1949 *Present :* **Dias and Windham JJ.**

BANK OF CEYLON, Appellant in No. 421, *and* KOLONNAWA URBAN COUNCIL, Respondent

S. C. 421–422—D. C. Colombo, 16,562 M

Banker and customer—Banker paying forged cheque—On whom does loss fall ?—Bills of Exchange Ordinance (Cap. 68), s. 24—Onus—Estoppel.

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

Where a banker sets up the genuineness of a signature which is alleged by the customer to be forged, the burden of proof is on the banker.

" As between a bank and its customer there is no implied agreement by the latter to take precautions, in the general course of carrying on his business, against forgeries on the part of his servants. Such estoppels will arise if, after knowledge of a forgery, the customer does anything to mislead the bank and the position of the bank is thereby prejudiced."

APPEAL and cross-appeal from a judgment of the District Judge, Colombo.

S. J. V. Chelvanayagam, K.C., with *C. S. Barr Kumarakulasinghe* and *Izadeen Mohamed*, for the plaintiff appellant in 422 and respondent in 421.—The plaintiff Council sued the defendant Bank for the recovery of Rs. 27,000 covered by cheques D1, D2 and D3 for Rs. 3,000, Rs. 4,000 and Rs. 20,000 respectively. The plaintiff's case was that the payment by the defendant Bank on these cheques and debiting the plaintiff's account with these sums was unlawful in that the signatures appearing on these cheques were not the genuine signatures of the persons authorised to sign on behalf of the Council, *i.e.*, Chairman and the Secretary, but were forgeries. The defendant's case was that the debiting to the plaintiff's account of such sums was perfectly lawful as the signatures were genuine. The defendant also pleaded that the plaintiff was estopped from denying that the signatures were genuine but that plea of estoppel was abandoned in the course of the trial. The District Judge held for the defendant Bank with respect to D1 and D2 but with respect to D3 he held for the plaintiff. It is submitted that the finding of the trial judge with respect to D3 is correct but the finding with respect to D1 and D2 cannot be supported on the evidence in the case.

The relationship between customer and bank is the same as that between creditor and debtor. The law on this point is clear and authorities all point the same way. The Bank is authorised to pay out money only on a mandate of the customer and unless the Bank proves that cheques were signed by the customer the Bank cannot evade liability. It may be that under certain circumstances the plea of estoppel may be available to the bank. But estoppel though pleaded has been abandoned in the course of the case.

1—J. N. A 02666-1,040 (10/49)

The only question which arises in this case is whether or not the cheques in question or any one or more of them were signed by both the Chairman and the Secretary. For the defendant to succeed in respect of any of these cheques both signatures on such cheque must be genuine. The initial burden to prove that signatures on these cheques are genuine is on the bank. See *Bennet v. London and County Bank* [1]. Mere negligence on the part of a customer is no defence to a bank to deny liability with respect to money paid out on forged cheques. See *Kepitigala Rubber Estates Limited v. National Bank of India Limited* [2].

A careful analysis of the evidence shows that there is no reliable evidence at all to prove that any signature on any of these cheques is genuine. The finding of the trial judge with respect to D1 and D2 is based on theories not founded on evidence. The plaintiff should have been given judgment for Rs. 27,000 and costs.

N. E. Weerasooria, K.C., with *S. Nadesan* and *S. Sharvananda*, for the defendant, respondent in 422 and appellant in 421.—That the negligence of a customer is no defence to a bank to escape liability is too wide a proposition to be accepted generally. On the other hand, cases and authorities seem to show that it is a question of fact in each particular case whether the bank should be held liable or not liable. See *London Joint Stock Bank Ltd. v. Macmillan and Arthur* [3]; *The Governor and Company of Bank of England v. Vagliano Brothers* [4]. There can be no doubt that there is a duty on the customer to take reasonable care in his dealings with his bank. The evidence in this case shows clearly that there has been a complete absence of office routine and a lack of elementary business precautions in keeping cheque books and drawing out cheques. Under such circumstances it would be impossible to say that the cheques were not signed by the Chairman and the Secretary. The learned judge has misdirected himself with regard to D3. He seems to have ignored the fact that, as against the bare denials of the Chairman and the Secretary, three responsible bank officials have testified to the genuineness of both signatures in each cheque. The plaintiff's case must fail altogether.

Cur. adv. vult.

November 4, 1949. DIAS J.—

The Kolonnawa Urban Council instituted this action against The Bank of Ceylon to recover three sums of Rs. 3,000, Rs. 4,000, and Rs. 20,000 said to have been wrongly paid out by the Bank on three forged cheques, D1, D2, and D3 bearing the forged signatures of the Secretary and the Chairman of the Urban Council. The plaintiff's case is that the Bank unlawfully paid this money, and unlawfully debited the plaintiff Council's account at the Bank with those sums. The case for the Bank is that the signatures of the three cheques are genuine, and the cheques having been honoured and honestly paid in the ordinary course of business, the money so paid out was correctly debited to the plaintiff's account. The defendant also raised a plea of estoppel against the Council. This plea was abandoned in the course of the trial.

[1] *(1885-6) 2 T. L. R. 765.*
[2] *(1909) L. R. 2 K. B. 1010.*
[3] *L. R. 1918 A. C. 777.*
[4] *L. R. 1891 A. C. 107.*

The law relating to a banker who pays out a customer's money on a forged cheque is clear. Section 24 of the Bills of Exchange Ordinance (Chap. 68) declares that where the signature on a bill (which includes a cheque) is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative. A banker who pays out money on a cheque bearing the forged signature of a customer cannot charge the amount so paid out to the account of the customer, unless facts or circumstances exist which in law preclude or estop the customer from pleading that his signature was forged—see *Imperial Bank of India Ltd. v. Sir S. D. Bandaranaike* [1], *Grant's Law of Banking (7th ed.) pages 21–22, Paget's Law of Banking (3rd ed.), pages 368 et seq.*

The plea of estoppel having been abandoned, the only issue which arose between the parties to this action is a question of fact—Are the cheques D1, D2, and D3 forgeries or not? If the former—the defendant, admittedly, would be liable to bear the loss. If the latter—the plaintiff, admittedly, would have to bear the loss, and the defendant would be legally entitled to debit the plaintiff's account with the value of the three cheques.

When a banker sets up the genuineness of a signature which is alleged by the customer to be forged, on whom does the initial *onus* lie? In this case, at the commencement of the trial, the District Judge has recorded: "On the question of the *onus* of proof, Mr. Chelvanayagam (Counsel for the plaintiff) is willing to take on the burden himself in the first instance, leaving it open to him to lead evidence in rebuttal of any facts which the defendant might prove. Mr. Gratiaen (Counsel for the defendant) agrees, and states he is satisfied with the undertaking, as he has always maintained that on the pleadings the burden is on the plaintiff". I may, however, point out that in circumstances such as these, the initial burden of proof was on the defendant. Watson in *The Law of Cheques (4th ed.) p. 107* says—"Where a banker sets up the genuineness of a signature alleged by the customer to be forged, the *onus* of proving his case beyond all reasonable doubt lies, it is said, on the banker—*per* Denman J. in *Bennett v. London & County Bank*" [2].

The District Judge holds on the facts that the cheques D1 and D2 are not forgeries. He takes the view that the Secretary who was on a holiday in Anuradhapura between May 19 and May 23 had signed his name on several blank cheques, including D1 and D2, in the cheque book before he left Colombo, so that should need arise during his absence for any cheques to be issued, such blank forms could be utilised, which, after being signed by a complaisant Chairman, could be issued to the payees. The District Judge, therefore, holds that D1 and D2 bear the genuine signatures of the two persons who by law were authorized and empowered to sign the Council's cheques. Therefore, when D1 and D2 were presented for payment at the defendant bank and honoured, the loss should fall on the plaintiff Council and not on the bank. The District Judge held that the case of cheque D3 stood on a different footing. He held that the defendant bank had not proved by any sort of evidence to

[1] *75 D. C., Colombo 45,270 (S. C. M. April 10, 1935).*
[2] *(1886) 2 T. L. R. 765.*

his satisfaction that D3 was signed by the Chairman or the Secretary. In other words, he held that D3 was a forgery, and that the loss resulting from the payment of such a forged cheque, there being no estoppel against the plaintiff, must fall on the defendant. He, therefore, entered judgment in plaintiff's favour for the sum of Rs. 20,000 (D3) and in favour of the defendant for the two sums of Rs. 3,000 and Rs. 4,000 (D1 and D2).

The evidence discloses an amazing state of affairs, which savours more of comic opera than actual fact, as to the manner in which the business of the Kolonnawa Urban Council was managed during the year 1945. In fact, the impression created by the evidence is that those who were responsible for the Kolonnawa rate-payers' money in the year 1945 did everything they ought not to have done, and did not do what they ought to have done, and there was no "health" in them! The Chairman, who is the chief executive officer, had no "business experience" at all. His educational qualifications, admittedly, are poor. He did not know what his duties and responsibilities were. In most matters he was guided solely by the Secretary who "ran the show". Provided a cheque bore the signature of the Secretary, the Chairman blindly appended his signature to it. In addition to his other shortcomings, the Chairman was an invalid who often could not go to the Council's office in order to attend to his duties. Therefore, the Council's cheque book and other important papers were conveyed without any cover or wrapper to the Chairman's residence. No proper office routine was observed. The evidence demonstrates that subordinate officers, including peons, had free access to the cheque book. Various officers were permitted to write out the body of cheques, and there is evidence that even peons had been allowed to do so. In fact, this fraud was first detected, not by a staff officer of the Council, but by a peon! In order to minimise the possibility of fraud a rubber stamp had been provided which had to be affixed to each cheque before it was submitted to the Secretary and the Chairman for their signatures. This stamp reads as follows:

"Urban District Council, Kolonnawa
..... Secretary
..... Chairman"

The evidence shows that this rubber stamp was kept in the office, and was indiscriminately affixed to each blank cheque no sooner did a new cheque book reach the office from the bank. Therefore, this safeguard against the unauthorised issue of cheques was frustrated. For the mutual safety of banker and customer, the defendant used to send statements regarding the state of the Council's bank account to the plaintiff every ten days. These statements were expected to be scrutinized and checked by the Secretary, who deputed that duty to a subordinate officer, with the result that no checking was ever done. If those statements when received had been checked with the counterfoils of the cheques issued, any fraud or mistake would at once become apparent. The defendant sent the statement P5 covering the period May 15, 1945, to May 21. This was received in the Council on May 25, 1945. One of the cheques debited against the Council is Cheque No. 746 for Rs. 4,000 (D1) which was cashed

on May 21. The Chairman stated in evidence that it was the duty of the Secretary to check P5. The Secretary stated that it was the duty of the Chief Clerk to do so. Anyway nothing was done, and the fraud passed undetected. The next statement from the bank—P6—was received on June 6, 1945. This statement covers the period May 22, 1945, to May 30. Had anyone taken the trouble to check the entries in P6 with the cheque counterfoils, it would have been discovered that both D1 for Rs. 3,000 and D3 for Rs. 20,000 had been cashed on May 23 and May 30, respectively. None of the staff officers discovered that anything was wrong. It was left to a peon on June 7 to discover that a cheque for Rs. 20,000 had been cashed. A cheque for such a sum had never been issued by the Council. Even then, the cheques D1 and D2 were not discovered. The Secretary and the Chairman then went to the bank, and complained about D3 to the bank officials, and the matter was reported to the C. I. D. It was after that—on July 17, 1945, when a "reconciliation statement" was being prepared, that cheques D1 and D2 and the fact that the counterfoils of those two cheques had been abstracted, were discovered for the first time. "As between a bank and its customers, however, there is no implied agreement by the latter to take precautions in the general course of carrying on his business against forgeries on the part of his servants. Such estoppels will arise if, *after* knowledge of a forgery, the customer does anything to mislead the bank and the position of the bank is thereby prejudiced; but no estoppel will result from mere silence for a period during which the position of the bank is not altered for the worse"—*Grant's Law of Banking, pages 21–22.* "Mere carelessness in keeping the cheque book is, of course, no use. In fact, it is generally adduced as the *reductio ad absurdum* of the contention as to estoppel by negligence. The entrusting of the occasional drawing of cheques to an agent, who subsequently draws others without authority, would come rather under the head of "holding out" than of estoppel by breach of duty. The lack of supervision over an agent who might have access to the cheque book and opportunities for concealing forgeries committed by him is, probably, too remote in this connexion"—*Paget on the Law of Banking, pages 368 et seq.*

Both the Chairman and the Secretary have denied on oath that the signatures on D1–D3 are theirs. The evidence of the handwriting experts did not carry the proof very far. Mr. Nagendram who was called by the plaintiff stated that in his opinion the signatures on D1 to D3 were forgeries. Mr. Lawrie Muttukrishna who was called by the defence expressed the view that D1 to D3 were "*probably*" signed by the Secretary, while with regard to the signatures of the Chairman he was of the view that "the probabilities were evenly balanced, there being no obvious feature of forgery". Taking all the circumstances Mr. Muttukrishna was of the view that the signatures were "more probably genuine than spurious". Dealing with the expert evidence, the District Judge said "I do not feel justified in accepting entirely either the opinion of Mr. Nagendram or the opinion of Mr. Muttukrishna. Each of these experts holds a different opinion and gives his reasons for it. These reasons fade when tested by cross-examination and when other signatures are pointed to, which bear the same features emphasised as reasons for

the opinions expressed". At the argument in appeal, neither counsel stressed the opinions of the experts. The question must, therefore, be decided without the aid of expert evidence. The officials of the bank, who from their experience and training may be as good witnesses on questions of handwriting as any handwriting expert, are unanimous in their view that the signatures on D1–D3 are genuine. These persons, however, are interested witnesses so far as the question at issue is concerned. The Chairman and the Secretary of the plaintiff Council are equally interested witnesses. Furthermore, there is evidence that since this action was instituted, the Audit has surcharged both of them with the value of these cheques—and that matter is awaiting the decision of this case before any further action is taken.

The authorities which I have cited show that however negligent the banker's customer may have been, such facts would not avail a banker who honours a forged cheque unless the customer is estopped from pleading the forgery. The question of estoppel does not arise in this case. The only question for decision therefore is whether the cheques D1 to D3 were or were not signed by the Secretary and the Chairman of the plaintiff Council ?

The plaintiff's cheque book for the relevant period is the exhibit P1. This contains two hundred cheque leaves, there being two cheques and two counterfoils to each page.

D1 is cheque No. C 374746. It bears the date May 19, 1945, and has been made out in favour of an admittedly non-existent person called D. J. Perera for the sum of Rs. 4,000. D1 bears the Council's rubber stamp, and purports to have been signed by the Secretary and the Chairman. D1 was presented at the defendant bank for payment by an unidentified person on May 21, 1945, and was honoured, the alleged forgery passing undetected. The evidence conclusively shows that no sum was owing to a person called D. J. Perera from the Council. There is no supporting voucher or receipt for it. This payment of Rs. 4,000 does not appear in any ledger or cash book of the Council. Obviously, some person who was thoroughly familiar with the negligent practices of the plaintiff Council, has taken advantage of the situation and perpetrated a fraud on the plaintiff. The Council gained no advantage by the issuing or the cashing of D1. There is no evidence to show that either the Chairman or the Secretary or any other official of the Council gained anything either.

Cheque D1 (C 374716) and cheque D2 (C 374745) formed one single page in the cheque book P1. Not only were both the cheque leaves used to commit fraud, but both the counterfoils of D1 and D2 have been skilfully removed from the cheque book, thereby preventing anyone from detecting the abstraction, unless he scrutinized the numbers of the various cheque counterfoils with care. In fact, neither D1 nor D2 were discovered until the C. I. D. commenced their investigation.

Cheque D2 (C 374745) is dated May 21, 1945, and is payable to an admittedly non-existent person named Thomas Perera for the sum of Rs. 3,000. D2 bears the Council's rubber stamp, and purports to bear the signatures of the Secretary and the Chairman. The Council had no dealings with a person called Thomas Perera, nor was a sum of Rs. 3,000 or any sum due from the Council for any work done or service rendered

by a Thomas Perera. There is no supporting voucher or any document or entry for this payment in any of the Council's books. Cheque D2 was presented by some unidentified person at the bank on May 23, 1945. He was paid the sum of Rs. 3,000.

The burden of proof lay on the defendant to prove either by direct or circumstantial evidence that the cheques D1 and D2 were signed by the Secretary or the Chairman of the plaintiff Council. There being no direct evidence, this fact had to be established by circumstantial evidence.

On May 22, 1945, the following admitted cheques were written and signed by the Secretary and the Chairman :

No. of Cheque	*Amount*	*Supporting voucher*	*Date of payment*	*Entry in votes' ledger*
	Rs. c.			
C374739—P17 ..	23 35 ..	No. 67—P44 ..	22.5.45 ..	P33
740—P18 ..	198 72 ..	No. 68—P45 ..	22.5.45 ..	P33
741—P19 ..	90 72 ..	No. 69—P46 ..	22.5.45 ..	P33
742—P20 ..	53 10 ..	No. 70—P47 ..	22.5.45 ..	P35
743—P21 ..	50 70 ..	No. 71—P48 ..	22.5.45 ..	P33
744—P22 ..	448 95 ..	No. 72—P49 ..	22.5.45 ..	P33
745—D2 (abstracted.)	D2 is dated 21.5.45.		Paid by the bank 23.5.	
746—D1 (abstracted.)	D1 is dated 19.5.45.		Paid by the bank 21.5.	
747—P23 ..	25 00 ..	No. 73—P50 ..	22.5.45 ..	P33
748—P24 ..	424 03 ..	No. 74—P51 ..	22.5.45 ..	?
749—P25 ..	264 10 ..	No. 75—? ..	? ..	?

It is a curious fact that although cheques had been written out and signed by the Secretary and the Chairman on May 18, 1945, there is no single cheque—other than D1—which bears the date May 19, 1945. The defence suggests that the reason for this lies in the fact that the Secretary was absent on leave from Kolonnawa between May 19 (a Saturday) and May 23 (a Wednesday), he having proceeded to Anuradhapura on a holiday. The defence points to the fact that on May 22 (Tuesday) the Secretary, although absent on leave, has signed no less than nine admittedly genuine cheques—P17 to P25. The evidence of the Secretary as to where he was on May 22 is extremely unsatisfactory. He made several contradictory statements on this point before the trial of the civil action. At the trial he swore that he curtailed his holiday, and returned from Anuradhapura by the night train reaching Colombo on the morning of May 22 (Tuesday) " because he did not like to leave his wife and children alone in Colombo ". This is a singularly unconvincing reason, and I cannot wonder at the learned District Judge disbelieving him on the point. Not only was there no reason why his wife and children, who had managed to exist without him until the 22nd May, could not safely wait another twenty-four hours for his return, but if his story is true, there should also be available documentary evidence in the office of the Council to corroborate him. If he had attended office on May 22, there must exist the attendance register and other documents written or signed by him on that day which would prove that his story is true. Furthermore, an officer who curtails his leave, would take steps to see that the unexpired portion of his leave would be

noted in his personal file, or the leave register, so that should he at any future time desire to avail himself of more leave, he would be able to utilise this unexpired leave. No evidence on this point was forthcoming. The contention of the defence which the District Judge has accepted is that the Secretary has given untrue evidence on this point, and that he was neither in Colombo nor did he sign the cheques P17–P25 or any cheques at all on May 22, 1945.

Why, then, is the Secretary stating what is untrue? The defence submits that he is doing so in order to cover up an irregularity he was guilty of before he left the office on leave on May 18. They maintain that before the Secretary left the office on leave, he signed a number of blank cheque leaves (P17–P25, D1 and D2), so that should the need arise during his absence for the Council to make payments, signed cheque leaves would be available to be filled in for the proper amounts and to be submitted to the Chairman who, as the evidence abundantly demonstrates, would have signed any cheque provided it bore the signature of the Secretary. During his absence the cheque book would be in the charge of another officer. The suggestion is that some dishonest person took advantage of this opportunity and utilised the two blank cheques D1 and D2 to perpetrate this fraud. When the cheque book was taken or sent to the Chairman on May 22 in order to sign genuine cheques, he found awaiting his signature no less than eleven cheques (P17–P25, D1 and D2), all of which he blindly signed according to his wonted custom. The guilty person then, undetected, abstracted D1 and D2 and removed the counterfoils in order to make detection difficult.

This is an attractive theory, but, unfortunately, it does not account for one important fact. *The cheque D 1 bears the date May 19 (Saturday), and was actually cashed at the bank on May 21 (Monday), i.e., before P17–P25 were written out.* Assuming that the contention for the defence is sound, and that the Secretary before he left Colombo signed a number of blank cheque forms including D1, then clearly someone had submitted D1 to the Chairman for his signature either on or *prior to May 21*, because D1 was in fact cashed on May 21. May 20 was a Sunday, and one can assume that the Council office would not be open for work on a Sunday. Therefore, the cheque D1 must have been submitted to the Chairman either on the Saturday (May 19) or on the Monday (May 21). *There are no less than seven cheques in the cheque book earlier than D 1, namely, P17–P23, and D 2.* Therefore, if the cheque book had been submitted to the Chairman for signature on the Saturday or the Monday, even this negligent Chairman could not have failed to detect the unusual circumstances that he was being asked to sign cheque No. C 374746 (D1) when seven cheques, C 374739 to C 374745 were not filled in, or if filled in, bore the date May 22 in regard to six of them and the date May 21 on D2, while D1 itself bore the date May 19.

It seems to me, therefore, that the chain of circumstantial evidence relied on by the defence is incomplete. They rely on this chain of circumstances in order to establish that the signatures of the Secretary and the Chairman on cheques D1 and D2 are genuine. The *onus* is on the bank. The evidence however does not establish the defence contention beyond reasonable doubt. The abstraction of D1 and D2 took place not necessarily after the Secretary had signed P17–P25. Therefore it does

not necessarily follow that D1 and D2 bear the genuine signature of the Secretary. At least there is a reasonable doubt on that point. Therefore the main—if not the only ground—upon which the learned District Judge differentiated the cases of D1 and D2 from the facts relating to the cheque D3 fails to the ground. The finding of the District Judge in regard to D1 and D2, that they bear the genuine signatures of the Secretary and the Chairman, cannot, therefore, be supported on the evidence when fairly considered. In the absence of any estoppel which precludes the plaintiff from alleging that D1 and D2 are forgeries, the finding of the learned Judge on this part of the case cannot in my view be justified on the evidence, and must be set aside.

With regard to the cheque D3 for Rs. 20,000, I agree with the findings of the District Judge and they must be affirmed.

The decree entered in the case will therefore be varied as follows: The defendants must pay to the plaintiff Council the sum of Rs. 27,000 with legal interest thereon from November 2, 1945, till payment in full.

On the question of costs, these should as a rule follow the event. In this case, however, the conduct of the plaintiff Council has been so negligent, that I feel that each party should be ordered to bear their own costs both here and below.

WINDHAM J.—I agree.

Decree varied.

1949 *Present:* **Nagalingam and Windham JJ.**

LEWIS APPU, Appellant, *and* PERERA, Respondent

S. C. 453—D. C. Colombo, 3,794

Fidei commissum—Deed of gift—Prohibition against sale or mortgage only—Effect of partial prohibition—Gift to D and her descending children, grand-children, heirs, executors, administrators and assigns—Certainty of beneficiaries—Time of vesting.

By deed of gift P1 certain property was gifted to D in the following terms:—

"All of which (the premises) I the said H in consideration of the help that is being rendered to me do hereby give and grant by way of gift to D. And therefore I do hereby declare that I have given and granted unto the said D and her children and grand-children who are her descendants, heirs, executors, administrators and assigns, the full power to possess and enjoy the said premises subject to the payments, if any, to the Government. And I also declare that the said property shall only be possessed and enjoyed as aforesaid but the same shall not be sold or mortgaged."

Held, that the deed did not create a *fideicommissum* for the reasons—

(*a*) that the prohibition against alienation was only partial and the inference was that the acts which were not prohibited were permitted.

(*b*) that there was no clear designation of the beneficiaries nor the time of vesting.