CASES DECIDED

IN THE

WITWATERSRAND LOCAL DIVISION.

S.A. LAW REPORTS (1914).

W.L.D. PART I.

LIPSCHITZ v. POSTMASTER-GENERAL.

1913, *December* 23; 1914. *January* 20. DE VILLIERS, J.P.

Post Office.—Savings Bank.—Act 10 *of* 1911, *sec.* 119.—*Deposits before and after Act.—Payment out after Act by fraud of third person.—Liability of Postmaster-General.*

In 1910 plaintiff deposited money in the A branch of the Post Office Savings Bank at Johannesburg under Proc. 33 of 1902. On the 18th September, 1911, Act 10 of 1911, came into force. Plaintiff continued making deposits at the A branch, and signed a consent that they should be managed according to the savings bank regulations. In September, 1912, without negligence on his part his deposit-book was stolen, and thereafter a person unknown, who represented himself to be plaintiff, presented the stolen deposit-book at the B branch in Johannesburg, forged plaintiff's name on the withdrawal form, and thereby obtained payment of £200. £50 thereof had been recovered, and plaintiff now claimed the balance from defendant, who relied upon sec. 119 of the Act. *Held*, in a case stated under sec. 66 of the Act, that in the absence of evidence to the contrary, plaintiff must be taken to have accepted the new Act as governing deposits made before as well as after its commencement, and that in the absence of proof of fraud, but assuming negligence on the part of the official who had paid out, sec. 119 relieved defendant of liability.

Case stated under sec. 66 of the Post Office Act 10 of 1911.

The facts appear from the judgment.

F. A. W. Lucas, for the plaintiff: Sec. 119 of Act 10 of 1911 upon which the Postmaster-General relies, does not protect him.

because the contract between him and plaintiff was made under the Post Office Savings Bank Proclamation 33 of 1902 which gave no such protection. The rights accruing to plaintiff under the Proclamation were not extinguished by the Act of 1911. But even if they were, only deposits made after the commencement of the Act namely, 1st September, 1911, would be affected. Plaintiff should be enabled at least to recover the amount standing to his credit on the 31st August, 1911, namely £84. Under the Proclamation it was settled law that the depositor had an absolute right to recover his money where it had been paid out on a forged signature, see *Payne* v. *Attorney-General* (1910, T.H. 76). The Act of 1911 could have no retrospective effect. All rights accrued under the law it replaced were safeguarded by the Interpretation Act 5 of 1910, see sec. 13 (2) (*c*). Further if sec. 119 protected the Postmaster-General the Post Office Savings Bank would disappear, and that clearly could not have been the legislature's intention.

The claim now made was not "in respect of any *bona fide* payment," but was simply one to recover money lent on hire to the Postmaster-General.

If defendant's contention as to sec. 119 be correct the effect will be to deprive depositors of their common law right to their own property. On the question of interpretation, see also *Hitchcock* v. *Way* (112 Eng. Rep. 360).

R. F. MacWilliam, for the defendant: The Legislature is entitled to make rules from time to time regulating transactions between the Postmaster-General and the public. A contract entered into by any depositor is subject to this right of the legislature. Sec. 119 was from its nature retrospective. But in fact on the 19th December, 1911, plaintiff had taken out a fresh deposit book, and signed a form framed under the new Act. Plaintiff must be taken to have known that the Proclamation was repealed, and in the face of such knowledge and his subsequent deposits he cannot be heard to say that the Act does not bind him. How could it be argued that plaintiff had money in the Savings Bank under two different contracts? When the new Act came into force he could have closed his account if he was not satisfied with the new conditions.

The words "in respect of any *bona fide* payment" cannot refer to anyone but a depositor, who is claiming back money paid out as the result of another's fraud. But the fraud must not be the fraud of a Government official.

(He cited *Kelly* v. *Buffalo Savings Bank* (69 L.R.A. 317).).

Cur. adv. vult.

Postea (January 20, 1914).

DE VILLIERS, J.P.: This case comes before me under sec. 66 of Act 10 of 1911. The salient facts are not in dispute. On the 4th April, 1910, the applicant became a depositor at the Fraser Street Post Office Savings Bank, Johannesburg, in terms of Transvaal Proclamation No. 33 of 1902. The Fraser Street Branch was subsequently removed to the Main Street Branch, and became the Main Street Branch. On Friday 20th September, 1912, the applicant had to his credit in the Savings Bank an amount of £206 19s. 9d. At that time he was living at 3, Betty Street, Jeppestown. On that day during his absence the trunk in which he kept his Post Office Savings Bank Book was broken into and the book stolen. The theft was not discovered until late on Monday, the 23rd September. The same evening the applicant reported the matter to the police and early the next morning to the Post Office authorities. Subsequently three persons were convicted of the theft of the Post Office Savings Bank Book. On the day the theft was committed the three thieves handed the book over to a fourth party. The latter did not go to the Main Street Branch but went to the Post Office in Fordsburg and there made application for £200, representing himself to be the applicant. He produced the deposit book and filled up the withdrawal form, forging the applicant's name. He was not known to anyone in the Fordsburg Post Office and as evidence of identity he produced in addition to the deposit book some receipts and letters addressed to the applicant, as well as the envelopes in which they had been contained. In reply to a question put to him by Gregson, an official in the Savings Bank, he stated that he required the money for the purpose of bailing out his father who, he stated, was in custody at Middelburg. At the request of Gregson he signed the name of the applicant on some telegraph forms without reference to any other book or document. Gregson compared the signature with the specimen signature of the applicant in the Deposit Book, and they appeared to correspond. About two hours elapsed between the time he made application for the payment of the £200, and the time when the £200 was paid out to him. A sum of £50 was found in the posses-

sion of one of the thieves and was recovered from him. The applicant therefore only claims £150 and interest, but the Postmaster-General refuses to pay him, relying on sec. 119 of Act 10 of 1911. The dispute was referred to the Minister of Justice in terms of sec. 66, who supported the Postmaster-General, and is now brought by the applicant before this Court for final decision.

The case which was made on behalf of the applicant by Mr. *Lucas* was (1) that the rights of the applicant continued to be governed by the Proclamation of 1902; (2) that the Postmaster-General is not protected by sec. 119, and (3) that even if sec. 119 does protect him, the applicant would be entitled to an amount of £84, which stood to his credit on the 31st August, 1911, the date when the Post Office Act of 1911 came into operation. On the part of the respondent it was not contended by Mr. *MacWilliam* that there had been any negligence on the part of the applicant, and it was admitted that under these circumstances the applicant would have been entitled to recover the money from the Bank under the Common Law, but it was urged that the respondent was covered by sec. 119 of the Act. The relevant portion of this section reads as follows:—" . . . . . *bona fide* payment of any sum of money under the provisions of this Act or any other Law shall, to whomsoever made, discharge the Government, the Postmaster-General, and the officer by whom any such payment was made from any liability whatsover in respect of any such payment, notwithstanding any forgery, fraud, mistake, neglect, loss or delay which may have been committed or have occurred in connection therewith." The difficulty is created by the words " in respect of any such payment." It was assumed throughout the argument and indeed it admits of no question that the payment to the forger by Gregson was " a *bona fide* payment of a sum of money under the provisions of the Act," for the payment to the forger was made under sec. 59. The Administration is therefore discharged from any liability whatever in respect of such payment. But it was urged on behalf of the applicant that the liability which it is sought to enforce here is not in respect of the payment to the forger at all, payment to the wrong person does not concern the applicant; the liability which he seeks to enforce is a liability in respect of the deposit made by him. Now there is no doubt that the language used by the Legislature is unfortunate; the words are quite appropriate where the Administration act merely

as the agent of a person and the *dominium* in the money does not pass to it. In such a case any liability which it might be sought to enforce would be "in respect of payment" to the wrong person. I am not aware however of any case where the administration acts merely as agent, and to which the language used would therefore alone be strictly speaking applicable, and indeed Mr. *Lucas* could not give me any clear example to which the words of the section would apply. Unless therefore we are to hold that the provision is practically inoperative it must be taken to cover a case like the present. At the same time if sec. 119 had stood alone I confess I would have had considerable difficulty in holding that the applicant could not recover money to which he would clearly have been entitled under the Common Law. But we have to construe the Act as a whole, and sec. 59 says in express language that a depositor shall "subject to the provisions of Section 119" be entitled to the repayment of any sum which may be due to him. Although therefore this section is quite general in its terms and does not refer specifically to the Savings Bank we cannot have any doubt that it was the intention of the Legislature to apply it to deposits in the Savings Bank.

The other two points raised by the applicant are soon disposed of. For I cannot agree that the rights of the applicant continued to be governed by the Proclamation of 1902, or that at all events he is entitled to the amount of £84. Apart from the difficulty of apportioning the amounts withdrawn from time to time, the new Act must be taken to have governed the relationship of the parties after it came into operation. After the commencement of the Act, the deposits were clearly made under it, and if the applicant was willing to make his deposits under the new Act, he must in the absence of any evidence to the contrary be taken to have been satisfied that the new Act should in future govern their relationship also with regard to deposits made previously. Indeed the applicant gave his consent in writing, after the new Act came into force, that his deposits should be managed according to the rules and regulations of the Savings Bank.

The result of sec. 119 is that a depositor loses his money and has no redress against the Administration in any case where a *bona fide* payment has been made by the Post Office, no matter how negligent the officer may have been in the excution of his duties. The Legislature is of course entitled to insert any provision in the

law it pleases to protect the administration from liability, but the experience of the applicant who loses a large sum of money through no fault of his own will hardly serve to encourage others to deposit their hard earned savings in the Post Office Savings Bank.

The application must be dismissed. Although this is a hard case, the applicant must pay the costs.

Plaintiff's Attorneys: *Mulligan & Routledge*; Defendant's Attorneys: *Van Hulsteyn, Feltham & Ford.*

[G. H.]

HOLE v. HOLE.

1914. *February* 3. GREGOROWSKI, J.

Husband and Wife.—Divorce.—Malicious Desertion.—Restitution of conjugal rights outside jurisdiction.

A husband domiciled on the Witwatersrand was now residing in England, where he had deserted his wife. The latter, who was desirous of going to England, now applied for leave to enable the return to the order for restitution to be made there. *Held,* refusing the application, that only under special circumstances as *e.g.*, in *Rooth* v. *Rooth* (1911 T.P.D. 47) would the return to such an order be permitted outside the jurisdiction.

Application for leave to enable the return to an order for restitution of conjugal rights granted by this Court to be made in England.

Plaintiff who had lived in South Africa most of her life had obtained an order for restitution here on the ground of defendant's malicious desertion. Defendant was an Englishman, but was domiciled in Johannesburg. The desertion took place in England whilst the parties were on a trip abroad.

Plaintiff's reason for the application was that she had "urgent need to go to England." No other reason was stated.

J. T. Barry, for the plaintiff: In *Rooth* v. *Rooth* (1911, T.P.D. 47) a defendant was ordered to return to his wife "at Pretoria or elsewhere."

GREGOROWSKI, J.: The parties who were domiciled here were married in 1909. Whilst on a trip abroad defendant deserted plaintiff in England. The action for restitution was brought here,