

## MILES v. HENDERSON.

1906.

Nov. 20, 21.

*Banks and Bank Holidays Act, 1898 No. 9, ss. 9, 10—City Bank Act, 27 Vic.—Registration of names of proprietors—Bank incorporated by Act with limited liability.*

1907.

February 15.

The provisions of s. 9 of 1898 No. 9 have no application to the City Bank, a bank incorporated by Act of Parliament with limited liability.

The C.J.  
Owen J.  
and  
Simpson J.

1898 No. 9, ss. 9, 13—*Neglect by manager of bank to cause lists to be recorded—Delegation of duty to clerk—Liability of manager in the absence of personal neglect or default.*

Where the manager of a bank delegates the duty of recording the list of proprietors of the bank to a clerk, under s. 9 of 1898 No. 9, and the list filed is incomplete, such manager is not liable to a penalty for omitting or neglecting to cause such list to be recorded, in the absence of evidence of personal neglect or default on his part.

## NEW TRIAL MOTION.

This was an action brought by a common informer against the manager of the City Bank to recover 200*l.* by reason of the omission and neglect of the defendant to cause a true and correct list of the names of all the persons who in 1895 and 1896 were existing proprietors or members of such bank, with their respective places of abode and description, to be recorded on oath in the office of the Registrar-General, as required by s. 9 of the Banks and Bank Holidays Act, 1898 No. 9, within 30 days after the first day of January in each of the said years.

The City Bank was incorporated under that name by an Act of Parliament, 27 Vic., assented to on February 9th, 1864. By this Act, s. 27, the liabilities of the shareholders of the bank are limited to twice the amount of their subscribed shares.

At the trial it appeared that lists were recorded for the years in question by a clerk in the bank holding the position of accountant. There was no evidence that this clerk was not competent to discharge this duty, but the lists were incomplete by reason of the omission to insert the full address and description of certain of the proprietors and members of the bank. At the

**1906.**  
**MILES**  
**v.**  
**HENDERSON.**

trial of the action before *Pring J.*, the plaintiff was non-suited, on the ground that he had failed to prove any omission or neglect on the part of the defendant. The plaintiff obtained a rule to set aside the non-suit.

*Curl Lewis*, for the plaintiff, in support of the rule. The City Bank comes under the provisions of the Banks and Bank Holidays Act, 1898 No. 9. By 4 Vic. No. 13 provision is made for the publication of a statement showing the liabilities and assets of banks in New South Wales, and for recording lists of names of the proprietors. By s. 12 the Act applies to every company, firm, or individual, engaged in the ordinary business of banking by receiving deposits and issuing bills or notes. By s. 8 every person whose name is recorded as a proprietor shall be liable to be sued as such, but no proprietor of any banking firm or company established by Royal charter is to be liable except so far as the provisions of the charter make him liable. By 5 Vic. No. 24 this limitation of liability is extended to proprietors of banks established by letters patent. By 42 Vic. No. 21, passed in 1879, the provisions of 4 Vic. No. 13, as amended by 5 Vic. No. 24, are made applicable to every company, firm, and association receiving money on deposit and trading under limited liability, although such company, firm, or association do not issue bills or notes payable to bearer at sight or on demand. These provisions are now consolidated in 1898 No. 9. The City Bank was incorporated by the Act 27 Vic., and by s. 27 the liability of the shareholders is limited. It will be argued that as s. 10 of 1898 No. 9, which corresponds to s. 8 of 4 Vic. No. 13, provides that every person whose name is recorded as a proprietor is liable to be sued as such, this section does not apply to the City Bank, because by the City Bank Act the liability of the shareholders is limited, and that s. 9 is ancillary to s. 10, and is, therefore, also inapplicable. But this disregards the clear provisions of the Act, which are made applicable to every bank. Further, s. 10 does not impose any additional liability on anybody. It says that members or proprietors are "liable to be sued as such." It does not render them liable for the whole of the debts of the bank if apart from the Act they

are not so liable. Further, it is inapplicable to the members of a corporation who cannot be sued as individuals, and the reference in s. 10 (b) to banks established by royal charter or letters patent shows that s. 9 applies to every kind of bank. Even assuming that the words "liable to be sued as such" would render the member or proprietor liable for the whole of the debts of the bank, the suggested absurdity is not escaped by saying it does not apply to a company established under a private Act with limited liability, because by s. 3 (b) bank includes any company trading under limited liability. The difficulty is avoided if s. 10 is regarded as merely an evidence section. If a liability already existed it was not necessary to impose it, and if it did not exist the section was not intended to create one. No reason can be suggested why banks established under a private Act should be exempt from the provisions of the Act if banks trading under the Companies Act are bound by it. The object of requiring registration of the names of proprietors and members is that the public should know who they are dealing with. It is not intended merely for the purpose of facilitating proceedings under s. 10; so that, even if it were held that s. 10 is not applicable to the City Bank, this would not exempt the bank from compliance with s. 9. There is no ambiguity either in the original or amending Act, and I rely on the express provisions of the Act.

As to the necessity of proving personal neglect on the part of the defendant, s. 13 provides that if anything required to be done is not done, the proof that it was not practicable shall lie upon the party required to do it, and that no excuse shall be allowed unless it is shown that the thing required to be done was done as soon as practicable. The Act imposes a duty upon the manager, and he cannot avoid a statutory obligation by delegating his duty to a clerk. If personal neglect must be proved, it would be impossible to prove a case against A, B, C or D if no list were filed. Where there is a statutory duty to do an act the omission to do it is *mens rea*. The manager cannot be absolved because some other person has filed a list which is not in accordance with the Act: *Gibson v. Barton* (L.R. 10 Q.B. 329); *Edmonds v. Foster* (33 L. T. 690).

1906.  
MILES  
v.  
HENDERSON.

**1906.****MILES**  
**v.**  
**HENDERSON.**

In the latter case the words were "knowingly and wilfully." It is, therefore, a stronger case. *Dickenson v. Fletcher* (L.R. 9 C.P. 1) is distinguishable. There the rules expressly provided that the lamps should be examined by a person duly authorised for that purpose. The duty was, therefore, primarily the duty of the agent contemplated by the rules. It was obviously impossible that the owner himself should examine the lamps, and it was held that he was not liable to a penalty if he appointed a competent agent. The judgment shows that if there had been a rule in the terms of s. 13 of 1898 No. 9 the defendant would have been held liable. Further, the Act 35 and 36 Vic. c. 76 provided that the owner might prove that he had taken all reasonable means to prevent a contravention of the Act. In this case the obligation of filing correct lists is expressly imposed upon the manager. No doubt he is not bound to do it personally, but if he delegates his duty to a clerk he is responsible for the manner in which it is done.

*C. B. Stephen*, K.C., and *H. M. Stephen*, for the defendant. In a penal action by a common informer the offence must be clearly proved, and every presumption in favour of the defendant must be rebutted: *Reid v. Wilson* ([1895] 1 Q.B. 315). The Act, 1898 No. 9, does not apply to the City Bank. The original Act, 4 Vic. No. 13, only intended to deal with voluntary partnerships. The object of s. 8 was to obviate the difficulty of finding the right person to sue. The Act has no application to corporate bodies where there is no individual liability of members. The City Bank Act incorporates portion of 4 Vic. No. 13. This shows the legislature did not consider that the 4 Vic. No. 13 applied to the City Bank. In the case of a private Act dealing with a new body it is reasonable to suppose that the Act contains a complete code of the liabilities and obligations of the body it creates. When the 4 Vic. No. 13 was passed the existence of limited companies was not contemplated. The Act 42 Vic. No. 21 dealt with voluntary associations coming under the Companies Act, and not with corporate bodies created

by Act of Parliament. The proviso to s. 10 of 1898 No. 9 shows that the section contemplates an action for debt. Where a particular body is created by statute, its sole rights and obligations, in the absence of express enactment or clear implication, will be those imposed upon it by the statute: *Surrey Commercial Dock Co. v. Bermondsey Corporation* ([1904] 1 Q.B. 474 at p. 483). Secondly, the defendant is not liable without evidence of personal neglect or default. The list has to be filed by one of a number of persons named. If no list is filed it does not follow that all these persons are liable. It is only the person who "omits or neglects" who is liable. Where the evidence shows that a list was filed by the clerk, and that he was the person charged with this duty, the mere fact that the list is incomplete does not make the manager liable. Otherwise, if a single name were omitted in copying the list every person employed in the bank, except the messengers, would be liable. This is work which must be delegated to an officer. Some personal default on part of the person sued must be shown. In *Gibson v. Barton* (L.R. 10 Q.B. 329), and *Edmonds v. Foster* (33 L.T. 690) no list was sent in at all. In the present case the duty is imposed upon one of a class, but in the cases cited the defendant was the only person who could do the act required. If the plaintiff is right, proof that a list is not recorded would by itself make all the persons mentioned liable. *Dickenson v. Fletcher* (L.R. 9 C.P. 1) is applicable and should be followed. [They also referred to *R. v. Tolson* (23 Q.B.D. 168); *Bank of New South Wales v. Piper* ([1897] A.C. 383); *Chisholm v. Doulton* (22 Q.B.D. 736)].

*Curlewis*, in reply, referred to *Hardcastle on Statutes*, 2nd ed. 509; *Maxwell on Statutes*, 3rd ed. 367.

*Cur. adv. vult.*

February 15. The judgment of the Court was delivered by,

1906.

February 15.

THE CHIEF JUSTICE. This is an action brought by a common informer against the manager of the City Bank to recover the

MILES

v.  
HENDERSON.

**1907.** sum of 200*l.* for having omitted or neglected within 30 days after the first day of January in the years 1895 and 1896 to cause a true and correct list of the names of all the persons who then were existing proprietors or members of such bank, with their respective places of abode and description, to be recorded on oath in the office of the Registrar-General. These proceedings were taken under the provisions of the Act 1898 No. 9, s. 9 (2).

**MILES**  
**v.**  
**HENDERSON.**  
  
**The C.J.**

To this action the defendant pleaded not guilty, and the issue thereon joined came on for trial before Mr. Justice *Pring*, who non-suited the plaintiff.

The City Bank was under that name incorporated by Act of Parliament, 27 Vic., assented to on the 9th February, 1864: See *Tarleton's Private Acts*, p. 286. The liability of the City Bank is limited by s. 27 of the Act, which is as follows:—  
“In the event of the assets of the said company being insufficient to meet its engagements then and in that case the shareholders shall be responsible to the extent of twice the amount of their subscribed shares only, that is to say, for the amount subscribed and for a further additional amount equal thereto.”

The principal matter for our consideration is whether s. 9 of the Act 1898 No. 9 has any reference to an incorporated bank with limited liability, such as the City Bank. The history of parts one and two of the Act 1898 No. 9 (which is a consolidated Act) is as follows:—An Act was passed in the year 1840, 4 Vic. No. 13, to provide for the periodical publication of the liabilities and assets of banks in New South Wales and the registration of the names of the proprietors thereof. Parts one and two of the Act 1898 No. 9 are a reproduction of 4 Vic. No. 13 and 5 Vic. No. 24. At this time I am not aware that any company was carrying on the business of banking under an Act of Parliament incorporating the bank and providing for limited liability. Banks were, however, carrying on business under charters and letters patent, and in some instances

these charters provided for a limit of liability. The Act 5 Vic. No. 24 was passed in order that letters patent should be placed upon the same footing as charters. This Act provided that no individual proprietor or member of any banking company or firm established by letters patent should be liable for any debts incurred by such company or firm except so far as he might be liable under the provisions of such letters patent. The Act was passed with the obvious object of freeing members of banks trading under letters patent and with limited liability from the operation of s. 8 of 4 Vic. No. 13. That section had already provided for banks trading under charters in the same manner. There is no similar provision affecting banks which are incorporated under Act of Parliament.

It is quite manifest that the sole object of requiring registration of the name, place of abode, and description of the proprietors or members of the bank was to facilitate any proceedings which might be taken under s. 8 of 4 Vic. No. 13 and of s. 10 of 1898 No. 9. That section is in the following words:—"Every person whose name is so recorded as aforesaid shall be taken to be a member or proprietor of the banking company or firm in which his name is so recorded as aforesaid, and shall be liable to be sued as such until a new list of the names of the members or proprietors of such bank shall be recorded as aforesaid, or until he has given notice in the *Gazette* of his retirement from such bank. Provided that nothing herein contained shall be deemed (a) to absolve any person from liability on account of any debts incurred by any such bank during the time such person remained a proprietor or member thereof."

Now, in the case of a bank which is incorporated, the debts of the bank are the debts of the corporation, and for these debts the units forming the corporation, the shareholders, are not liable; and although it is true that in the event of the assets of the bank being insufficient to meet its engagements a certain responsibility is imposed upon the shareholders, yet this is a liability to the bank or to its liquidators, and not directly to the creditors of

1907.

MILES  
v.  
HENDERSON.

The C.J.

**1907.** the bank. If then the shareholders in this bank cannot be sued  
**MILES** by the bank creditors, there is no reason why there should be a  
**v.** list of the shareholders with their place of abode and description,  
**HENDERSON.** and the maxim *cessante ratione legis cessat ipsa lex* applies.  
 The C.J.

Further, should s. 9 of 1898 No. 9 apply to a bank incorporated by Act of Parliament, this strange result will follow, that the shareholders in such a bank may be sued at any time for the debts of the bank. Nothing can absolve them from this liability no matter what limitation may be placed by the statute upon their liability, and that, although the shareholders or members in banks established by royal charter or letters patent are only liable for debts so far as they are liable under the provisions of the charter or letters patent, yet the shareholders in the bank incorporated by Act of Parliament are liable to the full amount, there being no such exemption in their favour as that contained in s. 10 (b) of 1898 No. 9.

The above considerations establish to our minds that a bank incorporated by Act of Parliament does not fall within the purview of division 2 of part 2 of the Act 1898 No. 9.

It was further urged, and in our opinion with effect, that s. 21 of the City Bank Act provides that periodical accounts or statements, and general abstracts of the assets and liabilities of the bank shall be prepared, made out and published, according to the provisions of ss. 1, 2 and 3 of 4 Vic No. 13, which are re-enacted by ss. 4, 5 and 6 of 1898 No. 9; but in the City Bank Act there is no allusion to the registration required by ss. 5, 6, 7 and 8 of 4 Vic. No. 13, and now by division 2 of part 2 of the Act 1898 No. 9. Accordingly the maxim, *expressio unius est exclusio alterius*, here applies.

For these reasons we are of opinion that the City Bank, being incorporated by Act of Parliament, is not called upon to comply with the provisions of s. 9 of 1898 No. 9.

Independently of the foregoing, and assuming the bank is bound to comply with s. 9 of the Act, then in order that the defendant may be made liable there should have been some



evidence of neglect or omission on his part; but there is no such evidence.

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1907.

MILES  
v.  
HENDERSON.

The C.J.

The lists of 1895 and 1896 were placed in evidence, and on looking at them they appear to have been registered and verified by a clerk of the bank holding the position of accountant. We may assume that this clerk was directed to register the lists in question. If, then, there be any omission or neglect, it would be the omission or neglect of the clerk, unless indeed it could be shown that he was not a competent person to have been selected to discharge this duty, of which there was no evidence.

In our opinion the defendant discharged his duty so soon as a competent person was employed to carry out the duty imposed by the Act: see *Dickenson v. Fletcher* (L.R. 9 C.P. 1), where the owner of a coal mine, having employed a competent person to carry out the provisions of a regulation made under the Mines Regulations Act, 23 and 24 Vic. cap. 151, respecting the locking of safety-lamps before delivery to the miners, and the person so appointed having failed in the discharge of his duty, it was held that in the absence of any personal default on the part of the owner, he was not liable to a penalty in respect of the act of the person so employed by him. At page 8 *Denman J.* says: "It would be straining the words of this Act, as it seems to me, far beyond the limits which the general rules of law and the decisions have laid down in the case of penal enactments to say that under the mere word "neglect" a person is to be liable to penal consequences for what was wholly the default of someone in his employ, and not in any way his fault." So in *Baker v. Carter* (3 Exch. D. 132), where the Coal Mines Regulations Act, 35 and 36 Vic., cap. 76, enacts that in the event of any contravention of or non-compliance with any of the general rules by any person whomsoever, the owner, agent and manager shall each be guilty of an offence against the Act unless he proves that he had taken all reasonable means of publishing and to the best of his power enforcing the said rules, the owner had appointed a competent manager in accordance with the provisions

**1907.** of the Act, and it was held he had by such appointment taken  
**MILES** all reasonable means to see that the rules were enforced. This  
**v.**  
**HENDERSON.** case was followed in *Stokes v. Mitcheson* ([1902] 1 K.B. 857).

**The C.J.** We are accordingly of opinion that there was no evidence of  
any omission or neglect on the part of the defendant in the  
registration of the lists. The non-suit was accordingly correct,  
and this rule should be discharged with costs.

*Rule discharged.*

Solicitors : *M. E. Price ; Lumsdaine & Leibius.*