged sum) been wrongfully paid out of the Orphans' Trust Fund by defendant Bank ?

2nd Issue.—Aye or no—are the 38 cheques, or any of them forgeries ?

3rd Issue.—Has plaintiff Government been guilty of contributory negligence as to estop him from recovering ?

At that sitting—the question as what Court should try this cause

(1) as a foreign action, *i.e.*, triable before the President sitting alone, or

(2) as an Ottoman action, *i.e.*, triable before the full District Court was left open for argument before the full District Court on the date fixed for trial.

On hearing, the attention of the Court was first called, by counsel for defendant, to the wording of the 3rd issue—to the wording he objected ; he contended that the word " contributory " was wrong, and should have, according to the note taken by him at the time, been " culpable," on referring to the record there was no doubt that the word written was " contributory " and not culpable.

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On suggestion made, and with the consent of plaintiff, the word " contributory " and the word " such " inserted, the 3rd issue then amended now running :

" Has plaintiff Government been guilty of such negli- " gence as to estop him from recovering."

The Court then proceeded to hear the evidence and arguments offered as to the constitution of the Court that should try this cause.

The decision of the Court was given in writing and now forms a part of this record.

We held : That plaintiff had failed to prove to our satisfaction that this was a " foreign action," as to the law to be applied in determining the question in dispute, we reserved to ourselves the right to declare this, when we had heard all the evidence and arguments in the cause.

Following this decision the case was heard before the full District Court of Nicosia.

When giving our decision as to the Court which should try this case, we stated as our view, that there was nothing on the record which would cast any doubt on the fact that the plaintiff, though a Government, sued in this action as a common customer of the Bank, claiming no other rights or privileges, than any other person also a customer of the Bank, and since we gave that as our view nothing has arisen to alter it.

The evidence has disclosed the " interest " claimed in this action, we take it to be interest at the rate of three per cent. on each sum drawn up to the 4th February, 1893, and at the rate of one and a half per cent. on all sums drawn by these cheques after that date and up to date of judgment.

Having now heard this action in its entirety, we must now decide what law we shall apply in the solution of the matter before us.

As we had left this an open question, we have naturally been keen to note during the hearing

(1) of any evidence on plaintiff's side which would justify our action under Section 25 of the Courts of Justice Order, 1882 ; and also

(2) on defendant's side, to hear mentioned any Ottoman Law, or Ottoman Case Law, on which defendant relied in support of his contention.

With regard to the first, we must hold that no evidence has been given during the hearing which would justify our action under Section 25 of the Courts of Justice Order, 1882, by declaring that English Law should be applied, and we must farther hold in construing the agreement of the 1st February, 1893, that there is nothing in that agreement which evidences to us the intention of the parties that English Law should be applied in the determination of such questions as are now before us.

With regard to the second, we note that, though the defendant has strenuously opposed all idea of the application of English Law in the determination of the matters now in dispute, and demanded that Ottoman Law should be applied, yet that his counsel has frankly admitted that there exists no Ottoman Law which can be so applied, and also his inability to quote any Ottoman Case Law that might be applied, and further we note that whilst he still refuses to consent to the application of English Law, yet, the only law his counsel does quote, presumably for our guidance, is English Law, up to date.

The position of this District Court is then, this :

The defendant having opposed the hearing of this cause as a foreign action, and the plaintiff having failed to shew that it should be tried as a foreign action, it has been tried by the full District Court.

That Court is restricted in its application of English Law by Section 25 of the Courts of Justice Order, thus:—

(*a*) it can only apply English Law by and with the consent of the parties,

(*b*) or, when on clear evidence, "it shall appear to the "Court that the transactions, on which the action is "based, were so conducted as to evidence the intention "of all parties thereto, that their rights, in relation to "such transactions, should be regulated by Ottoman "Law or English Law . . . . the Court shall, in the "solution of the questions at issue, apply the law by which "the parties so intended their rights to be regulated "without regard to the nationality of the defendant or "defendants."

Now, the defendant refuses his consent to the application of English Law, and we have found there is not sufficient evidence offered, to justify our application of English Law under the quoted section.

And, there is no Ottoman Law for us to apply.

Debarred then of the power of applying either English Law or Ottoman, we shall apply in the determination and solution of the matters before us such principles of law generally, as may occur to us, doubtless such will be found in English Law, but this is consequential on an English occupation of the Island.

Now, there can be no doubt that the defendant Bank has undoubtedly paid away and placed to the debit of this trust fund, to the danger of the plaintiff, its trustee, a sum of £832 13*s*. with an accruing interest thereon, whilst the plaintiff was not conscious of and, without doubt, never intended that such payments should be made.

The sum of £832 13*s*. so paid away, was paid on 38 cheques during a period of 32 months.

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These cheques have been before us, each and all are payable to order of "Island Treasurer." The endorsement on back of 23, is the name, F. G. Glossop, thus it is evident those were forged whilst he was the official known as Island Treasurer. Eleven others are endorsed by E. B. Vitalis (the forger), and on each of those cheques the endorsement is E. B. Vitalis for I. T., so that it is evident to us that when he so signed he was acting for Island Treasurer. It is instructive to notice the dates of these 11 cheques when cashed by the Bank.

(1) 28. 1.93.	(2) 30. 6.93.	(3) 28. 9.93.
(4) 27.11.93.	(5) 1.12.93.	(6) 21.12.93.
(7) 16. 4.94.	(8) 30. 4.94.	(9) 9. 5.94.
(10) 11. 5.94.	(11) 15. 5.94.	

Total sum £238 10*s*. on the 11 cheques.

The remaining four are endorsed A. Morton, and the last forged cheque was on the 19.6.94.

As defendant has, by his counsel in his address to us on the case, admitted that these cheques, the whole 38, were forged cheques, we are relieved from considering the question contained in the 2nd issue for trial, and, therefore, find at once on that issue in the affirmative.

As also defendant in his evidence has accepted the fact that if a banker pays money on a forged cheque, without negligence on the part of the customer, then the banker is liable, we are further relieved, and find so far on the 1st issue for trial—in the affirmative—pending this question of negligence on the part of the customer as averred in the 3rd issue for trial.

Now, the negligence on which defendant relies, as we gather it from the record, is :

1. The negligence of Registrars of District Courts in not affixing in all cases the Seal of the Court to orders emanating from the Courts for payments out of Court from the Orphans' Trust Fund.

2. The negligence of Mr. Taylor, the Receiver-General, when exercising general control over this Orphans' Trust Fund, allegations being, want of care in supervision of the work of his subordinates, and failure to take ordinary precautions against wrongdoing.

3. These allegations are intensified with reference to Mr. Glossop, whilst he was Island Treasurer, that had he done his duty these forgeries could not have occurred, as he had ample means daily at hand whereby they could have been detected.

4. Negligence of the Auditor, Mr. Montague, and of his Assistant Faik Bey, in not auditing the accounts of the Orphans' Trust Fund in an efficient manner.

5. Negligence generally on part of officials of this department, past and present, in not adopting the system, known as double entry, which, if adopted, would ensure early detection.

Naturally these charges of negligence on part of plaintiff have called forth counter charges of negligence against defendant Bank, these are :

1. Action contrary to the custom of bankers in omitting to enter into the customer's pass book, the name of the payee of each cheque paid.

2. Neglect in not forwarding periodically to customer all paid cheques.

3. Neglect in cashing cheques across the counter payable to order of "Island Treasurer," with insufficient endorsement thereon.

4. Want of enquiry before accepting and encashing a cheque made payable to the order of "Island Treasurer," when for seven years and more the only cheques drawn on this fund and payable across the counter, were to order of Registrars of District Courts and Cadis of Sheri Courts.

5. That the mere scrutiny of a cashier, without comparing signatures, is insufficient protection to the Bank and to customers.

To give our fullest consideration to these contentions, it is necessary we should go at length into the position of all parties concerned in relation to their duties in connection with the Orphans' Trust Fund.

We gather that the Orphans' Trust Fund consisted of moneys collected from all parts of the Island from the estates of persons (Greeks and Turks), who dying intestate, left heirs under disability :

(1) By reason of being under age.
(2) By reason of absence from Cyprus.
(3) By reason of being of unsound mind.

The several shares of such persons in an intestate's movable property, being paid into the Treasury of the district in which the death occurred and thence into the Central Treasury, practically, this Central Treasury was the Imperial Ottoman Bank, where it formed and was kept as a separate fund.

During the early years of the British Occupation we find that the Imperial Ottoman Bank consented to take over the custody of this fund, and undertook to keep it separate from all other Government funds, agreeing at the same time to allow three per cent. per annum on the amount found in their hands each half-year. Interest payable half-yearly.

Sometime in 1882, the Receiver-General took over the control of this fund, and when dealing with the moneys of the fund signed himself as Administrator Orphans' Trust Fund.

During the period of his personal control, we find a letter dated in September, 1884, whereby it appears, on request made by the Receiver-General, it was from that date arranged between the Receiver-General and the Imperial Ottoman Bank that no cheques should, in future, be drawn on this fund unless such cheque was signed by two signatories, the same two officials who were authorised to sign cheques on behalf of the Government, viz.: the Receiver-General and Island Treasurer, or, in their absence from Nicosia, the one or the other, by the person who then did the duties of one or the other.

Following this arrangement by consent, the practice holds good to the present time, and any person called on to act for R. G. or I. T., during their temporary absence, has sent his signature to the Bank for inspection and future comparison.

In 1884, by Ordinance VIII. of 1884, a change was made. The Receiver-General ceased to be Administrator. The administration of Moslem estates was left with the Cadis of Nahiehs, and those of Christian estates was transferred to the District Courts. By this change the duty of Receiver-General was, to acknowledge all payments in, received through District or Sheri Courts, and to obey all orders for payment out of Court, as ordered by the same. By this Law and Rules of Court thereunder, payments in or out of the Treasury were deemed to be payments in and out of Court. Section 17 also, so far as Christian estates were concerned, directed that payments out of Court should be either to the Registrar of the Court, or to some official of the Court named in the order.

In Moslem estates, payments out of Courts remained as before, that is, payable direct to the Cadis of Nahiehs.

Before going further into the detail duties, we are of opinion that the defendant, though he started with alleging negligence on the part of Registrars of Courts, has not pressed this charge, and, therefore, to save time, we shall omit any further references to the duties of Court officials, but confine ourselves to the duties of the officials in Receiver-General and Island Treasury offices only.

Duties of Receiver-General and Island Treasury offices—

For payments in :

1. All letters received by Receiver-General and sent on to Island Treasurer.

2. In Island Treasurer's office duties were :

To return a receipt signed by Island Treasurer for the deposit note forwarded.

To enter amount received in cash book.

To enter same in ledger.

To send such receipt to the Court which had forwarded deposit note.

For payments out—

1. As above for Receiver-General.

2. In Island Treasurer to make out certificate of moneys to credit of estate, sign it and send to applying Court.

3. On further communication for Receiver-General, as before.

4. To make out cheque and sign it for amount stated in order of Court : enter details in counterfoil of cheque, write advising letter, enter payment out in cash book, also in ledger and sign letter of advice.

Then take or send papers to Receiver-General, who would inspect papers, sign cheque, initial cash book, and last step of all, Island Treasurer would cause the receipt of Registrar, District Court or Cadi to be filed.

Examine these details with what care you will, the actual personal work of Receiver-General or Island Treasurer is but small, so long as one or other had at his disposal a clerk of average intelligence and unsuspected character.

Up to the 7th September, 1891, this was the practice of the two officers sitting in adjoining rooms.

For the same period the practice of the Bank appears to have been this :

1. To issue deposit notes for all moneys paid in to credit of this fund, and carry to its credit all moneys paid in by other districts.

2. To honour cheques signed by the two agreed upon signatories or their representatives, for the time being, made payable to either Registrars of District Courts or Cadis of Nahiehs, and endorsed by the same, such cheques when paid over the counter being further endorsed with the name of the ultimate payee.

3. To keep a pass book for the fund, wherein was entered the number of the cheque drawn and its amount, and to send such pass book to Treasury for inspection.

Such was the practice of the Bank and such the position of the parties to this action up to 7th September, 1891.

In 1892, a change was made.

It was decided that on and after 1st April, 1892, that the accounts of this Orphans' Estates Fund should be included with the usual monthly returns sent to England for the information of the Comptroller and Auditor-General.

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At the request of the Government, the Bank sent in a monthly certificate declaring the amount to credit of the fund at the end of each month.

In connection with this certificate the Government required certain details from its subordinates, what those details were is not necessary for us now to consider. We are content to know that what was then required from the Island Treasurer's office was in accord with the alterations made.

Also, because of this change, the accounts of the Orphans' Trust Fund came under the care of the Local Auditor for audit: apart from this monthly certificate, the Bank sent in a half-yearly statement, as before, shewing the interest due on this fund, and also a letter in print to its customer, stating that on such and such a date the accounts stood at so much, credit or debit, as the case may be, and requesting to be assured that the figure quoted was correct.

To this request, Receiver-General replied through the Island Treasurer, after comparing such note with the cash book of the fund. If it agreed, the Island Treasurer signed that it was correct.

On the 1st February, 1893, an agreement was entered into between the Bank and the Government; the only effect of this agreement on this Orphans' Trust Fund that we can see, was, that from and after the 1st February, 1893, the Bank reduced its rate of interest thereon from three per cent. to one and a half per cent. per annum.

This then was the practice between all parties from 1884; for more than seven years it had been found a good practice and sufficient for all purposes for honest men.

There was no doubt as to the signatories of the cheques, the Bank held samples of genuine signatures for those who signed, which they could, at any time, compare with, say, a shaky one.

There was no doubt as to the payee on such cheque, Cadi and Registrar of District Court, and no one else; the officials who were employed in the working of the details of this system were the same when the first forgery took place in September, 1891, and remained the same (with but few exceptions), until 1894, when such was discovered: all were experienced officials, both on the Government side and side of the Bank.

Amongst these experienced officials on the Goverment side, was one Etienne B. Vitalis, who entered the Island Treasurer's office in 1881: he became senior clerk, and was placed, in 1889, in charge of the books of the Orphans' Trust Fund: a short statement of the duties of his office, as herein given, will shew what his detail duties were, the ordinary duties of a chief clerk. Up to the day he left the

Island, in June, 1894, his immediate superior had nothing but good to say of him for the manner he had carried out these duties. But, this honest and highly considered official, for reasons only known to himself, became of a sudden a forger.

On the 7th September, 1891, he drew a cheque which had printed thereon "Orphans' Trust Fund," for £20; he entered on the counterfoil that such cheque was drawn to order of Cadi of Nicosia, but he drew the cheque payable to the order of the Island Treasurer; he forged the authorised signatories to that cheque, the name of F. G. Glossop (the then Island Treasurer), and F. Ongley (the official then acting for Receiver-General, in his absence from Nicosia), and he endorsed the cheque by again forging the name of F. G. Glossop.

What he did next we do not know, by what means it was cashed we do not know, what we do know is that this forged cheque, No. 50,873, for £20, was cashed over the counter by the Bank on the 8th September, 1891.

We find by the books, in the Island Treasurer's office, that at some time or another he did other acts.

1. On the 29th September, the cheque appears for £20 as if paid out on that date, duly initialled by the Receiver-General (initials W. T.), and it there appears as if paid out to order of Registrar, District Court, Famagusta.

2. An entry is found in a Christian estate, No. 4 of 1888, of this payment out of £20 as if from the funds to credit of this estate, but this estate had only a credit of £3 9*s*. 2*cp*., so to make matters look even he places a 2 before this sum and it then reads £23 9*s*. 2*cp*.

As no papers relative to this estate are forthcoming, it may be fairly assumed that he destroyed them.

On the 25th September he forges another for £15, encashed by Bank 26th September: 31st October he forges another for £25, encashed by Bank 3rd November; 20th February, 1892, he forges another for £20, encashed by Bank 25th February, 1892.

Now no papers are forthcoming in these three estates, again it may fairly be supposed that he destroyed them.

But here a noticeable change comes: all other estates on which forgeries were committed, have their papers in due order.

This forger continues his acts of forgery by drawing cheques still payable to Island Treasurer, but because this Orphans' Estates Fund will, after 1st April, 1892, be subject to audit, it is no longer safe for him to destroy the record of the estates, he must do something else for preventing detection, so he either alters the orders for payments out of Court, or forges entire new ones; these forged documents all appear genuine and appear as genuine vouchers for audit.

And so this forger continued until on the 19th June, 1894, a period of 32 months after his first forgery, he got his 38 cheques still payable to order of Island Treasurer encashed by the Bank, and proceeded on what every one then considered, well merited leave of absence.

What was the open door that tempted him to this theft?

What was the negligence which invited him to this forgery?

As this is only a Civil Court, we can hardly hope to succeed now in accurately ascertaining this, nor is it necessary for us so to do, all we have to determine is whether defendant has succeeded in proving to us, that the plaintiff Government, by its named officials, has been guilty of such negligence as would estop him from recovering from the defendant Bank the money which that Bank has paid away on what is now admitted to be 38 forged cheques.

In determining this question of negligence we here lay down the rule which shall guide us.

It must be proved to our satisfaction, that one or other of the named officials has been guilty of some particular act, conduct or default in each and every one of these 38 forgeries which was, in itself, the proximate or effective cause of the fraud. We will now take the several averments of negligence as relied on by defendant one by one.

1. The negligence charged against the officials of the Courts has died of inanition.

The 2nd and 3rd are best taken together, because the negligence alleged against the Receiver-General, is said to be intensified, when alleged against the Island Treasurer.

Now it seems to us, that the one allegation against the Receiver-General is, that he ought not to have left so much to his subordinates, but, after all, that is but a matter of opinion. Everything must necessarily depend upon the view which the Receiver-General took of the honesty and capability of the staff under him, at the time when he approved of the separation of duties required by the practice we have detailed.

It is a rule, that anyone has a right to suppose that a crime will not be committed, and to act on that belief.

In our opinion, it is not conducive to crime to place in a position of trust, a man of whose unflagging industry, and sterling worth as a clerk, both Receiver-General and Island Treasurer had nigh on 10 years' experience, 1881 to 1889.

If it be asserted that there was reason to suppose this trusted clerk would commit a forgery, then both Receiver-General and Island Treasurer have done wrong, but in the case before us, what reason had they to suspect this clerk, or to suppose that he would forfeit his good name and throw away all his years of good service?

The practice we have shewn that existed, was proved by seven years work as being a good practice for honest men, and being confident that he was surrounded by honest men, there was no danger in its continuance.

So holding, we can well exonerate the Receiver-General from the allegations made against him.

With respect to the allegations made against the Island Treasurer, it is clear to us, that the only result attainable had the Island Treasurer acted, as defendant holds he ought to have acted, would have been the earlier detection of these series of forgeries—that he could have prevented their commission we do not believe.

Let us examine closely the acts of the forger in his first act of forgery.

His first act, apparently, was to detach a cheque from the cheque book and make it out as payable to order of "Island Treasurer." Now what made him think of so making the cheque payable? He knew it was unusual and must be hidden from those in his office, so, he writes in the counterfoil of same cheque, that it is payable to order of Cadi of Nicosia. Such was the 7-year old practice of the office. How came it then that the forger considered it necessary to hide the act of drawing a cheque payable to order of Island Treasurer on this fund from those in the Island Treasurer's office, and yet could boldly present such a cheque to the Bank? The Bank officials had also seven years' experience to whose order cheques drawn on this fund were payable, just the same as had the officials in Island Treasurer's office; as yet no cheque payable to Island Treasurer had ever, for seven years and more, been paid across the counter.

If this forger had no confederate in the Bank, then it seems to us that the presentment of this cheque should at once have struck the Bank officials, that here, at least, was a departure from old custom, a new payee, and that some enquiry was necessary.

If there was no confederate in the Bank, then to pass such a cheque without enquiry was grave negligence. However, be this as it may, the forger apparently feared little from the Bank, he well knew that if he could get money on this cheque, so drawn, that this would not come under the notice of those of Island Treasurer's office, as the Bank pass book gave no details as to whom the money was paid. There might be enquiries, he would run the chance of that; he made the attempt, presented his forged cheque, the customer being in absolute ignorance of his act, and got the money: so far as we know, as no witness has been called by the Bank, who could throw any light on what passed on the first presentment of a forged cheque, we may take it,

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it was cashed without trouble. Perhaps from his entry of the forged cheque in the cash book, we may fairly suppose that the forger waited some time for enquiry to be made. Enquiry from the Bank none came, he boldly forged another cheque on the 25th September, which he cashed on the 26th September, and so he continued.

We ask ourselves is there anything here in these acts, which could be taken as an act over which the Island Treasurer had any control?

Then, as all the subsequent forgeries are similar, cheques all drawn to order of Island Treasurer, counterfoils of such cheques all shewn as either payable to order of Registrars of District Courts or the Cadis, on each occasion everything done to hide from those in his office, that a cheque was being cashed by the Bank to the order of Island Treasurer, we must exonerate the Island Treasurer from any negligence in the way of aiding the forger by any act, conduct or default which could be taken as the proximate or effective cause of the fraud.

As to the cashing cheques to the order of Island Treasurer by the Bank, it seems to us that the Bank kept this information very carefully guarded; the act of cashing such cheques was continuous over a period of 32 months; it was known to several of the Bank officials, for we find amongst these forged cheques, cheques initialled by Mr. Wortabet, Mr. Sandison, Mr. Michaelides, the cashiers during that period being Mr. Baldassar and Mr. Maltass. All these officials knew of such cheques being cashed, yet nothing was said; all the Government witnesses have declared that if any one little word had been dropped by any Bank official that cheques were being cashed over the counter to order of Island Treasurer this would have been enough to set enquiry going, yet that little word was not dropped even in private conversation.

Apparently, throughout this period, the Bank was well satisfied of its safety, which solely rested on the scrutiny given to these cheques by its cashier. We have seen how easily and how surely Mr. Glossop has out of 26 signatures of his own, shewn to him with every part of the cheque hidden except his bare signature, picked out what was true and what was false. We have also heard every witness, whose signature was forged, declare that the forgeries were bad imitations of their signatures, we have had the evidence of the defendant on the question of scrutiny, and we feel bound to say that the protection which the scrutiny gives the Bank, and the customer of the Bank, is very slight indeed.

That there was a lamentable failure for a long period in not detecting these forgeries, we do not hide from ourselves, nor can we hide from ourselves that detection on the part

of Government officials from the information contained in their books, information distorted by the forger was a difficult matter, especially when no aid was rendered by the system observed by the Bank, viz. : that of not entering the payee's name in the pass book.

For a moment we will leave the consideration of this matter until we have examined the defendant's allegation against the Auditor, Mr. Montague, and his Assistant Faik Bey.

Counsel for defendant says, that no one would be found to hold for a moment, that the manner in which it appears by the evidence, the audit was made, was efficient, he relies on the admission made by Mr. Montague, in his evidence referring to an audit made of the accounts of the Orphans' Trust Fund by his Assistant Faik Bey ; that such was, certainly, inefficient, and, therefore, counsel for defendant says, the whole case of the Government falls to the ground.

Now it seems to us that when, in 1882, the Bank took over the care of this fund, it did so on the condition that the fund should be kept separate, and three per cent. interest allowed thereon. It was within the knowledge of the Bank, or could easily have come within the knowledge of the Bank, that at that time that there was no audit of the accounts of that fund as kept by the Government.

By the record we find, that for seven years and more, the Bank had the custody of the money of this fund, without audit, and, apparently, without any stipulation on the Bank's part, that there should be any audit of the accounts of this fund, as kept by the Government.

By ordering that these accounts should be audited for the future, *i.e.*, from April, 1892, it is clear that the Government was taking greater precaution over a fund in defendant's possession, which was not taken when he (the banker) accepted the custody of this fund, the safety of which, without this added precaution, had not troubled any one's mind for over seven years.

Whatever audit did take place after 1st April, 1892, even if it was non-efficient, in the opinion of an expert, cannot rightly be turned against the plaintiff as evidence of negligence, in justice it should be an argument in defence of negligence.

Now audit is a means of detection of forgery, detection may follow by audit early or late.

But what has this question of detection, early or late, to do with the particular negligence which, in accordance with the rule we have laid down, the defendant must prove before he can exonerate himself from the responsibility he has incurred by paying over the counter money on these admittedly forged cheques.

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To our minds, it is outside this rule altogether, and no argument founded on want of detection can aid the defendant in the least.

So holding, we shall exonerate the Island Treasurer and the Auditor from the special negligence averred, and find there was no act, conduct or default of theirs which could be taken as the proximate or effective cause of these frauds.

But in so finding we, by no means acquit the Island Treasurer of all negligence during the period when he was Island Treasurer, from September, 1891, to March, 1894.

In our view the Island Treasurer knew well his responsibility to his chief, the Receiver-General, and though we have dismissed the allegation of negligence in the case of the Receiver-General, arising from the placing of too great a trust in his subordinates without qualification, we are unable to do this in the case of the Island Treasurer.

It is clear to us that the Island Treasurer, notwithstanding the default of the Bank in rendering necessary information, had evidence at hand which, if tested from time to time, as he himself admits, would have led to the discoveries of these forgeries at an earlier date, but, beyond this, from the evidence we have heard, we have been brought to think that the Island Treasurer too often presented or caused to be presented to his chief important papers without sufficient enquiry, and without, from time to time, testing the accuracy of the details supplied by his subordinates, and, further, that he failed in his duty in not making out periodically a trial balance, such as was afterwards made by Mr. Page, of the moneys of the Orphans' Trust Fund.

With regard to the Auditor, his duties go to detection alone, and assuming our decision on this question of audit is correct, we do not consider we are called upon to remark further thereon.

As regards the 5th allegation of negligence, that the Government should have adopted the system of double entry in keeping their books, we think we will leave that question as it appears on the record, the light thrown thereon by the learned Queen's Advocate in his cross-examination of the defendant, is all sufficing for us.

With the conclusion arrived at by counsel for defendant with reference to the receipts received from time to time by the Bank from the Receiver-General's office acknowledging :

1. monthly, that the Bank pass book was correct, and
2. half-yearly, that the amount to credit of Orphans' Trust Fund was as shewn by the Bank correct,

whereas such was not correct by some hundreds of pounds, as now disclosed, we do not agree.

It seems to us that if the pass book, as written up by the Bank, is acknowledged by its customer to be correct as of date, and this acknowledgment is to be binding on the customer, then, *ipso facto*, it should be binding on the Bank, but we have it in evidence that this is not the view of the Bank. It is binding on the customer when it suits the Bank, but is not binding on the Bank in any case.

If it had been shewn to us that such was binding on both parties, we might decide differently, but from the evidence we have heard, we must decide against the Bank in this matter.

Similarly we must decide against the Bank's views with respect to the half-yearly statement, if not binding on both it is binding on neither.

The last point we have to consider, we understand from the arguments of defendant's counsel that, even if we find that the defendant has failed to prove negligence, as averred against the plaintiff, that there are 11 cheques drawn for an aggregate amount of £238 10*s.* which were drawn by the forger, whilst he was acting as Island Treasurer, for which the Bank cannot, possibly, be held responsible. That he did so when acting in that capacity, as well as the number and amount of the cheques so drawn, is admitted.

The cheques so drawn, were drawn payable as usual to order of Island Treasurer, signed by him, as one of the authorised signatories, the name of the other authorised signatory being forged, the endorsement being genuine, *i.e.*, E. B. Vitalis for I. T.

Beyond a question or two to the witnesses who established the fact that the forger was acting Island Treasurer at the time these 11 cheques were cashed, and the admission as to their aggregate amount in money, we have had no arguments addressed to us relative to these cheques. We are told, at the last moment, that there is here involved a question which had never before arisen even in the English Courts, and we as a Court are called on to give a first decision on this matter. We gather that such question is, whether the negligence of half a customer would be sufficient to exonerate the banker? Possibly, had defendant consented to the application of English Law in the determination of his contention, and had we had the advantage of hearing full arguments on this point, and could apply English Law thereto, it might be, that defendant would have gained his point, but as he has debarred us from applying to this matter the full light of English Law, he must be content with the decision we give.

We consider that, though these 11 cheques were signed by half a customer, yet whole forger, and because one signature thereto is forged the whole cheque thus vitiated

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and is nothing more nor less than a forged cheque, and no distinction can be made between the 11 cheques and the remaining 27.

To complete our examination, we will refer to the law, be it in mind, the only law which counsel for defendant has quoted for our guidance: *Bank of England v. Vagliano Brothers*, Appeal Case, House of Lords Reports, 1892.

The decision in this case was in favour of the Bank.

Defendant's counsel has dwelt on the fact of the Bank's pass book, he quotes from a judgment given therein these words. "Was not the customer bound to know the contents of his pass book." Certainly he is, but in this case the banker's pass book contained the names of the various payees, persons to whom the Bank had paid the customer's money, in that pass book occurred frequently the name of Glyka, the forging clerk, but in the case before us the Bank's pass book of Orphans' Trust Fund gave no payee's name, merely a mass of figures, cheque No. so and so, amount so much; had the Imperial Ottoman Bank placed therein the magic word "Island Treasurer," and forgeries still continued, then those above quoted words would not have been lost upon us. Moreover, defendant's counsel has omitted to mention one very important point in that case.

The Bank of England was sued to recover the aggregate amount paid on 42 separate forgeries. When one or two only had been paid by the Bank, the Bank caused a representation to be made to Messrs. Vagliano, to that firm's chief confidential clerk, who was told that this clerk, Glyka, was himself receiving moneys across the counter which he invariably took in bank notes. The answer given by that chief confidential clerk was, in the opinion of Lord Chancellor Halsbury, sufficient to completely exonerate the Bank from any further liability.

In the case before us, this, or any similar representation on the part of the Bank to its customer, the Government, is conspicuous by its absence.

Therefore, we fail to see in what way the decision given in this case can operate in favour of the Bank.

In the other case that we have been able to examine, quoted by defendant's counsel, *Young v. Grote*, we again fail to see in what way that case can aid the defendant.

In that case the Bank was held exonerated, because of the negligence of its customer, who had drawn a cheque so carelessly that a person was enabled to insert, between the spaces left open on the cheque by the customer, figures which made the cheque appear on presentation as if drawn originally for a much greater sum, than what the customer actually drew it for.

But in this case the customer did not draw these cheques, certainly "half a customer" drew 11 of the 38, but even those were not carelessly drawn up.

Upon this record, voluminous as it is, there is still much left for comment, but we are of opinion that it is unnecessary for us to dwell any longer thereon.

In our view we have shewn herein ample ground for formally finding, as we do find, in the affirmative on the 1st and 2nd issues fixed for trial, and in the negative on the 3rd issue. So finding we order and adjudge that the defendant Bank do forthwith pay to the plaintiff (on said behalf) the sum of £832 13*s.* with accruing interest thereon, as paid out as of date at the rate of three per cent. per annum up to and including the 4th day of February, 1893, and on and after that date at the rate of one and a half per cent. per annum up to date of final payment, and also the costs of this action.

The defendant appealed.

Collinson (*Pascal Constantinides* with him) for the appellant.

Templer, Q.A., for the respondent.

Judgment: The real plaintiff in this action is the Government of Cyprus, suing in the name of the Queen's Advocate, and the defendant is the Imperial Ottoman Bank, sued by Mr. Van Millingen, the representative of the Bank in Cyprus. *Dec.* 31.

The claim is for the repayment of £832 10*s.*, which the plaintiff alleges has been wrongfully paid out of a fund known as the Orphans' Trust Fund, which is under the control of the Government, the real question at issue being, which of the two parties to this action is to bear the loss which has arisen, owing to the forgeries of a clerk in the employment of the Government of Cyprus.

The facts of the case are very fully set out in the judgment of the District Court from which this appeal has been made, and we propose here to refer very briefly to them.

Under the provisions of the Infants' Estates Law, 1884, and the amending law of 1886, the estates of deceased persons leaving heirs under disability are administered by the District Courts in the case of Christians, and by the Cadis in the case of Moslems. The moneys forming part of or representing these estates are paid into Court in accordance with the Rules of Court for the time being in force, such payment into Court being effected by payment into the Treasury. These moneys form and are kept as a separate fund by the Government of Cyprus, a separate account being

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opened with the Bank called the Orphans' Trust Fund, interest being allowed by the Bank on the credit balance of the fund at the end of each half-year.

The books relating to this fund are kept in the Receiver-General's Department at Nicosia, payments out of the fund being effected upon an order of a Court by means of cheques signed by the Receiver-General and Island Treasurer. These cheques are overprinted with the words "Orphans' Trust Fund," to indicate to the Bank the fund out of which they are to be paid.

The manner in which this fund is dealt with, both by the Government and the Bank, and the various duties of the officials connected therewith, are set out in detail in the judgment of the Court below, and it is unnecessary for the purposes of our judgment to recapitulate them here.

In the year 1881, a clerk, named Etienne B. Vitalis, entered the Receiver-General's Department, and in the year 1891, the books relating to the Orphans' Trust Fund were placed under his sole control. He continued to perform his duties to the entire satisfaction of his superior officers, the Receiver-General and Island Treasurer, up to the date when he left the Island on leave of absence, sometime, we believe, in June, 1894. In the following month of September, the clerk, who had succeeded Mr. Vitalis in the control of the books of the Orphans' Trust Fund, discovered that there was something wrong with the Orphans' Trust Fund accounts, and on an examination being made, an elaborate system of fraud on the part of E. B. Vitalis was brought to light. It was then discovered that he had drawn 38 cheques against this fund amounting to the sum of £832 10*s*. and appropriated the moneys. In the case of 27 of these cheques he had forged the names of the Receiver-General and the Island Treasurer as drawers of the cheques, the remaining 11 cheques being signed by him as Island Treasurer, he apparently having been acting temporarily as Island Treasurer, the other signature purporting to be that of Mr. Taylor, the Receiver-General, being forged by him. The whole of the 38 cheques were drawn payable to the order of the Island Treasurer; 27 of them purported to be endorsed by Mr. F. G. Glossop, the Island Treasurer, these endorsements being in every case forged by Vitalis. The remaining 11 cheques were endorsed by Vitalis himself for the Island Treasurer. In order to conceal these forgeries, the books relating to the Orphans' Trust Fund were extensively falsified, figures being altered and false entries made, and orders of various Courts were forged as authorities for the supposed payments out of Court. On these facts coming to light, the Government demanded that the Bank should replace the moneys paid on these forged cheques and the latter, denying its liability, this action was brought.

The issues fixed for hearing were three, viz.: whether these moneys had been wrongfully paid by the Bank, whether the cheques were forged, and whether the Government had by its servants been guilty of such negligence as to disentitle it to recover. The defendant, at the settlement of issue, also raised the question whether the Government was not bound by admission of the correctness of the balance to the credit of the fund, made from time to time, and by the acceptance of the pass book in which the amounts of these forged cheques appeared, without any objection being made to the debit entries appearing therein.

The District Court found on all these issues against the defendant, holding that the whole 38 cheques were forgeries: that the sum of £832 10*s*. had been wrongfully paid out of this fund by the defendant, that no such negligence had been proved as would disentitle the plaintiff to recover, and that the Bank had been guilty of grave negligence in the cashing of those cheques.

Against this judgment this appeal is made, and it is contended for the appellant that the servants of the Government have been guilty of such negligence as disentitles the plaintiff to recover in this action, that the Government placed Vitalis in a position which enabled him to commit these frauds, exercised no control over his actions, and are, therefore, responsible for the loss; that with regard to the 11 cheques signed by Vitalis when acting as Island Treasurer, the Government by appointing him so to act put him in the position to guarantee the genuineness of the signature purporting to be that of the Receiver-General, and that the cheques rightfully so signed by Vitalis, as Island Treasurer, amounted to representations made to the Bank that the cheques were in order and might be cashed: and that the acknowledgments made to the Bank by the Island Treasurer of the correctness of the balances which the Bank alleged were standing to the credit of the Orphans' Trust Fund, were admissions of the correctness of the accounts which bound the plaintiff.

For the respondent it was urged that the Bank having been found to be negligent in cashing these forged cheques, the negligence of the plaintiff was immaterial, that that negligence was further immaterial inasmuch as the servants of the Government had not been guilty of neglect of any duty owing to the Bank, and that the negligence was not the proximate cause of the loss: that, with regard to the 11 cheques, the fact that the signature of one drawer was forged placed them in the same category as the others: and that the admissions of the correctness of the balances made from time to time in ignorance of the real facts were not binding on the Government, and did not disentitle it to recover in this action.

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These appear to us to be the main arguments addressed to us by the one party and the other, and before proceeding to deal with them and the subsidiary arguments that arise out of them, we may observe that the parties are agreed that the law to be applied to ascertain their legal rights is the Ottoman Law.

In the Court below it was contended by the plaintiff that this action should be treated as a foreign action, as defined by the Cyprus Courts of Justice Order, 1882; and, further, that if this were not so, the parties had agreed that their rights should be regulated by English Law, and that under the provisions of Clause 25 of the Order in Council, English Law must be applied to the solution of the question at issue.

The latter contention was founded on the 12th Clause of the Agreement entered into between the High Commissioner on behalf of the Government of Cyprus with the Imperial Ottoman Bank on the 1st February, 1893, in which the terms on which the Bank undertook to transact the banking business of the Government of Cyprus are set forth.

These words are, the "contract is to be deemed for all "purposes an English contract." The District Court decided against the contention thus raised by the plaintiff, and held that the action was an Ottoman action and that Ottoman Law is to be applied. The correctness of this finding has not been impugned before us, and as both the plaintiff and defendant are apparently agreed that their rights and liabilities are to be regulated by the Ottoman Law, we shall not interfere with the decision of the Court on this point whatever view we might ourselves be inclined to take of the meaning and effect of the words in the agreement to which we have above referred.

It is admitted by both sides that the Ottoman Codes contain no provisions which regulate the rights of the plaintiff and defendant under the circumstances of the present case. The appellant's counsel referred us to Articles 101 and 102 of the Commercial Code as being the only law which he had been able to find which in any way touched the case. Article 101 says, that in cases of fraud, the person who has paid a bill of exchange before its maturity is responsible for the validity of the payment: and Article 102 says, he who has paid a bill of exchange at its maturity and without opposition is presumed to be freed, we suppose from liability on the bill. The argument was that as a cheque is equivalent to an inland bill of exchange, the defendant would be relieved from liability by the payment of these cheques on or after the date on which they appeared to be drawn. The law only says that there is a presumption that the person paying is freed from liability, and it can hardly be contended that a banker would be

justified in paying away the money of a customer on a forged cheque, the signature to which might bear no resemblance whatever to that of the customer, merely because he paid it on or after the day on which it was drawn. Mr. Van Millingen, in his evidence states, as his own view of his liability as a banker, that he would be liable for paying away the money of his customer on a forged cheque, unless that customer had been guilty of negligence. The articles in the Commercial Code do not, therefore, appear to us to touch the questions for our decision in the case.

The Queen's Advocate referred us to the chapter in the Mejellé dealing with the contract of deposit (*emanet*), and argued that the same principles which regulate the contract of deposit would apply to the deposit of money by a customer with a bank; and that as the trustee in the case of a deposit would be liable if he did not show the same care with respect to the safe keeping of the thing deposited as he shows with respect to his own property, so a banker would be liable for negligence on paying away moneys of his customer on a forged cheque. He called our attention to the fact, that the law contained no provision as to any liability on the part of the person making the deposit for any negligence he had been guilty of. The law in the Mejellé does not appear to us to be strictly in point, as it appears to contemplate more particularly the deposit of specific articles which the trustee undertakes to take care of and return on demand; but it is not material to discuss the matter, as it does not appear to us to be disputed, nor do we think that it could be disputed, that where a banker takes the money of a customer and undertakes to pay it away as here, on the production of an order signed by two of the agents of the customer, he would *prima facie* be liable, if he has paid the money away on orders which have not in fact been signed by those two agents. It has been clearly established in this case that the moneys held by the Government as trustees for various persons under disability were paid away on cheques, 27 of which did not bear the signatures of either the Receiver-General or the Island Treasurer, and 11 of which, though bearing the signature of the person acting as Island Treasurer, did not bear the signature of the Receiver-General. This being so, a *prima facie* case of liability was made out against the defendant, and the onus was cast upon him of showing the existence of circumstances which freed him from this liability. In the first place it is contended by his learned counsel, that as there is nothing specifically contained in the Ottoman Codes, the case must be decided by general principles, and the broad general principle is that laid down by Ashhurst, J., in *Lickbarrow v. Mason*, that "wherever one of two "innocent persons must suffer by the acts of the third, he

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" who has enabled such third person to occasion the loss " must sustain it ; " that in the present case the Government of Cyprus has by its negligence enabled Vitalis to commit these frauds, and that hence the Government and not the Bank must bear the loss consequent upon the frauds. The learned counsel further contends that, although the District Court stated in its judgment that in the absence of any specific provisions in the law, the case was to be decided upon general principles, it did not in fact do so ; but by deciding that the negligence which alone would estop the plaintiff from recovering must be negligence in the particular transactions themselves, it adopted, what he characterised as a narrowing down of the general principle, effected by means of the decisions of the Courts of England.

We may here interpose to remark upon the statement made by the learned counsel for the appellant that the judgment was drawn up by the President of the District Court, and that as the rule laid down was obviously founded on the ruling of English Courts, it would not be familiar to the other two Judges of the Court who were Cypriots. It is the practice in the Courts of Cyprus, where the Courts deliver a written judgment which represents the unanimous decision of the Court, for the judgment to be written by the President of the Court ; but this does not mean that it is the judgment of the President alone, but it is doubtless read over and explained to the other Judges of the Court and concurred in by them. There is no doubt that, though the judgment of the District Court in laying down the principle on which this question of negligence was in their opinion to be decided, is in harmony with the decisions in the English Courts, that principle would be discussed by the Judges of the Court between themselves and was unanimously adopted by them as the true one ; and that the judgment of the Court was a unanimous one.

Speaking broadly, the negligence on the part of the Government officials relied upon by the defendant as a defence to this action, consisted of the fact that the entire control of the books relating to the Orphans' Trust Fund was placed in the hands of Vitalis, that no supervision, or no supervision worthy the name, was exercised by the Island Treasurer over his actions, that the cash book was allowed to be carelessly kept, inasmuch as blank spaces were permitted to be left at the end of each month, whereby the forger was enabled to fill in false entries, that if the Island Treasurer had examined the books from time to time he could not have failed to detect the frauds, as the accounts show irregularities on the face of them which must have arrested attention if they were examined, and that if he had made a balance sheet at the end of each six months,

as he should have done, the frauds must have been discovered at an early stage. The fact that from 1884 to 1892, there had been no audit of these accounts, and that when an audit was made it was insufficient, was also relied upon as evidence of negligence. The Receiver-General was also, it was contended, guilty of negligence, more particularly in permitting Vitalis to detach cheques from the cheque books before bringing them to him for signature, whereas he should have insisted on the cheque book being put before him and initialling the counterfoil of each cheque.

These appear to us to be the principal allegations of negligence, and the contention founded on them is this, that if reasonable care had been exercised in the Island Treasurer's office these frauds would have been detected almost immediately, and that thus it is the Government which enabled Vitalis to occasion the loss.

Taking the view we do of this case, we do not think it necessary to go minutely into all the facts which showed that there was a want of due care in supervising Vitalis' proceedings.

We may observe generally, that the cause which induced this negligence—excepting the insufficiency of the audit—appears to be that implicit confidence was placed in Vitalis. The District Court has found as a fact that the Island Treasurer was guilty of negligence, and from that finding we see no reason to dissent. It is true that Vitalis was a trusted clerk who, entering the Receiver-General's office so far back as 1881, appears to have gained for himself a high reputation for capability and honesty, so highly indeed was he esteemed that we find him appointed by the Government to act as Island Treasurer during the temporary absence of the latter; but this does not afford in our opinion any excuse for the exercise of reasonable care and control on the part of his superior officers, who are responsible to the Government for the due administration of the affairs of this trust fund.

With regard to the question of the balance sheet we may observe that we are unable to find in the evidence that it was the duty of the Island Treasurer himself to make a balance sheet periodically. The only evidence is that of Mr. Page, who says it was the duty of the official in charge of the Orphans' Trust Fund accounts to make out a balance sheet every six months, which was submitted to the Island Treasurer. There does not appear to be any evidence whether this balance sheet was in fact made every six months: but in the absence of evidence to the contrary we may, perhaps, assume that it was. But in that case it would be made out by Vitalis, and placed before the Island Treasurer, who, relying upon Vitalis, doubtless accepted it as correct.

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With regard to the act of the Receiver-General in signing cheques without seeing the counterfoil, it does not appear to us that had he adopted the practice of not permitting cheques to be detached, it would have made any difference in this case. Vitalis here forged both counterfoil and cheque, and no doubt would have done the same thing had the Receiver-General's practice been what it was contended it should have been. If the Receiver-General had been in the habit of initialling the counterfoil, Vitalis would, no doubt, have forged the initials on the forged counterfoils as he did in the cash book ; and unless the Receiver-General happened to look back through the counterfoils and recollect that he had not signed a cheque for a particular amount, it is unlikely that the fraud would have been detected.

However this may be, it does not appear to us necessary to discuss it further, nor to advert to the fact that the audit of these accounts was not an efficient one. Neither do we think that it is necessary for us to discuss whether the principle laid down by the District Court, viz. : that the negligence which alone would estop the plaintiff must be negligence in the particular transactions themselves, is a correct one or not. Whilst, however, it may not be necessary, we think it may be convenient that we should state what our view of this question is. We accept the principle which the learned counsel for the appellant relied on as the true principle which should govern cases such as the present, viz. : that where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it. The question first to be determined is how and in what manner can a person be said to have enabled another to occasion the loss.

The principle has been discussed in many cases in the Courts of England, and its true meaning has been settled by a decision of the highest tribunal in the land. See *Young v. Grote*, 4, Bing. 253 ; *Arnold v. Cheque Bank*, 1, C.P.D., 575 ; *Baxendale v. Bennett*, 3, Q.B.D., 525 ; *Bank of Ireland v. Evans' Trustees*, 5, H.L.C., 389 ; *Swan v. North British Australasian Co.*, 2, H. and C., 181 ; *Johnson v. Credit Lyonnais Co.*, 3, C.P.D., 32 ; *Mayor and Merchants of the Staple of England v. Bank of England*, 21, Q.B.D., 160 ; *Scholfield v. Lord Londesborough*, 2, Q.B.D., 660 ; *Vagliano v. Bank of England*, 23, Q.B.D., 243. With regard to the latter case, the decision of the Court of Appeal and of Mr. Justice Charles on the question of negligence does not appear to be affected by the decision of the House of Lords in the same case. L.R. Appeal cases, 1891, p. 107. The judgments of Lord Halsbury, Watson, Herschell and Macnaughten, in so far as they did not proceed upon the construction to be placed upon Section 7 of the Bills of

Exchange Act, 1882, appear to be founded not on the question as to whether Vagliano had been guilty of negligence, but on the ground that he had made representations to the Bank of England which the latter were justified in acting upon.

We may observe that there is a great distinction between the present case and those of *Young v. Grote*, *Baxendale v. Bennett*, *Scholfield v. Earl of Londesborough*, *Arnold v. Cheque Bank* and *Vagliano v. Bank of England*, which were all cases turning upon the forgery of cheques or bill of exchange, for in all these cases the signature of the drawer of the instruments was genuine, whereas in the case now under consideration, in 27 of the cheques the names of the drawer and endorser were all forged, and in 11 the name of one drawer was a forgery.

These decisions of the Courts in England are decisions on the meaning to be placed upon the general principle, and the fact that they are decisions of Courts of Law in England does not disentitle us from taking the same view of the same general principles as the many learned Judges in England have done in the cases we have cited.

We do not regard the decisions of the English Courts to which we have referred as being a narrowing down of the general principle, but rather as an exposition of it. No reason was suggested to us why the Courts here should take any other view of the general principle to that taken by the many eminent Judges who have had it under consideration in England, save that the latter was a narrow one. With this, however, we do not agree.

This being a case of first impression, so far as the Courts here are concerned, we shall lay down as the true principle which should regulate our decision, that negligence to afford a defence in such a case as the present, must be some negligence in the transaction itself, which is the proximate cause of the loss, and, further, that negligence must be some neglect of duty owing by the person who has been guilty of the negligence towards the person sustaining the loss. The Government in the present case is in the same position as any other customer of the Bank, save that there is a special agreement between them as to the allowance of interest of credit balances and matters of that kind, and it does not appear to us that there is any duty cast upon the Government so far as the Bank is concerned, to keep an accurate account of this Orphans' Trust Fund, though there may be a duty as regards the persons entitled to the trust fund, to keep such accounts.

If, therefore, we had to decide this case solely on the question as to whether the negligence of the Government officials had enabled Vitalis to occasion this loss, we should

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take the same view as the Judges of the District Court, and hold that the negligence proved in this case was not such as to estop the plaintiff from recovering.

But the fact that officials of the Bank have been found to have been guilty of negligence in cashing these cheques, disentitles the defendant to rely upon the negligence of the officials of the Government. The finding of the Court below was, that either there was an accomplice of the forger in the Bank itself, or that the officials of the Bank were guilty of grave negligence. There being no evidence of the existence of any accomplice in the Bank itself, we are entitled to assume that the District Court found specifically that there was negligence on the part of the officials of the Bank; and it will be necessary for us to consider whether the finding is warranted or not.

We have already adverted to the fact that under the Infants' Estates Law, 1884, all moneys forming part of the Orphans' Trust Fund were payable into the Treasury, and were payable out only to a Registrar of a Court or to a Cadi. From the year 1884, to the month of September, 1891, when the first forgery was committed, this payment was effected by means of cheques drawn by the Receiver-General and the Island Treasurer against the fund in the Bank, to the order of a Registrar of one of the District Courts, or of a Cadi.

The Island Treasurer in his evidence says, that the Bank knew that payment was to be made by cheque, and that only three genuine cheques were ever drawn on the Orphans' Trust Fund payable to the Island Treasurer, and that these were for the purposes of adjustment of accounts and that no cash passed.

Mr. Van Millingen, the Manager of the Bank, admitted in his evidence that he was aware that for seven years, prior to 1891, no cheque to the order of the Island Treasurer was ever cashed over the counter.

We presume though the notes do not so state, that he was referring to cheques drawn upon the Orphans' Trust Fund.

It appears to us impossible to escape from the conclusion that, in September, 1891, when these forgeries commenced, the officials of the Bank must have been aware, that the settled course of practice in dealing with the Orphans' Trust Fund was, that it should be drawn upon only in favour of a Registrar of a Court, or a Cadi. The fact that when three genuine cheques were drawn payable to the Island Treasurer, they were only so drawn for the adjustment of account and that no cash passed, serves to emphasise this fact.

When in September, 1891, cheques began to be drawn upon the fund to the order of the Island Treasurer and cashed across the counter, there was a departure from the

settled course of business of which the Bank were bound to take note, and which should have led to some enquiry on their part as to whether this settled course of practice was to be departed from.

Then with regard to the forged signatures and endorsements on these cheques, beyond the fact that they were all clearly proved to bear forged signatures, very few of the witnesses were asked as to whether the imitations of their signatures were good or bad. Mr. Morton said that two of his signatures were not good, and two were fairly good imitations of his handwriting; and Capt. Young said that the signature on the one cheque was a good imitation of his. Mr. Morton says further that on obtaining one of the forged cheques from the Bank, when enquiry first began to be made, he saw at once that Mr. Taylor's signature was a forgery. Mr. Ongley says that it is easy to detect that the signatures to the two cheques purporting to bear his name are forgeries, that there appears to have been a physical effort in making the signatures, which are not so free or flowing as his own.

Mr. Taylor does not appear to have been asked by either party as to the similarity of the forged signatures to his genuine ones, though he says with regard to one cheque, No. 78262, that the signature is more like his than any of the others. Mr. Glossop was put to a severe test by the defendant's counsel. A number of cheques, genuine and forged, were shown to him, the whole face of the cheque, with the exception of his signature, being covered up. He, without any hesitation, picked out the genuine from the forged. Some 19 cheques appear to have been thus placed before him, 12 of which were genuine and seven forgeries.

He says, with regard to the forged cheques generally, that some of the imitations of his signature were good and some bad. With regard to the cheques purporting to bear Mr. Wilson's signature, he says that Mr. Wilson's handwriting is firm, whilst the signatures on the forged cheques purporting to be Wilson's are "shaky."

The appellant's counsel himself, in addressing us, described the signatures to the forged cheques generally as "shaky," and at his request the cheques have been placed before us. We have looked at them, and, in many instances, we think that they deserve the epithet of the learned counsel, whilst in one or two instances they appear to bear the mark of tracing, visible to the naked eye. The third of the forged cheques dated 2nd November, 1891, is one of these.

It appears to us, again, impossible to escape from the conclusion that, with regard to these cheques, the signatures in many cases were such as should not have been passed by the cashiers of the Bank without some enquiry, and that they were guilty of negligence in cashing the cheques. It is

a somewhat remarkable circumstance, that not a single official of the Bank who cashed these cheques was called as a witness by the defendant, and that the Court was left entirely in the dark as to the person by whom they were cashed. Two of them are endorsed with writing in Armenian, which, we believe, is the signature of the office messenger of the Receiver-General's Department, and it is suggested that these cheques were cashed by him, and that the cashier, for some reason or other, obtained his endorsement, but whether because he doubted the signatures or because he wished to have a record of the person to whom the money was paid, we are not informed. Mr. Van Millingen says that there is no record in the books of the Bank to show to whom the money on these forged cheques was paid, and, with regard to the cashing of cheques generally, he states : " If it strikes the cashier that the forged names " are similar he cashes it. The protection of the Bank " depends on the cashier's scrutiny and knowledge of his " clients' signature, and whether that client has sufficient " money to meet it." If that be the case, it seems to us that the duty of the cashier is to scrutinise with much more care than he apparently did, signatures which are described as " shaky " and as " not good."

One other point remains to be noticed in regard to these cheques, and that is this : in the case of those of the forged cheques payable to the Island Treasurer which purport to be endorsed " F. G. Glossop," it is proved that when endorsing cheques payable to the Island Treasurer (not of course out of the Orphans' Trust Fund), Mr. Glossop's custom was almost invariably to add the letters I. T., signifying Island Treasurer, to his signature. We say almost invariably, because one cheque was produced which had been endorsed by him without adding these letters, and he explains that this must have been an oversight. In the forged cheques purporting to bear his endorsement, the letters I. T. are in no case added. It does not appear to us to be a question as to whether the endorsement F. G. Glossop was or was not a sufficient endorsement, as in the case of a genuine cheque payable to the Island Treasurer and endorsed F. G. Glossop, we think, undoubtedly, that the Bank would be protected if F. G. Glossop was, in fact, the Island Treasurer. The point is, that this endorsement, without the letters I. T. being added, was not the usual and customary manner in which Mr. Glossop endorsed cheques payable to the order of the Island Treasurer. Here again was another circumstance which should, we think, have put the cashier of the Bank upon enquiry as to whether the cheques were in order. It is noteworthy that in the one solitary instance in which Mr. Glossop failed to add the letters I. T. to his signature when endorsing the cheque,

the signature of the office messenger again appears upon the cheque, though again we are left in the dark as to the reason for which this was done. It is, of course, open to the suggestion that the irregularity of the endorsement was observed, and that the cashier obtained his signature to the cheque as a record of the fact that he presented it, and that it was paid to him. However, neither the cashier nor the office messenger were called as witnesses, so that it is pure assumption, and possibly there may be other explanations of the fact. However this may be, the fact that one instance only can be produced in which Mr. Glossop inadvertently departed from his usual practice of placing the letters I. T. after his name when endorsing, does not detract materially from the strength of the observation that in the case of all these forged cheques which purport to bear his endorsement, that endorsement was not in accordance with his usual endorsement of genuine cheques. When we find then that for seven years from 1884 to 1891, no cheque payable to the Island Treasurer out of the Orphans' Trust Fund was ever cashed over the counter, and with the exception of the moneys paid on these forged cheques no moneys have been so paid up to the date of this action, that the forged cheques bear signatures which of themselves ought to have shown the Bank cashier, having specimens of the genuine signatures in his possession and accustomed to see constantly the genuine signatures of the gentlemen whose signatures were forged, that the signatures were to say the least doubtful, when we find that the forged endorsement on many of these cheques was not in the form in which Mr. Glossop endorsed genuine cheques, and when we find that not a single one of the cashiers of the Bank has been called to prove that they were deceived by the forgeries, or to explain how or by whom these cheques were cashed, we can only say that, in our opinion, the finding of the Court below that the officials of the Bank were guilty of grave negligence (unless the forger had a confederate in the Bank, of which there is no evidence) was amply justified. In our opinion this negligence, this want of due care, in cashing these cheques is such as of itself to disentitle the Bank from relying on the negligence of the Government officials in not detecting these frauds at an earlier time.

It was further argued by the learned counsel for the appellant that the Government, or its officers, by placing this trust fund practically under the control of Vitalis, without due supervision, placed him in a position to commit these frauds; that the Bank had the right to assume that, in their management of a trust fund, the Government would see that all reasonable precautions against fraud were taken, and that the Bank being thus misled, the Government is responsible for the loss. It was further argued, more particularly

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with regard to the 11 cheques signed and endorsed by Vitalis as Island Treasurer, and on which the signature of the Receiver-General alone was forged, that Vitalis was placed in a position to guarantee the signature of the Receiver-General, that he was placed in a position of trust, and the Bank invited to trust him, and that this was a representation to the Bank which the latter was entitled to act upon. The judgment of Lord Selborne in the *Bank of England v. Vagliano Brothers*, L.R., A.C., at p. 123, and the case of *Shaw v. The Port Philip Gold Mining Co.*, L.R. 13, Q.B.D., p. 103, were relied upon as authorities in favour of the defendant.

With regard to the first of these arguments, viz.: that the Government had placed Vitalis in a position to commit these frauds, it appears to us that it is the same argument in another form as that founded on the negligence of the Government with which we have already dealt. It was not the mere fact that these accounts were placed under the charge of Vitalis that gave him the opportunity of committing the frauds, but that the Island Treasurer did not exercise any proper supervision over his actions. Apart from the question of the 11 cheques signed by Vitalis as Island Treasurer, to which we shall advert in a moment, we do not see how it can be contended that the Government has in any way made any representation to the Bank, either by holding out Vitalis as a person competent to execute any transactions with respect to the Orphans' Trust Fund, or otherwise. Except for the fact that Vitalis by virtue of his acting appointment was held out to the Bank as a person authorised to sign these 11 cheques, we see no evidence as to any representation made to the Bank with regard to Vitalis at all. For all that appears to the contrary, it may well be that the Bank was quite unaware that Vitalis had the sole control of the Orphans' Trust Fund, save that the cashier may possibly have been acquainted with his handwriting, and seen that the body of the cheques after the year 1891, were invariably in his handwriting.

In our opinion, too, the defendant is not entitled to say that as this was a trust fund, he was entitled to rely upon the Government taking every reasonable precaution with regard to it, and thereby seek to excuse the negligence of the Bank cashiers in paying away the moneys of the fund under such circumstances as are proved in this case: and he is not entitled to set up that he was misled because the Government officials, or some of them, have been proved to have been guilty of negligence in the keeping of the accounts of the trust fund.

In our opinion, a banker who has paid away the moneys of a customer on forged cheques, under such circumstances of negligence as are shown to exist in this case, is not entitled

to shield himself from liability for the default of his own servants, by saying to his customer "this was a trust fund: you are the trustee: and I was entitled to trust to you to see that no forgery was committed."

We, therefore, are somewhat at a loss to see the relevancy of the passage in Lord Selborne's judgment in *The Bank of England v. Vagliano Brothers*, which was pressed upon us by the appellant's counsel. The sentence runs: "If the "plaintiff misled the Bank upon a material point, however "innocently, although they were themselves deceived by "the fraud which had been committed, I think that they "and not the Bank ought to bear the loss which has been "the consequence."

How did the Government in this case mislead the Bank? Was Vitalis held out to the Bank as the sole person competent to deal with the Orphans' Trust Fund? Certainly not, as the cheques to be drawn against the fund required the signatures of two persons, of whom Vitalis was not one. The Government did not "mislead" the Bank in any way by the fact that he was the clerk by whom all the books relating to the fund were kept, a fact which for all that appears to the contrary, was not known to the Bank officials.

We are at a loss to know how it can be said that the Government made any representations at all to the Bank in the matter, always excepting the case of the 11 cheques we have before mentioned.

It appears to us that the representations Lord Selborne was speaking of were these: first the instruments purporting to be bills of exchange were signed by Vagliano himself, and second the letters of advice, also signed by Vagliano, stating that the instruments would be presented for payment, and requesting the Bank of England to pay them at maturity and debit his account with the amount. Between that case and the present there does not appear to us to be any analogy at all.

With regard to the 11 cheques signed by Vitalis as Island Treasurer, it appears to us that as the signature of one of the two persons who alone was authorised to draw the cheque was forged, the cheques must be forgeries. We do not think that it was seriously disputed that they were forgeries, but it was contended that by appointing the forger himself to act as Island Treasurer, the Government gave him the opportunity of doing what he did do, viz.: forging the name of the Receiver-General as the other drawer of the cheque. It does not appear to us that Vitalis was given the opportunity of thus committing these forgeries: in point of fact, the greater number of the forgeries were committed by Vitalis when he was not acting as Island Treasurer. It, undoubtedly, rendered his task easier to this extent, that he had to forge

only the name of one drawer instead of the signatures of both drawers and the endorsement, as on the other 27 cheques. We do not think, however, that because by agreement with a Bank the signatures of two persons are required as drawers of a cheque, the Bank is absolved from liability to scrutinise both signatures, though the fact that one was genuine might possibly have a tendency to induce a cashier to scrutinise the other less closely. We have, however, in this case to take into consideration all the circumstances connected with the want of care shown by the Bank in dealing with cheques payable to the Island Treasurer out of the Orphans' Trust Fund.

The case of *Shaw v. The Port Philip Gold Mining Co.*, L.R., 13, Q.B.D., p. 103, does not appear to us to be at all conclusive of this case. In that case it was the duty of a secretary of a company to procure the execution of certificates of shares with all due formalities, and issue them to the persons entitled to them. The formalities were, that the certificates were to be signed by a director, the accountant and the secretary of the company, and sealed with the seal of the company.

The secretary of the company, who was also the accountant, issued a certificate signed by himself, and on which he had forged the name of a director, and to which he had affixed the seal of the company without authorisation. It was held in that case that the company were bound by the fraudulent act of their secretary. The decision proceeded on the ground that as it could not have been contemplated that the persons receiving the certificates from the secretary, the person authorised to issue them, should be put upon enquiry to ascertain that all the formalities necessary for a valid certificate had been duly carried out, the company having thus held out the secretary as their agent to warrant the genuineness of the certificates he issued, could not dispute what he had done. The principle of that case does not appear to us to be applicable here. In this case the Bank is bound to know the signature of the drawer of these 11 cheques, the Receiver-General, and is *prima facie* liable if they had paid moneys away on cheques which, though purporting to bear the signature, were not, in fact, signed by him.

If in the case of *Shaw v. The Port Philip Gold Mining Co.*, the person receiving the certificate from the secretary was a person bound to know the signature of the director whose name was forged, the decision would probably have been different.

For the reasons we have above given, we are of opinion that we can make no distinction between the case of these 11 cheques and those of the 27 which were forgeries throughout.

There remains to be considered whether the fact that the pass book containing the account of this trust fund having been received, from time to time, and returned without any dispute as to the correctness of its contents, concludes the Government from now disputing its accuracy. A great deal has been said both in the District Court and in this Court as to the practice of the Bank in entering in the pass book the number of the cheque and not the name of the payee, and in not returning the cheques after they have been cashed. It is said that the practice of the Imperial Ottoman Bank, on both these points, is in conformity with that of French and Scotch bankers, though not of English bankers. It is unquestionable that had the name of the payee been entered in the pass book, and the cheques themselves returned, the risk of detection would have been immeasurably increased, as if any official in the office, except Vitalis, had glanced at either pass book or cheques, attention would at once have been arrested by the fact that cheques were being drawn on the Orphans' Trust Fund in favour of the Island Treasurer.

Whether the pass book and cheques were or would have been examined by any other person than Vitalis, is, perhaps, open to some doubt, considering the confidence placed in him, and the lack of supervision over his actions. However, we see no evidence that the entries in the pass book, and the fact that no objection was taken to them until these forgeries came to light, constitute either by virtue of custom or contract, a settled account between the Government and the Bank. The forgeries were not known at the time, and when they were discovered, we do not see any reason why the items in the pass book placed to the debit of this fund should not be questioned.

One other fact was relied upon by the appellant's counsel. It appears that every month the Bank sent in a printed form stating the amount standing to the credit of the fund, and asking that the amount if correct should be acknowledged. If the amount shown to the credit of the fund agreed with the pass book, an acknowledgment was sent to the Bank that the amount was correct.

It does not appear to us that these acknowledgments amount to an account stated between the Bank and the Government.

The balances at the dates of these statements were, doubtless, correct, according to the book, but amounts had been paid out of the fund by the Bank officials negligently and without the knowledge of the Government on these cheques forged by Vitalis, and under these circumstances an acknowledgment of the correctness of the balances, appearing by the books to be correct, does not in our opinion

estop the Government now from asserting that, in consequence of these unauthorised payments by the Bank, the amounts standing to the credit of the fund ought to have been greater.

To hold otherwise would, in our opinion, practically, be to allow the defendant to take advantage of his own wrong. When once it is established that the officials of the Bank were negligent in cashing these cheques, an acknowledgment by the Government that the balance to the credit of this trust fund which was apparently correct, because the amounts of the forged cheques were included in it, was correct, cannot, in our opinion, estop the Government from claiming that the balance should have been greater, when once it was discovered that unauthorised payments had been made by the Bank officials out of the fund.

We may observe too that, as the Ottoman Law is to be applied, it is open to the Government under Article 1589 of the Mejellé to dispute the correctness of the acknowledgments, and the onus is thus cast upon the Bank of showing that the acknowledgments are correct. This they have not done, and cannot do, unless they establish that they are entitled to debit the Orphans' Trust Fund with the amount paid by them on these forged cheques. As we hold that the Bank is liable for the loss sustained through these forgeries, they cannot, of course, establish that they rightly debited the trust fund with the amount of these cheques, and the contention that the Government are bound by the acknowledgments of the correctness of the balances from month to month fails.

For these reasons we are of opinion that the judgment of the District Court must be affirmed and that this appeal must be dismissed with costs.

Appeal dismissed.