CASEBOOK

ON THE LAW OF BANKING & CHEQUES IN CEYLON

W.S. WEERASOORIA

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By

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CASEBOOK

ON THE LAW OF BANKING AND CHEQUES IN CEYLON

A Digest of Case Law on Banking and Cheques containing Cases decided from the earliest times by the Supreme Court of Ceylon and Her Majesty the Queen in the Privy Council on appeal from the Supreme Court of Ceylon together with a compilation of the Statute Law and Legislation relating to Banking and Cheques in Ceylon.

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FOREWORD

The extent and scope of the decisions of our Courts on the law relating to banking and cheques is often only insufficiently realised. The dominance of English decisions and text-books in this field is no doubt the cause of this tendency, but in regard to matters which have already formed the subject of decisions in this country, the importance of our own decisions cannot be sufficiently stressed.

Mr. Weerasooria's work will supply a most useful corrective to the tendency to overlook our own decisions, for he has taken great pains to collect together and arrange these decisions in a systematic and easily accessible way. The average practitioner glancing through this book would be surprised at the number of important decisions which he has been able to collect. The short summaries and notes which accompany these judgments constitute a feature which adds to the usefulness of this work.

To the student and to the practitioner the work supplies a long-felt need, and will be extremely welcome. To the non-lawyer, and especially to the banker whose work lies in these fields, the book will be no less useful as a source from which he can inform himself of the decisions of our Courts in an easy and digested form. I would congratulate Mr. Weerasooria on his effort in a new field hitherto left unexplored by the legal writer in this country, and would express the hope that his close studies and researches will bear more fruit in the form of further useful contributions to our literature in this department of the law.

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2 - 9 - 1970.

PREFACE

The law relating to Banking and Cheques in Ceylon is of comparatively recent origin. It does not extend beyond 1852, in which year was enacted the Civil Law Ordinance which introduced into the Island, *inter alia*, the English Law governing negotiable instruments like bills of exchange, promissory notes and *cheques*.

The origin of banking itself in the Island can also be traced to the post British era. Even during the early British period (1796-1841) there were no banks in the Island. It was the rise of the Coffee Plantations that gave rise to the establishment of banks in the Island. The first commercial bank established in Ceylon was the Bank of Ceylon, 1841. It, however, failed six years after its incorporation as a result of the Island's first Coffee crisis in 1847.

Prior to the advent of orthodox banking on Western lines the only " bankers " in the Island were the Nattukottai Chettiars who had migrated to Ceylon and other parts of South East Asia from Chettinad in South India. The Chettiars discounted the excess sterling bills for rupee bills to pay for the imports to the Island from India. Ceylon's exchange problem in the early British period, unlike what it is today, was that of meeting her trade deficit with India on account of imports from the mainland out of her receipt of excess sterling earned from her exports to England and other Western countries.

However, notwithstanding the failure of her first commercial bank, the Bank of Ceylon in 1847, the economy improved considerably and there was a slow but steady development of banking in the Island. Today, in 1970, a period of almost one hundred and twenty-five years since the establishment of the first

bank in Ceylon, there are eleven commercial banks. These eleven banks may be classified into three distinct categories :

(i) The British Exchange banks of which there are four,
(ii) Three Indian and one Pakistani bank, and
(iii) Four indigenous banks.

The total number of banking offices in the country amount to one hundred and fifty-five, and of them one hundred and thirty-nine belong to the Bank of Ceylon and the People's Bank. The majority of the banks in Ceylon have now done away with the *shroff* system and with the opening up of branches in rural areas banking has been brought to the people and is no longer confined to the golf links or to the tennis clubs. But even today, the population per bank is 106,000 to one.

The law relating to banking in Ceylon was also slow to develop. Ceylon is one of the few countries in South East Asia without a General Banking Act applicable to all banks. The legal aspect of banking in the Island is at present contained in the common law of banking which for Ceylon is the English law, a few statutory enactments scattered in different chapters of Ceylon's statute book and a few judicial decisions or " case-law " interpreting the law on the subject.

The English law of banks and banking was formally introduced into the Island by Ordinance No. 22 of 1866. However, it is important to bear in mind that although the English law of banking was introduced into Ceylon by statute only in 1866, it had been the English law that had been virtually administered in banking matters in the Island even during the previous years although it had not been formally declared in force. This Ordinance of 1866 is, however, no longer in our statute book. Its place has been taken and its provisions are now found in the Civil Law Ordinance (Cap. 8).

Like banking, the cheque or the cheque system was also an introduction of the British. It came in and developed as an adjunct of English Commercial law which was introduced into the Island as a legislative

measure by the Civil Law Ordinance No. 5 of 1852. "No mood of experimentation underlay the decision to introduce the English law in 1852 but rather the urgent and growing need to provide a stable base for a burgeoning economy."

"Three-quarter of a century later in 1927, there was passed the Bills of Exchange Ordinance No. 25 of 1927 described by the legislature as an Ordinance to declare the law relating to bills of exchange, promissory notes, cheques and banker's drafts."

"The formal promulgation of the Bills of Exchange Ordinance in 1927 marked the introduction of no new legislation. Indeed, the statement of objects and reasons for the introduction of this legislation states somewhat curiously but most significantly that 'in view of the fact that many of the District Judges are not provided with the English Acts it is considered desirable that the law should be reproduced in a local enactment.' This observation seems to emphasise that what the legislature was doing in 1927 was not to introduce fresh matter into our statute book or to alter the law then prevalent but merely to declare the law that had already found place therein."[1]

Containing as it did a series of specific statutory provisions in regard to such instruments the Bills of Exchange Ordinance obviated the need to retain on the statute books the general provisions relating to negotiable instruments as contained in the Civil Law Ordinance No. 5 of 1852. Accordingly, the provision in Ordinance No. 5 of 1852 relating to negotiable instruments was repealed and the law on this subject in Ceylon is today governed by the Bills of Exchange Ordinance No. 25 of 1927 and the rules of the English common law including the law merchant.

Of all the negotiable instruments recognised and used in Ceylon today cheques and promissory notes are the most popular. The Clearing House figures of the Central Bank indicate that more and more people in Ceylon are resorting to the use of cheques in the payment and collection of monies in day to day mercantile transactions. If disputes relating to the

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1. *Per* Weeramantry, J. in *De Costa* v. *Bank of Ceylon* (1969) 72 N.L.R. 457.

ownership or possession of *jak* trees were common in the Land Courts in the earlier days, actions on dishonoured cheques are in vogue among the " money cases " today.

Although the banking system and the use of cheques have assumed a considerable importance in the mercantile world of the Island, our law relating to this subject does not appear to be all that clear and well settled. Reported cases from the earliest times indicate that many a case where the cause of action was founded on a cheque has been lost on account of defective pleadings and as a result of a lack of appreciation of the correct law and procedure applicable in actions relating to banking and cheques.

Special mention may be made of the rules of the law merchant now incorporated in our Bills of Exchange Ordinance No. 25 of 1927, relating to *presentment for payment* and *notice of dishonour* when suing on dishonoured negotiable instruments like cheques. As **Mr. Justice Weeramantry** observed in the recent case of *Abdul Cader v. Abdul Cader* (1969) 77 C.L.W. 79 at p. 80.

" It is somewhat remarkable that although the importance of these matters as pre-requisite to the success of a claim, in such instances as they are required, has been stressed time and again by our Courts for a century and a half, and although the importance of pleading such facts has likewise been stressed, we all too often come upon pleadings ignoring these requisites and trials conducted as though they did not exist."

These remarks were made in 1969. But to go back into the pages of our case-law even as far back as the year 1884 the Supreme Court had lamented on the ignorance of lawyers who drafted pleadings in actions based on negotiable instruments like cheques. In the case of *Weerappa Chetty v. de Silva* (1884) 6 S.C.C. at p. 82, **Chief Justice Burnside,** in holding that the plaint was defective and disclosed no cause of action, observed :

" I cannot refrain from expressing my surprise that a libel like this should bear the signature of a proctor. It indicates a deplorable want of knowledge

of the principles or pleadings which I cannot help thinking has, in the present case, resulted in the defeat of the plaintiff's claim . . . The defects in the plaint are not even supplied by the evidence . . . . This, an every day transaction upon a cheque or note has been distorted out of its natural shape and instead of there being a regular count by a holder against an indorser of a cheque, which the merest professional tyro should be able to draft, there is this distorted pleading about false representation."

Case law is, to borrow a metaphor, forged on the anvil of reality and its study reveals to the reader the creation and the working of the law in practice. In themselves the cases tell their own tale and many of them also make interesting reading. A compilation of the reported case law and the statute law relating to the law of banking and cheques in the Island will be of assistance to bankers, lawyers and judges alike to gain a better appreciation of this branch of the law.

The law relating to Banking and Cheques in Ceylon is, as stated earlier, the English Law and it is interesting to note that judgments of the Ceylon Supreme Court have been cited by leading English text-book writers to support their statement of the law, in the absence of English authority on the subject. Of all the English texts on the Law of Banking the one most commonly referred to in our Courts by both Counsel and Judges is Sir John Paget's *Law of Banking*. Maurice Megrah's (7th 1966) Edition of Paget, cites the Ceylon cases of *Kulatilleke v. Bank of Ceylon* (1957) 59 N.L.R. 188 and *Kulatilleke v. Mercantile Bank of India* (1957) 59 N.L.R. 190.

To quote Paget :—

> " The (English) reports are redolent of cases concerning the collection of cheques affected be forgery other than that of the drawer's signatury. There seems, however, to be no decision in this country on the position of a Banker collecting an instrument, validly issued as a cheque but subsequently altered materially in fraud or without the consent of the drawer. A decision of the Supreme Court of Ceylon, *Kulatilleke v. Bank of Ceylon*, is directly in point and is specifically stated to have been reached after a consideration of the English reports and of this text-book."

Again, when discussing the liability of a Collecting Banker who has paid an altered cheque, Paget states :

> " Two cases, *Kulatilleke v. Mercantile Bank of India* and *Kulatilleke v. Bank of Ceylon* were decided by the Supreme Court of Ceylon and in the absence of decision in this country deserves consideration, for the law of Ceylon in respect of negotiable instruments is said to be that of this country."

Other Ceylon cases cited in Paget are the following :

(i) *Adaicappa Chetty v. Thomas Cook & Sons Bankers Ltd.* (1932) 34 N.L.R. 443.

(ii) *Bank of Chettinad Ltd. v. Commissioner of Income Tax* (1948) A.C. 378.

(iii) *Imperial Bank of India v. Abeysinghe* (1927) 29 N.L.R. 257.

(iv) *Ratnam v. Mercantile Bank of India* (1956) 57 N.L.R. 193.

(v) *Thambirajah v. Maheswari* (1961) 62 N.L.R. 519.

A recent decision of the Ceylon Supreme Court which will no doubt be cited as reference in future editions of English texts is the 5 Judge decision in *De Costa v. Bank of Ceylon* (1969) 72 N.L.R. 457, which *inter alia* outlined the origin and development of the Law of Banking and negotiable instruments in Ceylon and is an important judgment on the liability of a Collecting Banker for the torts of conversion and negligence.

The majority view of the Court in *De Costa's* case was that the conversion of a cheque by a collecting banker is a matter of Banks and Banking and has to be decided in Ceylon by the application of English Law. In view of this recent decision of the Ceylon Supreme Court, the statement in Paget that " the collecting banker is under no duty to the drawer because the tort of conversion is unknown in Ceylon," will have to be revised and restated.

A knowledge of case law on Banking and Cheques in Ceylon is also important for the reason that this is one of the branches of law in the Island which has not drawn the attention of our Legislature. While there is no General Banking Act in Ceylon our Bills of Exchange Ordinance of 1927 is based on the English Act of 1882. And, although in England there has been some reform of the statute law, at least as regards protection to Bankers, by the Cheques Act of 1957, in Ceylon there has been no such reform or amendment to the statute law in spite of recommendations by our Judges for a reform of the law. For instance, in *Daniel Silva v. Johanis Appuhamy* (1965) 67 N.L.R. 457, at page 472, Mr. Justice Tambiah commenting on the applicability of Roman-Dutch Law principles of liability in cheque cases, observed :

> " This is a matter where legislation is very necessary to amend the Bills of Exchange Ordinance in the interest of commerce. The Courts of Law can only interpret the provisions of law as they exist, and cannot usurp the functions of the Legislature. Legislation on the lines of those enacted in South Africa would be necessary in Ceylon to protect commerce.

This book is a compilation of all the reported cases decided by the Supreme Court of Ceylon and the Privy Council in appeal on the subject of the law of banking and cheques. One or two foreign cases have also been included insofar as they were relevant. The book is divided into two parts. Part I contains the " Case-Law " while Part II of the book contains a brief summary of the " Statute Law " relating to the subject. An Index and a Table of Cases has also been provided.

I must express my appreciation to Mr. William Tennekoon, Governor of the Central Bank of Ceylon, and to Mr. Bernard Aluvihare also of the Central Bank, both of whom have encouraged me to make this compilation and to the Banker's Training Institute of Ceylon for having undertaken the publication of this book. I am also indebted to Mr. Justice C. G. Weeramantry for having written the Foreword.

WICKREMA WEERASOORIA.

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PART I

THE CASE LAW RELATING TO BANKING AND CHEQUES IN CEYLON

CHAPTER 1

THE LAW RELATING TO BANKING AND BANKING PRACTICE IN CEYLON

The English Law relating to Banks and Banking was introduced into Ceylon by Ordinance No. 22 of 1866.

Although under Roman-Dutch Law compound interest is not chargeable since English Law applies to Bankers in Ceylon, a charge of compound interest on a customer by a Bank is not unmaintainable.

By reason of established custom with the Banks and of the acquiescence of customers to the charging of compound interest by Banks, a customer can become liable to pay compound interest charged by a Bank.

National Bank of India Ltd. *v.* **Stevenson**

(1913) 16 New Law Reports, p. 496.

In this case the plaintiff Bank sued the defendant, its customer, for the recovery of a sum of Rs. 125,678·81 being the balance shown to be due from the defendant to the plaintiff bank on a certain current account between the parties. The detail facts were as follows :

The defendant had a running account with the plaintiff bank, in which there were quarterly periods or rests at the end of which the defendant was debited with interest calculated on the average daily balance of the quarter and a balance struck, which was then carried on to the next quarter. The payment of the balance was secured by two mortgage bonds. It appeared that it was customary with the Banks in the Island, to charge compound interest calculated as stated above and that the defendant had, by his conduct, acquiesced in the charge of such interest made by the plaintiff bank and in the system of quarterly rests adopted by the bank.

The defendant customer defaulted in payment and when sued by the plaintiff bank he took up the position that the balance due to the plaintiff by him had been secured by the mortgage bond and that the terms of the bond did not authorise the charging of compound interest. In the alternative, the defendant argued that the Roman-Dutch Law applied to his transactions with the plaintiff bank and that under the Roman-Dutch Law compound interest was not chargeable.

The Supreme Court (*per* **Pereira** *J* and **Ennis** *J*) however held as follows :

1. That the rights and liabilities of the parties in connection with the current account were, in terms of Ordinance No. 22 of 1866 which introduced into this Island the English Law of Banks and Banking, governed by that Law and not the Roman-Dutch Law and that, therefore, the charge of compound interest was not as such, unmaintainable.

2. While under the Roman-Dutch Law compound interest was not allowed, even though it had been expressly stipulated for, under the English Law it was allowed where, *inter alia*, there was an agreement, express or implied, to pay it, or when its allowance was in accordance with a custom of a particular trade or business.

3. That by reason of the established custom with the banks and of the acquiescence of the defendant customer to the charging of the compound interest by the bank, the defendant became liable to pay the compound interest so charged.

4. The mortgage bonds given by the defendant to the bank were no more than collateral security for the balance of the current account and there was no objection to charging the property mortgaged with such balance despite the fact that the amount charged was partly composed of interest turned into principle by rests and interests on those interests. No objection could be taken to this mode of computing interest because it was done in the course of recognised custom and dealing between the bank and its customers.

As regards the introduction of English Law of Banks and Banking to Ceylon, **Mr. Justice Pereira's** observations merit quotation. His Lordship observed :

> " The first question to be decided is whether the rights and liabilities of the parties in connection with the current account are governed by the English Law or by the Roman-Dutch Law. Under the latter law, compound interest, that is, interest upon interest, is of course not allowed even though it is expressly stipulated for ; but under the former it is allowed when there is an engagement express or implied to pay it, or when the debtor has employed the money in trade and has presumably earned it, or where its allowance is in accordance with a custom of a particular trade or business.

"Now by Ordinance No. 22 of 1866, in all questions or issues which arise or which may have to be decided in this colony with respect to the Law of Banks or Banking, the Law to be administered is the same as would be administered in England in the like case at the corresponding period. (*See* Section 1).

"The expression 'Banking' has been construed to 'embrace every transaction coming within the legitimate business of a banker' (*Tennant v. Union Bank of Canada* (1894) A.C.31), and there is little doubt that the keeping of a current account between a Bank and its customer is a transaction coming within the legitimate business of a banker and that the law governing the rights and liabilities arising in connection therewith is, therefore, in terms of the provisions quoted in Ordinance No. 22 of 1866, the English Law.

"It has been argued that, even assuming that to be so, the matter of interest to be charged on accounts is removed from the operation of the English Law by reason of the provision as to interest in Section 3 of Ordinance No. 5 of 1852 and that the provision has in effect restored the Roman-Dutch Law against compound interest to transactions otherwise governed by the English Law.

"I confess that I cannot for one moment accede to this proposition. Section 2 of Ordinance No. 5 of 1852 introduced into this Island the law relating to bills of exchange, promissory notes and cheques and in respect of all matters connected with any such instruments; and a proviso was added to this enactment by Section 3, to the effect that no person should be prevented from recovering on any contract any amount of interest reserved thereby or from recovering interest at 9 per cent. per annum on a contract by which no different rate of interest had been specially agreed upon. I fail to see how this proviso in any way affects the provision of Section 1 of Ordinance No. 22 of 1866 which introduces into the Colony the English Law as to Banks and Banking."

Mr. Justice Ennis observed:

"It was argued that the law applicable in Ceylon is the Roman-Dutch Law which forbids compound interest. In was argued that Ordinance No. 22 of 1866 introducing English Law into Ceylon in questions relating to Banks and Banking did not apply in the case, as the matter was one of

loan, or an action on the bond, not coming under the Law of Banks and Banking. I am unable, however, to see how questions relating to deposit of money in a Bank by customers, the keeping of current accounts by the Bank and the remuneration of the Bank by interest, can be severed from the Law of Banking; moreover, the cases on these questions are all dealt with under the head 'Banking' in the text books (*e.g.*, *Halsbury's Laws of England*). Further if Roman-Dutch Law were to apply it seems to me that another principle of that law might also apply, on the contention that the matter is to be considered apart from banking and that every payment in current account might be deemed a repayment on account of an interest bearing debt, and be allocated first to the payment of interest then due. To apply this to an ordinary current account into which money is constantly being paid would leave very little room for any question, of compound interest. In my opinion the issues in the case had to be decided by English Law, and the cases cited by the learned District Judge are ample authority for the statement that the method of accounting adopted by the plaintiff-bank is not illegal by the Law of England."

NOTE :

1. **Today, the statute that brings in English Law to the law of banking in Ceylon is the Civil Law Ordinance (Cap. 79) also known as the Introduction of the Law of England Ordinance.**

   Section 3 of the Ordinance states :

   " In all questions or issues which may hereafter arise or which may have to be decided in Ceylon with respect to the law of..... banks and banking.....the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereafter to be enacted : Provided that nothing herein contained shall be taken to introduce into Ceylon any part of the Law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or immovable property, or any estate, right, or interest therein."

2. **For the law relating to charging of compound interest in Ceylon, *see* *Marikar v. Supramaniam Chettiar* (1943) 44 N.L.R. 409 (D.B.) : *Abeydeera v. Ramanathan Chettiar* (1936) 38 N.L.R. 389. *See* generally, Weeramantry, *Law of Contracts* Vol. 2 pp. 925 - 927.**

The words 'Banker' and 'Banking' may bear different shades of meaning at different periods of history and their meaning may not be uniform today in countries of different habits of life and different degrees of civilization.

In Ceylon, a Banker means a company or person carrying on as its or his principal business, the accepting of deposits of money on current accounts or otherwise, subject to withdrawal by cheque, draft or order.

The legal conception of a Bank in Ceylon is substantially the same as that of English Law.

Commissioner of Income Tax *v.* **The Bank of Chettinad Ltd.**

(1946) 47 New Law Reports, p. 25

The Bank of Chettinad Ltd. *v.* **Commissioner of Income Tax**

(1948) 49 New Law Reports, p. 409
(Privy Council)

In this case the Supreme Court and Their Lordships of the Privy Council had to decide the interesting and equally important question as to what *business constitutes a Banker or Banking business* in Ceylon. The facts were as follows:

The Bank of Chettinad Ltd., had its head office in Rangoon and a branch office in Colombo. In the course of carrying on its business in Ceylon the Ceylon branch of the bank credited a sum of Rs. 53,226/- to its head office in Rangoon by way of interest for a period of one year. When the Ceylon branch was taxed on this amount the bank claimed a deduction on the ground that the Ceylon branch carried on the business of banking and was entitled to a deduction by the provisions of the Income Tax Ordinance No. 2 of 1932 relating to Banks.

The available evidence, however, showed that the Ceylon branch of the Bank of Chettinad Ltd. had been mainly carrying on the business of lending money on promissory notes or on the mortgage of immovable property and also the management of estates and houses owned by the bank in Ceylon. No cheque books had been issued by the bank and there was no evidence that any monies in deposit could have been withdrawn by cheque, draft or order.

Before the Supreme Court, it was argued that a wide interpretation should be given to the word 'Bank' and that the correct test is whether the company utilises for profits its monies or the monies of others; furthermore, that it is not necessary to show that it carried on all the activities of a banker. Thus, in order to constitute a bank, a company need not deal with cheques. Discounting of bills would be sufficient to make its business a banking business. The words 'business of banking' do not refer to a particular class or set of activities.

The basis of some of these arguments was a statement of the Irish Law that a "Banker" is "one who traffics with money of others for the purpose of making profit" even apparently though he issues no cheque books and does not honour drafts on demand.

On the other hand, it was contended that a bank may have various activities but mere money lending does not constitute its business a banking business; and further, that the definition of a 'Bank' in the Companies Ordinance No. 51 of 1938 (Section 330) covers the legal conception of a 'Bank.'

The Supreme Court (*per* **Soertsz**, *A.C.J.* and **Rose**, *J.*) rejected the view that a wide interpretation should be given to the word "bank." "Whatever be the position under the Irish Law," observed Mr. Justice Rose, "it seems to me that it is too wide a conception of a bank according to the Law of England and Ceylon." The Court took the view that Section 330 of the Ceylon Companies Ordinance merely crystallised what was already the legal conception of a 'Bank' in Ceylon which is substantially the same as that of English Law. Accordingly, the Supreme Court held that a 'Banker' means 'a company or person carrying on as its or his principal business, the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheques, draft or order.' Applying this test the Supreme Court further held that the Colombo branch of the Bank of Chettinad was not a 'Bank' and did not carry on Banking business and hence, was not entitled to a deduction in income tax.

This decision of the Supreme Court was affirmed by Their Lordships of the Privy Council in *Bank of Chettinad Ltd. v. The Commissioner of Income Tax* reported in 49 New Law Reports at page 409. Their Lordships of the Privy Council recognized that the mere words 'Banking' and 'Bank' may bear different shades of meaning at different periods of history and that their meanings may not be uniform today in countries of different

habits of life and different degrees of civilisation. But, for the purpose of the appeal before Their Lordships it was only necessary to ascertain what was meant by the words 'business of banking' in the Income Tax Ordinance of Ceylon which came into force in 1932.

Their Lordships agreed with the view taken by the Supreme Court that Section 330 of the Ceylon Companies Ordinance of 1938 which came into force six years after the Income Tax Ordinance of 1932 merely crystallised what was already the legal conception of a bank in Ceylon and that, moreover, the definition in Section 330 in no way conflicted with the meaning attached to the word 'banker' in England in 1932. Their Lordships added that if Section 330 of the Companies Ordinance was to be entirely disregarded it would be necessary to bear in mind the terms of Section 3 of the Civil Law Ordinance of 1852 which introduced the English Law into Ceylon in respect of, *inter alia*, the Law of Banks and Banking.

In conclusion, Their Lordships took the view that the proper test for determining whether the Ceylon branch of the Bank of Chettinad Ltd. carried on the business of banking at the material time was to consider whether that branch, at that time, could fairly be described as 'a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order.' Applying this test, Their Lordships agreed with the view taken by the Ceylon Supreme Court and gave their answer in the negative, and dismissed the appeal.

NOTE :

Even today there is no statutory definition of a bank in Ceylon. Legislation relating to banking in the island, including the Bills of Exchange Ordinance (Cap. 82) never speaks of a 'Bank.' The term employed is 'banker' and 'banker' is described as 'any body of persons whether incorporated or not, who carry on the business of banking.'

In the present day economic context of Ceylon, apart from the already established commercial banking institutions there seem to be no probability of new banking institutions arising in the island except for State-sponsored or -controlled banks created by special Acts of Parliament (*e.g.*, The People's Bank set up by the People's Bank Act No. 29 of 1961 and the Commercial Bank of Ceylon Ltd., which took over the business of the Eastern Bank in 1969 and which is sponsored by the State and certain Public Corporations). There is also the statutory prohibition against the opening of bank accounts by Ceylonese in foreign banks — Section 22 of the Finance Act No. 65 of 1961. This statutory prohibition has, however, now been relaxed — *see* Finance (Amendment) Act No. 36 of 1968. To this extent, the question as to 'who is a banker' or 'what is a banker' still remains an academic question.

However, the question has often been discussed and has arisen in practical form on more than one occasion for the following reasons :

i. A cheque is defined as a bill of exchange *drawn on a banker* payable on demand — Section 72, Bills of Exchange Ordinance (Cap. 82).

ii. When payment is made on a forged endorsement and cheques are collected or paid, protection is strictly confined to cases where one or both parties to the transaction is or are a " banker " or " bankers." Sections 60, 80 and 82 of the Bills of Exchange Ordinance (Cap. 82).

iii. Section 74 (2) of the Bills of Exchange Ordinance refers to the *usage of bankers*. The custom of bankers recognised in law, can only be formed and proved by legitimate bankers.

iv. Section 3 of the Mortgage Act (Cap. 89) brings a *banking* company or institution within the definition of an *approved credit agency*.

v. Section 4 of the Exchange Control Act (Cap. 423) permits bankers to be authorised dealers in gold or foreign currency.

vi. Section 7 of the Money Lending Ordinance (Cap. 80) excludes *banks* from the operation of the Ordinance.

vii. Section 334 (1) of the Companies Ordinance (Cap. 145) prohibits *banking* partnerships, unless incorporated, where the number of partners exceed ten.

viii. The desirability of the law to protect the general public from being induced by the ostentatious adoption of the name " bank " to entrust their money to dubious concerns.

Basically speaking, the business of banking as it is known today comprises of the following functions :

(*a*) acceptance of money on deposit
(*b*) operation of current accounts
(*c*) payment and collection of cheques.

Anyone or any institution that does not perform these three essential functions or services is not a " banker " in law. Moreover, the *main* business must be the carrying out of such work. Accordingly many business concerns in Ceylon, *e.g.*, pawnbrokers, money-lenders, hire-purchase and finance companies, although they perform many functions performed by banks in Ceylon, yet do not come within the legal definition of a " bank " and are not entitled to the privileges that a " bank " is entitled to. To this extent, even the *Rural Banks* sponsored by the People's Bank do not appear to come within the legal definition of a " bank " in Ceylon for the purposes of the Bills of Exchange Ordinance (Cap. 82).

See generally as to the meaning of the word " Banker " and the business of banking, Cowen, *On the Law of Negotiable Instruments in South Africa* (4th ed.) pp. 357 - 361.

The English Law of Banking with regard to the realising of securities pledged does not obtain in Ceylon. The right of a pledgee to sell his security without recourse to a Court of Law is peculiar to the English Law of pledge and the common law of Ceylon in the matter of rights of mortgage and pledge which is the Roman-Dutch Law does not give place to the English Law when the mortgagee or pledgee is a Bank.

The Roman-Dutch Law will not recognise an agreement authorising the pledgee to sell the security pledged except in the case of movables of small value and in the case of shares held by a bank in which case the right to do so depends on custom by which the law has been abrogated. Such a custom does not exist in Ceylon and has not been recognised in our Courts.

A bank may legally sell shares held by it by way of pledge with the consent of and by arrangement with the assignee of an insolvent pledgor.

A bank with whom scrip (or share certificates) relating to shares in a Joint Stock Company is deposited by way of security for an overdraft with a written authority to dispose of the shares by sale or transfer, has no right to dispose of them without the intervention of Court, where the assignee in insolvency of the pledgor objects to such a course.

The bank is, however, entitled to obtain an order of Court that upon the sale of the shares by the assignee, it should be given preference in those proceeds for so much of its claim as is charged upon and secured by such shares.

The bank will be further entitled, in the event of its purchasing the property (the shares) so hypothecated, to get credit to the extent of its claim, provided the purchase is made for a price not less than the current market price of the shares.

Hong Kong & Shanghai Bank *v.* **Krishnapillai**

(1932) 33 New Law Reports, p. 249

In this case, a businessman had pledged his shares in a company with the plaintiff bank as security for an overdraft he had obtained from the bank. Consequently the businessman (mortgagor) had been adjudged an insolvent and his assignee in insolvency made an application to Court for an order to sell the shares held by the insolvent in various companies. The

bank opposed the application so far as it related to the shares pledged with the bank as security for the overdrafts which remained unpaid. The pledgor who was now insolvent had given the bank a blank transfer of the shares together with a writing authorising the bank to dispose of the shares.

On these facts, the Supreme Court (per **Garvin**, *S.P.J.* and **Drieberg**, *J.*) held that :

(1) A bank with whom scrip (or share certificates) relating to shares in a Joint Stock Company is deposited by way of security for an overdraft with a written authority to dispose of the shares by sale or transfer, *has no right to dispose of them without the intervention of Court*, where the assignee in insolvency of the pledgor objects to such a course.

(2) The bank is, however, entitled to obtain an order of Court that upon the sale of the shares by the assignee, it should be given preference in those proceeds for so much of its claim as is charged upon and secured by such shares.

(3) The bank will be further entitled, in the event of its purchasing the property (the shares) so hypothecated, to get credit to the extent of its claim, provided the purchase is made for a price not less than the current market price of the shares.

(4) The right of a pledgee to sell his security without recourse to a Court of Law is peculiar to the English Law of Pledge and the Roman-Dutch Law in the matter of rights of mortgage and pledge does not give place to the English Law, when the mortgagee or pledgee is a bank.

In this case, it was contended by the counsel for the bank, that the bank has the right of selling the shares independently of an order of Court as the writing given by the pledgor authorising the bank to dispose of the shares was an express agreement for *parate execution* which is recognised by the Courts of South Africa as valid in the case of a mortgage or pledge to a bank. (Wille — *On Mortgage and Pledge in South Africa*, page 176 and Morice's — "*English & Roman-Dutch Law*," page 62).

To this argument, **Mr. Justice Drieberg** replied :

" This question does not arise for decision for if the bank thought that it had this right, it should have disposed of the shares without the intervention of Court .... It is sufficient to say that according to the Roman-Dutch Law such an agreement is one which the Law will not recognise except in the case of movables of small value and in the case of shares held by the bank, *in which case, the right to do so depends on custom*, by which the law has been abrogated. It has not been proved that such a custom exists in Ceylon and that it has been recognised in our Courts."

His Lordship concluded :

" We were told that in the District Court of Colombo where such claims often arise, the shares so held by banks are sold with the consent of or by arrangement with the assignee ; to such a course there can be no objection ; and it would be in compliance with the law, the assignee representing the debtor and holders of subsequent mortgages, if any, and other creditors .... The position of the banks, therefore, is that they are creditors claiming to have a mortgage of movable property. They do not seek to sell the property without the intervention of Court and they cannot do so where the assignee, who represents their debtors, objects. It follows, therefore, that they must prove their claims and their right to preference ...."

NOTE :

This case goes to illustrate that although the law of banking proper in Ceylon is governed by English law yet the common law of Ceylon is the Roman-Dutch Law and that there may be many matters and transactions concerning the daily business of banking and cheques that may be governed by the principles of the Roman-Dutch Law and not by English Law.

See also *Mitchell v. Fernando* (1945) 46 N.L.R. 265 at 269.

Daniel Silva v. Johanis Appuhamy (1965) 67 N.L.R. 457 (D.B.).

Don Cornelis v. De Soysa & Co. Ltd. (1965) 68 N.L.R. 161.

But now see *De Costa v. Bank of Ceylon* (1969) 72 N.L.R. 457 (Bench of 5 Judges).

The Manager of a bank has no implied authority in terms of his appointment to bind the bank guaranteeing the payment of a cheque. Although a Manager may have a power of attorney to act for the bank and to pay *cheques, such a power does not involve or include the power to promise to pay. According to ordinary banking practice, such a power is quite outside the manager's general authority.*

Where money is paid to a bank by a lender who lent to a third person in pursuance of a purported guarantee of the bank and where the bank in pursuance of the understanding placed the money to the credit of the person to whom the money was lent, the bank was in a position of a mandatory who had had fully performed his mandate, before any mistake has been discovered. In such circumstances, no action for money had and received is maintainable against the bank and the bank is not liable to repay the money to the lender which it had disposed of according to the lender's wishes.

Adaicappa Chettiar *v.* Thomas Cook & Son Ltd.

(1930) 31 New Law Reports, p. 385

(1932) 34 New Law Reports, p. 443 (Privy Council)

In this case which was ultimately decided by the Privy Council in appeal in 1932, the plaintiff, Adaicappa Chettiar had lent money to one Peiris by issuing four cheques to the value of Rs. 170,000/-. The cheques were issued in favour, of the defendant bank, Thomas Cook & Son Ltd., (at that time Thomas Cook & Son Ltd. were carrying on the well-known travel agency as well as a banking business) under an arrangement entered into between the plaintiff, Peiris and the Manager of the defendant bank (one Mr. John Davis) according to which agreement the proceeds of the cheques were placed to the credit of Peiris in the account at the bank.

In return for the Rs. 170,000/- loaned by him to Peiris, the plaintiff received cheques drawn by Peiris for an equal value in the plaintiff's favour and each cheque was endorsed by Mr. Davis, the Manager of the bank as follows :

> " Payment of this cheque is guaranteed
> John Davis *per pro* Thomas Cook & Son
> (Bankers) Ltd. . . . ."

Subsequently, Peiris defaulted in re-paying the plaintiff the loan money and the cheques issued by Peiris as security for the loan and guaranteed by the bank's Manager were dishonoured

by the bank. Thereupon the plaintiff sued the bank for a sum of Rs. 170,000/- on the cheques guaranteed by them or alternatively as money had and received by the bank.

The plaintiff's case against the bank was made under two heads :

(1) That the bank was liable on the contract contained in the cheques because Davis, the Manager of the bank had actual authority to make such a contract and guarantee payment.

(2) If no such contract was in fact made, then the bank was liable in the amount of the cheques as money had and received either as money paid for no consideration or on a consideration which had wholly failed, or for money paid under a mistake of fact.

The District Judge gave judgment for the plaintiff and held that the bank was liable. On appeal, however, the Supreme Court (per **Fisher C.J.** and **Drieberg J.**) reversed the decision of the District Judge and held that the bank was not liable (*see* 31 New Law Reports at page 385). On further appeal from the decision of the Supreme Court, Their Lordships of the Privy Council affirmed the decision of the Supreme Court and dismissed the appeal. Their Lordships took the view that " plaintiff had advanced money to Peiris on an invalid security and that he and not the bank must bear the loss."

The judgment of the Privy Council may be summarised as follows :

(1) That the Manager of the bank had no authority in terms of his appointment to bind the bank in respect of the guarantee and that the bank was not liable, although the Manager held a power of attorney to act for the bank and the power of attorney gave him the power to ' pay ' cheques ; such a power did not involve or include the power to *promise to pay*. In the construction of a document, the general words in the later clauses must be read with the special powers given in the earlier clauses and cannot be construed so as to enlarge the restricted powers therein mentioned. It followed that Davis, the Manager of the bank, had no actual authority given him by the power of attorney to guarantee payment of the cheques given by Peiris as security for the loan he had taken from the plaintiff.

And as regards any possible ostensible or implied authority, it was clear that the position of Mr. Davis in the bank was not such as to make it necessary to imply the power to enter into such a transaction on the part of a bank.

(2) That where money was paid to the bank by a lender who lent to a third person in pursuance of a guarantee of the bank and where the bank in pursuance of the understanding placed the money to the credit of the person to whom the money was lent, *the bank was in the position of a mandatory* who had fully performed his mandate before any mistake had been discovered, and as such no action for money had and received was maintainable against the bank. In these circumstances the bank is not liable to repay money to the plaintiff which it has disposed of according to the plaintiff's wishes.

(3) But if the bank had received the money at their own disposal under a mistake by the plaintiff as to the supposed agent's authority, they would have to return it. But this was not so in this case, because, in fact, the bank received the money on the terms that it would be placed to the borrower's (Mr. Peiris') credit.

In the Supreme Court, in the course of delivery of his judgment, **Mr. Justice Drieberg** made certain observations about the practice in Ceylon by banks as regards *certifying or marking cheques for payment.* These observations merit quotation. (*See* 31 New Law Reports, page 385 at page 402).

" No special practice has arisen in Ceylon regarding the marking of cheques and such marking will not give the holder a right of action against the bank, unless there was an undertaking to pay him, or an admission that the money was held for his use (*Prince v. Oriental Bank Corporation* (1878) 3 A.C. at page 331). The Bank however would be entitled to retain certain funds to meet cheques marked for payment, dishonouring if necessary, other cheques for the purpose ; whether the customer could countermand payment would depend on whether it was marked at his instance or of the holder. (Paget — *On Banking* (3rd ed.) Chapter XI). Even if the marking for payment in this manner of the cheques to the Collector of Customs was an act within the power given to Davis to pay cheques, the guaranteeing of the cheques is an act of an entirely different nature."

The Shroff who received authority orally from the Manager of a bank is entitled to demand payment on behalf of the bank of a promissory note payable to the order of the bank at its office.

When a bank is a payee of a note of which the maker does not have any assets in the bank for the payment of the amount due on the due date there is a presumption of a demand or presentment and a refusal from the absence of assets.

Mercantile Bank of India Ltd. *v.* **Ramanathan Chettiar**

(1937) 39 New Law Reports, p. 448

In this case, the plaintiff bank sued the defendants to recover from them a sum of Rs. 40,000/- due on the promissory note sued upon, by which the defendants had jointly and severally promised to pay that sum to the order of the plaintiff bank at its office in Colombo.

At the trial, the defendants took up the following legal objections :

(1) That as the note was payable on demand, it did not fall due on any particular date and presentment for payment had to be made within a reasonable time in terms of Section 45 of the Bills of Exchange Ordinance.

(2) As the presentment and demand for payment had been made by the Shroff of the bank, such presentment was bad as the Shroff had no authority from the bank to make such demand.

(3) That, even if the Shroff had authority, the presentment for payment was irregular as he did not exhibit the bill to the defendants as required by Section 52 of the Ordinance.

As regards the authority of a Shroff of a bank to demand payment, the Supreme Court (per **Soertsz** *J.* and **Fernando** *A.J.*) held that a Shroff who has received authority *orally* from the Manager of a bank is entitled to demand payment on behalf of a bank of a promissory note payable to the order of the bank at its office.

With regard to the other points as to the presentment, the Supreme Court observed that under the English Law which is the same as ours, it is sufficient that a demand be made at the place appointed by the maker as the place of payment. And that where a bank is the payee of a note of which the maker does not have any assets in the bank for the payment of the amount on the due date, there is a presumption of a demand or presentment and a refusal from the absence of assets ; " . . . a compliance with Section 52 of the Ordinance was not necessary in this case because the maker of the promissory note did not have any assets in the bank for the payment of the amount due."

The shroff of a bank is a principal officer of such corporation within the meaning of Section 655 of the Civil Procedure Code and it is competent for him to make affidavit in substitution for the affidavit of the plaintiff bank as required by Sections 656 and 653 of the Civil Procedure Code.

The Bank of Madras *v.* **Ponnesamy Moodelly**

(1891) 2 Ceylon Law Reports, p. 22

This was an action by the Bank of Madras which had established a branch in Ceylon, against the defendant on certain promissory notes. After the bank had instituted action against the defendant it had also obtained a mandate of sequestration under Section 653 of the Civil Procedure Code on the ground that the defendant was fraudulently alienating his property to avoid liability. One of the affidavits upon which the mandate for sequestration had been granted by Court had been sworn to by the shroff of the bank.

In appeal it was argued that the shroff of a bank is not a " principal officer " of such corporation and is therefore not entitled to swear an affidavit asking for a mandate of sequestration of the defendant's property.

In this case, Mr. Ramalingam who had sworn to the affidavit had been the shroff of the Ceylon branch of the Bank of Madras for over twenty years and the Supreme Court held that the shroff of a bank certainly comes within the category of " principal officer " of an institution such as a bank.

NOTE :

An exceptional feature of the Ceylon banking system was the *Shroff* system. The shroff was a gentleman of some financial and social standing. In the early days when a bank in Ceylon lent directly to any Ceylonese

customer — including the Chettiars — it was invariably through the intervention of the shroff. It was the shroff's function to "guarantee" the loan made to the Ceylonese. In return for his "guarantee" the shroff collected a commission both from the bank and its customer.

The Ceylon Banking Commission of 1934 condemned the shroff system. The Commission took the view that the shroff system which more or less resembled the "batta" system of Robert Clive in the days of the East India Company was a most corrupt and vicious system and should be abolished. " It is indeed singular " observed the Commission, " that the shroff system should exist only in the Ceylonese branches of the Exchange Banks and not in their Indian and other Eastern branches." (*See* The Ceylon Banking Commission Report, Vol. I, Sessional Paper XXII of 1934).

The shroff system has now been done away with by the majority of the Exchange Banks in Ceylon. The Bank of Ceylon and the People's Bank never had shroffs. And except for the State Bank of India, the Mercantile Bank, and the Indian Overseas Bank, the other banks in Ceylon today have no shroff.

A District Court has jurisdiction by virtue of Section 62 of the Courts Ordinance to entertain proceedings for the winding up of a banking company not registered in Ceylon.

Anujee *v.* **Lewis**

(1940) 41 New Law Reports, p. 392

In this case it was argued that a District Court of Ceylon had no jurisdiction to wind up a banking company not incorporated and registered in Ceylon. The case concerned the compulsory winding up of The Travancore and Quilon Bank which had been incorporated and registered in Quilon and which had opened a branch in Ceylon in the 1930s. The argument of counsel for the bank was summarised by the Supreme Court as follows :

(1) The Joint Stock Companies Ordinance No. 4 of 1861 provides in Part IV (Sections 67 and 68) for the winding up of companies registered under that Ordinance *and of no other companies* by the District Court having jurisdiction in the district in which the registered office of the company in question is situate.

(2) Banking and Insurance Companies were not within that Ordinance (*see* Section 3) till it came about that the passing of Ordinance No. 2 of 1897 brought banks registered under that Ordinance within the purview of Ordinance No. 4 of 1861 in so far as the provisions of Ordinance No. 4 of 1861 were not inconsistent with the provisions of Ordinance No. 2 of 1897. (*see* Section 2 of Ordinance No. 2 of 1897).

(3) The Bank in question was not a bank registered by virtue of Ordinance No. 2 of 1897 and, therefore, the provisions of Part IV of Ordinance No. 4 of 1861 did not apply to it. Accordingly, the jurisdiction conferred on District Courts by Sections 67 and 68 of The Joint Stock Companies Ordinance No. 4 of 1861 to wind up banking companies did not cover the bank in question which had been incorporated and registered abroad.

The conclusion reached by the above line of reasoning was that a company or bank registered abroad could not be wound up in Ceylon.

To this argument **Mr. Justice Soertsz** replied that the above submissions were based on a major premise that the jurisdiction of the District Courts in Ceylon in respect of winding up of Companies and banks was conferred only by Sections 67 and 68 of Ordinance No. 4 of 1861 and that apart from those provisions, District Courts in Ceylon had no other jurisdiction.

The Supreme Court (per **Soertsz** *J.* and **Nihill** *J.*), held that the matter of the winding up of companies is undoubtedly a matter arising in the course of the ordinary administration of justice in a country and held that " the jurisdiction to wind up companies is conferred on District Courts by Section 62 of the Courts and their Powers Ordinance and that Sections 67 and 68 of Ordinance No. 4 of 1861 do no more than provide the test for ascertaining the particular District Court for any given winding up proceeding in regard to companies under that Ordinance."

This view, Their Lordships concluded is supported by Section 3 of the Introduction of the Law of England Ordinance (also known as the Civil Law Ordinance (Cap. 79) which introduced the English Law relating to companies and banks to Ceylon. The position in England was that certain Courts were empowered to wind up foreign and colonial companies having assets and liabilities in England. Therefore, in view of the introduction of the English law to Ceylon in respect, *inter alia*, of companies and banks the position in Ceylon could not be different from the position in England.

NOTE :

The winding-up of companies in Ceylon is now regulated by the Companies Ordinance No. 51 of 1938 (Cap. 145) and the Companies Winding-up Rules, 1939 (Cap. 145) Vol. 2, Subsidiary Legislation of Ceylon. Alternative remedies *in lieu* of winding-up are also provided by the Companies (Amendment) Act No. 15 of 1964.

As regards winding-up of banking companies special provision is also made in Sections 30 and 31 of the Monetary Law Act No. 58 of 1949 (Cap. 422). For example, Section 31 provides that the Director of Bank Supervision should be the liquidator in the winding-up of a banking institution.

It is not competent for a District Court in the course of testamentary proceedings to compel a bank to deposit in Court money lying to the credit of the deceased customer, whose estate is being administered.

The Imperial Bank of India Ltd. *v.* **Perera**

(1928) 30 New Law Reports, p. 59

The facts of this case were as follows. A sum of Rs. 9,755/- which had been deposited by the deceased testator was lying at the bank to the credit of his current account at the date of his death. In the testamentary case in which the deceased customer's estate was being administered an application was made to the District Judge for an order directing the Bank to bring into Court the sum lying to the credit of the deceased testator. The bank resisted the demand that the money should be brought into Court. After hearing argument the District Judge had made order directing the Bank to deposit in Court on or before a given date the sum of Rs. 9,755/-. The bank appealed from his order.

In setting aside the order of the District Judge the Supreme Court observed that the District Judge had not considered or appreciated the relation of a bank to its customer.

The Supreme Court (*per* **Schneider** and **Garvin** *J.J.*) approved the following statement of Grant in his *Law of Banking* (7th Edition) at page 2, as regards the relationship of a bank to its customer.

" The legal relation of banker and customer in their ordinary dealings in money is simply that of debtor and creditor. If the banker makes advances or grants on overdraft the banker is the creditor. On the other hand, if the customer opens an account and deposits money the customer is the creditor and the amount deposited or advanced can be recovered in an action for money lent, the deposit or advance creating a common law debt. So money paid into a bank ceases altogether to be money of the person who paid it in. It is the money of the banker who is bound to return an equivalent by paying a sum equal to that deposited by him when he asks for it."

Mr. Justice Schneider observed : " The appellant bank is in the position of a debtor of the deceased testator and in my opinion, it was not competent for the District Judge to make an order in the course of this case to compel the bank to deposit in Court the money lying to the credit of the deceased testator."

" If the bank had been an ordinary debtor and had refused payment of a debt the proper procedure for recovering it would be a properly constituted action."

Mr. Justice Schneider added : " I am not aware why the bank has refused in this instance to bring the money into Court, but it is possible that it might have been advised that if it did bring money into Court upon an order of the District Judge which was *ultra vires* it might be regarded as a voluntary payment and not a payment made upon compulsion in pursuance of a valid order of Court. If that view were taken then the defence would not be open to the bank if sued by any person lawfully entitled to the money, that it had paid the money into Court upon an order of the Court. But whatever may have been the reasons which actuated the bank, in my opinion, the bank was within its rights in objecting to deposit the money in Court upon an order made by the Judge in this testamentary action."

Mr. Justice Schneider concluded, " If the executors of the deceased testator had perfected their title by obtaining probate the situation might have been different, but I express no opinion thereon.

NOTE :

Under Section 547 of the Civil Procedure Code (Cap. 101) the value of the administrable estate of a deceased person was Rs. 2,500/-. So that if a deceased left an estate of over Rs. 2,500/- testamentary proceedings would have to be instituted and either probate or letters of administration obtained prior to one could claim such monies of the deceased. As from June 25, 1969 the value of the administrable estate has been increased to Rs. 20,000/-. See Civil Procedure Code (Amendment) Act - No. 24 of 1969.

Where a defendant admits liability it is competent for a Court of law to enter a decree for payment of the amount due by instalments and such relief will not be denied to the debtor merely because the creditor is a bank.

P. & O. Banking Corporation *v.* Selvathurai

(1926) 28 New Law Reports, p. 289

In the above case a promissory note for Rs. 500/- was endorsed and delivered to a bank and on default of payment the bank sued by way of summary procedure on liquid claims under Chapter 53 of the Civil Procedure Code for the recovery of the amount due on the note. The drawer of the note (the debtor) filed an affidavit in answer admitting the debt and asking that he be permitted to pay the amount due in instalments of Rs. 50/- per month owing to his financial inability to pay more.

It was argued *inter alia* that where the creditor is a bank, debtors should be compelled to keep strict faith in regard to their engagements and that instalment payments should never be permitted where the creditor is a bank.

The Supreme Court agreed that the fact that the plaintiff creditor is a Banking Corporation and that the promissory note came into their possession in the ordinary course of business and the resulting inconvenience to the work of the bank are factors to which due weight should be given not only in deciding whether an order to pay by instalments should be made but also in determining the terms of such order. But the Supreme Court held with the trial judge that " relief by way of instalments as regards the debtor should not be refused merely because the creditor is a bank."

NOTE :

As regards the power of a Court of law to decree payment of money by instalments, see also Section 194, Civil Procedure Code (Cap. 101) and the following cases : *Imperial Bank of India Ltd. v. Silva* (1933) 34 N.L.R. 346; *Bank of Chettinad v. Palmadan Chetty* (1932) 33 N.L.R. 358.

Where a banking corporation had appointed under its common seal one of its officers as its attorney to sue for debts due to the bank, such attorney has power to appoint by a proxy a proctor to bring an action on behalf of the banking corporation.

But where such a proxy only authorised the proctor to sue the defendant personally, the proxy is insufficient to enable the proctor to take proceedings against the defendant, in her representative character as executrix of her deceased husband.

The Oriental Bank Corporation *v.* **Corbet**

(1881) 4 Supreme Court Circular, p. 158

This case concerned the Oriental Banking Corporation which was a banking corporation established in Ceylon in the middle of the nineteenth century. It was one of the earliest exchange banks to be established in the island and it was also one of the largest banks at that time in the Far East. It ultimately failed in 1884 creating a temporary financial crisis in the island.

The Oriental Banking Corporation was established in Ceylon by Royal Charter. The Charter of Corporation required its common seal to be kept in its head office in London. If it were necessary to send to London every proxy required to file action in Ceylon in order that the seal of the Corporation be solemnly fixed to the proxy in the manner required by the Charter, the action of the bank in Ceylon in recovering its claims would have been paralysed.

To overcome this difficulty and inconvenience the bank had appointed one Mr. William Watson as the attorney of the bank to file all legal actions in Ceylon in the name of the bank. Mr. Watson had been duly appointed attorney by an instrument under the seal of the Corporation.

One of the questions for decision in this case was whether the proxy given to a proctor by Mr. Watson, the attorney of the bank was a valid proxy. The argument was that *the proxy itself* was not under the seal of the banking corporation. In other words the proxy did not bear the seal of the bank.

On the question of the validity of the proxy, the Supreme Court (*per* **Cayley** *C.J.* and **Dias** *J.*) held :

(1) that a trading corporation, like the Oriental Bank Corporation was entitled in law to appoint an attorney to file action and sue for debts due to the corporation ;

(2) that such an attorney had power to appoint by a proxy a proctor to bring an action on behalf of the corporation ;

(3) that the proxy need not be granted under the seal of the corporation. Chief Justice Cayley observed :

> " This case is one of those in which considerations of convenience, practically amounting to necessity, render the appointment of a proctor an exception to the general rule which requires the agent of a corporation to be appointed under its common seal. The Oriental Bank Corporation is a trading corporation and exceptions to the general rule of requiring acts of a corporation to be under seal are more fully recognised in such corporations than in municipal corporations."

The second argument was that a proxy which only authorises the bringing of an action against a person *personally*, will not *per se* authorise the bringing of an action against such person *in a representative capacity, viz.* as executrix of her deceased husband's estate.

The Supreme Court was of the view that this argument was entitled to succeed but further held that since the proxy did not authorise legal proceedings against a person in a representative capacity, the bank was not bound by these unauthorised proceedings and was entitled to get a fresh action filed on a proper proxy.

NOTE :

Where an action is instituted by a corporate body, it is sufficient if the plaint instituting the action is signed only by the proctor representing the corporate body. The plaint need not be subscribed by anyone else on behalf of the corporation.

There is a presumption of validity and regularity attaching to the execution of a proxy given to a proctor — *see, Wijesinghe v. The Incorporated Council of Legal Education* (1963) 65 N.L.R. 364.

When it is sought to serve a legal notice by post on a Bank the notice must be posted to the registered office of the Bank and not to any branch office of the Bank.

De Fonseka *v.* The Chartered Bank of India, Australia and China

(1938) 40 New Law Reports, p. 31

In this case The Chartered Bank had sued the appellant, one De Fonseka, who was a customer of the bank. The appellant had lost his case in the lower Court, *viz.* the District Court and had appealed to the Supreme Court but had lost the appeal as well. He thereupon applied for conditional leave to appeal to the Privy Council. The bank opposed the application on the ground that the notice of appeal to the Privy Council had not been properly served on the bank and that, therefore, the application for leave to appeal must be rejected.

The Chartered Bank was an incorporated bank carrying on business in Ceylon with its Head Office situated outside Ceylon. The appellant had sent the notice by post to the bank as follows :

(i) a notice by post addressed to The Chartered Bank of India, Australia and China, Colombo ;

(ii) a second notice served by the fiscal on " The Manager, Chartered Bank of India " ;

It was argued for the bank that both notices were bad and invalid in law.

The main contention was that the notices were not served on the bank as the notice sent by post was addressed to the Colombo branch of the bank and the notice served by the fiscal was in fact, served on a sub-accountant and not on the Manager. It was also submitted that even if it was served on the Manager it was not a good service.

On the other hand, it was argued for the appellant, that the notice addressed to the Colombo branch of the bank was a good notice as the Colombo branch should have transmitted it to its Head Office.

The Supreme Court, however, in the absence of any authority in support of this proposition rejected it. The Court (*per* **Maartensz *J.*** and **Moseley *J.***) held :

(*a*) that the notice sent by post was not served on the bank, as it had not been sent to its registered office,

(*b*) that the notice served by the fiscal had also not been validly served as the appellant had failed to obtain an order under Rule 5A of the Privy Council Appeal Rules that the notice be served on the attorney of the bank — whether he be a sub-accountant, or a Manager.

In the result the banks' objection was upheld and the application for conditional leave was refused with costs on the ground that the notice of the intended application was not served on the bank.

In conclusion, however, Mr. Justice Maartensz observed :

"Before leaving the case I should, I think, say that provision should be made in the Rules to facilitate the service of notices required to be served under the Ordinance and the Rules."

NOTE :

As to who is an attorney of a bank authorised to accept legal process and notices, *see Fradd v. Fernando* (1934) 36 N.L.R. 132; *Wijesekera v. Corea* (1931) 33 N.L.R. 394; *Wijesekera v. Norwich Life Assurance Company* (1936) 6 C.L.W. 121 : *The University of Ceylon v. Fernando* (1957) 59 N.L.R. 8 (F.B.) where *Fradd v. Fernando* (*supra*) was over—ruled and where a Bench consisting of five Judges of our Supreme Court held that Rule 2 of the Appeals (Privy Council) Ordinance (Cap. 100) does not require personal service of the notice and where the post is used as a medium of transmitting the prescribed notice, the applicant is required to do nothing more than send, in due time, a properly addressed pre-paid letter containing the name and address of the opposite party.

Service of documents which have to be served on a company can be effected by leaving it or sending it by post to the registered office of the company — Section 351, Companies Ordinance (Cap. 145); Section 471 Civil Procedure Code (Cap. 101).

As regards the presumption that a letter once posted reached the addressee, *see* Sections 16 and 114(*e*) of the Evidence Ordinance (Cap. 14) ; also Coomaraswamy : *Textbook on the Law of Evidence*, pp. 79 - 81.

Persons not carrying on a banking business who make advances against produce to suppliers cannot charge compound interest.

Velupillai *v.* **Marikar**

(1933) 2 Ceylon Law Weekly, p. 314

In this case, the plaintiffs who were carrying on the business of 'General Import and Export Merchants, Commission Agents and Planters' had charged compound interest on advances of money made by them against produce to suppliers for breach of contract and the District Judge had allowed their claim of compound interest.

The Supreme Court, in reversing the judgment of the District Judge, held that, since the plaintiffs were not bankers, they were not entitled to charge compound interest.

Mr. Justice Drieberg observed :

> "There is nothing in a business of this nature which would entitle it to be called a banking business. The plaintiff do no more than sell the defendant's produce for him, looking for their remuneration the very high rate of interest which they charge him on advances made against that produce. I am of opinion that the plaintiffs were not entitled to charge compound interest."

NOTE :

The Roman-Dutch Law prohibition against the charging of compound interest is no longer in force in Ceylon. There is also no prohibition against compound interest in the Money Lending Ordinance (Cap. 80). The recovery of such interest would be permitted when the parties have expressly agreed to pay it, as well as where an agreement to pay such interest may be implied from conduct such as acquiescence in prevailing banking business or other custom, or where it is allowed by statute. *See*, *Marikar v. Supramaniam Chettiar* (1943) 44 N.L.R. 409 (D.B.) ; *Abeydeera v. Ramanathan Chettiar* (1936) 38 N.L.R. 389 ; *Murugappa Chettiar v. Muththal Achy* (1956) 58 N.L.R. 225 at 226 (P.C.) ; *National Bank of India v. Stevenson* (1913) 16 N.L.R. 496 ; see, generally, Weeramantry, *Law of Contracts*, Vol. 2, p. 925.

Where a Bank goes into liquidation and proceedings are taken in several Courts of the Island and distribution is made by one Court after notice to all interested parties, and such order of distribution is affirmed by the Supreme Court, a creditor of the Bank who did not appear in the previous liquidation proceedings is not entitled subsequently to intervene and apply to the Supreme Court in revision to revise the distribution order so made.

Arumugam *v.* **Lewis and Pflge**

(1940) 4 Ceylon Law Journal, p. 224

This case, also like the case of *Anujee v. Lewis* (1940) 41 N.L.R. p. 392, concerned the winding-up and liquidation of the branches in Ceylon of the Travancore National and Quilon Bank.

This was an application by a creditor of the Kandy Branch of the Travancore National and Quilon Bank. When the bank failed, liquidation proceedings had been instituted in the District Courts of Colombo, Kandy, Galle and Jaffna.

The liquidation proceedings in the District Court of Jaffna had commenced first and the Court had made an order of distribution after giving notice to all interested parties. Sufficient notice to all creditors in Ceylon and in India had been given. Subsequently, the order of distribution was objected to by some of the creditors who had intervened but the Supreme Court, on appeal, had affirmed the order of distribution.

After all these proceedings had taken place, almost a period of over one year after the order of distribution had been made, the petitioner attempted to intervene by an application for revision in the Supreme Court. The petitioner alleged that he was a creditor of the bankrupt bank and that he was interested in the question of the distribution of its assets.

The Supreme Court (*per* **Keuneman** and **Nihil** *J.J.*), in dismissing the application of the petitioner, held as follows :

(1) The petitioner, as a creditor of the bank, was entitled even at a very much earlier stage to become a party to the liquidation proceedings,

(2) The petitioner had not availed himself of the opportunity of appearing and showing cause against the order of distribution for over a period of one year; and no reasonable explanation for this delay had been adduced by the petitioner.

Mr. Justice Keuneman observed :

" In the present case, the petitioner was interested in the question of the distribution of the deposit. As a creditor of the Bank, he was entitled even at an earlier stage to become a party to the proceedings in the Jaffna Court. He did not even avail himself of the opportunity of appearing and showing cause on the 12th December, 1938, and upto date he has not appeared before the Jaffna Court . . . Further, the present petitioner has delayed to make this application till the 8th of January, 1940, more than a year after the Judge made his Order. No explanation of this delay appears in the petitioner's affidavit.

" I do not think it would be fair to allow the petitioner who has preferred to let others bear the brunt of the opposition to apply in revision now, when the efforts of others have failed, and a considerable period of time has elapsed. It is intolerable that this matter should be allowed to drag on so long."

In conclusion the Supreme Court held that the petitioner was not, in the circumstances of the case, entitled to relief either by way of revision or by way of *restitutio in integrum.*

Where a deposit is made with a person who is not a banker and he grants in acknowledgment a document which is to be surrendered with a request for repayment before repayment could be claimed, such a transaction is not one as between banker and customer as such would attract the principles of English Law.

Section 3 of the Civil Law Ordinance importing the English Law in regard to matters of banks and banking is inapplicable in such a case. The matter falls to be governed by the Roman-Dutch Law under which the creditor must seek out the debtor to make payment. A demand is, therefore, essential before a cause of action accrues to sue the debtor.

Sivasubramaniam *v.* **Alagamuttu**

(1950) 53 New Law Reports, p. 150

This case concerned a transaction which is similar to a deposit account with a banker. The defendant-appellant carried on business as a pawnbroker and, as an ancillary to his main business, he was in the habit of receiving monies from depositors, undertaking to pay interest on the sums so deposited with him. The plaintiff-respondent had from time to time made deposits of various sums of money with the defendant in respect of which deposits the defendant had given the plaintiff separate receipts and documents as acknowledgments.

The plaintiff had sued the defendant *on a document acknowledging the receipt of the deposit* after the expiry of a period of six years from the date of the deposit. As his main defence to the action the defendant pleaded that the plaintiff's cause of action on the document was prescribed, and that the claim was thus statute-barred.

The Supreme Court, however, held that the plaintiff's action was not prescribed and gave judgment for the plaintiff. The Court held that the transaction, though similar to a deposit account that a customer has with a banker, was, however, not a transaction as between a banker and his customer and would not be governed by the principles of English Law. On the other hand, that the Roman-Dutch Law applied to the transaction in question and under the Roman-Dutch Law the rule was that a creditor must seek out his debtor to make payment. Therefore, a demand by the creditor, the plaintiff, was essential

before a cause of action accrued to sue the defendant, the debtor. And since, in the instant case, the demand for repayment by the plaintiff was made only two months before the date of the plaint, the action was clearly not prescribed.

Mr. Justice Nagalingam observed :

" This is not a negotiable instrument to which the Law Merchant can apply, under which it is settled law that no previous demand is necessary to commence an action. But this document is one the construction of which indicates that it had to be surrendered and a request made before payment could be claimed. Without surrendering the document the payment cannot be insisted upon—needless to say that other considerations would apply to a lost document. The surrender, by itself, without anything further being said, may also operate as a sufficient demand. It, therefore, seems to me that a surrender of the document and a demand are both conditions precedent to the institution of an action."

Mr. Justice Nagalingam added :

" It was argued that the transaction under investigation is similar to a deposit account with a banker. In regard to deposit accounts it has never been doubted in English Law that a previous demand is necessary to found an action. But I do not see why the principles of English Law should be transported into the transaction between these parties. The defendant is admittedly no banker in the sense in which the term is understood in law. Section 3 of the Civil Law Ordinance (Cap. 66) lets in the Law of England only in regard to the law of partnerships, joint stock companies, corporations, banks and banking, principal and agent, carriers by land and life and fire insurances ; so that I can see no justification for applying the principles of English Law to the decision of this case.

" It seems to me that the Roman-Dutch Law should govern the rights of the present parties. Under the Roman-Dutch Law, unlike under the English Law, it is for the creditor to seek out the debtor to claim payment. Even in the case of a simple loan, ' where no time has been fixed for repayment, it is not immediately claimable but after the lapse of a reasonable time,' so that it would be seen that under our common law a demand is essential before it could

be said that a cause of action accrues to a creditor to sue the debtor. But, as it was rightly remarked by Bankers L.J. in the case of *Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110, ' in every case, therefore, where this question arises, the test must be whether the parties have or have not agreed that an actual demand shall be a condition precedent to the existence of a present enforceable debt,' and it is therefore necessary to see whether there are any special terms of agreement between the parties throwing light on the question for determination in this case, irrespective of the question whether the English or the Roman-Dutch Law applies."

NOTE :

In an action to recover money deposited, the period of prescription should be reckoned from the date of the cause of action ; and the cause of action would be the refusal to return the deposit. — *Kanepathy v. Kanapathipillai* (1920) 2 C.L. Rec. 60 ; *In re Tidd* (1893) L.R. Ch. 154.

In regard to a deposit account with a *banker* it would appear that a previous demand is necessary to found an action, and it is a requirement that the deposit note must be surrendered to the bank before payment can be claimed — see *In re Dillon* (1894) 44 Ch. D. at p. 81.

Overdrafts are loans by the banker to the customer, and in general no demand is necessary, so that time runs against the banker in respect of each overdraft from the time when it is made — *see Parrs Banking Co. v. Yates* (1898) 2 Q.B. 460. — A bank cannot therefore recover against a customer on an overdraft which has lain dormant for the prescriptive period which, in Ceylon in the absence of a written contract, would be three years. — see generally, Weeramantry : *Law of Contracts*, Vol. 2 pp. 832 - 833.

Inasmuch as the Manager of the State Mortgage Bank performs functions of a public nature he holds a public office but inasmuch as such Manager is paid by the Bank out of its own revenue and not the public revenue, he does not hold 'a public office under the Crown' within the meaning of Section 15 (2) of the Colombo Municipal (Constitution) Ordinance.

William Alwis *v.* **J. Thiagarajah**

(1940) 4 Ceylon Law Journal Reports, p. 260

This case concerned the nature of the office held by the Manager of the State Mortgage Bank of Ceylon which was established in the island by the State Mortgage Bank Ordinance.

Mr. J. Thiagarajah who is now a member of the Monetary Board of Ceylon was then functioning as the Manager of the State Mortgage Bank of Ceylon. While so functioning, he had been credited with a double qualification mark in the list prepared under the provisions of the Colombo Municipal Council (Constitution) Ordinance. A registered voter objected to this on the ground that the respondent who was the Manager of the State Mortgage Bank of Ceylon, held a public office under the Crown and was, therefore, not entitled to the double qualification mark.

The said Colombo Municipal Council (Constitution) Ordinance is no longer in force in Ceylon and what was known as double qualification marks in voting lists are now obsolete. But this decision is interesting in that it contains observations of the Supreme Court as to the nature of the office of the Manager of the State Mortgage Bank of Ceylon which Bank is still in existence in Ceylon and plays a vital role as a leading credit institution of the island.

In that case the Supreme Court (per **Hearne J.**) held that the Manager of the State Mortgage Bank of Ceylon undoubtedly performs functions of a public nature. In that sense, he holds a public office and his office, as indeed do all public offices, derives from the Crown. But as he is paid by the Bank out of its own revenue and not the public revenue, he does not hold 'a public office under the Crown.'

The Bank of Ceylon did not become a Government Department in consequence of the nationalisation of the Bank by the Finance Act No. 65 of 1961.

The Bank of Ceylon is a public corporation and it is not a servant or agent of the Crown.

The Ceylon Bank Employees' Union *v.* **Yatawara**

(1962) 64 New Law Reports, p. 49.

Although this case did not strictly concern or decide any question or issue as to the law of banking it decided the interesting question as to the legal status of the largest bank in Ceylon, *viz.*, the Bank of Ceylon after its nationalisation by the Finance Act No. 65 of 1961.

The case arose in this way. In December, 1961, the Minister of Labour acting under the Industrial Disputes Act No. 43 of 1950, referred a dispute between the employees of the Bank of Ceylon on the one part and the Bank of Ceylon and the Commercial Banks' Association of Ceylon on the other part, to an Industrial Court for settlement. Unfortunately for the employees of the Bank the decision of the Industrial Court was against them and in favour of the employer, *viz.*, the Bank of Ceylon. The employees appealed from the decision of the Industrial Court to the Supreme Court. One of the grounds of appeal was that the Bank of Ceylon had become a Government Department after its nationalisation by the Finance Act No. 65 of 1961 and that its employees were therefore public servants and a dispute relating to public servants could not be referred for settlement under the Industrial Disputes Act. Section 48 of the Industrial Disputes Act states that its provisions will not apply to public servants and employees of the Government.

In other words it was argued that since the Bank of Ceylon had become a Government Department after nationalisation all its employees were government servants and that the provisions of the Industrial Disputes Act did not apply to a dispute between the Bank and its employees. If this were so, any decision by an Industrial Court constituted under the Act was bad in law.

In support of this argument that all the employees of the Bank of Ceylon were workmen in the employment of the Government, it was pointed out that by Section 2 of the Finance

Act No. 65 of 1961, all the ordinary shares of the Bank had become vested in the Government. Section 8 of the Act empowered the Minister of Finance to appoint and remove all the directors of the Bank except for the *ex-officio* director who is the Secretary to the Treasury for the time being. Under Section 5 of the Act the Secretary to the Treasury has the power to issue directions with regard to certain kinds of business conducted by the Bank. Section 10 of the Act enabled the Minister to make regulations relating to the functions of the Bank. It was contended that all these statutory provisions went to show that the Government had entered a field formerly occupied by private enterprise and that the true character of the Bank of Ceylon after nationalisation in 1961 was that of a Government Department.

On the other hand, it was argued by the Crown that the Bank of Ceylon had not become a Government Department despite nationalisation. In support of this contention, it was urged that the staff of the Bank is not appointed by the Government but by its Board of Directors. The Directors are not the agents of the Government but of the Corporation and the Bank continued to be a public Corporation under the Bank of Ceylon Ordinance of 1938 by virtue of the provisions of Sections 10 and 11 of the Finance Act No. 65 of 1961 ; no new Corporation was created, although the Minister would have more powers of control over the Bank. The regulations that may be framed by the Minister would not be directives to the directors of the Bank but would only be concerned with questions of policy.

The Supreme Court (*per* **Sansoni, J.**) rejected the argument that the Bank of Ceylon had become a Government Department after its nationalisation by the Finance Act No. 65 of 1961 and held that the Bank of Ceylon continued to be a public Corporation despite nationalisation. The Court also added that a public Corporation even though it may be controlled by a Minister is not necessarily a servant or agent of the Crown and that the employees of the Bank of Ceylon were not Government employees or public servants.

Sansoni, J., observed :

" Obviously each Corporation, and the terms of the Statute governing it, must be the subject of scrutiny when the question of its true character is raised. For instance, a Corporation to which the State Industrial Corporations Act, No. 49 of 1957, applies is of a widely different sort from the

Bank of Ceylon. Once the principles applicable to the determination of the question are known, the character of the particular Corporation can be decided."

" In *Tamlin v. Hannaford* (1950) 1 K.B. 18, Denning, L.J., after pointing out that ministerial control over such a body as this is insufficient to make it a servant or agent of the Crown, said : ' When Parliament intends that a new Corporation should act on behalf of the Crown it as a rule says so expressly, as it did in the case of the Central Land Board established by the Town and Country Planning Act, 1947 . . . . . In the absence of any such express provision, the proper inference, in the case, at any rate of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a Government Department.' He also pointed out that in the eye of the law the Corporation (in that case the British Transport Commission) is its own master, it has none of the immunities or privileges of the Crown, its servants are not civil servants, and its property is not Crown property. The same observations may properly, I think, be made about the Bank of Ceylon."

" There is also the instructive judgment of Rajagopala Ayyangar, *J.* in *Narayanaswamy Naidu v. Krishnamurthi*, A.I.R. (1958) Madras 343, which dealt with the Life Insurance Corporation of India. The learned Judge quoted the following passage from an article by Professor Wade in Current Legal Problems, 1949 : ' The public corporation as an agency distinct from the usual form of Government Department over which a political Minister presides, has evolved in its modern guise from the need for resolving two conflicting considerations : (*a*) the demand for some form of State intervention, (*b*) the resistance to a form of nationalisation which would involve direct administration by the Civil Service. Hence the constitution of these State agencies have been influenced by the desire to safeguard some of the features of private enterprise and to avoid the closer control necessarily involved in direct administration by the State. "

CHAPTER 2

THE LAW RELATING TO BANKER AND CUSTOMER

Where a crossed "not negotiable" cheque in the form of a dividend warrant is endorsed by the payee with the words "Credit my account only," a banker who collects payment of it and credits the proceeds to the account of a person other than the true owner is liable to pay the sum to true owner if he acted negligently in crediting the collected sum to a wrong account. In such a case Section 82 of the Bills of Exchange cannot protect the collecting banker, and his liability has to be determined by the application of the English law of conversion in respect of cheque transactions. The Bills of Exchange Ordinance (read with Section 2 of Ordinance No. 5 of 1852) has the effect that the liability of a negligent collecting banker in Ceylon to the true owner of a cheque is the same as would arise in England in a like case.

Alternatively, the collecting banker is liable to the true owner on the basis that he received the money for the use and benefit of the true owner and, accordingly, an action for money had and received would lie.

Where a collecting banker is sued by the true owner of a cheque for the recovery of the proceeds of the cheque credited by the banker to the account of a person other than the true owner, the onus, according to Section 82 of the Bills of Exchange Ordinance, is on the banker to show that he was not negligent and that at the time when he received the cheque for collection there was something on the face of the cheque which justified the action taken by him; in other words, the banker should show that the cheque was altered in such a manner as to mislead his officers.

De Costa *v.* **The Bank of Ceylon**

(1969) 72 New Law Reports, p. 457.
(Decision of a Bench of 5 Judges)

This case raised important questions of commercial law relating to the liability of a Banker in Ceylon in circumstances which frequently arise in transactions between a banker and a customer. The appeal had been referred by the Chief Justice for a decision by a Bench of 5 Judges (*per* **H. N. G. Fernando** *C.J.*, **Sirimanne** *J.*, **Alles** *J.*, **Weeramantry** *J.* and **Wijayatilleke** *J.*) in view of the conflicting decisions delivered in the earlier Divisional Bench case of *Daniel Silva v. Johanis Appuhamy* (1965) 67 N.L.R. 457 and the judgment of **Basnayake** *C.J.* and **Pulle** *J.*, in *Kulatilleke v. Bank of Ceylon* (1957) 59 N.L.R. 188. The facts of the case were as follows :

The plaintiff, who was a shareholder of Deniyaya Tea and Rubber Estates Company, received from the Company a dividend warrant in her favour for a sum of Rs. 30,637·13. The warrant was crossed " Not Negotiable " and was drawn on National & Grindlay's Bank. The plaintiff made on the back of the warrant the endorsement " Credit my account only " and duly affixed her signature. She then put the warrant in the envelope, addressed it to her Bank *viz.*, the City Office of the Bank of Ceylon, and gave it to a servant to be posted, but there was no proof of posting. The warrant got into the hands of a third party, one Loganathan, who was said to be the proprietor of " Movie & Co.". It was presented for payment at the Wellawatte Branch of the defendant Bank of Ceylon and the money realised was credited to the account of " Movie & Co.". The resultant position was that the amount collected by the defendant Bank on the dividend warrant, the true owner of which was the plaintiff, was paid by the defendant to a person other than the true owner.

In the present action, the plaintiff sued the defendant for the recovery of the amount of the dividend warrant on the basis that the Bank had wrongfully deprived the plaintiff of the proceeds of the warrant, or alternatively that the Bank recovered the proceeds for the use of the plaintiff.

It was found by the Supreme Court, that the defendant's officers had acted negligently in crediting the amount of the dividend warrant to the account of " Movie & Co." and that the trial Judge was wrong in his decision that there was no such negligence.

The Bench of 5 Judges had to decide the following questions (*inter alia*) :

(i) The correctness of the decision of the Divisional Bench in *Daniel Silva v. Johanis Appuhamy* that the English doctrine of conversion forms no part of the general law of Ceylon.

(ii) On what grounds or on what cause of action can a true owner of a cheque or other negotiable instrument sue a collecting banker for the recovery of the proceeds of a cheque which have been credited by the bank to the account of a person other than the true owner,

(iii) On whom does the burden of proof lie to show that the banker had not acted negligently in such circumstances and in what manner may such a burden be discharged.

As observed by **Mr. Justice Weeramantry :**

" This appeal raises matters of rare interest under our law. Among these are the questions whether the English doctrine of conversion forms part of the general law of Ceylon, and whether in any event it forms part of the particular sections of our law which relate to negotiable instruments and matters of banks and banking. The resulting examination of the precise areas of applicability of English and Roman-Dutch law has stimulated far-reaching researches into the manner in which a body of mercantile law, English in origin, was worked into the texture of a legal system primarily Roman-Dutch. Indeed the basic fabric itself was subjected to a searching scrutiny at the argument before us and counsel minutely examined the mode of introduction not only of our special commercial law but of our general common law itself. Other problems as well emerged, no less attractive and no less complex, relating to the nature and scope of the principles of quasi-contractual liability under both English and Roman-Dutch law.

The judgments of the Five Judges in this case which runs into 91 pages of the New Law Reports, constitute perhaps the longest reported judgment in a Civil case in Ceylon up to date. The decision of the Court is given in the headnote. The majority view of the Court (*per* **H. N. G. Fernando**, *C.J.*, **Alles**, *J.*, **Weeramantry**, *J.*) was that the English doctrine of conversion is not part of the common law of Ceylon.

Having referred to the earlier decisions of the Supreme Court, **Mr. H. N. G. Fernando**, *C.J.*, observed :

" I hold for these reasons that decisions in our Courts have not introduced and adopted the basis of liability for conversion which obtains under the English Common Law. This conclusion is, however, not decisive of the question whether, as was held in *Bank of Ceylon v. Kulatilleke*, the liability of a collecting Banker to the true owner of a cheque is the same in Ceylon as it would be in England. It has

been argued for the appellant in this case that such liability does exist in Ceylon in view of certain provisions of our statute law which have now to be considered . . ."

" For the reasons which have now been stated I am satisfied that so long as Section 2 of the Civil Law Ordinance of 1852 was in force, the liability of a collecting Bank in Ceylon in circumstances such as exist in the instant case had to be determined by the application of English law . . ."

" Having examined the English Act of 1882, I am satisfied that all its provisions applied in Ceylon by virtue of our Ordinance of 1852, and that from 1882 the liability of a collecting Bank in Ceylon was the same as that which arose in England in similar circumstances."

" At the present time however it is not the Ordinance of 1852 which determines the law to be applied in Ceylon to negotiable instruments. The legislature in 1927 enacted the Bills of Exchange Ordinance (Cap. 82) . . . and although the English doctrine of conversion is not part of the common law of Ceylon, the Bills of Exchange Ordinance (Cap. 82) has the effect that the liability of a collecting Bank in Ceylon to the true owner of a cheque is the same as would arise in England in a like case."

On the question as to *the burden and the manner of proving negligence on the part of the Bank* in collecting the cheque or dividend warrant, the Chief Justice observed :

" It seems to me that in a case where the defendant Bank had the burden of establishing the absence of negligence, it was unsafe lightly to apply the presumption that the common course of business was followed by the officers of the Bank itself . . . ."

" Since the burden under Section 82 of the Bills of Exchange Ordinance lay on the defendant bank it was not for the plaintiff to demonstrate that there was anything suspicious on the warrant which could have been visible on simple or technical examination ; the learned Judge failed to realise that the defendant bank had to adduce proof to the contrary."

" There was no evidence to show that the Bank's Collection Department scrutinizes cheques in order to ascertain whether the true owner of a particular cheque is in fact the customer of the Branch which forwards the cheque for collection."

" I have no hesitation in deciding that the Bank failed to establish the defence available under Section 82 of the Ordinance."

In the course of his judgment, **Mr. Justice Weeramantry** made the following observations (*inter alia*) on the issue as to the burden of proof :

" Irrespective of the question on whom lay the burden of proof, there was then evidence placed before the court by the plaintiff in regard to crossing and endorsement, which required adequate contradiction or explanation by the bank if the inference of negligence arising therefrom was to be the displaced ; for a cheque so crossed and endorsed at the time of presentment could not without negligence find its way into an account other than that of the payee. This evidence thus involved the bank in the necessity of proving the circumstances in which the endorsement referred to was overlooked, or alternatively, such fact as alternation or obliteration of the endorsement at the time of crediting. On these matters the bank has signally failed to provide the court with satisfactory proof."

A majority of the Court (*per* **Sirimanne, Weeramantry** and **Wijayatilleke** *J.J.*) took the view that the conversion of a cheque by a collecting banker is also a matter of banks and banking and thus affords an alternative basis for the application of English Law. In coming to this view, **Weeramantry** *J.*, observed :

" One can see of course, that where a particular transaction which is not part of the ordinary course of a banker's business as a banker is carried out by a person who happens to be a banker, that transaction does not attract the law of banks and banking. For example, if a banker advances money upon a mortgage, the law of banks and banking is not attracted to the transaction merely because the mortgagee or pledgee happens to be a banker, and I concur with respect in the decisions of this Court in *Krishnapulle v. Hongkong and Shanghai Banking Corporation* and *Mitchel v. Fernando* where this Court held that in such circumstances the English law was not drawn in."

" The position is manifestly different however where the transaction in question is, as here, a transaction into which the bank enters in its capacity as a banker. It is *qua*

banker that the cheque in this case was collected by the respondent and it is *qua* banker that its liability for this act is under review."

"It would be unrealistic in this situation to take the view that the law relating to conversion forms no part of the law of banks and banking, and it follows therefore that the Civil Law Ordinance as amended by Ordinance No. 22 of 1886 brought into this country the English rules relating to conversion in so far as they had become the subject of special application to the law of banks and banking."

"The applicability of the English Law of conversion to the transaction we are examining thus results from the twofold consideration and the transaction is both within the special sphere of cheques and within the special sphere of banking, either of which factors by itself would suffice to draw in the English Law."

It was the unanimous view of the Court that the collecting banker is liable to the true owner on the basis that he received the money for the use and benefit of the true owner and that accordingly, an action for money had and received would lie. Mr. Justice Weeramantry took the view that the plaintiff was also entitled, in the circumstances, to succeed on the basis of the law relating to unjust enrichment.

A paying bank is absolved from liability in accepting and paying the forged cheques of a customer when it can be established that: (a) the customer was in breach of the duty he owed to the bank to exercise due care in the manner in which the cheques were drawn; and (b) the bank had acted in good faith and without negligence in paying the cheque to the collecting bank.

Kulatilleke *v.* **Mercantile Bank of India**

(1957) 59 New Law Reports, p. 190

In this case, two cheques drawn by one Kulatilleke, the plaintiff-customer, for Rs. 93·50 and Rs. 43·85 were subsequently fraudulently altered by the plaintiff's clerk to Rs. 9,000·50 and Rs. 4,000·85 respectively. The cheques were presented to the paying bank, Mercantile Bank of India by the collecting bank

Bank of Ceylon Ltd., with whom the clerk had just opened a current account. In an action instituted by the plaintiff-customer against the paying bank it was found that the defendant bank had in good faith and without negligence paid to the collecting bank the amounts which appeared on the face of the cheques at the time of presentment for payment. It was also established that the plaintiff was in breach of the duty he owed the bank as a customer to exercise due care in the manner in which the cheques were drawn.

It was proved in evidence that the plaintiff was not able to write out in English the amounts and other particulars on the cheques. All that he was able to do was to sign them and it was obvious that the clerk who wrote out the body of each cheque did so deliberately in order to carry out with ease the fraudulent alterations which he made subsequently.

On the above facts and findings the Supreme Court (per **Basnayake** *C.J.* and **Pulle** *J.*) held that the paying bank was absolved from liability for accepting and paying the forged cheques and were entitled to debit the plaintiff-customer's account with the full amount of the sums forged.

NOTE :

As to the liability of bankers paying forged or altered cheques of their customers, *see* Halsbury : *Laws of England* (3rd edition) Vol. 2, pp. 204 - 206 and cases cited therein.

The drawer of a crossed "Not Negotiable" cheque, the amount of which is subsequently altered fraudulently by a third party is entitled to recover from the collecting banker the amount by which the cheque is so fraudulently raised.

In such a case the collecting banker cannot claim the benefit of Section 82 of the Bills of Exchange Ordinance.

Bank of Ceylon *v.* **Kulatilleke**

(1957) 59 New Law Reports, p. 188

The identical evidence that was led in the case of *Kulatilleke v. Mercantile Bank of India* reported in 59 New Law Reports at page 190 was relied upon the plaintiff, Kulatilleke, when he sued the collecting bank, *viz.* the Bank of Ceylon, on the same facts, in the case of *Kulatilleke v. Bank of Ceylon* also reported in 59 New Law Reports at page 188.

The facts, the evidence, and the Judges were the same as in the case against the paying bank, *viz.* The Mercantile Bank of India. But the decision was different. The Supreme Court (per **Basnayake** *C.J.*) held that the Bank of Ceylon was liable to Kulatilleke *as the collecting bank* and had to pay him the amount of the sums paid to his loss by the paying bank.

Basnayake, *C.J.* (with whom **Pulle** *J.* agreed) observed:

> "In the instant case the defendant claims the benefit of Section 82 of our Bills of Exchange Ordinance. The learned District Judge has held that the defendant is not entitled to the benefit of that section on the ground that a cheque the amount of which is fraudulently raised is not a "cheque" within the meaning of the expression in that section. It speaks of a cheque to which the customer "has no title or a defective title." Those words pre-suppose that the cheque is a good and valid cheque and that the only question is one of title to it. The section applies to cheques which do not have the taint of forgery or fraudulent alteration, a cheque which is the drawer's cheque in all respects and which carries the authority of the drawer. A cheque which has been altered fraudulently as in this case by raising the amount is invalid. I agree with the learned trial Judge that in the instant case the defendant is not entitled to the benefit of Section 82."

In holding that the *collecting bank* was liable to pay Kulatilleke the amount that had been paid by Kulatilleke's bank (*i.e.* the paying bank) without his authority, **Basnayake *C.J.*** made the following observations :

(1) Our law on the subject of banker's liability is the same as in England (Section 3 of the Civil Law Ordinance) except where special provision has been made in our law.

(2) It would appear from the English cases and the work in " Banking " cited by learned Counsel for the respondent that if this question had arisen for decision in England, it would be on the facts of this case be decided against the collecting banker.

NOTE :

The decision in this case was disapproved of by a Divisional Bench of the Supreme Court in *Daniel Silva v. Johanis Appuhamy* (1965) 67 N.L.R. 457. In Daniel Silva's case **Mr. Justice T. S. Fernando** observed :

> " It was brought to our notice that this Court in *Bank of Ceylon v. Kulatilleke* (1957) 59 N.L.R. 188 in holding that the drawer of a cheque was entitled to succeed in a claim against a collecting banker for recovery of the sums paid out on fraudulently altered cheques, has that in view of Section 3 of the Civil Law Ordinance the case fell to be decided according to the law of England. It was submitted to us that this case has not been correctly decided. It is sufficient to observe that the question whether the action was really one where the banker was sought to be made liable on the basis of the conversion did not receive attention by the Court ; nor were certain relevant authorities referred to in the judgment of the Court."

Mr. Justice Tambiah went even further and observed :

> " I regret I am unable to agree with the reason given in the case of *Kulatilleke v. Bank of Ceylon.*"

As regards the liability of a collecting banker, *see* Halsbury, *Laws of England* (3rd Edition) Vol. 2 p. 180 ; also *Motor Traders Guarantee Corporation v. Midland Bank Ltd.* (1937) 4 A.E.R. 90, where it was held that the customer's banking history might be such as to put the banker on inquiry.

See also *De Costa v. Bank of Ceylon* (1969) 72 N.L.R. 457 (a decision of a Bench of 5 Judges) where the decision in *Kulatilleke v. Bank of Ceylon* was approved of.

A banker who pays out money on a cheque bearing the forged signature of a customer cannot charge the amount so paid out to the customer, unless facts or circumstances exist which in law preclude or estop the customer from pleading that his signtaure was forged.

When a banker sets up the genuineness of a signature which is alleged by the customer to be forged the burden of proving that fact is on the banker.

Bank of Ceylon *v.* **Kolonnawa Urban Council**

(1949) 51 New Law Reports, p. 73

In this case, the Kolonnawa Urban Council sued the Bank of Ceylon to recover the sum of Rs. 27,000/- said to have been wrongly paid out by the bank on three forged cheques for Rs. 3,000/-, Rs. 4,000/- and Rs. 20,000/- respectively. The cheques bore the forged signature of the Secretary and the Chairman of the Urban Council.

The case for the Council was that the bank unlawfully paid this money and unlawfully debited the Council's account at the bank with these sums. The case for the bank was that the signatures of the three cheques were genuine and the cheques having been honoured and honestly paid in the ordinary course of business the money so paid out was correctly debited to the bank account of the Council. The bank also raised the plea of estoppel against the Council, *viz.* that there had been a complete absence of office routine and a lack of elementary business precautions in the Council as regards keeping its cheque books and drawing out its cheques and that the Council must, therefore, pay for its negligence.

This plea of estoppel (which was presumably based on Section 115 of our Evidence Ordinance (Cap. 14)), was however, abandoned in the course of the trial.

On the facts of the case the Supreme Court (*per* **Dias** *J.* and **Windham** *J.*) held that the Bank of Ceylon was not entitled to debit the Council with the sum of Rs. 27,000/- which the bank paid out on the forged cheques, and that the Council was entitled to that sum which had been wrongly debited.

The decision of the Supreme Court which was pronounced by **Mr. Justice Dias** may be summarised as follows :

" The law relating to a banker who pays out a customer's money on a forged cheque is clear. Section 24 of the Bills of Exchange Ordinance (Cap. 68) declares that where the signature on a bill (which includes a cheque) is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative. A banker who pays out money on a cheque bearing the forged signature of customer cannot charge the amount so paid out to the account of the customer, unless facts or circumstances exist which in law preclude or estop the customer from pleading that his signature was forged."

When a banker sets up the genuineness of a signature which is alleged by the customer to be forged, the burden or onus of proving that fact is on the banker. (*vide* also ***Bennet v. London and Country Bank*** (1886) 2 T.L.R. 765).

Mr. Justice Dias also cited with approval the following statements found in English texts on ' Banking ' on the plea of estoppel.

(*a*) " As between a bank and its customers, however, there is no implied agreement by the latter to take precautions in the general course of carrying on his business against forgeries on the part of his servants. Such estoppels will arise if *after knowledge of* a forgery, the customer does anything to mislead the bank and the position of the bank is thereby prejudiced ; but no estoppel will result from mere silence for a period during which the position of the bank is not altered for the worse. (Grant's *Law of Banking*, pp. 21 - 22 (7th Ed.))"

(*b*) " Mere carelessness in keeping the cheque book is, of course, no use. In fact, it is generally adduced as the *reductio ad absurdum* of the contention as to estoppel by negligence. The entrusting of the occasional drawing of cheques to an agent, who subsequently draws without authority would come rather under the head of ' holding-out ' than of estoppel by breach of duty. The lack of supervision over an agent who might have access to the cheque book and opportunities for concealing forgeries committed by him is, probably, too remote in this connection. (Paget, on the ' *Law of Banking*, ' pages 368 *et seq.* (3rd Ed.) "

In the ordinary relation of banker and customer, it is not necessary that the customer's demand for the balance due to him should be by cheque. Any demand if not complied with, will entitle the customer to recover such balance by action.

A banker, holding as endorsee, a promissory note payable at his bank upon which the customer is liable as an endorser is entitled upon dishonour of the note to debit the customer's account with the amount thereof, provided due notice of dishonour has been given to the customer.

Weerawago *v.* **The Bank of Madras**

(1829) 2 Ceylon Law Reports, p. 11 (F.B.)

In this case, the plaintiff, a customer having a current deposit account with the Bank of Madras, sued the bank to recover the sum of Rs. 1,039·64 as the balance due to him. He averred that the bank sought to charge him with Rs. 1,000/- due upon a promissory note alleged to have been made in the plaintiff's favour and endorsed by him to a third party who in turn endorsed it to the bank. The note had been dishonoured, and the bank took up the position that upon dishonour of the note, its amount had been debited to the plaintiff's account and the note itself had been returned to the plaintiff's messenger.

Three questions arose for decision by the Supreme Court ,

(1) What are the ordinary legal relations between a banker and his customer in respect of the repayment of money lodged by the customer in the bank ?

(2) In what relation does the banker stand to the customer with respect to notes in the hands of the bank as endorsees on which the customer is liable as an endorser ?

(3) As the endorser is the customer, is he entitled to notice of dishonour before he can be made liable on the note and before the banker can debit his account with the amount of the note ?

The ultimate decision of the Supreme Court was based on a question of fact. The decision (per **Clarence** and **Dias** ***J.J.***, **Burnside** *C.J.* dissenting) was that there was sufficient evidence to show that proper notice of dishonour of the note had been given to the plaintiff-customer by the bank and therefore the

defendant-bank was entitled to debit his account with the amount of the note. There was no difference of opinion, however, on the above three questions of law and the view of the Supreme Court on these three matters may be summarised as follows :-

As regards the first question, the Supreme Court held that there is no requirement of law that a demand by a customer for repayment can be made only by cheque —

> " It is the duty of the banker to pay the debt due to the customer pursuant to the order, cheque or draft of the latter. The customer may order the debt to be paid to himself or anybody else, or he may order it to be carried over or transferred from his own account to the account of any person he pleases. He may do so by written instrument or verbal direction ; but the banker is entitled to require some written evidence of the order of the transfer." (Per **Burnside** *C.J.* following the English decisions in *Watts v. Christie* 18 C.J., Ch. 173 : *Foley v. Hill* 2 H.L.C. 28).

As regards the second and third questions the Supreme Court observed :

> " If a note is payable at the bank, the acceptance of such note or its endorsement in blank by a customer is tantamount to an order from him to his banker to pay the note to the person who is the legal holder for value when the note becomes due ; and if the bank itself be the holder, the bank has the undoubted right to treat the amount of the note as a debt due from the customer to the bank and set it off against any balance which may be due to the customer, or claim it in reconvention in an action at the suit of the customer ; it being, however, incumbent on the bank, like every shareholder, to establish clearly that all the necessary preliminary steps such as notice of dishonour, etc., had been observed to make the customer liable upon the note to the bank for its amount."
> (Per **Burnside** *C.J.* at page 12)

NOTE :

A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose. He must either pay cheques or refuse payment at once — see Halsbury, *Laws of England* (3rd *Ed.*), vol. 2, pp. 190 - 191.

A banker has a lien on the customer's general balance in his bank account for a debt due to the bank.

If, however, the banker takes a mortgage security for the debt due such mortgage security extinguishes the banker's lien on the customer's general balance in respect of that debt.

But where the mortgagor fails to redeem such mortgage security within the time covenanted for the repayment of the amount secured, a fresh debt is thereby created, and the banker's lien revives.

Anderson *v.* **The Oriental Bank Corporation**
(1885) 7 Supreme Court Circular, p. 77

In this case, the plaintiff, a customer of the Oriental Bank Corporation, brought an action against the bank to recover damages from the bank for dishonouring his cheque on the ground that at the time of dishonour he had in his bank account a balance sufficient to meet the cheque in question. The bank, in their answer, took up the position that although the plaintiff had funds in his account to meet the cheque, the bank had claimed a lien over those funds in respect of a debt due from the plaintiff to the bank and that since the balance in the account was subject to the banker's lien, it could not be utilised to honour the cheque in question, and, therefore the dishonour of the cheque for want of funds was justified.

It appeared that the defendant bank had acquired a lien over the plaintiff's general balance in respect of a promissory note in favour of the defendant which the plaintiff had endorsed and which was subsequently dishonoured. The defendant bank had, however, accepted from the plaintiff a mortgage of immovable property in satisfaction of their claim in respect of the promissory note. There was a covenant in the mortgage to repay the mortgage debt within a year. The District Court held that after expiry of the date given for payment, the debt not having been paid off, the bank had a right to apply the amount standing to the plaintiff's credit in his bank account in reduction of the mortgage debt, in the absence of any express agreement to the contrary.

The Supreme Court affirmed the judgment of the lower Court. **Fleming** *A. C. J.* observed :

"The bank, it appears to me, had an undoubted lien for the amount due on the promissory note, but it can scarcely be contended that the lien claimed by them was actually

exercised with regard to this note. So soon as it was agreed that the mortgage security should be taken for the note, and the note was actually delivered up to the plaintiff, the lien on it was, in my opinion, gone. It was held in the case of *Hewison v. Guthrie* 2 Bing. N. C. 755, that if a security is taken for the debt for which a party has a lien, such security being payable at a distant day, the lien is gone.

"If then, the bank had no right to a lien as regards the promissory note, had they a right to a lien on the plaintiff's money with regard to the mortgage debt? When the mortgage security was taken it was agreed that the debt should be paid off within one year. This was not done, and when the bank found that the plaintiff's property had been seized, and that their security might be in jeopardy, they wrote to the plaintiff intimating that they could retain such moneys as were standing to his credit, unless he consented to confess to judgment on the mortgage bond. Whether he agreed to do this or whether he did not, seems to me to be really immaterial. There was undeniably a debt still due by him to the bank. It may be that before judgment was confessed or given on the mortgage bond the actual amount due under it could not be realised. But a debt existed, and it is not incompatible with a right of lien on the part of the person claiming it to sue for the debt due retaining his lien as a collateral security. I therefore think that, however much the lien may have been lost as regards the promissory note, it existed with regard to what may be looked upon as the new debt so soon as that debt became due."

NOTE :

The general lien of bankers is part of the law merchant as judicially, recognised and attaches to all securities deposited with them as bankers by a customer or by a third person on a customer's account, and to money paid in by, or to the account of a customer.

See Brande v. Barnett (1846) 12 Cl & Fin. 787; *Misa v. Currie* (1876) 1 App. Cas. 554 (H.L.) Halsbury's Laws of England (3rd ed.) pp. 210-213. According to Paget, the banker's lien is dependent partly on usage and partly on course of dealing; *see* Paget *Law of Banking* (6th ed.) pp. 446 - 450. Halsbury, *Laws of England* (3rd *ed.*) vol. 2, pp. 210 - 211.

Where a father makes a fixed deposit in a bank 'for and on behalf of the daughter', as far as the bank is concerned, the father is the depositor and on the father's death it is his executor and not the daughter who is entitled to claim the deposit money.

It is desirable that a bank should so regulate its practice as to preclude any doubt as to the person whom the bank regards as the depositor.

Silva *v.* **Mercantile Bank of India Ltd.**

(1920) 2 Ceylon Law Recorder, p. 157

This case is an important decision relating to the practice of bankers when accepting fixed deposits from customers.

The facts of the case are also interesting. A father had deposited certain sums of money in fixed deposits ' for and on behalf of the daughter ' who was a minor at the time the deposit was made. Although the deposits were made for and on behalf of the daughter there was no special agreement between the bank and the father (the depositor) as to the withdrawal of the money.

On the death of the father, his executor under the father's will obtained probate from Court, endorsed the fixed deposit receipt and presented it to the bank for withdrawal of the money deposited with the bank. The bank paid the executor the money lying in the fixed deposit. Thereupon the plaintiff, who was the daughter, filed action against the bank claiming the money lying in the fixed deposits. The simple question that the Supreme Court had to decide was as to who was entitled in law to draw out the money lying in the fixed deposit, made by the deceased father.

It was argued for the daughter that the father had deposited the money as Trustee and/or Agent of the daughter and that it was his intention that the money should be paid to her as dowry.

The Supreme Court, however, did not think it necessary to consider these questions. Their Lordships took the view that upon admitted facts it was obvious that the defendant bank was under no obligation to pay the money in question to the daughter, even if the money, in fact, did belong to her — unless the

bank had agreed with the father (depositor) to pay the money to the daughter. The Court held that on the facts, there was no such agreement. To quote :

> " The question between the parties therefore resolves itself finally into this — Whom did the defendant bank mean by depositor ? Was it the father or his daughter ? It was agreed that the words on the receipt ' for and on behalf of the daughter ' should be literally interpreted to mean that the daughter was the depositor and her father acted only as her agent."

The Supreme Court, however, took the view that the documents and oral evidence in the case proved that the bank regarded the father only as the depositor.

> " It is his signature that the bank obtained to identify the person who was the depositor and it agreed to pay only upon his signature. So far as the bank was concerned the words, ' for and on behalf ' or ' on account ' were mere words of description of the money or funds which the depositor adopted to earmark the deposit for his own purposes. The bank undertook no obligation as regards the daughter. It had no contract with her." (per **Schneider J.** at p. 159)

The Supreme Court, accordingly, held that the money claimed in this case was payable by the bank to the father and was rightly paid on his death to his legal representative, the executor.

In conclusion, Mr. Justice Schneider, added the following words of caution which ought to be noted by all bankers in the island :

> " It seems to me that the bank invites trouble by permitting persons to endorse receipts for payment of deposits in the form adopted by the depositor in this case. It leaves room for dispute that the signature is that of an attorney for a principal. It seems to me to be desirable that the bank should so regulate its practice as to preclude any doubt as to the person whom the bank regards as the depositor."

When a customer pays money to the Head Office of a bank in Colombo with instructions to pay certain individuals living in towns in India, where the bank has branches, the bank in issuing drafts and telegraphic transfers to effect such payment acts in a fiduciary capacity and not as a normal debtor.

In such a case, if the bank goes into liquidation the named payees are entitled to claim preferential treatment from the liquidator in respect of the monies entrusted to the bank.

Pope *v.* **Abdulla**

(1942) 43 New Law Reports, p. 467

In this case a merchant had debts and other obligations to pay to individuals living in towns in India. He was a customer of a bank in Colombo, which had its Head Office in Colombo and branches in India. The merchant-customer paid in money to the Head Office of the bank in Colombo giving the name of the payees in India with full particulars as to the place of payment in India and the amount to be paid to each payee.

Upon receipt of the money from the merchant, the Colombo branch immediately made an entry in its books debiting itself and crediting its branches in India. Thereupon, the Colombo branch issued to the payee a draft (or undial or telegraphic transfer) addressed to each of its branches concerned ordering them to pay on demand to the payees the sum indicated. But before the payees could claim payment the bank and its branches became bankrupt and went into liquidation.

In the insolvency proceedings, the payees claimed preferential treatment in respect of the sums due on the drafts. *They argued that their relationship with the bank was not that of an ordinary creditor and debtor* but that of a preferential creditor and that they were entitled to preferential payment before the other creditors of the bank were paid.

The Supreme Court took the view that the question as to whether the payees were entitled to preferential treatment depended upon the nature of the transactions. **Mr. Justice Keuneman** set out the law as follows :

> " If a person pays money into a bank and nothing further happens, the money is regarded as the money of the bank with the obligation super-added that the bank will

meet cheques presented to it up to that amount. *The relationship created is that of an ordinary debtor and creditor.* The position however, is different where the bank received money in trust or in a fiduciary capacity, such as an agent or bailee, as a result of directions which set out a particular purpose for which the money is given. In this case the money does not become the money of the bank to use as it pleases, but is earmarked for the particular purpose and should not be mixed with the ordinary funds of the bank. The right of the person who gives the money to the bank to follow this money in the event of the insolvency of the bank need not be gone into in this case, but the right is well established." (*See : In re Hallett's Estate* ; *In re Knatchbull v. Hallett* (1879) 13 Ch. D. 696).

Accordingly, Mr. Justice Keuneman rejected the argument put forward for the bank that the purchase of the draft by the customer and the telegraphic transfer was an ordinary banking transaction and resulted in the ordinary relationship between the parties, *viz.* that of debtor and creditor. His Lordship took the view that the special nature of the transactions amounted to an understanding or agreement between the parties that the money was received by the bank for the purpose of transmission to the appropriate branch for the special purpose of paying the person named in the advice and the bank was acting in a fiduciary capacity and not as a normal debtor, and hence the payees were entitled to ask for preferential payment from the liquidator of the bank, in the insolvency proceedings.

NOTE :

The relationship between banker and customer is a complex contractual relationship, comprising reciprocal rights and duties, founded on the custom and usages obtaining among bankers. The primary relationship is that of debtor and creditor with certain super-added obligations. *See* Halsbury, *Laws of England* (3rd ed.) Vol. 2. pp. 166 - 167 ; Cowen, *On the Law of Negotiable Instruments in South Africa* (4th ed.) p. 365.

Other than in exceptional circumstances, a banker is not a trustee for his customer,—*see, Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110 C.A. at p. 127.

Where a customer has a claim against a bank which has become bankrupt, the customer can agree to abandon such claim, on the Managing Director and largest shareholder of the bank giving him a promissory note for the amount of the customer's claim. The abandonment by the customer of his claim against the bank is sufficient consideration for the promissory note.

Senanayake *v.* **Wijesekera**

(1929) 31 New Law Reports, p. 88

The facts in this case are interesting for the reason that they are unusual. The case relates to the bankruptcy and liquidation in 1922 of the island's first indigenous Banking Company known as Bank of Colombo Ltd.

In 1922, the Bank of Colombo Limited was unable to meet its commitments and suspended payment. Senanayake, the plaintiff was a customer of the bank who, at the date the bank suspended payment, had a credit of Rs. 468·68 in his current account with the bank. The bank was unable to pay this amount. Wijesekera, the defendant, who was the Managing Director and also the largest shareholder and largest debtor of the bank requested the plaintiff to abandon the sum of Rs. 468·68 lying to his credit and agreed to give the plaintiff a promissory note for that amount. The plaintiff agreed and gave the defendant a cheque for Rs. 468·68, thus abandoning his credit in the bank and the defendant in return gave the plaintiff a promissory note for that amount.

The defendant failed to pay the money due on the note and plaintiff sued him on the note for Rs. 611·99, *i.e.* the principal sum of Rs. 468·68 plus interest, whereupon the defendant while admitting the making of the note took up a novel defence, *viz*, that there had been no valuable consideration for the promissory note and therefore he was not liable under the note.

The Supreme Court, however, held (per **Dalton** *J.* and **Maartensz** *J.*) that there was sufficient consideration for the note and that the defendant was liable to pay the plaintiff. Their Lordships took the view that the promissory note was given by the defendant to prevent the plaintiff who was a creditor of the bank from suing the bank. In other words, the note was given to the plaintiff in consideration of his abandoning his claim against the bank; or the plaintiff received the defendant's promise in the note to be personally liable in return for that forbearance.

Where, on a contract of suretyship, a bank as creditor, had recovered from the guarantor on default of payment by the debtor, and consequently the guarantor sues the principal debtor for the amount paid by him to the bank, the bank is not liable to be added as a party defendant to the action instituted by the guarantor against the principal debtor.

Chartered Bank *v.* **De Silva**

(1964) 67 New Law Reports, p. 135

In this case, the question arose as to whether a bank (*viz.* The Chartered Bank) who was the creditor in a transaction was liable to be added as a party defendant tc an action instituted by the guarantor against the principal debtor. The facts were as follows :

In a contract of suretyship, the principal debtors were the 1st and 2nd defendants, the creditor was the Chartered Bank and the guarantor was the plaintiff. The two defendants had contracted with the Ceylon Government Railway to supply railway sleepers to be imported from Bangkok. For that purpose they had caused the Chartered Bank to open a letter of credit in favour of the shippers in Bangkok for a sum of Rs. 68,520/02 with the plaintiff as guarantor. The bank paid this amount to the shippers and called upon the defendants to pay it. The defendants paid the bank only Rs. 40,000/00 but failed to pay the balance. Thereupon, the bank demanded payment from the guarantor who paid the bank and then filed action against the defendants (the principal debtors) for the recovery of the sum of Rs. 28,520/02 that he, the guarantor, had to pay the bank.

The defendants took up the position that the bank, had in breach of certain terms of the contract wrongly called upon the plaintiff to pay this amount and therefore, the plaintiff was not entitled to recover this sum from the defendants. On the trial date, the plaintiff and the defendants moved to add the bank as a party to the action under Section 18(1) of the Civil Procedure Code (Cap. 101) ' for the complete and effectual adjudication of all matters in this case.' Although the bank filed objections to be added as a party defendant the District Judge allowed the bank to be added and the bank appealed from this order.

The Supreme Court (*per* **Sri Skanda Rajah** *J.* and **Alles** *J.*) allowed the appeal and held that the bank was not liable to be added as a party. The decision of the Supreme Court may conveniently be summarised as follows :

1. The provisions regarding the joinder of defendants in a plaint is found in Section 14 of the Civil Procedure Code the relevant portion of which reads : " All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action."

   The relevant provision as to the addition of parties is found in Section 18(1) of the Civil Procedure Code which reads as follows : " The Court may order that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court to effectually and completely to adjudicate upon and settle all the questions involved in the action, be added."

2. The Supreme Court held that the above provisions, *viz* Section 14 and 18(1) of the Civil Procedure Code should be read together.

   Accordingly, the plaintiff's cause of action against the defendants arose on a contract of suretyship. His cause of action if any, against the bank arose on quasi-contract known as *condictio indebiti* which is an action for the recovery of money which was not due but which was paid under a mistake. They are different causes of action. Accordingly, the plaintiff could not have filed action joining the defendants and the bank under Section 14. If he could not do so, he cannot be permitted to achieve it indirectly by seeking the Court's intervention under Section 18(1). To add the bank under the provisions of Section 18(1) would result in a misjoinder of parties and causes of action.

3. In the present case there was nothing that could not have been determined in regard to the contest between the plaintiff and the defendant owing to the absence of the bank as a party defendant. The bank was undoubtedly a material witness and the process of the Court was available to the plaintiff and the defendants to compel the bank to produce the necessary documents.

4. Another test as to whether the bank should have been added as a party was to determine whether on the facts of the case the legal rights of the bank are affected by the result of the action between the guarantor and the principal debtor. The plaintiff was suing the defendants on a contract of suretyship for monies which the plaintiff paid to the bank on behalf of the defendants. The bank is not interested in the result of the action between the plaintiff and the defendants and the plaintiff's action against the defendants cannot in any way affect the rights of the bank.

NOTE :

Chapter VI, Sections 90A to 90F of the Evidence Ordinance (Cap. 14) provides for the production of banker's books and documents in legal proceedings. These statutory provisions were taken over from the English Banker's Books Evidence Act, 1879. The English Act had a two-fold purpose, namely, to protect bankers from the inconvenience of having to produce their books in Court and also to enable litigants to prove banking transactions more easily.

Under Section 90C a certified copy of any entry in a banker's book is considered as *prima facie* evidence of the existence of such entry — *see* generally, Coomaraswamy, *Textbook on the Law of Evidence*, pp. 257 - 261.

Where a person personally presents a cheque drawn in his favour at a bank and the bank pays the cheque believing the cheque to be a genuine cheque of its customer, the bank is entitled on discovering that the cheque is a forgery to recover the money so paid from the payee as money paid under a mistake of fact.

The Imperial Bank of India *v.* **Abeysinghe**

(1927) 29 New Law Reports, p. 257 (D.B.)

In this Divisional Bench case an action was brought by the Imperial Bank of India to recover a sum of Rs. 2,000/- and interest being the proceeds of a cheque paid by the bank to the defendant in the mistaken belief that it was a genuine cheque drawn by a customer of the bank.

The defendant was a Proctor and Notary. He had received the cheque for Rs. 2,000/- as part payment of the consideration on the transfer of a land, the deed relating to which he attested as a Notary Public. The cheque had been drawn in the defendant's favour by the alleged purchaser and had been presented by the defendant personally at the bank. The bank had paid the defendant who in turn had handed the money to the alleged vendor. It later turned out that the signature on the cheque was a forgery ; that the alleged purchaser and vendor of the land were bogus persons and that the entire land transaction had been a fictitious one. The forger of the cheque was found, prosecuted by the Police and convicted. The bank had then sued the defendant in this action asking him to pay back the Rs. 2,000/- which they had paid to him on the forged cheque and which they had wrongly debited their customer.

The District Judge had given judgment in favour of the bank holding, *inter alia* —

(1) that there was no negligence on the part of the bank ;

(2) that there was a representation on the part of the Proctor (defendant-appellant) that the "cheque" was genuine ;

(3) that there was no delay on the part of the bank in intimating to the defendant that the cheque was not genuine ; and

(4) that the bank was not estopped from claiming repayment of the money on account of their negligence or on account of any loss suffered by the defendant.

The Supreme Court, (*per* **Fisher** *C.J.* and **Schneider** *J.* with **Garvin** *J.* dissenting), in dismissing the appeal, held that the bank was entitled to recover the money as paid under a mistake of fact. **Chief Justice Fisher** observed :

" This is a case of a document which is not a cheque at all. It has no shred of genuineness in it. It is a document bearing a signature which purported to be that of a person having an account at the bank and the first question is whether the bank *qua* bank is in any special position with regard to it and in relation to the defendant-appellant.

" It is said that the bank is bound to know its customer's signature. I do not think that there is any authority to support the application of that proposition to the circumstances obtaining in this case. The utmost that can be taken as established is, I think, that the proposition is good as between a bank and its customer, but in the absence, at all events of any negligence in actually honouring the signature, I do not think that any duty or obligation towards a third party in the situation of the appellant can be founded upon it."

Mr. Justice Schneider observed :

" Although as between the bank and its customers the law imposes a duty on the bank to know the signature of its customer and thereby debars the bank from pleading as a defence a claim by a customer that a payment had been made in *bona fide* ignorance that a signature was a forgery, I am not aware of any law which imposes that duty on a bank to all persons who present cheques for payment .... there is authority to the contrary."

It was also contended that in honouring the "cheque" the bank must be taken to have made a representation to the payee that the signature was genuine and is therefore liable for any action taken by the defendant on the faith of that representation. The answer to this argument was that simply and solely by paying the money in the ordinary course of business to the person whose name appeared as payee the bank cannot be taken to have represented to him that the document was genuine. **Fisher** *C.J.* observed :

" In the default of authority, I am not prepared to say that merely cashing the document is in itself a conduct which amounts to a representation that the document is genuine."

On this point, **Schneider** *J.* took the view that the bank was precluded from setting up the forgery only if by some act or omission it intentionally caused or permitted the appellant to believe that the signature was not a forgery and to act upon that belief; (Section 114, Evidence Ordinance No. 14 of 1895) and on the facts, it could not be said that the bank had been guilty of any omission to do something it was bound to do in honouring the " cheque."

The next question was whether there were any circumstances which prevented the payer (*i.e.* the bank) from recovering the money back as money paid under a mistake of fact. The bank had dealt with the defendant as a principal and not as an agent. He was not really an agent at all ; he was a dupe. The Supreme Court took the view that the fact the defendant had parted with the money was not, under the circumstances of the case, a good answer or defence to the demand for payment.

Mr. Chief Justice Fisher concluded :

" In my opinion therefore, inasmuch as there has been no breach of the duty arising from mutual relations between the parties ; no negligence on the part of the bank ; no express or implied representation by them, there is no reason why the bank should not recover this money on the ground that it was paid by them to the defendant-appellant under a mistake of fact."

Mr. Justice Schneider observed :

" All the authorities cited before us, with the exception of a few passages from text books on banking to show how the cases had been regarded, were decisions of the Courts of England. I presume upon the assumption that they were applicable. I accept that assumption as correct. If the question involved in this case be regarded as one in respect of a matter connected with a cheque, Section 2 of the Ordinance No. 5 of 1852 would make the law of England applicable. So would the Ordinance No. 22 of 1866, if the question be regarded as one in respect of the Law of Banks and Banking or Principal and Agent. But if the provisions of neither of these Ordinances have any application, the authorities cited would still be applicable for the reason that

this is a case according to the English Law, for money had and received, and is founded on the same principle of equity as the Roman-Dutch Law action of *condictio indebiti* . . . . . Both actions being founded on the same principle, the decisions of the learned Judges of the English Courts . . . should be regarded by us not only as guides but even as binding authorities in appropriate circumstances. I would therefore accept the English decisions cited to us as authorities in deciding this case."

In a lengthy dissenting judgment, **Mr. Justice Garvin** took the view that the bank was not entitled to recover the money. In His Lordship's view the payment of the cheque on presentation by the bank was a representation that it believed it to be a genuine cheque of its customer and the defendant having been induced by this representation to pay out the proceeds of the cheque in accordance with his instructions, the money was not recoverable from him. Mr. Justice Garvin took the view that the facts of the present case could not be equiperated with those of any of the cases cited to Their Lordships and that there was no question here of an unconscientious claim to retain money paid by a mistake. The money paid by the bank was not in the possession of the defendant nor had he derived any benefit directly or indirectly from the money so paid. A loss has been sustained; which of the two innocent parties, the bank or the defendant, should bear the loss? In His Lordship's view the loss should remain where it lay, *i.e.*, on the bank and should not be shifted on to the defendant's shoulders.

NOTE :

The decision in this case was referred to and approved of by the Supreme Court in *Don Cornelis v. De Soysa & Co. Ltd.*, (1965) 68 N.L.R. 161 at p. 165. cf. *obiter dictum* of Tambiah J. in *Daniel Silva v. Johanis Appuhamy* (1965) 67 N.L.R. 457, at p. 472 to the effect that an action for money had and received is unknown to the law of Ceylon — disapproved of in *Don Cornelis v. De Soysa & Co., Ltd.* (*supra*). See also Paget (7th ed.) at page 368 and *Gowers v. Lloyds & National Provincial Foreign Bank* (1938) 1. A. E. R. 766.

Where a bank undertakes to negotiate drafts drawn on a customer of the bank by a foreign merchant on surrender of shipping documents in respect of goods of a specified weight and quality and where an agent of the bank negligently pays the foreign merchant the full sum due on a bill of lading showing less weight, the bank will be liable to its client, the customer, who has honoured the draft to the bank.

In such a case the customer-client is entitled to sue the bank for negligence to recover any loss sustained by him by the bank not complying with his instructions to it.

But where the customer-client fails to prove satisfactorily the damages sustained by him, a Court will award only nominal damages against the bank.

Essack *v.* **National Bank of India Ltd.**
(1950) 43 Ceylon Law Weekly, p. 30

The plaintiff who was a customer of the National Bank of India Ltd. sued the bank for the recovery of a sum of Rs. 1,525/- as damages sustained by him on account of negligence on the part of the bank in paying a bill of lading which did not comply with the instructions given by him to the bank. The Supreme Court held that the defendant bank was liable in negligence but awarded the plaintiff only *one rupee* as nominal damages as he was unable to prove satisfactorily the damages he had sustained. The facts of the case were as follows :

The plaintiff had entered into a contract for the purchase of 52 tons of dates from one Mehta of Basrah. It was a cost, insurance and freight contract. After entering into the contract, the plaintiff had requested his banker, the defendant bank, to negotiate drafts drawn on him by Mehta to the extent of Rs. 15,860/- on the condition that Mehta surrendered to the bank, shipping documents consisting of an on board bill of lading, an invoice and a policy of insurance representing a shipment of about 1,000 bundles of dates weighing 52 tons C.I.F. Colombo.

Thereafter, the defendant bank arranged with the Ottoman Bank of Basrah to honour Mehta's drafts. The Ottoman Bank honoured Mehta's drafts and paid him Rs. 15,860/- against the invoice, bill of lading and policy of insurance submitted by him. However, the weight of the *dates* shipped turned out to be 47 tons and not 52 tons as indicated by the plaintiff. The bill of lading, therefore, did not agree with the original invoice and there was a difference of 5 tons in the weights given in both documents. Since the Ottoman Bank had paid the foreign merchant, Mehta, the National Bank (the defendant bank) in turn paid the Ottoman Bank and debited the plaintiff's account.

The plaintiff thereupon sued the defendant bank on the ground that although he had asked the Bank to honour drafts covering a shipment of 52 tons of dates, the bank had, contrary

to his instructions, paid upon a bill of lading covering a shipment of only 47 tons. The plaintiff claimed from the defendant bank the value of the unshipped quality of dates as damages for negligence.

On these facts, on the authority of an English decision *viz.*, *London and Foreign Trading Corporation v. British and Northern European Bank* (1921) Lloyd's Law Reports p. 116, the Supreme Court held that " there can be no question that there has been negligence on the part of the agent of the defendant bank in honouring the foreign merchant's draft which was not accompanied by a bill of lading showing that 52 tons of dates had been shipped."

Coming to the question of the damages that the defendant bank had to pay, the Supreme Court (per **Jayatillake** *C.J.* and **Gunasekera** *J.*) added :

> " The only question is what damages the plaintiff is entitled to ; on this question the English case referred to is not helpful because the damages seem to have been agreed upon by the parties . . . The Law of England in maritime matters has been introduced to Ceylon; under the English Bills of Lading Act, a bill of lading is conclusive evidence in favour of a consignee or indorsee for valuable consideration of the shipment of the goods against the master or the person signing the bill of lading. But it is not conclusive as between the signer and the shipper, nor as between the owner and the shipper nor as between the owner and holder for value unless the owner signs it himself or by a servant. In all these cases the statements in the bill of lading are *prima facie* evidence which the person disputing them must disprove."

> " The present action is not one by or against the signer of the bill of lading or the owner of the ship. The bill of lading was given by the signer to the foreign merchant (Mehta) and not to the defendant bank and it cannot be said that the statement in the bill of lading that 47 tons were shipped can be regarded as evidence against the defendant bank. So far as the defendant bank is concerned the statement in the bill of lading appears to be hearsay. There is no evidence before the Court that the plaintiff received only 47 tons . . . The plaintiff has in our opinion failed to prove the damages sustained by him and we have no alternative but to award him only nominal damages which we would fix at one rupee."

Where a manager of a company who has authority to draw company cheques for the business of the company but not for his private business draws and issues company cheques in payment of his personal liabilities, the company is entitled on the discovery of the manager's fraud to recover the amount of the cheques so drawn from the payee. In such a case the payee acquires no right to the money represented by the cheques and is liable for the amount of the cheques to the company.

There is no trade custom in Ceylon which has been recognised by the Courts which entitles a manager of a business to draw on the banking account of his principal to pay the manager's personal debts.

Dodwell & Co. Ltd., *v.* John

(1915) 18 New Law Reports, p. 133 (F.B.)

(1918) 20 New Law Reports, p. 206
(Privy Council)

This was an interesting case both from the point of view of the law as well as on the facts. What happened in *Dodwell & Co. Ltd., v. John* can happen in any of the limited liability companies doing business in Ceylon today. As observed by the Supreme Court it is for the directorate or management of companies to guard against such situations. The facts of the case were shortly as follows :—

Dodwell & Co. Ltd., were a company incorporated and registered in England and carrying on business as import and export merchants at various places in Ceylon, including Colombo, through branch offices. One R. H. Williams had acted as the manager of the Colombo Branch of the company since 1905. Williams held a power which enabled him to conduct the business of the company at Colombo. The power of attorney gave the manager, Williams, wide powers including the power to draw cheques on the company's bank account.

The defendants, John and Others, were partners in the firm of E. John & Co. which carried on business as share and produce brokers in Colombo. Dodwell & Co. Ltd. had transacted a considerable amount of business with the defendants, relating in the main to the purchase and sale of produce. John & Others, had a running account with Dodwell & Co. Ltd. and they also

had a separate personal account for the manager of the Company, Williams, who also often employed the defendants as brokers in the purchase and sale of shares. These share transactions were private transactions of the manager, Williams and had nothing to do with the business of Dodwell & Co. Ltd.

In the course of his private dealings with the defendants, Williams fraudulently drew four cheques on the company bank account in favour of the defendants for purchase of shares. The cheques were drawn as follows :

June 15, 1909	Rs.	11,517.50
October 12, 1909	...	20,102.50
May 3, 1910	...	67,500.00
May 5, 1910	...	46,740.00
	Rs.	145,860.00

These cheques were drawn by Williams under his power of attorney in the name of the defendants as payees, on the bank account of the plaintiff company. The cheques were in fact drawn by him not in the conduct or for the purposes of the business of Dodwell & Co. Ltd. but in the private interest of Williams himself to be used in his own share transactions.

The employment of company funds for this private purpose was plainly outside the general authority entrusted to Williams. In so doing, Williams was no doubt guilty of fraud, and in fact when the company discovered the fraud they not only sued him but initiated criminal proceedings against him and Williams was convicted and punished. As a next step, Dodwell & Co. Ltd. sued the defendants who were the payees of the four cheques for the refund of the sum of Rs. 145,860/- paid to them on the cheques issued by Williams.

For the plaintiff company, it was argued that the manager, Williams, had no authority to draw cheques upon the plaintiff company's banking account for paying his personal debts ; on the face of the cheques it was clear that Williams was paying plaintiff company's money and not his own. In such a case, the defendant payees could not retain plaintiff company's money which had been fraudulently and unlawfully paid to them,

For the defendants it was argued, *inter alia* —

(*a*) that they were not aware and were free from participation in the manager's fraud and had in fact, obtained no benefit from it. The defendants, admittedly, had acted throughout in good faith. They had accepted the cheques in the ordinary course of business ; the cheques were passed through the defendant's offices and paid into the bank without any of the defendants personally seeing them. In such circumstances, the defendants were not to blame ;

(*b*) that there was evidence in the case to prove that there was a custom that the manager of a business was entitled to draw cheques on his master's bank accounts to pay his personal debts.

Three Judges of the Supreme Court by a majority decision (*per* **Pereira** *J.* and **Shaw** *J.* with **Ennis** *J.* dissenting) however, decided in favour of the plaintiff company and held that that Dodwell & Co. Ltd. were entitled to recover from the defendants the monies paid out on the four cheques.

As regards the question whether the defendants were to blame or whether the plaintiff company were themselves to blame for any laches or carelessness on their part in allowing the manager to defraud the company in this manner, **Mr. Justice Pereira** observed :

" The defendants had every reason to know that the money that was being paid to them by the manager was the money of the plaintiff company, and they had no reason to suppose that Williams had any authority to give them the plaintiff's money in payment of his own debt. That being so, the defendants, were to say the least, guilty of such gross negligence and carelessness in making no inquiry as to the authority of Williams, so that perfect *bona fides* can hardly be attributed to them in law . . . ."

" I do not think that the evidence shows that the plaintiffs have been guilty of any laches whatsoever. It has been said that the plaintiffs should have had their books audited periodically by local auditors rather than by auditors in England . . . . The plaintiffs cannot be blamed for adopting methods of audit that seemed to them to be preferable, so long as the audit was carried out by

competent accountants. There is no evidence of any act of the plaintiff company indicative of laches in the detection of the fraud. The mere fact that ' some clues and hints ' reached the ears of the directors which, perhaps, if ' vigorously and acutely followed up might have led to a complete knowledge of the fraud ' is insufficient to render the plaintiff guilty of laches, in the absence of some disclosure that informed the mind of the corporation that it had been defrauded by its manager."

On this point, **Mr. Justice Shaw** observed:

" The evidence, in my opinion, clearly shows that the defendants knew that the purchase of shares in respect of which the cheques were given were private speculations of the manager, Williams, and had they looked at the face of the cheques they should have at once seen that he was giving the company's cheques for his personal debts. The fact that owing to the pressure of business none of the partners in the defendant firm actually examined the cheques or noticed on what account they were drawn does not seem to me to better their position."

As to the legal contention that there was a trade custom in the island that entitled a manager of a business to draw on the banking account of his principal to pay his personal debts, **Mr. Justice Shaw** observed:

" The power of attorney given to the manager, Williams, gave him no authority to draw cheques upon the company's banking account, or otherwise to use the company's money in payment of his personal liabilities. The trade usage that the defendants have attempted to prove, authorising managers to draw cheques on their principal's banking accounts in discharge of their private debts cannot extend the specific authority given by the power of attorney, and I agree with the District Judge that the evidence is insufficient to establish any such universal usage, and that such a usage, even if proved, would not be one such as the Courts would recognise."

On an appeal from the judgment of the Supreme Court of Ceylon, Their Lordships of the Privy Council held as follows:

(1) that a manager of a company who is authorised to draw cheques for the business of the company on the company bank account is not entitled to draw company cheques for his private business and transactions;

(2) that a manager who utilises the company bank account for his private transactions commits a fraud and the company is entitled to sue the payee of the cheques and recover the amounts of the cheques so paid from the payee ;

(3) that in such a case the payees acquire no right to the money represented by the cheques and are liable for the amount of the cheques to the company which was so defrauded ;

(4) when an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is in a fiduciary position, and any third person taking from the agent a transfer of that property with the knowledge of a breach of a duty committed by him in making the transfer, holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between such third party and the principal does not make any difference, for the title does not rest on contract.

(5) A claim for *conversion* falls under Section 10 of the Prescription Ordinance (Cap. 68) and is barred in *two* years. As the claim in this case was not merely for conversion, but alternatively to recover what was in effect a trust fund, it falls within Section 8 or else within Section 11 of the Prescription Ordinance and is thus barred only in *three* years. It cannot be said in this case that the cause of action had not arisen in respect of the claims until the manager's fraud was discovered by the plaintiff company ;

(6) Accordingly, since the company had discovered the manager's fraud only in October 1911 and filed action only in January 1913, the plaintiff company's action in respect of the 1909 cheques were barred by prescription but the claims in respect of the 1910 cheques were not so barred or prevented by the law of prescription.

The Ceylon Supreme Court, on the other hand, had, by a majority decision, held that the cause of action to sue on the cheques arose only when the manager's frauds had been discovered by the company in October 1911 and that the Prescription Ordinance did not bar the claim on the cheques and that the plaintiffs were entitled to recover on all four cheques

and not merely on the two cheques issued in 1910. Their Lordships of the Privy Council, set aside the judgment of the Supreme Court only on this point. On the main point as to the liability of the defendants to repay the plaintiff company the amount of the two cheques issued in 1910 the Privy Council affirmed the majority decision of the Ceylon Supreme Court.

Where the secretary of a company forged the signatures of certain of the directors to a number of cheques purporting to be drawn on behalf of the company and obtained payment thereof from the company's bankers, the company is entitled to recover from the bankers the amount so paid where the bank is unable to show that it had been misled into paying any of the cheques by any conduct of the company or to show what induced it to pay the cheques.

The fact that the directors of the company had not regularly examined the company's finance book and pass book during the period within which the forgeries were committed did not preclude the company from recovering.

The fact that the pass book or the bank statements had been returned to the bank without objection being taken by the company who at the time had no knowledge of the forgeries did not constitute a settled account between the bankers and the company.

Where a company's cheques require the signature of two of the directors and the secretary, a bank which pays one of the company's cheques on which an alteration had been initialled by only two of the signatories does so at its peril.

Kepitigalla Rubber Estates Limited *v.* **National Bank of India**

(1909) 78 Law Journal Reports, p. 964

The above case is a decision of an English Court but is reported in this volume for two good reasons. Firstly, the decision contains important principles of law relating to the liability of bankers that pay company cheques that later turn out to be forgeries. The principles laid down in this case should, therefore, be of interest and importance to bankers in Ceylon. Secondly, the case itself concerns a limited liability company

formed in England for the specific purpose of purchasing estates in Ceylon and planting and cultivating tea thereon. The estates in Ceylon had been purchased and were being cultivated and the produce sold.

The company employed no one in England except a Secretary named Talbot who committed a series of frauds by drawing several cheques on the bank account of the company forging some of the signatures of the directors and thereafter cashing the cheques.

The principles of law stated above were laid down by **Mr. Justice Bray** who held that in the special circumstances of this case the company was entitled to recover from its bankers the amounts paid by the bank on the forged cheques.

In arriving at his decision **Mr. Justice Bray** made the following observations which merit quotation :

> " There is no authority for the proposition that the directors of a company must take reasonable precautions to prevent the company's servants from forging their signatures.
>
> " I do not enquire whether the bank officials were careless. It is for them to say what precautions they should take in their own interest. They are responsible if they choose to cash forged cheques unless they can show that they have been misled by their customer.
>
> " The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for the very small risk. To the individual customer the loss would often be very serious ; to the banker it is negligible."

Where a Buddhist priest who had maintained an account at a bank in his personal name dies without assigning, during his lifetime, the monies in the said account to any person or institutions, any monies remaining in the bank account at the time of his death will become Sanghika property and vest in the temple to which such priest belonged.

In such an event, the controlling Viharadhipathi of such temple is entitled to such money and may apply to Court for an order of payment in his favour to withdraw the monies lying in such bank account.

Indrasumana Thero *v.* **Kalapugama Upali**

(1966) 70 New Law Reports, p. 359

It is not uncommon in Ceylon for Buddhist priests to maintain and operate current and savings accounts in their personal names with banks in the Island. In the above case the interesting question arose as to who would be entitled to the money lying in the bank account of a Buddhist priest who had died without assigning such monies during his lifetime.

In the case of a customer of a bank who is a layman the rule is that on the customer's death, the funds, if any, in his account will normally vest in his legal representative. But in the case of a Buddhist priest, the Buddhist Ecclesiastical Law and not English Law will apply.

Under Section 23 of the Buddhist Temporalities Ordinance (Cap. 318):

> "All *pudgalika* property that is acquired by any individual bhikku for his exclusive personal use, shall, if not alienated by such bhikku during his lifetime, be deemed to be the property of the temple to which such bhikku belonged unless such property had been inherited by such bhikku."

Accordingly, where a Buddhist priest opens a savings or current account in a bank with monies that he has acquired and operates such account for his exclusive personal use, such monies will be treated in law as his own (*pudgalika*) property; and if he does not during his lifetime assign such monies to any person or institution, the monies, if any, lying in the bank will, on his death vest in the controlling *Viharadhipathi* of the temple to which he belonged.

In such an event, the controlling *Viharadhipathi* is entitled to the money in the bank account and can withdraw it. To do so he may apply to the relevant Court having jurisdiction for an order of payment on the bank to withdraw the money.

In the above case the Supreme Court also held that a Last Will of a Buddhist priest is not an alienation (or assignment) as contemplated by Section 23 of the Buddhist Temporalities Ordinance.

Where a cheque crossed generally by the drawer is paid by the drawee bank otherwise than to another bank, the drawee bank's liability to the drawer is not automatic. It arises only if, by reason of the unauthorised mode of payment, the drawer proves that he has incurred a loss for which responsibility may fairly be imputed to the drawee bank.

Accordingly, where a cheque crossed generally is stolen after the payee endorses it in blank and is subsequently paid by the bank across the counter to a holder, the drawer of the cheque cannot avail himself of the provisions of Section 79(2) of the Bills of Exchange Ordinance to institute an action for a declaration that the drawee bank is not entitled to debit his account with the amount of the cheque.

Mercantile Bank of India Ltd. *v.* **Ratnam**

(1955) 57 New Law Reports, p. 193

This case was an interesting case which concerned the liability of a bank which had paid a cheque across the counter to a person who later turned out to be a thief. The facts of the case were as follows :

The plaintiff had borrowed Rs. 2,000/- from one Dr. Thurairajah and had given a cheque in his favour, ' or order,' drawn on the defendant bank, namely, Mercantile Bank of India, Ltd. Accordingly, the plaintiff was the drawer of the cheque ; Dr. Thurairajah, the payee, and the defendant bank, the drawee of the cheque. The payee had subsequently endorsed the cheque in blank and had given it to someone to be sent by post to the payee's bank, namely, The Bank of Ceylon, for collection. Unfortunately, the payee had not taken the precaution of indorsing the cheque specially in favour of the Bank of Ceylon or even of marking it ' Not Negotiable.'

Subsequently, it was discovered that the cheque had been presented over the counter at the defendant bank and it had

been paid. Presumably, the cheque had been stolen in the post, the general crossing had been cancelled and the payee's signature forged under the cancellation.

The plaintiff, the drawer of the cheque, sued the defendant bank for a declaration that the bank was not entitled to debit his account with the sum of Rs. 2,000/- representing the payment made by the bank across its counter.

The District Judge had given judgment for the plaintiff (the drawer of the cheque) on the ground that by reason of the drawee bank having paid the crossed cheque otherwise than to a banker, the plaintiff's original debt to the payee was revived by operation of law. The bank was, therefore, held liable to indemnify the plaintiff for the loss resulting to him from its disobedience of the drawer's mandate as to the mode of payment.

The Supreme Court (*per* **Gratiaen** *J.* and **Swan** *J.*) set aside the judgment of the District Court and held that the bank was not liable. Mr. Justice Gratiaen, who delivered the judgment of the Supreme Court in appeal, observed as follows :

> " It may be assumed for the purposes of this appeal that when the cheque in question was presented for payment over the counter, the bank realised (or should have realised) that it was still crossed generally and ought *not* to have been paid across the counter. The question is : what legal consequences flow from this unauthorised mode of payment?
>
> " Section 79(2) of the Bills of Exchange Ordinance expressly provides that where a cheque crossed generally has been paid by the drawee ' otherwise than to a banker ' he is liable to the ' true owner ' for ' any loss he may sustain owing to the cheque having been so paid.' The proviso to the section introduces a statutory exemption from liability which has no bearing on the present case. Indeed, Section 79(2) admittedly does not apply to the plaintiff (the drawer). It was the payee who became the ' true owner ' of the cheque when he took delivery of it from the drawer, and for reasons which I shall later explain, the payee had himself been divested of ownership before the cheque had been paid across the counter by the bank.
>
> " In what circumstances, then, can the drawer of a cheque which was generally crossed refuse to let the drawee debit his account if the cheque was paid across the counter? The Ordinance does not prohibit this mode of payment in

express terms, nor does it provide the drawer himself (as opposed to the ' true owner ') with a statutory remedy in such a situation. Nevertheless, under the common law of England which applies to Ceylon in cases of this kind, the general crossing of a cheque operates as a mandate to the drawee to make the payment to a banker *and to no one else*; accordingly, a drawee who makes a payment across the counter in disobedience of the mandate acts at his peril. His liability to the drawer in such an event is not, however, automatic : it arises only if by reason of the unauthorised mode of payment, the drawer proves that he has incurred a loss of which responsibility may fairly be imputed to the drawee."

Having referred to the English decisions of *Bobbet v. Pinkett* (1876) 1 Ex. D 389, *Smith v. The Union Bank of London* (1875) 10 Q.B. 291 and *Baines v. The National Provincial Bank* (1927) 96 L.J.K.B. 801, Mr. Justice Gratiaen held in favour of the defendant bank and dismissed the plaintiff's action against the bank. In His Lordship's view, " the plaintiff had not alleged in his plaint that any loss had resulted to him from the payment of the crossed cheque across the counter, nor was an issue raised at the trial as to whether such loss had in fact occurred. For this reason alone the learned District Judge should have upheld the objection that the plaint disclosed no cause of action against the bank.

Mr. Justice Gratiaen concluded :

" Assuming that the cheque was accepted only as conditional payment of the original debt, the payee had indorsed it in blank and subsequently ceased to be its ' true holder ' at the time when it was stolen. The payee's indorsement converted the cheque into a ' bill payable to bearer ' by virtue of Section 8(3) of the Ordinance. Accordingly, ' W. D. Fernando ' who presented the cheque bearing the payee's genuine indorsement in blank was its ' holder ' at that point of time, so that payment to ' W. D. Fernando ' (even if he were the actual thief) operated as ' a discharge of the bill.' The circumstance that the crossed cheque was paid across the counter instead of through a Bank did not divert the proceeds into wrong hands. Indeed, the payee's failure to protect himself by making the cheque ' not negoitable ' was the primary cause of his loss. He was in no better position, after losing the cheque which he had indorsed in blank, than he would have been if he had

lost a currency note which he had taken in satisfaction of the earlier debt. In such a situation, the loss clearly lies (as between himself and his debtor) where it falls."

"In this case the plaintiff had delivered to the payee a cheque in precisely the form in which it was asked for, and funds were available in the bank to meet it upon presentation. The subsequent conversion of the document, by indorsement, into a 'bearer cheque' was the primary consequence of the loss sustained by the payee. Once the cheque was paid to 'W. D. Fernando,' the payee had no further claims upon the plain tiff; nor indeed, had he a remedy against the bank under Section 79(2) because he was not the 'true holder' of the cheque at the time that it was paid. His only remedy is against the thief if he can find him."

Where a trustee at the request of the beneficiary deposits in a Bank a sum of money given as security by the beneficiary to the trustee and where the money so deposited is lost owing to a failure of the Bank the trustee cannot be held responsible for the loss of the money.

In such case, there is also no obligation on the part of the trustee to take steps to recover what he could from the insolvent Bank.

Garvin *v.* **Abayawardene**

(1924) 26 New Law Reports, p. 719

"This case," observed **Bertram** *C.J.*, "raises a question of law on which unfortunately there appears to be no authority, and we must accordingly decide it upon a first impression according to principles which seems to us to be applicable to the case." Briefly the facts were as follows:

The defendant, Abayawardene, was a toddy renter and in pursuance of the usual system of obtaining the rent he had deposited with the Government Agent a sum equivalent to two months' instalments of the purchase money, and again in pursuance of the usual system he had subsequently executed a bond purporting to hypothecate this sum in the hands of the Government Agent as security for the discharge of his obligations under the contract. The sum involved was Rs. 1,341·66. The defendant had also by a letter to the Government Agent requested him to deposit the amount so hypothecated as security in the Bank of Colombo on a fixed deposit so that the money may earn interest at 6 per cent. per annum. This was accordingly done.

Unfortunately, the Bank of Colombo which happened to be the first indigenous bank to be established in Ceylon, became insolvent and failed in June 1921 and was unable to pay its creditors. The amount thus deposited by the Government Agent at the request of the defendant with the Bank of Colombo was thus lost. And the real and only question was who was to be responsible for the loss of this sum of money so deposited with the Bank — the Government Agent or the defendant?

The Supreme Court held that the Government Agent was not responsible for the loss of the money and was also under no obligation to take steps to attempt to recover it from the insolvent bank. **Bertram**, *C.J.*, observed :

> " The transaction may be looked at in this way. This money was deposited with the Government Agent. The Government Agent held this fund as a trust fund on behalf of the toddy renter, subject to his rights in connection with it. While he was so holding it at the request of the person, in trust for whom he held it, he deposited the fund in a particular bank for the benefit of that person. It surely follows on all principles of equity that a trustee in that position ought not to be held responsible for the loss which occurred through his acting upon the special request.
>
> " There remains the further question to which the learned District Judge attributes some importance : Whether the Government Agent was under any obligation to undertake salvage operations to get back what he could out of the wreck. As a matter of fact there is no express authority on this point, but it seems clear that any person acting at the request of another in this way, and particularly any trustee acting in pursuance of an express request by a *cestui que trust*, competent to make such a request, would be entitled to refuse to bring an action of the nature suggested, unless he were indemnified against all possible expenses."

CHAPTER 3

LAW RELATING TO PROPER PLEADINGS IN ACTIONS ON CHEQUES

The English law is to be applied in respect of all contracts and questions arising upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instruments.

Latchime *v.* **Jamison**

(1913) 16 New Law Reports, p. 286

This was an action based on a promissory note. The facts were as follows :

The plaintiff was the defendant's brother's mistress and had two children by him. When the defendant's brother was leaving Ceylon, the defendant as a favour, gave a note to the plaintiff to maintain the children. The defendant did not receive any consideration from his brother for making this arrangement, and gave the note of his own accord and not at his brother's request.

The question before the Court was whether the plaintiff could sue the defendant on the promissory note. For the defendant it was argued that since no valuable consideration passed between the plaintiff and the defendant for the note, no action could be filed on the promissory note for lack of consideration. This view was in accordance with the principles of English law which requires valuable consideration before a person can sue on a negotiable instrument.

On the other hand it was argued for the plaintiff that the defendant's liability had to be determined according to the principles of Roman-Dutch Law and not English Law and that under Roman-Dutch Law the plaintiff need not prove that there had been valuable consideration for the note.

The Supreme Court, (*per* **Lascelles** *J.* and **Pereira** *J.*) however, rejected this argument and held that it was quite clear under Section 2 of the Civil Law Ordinance No. 5 of 1852 that the validity of the note in suit must be determined by English Law, for that section provided that the law to be administered " in respect of all contracts and questions arising upon or relating to bills of exchange, promissory notes and *cheques*, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in

England in the like case at the corresponding period, if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in England."

Accordingly, the Supreme Court held that English Law applied and that in the circumstances of the case the plaintiff could not sue the defendant on the note, as the note was given without valuable consideration.

Although by virtue of Section 2 of the Civil Law Ordinance No. 5 of 1852 the English law relating to negotiable instruments like bills of exchange, cheques and promissory notes was introduced to Ceylon, Ordinance No. 5 of 1852 did not at the same time introduce any part of the English procedure into actions on negotiable instruments in Ceylon.

Actions on negotiable instruments, like others are regulated in Ceylon by the Civil Procedure Code.

Mudalihamy *v.* **Punchi Banda**

(1912) 15 New Law Reports, p. 350

This was an action on a promissory note. The Supreme Court (*per* **Lascelles** *C.J.*) held that the legal procedure that has to be followed in Ceylon in actions relating to negotiable instruments like bills of exchange, cheques and promissory notes, is the procedure as laid down by the provisions of our Civil Procedure Code (*Cap.* 101) and not the procedure adopted in England in similar actions. The Court took the view that the English rules of procedure are not in force in Ceylon.

Lascelles, *C.J.*, observed:

"I think that Section 2 of the Ordinance No. 5 of 1852 cannot be construed as introducing any part of the English procedure into actions on bills of exchange and promissory notes. These actions, like others, are regulated by the Civil Procedure Code."

Our Bills of Exchange Ordinance No. 25 of 1927 is based upon the English Bills of Exchange Act of 1882.

Section 98 (2) of our Bills of Exchange Ordinance enacts that the rules of the Common Law of England, including the law merchant, save in so far as they are not inconsistent with the provisions of the Ordinance or any other Ordinance in force, shall apply to bills of exchange, promissory notes and cheques in the island.

Accordingly, in every case relating to negotiable instruments like bills of exchange, cheques and promissory notes, where such a case is not governed by the express provisions of the Bills of Exchange Ordinance No. 25 of 1927, we must look to the common law of England and not to the entirety of the law that would be administered in England at the corresponding period.

Soosaipillai *v.* **Vaitalingam**

(1935) 37 New Law Reports, p. 381

Outstanding among the Statutes directly introducing the English Law into Ceylon is Ordinance No. 5 of 1852. Commonly referred to as the Civil Law Ordinance, this Ordinance introduced into Ceylon the Law of England in maritime and commercial matters unless there is contrary statutory provision in the island.

The Civil Law Ordinance No. 5 of 1852 in its original form covered bills of exchange, promissory notes and cheques as well, but in view of the enactment of the Bills of Exchange Ordinance No. 25 of 1927 (*Cap.* 82) the reference in the Civil Law Ordinance (*Cap.* 79) to these instruments has been dropped.

In the case of *Soosaipillai v. Vaitalingam* decided in 1935 which was a case referring to a promissory note, the Supreme Court emphasised the difference between the provisions relating to the introduction of English Law in the Civil Law Ordinance No. 5 of 1852 and in the Bills of Exchange Ordinance No. 25 of 1927.

Section 2 of the Civil Law Ordinance enacts that, in respect to the branches of the law to which it relates (*e.g.*, law relating to banks and banking, partnerships, agency, corporations, carriers by land, fire and life insurance), the law to be administered shall be the same as that which would be administered in England in the like case at the corresponding period. The general terms in which this section is phrased indicates that the English Law so introduced is *not only the common law of England but the entire body, of the English Law* prevailing at the relevant date.

On the other hand, in the case of negotiable instruments like bills of exchange, cheques and promissory notes, Section 98(2) of our Bills of Exchange Ordinance introduces into Ceylon (in cases not covered by the express provisions of the Ordinance itself) *only the common law of England* and not the entirety of the English Law that would be administered in England at the corresponding period.

This distinction is important, although as **Mr. Justice Dalton** observed :

> " This may have been due to an oversight in drafting Section 97(2) when the Bills of Exchange Ordinance was enacted in 1927."

In actions based on negotiable instruments, like cheques, care must be taken to draft the pleadings correctly in accordance with the first principles of pleadings and the law applicable to actions on bills and notes.

When a person sues on a cheque that has been endorsed to him he must aver in his plaint that the cheque had been endorsed to him and presented for payment within a reasonable time and dishonoured and that he had given due notice of dishonour to those liable on the cheque.

Weerappa Chetty *v.* **De Silva**

(1884) 6 Supreme Court Circular, p. 82

Our law reports from the earliest time indicate that many an action founded on a negotiable instrument has been lost on account of defective pleadings. As far back as 1884, in the above case, our Supreme Court had observed such defects and had remarked on the manner in which a plaint on a dishonoured cheque should be filed. The pleadings in that case disclosed a lamentable ignorance of first principles of the law relating to bills of exchange and cheques. As a result of bad pleadings the plaintiff's action was dismissed with costs.

The facts of the case were as follows :

The plaintiff who was the holder of a cheque for Rs. 237/- which was payable to bearer had sued the defendant who was

the last indorser. The plaintiff alleged that the defendant had told him that the drawer of the cheque had money in the bank on which the cheque had been drawn but when the plaintiff presented the cheque for payment, he was told that there were no funds in the bank to meet the cheque and the drawer had refused to pay the money on the cheque. On the basis of the plaint this was the plaintiff's first cause of action.

The plaintiff had also sued in the same plaint on a second cause of action, *viz.*, ' for money fraudulently received by the defendant from the plaintiff,' and for a third cause of action, *viz.*, ' money paid by the plaintiff to the defendant for his use and at his request.'

From the evidence in the case it appeared that the plaintiff had not taken steps to put the cheque in suit until sixteen months after it was drawn and that in the interval he had had a series of business transactions with the drawer of the cheque. There was also no averment in the plaint that the cheque had been presented at the bank for payment, and that it had been dishonoured. Nor had the plaintiff pleaded that he had given due notice of dishonour to the defendant who was the drawer of the cheque.

The Supreme Court (per **Burnside** *C.J.* and **Lawrie** *J.*) held that none of the above three counts disclosed any cause of action against the defendant. Accordingly, they dismissed the plaintiff's action with costs.

In holding that the plaint was defective and disclosed no cause of action, **Burnside**, *C.J.* observed :

> " I cannot refrain from expressing my surprise that a libel like this should bear the signature of a proctor. It indicates a deplorable want of knowledge of the principles of pleadings which I cannot help thinking has, in the present case, resulted in the defeat of the plaintiff's claim . . . The defects in the plaint are not even supplied by the evidence . . . This, an everyday transaction upon a cheque or note, has been distorted out of its natural shape and instead of there being a regular count by a holder against an indorser of a cheque, which the merest professional tyro should be able to draft, there is this distorted pleading about false representation."

Lawrie, *J.* observed :

> " The plaintiff does not sue as an indorsee against an indorser. His libel is wanting in averments essential to

such an action; for instance, he does not aver that the cheque was indorsed to him, nor that he presented it for payment within a reasonable time of its issue, nor that he gave notice of dishonour to the indorser .... In my opinion, the plaintiff is not entitled to recover as indorsee both because his libel is not in form, and because the proof is defective."

In regard to cheques, the place where the cause of action arises upon dishonour, is the place where the cheque is dishonoured.

Seneviratne *v.* **Thaha**

(1961) 65 New Law Reports, p. 184

In the above case the defendant who was residing at Panadura, drew a cheque in favour of the plaintiff payable at the Panadura office of the Bank of Ceylon. When the cheque was dishonoured at Panadura, the plaintiff instituted the present action in the District Court of Colombo for the recovery of the amount of the cheque.

On the above facts, the Supreme Court (per **Basnayaka** *C.J.* and **Sansoni** *J.*) held that the *cause of action* arose in Panadura and the District Court of Colombo, therefore, had no jurisdiction to hear the case. The proper Court where the action ought to have been filed was the District Court of Panadura. Accordingly, the plaintiff's action on the cheque was dismissed with costs.

Ordinance No. 5 of 1852 enacts that the law to be administered in Ceylon in respect of all contracts and questions arising upon or relating to bills of exchange, promissory notes and cheques and in respect of all matters connected with any such instrument shall be the English Law.

The widow and next of kin of a deceased payee cannot, unless they be his legal representative sue the maker to recover the amount due on a note or cheque, even if the estate of the deceased is below administrable value.

Supreme Court decision dated 18th July, 1899.
C. R. Matara No. 548

(1899) 1 Koch's Reports, p. 39 (F.B.)

The decision of the Full Court of the Supreme Court in the above case constituted an important point of law.

The Civil Procedure Code of Ceylon enacts that no action is maintainable in respect of the estate of a deceased person in Ceylon who has left an estate above the administrable value (which for Ceylon until recently was Rs. 2500/- — now Rs. 20,000/-) unless the person maintaining the action is the legal representative of the deceased. *Legal representative* means either the executor of a deceased person's will or where the deceased has left no will the person to whom the Court has granted letters of administration.

Where, however, the estate of a deceased person was below administrable value (*i.e.* then Rs. 1,000/- now Rs. 20,000/-) it was the common law of Ceylon that the next of kin of a deceased may maintain an action to recover any debts due to the deceased without administration of the estate.

In the above case, a Bench of three Judges of the Supreme Court (which at that time constituted a Full Court) had to consider whether this common law right extended to the case where the debt due to the deceased was based on a bill of exchange promissory note or cheque. In other words, whether the widow or next of kin of a deceased person could sue on a debt due to the deceased on a bill of exchange, promissory note or cheque where the estate of the deceased was a small estate below the administrable value.

The Supreme Court (per **Lawrie** *A.C.J.*, **Withers** *J.* and **Browne** *A.J.*) answered in the negative and held that the widow and next of kin of a deceased payee of a promissory note cannot (unless they be his *legal representative*) sue the maker to recover the amount due on the note. Although strictly speaking, the case concerned an action on a promissory note the same considerations would apply to an action on a bill of exchange or cheque since all these instruments are governed in Ceylon by English Law.

Lawrie *A.C.J.* observed :

> " Ordinance No. 5 of 1852 enacts that the law to be hereafter administered in this colony in respect of all contracts and questions arising within the same upon or

relating to bills of exchange, promissory notes and cheques in and respect of all matters connected with any such instrument shall be the same as would be administered in England in the like case at the corresponding period if the contracts had been entered into or if the act in respect of which any such question shall have arisen had been done in England, unless in any case any other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted.

"Now this is very wide language, and to my mind clearly embraces the question who has the right to sue on the promissory note of a deceased payee. Now I think it must be admitted that only the legal representative of a payee can sue the maker for the amount due upon a note held by the deceased payee. And it must also be admitted that in Ceylon law the legal representative means either the executor of a deceased payee's will or the administrator of his estate ; it cannot on the other hand be pretended that the widow and next of kin of a deceased payee can be called his legal representative.

"The provision implied in the terms of Section 547 of the Civil Procedure Code cannot be regarded as coming under "such other provision" contemplated in Ordinance No. 5 of 1852. To come within the term "such other provision" the provision must be an express one."

Quite cynically, **Lawrie**, *A.C.J.* concluded :

"I do not regret having to decide that such a case is not maintainable because I do not think that promissory notes are forms of contract which should be current among such persons as the parties to this action." —

implying no doubt that poor persons (to which category the plaintiff belonged) should not dabble in promissory notes.

A Bank Pass Book is not an 'instrument' or 'contract in writing' within the meaning of Section 703 of the Civil Procedure Code. It is not a document of the same nature as a bill of exchange, promissory note or cheque. Hence, the special summary procedure on liquid claims provided by Chapter 53 of the Civil Procedure Code in the case of instruments like bills of exchange, promissory notes or cheques is not available to a person who wishes to sue on a Bank Pass Book.

Sabapathipillai *v.* **The Jaffna Trading Co. Ltd.**

(1922) 1 Times Reports, p. 128

This was a somewhat curious case. In this case the defendant company carried on, among other things, some kind of banking business and received deposits from customers to be repaid on application. Each customer was supplied with a pass book in which the deposits and withdrawals were entered. Under this system of business on 13th February, 1922, the plaintiff deposited a sum of Rs. 750/- which was entered in a pass book issued to him. On 23rd March, 1922, the plaintiff brought this action against the defendant company to recover the said sum of Rs. 750/- and purported to adopt the summary procedure on liquid claims provided by Chapter 53 of the Civil Procedure Code.

The defendant company objected to the adoption of summary procedure on the ground that the bank pass book which was the basis of the action was not such an instrument as was contemplated by Section 703 of the Civil Procedure Code and moved that they be permitted to defend the action as a regular action in the ordinary way. The District Judge over-ruled the objection and the defendant company appealed to the Supreme Court.

The Supreme Court allowed the appeal and set aside the order of the District Judge. **Mr. Justice De Sampayo** observed :

> " The first reason given by the District Judge is that the pass book is an " instrument " or " contract in writing " within the meaning of Section 703 of the Civil Procedure Code. In my opinion, it is neither the one nor the other. *It may be a receipt of acknowledgment of the deposit but no more.* It is not signed, nor is it stamped, and I cannot understand how it can be regarded as of itself constituting a contract. The contract or obligation of the defendant company must be gathered not from the pass book but from the rules and practice of the defendant company. In this connection, I may point out that Section 705 requires the Court to satisfy itself that the instrument is properly stamped before it allows summons. It appears to me that " the instrument or contract in writing for a liquid amount of money " under Section 703 must be of the same nature as the documents referred to immediately before, namely, bill of exchange, promissory note and cheque. The procedure adopted is, therefore, wholly inapplicable to the pass book."

Where a cheque crossed 'Not Negotiable' is stolen from the drawer and the payee's endorsement is forged and the cheque is cashed by the thief with a third person who credits the cheque to his account and realises the cheque, the drawer of the cheque is not entitled to sue such third party on the tort or delict of conversion for the value of the cheque.

The tort or delict of conversion is unknown to Roman-Dutch Law and an action does not lie in Ceylon in respect of the tort of conversion. The English doctrine of conversion is not part of our law.

Section 98 (2) of the Bills of Exchange Ordinance was only intended to apply to any omissions or deficiencies in the Ordinance in the Law relating to negotiable instruments and could not form the basis of the proposition that where the subject matter of a conversion is a cheque, the English Common Law of conversion was introduced into the Law of Ceylon. Section 3 of the Civil Law Ordinance, too, does not have the effect of bringing in the English Law on this point.

Under the Roman-Dutch Law the basic doctrine is that without fraud (dolus) or fault (culpa) there is no liability.

Daniel Silva *v.* **Johanis Appuhamy**

(1965) 67 New Law Reports, p. 457 (D.B.)

This Divisional Bench case may be regarded as one of Ceylon's leading cases on the law relating to negotiable instruments. The facts of the case may be summarised as follows :

The plaintiff who were traders in Galle drew a cheque crossed 'Not Negotiable' for Rs. 1,117/25 in favour of the payee, a firm in Colombo. The cheque was stolen (either in the post or from the drawer) and the payee's endorsement had been forged. Subsequently, the cheque had been tendered to the defendant (another trader in Galle) in payment for a radio set by a person who was unknown to the defendant. The defendant had accepted the cheque and had credited it to his account and when the cheque had been realised the defendant had handed over the radio set and the balance sum of Rs. 925/25 to the person who presented the cheque. That person could not be traced thereafter. He was presumably a thief.

The plaintiff subsequently sued the defendant for the recovery of the sum of Rs. 1,117/25 and in his plaint averred that the endorsement of the payee on the cheque had been forged

and that the defendant therefore got no title to the cheque and consequently had no lawful authority to *convert* the cheque to his own use. The defendant stated in his answer that he took the cheque *bona fide* and for value and denied that any cause of action accrued to the plaintiff to sue him for the recovery of the amount represented by the cheque.

A Divisional Bench of the Supreme Court (per **T. S. Fernando, Tambiah** and **Alles** *JJ.*) held :

1. That the plaintiff's action was founded on delict and called for the application of the Roman-Dutch Law.

2. That on the pleadings it was manifest that the action was one for conversion and such an action was not available under the Roman-Dutch Law, although it was available under the Common Law of England.

3. Although under the English Common Law the plaintiff would be entitled, *prima facie* to recover the sum claimed either as damages for conversion or as money had and received, it was not open to the plaintiff to rely on Section 98 (2) of the Bills of Exchange Ordinance to succeed in his claim. Section 98 (2) only intended to apply to any omissions or deficiencies in the Ordinance in respect of the law relating, *inter alia*, to cheques and cannot form the basis of a proposition that, where the delict of conversion is in relation to a cheque, the English common law of conversion is introduced into our law. Section 3 of the Civil Law Ordinance, too, does not have the effect of bringing in the English Law on this point.

4. Therefore, the action instituted against the defendant was not maintainable in law.

5. Under the Roman-Dutch Law, the basic doctrine is that without fraud (*dolus*) or fault (*culpa*) there is no liability.

The Divisional Bench also disapproved of the earlier decisions of the Supreme Court in *Punchi Banda v. Ratnam* (1944) 45 New Law Reports at page 198 and *Bank of Ceylon v. Kulatilleke* (1957) 59 New Law Reports at page 188.

As regards the case of *Punchi Banda v. Ratnam* (*supra*), the Divisional Bench observed :

" It was assumed in that case that the English Law of conversion was part of our law. The question as to whether

the law governing the right of action was not Roman-Dutch Law does not there appear to have received consideration. Certainly, an earlier decision of this Court in *Thomson v. Mercantile Bank* (1935) reported only in 15 Ceylon Law Recorder at page 61 where it had been held that it was the Roman-Dutch Law that should be applied had not been cited or considered."

As regards the case of *Bank of Ceylon v. Kulatilleke* (*supra*) **Mr. Justice T. S. Fernando** observed :

"It was submitted to us that this case had not been correctly decided. It is sufficient to observe that the question whether the action was really one where the banker was sought to be made liable on the basis of conversion did not receive attention by the Court ; nor were certain relevant authorities referred to in the judgment of the Court."

Mr. Justice Tambiah, however, went further and observed :

"I regret I am unable to agree with the reason given in the case of *Kulatilleke v. Bank of Ceylon.*"

In the concluding parts of his judgment **Tambiah *J.*** observed :

"Where a cheque is forged and money obtained by using it, the remedy available under the Roman-Dutch Law has to be found within the four corners of this system of law. In *Leel & Co. v. Williams* (1906) T.S. 554, *Ennis C.J.* after citing Voet 6.1.10 said : 'The remedy that our law gives to the owner of a stolen property is, he may follow the property and vindicate it, anywhere, provided it is still *in esse* and he may bring an action *ad exhibendum* to recover the property or its value should it have been consumed against the thief or heirs or against any person, who has received it with the knowledge of the tainted title."

"But the fact these are the only remedies allowed by our law is inconsistent with the doctrine of conversion, which allows an owner to proceed against a *bona fide* intermediary who obtains a stolen property and parts with it again. It may be that the Aquilian action would also be available if negligence or intentional wrong-doing could be shown on the part of the person who is made liable in such cases. The Roman-Dutch Law always attaches liability on a fault basis. This is a matter where legislation is very necessary to amend the Bills of Exchange Ordinance in the

interests of commerce. The Courts of Law can only interpret the provisions of law as they exist and cannot usurp the functions of the legislature. Legislation on the lines of those enacted in South Africa would be necessary in Ceylon to protect commerce. (*Vide* Allison and Kahn, pages 582-583 and 726)."

"For the reasons set out I am of the view that the plaint does not disclose a cause of action. Even if it is based on an action for use of money had and received, as contented by counsel for the respondent, it cannot succeed for the reason that such an action is unknown to our law. In the present action even the Roman-Dutch principle against undue enrichment cannot be invoked since enrichment is not available. The defendant has paid valuable consideration for the cheque. He has parted with a radio set and also given the balance sum to Aboosali. Therefore he would not be liable even if an action for undue enrichment was brought against him."

NOTE :

This case was distinguished in the subsequent case of *Don Cornelis v. De Soysa & Co., Ltd.* (1965) 68 N.L.R. 161. It was approved of by the majority of the Bench of 5 Judges in *De Costa v. Bank of Ceylon* (1969) 72 N.L.R. 457.

Where twenty cheques crossed and marked "Not Negotiable" were stolen before they were delivered by the drawer to the payees and the endorsement of the respective payees forged and the cheques cashed by a clerk of the drawer with a third party who had them credited to his account and realised, the third party would be liable to the drawer for the value of the cheques so realised on an action for money had and received. In such a case the conduct of the drawer and the precautions that the third party took in cashing the cheques would be material factors.

Forged indorsements are wholly inoperative under Section 24 of the Bills of Exchange Ordinance.

The action for money had and received is recognised in Ceylon. It is founded on the same principle of equity as the Roman-Dutch Law action of condictio indebiti.

Don Cornelis *v.* **De Soysa & Co. Ltd.**

(1965) 68 New Law Reports, p. 161

In this case, twenty cheques crossed and marked "Not Negotiable" were stolen before they were delivered by the drawer (plaintiff) to the payees. The endorsements of the respective payees had been forged and the cheques were presented by a clerk of the drawer for valuable consideration to a third party (the defendants) who had them credited to their account at the Bank. On the evidence it appeared that the defendants were at fault when they cashed so many cheques at the request of the clerk of the plaintiff, especially since some of the cheques were for large amounts and the defendants had not taken the slightest precaution to ascertain from the clerk what right he had to the cheques. On the other hand the conduct of the plaintiff who was the drawer of the cheques was entirely innocent. Action was instituted by the drawer against the defendants on the basis that the amounts of the cheques credited to the account of the defendants by the plaintiff's bank were in fact monies had and received by the defendants for the plaintiff and the defendants were liable to re-imburse the plaintiff.

The Supreme Court (*per* **Sansoni** *C.J.* and **Sirimanne** *J.*) held :

(1) That the action for money had and received of the English Common Law had been followed in Ceylon and Section 7 of the Prescription Ordinance has provided for such an action.

(2) That the action for money had and received is founded on the same principles of equity as the *condictio indebiti* of the Roman-Dutch Law, namely, that a person who takes the property of another without legal justification is under an equitable obligation to restore it or pay its value to the owner.

(3) That the equities favoured the plaintiff since he was innocent and weighed against the defendants who had cashed many cheques, some for large sums, without taking reasonable precautions to ascertain whether the plaintiff's clerk had a right to the cheques.

(4) That on the facts proved in this case the defendants were under a duty to restore to the plaintiff the monies on the cheques.

In arriving at the above decision their Lordships appreciated that the facts in the Divisional Bench case of *Daniel Silva v. Johanis Appuhamy* (1965) 67 New Law Reports at page 457 were very similar to the facts of the case before them. But in distinguishing the binding decision in *Daniel Silva's* case **Sansoni** *C.J.* observed :

" The three judges who heard that appeal unanimously decided that as the cause of action pleaded there was conversion, the plaint did not disclose a cause of action inasmuch as the English doctrine of conversion is not applicable in Ceylon. That decision is binding on us. But I do not think it applies to this case because the plaintiff here has not claimed damages on the grounds of conversion. The plaint is framed instead, on the ground that the amounts recovered by the defendants were monies had and received by them to the use of the plaintiff. It is well established in England that a plaintiff is under these circumstances, entitled to waive the tort of conversion and sue instead for the amount of the cheques as monies had and received to his use. In the case cited, Tambiah *J.* alone expressed the view that the action for money had and received is unknown to our law. I regret that I am unable to accept this dictum which was not necessary for the decision of that case."

In the course of his judgment the Chief Justice added :

" The rules applicable to claims to money had and received and for restitution are closely connected with the doctrine of unjust enrichment which proceeds on the basis that the defendant has received some property of the plaintiff, or some benefit from the plaintiff, for which it is just that he should make restitution. I concur with respect in the view of *Tambiah J.* expressed in *Pieris v. ThetMunicipal Council of Galle* (1963) 65 New Law Reports at page 555 that this doctrine of unjust enrichment is part of our law. It follows that there is no inconsistency in applying the principle of the action for money had and received which is founded on the same principle of equity as the Roman-Dutch Law action of *condictio indebiti*, and is ' a liberal action, founded upon large principles of equity where the defendant cannot conscientiously hold the money '— see the judgment of *Schneider J.* in the *Imperial Bank of India v. Abeysinghe* (1927) 29 N.L.R. 357.

" On the facts proved in this case I would hold that the defendants are under a duty to make restitution of the proceeds of the twenty cheques which bore forged

indorsements. They were always the property of the plaintiff, and ' a holder under a forged indorsement, if paid, must make restitution either to the payer or to the true owner . . . . . Liability does not depend in these cases on the innocence of the defendant, who may be a purchaser in good faith but has dealt with the goods without title and without the owner's authority '—(*see* Legal Essays and Addresses by Lord Wright, pages 42 and 54, where the author reviews the American Restatement on the Law of Restitution.

" It was argued for the defendants that in the absence of proof of *dolus* or *culpa* they would not be liable. This is to confuse their delictual liability with their liability to make restitution. ' Restitution,' as Lord Wright has said at page 36 of the same work, ' is not concerned with damages, or compensation for breach of contract or for torts, but with remedies for what, if not remedied, would constitute an unjust benefit or advantage to the defendant at the expense of the plaintiff.' "

NOTE :

This decision was approved of by the majority of the 5 Judges in *De Costa v. Bank of Ceylon* (1969) 72 N.L.R. 477.

A professional money lender cannot institute an action and sue on a cheque given to him by a client if he has neglected to comply with the provisions of Section 8 of the Money Lending Ordinance and failed to maintain proper books of accounts relating to the particular money lending transaction.

Dissanayake *v.* **Saravanaparanthan**

(1963) 66 New Law Reports, p. 187

Professional Money Lenders who wish to sue on dishonoured cheques given to them by their debtors should take cognisance of the above decision of the Supreme Court. The defendant in this case had given the plaintiff, who was a professional money lender, a cheque for Rs. 10,000/-, for loans he had taken. When the plaintiff presented the cheque to the bank for payment, it was dishonoured for want of funds. Thereupon the plaintiff sued the defendant on the cheque.

The Supreme Court (per **Herat** *J.* and **Abeysundere** *J.*) held that the plaintiff being a professional money lender could not institute the action and sue on the cheque as he had neglected

to comply with the provisions of Section 8 of the Money Lending Ordinance (Cap. 80) and failed to maintain proper books of accounts relating to this money lending transaction.

The Court further held that the proviso to Section 8(2) of the Money Lending Ordinance which gives relief to a professional money lender in the case of a failure by him to maintain proper books of accounts due to inadvertence in the case of non-entry of a transaction did not apply in this particular case where there had been a *total failure to keep account books of any sort whatever.*

Where a cheque is given as a donation but the bank refuses to honour the cheque as the signature of the donor was doubtful, and where the donor dies before the genuineness of his signature can be confirmed, the donee has a right to sue the legal representative of the deceased donor for the amount of the cheque.

The action is not an action on the cheque but is based on the promise to donate simpliciter *and is governed by the principles of Roman-Dutch Law and not English Law.*

Public Trustee *v.* **Mrs. N. Seneviratne**

(1952) 54 New Law Reports, p. 145

In the above case, one Rodrigo had offered to donate to one Mrs. Seneviratne (the plaintiff) a sum of Rs. 5,000/- for having looked after him when he was sick, and the plaintiff had accepted the offer. Contemporaneously, with the acceptance of this offer to donate Rs. 5,000/-, the plaintiff received a cheque for that amount from Rodrigo.

The bank, on which the cheque was drawn, however, refused to honour the cheque on the ground that Rodrigo's signature on the cheque was doubtful. The bank wanted confirmation of the genuineness or authenticity of the disputed signature. But before the plaintiff could satisfy the paying bank as to the genuineness of the signature, Rodrigo, the drawer of the cheque, died. The bank, thereupon, refused to pay.

On the refusal of the bank to honour the cheque, the plaintiff who was the donee instituted an action in the District Court of Colombo against the Public Trustee who was the administrator of the estate of the deceased Rodrigo, to recover the amount of Rs. 5,000/- which was the amount of the cheque.

The plaintiff in her action sued the Public Trustee on two causes of action :

(1) Upon a cause of action based on Rodrigo's liability on the *cheque itself*, and alternatively,

(2) On the footing that Rodrigo " gave and donated to and/or promised or offered the sum of Rs. 5,000/- and the plaintiff accepted the same."

The District Court *rejected the cause of action on the cheque* because admittedly the English Law governed that aspect of the plaintiff's claim and a promise to donate a sum of money to the payee does not constitute ' valuable consideration ' which is a condition precedent to liability on a cheque. (*vide* Section 27 of our Bills of Exchange Ordinance (*Cap.* 82)).

With regard to the alternative cause of action, however, the District Court took the view that the plaintiff could succeed on the basis that, in the circumstances of the case, the issuing of a cheque amounted in law to a ' constructive delivery ' of a sum of Rs. 5,000/- lying to Rodrigo's credit at the Bank. In other words, that the cheque was an assignment of the money in the hands of the banker. In arriving at this conclusion, the District Judge purported to follow a ruling of the Court of Equity in England in *Bromley v. Brunton* (1868) L.R. 6 Eq. 265.

The Public Trustee appealed to the Supreme Court from this decision of the District Judge. The Supreme Court (*per* **Gratiaen** *J.* and **Gunesekera** *J.*) affirmed the decision of the District Judge and dismissed the appeal, but for different reasons and not for the reasons which weighed with the District Judge.

Mr. Justice Gratiaen who delivered the judgment of the Supreme Court observed :

(*a*) that English Law unlike the Roman-Dutch Law insists on actual or at least a constructive delivery in order to confer validity on a gift *inter vivos* and in *Bromley's case* (*supra*) the Court of Equity took the view that the drawing of the cheque served automatically to appropriate to the donee's benefit an equivalent sum of money lying to the donor's credit at the bank ;

(*b*) that *Bromley's case* enjoyed only a brief and most precarious career as a precedent in the English Courts. In *Beaumont v. Ewbank* (1902) 1 Ch. 889 it was politely distinguished and it was strongly disapproved of

by the English Court of Appeal in *re Swinburne* (1926) Ch. 38 and its epitaph was recorded in *Owen v. Inland Revenue Commissioners* (1949) 118 L.J.R. 1128;

(*c*) the true principle is that the mere issuing of a cheque granted to a person by way of gift, *unless accompanied by an irrevocable undertaking by the Bank to hold an equivalent sum of money exclusively available to answer the cheque*, cannot be regarded as an appropriation or dedication of the money in the Bank or a constructive payment of the cheque.

In the result, Rodrigo's intention to discharge his obligation was frustrated during his lifetime and the plaintiff's action must stand or fall on the enforceability of Rodrigo's unfulfilled promise to donate Rs. 5,000/- to her.

(*d*) the answer to the question as to whether there was an enforceable donation was regulated by Roman-Dutch Law. The motive underlying Rodrigo's donation was gratitude, generosity and benevolence, all of which elements constitute a *justa causa debendi* sufficient to sustain a promise under the Roman-Dutch Law. (*vide Jayawickrema v. Amarasuriya*, 20 N.L.R. 289).

The plaintiff had accepted the offer of Rs. 5,000/- and in consequence there was immediately formed by mutual consent of the parties a valid contract of donation *inter-vivos* (as distinguished from a *donatio mortis causa*) which in the circumstances of the case may be classified as a *donatio remuneratio* (remuneratory gift); upon the acceptance of the offer by the donee she became vested with a right of action to compel the donor to specific performance of his obligation. (*vide:* Voet 39.5.19,20 also: *Public Trustee v. Udurawana* 51 N.L.R. 193). For, whereas under the English Law a bare executory contract of donation *inter-vivos* unless embodied in a formal deed or implemented by delivery (actual or constructive) creates no legally enforceable rights (*vide:* Morice's "*English & Roman-Dutch Law*" (2nd edition) pp. 108-109), the Roman-Dutch Law principles recognise a donation as a species of 'contract' entitling a donee upon acceptance of a promise solemnly made and proceeding from proper motives, to enforce that promise. (Voet 39.5.2).

On the above view of the law, the Supreme Court held that the acceptance of the offer by the plaintiff donee and the subsequent dishonouring of the cheque which had been granted as a conditional (and not an absolute) discharge of the resulting obligation clearly entitled the plaintiff to sue on the promise *simpliciter*. The Supreme Court affirmed the decision of the

District Court and granted the plaintiff's claim of Rs. 5,000/- against the Public Trustee who was the Administrator of the estate of the deceased donor, Rodrigo.

When a person is sued on a bill of exchange or cheque he can, by way of defence, plead a total failure of consideration for the bill or cheque.

Where a seller sues the buyer on a cheque given by the buyer to the seller as the purchase price of an interest in land, it is open to the buyer to raise the defence of failure of consideration on the ground that the seller had no title to the land sold by him.

Nugawela *v.* **George**

(1929) 30 New Law Reports, p. 345

In this case, a vendor of land sued the defendant, the purchaser of the land, on a cheque which had been given by the defendant as the purchase price of the land. The defendant purchaser had subsequently stopped payment of the cheque before it had been cashed by the plaintiff.

When sued on the cheque, the defendant pleaded that there was a total failure of consideration for the cheque in that the plaintiff-vendor had no right, title or interest in the land he had sold. It was further argued for the defendant that the English Law applied and that when a person is sued on a bill of exchange or cheque he can plead a total failure of consideration and thus avoid liability on the cheque.

The Supreme Court (per **Lyall Grant** *J.* and **Akbar** *J.*) upheld this argument and held that the defendant purchaser was entitled to lead evidence to prove that there had been a total lack of consideration for the cheque. In other words, that the defendant was entitled to show that the plaintiff-vendor had no title at all to the land and that the deed purchased nothing at all.

Mr. Justice Lyall Grant observed :

> " Payment by cheque is only conditional payment, and if the cheque is stopped before payment, there is no payment of the price. The buyer has not performed his share of the contract, and the only question we are called upon to decide at present is whether delivery of a worthless deed constitutes such performance on the seller's part of the contract as to entitle him to call upon the buyer to perform his part.

" I think the buyer ought to have an opportunity of proving that no consideration passed; that the vendor conveyed no title and was therefore not in a position to give vacant possession."

Where a defendant gave three cheques to the plaintiff at various times to cover the value of goods sold and certain advances made to him and thereafter took back cheques and gave a promissory note for the value of the cheques, the note is given for a money lending transaction although no money actually passed between the parties at the time the note was given.

Abeydeera *v.* **Ramanathan Chettiar**

(1936) 38 New Law Reports, p. 389

In this case the Supreme Court had to consider the legal effect of a transaction where a debtor gives a creditor several cheques in payment of goods purchased and monies borrowed from a creditor and subsequently takes back the cheques before they are cashed and gives a promissory note for the value of the cheques.

This was an action for the recovery of a sum of Rs. 22,699·97 alleged to be due on a promissory note given by the defendant to the plaintiff made out for Rs. 20,000/- with interest thereon at the rate of 14 per cent. per annum. The plaint stated that this sum was " the amount found to be due from the defendant to the plaintiff upon an account stated between them on the said date in respect of their prior dealings."

The plaintiff, Ramanathan Chettiar, was a money lender. He also appeared to be a dealer in rice. On May 15, 1931, the defendant had given the plaintiff a cheque for Rs. 4,000/- in payment of rice purchased from him. There had also been money lending transactions between the parties and on February 6, 1932, the defendant had given the plaintiff two cheques for Rs. 14,000/- and Rs. 1,000/- to cover certain advances made to him. On July 19, 1932, the defendant had taken back the three cheques from the plaintiff and had given him the promissory note for Rs. 20,000/- on which the plaintiff had sued.

It was contended (*inter alia*) on behalf of the defendant :

(1) that the actual amount due did not appear on the promissory note,

(2) that the note did not comply with the provisions of Section 10 of the Money Lending Ordinance and was therefore, not enforceable,

(3) that the note was a fictitious one and, therefore, not enforceable.

The Supreme Court however, rejected these arguments. The Court also held that the note had been given for a purely money-lending transaction, although no money actually passed between the parties at the time the note was given. **Chief Justice Abrahams** observed :

" The learned District Judge in holding that no money actually passed between the parties came to the conclusion that no money was actually lent and he thereby overlooked the implications which arose from the return of the three cheques and the consequential giving of the promissory note. The obligation to pay the sums of money represented by the cheques was extinguished when the promissory note was given for value received.

" What is the actual analysis of that transaction ? The cheques by being returned, were deemed to have been paid. The defendant had no money to pay them, and the payment was therefore made by the plaintiff notionally lending the defendant the money to pay the sums due and the defendant notionally handing back the money to the plaintiff and securing the repayment of the loan by the promissory note, the value received being the money which was notionally received by the defendant and notionally returned to the plaintiff. The fact that the plaintiff did not physically hand the Rs. 20,000/- to the defendant and the defendant hand it back to him does not make any difference to the substance of the transaction."

CHAPTER 4

THE LAW RELATING TO POST - DATED CHEQUES

Although it may be very convenient, it certainly is not a correct way of doing business to issue post-dated cheques.

Under Ordinances No. 19 of 1852 and No. 11 of 1861 (now amended) post-dated cheques were void.

Tillappenemar Chetty *v.* **Gordon**

(1860) 4 Beven & Siebel Reports, p. 80

Chartered Mercantile Bank *v.* **Silva & Company**

(1863-68) Ramanathan Reports, p. 199

The case of *Tillappenemar Chetty v. Gordon* is one of the earliest reported cases in Ceylon where a party had sued on a cheque. The plaintiff sued the defendant for the recovery of the sum £ 32 10 sh. as monies paid by the plaintiff to one Habby Lebbe for the use of the defendant at the defendant's request and on an account stated. The defendant in his answer denied that he was ever indebted to the plaintiff.

What had actually happened was that the plaintiff had cashed four cheques for the defendant to the aggregate value of £ 32 - 10 sh. drawn in favour of Habby Lebbe. When the plaintiff presented the cheques at the bank he found that their payment had been stopped. At the time the plaintiff cashed the cheques they were post-dated.

In the District Court of Kandy (where the action was instituted) it was argued for the defendant that the cheques must be treated as void. The plaintiff cashed them knowing them to be post-dated. Moreover, the cheques were not stamped. Counsel referred to Section 19 of the Stamp Ordinance No. 19 of 1852.

The District Judge held that the plaintiff had no legal claim against the defendant whatsoever. The learned Judge observed :

> " These drafts were post-dated and in favour of a third party ; and before they became due, payment of them was stopped at the bank. At the time, therefore, that they were cashed by the plaintiff it is clear they were not due to the party in whose favour they were drawn. The plaintiff cashed them at his own risk. He treated them, in fact, as promissory notes, which they are not. It would be an evasion of the Stamp Law to hold that the defendant is

liable to pay the amount of these cheques. But it is agreed that the claim is not founded upon the cheques. If it is not, the Court fails to see upon what it is founded, for there is no other evidence, positive or constructive, of any request by the defendant to the plaintiff to pay the money on his account."

In dismissing the plaintiff's action, the learned Judge added :

"Although it may be very convenient, it certainly is not a correct way of doing business to issue post-dated cheques."

In appeal, the Supreme Court affirmed the decision of the District Judge.

In the case of *Chartered Mercantile Bank v. Silva & Company* the Supreme Court had to consider the legal effect of a post-dated cheque under the Stamp Ordinance No. 11 of 1861. Here again, the Court held that a post-dated cheque is illegal and no action could be founded on such a cheque.

The Supreme Court (*per* **Creasy** *C.J.* and **Stewart** *J.*) observed :

"It has nowhere been held that the man who received a post-dated cheque with knowledge that it is post-dated shall be allowed to sue on it. We certainly are not going to introduce such a doctrine.

"The drawer of a post-dated cheque and the taker of it from him who knowingly receives it in that state, both commit an illegal act, from which the taker can acquire no right of action ; and as between them the cheque is certainly invalid, as being insufficiently stamped to their knowledge.

"If the second taker received the cheque from the first taker, knowing also that it is post-dated, the second taker is in no better position as to right of action than the first taker could be. The second taker, in knowingly receiving the post-dated cheque, commits an illegal act for which he is made liable to an express penalty under the 18th Clause of the Stamp Ordinance No. 11 of 1861. The second taker also takes a cheque which is, to his knowledge at the time, insufficiently stamped.

"We cannot consider that he can have a right to maintain an action on it."

A cheque is not invalid by reason of it being post-dated. An endorsee of a cheque, who knew at the time of the endorsement that the cheque was post-dated may nevertheless maintain an action on the cheque.

Krishnappa Chetty *v.* **Carpen Chetty**

(1912) 15 New Law Reports, p. 243

The above case raised a question of law which was of some public importance, namely, whether since the enactment of the Stamp Ordinance of 1909 an action can be maintained to recover money on a post-dated cheque.

Lascelles *C.J.* observed :

" The law of Ceylon prior to the enactment of ' Stamp Ordinance, 1909 ' may be stated as follows : By Section 2 of Ordinance No. 5 of 1852 the law to be administered in Ceylon in respect of all contracts and questions arising within the Island upon or relating to bills of exchange, promissory notes and cheques was the same as would be administered in England in the like case at the corresponding period, unless other provision was, or should be, made by any Ordinance, then in force in the Colony or thereafter to be enacted."

" Prior to the Stamp Act of 1870 the post-dating of cheques payable on demand was prohibited by English law, but this prohibition was removed by the Stamp Act of 1870 and cheques by the Law of England are not now invalid by reason only that they are ante-dated." (Bills of Exchange Ordinance, 1882, Section 13(2)).

" Turning to the Statute law of Ceylon, we find that Section 18 of the Stamp Ordinance No. 11 of 1861 imposed penalties on all who issued post-dated cheques payable on demand not duly stamped as bills of exchange and on all persons who knowingly received them and on bankers who cashed them. The application of this section was discussed in *Chartered Mercantile Bank v. Silva & Co.* (1863 - 68) Ram. Reports 199 where it was decided that the holder of a post-dated cheque who took it with knowledge that it was post-dated could not sue on the cheque. The Stamp Ordinance of 1890 by Section 20(5) re-enacted and amplified the substance of Section 18 of the Ordinance of 1861. It is thus clear that under the Stamp Ordinances which preceded the enactment of " the Stamp Ordinance of 1909 " an action was not maintainable on a post-dated cheque payable on demand, if the holder took the cheque with knowledge that it was post-dated.

" The question raised by this appeal is whether " The Stamp Ordinance of 1909 " has assimilated the law of Ceylon as regards the validity of post-dated cheques on demand to the Law of England or whether it has perpetuated the provisions of the earlier Stamp Ordinance under which such cheques were invalid. The material section in " The Stamp Ordinance, 1909 " is Section 64(*a*) :

" Any person who with intent to defraud the Government of duty, draws, makes or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made . . . . ."

One of the questions in issue, *inter alia*, was whether the above section applied at all to cheques. The Supreme Court took the view that Section 64 of the Ceylon Stamp Ordinance of 1909 and Section 68 of the Indian Stamp Act (which corresponds to and was identical with Section 64 of the Ceylon Ordinance) refer only to bills of exchange and promissory notes. **Lascelles** *C.J.* observed :

" It is true that the definition of ' bills of exchange ' in the English Bills of Exchange Act, which definition is incorporated in the Ceylon Ordinance, would include a cheque. But an examination of the Ordinance as a whole removes all doubt on the question. Some sections — Section 49, for example — are intended to apply to all the three classes of instruments which fall within the definition of ' bills of exchange, ' namely, bills of exchange, promissory notes and cheques. In such cases, all three instruments are specified. Other sections, such as Section 51(1) apply only to bills of exchange and cheques. These instruments are specified, and the case of promissory notes is dealt with in the following sub-section. *As a question of construction, I am clearly of opinion that Section 64 applies only to the instruments specified in the section and that cheques are not within the scope of the section.*

" The language of the Ordinance in this respect is quite consistent. The term ' bills of exchange ' is in some cases used in its generic sense, but where cheques and promissory notes, or either of these instruments, are particularised, the intention is clear that the term ' bills of exchange ' is not used in its generic sense, but is intended to denote a bill of exchange in the ordinary acceptance of the term."

Lascelles, *C.J.* also observed :

" I think there can be no doubt that the effect of ' The Stamp Ordinance, 1909 ' has been to assimilate the Law of Ceylon as regards post-dated cheques to the Law of England."

To the argument that a post-dated cheque was illegal under the provisions of Section 64 of the Stamp Ordinance No. 22 of 1909 and therefore could not be sued upon in a Court of Law, **Mr. Justice Wood Renton** answered as follows :

> " In the first place, I do not think that Section 64 of Ordinance No. 22 of 1909 applies to cheques at all. Cheques are not referred to in the section and a very cursory examination of the provisions of the Ordinance is sufficient to show that, while a cheque is itself a form of ' bill of exchange ' frequently included in the latter term, there are provisions, which are restricted to bills of exchange, properly so called and distinguished both from cheques and from promissory notes. Section 63, for example, which deals with bills of exchange ' drawn in sets according to the custom of merchants ' is clearly an enactment of that character."

Mr. Justice Wood Renton took the view that the authorities also do not support the contention that a post-dated cheque is really a bill of exchange that requires to be stamped as such.

His Lordship added :

> " It must be remembered that the English Statute Law as to bills of exchange is in force in Ceylon and that under that Law a cheque is not invalid by reason only of the fact that it has been post-dated. In view of these circumstances, I am unable to hold that the effect of Section 64 of Ordinance No. 22 of 1909 is to prevent a good action from being brought on a post-dated cheque."

His Lordship concluded :

> " The decision of Creasy *C.J.* and Stewart *J.* in *Chartered Mercantile Bank v. Silva & Co.* (*supra*) ' that a man who receives a post-dated cheque with knowledge that it is post-dated shall not be allowed to sue on it, turned I think on the fact that that was then the Law in England ; Section 18 of ' The Stamp Ordinance, 1861 ' (No. 11 of 1861) was, it is true, substantially identical with Section 64 of Ordinance No. 22 of 1909. but Creasy *C.J.* and Stewart *J.* would, in my opinion, have construed the former section differently if the present English Law as to post-dated cheques had been in force at the time of their decision."

NOTE :

The stamping provision applicable in Ceylon today would be Section 73 of the Stamps Ordinance (Cap. 247). Section 73 prohibits only the post-dating of bills of exchange and promissory notes. There is no reference in the section to cheques. Section 94 of the Ordinance defines a cheque separately as " a bill of exchange drawn on a specified bank and not expressed to be payable otherwise than on demand."

In England also post-dated cheques are not invalid, see *Robinson v. Benkel* (1913) 29 T.L.R. 475, where it was held that a post-dated cheque is a cheque payable on demand when the due date arrives and is not a bill of exchange for stamp duty purposes,—*see* generally, Halsbury, *Laws of England* (3rd ed.) vol. 2, p. 191.

CHAPTER 5

THE LAW RELATING TO THE SIGNING AND ENDORSING OF CHEQUES

An endorsement written on a bill or cheque and signed by the endorsee with his initials is a good endorsement for the purpose of Section 32 of the Bills of Exchange Ordinance. There is nothing in the context of Section 32 that excludes signature by initials.

Badurdeen *v* **Alagirishamy**

(1957) 61 New Law Reports, p. 212

Section 32 of our Bills of Exchange Ordinance which deals with the law relating to endorsement of bills, notes and cheques states : " An endorsement in order to operate as a negotiation must comply with the following conditions, among others namely, it must be written on the bill itself and *be signed by the endorser.* The simple signature of the endorser on the bill, without additional words, is sufficient."

In the above case the Supreme Court held that " a *signature* does not necessarily mean writing a person's *forename and surname in full.* The signature of a person on a document by placing thereon the initial letters of his names or name is a good signature."

The Supreme Court (*per* **Basnayake** *C.J.* and **Pulle** *J.*) added :

> " The word ' sign ' is derived from the Latin word ' *signum* ' and means a mark. A signature is the name or special mark placed on a document by a person or by his authorised agent either with his own hand or with the hand of such agent or with any artificial aid or mechanical device with the intention of authenticating a document as being that of, or as binding, on the person whose name or mark is so placed. And, there is nothing in the context of Section 32 of the Bills of Exchange Ordinance that excludes signature by initials and we are of the opinion that an *endorsement written* on a bill and *signed by the endorsee with his initials is a good endorsement* for the purpose of that provision . . . . This mode of signature is not uncommon among the Indian Business community in Ceylon, especially the South Indian."

Where a person signs a cheque for and on behalf of a business a mere description of the capacity in which he signs is not sufficient to indicate that he has signed for and on behalf of the business and that he is not personally liable if the cheque is subsequently

dishonoured. To avoid personal liability the drawer must add words to his signature clearly indicating that he signs for or on behalf of a principal or in a purely representative capacity.

Kathiresan Chetty *v* **Doresamy**

(1921) 22 New Law Reports, p. 491

This was an action by a payee of a cheque against the drawers, the two defendants. The cheque had been duly presented at the bank but had been dishonoured. The first defendant was the proprietor of a business carried on under the name of ' Indo-Ceylon Trading Co.' The second defendant was the accountant. Over the signature of the first defendant were in rubber stamp the words ' Indo-Ceylon Trading Co.' and below this signature the signature of the second defendant and underneath his signature were the letters ' Acct.' (meaning 'Accountant ').

The first defendant did not appear in Court and judgment was entered against him. The second defendant while admitting that he signed the cheque argued that he was not liable as he had signed as an officer of the firm in a representative capacity and that the sole proprietor of the firm was the first defendant, and therefore only the first defendant was liable. To arrive at a decision the Supreme Court had to consider the effect of Section 26 of the Bills of Exchange Ordinance which enacts as follows :

> " Where a person signs a bill as drawer, endorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of the principal, or in a representative character, he is not personally liable thereon ; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability."

The Supreme Court (*per* **De Sampayo** *J.* and **Schneider** *A.J.*) held that the second defendant was personally liable on the dishonoured cheque. **Mr. Justice de Sampayo** observed :

> " It appears to be clear that although he described himself as Accountant, he did not thereby sufficiently indicate that he was signing for and on behalf of the Company."

His Lordship cited with approval the decisions in two English cases, *viz.*, *Lander v. Marcus* (1909) 25 T.L.R. 478 and *Dutton v. Marsh* (1871) L.R.Q.B. 361 :

> " In the first of these cases two Directors of a limited company drew a cheque adding to their respective signatures the word ' Director.' In that case as in this case, the cheque was stamped with the name of the company and yet it was held that they were personally liable on the cheque."

When a cheque is required to be signed by a partnership, the affixing of a rubber stamp which merely bears the name of the firm is not a valid signature unless there is added to the name so stamped a signature of a person verifying the so-called signature to show that it was placed there with the authority of the partnership firm.

The mere stamping of the firm's name is not a sufficient signature within the meaning of Section 29(1) of the Bills of Exchange Ordinance for the purpose of rendering the partnership firm liable as indorsers.

If the signature of a partnership is required, one of the partners should write out the name of his firm with his own hand or it should be written by the hand of a duly authorised agent. A so-called signing by stamping the name of the firm without anything to verify it, as in the present case, is no signing at all.

Meyappan *v.* **Manchanayake**

(1961) 62 New Law Reports, p. 529

The above case will be of interest to partnership firms and those who have business dealings with partnership firms since the decision in the case concerns the liability of a partnership firm on a cheque which had been signed and endorsed only by a rubber stamp bearing the name of the firm. The Supreme Court also had to decide the legal effect of a signature by rubber stamp as an endorsement on a cheque and as to its validity under the Bills of Exchange Ordinance (Cap. 82). The facts of the case were as follows :

The second, third and fourth defendants were partners carrying on business in partnership under the name of " Nirchalananthan Co." Four cheques drawn by the first

defendant payable to bearer were indorsed with a rubber stamp which merely bore the name " Nirchalananthan Co." The name was indorsed with a rubber stamp on the back of each cheque by the cashier of the firm, on the instructions of the second defendant before the cheques were delivered to the plaintiff by the second defendant. The cheques were subsequently dishonoured and on an action instituted by the holder of the cheques, judgment was entered against the second, third and fourth defendants on the cheques drawn by the first defendant. The question for decision by the Supreme Court was whether the second, third and fourth defendants as partners were liable on the cheques.

In fact, the only question for decision by the Supreme Court was whether the mere stamping of the firm's name by a rubber stamp was a sufficient signature for the purpose of rendering the firm liable.

The Supreme Court (*per* **Sansoni** *J.* and **L. B. de Silva** *J.*) answered in the negative and laid down the following principles of law.

Mr. Justice Sansoni observed :

> " The correct view, I think, is that unless there is added to the name so stamped a signature of a person verifying the so-called signature to show that it was placed there with the authority of the firm, the document cannot be regarded as validly signed. No case has gone so far as to hold that the mere stamping of the name of a firm, be it a company or a partnership, on a document is a valid signature by that firm."

In arriving at this decision the Supreme Court considered the following statutory provisions and legal arguments :

(*a*) Section 67 of the Evidence Ordinance (Cap. 14) and Section 155 and other Sections in Chapter 19 of the Civil Procedure Code (Cap. 101). The Court held that these sections in the Evidence Ordinance and the Civil Procedure Code deal with the admission of documents in evidence in a Court of Law ; they do not lay down the rules relating to how instruments or documents should *be executed* ; they merely deal with the question of how a document which has been signed by hand *may be proved.*

(*b*) It is not correct to say that a document cannot be said to be signed *unless the signing is written by hand.* For example, there is no doubt that a document can be *signed with*

a mark for both Section 2(*q*) of our Interpretation Ordinance (Cap. 2) and Section 5 of our Civil Procedure Code (Cap. 101) states that the word ' sign ' with its grammatical variations and cognate expressions (in practice, a thumb impression) is sufficient and acceptable.

(*c*) The Supreme Court discussed English cases where it was held that under the English Solicitor's Act a *facsimile reproduction* of a solicitor's signature affixed by means of a rubber stamp was a good and valid signature, but concluded as follows :

" One must be careful not to introduce a new rule where one is dealing with documents to which the Bills of Exchange Ordinance applies, for as is observed in Chalmer's Bills of Exchange (12th edition) at page 274 legal analogies must be applied with caution to bills which are the creation of custom and where it is of the utmost importance that a clear title should appear on the face of the instrument."

Accordingly, in view of the Supreme Court decision in the above case the law relating to a *valid endorsement by signature* may be stated as follows :

For there to be a *valid endorsement* the bill or cheque must be signed by the endorser, *i.e.*, there must be a proper signature.

A mere typed or *printed representation* of a person's name or the name of the endorser is not a *signature* and therefore not a valid endorsement.

A *facsimile reproduction* of a person's signature is also not a proper signature.

The affixing of a rubber stamp which merely bears the name of the person or the name of the firm is also not a valid signature.

The negotiability of such instruments like bills, notes and cheques would be seriously affected if the above mode or usages are to be accepted as valid signatures.

If any of the above modes or usages are to be accepted as a valid signature and therefore a valid endorsement, there must be added to such typed, printed or facsimile representation of a person's or firm's signature, the signature of a person verifying the so-called signature to show that it was fixed or placed with the authority of that person or firm.

Where owing to the illness of the drawer a cheque is signed by his thumb impression in lieu of his normal signature and the bank refuses to honour the cheque unless the genuineness of the signature is confirmed and the drawer dies before the genuineness is confirmed, the bank is not liable on the ultimate refusal to honour the cheque on the death of the drawer.

Public Trustee *v.* **Seneviratne**

(1952) 54 New Law Reports, p. 145

This case is one of the few reported cases in Ceylon which deals with the refusal of a Bank to honour a cheque because the drawer's signature was irregular.

In that case, the amount of the cheque in question was Rs. 5,000/-. At the time of drawing the cheque, the drawer of the cheque (one Rodrigo) was seriously ill and was in hospital. Owing to his state of health he was unable to subscribe his normal signature on the cheque. Accordingly, (on November 18th) in the presence of the doctor, the payee and the legal adviser of the drawer, the drawer signed the cheque by placing his thumb impression in lieu of his normal signature and his lawyer attested the thumb impression as being that of the drawer. The cheque was drawn on the Branch of the Bank situated in Galle.

The Bank at Galle, however, refused to honour the cheque on the ground that the drawer's ' signature ' was irregular and the Bank advised the payee (Mrs. Seneviratne) to have the authenticity of the drawer's thumb impression certified by a Justice of the Peace. The payee returned to Colombo and consulted a Justice of Peace (one Perera) who knew the drawer and who visited the drawer in hospital and discussed the matter with him. The drawer confirmed the genuineness of the cheque and asked the Justice of Peace to have the matter regularised. Perera consulted the officials of the Head Office of the Bank in Colombo and was advised by them to obtain a properly authenticated letter from Rodrigo (the drawer) requesting their Branch Bank in Galle to meet the cheque in spite of the irregularity in his signature. A letter on the lines indicated was in fact prepared by the Proctor who had previously attested Rodrigo's thumb impression but when he arrived at the hospital he was unable to contact the invalid Rodrigo, and get his signature

to the letter. Rodrigo died on November 24th (seven days after drawing the cheque) without authenticating his ' signature ' or authenticating the letter of authority as required by the paying bank. The bank refused to pay.

The bank refused to honour the cheque on the ground that the mere issuing of a cheque (unless accompanied by an irrevocable undertaking by the bank to hold an equivalent sum of money exclusively available to answer the cheque) cannot be regarded as an appropriation or dedication of the money in the bank or a constructive payment of the cheque. In fact, it was impliedly admitted that there was no cause of action to sue the bank. Moreover, the bank could always plead as a defence that the ' signature ' was irregular.

Accordingly, the payee (Mrs. Seneviratne) brought an action against the Public Trustee as the Administrator of the estate of the deceased Rodrigo (the drawer of the cheque) and she won her case both in the District Court and in the Supreme Court on the ground that under the Roman-Dutch Law she was entitled to sue on the offer of Rodrigo to *donate* Rs. 5,000/- to her by cheque and her acceptance of this offer. In other words this offer, and the acceptance constituted a remuneratory donation (*donatio remuneratio*) which entitled her to sue, if the amount of the gift (Rs. 5,000/-) had not been paid to her.

The mere writing of a name on a bill or cheque does not in itself constitute an endorsement sufficient to confer title to sue on it. Endorsement imports a delivery and transfer so as to confer title and upon a traverse of the endorsement the defendant may always show that the circumstances were such that the endorsement did not effect a legal delivery of the bill to the endorsee.

An agent cannot by a mere endorsement transfer the title in a cheque, drawn in his principal's favour, to himself so as to sue the drawer or maker of the cheque in his own name thereon.

Caruppen Chetty *v.* **S. P. Chelliah**

(1887) 8 Supreme Court Circular, p. 107

This was a curious case. The plaintiff in that case was the agent of one Supramaniam. He had been given a power of attorney by Supramaniam which authorised him to sign, make

and endorse promissory notes, bills of exchange and cheques. The defendant had owed Supramaniam some money and had given a cheque in Supramaniam's name in payment of this debt. The plaintiff who was the agent of Supramaniam had endorsed Supramaniam's name in blank on the cheque. He then alleged endorsement of the cheque by Supramaniam to him and presented the cheque to the bank. But the cheque was dishonoured. The plaintiff then sued the defendant, the drawer of the cheque. The defendant argued that the plaintiff cannot maintain the action.

To summarise the facts, the plaintiff was the agent of Supramaniam. The cheque was issued in favour of Supramaniam. The plaintiff writes Supramaniam's name on the back of the cheque, and then sues the drawer of the cheque in his own name. The question was whether he can do that. In other words, had the plaintiff such a title to the cheque by reason of his endorsement of his principal's name, as gave him a right to sue on it in his own name? The Supreme Court held that he could not. They gave the following reasons for their decision :

(1) The position of the plaintiff and Supramaniam was analogous to that of vendee and vendor, and, in principle, this double position cannot be held by one and the same person. As an agent, upon recognised principles, the plaintiff could not transfer to himself a debt due to his principal from a third party, so as to release the debtor from the debt to the principal and make him his own debtor and substitute himself to his principal in place of the original debtor.

(2) The mere writing of a name on a bill does not in itself constitute an endorsement sufficient to confer title to sue on it. Endorsement imports a delivery and transfer so as to confer title and upon a traverse of the endorsement the defendant may always show that the circumstances were such that the endorsement did not effect a legal delivery of the bill to the endorsee. For example, as in this instance where no consideration had passed between the plaintiff and his principal for the cheque.

Accordingly, the decision of the Supreme Court was that an Agent could not by a mere endorsement transfer the title in a cheque, drawn in his principal's favour, to himself so as to sue the drawer or maker of the cheque in his own name thereon.

CHAPTER 6

THE LAW RELATING TO "NOT NEGOTIABLE" CROSSING ON CHEQUES

Under Section 18 of the Bills of Exchange Ordinance a person who takes a crossed cheque bearing the words " Not Negotiable " does not take and is not capable of giving a better title to the cheque than that which the person from whom he took it had.

What is meant by a better title to the cheque is that the holder of the cheque is not entitled to any better rights upon the cheque than what the person who endorsed the cheque to him had.

Nagoor Pitchai *v.* **Kanapathy Pillai**

(1963) 66 New Law Reports, p. 207

In this case the first defendant who was a dealer in produce drew a cheque for Rs. 500/- in favour of the second defendant and gave it to him as an advance on condition that the second defendant should deliver certain goods to him. The cheque was crossed " Not Negotiable." The second defendant failed to deliver the goods and the first defendant wrote to his bank stopping payment on the cheque. But unknown to the first defendant and before he had stopped payment, the second defendant endorsed the cheque and gave it to the plaintiff who paid him consideration (Rs. 500/-). But when the plaintiff presented the cheque at the bank for payment, it was dishonoured as the first defendant (the drawer) had stopped payment.

The plaintiff then sued both the first defendant (as drawer) and the second defendant (as endorser) for the value of the cheque (Rs. 500/-). The Supreme Court (*per* **L. B. de Silva** *J.* and **Abeysundere** *J.*) held that, although the second defendant was held liable, the first defendant was not liable on the cheque. The reasoning of the Supreme Court was as follows :

Under Section 81 of the Bills of Exchange Ordinance a person who takes a crossed cheque bearing the words " Not Negotiable " shall not take and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

In view of this provision, the plaintiff (the present holder of the cheque) was not entitled to any better title to the cheque than what the second defendant had. The question as to " what is meant by a *better title to the cheque* " was answered by the Supreme Court as follows :

"The plaintiff is not entitled to *any better right upon this cheque* than what the second defendant who endorsed it to him had. The plaintiff in this case will not be in any better position than the second defendant if he was suing on this cheque, and as the second defendant had not supplied the goods on account of which he had obtained this cheque, an action by him on this cheque would have definitely failed for want of consideration. That same defence is open to the first defendant as against the plaintiff. The plaintiff's action against the first defendant must therefore fail."

(It was not disputed that the plaintiff could succeed against the second defendant, the endorser).

The following passage in *Byles* on *Bills of Exchange* (21st edition, page 37) which deals with Section 81 was cited with approval by the Supreme Court :

"A cheque marked 'not negotiable' is freely transferable, but the holder of such an instrument is in an exceptional position, since, though he is otherwise a holder in due course, he gets no new and independant title and no presumption as to the liability of antecedent parties is drawn in his favour."

Where a crossed cheque which is marked "Not Negotiable" is given on the distinct understanding that it would not be presented for payment, a holder for value is not entitled to sue upon the cheque in view of the terms of Section 81 of the Bills of Exchange Ordinance.

Whether or not a cheque is an accommodation bill would depend on the particular facts of each case.

Nadaraja *v.* **Jonklass**

(1942) 43 New Law Reports, p. 549

The facts of this case were as follows :

A had given B a cheque, *not for value*, but on the distinct understanding that the cheque would not be negotiated or presented for payment and that it was to be returned to A. Without sending it to the bank, however, B in breach of his

agreement with A, endorsed the cheque and negotiated the cheque for value to C. When C, presented the cheque for payment to the Bank, it was dishonoured since A had stopped payment because B had not returned it to him as promised. C, the holder of the cheque then sued A, the drawer of the cheque for the value of the cheque claiming that he was a holder-in-due course.

The Supreme Court (*per* **Mosely** *S.P.J.* and **de Kretser** *J.*) however, held that A was not liable to C. **Mr. Justice Mosely** observed as follows :

> " It was argued that the cheque was admittedly an *accommodation cheque*, and that Section 28 (2) of the Bills of Exchange Ordinance which renders an accommodation party liable to a holder for value should apply in this case. I have serious doubts as to whether or not the cheque in question can be properly described as an accommodation bill. If it were, the drawer of the cheque would *prima facie* be liable as a surety, that is to say, in the absence of any agreement such as that which has been proved to exist in this case. The term " Accommodation Bill " seemed to me to connote liability on the part of the accommodation party. The fact that it was specifically agreed that the cheque should not be negotiated or presented for payment, seems to take the drawer of the cheque out of this category. Whether or not the cheque is an accommodation bill seems to me, however, to be immaterial in view of Section 81 of the Bills of Exchange Ordinance which deals with Crossed Cheques bearing the word " not negotiable." The case, therefore, in my opinion must be decided upon an interpretation of Section 81 which reads as follows :
>
> " Where a person takes a Crossed Cheque which bears on it the words " not negotiable," he shall not have and shall not be capable of giving a better title in the cheque than that which the person from whom he took it had."

The Supreme Court rejected the contention of the plaintiff's counsel that the word " title " in Section 81 must be restricted to the mere act of possession on the ground that it was too narrow a meaning. The Court held that there had been a distinct agreement that the cheque should not be negotiated or presented for payment. Clearly, on the agreement, B could not have sued A on the cheque. Therefore, equally clearly in view of the terms of Section 81 the plaintiff, C also could not sue upon the cheque.

When a crossed cheque which bears on it the words 'Not Negotiable' is lost, any person who takes that cheque thereafter has no title to it and cannot pass title to it.

Seyed Mohamed *v.* **Ibrahim**

(1966) 69 New Law Reports, p. 489

In *Seyed Mohamed v. Ibrahim*, **Sansoni** *C.J.* observed :

"The judgment under appeal cannot stand because the Commissioner of Requests has ignored the provisions of Section 81 of the Bills of Exchange Ordinance (Cap. 82). He has accepted the evidence of the first defendant's witness, Maharoof, who said that he lost the cheque in question. That cheque is crossed and bears on it the words 'Not Negotiable.' Consequently, any person who took that cheque after it was lost had no title to it. Therefore, the person who endorsed the cheque to the plaintiff had no right to endorse it or to negotiate it in the way he has. The plaintiff got no title to it, and had no right to sue the first defendant on it.

"The plaintiff is certainly not a holder in due course as the Commissioner seems to have thought."

Accordingly, the Supreme Court set aside the judgment and dismissed the plaintiff's action on the cheque with costs.

Where a person who was in the habit of purchasing goods from a trader gives the trader two cheques for the supply of certain goods marking the cheques "Not Negotiable" and the trader fails to supply the goods but endorses the cheques in favour of a third person, that third person is not entitled to sue the drawer of the cheques if they are dishonoured on presentation.

Where a cheque is crossed "Not Negotiable" the endorsee of the cheque has no better title against the drawer of the cheque than what the payee had.

Mohamed Lebbe *v.* **Pemoris**

(1930) 8 Times Law Reports, p. 27

In this case, A, who was in the habit of purchasing vegetables from B granted B two cheques for Rs. 100/- each for the supply of certain goods marking the cheques "Not Negotiable." B, however, failed to supply the goods as promised but endorsed

the cheques in favour of C. When the cheques were presented for payment by C they were dishonoured as A, the drawer had stopped payment. C thereupon sued both A, as the drawer, and B as the endorser, for the amount of the two cheques. C claimed that he was a holder-in-due course and that both A and B were liable to him as the drawer and endorser respectively.

As far as the drawer of the cheque, A, was concerned, he took up the position that C, the plaintiff, was not a holder-in-due course as the cheques had been given by the drawer to B as security against the delivery of vegetables ; that the cheques had been crossed " Not Negotiable " and since the vegetables had not been delivered, B had no right to endorse the cheques to C.

The Supreme Court (*per* **Maartensz** *J.*) upheld this contention and held that C, the plaintiff could not recover in an action on the cheques against A, the drawer. B having failed to supply the goods could not himself have sued A on the cheques. If that was so, B could not, therefore, give a better title than what he had to C.

Mr. Justice Maartensz observed :

" If the cheques were given to the second defendant (*i.e.*, B) merely as an advance there was no purpose in crossing them " Not Negotiable." It appears to me that they were so crossed to prevent the second defendant getting payment before he supplied the vegetables.

" I accordingly hold that the cheques in question were given by the first defendant (*i.e.*, A) to the second defendant, B, for the supply of vegetables. The second defendant, not having supplied the vegetables, could not himself sue on the cheques and he could not give the plaintiff a better title than what he had. I would therefore dismiss the plaintiff's action against the first defendant with costs in both courts.

CHAPTER 7

THE LAW RELATING TO PAYMENT BY CHEQUE

Payment by cheque is only a conditional payment. The tender of a cheque in payment of a debt is not the equivalent to immediate discharge of the debt. But if the cheque is accepted as payment, and it is subsequently honoured, the payment dates back to the date of acceptance of the cheque.

(1) **Meyappa Chetty** *v.* **Weerasooriya**
(1916) 19 New Law Reports, p. 79
(Divisional Bench)

(2) **Nugawela** *v.* **George**
(1929) 30 New Law Reports, p. 345 at 347

(3) **Caldera** *v.* **Perera**
(1965) 68 New Law Reports, p. 375

(4) **Subbiahpillai** *v.* **Sheriff & Co., Ltd.**
(1955) 56 New Law Reports, p. 553
(Divisional Bench)

In the Divisional Bench case of *Meyappa Chetty v. Weerasooriya* the purchaser at a sale in execution of a debtor's property had paid the Fiscal the balance of the purchase money by cheque. One of the questions for determination by th Supreme Court was the legal effect of payment by cheque and the acceptance of a cheque as payment.

On the one side, it was argued that the cheque should not be regarded as a realisation of money. A cheque is not money. In all statute law when the word " money " is used, the purposes of the statute is not satisfied by the tender of a cheque. Furthermore, the cheque may be dishonoured by the bank.

On the other hand, it was argued that if a cheque is accepted and it is subsequently honoured, the payment dates back to the date of acceptance of the cheque.

The Supreme Court (*per* **Shaw** *A.C.J.* and **Ennis** *J.* and **De Sampayo** *J.*) followed the principles of English Law (*vide Hadley v. Hadley* (1898) L.R. 2 Ch. 680) and took the view that a cheque is used to effect a transfer of money and payment of a cheque relates back to the time when the cheque was given. (*per* **Mr. Justice Ennis**). Generally speaking, payment by cheque is conditional payment and when the cheque is honoured, that operates as a payment as from the date of the giving of the cheque. (*per* **De Sampayo** *J.*).

In the Supreme Court case of *Nugawela v. George*, a vendor of land sued the defendant, the purchaser of the land, on a cheque which had been given by the defendant as the purchase price of

the land. The defendant purchaser had stopped payment on the cheque before it had been cashed. When sued on the cheque, the defendant pleaded that there was a total failure of consideration for the cheque in that the plaintiff-vendor had no right, title or interest in the land sold. It was argued that when a person is sued on a bill of exchange or cheque he can plead total failure of consideration and that the English Law must apply.

The Supreme Court (*per* **Lyall Grant** *J.* and **Akbar** *J.*) upheld this argument and held that the defendant-purchaser was entitled to lead evidence to prove that there was a total lack of consideration for the cheque. In other words, that the defendant was entitled to show that the plaintiff-vendor had no title at all to the land and that the deed purchased nothing at all.

In arriving at this conclusion, **Mr. Justice Lyall Grant** observed :

> " Payment by cheque is only conditional payment and if the cheque is stopped before payment, there is no payment of the price."

In *Caldera v. Perera*, parties to the case had agreed to the postponement of a case on condition that if the costs of the day were not paid by the plaintiff to the defendant at or before 10 a.m. on the 28th February, the action should be dismissed. On 27th February at 1.30 p.m. the plaintiff had handed a cheque to the defendant's proctor. The question for determination by the Supreme Court was whether the condition of pre-payment of costs before the fixed date and time, *viz.*, 10 a.m. on 28th February, had been satisfied by the tender of a cheque as payment and its acceptance on 27th February at 1.30 p.m.

It was argued that the money on the cheque could not be realised before 10 a.m. on 28th February as there was insufficient time to present the cheque for payment at the bank. This being so, the peremptory condition as regards pre-payment before a fixed date and time was not satisfied and therefore the plaintiff's action should be dismissed.

The Supreme Court (*per* **Abeysundere** *J.* and **Manicavasagar** *J.*), however, held that having regard to all facts of the case it could not be said that there had been no re-payment of costs. " If the defendant's Proctor was unwilling to receive payment by cheque he should have returned the cheque in time to enable the plaintiff's Proctor to make the payment in cash within the time allowed for." (*per* **Abeysundere** *J.*).

In the Divisional Bench case of *Subbiahpillai v. Sheriff & Co. Ltd.*, it was argued that the giving of a cheque in payment of a debt (in this case, rent) did not amount to even a conditional payment of the rent in question. The Supreme Court (*per* **Gunesekera** *J.*, **Pulle** *J.* and **Weerasooriya** *J.*) rejected this argument.

As a reply to this legal argument, **Mr. Justice Weerasooriya** made the following observation as regards the legal effect of a payment of a debt by cheque :

> " Although as a general rule the tendering of a cheque is not equivalent to payment, the Court will not require very strong evidence to show that the parties contemplated that payment might be made by cheque. This appears to be the view not only of the English Courts but also of the South African and American Courts."

His Lordship agreed with the decision of the South African Courts in *Scheider and London v. Chapman* (1917) T.P.D. 497 where the judgment of **Mr. Justice de Villiers** contains the following citation from a judgment of the American Courts in the case of *Gunby v. Ingram* 36 Law Reports Annot. N.S. page 232 at 234 :

> "It may be conceded, we think, under universal authority, that a strictly good tender cannot be made by the offer of a cheque for the amount due. But it is well established that the creditor may waive the character of the money which is tendered by raising no objection to the payment for the reason that it is not the character of money or specie that is called for in the obligation, or by raising some other objection which would exclude the idea of objecting on that ground. Considering the fact, which is a matter of common knowledge, that probably ninety per cent. of the business of the mercantile world is now done through the medium of cheques, drafts, etc. instead of by the transfer of gold and silver coins or even of any other species of legal tender, it would be a dangerous rule to announce, and one which could easily be turned into an engine of oppression, engine of oppression, if the tender or a payment..... could not be made by cheque, where no question was raised as to the value of the cheque tendered, and especially, as in this case, where it was shown that the former payments involved in this transaction had been made by cheques, which were not objected to by the creditor."

" The fact of a landlord taking a bill of exchange (cheque) from his tenant for rent due is, however, some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill, (*Palmer v. Bramley* (1895) 2 Q.B. 405) although it does not raise a legal implication of such agreement. (*per* **Gunasekera** *J.* at page 556)."

In *Subbiahpillai's* case, however, there was sufficient evidence to support the finding that the cheques were taken by the landlord as conditional payment of the rent due.

" The condition upon which cheques were received as payment of the rents due must be understood to be that the debt would revive if they were not realised (*Currie v. Misa* (1875) L.R. 10 Eq. 153) and they would operate as payment unless they were presented and dishonoured (*Marreco v. Richardson* (1908) 2 K.B. 548." (*per* **Gunasekera** *J.* at page 556).

In the same Divisional Bench case it was further argued that even if the tender of a cheque amounts to a conditional payment, *the tender of a cheque by a tenant in payment of rent does not amount even to a conditional payment of the rent in question.*

The basis of this legal contention was that while there is ordinarily a strong presumption that the giving of a bill or note on account of a debt is a conditional payment, there is no such presumption in a case where a creditor already possesses a higher remedy. (*See : Chalmer's Bills of Exchange* (11th edition) pages 310, 312). In this case, the higher remedy that the creditor landlord possessed was the landlord's lien.

The Divisional Bench rejected this argument. **Mr. Justice Weerasooriya** observed :

" There is nothing in law which precludes a creditor who already possesses a higher remedy than mere recourse to the debtor for payment of the amount due, from accepting a cheque in settlement of the debt."

In a contract for sale of goods where a cheque is tendered in part payment by the buyer and is accepted in part payment by the seller it constitutes a part payment within Section 4 (1) of the Sale of Goods Ordinance No. 11 of 1896, although it was subsequently dishonoured.

Mohamed Ezak *v.* **Marikkar**

(1919) 21 New Law Reports, p. 289

This case raised an interesting point as to whether part payment by cheque is a good part payment under the Sale of Goods Ordinance.

In this case, a cheque was given by the purchaser on a Sunday, as part payment but the payment was stopped on Monday. Accordingly, it was argued that it was not part payment as contemplated by Section 4 (1) of the Sale of Goods Ordinance which requires that the purchaser must " pay the price or part thereof." The legal argument was as follows :

A cheque which is dishonoured later is not payment. (*Pape v. Westacoth* (1894) 1 Q.B. 272). Payment of a cheque is only a conditional payment from the date of the giving of the cheque. (*Meyappa Chetty v. Weerasooriya* (1916) 19 N.L.R. 79 ; *Hadley v. Hadley* L.R. 2 Ch. 680). The cheque was not honoured, and cannot therefore be considered as a part payment. A cheque may be considered earnest but it is not part payment unless honoured.

The Supreme Court (*per* **Bertram** *C.J.* and **Loos** *A.J.*) was unable to accept this argument and accordingly rejected it. Citing two English decisions the Court held that there was express authority on this point which seemed to conclude the question. " In the case of *Parker v. Crisp & Co.* (1919) 1 K.B. 481, it was held that when a cheque was sent in payment of goods that had been ordered the payment of that cheque was a good payment within the meaning of the Sale of Goods Act of 1893, Section 4, in spite of the fact that the cheque was subsequently returned." (Also *Davis v. Philipps & Co.* (1907) 24 T.L.R. 4).

Chief Justice Bertram observed :

> " I think it sufficient to say that where a cheque is tendered in part payment and is accepted in part payment, it is part payment within the meaning of the Section."

Where the administrator of a deceased person's estate issues a cheque for the purpose of paying into Court money due to an heir, he should as a prudent man draw the cheque in favour of the Government Agent who is the head of the Kachcheri where monies brought to Court are paid. In such a case, if the administrator draws the cheque in favour of his Proctor, and the Proctor misappropriates the money, the administrator must bear the loss.

Fonseka *v.* **Fonseka**

(1964) 68 New Law Reports, p. 59.

In this case a person administering the estate of his deceased wife had in his hands a sum of money (Rs. 18,343·42) due to his minor children from the deceased. It was conceded that, as administrator, he was in the position of a trustee in regard to the money. When a deposit-note for the payment of the money into Court was obtained from the Judge, the administrator made out a cheque payable to his Proctor personally, instead of following the usual practice of making such a cheque payable to the Government Agent. The Proctor misappropriated the money.

On these facts, the Supreme Court (*per* **Sirimanne, *J.*** and **Manicavasagar, *J.***) held that the administrator should have as a prudent man made the cheque payable to the Government Agent, and not to the Proctor. In such a case, if the administrator dies, his own estate must bear the loss.

Sirimanne, *J.* observed :

> " Payments into Court are made on a deposit-note obtained from Court. It is the Proctor (if there is one on record) who has to apply to Courts for such a note. But it is the client who provides the money ; and when a fairly large sum has to be deposited as in the present case the usual practice is to draw up a cheque in favour of the Government Agent. The Proctor is merely an agent through whom the money is transmitted. In this instance, there were two courses open to the administrator : either to draw the cheque in favour of the Proctor, or in favour of the Government Agent. In adopting the former course he took an unnecessary risk."

NOTE :

As to payment of money into Court by administrators, *see* also *Mohamed v. Kadiya Umma* (1900) 1 Br. 283.

CHAPTER 8

THE LAW RELATING TO PAYMENT OF RENT BY CHEQUE

Payment of rent must normally be in cash. A landlord, however, can agree either expressly or impliedly to accept payment of rent by cheque. But such an agreement does not cast an obligation on the landlord to accept a cheque drawn by a person other than the tenant in the landlord's favour as payment of rent.

Cassim *v.* **Kaliappa Pillai**

(1960) 62 New Law Reports, p. 409

In this case A, was a monthly tenant of B's premises. It was the practice for A, the tenant, to pay his rent to B, the landlord, by a cheque drawn on his bank. In April 1955, however, B, received a cheque drawn on a different bank and signed by a third party, C.

The Supreme Court (*per* **Basnayake** *C.J.* and **Sansoni** *J.*) held that the cheque sent by C, did not operate as payment of rent by A.

Basnayake, *C.J.*, observed :

> " Payment in a contract of letting and hiring must be in cash. The landlord is under no obligation to accept payment by cheque unless there is an agreement, express or implied, to do so. Such an agreement may be presumed when over a long period of time the landlord has accepted cheques drawn by the tenant on his bank account without question. But even such an implied agreement does not cast an obligation on the landlord to accept a cheque drawn by a person other than the tenant in his favour in payment of rent. Nor has a third person a right to force the landlord of another to accept a cheque drawn by him in payment of that other's rent. Such a payment by a third person not being a payment in terms of the contract of letting and hiring would not amount to payment thereunder."

Where a tenant pays his rent by cheque and the landlord accepts it as payment and gives a receipt for it without waiting until the cheque is realised, then if the cheque is subsequently dishonoured the landlord cannot sue for the rent if he had by his receipt acknowledged satisfaction of the rent debt.

The position is different if the landlord merely acknowledges the receipt of the cheque without treating it as an acknowledgement of the debt (rent).

The mere retention by the landlord of the cheque sent by the tenant after the landlord had given notice of the determination of the tenancy does not by itself give rise to a new tenancy.

Fernando *v.* **Samaraweera**

(1951) 44 Ceylon Law Weekly, p. 19

In this case the Supreme Court had to consider whether the sending of cheques by a tenant amounted to a payment of rent to the landlord and if so, whether the payment of rent, by cheque after the determination of the tenancy gave rise to a new tenancy.

Mr. Justice Basnayake observed :

" The giving of a cheque does not operate as an assignment *pro tanto* of the maker's funds or credit at the bank upon which it is drawn. The maker can stop payment, or, in the event of his death, the authority of the bank to make payment is revoked. (*Johnson v. Johnson* (1948) 3 D.L.R. 590 at page 595). The law on the point is thus stated by **Sir Ernest Pollock,** *M.R.*, in *re Swinburne* (1926) L.R. Ch. 41."

" Now a cheque is clearly not an assignment of money in the hands of a banker. A cheque as explained by **Lord Romily**, *M.R.*, in *Hewitt v. Kaye* (1868) L.R. 6 Eq. 198, is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is with the bankers or elsewhere. It is an order to deliver the money ; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. Let me assume, therefore, that there was money in the current account ready to meet this cheque as and when it was accepted for payment by the banker, but it is clear law that the fact that this cheque was outstanding did not indicate that there had been any assignment of the money on current account to meet the cheque. It is merely a mandate or authority in the hands of the holder of the cheque to go to the bank and get the money from it."

" A practice of ' certifying ' or ' marking ' cheques for payment has grown up among bankers. In the United States ' certified ' cheques have received statutory recognition but in our country the practice has not been recognised by law. ' Certification ' is taken in practice as a representation that the bank, at the time of certifying, has funds of the drawer to carry out the order of the drawer. A certified cheque remains a cheque and the giving of such a cheque does not amount to payment in cash nor does it operate as an assignment of funds. (*Chalmer's* " Bills of Exchange " 11th edition, page 245 ; *Byles* on " Bills " 20th edition, pages 22-23)."

" The tenant pays by cheque at his risk. The loss of or delay of the cheque in transit or the negligence of the bank may not excuse his default. The fact that the cheque is as a matter of practice sent by post will not change the character of the payment made by cheque. (*Die Afrikanee Pers Bpk v. Perestrello and Another* (1949) 2 S.A.L.R. 346 at page 349). But where the tenant pays his rent by cheque and the landlord accepts it as payment and gives a receipt therefore without waiting till the cheque is realised, then if the cheque is dishonoured, he cannot sue for the rent if he has by his receipt, acknowledged satisfaction of his debt. The position is different if he merely acknowledges the receipt of the cheque without treating it as a discharge of the debt. *Where a complete discharge of the debt is given the remedy is an action on the cheque and not an action for rent.* In the instant case no receipts were given and the cheques were not cashed."

In conclusion, the Supreme Court held *inter alia* that the mere retention by the landlord of the cheques sent by the tenant after the landlord had given notice of the determination of the tenancy did not by itself give rise to a new tenancy.

Where a tenant pays his rent by cheque and the landlord accepts the cheque as payment of rent but does not present the cheque at the Bank in time and returns it to the tenant after it has become " stale," the tenant cannot be said to be in arrears of rent for the period for which he gave the cheque as payment of rent. In such a case the failure of the tenant to make a fresh payment within a reasonable time after the stale cheque is returned to him by the landlord, does not have the effect of placing him in arrears of rent and forfeiting the statutory protection given to him by the Rent Restriction Act.

Thangodorai Nadar *v.* **Esmailjee**

(1954) 56 New Law Reports, p. 343

This was an action by a landlord against his tenants for rent and ejectment. According to the facts of this case the practice between the landlord and his tenants was that the payment of rent was to be made by cheque. Accordingly, the tenants had tendered rent by cheque to the landlord and the

landlord had accepted the cheques as payment of rent. But the landlord had not presented the cheques to his bank for realisation and later returned the cheques to the tenants after they had become 'stale.' The tenants, on their part, did not make a fresh payment within a reasonable time after the stale cheques had been returned to them by the landlord. The question of determination was whether in such circumstances, the tenants were in arrears of rent and would forfeit the statutory protection, namely, protection against ejectment in the absence of any arrears of rent.

Mr. Justice Gratiaen (with whom **Fernando** *A.J.* agreed) observed :

> " The payee's (landlord's) decision not to present this cheque for payment before it became stale could not therefore retrospectively convert the tenants into defaulters within the meaning of the Act, as it is not suggested that the cheque would have been dishonoured if presented within a reasonable time. It would indeed be a remarkable result if a landlord, by resorting to the simple device of postponing presentation of his tenant's cheque until the bank refused to honour it (for no reason than that it had become stale) could deprive the tenant of his statutory protection." (Quoted with approval in 56 N.L.R. p. 344).

It was also argued that the tenants at least became defaulters when they failed to make a fresh payment within a reasonable time after the stale cheques were returned to them by the landlord. To this argument, **Mr. Justice Gratiaen** replied as follows :

> " I agree that the debt was perhaps revived. But the revival of the indebtedness must not be confused with the totally independent issue as to the alleged forfeiture of statutory protection. Rent for any particular month is not ' in arrears ' within the meaning of the Act if it was paid *or tendered* by the tenant within the stipulated period. Let us take the hypothetical case where a valid tender of rent had without justification being rejected by the landlord. In such a situation, the debt remains unsatisfied but the tenant's statutory protection is not thereby forfeited."

Whereas a landlord takes cheques from his tenant as conditional payment of rents due, the cheques operate as payment and the tenant is not in arrears within the meaning of the proviso to Section 13 (1)

of the Rent Restriction Act No. 29 of 1948 unless the cheques are dishonoured on presentment.

Nor is the tenant in default when the reason why his cheques have not been realised is that the landlord elected not to present them for payment. If then the landlord returns the cheques and asks for a "fresh cheque to cover the entire rent due" the tenant's liability would be a liability on the cheques and not a liability to pay rent.

Subbiahpillai *v.* **Sheriff & Co., Ltd.**

(1955) 56 New Law Reports, p. 553
(Divisional Bench)

In this case which was an action by a landlord against his tenant for rent and ejectment, a Divisional Bench took the view that the condition upon which cheques were received by the landlord as payment of rent due must be understood to be that the debt would revive if the cheques were not realised when presented for payment at the Bank (*Currie v. Misa* (1875) L.R. 10 Eq. 153) and that they would operate as payment unless they were presented and dishonoured. (*Marreco v. Richardson* (1908) 2 K.B. 584).

It was argued that though the tenant was not in default while the cheques were in the hands of the landlord, yet he became liable to pay the amounts of the cheques within a reasonable time after the cheques were returned to him by the landlord. And, on his failure to discharge this liability the tenant was in default.

The Supreme Court (*per* **Gunasekera** *J.*, **Pulle** *J.* and **Weerasooriya** *J.*) rejected this argument and held that:

> "any such liability would be a liability on the cheque and not a liability to pay rent. Moreover, the rent can be in arrear only from the day on which it became due, which is fixed by the terms of the contract of tenancy and cannot be varied by the unilateral act of the landlord in returning a cheque that he has taken as conditional payment." (*Per* **Gunasekera** *J.* at page 557).

In the same Divisional Bench it was also argued that even if the tender of a cheque amounts to a conditional payment, *the tender of a cheque by a tenant in payment of rent does not*

amount even to a conditional payment of the rent in question. The basis of this contention was that while there is ordinarily a strong presumption that the giving of a bill or note on account of a debt is a conditional payment, there is no such presumption in a case where the creditor already possesses a higher remedy. (*See : Chalmer's Bills of Exchange*, (11th edition), pages 310, 312).

Or in other words that, since in the present case, the landlord-creditor has the higher remedy of the landlord's lien against the debtor, the tenant, the giving of the cheque in payment of rent, did not amount to a conditional payment of the rents in question.

The Divisional Bench did not find it necessary to pronounce a finding on this argument as the Court found that there was sufficient evidence to support the finding that the landlord had accepted the cheques as conditional payment of the rents in question. The Court, however, made the following observation :

> " The fact of a landlord taking a bill of exchange from his tenant for the rent due is, however, some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill. (*Palmer v. Bramley* (1895) 2 Q.B. 405) although it does not raise a legal implication of such agreement." (*per* **Gunasekera** *J.* at page 556).

> " There is nothing in law which precludes a creditor, who already possesses a higher remedy than mere recourse to the debtor for payment of the amount due, from accepting a cheque in settlement of the debt." (*per* **Weerasooriya** *J.* at page 559).

His Lordship, **Mr. Justice Weerasooriya,** further held that there was a valid payment of the rents by the tenant when he sent cheques from time to time to the landlord :

> " The effect of a tender, though it will not release a debtor from the necessity of making payment or fulfilment in terms of his tender if subsequently called upon to do so, is to release the debtor from all the consequences which would otherwise have arisen from his omission to make such payment or fulfilment." (*Maasdorp's Institutes of South African Law*, Vol. IV (5th edition), page 160).

Where a landlord has agreed with his tenant that the payment of rent should be made monthly by means of a cheque posted to his address, the mere posting of the cheque by the tenant on a particular date operates as payment of the rent on the date for the purpose of ascertaining whether the tenant was in arrears of rent.

Seneviratne *v.* **Tissaverasinghe**

(1956) 57 New Law Reports, p. 557

Landlords of houses who have agreed with their tenants that *rents may be paid by cheque by post* should be aware of the decision of the Supreme Court in this case. The decision in this case was that where a landlord had expressly agreed that payment of rent should be made monthly by means of a cheque posted to his address, *the mere posting of the cheque* by the tenant on a particular date operates as payment of the rent on that date, for the purpose of ascertaining whether the tenant was in arrears of rent.

According to the facts, the landlord had required that the rent be paid by the tenant before the last date of each month but had agreed that the rent may be paid by cheque by post. The tenant had posted the rent cheque on the 30th of September, and the landlord had received it on the 1st of October, *i.e.*, one day late. But the Supreme Court held that the *date of posting* was the date of payment. In other words, the landlord had constituted the postal authorities as his agents to receive on his behalf the letter containing the cheque. In these circumstances, the posting of the cheque on 30th September, operated as a payment of the debt on that date.

The Supreme Court (*per* **Gratiaen** *J.* and **Gunasekera** *J.*) added :

> " The legal position would of course, have been different if the agreement between the parties had merely provided for payment of the rent on or before a particular date, in which event, the unilateral decision of the debtor (tenant) to send the rent by post at his own risk would not have sufficed to constitute payment until the money (or cheque) actually reached the landlord."

A tenant is not entitled unless by prior agreement express or implied to tender cheques in settlement of the rent payable by him.

Kanapathy Pillai *v.* **Dharmadasa**

(1960) 58 Ceylon Law Weekly, p. 79

In this case the learned District Judge had held that where a landlord refused to accept a tenant's cheque in payment of rent, the tenant was under no obligation to pay his rent.

On appeal, the Supreme Court (*per* **Basnayake** *C.J.* and **Sansoni** *J.*) rejected this view. **Basnayake** *C.J.* observed :

> " Such a finding is contrary to the decision of this Court in *Samaraweera v. Ranasinghe*, 59 N.L.R. and the decision in *Cassim v. Kaliappa Pillai*, 58 C.L.W. 64, wherein this Court has held that a tenant is not entitled unless by prior agreement, express or implied, to tender cheques in settlement, of the rent payable by him. For thirteen years the 1st defendant (tenant) had paid his rent in cash. He was not entitled, therefore, on his own motion to decide to pay his rent by tendering a cheque for that amount. The landlord was within his rights in returning the cheque and the tenant was not relieved of his obligation to pay his rent in cash as he has done during the preceding thirteen years."

CHAPTER 9

THE LAW RELATING TO PRESENTMENT FOR PAYMENT OF CHEQUES

There are two reasons why an endorsed cheque should be promptly presented for payment. Firstly, if the drawer suffers actual damage through the delay, as by the failure of the bank, he is discharged to the extent of such damage. Secondly, if it is not presented for payment within a reasonable time after endorsement, the endorser will be discharged.

Arnasalam *v.* **Marikar**

(1903) 8 New Law Reports, p. 209

This case was not an action on a cheque by the holder against the endorser and drawer but an action on promissory notes for which a cheque for Rs. 3,075·50 is alleged to have been given in payment. But in deciding the case the Supreme Court had to consider the legal position when an endorsed cheque given in payment of a debt had been unduly delayed in presenting for payment.

The Supreme Court observed :

> " There are two reasons why an endorsed cheque should be promptly presented for payment. The first being that if the drawer suffers actual damage through the delay, as by the failure of the bank, he is discharged to the extent of such damage." (Section 74, *Bills of Exchange Act 1882*) and secondly, " that if it is not presented for payment within a reasonable time after endorsement, the endorser will be discharged." (Section 45 (2), *Bills of Exchange Act 1882*).

In this case the plaintiff's agent received the first defendant's (drawer's) cheque on 1st December, dated 30th November, 1900 and endorsed by the second defendant (endorser) apparently without any stipulation, and it was not presented for payment until 6th February, 1901, when it was dishonoured.

The Supreme Court, *per* **Middleton** *J.*, also cited with approval the following principles of English Law relating to payment by negotiable instruments such as cheques :

(i) A negotiable security as a bill or note endorsed or delivered to and taken by the creditor on account of a simple contract debt presumptively operates as conditional payment — that is, payment with the

condition that it is paid when due — and that the debt revives if it is dishonoured. (*Sayer v. Wagstaff*, 5 Beav. 415, 13 L.J., Ch. 161),

(ii) If the bill or note is given and taken in satisfaction and discharge of the debt, the creditor takes upon himself the risk of dishonour, and the subsequent dishonour does not revive the debt. (*Sayer v. Wagstaff* (*supra*)),

(iii) Whether the bill or note is given or taken in satisfaction, or as conditional payment, is a question of fact as to the intention shown by the parties, (*Goldshede v. Cotrell*, 2 M.W. 20),

(iv) Again, if a creditor chooses for his own convenience to take a bill, note or other form of credit of a third party, which is offered instead of cash, it is an absolute payment in satisfaction of the debt, and he cannot upon dishonour of the security have recourse to his remedy for the debt. (*Strong v. Hart*, 6 B & C 160),

(v) Upon these principles the giving of a cheque on a banker, whether payable to bearer or to order, if accepted on account of a debt, is equivalent to payment, and suspends the remedy until the cheque has been presented for payment and dishonoured. (*Hough v. May*, 4 A & E 954),

(vi) A creditor, however, taking a cheque in preference to cash does not preclude himself from resorting to his original claims upon dishonour of the cheque. (*Everett v. Collins*, 2 Camp. 515),

(vii) Finally, a creditor who takes a cheque may present it for payment at any time until it is barred by the Statute of Limitation; but after a reasonable time (within the next day after receiving it) for presenting it has elapsed, he holds it at his own risk against the failure of the bank; and if the money is lost through that failure, the drawer to that extent is discharged, the holder becoming creditor of the banker to the same extent. (*Bills of Exchange Act* 1882, Section 74, *Robinson v. Hawksford*, 9 Q.B. 52; *Laws v. Rand*, 27 L.J.C.P. 76; *Leake on "Contracts."*

The delay on the part of the holder in presenting a cheque for payment does not exonerate the payee and the endorser from liability to the holder unless it can be proved that the payee or the endorser had been prejudiced by the delay or the banker had become insolvent during the delay.

Karpen Chetty *v.* **Greve**

(1886) 8 Supreme Court Circular, p. 18

This was an action by the holder of a cheque against the payee and endorser. The second defendant, the endorser, took up the position that he was not liable on the cheque because the plaintiff the holder of the cheque had delayed for *over a month* to present the cheque for payment.

The Supreme Court, however, took the view that the delay of presenting the cheque did not exonerate the defendant from his liability to the holder unless it can be proved that the endorser had been prejudiced by the delay or the banker had become insolvent during the delay of one month.

When the presentment for payment of a cheque is made impossible by the drawer's own act it is not open for the drawer of the cheque to disclaim liability on the cheque on the ground that it had not been duly presented for payment.

Sinnaya Chetty *v.* **Imray**

(1899) 3 Appeal Court Reports, p. 113

This was an action brought by a holder of a cheque against the drawer. The drawer took up the defence that he was not liable because the cheque had not been presented at the bank for payment and that there had been no waiver of presentment by him. But on the facts it was clear that though the drawer had not waived the need for presentment he had in fact prevented the presentment for payment by keeping the cheque with him and refusing to return it to the holder who had entrusted the cheque to him. The drawer had made a clerical error in drawing

the cheque and the holder (payee) had returned the cheque to the drawer for correction. The drawer had, without correcting the error and returning the cheque, withheld it from the payee.

Accordingly, the Supreme Court (*per* **Lawrie** *A.C.J.* and **Withers** *J.*) held that since it was the drawer's own act that had made presentment for payment impossible it was not open now for the drawer to plead that the action on the cheque was bad because it had not been duly presented for payment.

Lawrie *A.C.J.* observed :

> " It is in vain for the drawer to plead that the cheque was not presented at the bank when by his own act he made presentment impossible."

Presentment for payment of bills of exchange, promissory notes and cheques should be made during the usual hours of business and if at a bank within banking hours.

(*Supreme Court decision in 442 D.C. Colombo 3721. Decided by the Supreme Court on 17th June, 1894 and reported in Balasingham's Notes of Cases*, Vol. 5, p. 78).

Where a plaintiff sues on a promissory note payable at a bank and alleges due presentment at that bank and the defendant admits the making of the note but does not traverse the allegation of due presentment, the plaintiff is not entitled to provisional judgment by way of summary procedure in the absence of proof of due presentment at the bank.

The fact that due presentment had been alleged and had not been traversed does not assist the plaintiff.

Raman Chetty *v.* **Cader Saibo**

(1887) 8 Supreme Court Circular, p. 72

Under our Civil Procedure Code a summary procedure is available to speedily dispose of actions based on negotiable instruments like promissory notes and cheques. But unless the pleadings are properly drafted a plaintiff may lose this valuable right to summary procedure and provisional judgment.

In the above case, the plaintiff sued the defendant on a promissory note made by the defendant and payable at the Bank of Madras, Colombo. The plaintiff averred that the note was duly presented at the bank but that it had not been paid on presentment.

A legal objection was raised on behalf of the defendant, *viz.*, that since the note was payable at the Madras Bank, the plaintiff, in order to succeed in the action must prove and establish due presentment at the bank.

It was argued, however, for the plaintiff that inasmuch the defendants had filed answer in which he did not traverse plaintiff's express averment as to presentment — due presentment at the bank may be taken for granted without actual proof of it.

The Supreme Court (*per* **Clarence** *J.*) however, rejected this argument and held that the plaintiff must prove due presentment at the bank. On his failure to do his action will also fail.

Mr. Justice Clarence observed :

> " This much is clear. That in consequence of the note being made payable at the Bank of Madras, the plaintiff, before he can recover the amount of the note from the maker, has to show something more than the defendant's signature to the note, and such *prima facie* presumption of non-payment as may arise from plaintiff's possession of the note . . . . He must, by some means, establish the fact of presentment at the bank . . . . It seems to me clear on principle that the plaintiff cannot be allowed so to eke out his case for provisional judgment by means of any omission in the defendant's answer."

NOTE :

Where a promissory note is made payable at a particular place it is necessary for a person suing on such note to aver in his plaint and prove that the note was so payable and that it had been duly presented at that particular place but dishonoured — *see also Ponnambalam v. Kirunather* (1884) 6 S.C.C., p. 8.

A Court is entitled to enter provisional judgment in an action upon a cheque, which had been protested for dishonour on presentation, brought by an indorsee of the cheque against the drawer thereof.

Doubtless a cheque should in prudence be presented to the banker within a reasonable time of its being drawn; but if no loss is occasioned by the delay the drawer's liability continues until the expiration of the prescriptive period. The delay in the presentation of the cheque for payment will not per se prejudice the plaintiff's right to the provisional remedy.

Abdul Cader *v.* **Mohammadu**

(1878) 2 Supreme Court Circular, p. 22

In this case the defendant appealed to the Supreme Court from a judgment of the District Court of Galle, granting a provisional decree on a cheque drawn on the Oriental Bank Corporation in the usual form and payable to order of which the defendant was the drawer and the plaintiff the indorsee. It was argued on behalf of the defendant-appellant that the plaintiff-endorsee was not entitled to this summary remedy inasmuch as :

(1) a cheque did not contain in itself an acknowledgement of a debt ;

(2) there was no proof of endorsement to the plaintiff ;

(3) there was undue delay in presenting the cheque for payment, and no proof of the assignor's title.

As regards the first ground of objection, the Supreme Court observed :

" Though a cheque does not in terms expressly set out that it has been given for valuable consideration, yet it clearly creates a *prima facie* legal obligation of payment, pure and liquid, on the part of the maker."

As regards the second ground of objection the Supreme Court remarked :

" This is not an action against the indorser. It is a suit against the maker of the cheque, whose liability (in this case the cheque was refused payment and protested) is precisely the same as that of a drawer of a promissory note or the acceptor of a bill of exchange . . . . Whether or not

the plaintiff assignor had title to assign or whether the plaintiff is a *bona fide* holder, is not a question for determination at the present stage of the proceedings."

The Supreme Court also rejected the third objection :

"Doubtless a cheque should in prudence be presented to the banker within a reasonable time of its being drawn ; but if no loss is occasioned by the delay, the drawer's liability continues until the expiration of the prescriptive period."

NOTE :

Referring to the effect of delay in presentation for payment, Chorley, *Law of Banking*, 5th *ed.* at p. 94, states : The contract entered into by the drawer by the issue of a cheque is enforceable against him for six years from the date of the breach, *i.e.*, dishonour (see for Ceylon, Section 6, Prescription Ordinance (Cap. 68) but the presentment for payment should be made within a reasonable time of its issue—Section 45 (2), Bills of Exchange Ordinance (Cap. 82). If it is not so presented, and the drawer or the person on whose account it is drawn had the right at the time when it ought to have been presented as between him and the banker to have the cheque paid and suffers actual damage through the delay he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such a cheque been paid—Section 74 (1), Bills of Exchange Ordinance.

CHAPTER 10

LAW RELATING TO CERTIFYING CHEQUES FOR PAYMENT

(1) *The practice of certifying cheques is not judicially or legislatively established in England and the same is true of India.*

(2) *Certification of a cheque for payment is not an acceptance within the meaning of the English or Indian Bills of Exchange Acts or the English Common Law.*

(3) *A Bank Manager has no authority implied by law to certify for payment a post-dated cheque.*

(4) *In England and India the marking of a cheque has so far been only judicially recognised to import a promise or undertaking to pay as between banker and banker for the purpose of clearance.*

(5) *A Court of Law is not an arbiter on questions of banking ethics or etiquette or good banking policy as a matter of business.*

Bank of Baroda Limited *v.* **Punjab National Bank Limited**

(1944) 37 Ceylon Law Weekly, p. 33

The above views were expressed by their Lordships of the Privy Council in *Bank of Baroda Limited v. Punjab National Bank Limited* decided in 1944 and reported for good reasons in 37 Ceylon Law Weekly at page 33. Although the case itself was an appeal from India the importance of the decision lies in the fact that the Indian Law on the subject as well as our law relating to cheques and negotiable instruments as contained in our Bills of Exchange Ordinance (Cap. 82) is based on the English Law. By Section 3 of the Civil Law Ordinance (Cap. 69) our law relating to Banking is also English Law. Accordingly, this leading decision of the Privy Council (delivered by Lord Wright) would apply to our law relating to cheques and banking and may be considered as a persuasive, if not an authoritative statement of the matters contained in the judgment.

In the course of his erudite judgment, **Lord Wright**, referred to the well-established distinction between a bill of exchange and a cheque and explained why cheques, unlike bills of exchange, are not in practice accepted.

His Lordship observed :

" Both Chalmers (Bills of Exchange) and Paget (Law of Banking, 4th edition, page 164) are of the opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but if the form can be disregarded it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England in a very limited practice apparently referred to by the Court in 1810 in *Robson vs. Bennet* (1810 — 2 Taunt 388). That is a practice between bankers for the purpose of clearing. It was judicially recognised by Sir Alexander Cockburn *C.J.* in *Goodwin vs. Robarts* (L.R. 10 Ex. at page 351) in these words : "A custom has grown up among bankers themselves marking cheques as good for the purpose of clearance by which they became bound to another." This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature and characteristics by the Act . . . . The practice seems to be simply that after clearing hours, a cheque presented for clearing may be marked, and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot, however, be identified with an acceptance.

" In the United States, the practice of marking or certifying cheques has been established and defined by the different State Legislatures in the Uniform Negotiable Instruments Acts . . . A similar rule has been adopted, it seems, by the Courts in Canada, and judicially recognised by this Board in *Gaden v. Newfoundland Savings Bank* (15 Times L.R. 228 ; 1899 A.C. 281) . . . *But it is different in England and India where the marking of a cheque has so far been only judicially recognised to import a promise or undertaking to pay as between banker and banker for the purpose of clearance.* In the absence of relevant enactment or custom, the issue in England and India as to the effect of certification of a cheque must be determined by the Common Law. Their Lordships are of the opinion that the certification which is relied on as constituting acceptance of the cheque is not an acceptance within the meaning of the English or Indian Act or Common Law. It is not necessary,

categorically, to hold that a cheque can never be accepted ; it is enough to say that it is done only in very unusual and special circumstances."

As regards the alternative claim that, according to custom and usage, certification of a cheque amounted to acceptance, Lord Wright remarked :

> " Practice of businessmen change, and Courts of Law in giving effect to the dealings of parties will assume that they have dealt with one another on the footing of any relevant custom or usage prevailing at the time in the particular trade or class of transaction. Hence, evidence is admitted of custom and usage which when judicially ascertained and established become incorporated in the Common Law."

In the case before them, their Lordships held that *the evidence of custom was insufficient both in the number and in the quality of the witnesses and in the certainty and precision of the evidence given.*

Lord Wright also dealt at length with the question as to the legal validity of post-dated cheques and as to whether a Bank Manager has implied authority to certify for payment a post-dated cheque. The concluding parts of his judgment, where his Lordship refers to the function of a Court of Law in cases where one or both parties to an action are bankers, merit quotation :

> " Their Lordships are not unconscious that bankers regard their word as their bond and honour their signature even though they might have an answer in law. This is specially true as between banker and banker . . . . In any case a Court of Law is called upon to decide how the law at present stands. It is not the arbiter on questions of banking ethics or etiquette or good banking policy as a matter of business. The high standards of bankers are too firmly established to be shaken."

Although a practice of "certifying" or "marking" cheques for payment has grown up among bankers such a practice has not been recognised by law in Ceylon.

(1) **Fernando** *v.* **Samaraweera**

(1942) 44 Ceylon Law Weekly, p. 19

(2) **Adaicappa Chettiar** *v.*
Thomas Cook & Sons Limited

(1932) 31 New Law Reports, p. 385

In the Supreme Court case of *Fernando v. Samaraweera*, **Mr. Justice Basnayake** observed :

> " A practice of 'certifying' or 'marking' cheques for payment has grown up amongst bankers. In the United States 'certified' cheques have received statutory recognition but in our country the practice has not been recognised by law. 'Certification' is taken in practice as a representation that the bank, at the time of certifying has funds of the drawer to carry out the orders of the drawer. A certified cheque remains a cheque and the giving of such a cheque does not amount to payment in cash nor does it operate as an assignment of funds. (Chalmers, *Bills of Exchange* (11th edition) page 245 ; Byles, *On Bills* (20th edition) page 22-23)."

In the Supreme Court case of *Adaicappa Chettiar v. Thomas Cook & Sons Limited*, **Mr. Justice Drieberg** made the following observations about the practice by bankers in Ceylon as regards certifying or marking cheques for payment :

> " No special practice has arisen in Ceylon regarding the marking of cheques and such marking will not give the holder a right of action against the bank, unless there was an understanding to pay him, or an admission that the money was held for his use. (*Prince v. Oriental Bank Corporation* (1878) 3 A.C. page 331). The bank, however, would be entitled to certain funds to meet the cheques marked for payment, dishonouring if necessary other cheques for the purpose ; whether the customer could countermand payment would depend on whether it was marked at his instance or of the holder. (Paget, *On Banking* (3rd edition) Chapter XI)."

NOTE :

The practice of marking cheques has been condemned by the London Clearing Bankers, and it is understood that it has almost ceased to be followed, at any rate by bankers in England—see Chorley, *Law of Banking*, 5th *ed.*, p. 41.

CHAPTER 11

THE LAW RELATING TO NOTICE OF DISHONOUR OF CHEQUES

In an action on a cheque it is necessary for the plaintiff to both plead and prove *the essential statutory requirements of presentment and notice of dishonour. Where these requirements can be dispensed with or have been waived in terms of the statute, then it is necessary to plead and prove the circumstances which in law have the effect of dispensing with these requirements.*

An action on a cheque will fail in limine *for non-compliance with these essential and imperative requirements.*

Senanayake *v.* **Abdul Cader**

(1969) 74 Ceylon Law Weekly, p. 79.

The above case contains the most recent pronouncement of the Supreme Court stressing the importance of compliance with the rules of the Bills of Exchange Ordinance when suing on a dishonoured cheque.

In that case, the plaintiff had sued the defendant on a cheque of Rs. 12,000/- which had been drawn by the defendant in the plaintiff's favour and which had been dishonoured by the Bank on presentment. The plaint, however, contained no averment of presentment for payment or of notice of dishonour, or of any circumstances showing that these essential requirements had been dispensed with ; nor had any issues been raised at the trial on any of these matters.

The Supreme Court (*per* **Weeramantry, J.** and **Wijayatilleke, J.**) held that since there was a non-compliance with these essential and imperative requirements of the law, the plaintiff's action must fail *in limine.* In the course of a lucid judgment which traced the history of the enactment and introduction of the law relating to cheques and negotiable instruments into Ceylon, and the development of this branch of our law and procedure by our judges, **Mr. Justice Weeramantry** observed :

> " The law on the necessity of proving presentment or any excuses therefor as well as dishonour or any excuses therefor is clear and well settled. It is somewhat remarkable that although the importance of these matters as pre-requisites to the success of a claim, in such instances as they are required, has been stressed time and again by our Courts for a century and a half, and although the importance of pleading such facts had likewise been stressed, we all too often come upon pleadings ignoring these requisites and

trials conducted as though they did not exist. These decisions, as will be observed, reach back to a time prior to the codification in 1882 of the English law relating to Bills of Exchange, for under the English Common Law as well this was the accepted position.

" Indeed they reach back to a time even prior to the Civil Law Ordinance No. 5 of 1852, which by Section 2 required our Courts to apply, in questions relating to bills of exchange, promissory notes and cheques, the same law that would be applied in England in the like case at the corresponding period.

" Thus, as early as 1821, a time long anterior to the Civil Law Ordinance, this Court decided in *Boyd v. Benett* (1820-33) Ram. p. 24, that a drawer of a bill of exchange payable to a third party is entitled to notice of dishonour. The Court there observed that no proof having been made that the drawer had received notice of dishonour, to which he was entitled, there would be a valid objection to the claim, and had the action been founded on that only, the plaintiff's libel would have been dismissed.

" Passing next to the period between the enactment of the Civil Law Ordinance and 1882, the year of codification of the English law, we see numerous decisions indicating that the requirements of notice of dishonour and presentment were well recognised by our Courts as pre-requisites to actionability. For example, in 1871 D.C. Colombo 56533—(1871) Vand. p. 165, this Court, citing the 5th edition of Byles on Bills held that where a debtor indorses a note of a third party to his creditor, the latter cannot sue for his debt without proving presentment and notice of dishonour. So also in *Weerappah Chetty v. de Silva* (1884) 6 S.C.C. 82 Burnside, *C.J.*, held that the pleadings against the last indorser disclosed no cause of action as they failed to aver among other matters presentment for payment and due notice of dishonour. This case is of some special interest in view of certain very caustic observations made by the Chief Justice in regard to the drafting of the pleadings.

" Between 1882, the year of enactment of the Bills of Exchange Act in England and 1927, we directly applied the provisions of the English Act. Thus in the year 1907, the Court in *Karuppen Chetty v. Palaniappa Chetty* (1907) 10 N.L.R. 278 applied Section 87 (1) of the English Act of 1882 and required presentment of a note payable at a

particular place, unless there was some excuse for not so doing. Applying this principle, the maker was held not liable when the note was not so presented. Apposite to the present case the Court observed that though it was inclined to think that the case should be sent back for the framing of a new issue on the question whether there was an excuse for non-presentment, on reconsideration it though that the parties should be held to the issues which they had framed and accepted, and that, in the absence of such an issue, the appeal should be allowed and the action dismissed.

"So also in 1917, Wood Renton, *C.J.*, observed that presentment for payment and notice of dishonour were conditions precedent to a right of action against the indorser on a promissory note and that the burden of showing that those conditions had been complied with rested upon the plaintiff (*Murugappa Chetty v. de Silva* (1916) 2 C.W.R. 33).

"It is also important to note that when the Civil Procedure Code was enacted in 1889, the English law had been codified by the Act of 1882; and the Civil Procedure Code, through the several specimen plaints contained in its first schedule, makes it quite clear that these principles, which had originated in the English common law, had been taken over by our legal system. It will be seen that in several of these specimens, where it is necessary in law to plead presentment or an excuse therefor or notice of dishonour, such averments are expressly made. Shortly after its introduction, we find Clarence, *J.*, observing in *Sadeyappa Chetty v. Lawrence* (1892) 2 C.L. Reps. 3, that according to the rules of pleading laid down in the Civil Procedure Code an excuse for non-presentment of a promissory note or a waiver of presentment must be specially pleaded by a statement of the facts relied on. It was further held in that case that evidence would not be admissible on a question of excuse or waiver of presentment in the absence of the necessary averments in the plaint.

"No change was brought about in respect of these matters by the enactment in 1927 of the Bills of Exchange Ordinance, in practically the same terms as the English statute, with the provision also, in Section 98 (2), that the rules of the Common law of England, including the law merchant, shall apply to bills of exchange, promissory

notes and cheques, save in so far as they were inconsistent with the express provisions of the Ordinance or any other enactment for the time being in force."

His Lordship took the view that the law relating to the matter under discussion is contained in Ceylon today in the provisions of the Bills of Exchange Ordinance of 1927 and the Civil Procedure Code. Mr. Justice Weeramantry also referred to the relevant provisions of the Bills of Exchange Ordinance and to the more recent decisions of the Ceylon Supreme Court and also the English authorities on this subject, and held that as the plaintiff's action omitted to comply with these essential and imperative requirements of the law, it must fail *in limine*.

NOTE :

For the other Ceylon and English authorities on this subject, *see*, *Ceylon Estates Agencies and Warehousing Co., Ltd. v. de Alwis* (1966) 70 N.L.R. 31 at 39 : *de Alwis v. Ranasinghe* (1966) 69 N.L.R. 278 : *Wijewardana v. Kunjimoosa & Company* (1967) 70 N.L.R. 64 : *Edridge v. Rustomji* (1933) A.I.R. Privy Council 233 at 236 : *May v. Chidley* (1894) 1 Q.B. 451 : *Roberts v. Plant* (1895) 1 Q.B. 597 : *Burgh v. Legge* (1839) 5 M. & W. 418 : *Franhauf v. Grovenor* (1892) 61 L.J.Q.B. 717 : Halsbury, 3rd *ed.* vol. 3, p. 220 : Bullen and Leake, *Precedents and Pleadings*, 11th *ed.*, pp. 123, 132, 135 : Byles on *Bills*, 21st *ed.*, p. 344.

See also, Journal of Ceylon Law, Vol. 1 No. 1 June 1970, pp 14—16.

When a cheque is dishonoured, notice of dishonour is a condition precedent to a right of action against an endorser. Excuses for delay in giving notice of dishonour are limited only to those which are set down in Section 50(1) of the Bills of Exchange Ordinance.

De Silva *v.* **Ranasinghe**

(1966) 69 New Law Reports, p. 278

In this case the plaintiff alleged that the defendant had borrowed a sum of Rs. 3,500/- from him on the cheque produced at the trial marked P1. The cheque had been drawn by a third party, and according to the plaintiff, endorsed to him by the defendant.

The cheque was dishonoured (the drawer having stopped payment) and the plaintiff filed this action against the endorser (*i.e.*, the defendant) only. He obtained judgment against the defendant in the lower Court and the defendant appealed.

The main ground urged by the defendant's counsel in appeal was that there had been no notice of dishonour given to the defendant as required by Section 49(12) of the Bills of Exchange Ordinance (*Cap.* 82) which reads as follows :

Section 49 :

Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules :

(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances notice is not deemed to have been within a reasonable time, unless —

(*a*) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill ;

(*b*) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour of the day, and if there be no such post on the day, then by the next post thereafter.

The Supreme Court (*per* **Sirimanne** *J.* and **Alles** *J.*) followed the decision in *Murugappah Chetty v. Silva* (1916) 2 C.W.R. 33 and held that " notice of dishonour is a condition precedent to a right of action against an endorser." Excuses for delay in giving notice of dishonour which may be accepted by a Court are set down in Section 50(1) of the Ordinance. The delay must be " caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence." The fact that money had been borrowed by a person on a cheque signed by another is hardly an excuse for delay in giving notice of dishonour to the endorser."

The Court also took the view that in such cases a question that arises is the exact date on which the cheque was dishonoured and this burden is normally on the plaintiff who sues on the dishonoured cheque. The question as to whether notice of dishonour can be dispensed with in the case of an "accommodation cheque" in terms of Section 50 (2) (*d*) (iii) of the Bills of Exchange Ordinance was left open by the Court.

Notice of dishonour in terms of Section 49(12) of the Bills of Exchange Ordinance is a condition precedent to a right of action against an endorser or drawer of a cheque.

Where a cheque when presented for payment is dishonoured by a bank with the endorsement " effects not cleared " an indorsee of the cheque must be given due notice of dishonour before he can be sued on the cheque. In such a case Section 50 (2) (c) of the Bills of Exchange Ordinance does not dispense with notice of dishonour.

Notice of dishonour must be given within a reasonable time. A notice sent nearly a month after the date of dishonour is not a notice as required by the Bills of Exchange Ordinance.

Wijesundera *v.* **Kunjimoosa & Co.**

(1967) 70 New Law Reports, p. 64

This was an action filed by the plaintiff company against two defendants for the recovery of a sum of Rs. 2,000/- which they alleged was due to them on two cheques marked 'A' and 'B.' Cheque 'A' was for a sum of Rs. 1,000/- drawn by the first defendant in favour of the second defendant. Cheque 'B' was also for Rs. 1,000/- drawn by an unknown person and endorsed by the first defendant to the second defendant who obtained cash for both cheques from the plaintiff company. Cheque 'A' was dishonoured on 3-4-62 because payment had been stopped by the drawer. Cheque 'B' was dishonoured by the bank on 11-5-62 with the endorsement "effects not cleared." A notice of dishonour in respect of both cheques had been sent to the first defendant only on 11-6-62.

The trial Judge had given judgment to the plaintiff company against both defendants. The second defendant did not appeal. The first defendant appealed and the only point argued in appeal was that no notice of dishonour had been given to him within a reasonable time as required by the Bills of Exchange Ordinance (Cap. 82).

The Supreme Court (*per* **H. N. G. Fernando** *C.J.* and **Sirimanne** *J.*) held that notice of dishonour is a condition precedent to the right of action against an endorsee or drawer and that a notice sent nearly a month subsequent to the dishonour was not a sufficient notice. But when a drawer of a cheque stops payment notice of dishonour is dispensed with under Section 50 (2) (*c*) (*v*) of the Bills of Exchange Ordinance.

Accordingly, in respect of cheque 'A' where the drawer had stopped payment, the Court held that notice of dishonour was unnecessary. But in the case of cheque 'B' however, the endorsement by the bank on the dishonoured cheque was merely "effects not cleared." In the view of the Supreme Court such an endorsement did not mean that the drawer had countermended payment. Therefore, in such a case notice of dishonour must be given and cannot be dispensed with under Section 50 (2) (*c*) of the Bills of Exchange Ordinance, which dispenses with notice of dishonour *only* where the drawer has countermanded or stopped payment of the cheque.

In the absence of special circumstances notice of dishonour of a cheque is not deemed to be given within a reasonable time in terms of Section 49 (12) of the Bills of Exchange Ordinance if the person giving the notice and the person receiving the notice reside in the same place (town) and the notice is not given or sent of in time to reach the latter on the day after the dishonour of the cheque.

Kulasuriya *v.* **Perera**

(1963) 66 New Law Reports, p. 188

The facts in this case were as follows :

The plaintiff brought an action in respect of a cheque which had been endorsed by the first defendant to her. It was a cheque issued on the Bank of Ceylon at Panadura drawn on 7th September, 1960, and on the back of the cheque was an entry — " To be presented on 7-10-60." The drawer, the second defendant, the endorser, the first defendant, and the plaintiff were all from Wadduwa, the town adjoining Panadura. The cheque was presented for payment on 6th December, 1960, by one D. J. Perera to whom the plaintiff had endorsed the cheque and it was dishonoured with the endorsement " Refer to Drawer." On 6th December itself D. J. Perera notified the plaintiff that the cheque had been dishonoured. The plaintiff in turn gave notice of dishonour to the first defendant who had endorsed the cheque to the plaintiff, but he delayed to give this notice until 11th January, 1961, *i.e.*, over a month after the cheque was dishonoured.

The Supreme Court (*per* **Herat** *J.* and **Sri Skanda Rajah** *J.*) held that since notice of dishonour of the cheque had been given only a month afterwards and as there were no special circumstances to justify this delay, it was not a proper notice of dishonour as contemplated by Section 49 (12) of the Bills of Exchange Ordinance (*Cap.* 82) and that the action on the dishonoured cheque could not be maintained.

When a debt is paid by the cheque of a third party and the cheque is subsequently dishonoured, the creditor loses his right of recourse against the debtor unless prompt notice of dishonour is given to the debtor.

Notice of dishonour may be dispensed with only if the cheque is a mere accommodation cheque.

The plea of failure to give notice of dishonour arose under the Law Merchant which is now codified in the Bills of Exchange Ordinance. It is based upon the custom of businessmen and relates to a department of law which every businessman or merchant is supposed to know.

The Eastern Garage & Colombo Taxi Cab Co., Ltd. *v.* Silva

(1922) 23 New Law Reports, p. 509

This case will no doubt serve as a lesson that when an account is paid by the cheque of a third person and that cheque is dishonoured, the creditor loses his right of recourse against the debtor, unless prompt notice of dishonour is given to that debtor.

The facts of the case were as follows :

The defendant, Silva had got extensive repairs done to his motor car at the garage of the plaintiff company and paid the repair bill by a cheque drawn by a third person in his favour which he endorsed and gave the garage. The cheque was dishonoured. When the plaintiff company sued on the cheque a technical objection was taken that they had *not given notice of dishonour* to the defendant, *i.e.*, the original payee (Silva) who had endorsed the cheque and given it to them or to the drawer of the cheque, *i.e.*, the third party.

The Supreme Court (*per* **Bertram** *C.J.* and **De Sampayo** *J.*) held that the plaintiff company, unfortunately for themselves, must pay the penalty for having omitted to give notice of dishonour and that the action on the dishonoured cheque must fail. **Bertram** *C.J.* observed :

> " The plea of failure to give notice of dishonour arose under the law merchant, and is now codified in the Bills of Exchange Ordinance ; it is based upon the custom of businessmen and relates to a department of law which every businessman or merchant is supposed to know. It is not to be expected that either the manager of a motor garage or boutique keeper should be acquainted with the rules of the law merchant in this particular or should be aware that these rules which originally evolved with reference to bills of exchange also apply to cheques."

But the Chief Justice added that even though both parties were ignorant of the necessity to give notice to dishonour it is a legal point upon which the Court must decide.

The Supreme Court further observed that if the cheque was a *mere accommodation cheque, notice of dishonour could be dispensed with* but in the present case as the third party (*i.e.*, the drawer) had given the cheque to the defendant Silva for valuable consideration, it was not a mere *accommodation cheque.*

Actions on negotiable instruments like cheques should be decided in accordance with the pleadings and the issues raised thereon and the evidence led relevant to those issues.

Notice of dishonour is a condition precedent to the right of action on a cheque.

When a person sues on a cheque and states that notice of dishonour is not necessary in view of the remarks " not arranged for " on a cheque, he must prove that those words were written by the paying banker, and also the true meaning of those words and that there were no funds in the bank to meet the cheques when they were presented for payment.

Perera *v.* **Perera**

(1968) 71 New Law Reports, p. 167

This is another case which illustrates how important it is to file proper pleadings, and give prior notice of dishonour, when one sues on a cheque. The facts of the case were as follows :

The plaintiff sued the defendant on five cheques marked 'A' to ' E ' but the appeal to the Supreme Court was concerned with only two of the cheques, *viz.*, ' D ' and ' E.' The trial Judge had given judgment for the plaintiff in a sum of Rs. 11,000/-, being the value of the two cheques ' D ' and ' E ' together with legal interest and costs.

At the trial the defendant had taken up the position that no notice of dishonour had been given and had raised the following issues 8 and 9 (*inter alia*) :

" Issue 8. Was notice of dishonour according to the provisions of the Bills of Exchange Ordinance given in respect of all or any of the cheques marked A, B, C. D. and E ?

Issue 9. If not, can the plaintiff have and maintain this action in all or any of the cheques marked ' A,' ' B,' ' C,' ' D ' and ' E ' ? "

The trial Judge had answered issue No. 8 in the defendant's favour and issue No. 9 in favour of the plaintiff as far as the cheques ' D ' and ' E ' were concerned. In appeal, it was submitted that once the learned trial Judge answered issue No. 8 in the defendant-appellant's favour, the plaintiff's action should have been dismissed, as the only question that arose on the pleadings and issues was whether notice of dishonour had been given. It was argued that such notice was a condition precedent to the right of action on the cheques.

On the other hand, for the plaintiff-respondent, it was argued that the cheques contained the remarks " not arranged for " and this was evidence that notice of dishonour was not necessary. It was further argued that the defendant had not objected to the admission of the said cheques in evidence. But no evidence had been called by the plaintiff to show the true meaning of the words " not arranged for " ; nor was there any proof as to who wrote those words on the cheques, and there was not even the seal of the bank on the cheques.

On the above facts, **Mr. Justice de Kretser** observed :

" This appears to be a case which should be decided in accordance with the pleadings, the issues raised on the pleadings, and the evidence led relevant to those issues."

Accordingly, the Court (*per* H. N. G. Fernando *C.J.* and de Kretser *J.*) held that in the absence of an explanation by a banker as to the true meaning of the words " not arranged for," the plaintiff had failed to prove that the defendant had no funds in his bank to meet the cheques, when they were due for presentation. In such a circumstance, notice of dishonour was a condition precedent to the right of action on the cheques, and since no notice of dishonour had been given the plaintiff's action failed.

CHAPTER 12

THE LAW RELATING TO LIABILITY OF DRAWERS AND ENDORSERS OF CHEQUES

The mere fact that a principal gives cheques 'payable to bearer' to his agent to purchase goods for him from a firm does not imply that the agent has authority to pledge the principal's credit for any purchases.

Velanthapillai *v.* **Haramanis Appu**

(1930) 31 New Law Reports, p. 467

According to the facts of this case, the defendant who was a trader in Galle used to send his agent to Colombo to purchase goods from the plaintiff's firm in Colombo. The agent was given money in the shape of cheques, payable to bearer, to purchase the goods. But the defendant had not expressly or impliedly authorised the plaintiff to give goods on credit to the agent.

The agent had, one day, bought items by pleading the defendant's credit and then disappeared. The plaintiff sued the defendant for the value of the goods purchased on credit. The plaintiff contended that, by giving the agent bearer cheques to pay for the goods, the defendant had impliedly given the agent authority to pledge the defendant's credit, and therefore the defendant was liable.

The Supreme Court (*per* **Jayawardene** *A.J.*), however, rejected this argument. Following several decisions of the English Courts relating to the law of principal and agent, the Court held that the giving of bearer cheques for payment of goods purchased did not *per se* amount to an implied authority to the agent to pledge his principal's credit.

When a person has given authority to another to draw cheques on his behalf the burden of proving that the authority of the agent had been terminated is on the person who gave such authority.

Sinniah Chetty *v.* **Silva**

(1929) 31 New Law Reports, p. 69

In this case, the plaintiff sued the defendant on three cheques for the sums of Rs. 1,500/-, Rs. 1,000/- and Rs. 2,500/- respectively, signed as follows: "V. Silva & Co., D. A.

Amerasekera, Manager." The defendant denied that he made or signed the cheques. He admitted that some time back he carried on a business under the name of V. Silva & Co. and that its manager was one D. A. Amerasekera. Therefore, the question was whether Amerasekera had authority to sign cheques for the firm. If he was an agent of the firm, the defendant was liable. The District Judge had held that the burden of proving the agency of Amerasekera to sign cheques for the firm was on the plaintiff.

The sole question in appeal was as to on whom the burden of proof lay. The Supreme Court (*per* **Dalton J.** and **Drieberg J.**) rejected the view taken by the District Judge and held that if the defendant had given authority to Amerasekera to sign cheques on behalf of his firm, the burden of proving that the authority had been terminated was on the defendant himself. This view, Their Lordships observed, was in accordance with Section 109 of our Evidence Ordinance which states that when the question is whether persons are principal and agent and it has been shown that they have been acting as such, the burden of proving that they do not stand or have ceased to stand to each other in that relationship is on the person who affirms it. The Court took the view that the terms of this section are explicit.

Where a principal entrusts his agent with the collection of a cheque which had been dishonoured and the agent put the cheque in suit in his own name and obtained judgment thereon, the principal is not entitled to file a fresh suit against the agent and the drawer of the cheque for the purpose of getting the judgment in favour of the agent in the first suit set aside and judgment upon the cheque being entered in favour of the principal.

Muttappa Chetty *v.* **Yegappa Chetty**

(1886) 7 Supreme Court Circular, 198

This was a very novel action and disclosed a total misconception of a principal's rights against his agent in an action on a cheque. The facts were as follows :

The plaintiffs or either of them claimed to be the lawful owners or owner of a cheque drawn by the second defendant, which they alleged was in the possession of the District Court,

having been put in as evidence in an action which the first defendant brought upon it and in which he recovered judgment against the second defendant. The plaintiffs alleged that the first defendant was entrusted with this cheque as their agent and that he fraudulently put it in suit against the second defendant and recovered judgment. They asked the Court for a declaration ;

(i) that the cheque is theirs ;

(ii) that their agent, the first defendant was never the lawful owner of the cheque ;

(iii) that the judgment on the cheque entered in favour of their agent, the first defendant, against the second defendant, be set aside ;

(iv) that the first defendant be decreed to give up the cheque ; and

(v) that the second defendant be adjudged to pay the plaintiffs the amount due on the cheque with interest, &c.

The Supreme Court (*per* **Burnside** *C.J.* and **Clarence** *J.*) however, held that the plaintiffs were not entitled to any of the reliefs they had prayed for. The Court took the view that assuming for the sake of argument that the plaintiffs were the *bona fide* owners of the cheque, the judgment obtained by the first defendant their agent, against the second defendant, the drawer of the cheque, does not prejudice the legal rights of the plaintiffs who were the principals. The judgment against the second defendant was either good or bad. If it was good it enures to the benefit of the plaintiff, and if the first defendant as the plaintiff's agent improperly seeks to appropriate the proceeds of the cheque to himself as against them, the plaintiffs would have the right, as the principals, to intervene in that action and enforce their paramount claim, or call upon the defendant in a separate suit to account. On the other hand, if the judgment was a bad judgment as between the plaintiffs and the second defendant and does not operate as an estoppel upon them as real owners of the cheque, then they have no *locus standi* to ask that it be set aside, because it does not stand in the way of their suing on the cheque, or in any way prejudice their legal rights.

Burnside *C.J.* observed :

" It was ingeniously argued by the Attorney General, that the libel in effect contains a claim in trover or detinue for the cheque itself. I at first thought this might be so, but looking at the libel as a whole, I cannot narrow it to a claim of the kind, and even if I could, I do not think that such a contention can be supported on the facts. It is admitted that the cheque is not now in the defendant's possession, but in the custody of the Court. It cannot, therefore, be said that the first defendant detains it from the plaintiffs, and the question whether there had been any conversion depends on the larger question, whether the judgment obtained on it does or does not insure to the plaintiffs. If it does, then there was no conversion, because the plaintiffs are entitled to the fruits of that judgment. If it does not, and the judgment has not affected the plaintiff's rights as owners of the cheque, they would be entitled to obtain it from the custody in which it now is. True it is that the using the cheque by the first defendant for a purpose other than that for which it was entrusted to him would be evidence of a conversion, but if such user had entailed no substantial injury on the plaintiffs, they would be entitled to nominal damages only, and I hesitate to regard this action as merely a round-about way of recovering nominal damages in trover."

Clarence *J.* who agreed with the judgment of the learned Chief Justice that the plaintiffs action should be dismissed, added :

" The libel discloses no right whatever to have the judgment obtained by the first defendant set aside. If the first defendant sued without any authority to sue, and if the plaintiffs were the holders of the cheque, the judgment will not estop the plaintiffs from suing the parties indebted on the cheque . . . The plaintiffs may also have a right to require an account from the first defendant of the proceeds of the cheque, or perhaps to intervene in the first defendant's action, and take steps to obtain payment for themselves. The frame of their present suit is, however, in my opinion, misconceived."

Where a person as an agent of a disclosed principal purchases goods from a trader and pays by a cheque drawn by him in favour of the principal and endorsed as if by the principal, the agent renders himself personally liable in an action on the cheque.

Although, in such a case, the disclosed principal is also liable in law, if both the agent and the principal are originally sued on the cheque but subsequently, only the agent consents to judgment and the trader accepts such a decree, he cannot thereafter seek to proceed against the principal as well.

Mohamedally *v.* **Navaratna and Another**

(1938) 3 Ceylon Law Journal Reports, p. 169

This case concerns the question as to the liability of an agent and his principal on a dishonoured cheque drawn by the agent in payment of goods purchased by him as an agent on behalf of his principal.

The facts of this case were unusual. The plaintiffs who were traders supplied goods to the first defendant who put himself forward as the agent of the second defendant. The plaintiffs accepted the first defendant as agent and regarded the the second defendant as the principal.

Later, the first defendant drew a cheque in favour of the second defendant to the value of the goods purchased from the plaintiffs and endorsed the cheque himself as if it had been endorsed by the second defendant and then delivered the cheque to the plaintiffs.

The cheque was dishonoured and the plaintiffs instituted an action on the cheque against both the defendants but before summons was served on the second defendant, the first defendant consented to pay the amount of the cheque in monthly instalments and decree was accordingly entered against the first defendant.

The second defendant (the principal) then appeared in Court and by his answer denied that he had endorsed and delivered the cheque to the plaintiffs. The plaintiffs, thereupon, with the consent of the second defendant, filed an amended plaint seeking to make both defendants liable on the cheque and adding an alternative claim for goods sold and delivered. The first defendant filed no amended answer but the second defendant filed one denying his liability on either of the two claims.

The trial Judge held in favour of the second defendant on the first cause of action (*i.e.*, the action on the cheque) but against him on the second (*i.e.*, on the action for goods sold and delivered) and entered decree accordingly. The second defendant appealed to the Supreme Court.

On appeal the Supreme Court (*per* **Soertsz**, *J.* and **De Kretser**, *A.J.*) held :

(1) In view of the fact that the cheque was given by the first defendant (the agent) and not by the second defendant (the principal) although it was made payable to the second defendant and then endorsed as if by the second defendant, the first defendant rendered himself personally liable on the contract of goods sold and delivered.

(2) That, though the second defendant as the disclosed principal was also liable in law, as the two defendants were sued originally on the cheque, they were in reality being sued for the value of the goods sold and delivered and when the first defendant consented to judgment and the plaintiffs took it against him they must be deemed to have elected to look to the agent alone and they cannot thereafter seek to charge the principal as the other person liable on the contract.

(3) That in view of Section 93 of the Civil Procedure Code, no amendment of the pleadings should have been allowed after the final judgment had been entered against one of the parties sued.

Where a minor, with the consent of his father, trades in partnership with another and draws a cheque on the partnership account in favour of his partner who endorses it for value to a third party, the minor who draws the cheque cannot plead minority as a defence when sued by the holder of the cheque on the cheque been dishonoured.

Sathappa Chettiar *v.* **Thaha**

(1937) 9 Ceylon Law Weekly, p. 45

This case is important because it decided the legal liability of a minor who had issued a cheque which was subsequently dishonoured by the bank. The question at issue was whether the minor can avail himself of the general plea of minority as a defence to liability in an action on the dishonoured cheque.

The facts of the case were as follows :

The plaintiff (*i.e.*, the holder of the dishonoured cheque) carried on business in Colombo with a branch at Gampola. The first defendant, one Thaha, who was a minor carried on business in partnership with the second defendant. The first defendant minor traded in partnership with the consent and approval of his father.

The first defendant (minor) had issued two cheques for Rs. 938·38 and Rs. 1,534·56 in favour of his partner, the second defendant, as payment for tea supplied by the latter. The second defendant had endorsed the cheques for value to the plaintiff with whom he regularly transacted business at his branch in Gampola.

At the date the first defendant issued the two cheques he was only 16 years of age and was a minor in the eyes of the law. Shortly after he issued the cheques the first defendant had stopped payment on the cheques and consequently the bank dishonoured the cheques when they were presented for payment by the plaintiff.

The plaintiff thereupon filed action against both the first and second defendants for the value of the two cheques.

At the trial, the first defendant pleaded minority as a defence to liability. The District Judge, however, rejected this plea and held that he had committed a fraud and he was not entitled to plead his own fraud and further that as he traded with the approval of his father he was bound by his contract.

The first defendant thereupon appealed to the Supreme Court. A Divisional Bench of the Supreme Court (*per* **Abrahams** *C.J.*, **Maartensz** *J.* and **Soertsz** *J.*) held that the first defendant was liable to pay the amount due on the cheque and that in the circumstances of the case he was not entitled to plead minority and avoid liability.

In arriving at this decision Their Lordships approved of an earlier decision of the Supreme Court in *Shorter & Co. v. Mohamed* (1937) 39 N.L.R. 113, where the Court had held that when a minor by falsely representing himself to be of full age deceives a person to contract with him the minor is bound by his contract.

NOTE:

See also, *Constantinu v Perera* (1889) I.C.L.R. 31. As to minors contracts, see generally Weeramantry, Law of Contracts, Vol I, chapter 14.

Where the drawees and the endorsees of a cheque are sued together for the recovery of the value thereof, the fact that judgment was entered against some of them earlier does not preclude the plaintiff from recovering judgment against others as their liability is a joint and several one.

Kuhafa *v.* **Vairavan Chettiar**

(1949) 51 New Law Reports, p. 176.

This was an action on a cheque instituted under Section 53 of the Civil Procedure Code. The cheque had been drawn by the first defendant in favour of the second defendant. The third and fourth defendants were successive endorsers of the cheque. The fourth defendant had endorsed the cheque for valuable consideration to the plaintiff. The plaintiff had got judgment against the first and second defendants and then subsequently obtained judgment against the third and fourth defendants also.

The third and fourth defendants appealed to the Supreme Court on the ground that the plaintiff was not entitled to ask for judgment against them as judgment had already been entered against the first and second defendants. The appellant's counsel relied on some decisions of the Supreme Court where it was held that judgment against one debtor on a joint debt was a bar to any further proceedings against the remaining debtors.

The Supreme Court (*per* **Wijewardena** *C.J.* and **Pulle** *J.*), however, held that those decisions were not relevant to the case in issue and dismissed the appeal.

Wijewardena *C.J.* observed :

" The defendants in this case are liable jointly and severally to pay the amount of the cheque (*vide* Halsbury's Laws of England, Volume 2, paragraph 887). Where the parties are jointly and severally liable, a creditor recovering judgment against one is not precluded thereby from recovering judgment against the others (*Blyth v. Fladgate* (1891) Chancery 337 at page 353). This principle is recognised in Section 89 of our Civil Procedure Code."

Mr. Justice Pulle added :

" Under Section 55 of the Bills of Exchange Ordinance (Cap. 82) the drawer of a bill and the endorsees thereof incur distinct obligations towards the holder who is entitled

under Section 57 to recover from any party liable on the bill. The entering of a judgment against one party would result in the merger of only the cause of action against the party and the holder of the bill would still be entitled on the distinct cause of action against the remaining parties to proceed to judgment against them."

A person who takes a cheque from another without giving valuable consideration and, after it is realised by the bank, pays the amount of the cheque to the person who gave him the cheque is not a holder in due course within the meaning of Section 29 (1) (b) of the Bills of Exchange Ordinance. He will, therefore, be liable to a third party who subsequently claims the amount of the cheque from him on proving that the cheque had been misplaced and lost by him.

Nalliah *v.* **Pure Beverages & Co., Ltd.**

(1965) 68 New Law Reports, p. 311

In this case plaintiff-appellant sued the defendant-respondent company for the recovery of Rs. 250/- which was the amount of a cheque which had been misplaced by the plaintiff and ultimately had found its way to the defendant company through one of its employees who drew cash from the company. When the defendant-company's employee, Sirisena, had wanted cash for the cheque the defendant company had sent it to its bank account and the amount had been paid to Sirisena after realisation of the cheque.

The case for the plaintiff was that he had received the cheque from one Silva and before he could cash the cheque he had lost it and one Sirisena, an employee of the defendant company had got hold of it and cashed it with the defendant company. On discovering from the Bank that the cheque had been paid, the plaintiff sued the defendant company for the amount of the cheque.

Mr. Justice G. P. A. de Silva in allowing the appeal and entering judgment for the plaintiff against the defendant company observed ;

" The learned Commissioner in giving judgment against the plaintiff held that the defendant company was the holder in due course of the cheque and that it had given value for the cheque in good faith.

" Counsel for the appelant who drew my attention to the Bills of Exchange Ordinance relied on Section 29 (1) (*b*) which has to be read with Section 27, to show that the defendant company was not the holder in due course according to the provisions of that section. I think there is force in his contention. For, even though the cheque was paid for by the company in good faith, it is not possible to say that the company took the cheque for value as defined in Section 27 (1) of the Ordinance for the reason that there was no consideration for it of the nature that is contemplated by the provisions of Section 27 (1) (*a*), nor was it given in discharge of an antecedent debt or liability within the meaning of that sub-section. Further, the payment of the amount of the cheque depended on the happening of a certain event, namely, that it was realised by the Bank. It seems to me that it is only on the basis of the defendant company being the holder in due course that it can resist the plaintiff's claim. The learned Commissioner has misdirected himself on this point when he gave judgment dismissing the plaintiff's action. I, therefore, allow the appeal, set aside the order of the learned Commissioner and order that judgment be entered for the plaintiff-appellant with costs in both Courts."

Where a person, being aware that he has not sufficient funds in his bank to meet the full amount of the cheque, nevertheless issues such cheque in the honest belief that it would be met on presentation, he cannot be held guilty of cheating under Section 308 of the Penal Code as he had no intention to defraud.

The position would be different, if at the time the cheque is given the drawer of the cheque has nothing but a hope (as opposed to a genuine and reasonable belief) that sufficient funds would be paid into his bank to meet the cheque.

Salih Bin Ahmed *v.* **Howth**

(1951) 45 Ceylon Law Weekly, p. 62

In this case the drawer of a cheque was charged under Section 398 of the Penal Code with cheating. On the facts, he had issued a cheque for Rs. 1,000/- when he had only Rs. 500/-

to his credit in his account at the bank. The accused (the drawer of the cheque) however, stated that before he issued the cheque he had instructed some of his business associates to deposit further sums of money to his account and that he had issued the cheque in the honest belief that there would be sufficient funds to honour the cheque on presentation.

In delivering the judgment of the Supreme Court, **Mr. Justice Gratiaen** set out the law relating to the offence of cheating by issuing cheques which, on presentation are proved to be worthless, as follows :

> " If a person gives a cheque for a sum of money, knowing that he has no money in his bank to meet it, but believing on reasonable grounds that somebody is going to pay in a further amount to his credit so that at the time the cheque is presented it will be met, he has not an intent to defraud. (*R. v. Oster-Ritter*, 32 C.A.R. 191). The position would be different, of course, if at the time when the cheque is given, the accused has nothing but a hope (as opposed to a genuine and reasonable belief) that sufficient money would be paid into his bank to meet the cheque."

In this case, there was a suggestion that the accused's banking account was closed very shortly after the cheque was issued and before it was presented for payment. But Mr. Justice Gratiaen took the view that this mere suggestion fell short of proof required in a criminal case. His Lordship took the view that since no officer of the bank had been called to prove this suggestion a mere endorsement bearing the words "Account Closed " purporting to have been made by a bank official did not amount to proof of this fact alleged by the complainant.

Where a person signs cheques in his cheque book in blank and entrusts the cheque book to his servant from whom one of the cheques is stolen, filled in and cashed by the thief with a third party for value, the drawer of the cheque is not liable to the holder on the cheque being dishonoured by the bank. In such a case the filling up of the cheque by the thief would amount to a forgery and the drawer of the blank cheque would not be liable in the absence of negligence on his part.

Where a cheque which has, undoubtedly, been signed by a person in the first instance, and is found in circulation, the onus lies on the drawer to show that he is not liable thereon to a bona fide *holder for value and without notice. As, however, it is contemplated of cheques that they shall be speedily presented for payment, and so should not form part of the currency of the country like other bills of exchange, the onus may be of a lesser degree than would be necessary in the case of any other bill of exchange.*

Meyappa *v.* **Somasunderam**

(1900) 1 Browne's Reports, p. 275

This was a case which raised an interesting question as to the rights and liabilities of the drawers and holders of cheques. The facts were as follows :

The plaintiff was a Chetty who resided in, and carried on a business, in Colombo. The defendant, also a Chetty, resided in, and carried on a business, in Kandy. The defendant had an account with the branch of the Mercantile Bank of India at Kandy : and as it was difficult for bank managers to recognise the signatures of their customers when they are written in Tamil characters, a practice had sprung up of the customers signing blank cheques in their cheque books in the presence of the Bank Manager who then initials the signatures ; so that there was no difficulty, when a cheque drawn by a customer is presented, in its being recognised as a cheque signed by the customer.

The defendant had an account with this bank and signed a number of cheques in blank. The cheque book was given by him into the custody of his Kanakapulle. In some way, one of the cheques had been stolen by a thief who had filled up the cheque for a sum of Rs. 2,800/- and had cashed the cheque with the plaintiff, another Chetty in Colombo. The thief was unkonwn to the plaintiff. Fortunately for the defendant, when the cheque was sent to the bank for realisation, there had not been sufficient money in the defendant's account to meet the cheque and the bank had referred the cheque to the defendant who immediately informed the bank that it was a forgery. On the bank not paying, the plaintiff sued the defendant for the value of the cheque as a holder in due course. In appeal, the Supreme Court held that the defendant was not liable. The Chief Justice, **Mr. Justice Bonser,** observed :

" The cheque had not been filled up by the defendant or by the Kanakapulle who had authority to fill it up, nor was it filled up directly or indirectly with the knowledge or approval of the defendant or his Kanakapulle. So that the person who filled this cheque in with the date and amount committed the crime of forgery in doing so. The question is, whether in the circumstances, the defendant is liable to the plaintiff upon this cheque."

" Now it seems to me that the case is governed by the principles laid down in the case of *Baxendale v. Bennet* (1873) 3 Q.B.D. 525 . . . The cases of *Young v. Grote* and *Ingham v. Primrose* went a long way to support the affirmative answer to the question but it has been held that *Ingham v. Primrose* ought not to be followed ; it was bad law and that *Young v. Grote* only applied to cases between banker and customer."

" In the present case if there had been sufficient assets in the bank to meet the cheque and the banker had cashed it, the position of affairs would have been different and the case might have come within the principles of *Young v. Grote*. But it appears to me that, in this case, the defendant has done nothing to stop him from pleading the fact that the cheque was not filled in by his authority, direct or indirect. It appears to me that the fact that the cheque was in the custody of his servant makes no difference. The custody of the servant is the custody of the master."

Mr. Justice Browne who agreed with the learned Chief Justice made the following observations :

" When a cheque which was undoubtedly signed by the defendant in the first instance is found in circulation, I would consider that the onus lies on the defendant to show that he is not liable thereon to a *bona fide* holder for value and without notice. As, however, it is contemplated of cheques that they shall be speedily presented for payment and should not form part of the currency of the country like other bills of exchange that *onus* may be of a lesser degree than would be necessaryin the case of other bills of exchange, *i.e.*, the Court, in any case where there had been delay in presenting the cheque for payment, or any other element of suspicion, *e.g.*, reckless discounting for persons unknown, might question the holder as to his *bona fides*

when he took what for any such cause, should have made him act with caution rather than require the strictest proof by the drawer that he had not made nor issued it, as the primary essential in the proof."

"There is not, in my judgment, proved (against the defendant) an estoppel by negligence of the threefold character specified in *Andrew v. Cheque & City Bank* (1876) 1 C.P.D. 579, *viz :*

(1) in the transaction itself,
(2) the proximate cause of leading the third party into mistake, and
(3) the neglect of some duty owing to the third party or the public.

Not negligence, but criminality, as I have said, was the proximate cause. If there was negligence anywhere I would say it was rather to be attributed to the plaintiff, who, for the discount profit he gained thereby discounted the cheque for a person previously unknown to him without enquiry of or guarantee by any other person. He took the risk of the discounter's right and title as holder, and in my judgment he must bear that risk and have his action dismissed with all costs."

When a debtor, in repayment of debt, intentionally signs a cheque with a fictitious name on a bank at which he has no account and delivers the cheque to the creditor as the cheque of the person whose fictitious name he has signed but the creditor accepts the cheque as the debtor's own cheque, the debtor would be guilty of forgery as defined in Section 452 of the Ceylon Penal Code.

The Queen *v.* **Silva**

(1886) 7 Supreme Court Circular, p. 161

In this case, the accused, one G. W. Silva, was indebted to one Letchimanan, a Tamil Chetty. In part payment of the debt, the accused gave his creditor a cheque drawn on a bank on which he had no account, in the name of B. J. Perera. The cheque was drawn and signed by the accused in English in the presence of his creditor (Letchimanan) who, however, could not read, write or understand English. The creditor (Letchimanan) had taken the cheque thinking that it was the cheque of the accused.

It was held that the accused had intentionally signed the cheque with a fictitious name and with intent to defraud and that he was guilty of *forgery* as defined by Section 452 of the Ceylon Penal Code.

Where the holder of a cheque is an indorsee who has paid valuable consideration, his rights on the cheque cannot be extinguished by the subsequent death of the drawer before presentment of the cheque for payment. The liability of the drawer passes to the administrator of his estate.

Where a cheque, after it is indorsed, is materially altered by the drawer with the consent and acquiescence of the indorser, the indorser's liability to the indorsee remains unaffected by the alteration.

Where a cheque is dishonoured on presentment of an indorsee, a promise made thereafter by the indorser to pay the amount of the cheque to the indorsee is evidence of an admission on his part that notice of dishonour was given to him by the indorsee.

Where the drawer of a cheque is dead, Section 35(2) of the Civil Procedure Code does not bar an indorsee from suing both the indorser and the executor of the deceased drawer's estate in the same action. And if the indorser happens to be the executor de son tort *also of the drawer's estate, he may be sued both personally and as* executor de son tort *in the same action.*

Charlotte Jayasekera *v.* **Sinna Karuppan**

(1966) 69 New Law Reports, p. 88

In this case, the Supreme Court had to decide interesting questions relating to liability on cheques. The facts of the case were as follows :

The plaintiff, Sinna Karuppan, instituted this action claiming from the defendant, Charlotte Jayasekera, a sum of Rs. 15,000/- both personally and as *executrix de son tort* of the estate of her deceased husband, F. W. Jayasekera, on a cheque dated 17-6-63, drawn by Jayasekera on the Bank of Ceylon, Galle, directing the bank to pay " Cash or Bearer Rs. 15,000/-" and endorsed by the defendant and delivered to the plaintiff. The

learned trial Judge had found that the defendant received a sum of Rs. 15,000/- in cash from the plaintiff when she endorsed and delivered the cheque to the plaintiff. When the cheque was presented for payment to the bank on 24-8-1963, it was dishonoured on the ground that the drawer was dead.

The cheque had been drawn by Jayasekera and endorsed by the defendant and handed to the plaintiff on 19-12-1962. The amount due on the cheque remained unpaid on 17-6-1963 and by agreement between the parties, in lieu of issuing a fresh cheque, Jayasekera altered the date to 17-6-1963. The alteration was made and signed by Jayasekera in the presence of the defendant.

The defendant, Charlotte Jayasekera, resisted the plaintiff's claim on the cheque on the following grounds :

(1) That she was not personally liable as she had endorsed the cheque at the request of the plaintiff and that no valuable consideration had passed. (She, however, admitted that this sum was a debt of her husband).

(2) That she was not liable as *executrix de son tort* as she had not intermeddled with her husband's estate ; and there was, therefore, a misjoinder of parties and causes of action,

(3) That she was discharged from liability as she had no notice of dishonour,

(4) That in view of the material alteration of the date on the cheque she was discharged from personal liability, and

(5) That the action on the cheque was not maintainable for the reason that the cheque became a nullity on the death of the drawer, in the absence of presentment before the death of the drawer. In such a case, the only remedy available to the plaintiff was an action on the original transaction independent of the cheque.

In considering the argument that the cheque became a nullity on the death of the drawer, in the absence of presentment before the death of the drawer, the Supreme Court made reference to the following authorities :

viz : *Hewitt v. Kaye* (1868) L.R. 6 Equity 198 at 200 ; *Re Swinburne* (1926) 1 Ch. at page 41 ; *Chalmer's* Bills of Exchange (11th edition) page 249 ; *Rolls v. Pearce* (1877) 5 Ch. 730 ; *Tate v. Hilbert* 2 Vesey page 111 ; *Public Trustee v. Seneviratne* (1952) 54 N.L.R. 145.

The Supreme Court (*per* **Sansoni** *C.J.* and **Siva Supramaniam** *J.*) took the view that if valuable consideration had been given (as in this case), the action on the cheque was maintainable despite the drawer's death before presentment. " Where the holder is an endorsee who had paid valuable consideration his rights on the cheque cannot be extinguished by the subsequent death of the drawer before presentment . . . . It should be noted that there is no provision in the Bills of Exchange Ordinance (Cap. 82) which renders a cheque non-actionable on the death of the drawer in the absence of presentment before his death."

Mr. Justice Siva Supramaniam, who delivered the judgment of the Court, observed :

> " The plaintiff was a holder for value and in my opinion, the plaintiff's rights and powers as a holder under Section 38 of the Bills of Exchange Ordinance remained unaffected by the drawer's death. The liability of the drawer would pass to the executor or administrator of the estate of the deceased drawer."

As regards the defendant's contention, that she should be discharged from personal liability as endorser (*a*) because of the material alteration of the date and (*b*) because she had no notice of dishonour, the Supreme Court took the view that the alteration had been effected with her consent and acquiescence and she could not now complain.

As regards notice of dishonour, there was evidence that the defendant knew that the cheque had been dishonoured by the bank and had agreed to pay the plaintiff. This admission of liability subsequent to the dishonour amounted in law to an admission on the defendant's part of having received notice of dishonour.

Their Lordships also took the view that there was evidence to show that the defendant sufficiently intermeddled in the estate of her deceased husband to constitute her an *executrix de son tort* of the estate. The only question was whether there was a misjoinder of parties and causes of action.

It was submitted that the cause of action against the defendant personally as indorser was distinct and separate from her liability as *executrix de son tort* of the estate of her husband who was the drawer and that the claim made against the defendant both personally and as *executrix de son tort* was barred by Section 35(2) of the Civil Procedure Code.

The Supreme Court rejected this argument and held as follows:

> " In regard to the holder, the drawer and indorsers of any instrument are jointly and severally liable for its due payment (Halsbury — Simonds Edition, Volume III, page 215). Had the drawer been alive, he as well as the defendant could have been sued together in the same action. (Section 15, Civil Procedure Code). Does Section 35(2) bar the claim made against the defendant both personally and as executrix? If the liability of the defendant and the deceased was joint, Section 35(2) permits the joinder of the claims. Does the fact that the liability is also several take away from the creditor the right to so join? *Lee & Honore* state ' In the case of a joint liability, each joint debtor is liable only *pro rata parte* of the performance promised . . . By law or by the terms of a contract a joint debtor may be bound both jointly and severally (correal or solidary obligation). The joint debtor . . . . may then be sued either *pro rata parte* or for the whole performance promised.' (*Lee & Honore* ; South African Law of Obligations, page 62)."

> "Although certain differences exist in regard to the rights and liabilities of the co-debtors *inter se* in joint and solidary obligations, so far as the creditor is concerned, the liability of the co-debtors on a solidary obligation does not cease to be a joint liability. The plaintiff was therefore entitled under Section 35(2) of the Civil Procedure Code to sue the defendant both personally and as *executrix de son tort* in the same action."

A contract of guarantee does not arise as a result of an agreement whereby a person draws cheques in favour of another on the distinct understanding that the payee shall place funds at the bank to meet the cheques.

Ohlmus *v.* Nicholas

(1915) 1 Ceylon Weekly Reporter, p. 81

In this case, the facts were rather unusual. The defendant had drawn two cheques to the value of Rs. 1,000/- and indorsed them to the plaintiff on the distinct understanding that the plaintiff should place sufficient funds at the bank to meet the cheques.

The plaintiff had failed to carry out his undertaking. On the other hand, the plaintiff had endorsed the cheques to a third party for value and when the cheques were presented for payment at the bank, they were dishonoured for want of funds. The third party sued the defendant (the drawer of the cheques) and he was condemned to pay the value of the cheques. In a subsequent action the defendant claimed the value of the cheques in reconvention from the plaintiff who had failed to deposit money in the bank to meet the cheques as promised.

On the above facts, the Supreme Court, (*per* **Shaw *J.*** and **de Sampayo *J.***), held that there was no contract of guarantee between the defendant and plaintiff and also that the defendant's claim in reconvention was premature and that it disclosed no cause of action against the plaintiff.

A bona fide holder who gets a lost or stolen cheque, which is transferable by mere delivery, by paying value for it, can maintain an action against the acceptor or other parties to the cheque, and the original holder who lost the cheque forfeits all right of action on the cheque.

Gross negligence is not of itself enough to destroy the title of a holder for value, but there must be proof of mala fides on the part of such holder in order to defeat his claims.

The property in a bank note passes like that in cash by delivery and a party taking it bona fide and for value is entitled to retain it against a former holder from whom it has been stolen.

When a Bill is paid by an endorser and where a Bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties and he may, if he thinks fit, strike out his own and subsequent endorsement and again negotiate the note.

Supreme Court Case No. 534 of 27-2-1899.
C.R. Kandy, No. 920.

(1899) Koch's Report, p. 15

The above observations were made by **Mr. Justice Lawrie** in the Supreme Court in appeal No. 534 on 27-2-1899, in affirming the decision of the Court of Requests, Kandy, in Case No. 920. Unfortunately, the names of the party litigants do not appear in the Law Report. The facts of the case were as follows :

This was an action on two cheques. One was payable to Naacooty Kangani or order. It had been endorsed in blank by the payee. The other cheque was payable to Dingiti Appu or bearer. Both cheques were, therefore, transferable by delivery.

Both cheques had been subsequently lost by a holder in due course and payment had been stopped at the bank. When the cheques were presented at the bank payment was refused and it was noted on each cheque that payment had been stopped by the drawer.

One Segu Abdul Kader who had presented the cheques for payment at the bank returned them to the defendant from whom he had got the cheques for value. The defendant repaid the money on the cheques to him and took back the cheques.

On these facts, **Lawrie** *J.*, observed :

> " Doubtless Segu Abdul Kader could have sued the makers and indorsers of the cheques because he was a *bona fide* holder for value, but as he, after dishonour, transferred the cheques to the defendant, can the latter be held to be a holder in due course ?
>
> " Where a bill is paid by an endorser and where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties — but the section goes on to say — and he may, if he thinks fit, strike out his own and subsequent endorsement and again negotiate the note.
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> " Here the defendant, on paying Segu Abdul Kader the amount he had received from him, could not have again negotiated the cheques for they had been dishonoured ; but though he could not have negotiated them, I think he was, by payment, remitted to his former rights. If he was remitted to his former rights those rights were those of a *bona fide holder.*"

Where a person gives a cheque to another for money borrowed from him but makes the payee understand that he had no money in the bank to meet the cheque at the time of giving the cheque, the payee of the cheque would be guilty of cheating under Section 398 of the Penal Code if he endorses the cheque to a third party so that it may be cashed well knowing that it would not be met on presentation.

The King *v.* **Chandrasekera**

(1921) 23 New Law Reports, p. 286

According to the facts of this case, A had given a cheque to the accused on the strict understanding that he had no money in the bank to meet the cheque on presentation. A few days later, the accused knowing that the cheque would not be met on presentation, endorsed the cheque and gave it to B to cash it at C's boutique. The accused did not accompany B when he went to cash the cheque and B thinking that it was a good cheque had told C that he would be responsible if it was not honoured on presentation to the bank.

In the above circumstances, the Supreme Court (*per* **Shaw, *J.***) held that the accused was guilty of cheating as defined by Section 398 of the Ceylon Penal Code.

The Supreme Court took the view that the accused by endorsing the cheque and giving it to be cashed made a representation it was a good cheque. Although B said that he would be personally responsible if the cheque was not met nonetheless C was paying the money on account of the cheque itself.

Mr. Justice Shaw observed :

"In the present case the accused by endorsing the cheque and giving it to the people who were accompanying him for the purpose of getting it cashed by B was in my view making a representation that it was a good and valid document and that so far as he knew it would be met in the same way as any other commercial document of this sort. If he knew, as it is found that he did, that the cheque would not be met on presentation, he was guilty, in my opinion, of misrepresentation to B (Rawther) by endorsing the cheque and getting it cashed by him."

Where there is evidence that the accused had dishonestly become possessed of a cheque which he cashed and appropriated to his own use he cannot be convicted for dishonestly receiving stolen property under Section 394 of the Penal Code unless there is definite evidence of the theft of the cheque.

Nor can such an accused be convicted for dishonest misappropriation of property under Section 386 of the Penal Code unless it is proved that there was originally an innocent possession and a subsequent change of intention.

Georgesy *v.* **Seyadu Saibo**

(1902) 3 Browne's Reports, p. 88

In this case the accused had been found guilty by the Magistrate under Section 394 of the Ceylon Penal Code of dishonestly receiving a cheque knowing or having reason to believe the same to be stolen property.

The evidence in the case was that one Mr. Ogilvie had received a cheque from a Mr. Carey for Rs. 100/-. He had endorsed the cheque and put it into an envelope with a letter and addressed it to the Manager of the Mercantile Bank requesting him to credit the cheque to his account. He had given the letter to his appu, one Appawu to post. According to Appawu, he had handed the letter to the *tappal* man, one Alagan, to post. According to the tappal man he always posted the letters given to him.

Subsequently, it appears that the accused had got this cheque cashed by a Chettiar trader who had charged him a commission of Re. 1/- to cash the cheque. The Chettiar had ascertained that the cheque was a good one and he had also got the accused to endorse it. The Chettiar's evidence was corroborated by other Chettiar traders who all stated that they knew the accused.

The accused when charged denied having even seen the cheque. The Magistrate had convicted him under Section 394 of the Penal Code for dishonestly receiving a cheque knowing it to be stolen property.

The Supreme Court, however, set aside the conviction on this count. The Court took the view that there was insufficient evidence to prove the ingredients of the offence. **Middleton, J.** observed :

"In the first place I must say that I believe the evidence given by the Chettiar, namely to the effect that the accused did, as a matter of fact, tender the cheque to the person named and received cash for it. But the question is whether he can be convicted of receiving this cheque knowing it to be stolen upon that evidence. I think that there is no definite evidence that the cheque was stolen. It may have been stolen possibly by Appawu, the appu, or it might have been stolen by Alagan the *tappal* man, or it may have been lost. The evidence is not satisfactory to my mind to show that it was proved to have been stolen."

It was next contended by the complainant that accused may be found guilty under Section 386 of the Penal Code for dishonestly misappropriating or converting this cheque to his own use. But in the view of the Court, even such a finding was not tenable in law for the following reasons. **Middleton**, *J.* added:

"Now the inference that I consider I am entitled to draw from the evidence is that the accused came dishonestly by the cheque. It is a fair and reasonable inference to draw. But all the authorities point to the conclusion that in order to constitute the offence of criminal misappropriation there must be first an innocent possession and then a subsequent change of intention. If I find, as I do, that the accused dishonestly came by the cheque, although that would put him in a worse position morally than if he had come by it in such a way as would make him amenable under Section 386, yet I am bound to confess that it is impossible to meet the weight of authority that has been put before me, and to say that the original misappropriation constitutes an offence under Section 386."

"I have already said that the evidence is not sufficient in my opinion to show that the accused received the cheque knowing it to be stolen, nor is the evidence sufficient to warrant me in finding that he stole it. In spite of my opinion of the immorality of his offence which seems to me to exceed what is required to make an offence under Section 386, I feel that I must acquit this man."

PART II

THE STATUTE LAW RELATING TO BANKING AND CHEQUES IN CEYLON

THE STATUTE LAW RELATING TO BANKING AND CHEQUES IN CEYLON

Introduction

Any system of banking of a country has to undergo constant modification in order to adapt itself to economic changes arising as much from natural growth as from the evolution of Governmental policy. The pattern and requirements of credit have to vary from time to time in line with such development. Economic development not only determines the structure of any system of banking in a country in a given period but also compels changes in the factors, including the law which tend to circumscribe the growth of such facilities.[1]

Of all the Commonwealth countries, Ceylon is said to have one of the simplest and least developed banking systems. In comparison to Ceylon, the Canadian banking system is said to be the most developed of all the Commonwealth banking systems. The genesis of the Canadian banking system is undoubtedly American, and therefore, indirectly English, but this was powerfully influenced by a Scotch tradition. On the other hand, in some other parts of the Commonwealth however, notably Eastern Africa and the Carribbean local banking establishments have still to appear or if they have appeared, are still a very long way from extensive development.[2]

No reliable data is available as regards the origin and history of banking in Ceylon. The origin of banking in Ceylon may, however, be traced with a certain degree of accuracy to the post British era.

Ceylon's Banking Structure :

At the apex of Ceylon's banking structure, today, stands the Central Bank of Ceylon which was established in 1950 under the Monetary Law Act No. 58 of 1949.[3] Under this statute the Central Bank of Ceylon has supervisory jurisdiction and control over all the commercial and exchange banks in Ceylon and all State sponsored financial and credit institutions in the Island.

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1 *See* Report of the Bank of Ceylon Commission, Sessional Paper XXVII, 1968.

2 *See* Commonwealth Banking Systems by Crick, 1965, pp. x - xi.

3 *See* Cap. 422, Legislative Enactments of Ceylon, (1965), Revised Edition.

As at the beginning of 1970 a period of almost one hundred and thirty years since the establishment of the first bank in Ceylon in 1841, there are in the Island eleven commercial banks. These eleven commercial banks may be classified into three categories. The first to be established were the British Exchange Banks, and today there are four banks in this group. In 1950, there were six exchange banks, but at the end of 1969, the number had fallen to four, *viz.* :

(i)	The Mercantile Bank Ltd.	—	(1854)
(ii)	The National & Grindlays Bank Ltd.	—	(1881)
(iii)	The Chartered Bank Ltd.	—	(1892)
(iv)	The Hongkong & Shanghai Bank Ltd.	—	(1892)

The reduction in the number of exchange banks from six to four was not due to the closure of a bank office but due to bank amalgamations which have helped to strengthen the exchange banks and introduce economies in their operation. In January, 1958, the National Bank of India merged with the Grindlays Bank Ltd., and came to be known as the National and Grindlays Bank Limited. About the same time, the Eastern Bank which had been established in the Island in 1920 became a fully owned subsidiary of the Chartered Bank although the two banks continued to function separately. In 1959, the Hongkong & Shanghai Bank which held a substantial proportion of the shares in the Mercantile Bank purchased the remaining shares as well. The two banks did not, however, amalgamate but have like the Chartered and the Eastern Bank continued to operate as separate institutions.

The second group of commercial banks in Ceylon consists of three Indian and one Pakistani bank. Of the three Indian banks the State Bank of India which is a bank of the Indian Government is by far the largest and the most important. The other two Indian banks are, The Indian Overseas Bank Ltd., and the Indian Bank Ltd. On 19th July, 1969, by a statute entitled Banking Companies Requisition and Transfer of Undertakings Ordinance of 1969 the Government of India nationalised the private owned Indian Bank Limited and the Indian Overseas Bank Ltd., but their branches in Ceylon operate as before without any change except in the deletion of the word ' Limited ' after their name. The only Pakistani Bank in Ceylon is the Habib Bank (Overseas) Limited.

The foreign banks in Ceylon, thus fall into three racial groups : British, Indian and Pakistani. Surprisingly, there are no American Banks in Ceylon.

Today, four indigenous banks consist of the third group of commercial banks in Ceylon. Of them, the two major indigenous banks, *viz.*, The Bank of Ceylon and the People's Bank stand out today as the largest and leading banks in the Island both from the point of view of the volume of business, the bulk of the deposits and the network of their branches and operations. The other two indigenous banks are the Hatton Bank Limited, which is now a wholly owned subsidiary of Browns Group Limited, a well known limited liability company in Ceylon, and the Commercial Bank of Ceylon Limited which is the newest bank in Ceylon having being incorporated on 25th June, 1969. The Commercial Bank of Ceylon Ltd., took over the business of the Eastern Bank Ltd. It is a State sponsored bank and sixty per cent. of the rupees fifteen million share capital of the bank is to be held by the Government and State sponsored Corporations.

The total number of banking offices in the country as at 1969 is one hundred and fifty-five and one hundred and thirty-nine of them belong to the Bank of Ceylon and the People's Bank. The British banks have twelve offices and the Indian and the Pakistani Banks have four. The population per bank is roughly 106,000 to one.[4] The number of offices and branches has increased in recent years owing to the rapid expansion of the Bank of Ceylon and the People's Bank. These two State sponsored banks have in fact come to be the pace setters in Ceylon's current banking scene. Reference may also be made to the scheme of Rural Banks which was inaugurated in 1964 by the People's Bank. The Rural Banks maintain and operate savings and fixed deposit accounts but not current accounts. They do not engage in the payment and collection of cheques and therefore will not come within the definition of a 'bank' for the purposes of the Bills of Exchange Ordinance. In addition to lending operations to the rural sector, the Rural Banks also function as agents of the People's Bank in the pawnbroking business. At the end of 1969, there were sixty-eight Rural Banks in the Island.

Legislation on Banking in Ceylon :

In considering the legal aspects of Banking in Ceylon a noteworthy feature is that there is no general banking legislation in Ceylon as found in most other Asian countries. This fact was highlighted by the Bank of Ceylon Commission in 1968. The observations of this Royal Commission merit quotation :

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4 *See* Report of the Central Bank of Ceylon, (1969), pp. 105 - 106.

"In our view, the enactment of General Banking Legislation as found in most Asian countries is overdue. Ceylon appears to be one of the few countries in Asia without a General Banking Act applicable to all banks. In India the Banking Companies Act of 1949 legislated for the control of all banks, and both public and private banks are subject to control by the Reserve Bank of India under this Act. We recommend that the Government should consider the early enactment of such legislation to bring all banks under general control particularly as the passage of the Finance Amendment Act No. 56 of 1968, re-introduces the principle of competition between all banks.[5]

The Bank of Ceylon Commission further recommended that the Bank of Ceylon Ordinance and the People's Bank Act should remain constituting Acts, and all provision for the control, regulation and direction of banking and credit institutions in Ceylon be incorporated under a General Banking Law covering all banks both indigenous and foreign operating in Ceylon.

It may also be noted that as far back as 1934 another Royal Commission, the Ceylon Banking Commission better known as the Pochkhanawala Banking Commission also spotlighted the inadequacy of general banking legislation or regulations in the Island. The Pochkhanawala Banking Commission attributed the failure of banks in the Island in the past to the inadequacy of the law and recommended a comprehensive code of legislation on the subject of banking in Ceylon. The Commission observed :

"Failure of banks and limited liability companies in Ceylon in the past may be attributed in no small measure to the inadequacy of the law. There are so many loopholes of which the dishonest management can take advantage and they can thus deceive and swindle shareholders, depositors and creditors and still escape punishment. We understand that both the public and the Government of Ceylon are conscious of the deficiencies of the present law and that attempts have been made and are being made to thoroughly overhaul it. Unfortunately no tangible result has been achieved as yet."

"In the present state of the country's banking, which is conspicuous for its lack of national or indigenous concerns, simple but non-defective regulations would be of great value. Where the law based on the model prevailing in the United

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5 *See* Report of the Bank of Ceylon Commission (1968), paras. 373 - 375.

States of America, Canada and other countries where the legislature has attempted to impose considerable checks on the routine working and conduct of business, it would retard the growth of banking. The best policy would be the golden mean between the total absence of provisions relating to banking regulations and a highly specialised and rigid bank code." [6]

Subject to the above observations of two Royal Commissions on Banking in Ceylon our law relating to banking and cheques in Ceylon is at present contained in the common law of banking which for Ceylon is the English law and several legislative enactments and statutory provisions that relate to and govern the law of banking and cheques in Ceylon.

From the point of view of *banking* transactions in the country, the Monetary Law Act No. 58 of 1949 which established the Central Bank of Ceylon, the Bank of Ceylon Ordinance No. 53 of 1938 which established the Bank of Ceylon and the People's Bank Act No. 29 of 1961 which established the People's Bank are the most important. As regards the law relating to *cheques*, the Civil Law Ordinance No. 5 of 1852, and the Bills of Exchange Ordinance No. 25 of 1927 are important. The legislation or "Statute Law" on banking and cheques as distinguished from the "Case Law" which has already been compiled and referred to in Part I of this book may briefly be summarised as follows :

The Monetary Law Act No. 58 of 1949 — which established the Central Bank of Ceylon as the sole authority in the Island responsible for the administration and regulation of the monetary and banking system of Ceylon. The Central Bank is the Fiscal Agent, Banker and Financial Agent of the Government of Ceylon. The Central Bank of Ceylon is also charged with the duty of so regulating the supply, availability, cost and international exchange of money as to secure, so far as possible, the following objects :

(*a*) the establishment of domestic monetary values,

(*b*) the preservation of the value of the Ceylon rupee and the free use of the rupee for the current international transactions,

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6 *See* Report of the Ceylon Banking Commission, Sessional Paper XXII of 1934, paras. 386 - 388.

(*c*) the promotion and maintenance of a high level of production, employment and real income in Ceylon, and

(*d*) the encouragement and promotion of the full development of the productive resources of Ceylon.

Section 28 of the Monetary Law Act provides for a Department of Bank Supervision of the Central Bank for the continuous and periodical examination of all banking institutions in Ceylon. The Central Bank is also empowered to suspend or restrict the business of any banking institution in Ceylon and to act as liquidator in the winding-up of banking institutions.

The Central Bank is also empowered (*inter alia*) —

(*a*) to regulate the foreign exchange operations of any commercial bank in Ceylon,

(*b*) to control the foreign exchange holdings of any commercial bank in Ceylon,

(*c*) to regulate the currency position of commercial banks in Ceylon,

(*d*) to revalue profits and losses on holdings of gold and foreign exchange by banking institutions in Ceylon,

(*e*) to regulate the reserves of commercial banks in Ceylon,

(*f*) to regulate the credit and lending operations and policies of banking institutions in Ceylon,

(*g*) to limit the loans and investments of commercial banks in Ceylon.

The Monetary Law Act itself protects all banking institutions in Ceylon from any legal liability arising out of any loss or damage suffered by any person by such banking institution carrying out or conforming to the orders or directives of the Central Bank of Ceylon.

Of special importance to bankers in Ceylon, is Section 28 of the Monetary Law Act which sets up a *Department of Bank Supervision* of the Central Bank for the purpose of supervision

and the periodical examination of all banking institutions in the Island.[7] Under Section 29 (1) of the Act, the Director of Bank Supervision of the Central Bank is empowered to examine or cause to be examined the books of accounts of every commercial bank in the Island. Banking institutions in Ceylon are under a duty to afford the Department of Bank Supervision a full opportunity and to render all assistance to examine their books and documents and records, etc. Section 32 of the Act makes it an offence for any banking institution to obstruct the Director of Bank Supervision from performing his duties under the Act.

Section 30 (1) of the Act gives the power to the Monetary Board to suspend or restrict the business of banking institutions in Ceylon under certain circumstances for example, where the banking institution is insolvent or is likely to become unable to meet the demands of its depositors, or where its continuance in business is likely to involve loss to its depositors or creditors. Steps may be taken by the Monetary Board under Section 30 to make order suspending the banking business of such institution and to direct the Director of Bank Supervision to take charge of all books, records and other assets of such institution and to prevent the continuance of business by that institution.

Section 31 of the Act makes provision for the Department of Bank Supervision to be the liquidator in the winding-up of a banking company or institution in the Island. The winding-up rules and provisions of the Companies Ordinance No. 51 of 1938 will not, therefore, apply today to the winding-up of a banking institution in Ceylon but will be governed by the provisions as set out in Sections 30 and 31 of the Monetary Law Act.

The Monetary Board is also empowered under the statute :

(*a*) to prohibit the Commercial Banks in the Island from increasing the amount of their loans and investments,

(*b*) to fix limits to the rate at which the amount of loans and investments may be increased within specified periods.

Provided, however, that nothing in any such order shall be deemed to require any commercial bank to reduce the amount of its loans and investments, below the amount outstanding on the date of the order.

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7 In the year 1969, the Department of Bank Supervision examined six Commercial banks under Section 29 (1) of the Monetary Law Act. *See* Report of the Central Bank (1969), p. 249.

It may be noted that in 1968, the Monetary Board exercised these powers and with a view to curbing the emergence of inflationary measures in the Island, fixed new ceilings, limiting the increase in specified forms of Commercial Banks advances to eight per cent of their level at the end of August 1968, according to whichever was higher. This ceiling which became effective from the beginning of October, 1968, is still in operation and applies to loans, overdrafts, import bills and local bills undertaken by or engaged in by Commercial Banks but excludes export bills, loans under the Agricultural Credit Schemes and loans under the Tea Factory Modernisation projects.[8]

Section 104 of the Monetary Law Act empowers the Monetary Board from time to time :

(*a*) to fix the maximum rate of interest which commercial banks may pay upon various classes of deposits.

(*b*) to fix the maximum rates Commercial Banks may charge for different types of loans and other credit operations.

The Central Bank of Ceylon also acts as the Clearing House in the Island for all Commercial Banks. Section 98 (1) of the Act enacts that the Central Bank shall provide facilities for clearing transactions among commercial banks operating in Ceylon.

(2) The Bank of Ceylon Ordinance No. 53 of 1938 : [9]

The Bank of Ceylon which is by far the largest individual bank in Ceylon was established in 1938 by the Bank of Ceylon Ordinance No. 53 of 1938 and is governed by that statute and by the provisions of the Finance Act No. 65 of 1961 which nationalised the Bank of Ceylon with effect from 12th October, 1965.[10]

Since the Bank of Ceylon was established before the Central Bank of Ceylon many of the controls that would normally have been exercised by a Central Bank over the entire banking system had to be written into the Bank of Ceylon Ordinance. As regards the legal aspects of the Bank of Ceylon reference may be made to a Report of a Royal Commission appointed in 1968 to investigate into the affairs of the bank, mainly with regard to —

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8 *See* Report of the Central Bank of Ceylon (1969), pp. 16 - 18.
9 Cap. 397 Legislative Enactments of Ceylon (1956), Revised Edition.
10 *See Ceylon Bank Employees' Union v. Yatawara* (1962), 64 N.L.R. 49.

(i) " The extent to which the bank has within the limits permitted by banking practice and the statutory provisions under which it operates, assisted in the economic development of Ceylon and the extent to which the bank has provided financial assistance, by way of loans, overdrafts or other accommodation, to citizens of Ceylon for the promotion of business, industrial and agricultural enterprises."

(ii) " To make such recommendations in regard to the steps that should be taken to secure the efficient and smooth working of the bank to enable the bank to adequately meet the credit requirements of Ceylon nationals and to play a more effective role in accelerating the economic development of Ceylon."

The Report of the Bank of Ceylon Commission has now been published by the Government as a Sessional Paper No. XXVII of 1968 and some of the recommendations have already been given effect to by statutory amendments.

On August 5th, 1968, the Bank of Ceylon (Amendment) Act No. 34 of 1968 received Royal Assent thereby removing the original limitation of advances by the Bank to 50% of the total deposits and the restriction of any single unsecured loan or advance to a maximum of Rs. 50,000/-. The withdrawal of these restrictions on the Bank's lending policy will allow for greater flexibility in its lending operations and thus ensure that the Bank will play an increasingly important role in the country's economic development.

(3) The People's Bank Act No. 29 of 1961 : [11]

Next to the Bank of Ceylon, the People's Bank is the largest commercial bank in Ceylon and having the largest branch network of banks in Ceylon with ninety-one branches scattered all over the Island. The main object for which the People's Bank was established in 1961 was " to develop the co-operative movement in Ceylon, rural banking and agricultural credit " but as observed by the Royal Commission which was appointed in 1965 to investigate the working and functions of the bank, the People's Bank has constituted itself as yet another Commercial Bank in Ceylon on the conventional pattern.

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11 Volume II, Supplement to the Revised Edition of the Legislative Enactments of Ceylon, p. 878.

The legal aspects of the People's Bank are contained in the People's Bank Act No. 29 of 1961, which established it.

The Report of the People's Bank Commission has been published by the Government as a Sessional Paper No. VII of 1966. The People's Bank Commission had proposed certain amendments to the People's Bank Act and some of them have already been given effect to.

(4) The Companies' Ordinance No. 51 of 1938 : [12]

Part XIII, Sections 333-345 of the Companies' Ordinance of Ceylon contains a number of important statutory requirements relating to the formation and establishment of banks in Ceylon.

Section 333 of the Companies' Ordinance defines a 'Banking Company,' and states that a Banking Company means a company which carries on as its principal business, the accepting of deposits of money on current account or otherwise subject to withdrawal by cheque, draft or order notwithstanding that it engages in addition in any one or more of the forms of business enumerated in sub-sections 1-17 of Section 333.

Section 334 prohibits banking partnerships with more than ten persons. The section enacts :

> "No Company, Association or Partnership in Ceylon consisting of more than 10 persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a Company under this Ordinance, or under some other enactment."

Section 334, sub-section (2) enacts that :

> "No Company, Association or Partnership consisting of more than 10 persons, which is formed outside Ceylon shall carry on the business of banking in Ceylon unless :
>
> (*a*) it is formed in pursuance of some Act of Parliament of the United Kingdom, Royal Charter or Letters Patent, or is duly incorporated as a Banking Company outside Ceylon, and
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> (*b*) has an established place of business in Ceylon.

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12 Cap. 145, Vol. 6, Legislative Enactments of Ceylon (1956), Revised Ed.

Section 336(1) limits the activities of Banking Companies in Ceylon and enacts as follows :

> " No Company formed after the appointed date for the purpose of carrying on banking business as a Banking Company, or which uses as part of the name under which it proposes to carry on business the word ' Bank ' and ' Banker ' or ' Banking ' shall be registered under this Ordinance, unless the Memorandum limits the objects of the Company to the carrying on of the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or otherwise along with some or all of the forms of business specified under Section 333."

Section 337 of the Companies Ordinance enacts that no Banking Company in Ceylon shall after the expiry of two years after the appointed date, employ or be managed by a manager or agent other than a banking company.

Sections 339 and 340 of the Companies' Ordinance contain provisions which prohibit the creation of any charge by a Banking Company on the unpaid capital of such a Company, and also insist on Banking Companies in Ceylon maintaining reserve funds.

Section 342(1) of the Companies' Ordinance restricts a Banking Company in Ceylon from forming any subsidiary Company, which is not in itself a Banking Company.

As regards the business of Banking in Ceylon the leading case on the subject is *Bank of Chettinad v. Commissioner of Income Tax*,[13] which is a decision of the Privy Council in 1948. In this case it was held that the Bank of Chettinad Ltd., which had a branch in Ceylon was merely a money-lending concern and did not do banking business, and did not come within the definition of a " Bank," under the Law of England or Ceylon.

(5) The Civil Law Ordinance No. 5 of 1852 : [14]

Section 3 of the Civil Law Ordinance No. 5 of 1852 enacts :

> " In all questions or issues which may hereafter arise or which may have to be decided in Ceylon with respect to the law of ..... *banks and banking* ....., the

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13 (1946) 47 N.L.R. 25 ; (1948) 49 N.L.R. 404 (P.C.).
14 Cap. 79 : Vol. III : Legislative Enactments of Ceylon (1956) Revised Ed.

law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereafter to be enacted.

Provided that nothing herein contained shall be taken to introduce into Ceylon any part of the Law of England relating to the tenure or conveyance or assurance of, or succession to, any land or other immovable property, or any estate, right or interest therein."

The Civil Law Ordinance was enacted as far back as 1852. In its original form the Ordinance covered bills of exchange, promissory notes and cheques as well. But in view of the subsequent enactment of the Bills of Exchange Ordinance in 1927, the reference in the Civil Law Ordinance to the law applicable to bills of exchange, promissory notes and cheques has been omitted. It will thus be appreciated that even before the Bills of Exchange Ordinance of 1927, negotiable instruments like bills of exchange, promissory notes and cheques were governed in Ceylon by principles of English law introduced into the Island by the Civil Law Ordinance. In fact, it appears that even prior to the enactment of the Civil Law Ordinance in 1852, the law that was applied in Ceylon by our Courts to cases relating to negotiable instruments was the English Law. [15]

(6) The Bills of Exchange Ordinance No. 25 of 1927 :

The Bills of Exchange Ordinance was enacted in 1927. It was an Ordinance to declare the law in Ceylon relating to bills of exchange, cheques, bankers' drafts and promissory notes. It came into force on 1st March, 1928. The Ceylon Ordinance itself is based on the English Bills of Exchange Act of 1882.

In England, some of the provisions of the Bills of Exchange Act of 1882 have been revised and brought up to date with the progress of commerce by the Bills of Exchange (Amendment) Act of 1932 and the Cheques Act of 1957, but unfortunately, there have been no such substantial amendments to our Bills of Exchange Ordinance of 1927. However, it should be noted that Section 98 (2) of the Ordinance attracts the common law of England — not the statute law — in so far as it is not inconsistent with the provisions of the Ordinance, or any other local enactment.

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15 For a discussion as to the introduction and development of the law of banking and cheques to Ceylon, *see, De Costa v. Bank of Ceylon* (1969) 72 N.L.R. 457 (Bench of five Judges).

There is another important point to be borne in mind. Section 3 of the Civil Law Ordinance which introduces the English Law into Ceylon in matters relating *inter alia* to banks and banking is phrased in very wide terms. The words used in the section are " the law administered in England in the like case at the corresponding period." Accordingly, it appears that the English Law that is introduced into Ceylon by the Civil Law Ordinance in respect of *banks and banking* is not only the common law of England, but the entire body of the English law prevailing at the relevant time. In other words, it included even the English Statute Law.

On the other hand, Section 98 (2) of the Bills of Exchange Ordinance of 1927 does not go so far. The English Law that is introduced by this section to negotiable instruments in Ceylon is *only* the *common law* of England, and not the entirety of the law that would be administered in England, at the corresponding period. In other words, English Statute law was excluded.[16]

To explain by way of an illustration from a decided case, in *Soosaipillai v. Vaitalingam*,[17] the only question was whether a part payment on a promissory note by one of the joint-debtors operates to arrest the running of prescription not only as against the debtor making the payment, but also as against all the other joint-debtors of the note. According to the common law of England, such a part payment by one of the co-debtors arrested prescription as against the other joint-debtors. But according to the statute law of England which amended the common law on this point a payment by a co-debtor did not have such an effect.

The Ceylon Supreme Court, however, held that by Section 98 (2) of the Bills of Exchange Ordinance of 1927, what was introduced to Ceylon (unlike in the case of Section 3 of the Civil Law Ordinance) was *only* the common law of England on the subject and not the entirety of the English statute law. Accordingly, the Supreme Court applied English common law and held that a payment by a co-debtor arrested prescription of the debt as against the other debtors, and the other co-debtors cannot avail themselves of a plea of prescription in such a case.

Thus, in respect of negotiable instruments, like bills of exchange, promissory notes and cheques, where there is no express provision in our Bills of Exchange Ordinance No. 25 of 1927, our

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16 *See, De Costa v. Bank of Ceylon* (1969) 72 N.L.R. 457 (Bench of five Judges).

17 (1935) 37 N.L.R. 381.

Courts can only rely on the common law of England governing such matters and not upon the entirety of the law that would be administered in England at the corresponding period. Accordingly, as far as the statutory effect of our Bills of Exchange Ordinance of 1927 is concerned, there is no doubt or room for speculation as to the period of time with reference to which English law must be examined.

Another important point to note is that English law relating to negotiable instruments applies not merely to completed contracts and the results flowing therefrom but also to the requisites for their formation. Consequently, the law of Ceylon in respect of all contracts and questions arising *upon* or *relating* to bills of exchange, promissory notes, and cheques and in respect of all matters *connected* with any such negotiable instruments, is the English Law.[18]

This point is important because different considerations would arise if the liability of parties in such cases is determined by the Roman-Dutch Law.

For instance, the question whether there is *consideration* for a negotiable instrument would be governed by English Law.[19]

Also in considering the liability of parties on a negotiable instrument the issue as to the place where payment ought to have been made, would in the absence of an express agreement between the parties be determined in accordance with the rule of English law that the debtor should seek out the creditor — and not according to the opposite rule of Roman-Dutch Law that the creditor must go behind the debtor. Where the English Law does not for any reason apply, or when its applicability to the facts of a particular case is exhausted, the common law, namely the Roman-Dutch Law, springs back to govern the case. For example, where an action has been instituted on a cheque or promissory note and judgment and decree has been entered in favour of the plaintiff, and the plaintiff creditor agrees to waive the amount due on the decree, the question arises whether the *consideration* for the agreement must be decided according to the principles of English Law or Roman-Dutch Law. Normally, *consideration* in the case of cheques, promissory notes and other negotiable instruments must be determined according to the principles of English Law. But the consideration for the

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18 *See, De Costa v. Bank of Ceylon* (*supra*); Weeramantry: *Law of Contracts*, Vol. 1, pp. 49-50.

19 *See, Ramalingam v. Jones* (1939) 40 N.L.R. 486; Weeramantry: *Law of Contracts*, Vol. 1, p. 48.

agreement to waive a judgment debt must be decided according to the principles of the Roman-Dutch Law ; for the debt due on the decree is a new debt quite distinct from and independent of the debt on the promissory note ; when the decree is entered the cheque or promissory note as the case may be, is merged in the decree and loses its identity. The debt due on the decree would thus be a new debt governed not by English Law but by our common law the Roman-Dutch Law.[20] Likewise, our Courts have held when a negotiable instrument like a cheque or promissory note has been discharged by payment, it is no longer governed by English Law but will be governed by principles of Roman-Dutch Law.[21]

The importance of a knowledge of the Roman-Dutch Law to bankers in Ceylon is further illustrated by the recent decision of the Divisional Bench of the Supreme Court in *Daniel Silva v. Johanis Appuhamy* (1965) 67 N.L.R. 475 which held that the delict or tort of *conversion* of a cheque is unknown to the Roman-Dutch Law and an action does not lie in Ceylon in respect of the tort of conversion. The Court further held that the English doctrine of conversion is not part of the Law of Ceylon — and does not apply even in the case of a conversion of a negotiable instrument like a cheque, which is normally governed by principles of English law.

The Court also took the view that Section 98 (2) of the Bills of Exchange Ordinance No. 25 of 1927 was only intended to apply to any omissions or deficiencies in the Ordinance itself in the law relating to negotiable instruments and could not form the basis of the wider proposition that where the subject matter of a conversion is a cheque, the English common law of conversion was introduced into the law of Ceylon.

For a detail discussion of this case and its effect see : *Daniel Silva v. Johanis Appuhamy* (1965) 67 N.L.R. 457 (*D.B.*) at page 88 of this book. The decision in *Daniel Silva's* case was modified to some extent by a Bench of five Judges in *De Costa v. Bank of Ceylon* (1969) 72 N.L.R. 457, which is discussed at page 37 of this book.

In the earlier case of *Hongkong and Shanghai Bank v. Krishnapillai* (1932) 33 N.L.R. 249, our Supreme Court held that the English law of banking with regard to the realising of

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20 *See, Ramalingam v. Jones* (1939) 40 N.L.R. 486 ; Weeramantry : *Law of Contracts*, Vol. 1, p. 48.

21 *See, Gunasekera v. Gunasekera* (1941) 24 C.L.W. 35.

securities pledged with a Bank does not obtain in Ceylon. And that the right of a pledgee to sell his security without recourse to a Court of Law is peculiar to the English Law of pledge and the Common Law of Ceylon which is the Roman-Dutch Law does not give place to the English Law on this matter even where the mortgagee or pledgee is a bank and the transaction concerns a banker and his customer.

All the above legal decisions go to show that although it is generally true to say that the law relating to banking and cheques in Ceylon is the English law, yet there are many matters that relate to or are incidental to banking and cheques in Ceylon that are governed not by English Law but by Roman-Dutch Law. To this extent, those engaged in banking business in Ceylon ought to have some appreciation of the principles of Roman-Dutch Law as well.

Another feature that affects bankers and banking business in Ceylon is the prevalence of several *personal laws* side by side with the English Law and the Roman-Dutch Law. Specific reference may be made to :

(i) *Kandyan Law*, which is a personal law based on custom which governs all Kandyan Sinhalese.

(ii) *The Thesawalamai*, which is also a personal law based on custom which applies to all Jaffna Tamils and to all immovable property situated in Jaffna irrespective of the nationality or community of the owner of the property.

(iii) *Muslim Law*, which is a personal law based essentially on religion which is applicable to all Muslims in Ceylon.

What is important to remember is that a customer of a bank in Ceylon may belong to any one of the above three communities in which case quite apart from the principles of English Law or Roman-Dutch Law that may apply to the transaction in question, further questions of law may arise depending on the peculiarities of each system of personal law which governs that particular customer. This fact must be borne in mind especially by Managers and other bank officials of outstation branches and offices where they may have to deal with customers governed by these personal laws.

It is also interesting to note that the procedure in our Civil Courts for the enforcement of actions based on negotiable instruments in Ceylon is governed not by English Law or the

procedure adopted in English Courts but by the provisions of our Civil Procedure Code, (Cap. 101).[22] Under Chapter 53 of the Civil Procedure Code actions arising upon bills of exchange, promissory notes or cheques are referred to, *inter alia*, as actions on liquid claims and may be instituted by way of *Summary Procedure* as laid down in Sections 703 - 711 of the Code.

(7) The Evidence Ordinance No. 14 of 1895 : [23]

Sections 90A to 90F of the Ceylon Evidence Ordinance contain several statutory provisions as to the mode of proof in legal proceedings of entries in Bankers' books. These statutory provisions are modelled on the provisions of English Law contained in the English Bankers' Book Evidence Act of 1879. The English statute had a two-fold purpose, namely, to protect bankers from the inconvenience of having to produce their books and ledgers in Courts of Law and also to enable litigants to prove banking transactions more easily.

The statutory provisions of the Ceylon Evidence Ordinance which deal with this matter provide for the following :

Mode of Proof of Entries in Bankers' Books :

Subject to the provisions of Chapter VI of the Ordinance a *certified copy* of any entry in a banker's books shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

What is a Bank and Who is a Banker for the purpose of these provisions :

For the purpose of this section of the Evidence Ordinance the terms Bank and Banker have been defined. The definition includes —

(i) any company carrying on the business of bankers in Ceylon and registered under the Ceylon Companies' Ordinance or established by Royal Charter or Letters Patent,

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22 *See, Mudalihamy v. Punchi Banda* (1912) 15 N.L.R. 350.
23 Cap. 14, Vol. I, Legislative Enactments of Ceylon (1956) Revised Ed.

(ii) any partnership or individual carrying on the business of banking and to whom these provisions are made applicable by reason of a Gazette notification,

(iii) any Savings Bank, Post Office Savings Bank or Money Order Office.

What are Bankers' Books ?

Bankers' Books have been defined so as to include ledgers, day books, cash books, account books and all other books used in the ordinary business of a bank.

What is a Certified Copy ?

A certified copy means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy containing the following particulars :

(*a*) that it is a true copy of such entry,

(*b*) that such entry is contained in one of the books of the bank,

(*c*) that such entry was made in the usual and ordinary course of business, and

(*d*) that such entry was made from a book in the custody of the bank.

The certificate must be dated and signed by the principal Accountant or the Manager of the bank with his name and official title.

Production of Original Books of a Banker :

In certain cases the law provides for the production of the *original* books of a Banker. Such a case is where a banker or bank is *one of the parties* to a case. Where the bank is the plaintiff or defendant in a case, the production of the original books can be obtained in the same way as in the case of books and documents of an ordinary party litigant.

But where the bank is *not* a party to a case no officer of a bank is compellable —

(*a*) to produce any banker's books, the contents of which can be proved by way of certified copies ; or

(*b*) to appear as a witness to prove the matters, transactions and accounts recorded in any books of the bank unless he is ordered to do so by a Judge of a Court of Law for a special purpose.

(*See*, Section 90D of the Evidence Ordinance).

The above Section 90D must be read in conjunction with Section 130(3) of the Evidence Ordinance which reads : " No Bank shall be compelled to produce the books of such bank in any legal proceedings to which such bank is not a party, except as provided by Section 90D."

Inspection of Bankers' Books by Order of a Court of Law :

Sections 90E and 90F of the Evidence Ordinance contain statutory provisions as to inspection of bankers' books by obtaining an order of a Court of Law.

Section 90E provides as follows :

On the application of any party to legal proceeding the Court or a Judge may order :

(*a*) that such party be at liberty to inspect and take copies of any entries in a banker's books for any of the purposes of such legal proceeding ; or

(*b*) that the bank should prepare and produce within a time specified in the order, certified copies of all such entries accompanied by a *further certificate*, which must satisfy the following requirements :

(i) it must state that no further entries are to be found in the books of the bank relevant to the matter in issue in such proceeding ;

(ii) it must be dated ; and

(iii) it must be subscribed in the same manner as directed in Section 90A in regard to certified copies.

An order under Section 90E or 90D of the Evidence Ordinance may be made either with or without summoning the bank and must be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge orders otherwise.

The Bank on whom the order is served may at any time before the time given to comply with any such order either :

(i) offer to produce their books at the legal proceedings ; or

(ii) give notice of its intention to object to and show cause against such order and thereupon the same shall not be enforced without a further order.

These sections for the production and inspection of originals of Bankers' Books did not give any new power of *discovery or inspection* as contained in Chapter XVI of the Civil Procedure Code or take away any existing ground of privilege. On the other hand, these sections are merely intended to protect bankers from being prevented from carrying on their business by being compelled to produce their books in Court frequently.

A Judge of a Court of Law has a discretion under these provisions whether to grant an order for production or inspection of bankers' books but the Court will exercise its discretion with caution.

Section 90F of the Evidence Ordinance provides for the payment of costs incurred in any application for the production or inspection of bankers' books under Chapter VI of the Ordinance. The costs shall be fixed at the discretion of the Judge.[24]

(8) The Exchange Control Act No. 24 of 1953 :[25]

Section 4 of the Exchange Control Act provides for Commercial Banks in Ceylon to be authorised dealers in gold or foreign exchange. The section enacts that the Minister of Finance may authorise any Commercial Bank to act, for the purpose of the Exchange Control Act, as an authorised dealer in relation to gold or any foreign currency. In dealing with the subject of gold and foreign currency, Section 71 of the Monetary Law Act may also be noted. Section 71 (2) of the Act states that the Central Bank may transact foreign exchange operations in Ceylon.

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24 *See*, Coomaraswamy : Law of Evidence, pp. 257 - 261.
25 Cap. 432, Vol. XII of the Legislative Enactments of Ceylon (1956), Revised Edition.

(9) The Mortgage Act No. 6 of 1949 : [25]

The Mortgage Act of 1949 provides for certified and approved credit agencies in the Island to lend money on specified terms and securities, and also provides for a special form and manner in which such securities may be obtained from borrowers. These special privileges relating to lending are granted by the Mortgage Act only to *approved credit agencies* as defined under Section 3 of the Act. Under Section 3 of the Act, all Banking Companies in Ceylon as defined under Section 333 of the Companies' Ordinance, and which are approved by the Director of Commerce by Gazette Notification are deemed to be " approved credit agencies " for the purposes of the Mortgage Act.

In practice, all Commercial Banks in Ceylon have obtained approval as approved credit agencies and are exercising the privileges conferred on them by the Mortgage Act, especially in relation to lending money on the security of shares in companies, and life insurance policies.

The Stamp (Amendment) Act No. 49 of 1968 exempts approved credit agencies as defined in Section 3 of the Mortgage Act from payment of stamp duty on the following documents :

(i) Writing or bond either in respect of or creating a pledge or *corporeal movables*.

(ii) Transfer or assignment of a policy or insurance.

It is noteworthy that since all commercial banks in Ceylon are approved credit agencies they enjoy exemptions from payment of stamp duty on the aforesaid securities.

(10) The Finance Act No. 65 of 1961 : [26]

Section 22 of the Finance Act No. 65 of 1961, which incidentally, nationalised the Bank of Ceylon, prohibited the opening of any bank account by citizens of Ceylon or any Ceylonese Company or Firm in any bank other than :

(1) The People's Bank,
(2) The Bank of Ceylon,
(3) Ceylon Savings Bank,
(4) Ceylon Post Office Savings Bank, and
(5) Any Bank registered under the Co-operative Societies Ordinance.

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25 Cap. 89, Vol. II of the Legislative Enactments of Ceylon (1956), Revised Edition.

26 Vol. II of the 1966 Supplement to the Legislative Enactments of Ceylon.

In other words, the opening of bank accounts by Ceylonese in foreign banks in Ceylon were totally prohibited as from 27th July 1961. However, this restriction on the opening of accounts by Ceylonese in foreign banks was lifted by the Finance (Amendment) Act No. 36 of 1968, which empowered the Minister of Finance, acting on the recommendation of the Monetary Board to declare by order published in the Government Gazette, any foreign bank as an approved bank for purposes of maintaining and operating Bank Accounts for Ceylonese. Today in practice all the foreign banks operating in Ceylon other than the Habib Bank Limited have been so approved and can maintain and operate bank accounts for Ceylonese as well.

(11) The Money Lending Ordinance No. 2 of 1918 :

It is important to note that the Money Lending Ordinance of Ceylon which imposes restrictions on the rates of interest which may be charged on loans and money-lending transaction, and which provides in certain circumstances, for the re-opening of money-lending transactions does not apply to Banks in Ceylon.

Section 7 of the Money Lending Ordinance expressly excludes the operation of the Ordinance to transactions carried on in the ordinary course of business by any duly incorporated and registered Bank or Banking Company in Ceylon.

It may be noted that Section 48 of the Finance Act No. 11 of 1963 amended the Money Lending Ordinance and prohibited any non-Ceylonese or foreign firm or company other than Commercial Banks from carrying on Money Lending business in Ceylon on or after 1st January, 1964.

(12) The Bank Debits Tax Act No. 42 of 1957 :

The Bank Debits Tax Act No. 42 of 1957, which came into operation as from 5th July, 1957, imposed a tax on debits made against current accounts in Commercial Banks in Ceylon. This was a fiscal measure instituted by the then Minister of Finance with his budget of 1957 in order to collect more revenue for the Government. These statutory provisions were, however, repealed as from 1st October 1965 and are no longer in operation in Ceylon, and at present there is no debits tax levied on Bank Accounts in Ceylon.

(13) The Pawnbrokers' Ordinance No. 13 of 1942 :

The Pawnbrokers' Ordinance No. 13 of 1942 provides for the regulation of the business of pawnbrokers in Ceylon, and enacts that no person shall carry on the business of a pawnbroker in the Island unless he has obtained a license to do so.

Section 5 (i) (*c*) of the People's Bank Act No. 29 of 1961 empowers the People's Bank to carry on as one of its functions the business of a pawnbroker subject to such conditions as may be prescribed. Section 5 (3) of the People's Bank Act further enacts that the Pawnbrokers' Ordinance shall not apply to the Bank when it carries on the business of a pawnbroker. In other words, the People's Bank is exempted from the provisions of the Pawnbrokers' Ordinance.

Today, the People's Bank does a considerable volume of pawnbroking business. However, it appears that no Rules and Regulations have been enacted or prescribed by the Minister of Finance for the conduct of pawnbroking business by the People's Bank as required by Section 5 (i) (*c*) of the Act. In the absence of such Rules and in view of the fact that the Bank is specifically exempted from the provisions of the Pawnbrokers' Ordinance, it is submitted that the Roman-Dutch Law as the Common Law will govern the pawnbroking transactions of the People's Bank.

Commercial Banks in Ceylon, other than the People's Bank, are not exempted from the provisions of the Pawnbrokers' Ordinance. The Bank of Ceylon Commission in its Report recommended that the Bank of Ceylon also be exempted from the provisions of the Pawnbrokers' Ordinance.

It may also be noted that Section 47 of the Finance Act No. 11 of 1963 amended the Pawnbrokers' Ordinance and prohibited any non-Ceylonese or foreign firm or company other than a Commercial Bank from carrying on pawnbroking business in Ceylon after 1st January, 1964.

(14) The Inland Revenue Act No. 4 of 1963 :

The Inland Revenue Act No. 4 of 1963 exempts banking institutions in the Island from the payment of wealth tax Section 28 states that Chapter VII of the Act which imposes a wealth tax shall not apply to (*inter alia*) :

(i) the Ceylon Savings Bank and the Ceylon Post Office Savings Bank,

(ii) the Central Bank of Ceylon and the Monetary Board established under the Monetary Law Act,

(iii) the Ceylon State Mortgage Bank established under the Ceylon State Mortgage Bank Ordinance,

(iv) any institution whose primary business is the business of a bank.

Normally Banks are under a duty of secrecy not to divulge to others particulars of their customer's account and his transactions with the Bank. Section 115 of the Inland Revenue Act No. 4 of 1963 provides one of the exemptions to this duty of strict secrecy. Under this section the Commissioner of Inland Revenue is empowered by a written notice to require a bank to furnish any information to him within a specified period which may be required for the purpose of recovering any income tax, wealth tax or gifts tax due from any customer of the bank.

GENERAL INDEX