BANKING AND BILLS OF EXCHANGE IN MALAYSIA AND SINGAPORE

The law relating to banking and bills of exchange in Malaysia and Singapore is basically the same as in England, other Commonwealth countries and the United States. By virtue of section 5 of the Civil Law Ordinance,[1] the law of England applies in the Republic of Singapore to all questions relating to banks and banking. In Malaysia, by section 5(1) of the Civil Law Ordinance[2] English law again applies to all questions or issues which arise with respect to banks and banking. With regard to bills of exchange, the matter is governed by the Bills of Exchange Ordinance[3] which with slight modifications reproduces the provisions of the English Bills of Exchange Act, 1882.[4] Further, section 96(2) of the ordinance enacts that "subject to the provisions of any written law for the time being in force, the rules of the common law of England, including the law merchant, shall, save in so far as they are inconsistent with the express provisions of this ordinance apply to bills of exchange, promissory notes, and cheques."[5] Though the law on the subject under consideration in both Singapore and Malaysia is substantially the same as the corresponding English law, yet a useful inquiry may be made on a number of problems. Matters which have arisen here have not been considered in England and *vice-versa.* Moreover,

1. Laws of the Colony of Singapore (1955), Cap. 24. In addition, the Bankers Books Evidence Ordinance (Cap. 5) which is the same as the corresponding English Act, 1879 and the relevant provisions of the Companies Act, No. 42 of 1967 apply to banks and banking.

2. F.M. Ordinance No. 5 of 1956. It is expressly provided in this section that English law so received is that which existed as at 7th April, 1956, the date of coming into force of the above Ordinance. On this matter generally, see Bartholomew, *The Commercial Law of Malaysia,* (1965). See also the Bankers' Books Evidence Ordinance No. 52 of 1949 and the Companies Ordinance No. 79 of 1965. Reference must also be made to the Banking Ordinances of the two territories, Ordinance No. 58 of 1958 (Malaysia) which applies in Singapore. This enactment is primarily intended to deal with the registration and control of banking operations and in particular to distinguish finance companies from banks. Otherwise this Ordinance leaves untouched the relationship of banker and customer.

3. P.M. Ordinance 75 of 1949 which incorporates all amendments and modifications in England and Malaysia up to 1st July, 1965. Accordingly, the provisions of the United Kingdom Cheques Act, 1957 are incorporated in the Ordinance in sections 82 and 83. This Ordinance has been extended to the States of Malacca and Penang, *vide* (F.M. Ordinance No. 30 of 1959) and also to the States of Sabah, Sarawak and the Republic of Singapore by the Modification of Laws (Bills of Exchange) (Extension) Order 1965 (L.N. 260 of 1965). This legislation is referred to in this article as the "Ordinance".

4. As amended by the Crossed Cheques Act, 1906, Bills of Exchange Act, 1882, Bills of Exchange (Amendment) Act, 1932, and the Cheques Act, 1957.

5. As to the scope of this provision with respect to the reception of English law thereunder, see Bartholomew, *op. cit.*, p. 57 *et seq.*

notwithstanding the close similarities between the English law and the local law, there are material differences in our law, especially with regard to the requirement of value and contractual capacity. "English decisions on the subject are not always a safe guide and there are many points on which there is no English authority or none that is clear and convincing." Negotiable instruments is a branch of law where Malaysian and Singapore lawyers may with advantage cast their nets wide in their search for persuasive authority in jurisdictions other than England where the common law prevails and whose bills of exchange legislation is based on the English Acts.[6]

(a) *Banker-Customer Relationship*

The precise legal definition of the term "banker" is of considerable importance for a number of reasons. A cheque can only be drawn on a banker. Payment on a crossed cheque may not be made by one banker except to another banker. Protection against loss for payment on cheques bearing forged endorsement is confined to a banker. Exemption from compliance with the provisions of various statutes is expressly made available only to a banker.[7] In short "bankers are a privileged class."[8] Yet it is regrettable that no clear statutory definition is available on the matter. Section 2 of the Ordinance reproducing verbatim section 2 of the English Act provides that " 'banker' includes a body of persons whether incorporated or not who carry on the business of banking." Nowhere else in the Ordinance is the term "business of banking" further elaborated. Accordingly the question, who is a banker becomes one of mixed law and fact.[9] The answer need not and indeed cannot consist of an all embracing definition, for that is impossible, because banks undertake a variety of functions such as advising on in-

6. Indeed in his introduction to his book *Bills of Exchange* (3rd ed.) p. xxxviii, Sir McKenzie Chalmers, who drafted the U.K. Bills of Exchange Act, 1882, which has been described as the best piece of codifying legislation, wrote: "In mercantile matters, when the law is uncertain, or authority wanting, there is an increasing tendency to refer to foreign codes and laws in order to see how other nations have solved the difficulty. This is especially the case as regards negotiable instruments, the most cosmopolitan of all contracts." See also Cowen, *Law of Negotiable Instruments in South Africa,* (4th ed.) p. 32.

7. Money Lenders Act (Singapore No. 58 of 1959; Malaysia No. 42 of 1951). Finance Companies Act (Singapore No. 43 of 1967). Companies Act (Singapore No. 42 of 1967; Malaysia No. 79 of 1965).

8. *Per* Lord Denning, M.R. in *United Dominions Trust Ltd.* v. *Kirkwood* [1966] 1 All E.R. 968 at p. 972. See his judgment which details the various privileges accorded to bankers; *ibid.* pp. 972-973.

9. In *Woods* v. *Martins Bank Ltd.* [1959] 1 Q.B. 55 at p. 70, Salmon J. said: "In my judgment the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact and, accordingly cannot be treated as if it were a matter of pure law." Lord Denning M.R. has observed "so one sees that Parliament has conferred many privileges on 'banks' and 'bankers', but it has never defined what is a 'bank' and who is a 'banker'. It has said many times that a banker is a person who carries on 'the business of banking', but it has never told us what is the business of banking. It has imposed penalties on persons who describe themselves as a 'bank' or 'bankers' when they are not, but it has never told us how to decide whether or not they are bankers." [1966] 1 All E.R. 968 at p. 974.

vestments, trustees, brokers, etc.[10] What has to be sought, therefore, is an essential minimum activity which in the eyes of the law constitutes a basic test for determining what is 'banking business.' In the leading case of *Commissioner of Income Tax, Colombo* v. *Bank of Chettinad*[11] the Judicial Committee of the Privy Council observed that "these words, 'banker' and 'banking business' 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 civilisation." [12] Their Lordships thought that a valuable guide was provided by s. 330 of the Ceylon Companies Ordinance[13] which defines a banking company 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." Rose J. in the Supreme Court of Ceylon was of the view that this definition merely crystallised what was already the legal conception of a bank in Ceylon [14] while the Judicial Committee of the Privy Council thought that it "in no way conflicted with the meaning attached to the word 'banking' in England in 1932." [15] Accordingly their Lordships formulated the test for determining whether a person or body of persons was engaged in the business of banking "to consist in the acceptance of deposits withdrawable by cheque, draft or order." This view has now found favour with the Court of Appeal in England in the most recent case of *Dominions Trust Ltd.* v. *Kirkwood,*[16] though Denning M.R. and Harman L.J. thought that in modern conditions, collection of cheques for a customer was also an additional requirement. On the other hand, no English case has so far held that acceptance of money on deposit account not subject to withdrawal by cheque makes the acceptor a bank.[17] An Irish case supports this proposition, where Fitzgibbon L.J. said: "If a banker's business was confined to honouring cheques on demand he could not make any profit at all; those who take on deposit account are just as much bankers as those who hold it on current account."[18] In the

10. In the Australian case of *Bank of N.S.W.* v. *The Commonwealth* (1948) 76 C.L.R. 1 at p. 334, Sir Owen Dixon observed: "To give an inclusive and exclusive definition of such a conception *(i.e.* business of banking) is almost impossible." Lord Chorley suggests that the object of the legislature was merely to make it clear that the Bills of Exchange Act, 1882 is concerned not only with individuals but also with firms and companies: *Law of Banking,* (5th ed.) p. 24.

11. [1948] A.C. 378.

12. *Ibid*., at p. 383. Similarly in *Bank of N.S.W.* v. *Commonwealth* (1948) 76 C.L.R. 1 at p. 334, Sir Owen Dixon, C.J. observed "that the theory and practice of banking differ from age to age and from country to country."

13. Legislative Enactments of Ceylon (1956), cap. 145.

14. (1946) 47 N.L.R. 25.

15. [1948] A.C. 378 at p. 383. In the most recent decision of the Court of Appeal on the matter, *United Dominions Trust Ltd.* v. *Kirkwood* [1966] 1 All E.R. 968 at p. 981, Harman L.J. expressed the view that the position was the same at the present time in England as in 1932.

16. [1966] 1 All E.R. 968.

17. Whatever authorities there are point the other way. See *Industrial Tribunals ex parte East Anglian Savings Bank* [1954] 2 All E.R. 730; *Knight and Searle* V. *Dove* [1964] 2 Q.B. 631. See post, note 22.

18. *In re Shields* (1901) 1 I.R. 172 at p. 198. The later Irish case of *Commercial Bank* v. *Hartigan* (1952) 86 Irish L.T. 109 supports this view.

Supreme Court of Ceylon, Rose J. referring to this case observed, "whatever may be the position under Irish law, it seems to me that that is too wide a conception of a bank according to the law of England and Ceylon."[19]

Similarly, in an early Australian case the majority of the High Court held that an institution which accepts money only on deposit account is a bank.[20] Isaacs J. said: "the essential characteristics of the business of banking may be described as the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon and the utilisation of the money so collected by lending it again in such sums as are required. These are the essential functions of a bank as an instrument of society."[21] While this definition may have been appropriate to the conditions of 1914, it is doubtful if it would be tenable at the present time. On the other hand, in two recent cases the South African Courts[22] have expressly held that the acceptance of deposits on savings account does not constitute an institution a bank nor the depositor a customer within the meaning of these terms in the South African Bills of Exchange legislation, which on the matter is the same as in England, Singapore and Malaysia. In the light of the authorities discussed above, we may define the business of banking as the acceptance of deposits on current account (not deposit account) withdrawable by cheque or order and the collection of cheques for customers.

Position in Malaysia and Singapore

The point has so far not arisen for decision here, but should the question arise, the position would appear to be more complicated.

19. (1947) 47 N.L.K. 25 at p. 27.

20. *Commissioners of the Savings Bank of Victoria* v. *Permewan Wright & Co. Ltd.* (1914) 19 C.L.R. 157.

21. *Ibid*., at p. 471. Referring to this passage Harman L.J. states: "This would suggest that the maintenance of deposit accounts is enough, and so it may perhaps be if by deposit accounts is meant the keeping of accounts in which money is deposited by the customer subject to withdrawal on the agreed notice, whether seven days or longer. This is in fact a form of current account." *United Dominions Trust Ltd.* v. *Kirkwood* [1966] 1 All E.R. 968 at p. 982. In the absence of any direct English authority on the matter these observations of His Lordship must be regarded as *obiter.*

22. *National Housing Commission* v. *Cape of Good Hope Savings Society* (1963) 1 S.A.L.R. 230(c); *Standard Bank of S.A.* v. *Minister for Bantu Education* (1966) 1 S.A.L.R. 229; in the latter case the Court stated: "a depositor who opens a savings bank account at his bank is not, opening and operating upon a bank account and the banker is not a banker for the purposes of the legislation under consideration in this case *(i.e.* Bills of Exchange Act, 34 of 1964 S.A.). *Ibid*., p. 232. *In Industrial Disputes Tribunal, ex parte East Anglian Savings Bank* (1954) 2 All E.R. 730, Goddard L.J. regarded the issue of cheque books as an essential attribute of the "business of banking." Accordingly, he held that a Trustee Savings Bank was not engaged in the "business of banking". Trustee Savings Banks in England are now governed by the Trustee Savings Bank Act, 1964, but yet do not qualify to be a bank for the purposes of the Bills of Exchange legislation. See *Knight & Searle* v. *Dove* [1964] 2 Q.B. 631; [1964] All E.R. 307. Similarly, Merchant Banks in England are not bankers within the Bills of Exchange legislation as they do not "open accounts for any member of the public who chooses to apply, and do not ordinarily issue cheque books to their 'customers'."

Malaysia and Singapore, alone in the Commonwealth, attempt a statutory definition of the term "banking business." The Banking Ordinances of both countries which are identical in terms provide in section 2(1) that " 'banking business' means the business of receciving money on current or deposit account, paying and collecting cheques drawn by or paid in by a customer, and making advances to customers." If it is meant by this provision that an institution must perform all these functions to qualify as a bank then no doubt it goes much further than the conception of a bank elsewhere in the Commonwealth.[23] No doubt banks nomally perform all these activities, but it is doubtful whether all of them must exist together. From a practical point of view, the difficulties inherent in defining "banking business" for the purposes of the Bills of Exchange legislation have, in part, been resolved in Malaysia and Singapore by section 3(1) of the banking ordinances which provide that "Banking business shall not be transacted in Singapore (and Malaysia) except by a company which is in possession of a licence in writing from the Minister authorising it to do so."[24] Nevertheless difficulties can and do arise.[25] One further observation may be made here wth regard to the effect of the Banking Ordinances. These enactments specifically exclude from their operation the Post Office Savings Bank. Accordingly the latter will clearly not be a bank within the Bills of Exchange Ordinance. The more important question, however, is whether a person who maintains only a deposit account (whether saving or fixed) in a licensed bank can become a customer within the meaning of that term in the Bills of Exchange Ordinance. This question was recently answered in the negative in South Africa [26] as well as in England [27] and it is submitted that the result will be the same here.[28] The reason is that the holder of a deposit account does not issue a cheque. Withdrawal can only be made by the depositor personally. He cannot order the banker to pay a third person. In most cases the withdrawal is also not on demand as some days' notice may be necessary. This is a point of considerable importance to bankers in view of section 82(c) of the Bills of Exchange Ordinance.[29]

23. This definition seems to have been borrowed from Hart, *Law of Banking,* (4th ed. 1931) p. 1, but it is submitted that it no longer represents either the law of England or any other part of the Commonwealth.
24. In *United Dominions Trust Ltd.* v. *Kirkwood* [1966] 1 All E.R. 968 the latest pronouncement on the subject by the Court of Appeal in England, Lord Denning M.R. suggested that difficulties in this regard could be overcome if the Board of Trade were to issue such a certificate. S. 127 of the Companies Act, 1967 now provides for this to be done.
25. *Bank of China* v. *Lee Kee Piu* (1961) M.L.J. 40 and *Bank of China* v. *Chew Kean Kor* (1963) M.L.J. 41. As pointed out in note 2, *ante,* the object of these enactments is to control the registration and operation of banks and to ensure the protection of depositors. The law of Banks and Banking is yet the English law by virtue of the Civil Law Ordinance (Singapore: Cap. 24), and F.M. Ordinance No. 5 of 1956, section 5 of which has not been displaced by the Banking Ordinances. See the remarks of Riley, *Bills of Exchange,* p. 26 on the similar provisions of the Australian Commonwealth Banking Act, 1959.
26. *Standard Bank of South Africa* v. *Minister for Bantu Education* (1966) 1 S.A.L.R. 229.
27. *Industrial Disputes Tribunal, ex parte East Anglian Savings Bank* [1954] 2 All E.R. 730.
28. For Malaysia: see Banking Ordinance, 1958 (No. 58 of 1958); Civil Law Ordinance, 1956 (No. 5 of 1956). For Singapore, see Civil Law Ordinance (cap. 24).
29. See *post,* at pp. 84 *et seq.*

(b) *Customer*

The meaning of the term customer is no less important. A banker owes the duty of secrecy only to his customer.[30] Statutory protection against the consequences of the tort of conversion is available to a banker only where he is shown to have received payment for a customer. While it is clear that the maintenance of a current deposit account withdrawable by cheque is essential to constitute a person a customer, opinions have differed as to whether such relationship ought to have continued for some length of time or whether a single transaction would suffice. These doubts have now been set at rest by the Judicial Committee of the Privy Council in the leading case of *Commissioners of Taxation* v. *English, Scottish and Australian Bank*[31] in these *terms*:[32]

> Their Lordships are of the opinion that the word 'customer' signifies a relationship in which duration is not of the essence. A person whose money has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitue and a newcomer, but between a person for whom the bank performs a casual service, such as for instance, cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank.

This question arose for consideration in the Malayan case of *Oriental Bank of Malaya* v. *Rubber Industry (Replanting) Board*[33] the facts of which were as follows: The Rubber Industry Board (the plaintiffs) drew a cheque for $14,730.89 in fovour of Kok Ann Rubber Estate, marked it 'Account Payee Only' and despatched it in the post to the payee. It was not received by the latter but by some means unknown the cheque came into the possession of one Lee Man Choi who went with it to the Kuala Lumpur office of the defendant bank and requested them to open an account for him. He produced his identity card and the duplicate original of a business registration form attested by a lawyer which described him as the sole proprietor of Kok Ann Estate.[34] An account was opened for him in the name of Kok Ann Estate and Lee Man Choi paid the above mentioned cheque as his first deposit. After it was realised he withdrew the proceeds and decamped. The plaintiffs now sued the defendants in conversion. Accordingly the first crucial question to be decided was whether Lee Man Choi was a customer of the defendant bank.

30. It is of interest to note that this common law duty of the banker is given express legislative sanction in Singapore and Malaysia. Section 22 of the Banking Ordinance, 1958, expressly provides that nothing therein shall authorise the Commissioner to enquire specifically into the affairs of any individual customer of a licensed bank.

31. [1920] A.C. 683. Though this is a decision of the Judicial Committee of the Privy Council, it correctly represents the English law on the matter.

32. *Ibid*., at p. 687.

33. (1957) M.L.J. 153.

34. As it transpired later, this form was not a copy of a certificate issued by the Registrar of Business Names, but merely an application for one. No blame, therefore, attaches to the lawyer who attested this document, for he merely acted on information furnished by the fraudulent applicant.

Buhagiar J. adopting the test propounded by the Privy Council[35] held that the plaintiffs were customers within the meaning of that term in s. 82 of the Ordinance. With respect, this decision is open to criticism. The banker customer relationship, whatever its other incidents may be, is basically one of contract at its inception. It is submitted that there was here no contract between the bank and Lee Man Choi, the agreement between them being vitiated by a fundamental mistake as to identity. This is one of those types of contract where identity of the prospective customer is of the utmost relevance. It is for this reason that bankers insist on satisfactory references as to the identity of a prospective applicant before he is accepted as a customer. In the present case the bank were intending to deal not with the person physically present before them, but with Lee Man Choi, sole proprietor of Ann Kok Estate. Indeed this was vital to the bank in the instant case for otherwise they could not have collected a cheque marked 'account payee' to any one else. It is respectfully submitted therefore, that Buhagiar J.'s decision on this point is unsound.[36]

(c) *Customer's Duty of Care*

We have already seen that withdrawal of money by means of a cheque is an essential attribute of the business of banking. A cheque is in law a mandate and the banker disobeys it at his peril. Yet a customer in issuing this mandate owes a duty to his banker to take care not to leave blank spaces such as would enable a forger to raise the amount. That, this is so, is now settled by the decision of the House of Lords in the leading case of *London Joint Stock Bank* v. *McMillan and Arthur*[37] disapproving of the earlier Privy Council decision to the contrary in *Colonial Bank of Australasia Ltd.* v. *Marshall.*[38] Lord Finlay, in the *McMillan* case expressed himself in the following terms:[39]

35. Commissioners *of Taxation* v. *English, Scottish and Australian Bank* [1920] A.C. 683.

36. For the same reason, the same judge's decision in *Rubber (Industry) Replanting Board* v. *Hongkong and Shanghai Banking Corporation* (1957) M.L.J. 103 cannot be supported. *Ladbroke* v. *Todd* (1913) 30 T.R.L. 433 must be considered as having been wrongly decided. See *Ingram* v. *Little* [1961] 1 Q.B. 31. *Barclays Bank Ltd.* v. *Okenarke* (1966) 2 Lloyds Rep. 87. In *Robinson* v. *Midland Bank Ltd.* (1925) 41 T.L.R. 402, the court held "where a person opens an account in the name of another person without authority so to do, it is quite plain that there is no relation of banker and customer." This particular passage was expressly approved in the latest decision of the Court of Appeal in England in *Stoney Stanton Supplies* v. *Midland Bank Ltd.* (1966) 2 Lloyds Rep. 373 at p. 384 where Lord Denning M.R. observed: "as far as the opening of the account was concerned, it was not taken by the company but by Fox, who forged all the documents. The company did not authorise it at all. It *is* quite impossible to hold that there was any relationship of banker and customer."

37. [1918] A.C. 777.

38. [1906] A.C. 559. Commonwealth Courts have followed the decision in *London and Joint Stock Bank* v. *McMillan & Arthur* in preference to the *Colonial Bank of Australasia Ltd.* case. Canada — *Will* v. *Bank of Montreal* (1931) 3 D.L.R. 526. Ceylon — *Kulatilleke* v. *Mercantile Bank Ltd.* (1957) 59 N.L.R. 187. South Africa — *Union Govt.* v. *National Bank* (1921) A.D. 121. Singapore — *Barbour Ltd.* v. *Ho Hong Bank Ltd.* (1929) S.S.L.R. 116 C.A. The position in Australia seems to be doubtful. The decision in *Colonial Bank of Australasia Ltd.* v. *Marshall* being a decision of the Privy Council on appeal from Australia may well be regarded as binding on Australian Courts. If so, the position would be most unsatisfactory.

39. [1918] A.C. 777 at p. 779.

> A cheque drawn by the customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care to prevent the banker being misled. If he draws a cheque in a manner which facilitates fraud, he is guilty of a breach of duty between himself and the banker and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty.

Whether there has been such negligence on the part of the customer is in each case a question of fact, and one not always free from difficulty. In the Singapore case of *Barbour Ltd.* v. *Ho Hong Bank* Ltd.[40] two out of four judges who heard the case thought that the customer was not at fault.[41] In that case a cheque payable to a named payee for $2,250/- had been fraudulently increased to $12,250/- and payment obtained over the counter, a few days later. *London Joint Stock Bank* v. *McMillan*[42] being a decision of the House of Lords is no doubt an authority for the proposition it lays down, but the case leaves unanswered a number of problems which have not so far been explored in England. For example, what is the position, if notwithstanding the initial negligence of the customer, the loss could have been prevented but for the subsequent negligence of the bank? Murison C.J. was the first to advert to this question in the *Barbour* case, though on the facts before him he held that no negligence could be attributed to the bank. It is pertinent to speculate what the result would have been had he found that the bank was in fact negligent. The loss must then surely fall on the bank, but can the latter claim to apportion the loss under the Contributory Negligence and Personal Injuries Ordinance?[43] It is submitted that he cannot. In the first place the customer will be suing not for damages, but for a declaration that the banker ought not to debit his account with the raised amount while the banker will be claiming compensation. Apart from the form of the action, the claim being a contractual one, apportionment of damages is it would seem not possible as the Contributory Negligence Act 1945 was not intended to apply to contractual claims. In *Ingram* v. *Little,*[44] Devlin L.J. called for legislation to enable the defence of contributory negligence to prevail in contractual actions.[45] If this view is correct as it is thought it is, then a suitable amendment would be required.[46] Again the *McMillan* case is totally inapplicable to a situation such as that which arose in *First National City Bank* v. *Ho Hong Bank*[47] where a

40. (1929) S.S.L.R. 116.

41. Murison C.J. the trial judge, and Burton J. in the Court of Appeal.

42. [1918] A.C. 777.

43. Laws of the Colony of Singapore (1955), cap. 25, s. 3; Malay Civil Law Ordinance, 1956, s. 12; U.K.: Law Reform (Contribuory Negligence; Act 1945.

44. [1961] Q.B. 32.

45. *Ibid*., at pp. 73-74 where His Lordship did not appear to contemplate that the English Law Reform (Contributory Negligence) Act was capable of application to actions framed in contract.

46. For the position in the United States, see *Ruter* v. *Western State Bank of St. Paul* (1935) 42 A.L.R. 22, 1064 and cases cited in *American Jurisprudence,* (2nd ed.) X (1963) s.v. 'Banks' s. 617. See also the recent South African case of *Barclays Bank Ltd.* v. *Straw* (1965) (2) S.A. 93.

47. (1932) 1 M.L.J. 64. See (1967) *M.L.R.* 325 for a detailed discussion of this case.

cheque for $100/- drawn by Drew and Napier (a firm of solicitors) in favour of a named payee or order was raised to $9,000/- and in that condition was paid by the drawee bank, the endorsement of the payee being forged. In such a situation the *McMillan* case is of no avail to the drawee bank. Notwithstanding the negligence of the customer in drawing the cheque in such a way as to facilitate forgery, the banker is in breach of the mandate in so far as he paid the wrong person. His only defence would be to plead section 82 of the Ordinance which provides protection to a bank paying a cheque on which the endorsement of the payee is a forgery. This defence must necessarily fail because by section 64 of the Ordinance a cheque which is materially altered is no longer a cheque.[48] Such a situation arose in the Ceylon case of *Kulatilleke* v. *Mercantile Bank*[49] but this point was not considered as the drawer succeeded against the collecting bank, in conversion. It may here be pointed out that there is some ambiguity with regard to the language of section 64 of the Ordinance. That section while enacting that a material alteration such as the raising of the sum payable renders the bill void goes on to say that "provided the alteration is not apparent, and if the bill comes into the hands of a holder in due course, the latter may enforce it according to its original tenor." This provision is somewhat difficult to understand, for how can a holder of a document which is not a *bill* be a holder in due course? Section 29 of the Ordinance which defines a holder in due course states that such a holder is one who has taken a *bill.* This is an essential requisite. An altered cheque is not a bill, it is a worthless document. Devlin L.J. categorically said that "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." [50] The question has not directly been raised in any English case, but it is submitted that when section 64 was enacted its full implications were not foreseen. To put the matter beyond doubt, an amendment ought to be made to section 64 by providing that an instrument which begins its career as a valid bill should be regarded as valid for the purposes of sections 29, 60, 80 and 83 of the Ordinance. Otherwise, serious harm will be done to commerce.

(d) *Effect of War on Banker-Customer Relationship*

The effect of war on the banker-customer relationship received full and detailed consideration by the Federal Court of Appeal in *Chartered Bank* v. *Public Trustee* [51] the facts of which were as follows: When war broke out with Japan on December 8, 1941, the amount standing to the credit of Yokohama Specie Bank on current account with the Singapore office of the defendant bank was $3,652,124/-. On December 12, 1941, a restriction order was made appointing the custodian to be the controller

48. See the observations of Devlin L.J. in *Chao* v. *British Traders and Shippers Ltd.* [1954] 2 Q.B. 459 at p. 476.

49. (1957) 59 N.L.R. 187.

50. *Chao* v. *British Traders and Shippers Ltd.* [1954] 2 Q.B. 459 at p. 476. See also *Kulatilleke* v. *Bank of Ceylon* (1957) 59 N.L.R. 189.

51. (1957) M.L.J. 211.

of the Yokohama Specie Bank with all the powers of liquidator. On February 6, 1942, before the fall of Singapore the latter transferred a sum of $3,003,351/- to London leaving a balance of $789,495/- in the account. On September 7, 1951, a General Vesting Order was made vesting in the custodian the beneficial interest in any property (of enemy subjects) held on their behalf. The Public Trustee in his capacity as custodian claimed the sum of $789,498/- from the defendants. The latter alleged that they had suffered heavy losses by the winding up of their Hong Kong, Kuching and Penang branches by the Japanese custodian of enemy property during the war which losses amounted to well over the sum of $789,498/- which they claimed to set off against this amount and counterclaimed for the balance. Before discussing the decision of the Federal Court of Appeal in this case, it may as well be desirable to refer to the earlier English case of *Arab Bank* v. *Barclays Bank D.C. & O* [52] which received the close attention of the House of Lords on this point. Arab Bank had an account with the Jerusalem branch of the Barclays Bank the balance in credit being $582,931/- on the date the British mandate in Palestine ended. The new state of Israel vested in a custodian all absentee property, and Barclays Bank in due course paid the amount in question to the custodian, the Arab Bank being deemed to be absentees, by the removal of their office to Amman. They now sued Barclays Bank in London claiming the return of this amount. The House of Lords after a detailed analysis of the position of a banker and his enemy customer on the outbreak of hostilities in an unanimous decision laid down the following propositions as representing the common law on the matter.[53]

(a) The contract of current account was frustrated by the outbreak of war.

(b) But at that moment the customer had an accrued right to the credit balance.

(c) The enforcement of that right was not destroyed but survived the war.

(d) That right was situate in the state of Israel, where the account was kept.

Their Lordships were of the opinion that this common law position had been modified by Israeli legislation which vested the property in the custodian. Barclays Bank therefore acted lawfully in paying over the money to the custodian at his request and accordingly they were not liable to the Arab Bank. In *Chartered Bank* v. *Public Trustee* Whyatt C.J. adopted the common law position as enunciated by the House of Lords and also held that as in Israel, in Singapore too the property of the Yokohama Specie Bank was vested in the custodian. The latter was, therefore, entitled to succeed in his action unless the defendants could establish their right of set off and counterclaim. To do this they had to prove two further matters. (1) That the Yokohama Specie Bank was indebted to them in a large liquidated amount; (2) That when the chose of action passed to the custodian, he received it subject to this indebtedness. This

52. [1954] A.C. 495.

53. *Ibid.*, at p. 529, *per* Morton of Henryton.

they attempted to establish by alleging that the debt which vested in the custodian was in fact an assignment and accordingly the custodian took the assignment subject to equities. Construing the statutory provisions, the court rejected this argument. Whyatt C.J. said, "In my opinion the question whether the chose in action vested in the custodian subject to a right of set off depends not upon the principles applicable to assignment, but upon the provisions of the war-time legislation by which the vesting was effected. An examination of the relevant statutory provisions shows that they did not attach any condition to the vesting of this chose in in action."[54]

The *Arab Bank* case did not involve any claim of set-off. It is submitted, however, that had the action been brought by the Yokohama Specie Bank itself before the date of the vesting order, *i.e.* September 8, 1951, they would have been entitled to recover not merely the balance of $789,498/- but the full amount which stood to their credit at the date of the outbreak of war namely $3,652,124/-. The defence of set off and counterclaim would have equally failed. For such defence to prevail there ought to be a mutuality between the debt claimed and the cross-claim of the defendant and such mutual debts must be due to and from the parties in the same right. The Yokohama Specie Bank was not to be affected by anything done by the Japanese custodian of enemy property acting under Japanese war time law. The whole subject of set off between banker and customer is discussed in the next section.

(e) *Banker's Right to Combine Customer's Accounts*

A customer of a bank may have more than one account either with the same branch or with different branches of the same bank. In law a bank's branches together with its head office constitute one single legal entity. Where a customer has two accounts with a bank, one may be in credit, the other in debit. The question arises, in what circumstance is it possible for two or more accounts to be combined or blended by a bank, or for a debt owed to the bank through operations at one of its branches to be combined with a credit owed by the bank at another of its branches? This question arose in the local case of *Re Firm of T.S.N.*[55] The position in English law may be summarised as follows in the light of existing authorities: [56]

1. The general principle is that where a customer has two running accounts at each of two branches of a bank, the bank is entitled to combine the two accounts.

2. In certain circumstances a bank may be obliged to combine the two accounts. For example if a customer has a current account which is in credit and a loan account which is in debit, and if the loan account is backed by securities, the customer goes bankrupt, the banker must combine the two accounts and realise the securities only to the extent of the

54. (1957) M.L.J. 211 at p. 215.

55. (1935) M.L.J. 139; (1935) S.S.L.R. 128.

56. *Garnett* v. *M'Kewan* (1872) L.R. Eq. 10, approved by the Privy Council in *Prince* v. *Oriental Bank Corporation* (1878) 3 App. Cas. 325.

difference. Otherwise the unsecured creditors of the bankrupt customer would be prejudiced.

To the rules so formulated there are well recognised exceptions. These are:—

1. A banker has no right to combine two accounts maintained by a customer in different capacities, for example, one a personal account and the other a trust account.[57]

2. Where there is an agreement express or implied that the two accounts must be kept separate.[58]

3. Where one account is a current account and the other a loan account, the banker cannot combine the two accounts so as to set off the credit balance in the current account in satisfaction of the loan account, without giving reasonable notice to the customer. Otherwise the banker would be liable to the customer in damages for the wrongful dishonour of his cheques.[59]

4. Where a customer maintains two accounts A and B and issues a cheque for an amount larger than the balance in account A but less than the combined balance in accounts A and B, the banker cannot without instructions from the customer combine the two accounts.[60]

In *Re Firm of T.S.N.* a customer of the Chartered Bank had accounts with the bank's branches in Penang, Medan and Rangoon, all of which were pverdrawn.Valuable securities, title deeds were from time to time deposited by the customer with the bank's Penang branch, though, no documents of hypothecation were granted to secure these overdrafts or any other future liabilities. The customers became bankrupt and the Penang branch of the Chartered Bank realised part of the said securities in satisfaction in full of their own indebtedness and partly of that of their Medan office. The Official Assignee claimed to redeem the remaining securities on payment of the balance due to the Medan branch. The Bank claimed the right to combine all three accounts above referred to, and hold these securities in payment of the overdraft due to their Rangoon branch. The Court upheld their claim on the grounds that (a) in the absence of an express or implied contract to the contrary (and there was none in the present case) the bank had a general lien over the securities deposited with them, (b) the bank had the right to combine all three accounts of their customer. In support of proposition (a) the court relied on the English case of *Garnett* v. *M'Kewan*[61] while with respect to (b) the decision was based on *Brandao* v. *Barnett.*[62] Neither of these conclusions would appear to be sound. A banker's lien is pecu-

57. *Mutton* v. *Peat* [1900] 2 Ch. 79; *Garnett* v. *M'Kewan* (1872) L.R.8 Eq. 10.

58. *Greenhalgh & Sons* v. *Union Bank of Manchester* [1924] 2 K.B. 153.

59. *Buckingham Co.* v. *London and Midland Bank Ltd.* (1895) 12 T.L.R. 70.

60. *Garnett* v. *M'Kewan* (1872) L.R. Eq. 10.

61. *Ibid.*

62. (1846) C.&S. 193.

liar in that it confers not merely the right to retain possession but carries with it also the valuable right of sale and recoupment. Accordingly the nature of the security on which such lien could be exercised is of importance. *Garnett* v. *M'Kewan* did not decide that the lien is available against title deeds to immovable property. Where such property is given to a banker as a security for an advance, it will be in the nature either of a legal or an equitable mortgage, neither of which is compatible with a lien. As Paget observes, "normally, deeds of property come into the banker's possession either when handed over as security or with the request that they be held for safe custody. Thus they cannot ordinarily be the subject of lien." [63] Furthermore, the Civil Law Ordinances of both Malaysia and Singapore which import the English Law of banks and banking expressly provide that nothing therein shall be taken to introduce the law of England with regard to any right or interest relating to any immovable property. As regards (b) no English case and for that matter no authority elsewhere has gone to the extent of holding that a bank has the right to combine the accounts of a customer maintained in two different jurisdictions. It is, therefore, of interest to note that in Malaysia and Singapore that is simply not possible, for the Banking Ordinance, provides that all the offices and branches in Singapore of a licensed bank shall be deemed to be one bank (s. 2). The provisions of (s. 2) of the Malaysian Ordinance is in the same terms. Accordingly, the question would be whether the Head Office or other office of a licensed bank in Singapore and a branch office in Kuala Lumpur could be regarded as one bank for the purpose of exercising the right to combine the accounts of a customer maintained in these two offices and *vice versa* in Malaysia. The answer would seem to be in the negative.

(f) *Banker as Holder for Value in Due Course*

It is often of considerable importance to determine whether a banker to whom cheques are deposited by his customer is a holder for value or a mere agent for collection. If it is the former his rights depend on his status as a holder for value under the negotiable instruments law. If the latter then he is a mere conduit pipe and will be liable in conversion to the true owner if his customer had a defective title to such cheques, unless of course he can bring himself within the protection of section 82 (c) of the Ordinance. A banker may be a holder for value in a variety of circumstances, for example, where a customer pays a cheque specifically in reduction of his overdraft or loan account. Again where a banker discounts for someone a cheque drawn on another bank. In each of these cases the banker is a holder for value and the payment he receives subsequently on the cheques is for himself in his own right. Whether a banker is a holder in due course or not is in each case a question of fact and often the matter is not free from difficulty. The point arose for consideration in two local cases, *Bank of China* v. *Synn Lee Co.* Ltd.[64] and *Chartered Bank* v. *Yeoh Bok Han.*[65] In the former case two cheques on the Overseas Chinese Banking Corpn. (Taiping Branch) for $17,000/- and $14,840/- respectively were issued by the defendants, *Synn Lee Co. Ltd.* in favour of *Heng Moh & Co.* customers of the plaintiff bank. Upon

63. *Law of Banking,* (7th ed.) p. 484.

64. (1962) M.L.J. 395.

65. [1965] 2 M.L.J. 125.

dishonour of the cheques the plaintiffs sued the drawer *(Heng Moh & Co.* having in the meantime become bankrupt) for the recovery of the amounts represented by the two cheques claiming to be holders for value in due course. Hepworth J. expressed himself in the following terms. "A banker who is asked by a customer to collect a crossed cheque and who pursuant to a contract so to do credits the customer forthwith with the amount of the cheque before the amount has been received, in fact receives the sum for himself and not for the customer. This is so because, by crediting the customer with the money before receiving it, the banker has become a holder for value." [66] In support of this proposition His Lordship relied on the decision of the House of Lords in *Capital and Counties Bank Ltd.* v. *Gordon.*[67] In doing so, however, the learned judge overlooked the fact that that case was wrongly decided and as a result of anxiety expressed by the banking community, the legislature in England passed an amending act,[68] remedying the mischief caused by the decision in that case. In order to constitute a banker a holder for value there should be an agreement, express or implied that the customer could draw cash against the cheque before clearance. Hepworth J. recognised this fact and held on the evidence of three officials of the bank that there was in fact such an agreement in the present case and citing the decision of the Court of Appeal in England in *Underwood (A.L.) Ltd.* v. *Barclays Bank*[69] he held that the plaintiff bank were holders for value in due course and entitled to succeed in the action. With respect, His Lordship was again in error in arriving at this conclusion. An agreement such as was found to exist in the present case by itself is not sufficient to constitute a banker a holder in due course. What is more important is that in pursuance of such an agreement the customer should actually draw cash or his cheques honoured before the actual receipt of the money by the bank. Otherwise the banker does not give value and therefore is not a holder in due course within the meaning of s. 29 of the Bills of Exchange Ordinance *e.g.* a customer may have an overdraft account with his bank and may pay in cheques for the credit of that account. The mere existence of such an overdraft does not render the banker a holder for value for such a cheque much less a holder in due course. The most that can be said is that the banker has a lien on that cheque.[70] On the facts of this case it seems clear that *Heng Moh & Co.* did not in fact draw any cash

66. (1962) M.L.J. 91. [1965] M.L.J. 125. It must be pointed out that in Malaysia and Singapore as in England, it is the practice of bankers to credit as cash cheques paid in by a customer before actual clearance. It must be noted however that this fact by itself does not constitute the Banker a holder for value. For English cases on the matter see *National Bank* v. *Silke* [1891] 1 Q.B. 435 and *Royal Bank of Scotland* v. *Tottenham* [1894] 2 Q.B. 715.

67. [1903] A.C. 240.

68. Bills of Exchange (Crossed Cheques) Act, 1906. This provision is now embodied in s. 82c.(1) of the Malaysian Bills of Exchange Ordinance which reads: "Where a Banker having credited a customer's account with the amount of a cheque nevertheless receives payment for it as agent for collection and is not a holder for value himself."

69. [1924] 1 K.B. 775.

70. See *Clarke* v. *London & County Banking Co.* [1897] 1 Q.B. 552. See also on this point s. 82A of the Bills of Exchange Ordinance, 1949 and the recent decision of the House of Lords in *Westminister Bank Ltd.* v. *Zang* [1966] 1 All E.R. 114.

against the cheques referred to and accordingly it is submitted that Hepworth J.'s decision is erroneous.[71] Much more difficult to comprehend is the same learned judge's decision in *Chartered Bank* v. *Yeoh Bok Han.*[72] In this case the defendants in November, 1963 issued five cheques drawn on the Alor Star branch of the Malayan Banking Ltd. amounting in all to $10,000/- in favour of the Heng Seng Oil and Rice Mill, customers of the plaintiff bank. The cheques were crossed "Credit A/c Heng Seng Oil and Rice Mill" and were postdated to 28th December, 1963. Heng Seng Oil and Rice Mill had an overdraft with the plaintiff bank for a sum of $800,000/- secured by stocks of padi stored in a warehouse which at all times was under the control of the plaintiff bank. The arrangement was for the bank to release bags of padi against payment calculated at the rate of $9/- per bag. Heng Seng Oil and Rice Mill handed over the above mentioned postdated cheques to the plaintiff bank who released the equivalent quantity of padi and kept the cheques in their safe until the arrival of the due date. When presented the cheques were dishonoured with the answer "Payment stopped". The plaintiffs now sued the defendant, claiming to be holders in due course. Hepworth J. was of the view that the crossing "Credit A/c Heng Seng Oil and Rice Mill" appearing on face of each of the cheques was not a restrictive endorsement and did not prohibit the further transfer of the instruments. He observed: "In my opinion the words "credit A/c Heng Seng Oil and Rice Mill do not constitute a restrictive endorsement."[73] His Lordship was here confusing a crossing with an endorsement. Section 32 of the Ordinance which deals with the requisites of a valid endorsement defines it as a signature which must be written on the bill itself and be signed by the endorser. More importantly, however, the learned judge held that the plaintiff bank were holders in due course of the "cheques" in question. This is a difficult conclusion to sustain. Hepworth J. cited no authority except his own earlier decision, *Bank of China* v. *Synn Lee Co. Ltd. (supra)* nor did he refer to the relevant provisions of the Ordinance. The plain truth is that a person who takes a postdated cheque with knowledge of that fact as in the present case cannot qualify to be a holder in due course. Section 73 of the Ordinance defines a cheque as "a bill of exchange drawn on a banker *payable on demand."* Accordingly an instrument in the form of a cheque which is postdated is not a cheque at all. Section 29 of the Ordinance defines a holder in due course *(inter alia)* as a holder who has taken a bill complete and *regular on the face of it."* Accordingly a postdated cheque is not regular on the face of it and the holder of such an instrument is, it is submitted not a holder in due course.[74] The decision of Hepworth J. in clearly erroneous and ought not to be followed.

71. Before the Court of Appeal this point was not pursued. See (1962 28 M.L.J. 395.

72. [1965] 2 M.L.J. 125.

73. *Ibid.*, at p. 108.

74. The whole subject of postdated cheques is a distasteful matter, but they are commonly used in commerce as a means of avoiding stamp duty and frequently issued in money lending transactions. For the position in the United States before and after the enactment of the Negotiable Instruments Law see Breckenbridge 38 *Yale L.J.* 1063 (1929) and Holden, *Journal of the Institute of Bankers,* Vol. 81, p. 295 and Vol. 85, p. 41.

(g) *Banker's Liability in Conversion*

One of the services afforded by bankers to their customers is to collect cheques drawn on other banks and deposited by their customers. Indeed it has now been decided that this is an essential attribute of the business of banking.[75] In performing this function the banker is acting purely as an agent for his customer and in that capacity he is faced with the danger that he may commit perfectly innocently the common law tort of conversion where his customer has no title or a defective title to cheques handed to the banker. In English law the tort of conversion consists in any dealing by one person with the goods of another in a manner inconsistent with the latter's right of ownership. Intention is immaterial.[76] Therefore, any person "who however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them and disposes of them, whether for his own benefit or that of any other person is guilty of conversion." [77] In England the doctrine of conversion originally developed as a primary tort dealing with conversion of goods and chattels, but was anomalously extended to cheques which are neither goods nor money, nor chattels but only choses in action, by treating the piece of paper used as a cheque form as a chattel.[78] Section 96(2) of the Ordinance enacts that the rules of the common law of England shall apply to cheques. Accordingly English law on the matter has been imported here.[79] A banker is therefore, in a vulnerable position. He may not regard his customer whose identity and respectability he has ascertained on the opening of the account and with whom he is in privity of contract as a potential wrongdoer. On the other hand bankers have paid dearly in this connection. Numerous cases, throughout the Commonwealth have established their liability in conversion. In recognition of this fact, the Ordinance provides a measure of protection for bankers. Section 82c(1) is as follows: "where a banker, in good faith and without negligence receives payment for a customer of an instrument to which this section applies[80]

75. *United Dominions Trust Ltd.* v. *Kirkwood* [1965] 2 All E.R. 992. See Banking Ordinance, 1958.

76. *Lancashire and Yorkshire Railway* v. *MacNicoll* [1919] 88 L.J.K.B. 601 at p. 605.

77. *Hollins* v. *Fowler* (1875) L.R. 7 H.L. at p. 791.

78. *Underwood Ltd.* v. *Bank of Liverpool* [1924] 1 K.B. 775; *Lloyds Bank Ltd.* v. *Chartered Bank of India, Australia and China* [1929] 1 K.B. 40. See especially the judgment of Atkin L.J. in the latter case and the authorities there cited.

79. The concept of conversion is peculiar to English law. In jurisdictions where the Roman Dutch common law prevails, a banker is not liable in conversion. Accordingly in Ceylon, South Africa and the province of Quebec in Canada, an action based on conversion is not maintainable against a banker. See Ceylon — *Silva* v. *Johanis Appuhamy* (1965) C.L.W. 26. *Thomson* v. *Mercantile Bank* (1935) C.L.R. 61. South Africa — *Leal Co.* v. *Williams* (1906) T.S. 544; *Yorkshire Insurance Co.* v. *Standard Bank* (1928) W.L.D. 251. Quebec — *Norwich Union Fire Insurance Society* v. *Banque Canadienne Nationale* (1934) 4 D.L.R. 223 at p. 232 where Rinfret J. speaking for the Supreme Court of Canada stated: "actions in conversion are unknown to the law of Quedec."

80. *I.e.* (a) cheques, (b) any document issued by a customer of a banker, (c) any draft payable on demand.

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 such payment." In order to avail himself of this provision, the onus is on the banker to show that (a) he received payment for a customer, and (b) he did so in good faith and without negligence.

It will be seen that the legal conception of the term "customer" is of great significance.[81] Of greater importance is the fact that the liability of the banker is to the *"true owner"*. This term which is used in other provisions as well[82] is nowhere defined in the Ordinance itself. This is a matter of fundamental importance for only a *"true owner"* can maintain an action in conversion. The term cannot be equated with a "holder in due course." The statement in Paget's *Law of Banking* that "a true owner must be the holder in due course"[83] is clearly erroneous, for a drawer of a cheque and the payee thereof are not holders in due course[84] but may be *"true owners"* for the purposes of section 82c(1). There is a dearth of authority on the matter in England but the point arose for consideration in a number of local cases.[85] In *Official Assignee* v. *The Overseas Chinese Bank Ltd.*[86] the facts were as follows: One Loh Chuck Poh was adjudged bankrupt and in payment of a dividend, the Colonial Treasurer drew a cheque for $12,612.13 on the Hongkong and Shanghai Banking Corporation in favour of a creditor, Govindasamy Krishnasamy or order and forwarded it to the Official Assignee, who was the competent authority in bankruptcy matters for transmission to the payee. The latter did so. However, the cheque did not reach the payee but came into the possession of a customer of the defendant's bank who having forged the payee's endorsement thereon, paid it into his account with the latter bank who in the ordinary course received payment thereof. On discovery of the fraud the Official Assignee (plaintiff) sued the defendant bank in conversion. The point arose directly, whether the plaintiff was the *"true*

81. See *Oriental Bank of Malaya* v. *Rubber Industry (Replanting) Board* (1957) M.L.J. 153; *ante,* at pp.84, *et seq.*

82. Section 79 of the Ordinance.

83. (7th ed.) p. 221.

84. *Jones R.E. Ltd.* v. *Waring & Gollow Ltd.* [1926] A.C. 670 where the House of Lords held that the payee of a cheque can never be a holder in due course. He may, however, maintain an action in conversion for he is a true owner if the instrument has been fraudulently deprived from him. See *Bute (Marques of)* v. *Barclays Bank Ltd.* [1955] 1 Q.B. 202; [1954] 3 All E.R. 365. It is submitted that for the purpose of s. 82c(1) a true owner is one who is entitled to possession of the instrument. See the case cited and Chorley, *Law of Banking,* (5th ed.) p. 87.

85. *Official Assignee* v. *Overseas Chinese Bank Ltd.* (1934) 3 M.L.J. 76; (1934) 3 M.L.J. 78 C.A.; *Rubber Industry (Replanting) Board* v. *Hongkong & Shanghai Banking Corporation* (1957) M.L.J. 103; *Oriental Bank of Malaya* v. *Rubber Industry (Replanting) Board* (1957) M.L.J. 153; *First National City Bank* v. *Ho Hong Bank* (1932) 1 M.L.J. 64.

86. (1934) 3 M.L.J. 76; (1934) 3 M.L.J. 78 C.A.

owner" of the cheque and entitled to maintain an action in conversion[87] Mills J. in the court of first instance held that the Official Assignee was not the true owner on the grounds (a) he was not the drawer of the cheque (b) he was not in the position of a drawer and (c) he was not the legal owner of the fund on which the cheque was drawn.[88] Mills J.'s conclusion on the point was overruled by the Court of Appeal (Huggard C.J., Thomas C.J. (F.M.S.) and Gerahty J.) who though agreeing with the learned trial judge that the Official Assignee was not the *"true owner"* in the mercantile sense of the term as he was neither the drawer, nor the payee of the cheque, nevertheless held, in the absence of any direct authority to guide them that he was a *"true owner"* within the meaning of section 82 of the Bills of Exchange Act, 1882, Gerahty J. observed: "In arriving at this conclusion *(i.e.* that the Official Assignee was the true owner) I have had in mind that the expression *"true owner"* as employed in section 82 of the Bills of Exchange Act 1882, is not defined in that Act and I have been unable to find any authority for holding that the *"true owner"* of a cheque must necessarily be a party to the cheque in the mercantile sense or for holding that the protection afforded to a collecting banker by that section is limited to such an owner."[89] Huggard C.J. expressed himself thus: "It is clear that a cheque is a chattel, it is not denied that the Official Assignee was in lawful possession of the cheque; in as much as the cheque represented portion of the property of a bankrupt the Official Assignee had in my opinion, a definite property in it. It seems to me that on these facts the right to possession of and the property in this cheque are still vested in the Official Assignee and that he is therefore entitled to maintain an action for conversion against any person who, however innocently, has obtained possession of the cheque and has disposed of the proceeds thereof, whether for his own benefit or that of any other person."[90] Thomas C.J. reached the same result by a process of reasoning totally untenable. He regarded the transmission of the cheque by the colonial treasurer to the Official Assignee as a transfer of

87. For authorities on the matter in other Commonwealth jurisdictions see: *U.K.*: *Smith* v. *Union Bank of London* (1875) 1 Q.B.D. 31. *Great Western Railway Co.* v. *London and County Banking Co. Ltd.* (1901) A.C. 414. *Bristol and West of England Bank* v. *Midland Railway Co.* (1891) 2 Q.B. 652. *Bute (Marquess of)* v. *Barclays Bank Ltd.* (1955) 1 Q.B. 202; (1954) 3 All E.R. 465. *Australia: Union Bank of Australasia Ltd.* v. *McClintock* (1922) 1 A.C. 240 (P.C.). *Commercial Banking Co. of Sydney* v. *Mann* (1960) 3 All E.R. 482 (P.C.). *Canada: Gaden* v. *Newfoundland Savings Bank* (1899) A.C. 281 (P.C.). *South Africa: National Housing Commission* v. *Cape of Good Hope Savings Bank Society* (1963) 1 S.A. 230 (c). *Ceylon: John* v. *Dodwell Co.* (1918) A.C. 563 (P.C.). *Ratnam* v. *Mercantile Bank of India Ltd.* (1956) 57 N.L.R. 193. *Bank of Ceylon* v. *Kulatelleke* (1957) 59, N.L.R. 188. *Don Cornelia* v. *De Zoysa Co. Ltd.* (1966) 68 N.L.R. 161.

88. (1934) 3 M.L.J. 76 at p. 78.

89. *Ibid*., at p. 82. Certainly protection to a collecting banker under s. 82 of the Ordinance is available only against a "true owner". Support for the other observation of the learned judge is to be found in the more recent English case of *Bute (Marquess of)* v. *Barclays Bank* [1955] 1 Q.B. 202; [1954] 3 All E.R. 365. No authority can, however, be found anywhere in the Commonwealth or in the United States for the learned judge's proposition that a person "who is not a party to the cheque in the mercantile sense" can be a "true owner" for the purpose of s. 82 of the Act.

90. (1934) 3 M.L.J. 76 at p. 80.

the instrument to the latter. Basing himself on this line of thought his lordship was of the view that "the transfer is in this case irrespective of any negotiability dealt with in the Act *(i.e.* Bills of Exchange Act, 1882) or of anything relating to negotiability; it is a transfer of the thing itself with the right to keep it or issue it and to receive protection against any person improperly taking it or using it. In my opinion the person who has the right to enforce these rights is the transferee himself. I am, therefore, of the opinion that this suit was properly brought by the Official Assignee."[91] Accordingly the matter was referred back to the trial judge for consideration of the case on the merits.[92] It is submitted with respect that the decision of Mills J. is to be preferred to that of the Court of Appeal. No doubt a person entitled to possession of a negotiable instrument and who in the mercantile sense has a right of property therein is entitled to be regarded as a *"true owner"* for the purposes of the Bills of Exchange legislation.[93] The Official Assignee may have been entitled to possession of the cheque as the competent authority for the administration of matters arising out of bankruptcy. Certainly he had no right to any property in the cheque, he being neither drawer, a person in the position of drawer, holder or payee. Mills J. was perfectly right when he said: "I hold that, whether or not the Official Assignee is the owner of the fund, he is not in the present instance, the true owner of the cheque."[94] In any event, the Official Assignee, having parted with possession of the cheque, even by means of a fraud perpetrated on him ceased to have any right of action on the instrument.[95] It is accordingly submitted with respect that the decision of the Court of Appeal in the above case is clearly erroneous and the proper plaintiff ought in the circumstances[96] to have been the Colonial Treasurer himself. It must, however, be stated, that when our courts were considering this matter in 1934, they had no

91. (1934) 3 M.L.J. 76 at p. 82. There is here much that is open to question. For instance what did his lordship mean when he said that "it is a transfer of the thing itself" in the passage quoted. The learned judge referred to no authority for there was none to support so startling a view. It is trite learning that a "transferee" is one to whom a negotiable instrument is delivered if payable to bearer, or if payable to order as in this case by delivery coupled with endorsement. See section 21 of the Bills of Exchange Ordinance, 1949 and section 21 of the English Bills of Exchange Act, 1882. The Official Assignee was certainly not a transferee in this sense. He was merely a conduit pipe through whom the Colonial Treasurer intended the cheque to be transmitted to the payee G.K.

92. The matter was not pursued further. Inquiry by the present writer reveals that the creditor Govindasamy Krishnasamy was paid the amount due to him and accordingly he was no longer interested in any litigation on the matter. The Official Assignee was well advised not to press his claim against the Oversea Chinese Bank Ltd., as the latter was clearly within the protection of s. 82 of the Bills of Exchange Act, 1882.

93. *Bute (Marquess of) v. Barclays Bank Ltd.* [1955] 1 Q.B. 202; [1954] 3 All E.R. 365; *Rubber Industry (Replanting) Board* v. *Hongkong and Shanghai Banking Corporation* (1957) M.L.J. 103; *Oriental Bank of Malaya* v. *Rubber Industry (Replanting) Board* (1957) M.L.J. 153.

94. (1934) 3 M.L.J. 76 at p. 78.

95. Chalmers, *Bills of Exchange* (14th ed.) pp. 8, 127-8, *Byees on Bills* (21st ed.) p. 205, and the recent decision of the House of Lords in *Westminister Bank Ltd.* v. *Zang* [1966] 1 All E.E. 114; [1966] 2 W.L.R. 110.

96. As the payee was no more concerned in the matter to have been paid the amount due to him.

English authority to guide them, a fact which they plainly recognised.[97] In the much later case of *The Rubber Industry (Replanting) Board* v. *Hong Kong and Shanghai Banking Corporation*[98] Buhagiar J. applying the decision in the English case of *Bute (Marquess of)* v. *Barclays Bank Ltd.*[99] rightly held that the plaintiff there was a true owner within the meaning of section 82 of the Ordinance. Much more difficult, however, to comprehend is the case of *First National City Bank* v. *Ho Hong Bank.*[100] In that case, Drew and Napier, a firm of solicitors issued a cheque for $100/- which was fraudulently raised to $9,100/-, the payee's endorsement forged and the cheque was credited to the forger's account with the Ho Hong Bank Ltd. who in due course received payment. When the fraud was discovered the First National City Bank sued the Ho Hong Bank Ltd. in conversion for the recovery of the amount. How the plaintiffs in this case could have maintained an action in conversion is totally inexplicable. They were in no sense the true owners of the cheque in question. They were neither the drawers, payees, nor entitled to possession of the instrument in the mercantile sense of the term. It seems probable, however, that they were unable to resist the claim of their own customers and elected to stand in the shoes of the latter. If so their action against the defendants ought to have been for the recovery of money paid by mistake or for money had and received by the latter to their use. In either event, the plaintiffs claim would have been untenable as the defendants being merely agents for collection received the money and paid it over to their principal.[1] It must, however, be observed that this point was not raised before the court in this case and accordingly it is not an authority with regard to the concept of *"true owner."*

(i) *Receives Payment for a Customer*

The first ingredient which a banker must show to satisfy, section 82c(l) of the Ordinance is that as an agent he received payment for a customer on an instrument covered by that provision. The legal concept of who is a customer assumes its greatest significance for this purpose. This question has already been dealt with in the light of local authorities available on the matter,[2] and need not be pursued further.

(ii) *Receives Payment in Good Faith and Without Negligence*

By section 90 of the Ordinance a thing is deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not. Bankers as a rule never act in bad faith and therefore the question of good faith will always be presumed in their favour and the matter

97. (1934) 3 M.L.J. 76.

98. (1957) M.L.J. 103.

99. [1955] 1 Q.B. 202; [1954] 2 All E.E. 365. Buhagiar J.'s decision is discussed in greater detail. See *ante,* p. 84.

100. (1932) 1 M.L.J. 64. See (1967) 9 *M.L.R.* 324 for a detailed discussion of this case.

1. *Jones (R.E.) Ltd.* v. *Waring & Gallow Ltd.* [1926] A.C. 670. *Kleinwort, Sons Co.* v. *Dunlop Rubber Co.* (1907) 97 L.T. 263. *Gowers* v. *Lloyds and National Provincial Foreign Bank Ltd.* [1938] 1 All E.R. 766.

2. See (b), *ante,* p. 84.

need no further discussion, particularly in view of the fact that in no case anywhere in the Commonwealth or the United States has a banker been held to have acted otherwise than in good faith within the meaning of this section. The crucial question therefore is whether he acted without negligence. The onus is on the banker, the moment the true owner has established conversion, and this point is never in issue for it is for the banker to show that in receiving payment for his customer he acted without negligence. What constitutes negligence for the purpose of section 82c (1) is not defined in the Ordinance, but other provisions notably section 82(1) (2) provide a key to the definition of negligence. These two sections lay down that the banker should act in the ordinary course of business. Accordingly, negligence for the purpose of section 82c(1) must consist of a departure from what the banking community in general would regard as being outside the ordinary course of business. This is not the place to discuss the many cases where the collecting bankers' liability under this head has been considered in the numerous cases which have arisen in the courts of the Commonwealth and the United States.[3] The negligence of the collecting banker was considered in two local cases, *Rubber Industry (Replanting) Board* v. *Hong Kong & Shanghai Banking Corporation,*[4] and *Oriental Bank of Malaya* v. *Rubber Industry (Replanting) Board,*[5] both of which are noteworthy in that they involve points not hitherto considered elsewhere and accordingly merit some attention. In both these cases the collecting bankers were held to have been negligent within the meaning of section 82c(1) in that they collected cheques marked "Account Payee" in contravention of such direction. The word 'direction is here used advisedly because the words "Account Payee" are not an authorised crossing, not authorised as such by the Ordinance. However, by the usage of bankers, this term, though it in no way restricts the negotiability of an instrument so marked is yet a direction to the collecting banker to place the proceeds of such a cheque only to the named payee. Having regard, therefore, to the "ordinary course of business' of bankers it is conclusive evidence of negligence on the part of the collecting banker to accept a cheque bearing the words "Account Payee" or "Account so and so", for an account other than that indicated.[6] In the English cases where the collecting banker was held liable on this ground it was plain that he had clearly transgressed such direction, in so far as a cheque marked "account A.B. only" was collected for C.D.[7] In the two Malaysian cases, however, referred to above,[8] the banks received payment for the payees actually designated therein. Yet they were held liable on the ground that they were negligent. These cases raise important questions not fully considered elsewhere. In the first

3. The reader is referred to the standard works on banking and in particular to Chorley, "Problems of the Collecting Banker", Gilbart Lectures *(Institute of Bankers)* 1953. Gordon Borrie. "The Problems of the Collecting Bank" (1960) 23 *M.L.R.* p. 16.

4. (1957) M.L.J. 103.

5. (1957) M.L.J. 153.

6. See questions on "banking practice", *Institute of Bankers,* London (9th ed.) ; also *Akrokerri (Atlantic) Mines Ltd.* v. *Economic Bank* [1904] 2 K.B. 465.

7. *Bevan* v. *National Bank Ltd.* (1906) 28 T.L.R. *House Property Co. of London Ltd.* v. *London County and Westminister Bank* (1915) 84 L.J.K.B. 1846.

8. See *supra,* notes 4 and 5.

case[9] a cheque in favour of Toh Whye Teck was in fact collected for this particular payee though the account was opened in that name by fraudulent means. In the second[10] similarly, a cheque in favour of "Kok Ann Rubber Estate" was collected for the ostensible payee. Dealing with the question of negligence Buhagiar J. observed in the first case, "It is well established that the question of negligence is one of fact and that each case must be determined on its own circumstances" and went on to say, "in the circumstances of this case it seems to me to be difficult to separate the two transactions of the opening of the account and of collecting the cheque." [11] In the second case the same judge observed that the bank was negligent in opening the account in the first instance and that negligence affected the subsequent collection of the cheque. Inherent in this conclusion is the fact that the banker's initial negligence in the opening of the account deprives him of the protection of section 82c(1). No English case[12] has gone as far as these two Malaysian cases on the points they decide. Practically and from a legal standpoint also, a banker has ordinarily no option but to collect cheques for his customer and this surely demands that he should be free from liability where he acts reasonably, in particular, where his action in collecting is in accordance with the standard of care which can reasonably be demanded of a prudent banker engaged in the business of banking. It is reasonable to assume that the legislature in enacting section 82c(1) could not have demanded a standard apart from the conditions in which it had to be sustained. Any other assumption would be to ignore the relationship of banker and customer. Nevertheless in a series of cases beginning with *Lloyds' Bank Ltd.* v. *Chartered Bank of India, Australia and, China*[13] and ending with (if ending is the right word) *Orbit Mining and Trading Co. Ltd.* v. *Wesminister Bank Ltd.,*[14] the courts have demanded a standard of care impossibly high. The banker has to stand or fall by section 82c(1) of the Ordinance. Bankers have a legitimate right to complain that judicial decisions so far given have as far as they are concerned witnessed the decline of section 82c(1). If the above two Malaysian cases and a recent decision of the Supreme Court of Ceylon [15] where it was held that where a banker who had satisfied all the stringent tests of section 82c(1) must yet forfeit the protection of that section because the cheque was materially altered are right and it is submitted they are, then these signify not merely the decline but the actual fall of section 82c(1). By successive interpretation of the concept of negligence under section 82c(1) the courts have forced the banker into a position in which he cannot with immunity collect for his customer any third party cheques, which means that the essential principal of banking

9. (1957) M.L.J. 103.

10. (1957) M.L.J. 153.

11. (1957) M.L.J. 106.

12. The nearest English authorities are: *Turner* v. *London and Provincial Bank Ltd.* (1903): *Legal Decisions Affecting Bankers,* vol. 11, 33. *Journal of the Institute of Bankers,* vol. xxiv, 220.

13. [1929] 1 K.B. 40.

14. [1963] 1 .Q.B. 794.

15. *Bank of Ceylon* v. *Kulateleke* (1957) 59 N.L.R. 187.

business is squeezed out. In most cases under the section where bankers have been held liable it has been due to the contributory negligence of the true owner. Yet in no English case or for that matter anywhere else in the Commonwealth has the defence of contributory negligence been pleaded and it has therefore been assumed that it is not pleadable. At present as that doctrine is understood the negligent or reckless act of a plaintiff is considered relevant only if it amounts to a representation leading to an estoppel. But, if justice is to be done, the contributory negligence of the true owner, ought to be taken into account as a factor in determining the extent of the banker's liability and negligence. A claim in conversion is undoubtedly an action in tort and there seems to be no reason why the defence of contributory negligence ought not to prevail. It is submitted that a banker would be well advised to pursue this remedy in an appropriate case.

(h) *Recovery of Money Paid Under a Mistake of Fact*

We have seen that a banker very often suffers loss either by disobeying his customer's mandate or by receiving payment on a negotiable instrument for some one other than the true owner. It may well be that in most such cases the banker may be able to recover the money from the party to whom it was paid provided the latter can be traced, as money paid on a mistake of fact. Such a course has been pursued successfully by bankers elsewhere.[16] This action known as one for money had and received had its origin in the equitable doctrine of restitution, but since the Judicature Acts of 1873-1875, it has been recognised by the common law Courts as an alternative to conversion, the view having been taken that the plaintiff waives the tort of conversion and instead claims for money had and received by the defendant to the plaintiff's use. For example in the Ceylon case of *John* v. *Dodwell,* the Privy Council stated that "The action for money had and received, is, according to the Law of England, in its nature one of assumpsit, founded on implied or imputed contract and depends on a waiver of any tort committed and on the correlative affirmance of a contractual relation".[17] Accordingly this claim has been used in all but one of the English cases as an alternative to a claim in conversion. The exact rationale of this rule in English law has not been altogether clear and has been condemned as harsh.[18]

The matter came up for consideration in the local case of *Re Indian Overseas Bank Ltd., American International Assn. Co. Ltd.* v. *Ho Chooi Soon*[19] upon facts which were unusual and somewhat extraordinary. The plaintiffs drew a cheque which was uncrossed in favour of one of their policy holders Yeo Wee Yang for $3,243.87 and forwarded

16. *Imperial Bank of India* v. *Abeysinghe (Ceylon)* (1927) N.L.R. 257. *Bank of Montreal* v. *King* (1907) 38 S.C.R. 258. *Dominion Bank* v. *Union Bank of Canada* (1908) 40 S.C.R. 366. *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A.C. 49.

17. [1918] A.C. 563 at p. 570. This view would appear to be incorrect. See the authorities cited in note 18 below.

18. See Lord Wright's *Legal Essays and Addresses,* (Cambridge University Press 1939). Denning L.J. (1949) 65 L.Q.R. 40. *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1.

19. (1962) 35 M.L.J. 134.

it to their Penang office for transmission to the payee. Instead of doing so, however, the manager of the plaintiff's office in Penang forged the payee's endorsement and negotiated it to the defendant who deposited it with the Indian Overseas Bank Ltd., who in due course received payment thereon and credited the defendants account with the amount. Nearly two years later the plaintiffs claimed from the bank this amount representing themselves to be the true owners of the said cheque. The bank refused to accede to this demand but nevertheless debited the defendant's account with the amount and applied for and obtained an interpleader summons. Rigby J. whose observations were approved by Hepworth J. confessed that he found the case to be one of considerable difficulty and complexity. The learned Judge went on to observe that "It certainly seems a startling proposition that a bank, two years after it has collected the proceeds of a cheque paid by a customer into his account and credited the customer with that amount, should claim the right to debit the customer with that amount, simply on the representation of the makers of the cheque that it was a forgery."[20] Nevertheless Hepworth J. came to the conclusion that the plaintiffs ought to succeed in their action for the following reasons:—

(a) The Indian Overseas Bank in so far as they collected a cheque which was uncrossed were not within the protection of section 82c(1) of the Bills of Exchange Ordinance, 1949.

(b) They were entitled to debit the defendant's account, there having been no settlement of account between themselves and their customer.

(c) The defendant was not a holder in due course of the cheque in question in so far as he did not take it in good faith.

(d) Accordingly the plaintiffs could recover the amount from the defendant as money paid under a mistake of fact. It is submitted with the greatest respect that each of these conclusions and that the entire decision in this case is totally unsatisfactory and cannot rank as an authority for the propositions it lays down. In the first place, Hepworth J. quoted with evident approval, Rigby J.'s finding that the collecting bank was without protection under section 82c(1) of the Ordinance, as the cheque was uncrossed. If so, the simplest thing would have been for the plaintiffs as true owners to have brought the action against the bank in conversion. The latter without statutory protection would have been really liable. The truth, however, is that at the time Hepworth J. was considering the matter in 1962, the Ordinance had been amended to confer protection on a collecting banker in respect of, both crossed as well as uncrossed cheques.[21] Accordingly, the bankers being merely agents for collection could not have been liable in the absence of negligence and there was none on the facts. Secondly, the finding that the bankers were justified in debiting the defendant's account two years later was justified in the absence of a settled account between the parties

20. (1962) 35 M.L.J. 134 at p. 136(D).

21. F.M. Ordinance 75 of 1949, s. 82(1) (c) as amended by 57 of 1959; Cheques Act, 1957 (U.K.).

> is clearly unsupportable. As authority for this proposition, both judges relied on the English case of *Bavins, Junr. and Sims* v. *London & South Western Bank Ltd.*[22] In that case the bank was sued by the true owners for money had and received, and the Court held that the bank were negligent in receiving payment, and accordingly were liable to account to the plaintiffs for whose use they had received the money. In the particular situation that existed there, they had lost nothing, as they were in a position to recover the amount from their own customer. This statement was purely obiter and was not a decisive factor, in that case, the question of settlement of account never arose. Indeed it would be startling to contemplate that a collecting banker having received payment for a customer and paid the money over to him, acting merely as a conduit pipe could debit the latter's account at the request of a third party even were he the true owner of the instrument. No authority to support so sweeping a proposition, was cited. Fortunately none exists in any common law jurisdiction.

That distinguished authority, Grant says: "A banker cannot dishonour his customer's cheque upon a mere claim by a third person to the moneys standing to the credit of the account; otherwise the banker would often be set the task of conducting a judicial inquiry into the rights of parties. The person claiming the moneys should obtain an injunction restraining the bank from honouring the customer's drafts."[23] Settlement of account between banker and customer in the present case was irrelevant and the *ratio decidendi* of *Bavins Junr. & Sims* v. *London and South Western Bank Ltd.*[24] was plainly misunderstood. Unlike that case, in the present one, the Indian Overseas Bank Ltd. was not and could not have been required to account to the plaintiffs. The decision on this point, therefore is plainly erroneous. Thirdly, Hepworth J. not Rigby J. reached the conclusion that the defendant Ho Chooi Soon, though a holder for value was nevertheless not a "holder in due course" as the negotiation of the cheque was affected with fraud and the defendant did not subsequently take it in good faith. In reaching this conclusion Hepworth J. gave three reasons and it is instructive to quote His Lordship's observation in full. Said he:[25]

> The first thing to be noted is that the said cheque was an open cheque and was made payable to Mr. Yeo Wee Yang or order and accordingly, at any rate in theory, all that was required in order to obtain cash for it from the bank upon which it was drawn was for the payee to endorse it and for it to be presented for payment. . . .
>
> The second thing is that the payee of the said cheque, Mr. Yeo Wee Yang, was known to the defendant and had been known to him since before the War when he was a partner in a firm of rubber dealers named Yeong Fee & Co. with whom the defendant had small dealings. Did the defendant really think that the payee had no bank account?

22. [1900] 1 Q.B. 270.
23. It must be observed that the action was not one in conversion. This is important, as the instrument involved was not a cheque.
24. *Law of Banking,* (7th ed.) p. 97. The plaintiffs did not in the instant case move for or obtain such an injunction.
25. (1962) 28 M.L.J. 134 at p. 138.

> The third thing is that . . . Even if the defendant did not realise that cash could be obtained for open cheques like the said cheque without assistance from him, did it not occur to him that, if so many of the policy holders of the plaintiff company required cash, the plaintiff company's arrangements would be likely to be such as to enable them to obtain cash? Did it not occur to to the defendant that something irregular was going on?

There is here much that can be questioned. The inference that the defendant in accepting an open cheque was guilty of bad faith, that his previous dealings with the fraudulent manager of the plaintiffs' Penang Branch ought to have suggested to him that there was something irregular, that his acquaintance with the payee and, therefore, the possibility that the latter ought to have had a banking account are all open to question. Be that as it may, the learned judge could have easily avoided such, involved, devious and erroneous reasoning and reached the same conclusion through a much simpler and more direct route. It was admitted that the signature of the payee on the cheque in question was a plain forgery. Accordingly, the defendant was not a holder in due course, for by section 29(1) of the Ordinance he did not take a bill "complete and regular on the face of it." It is trite learning that the holder of a bill payable to order on which the operative endorsement such as that of the payee or a subsequent endorser is a forgery can never be a holder in due course. In the result, Hepworth J. reached the correct conclusion for the wrong reasons. However, that may be, the status of the defendant, whether holder for value, or holder in due course was totally irrelevant in a claim for money had and received, where the plaintiff merely complains that the defendant has received money which he must turn over to the plaintiff which brings us to the final conclusion in the case. The Court held that the plaintiffs could recover from the defendant the amount of the cheque as money paid under a mistake of fact. In support, the Court relied on the decision of the Privy Council in *Imperial Bank of Canada* v. *Bank of Hamilton,*[26] Hepworth J. stated "But even if the defendant did take the said cheque in good faith and for value, on the authority of the *Imperial Bank of Canada* v. *Bank of Hamilton and Bavins' case*[27] the money can be recovered by the plaintiffs because the defendant has not lost his remedy against some previous party by being deprived by lapse of time of the opportunity of giving notice of dishonour." [28] There is here something profundly wrong. If giving notice of dishonour which had not been lost was the decisive test, then as Rigby J. pointed out there was none to whom effective notice of dishonour could have been given, the only operative endorsement being a forgery.[29] It is extremely unfortunate that Hepworth J. in the year 1962 chose to rely on the one Privy Council decision referred to above which had long before been regarded as patently wrong and totally irreconcilable with such cases as *Price* v. *Neal*[30] *Cocks* v. *Masterman,*[31] *Holt*

26. [1903] A.C. 49.

27. *Ibid.*

28. (1962) M.L.J. 28 at pp. 138-9.

29. *Ibid.*, at p. 139.

30. (1762) 3 Burr 1854.

31. (1829) 9 B & C 902.

v. *Markham,*[32] and *Kleinwort Sons Co.* v. *Dunlop Rubber* Co.[33] In *Morison* v. *London County & Westminister Bank Ltd.*[34] the English Court of Appeal plainly recognised the Privy Council decision in the *Imperial Bank of Canada* case, as clearly erroneous and preferred to follow *Cocks* v. *Masterman.*[35] English cases on the matter, difficult as they are to comprehend, at least fall into two separate and well understood categories.

(a) Payment on a negotiable instrument.

(b) Payment otherwise than on a negotiable instrument.

It seems pretty clear that in the former category payment made under a mistake of fact cannot be recovered if the payment was made to an innocent person and if the latter had had the money in his possession for such a period that his financial position might, not necessarily would, be affected if he had to refund.[36] Notice of dishonour test has nothing whatever to do with this principle of payment on a negotiable instrument. Indeed in many cases it would be impossible to give such notice of dishonour as Rigby J. plainly understood the position to be.[37]

In the second category of cases which do not involve negotiable instruments, payment made under a mistake of fact could be recovered if the person to whom the payment was made was acting not as an agent but as a principal. The exigencies of negotiability do not apply to such a situation where the agent has received the money and paid it over to his principal, real or imaginary.[38]

It is submitted that, whichever test is applied, the defendant in the case under discussion could not legally have been required to refund the money to the plaintiffs. In the result this decision is clearly erroneous.

(i) *The Requirement of Value*

As has already been pointed out,[39] one of the essential points of departure between the English law and ours consists in the concept of value. The terms "value" and "valuable consideration" occur in several sections of the Ordinance.[40] Unfortunately, however, the manner in which these terms are used tend to confuse rather than illumine the

32. [1923] 1 K.B. 504.

33. (1907) 97 L.T. 263.

34. [1914] 3 K.B. 356.

35. In fairness to Hepworth J. it must be observed that these authorities were cited neither to him nor to Rigby J.

36. See Matthew J. in *London & River Plate Bank* v. *Bank of Liverpool* [1896] 1 Q.B. 7 and Paget's *Law of Banking,* (7th ed.) p. 356.

37. (1962) M.L.J. 139. See s. 45(1) of the Ordinance.

38. Gowers v. *Lloyds and National Provincial Bank Ltd.* [1938] 1 All E.R. 766.

39. See *ante,* at p. 80.

40. Sections 2, 3(4), 27, 28, 29(1) (b), 30(1) and 58(3).

problems therein involved. It must at once be pointed out that the draftsman of our Ordinance in reproducing verbatim the identical provisions of the English Bills of Exchange Act, 1882, overlooked the fact that the latter legislation was enacted against a fundamentally different legal background and was intended to overcome problems which did not present themselves in Malaysian law. This point should be borne in mind if the terms, "value" and "valuable consideration" occurring in the various provisions of our Ordinance are to be correctly understood in their context. In the first place, the *rationale* for their inclusion in the English Act did not exist in Malaysia. Secondly, notwithstanding the fact that section 2 of our Ordinance defines value, unless the context otherwise requires, as meaning valuable consideration, it is submitted that for reasons stated below the term "value" does not bear the same meaning in each of the sections of the Ordinance where it appears. Thirdly, there is considerable doubt as to what this term (value) actually means, in each of the sections where it occurs. Even for so basic a purpose as that of qualifying as a holder in due course, doubt still exists in the law of Malaysia as well as other Commonwealth jurisdictions, as to the true meaning of value.[41] The requirement of value as used in the Ordinance is of especial relevance to the following matters:

(a) the validity of the instrument;

(b) the liability of the parties to a bill;

(c) the position of an accommodation party;

(d) the status of a holder for value;

(e) the banker's lien.[42]

English Law

In the leading case of *Currie* v. *Misa*[43] valuable consideration was defined as "some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other" At common law consideration in this sense is essential to support a promise not under seal. Secondly, consideration must move from the promisee. Thirdly, it may not be past or executed. The draftsman of the English Bills of Exchange Act, 1882, while retaining the common law requirement of consideration recognised the need to provide for certain essential exceptions in the interests of commerce.[44]

41. *Chartered Bank* v. *Yeoh Bok Han* [1965] 2 M.L.J. 125; *Nalliah* v. *Pure Berenager Co. Ltd.* (1965) 67 N.L.R. 311. *Westminister Bank Ltd.* V. *Zang* [1966] 1 All E.R. 114.

42. (d) and (e) have already been discussed, *ante,* pp.91 *et seq.*

43. (1875) L.R. 10 Ex. 162.

44. See section 27 of the Act. For a history of the matter in English law, see Holden, "The History of Negotiable Instruments in English law." For the position in the United States, see Williston, *Contracts, s.* 108 and Brannan, *Law of Negotiable Instruments,* (4th ed.) p. 212. Canada: see Falconbridge, *Banking and Bills of Exchange* (1956 ed.) pp.597 *et. seq.*

Malaysian and Singapore Law

Borrowing the language of the corresponding English Act, section 2 of the Ordinance defines value as follows: "unless the context otherwise requires, 'value' means valuable consideration." Section 27(1) (a) of the Ordinance provides that "valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract."[45] Thus far, the Ordinance does no more than restate the ordinary rule of contract that consideration is essential to support a simple contract.[46] The Ordinance, however, goes on to say in section 27(1) (b) that valuable consideration for a bill may be constituted by "an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time." Thirdly, the Ordinance provides in section 27(2) that where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time." This provision has given rise to considerable difficulty, for upon a literal interpretation of its terms, a thief may qualify to be a holder for value and exercise the rights of such a holder; so startling a result could not have been intended by the legislature. Yet courts have been compelled to reach such a result by a literal interpretation of the provision.[47] Fourthly, the Ordinance provides in section 30(1) that "every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value." Fifthly, section 28(2) of the Ordinance provides that "an accommodation party is liable on the bill to a holder for value."

Each of these provisions was copied verbatim from the corresponding English legislation without a realisation of the different legal backgrounds. For reasons already stated, these provisions were clearly needed in England to overcome the obvious difficulties of the English common law, but were merely redundant in a different legal background in Malaysia; they have been and may continue to be a source of unwholesome uncertainty and obscurity, unless the essential differences between the two legal systems are kept clearly in mind. Indeed one may well re-echo the picturesque language, no less applicable to our own legal

45. The corresponding provision of the Ceylon Bills of Exchange Ordinance (Cap. 82) adds the words, "sufficient by the law of England to support a simple contract." This was because the common law of Ceylon which is Roman-Dutch does not recognise the English common law concept of consideration. By the law of Ceylon all that is required is an element called *'justa causa debendi'* which means that any promise made seriously and deliberately is binding on the promisor notwithstanding the absence of "consideration" as understood in English law. See *Jayawickreme* v. *Amarasuriya* (1918) 20 N.L.R. 289 (Privy Council). It is of interest to note that the South African Bills of Exchange legislation expressly preserves the Roman-Dutch law rule of "cause" instead of valuable consideration. See section 25(1) of Act No. 34 of 1964. In Scotland, valuable consideration is not necessary to support a simple contract. See Gloag and and Henderson, *Introduction to the Law of Scotland,* (4th ed.) p. 37. For the position in the province of Quebec, Canada, see Falconbridge, *op. cit.,* p. 599.

46. See Contracts (Malay States) Ordinance, 1950 (No. 14 of 1950) section 2(d) and 26. Nowhere does the Ordinance speak of "valuable consideration."

47. *Smith* v. *Union Bank of London* (1875) 1 Q.B.D. 31; *Ratnam* v. *Mercantile Bank of India Ltd.* (1956-57) N.L.R. 193. See Bankers' Magazine London (1950) for a fuller treatment of this case by the present writer. See also (1967) 9 *M.L.R.* 328 *et seg.*

history of two distinguished South African text writers who have recently observed as follows: "Some English institutions marched into our law openly along the highway of legislative enactment, to the sound of brass bands, of royal commissions and public discussion. Others slipped into it quietly and unobstrusively along side roads and by-paths."[48]

As already pointed out section 27(1) of our Ordinance provides that valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract. By virtue of section 96(2) of the Ordinance, the law applicable to this matter is the Contracts (Malay States) Ordinance, 1950, whereby consideration need not move from the promisee.[49] More, importantly, however, the draftsman of our Ordinance acted unwisely in reproducing section 27(1) (b) of the English Bills of Exchange Act, 1882. The draftsman was in this respect entirely misguided in view of the fact that under the Contracts (Malay States) Ordinance, past consideration is no bar as in English law. If any doubt existed on the matter it has been disposed of by the recent decision of the Privy Council in *Schmidt* v. *Kepong Prospecting Ltd.*[50] Accordingly, it becomes necessary to devote some attention to a consideration of section 27(1) (b) of the Ordinance, which is an exact replica of section 27(1) (b) of the English Bills of Exchange Act of 1882. In the first place, having regard to the fact that under the Contracts (Malay States) Ordinance past consideration is good consideration, the reproduction of section 27(1) (b) of the English Act was ill-advised. However, even in England this provision has been misunderstood. No textwriter of repute in England has submitted this provision to a close and careful analysis.[51] Some observations may, therefore, be made with respect to this provision. Leading English textwriters on the general law of contract, seem to regard section 27(1) (b) as a genuine exception to the common law doctrine of past consideration.[52] No authority is referred to by any of these writers in support of the proposition. Indeed, none is available. It is submitted that the words "antecedent debt or liability" occurring in the provision [53] has nothing whatsoever to do with the English common law concept of

48. Hahlo and Khan, *The Union of South Africa,* p. 18.

49. See s. 2 (d).

50. [1968] 2 W.L.R. 55.

51. See *Byles on Bills,* (21st ed.); Chalmers, *Bills of Exchange* (14th ed.); Chorley, *Law of Banking* (5th ed. 1967) where he avoids a discussion on the subject.

52. See Anson, *Law of Contract,* (22nd ed.) p. 89, where in citing section 27(1) (b) of the English Bills of Exchange Act, 1882, the section is considered to be a genuine exception to the rule *i.e.* past consideration. It is stated: "So if *A,* whose account at the bank is overdrawn, pays into that account, a cheque drawn by a stranger, the bank becomes a holder for value of the cheque, as the antecedent debt of *A* is good consideration for the instrument." No authority is cited in support of the proposition. None is available and it is submitted with respect that this statement does not represent the present state of English law on the matter. See *Oliver* v. *Davies,* [1949] 2 K.B. 727, particularly the reasoning of Evershed M.R. at p. 734. See also, Trietal, *Law of Contract,* (2nd ed. 1966) p. 52; Cheshire and Fifoot *Law of Contract* (6th ed.) p. 64.

53. Section 27(1) (b) of the Ordinance; section 27(1) (b) of the English Bills of Exchange Act, 1882.

past consideration. This particular clause received the attention of the English Court of Appeal in only one case.[54]

The following propositions may be derived from that decision:

(a) The proper construction of the words "antecedent, debt or liability" is that they refer to an antecedent debt or liability of the promisor or drawer of the bill.

(b) Where the debt or liability is that of a third party, one must find something to provide consideration for the bill in the form of forbearance or a promise to forbear, express or implied, on the part of the recepient of the bill in regard to the third party's antecedent debt or liability. This is the real point which this case settles, a point not well understood everywhere. The main question it is submitted is not whether the consideration is past or antecedent, but whether there is any consideration at all.

Section 2(d) of the Contracts (Malay States) Ordinance defines consideration as follows:

> When, at the desire of the promisor, the promisee or any other person has done or abstain from doing, or does or abstain from doing, or promises to do or to abstain from doing, something such act or abstainence or promise is called a consideration for the promise.

It will be seen that this definition is much wider than the English common law doctrine of consideration. Accordingly it was unnecessary to have reproduced the provisions of section 28 of the English Act in our Ordinance. In English law this was perhaps required by reason of the fact that an accommodation party is one who becomes a party to a bill gratuitously, *i.e.* without giving value himself and in the absence of a *quid pro quo* would incur no liability under the common law, but for legislative sanction which the English section was presumably intended to give effect.[55] For example, if *A* for the purpose of lending his name to enable *B* to raise money, make a note in favour of the latter who negotiates it to *C* for value,[56] under the Contracts (Malay States) Ordinance, *A* would be liable to *C* though under the common law of England he would not have been so liable. It is to be hoped that the problems which baffled American Courts will not be forced upon Malaysian and Singapore judges by the inclusion of this provision in our Ordinance.

(j) *Antecedent Debt or Liabiilty*

For reasons already stated it was equally unwise for the draftsman of our Ordinance to have reproduced the provision of section 27(1) (b) of the English Act, *viz.* "an antecedent debt or liability." [57]

54. *Oliver* v. *Davies* [1949] 2 K.B. 727.

55. Neither leading English text writers nor judicial decisions on the matter have explored this provision with any clarity. This very same section which was reproduced in the original American Negotiable Instruments Law, (s. 29), was the source of endless trouble and has now been dropped in the latest codification on bills and notes. See Brannan, *op. cit*., pp. 554-88 and the official text, p. 273.

56. Example taken from *Jacobs on Bills,* (3rd ed.), p. 114.

57. The words "or liability" as distinct from "an antecedent debt" appear to be clouded in mystery. No English commentator or judge has so far provided an explanation of this phrase.

(k) *Absence of Consideration and Illegality*

As consideration sufficient to support a simple contract is essential for the validity of a bill or note both by English law and our own, absence of value is a good defence between immediate parties or those in privity with immediate parties, in English law, though not by our law.[68] Nevertheless by both systems of law, where a bill or note is given for a purpose which is illegal, immoral, forbidden by statute or contrary to public policy, the consideration would be illegal. In England, difficulties have arisen where negotiable instruments have been given as securities in respect of wagers or games and pastimes or in respect of money knowingly lent for betting or such games or pastimes.[59] Section 31 of the Contracts (Malay States) Ordinance provides that "agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made." Our courts have generally followed English decisions on the matter of illegality, but two recent decisions deserve special attention as bearing directly on the Bills of Exchange Ordinance and the Contracts Ordinance. In the first, *Ong Guan Hua* v. *Chong,*[60] the plaintiff lent a sum of $3,500/- to one Lim Beng Hean, admittedly for a gaming transaction. The money was lost and the said Lim Beng Hean endorsed over to the plaintiff seven cheques each for $500/- drawn by the defendant. All these cheques were dishonoured and the plaintiff sued the defendant on the cheques. Suffian J. the trial judge found as a fact that these cheques were given by way of repayment of money advanced by the plaintiff for the purpose of gaming transactions and that the claim was therefore unenforceable. The Court of Appeal was of the opinion that "In this country the law relating to contracts or agreements by way of gaming and wagering is not the same as the law of England . . . one result of which is that securities given in respect of wagers or games and pastimes are to be deemed, to be given upon an illegal consideration." [61] This point is not of much significance and calls for no further comment. The second point stressed by the court deserves further attention. Thomson C.J. said, "The difference which is important here is that in an action based on a contract it is for the plaintiff to prove the consideration. In an action on a negotiable instrument, however, consideration is presumed and it is for the maker or the endorser of the instrument to prove that there was no consideration." [62] The learned judge relied on section 30 of the Ordinance. Hill J. A. agreed with him.[63] Good J. A. had nothing more to add except to give his assent. The approach of the Court is, it is submitted, clearly wrong. Having regard to the finding of fact of the trial judge, the negotiation of these cheques was tainted with illegality and accordingly the burden shifted to the plaintiff under section

58. See *ante,* p 108.

59. See Anson, *Law of Contract,* (22nd ed.) p. 301 *et seq.* where the relevant legislation and cases are considered.

60. (1963) 29 M.L.J. 6.

61. *Ibid.*, at p. 7.

62. *Ibid.*, at p. 8.

63. *Ibid.*, at p. 8.

30(2) of the Ordinance to show that subsequent to such illegality, he had himself given value in good faith.[64] It is submitted with respect that the view of Suffian J. is right and that of the Court of Appeal wrong. In the second case, *Ratna Ammal* v. *Tan Chow* Soo,[65] on 24th January, 1961, the defendant issued a cheque for $50,000/- to the plaintiff's son who was an assistant controller of foreign exchange in charge of issuing permits for trade with Indonesia for the purpose of inducing the latter to do an illegal act. The cheque was endorsed over to the plaintiff who presented it for payment on 5th July 1963 and was dishonoured. In an action by the plaintiff, the defendant pleaded that the cheque was given for an illegal consideration contrary to public policy or forbidden by statute. Raja Azlan Shah J. observed:[66]

> In the present case the defendant has admitted that he is the drawer of the said cheque and therefore the law presumes that the plaintiff is the holder of the said cheque in due course. The burden is therefore on the defendant to prove that the said cheque was tainted with illegality or there was total failure of consideration. If he has satisfied the court that on a higher degree of probability there was the element of illegality or total failure of consideration then the presumption in favour of the plaintiff no longer holds good and it is thus for the plaintiff to prove that subsequent to the alleged illegality value has in good faith been given for the bill, though not necessarily by herself.

Having thus stated the law so clearly and correctly, the learned judge was of the view that "on the balance of probability as is required to be proved in a case of this nature, the defendant has substantiated his claim that at the time it [the cheque] was given it was tainted with illegality and is therefore void."[67] The learned judge's decision on the law is plainly correct, though the factual test he applied is open to question.

(1) *Contractual Capacity*

Capacity to incur liability as a party on a bill is the second point of difference between, the law in Malaysia and Singapore and the English law. Section 22(1) of the Ordinance provides that "capacity to incur liability as a party to a bill is coextensive with capacity to contract."[68] Section 11 of the Contracts (Malay States) Ordinance enacts that "every person is competent to contract who is of the age of majority according to the law to which he is subject. …" In a country inhabited by peoples of different races and religions, subject to special laws of their own, difficult problems could arise, and accordingly, the Age of Majority Act 1961,[69] fixes twenty-one years as the age of majority for all males and females who are not Muslims and eighteen years for all males and females

64. See Anson, *op. cit.*, p. 408 where the law is correctly stated.

65. [1966] 2 M.L.J. 294.

66. *Ibid.*, at p. 295. It is significant that the judge refers to the English Bills of Exchange Act, 1882, instead of the local Ordinance which applies in Penang.

67. *Ibid.*, at p. 300.

68. The proviso to this section and subsection (2) thereof are identical with the English Bills of Exchange Act.

69. No. 9 of 1961.

who are Muslims.[70] Accordingly, there are two categories or persons (a) Muslims whose minority is determined at the age of 18 years, and (b) others who reach their majority at the age of 21. The Infants' Relief Act, 1874,[71] does not apply in Malaysia. However section 1 (g) of the Contracts Ordinance provides that "an agreement not enforceable by law is said to be void." A contract of loan to a minor is, therefore, void and to that extent the English decisions in *Coutts Co.* v. *Brown Lecky*[72] and *Leslie (R) Ltd.* v. *Sheill*[73] are no less applicable in Malaysia. It is also submitted that as in English law, if the loan was granted for the purchase of necessaries and actually used for that purpose, the infant would not be liable.[74] In English law an infant cannot after he reaches the age of majority render himself liable by a fresh promise on a contract entered into while he was an infant, a contract declared by the Infants' Relief Act to be void.[75] The position in Malaysia would seem to be otherwise. In *Arunasalam Chetty* v. *Aziz Khan*[76] the defendant made a promissory note during infancy, and after he reached the age of majority, executed a further note for $1,000/- representing the amount borrowed during infancy plus a fresh advance of $50/-. The Court held the defendant liable for the entire sum of $1,000/-.

In Singapore the liability of an infant on a bill arose in *Ngo Bee Chan* v. *Chia Teck Kim*[77] where the defendant was sued on a promise to repay money borrowed by him during infancy and ratified after coming of age. Ebden J. held that by virtue of section 5 of the Civil Law Ordinance,[78] the Infants' Relief Act 1874 applied. This decision has been subject to serious criticism[79] and it is doubtful if it would be followed at the present time.

However, it is submitted that the law of Singapore with respect to capacity to incur liability on a bill is the same as that of Malaysia.[80]

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70. Muslim is defined as a person professing the Muslim religion (s. 2).

71. 37 & 38 Vict. c. 62.

72. [1947] K.B. 104.

73. [1914] 3 K.B. 607.

74. See Contracts (Malay States) Ordinance, 1950, *s.* 69.

75. S. 2.

76. (1941) M.L.J. 159.

77. (1912) 2 M.C. 25.

78. Laws of the Colony of Singapore (1955), Cap. 5.

79. Sheridan, *Malaya and Singapore, the Borneo Territories,* pp. 395-401.

80. See s. 96(2) of the Ordinance.

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