FORGERY AND MATERIAL ALTERATIONS UNDER THE BILLS OF EXCHANGE ACT

BILLS of exchange, cheques and promissory notes are among the earlier types of negotiable instruments which acquired popular usage. In recent years, new instruments possessing the characteristics of negotiable instruments have made their appearance. The value of each of these instruments stems from the mandate or promise embodied in the instrument. Being negotiable securities, they are easy targets for fraud and forgery. This article examines the legal consequences flowing from forgery and material alterations to instruments embodied in the Bills of Exchange Act.[1]

FORGERY AND MATERIAL ALTERATIONS

The Act expressly governs the form and legal nature of the bill of exchange,[2] the cheque[3] and the promissory note.[4] All these instruments have one feature in common. They embody a mandate or promise authenticated by the signature of the person giving the mandate or making the promise. Frauds perpetrated on such instruments can be put broadly into two groups. The first involves cases where the entire instrument including the signature is a forgery. The second group covers cases where the document starts life as a valid instrument but is subsequently tampered with by altering a material portion of the instrument. In the case where the signature of the drawer of the instrument has been forged, the Act, makes the whole instrument inoperative. Section 24 of the Act provides as follows:

> "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
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> Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery."

Where the signature of the drawer is a forgery, the only issue the court has to consider is one of fact. With respect to material alterations, the task of the court is more difficult. This difficulty arises

[1] Cap. 28, Singapore Statutes, Rev. Ed. 1970 (hereinafter referred to as the "Act"). Our Act is *in pari materia* with the English Act.
[2] Section 3.
[3] Section 73.
[4] Section 88.

partly from the fact that the Act gives the holder of an instrument which is incomplete the authority to fill it up as a complete instrument. This is provided for by section 20 which reads as follows:

> "(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and in a like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.
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> (2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time and strictly in accordance with the authority given. Reasonable time for *this* purpose is a question of fact."

The authority given under section 20 is to complete the instrument and this must be done strictly within the authority given and within a reasonable time.[5] Once the instrument is completed, section 20 will cease to operate and no further alteration to the instrument is permitted.[6] The only exception is the addition of a crossing in the case of a cheque.[7] Any addition or alteration to the instrument by unauthorised persons would have the effect of avoiding the instrument. This is provided for in section 64 of the Act which reads as follows:

> "(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsers:
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> Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.
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> (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

The situations to which section 20 and section 64 apply are quite different. Section 20 covers the case of an instrument which is incomplete and is subsequently filled up in accordance with the implied authority given to complete the instrument. Section 64, on the other hand, covers instruments which are complete but are subsequently altered without authority. This distinction between the sections is clearly brought out in two English decisions. The first is the case of *Foster* v. *Driscoll*.[8] In this case, two bills of exchange were issued

5 See *Herdman* v. *Wheeler* [1902] 1 K.B. 361, *Lloyd's Bank Ltd.* v *Cooke & Ors.* [1907] 1 K.B. 794 and *Griffiths* v. *Dalton* [1904] 2 K.B. 264.
6 See *Foster v. Driscoll & Ors.* [1929] 1 K.B. 470 and *Koch* v. *Dicks* [1933] 1 K.B. 307.
7 Section 77.
8 [1929] 1 K.B. 470.

pursuant to a contract to smuggle a cargo of whisky into the United States. One of the bills was accepted without the drawer's name being put on the bill. The bill was unstamped and headed "London". The drawer struck out the heading "London" and substituted "Lausanne" and then inserted his name as the drawer. The acceptor of the bill argued *inter alia* that the alteration "Lausanne" for "London" was a material alteration. The Court of Appeal decided that this change did not amount to a material alteration. Scrutton L.J. said:[9]

> "When the document was altered it was not a bill; it was being completed by inserting (inter alia) the true place where it became a bill. I am of opinion that s, 64 of the Bills of Exchange Act, 1882, does not apply to such a transaction, and I take the view of the transaction which makes the bill valid rather than the one which destroys it."

Once the bill is complete, any unauthorised alteration would lead to the avoidance of the bill. In *Koch* v. *Dicks*,[10] five bills of exchange were accepted in London in payment of the purchase of wireless apparatus from Germany. The bills were headed "London". The bills were negotiated to a German bank. The bank would only advance money on the bills if they were changed into foreign bills by altering the place where they were drawn from "London" to "Deisslingen". The drawers then made the alteration from "London" to "Deisslingen" as the place where the bills were drawn. This alteration was made without the acceptor's knowledge or consent. The acceptor pleaded that the alteration was a material alteration and that he was discharged from all liability under section 64(1) of the Bills of Exchange Act. The indorsee of the bills contended *inter alia* that as the drawers had authority to make the alteration before they completed the bills, there was no reason why they could not subsequently correct a mistake in the bills. The Court of Appeal in this case held that the alteration was a material alteration and Scrutton L.J. distinguished *Foster* v. *Driscoll.* He said:[11]

> "In my view *Foster* v. *Driscoll* does not apply to this case because the facts there were quite different from those in the present case. The alteration of the place of drawing from "London", which was in a lithographed form, to "Lausanne", where the bill was in fact drawn, was made while the bill was an incomplete instrument, a purported English bill on unstamped paper, with no time for payment filled in; it was not a complete bill at the time the alteration was made.... In the present case the alteration was made to a complete bill; the names of the drawers had previously been put in, and on the face of it the bill was then a complete inland bill, that complete bill was subsequently altered by striking out the purported place of drawing in the bill and substituting another place of drawing."

These two cases serve to illustrate the underlying differences between section 20 and section 64.

[9] *Ibid.*, at p. 494.
[10] [1933] 1 K.B. 307.
[11] *Ibid.*, at pp. 321 & 322.

MATERIAL ALTERATIONS

Section 64(2) enumerates the instances where the alteration to a bill of exchange is deemed to be material. It is apparent that this list is not exhaustive and there are other instances of alterations which would materially affect the validity of a bill. One example is the crossing on a cheque which is nowhere referred to in section 64(2). In section 78 of the Act, a crossing is stated to be a material part of the cheque. Similarly, in *Koch* v. *Dicks* it was contended that inasmuch as the place where a bill is drawn is not included in the list of material alterations, the inference is that the Legislature did not regard such an alteration as material. The Court had no difficulty in deciding that the alteration was material. Slesser L.J., put forward what he considered to be the test of materiality:[12]

> "I take the word "material" here to mean, in addition to the matters specifically mentioned in sub-s. 2 of s. 64, any such alteration which would produce a change in the legal nature of the instrument."

It is to be noted that section 64 is directed at unauthorised alterations, so that if a mistake has been made by the person drawing up the instrument, the mistake can be corrected if the amendment is properly authenticated by the signature of the drawer. Such an amendment would not affect the validity of the instrument as this would be an authorised amendment. This is in fact the usual way in which genuine mistakes on a bill are corrected.

Section 64 does not protect a drawer who deliberately alters the instrument in order to escape liability. Such an attempt was made in *Mercantile Bank Ltd.* v. *Yoon Slew Kang*.[13] The defendant in this case was a remisier in a stock broker's firm. He issued cheques in favour of the firm which then deposited them with their bankers to secure the firm's overdraft. Several of these cheques had their dates altered. In an action by the bank on the cheques, the defendant pleaded *inter alia* that the cheques were void because of the alteration to the dates. This defence was rejected by the Court. His Lordship, MacIntyre J. said:[14]

> "I have already dealt with the facts and drawn the conclusion that the alteration of dates in the relevant cheques were done deliberately in order to render them void as negotiable instruments; and that the only party who stood to gain by the alteration is the defendant. I have no hesitation in holding that the alteration was done either by the defendant himself or someone acting on his instructions. Therefore his defence based on material alteration must fail."

Material alterations under section 64 will also not extend to cases where the alteration is accidental, provided that the instrument can still be identified. The Privy Council had occasion to consider this form of alteration in *Hong Kong and Shanghai Banking Corpn.* v. *Lo Lee Shi*.[15] What happened in this case is a matter of common

[12] *Ibid.*, at p. 328.
[13] [1967] 2 M.L.J. 226.
[14] *Ibid*., at p. 233.
[15] [1928] A.C. 181.

experience. The plaintiff was given by her husband two bank notes, each, for five hundred dollars. She placed the notes in the pocket of some garment and having forgotten them, washed, starched and dried the garment. The notes were discovered when she was about to iron the garment. One of the notes was completely restored. It was not possible to restore the number on the other note. The bank refused payment upon the ground that the number was missing. The Board had to consider whether this was a material alteration within the meaning of section 64. The Board was of the view that the alteration here did not come within the purview of the section. Lord Buckmaster, delivering the decision of the Board said:[16]

> "Both the history of the Law which this section enunciates and the terms of the section itself show that it relates only to alterations effected by the will of the person by whom or under whose direction they are made, and that it does not apply to a change due to pure accident.
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> The alteration contemplated is one to which all might assent. It is not reasonable to assume parties assenting to part of the document being effaced by the operations of a mouse, by the hot end of a cigarette, or by any of the other means by which accidental disfigurement can be effected. Again, the provision which excepts from the category of persons against whom the bill is avoided, a party who has "himself made, authorised, or assented," to the alteration cannot reasonably apply to the ravages of a rat, a white ant, or any other animal pest. The fact that the change is accidental in itself negatives the possibility of assent."

RIGHTS OF THIRD PARTIES

The interests of third-parties are given some measure of protection under the proviso to section 64(1). Where the alteration is not apparent, a holder who has taken the instrument for value and in good faith will be able to enforce payment of it according to its original tenor. This issue was considered in *Bank of Montreal* v. *Exhibit & Trading Co.*[17] This case involved a promissory note which was made in Liverpool and posted to Canada promising to pay to the order of "The Goderich Organ Co." a certain sum. The payee converted itself into a limited company. An officer of the company inserted the word "Limited" after the payee's name and indorsed the note to the plaintiffs. One of the issues the Court had to consider was whether this alteration had the effect of vitiating the note. The Court found that the alteration was not apparent on the face of the note. His Lordship Phillimore J. said:[8]

> "… I am inclined to take the view that the alteration made in the note is not an "apparent" alteration, and therefore that the note is not on this ground vitiated in the hands of the plaintiffs who are holders for value."

Aside from this narrow exception, it would appear that a third-party would have no cause of action against the party who drew up the instrument for negligence in the drawing of the instrument. In

16 *Ibid*., at p. 187.
17 (1906) 11 Com. Cas. 250.
18 *Ibid*., at p. 253.

Scholfield v. *Earl of Londesborough*,[19] the House of Lords was of the view that an acceptor of a bill of exchange owed no duty to a third-party to ensure that the bill was drawn up in such a way that it cannot be tampered with. In this case, a bill was written out by the drawer for £500 in such a way that the amount could be increased without the alteration becoming apparent. After the bill had been accepted, the drawer increased the amount of the bill to £3,500 before indorsing the bill to the plaintiff. The alteration would have been impossible to detect being done by the person who drew up the bill. In an action by the holder of the bill against the acceptor, the holder put forward two contentions. He argued firstly, that there was a duty on the acceptor to see that the bill was in such a form as not to invite or facilitate fraudulent alterations which would mislead a holder. Secondly, that the alteration does not avoid the bill, as in this case, the alteration was not apparent. Most of their Lordships were content to dismiss the plaintiff's appeal on the ground that no such duty as contended for by the plaintiff exists. Lord Watson disposed of the issue in this way. He said:[20]

> "The duty which the appellant's argument assigns to an acceptor is towards the public, or what is much the same thing, towards those members of the public who may happen to acquire right to the bill, after it has been criminally tampered with. Apart from authority, I do not think the imposition of such a duty can be justified on any sound legal principle."

Duty of the Paying Banker

A bank very often acts as the paying agent in a bill of exchange or cheque transaction. As a banker, he acts under a mandate. If the signature of his customer is forged, he will be paying without the authority of his customer. Similarly if the instrument has been materially altered the instrument is avoided and the banker who pays does so without the customer's mandate. Thus, the banker runs a serious risk when he carries out the mandate of his customer. This risk is sufficiently illustrated by the case of *Hall* v. *Fuller*.[21] The plaintiffs were merchants in the City of London who had an account with the defendants, as bankers. One, Mr. Hill applied to the plaintiffs for a cheque for £3 stating it was for a friend. Mr. Hill's friend subsequently altered the amount of the cheque to £200 in such a way that the alteration was not apparent. This cheque was paid by the defendants. In an action by the plaintiffs against the bank, the plaintiffs contended that the loss must fall on the bankers on the ground that the altered cheque was not their cheque and that the defendants paid the money without any authority. The Court upheld the plaintiffs' contention and Bayley J. said:[22]

> "The banker, as the depository of the customer's money is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer, and to justify the payment, he must show that the order is genuine, not in signature

[19] [1896] A.C. 514.
[20] *Ibid.*, at p. 537.
[21] (1826) 5 B. & C. 750.
[22] *Ibid.,* at p. 757.

only, but in every respect. This was not a genuine order, for the customer never ordered the payment of the money mentioned in the cheque."

The position of the paying banker in relation to the handling of a materially altered cheque is further weakened by the fact that he would be unable to rely on the statutory protection embodied in the Act, particularly sections 60, 80 and 82. This is because the protection in these three sections extends to cheques and a materially altered cheque is technically no longer a cheque, for under section 64, a materially altered cheque is avoided as against the drawer. This issue was considered in *Slingsby* v. *District Bank Ltd.*[23] The plaintiffs were executors of a will and they kept an executors' account with the defendant bank. They retained a firm of solicitors by the name of Cumberbirch & Potts. The executors decided to invest £5,000 through a firm of London stockbrokers, John Prust & Co. They made out a cheque as follows: "Pay John Prust & Co…. or order." The cheque was handed to the firm of solicitors for transmission to the stockbrokers. James Cumberbirch, a partner in the firm of solicitors altered the cheque by adding the words "per Cumberbirch & Potts" after the name of the payee. Cumberbirch then indorsed the cheque "Cumberbirch & Potts" and paid it into the account of a company of which he was chairman. In an action against the bank, the executors based their claim, on two main grounds. Firstly, they alleged that their account had been debited without authority in that there was no proper or regular indorsement of the cheque. In the second place, they said that the cheque had been materially altered without their assent and was therefore void by section 64. The bank pleaded that they were protected by sections 60 and 80 of the Act, having paid the cheque in good faith and in the ordinary course of business.[24] The bank further alleged that the plaintiffs were negligent in leaving a space after the payee's name enabling the words to be added in. The Court found that the addition was indistinguishable from the description of the payee as it was done in the same handwriting. It was further of the view that the cheque was avoided under section 64 because of the addition. The Court went on to hold that the protection given under sections 60 and 80 was excluded by the fact that the alteration had made the paper a null and void document, no longer a cheque. On the question of the form of the cheque, the Court held that it was not then a usual precaution to draw lines before or after the name

[23] [1932] 1 K.B. 544.

[24] Bills of Exchange Act, 1882,

S. 60: "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

S. 80: "Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payer, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

of the payee. However, if this sort of case becomes frequent, it may become a usual precaution.

CUSTOMER'S DUTY OF CARE

If the loss resulting from the payment of a materially altered cheque, were to fall entirely on the shoulders of the paying banker, it would make the task of a banker extremely onerous. Further, in most cases where cheques have been materially altered, the drawers are not entirely blameless. Drawers of cheques have often provided the opportunities for the alterations by their lack of care in drawing up their cheques. It was not long before the courts recognised that a customer of a bank owes a duty of care to the bank in drawing his cheques. This duty is now so firmly established that it is only necessary to refer to the decision of the House of Lords in *London Joint Stock Bank Ltd.* v. *Macmillan*[25] for a statement of the duty. The plaintiffs who were a firm of general merchants kept an account with the defendant bank. They had in their employment a clerk by the name of Klantschi who was entrusted with the duty of filling in cheques for signature. One day, he presented for the signature of a partner in the firm a bearer cheque for £2. The clerk had very cleverly left spaces for the amount in words blank and also spaces between the figures in numerals. After obtaining the signature to the cheque, the clerk added the words "one hundred and twenty pounds" in the space for words, and increased the figures in numerals to £120. The alteration was undetectable as it was in the same handwriting. The plaintiffs brought an action against the paying bank for the unauthorised payment. The bank resisted the claim on the grounds that the plaintiffs had drawn the cheque so negligently as to lead to the fraud and that the plaintiffs had entrusted the cheque signed by them to Klantschi authorizing him to fill it up. The House had no difficulty in finding that a customer owes a duty of care to the paying bank in drawing his cheques. Lord Finlay, L.C. said:[26]

> "It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque 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 as 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."

The House found that the plaintiffs were negligent in signing the cheque in the form presented by the clerk. The cases have revealed that the most common instance of the breach of this duty of care in the drawing of cheques is the leaving of blank spaces either before, in between or at the end of written words. Drawers of cheques should therefore avoid leaving spaces when they fill up their cheques. It must also be pointed out at this juncture that while the overwhelming judicial opinion is in favour of the customer's duty not to leave blank spaces when he writes his cheques, there exists a lone Privy Council decision which appears to be contrary to this long line of decisions.

[25] [1918] A.C. 777. See also *Young* v. *Grote* (1827) 4 Bing 253. *E.A Barbour Ltd.* v. *Ho Hong Bank* [1929] S.S.L.R. 116.
[26] [1918] A.C. at p. 789.

The decision in *Colonial Bank of Australasia Ltd.* v. *Marshall* [27] has largely been ignored by the English courts on the basis that being a Privy Council decision it is not binding on the English courts. The Privy Council case arose on an appeal from the High Court of Australia. The plaintiffs in this case were executors and they had an account with the defendant bank. One of the executors, Myers, was in the habit of preparing cheques for the others to sign. The dispute arose out of five such cheques which Myers had prepared. After getting the signatures of the other two executors, Myers increased the amounts on each of the cheques. The alterations were of course undetectable, being in the same handwriting. In an action against the paying bank, the bank pleaded that the customer was under a duty to exercise ordinary and reasonable care in drawing cheques. They also contended that here one of the drawers himself committed the fraud and therefore the plaintiffs were bound to indemnify the bank against the loss. After reviewing the English authorities on this point, the Board came to the conclusion that there was no evidence of negligence to be left to the jury. Sir Arthur Wilson, delivering the opinion of the Board said:[28]

> "The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation."

This view of the law is inconsistent with the line of English decisions. Our own courts have also not followed the above decision.[29] It is apparent that the case was wrongly decided and should not be followed in future.

MATERIAL ALTERATION AND THE COLLECTING BANKER

In a simple cheque transaction, it is normal for at least two banks to be involved. First, there is the drawer's bank which pays the cheque. The payee can either obtain payment directly from the paying bank or get his own bank to collect the cheque. This would involve a second bank coming into the transaction. The second bank is normally known as the collecting bank. A potential risk which a banker faces when he collects a cheque for a customer is that the customer might turn out to be a person with no title to the cheque. This would expose the banker to a possible action for conversion. When a collecting banker is sued for conversion, his strongest defence lies in the statutory provisions embodied in the Act and in particular sections 83 and 85. We considered earlier the statutory protection accorded to the paying banker and one question we looked at was whether the protection would extend to a materially altered cheque. A similar question arises in connection with the collecting banker. This issue was considered by the Court of Appeal of Ceylon in *Bank*

[27] [1906] A.C. 559. In *Commonwealth Trading Bank of Australia* v. *Sydney Wide Stores Pty. Ltd, & Anor.* (1981) 35 A.L.R. 513, the High Court of Australia declined to follow the Privy Council decision.

[28] *Ibid*., at p. 568.

[29] See Burton J.'s decision in *Barbour Ltd.* v. *The Ho Hong Bank Ltd.* [1929] S.S.L.R. 116, at p. 126.

of Ceylon v. *Kulatilleke.*[30] The action in this case was brought by the legal representative of the drawer of a cheque which had been materially altered against the bank which collected the cheque. The drawer, who was not literate in English, signed two cheques prepared by a clerk in his employment. The clerk wrote the cheques in such a way that the amounts could be increased without being detected. The cheques were collected by the defendant bank. The drawer was unsuccessful in his action against the paying bank as the Court found that he was in breach of his duty to exercise care in drawing his cheque.[31] He then turned to the collecting bank. The bank pleaded that they were protected by section 82 of the Ceylonese Bills of Exchange Ordinance. In holding that the bank could not rely on the above section, Basnayake CJ. said:[32]

> "The section applies to cheques which do not have the taint of forgery or fraudulent alteration, a cheque which is the drawer's cheque in all respects and which carries the authority of the drawer. A cheque which has been altered fraudulently as in this case by raising the amount is invalid."

This view is consistent with the decisions dealing with the paying banker. It would thus appear that the collecting banker is in an even more onerous position than the paying banker, for while the paying banker can rely on the contractual duty of the customer to exercise care in drawing his cheques, this defence would be unavailable to the collecting banker as there is no contractual relationship between the drawer of the cheque and the collecting banker.[33] In passing, it may be noted that there is a local decision in which the collecting banker has successfully pleaded the defence under section 82 of the Act for collecting a materially altered cheque. This decision in *National City Bank of New York* v. *Ho Hong Bank Ltd.*,[34] however must be treated with some caution, as the issue of the validity of the cheque was never raised before the court.

FORGERY AND THE PAYING BANKER

One of the duties of a paying banker is to recognise the mandate of his customer, and this is usually done by identifying the signature of his customer. Should the signature of the customer be forged, the bank would have no mandate to pay the cheque.[35] However, if the customer is aware that somebody has been forging his cheques, he is under a duty to bring this to the notice of the bank. Failure to do so, would allow the bank to raise the plea of estoppel. The extent of this duty was considered by the House of Lords in *Greenwood* v. *Martins Bank.*[36] The plaintiff had two accounts with the defendant

30 [1957] N.L.R. 188.
31 *Kulatilleke* v. *Mercantile Bank* [1957] N.L.R. 190.
32 [1957] N.L.R. at p. 189.
33 In *Lumsden & Co.* v. *London Trustees Savings Bank* [1971] 1 Lloyd's Rep. 114, the Court held that the Law Reform (Contributory Negligence) Act, 1945 applied to the tort of conversion and that the collecting banker could rely on the contributory negligence of the drawer of the cheque.
34 (1932) M.L.J. 64.
35 There is no duty on the part of a customer of a bank to take precautions to prevent forgeries. *Kepitigalla Rubber Estates Ltd.* v. *National Bank of India* [1906] 2 K.B. 1010.
36 [1933] A.C. 51.

bank, one jointly with his wife and the other solely his own. The wife forged her husband's signature to cheques on both accounts. The forgeries on the husband's account were discovered by the husband but he was persuaded not to report the matter to the bank. The husband threatened to tell the bank eight months later when he found that his wife had been lying to him. The wife subsequently committed suicide. The husband then brought an action against the bank for paying the money without authority. The bank pleaded *inter alia* that the plaintiff had failed in his duty to the defendants in keeping silent when he knew or ought to have known that they were relying on the validity of the forged cheques and that in the circumstances he should be estopped from alleging that the signatures were forgeries. The House upheld the plea of the bank. Lord Tomlin said:[37]

> "Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation.... The appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced — namely the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant's wife. The deliberate absention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me present all the elements essential to estoppel."

The customer of a bank has a duty to inform the bank once he is aware that his signature is being forged and deliberate silence can amount to a representation by conduct. It would follow *a fortiori* that if the customer makes an active representation that everything is all right with his account he should clearly be estopped from proving to the contrary. The case of *Brown* v. *Westminster Bank Ltd.*,[38] would be a case in point. The court in this case held that an old widow who had repeatedly represented to the bank manager that there was nothing wrong with her account was estopped from denying that her cheques had been forged.

CONCLUSION

The above review has shown that the consequences resulting from the fraudulent alteration of a negotiable instrument go far beyond the interests of the party against whom the fraud is committed. The task of the law as always is one of attempting to adjust a loss between two innocent parties. The law has achieved some measure of success in being able to attribute the loss to the party who has failed to exercise due care in the transaction. This solution is only just and equitable for carelessness often creates the opportunity for fraud.

POH CHU CHAI*

[37] *Ibid.*, at pp. 57 & 58.
[38] [1964] 2 Lloyd's Rep. 187.

* LL.B. (Sing.), LL.M. (Lond.), Advocate & Solicitor, Supreme Court of Singapore, Senior Lecturer in Law, National University of Singapore.