Government Appellant v National Bank of South Africa Ltd Respondent
1921 AD 121

Appellate Division, BLOEMFONTEIN --- CAPE TOWN.

1920. December 2. 1921. February 19.

INNES, C.J.; SOLOMON, J.A; C.G. MAASDORP, J.A; JUTA, J.A; and J.E.R DE VILLIERS, A.J.A.

Flynote

Post office. --- Postal orders. --- Forgers. --- Bank. --- Condictio indebiti. --- Estoppel. --- Neyligeuee.

Headnote

Certain unused blank postal order forms which had been stolen from a post office found their way into the hands of S. S thereafter obtained access to the offices occupied by a postmaster with his permission. The office stamp contrary to regulations was on the counter, instead of under lock and key, and

1921 AD at Page 122

S was thus enabled to stamp a number of the stolen orders. He then added fictitious initials, purporting to be those of an issuing postmaster, to some of the orders and disposed of the instruments thus falsified. Thereafter forged orders bearing a face value of £357 18s. 6d. were presented for payment by the defendant bank which had acquired them from its customers, and wear cashed.

Held, on appeal, that the Government was entitled to recover the money thus, disbursed from the defendant bank.

Estoppel discussed.

The decision of the Transvaal Provincial Division in *Union Government v National Bank of South Africa, Ltd.,* reversed.

Case Information

Appeal from a decision of the Transvaal Provincial Division (WESSELS, J.P., and MASON, J.).

Plaintiff, the Minister of Posts and Telegraphs, as representing the Union Government, sued to recover from defendant bank the sum of £357 18s. 6d., being the amount of certain postal orders, presented for payment by defendant and cashed by plaintiff under circumstances set out in the judgments of the Court.

The Provincial Division gave judgment for the defendant, and plaintiff appealed.

T.J. Roos (with him *I. Grindley-Ferris*), for the appellant The claim is based *on condictio -indebiti* and the agreement between the Government and the bank.

The object of the agreement was to enable the bank to grant facilities to their clients; it could not protect the Government. The Government is fully protected by the provisions of sec. 119 of Act 10 of 1911. They cannot be taken to have waived the protection under this section. The expression "wrong payment" used in the agreement is very wide.

Unless the bank can prove negligence the Post Office would have been entitled to refuse payment on the ground that the documents were not negotiable instruments.

In any case the *condictio indebiti* is maintainable by reason of the doctrine "No man may be enriched at the expense of another." Consequently, the negligence must be very substantial in the actual payment of the amount claimed in respect of the notes.

The alleged negligence in leaving the stamp about is analogous to negligence in failing to lock up a cheque book, but such negligence could not be successfully alleged as a ground of liability on a forged cheque.

1921 AD at Page 123

The notes were never issued by the Post Office.

There was no duty to the Bank to prevent the blank form of a postal order from being stamped by a person without authority with an official instrument, and therefore negligence in the custody of the notes and of the instrument is irrelevant, as the negligence must be closely connected with the paying out and not merely collateral to it. See *London Joint Stock Bank v MacMillan & Arthur 1918 AC 777,* at pp. 796-7, 801 ad fin., 802 ad fin, 815 and 836).

As an illustration of negligence sufficiently connected I would suggest that if the person paying out knew or ought to have known that the notes had been forged, the Post Office would have been liable. If the theft had taken place a very short time previously, it might be held that the person paying out ought to have made investigation as to the number of the note before paying.

[INNES, C.J.: Can you take advantage of the *condictio indebiti* if your negligence caused your error?]

The negligence in leaving the stamp about was not itself the cause of the loss, but that fact in conjunction with the theft, in connection with which there was no negligence. See *Divisional Council of Aliwal North v de Wet* (7 CSC 232). The loss was really due to the fact that the bank is unable to trace the clients who had deposited the postal orders, by reason of the fact that the number of notes are not stated on deposit slips.

As to the knowledge that would have disentitled the Post Office to recover, see *Kelly v Solari* (9 M. & W. 54 and 152, E.R. 24), which was approved in *Natal Bank v Roorda 1903 TH 298,* at, p. 303).

As to the question of the negotiability of a postal order, see *Fine Art Society v Union Bank of London* (17 QBD 705); see *Imperial Bank of Canada v Bank of Hamilton* (1903 AC at p 56).

A postal order is not valid unless signed or utialled.

B. A. Tindall, K.C. (with him *A. Davis*), for the respondents. The correspondence only refers to properly issued postal orders. The bank only accepts responsibility where wrong payment is constituted by the absence of the payee's signature.

The Government is estopped as regards the bank from saying that the postal orders had not been properly issued.

1921 AD at Page 124

There is a duty on the Government not to be negligent in respect of postal orders, as the Government must be taken to know that they are passed from hand to hand as if they were negotiable.

The benefit derived by the Government from the arrangement with the bank lies in the probably increased turn-over and in the fact that less work is entailed as far as the Post Office is concerned.

The case is much in the same position as that of shares endorsed in blank. See *United S.A. Association v Cohn* 1904 TS 733, at p. 738-9 and 740 and 744).

The stamp takes the place of a signature. The Government knows that by enabling a third party to obtain postal orders they may be passed from hand to hand. *London Joint Mock Bank v Macumillan & Arthur* (supra) is distinguishable because the document in that case was a power of attorney, which is not a document that is passed from hand to hand.

I submit that the stamping of the order is part of the process of issuing it and consequently the stamping was part of the transaction. If the Government had not paid, the bank could have successfully claimed to be paid on presentment of the order.

The case is not unlike a number of cases, of which *Lloyd's Bank v Cooke* (1907, 1 KB 794, at p. 800) is an example. See also *Standard Bank v Du Plooy and Another* (16 CSC 161) and *Preuss & Seligmann v Prins* (1 Rascoe 198).

The *Fine Art Society v Union Bank* (supra) is distinguishable because it is based on the doctrine of conversion, which is not part of our law. See *Leal & Co. v Williams 1906 TS 554.*

Roas replied.

Cur. adv. vult.

Postea (February 19th).

Judgment

INNES, C.J.: The point at issue in this case is whether the sum of £357 18s. 6d. paid by the Transvaal postal authorities to the respondent bank upon certain postal orders can be reclaimed. The orders in question were not genuine but false. They formed portion of unissued order forms stolen in April, 1914, from the Roodepoort office. They were then blank, in the sense that though

1921 AD at Page 125

each bore some face value, they had not been signed or initialled by any postmaster; nor had they been stamped with the mark and date of issue of any post office. Such official date stamp is regarded as essential to the validity of postal orders. Portion of the stolen notes found their way into the hands of one Schmulian, who in 1918 was convicted of receiving them with guilty knowledge. Early in 1917 Schmulian obtained access to the office occupied by one Israelstam, the Rietfontein postmaster. The office stamp, contrary to regulations, was on the counter, instead of under lock and key; he was thus enabled to stamp a number of the stolen notes. In some cases he added fictitious initials, purporting to be those of an issuing postmaster. The instruments thus falsified he disposed of; and at various dates during the period March to June, 1917, forged orders bearing a total face value of £357 18s. 0d. were presented for payment by the bank, which had acquired them from its customers, and were cashed. The Transvaal Provincial Division decided that the money thus disbursed could not be recovered by the Government, and the matter comes before us on appeal from that decision.

The grounds of action were two, of which one may be summarily dismissed. It related to certain written communications which passed between the parties. Under date 31st March, 1909, the Postmaster-General informed the respondent that the practice which then prevailed of cashing postal orders when presented for payment through a bank, without the payee's receipt. Or the name of the remitter, could not be continued without a definite undertaking by the bank "to accept responsibility in the event of wrong payment. The respondents in reply undertook to accept such responsibility. I do not think that the present claim can be effectively based upon that correspondence. The indemnity therein given was for loss caused by wrong payments made without the payee's receipt or the remitter's name, --- that is for wrong payments of genuine orders. The parties were not dealing with loss due to wrong payments of false orders, and the present dispute is not affected by what then passed between them.

Che second and more important ground remains. The claim was framed as *a condictio indebiti;* so that it became necessary to prove that under an error of fact there had been a payment of money not owing. The money paid was of course not owing; but

1921 AD at Page 126

it was suggested that the error of the postal authorities who honoured the orders was not such as would justify a demand for repayment, because they could have checked the notes when presented and ascertained that they were not genuine. The point is discussed by *Voet* (12.6, Sec. 7); the ignorance relied upon as justifying a *condictio* must, he says, be neither heedless nor far-fetched *(nee supina nec affectata).* At another place (22.6.7) he explains the meaning of that expression. Ignorance is *supina aut affectata* when it relates to a fact connected with the affairs of others, which is common knowledge; or speaking generally when it relates to *a* fact connected with one's own affairs. But he adds that there are many instances when ignorance of one's own affairs will satisfy the requirements of a *condictio,* especially when the matters concerned are remote and involved *(antiqua aut valde intricata).* The ignorance under which the present payments were made, was in my opinion quite excusable; the postal officials concerned could hardly have been expected to keep in mind the numbers of orders which had been circularised as stolen some three years before. That being so the necessary elements --- *solutio in debiti* and *justus error* --- *were* present and a *prima facie* case for a *condictio* was made out. But a defence of estoppel by negligence was set up --- the negligence relied upon being that of Israelstam, the postal agent at Rietfontein. Schmulian was enabled thereby, it was said, to give to the stolen orders the semblance of validity, which had the effect of misleading the bank, and the Government could not now maintain that the orders were false. This defence was upheld by the trial court. "The Government," said WESSELS, J.P., "can

only claim back the money by proving that it was through the gross negligence of its own agent that it came to pay that money and this I do not think the Court can" allow the Government to do." MASON, J., was substantially of the same opinion; though he also applied the principle that "whenever one of two innocent persons suffers by the act of a third person, he who has enabled such person to occasion the loss must sustain it." Obviously the whole matter turns upon the conduct of Israelstam; that he was careless or negligent in the popular sense may be taken for granted; the question is whether he was negligent in the legal sense.

The doctrine of estoppel is in accordance with the principles

1921 AD at Page 127

of our law and is constantly applied by South African Courts. It was historically examined by CURLEWIS, J., in *Waterval Coy v New Bullion Coy.* (1905, T.S p. 717), and his reasons were ,approved by this Division in *Baumann v Thomas* (1920 A.D p. 428), where SIR WILLIAM SOLOMON, in delivering the judgment of the Court, said this: "The subject, however, has been much more fully developed by the decisions of the English Courts than it has been in our own authorities, so that in practice we usually look for guidance to the former rather than to the latter." (Ib. p. 435). Turning to these decisions, there can be no doubt that under certain circumstances negligence may found an estoppel *in pais,* or, as it is sometimes called, an equitable estoppel. The Transvaal Court in the case above referred to adopted the propositions formulated by BRETT, J., in *Carr v London and North-Western Railway Company* (L.R. 10 C.P pp. 316-318), one of which was as follows "If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the first cannot be heard afterwards, as against the other, to show that the state of things referred to did not exist." That is a proposition of high authority and great practical value, but in applying it to our own practice we would do well to bear in mind the warning of LORD MCNAGHTEN (quoted by SOLOMON, J, in *Baumann v Thomas*) against clinging to rules rather than attending to principles. Indeed, the learned author of the proposition himself modified it in a later case (*Seton v Lafone* (19 Q.B.D p. 71)) by substituting the word "real" for the word "proximate." But, however that may be, it is clear to me that the negligence referred to (I discard the adjective) as sufficient to establish estoppel, must be negligence which would found an action at the suit of the person misled

In short, that it must be actionable, not merely abstract negligence. The distinction between the two will be developed later, but I fail to see how negligence unassociated with any duty to another can affect the legal relation to that other of the party who is negligent. That was evidently the view of PARKE, B, in *Bank of lreland v Evans' Trustees* (5 H.L.C p. 410) and

1921 AD at Page 128

apparently also of LORD FINLAY *(London Joint Stock Bank v MacMillan* (1918 AC at p 793)), and it seems to me the correct view, though there have been differences of opinion upon it. In the present instance the bank claimed in reconvention for damages (calculated at the full total of the notes in suit) on the ground of negligence. The terms of the claim were very wide, but the negligence relied upon in support of it at the trial was the same as that upon which the defence of estoppel was based. Mr. *Tindall,* during the argument incautiously admitted that if the bank could succeed in estoppel, then it ought to have succeeded in an action on the orders. But that is not so. A plaintiff cannot invoke estoppel to create a cause of action where none existed before. A hasty admission in argument, however, cannot affect the legal position with which we are concerned, and I proceed to consider the point upon which, in my opinion this dispute turns, and that is whether the conduct of Israelstam amounted to negligence in the legal sense.

Legal negligence consists in a failure to exercise that degree of care which, under the circumstances, it was the duty of the person concerned to use towards another. It involves therefore the existence of a duty to take care owed to the complainant. Such a duty may arise in various ways. It may be specially imposed, as by statute; but, speaking generally, it either springs from a privity of relationship (contractual or other) between the parties concerned, or it is created by the circumstances of the case *Young v Grote,* that much debated decision, deeply submerged by hostile criticism, but finally rescued and revived by the House of Lords, affords an example of the breach of a duty based on relationship. The customer owed to the banker a duty to draw his cheques with reasonable care; and a disregard of that duty was negligence. *(London Joint Stock Bank v MacMillan* (1918 AC at p 793-794)). That was the principle of *Young v Grote,* as interpreted by LORD FINLAY; and it was, he thought, in full harmony with Pothier (*Contrat de Change,*

sec. 100). That the circumstances alone, without the contractual relationship, would not, in the opinion of the House of Lords, have given rise to the duty is clear from *Scholfield v Earl of Londesborough* (1896, A.C. p. 514), where it was held that the acceptor of a bill of exchange was under no duty to future indorsees to

1921 AD at Page 129

take precautions against fraudulent alterations after acceptance.

If there was any duty to take care owed by the postmaster to future holders of postal notes, it must be looked for, not in relationship, for there was none, but in the circumstances of the case. Every man has a right that others shall not injure him in his person or property by their actions or conduct, but that involves a duty to exercise proper care. The test as to the existence of the duty is, by our law, the judgment of a reasonable man. Could the infliction of, injury to others have been reasonably foreseen? If so, the person whose conduct is in question must he regained as having owed a duty to such others --- whoever they might be --- to take due and reasonable care to avoid such injury. There are innumerable cases in which South African Courts have dealt with these questions by an application of the extended principles of the Aquilian Law. But, speakinally, there will be found in them this element: that the injury to person or property relied upon was the direct result of the act done or the force set in motion. The obstruction placed in the road, the vehicle unskilfully driven, the fire carelessly, kindled, in these and numerous other cases the injury was due to the direct operation of the act or agency complained of. Here the alleged injury did not result from the direct operation of the conduct complained of. It followed from the fact that the postmaster's conduct rendered possible a forgery which resulted in the acquisition by the bank for value of a false instead of a genuine order. For the purposes of this case, however, I will assume (without deciding) that the usual test is applicable, and proceed to enquire whether, under the circumstances, the postmaster owed a duty to the bank not to leave the date stamp where strangers could have access to it. That would depend upon what would have been a reasonable anticipation. Would a reasonable man have foreseen that a date stamp so placed would be likely to be utilised for forging postal orders, to the prejudice of those who acquired them? If so, he owed a duty to all such to safegaurd the stamp; and it was *culpa* not to do so but, if not, there was no duty and no *culpa,* thoug is conduct may have been careless and officially blameworthy. The facts are quite simple. There is no suggestion that Israelstam was in league with Schmulian. He had known the latter for 25 years,

1921 AD at Page 130

and used at one time to have some business connection with him. He allowed him, on the plea that he wanted a quiet place for work, to have the use of his office on four or five Sundays. He was in the habit, contrary to regulations, of leaving the stamp from time to time in a saucer of paraffin under the counter, and Schmulian, who had obtained possession of blank orders stolen three years before, used the stamp for the purpose of forging them. The due impress of a stamp is essential to, and the hall mark of, a genuine postal order. But I do not think that the manufacture of false orders could have been reasonably anticipated as a consequence of leaving the stamp out on certain occasions. Because the stamp was of no use for such a purpose without blank orders; and these apparently were kept in safe custody. It was in the highest degree improbable that the possessor of postal order forms stolen elsewhere would repair to the Rietfontein office and there make use of the unguarded stamp in order to give them the appearance of validity. And there was no duty owed to members of the public who might be damnified by a contingency so remote. No doubt the regulation on the subject was explicit, but do not think that it carries the matter much further. The stamp was to be kept under observation during the day, and placed under lock and key at night. But the same directions applied to obliterating stamps and seals which were not used for validating postal orders. From a Post Office point of view it. was of course most desirable that every care should be taken of stamps and seals which were used for important official purposes, and the regulation was framed accordingly. I do not think that it imposed a duty towards the public which would have not existed without it. And without a duty to possible holders of forged orders as members of the public, there could be no negligence to found an action or an estoppel. The postmaster was careless, no doubt, and in a general sense negligent in the discharge of his duty towards his employer, but there was no negligence in a legal sense (because there was no duty) towards the bank. That being so, it becomes unnecessary to consider whether, even if there was negligence, it was the proximate cause of the loss. But I do not desire to indicate that, in my opinion, it was. Nor do I think that the respondent's case can be advanced by an application of the principle, laid

1921 AD at Page 131

down by ASHURST, J., in *Lickbarrow v Mason,* that when one of two innocent persons must suffer by the act of a third person, then he who enabled such third person to occasion the loss must sustain it. Because that rule has on several occasions been held to have been too broadly stated. And, as pointed out by BLACKBURN, J., in *Swan v North British Australasian Company* (2 H. & C., p. 182), the neglect which would justify its application in a case like the present must not only be in the transaction itself and the proximate cause of the mistake, but it must be the neglect of some duty owing to the party misled. (See also remarks of LORD PAR MOOR (1918, A.C. p. 836). Here there was no duty owing to the party misled.

It follows that, in my opinion, the defence of estoppel should have failed and also the claim in reconvention. The appeal succeeds, and the order of the Trial Court must be set aside and judgment entered for the plaintiff as prayed, with costs here and below.

SOLOMON, J.A.: The main facts of this case can be very shortly stated. On the 27th April, 1914, the Roodepoort Post Office was broken into and a number of blank, unissued postal order forms of an aggregate face value of £1,701 4s. 10d were stolen. On the 11th February, 1918, one Schmulian, a printer residing in Johannesburg, was convicted of having wrongfully received a portion of the said order forms of the face value of £829 18s. 8d. knowing them to have been stolen. These order forms were of no value until they were impressed with the official stamp of some post office showing the date when they were stamped. Before his conviction Schmulian had, in circumstances which will be explained hereafter, secured the use of the stamp of the post office at Rietfontein and had stamped with it a number of the stolen order forms. On many of these he had also placed the initials of the postmaster or postal clerk at Rietfontein. He disposed of these false postal orders to various persons who deposited some of them to the value of £357 18s. 6d. with the defendant bank. These were presented by the bank to the Post Office, which paid the bank their face value. In the action in the court below the Government claimed this amount from the bank either under a *condictio indebiti* or by virtue of a special agreement between the post office and the bank which is set out in the declaration.

1921 AD at Page 132

It will be convenient to deal in the first place with the second of these grounds of action. The agreement relied upon is contained in three letters annexed to the declaration, which it is unnecessary to set forth in full. Under it the plaintiff undertook to accept and pay postal orders presented for payment by the defendant bank on condition that the defendant accepted responsibility in the event of wrong payment. It is alleged that the payments made as aforesaid were wrong payments within the meaning of this agreement, and that the defendant is therefore liable for the amount thereof. There is one very simple answer to this contention, viz., that this agreement is concerned with postal orders, whereas these order forms which were fraudulently stamped and issued by Schmulian are not postal orders. They are mere forms of no value whatsoever, which could not be converted into postal orders by anything that Schmulian could do to them. The argument, therefore, has nothing to say to a case like the present and cannot be relied upon by the plaintiff. Even if it could be, the answer given by Mr. Justice MASON in the court below would he a sufficient one, that the bank only accepts responsibility for any payments which are wrong by reason of the absence of the payees signatures or the names of the remitters, and that there is not the slightest ground for thinking that the absence of these signatures had any effect on the position of the Government in this matter.

Passing on then to the first ground of action it seems clear that *prima facie* the plaintiff was entitled under *a condictio indebiti* to recover the amount of £357 18s. 6d. paid to the bank. For it did not owe the money to the bank, being under no legal liability in respect of these false postal orders, but it paid the amount under the mistaken belief that the orders had been lawfully issued by the official at the Rietfontein post office. And indeed it was not seriously contested by the respondent's counsel that a *prima facie* case had not been made out by the plaintiff, his whole contention being that the latter was estopped by reason of the negligence of its servant from alleging that the orders were not valid.

Now the negligence relied upon is that of one Israelstam, the postmaster of the Rietfontein post office. He carried on business as the keeper of a shop and kaffir eating house, and was employed by the Government as postmaster. One room of his premises was set apart as a post office. In it was a safe in which he kept such.

1921 AD at Page 133

articles as postal orders, stamps, etc. The actual work of the post office was entrusted by him to his clerk, Jacob Stein. The book of instructions to postmasters directs that "Every precaution must be taken for the safe custody of the office date stamp, obliterating stamp and seal . . . . Dating and obliterating stamps must be kept under observation during the day and in reach only of officers of the Department and at the close of business they must be collected and placed under lock and key by a responsible officer." It is clear from the evidence that these instructions were not observed by Israelstam nor by his assistant Stein. The date stamp, so far from being locked up at the close of business hours, was habitually left on or under the counter, and on Saturdays was placed in a small tin of paraffin, sometimes on and sometimes under the counter. If that had been all probably no harm would have followed from this failure to observe the instructions, provided that no stranger was allowed access to the room in which the date stamp was kept. But unfortunately Israelstam permitted Schmulian to make use of this room on more than one occasion. Schmulian was a man whom he had known for about 25 years, and with whom he was on friendly terms, though he says that he was "not exactly a friend." The first time that he visited Israelstam was for the purpose of looking at the store for a customer who wanted to buy it. Thereafter he came again on three or four occasions. His visits always took place on Sunday mornings and he spent the day there, returning to his home in the evening. On these occasions Israelstam allowed him to make use of the post office room. He said that he had work to do involving calculations, and that he wanted a quiet place for the purpose. The reason he gave for not working at home was that the children there disturbed him. Israelstam says that his suspicions were never aroused, and there is no suggestion that he was acting in collusion with Schmulian, so that we must take it that he was, no party to the frauds committed by the latter.

The question then arises whether there was such nelgligence on the part of Israelstami in the care of the post office stamp that the Government, whose servant he was, is estopped from saying that the order forms falsified by Schmulian were not valid postal orders. That the doctrine of estoppel is as much a part of our law as it is of that of England has been laid down in many caves,

1921 AD at Page 134

1921 AD at Page 135

1921 AD at Page 136

1921 AD at Page 137

1921 AD at Page 138

So in the present case, the direct cause of the loss was the intervention of an act of wickedness on the part of Schmulian, which I do not think that Israelstam could have been expected to anticipate. That being so, I do not think that the defence of estoppel set up by the defendant can be sustained.

In his judgment, Mr. Justice MASON refers to the principle laid down by ASHHURST, J., in *Lickbarrow v Mason*. (2 TR 63), that, whenever one of two innocent parties suffers by the act of a third person, he who has enabled such person to occasion the loss must sustain it. But, as was pointed out by LORD PARMOOR in *London Joint Stock Bank v MacMillan & Arthur* (supra p. 836), the rule is too widely stated, and needs to be qualified in the manner suggested by BLACKBURN, J., in *Swan v North British Australasian Co.* It is true that Mr. Justice MASON accepts the qualification adopted by LORD FIELD in *Bank of England v Vagliano 1891 AC 171,* which is practically the same as that of BLACKBURN, J. So qualified, it becomes necessary, amongst other things, that the neglect must be the proximate cause of the loss; and that, in my opinion, is where the defence of estoppel breaks down in the present case. For the same reason the defendant's claim in reconvention for damages for negligence against the plaintiff must fail, for such damages can be recovered only when the negligence complained of is the proximate cause of the loss which has been sustained.

In the court below it was suggested that the Post Office itself' was negligent in not having ascertained before payment that the forged postal orders formed part of those which had been stolen three years before. Very properly, however, this contention was not insisted upon at the hearing of the appeal, for it is clear that there is no substance in it.

For the reasons given, without expressing any opinion upon the question whether or not there was negligence on the part of the servant of the Government, I think that the appeal should be allowed with costs, and that judgment in the court below should be altered into one for the plaintiff for the sum of £357 18s. 6d., with costs.

1921 AD at Page 139

JUTA, J.A., The first ground on which the plaintiff seeks to recover the money paid is by virtue of an agreement between the parties contained in two letters dated 31st March, 1909, from the plaintiff to the defendant and the reply dated April 8th, 1909. The first reads: "In connection with the arrangement under which money orders and postal orders presented for payment through a bank and bearing an impression of the bank stamps are accepted and paid by the Post Office whether or not such orders have been receipted by the payee, and without requiring that the name of remitter should be furnished, I beg to inform you that the Imperial Post Office . . . states that it is very desirable that the conditions under which money and postal orders are paid to private persons should not be relaxed in the case of a banker except upon the definite undertaking given by the bank concerned to accept responsibility in the event of a wrong payment. The modification of the rules referred to is no doubt a very considerable convenience to business men, who in the event of irregular payment could scarcely object to their accounts being debited with the amount of the order returned through the bank. I shall be glad to know whether you are prepared to give a formal undertaking on the lines indicated in consideration of which this Department will be prepared to dispense with signatures on money or postal orders passed through your bank. In the absence of such an undertaking it will probably be necessary to alter the existing regulations and to require that all orders should be properly signed by the payee, and in the case of money orders the name of the remitter furnished." By their reply the defendant bank agreed to undertake the responsibility in terms of the request for all money and postal orders cashed by its branches. The plaintiff contends that the payment of the postal orders in question is a " wrong payment" in terms of this agreement, but I think it is clear that it is not. A postal order is issued by a post office on payment of a certain sum and a small commission for its work and labour, by which the Post Office undertakes to pay that sum to a person whose name is intended to be inserted in the order, and provision is made therein for the order to be receipted on payment, It is marked " not negotiable," and although such postal orders do pass from hand to hand they are not negotiable instruments in the sense that they are treated as cash. If such an order is stolen from the owner. the thief cannot pass a good title, even to a bona

1921 AD at Page 140

fide holder for value, who has no better title to the order than the person had who made it over to him. The owner could prevent the Post Office from paying over the money designated by the order to such holder. In the case of negotiable instruments treated as cash, e.g., a banknote, the *bona fide* holder for value from the thief would be entitled to payment. It follows that postal orders may be paid to the person not entitled to payment and hence the safeguard adopted of obtaining the receipt of the payee. And this condition is printed on the back of the note. But it is also stated there that such condition, viz., that the payee must receipt the order is dispensed with where the order is paid through a bank: and the letter of the 31st March refers to this, and in effect states that unless the bank will accept responsibility for all such orders cashed by it, the Post Office would have to insist on their being properly signed by the payee.

It is clear that what the Government contemplated and asked for was that it should be put in the same position as if it insisted on obtaining a receipt from the payee. In the latter case if the payee was not the person entitled to receive the payment, the Government had its remedy against him. Such receipt it was wiling to dispense with if the bank would accept the liability for the wrong payment, leaving it to the bank to debit the account of its customer who had received credit therefor. This contemplated that some person was properly entitled to the payment, and that the order was a genuine one. But it cannot be gathered from these letters that either the Government requested the bank to undertake responsibility for forged orders or that the bank agreed to undertake such a liability.

The next question is whether the negligence, assuming there was such, in regard to the way the office stamp was left lying about, prevents the Government from suing on the *condibtio indebiti.* The requisites for such an action are that the payment was not due either civilly or naturally and was made in ignorance of the fact that it was not due, provided that such ignorance was not, as *Voet* (NII vi.7) puts it, supine, that is, it must be a reasonable and excusable mistake, gross and reckless ignorance not being protected. But such grossness and recklessness must, however, be in the ignorance itself, and not in something *de*

hors. It is contended that the Government could have

1921 AD at Page 141

ascertained before payment that these orders formed part of those stolen from the Roodepoort Post Office. But such a contention is not reasonable. There were many thousands of orders which at that time had been stolen; the Government had been notified between 1914 and 1917, the dates which cover the orders in question, that between 15,000 and 17,000 orders had been stolen. Every day some hundreds of orders are presented for payment, and naturally the banks want the payment of such orders, cashed for their customers, to be made as soon as possible. It is not reasonable to expect that before the Government pays any order its officials should go through a list of such dimensions. It would be quite impossible for business to be carried on under such circumstances. When it is said that the debt must not be due either naturally or civilly, the distinction contemplated is that between a debt due by the *jus civile* as distinguished from the *jus naturale;* for example, where the debt arises *ex nude pacto,* since payment following, on a pact is sufficient proof that he, who made the promise by the pact, had the intention of binding himself." (*Voet,* XII vi.2.) These considerations do not affect the case before us.

But it is further contended that, by reason of its negligence, the plaintiff is estopped, and defendant's counsel applies the principle to the *condictio indebiti* thus: He says the Government is estopped from saving and proving that the money paid on these orders was not due. The principle underlying the doctrine of estoppel is part of our law, and the development and application has undoubtedly followed upon the English, law. In the case of *van Blommestein v Holliday* (21 SC 11), DE VILLIERS, C.J., said: "I am satisfied also that by our law, as by the law of England, a person who by his conduct has clothed his agent with the apparent ownership and right of disposition of a document, whether negotiable or not, is estopped from asserting his title as against a person to whom such agent has sold it and who received it in good faith and for value." There the plaintiff had bought gold mining shares and accepted as sufficient delivery a certificate endorsed in blank by the registered owner, which, though not a negotiable instrument, was by the universal custom" in South Africa, accepted when so endorsed as being "in order." He deposited the certificate with his broker for safe custody, who

1921 AD at Page 142

fraudulently delivered it for valuable consideration to the defendant, who had no notice of the plaintiff's interest therein: and it was held that the plaintiff was estopped from asserting his, right to the certificate. No authorities in our law were cited either in argument or in the judgment, but only decisions in the English law were relied on. The authorities in the Roman-Dutch law are stated in *Dlorum Bros. v Nepgen* (1916, C.P.D. 392). Whether they go the length of the English doctrine need not now be considered. For that was a case in which the agent was entrusted with the symbol of the property, " with the apparent ownership and right of disposition of the document." In the case of the *United South African Association, Ltd., v Cohen* (1904 TS 733), scrip certificates endorsed in blank were entrusted by the plaintiff to the custody of one of its clerks; they were deposited in a safe, not on the company's premises, the only key of which was kept by the clerk who stole some of them and sold them to an innocent purchaser for value. The plaintiff was estopped from disputing the latter's title. Again, in *Hartogh v National Bank* 1907 TS 1092, a married woman ceded a bond, passed in her favour, to V. The cession was absolute in form, but was made in reality as security for her husband's indebtedness to V. The latter ceded the bond to the defendant bank as security for advances equivalent to its face value. It was held that she was estopped from denying that her cession to v was an absolute one. Other decisions in our Courts, *viz., Adams v Mocke* (23 SC 782), *Lawless v Lane* 1909 TS 589, and *Horzcnt Bros. v Nepgen* 1916 CPD 392, were cases where property sought to be recovered from the defendant had been entrusted by the owner to a person who had parted with it to a *bona fide* purchaser for value.

In none of these cases did any question arise as to estoppel by negligence. DE VILLIERS, C.J., is reported in *van Blommestein v Holliday* to have said: "But I am satisfied that neither under the Roman nor under the Dutch law would a person, who has by his words or conduct wilfully or *negligently* induced another to alter his position in the belief that a certain state of affairs existed, have been allowed to assert a right against such other person inconsistent with such state of facts." The only authority cited by him is the *Digest* (1.7.25), where a father allowed his

1921 AD at Page 143

daughter, who had not been legally emancipated, to live as a materfamilias. She died, leaving a will by

which she appointed heirs. It was held by *Ulpian* that the father could not contest the will on the ground that she had not been emancipated in due form and in the presence of witnesses; that he could not sue *adversus suum actum.* In the case of *Waterval Gold Mining Co. v New Bullion Gold Mining Co.* 1905 TS 717, CuRLEwzs, J., on an examination of the Roman law, held that the doctrine of estoppel *in pais* is an extended interpretation of the principle underlying the *exceptio doli mali;* that the application of the maxim *nemo contra suum factumn venire debet* would create the same legal consequences as estoppel in English law; "it is practically the estoppel by conduct of the English law." The learned Judge, delivering the judgment of the full Court, adopted the four propositions laid down by BRETT, J., *in Carr v London Railway Company* (L.R. 10 CP 316-318), the fourth of which is: "If, in the transaction itself which is in dispute, a person has led another into the belief of a certain state of affairs by conduct or culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of the leading, and has led the other party to act by mistake upon such belief to his prejudice, the first person cannot be heard afterwards as against such other to show that the state of affairs referred to did not exist." This proposition postulates four requisites: (a) The negligence must be in the transaction itself --- the meaning of this will be considered further on; (b) the negligence must be culpable; (c) it must be calculated to have the effect of leading another into the belief of a certain state of facts; and (d) it must be the proximate cause of such leading. That the neglect must be in the transaction itself and the proximate cause of the leading of the party into the mistake is emphasised by LORD ESHER in *Staple of England v Bank of England* (21 Q.B.D p. 173). This case is similar to, and followed upon, that of the *Bank of Ireland v Evans' Trustees* (5 HLC 390). There the trustees of a charity in Dublin, incorporated and having a common seal possessed stock in the public funds, which stock was in Ireland registered in the Bank of Ireland. G., the secretary, was allowed to have the seal in his possession. Five letters of attorney, purporting to be executed by the plaintiffs,

1921 AD at Page 144

the trustees, and authorising the transfer of the stock in question, had been presented to the defendant bank. The signatures thereto were genuine, but the seal had been fraudulently affixed by G., who was convicted of the forgery. The affixing of the seal had been attested by witnesses, who, though without any fraudulent intention, attested what was not true, as the affixing of the seal was an authorised act. By reason of these forgeries the defendant bank made the transfer of the stock and received and remitted the product to G. The trustees, by means of a properly executed power of attorney, authorised G, to transfer the stock, but the defendant bank refused to do so The jury were directed that if the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given for the bank. The jury found for the latter. It was held in the House of Lords that the decision was wrong. The question "whether there was such negligence as to disentitle the trustees to insist on the transfer being void" was submitted by the House of Lords to the Judges, whose unanimous opinion was delivered by BARON PARKE, and that opinion was that if there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. "If such negligence could disentitle the plaintiffs, to what extent is it to go?" said BARON PARKE. "If a man should lose his cheque-book or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying the forged cheque would be entitled to charge his customer with that payment."

In the *Waterval* case, prior to the proclamation of a farm under the Gold Law, a mijnpacht had been reserved, surveyed and beaconed off, but claims were pegged on the reserved ground by persons ignorant of the mijnpacht. The plaintiff, the owner of the mijnpacht, protested to the Minister of Mines against the pegging and issue of licences in respect of such claim. Some of the claims were bought at public auction under the Gold Law by T, who sold them to defendant. It was held that plaintiff could eject the defendant from such claims. The grounds of the decision were that defendant had constructive notice or was put on enquiry as to the existence of the mijnpacht; that there was, no culpable negligence, inasmuch as the plaintiff had protested

1921 AD at Page 145

to the Minister of Mines, and that there was no duty on the plaintiff to protect probable purchasers from those who held claims, by instituting proceedings which would have prevented any of the trespassers from disposing of his claims, and that the abstaining from vindicating his rights by the plaintiff was not the "proximate cause" which induced the defendant to buy the claims, but that the issuing of the licences for these claims was such proximate cause. This case partakes chiefly of the nature of one where a person knowingly or passively stands by and looks on, and thus suffers another to buy his land under an erroneous belief as to the title, without making known his claim, and does not afford much assistance so

far as the facts are concerned in dealing with the present case.

The principle that the negligence must be in the transaction itself is further emphasised by LORD FINLAY in the case of *The London Joint Bank v MacMillan & Arthur* (1918 AC at p 795 and 797), and he points out that these decisions, which he reviews at length, have no application to cases where the fraud has been merely facilitated by negligence in the custody of a seal of a corporation or of transfers in blank. It is sometimes difficult to gauge exactly whether some of these cases were decided on the ground that the negligence was in the transaction itself or on the ground, assuming there was negligence, that it was not the proximate cause, e.g., BOWEN and FRY, JJ., in *Staple of England v Bank of England* (21 QBD 175-6), It is obvious that the principles are closely allied to the case of the fraudulent use of a seal or blank transfers.

In all these cases the difficulty which the Courts were met with was the decision in *Young v Grote* (4 Bin. 253), and various reasons were assigned from time to time as the ground for the decision.

In that case, Young, on leaving home, left blank signed cheques with his wife, to have them filled up as his business required. His wife required one filled up for £50 2s. 3d., and a clerk of Young's filled it up and showed it to the wife, who authorised it to be cashed. But it had been filled up so that there was a space before the word "fifty," which allowed of the words "three hundred, and" to be inserted, and a space before the figure "5," to allow the insertion of the figure "3." The

1921 AD at Page 146

clerk fraudulently so filled up the spaces, and the banker cashed the cheque for £350 2s. 3d. It was held that Young was bound to make good to the banker the loss which, by reason of his negligence, the banker had sustained by paying that amount.

Thereafter, the case of *Scholfield v Earl of Londesborough* 1896 AC 514 was decided. There a bill of exchange for £500 was presented for acceptance with a stamp of much larger amount than was necessary and with spaces left which allowed of the words "three thousand" being written before the words "five hundred" and of the insertion of the figure "3" between the letter "£" and the figures "500." The acceptor wrote his acceptance and handed the bill to the drawer, who fraudulently filled up the spaces and turned it into a bill for £3,500. Being sued by a *bona fide* holder for value, the acceptor paid £500 into Court. It was held by the House of Lords, affirming the decisions of the courts below, that the acceptor owed no duty to the plaintiff and was guilty of no negligence and was entitled to judgment. The case of *Young v Grote* was commented on. In that case there is no doubt that the law, as laid down by Pothier (*Change,* 4.3.99), influenced some of the Judges, but in the numerous decisions in which *Young v Grote* is referred to, which are all reviewed by LORD FINLAY in *London Joint Stock Bank v MacMillan & Arthur* (1918 AC 777), there is considerable difference of opinion as to the ground for the decision in that case. *Pothier* is clearly of opinion that where the customer has given the opportunity for the alteration of a cheque by his own negligence in drawing it, he must bear the loss if the cheque is fraudulently altered and is cashed by the banker; and that this liability arises out of the relationship of the contract of mandate, which exists between the customer and the banker. As LORD WATSON pointed out in *Scholfield's* case (p. 539), *Pothier* meant this rule to apply also as between a drawer and an acceptor, who pays in compliance with his drawer's mandate, and he adds: "But the rule has no application to parties between whom there is no subsisting contract of mandate." The Privy Council, apprehending that the case of *Scholfield* overruled *Young v Grote,* applied its principles in the case of *The Colonial Bank of Australasia v Marshall* (1906, A.C p. 559), which was a case of a cheque fraudulently altered by reason of the negligent

1921 AD at Page 147

way in which it was, drawn, and held that the customer was not liable to the bank. It applied the same standard of negligence applicable in the case of an acceptor to that of a customer and the bank, assuming that a duty to take care did not exist. But the House of Lords, in the *London Joint Bank v MacMillan & Arthur,* affirmed the decision of *Young v Grote,* on the ground that there was a special duty on a customer drawing a cheque not to draw it in such a negligent manner as to allow of its fraudulent alteration, a duty which arises from the relationship between the customer and the banker; but that there is no such relationship between the acceptor of a bill of exchange and subsequent holders.

The English cases decided on the ground of estoppel are not in terms based upon any duty. Doubtless the existence or absence of a duty may affect the question of whether there has been such negligence as to create an estoppel. But there seems to be a difference of opinion whether, in order to create an estoppel

by conduct, the latter must be such as to render the person guilty of it liable to an action at the suit of the other person.

In the case of *Swan v North British Australasian Company* (7 H. & N p. 639), in which the Court was equally divided, MARTIN, B., said that in the consideration of estoppel by conduct "one question must be whether his conduct be such as, assuming it to have caused damage to the person alleging the estoppel, would render him liable to an action at the suit of the person." The point was referred to by BARON PARKE in delivering the opinion of the Judges in *The Bank of Ireland v The Trustees of Evans' Charities* (5 HLC 389), and it is an apt and pertinent one. "If he would not be liable to an action, it is difficult to see how he can be estopped." This statement of the law was, however, dissented from by WILDE, J., who said: "It is, I think, always difficult, and sometimes illusory, to compare two principles which emanate from different sources and proceed in different directions. The action for negligence proceeds from the idea of an obligation towards the plaintiff to take care and a breach of that obligation to the plaintiff's injury. The doctrine of estoppel, as applied to these cases of negligence, is based on the injustice of allowing the plaintiff to be the author of his own misfortune, and then charging the consequences on others

1921 AD at Page 148

. . . . it would be very fallacious to test any set of circumstances as raising an estoppel or not by asking whether, reversing the parties, an action for negligence would lie." Mr. *Tindall,* for the respondent, admitted that he would have to go so far as to maintain that if the bank had sued the Government on the orders in suit, it could have compelled payment of them. Whether that is so or not is a consideration which may be deferred. There is in the present case a counter-claim for damages by reason of the negligence of the Government in leaving the orders in premises which could easily be burgled, in taking no precautions against theft or burglary, and, further, in not keeping such orders and the official stamp in a burglar-proof safe. As the measure of damages is the amount of the orders in suit, it follows that if the bank is entitled to succeed in obtaining them, then, in order to avoid a circuity of actions, the plaintiff would not be entitled to succeed in recovering payment of the orders.

The liability of the Government must therefore be considered from three points of view.

Whether there was a duty on the Government or its servant, the postmaster at Rietfontein, to take such care of the office stamp that the damage caused to the bank, viz., the cashing of the forged orders, could not have been occasioned; so as to make the Government liable at the suit of the bank for a breach of such duty

Whether the bank can claim damages by reason of the *culpa* of the Government or its servant, the damage consisting in its payment of the forged orders

Whether, if there is neither such duty nor such *culpa* as to entitle the bank to succeed in an action against the Government, the latter is nevertheless estopped by its conduct from denying that the money it seeks to recover was due.

There is, of course, one element which may be common to all these propositions, and that is that the breach or negligence or conduct must have been the proximate cause of the *damnum* to the bank. That must, in the first proposition necessarily depend upon the extent of the duty. What then s the duty, if any, and how does it arise? There is no statutory duty to keep the stamp under lock and key. There was no contract between the Government and the bank, and therefore the principles

1921 AD at Page 149

laid down by *Pothier* in the case of cheques and bills of exchange cannot be applied. Nor does the case fall within the principles which govern the liability of a person who negligently leaves a loaded gun where some other person might take it up and be injured, or leaves a cart and horse unattended in a place to which children would have access to them, or where a person digs a hole on his unfenced property in such proximity to a place frequented by others as to cause a danger of their falling into it --- cases which really fall under the consideration whether there is *culpa.* It is true that instructions were issued by the Government to the postmaster to keep the stamp locked away after office hours; but this cannot give rise to a duty to any member of the public who gives value for a forged postal order. Banks urge upon their customers in issuing cheque books that the latter should be locked away. But this is done for their own protection; and though a person who leaves a cheque-book lying about so that a forgery is facilitated may be careless, yet there is no duty even as between him and the bank to keep it under lock and key. Indeed,

in the English decisions, such conduct, though it may be carelessness, is not such negligence as to make the customer liable to the bank. Much less is there any such duty to a third person who takes a forged cheque or bill of exchange innocently and for value. Where an acceptor of a bill of exchange accepts it stamped with a stamp covering a larger amount than that for which it was drawn, facility is afforded for the falsification of the document. And where, in addition, it contains spaces in which words and figures can be written, there is still greater facility afforded for the forgery of an instrument whose very nature implies that it will get into the hands of a third party. And yet it was held in *Scholfield's* case that whatever may be the duty as between the drawer and the acceptor, there is no such special duty in the acceptor to a *bona fide* holder for value of such a bill, falsified by the insertion of words and figures, as to make the acceptor liable to such holder.

It is said by the learned JUDGE PRESIDENT in the court below that " the Government is responsible for the negligence of its agents in enabling stolen postal orders which bear all the insignia of genuine documents to be sent out in the world." By

1921 AD at Page 150

the insignia, I take it, is meant the impression of the Post Office stamp. But that proposition depends on the meaning of "negligence." The principle laid down by *Pothier,* which the learned Judge invokes, is one which arises out of the contract of mandate and in that case the customer suffers because there was a breach of his duty to the banker, and the decision whether there was negligence or not depends on what was the extent of the duty. In determining whether the Government is liable or not in this branch of the case, it is necessary to determine whether or not there was some special duty on the part of the Government to take such care of the stamp by locking it away or otherwise, that the access to it by Schmulian was, under the circumstances of this case a breach of such duty. The consideration under this branch of the case is not whether there was *culpa* under the ordinary principles of our law --- that falls to be determined under the second branch --- but whether there was such a special duty to take care of the office stamp as to render the Government liable for all consequences connected with the unauthorised use of the stamp by persons other than its servants, whether or not the want of care is the proximate cause of the prejudice or *damnum.* Because if the want of care must be the proximate cause, then, for reasons which will appear later, I do not think it was such in this case; so that, even if there was some duty on the Government not going to the extent I have stated, the Government is not liable to the bank. I can find no principle upon which such a duty can be based nor can I see any relationship between the Government and the holder of a forged postal order from which such a special duty can arise.

I now come to the consideration whether, under the circumstances, there being no special duty on the Government towards the defendant bank, there was negligence or *culpa* on the part of the postmaster, which would entitle the bank to recover damages. Now what were the circumstances? Israelstam, the postmaster, allowed Schmulian to use his private office on Sundays to do some calculations. This office was used during week days as the post office, and on Sundays the post office stamp was left lying on the counter in a dish of paraffin. Schmulian had been known to the postmaster for twenty-five years, and was not a stranger to him. The office was not locked on Sundays, and the

1921 AD at Page 151

telephone was in it, so that anyone using the latter had access to the office. It was while working in the office in 1917 that Schmulian was able to stamp the postal orders that had been stolen from Roodepoort in 1914. The postal orders for which Israelstam was responsible were locked away in the safe in the office every night and were in the safe on Sundays. Can it be said that, the orders being safely locked away, any reasonable man could have foreseen or anticipated that the stamp would have been improperly used to stamp orders stolen some three years before? Unless a person is in possession of the orders themselves the stamp is of no use to him. In the case of *Bank of Ireland v Evans' Trustees* and *Staple of England v Bank of England,* not only was the seal entrusted to the secretary, but the powers of attorney, duly signed, and necessary for the transfer of the stock were also available for the secretary, who fraudulently affixed the seal; and yet it was held that there was no such negligence as to estop the principals of the secretary. It is also said by the learned JUDGE PRESIDENT that the Government "can only claim back the money by proving that it was through the gross negligence of its own agent that it came to pay that money." Whether there was gross negligence is what falls to be determined in this case. But exactly the same may be said of the principals in the cases just mentioned; they could not succeed without proving that it was through their own want of care in the custody of the seal that their secretary was able to commit a fraud; but that did not prevent them from succeeding, because it was held that it was not such

negligence as to disentitle them to do so. In my opinion there was not such negligence either in the present case.

But there is another aspect of the case, and that is whether the conduct of the postmaster, assuming that it was negligent --- that there was *culpa* on his part --- was the proximate cause of the *damnum* to the bank, or whether it was not too remote. Now, whatever might have been said if the postmaster had been careless in the custody of postal orders themselves, cannot be said here. The orders were orders which had been stolen from another post office three years before; and it cannot be said that the conduct of Israelstam in leaving the stamp lying in his office, which was used to stamp these stolen orders, was the proximate

1921 AD at Page 152

cause of the loss occasioned to the bank. There are other circumstances which existed between the negligence, in leaving the stamp in the office, and the cashing of the orders by the bank, which prevents that negligence (assuming it) from being the proximate cause of the loss to the bank: just as in the cases of

Bank of Ireland v Evans' Trustees and *Staple of England v Bank of England (21* Q.B.D. 174-5), the negligence (assuming it) of leaving the seal in the clerk's custody was held to be not the proximate cause of the unauthorised transfer.

The last consideration is whether the Government is estopped. I am not prepared to say that the test of estoppel by conduct is whether the person who has been prejudiced thereby can succeed in an action against the person whose conduct lea to his prejudice, nor is it necessary to determine that question. It is clear that in the case of estoppel by conduct also the conduct complained of must be the proximate cause of the prejudice sustained. For the reasons already stated in considering the liability on the ground of *culpa,* the conduct of the postmaster cannot be said to be the proximate cause of the prejudice to the defendant bank. Unless, therefore, there is some special duty on the postmaster to members of the public to take such care of the official stamp as to render the Government liable for all consequences connected with the unauthorised use of the stamp by others than their servants, whether or not the want of care is the proximate cause of any prejudice or *damnum* to a member of the public, there is no reason in law why the Government should not be entitled to claim back by the *condictio indebiti* the money which it paid the bank and which was not due.

For the reasons already stated, I cannot see from whence such a special duty can spring. The result is that the appeal must be allowed with costs and the judgment in the court blow altered into one of judgment for the plaintiff, with costs.

C.G. MAASDORP, J.A., and J. E. R. DE VILLIERS, A.J.A., concurred.

Appeal accordingly allowed.

Appellant's' Attorney: *C.I. Pienaar,* Pretoria; Respondent's Attorneys: *Rooth & Wessels,* Pretoria; *C.J. Reitz,* Bloemfontein.