Privy Council Appeal No. 104 *of* 1927.

The Hong Kong and Shanghai Banking Corporation - - - *Appellants*

v.

Lo Lee Shi - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF HONG KONG.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY, 1928.

Present at the Hearing:
LORD BUCKMASTER.
LORD BLANESBURGH.
LORD DARLING.

[*Delivered by* LORD BUCKMASTER.]

Their Lordships notice with approval that this case has been brought before them for consideration within twelve months of its first hearing before the Puisne Judge in Hong Kong. They wish that this example of expedition was widely known and imitated. The point that arises for decision is singularly free from authority, but fortunately the facts are beyond dispute. The appellants are the Hong Kong and Shanghai Banking Corporation, who carry on the business of banking in Hong Kong. In the course of their business they issue bank-notes for various sums; such notes are not legal currency but, owing to the high credit of the appellants they are used as if they were. The bank is under liability to the Government of Hong Kong to deposit dollars as against all notes issued over a certain amount and a tax is payable at the rate of 1 per cent. per annum on the value of notes in circulation. Apart from these conditions, which it may be assumed would apply to every bank in Hong Kong, the appellants have no special relationship with the Government at all. The notes they issue are in the ordinary form of a bank-note. The name of the bank is at the head, the amount of the note is written in figures in the right- and

left-hand corners. In the middle of the document the number of the note appears in two places on the same line, one on each side; below this there comes the promise to pay the bearer on demand at the office of the Bank the amount of dollars, stated in words, for which the note is issued. Underneath this promise the value of the note appears again in large light letters, over which is written "Hong Kong" followed by a date, and then "by order of the Board of Directors" with the signature of the Chief Accountant and the Chief Manager.

Lo Lee Shi, who is the respondent in this appeal, was given by her husband two of such notes, each for five hundred dollars. She placed them in the pocket of some garment, and then, having forgotten their hiding-place she washed, dried and starched the garment and was proceeding to iron it when she found a wad of paper in the pocket; this upon extraction proved to be the remains of the two bank-notes which, together with the coat, had been subjected to all the above processes. Considerable effort was made, with the help of the bank to restore these agglutinated fragments to their original shape and, as to one note, this met with complete success and the note was accordingly paid. The full restoration of the other was more difficult; with the utmost skill the number could not be recovered. Apart from this, a very considerable portion of the note was replaced and its most critical characteristics were made plain—the name of the bank, the amount of the note, the definite promise to pay the "Bearer" on demand at the appellants' office, and the signatures by the Chief Accountant and the Chief Manager were all clearly and definitely evidenced. The bank, however, refused payment mainly upon the ground that the number was missing and Lo Lee Shi accordingly brought an action against them upon the note. The Judge on the trial of the action found in favour of the plaintiff. On appeal to the full Court the Judges were divided, the Chief Justice being in favour of the defence and the Trial Judge who formed the other member of the Court affirmed his own judgment. The bank, anxious to know their true legal position with regard to a note whose number was defaced, brought this appeal but the respondent, deterred no doubt by fear of cost, has not appeared. The case has, however, been fully and carefully placed before the Board who see no reason to think that any relevant matter escaped their attention. The real point of controversy is this. In the circumstances above stated are the appellants liable on a note whose number has been accidentally defaced? The case to which most consideration was given both in the earlier Courts and in argument on the appeal was the case of *Suffell* v. *the Bank of England* (9 Q.B.D. 555), but their Lordships think that apart from certain dicta the actual decision is of little assistance. In that case certain Bank of England notes had been intentionally and fraudulently altered by changing a 5 in the numbers to a 3. After

this alteration the notes having come into the hands of a perfectly innocent holder, he presented them for payment to the bank, who refused to honour them on the ground that the change in the number effected a material alteration in the document by virtue of which their liability was discharged. The action was brought upon the notes. The Court of Appeal decided in favour of the bank, but the grounds of their decision were these—First, that according to old and indisputable law the alteration of a deed in a material respect avoided the document; secondly, that this doctrine had become extended to ordinary written documents and was applicable to bills of exchange and promissory notes; and thirdly, that upon a Bank of England note, which the bank was bound to issue against bullion and which by law was currency, the alteration of the number was a material alteration.

The authority for the first two of these propositions needs no further investigation; for those interested in the subject the history of the principles will be found fully examined in the judgments of the learned Judges in the case referred to, but since the date of that decision the law has been summarised in Section 64 of the Bills of Exchange Act, 1882, whose terms are literally reproduced for Hong Kong in the Bills of Exchange Ordinance, 1885, Section 64, in the following terms:—

"*Alteration of bill.*

"64.—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenor.

"(2) In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

Both the history of the law which this section enunciates and the terms of the section itself show that it relates only to alterations effected by the will of the person by whom or under whose directions they are made and that it does not apply to a change due to pure accident.

The alteration contemplated is one to which all parties might assent. It is not reasonable to assume parties assenting to a part of the document being effaced by the operations of a mouse, by the hot end of a cigarette, or by any of the other means by which accidental disfigurement can be effected. Again, the provision which excepts from the category of persons against whom the bill is avoided, a party who has "himself made authorised, or assented," to the alteration cannot reasonably apply to the ravages of a rat, a white ant, or any other animal pest. The fact that the change is accidental in itself negatives the possibility of assent.

The case of *Davidson* v. *Cooper* (13 L. J. Exch. 276) emphasises the point since there Lord Denman states that the party who may suffer if a document is avoided by alteration has no right to complain since there cannot be any alteration except through fraud or laches on his part, meaning a fraudulent alteration, effected by the party or carelessness permitting it to be effected by another. It is not on that section that the solution to this difficulty is to be found, and yet it is upon the authority of the case which depended on this law, that the learned Chief Justice bases his judgment, holding that the accidental obliteration of the number was an alteration within the meaning of the section and that the case quoted showed that such alteration was material. It is therefore necessary to determine this case apart from the ordinance, and in this connection their Lordships do not think the question of negligence plays any part. The right of a party to sue on the note in the event of its being defaced by fire or attacked by a mouse cannot depend upon whether it had been placed in a fire-proof or a mouse-proof safe or left in an ordinary box. When once honest accident is accepted as the cause of damage, the only remaining question is whether the extent of the damage is such as to prevent the note being sued upon, and it may be also whether the missing material parts can be supplied by verbal evidence, though that question does not now arise. In the first instance therefore it is essential to investigate whether there is sufficient of the note remaining to establish its identity as a note of the bank, and to contain all the necessary elements that render it valid and effectual as a negotiable document. To some extent this must depend upon verbal evidence as well as upon the pieces of the document. These pieces must be identified, their condition must be explained, and they must of course be shown to be parts of one and the same instrument. In this case every one of these conditions has been satisfied. It is indeed not denied that the pieces are pieces of one of the appellants' notes, nor is it, or could it be, suggested that the missing particles could be used in building up another note. It is the absence of the number on which the appellants rely, and this is no part of the operative portion of a bill of exchange or promissory note, although its alteration was held to be material in the case of a Bank of England note, owing to its special features. (See Jessel, M.R. at p. 563 and Cotton, L. J., at p. 575.) Alteration, within the meaning of the statute, is not what has taken place here—and apart from this, it is difficult to see what has destroyed the liability of the bank upon a document admitted to be one of their notes. Brett, L.J., states at p. 566 and p. 568 that the number even of a Bank of England note is no part of the contract, and its alteration does not affect the contract, and Cotton, L.J., at p. 574, appears to take the same view, though Jessel, M.R., leaves the question open. In their Lordships' opinion the contract here has never been altered and is sufficiently evidenced by the mutilated document and the verbal testimony.

Their Lordships do not think that beyond their decision as to the meaning of the ordinance it is possible in this case to lay down any general principles of law; they desire their judgment to be limited to this point, that in the special circumstances of this case it is possible, by means of the fragments of the document assisted by verbal evidence, to establish a claim against the bank for the 500 dollars due upon the note and that accordingly this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE HONG KONG AND SHANGHAI BANKING
CORPORATION

v.

LO LEE SHI.

DELIVERED BY LORD BUCKMASTER.

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