THE CHEQUE AS A MANDATE TO THE BANKER[1]

A cheque is, by definition a bill drawn on a banker payable on demand. It will be seen, therefore, that unlike other bills of exchange used in commercial transactions a cheque is unique in that it fulfills the twin functions of a mandate as well as of an ordinary commercial bill, viz. a negotiable instrument. The law relating to cheques under both these heads is a fascinating topic for study. This article, however, concentrates on the legal aspects of a cheque as a mandate addressed to the banker, and where necessary, suggests desirable reforms in the existing law.

A banker is involved in litigation (very often unsuccessfully) in his capacity as paying banker in the following circumstances, *inter alia:*

(a) Where the signature of a customer on a cheque is forged;

(b) Where the signature of a customer is unauthorised, in the sense that it is used for a purpose which is outside the authority actually given;

(c) Where the amount of the customer's cheque is fraudulently raised;

(d) Where the banker pays a crossed cheque otherwise than according to the crossing;

(e) Where the banker pays a cheque on which the payee's or a subsequent indorsee's endorsement is forged;

(f) Where a banker marks or certifies a cheque drawn by his customer which he is subsequently obliged to dishonour.

(a) *Forgery of the customer's signature*

Forgery is a crime and is normally associated with the criminal law. Yet its ramifications extend to commercial transactions and involve innocent third parties. The effects of forgery are particularly felt in the law of banking. A banker is not an amateur detective. The law does not require him to scrutinise every cheque under a deep ray light. Yet, the law holds him responsible if he pays a cheque, the operative signature on which is a forgery. The reason is that a cheque apart from being a negotiable instrument is a mandate to the banker. Hence where he has no mandate from his customer, the banker cannot

1. The law on the subject considered in this article is the same in Singapore and Malaysia as in England. Not many cases have, however, attracted the attention of the Malaysian and Singapore Courts. Hence, extensive use is made of decisions in England and other jurisdictions whose negotiable instruments legislation is based on the English Bills of Exchange Act, 1882.

debit the latter's account. A cheque on which the customer's signature is a forgery is not a mandate. The law is quite definite. Section 24 of the Malayan Bills of Exchange Ordinance, 1949,[2] enacts that:

> . . . where a signature on a bill is forged . . . the forged signature is wholly inoperative.

If then a banker pays a cheque on which his customer's signature is a forgery, the banker has no mandate and hence cannot charge the amount of the forged cheque to the customer's account. It follows, therefore, that, however recklessly negligent the customer has been with regard to the custody of the cheque book or the choice of servants or employees, this circumstance will not avail the banker.[3] This may be asserted as undisputed law in the Commonwealth. Two decisions from two different jurisdictions will suffice to illustrate the point. In *Bank of Ireland* v. *Trustees of Evans' Charities in Ireland,*[4] it was decided that if a party having an account at a banker's is not in the habit of locking up his cheque book, with the result that a person in his establishment abstracts from it a blank cheque, forges his name to it and thereby obtains money from the banker, the omission to look up the cheque books, cannot be relied upon as a defence to an action for recovery of the amount obtained by the forger. Secondly, *Kollonnawa Urban Council* v. *Bank of Ceylon,*[5] affords an extreme instance of reckless negligence on the part of the customer where the Supreme Court said:[6]

> The evidence discloses an amazing state of affairs which savours more of comic opera than actual fact, as to the manner in which the business of the Kollonnawa Urban Council was managed during the year 1945. In fact, the impression created by the evidence is that those who were responsible for the Kollonnawa ratepayer's money in the year 1945 did everything they ought not to have done and did not do what they ought to have done and that there was 'no health' in them.

Despite this finding of fact, the court was compelled to hold that:[7]

> However negligent the banker's customer may have been, such facts would not avail a banker who honours a forged cheque, unless the customer is estopped from pleading the forgery.

The mandate to the banker may be a joint one as where two trustees or two partners keep a joint account which requires the signatures of both on the cheque. It may well be that one of the co-signatories might forge the signature of the other and the banker may make payment. The liability of the banker to the other in such a situation has

2. F.M. Ordinance 75 of 1949 extended to Sabah, Sarawak and Singapore by the Modification of Laws (Bills of Exchange) (Extension) Order (L.N. 260 of 1965).

3. Chalmers, *Bills of Exchange,* (12th ed.) pp. 191, 192.

4. (1855) 5 H.L. Cas. 389.

5. (1948) 51 N.L.R. 74.

6. *Ibid.,* at p. 76, *per* Dias J.

7. *Ibid.*

arisen in a number of cases.[8] Except in one case[9] which is now generally regarded as unsatisfactory, the courts in England and Australia where the problems arose have held that the banker is liable to the co-signatory.

The only defence open to a banker who has paid a cheque on which his customer's signature is forged is that of estoppel for section 24 of the Malayan Bills of Exchange Ordinance, 1949, which provides that a forged signature is wholly inoperative goes on to say that such forged signature is not so inoperative if the customer is precluded from setting up the forgery.

An examination of the law reports in the Commonwealth reveals that this defence of estoppel was successfully pleaded in only one case, which shows the narrowness of its scope, i.e. *Greenwood* v. *Martin's Bank* where Lord Tomlin stated the essential factors giving rise to an estoppel as follows:[10]

> (i) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
>
> (ii) An act or omission resulting from the representation, whether actual or by conduct by the person to whom the representation is made.
>
> (iii) Detriment to such a person as a consequence of the act or omission.

Mere silence will not amount to a representation unless there is a duty to disclose, when deliberate silence may become significant and amount to a representation. To constitute estoppel by silence, therefore, there must be a duty owed by the person making the representation and the silence must be deliberate. Lord Tomlin said in the *Greenwood* case:[11]

> The course of conduct relied upon as founding the estoppel was adopted in order to leave the respondents (i.e. the bank) in the condition of ignorance in which they, the appellant, knew they were. It was the duty of the appellant to remove that condition however caused. It is the existence of that duty, coupled with the deliberate intention to maintain the respondents in their condition of ignorance that gives its significance to the appellant's silence.

Two points emerge from this decision. First, there must be a duty to disclose; secondly, as a result of the failure to disclose, the banker must have suffered some detriment. If both these conditions are not

8. *Brewer* v. *Westminister Bank Ltd.* (1952) 2 T.L.R. 568; *Welch* v. *Bank of England* (1955) 2 W.L.R. 757; *Baker* v *Barelays Bank Ltd.* (1955) 1 W.L.R. 822; *Arden* v. *Bank of N.S.W.* (1956) V.L.R. 569.

9. McNair J.'s decision in *Brewer* v. *Westminister Bank Ltd.* (1952) 2 T.L.R. 568. See Glanville Williams in (1953) 16 *M.L.R.* 232; Sir Arthur Goodhart in (1953) 68 *L.Q.R.* 446; Lord Chorley in (1956) 19 *M.L.R.* 76 *et seq.* In the most recent case of *Jackson* v. *White and Midland Bank Ltd.* 1967 (2) LL.L.R. 68 Parke J. expressly refused to follow the decision in the *Brewer* case.

10. [1933] A.C. 51 at p. 59.

11. *Ibid.*

present then estoppel based on silence cannot be founded. Thus, in *Begley* v. *Imperial Bank of Canada,* the Judicial Committee of the Privy Council stated:[12]

> Thus on the one hand there was no evidence of any detriment to the appellants (*i.e.* the Bank) as a consequence of the silence of the respondent and on the other hand no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants.

If however, the duty to disclose exists, then it does not matter whether the person bound by the duty is a customer of the bank or not. Thus in *Ewing* v. *Dominion Bank,*[13] which goes further than any English decision in the direction of holding a person liable on the ground of estoppel, E. and Co. who were merchants at Montreal received from a bank in Toronto with whom they had no account, on the morning of 16th August a letter notifying them that their note for $2,000 in favour of the T. P. Co., would fall due at the bank on a date named and requesting them to provide for the same. The name E. and Co. had been forged to the note. E. and Co. communicated at once with the forger, but did not communicate with the bank till the following December, a few day before the note fell due. On 15th and 16th August, the T. P. Co. issued the cheques on the bank, payment of which left a balance to their credit at the close of business on the 15th of $1,611, on the 16th, of $1,355, and on the 17th, of $84. It was held by the Supreme Court of Canada, by a majority judgment, that on receipt of the notice E. and Co., were under a legal obligation to inform the bank, by telegraph or telephone, that they had not made the note, and that as they had not done so they were estopped from denying their alleged signature.

The following propositions of law may be deduced from the judgments of the Supreme Court of Canada:

(i) If a person becomes aware that by the unauthorised use of his name a fraud is being practiced upon a bank, there may be a duty to notify the bank of the fraud, although no business relations previously existed between him and the bank, sufficient relationship being created by the fact that express notice is given by the bank to such a person that his name is being used.

(ii) Assuming that there is a duty to notify the bank, modern business methods may require the use of the telephone or telegraph.

(iii) If a person is under such a duty, and, by reason of his neglect to notify the bank, the bank is prejudiced, he is estopped from denying the genuineness of his signature and is liable to the full amount of the document. The loss need not be the direct and necessary consequence of the neglect.

It seems doubtful if proposition (i) would be followed either in England, Malaysia or Singapore, in the absence of a definite contractual relationship between the parties, when the duty to disclose will arise.

It will, therefore, be appreciated that a paying banker is in a

12. (1936) 3 D.L.R. 1 at p. 7, a case which has escaped the attention of English text writers probably because it has not been reported in the Appeal Cases.

13. (1904) 35 S.C.R. 135.

vulnerable position when he has paid a forged cheque. The law as it now is, is particularly hard on him when it is realised that in many cases, the forgery is facilitated by his customer's own negligence in leaving cheque books within the reach of forgers, or that the forgery has been executed so skilfully as to escape detection by the naked eye.

We have also seen that the only available defence of estoppel provides poor relief to the banker.[14] It is legitimate, therefore, to consider whether the banker could not rely on a more effective defence. Such a defence it is submitted should be based on the concept of a settled account. Bankers send to their customers periodically (often monthly) a statement [15] of account showing the debits and credits and requiring the customers to certify that the entries therein are correct. If a customer does confirm that the entries are correct, ought not this amount to a settled account either because of the existence of an express term of the contract or because such a term should be implied? In the United States, such a term has been implied.[16] But in England, the concept of a settled account has not received acceptance by the courts. Two reasons may be adduced. (1) In the few cases that have arisen there has been no evidence that there was an express term in the contract between banker and customer that the return of the statement of account confirmed as correct should amount to such a settlement of account. It has however, not been doubted that there can be such a settlement if there is an express term to that effect, between the parties.

In the Indian case of *Bishun Chand* v. *Lal,* Lord Wright speaking for the Judicial Committee of the Privy Council said:[17]

> It has not been doubted that in law there can be a settled or stated account between banker and customer. What has been questioned is whether the acceptance by the customer without protest of a balance struck in the passbook constitutes a settled account, but the question has had reference merely to the issue whether such a settlement can be inferred as a matter of fact from passing backward and forward of the passbook. The legal competence of such a settlement if made is not questioned.

In *B. G. Construction Co.* v. *Bank of Montreal,*[18] the Supreme Court of Canada held that a verification statement signed by the customer and binding him to raise within fifteen days any objection that he might have to the debit items appearing in his statement was valid and the customer, having failed to make such objection, was not able to recover from the bank sums debited against forged cheques. There is therefore, no legal

14. Indeed it has been suggested that the decision in the *Greenwood* case really rests on ratification rather than on estoppel See Stoljar, *The Law of Agency,* p. 186. This is a somewhat difficult conclusion to sustain because section 24 of the Bills of Exchange Act, 1882 reads thus: "Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery." It seems clear that the section excludes the possibility of the ratification of a forged signature.

15. The modern counterpart of the old passbook.

16. *Leather Manufacturers National Bank* v. *Morgan,* 117 U.S. 96 (1885).

17. (1934) 50 T.L.R. 465 at p. 468.

18. (1954) 2 D.L.R. 733.

objection to the existence of a settled account provided an express term to that effect is embodied in the contract between both parties. Practical difficulties, however, exist in the way of creating such an express contract unless the entire banking fraternity agree to stipulate such ah express term. This, however, has been found to be impracticable in the competitive business of banking where one banker seeks to attract others' customers on better terms.

(2) The Courts have refused to imply such a term on the ground that it is not essential to the business efficacy of the banker-customer relationship as in *Chalterton* v. *London County Bank.*[19] The basis of this reasoning would appear to be that the customer is not under a duty to examine his statement of account and the paid cheques. Recent developments in the law that such a duty on the part of the customer may well be founded. It is hoped that the House of Lord may be persuaded to dissociate itself from the existing decisions particularly the *Chalterton* case. Pending such an authoritative review of the existing decisions by the House of Lords it is suggested as Paget did[20] that:

> For their own protection, bankers should cooperate to formulate such custom, establishing the status of the pass book as a settled account, and affirming the duty of the customer to examine and compare it with the returned cheque and bills, and notify the bank of any errors therein appearing.

(b) *Where the Signature of the Customer is Unauthorised*

Though the signature of the customer may not be a forgery in the strict sense it may be that the customer's agent authorised to draw on his account may have acted in excess of his authority. Section 24 of the Malayan Bills of Exchange Ordinance, 1949, provides that an unauthorised signature like a forged signature is wholly inoperative unless the principal ratifies the unauthorised signature.

In the leading Ceylon case of *Dodwell and Co.* v. *John,*[21] the manager of the Colombo branch of Dodwell and Company was given a general power of attorney providing for the drawing of cheques on the company's banking account.

The manager misused this power by drawing cheques on the company's account for his own purposes. He gave those cheques to the defendants in payment of shares purchased in his own name.

In an action against the defendants to recover the amounts of the cheques, the Judicial Committee held that the defendants were liable because they had notice that the agent was exceeding his authority. This decision was approved by the House of Lords in *Reckitt* v. *Barnett Pembroke and Slater Ltd.*[22]

19. Reported in Paget's *Law of Banking* (5th Ed.), p. 349 *et seq.* See also *Kepitigala Rubber Estates* v. *National Bank of India* [1909] 2 K.B. 1025. See "Bank Pass Books & Statement" by Dr. J. Milnes Holden in (1954) 17 *M.L.R.* 41 *et seq.* for a survey of the cases on this point.

20. *Law of Banking,* (4th Ed.), p. 348.

21. (1918) A.C. 563.

22. (1929) A.C. 176.

Still, circumstances might arise when the paying banker will be in a similar position and therefore liable to the principal. A good illustration of such an instance is provided by the Canadian case of *Begley* v. *Imperial Bank of Canada*[23] decided by the Privy Council, a decision which has escaped the attention of English text writers as the case has been reported only in the Dominion Law Reports, but it is of interest to bankers generally and hence the facts and the decision are stated here in some detail. Mrs. Begley had an account with the Calgary branch of the defendant bank. She gave a general power of attorney to one McElroy in very wide terms, using for this purpose a printed form supplied by the bank. The power of attorney contained a ratification clause. McElroy himself had an account with the same branch of the defendants which account was overdrawn for a considerable time. The bank was pressing him for repayment of the overdraft and he informed the manager of the bank that he would borrow the amount from Mrs. Begley and settle the matter.

Sometime later, he withdrew sufficient money from Mrs. Begley's account and paid it to the bank in settlement of his overdraft with the bank. At the same time he handed over to the bank manager a promissory note for the amount in favour of Mrs. Begley and requested the bank to retain it. The bank did not inform Mrs. Begley of this transaction and for a long time she was not aware of it. When she discovered it, she came to an arrangement with McElroy, whereby she treated the matter as a loan to McElroy and obtained from him a fresh promissory note. McElroy however did not repay the loan and Mrs. Begley sued the bank for the recovery of the amount. The bank pleaded estoppel and ratification against Mrs. Begley. The Supreme Court of Canada gave judgment for Mrs. Begley and the bank appealed to the Privy Council without success. The Judicial Committee made some adverse comments on the conduct of the bank in the whole matter.[24]

> It is unnecessary for their Lordships to comment upon the participation of the officers of the bank in this curious transaction carried through without the smallest endeavour to verify from the respondent herself who it may be mentioned incidentally was in very bad health at the time, she was lending so large a proportion of her property without security to a man whose financial position was known to the bank to be of an unsatisfactory character."

In dismissing the bank's appeal the Privy Council disposed of two defences thus: [25]

> The point of estoppel can be briefly dealt with. As pointed out in the reasons for the judgment of the Supreme Court of Canada there is no evidence to support the view that the respondent's silence, that is her delay in complaining to the bank that McElroy had used the money drawn from her account improperly and without her authority, had caused the appellants to alter their position in any way. Nor, on the other hand, is there any reason whatever for contending that the silence upon which the estoppel is sought to be based was, to quote the words of Lord Tomlin in his speech in *Greenwood* v.

23. (1936) 3 D.L.R. 1.

24. *Ibid.,* at p. 4.

25. *Ibid.,* at p. 8.

Martin's Bank Ltd.,[26] "deliberate and intended to produce the effect which it in fact produced — namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the third party. There is thus on one hand no evidence of any detriment to the appellants as a consequence of the silence of the respondents, and on the other hand no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants." Before their Lordships the main argument for the appellants was that the respondent, though entitled to repudiate the act of McElroy, had chosen with full knowledge to ratify it. In other words she had treated the transaction as a loan by her to McElroy and had accepted and retained the promissory notes given to her by McElroy. This ratification it was urged must date back according to the well-known maxim to the moment when McElroy endorsed the cheque for $8,500, with the result that the money was lent to McElroy and properly used by him to discharge the debt to the appellants. This is a somewhat surprising conclusion, for it is difficult to see how a contract between the respondent and McElroy entered into some time after the appellants had become constructive trustees for her of the $8,500 could operate to release them from their equitable liability. If the facts would permit it, the appellants might no doubt argue that they had been released in equity from their liability to the respondent; but to such a contention there are some obvious and conclusive objections. In the first place there is no evidence to suggest that the respondent had any intention whatever of releasinging the appellants. In the second place as there was no deed, this alone would be fatal. In the third place, the respondent could not be held in equity to have released the appellants unless she had full knowledge of her rights, and it seems to be clear that until shortly before the commencement of her action against the appellants she had no such knowledge. She doubtless knew in June 1930, that McElroy had used her money to pay off his debt to the appellants, but this fact alone would not have informed a competent man of affairs, still less a woman without business experience, that there was a right of action against the appellants. She did not know and could not be expected to surmise that the appellants had, without explanation and without the smallest inquiry, been parties to the strange transaction with McElroy which their Lordships have thought it sufficient to describe in the moderate terms used above. She was thus without such knowledge of the facts, to say nothing of knowledge of her rights against the appellants, as would be necessary before a Court of Equity could hold her bound by an implied release.

These considerations alone would be sufficient to dispose of the appeal; but their Lordships are unwilling to leave unanswered the argument based on the alleged ratification by the respondent. It must be remembered that it is not the drawing of the cheque by McElroy but the use of the proceeds of the cheque which the respondent could properly complain of. What act of McElroy is it which the respondent is said to have ratified? The appellants must say that it was either the lending of the proceeds to McElroy or the paying of the proceeds to the appellants to discharge McElroy's debt. Both of these suggestions must fail for the simple reason that neither act was done or professed to be done by McElroy acting as agent for the respondent. The first essential to the doctrine of ratification, with its necessary consequence of relating back, is that the agent shall not be acting for himself, but shall be intending to bind a named or ascertainable principal. If the suggestion of ratification in this case is analysed it comes to this, that the agent having put some of the principal's money in his pocket the later ratifies the act. For the reason given this is not possible as a legal conception, since the agent did not take, and could not be deemed to have taken the money for himself as agent for the principal. There can be no room here for the application of doctrine of ratification.

(c) *Where the banker pays a cheque the amount of which has been fraudulenly raised*

It has been suggested by English text writers that the position of the paying banker in this respect is sufficiently clear and fair. The basis for this optimism is a decision of the House of Lords in *London and Joint*

26. (1933) A.C. 51 at p. 58.

Stock Bank v. *MacMillan and Arthur*.[27] However, this case leaves unanswered a number of points of practical interest. For example, a customer whose credit balance in his account with his bank is only $1,000/- makes out a cheque for $250/- and entrusts it to his employee to be disposed of as instructed. As the cheque is carelessly drawn the latter raises the amount to $2,500/-. Can the bank recover this amount from the customer?

Yet other situations have arisen where reliance on the *MacMillan* case may prove illusory.

In the *MacMillan* case, the House of Lords, after a review of the earlier authorities,[28] laid down the following proposition of law:[29]

> As the customer and banker are under a contractual relation in this matter, it appears obvious that, in drawing a cheque, the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is indeed a serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way to facilitate or almost invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote, but a very natural consequence of neglect of this description.

The *MacMillan* case was a straightforward one where the forger having fraudulently raised the amount of the cheque cashed the cheque across the counter. The decision was therefore based on the concept of the duty of care owed by the customer to his banker. In a different factual setting the legal position may be more complicated and, therefore, the principle of the *MacMillan* case may be inapplicable. In the Singapore case of *First National City Bank* v. *Ho Hong Bank*[30] the facts were as follows: Drew and Napier, a firm of solicitors, drew a cheque for $100/- in favour of Tai Seng Co., and marked it 'a/c Payee only'. This cheque was fraudulently altered so that the name of the payee appeared as 'Khoo Kock Chai'. The amount was raised to $9,000/-. The forger paid this cheque in its altered state to his own account with the Ho Hong Bank. On presentation through the clearing, the First National City Bank paid the sum of $9,000/-. It was common ground that the alteration of the name of the payee was effected by the use of a chemical and was not apparent to the naked eye. When the fraud was discovered, the F.N.C.B. sued the Ho Hong Bank for the recovery of the difference between the amount of the original cheque and the amount as altered, viz., $8,000/-.[31] Ho Hong Bank set up section 82 of the Bills of Exchange

27. (1918) A.C. 777. This decision was followed in the Singapore case of *Barbour Ltd.* v. *Ho Hong Bank Ltd.* (1929) S.S.L.R. 116.

28. *Young* v. *Grote* (1827) 4 Bing 253; *Scholfield* v. *Earl of Londesborough* (1896) A.C. 514.

29. (1918) A.C. 777 at pp. 789-790.

30. (1932) 1 M.L.J. 64.

31. It is not clear how the First National City Bank could have maintained an action against the defendants except on the basis of recovery of money paid under a mistake of fact. If so, the answer would have been that the defendants were agents who innocently received the money and paid it over to their principals. If the action was based on conversion as it appears to be, then such an action could only have been brought by the true owners, who in this case were Drew and Napier.

Act, 1882 [13b] as their defence namely that they collected the cheque in good faith and without negligence. Simpson J. raised the following questions, each of which he answered in the affirmative:

(1) Did the defendant bank act in good faith?

(2) Did they act without negligence?

(3) Did they receive payment for a customer?

It is respectfully submitted that the learned judge should have asked the further question clearly arising from the section he was dealing with[32] "Did the defendants receive payment on a cheque?" Had he done so the answer would have been in the negative. For by Section 64 of the Bills of Exchange Act, 1882, "where a bill is materially altered without the assent of all parties liable on the bill, the bill is avoided . . ." The section specifically states that an alteration is material when it concerns the sum payable. Accordingly, the defendants in this case did not receive payment on a 'cheque' and consequently were not entitled to the protection of section 82. This argument is reinforced by the reasoning of Devlin J. in *Chao* v. *British Traders and Shippers Ltd.*[33] where he used this very example of an altered cheque as an illustration of a material alteration. Devlin, L.J. said:[34]

> If a man adds two noughts to a cheque that is the end of it. It is no longer a cheque for, let us say, £10/- because the original figure has been destroyed by the addition of the two noughts. It is not a cheque for £1,000/- because the figure of £1,000/- is a forged figure. There is, therefore, nothing left of it and it must go.

This very same point arose in the two Ceylon cases of *Kulatilleke* v. *Mercantile Bank*[35] and *Kulatilleke* v. *Bank of Ceylon.*[36] *K* had an account with the Mercantile Bank of India Ltd., Colombo. He authorised his clerk *S* to prepare two cheques for Rs. 93/50 and Rs. 43/85 in favour of two specified payees. *S* did so but in such a way as to facilitate a forgery. After *K* had signed the cheques *S* increased the amounts to Rs. 9003/50 and Rs. 4000/85. He then opened an account with the Bank of Ceylon and paid these two cheques into that account having forged the endorsement of the payees. *K* brought an action against his own bank, the Mercantile Bank for the recovery of the amounts. The bank pleaded that *K* was in breach of his duty to them and relied on the *MacMillan* case. This contention was upheld by the Supreme Court.

31b. The English Act was then applicable to Singapore. This corresponds to section 82 of the Malayan Bills of Exchange Ordinance, 1949.

32. Section 82 of the Bills of Exchange Act, 1882, as it then stood is as follows: "Where a banker in good faith and without negligence receives payment for a customer of a *cheque* crossed generally or specially and the customer has no title, or a defective title to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.

33. [1954] 2 Q.B. 459.

34. *Ibid.,* p. 476.

35. (1958) 59 N.L.R. 188.

36. (1958) 59 N.L.R. 189.

K now turned, this time with success to the collecting bank, the Bank of Ceylon. The bank pleaded section 82 of the Ceylon Bills of Exchange Ordinance, 1927. The Supreme Court while holding that the bank was not negligent, yet held them liable in conversion on the ground that the instruments on which they received payment were not cheques by reason of the material alteration. In view of the conclusion reached in *Bank of Ceylon* v. *Kulatilleke,* the earlier decision in *Kulatilleke* v. *Mercantile Bank* was clearly wrong. An instrument which is not a cheque for the purpose of section 82 cannot be so for any other purpose under the Ordinance. The *MacMillan* case did not cover the facts of *Kulatilleke* v. *Mercantile Bank,* and was inapplicable. The drawee bank having paid "cheques" on which the endorsements were forged must necessarily rely on sections 60 and 80 of the Bills of Exchange Ordinance. This they could not do if the instruments were not cheques. These two decisions bring to light a further point. A customer of a bank who negligently issues his mandate may not be able to recover the amount from his own bank with whom he is in privity of contract. But if the cheque has been collected by another bank as it must be if it is crossed, then, the drawer can successfully bring an action in conversion against the latter. If the decision in *Kulatilleke* v. *Bank of Ceylon* is right, as it is submitted it is, then, a collecting banker is in a vulnerable position.

An amendment is therefore clearly called for to section 82 of the Malayan Bills of Exchange Ordinance, 1949, that a cheque which begins its valid career as a cheque under the hand of the drawer ought to be deemed to be a document issued by a customer of a banker for the purposes of that section notwithstanding any subsequent material alterations.

(c) *Banker's liability where he pays a cheque contrary to its crossing*

Again a banker may violate his customer's mandate where he pays contrary to its crossing; where a customer issues a crossed cheque he clearly gives a direction to his banker that the cheque ought not to be paid unless presented by another banker. Failure to comply with such a direction may render the banker liable in damages to the true owner. Section 79(2) of the Malayan Bills of Exchange Ordinance, 1949 enacts that where a banker on whom a cheque is drawn, pays it contrary to the crossing, he is liable to the true owner of the cheque, for any loss, the latter may sustain.

There is a dearth of authority on this matter. An examination of the law reports in the Commonwealth reveals only two reported decisions. The first is the English case of *Smith* v. *Union Bank of London*[37] where a debtor drew a cheque in favour of his creditor. The latter endorsed it and crossed it with the name of his bankers, the London and County Banking Co. The cheque was then stolen and eventually transferred to *C* who gave value for it in good faith. He paid it into his account at the London and Westminster Bank, and they presented it to the drawee bank who paid it. The payee, who claimed to be still the true owner of the instrument, brought an action against the paying

37. (1875) 1 Q.B.D. 31.

banker for conversion. The Court of Appeal held that the plaintiff's action must fail on the ground that he was no longer the true owner of the cheque.

Suppose however that *A* draws a cheque on the *X* bank in favour of *B* and crosses it generally. A thief steals the cheque from *B,* forges *B's* signature on the back and negotiates it to *C,* who takes it in good faith and for value; *C* presents the cheque for payment over the counter at the *X* bank and is paid cash. The *X* bank will be liable to the true owner *B* since it should have paid the cheque only to a banker. This much is undisputed law. But is the result different, if in the above example the thief steals the cheque after *B* has endorsed it, purports to cancel the crossing thereon, forges the drawer's signature thereto, presents it to the drawee bank and obtains cash over the counter? It is stated in *Jacobs on Bills* that in these circumstances the drawee bank will be liable to pay the amount again to *B* because they paid it to someone other than a banker:[38]

> They will be liable to *B* because he is the true owner.

This question has not, as far as is ascertainable, been directly raised before an English court. It arose, however, in the Ceylon case of *Ratnam* v. *The Mercantile Bank of India Ltd.*[39] The plaintiff borrowed a sum of money from *T,* on the security of plaintiff's cheque dated 1st December, 1950, drawn on the defendant bank in favour of *T* or order. This cheque was crossed generally. The agreement between the plaintiff and *T* was that the cheque was not to be presented until a future date. Six months later, the plaintiff was in a position to repay the loan, but as the cheque in its original form might be rejected as "stale",[40] the plaintiff, at the request of *T,* the payee, altered the date 1.12.50 to 1.6.51 and placed his signature below the alteration. The payee then took back the cheque and shortly afterwards having endorsed it in blank, gave it to someone to be sent by post to the Bank of Ceylon, for the credit of his account with him. It was later discovered that the cheque had been paid across the counter on 4th June 1951, to a subsequent endorser signing himself as "W. D. Fernando". The cheque, at the time it was presented for payment, bore words cancelling the original crossing, and also purporting to contain immediately beneath those words the plaintiff's signature.

After some hesitation on the part of the drawer and payee as to who should bring the action against the drawee bank, the plaintiff did so.[41] The trial judge found as a fact that the plaintiff's alleged signature to the alteration of the crossing was a forgery, and gave judgment for the plaintiff on the ground that the plaintiff's debt to the payee had revived by reason of the bank making payment at it did. The defendant bank appealed to the Supreme Court which reversed the order of the Lower

38. (4th ed.), p. 239.

39. (1956-57) N.L.R. 193.

40. In Ceylon a cheque which has been in circulation for six months is referred back to the drawer with the remark "Cheque stale".

41. In the opinion of the Supreme Court, the choice of plaintiff was immaterial for the result would have been the same. Gratiaen J. at p. 194.

Court and held the bank not liable. It is submitted respectfully that the appeal court's decision was erroneous.

At common law, the drawee banker would have been unable to debit the customer's account for at least two reasons. First, on the doctrine of the mandate, secondly, on the ground of the bank's negligence. "The cheque regarded as an order from the customer to the banker in relation to the repayment of the debt or part of it is in law a mandate." [42] At common law, therefore, a banker who pays a cheque crossed generally otherwise than to a banker, disobeys the customer's mandate and hence is liable to him.[43] Paget says that the more potent reason why a banker would be unable to debit his customer's account in such a situation is:[44]

> that payment in contravention of the crossing, in disobedience to the customer's mandate is an unauthorised payment with which the banker cannot debit the customer. This mandate of the customer appears independent of any prohibition in the Act.

Secondly, the banker would be deemed to have been negligent if he made payment on a crossed cheque otherwise than to a banker. In *Bellamy* v. *Majoribanks,* Baron Parke observed:[45]

> We think that the crossing of a cheque is a protection and safeguard to the owner of the cheque and that in the event of a banker paying a crossed cheque otherwise than through a banker, the circumstances of his so doing would be strong evidence of his negligence in an action against him. No prudent banker would pay a crossed cheque otherwise than to a banker.

Again,

> If the banker disregarded the custom and paid the cheque to a private individual, that circumstance would be strong evidence against him in the event of his seeking to charge the customer with the payment if the person actually presenting it was not the lawful holder and bearer of the cheque.

It is submitted therefore that at common law, on the above facts, the banker would have been unable to debit the customer's account. How has this position been altered by the Malayan Bills of Exchange Ordinance, 1949? Tha main provisions are sections 60, 80 and 79(2). In the first place, the Ordinance has done nothing to undermine the doctrine of the mandate. This appears independent of any direct prohibition in the Ordinance.[46] On the question of negligence, section 60 will not avail the banker because payment of a cheque crossed generally otherwise than to a banker would certainly not be payment in the ordinary course of business.[47] Similarly, his position will remain the same under section

42. Lord Chorley, "Cheque as Mandate and Negotiable Instrument". *Journal of the Institute of Bankers,* 1939, vol. IX, p. 391.

43. Lord Cairns in *Smith* v. *Union Bank, ante,* at p. 39 said, "Further the drawers might refuse to be debited with it as having been paid contrary to the mandate."

44. *Law of Banking,* (5th ed.), p. 214.

45. 7 Exch. at p. 404.

46. Paget, *op. cit.,* p. 214.

47. Lord Chorley says "it is equally clear that any payment in contravention of a crossing, or of the prohibition of double crossings contained in section 79(1) of the statute would equally forfeit the protection of the section." i.e. section 60. *Law of Banking* (3rd ed.) p. 92.

80; to obtain the protection of this section, the banker must show that he acted without negligence. This he will be unable to do,[48] at any rate today, particularly in view of the resolution of the London Clearing Banks' Association that payment on a cheque on which the crossing has opened must be "made only to the drawer or to his known agent."[49]

It remains to consider section 79(2). This provides that a banker paying a cheque in contravention of the crossing is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. The crux of the matter here is the meaning of the words "true owner". We can conveniently consider section 79(2) in the light of the reasoning of the Supreme Court of Ceylon. Before doing so, however, it is desirable also to mention the relevant cases in this connection. In *Bobbet* v. *Pinkett,*[50] the plaintiff drew a cheque on his bankers, M. and Co., payable to order, crossed it "L and C bank" and sent it for value to the payee, from whom it was stolen, and his endorsement was forged. It was ultimately passed to the defendant who took it bona fide in ignorance of the forgery. The defendant gave it to his country bankers and their London agents the L and J bank, presented and received payment for it from M and Co., who either did not perceive or disregarded the crossing "L and C Bank".

It was held that the cheque was paid by M and Co. improperly and without authority, because they had paid it to the wrong bankers, that the plaintiff could maintain an action against the defendant who had acquired no title to the cheque.[51]

The other case is *Smith* v. *Union Bank of London*[52] where the debtor drew a cheque in favour of his creditor, who endorsed it and crossed it with the name of his bankers, the London and County Banking Co. The cheque was then stolen and eventually transferred to *C* who gave value for it in good faith. He paid it into his account at the London and Westminster Bank, and they presented it to the drawee bank who paid it. The payee, who claimed to be still the true owner of the instrument, brought an action against the paying banker for conversion. The Court of Appeal held that the plaintiff's action must fail on the ground that he was no longer the true owner of the cheque.

We can now examine the reasoning of the Supreme Court of Ceylon in *Ratnam* v. *The Mercantile Bank of India Ltd.*[53] It must be noted that the trial judge found as a fact that the plaintiff's signature to the alteration of the crossing was a forgery. The appeal court did not

48. Dr. Holden takes this view in (1958) 15 *M.L.R.* 38 note 21.

49. This ruling is followed in Malaysia and Singapore as well.

50. (1876) i. Exch. D. 368.

51. Dr. Hart says "in such circumstances, since the act was passed (i.e. the 1882 Act) the payee as the true owner of the cheque would have a remedy against the bankers for the loss sustained by him owing to the cheque having been so paid". *Law of Banking* (4th ed., 1931) p. 439.

52. (1875) 1 Q.B.D. 31.

53. (1956-57) 57 N.L.R. 193.

question that finding. The result is that as the forged signature was by section 24 of the Ceylon Bills of Exchange Ordinance, 1927, wholly inoperative, the cheque remained crossed. This was clearly recognised by the Supreme Court. Gratiaen J., who delivered the judgment of the court said:[54]

> It may be assumed for the purposes of this appeal that when the cheque was presented for payment by 'W. D. Fernando' on 4th June 1951 the Bank realised (or should have realised) that it was still crossed generally and ought not to have been paid across the counter.

Gratiaen J. then went on to say:

> the question is, what legal consequences follow?

He answered it by saying:[55]

> 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 for which responsibility may fairly be imputed to the drawee.

Gratiaen J. then dealt with the two cases above referred to. He distinguished *Bobbett* v. *Pinkett*[56] on the ground that here the payee's endorsement was forged. He said:[57]

> In that state of things the drawer's original debt to the payee was revived because the payee had relied on the protection of the special crossing when he accepted the cheque as a discharge of the debt.

Why it may be asked was the position of the payee in the instant case different? By a parity of reasoning, he took the cheque relying on the protection of the general crossing. The learned judge then referred to *Smith* v. *Union Bank of London*[58] and said that payment there was made to the lawful holder.

Dr. Holden says that if the same facts as in *Smith's* case came up today, the decision would be the same.[59] Perfectly so, because the lawful holder who received payment there was a holder in due course. The original payee's position there was that he ceased to be the true owner because a holder in due course had acquired a better title. As Paget

54. (1956-57) 57 N.L.R. 193 at p. 194.

55. *Ibid.,* at p. 195.

56. (1876) 1 Ex. D. 368.

57. (1956-57) N.L.R. 193 at p. 195.

58. (1875) 1 Q.B.D. 31.

59. *History of Negotiable Instruments in English Law,* p. 236.

says, there cannot be two true owners of the same cheque at the same time.[60] The holder in due course must be deemed to be the true owner. The error which Gratiaen J. made, as will be shown below, was to equate holder with holder in due course. He cited *Baines* v. *The National Provincial Bank*[61] as tacitly recognising the principle that an unauthorised mode of payment of a crossed cheque did not automatically attach liability to the disobedient banker. With respect, that case is no authority for such a wide proposition. As Paget says:[62]

> Lord Hewart was there considering purely the question of time and did not refer to the fact that the cheque was crossed nor did the plaintiff raise the point.

Gratiaen J. then concluded as follows:[63]

> .... even upon the theory of a conditional payment the debt did not revive. .... Assuming that the cheque was accepted only as conditional payment of the original debt, the payee had endorsed it in blank and subsequently ceased to be its 'true holder' at the time when it was stolen. Accordingly, 'W. D. Fernando' who presented the cheque bearing the payee's genuine endorsement 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 .... was in no better position, after losing the cheque which he had endorsed in blank, than he would have been if he had lost a currency note which he had taken in satisfaction of the earlier debt.

Two consequences flow from this conclusion. First, it was uppermost in the judge's mind that acceptance of a cheque in satisfaction, provided there are sufficient funds to meet it, operates as a discharge of the debt. That however is not supported by authority and in any event such an idea is indeed irrelevant to the question of the drawee bank's liability under section 79(2). Indeed Paget says:[64]

> When the direct prohibition was in force, a creditor clearly only accepted a cheque in satisfaction on condition that if crossed, it was paid in accordance with the crossing, and it is submitted that notwithstanding the omission of the direct prohibition, the wording and obvious intention of the crossed cheques sections, and the invariable custom of bankers not knowingly to pay cheques contrary to the crossing, are insufficient to import the condition in every case in which a cheque is taken in payment.

Gratiaen J.'s second conclusion is a *non sequitur.* For the purpose of section 79(2) what matters is to determine the meaning of "true owner". *Smith* v. *Union Bank of London* was decided before the Bills of Exchange Act, 1882, was enacted. It is submitted however that what the court meant by "lawful holder" in that case was a holder in due course. Gratiaen J. said:[64a]

60. Paget *op. cit.*, p. 213.

61. (1922) 96 L.J.K.B. 801.

62. *Op. cit.*, p. 288.

63. (1956-57) 57 N.L.R. 193 at p. 196.

64. Paget, *op.cit.*, p. 214.

64a. (1956) 57 N.L.R. 193 atp. 196.

> Accordingly 'W. D. Fernando' who presented the cheque bearing the payee's genuine endorsement 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.

With respect, if 'W. D. Fernando' was the actual thief, he was no doubt the holder of the cheque at that point of time because any one in possession of a bill, thief or otherwise, is a holder, but he certainly was not a lawful holder. The point to note, however, is that at that point of time, the payee was the true owner of the cheque because he already was its lawful holder. Gratiaen J. said:[65]

> The circumstances that the crossed cheque was paid across the counter instead of through a bank did not divert the proceeds into wrong hands.

If 'W. D. Fernando' was the actual thief, it certainly diverted the proceeds into wrong hands. The finding of fact by the lower court, that the signature purporting to authenticate the alteration of the crossing was a forgery was not questioned by the Supreme Court. Indeed, Gratiaen J. observed:[66]

> It may be assumed for the purposes of this appeal that, when the cheque was presented for payment by 'W. D. Fernando' the Bank realised (or should have realised) that it was still crossed generally and ought not to have been paid across the counter.

It has been pointed out that if 'W. D. Fernando' was the thief, he was not a holder in due course. It is respectfully submitted that even if he were a *bona fide* holder for value with whom the thief negotiated the cheque, he was not a holder in due course because he did not take a bill regular and complete on the face of it within section 29 of the Bills of Exchange Ordinance, 1927. There is no direct English authority on the point, but in the case of *Estate Ismail* v. *Barclays Bank D.C. and* O.,[67] the Supreme Court of the Transvaal Provincial Division has held that a person who takes *bona fide* and for value a cheque which has on the face of it a material alteration is not a holder in due course.

In that case, the date of the cheque was altered and the court held that for that reason the holder was not a holder in due course. The alteration was not signed by the drawer, but from the reasoning of the court it is clear that even if the alteration had been signed by the drawer it would not have made any difference to the decision. This view is supported also by Paget.[68] The cheque the Supreme Court of Ceylon was dealing with in the *Ratnam* case had two material alterations, one the date and the other the crossing. By section 78 of the Ceylon Bills of Exchange Ordinanre, 1927, a crossing is a material part of the cheque, and it is not lawful for any person to obliterate, or except as authorised by the ordinance, add to or alter the crossing. Consequently, 'W. D. Fernando' was not in any event a holder in due course. The payee

65. (1956) 57 N.L.R. 193 at p. 196.

66. *Ibid.,* at p. 195.

67. *Ibid.*

68. *Op. cit.,* p. 282.

remained the true owner of the cheque. He suffered a loss and should have been able to recover it from the disobedient banker. It would seem from the judgment of the court that the result would not have been any different if the payee and not the drawer had brought the action. It is respectfully submitted that the conclusion reached by the Supreme Court that the bank was not liable is erroneous.

(a) *Paying banker's liability on a marked or certified cheque*

In Malaysia, Singapore, India and Ceylon, it is often sought to enhance the value of a cheque by having it marked or certified by the drawee bank. The customer draws a cheque and takes it to his banker who writes on the face or reverse of it, "good for payment", "payment guaranteed" or words to that effect. This statement or certification as it is called is signed by an official of the bank. The cheque is thereafter freely accepted by the public in the belief that it will be paid on presentation. The question has been raised, what liability does the drawee bank thereby incur? In England, it seems that the banker incurs no liability to the payee or holder of the cheque by reason only of marking it.[69]

It would appear, however, that in England the practice of marking cheques had been in vogue during the early part of this century. It took one of two forms, one, between banker and banker for the purpose clearing, and second, at the instance of the customer or holder.

(i) *Marking for clearing purposes*

Cheques which are too late to catch the last clearing are presented to the drawee bank to be marked. The marking consists of a mere initial on the back of the cheque and amounts to a guarantee that the cheque will be paid if presented through the Town Clearing the next morning. Such marking is constructive payment and the drawer's account can be debited in due course, notwithstanding his decrease or countermand of payment meanwhile.

(ii) *Marking at the instance of the customer or holder*

Bankers were occasionally requested by the drawer of a cheque to mark or certify it as good for the amount, as, for example, when the customer desired to settle for the purchase of property or to pay customs duties. The practice was for customers to get their bankers to endorse the cheques with some such formula as: 'This cheque is good for £x.' What then is the legal significance of this marking?

With regard to this, Paget says:[70]

> It may be taken that the marking of a cheque at the instance of the customer does not, in this country, involve any direct or immediate liability on the part of the banker to the payee or any subsequent holder to the cheque. The marking does not possess the essential characteristics of an acceptance required by the Bills of Exchange Act.

69. Paget, *op. cit.,* p. 224.

70. *Op. cit.,* p. 224.

Similarly, Chalmers says:[71]

> It is clearly not an acceptance that the holder can take advantage of.

This practice of marking cheques was thought by bankers to be fraught with grave danger and as early as 1905, the Committee of London Clearing Bankers resolved:

> That this Committee strongly recommend the Clearing Bankers to discontinue the practice of marking or certifying at the request of a customer his cheques or drafts upon themselves and to adopt instead the practice of issuing to each customer in exchange for his cheque their own transfer cheque on the Bank of England. This resolution does not in any way affect the existing practice of marking after business hours cheques presented by another clearing bank.

In spite of this resolution, it appears that the practice of marking cheques was continued thereafter, so much so, the Committee of London Clearing Bankers again in 1920 further resolved that marking cheques for customers should be discontinued in favour of supplying them with a banker's draft.[72]

At the present time, the law on the matter of marking cheques, is the same in Malaysia and Singapore as in England. The question arose directly for consideration by the Judicial Committee of the Privy Council in two leading cases, one from Ceylon, *Adicappa Chettiar* v. *Thomas Cook & Son*[73] and the other from India, *Bank of Baroda* v. *Punjab National Bank*.[74] In the latter case the Privy Council were of the view that there could be an acceptance of a cheque only in very unusual and special circumstances, though they did not specify what these circumstances could be, while in the earlier Ceylon case they were emphatic that there could be an acceptance of a cheque; but in both cases they did hold that the certification as it appeared on the cheques under consideration did not amount in form to an acceptance within the meaning of the relevant statutes in these two countries. Lord Wright said:[75]

> It is not necessary categorically to hold that a cheque can never be accepted; it is enough to say that it is only done in very unusual and special circumstances. Their Lordships are of opinion that the certification which is relied on as constituting acceptance is not an acceptance within the meaning of the English or Indian Act or the common law.

It was unfortunate that the much older Ceylon case of *Adicappa*

71. *Bills of Exchange,* (12th ed.), p. 234.

72. See Gilbert Lectures 1949 by R. W. Jones, p. 48. This practice is now generally followed as the result of a decision of the Privy Council in the case mentioned in footnote 73 below. It would, however, appear that in England the practice of marking is resorted to even now in spite of the London Clearing Bankers' resolution. See *The History of Negotiable Instruments in English Law* by Dr. J. M. Holden, pp. 275-276.

73. (1932) 34 N.L.R. 443.

74. (1944) A.C. 176.

75. *Ibid.,* at p. 187.

Chettiar v. *Thomas Cook and Son Ltd.,*[76] also decided by the Privy Council, was not before their Lordships in the *Bank of Baroda* case. In that case Lord Atkin stated:[77]

> No doubt also a cheque may be accepted, however unusual such a transaction is.

The certification in this case took the following form:

> Payment of this cheque on March 6th guarantee, *per pro* Thomas Cook & Sons (Bankers) Ltd. John Davies, Manager.

The question thus turned on the crucial issue whether Davies had authority to accept a bill. The power of attorney given to Davies enabled him to "draw, endorse, negotiate, retire, pay or satisfy any bills of exchange." The word "accept" was omitted. Oddly enough, both parties contended that the certification by Davies on the cheques was an acceptance of them. The plaintiff sought to read the word 'accept' into clause 4 of the power of attorney, suggesting that it had been omitted by a typist's error, while the defendants sought to make the promise an acceptance in order to place it outside the authority of Davies, relying upon the omission of the word 'accept' in the power of attorney. The Supreme Court of Ceylon held that the effect of the certification was to constitute the cheques, bills of exchange under section 3(1) of the Bills of Exchange Act, 1882. In other words, the Supreme Court held that there was a valid acceptance of the cheques. Fischer C.J. said:[78]

> As to the effect of the endorsements, it would seem to be clear that the endorsements constituted acceptance of the bills of exchange and that the four cheques, from being merely cheques under section 73 of the Bills of Exchange Act, 1882, became bills of exchange under section 3(1) of the Act.

The Supreme Court, held, however, that Davies, the manager had no authority to accept bills and therefore the bank was not liable. The plaintiff appealed to the Judicial Committee of the Privy Council. As already pointed out their Lordships were in no doubt that a cheque like any other bill of exchange could be accepted, a point which, as we have seen was doubted by Lord Wright in the *Bank of Baroda* case. Accordingly in the Ceylon case the Privy Council were content to rest their decision on the lack of authority on the part of Davies to accept bills. This is clear from the following passage:[79]

> In their Lordships' opinion, this power of attorney should not be construed as giving Davies the power to sign otherwise than as drawer or acceptor or holder so as to cause the bank to incur the liabilities as endorsed under section 56 of the Bills of Exchange Act. It follows that Davies had no actual authority given him by the power of attorney to guarantee payment of these loans by Peiris. Their Lordships are also quite satisfied that his position in the bank was not such as to make it necessary to imply the power to enter into these transactions on the part of the bank. They appear on

76. (1930) 31 N.L.R. 385; (1932) 34 N.L.R. 443 on appeal to the Privy Council. This decision was not reported in Appeal Cases.

77. (1932) 34 N.L.R. 443 at p. 448.

78. (1930) 31 N.L.R. 385 at p. 390.

79. (1932) 34 N.L.R. 443 at p. 448.

> the evidence and according to ordinary banking usage to be quite outside a manager's general authority. This last contention would dispose of any question of ostensible authority; but as the plaintiff twice examined the power of attorney and plainly relied only on the evidence of actual authority, any reliance on ostensible authority was properly negatived in the Courts below and was not pressed before their Lordships.

It would seem therefore, that if Davies had authority to accept bills their Lordships would have been prepared to hold that there was a valid acceptance and that therefore the bank was liable in the Ceylon case. It is submitted with respect, that had this decision of the Privy Council been before their Lordships in the later case of the *Bank of Baroda,* the result may well have been different notwithstanding the fact that in the latter case the cheques were post-dated.

Notwithstanding the lack of authority on the part of a bank manager to accept a bill, much less a cheque, the question yet arises whether a banker may incur liability to a holder by reason of marking or certification either under statute or common law. Such an enquiry may proceed under the following heads.

(i) Is the banker liable to a holder by virtue of custom?

(ii) Alternatively, does the representation constitute an estoppel against the bank?

(iii) Does certification amount to a guarantee by the bank that the cheque will be paid on presentation? If so, is the banker liable on the guarantee?

(iv) Does the banker incur liability as an endorser to a holder in due course in terms of section 56 of the Malayan Bills of Exchange Ordinance, 1949, which enacts that "where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course?"

(v) If a banker erroneously or negligently certifies a cheque when there are no funds in the account of the drawer, may a holder who relies on the certification to his prejudice claim damages in tort?

(i) In *Bank of Baroda Ltd.* v. *Punjab National Bank,*[80] both the Privy Council and the High Court of India held that the evidence of custom adduced in the case was insufficient both in the number and quality of the witnesses and in the certainty and precision of the evidence given, to warrant a finding based on custom. It may well be that the practice of marking cheques, has been sufficiently established in Malaysia and Singapore as to enable the courts in these jurisdictions to recognise the existence of such a custom binding in law.[81]

80. (1944) A.C. 176.

81. See the recent decision (as yet unreported) in *Wah Tat Bank Ltd.* v. *Chan Cheng Kum* where the Federal Court of Appeal recognised a mercantile custom peculiar to Malaysia having the force of law. It held that mate's receipts were equivalent to bills of lading.

(ii) The Privy Council in the *Bank of Baroda* case also considered the question of estoppel but as the cheque there involved was post-dated, they held that that doctrine could not be founded, as that doctrine was limited to a representation relating to an existing fact. But even if the cheque is not post-dated, it is doubtful whether to-day the doctrine of estoppel could be invoked against a banker certifying a cheque as it is still controversial as to whether estoppel can be used as a sword.[82] As the banker will be the party sued in such circumstances, estoppel cannot be pleaded against him.

(iii) The form of the certification employed in the above two cases was held by the Privy Council to constitute a guarantee. Nevertheless a holder cannot enforce the guarantee for want of privity between him and the banker, but, privity apart, the guarantee will be unenforceable for want of consideration.

(iv) In *Adicappa Chettiar* v. *Thomas Cook and Son Ltd.,*[83] it was argued also that the certification amounted to an endorsement by the bank and that the bank was therefore liable under section 56 of the Ceylon Bills of Exchange Ordinance, 1927. But this claim was denied by the Privy Council on the ground that the bank's manager had no authority by the terms of his appointment to sign otherwise than as drawer or acceptor so as to cause the banker to incur the liabilities of an endorser to a holder in due course. But granted that the requisite authority exists, then no doubt a banker cannot avoid liability under this section.

(v) Again in view of the recent decision of the House of Lords in *Hedley Bryne & Co. Ltd.* v. *Heller & Partners Ltd.,*[84] it may well be that a banker who negligently certifies a cheque may become liable to a holder for value. It cannot, therefore, be asserted as has been done that marking or certification of a cheque is not without legal effect. It is to be hoped that this matter which is of particular interest in Malaysia and Singapore will soon be settled beyond doubt. In Singapore the occasions where marking or certification is resorted to are many. An importer who has to pay customs duty gets his cheque certified by his banker and is duly accepted by the authorities. The legal effect of such certification should not be in doubt.

M. J. L. RAJANAYAGAM*

82. See *Dillyn* v. *Llewelyn* (1862) 4 De G.F. &J. 517; *Combe* v. *Combe* (1951) 2 K.B. 215. See generally, L. A. Sheridan,, "Equitable Estoppel To-day" (1952) 15 *M.L.R.* 325; D. Jackson, "Estoppel as a Sword" (1965) 81 *L.Q.R.* 84, 223.

83. (1932) 34 N.L.R. 443.

84. (1964) A.C. 465.

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