It is proved by the evidence that certified cheques apparently in order and presented through the clearing house are paid as a matter of course and that it is not usual with bankers to turn to their customers' accounts on the day marked cheques are presented for payment through the clearing house to see whether there is anything wrong before paying them. It is however usual to check the returns with the customer's accounts the next day and then to enter the cheques paid the day before. In conformity with this practice the Bank of Hamilton paid the cheque on the 27th January without looking at Bauer's account in their ledger; but on the next day *i.e.* the 28th January they turned to it and at once discovered the fraud. The Bank of Hamilton immediately gave notice to the Imperial Bank of Canada and demanded repayment of 495 dollars being the amount paid by the Bank of Hamilton in respect of the cheque less the five dollars for which it was drawn and certified. This demand not having been complied with the present action was brought by the Bank of Hamilton to recover the 495 dollars. The action was defended on three grounds viz. 1st, because the Bank of Hamilton was negligent in marking the cheque with the blank in it; 2nd, because the Bank of Hamilton was negligent in paying the forged cheque without first turning to Bauer's account; 3rd, because notice was not given to the Imperial Bank of Canada on the 27th January, the day on which the cheque was paid.

The action was tried by McMahon J. without a jury and he gave judgment for the Plaintiffs *i.e.* the Bank of Hamilton. From this judgment the Imperial Bank of Canada appealed and the Court of Appeal affirmed the judgment of McMahon J. but Armour C.J. dissented. From this decision the Imperial Bank of Canada

again appealed to the Supreme Court which again affirmed the decision appealed from, Gwynne J. however dissenting. The present Appeal is from their decision.

The learned Counsel for the Appellants did not seriously rely upon the first of the three grounds of defence feeling it to be untenable after the decision in *Scholfield* v. *Earl of Londesborough* to which reference has already been made. They relied on the second and third grounds on which alone there was any difference of opinion in the Courts below.

As regards negligence in paying the cheque :— It cannot be denied that when the Bank of Hamilton paid the cheque on the 27th of January it had the means of ascertaining from its own books that the cheque had been altered. But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly* v. *Solari* 9 M. & W. 58 that money honestly paid by mistake of facts could be recovered back although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since and their Lordships consider it applicable to the present case. There was nothing on the face of the cheque to excite suspicion, nor to lead the clerk who cashed the cheque to take the unusual course of referring to Bauer's ledger account to see if all was right before cashing it. Moreover even if negligence in this respect could be imputed to the Bank of Hamilton such negligence did not induce the Imperial Bank of Canada to treat the cheque as good and to give Bauer credit for its amount. That had been done already. These were the reasons which induced the Courts below to decide against the second ground of defence and their Lordships have no hesitation in coming to the same conclusion.

There remains the third ground which is based upon a supposed hard and fast rule referred to by Armour C.J. who said :—

"In my opinion this case is governed by the rule laid down "in Cocks *v.* Masterman, 9 B. & C 902, where it said 'But "'we are all of opinion that the holder of a bill is entitled to "'know on the day when it becomes due whether it is an "'honoured or dishonoured bill, and that if he receives the "'money and is suffered to retain it during the whole of that "'day the parties who paid it cannot recover it back.'

"This rule, rigorous though it may be, has been adhered to "in England ever since. *See* Mather *v.* Lord Maidstone, "18 C.B. 273; Durrant *v.* Ecclesiastical Commissioners, "6 Q.B.D. 234; Leeds Bank *v.* Walker, 11 Q.B.D. 84; "London & River Plate Bank *v.* Liverpool Bank, L R. 1896, "1 Q.B. 7; Byles on Bills 16th Ed. 353.

"The application of this rule does not at all depend upon "whether the holder of the bill is or is not in fact prejudiced "by the delay, for the conclusion in law is that he may be "prejudiced and this is the reason of the rule.

"In this case the Defendants, the holders in due course of "the cheque, presented it to the Plaintiffs on the 27th January "through the Clearing House, and it being due on presentation, "the Defendants were entitled to know on that day whether "it was honoured or dishonoured.

"The Plaintiffs paid the cheque through the Clearing House "on that day, but this payment was, in my opinion, con-"ditional upon their right to dishonour the cheque during "that day, but not having dishonoured the cheque during "that day such payment became absolute, and the Defendants "having received the money for the cheque from the Plaintiffs, "and being suffered to retain it during the whole of that day, "the Plaintiffs cannot recover it back."

The prejudice which it is suggested that the Imperial Bank of Canada may have suffered from want of notice of dishonour on the 27th of January consists in their inability to take proceedings on that day against Bauer for the fraud which he had committed. But no one suggests that Bauer could have paid anything if he had then been proceeded against. The Bank was not deprived of any of its rights against him, nor was its position altered by reason of notice of the forgery not being given until the day after the bill was paid.

But quite apart from the fact that the Appellants were not in any way prejudiced by

want of notice on the day of payment it appears to their Lordships that the stringent rule referred to in the foregoing extract from the judgment of Armour C.J. does not really apply to this case. The cheque as drawn and certified *i.e.* for five dollars was never dishonoured and no question arises as to that. The cheque for the larger amount was a simple forgery; and Bauer, the drawer and forger, was not entitled to any notice of its dishonour by non-payment. There were no indorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has therefore no application. The rule laid down in *Cocks* v. *Masterman* and recently re-asserted in even wider language by Mathew J. in the *London River Plate Bank* v. *The Bank of Liverpool* has reference to negotiable instruments on the dishonour of which notice has to be given to some one viz. to some drawer or indorser who would be discharged from liability unless such notice were given in proper time. Their Lordships are not aware of any authority for applying so stringent a rule to any other cases. Assuming it to be as stringent as is alleged in such cases as those above described their Lordships are not prepared to extend it to other cases where notice of the mistake is given in reasonable time and no loss has been occasioned by the delay in giving it.

See The Bills of Exchange Act, 1882, s. 50 (2*c*).

Their Lordships therefore will humbly advise His Majesty to dismiss this Appeal and the Appellants must pay the costs.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ram Pershad Singh and others v. *Lakhpati Koer and another, from the High Court of Judicature at Fort William in Bengal; delivered the* 14*th November* 1902.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
SIR JOHN BONSER.

[*Delivered by Sir Andrew Scoble.*]

Umra Singh, Zemindar of Shaistapur in the Patna District of Behar, died in 1836, leaving four sons—Gur Sahai, Tundan, Bhikhari and Tukan—and a grandson, Kashi Singh (the son of a predeceased son named Ram Sahai), him surviving. These five persons, for some time after Umra Singh's death, are stated to have formed an undivided Hindu family, under the Mitakshara law. The question in the present Appeal is whether Tiluckdhari Singh, the son of Bhikhari, was at the time of his death separate in estate from the rest of the family; and the contest is between his nearest agnates, the Plaintiffs and Appellants, and his widows, the Respondents.

In order to determine this question it is necessary to examine not only the proceedings in this suit, but also those of a previous litigation which took place between the members of the family in the year 1868.

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At the time of the institution of this earlier suit, the family consisted of Tundan, Tukan and Kashi Singh already mentioned, Pokh Narain (son of Gur Sahai) and Tiluckdhari (son of Bhikhari). The Plaintiffs were Pokh Narain, Kashi Singh and Tiluckdhari; Tundan was the principal Defendant; and Tukan was made a Defendant *pro formâ*, as he was alleged to be acting in concert with Tundan. The plaint was "for recovery of possession, after adjudication "upon the rights and interest of the parties "respectively, in their shares" of the family property, which was described to be of two classes, partly inherited and partly acquired by purchase, by the joint family. After stating that the family had for many years lived jointly and in commensality, and in joint possession of the family property, and that as Tundan was "a shrewd man and had the management of "Court business, all the deeds and documents "were left in his custody," the plaint went on to aver that "as the ancestral house in Mouzah "Shaistapur was not sufficiently large to accom-"modate the family," Tundan built a house in Mouzah Nahusa with the joint funds, and in 1861, "with the consent of all the members of "the family, took up his abode in it" with his junior wife. This was the beginning of strife, for, although for some time after his removal to the new house, "possession was as before held, "and business was carried on jointly," Tundan ere long disputed the possession of one of the family properties with his kinsmen, and criminal proceedings were taken, the result of which was that all the parties had to enter into recognizances to keep the peace. From this time (the plaint proceeds) Tundan "on the strength of having "numerous deeds in his name and possession," commenced the eviction of the other members of the family from the purchased estates, and

disturbed them in regard to their ownership of the inherited property. The plaint finally averred that "since the property in suit was acquired by "all the parties at the time of joint tenancy and "commensality of the partners, every one of "them is entitled to an equal share according to "the provisions of the *Shastras*." The prayer of the plaint was that "possession over the "disputed property" might be decreed to the Plaintiffs.

In his written statement, Tundan alleged that, after the death of Umra Singh in 1836, "the "four sons personally and Kashi Singh, through "his mother and guardian, divided the ancestral "property among themselves, and each took "possession of his respective share," and broke up commensality; and he claimed the property in his possession as being either his share of the ancestral estate or acquired by himself personally after the partition in 1836. Tukan, on the other hand, in his written statement, supported the view of the Plaintiffs, alleging that, up to 1860, he, the Plaintiffs and Tundan, "had every-"thing, as before, in common for all purposes"; that in 1861, he, "at the same time with the "Plaintiffs, was ousted from some of his share"; and that "upon the same right that the Plaintiffs "have in the property in suit," he was entitled to recover his share from Tundan.

The case came on for settlement of issues, in the presence of the pleaders of both parties, and the following question was put to the Plaintiffs' pleaders by the Judge. "How long is it since "your clients separated, and discontinued com-"mensality?" To which the answer was, "The "separation took place since 26th Magh, "Fasli 1268, the time when Tundan took up "his residence in another mouzah, and my "clients were thrown out of possession on the "day the recognizance was taken, *i.e.*, 3rd June "1861."

The following were the first and second issues of fact settled :—

"1. When did the contending parties, the "heirs of the common ancestor Umra "Singh, separate from board, and divide "the ancestral estate ?

"2. Whether the property in contention, save "that admitted by the Defendant Tundan, "was acquired from the joint and ancestral "funds of all the coparceners, while the "heirs of Umra Singh had joint interest "and lived in commensality, or subse- "quent to the division of the family, "from the funds of the Defendant "Tundan."

The suit was tried before the Judge of the District Court of Patna, who, on the 15th September 1868, delivered a judgment dealing mainly with the evidence in support of Tundan's allegation of a partition in 1836, which he found was not proved. "Consequently," he said, "I must decide the issues of law, as well "as the first two issues of fact, in favour of "the Plaintiffs"; and the terms of his decree were "that the Plaintiffs shall be put in pos- "session of their shares each respectively in the "three-fifths of the properties from Nos. 1 to "35, and 38, 47, 51 and 53, together with "mesne profits, the amount of which will be "determined in the execution department, and "also get a decree for the three-fifths of the "right alleged by them in respect of the "properties from Nos. 40 to 46, 48, 50 and 54."

This decree was appealed against to the High Court at Calcutta, and eventually to Her late Majesty in Council, and both Appeals were dismissed. But, in the interval between the decision of the High Court and the hearing of the Appeal in England, an application was made to the High Court for a review on the ground that, "assuming "the decision of that Court to be correct, the facts

" proved showed that a large portion of these pro-
" perties had been acquired by successful purchases
" of property sold for arrears of revenue in execu-
" tion of decree and otherwise by Tundan Singh,
" who not only manifested great judgment and
" skill in making the purchases, but seems to have
" enjoyed some peculiar means of obtaining infor-
" mation and other advantages in the purchase of
" property in consequence of his connection with
" * * *, wealthy bankers at Patna "; and that under these circumstances, according to Hindu law, he was entitled to a double share. The review was granted, and the Court ordered that " should their " decision on the main question be affirmed by Her " Majesty in Council, a further enquiry would be " necessary to determine the shares of the several " properties in dispute to which the Plaintiffs and " Tundan would be respectively entitled." It does not clearly appear whether this further enquiry was ever held, but the decision of the High Court was confirmed by Her late Majesty in Council on the 9th of June 1874, the only point argued before their Lordships having been the proper construction to be put upon the 21st Section of Act 1 of 1845.

It appears to their Lordships, upon a careful study of these proceedings, that notwithstanding the imperfect form of the decree a separation of the joint family in 1861 must be held to be established. The contest before the District Judge was not whether the family was still joint, but when did they separate. The two dates named by the parties were 1836 and 1861, and it being found that a separation in 1836 was not proved, it seems to have been taken as a necessary inference that the separation took place in 1861. Otherwise it is difficult to understand the meaning of the Judge's decision of the first two issues of fact in favour of the Plaintiffs. The first issue

being "when did the parties separate from board, "and divide the ancestral estate," the finding in favour of the Plaintiffs upon this issue is unmeaning without reference to the statement made by their pleaders when the issue was framed, namely, that the separation took place in 1861. And the application for a review of the decree of the High Court clearly indicates that this was the light in which that decree was regarded by Tundan, whose claim for a larger share could not have been satisfied unless the shares of all the coparceners had been ascertained under a scheme for the partition of the family estate at the alternative date to that suggested by himself.

It was contended on behalf of the Appellants in the present suit that although the decree in the suit of 1868 may have effected a separation *quoad* Tundan and Tukan, it left the Plaintiffs united *inter se;* and that this might have been the legal effect of the decree is undeniable. But here again the conduct of the parties must be looked at, in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners. The proceedings in the suit now under appeal afford the answer to this question.

In the interval between the institution of the suit of 1868, and the death of Tiluckdhari in 1891, which gave rise to the present suit, several changes had occurred in the family. Kashi Singh died in 1868, soon after the filing of the plaint, leaving two sons named Ram Pershad and Bishun Dyal; and Tundan died, without male issue, in 1876. Tukan brought a suit in 1869, in which he recovered his share in the family property, and made and registered a will in 1887, by which he left his share of the estate

to the heirs of his brothers Gur Sahai and Ram Sahai, to the exclusion of the heirs of his nephew Tiluckdhari, who had no male issue.

Tiluckdhari died on the 15th of November 1891, leaving two widows and four daughters him surviving. The widows thereupon obtained a certificate under Act VII. of 1889, authorising them to collect certain debts due to their deceased husband, and also procured the registration of their own names in the Collector's books in respect of the landed property which had previously stood in his name. These attempts to establish their title were strenuously but ineffectually resisted by the male members of the family, and led to the institution of the suit now under appeal in 1893. The plaint recited the history of the family and of the previous litigation, and prayed for the recovery of possession from the widows of the interest of Tiluckdhari in the joint properties on the ground that at the date of his death he and the Plaintiffs constituted an undivided Hindu family. The Defendants by their written statement alleged a separation of the family in 1861, and that the property left by their husband was his separate estate.

The material issues settled by the Subordinate Judge of Patna, by whom the case was originally tried, were these:—

"3. Whether Babu Tiluckdhari Singh was a "member of a joint Mitakshara family with the "Plaintiffs at the time of his death?

"4. Whether there was separation of the joint "family as described in paragraph 3 of the written "statements of the Defendants in F. 1268 "(A.D. 1861). If not, whether the suit that was "instituted by Pokh Narain and others in 1868 "against Tundan Singh and the decree passed "thereon had the effect in law of creating a "partition between the several members of the

" family ? If so, whether there was subsequent " re-union as alleged by the Plaintiffs ? "

The Subordinate Judge came to the conclusion that " on the whole " the defence of partition of ancestral property between Tiluckdhari, Pokh Narain and Ram Pershad either in 1861, or after delivery of possession under the decree in the suit of 1868, was not established either by satisfactory oral evidence or by documentary testimony ; that " the theories of legal severance " and of re-union set up respectively by the " Defendants and Plaintiffs are legal fictions " concocted on a mistaken view of certain " precedents not at all in point to the facts of " this case ; " and that " Tiluckdhari, at the time " of his death was separate from Pokh Narain, " Ram Pershad and Bishun Dyal in mess, worship " and residence, but not in ancestral property, " though he acquired on his (own) account " certain separate property " ; and he passed a a decree in conformity with these findings.

The High Court agreed with the Subordinate Judge in holding that Tiluckdhari, at the time of his death, was separate in food, worship and residence from the Plaintiffs, but differed from him as to there having been no partition of estate. Upon a careful and exhaustive review of the evidence, the learned Judges were of opinion that there was a separation in 1861, when the shares of the parties must have been ascertained, and that there was documentary evidence, dating as far back as 1864, in which these shares were specified in connection with purchases of property by various members of the family at dates anterior to the litigation of 1868. They accordingly dismissed the Plaintiffs' suit with costs.

The evidence on which this decision was based was, in great part, discredited by the Subordinate Judge; and, in the argument before their

Lordships, great stress was laid upon this circumstance. When different conclusions as to matters of fact are formed by the Courts below, there is always more or less ground for damaging criticism of the evidence of witnesses and the genuineness of documents. But in this case the District Judge and the High Court agree that as regards residence, food and worship, the family had long ceased to be joint—the only point of difference being as to partition of ancestral property. Upon this question their Lordships have come to the same conclusion as the High Court. As has already been pointed out, the result of the litigation of 1868 was to ascertain the shares of all parties, and although there was, from the nature of the property, no partition by metes and bounds, there was undoubtedly a numerical division, by which the proportion of each partner in the holding was fixed. This is conclusively shown by the petitions for registration under Bengal Act VII. of 1876, of which a great number are on the record. The petitioners in each case are Pokh Narain, Tiluckdhari, and Ram Pershad and Bishun Dyal; and the petitions are all in the same form and bear the same date, 20th April 1877. Under the heading "Extent of Applicants' "Interest," the share of each petitioner is separately stated; as thus, for example, in Exhibit OO4 relating to Mouzah Nehusa—

	As.	d.
Pokh Narain Singh - -	3	4
Tiluckdhari Singh - -	3	4
Ram Pershad Singh and Bishun Dyal Singh -	3	4

and the root of the title is thus described :—

"Your petitioners, the applicants, were in "possession of the share in this mouzah jointly "with Babu Tundan Singh, but owing to

"disputes your petitioners, the applicants, were "dispossessed. Thereupon your petitioners insti- "tuted a suit for recovery of three sahams out "of five sahams, and your petitioners got posses- "sion therein under a decree and delivery of "possession given by the Court." These petitions all bear the signatures of the parties, and clearly indicate individual, not joint, ownership, under the final decree in the suit of 1868.

In order to get rid of the effect of these petitions, it was suggested that the shares of the parties were entered at the direction of the registering officer with a view to the imposition of additional stamp duty, but this suggestion is displaced by the terms of the Act, which requires (*Sec.* 8 *c.*) that the "names and addresses of the "proprietors, managers or mortgagees of the "estate, with the character and extent of the "interest of each proprietor, manager and "mortgagee" must be entered on the register; and the petitions, therefore, merely comply with the requirements of the Act.

The only evidence of re-union subsequent to the clear acknowledgment of separate ownership contained in these petitions is to be found in a document bearing date the 17th September 1891, two months before Tiluckdhari's death, and purporting to be signed by him, in which an absolutely gratuitous statement is made that the family was joint. The High Court considered that this was a fabricated document, and in this opinion their Lordships concur. It was supported by very questionable evidence, and is entirely inconsistent with the general facts of the case.

For the reasons above stated their Lordships have come to the conclusion that Tiluckdhari Singh at the time of his death was not a member of an

undivided Hindu family, and they will humbly advise His Majesty that the Decree of the High Court ought to be confirmed and this Appeal dismissed. The Appellants must pay the Respondents' costs of this Appeal.