1973 *Present* : **Pathirana, J., and Sirimane, J.**

W. D. P. DE SILVA, Appellant *and* P. B. Molligoda, Respondent

S. C. 14/68 D. C. Galle, 3549/M

Cheque,—Lost in transit in post—Alteration and erasure of endorsements thereon—Action based on unjust enrichment and for money had and received—Maintainability of such action—Title to cheque—Effect of endorsement by payee—Bills of Exchange Ordinance, Sections 2, 31.

The Plaintiff was the Superintendent of the estate of which his father was the proprietor. The plaintiff sold the rubber belonging to his father and received payment by the cheque in question. The cheque was drawn in the name of the plaintiff and was crossed. The plaintiff endorsed the cheque, put the franked seal "to the credit of Ellawatte Estate A/c," wrote the account number and signed as superintendent. The plaintiff posted the cheque to the Chartered Bank, Colombo to have the cheque credited to the account of Ellawatte Estate. The cheque was stolen in transit in the post and endorsements thereon were erased and altered. One 'S' had taken the cheque to the defendant who cashes cheques for commission. The plaintiff sued the defendant for the recovery of the proceeds of the cheque which had been credited to the account of the defendant in the Bank of Ceylon, Galle.

It was contended on behalf of the defendant-appellant that— (*a*) the action either for money had and received or on the basis of unjust enrichment could not be maintained as the plaintiff had failed to prove 'dolus' or 'culpa' on the part of the defendant; (*b*) the plaintiff had no title to the cheque inasmuch as he had received it as agent for his father, the proprietor of Ellawatte Estate; (c) the moment the payee endorsed the cheque in favour of Ellawatte estate account as superintendent the cheque was 'negotiated' within the meaning of Section 31 of the Bills of Exchange Ordinance.

Held,—(*a*) the action for money had and received is part of our law and is governed by English principles. The liability on the part of the defendant is to make restitution;

(*b*) it was a cheque on which the payee was the plaintiff and the plaintiff had title to the cheque;

(*c*) that the defendant who was a holder of a cheque (where the endorsement was erased and altered without authority) from a spoliator with the knowledge or suspicion that the transaction is tainted with some illegality or fraud is precluded from taking up the plea that the cheque had been "negotiated" and "delivered" to the indorsee.

"The unauthorised indorsement which in fact appears on the reverse of the cheque had been fraudulently made and is in law vitiated. In this situation the property in the cheque remains where it was before any indorsement was made. The plaintiff, therefore, remains the true owner of the cheque and he has title to the cheque despite the erasures and alterations in the cheque."

Don Cornelis and another *Vs. De Soysa and Co Ltd.*, 68 N.L.R. 161, followed.

APPEAL from a judgement of the District Court, Galle.

C. *Ranganathan*, with *M. S. M. Nazeem*, and *S. Ruthiramoorty*, for Defendant-Appellant.

E. B. Wikremanayake, with *K. Thevarajah*, and *N. R. M. Daluwatte*, for Plaintiff-Respondent.

Cur. adv. vult.

November 9, 1973. PATHIRANA, J.—

The plaintiff-respondent as payee of a cheque for a sum of Rs. 5581.89 sued the defendant-appellant for the recovery of this sum being the proceeds of the said cheque which had been paid to the credit of the defendant to his account in the Bank of

Ceylon, Galle. The action was based on two grounds. Firstly, that the defendant obtained money belonging to the plaintiff without the plaintiff's knowledge or consent on the ground of unjust enrichment. Secondly, that the defendant received the said sum which was money had and received by the defendant for the use of the plaintiff. It is, therefore, clear that the action was not based on the doctrine of conversion and for consequential damages. Judgment was entered for the plaintiff as prayed for with costs.

The facts briefly are as follows: The plaintiff was the Superintendent of Ellawatta Estate of which his father was the proprietor. The plaintiff sold the rubber belonging to his father from the said Estate to Ruhunu Trading Co. Ltd., Galle who paid for the rubber by the cheque in question. The cheque dated 26.2.1966 payable to order was drawn on the Bank of Ceylon, Galle, in the name of the plaintiff, P. B. Molligoda, as payee and crossed with the abbreviation "& Co.,". The plaintiff indorsed this cheque by writing his name and signing on it. Thereafter he put the franked seal "To the credit of Ellawatte Estate A/C" and wrote the account number in ink and signed as Superintendent. The word "Superintendent" is franked and the signature is on the franked dotted line. The plaintiff then sent the cheque by the ordinary post on the same day he received it with a covering letter to the Chartered Bank, Colombo, to have the cheque credited to the account of Ellawatte Estate. As the plaintiff did not get an acknowledgement for the cheque from the Chartered Bank, Colombo, the plaintiff wrote to the Bank but was informed that the bank had not received this cheque. Subsequently he discovered that the account of Ruhunu Trading Co. Ltd., in the Bank of Ceylon, Galle, had been debited with the amount on this cheque. The cheque had been stolen in transit in the post. Certain erasures had been made on the reverse of the cheque in respect of the indorsements made by the plaintiff before he posted the cheque. The franked words "To the credit of" had been erased. So were the letters "A/C" in the franked words "Ellawatte Estates A/C". The account number which was written in ink had also been erased. The words "Ellawatte Estate, Elpitiya" had been substituted in ink over the erased words. One Somapala had taken this cheque to the defendant,

a trader in Galle, who said that he used to cash cheques for commission. Somapala was unknown to the defendant. Somapala had endorsed the cheque with the signature in English. The defendant said in evidence that he did not give Somapala the money immediately as he told him that he would do so only when the cheque was realised to his account. After the cheque was realised seven days later he says he paid Somapala the value of the cheque. It is, therefore, clear that Somapala paid no value on this cheque either to the plaintiff or to Ellawatte Estate. The whereabouts of Somapala were not known and he was not available as a witness at the trial.

The defendant pleaded that he received the cheque bona fide, innocently and without fraud on his part in the ordinary course of his business and that he became the holder in due course. He presented this cheque to his bank for realisation. He pleaded that the plaintiff could not maintain this action on the basis of unjust enrichment or on the ground of money had and received for the use of the plaintiff. He further pleaded that the plaintiff was estopped by reason of negligence and/or his conduct from maintaining this action.

The learned District Judge held against the defendant on this issue of estoppel and this aspect was not canvassed in appeal. The District Judge, however, held that the defendant did not receive the said cheque (*a*) bona fide, (*b*) for valuable consideration and that the defendant was not a holder in due course. He further held that he could not say " that the defendant cashed the cheque innocently. "

I shall first deal with the contention put forward by Mr. Ranganathan that in the absence of dolus or culpa the defendant could only be liable on the doctrine of conversion which is not known to the Roman-Dutch Law. The argument proceeded on the basis that the Roman-Dutch Law and not the English Law of conversion applied to the plaintiff's claim. He further submitted that the action either for money had and received or on unjust enrichment could not be maintained as the plaintiff had failed to prove dolus or culpa on the part of the defendant. Mr. Ranganathan relied on the case of *Daniel Silva vs. Johanis Appuhamy* 67 N. L. R. 457—judgment of a Bench of three Judges—which

decided that on the pleadings it was manifest that the defendant was sued in respect of the English tort of conversion and the plaint did not disclose a cause of action against the defendant. The action being one founded on a delict the Roman Dutch Law applied. The tort of conversion is unknown to the Roman-Dutch Law. This decision so far as it deals with the English Law of conversion does not apply to the facts of this case, as this action is not based on the English doctrine of conversion.

The action for money had and received by the defendant for the use of the plaintiff is now part of our law. In *Don Cornelis vs. de Soysa and Co. Ltd.* 68 N.L.R. 161 Sansoni C.J.—(Sirimane, J. agreeing) disagreed with Tambiah, J. who alone in *Daniel Silva v Johanis Appuhamy* 67 N.L.R.—457, expressed the view that the action for money had and received was unknown to our law. After referring to the recognition given to this action under Section 7 of the Prescription Ordinance Sansoni C.J., said :

> " The principle underlying the action is that the money which in justice and equity belonged to the plaintiff has been received by the defendant under circumstances which rendered its receipt, a receipt by the defendant for the use of the plaintiff ".

He cited the following passage of Lord Sumner in *Sinclair vs. Brougham* 1914 A.C. 398 :

> " It is clear that all ideas of natural justice are against allowing A to keep the property of B which has some-how got into A's possession without any intention on the part of B to make a gift to A ".

Sansoni C. J., next referred to the case of *Kiriri Cotton Co., Ltd. vs. Dewani* 1960 A.C. 192 where Lord Denning referred to the action of money had and received :

> " It is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff ".

Sansoni C. J., also refers to the case of *Dodwell & Co. Ltd., vs. John* 20 N.L.R. 206 a decision of the Privy Council and also the case of *Saibo vs. The Attorney General* 25 N.L.R. 321 in which Bertram C. J., referred to the action for money had and received and said that the English Law on the subject may be treated as

identical with the law of Ceylon. He also said that the rules applicable to claims to money had and received and for restitution are closely connected with the doctrine of unjust enrichment which proceeds on the basis that the defendant has received some property of the plaintiff or some benefit from the plaintiff for which it is just that he should make restitution. He agreed with the view of Tambiah J., in *Peiris vs. Municipal Council Galle,* 65 N.L.R. 555 that the doctrine of unjust enrichment is part of our law.

In *Dodwell & Co. Ltd. vs. John* 20 N.L.R. at 211 Viscount Haldane observed :

> "For under principles which have always obtained in Ceylon, Law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases "where the defendant has received money which *ex aequo et bono* he ought to refund". If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, in as much as every court can treat the question as one not merely of contract, but of trust fund where necessary, there is no difficulty in extending the remedy to all the cases covered by the words just quoted".

In *Saibo vs. The Attorney-General* 25 N.L.R. 321 at 324 Bertram CJ, having referred to the action known as condictio indebiti under the Roman-Dutch Law and to the action known in English Law as an action for money had and received, cited the classical exposition of the principles of the action for money had and received in the judgment of Lord Mansfield in *Moses vs. Macferlan.* Bertram CJ, makes this very important comment ;

> "It has been shown by William David Evans in an interesting appendix to his translation of Pothier's Law of Obligation (Edition of 1806, vol. II., p. 378) that for every material phrase of this passage Lord Mansfield has the authority of an expressed provision of the Civil Law, so that the English Law on the subject may be treated as identical with the Law of this Colony".

Sansoni CJ, in de Soysa's case was of the same view as to the nature of the two actions :—

> "It follows that there is no inconsistency in applying the principle of the action for money had and received, which is founded on the same principle of equity as the Roman-Dutch

Law action of *condictio indebiti,* and is "a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money"—see the judgment of Schneider J, in the *Imperial Bank of India vs. Abeysinghe.* "There is no principle of equity which appears more frequently in Roman Law, and in more diverse connexions, than the prohibition of unjust enrichment at the expense of another. He who has come into possession of property not his own, even though the acquisition might have been made accidentally or by mistake and without deliberate fraud, is under a strict obligation to return it or its value to the true owner. This was the foundation of the important action of *condictio indebiti* and in the main of the praetors' wide discretionary remedy of *in integrum restitutio*"

The decision in *de Soysa's* case was approved in *de Costa vs. Bank of Ceylon* 72 N.L.R. 457. Sirimane, J. who had earlier concurred with Sansoni CJ, in *de Soysa's* case at page 485 observed :

> "After that case, the question came up again for decision before Chief Justice Sansoni and myself in *Don Cornelis vs. de Soysa & Co. Ltd.,* and we were of the view that such an action is maintainable in Ceylon. I do not wish to repeat here the reasons for our view which have been so lucidly set out in the judgment of the learned Chief Justice. I am still of that view, and only wish to add that the action for money had and received has been filed and relief obtained by parties in all parts of our Island from the very inception of our Courts. Nothing that was urged at the argument has led me to think that for the last hundred years or more our Courts have granted a remedy where none existed. Section 7 of the Prescription Ordinance (Chapter 68) which laid down the prescriptive period for a claim "for money received by the defendant for the use of the plaintiff" was enacted in 1872".

The action for money had and received is therefore part of our law and the English principles governing the matter apply to the action.

The facts in the case of *Don Cornelis vs. de Soysa and Co. Ltd.* have a useful bearing on the facts of the case before me. The plaintiff company sued the defendants who were carrying on business in partnership to recover a sum of Rs. 7,962/12 on twenty-two causes of action. In respect of each cause of action the plaintiff pleaded that it had drawn a cheque crossed and marked "Not negotiable". Instead of being delivered to the payee, the cheque was stolen and the payee's indorsement

forged. The defendants thereafter though they had no title to the cheque, sent it for collection to their bank, which credited their accounts with the amount of the cheque while the plaintiff's Bank correspondingly debited their account. The plaintiff company claimed the money credited to the defendant's account in respect of each cheque as money had and received by the defendant to the use of the plaintiff which the plaintiff was entitled to recover. The defendant pleaded that he had merely cashed this cheque on the request of one Francis who was a clerk of the plaintiff's estate department. He never asked Francis how he got cheques drawn in favour of the plaintiff. It was held that the cheques were never the property of Francis who probably stole them from the plaintiff who could not give the defendant any title to them. Although the defendants obtained amounts of the cheques from their banks which collected the amount from the plaintiff's bank, the defendants had no right to these monies. In the result the defendant obtained monies belonging to the plaintiff without the plaintiff's consent or even knowledge. Sansoni CJ, observed that on the facts proved the defendants were under a duty to make restitution of all the proceeds of the twenty cheques which bore forged indorsements. A holder under a forged indorsement, if paid, must make restitution either to the payer or to the true owner. Liability did not depend in these cases on the innocence of the defendant who may be a purchaser in good faith but had dealt with the goods without the owner's authority or consent.

Sansoni CJ., made this very relevant observation :

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

There is a positive finding by the learned District Judge in the instant case that the defendant did not cash the cheque in question innocently. This can only mean that the defendant took the cheque under circumstances fairly warranting the inference that he knew or believed or thought that the cheque was tainted with illegality or fraud. He had cashed the cheque for Somapala who was a total stranger to him. I can even understand if he had cashed it for such a person for some articles purchased by him. The learned District Judge has found that he did not give cash in the first instance as he said that he sent the cheque to the bank and waited as he feared that if he found that there was not sufficient money in the bank difficulties would arise and that he thought of giving the money after the cheque was realised. This alone shows that he was on his guard and that till the cheque was realised he refused to give the money. Somapala was not available as a witness nor was he available at the address which he gave the defendant. The learned District Judge has held that in his opinion the erasures were difficult to detect unless it was known earlier but that the hand-written words "Ellawatte Estate, Elpitiya" were out of place in view of the fact that the words "Ellawatte Estate" had been franked and that this was noticeable by anyone. In regard to that matter the defendant said that he was not sure whether the words 'Ellawatte Estate, Elpitiya' were there and that if they were there he would not have cashed it because he knew English and he knew the difference. The defendant cannot say that the words 'Ellawatte Estate, Elpitiya' were not there on the cheque because the reverse of the cheque clearly shows these words and this cheque had been produced from the custody of the Magistrate's Court where it was kept as a production in the connected criminal case. This admission of the defendant is itself a circumstance which should have put the defendant on inquiry. On the evidence he made no such inquiry. All issues raised by the defendant of negligence and estoppel against the plaintiff have been answered in the plaintiff's favour. I am, therefore, of the view that the learned District Judge had come to the correct conclusion when he held that neither Somapala nor the defendant was a holder in due course. He further held that the

defendant did not receive the cheque (a) bona fide, (b) for valuable consideration. No cogent reasons have been adduced before us to disturb the findings of fact on which the learned Judge arrived at this decision.

Section 29 (1) of the Bills of Exchange Ordinance (Chap. 82) defines a holder in due course:—

> "A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely :
>
> (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;
>
> (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

Every holder of a bill is prima facie deemed to be a holder in due course and there is a presumption of value and good faith. But if fraud is proved at any stage of the transaction then the burden of proof is shifted unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill—Section 30 of the Bills of Exchange Ordinance. Devlin J. in Baker vs. Barclay's Bank Ltd. 1955 (2) A.E.R. 580 at 581 observed :

> "It is, I think, clear, both from the wording of sub-section (2) (of Section 30) itself and from the authorities that were decided before 1882 that if fraud is proved at any stage of the transaction then the burden is shifted".

It is clear, therefore, where there is an illegality or fraud shown in a previous holder a presumption that there is no consideration for the indorsement does arise ; for the person who is guilty of illegality, or fraud, and knows that he cannot sue for himself is likely to hand over the instrument to some other person to sue for him. The plaintiff who normally has to prove that there was no consideration has by proving fraud or illegality in the former holder raised a prima facie presumption that there was no consideration, unless that presumption was rebutted (vide the observations of Lord Campbell C. J. in *Fitch vs. Jones* (1855 5 E. and B 238) quoted by Devlin J., in *Baker vs. Barclay's Bank Ltd.* at page 581—(this case was decided before the Bills of Exchange Act, of 1882).

The evidence in the case leads to the irresistible conclusion that Somapala came by this cheque either illegally or fraudulently or with such knowledge and that he paid no value either to the plaintiff or to Ellawatte Estate.

Applying the principles laid down by Sansoni C. J., in *Don Cornelis vs. de Soysa and Co. Ltd.*, I am of the view that the plaintiff is entitled to succeed in this action against the defendant on the ground that the defendant is liable on the ground of money had and received for the use of the plaintiff. The liability on the part of the defendant is to make restitution and in my view in accordance with a dictum of Sansoni CJ, the defendant is liable even in the absence of *dolus* or *culpa*. The indorsements in the cheque have been materially altered without the consent of the parties liable on the cheque. According to the District Judge's finding this alteration is noticeable by anyone. He has also noted that, that the letters ELLE in the word "Ellewatta" are somewhat smudged having been written over the erasures. This material alteration therefore avoids the cheque—vide section 64 of the Bills of Exchange Ordinance. The defendant had no lawful justification to receive the proceeds of this cheque without the consent of the plaintiff. As I have pointed out the evidence in this case, however, clearly shows that there were circumstances fairly warranting an inference that the defendant knew or believed or thought that the cheque was tainted with illegality or fraud and this was something that should have put the defendant on inquiry. This the defendant failed to do and in my view he was also guilty of *culpa*.

Mr. Ranganathan next submitted that there was no enrichment as the defendant claims that he paid value on the cheque. On this question the learned District Judge has held that no valuable consideration was paid by the defendant. I see no reason to distrub this finding of the learned District Judge. In a similar argument that was urged in the case of *Don Cornelis vs. de Soysa & Co. Ltd.*, Sansoni C. J. held that he did not consider this a valid argument.

Two other contentions were put forward by Mr. Ranganathan as to why the plaintiff cannot succeed in this action. He submitted firstly, that the plaintiff had no title to the cheque and secondly,

that the moment the payee indorsed the cheque in favour of Ellawatte estate account as Superintendent he held the cheque as agent of the indorsee who is therefore the person who can maintain the action but not the plaintiff. Mr. Wikramanayake for the plaintiff-respondent rightly complained that this contention was never put forward at the trial and that this was a new ground that was urged in appeal. I have examined the answers of the defendant, the opening submissions made by the defendant's counsel, the evidence in the case and also the submissions made at the address stage by defendant's counsel. I find that at no stage was the position taken up by the defendant that the plaintiff did not have title or property in the said cheque. The trial had proceeded on the basis or assumption that the plaintiff had title to this cheque. We would, therefore, have been justified in not taking these two grounds into consideration and dismissing the appeal. But as Mr. Ranganathan has stated that the matters have been raised in the petition of appeal and he had taken pains to argue this matter, I propose to consider these two grounds also.

The first ground is that the plaintiff, although the payee on the cheque, had received it as agent for his father, the proprietor of Ellawatte Estate, for the rubber supplied to the Ruhunu Trading Co. Ltd., as such he had no title to this cheque. I do not agree with this contention. If the plaintiff had an account in a bank he could have sent this cheque to the bank and credited it to his account. No doubt, he had certain obligations to account for the proceeds of the cheque to his principal but that is quite different from saying that he had no rights at all to the cheque. It was a cheque in which the payee was the plaintiff and in my view the plaintiff had title to the cheque.

On the second ground urged by Mr. Ranganathan he maintained that the moment the plaintiff endorsed the cheque to the credit of Ellawatte Estate account and signed as Superintendent the cheque was negotiated within the meaning of Section 31 of the Bills of Exchange Ordinance. Section 31 (1) reads as follows :

> "A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill".

Section 31 (3) reads as follows :

> " A bill payable to order is negotiated by the indorsement of the holder completed by delivery ".

Delivery is defined in Section 2 and it means transfer of possession actual or constructive from one person to another. Mr. Ranganathan submits on the facts of this case there was indorsement and delivery to Ellawatte Estate account constructively. He justifies this position on two grounds. Firstly, he says that moment the plaintiff indorsed the cheque and signed as the Superintendent he held the cheque no longer on his account but as the agent of the indorsee. He cited illustration No. 9 at page 53 Chalmers "Bills of Exchange" 11th Edition which reads as follows :

> " A firm is indebted to D. X who is a partner in the firm, and also agent for D, writes the firm's indorsement on a bill held by the firm, and puts the bill with some other papers of D's of which he has the custody. This is delivery and so a valid indorsement by the firm, and the property in the bill passes to D ".

The same illustration is found in Byles on Bills of Exchange 22nd Edition at page 92. Halsbury's Laws of England, 3rd Edition, Volume 3, page 145 at the foot-note gives three examples of constructive transfer. They are : (1) Where an agent holding a bill on his own account subsequently holds it as agent for another.

(2) Where having held it as agent for one subsequently holds it as agent for another.

(3) Where having held it as agent for another he subsequently holds it on his own account. Mr. Ranganathan seeks to bring his case under the example No. 1 namely where an agent holding a bill on his own account subsequently holds it as agent for another there is constructive delivery. He, therefore, submits that the bill had been negotiated by delivery as such the plaintiff had no title to this cheque. He re-inforces his argument by submitting that once the plaintiff had posted the cheque, the cheque as soon as it is posted became the property of the indorsee—*in Re Deveze, Ex parte Cote* (1873), 9 Ch. App. 27.

I am not in disagreement with Mr. Ranganathan on his very lucid exposition of the law regarding negotiation of a bill by indorsement and constructive delivery. The principle he has correctly set out, is, in an appropriate case, certainly the law.

For example, if the indorsee in this case namely the proprietor of the Ellawatte Estate sued the indorser, the plaintiff, the latter can plead indorsement and constructive delivery and take up the position that he no longer has title to this cheque. Likewise, if the proprietor of the estate sues the Ruhunu Trading Co. Ltd., for payment for the rubber supplied, the company could take up the defence that they had paid the money by cheque to the agent and the agent had delivered the cheque constructively to the proprietor of the estate.

But can a spoliator, for example, a person who steals a crossed cheque payable to order while in transit in the post, who erases the indorsement in the cheque, then alters the indorsement without any authority and then negotiates it, can he when sued by a person who had made the last indorsement, like the plaintiff in this case, take up the plea that by reason of his indorsement and posting of the cheque, the indorser had negotiated it and delivered it and therefore ceased to have property in the cheque? Whatever notion of constructive delivery could have been attributed to the act of the indorser in making the indorsement on the cheque and posting it, the cheque in fact had not been "completed by delivery" as due to the act of the spoliator the cheque had in fact not been delivered to the indorsee. The spoliator's conduct amounts to fraud, he therefore, cannot take up the plea that there has been an indorsement completed by delivery and that the indorser cannot maintain the action against him for the value of the cheque because to his own knowledge and by his own act the bill had not been completed by delivery. No person can take advantage of his own fraud. A person who becomes a holder of such a cheque from a spoliator with the knowledge or suspicion that the transaction is tainted with some illegality or fraud, or from circumstances fairly warranting such an inference is in no better position than the actual spoliator. He too is precluded from taking up the plea that the cheque had been completed by delivery to the indorsee. The legal notion of constructive delivery can never be attributed to a situation like in the present case when the facts clearly and definitely establish that delivery intended by the indorser had not taken place. It is common knowledge today in this country that cheques and other valuable documents are stolen in transit in the post. The frequency is so high that a Court can even take judicial notice of pilfering of such articles in the post. Besides when a spoliator erases the original indorsement without the authority of the parties concerned, and makes a fraudulent indorsement as in this case and obtains the benefit of it, he

cannot fall back on the original indorsement which no longer exists and take up the plea that by reason of the earlier indorsement (which no longer exists) the cheque had been negotiated and delivered, when in fact the original indorsement no longer appears on the reverse of the cheque. The unauthorised indorsement which in fact appears on the reverse of the cheque had been fraudulently made and is in law vitiated. In this situation the property in the cheque remains where it was before any indorsement was made. The plaintiff, therefore, remains the true owner of the cheque and he has title to the cheque despite the erasures and alterations in the cheque.

A complete answer to all the contentions in the submissions made by Mr. Ranganathan is found in the case of *Arnold vs. The Cheque Bank* (1876) Common Pleas Division 578. The facts of this case are as follows :

The plaintiffs, merchants at New York, desiring to transmit £ 1000 in payment to their correspondents, Messrs. E. G. Williams & Co., of Bradford, England, purchased from Stewart & Co., in New York, the draft in question, which was dated the 21st of August, 1874, and drawn by Stewart & Co. on Smith, Payne and Co. bankers in London for £ 1000, payable to the order of D. R. Arnold & Co., on demand. The plaintiffs having thus obtained the draft, a special indorsement to Messrs. Williams & Co. was written upon it, and it was inclosed by the plaintiffs in a letter to Messrs. Williams & Co., for the purpose of transmission. The letter was then placed, with others, at the office of the plaintiffs, in a box on the outside of which were painted the words 'Letter Box' and which was the place in which letters for the post were usually deposited. The envelope was addressed to Messrs. E. G. Williams & Co., Bradford, and had the name "Celitic" written on it, that being the name of the steamer sailing the next day, by which the mail was sent.

Instead, however, of the letter having gone through the post to Messrs. William & Co., it was abstracted by some person who had means of access to it, and the draft was stolen; but these facts did not become known to the plaintiffs until after payment of the draft had been obtained by the defendants.

On the 10th of September, 1874, a Mrs. Chandler called at the defendants' bank with the draft in question. It then bore on it a forged special indorsement by Messrs. E. G. Williams & Co., to "D. H. Chandler, or order," and a blank indorsement by

"D. H. Chandler". Mrs. Chandler came to the defendants without introduction. She was a middle-aged lady of respectable appearance, and said she was from America. She inquired as to the manner in which the defendants conducted their business, and asked if the defendants would receive the draft. She was answered that they would, but that it must first be realised before they could give an equivalent in cheques. She stated that she did not wish to go to the city that day, and inquired whether the defendants had any one they could send, as it was a draft payable to bearer. The defendants informed her that they had messengers going continually to the city, and would send for her, and then took the draft, and, after stamping it with the name of the Cheque Bank, sent it to Smith, Payne, & Co., and received the amount. The bank on receiving the money opened an account with Mrs. Chandler, crediting her with £ 1000, and Mrs. Chandler received cheque-books, by means of which she drew out the whole amount with the exception of £ 106.

The question was raised whether under the circumstances the money received by the defendants in payment of the draft was received to the use of the plaintiffs. Lord Coleridge, C.J answered the question as follows :

> "As regards the first question, it is clear that the property in the draft had never in fact passed out of the plaintiffs; for, indorsement consists not merely of the written indorsement on the draft, but there must also be a delivery with intention to transfer the property ; *Marston vs. Allen.* (1) 8 M. & W. 494. In this case there was no delivery of the draft to the indorsee and therefore, unless the plaintiffs are estopped from setting up as against the defendants the forgery of the indorsement of Williams & Co., the bill remained their property when it reached the hands of the defendants, and they are entitled to the draft".

I, therefore, hold that all contentions raised by Mr. Ranganathan fail. I dismiss the appeal with costs.

SIRIMANE, J.—I agree.

Appeal dismissed