COLLETTES LIMITED

v.

BANK OF CEYLON

SUPREME COURT
SHARVANANDA, J., ABDUL CADER, J. AND RODRIGO, J.
S. C. No. 48/83 – C. A. No. 325/74 (F) – D. C. COLOMBO 73754/M.
JUNE 18 TO 20, 25 TO 27, 29, 1984.
JULY 2 TO 5, 9 TO 11, 13, 16 TO 19, 23 TO 27, 30, 31, 1984.
AUGUST 1 TO 3, 6, 7, 9, 27, 1984.

Jurisdiction of Supreme Court to review concurrent findings of fact arrived at by the lower Courts – Articles 127 and 128 of the Constitution – Assessment of demeanour of witnesses by trial Judge – Non-production of Register – Presumption under section

114 of the Evidence Ordinance – Obligation to send bank statements by post – Acquiescence – Imputation of agent's knowledge to principal – Estoppel by acquiescence – Scope of servant's authority – Effect of prohibition to determine whether an act of fraud and negligence by an employee was done in the course of and within the scope of his employment – Negligence and remoteness of damages – Novus actus interveniens – Onus of proof – Effect of fraud committed by officers and Directors of the Company who are not its directing mind and will and not in control of the operation of the company – Duress – Commercial pressure as duress – Estoppel by convention.

The plaintiff was a company dealing in motor vehicles, repairs and spare parts and had an overdraft facility of Rs. 3 1/2 million on its account No. 22200 with the defendant bank. In August 1968, Harasgama, Managing Director of the Plaintiff-company made an application to the defendant-bank to have the overdraft facility increased to Rs. 5 million stating that the overdraft amount then drawn was Rs. 2 million. When this application was processed it was found that the amount overdrawn was much more. This was discovered on 28.11.1968. A check revealed that a large number of items of cheques and cash which according to the Bank statements and deposit counterfoils in the possession of the plaintiff amounting to Rs. 1,275,883.66 had not been credited to the plaintiff's account and further a sum of Rs. 49,546.16 had been debited as interest. Moreover fictitiously inflated stock statements which did not correspond with those in the possession of the plaintiff had been tendered month after month to the Bank to enhance the overdraft facility and so enable as much as Rs. 3,431,409.99 inclusive of interest, expenses and charges to be overdrawn. The fraud had gone on for 12 years and involved over a million rupees. The Bank Statements were found to be fabricated and so were the counterfoils.

On 05.12.1968 the defendant-bank sent the plaintiff a certificate of balance showing the overdraft as at 28.11.1968 to be Rs. 3,403,099.92 and this was accepted by the plaintiff without protest. On 30.12.1968 the plaintiff-company, having earlier on 21.12.1968 executed a primary mortgage in favour of the bank hypothecating premises No. 101, D. S. Senanayake Mawatha, Colombo against its indebtedness, signed a document admitting that as at close of business on 14.12.1968 the amount overdrawn by it on its account was Rs. 3,381,497.28.

The plaintiff-company instituted this action on 22.11.1970 against the defendant-bank praying for a declaration that cheques and cash to the value of Rs. 1,275,883.03 were deposited by the plaintiff to the credit of its current account No. 22200 with the defendant-bank and the said account was wrongfully debited with a sum of Rs. 49,546.16 alleged to be due as interest and that the plaintiff's said account was overdrawn on 18.11.1968 only in a sum of Rs. 2,268,381.34.

For a first alternative cause of action the plaintiff pleaded that if the said cheques and cash to the value of Rs. 1,275,883.03 had not in fact been deposited then such non-deposit and/or misappropriation was due to the fraud and/or negligent acts or omissions of the defendant and/or its servants and agents acting in the course of their

employment and within the scope of their authority. The defendant-bank had acted fraudulently and/or negligently in that it had permitted unauthorised persons to have access to and control of blank forms of statements of account, forms used to certify balances and/or other security documents and issued or caused or permitted to be issued or facilitated the issue of fabricated or incorrect receipts and monthly and weekly statements of accounts and certificates of balances to the plaintiff. The plaintiff thus suffered a loss of Rs. 1,275,883.66 together with debited interest in a sum of Rs. 49,546.16.

For a second alternative cause of action, if the cheques and cash to the value of Rs. 1,275,883.66 had not been brought to deposit, the defendant and/or its servants had jointly with one Ingram who was the Sales Manager of the plaintiff and a Director of Collettes Finance Ltd. a subsidiary of the plaintiff-company misappropriated them and plaintiff was entitled to recover the said sum as loss and damage suffered.

The defendant-bank took up the position that the cheques and cash referred to had not in fact been deposited and the receipts in respect of such alleged deposits were faked and disclaimed liability for the fraudulent actions and concealments of Ingram who was plaintiff's Sales Manager and also a Director of one of its subsidiaries. On the fraudulent representations made monthly by the plaintiff to the defendant in regard to the value of its stocks, the plaintiff was able to overdraw on its current account more than it would otherwise would have been entitled to overdraw and the damages if any suffered by the plaintiff was due to its own fraud. The defendant had sent the plaintiff statements of accounts, and certificates of balances relating to the current account of the plaintiff and so also had the auditors sent confirmation slips of the state of its current account but the plaintiff had not questioned them nor had it at any time material to the action imputed fraud to the defendant's employees. The plaintiff had accepted the certificate of balance of 05.12.1968 without protest and signed the document of 30.12.1968 acknowledging it had overdrawn a sum of Rs. 3,381,497.28. In addition the plaintiff had executed a primary mortgage in respect of premises No. 101, D. S. Senanayake Mawatha. On the faith that no allegations of fraud were being made against it the defendant extended further credit facilities to the plaintiff. Therefore the plaintiff was estopped from now denying the sum due or asserting fraud and negligence and claiming damages. The plaintiff company then filed a further pleading on 10.12.1971 averring that it, through two of its Directors, was induced to sign the mortgage dated 21.12.1968 and document dated 30.12.1968 by the deliberate misrepresentations, suppressions of facts, duress, undue influence and threats of harm to the Company by the defendant's General Manager, C. Loganathan, and by a breach of the fiduciary duty the defendant owed the plaintiff-company and its Managing Director Harasgama.

At the conclusion of the trial Counsel for the plaintiff-company conceded he had failed to prove his main cause of action viz. the alleged deposit of cash and cheques to the value of Rs. 1,275,883.66 and the District Judge found accordingly but he (Counsel for plaintiff) relied on the two alternative causes of action based upon fraud and negligence and/or misappropriation on the part of the Bank's agents and employees acting in the course of and within the scope of their duties.

The bank employee mainly involved was Abeywickrema. He worked in the Foreign Department of the defendant-bank as a ledger clerk from 1955-1957 and in the Loan Department from 1957-1962 and from 1962 to June 1966 again in the Foreign

Department as clerk-in-charge of checking export documents. From 15.06.1966 he worked in the York Street Branch on Ledger No. 8 where plaintiff's account was until September 1966. He later worked on Ledger No. 9 from 11.06.1968 to 23.08.1968 and during this period plaintiff's account was in this Ledger. Amerasinghe was also working with Abeywickrema from 12.08.1965 at the defendant-bank and he succeeded Abeywickrema as Ledger clerk-in-charge of plaintiff's account on 23.08.1968 right up to 28.11.1968 when Ingram's fraud was discovered. The Plaintiff's case was that Abeywickrema went out of his way to pilfer plaintiff's statements of accounts when he was not in charge of plaintiff's account and later when he was in charge of its account between June to September 1966 and June to August 1968 and fraudulently handed them over to Ingram. From August to November 1968 Amerasinghe handed over the statements to Abeywickrema to be delivered to Ingram.

On the first alternative cause of action, the trial Judge found that the defendant-bank had been negligent in the matter of storing its blank forms and keeping them away from the reach of unauthorised persons. It had failed to follow its own Rules and instructions set out in the Bank of Ceylon Manual of Operations with regard to the delivery of bank statements and certificates of balances. Its employee Abeywicrema helped later by another employee Amerasinghe had in the course of his employment intercepted the genuine bank statements and certificates thus preventing them from going by post and substituted them with fabricated statements and certificates on pilfered obsolete and discarded blank forms available in the Bank and handed them to Ingram for delivery to the plaintiff-company and also introduced into the bank fabricated stock certificates received from Ingram who was his brother-in-law. These acts and omissions the trial Judge held established negligence and complicity on the part of the Bank in the fraud committed by its employees mainly Abeywickrema. The trial Judge therefore held with the plaintiff on the first alternative cause of action and entered judgment for plaintiff in a sum of Rs. 1,169,240.93 as representing the loss and damage sustained by the plaintiff.

On the second alternative cause of action the trial Judge held that no misappropriation by the defendant's employees had been proved and that it was Ingram the plaintiff's Sales Manager who had misappropriated the cash and cheques.

Held–

(1) The appellate jurisdiction of the Supreme Court is all embracing and unfettered. On leave to appeal being granted under Articles 127 and 128 of the Constitution the Supreme Court is vested with power as a final Court of Civil and Criminal appellate jurisdiction to consider the correctness of the decision appealed against on any ground whether on questions of fact or law and to affirm, reverse or vary any judgment or decree of the Court of Appeal or any Court of First Instance, tribunal or other institution. It has jurisdiction to revise concurrent findings of fact reached by the lower court in appropriate cases. However, ordinarily it will not interfere with findings of fact based upon relevant evidence except in special circumstances as for instance where the judgment of the lower Court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. In the instant case the District Judge had grievously gone wrong in his opinion. The judgment by its manifest errors of law and fact would result in a miscarriage of justice if the Court of Appeal had affirmed it.

(2) An appellate Court can interfere, although it will do so rarely, with the trial Judge's assessment of demeanour. The demeanour of a witness ought not to be adopted by a trial Judge without testing it against the whole of the evidence of the witness in question The trial Judge had been so carried away by the demeanour of the witness Harasgama Managing Director of the plaintiff-bank that he failed to take into account that Harasgama's principal claim was false and untenable to his own knowledge, that his evidence on the non-receipt of the Bank's statements by post when the other subsidiaries of the Group had received theirs by post was open to question, that he had employed private detectives to steal documents from the defendant and that he had not taken timely steps to prevent Ingram's flight from Sri Lanka.

(3) For the defendant-bank to be liable for the acts of Abeywickrema and Amerasinghe they must have been committed fraudulently or negligently in the course of and within the scope of their employment as Ledger Clerks under the defendant. In order to determine whether the proved act of negligence or fraud on the part of a servant is within or without the scope or course of his employment, it is not enough to decide whether or not what was done was prohibited conduct. The prohibition may either limit the scope of his employment or merely regulate his conduct within the sphere of his employment. If the latter the employer will be vicariously liable but not if it is the former. Even an express prohibition will not save the employer from liability if the act was merely a mode or method of doing what the servant was employed to do. The distinction is between an order which limits the scope of the employment and an order which limits the method in which the duties of the servant may be performed.

(4) According to the Bank rules the Ledger Clerk is prohibited from having anything to do with the sending out of the bank statements which is handled by an independent officer called the Adjuster who in this area of duty was an "outsider" and his actions did not bind the Bank. The Ledger Clerk was permitted to hand over weekly statements to a customer or to an agent of a company authorised by the company and this action is entered in a book maintained by the Ledger Clerk the entries wherein are initialled on identification by the cheque book clerk. In practice these statements are handed over by the Ledger Clerk to the person who comes to deposit the Company's monies.

The rules of the Bank's Manual of Operations are merely counsels of perfection and they afford valuable criteria of the risk against which the bank has to guard. They do not constitute a legal measure of the liability of the Bank and failure to comply strictly with them cannot render the Bank negligent. The trial Judge erred in thinking otherwise. The Bank's admitted obligation to send the statement of accounts to the plaintiff could be fulfilled by sending them by post or by delivering them to plaintiff's representatives.

(5) In any event the plaintiff-company's employees Paul Fernando the Accountant and Lionel Fernando the Assistant Accountant and their predecessors before them and the Accounts Section were aware of and acquiesced in the handing over of the monthly statements (from 1958 to 1962) and weekly statements (from 1962 to November 1968) to Ingram (their Sales Manager and Director of one of their subsidiaries) and their knowledge is in law the knowledge of the Company even if the Managing Director Harasgama was, though this is unlikely, unaware of it. The knowledge of an agent will generally be imputed to his principal where the agent received the information in connection with a transaction in which he is acting for his principal and where it is his duty to communicate that information to his principal.

An acquiescence is not a question of fact but of legal inference from facts found. It must be intentional conduct with knowledge. Plaintiff is now estopped by twelve years (1956 to 1968) of acquiescence from complaining that the delivery of the bank statements to Ingram is wrongful : it is bound by such performance. Although the plea of estoppel arising from acquiescence was neither pleaded nor raised in the issues, yet the trial Judge dealt with the issue of plaintiff's acquiescence and found against the defendant on it. Hence this matter can be dealt with in appeal.

(6) By acquiescing in Ingram's acts of collecting the bank statements the plaintiff held him out to the defendant as having authority to collect the monthly and weekly statements and thereby dispensed with the necessity of sending them by post. The plaintiff by its conduct ratified and adopted the delivery of the statements to Ingram on its behalf and the obligation of the defendant to send them to the plaintiff was thereby discharged. There was here estoppel by acquiescence.

(7) When Abeywickrema handed over the bank statements to Ingram when he was not functioning as Ledger Clerk in charge of plaintiff's accounts, he did something so remote from his duties as to be altogether outside and unconnected with his employment. There was no evidence that the plaintiff or Ingram relied on any ostensible authority of Abeywickrema to hand over the statements or changed positions upon the faith of it nor is there evidence of any representation made by the defendant bank. The essence of ostensible authority is that the employer by his words or conduct represents to third parties that his servant has his authority to perform certain types of acts and once the third party has acted on the faith of that ostensible authority the master is not entitled to deny that the servant in truth had such authority. A prohibition cannot effect a servant's ostensible authority unless it is known to the other party. The vicarious liability of the employer will not be affected by an order which limits the method or mode by which the duties of the servant may be performed.

During the two spells June to September 1966 and 11th June to 23rd August 1968 when Abeywickrema was functioning as Ledger Clerk working on plaintiff's accounts he had authority according to the Bank Rules to hand over the statements to the plaintiff-company or its accredited representative and if he had negligently, fraudulently or otherwise wrongly assumed that Ingram was an authorised representative of the plaintiff-company and delivered to him the bank statements the bank will be liable.

Abeywickrema and Amerasinghe acted in the transaction to help Ingram. The issuing of the statements to Ingram was acquiesced in by the plaintiff-company. Hence the plaintiff-company cannot claim against the defendant-bank on the basis of the negligent or fraudulent acts committed by defendant's agents or servants.

(8) The trial Judge's finding that Abeywickrema prepared the false bank statements relating to plaintiff's account cannot be sustained and must be set aside.

(9) The evidence in any event does not conclusively establish that during all the 12 year period 1956 to 1968 none of the Bank statements and certificates came to the plaintiff by post. Except for the 75 weekly statements admitted by Abeywickrema to have been delivered by him to Ingram the plaintiff must be held not to have proved that the other monthly and weekly statements from August 1956 to the end of November 1968 had not been received by post by the plaintiff-company because :

(a) Ingram could have, on the basis of the arrangements for handling plaintiff's mail at its own office, appropriated the genuine bank statements and certificates at the plaintiff's own office on their arrival by post and substituted them with faked ones

(b) One Ledger Clerk at least of the Bank namely Bunny during the period he handled plaintiff's account had not handed over the bank statements to Abeywickrema and these statements would have gone by post

(c) The Bank Statements of the other companies of the Collettes group were admittedly coming by post.

(d) The plaintiff had called for weekly statements from the Bank obviously in its anxiety to monitor its finances more closely and would want to scrutinize the Bank statements regularly and if these were not coming by post it would have been known to the Accounts Section and Directorate of the plaintiff.

(e) The burden of proof of the non-receipt by post of the Bank Statements was on the plaintiff but the Inward Mail Registers of the plaintiff which would have shown the non-receipt of the Bank Statements by post though listed were not produced raising an adverse inference on the basis of section 114 of the Evidence Ordinance

(10) It would have been impossible for the bank to ensure against its Ledger Clerk pilfering bank statement forms. In any event the bank cannot be liable for forgeries committed by a third party on discarded forms stolen from the bank. It would be far-fetched to say the bank facilitated the forgeries. It is a clear case of novus actus interveniens. Assuming there was negligence, the damage complained of could not have been contemplated as a reasonably foreseeable consequence of such negligence. The damages claimed are too remote.

(11) The onus of proof is on the plaintiff to show that a particular item of damage is not too remote before he can recover it. Plaintiff has not discharged this burden.

(12) A company is liable in torts for all the wrongful acts of the persons who control the management of its undertaking when they are acting as such. Those persons may be the Directors collectively, or some of the Directors who in fact manage the Company's business or the governing body may be a single Managing Director or even a Manager who is not a Director at all. These will be in the "brain area" of the company and be its directing will and mind, its alter ego. But Ingram was not the directing mind and will of the Company. He was not in the "brain area" or in the top management area of the Company and did not hold any position of control nor share in the management. The role he played in the administration of the company was a subservient role, the role of a trusted employee or servant or agent. Nor can the co-perpetrators of the fraud from the Company's Directorate – Samuel (Finance Director), Wickremasinghe and Classen (Directors) – be individually or collectively identified with the Company as representing its directing mind and will. They were not in control of the operation of the Company and cannot be identified with the company. Hence the plaintiff's action cannot fail on the principle that a wrong-doer is out of court. The maxim of public policy ex turpi causa non oritur actio does not apply.

(13) The allegations of duress, influence and threats in connection with the admission of the amount of the overdraft and mortgage bond made for the first time in the plaintiff's further pleadings of 10.12.71 are an afterthought and not borne out by the previous correspondence and the concession that Rs.1,273,883.60 in cash and cheques was not in fact deposited. Further the bond and the document admitting the quantum of the overdraft were voluntarily approved by the Board of Directors of the plaintiff-company. There was not that coercion that will vitiate consent. Harasgama had no ground to doubt the correctness of the bank's accounts and the Bank's demand for a certificate accepting the correctness of the accounts even though supported by a certain measure of economic pressure was lawful. The plaintiff was still free not to succumb to such pressure. It had the benefit of independent advice and it raised no protest until three years later. The demand of the defendant-bank was neither unjust nor unconscionable. Therefore the commercial pressure under which the plaintiff acted did not amount to duress. The District Judge's finding on duress is wrong.

(14) When the parties made the basis of their transaction an agreed statement of facts the truth of which is assumed by the convention of the parties, each will be estopped as against the other from questioning the truth of the statement of the facts so assumed. This is the principle of estoppel by convention. It was on the certificate admitting the quantum of liability and the Mortgage bond that the defendant continued to extend overdraft facilities to the plaintiff. The plaintiff having obtained this advantage to which it became entitled on the basis of acceptance of the certificate and the execution of the Mortgage bond cannot now resile from them and say they are void. The plea of estoppel by convention is entitled to succeed.

Cases referred to :

(1) *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy [1946] AC 508, 521.*

(2) *Silva v. Swaris (1904) 1 Bal 61.*

(3) *Nawadun Korale Co-operative Stores Union Ltd. v. Premaratne (1954) 55 NLR 505.*

(4) *Sri Lanka Ports Authority v. Peiris [1981] 1 Sri LR 101.*

(5) *Flower v. Ebbw Vale Steel, Iron and Coal Company Limited [1936] AC 206, 220, 221.*

(6) *Powell v. Streatham Manor Nursing Home [1935] AC 243.*

(7) *Yuill v. Yuill [1945] 1 All ER 183, 188, 189.*

(8) *Raghavamma v. Chenchamma AIR 1964 SC 136.*

(9) *Mt. Bilas Kunwar v. Desraj Ranjit Singh AIR 1915 PC 96 ; 37 Allahabad 557, 30 IC 299.*

(10) *Thirumalai Iyengar v. Subba Raja AIR 1962 Madras 219*

(11) *Karwadi v. Shambharkar AIR 1958 Bombay 296.*

(12) *Ramanathan Chettiar v. Viswanathan Chettiar AIR 1941 PC 43.*

(13) *Chandra Narayan Deo v. Ramachandra Serawgi AIR 1946 Patna 66.*

(14) *John Henshal (Quarries) Ltd. v. Harvey [1965] 1 All ER 725, 729.*

(15) *H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham & Sons Ltd. [1956] 3 All ER 624, 630.*

(16) *Applebee v. Percy [1874] L R. 9C. P. 647, 656.*

(17) *Stiles v. Cardiff Steam Navigation Co. [1864] 33 L.J.Q.B. 310.*

(18) *Penhallow v. Mersey Docks and Harbour Board (1861) 30 L.J. Ex. 329, 331.*

(19) *Sunlife Assurance Co. of Canada v. W. H. Smith & Son Ltd. (1934) 150 Law Time 211, 215*

(20) *Dodwell & Co. Ltd. v. John (1918) 20 NLR 206.*

(21) *De Bussche v. Alt [1878] 8 Ch. D. 286, 314.*

(22) *Cairncross v. Lorimer (1860) 3 Macq. (H.L.) 829.*

(23) *Sarat Chunder Dey v. Gopal Chunder Laha [1892] L.R. 19 A.C. 1A 203.*

(24) *Plumb v. Cobden Flour Mills Co. Ltd. [1914] A.C. 62, 67.*

(25) *Limpus v. London General Omnibus Co. [1862] 1H & C 526.*

(26) *Canadian Pacific Railway v. Lockhart [1942] 2 All ER 464, 468 ; (1942) A.C. 591.*

(27) *Twine v. Bean's Express Ltd. [1946] 1 All ER 202 ; 175 L.T. 131.*

(28) *Lloyd v. Grace, Smith & Co. [1912] AC 716, 737.*

(29) *Uxbridge Permanent Benefit Building Society v. Pickard [1939] 2 K.B. 248 ; (1939) 2 All ER 344.*

(30) *Metropolitan Police Commissioner v. Charles [1976] 3 All 112, 114.*

(31) *Freeman & Lockyer (a Firm) v. Buckhurst Park Properties (Mangal) Ltd. [1964] 1 All ER 630, 641, 646 ; 1964 2 Q.B. 480.*

(32) *Kooragang Investments Pty Ltd. v. Richardson & Wrench Ltd. [1981] 3 All ER 65*

(33) *United Africa Co. v. Saka Owoade [1957] 3 All ER 216 ; 1955 A.C. 130.*

(34) *London County Council v. Cattermoles (Garages) Ltd. [1953] 2 All ER 582 ; 1953 1 WLR 997.*

(35) *Goh Choon Seng v. Lee Kim Soo [1925] AC 550.*

(36) *Biggar v. Rock Life Assurance Co. [1902] 1 KB 516.*

(37) *Munday v. London County Council [1916] 2 K.B. 331, 334.*

(38) *East Suffolk Rivers Catchment Board v. Kent [1940] 4 All ER 527, 532 : [1941] A.C. 74 (H.L.).*

(39) *Overseas Tankship (U.K.) v. Morts, Docks & Engineering Co. The Wagon Mound (No. 1) [1961] 1 All ER 404 ; [1961] A.C. 388 ; [1961] 2 WLR 126 (P.C.).*

(40) *Hughes v. Lord Advocate [1963] 1 All ER 705 ; [1963] 2 WLR 779 ; [1963] A.C. 837 (H.L.).*

(41) *McLean v. Bell (1932) 147 L.T. 262 ; 48 TLR 467.*

(42) *Re Polemis and Furness, Whithy & Co. Ltd. 1921 3 KB 560.*

(43) *S. S. Singleton Abbey v. S. S. Paludina [1927] A.C. 16, 25-26 (H.L.).*

(44) *The Paludina [1925] P 40, 43, 48, 49, 50 (C.A.)*

(45) *The Oropesa 1942 P. 140, 144.*

(46) *The Oropesa [1943] 1 All ER 211 ; 1943 P 32, 37 (C.A.).*

(47) *Canadian Pacific Railway Company v. Kelvin Shipping Company Limited (1927) 138 Law Times 369 (H.L.).*

(48) *The Guildford [1958] 3 All ER 915, 919.*

(49) *McWilliams v. William Arrol & Co. [1962] 1 All ER 623, 626, 628 (H.L.).*

(50) *McLoughlin v. O' Brian [1983] AC 410, 426.*

(51) *Woods v. Duncan [1946] AC 401, 442.*

(52) *Weld-Blundell v. Stephens [1920] AC 956; 986.*

(53) *McKew v. Holland & Hannen & Cubitts (Scotland) [1969] 3 All ER 1621, 1623.*

(54) *Home Office v. Dorset Yacht Co. [1970] 2 All ER 294, 298.*

(55) *Petrovitch v. Callinghams [1969] 2 Lloyds Reports 386.*

(56) *Stansbie v. Troman [1948] 1 All ER 599 ; 1984 2 KB 48.*

(57) *Lamb v. London Borough of Camden [1981] 2 All ER 408.*

(58) *Henderson v. Williams [1895] 1 QB 521, 529 ; [1902] AC 325, 331-332.*

(59) *Bank of Ireland v. Evans Trustees [1955] 5 HL 380.*

(60) *Lloyds Bank Ltd., v. E. B. Savory & Co. [1933] AC 201 , [1932] All ER 105, 109.*

(61) *Motor Traders Guarantee Corporation Ltd. v. Midland Bank Ltd. [1937] 4 All ER 90, 94.*

(62) *Orbit Mining & Trading Co. v Westminster Bank Ltd. [1962] 3 All ER 565, 580.*

(63) *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd. [1915] AC 705.*

(64) *Fanton v. Denville [1932] 2 K. B. 309.*

(65) *Rudd v. Elder Dempster & Co. [1933] 1 K. B. 566, 576.*

(66) *H. M. S. Truculent, The Admiralty v. The Divina (Owners) [1951] 2 All ER 968.*

(67) *The Lady Gwendolen 1965 2 All ER 283.*

(68) *Tesco Supermarkets Ltd. v. Nattrass [1971] 2 All ER 127 (HL).*

(69) *Smith v. Jenkins (1969) 119 CLR 397 (1970) 44 A.L.J.R. 78.*

(70) *Barton v Armstrong [1976] AC 104.*

(71) *Pao On v. Lau Yiu Long [1980] AC 614*

(72) *Maskell v. Horner [1915] 3 KB 106.*

(73) *Occidental Worldwide Investment Corp. v Skibs A/S Avanti The "Sibeon" and the "Sibotre" [1976], 1 Lloyds 293*

(74) *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd. [1978] 3 All ER 1170*

(75) *Universe Tankships Inc of Monrovia v International Transport Worker's Federation [1982] 2 All ER 67.*

(76) *Thorn v. Motor Trade Association [1937] 3 All ER 157, 160.*

(77) *The Amalgamated Investment and Property Co. Ltd. v Texas Commerce International Bank [1981] 3 All ER 577, 584.*

(78) *Keen v Holland [1984] 1 All ER 75.*

(79) *Grundt v Great Boulder Proprietary Gold Mines Ltd (1938) 59 CLR 641, 657.*

(80) *Verschures Creameries v. Hull & Netherland Steamship Co. Ltd. [1921] 2 KB 608, 612.*

(81) *Foster v. Essex Bank 17 Massachussets Reports 478.*

(82) *Giblin v. McMullen [1868] LR 2 PC 317.*

(83) *Foley v. Hill [1848] 2 HL Cas. 28.*

(84) *De Zilva v. Cassim (1903) 7 NLR 230, 233.*

(85) *Gray v. Barr [1971] 2 All ER 949.*

(86) *Colburn v Patmore 1834 1 CR. M. & R 73 ; 3 L.J.Ex. 317.*

(87) *Hardy v. Motor Insurers Bureau [1964] 2 All ER 742.*

(88) *Derry v. Peek [1889] 14 App. Cas 337.*

(89) *Le Lievre v. Gould [1893] 1 QB 491, 503.*

APPEAL from the Court of Appeal.

P. Navaratnarajah, Q.C. with *H. L. de Silva, P. C., K. Kanag Iswaran, S. Mahenthiran, K. Neelakandan, Miss U. Weerasinghe, Miss. R. Kandasamy* and *A. A. M. Illiyas* for plaintiff-appellant

H. W. Jayewardene, Q.C. with *J. W. Subasinghe, P.C., K. N. Choksy, P.C., L. C. Seneviratne* and *Lakshman Perera* for defendant-respondent

Cur. adv vult.

October 10, 1984.

SHARVANANDA, J.

This appeal has come up before this court, with leave granted by the Court of Appeal on the ground that it involves substantial questions of law and also with leave granted by this court, under article 128(2) on the ground that this was a fit case for review by this court. When so granting leave this court granted permission to both plaintiff-appellant and the defendant-respondent to make submissions on the entire case, both on facts and on the law involved in this case.

Concurrent findings of facts

At the hearing before us when Counsel for the defendant-respondent canvassed the correctness of certain findings of fact made by the trial Judge which were confirmed by the Court of Appeal, counsel for the plaintiff-appellant objected to the reviewing by us of the concurrent findings of fact arrived at by the lower courts and urged that this court should not disturb the concurrent findings of fact. Counsel for the appellant invited this court to adopt the practice of the Judicial Committee of the Privy Council, of declining to review the evidence for the third time when there are concurrent judgments of two courts on clear questions of facts and referred us to certain propositions enunciated by the Privy Council in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* (1). With reference to that practice the Privy Council said at page 521 :

> "In order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all".

I have observed that the practice of non-interference in a case of concurrent findings of facts "is not a cast-iron one, and . . . . . there may occur cases of such an unusual nature as will constrain the Board to depart from the practice."

Article 127 of our Constitution spells out the appellate jurisdiction of this court. It provides that this court (Supreme Court) is a final court of civil and criminal appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any court of first instance, tribunal or other institution and that this court may, in the exercise of its appellate jurisdiction, affirm, or reverse or vary any judgment or decree of the Court of Appeal. It will thus be seen that the appellate jurisdiction of this court is all embracing and unfettered. On leave being granted under Article 128 to appeal to this court, this court is vested with the power, as a final Court of Appeal to consider the correctness of the decision appealed against on any ground, whether on questions of fact or law. This is a court of re-hearing. *Silva v. Swaris* (2), Sansoni, J. in *Nawadun Korale Co-operative Stores Union Ltd. v. Premaratne* (3). The leave granted under Article 128, though it is a precondition for the maintainability of an appeal to this court, cannot circumscribe the scope of the appeal. *Sri Lanka Ports Authority v. Pieris* (4). Thus this court undoubtedly has

the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate cases. However, ordinarily it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may, but is under a duty to examine the supporting evidence and reverse the findings.

Counsel for the defendant-respondent has persuasively argued before us that this court being the final appellate court for and within the Republic of Sri Lanka, is the counterpart of the House of Lords which is the Supreme Court of Appeal in Great Britain, and it would be more appropriate that this court should follow the practice of the House of Lords in the exercise of its appellate jurisdiction on questions of fact, rather than that of the Judicial Committee of the Privy Council, which is the final court of appeal of the British Commonwealth and British colonies. In the nature of things the Privy Council labours under certain handicaps in embarking on a fresh examination of facts for the purpose of reviewing concurrent findings by lower courts. The court from which an appeal is taken whether from a colony or some Dominion is naturally better adapted to appreciate local customs, conditions, habits and ways of the witnesses. The local court is better equipped to assess evidence involving questions of relationships and conduct peculiar to the locality from which the case came,and whose significance is specially within the knowledge of the courts of that country. The Privy Council suffers inevitably from its alienage, though it is the apex of the hierarchy of courts. I would therefore prefer to adopt the practice of the House of Lords in the matter of consideration of questions of facts since that court, like the Supreme Court of Sri Lanka, suffers no such limitations as the Privy Council in the matter of findings of fact by an alien trial court.

Halsbury Laws of England, 4th Edition, Vol. 10, para 744 at page 340 and 341 states the jurisdictional practice of the House of Lords as follows :

"Except in cases when the findings of fact by the tribunal appealed from are made final by statute, questions of fact are as much open to review by the House of Lords as are questions of law. The House

is, however, reluctant to disturb concurrent findings of facts of the courts below, but will revise the findings if it considers them erroneous or if fresh evidence is available. Moreover the House will hesitate to interfere with the findings of the judge who saw and heard the witnesses, unless it is a question not of credibility of the witnesses, but of sufficiency of the evidence. However, the House will more readily form an independent opinion where the finding of fact is really an inference drawn from facts specifically found by the judge and where there is no question of the credibility of the witnesses."

In this connection the observations of Lord Wright in *Flower v. Ebbw Vale Steel, Iron & Coal Company Limited* (5) at 220, 221 are relevant to the consideration of the judgment under appeal :

"It was said that Your Lordships should not differ from a finding of fact by the trial judge, and reliance was placed on a recent decision of this House in the case of *Powell v. Streatham Manor Nursing Home* (6). But as was pointed out in that case, every appeal from a judge trying a case without a jury is a retrial, so that the appellate Court is bound to exercise a judgment of its own because the appellate Court is in its turn a judge of fact. What was pointed out in that case was that where the personality of the witnesses was an essential element in the decision, there being a conflict of evidence of fact, an appellate Court ought not save in the clearest cases to set aside the decision of the trial judge who has seen and heard the witnesses. But in the present case it is not really a question of the credibility of the witnesses but a question of the sufficiency of their evidence to establish what the respondents had to prove. The evidence, if fully believed,may still be inadequate to prove the case.

It is further objected that there are here concurrent findings of fact. That would not be a relevant consideration if the case were one in which there was no evidence at all that any such specific instructions as were relied on were brought home to the appellant's mind. I do not feel it necessary to say whether I am so satisfied, but I am quite clear that there is no sufficient evidence. I do not think that in any event this is a case in which the fact of concurrent findings below should prevent Your Lordships from setting aside the finding, if satisfied that it should not have been made. There is no rule binding this House not to interfere with concurrent findings of

fact. This House will always in proper cases reconsider the evidence notwithstanding that there are concurrent findings of fact, and this is a case in my opinion in which reconsideration is justified."

Circumstances in which an appellate court will interfere and ought to interfere with the judgment of the trial Judge on questions of fact largely founded on opinion of witnesses' demeanour are set out vividly by Lord Greene M.R. in *Yuill v. Yuill* (7) as follows :

"We are reminded of certain well known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial Judge has been based in whole or in part upon his opinion of the demeanour of the witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial Judge has formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced Judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad, as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question."

In my view the opinion of the trial judge on vital questions of fact is flawed by the kind of shortcoming referred to by Lord Greene M.R. The trial judge has overlooked relevant considerations in the assessment of the evidence. He had not directed his mind to relevant questions and had failed to apply correct principles of law to the facts. The deficiencies in the judgement are such that I am convinced that an appeal court will be failing in its primary duty if it inhibits itself by regarding the findings of fact arrived at by the District Judge as unreviewable and final just because credibility of witnesses is involved. It was significant that Counsel for the plaintiff when asked to substantiate certain findings of fact, could fall back only on the mere fact of the Judge's finding in his favour and not on any other supporting material. I have no doubt, in fact I am convinced, that the

District Judge has grievously gone wrong in his opinion. It is a judgment which by its manifest errors of law and fact would have resulted in miscarriage of justice had the Court of Appeal affirmed it. The trial judge seems to have been carried away by the demeanour and manner in which Harasgama, the Managing Director of the Plaintiff-company and the chief witness in the case, gave his evidence and withstood the cross-examination of counsel for the defendant bank. He had not tested his testimony by the intrinsic merit and nature of the evidence in the case. It is unfortunate that the trial Judge has lost his priorities in the matter of testing the credibility of witnesses. When one goes by the record, certainly, Harasgama's testimony does not bear examination. The favourable impression that he had created on the District Judge by his demeanour in court has outweighed or displaced all other relevant considerations in determining the veracity of the witness. The trial Judge had, in assessing Harasgama's evidence, failed to take into account the fact that plaintiff's principal claim to the sum of Rs. 1,273,883.66 that was alleged to have been deposited with the defendant bank was a false claim, false to the knowledge of Harasgama who gave instructions for the preferring of that claim. Counsel for the plaintiff at the end of the trial, in his final submission, was obliged to abandon that claim as the evidence militated against the claim. Plaintiff's auditors had prior to the institution of the action reported to Harasgama, that the claim was untenable. The effort made by Harasgama, in the course of his evidence to distance Ingram from him, his reluctance to report Ingram's fraud to the Police and have the fraud investigated and his employment of private detectives, not to uncover the fraud inside his company but to steal defendant's documents, all disclosed a designing nature, not disposed to candidness. These matters should have made the trial Judge wary of accepting Harasgama's evidence on vital issues. Certainly, on the crucial question whether the plaintiff was receiving the Bank's weekly statements by post, during the time Harasgama was Managing Director, 1962-68, his evidence that he was not aware that the plaintiff-company was not receiving them by post cannot be accepted with confidence and was not sufficient to discharge the onus that lay on the plaintiff to establish non-receipt of them by post. The trial Judge erred in basing his acceptance of his evidence on his demeanour in the witness box, without submitting his testimony to a critical examination as to why for six years he had failed to notice such an irregularity if it in fact existed. When the company was receiving the monthly statements relating to No. 2 account of the

company and of the company's subsidiaries regularly by post, but was for some mysterious reason not receiving by post the weekly statements relating to No. 1 overdraft account, it is unbelievable that a businessman like Harasgama was not interested, if such was the fact, in ascertaining why the Bank was not sending by post the weekly statements. This criticism of the trial judge's assessment of Harasgama applies also to his assessment of Lionel Fernando.

I have had the advantage of reading the judgment of Abdul Cader, J. He has dealt with the salient facts of the case and the errors committed by the trial Judge. I agree with his analysis of the errors. In my view the Court of Appeal was justified in reversing the judgment of the District Court. Since Abdul Cader, J., has dealt with the facts and I agree with his conclusions, I shall deal mainly with the issues of law involved in the appeal.

The plaintiff-company instituted this action on 22.11.70, against the defendant bank praying for a declaration that cheques and cash to the value of Rs. 1,275,883.03 were deposited by the plaintiff to the credit of the current account bearing No. 22200 with the defendant bank ; and that the said account was wrongfully debited with a sum of Rs. 49,546.16 alleged to be due as interest and the plaintiff's said account was overdrawn on 18.11.1968 only in a sum of Rs 2,268,381.34.

For a first alternative cause of action the Plaintiff pleaded that if the said cheques and cash had not in fact been deposited, then such non-deposit and/or misappropriation thereof was due to the fraudulent and/or negligent actions or omissions of the defendant and/or its servants and agents, acting in the course of their employment and within the scope of their authority, for whose actions and omissions the defendant is in law liable and responsible ; the defendant-bank had fraudulently and/or negligently issued or caused or permitted to be issued or fabricated or facilitated the issue of fabricated or incorrect receipts and weekly statements of accounts to the plaintiff, particularly in that :

(*a*) The defendant bank, being aware that incorrect weekly statements and receipts were being issued to and received by the plaintiff company, failed and neglected to inform the plaintiff and/or to stop such issue and/or to take reasonable precautions ;

(*b*) The defendent-bank failed and neglected to exercise proper care and control in respect of the custody and issue of blank forms of statements of accounts.

(*c*) The defendent-bank had failed and neglected to exercise proper care and control in respect of the issue and delivery of receipts and weekly statements of accounts and certificates of balances to the plaintiff.

(*d*) The defendant permitted unauthorised persons to have access to and control of blank forms of statements of account, forms used for certifying balances and/or other security documents.

The plaintiff stated that the above were the causes of such non-deposits and/or misappropriation thereof and that by reason thereof the plaintiff had suffered loss and damage in the said sum of Rs. 1,275,883.66 together with a further sum of Rs. 49,546.16 being interest debited.

For a second alternative cause of action the plaintiff averred that if the aforesaid cash and cheques totalling Rs. 1,275,883.66 had not in fact been deposited, the defendant and/or its servants had jointly with one W. L. Ingram (who was both the Sales Manager of the plaintiff company and a Director of Collettes Finance Ltd., a subsidiary of Collettes Company) misappropriated such cash and cheques and that the plaintiff was entitled to recover the said sum as loss and damage suffered by the plaintiff from the defendant bank.

The position taken up by the defendant-bank, in the amended answer is briefly : that the cheques and cash alleged by the plaintiff to have been deposited with the defendant-bank have not in fact been so deposited ; that the documents purporting to be receipts of the defendant-bank in respect of such deposits are all faked documents ; that the defendant-bank is not liable for any of the fraudulent actions or concealments attributed to Ingram who was the Plaintiff's Sales Manager by the plaintiff ; that, by reason of fraudulent representation made by the plaintiff-company to the defendant-bank monthly in regard to the value of the stocks held by the plaintiff-company, the plaintiff was able from time to time to overdraw monies on the plaintiff-company's aforesaid current account in excess of the amount which the plaintiff was entitled to overdraw ; that the damages, if any, suffered by the plaintiff-company are due to the fraud which was entirely engineered and accomplished by the plaintiff-company ; that

the defendant-bank had sent the plaintiff-company from time to time statements of accounts and also certificates of balances relating to the aforesaid current account of the plaintiff company ; that the auditors of the defendant-bank also sent, in the usual course of business, confirmation-slips showing the state of the plaintiff company's said current account ; that the plaintiff-company never questioned the correctness of the aforementioned bank statements, certificates of balance and/or the confirmation slips, and accepted them without demur ; that, at all times material to this action, the plaintiff-company made no allegation of fraud on the part of the employees of the defendant-bank ; that, at the express request of the defendant-bank, the plaintiff-company gave a primary mortgage of the premises bearing No. 101, D. S. Senanayake Mawatha, Colombo. in respect of the monies found to have been overdrawn by the plaintiff-company as on the 28th November 1968 ; that on 30.12.68 the plaintiff-company expressly admitted that the plaintiff-company had overdrawn the amount which the defendant-bank stated had been so overdrawn as on 14.12.68 and further admitted that the said sum was still due and owing to the defendant-bank as on 30.12.68 ; that the defendant-bank having been intentionally made to believe that the plaintiff-company was making no allegation of fraud against the defendant-bank in regard to the loss sustained by the plaintiff-company, the defendant-bank extended further credit facilities to the plaintiff-company and refrained from stopping or curtailing in any way the existing facilities ; the plaintiff-company was now estopped from denying the genuineness and the receipt of the aforementioned statements and the correctness of the amount overdrawn by the plaintiff and was precluded from asserting that the defendant-bank has been guilty of fraud-negligence, and claiming damages on such basis.

After the defendant-bank filed its amended answer, the plaintiff-company filed further pleadings by which the plaintiff-company averred that the plaintiff-company, through two of its directors, was induced to sign the document, dated 30.12.68 (and referred to in the amended answer) acknowledging the amount stated by the defendant-bank as having, by 14.12.1968, been overdrawn by the plaintiff-company, not only by the deliberate misrepresentations and suppressions of facts made by the defendant-bank's General Manager, C. Loganathan, but also by the exercise of duress, undue influence and threats of harm to the

plaintiff-company's business by the said Loganathan, and also by a breach by the defendant-bank of the fiduciary duty it owed towards the plaintiff-company.

The case proceeded to trial on 30 issues. Counsel for the plaintiff frankly conceded in his written submissions, after the trial was concluded, that the plaintiff-company had failed to prove that the plaintiff-company had deposited to the credit of its account with the defendant-bank the various amounts in cash and by cheque set out in the schedule "B" to the plaint, that therefore issues 1 and 2 which were based upon the main cause of action be answered against the plaintiff-company. Accordingly the said issues were answered in the negative. The plaintiff's main cause of action as set out in the plaint having failed, the plaintiff then relied on the two alternative causes of action set out in the plaint, based upon the fraud and negligence of and the misappropriation by the defendant-bank's agents and servants, acting within the scope and in the course of their duties.

In regard to the second alternative cause of action the trial Judge held that no misappropriation of any money belonging to the plaintiff-company by the employees of the defendant-bank had been proved and that it was Ingram "plaintiff's employee" who would have misappropriated the said cash and cheques belonging to the plaintiff-company and dismissed that claim. The plaintiff makes no complaint against this finding.

The trial Judge however held that the first alternative cause of action had been established against the defendant-bank and had entered judgment in favour of the plaintiff in a sum of Rs. 1,169,240.93 as representing the loss and damage sustained by the plaintiff by reason of the negligence of the defendant and/or its servants.

In regard to the first alternative cause of action the trial Judge found that the defendant-bank –

(*a*) was negligent in that :

(i) Abeywickrema, the Ledger Clerk of the defendant-bank had during the period June 1966 to 19.8.1968 violated the instructions relating to the delivery of bank statements ;

(ii) In respect of the period before and after the period during which Abeywickrema was the Ledger Clerk, the employees of the defendant-bank had failed to follow instructions with regard to the delivery of bank statements ;

(iii) That the defendant-bank had failed to carry out periodical checks of the stocks of the plaintiff-company ;

(iv) The defendant-bank had failed to have proper care and custody of its blank Bank Statement Forms ;

(*b*) Was guilty of fraud in that Abeywickrema had during the period, he was Ledger Clerk from June 1966 to 19.8.1968, in the course of his duties prepared false bank statements in respect of the plaintiff-company's accounts.

The trial Judge has held that negligence and complicity in the fraud on the part of bank employees, mainly Abeywickrema and Amerasinghe, have been established and that in order to consider the legal implications of Abeywickrema's complicity in the fraud, it had to be viewed in this way –

(1) He extracted genuine bank statements and handed them to Ingram.

(2) He introduced into the bank fabricated stock certificates having received them from Ingram, knowing them to be so.

(3) He probably pilferred obsolete blank statement forms.

The District Judge has held that neither the extraction of genuine statements nor the introduction of fabricated stock certificates was an act done in the course of Abeywickrema's duties and the introduction of stock certificates by carrying and handing them over to the bank's relevant officer, was also not done in the course of his duties, and that these were clearly done for his and Ingram's purposes. He further held that Abeywickrema prevented genuine statements from going into Collettes by post ; he also held that the forms were obtained by Abeywickrema or obtained aided by him. But that this act of pilfering was not done in the course of performance of his duties. That it was also outside the scope of his duties and the bank was not liable because Abeywickrema stole the forms and gave them to Ingram. He held that the bank was guilty of negligence, in that it did not take proper care of its obsolete forms and that the free availability of the forms enabled a fraud to be perpetrated.

Concluding this analysis of the evidence the trial Judge has held as follows :

"With regard to the extraction of statements, as in pilfering of blank forms, it was not done in the course of the performance of Abeywickrema's duties as assigned to him by the bank, but was done for his own purpose. From 1.7.56 – May 1966 Abeywickrema had not been in the York Street Branch. He had been there from June 1966 to 19.8.1968. Thereafter till 28.11.68 it was Amerasinghe. During Abeywickrema's period at the ledger, could the preparation of false statements by him make the bank liable ? At this time he was perpetrating the fraud in the course of his duties, no matter that those were not the instructions given to him by the bank. The instructions of the bank to him were to prepare statements, but he prepared false statements in the course of performing the duties he was assigned, and preparation of statements was incidental to the carrying out of the bank's orders. He could also be said to be negligent in that instructions for delivery of statements had been observed in the breach. So was Amerasinghe and others.

As far as the periods before and after Abeywickrema's service at the ledger department go the negligence of the bank, arises from the failure of officials to follow the important instructions with regard to the delivery of statements.

Thus it would be seen that the acts of commission and omission by various servants of the defendant amount to negligence as contemplated by law."

The issues that were framed in connection with the first alternative cause of action and the District Judge's answers to same are–

8. Was the defendant under a duty arising from agreement, practice and/or course of dealing to send correct receipts and correct weekly statements of accounts to the plaintiff ?

   Ans : Yes – also admitted after the issue was suggested.

9. Had the defendant by its servants or agents acting in the course of their employment and within the scope of their authority and/or for whose acts and omissions the defendant is in law liable and responsible, fraudulently issued, caused or permitted, to be issued incorrect receipts and weekly statements of account to the plaintiff ?

   Ans : Yes, only weekly statements ; not receipts

10. Did the defendant by its servants or agents acting in the course of their employment and within the scope of their authority and/or for whose acts and omissions the defendant is liable and responsible; fabricate or cause or permit to be fabricated the said incorrect receipts and weekly statements of accounts ?

Ans : Yes, only weekly statements ; not counterfoil receipts.

11 (i) Did the defendant fail and neglect to exercise proper control over and in respect of the–

(*a*) custody and issue of blank forms of statements of account and forms used for certificates of balances and other security documents ?

(*b*) issue and delivery of receipts, weekly statements of account and certificates of balances to the plaintiff ?

Ans : 11 (i) (*a*) Yes.
(*b*) Yes, of weekly satements of account only.

11 (ii) Did the defendant by its servants or agents –

(*a*) acting in the course of their employment and within the scope of their authority and/or

(*b*) for whose acts or omissions the defendant is in law liable and responsible facilitate the issue or fabricate the incorrect receipts or weekly statements of account ?

Ans : 11. (ii) (*a*) Yes – weekly statements only.
(*b*) Yes – weekly statements only.

12. Did the defendant by its servants or agents acting in the course of their employment and within the scope of their authority and/or for whose acts or omissions the defendant is in law liable and responsible fraudulently conceal from the plaintiff that the said receipts and weekly statements of account were incorrect ?

Ans : Yes – weekly statements of account only.

13. Even if the sum of Rs. 1,275,883.66 had not been deposited to the credit of the plaintiff's account, but if issues 8 and 9 to 12 or any of them are answered in favour of the plaintiff, has the plaintiff suffered loss and damage in a sum of Rs. 1,325,425.82 ?

Ans : Yes.

Counsel for the defendant at the outset admitted the Bank's duty referred to in issue 8 above and stated that the issue could be answered in the affirmative. The case for the plaintiff in the trial court was that Abeywickrema had handed over regularly fabricated bank statements to Ingram. But, perhaps in view of the fact that genuine bank statements could not have been altered to fall in line with the accounts maintained in the plaintiff-company's office as it would have been very necessary for Abeywickrema to have knowledge of the entries appearing in the books of the company and there was no evidence that he had any such knowledge, counsel for plaintiff modified his case in argument before us and stated to us that, presently, his case was that Abeywickrema had handed over genuine bank statements which contained the true and accurate position of the plaintiff company's current account with the defendant-bank as set out in the books of the defendant-bank and that Ingram had fraudulently substituted altered statements and that the statements that were in the possession of the plaintiff-company were statements fabricated by Ingram. It was only after the genuine statements had got into the hands of Ingram that fabrication could have taken place. The part played by Abeywickrema was to pilfer the genuine statements prepared by the bank before they were posted and to deliver them to Ingram. Thus, on the concession of counsel for the plaintiff, it has to be held that what Abeywickrema handed over to Ingram were genuine bank statements and not the false statements that were substituted for same by Ingram and that neither the Bank nor its servants took part in the fabrication of the statements that ultimately reached the plaintiff. On the basis of this concession, the District Judge's aforesaid finding that the defendant-bank is guilty of fraud, in that Abeywickrema had during the period that he was the Ledger Clerk from June 1966 to August 1968, in the course of his duties prepared false bank statements relating to plaintiff's account cannot be sustained and has to be set aside. The answers to aforesaid issues 9 and 10 by the trial Judge too correspondingly get vitiated as the defendant-bank was not involved by itself or through its agents in the issue or fabrication of the

false weekly statements in the possession of the plaintiff. The weekly statements referred to in issues 9 and 10 are the fabricated statements. Assuming that the plaintiff has established that Abeywickrema had stolen all genuine weekly bank statements and had irregularly delivered the same in person to Ingram, that fact by itself does not implicate the bank in respect of the weekly statements fabricated by Ingram. The delivery of the genuine bank statements to Ingram, although irregular, in that they had not been sent by post cannot in any sense be said to conduce to the fabrication of the false weekly statements ; it only enabled Ingram to thwart the genuine statements reaching the plaintiff. The false statements could have been prepared from the knowledge that Ingram had of what monies and cheques were deposited with the bank and what were not. I shall later deal with the finding of the District Judge that Abeywickrema gave the statements to Ingram with full knowledge that Ingram obtained the statements for a fraudulent purpose and that Ingram wanted the genuine statements before they went by post to the plaintiff and that the perpetration of the fraud was made possible by such delivery and how far that finding affected the defendent-bank.

Issue 12 refers to fraudulent concealment from the plaintiff "that the said weekly statements of accounts were incorrect". There is no evidence that the bank by itself or through its servants was aware of the substitution of the false weekly statements. The submission of counsel that Abeywickrema gave the genuine bank statement to Ingram, with knowledge that Ingram obtained the statements for fraudulent purposes did not extend to suggest that the bank by its servants was concealing from the plaintiff the fact that the false weekly statements in the possession of plaintiff were incorrect.

The trial Judge has come to a finding that from 1956 to November, 1968, Abeywickrema delivered the bank statements (monthly from 1956 to 1962 and weekly statements from 1962-1968) to Ingram and that the said statements were not sent by post to the plaintiff as claimed by the defendant-bank. The Court of Appeal has not disagreed with this finding. It has assumed the correctness of this finding without analysing the evidence in support of such a finding. I agree with Abdul Cader, J., for the reasons stated by him, that this crucial finding is not supported by the evidence and probabilities of the case. The District Judge has failed to consider the question of burden of proof that was on the plaintiff to establish that the bank statements were not sent by post by the bank, a fact in issue for the establishment of the plaintiff's

case. Since the relevant period extends from 1956-1968 and there was no witness who could speak for the whole period of 12 years, the only reliable documentary evidence that was available to the plaintiff to establish the non-receipt of the bank statements was the Inward Letter Registers which it regularly kept in the course of its business, and which were available for production at the trial as they have been included in the plaintiff's list of documents. These registers would have reflected whether these statements came by post and were the best evidence to prove the fact that they did not come by post.

For the reasons given by Abdul Cader, J., one cannot, with confidence, accept and act on the oral evidence of witnesses like Lionel Fernando or Samuel or Harasgama himself.

Presumption under Section 114 of the Evidence Ordinance

The plaintiff could have supported its evidence with the registers, which were regularly and contemporaneously kept, showing the incoming mail. They undisputedly afforded relevant and substantive evidence. But for some reason best known to the plaintiff, these registers, which would have been conclusive, have not been put in evidence by the plaintiff. Since the relevant documents, namely the Inwards Mail Registers which were admittedly in existence have not been placed before this court, an adverse inference has therefore to be drawn against the plaintiff that these registers would, if produced, have belied plaintiff's assertion. Since the plaintiff has withheld these documents which are in its possession, the Court may properly draw a presumption under section 114 of the Evidence Ordinance that these documents, if produced, would refute the plaintiff and show that the bank statements were in fact being received by post by the plaintiff-company, and that the plaintiff's witnesses were not speaking the truth when they testifed that these statements were not coming by post. "All the relevant documents admitted to have been in existence have not been placed before the Court and an adverse inference has, therefore, to be drawn against the appellant." *Raghavamma v. Chenchamma* (8). Counsel for the plaintiff in his written submissions has referred to certain Indian cases in support of his contention that "It is an established principle of law that it is for the suitor to decide which would be the best evidence to prove his case and for failure to produce one piece of evidence, an adverse inference should not be drawn against a party who has chosen not to file it unless the other side has called for that evidence." I cannot accept the correctness of this proposition of law. I have examined the cases referred to by the

plaintiff, namely *Mt.Bilas Kunwar v. Desraj Ranjit Singh (9). Thirumalai Iyengar.v.Subba Raja (10) Karwadi v. Shambharkar* (11) *Ramanathan Chettiar v. Viswanathan Chettiar* (12) ; none of these cases support the plaintiff's proposition that no adverse inferences should be drawn against a party who had chosen not to produce a relevant document unless the other side has called for that evidence. The Sheet-anchor for his contention is the following statement of Farwell, J., in the case of *Mt. Bilas Kunwar v. Desraj Ranjit Singh* (9).

> "The High Court Judges 'attach great significance' to the non-production of the books showing the accounts of the general estate, and appear to draw an inference therefrom adverse to the plaintiff's claim ; any such inference is, in their Lordships' opinion, unwarranted. These books do not necessarily form any part of the plaintiff's case ; it is, of course, possible that some entries might have appeared therein relating to the bungalow. But it is open to a litigant to refrain from producing any documents that he considers irrelevant ; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference such as is made in the High Court that the books, if produced, would have shown rent credited to Jagmag or set off against some claim against her. They related to a different property, and the possibility of entries relating to the bungalow therein is very remote, but even if it had been greater, the Court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of the documents to put them in evidence in the usual and proper way ; if he fails to do so no inference in his favour can be drawn as to the contents thereof."

This statement of law by Farwell, J., has to be appreciated in the context of the facts in which it was stated and not isolated from the context. In that case, the plaintiff's case was that the purchase of the bungalow in suit by the deceased Taluqdar in the name of his Mohammadan mistress Jagmag Bibi was a benami transaction, in that, the purchase money was paid by Taluqdar. After his death the possession and management of the bungalow was given to the plaintiff who was one of the two widows of the deceased and she had managed the property in question from the time of the death of the

deceased. The defendant resisted the plaintiff's claim to the bungalow on the ground that Jagmag the Mohammadan mistress of the deceased was the absolute owner of the bungalow and that she had paid the purchase money and had collected the rents of the bungalow. The Privy Council accepted the finding of the trial Judge that the evidence given by Jagmag was quite untrustworthy and also accepted the evidence of the plaintiff that all rates, rents and taxes and repairs, ground rent of the bungalow had been paid by the plaintiff, and that she had let out to various tenants from 1891 down to the commencement of the action the premises in suit. It was in this context that the Privy Council stated that the High Court of Allahabad which set aside the judgment of the trial court had erred in attaching significance to the non-production of the books of the deceased's estate which it was the contention of the defendant, if produced would show that rent had been credited to Jagmag. It is to be noted in this case that the plaintiff was not relying on any entry in the books in support of her case. On the other hand, it was the defendant who pleaded that there were entries in the plaintiff's books which supported her. It is in this context that the Privy Council stated that nothing adverse could be drawn against the plaintiff's non-production of the books which according to her were not relevant. On the other hand since the defendant was relying on certain alleged entries in the book it was for him to ave taken proper steps to have summoned the plaintiff to produce the books and in the event of the plaintiff failing to produce the books after the summons then an inference could have been drawn against the plaintiff that had the books been produced it would have supported the defendant's case. The judgment of the Privy Council does not lend any support to the proposition that if plaintiff fails to produce documents in his possession which are relevant to support his case, he should have been summoned by the defendant to produce them before the presumption under section 114 of the Evidence Ordinance could be drawn. He is not bound to produce documents which prove defendant's case unless he has been summoned, acording to law, to produce same by defendant. The Patna High Court had in *Chandra Narayan Deo v. Ramachandra Serawgi* (13) misunderstood or misapplied the judgment of the Privy Council in the above case by taking one portion of the judgment out of its context and relying on the isolated statement as the ratio decidendi of that judgment. The High Court had failed to note that the books referred to in the Privy Council judgment, did not form part of the plaintiff's case and that it was the defendant who was relying on them.

In those circumstances the Privy Council rightly held that the presumption under section 114 of the Evidence Ordinance could not be drawn against the plaintiff.

On the other hand in the instant case, it is to be noted that the burden was on the plaintiff to prove the non-receipt of the bank statements and in that connection the Inward Registers referred to by plaintiff's witnesses as supporting their oral evidence were highly relevant. It was not necessary for the defendant-bank to have summoned the plaintiff to produce the Inward Register as no burden lay on the defendant to establish the non-receipt and the defendant was not relying on them in support of its case. The plaintiff was relying on the Inward Registers to support its case that it did not receive by post the bank statements and no explanation has been given for their non-production.

In the other cases *Ramanathan Chettiar v. Viswanathan Chettiar* (12) and *Karwadi v. Shambharkar* (11), relied on by, the plaintiff, the evidence was that the relevant accounts or register were not available or had been lost and that explanation had been accepted by the Judge and hence there was no question of withholding the evidence from court. Hence the court quite properly said that no adverse inference can be drawn for non-production of the said documents though they were relevant. Woodroffe and Ameer Ali in their Law of evidence, 12th Ed. vol. 3 at page 2153 have stated the correct position in law–

> "A distinction should be made between documents relevant to one's case and those which are not so relevant. If a party to a case does not produce the document which is the best evidence in support of his contention an inference can be drawn that, if produced, it would be against his contention. But if the document is not relevant to his case no adverse inference can be drawn from his non-production unless he was asked to produce the document and he fails to do so."

Had the trial Judge had the above relevant consideration in mind it is highly improbable that he would have held that the plaintiff had proved that it did not receive any of the bank statements from 1956 right up to November 1968. The Inward Letters Registers were relevant also for the purpose of showing that the plaintiff did not receive, not only the bank statements but also the certificates of balance sent annually by the defendant-bank, the confirmation-slips sent out annually

by the auditors of the defendant-bank, the overdraft limit advice setting out the limit of the over-draft, alleged to have been sent out monthly by the defendant to plaintiff setting out the limit of the overdraft from January 1966. According to the plaintiff, though the defendant-bank had regularly sent overdraft limit advices from 1962 to the end of December 1965, apparently for no good reason the defendant-bank had stopped sending such advices from January 1966 and the plaintiff never questioned the defendant-bank about this alleged non delivery of overdraft limit advices though they were necessary to the plaintiff to ascertain the limit of the overdraft available to it.

I agree with Abdul Cader, J., that except for the 75 weekly statements admitted by Abeywickrema to have been delivered by him to Ingram, the plaintiff has not proved that the other monthly and weekly statements from August 1956 to the end of November 1968 had not been received by the plaintiff-company. It was admitted by plaintiff that if any one of these statements did reach the plaintiff-company unaltered and untampered, the plaintiff-company could have become aware of the fraud committed by Ingram and this alternative cause of action could not have been maintained by him.

Let me now assume, for the purpose of argument, that the District Judge was correct in finding that none of the monthly and weekly statements were sent by post by the defendant-bank to the plaintiff but were delivered personally by Abeywickrema to Ingram : what is the legal consequence of such failure ? It is in evidence that Paul Fernando, Chief Accountant and his Assistant Lionel Fernando were aware and their predecessors in office should also have been aware of the fact that the bank statements were not coming by post but were delivered by Abeywickrema to Ingram, who in turn brought them to the company. It is highly significant that throughout the period of 12 years from 1956 to 1968 there was no protest by the plaintiff-company against this personal delivery of bank statements to Ingram. In its plaint the planintiff stated that the defendant-bank was under a duty arising from agreement, practice and/or course of dealing to send correct weekly statements of accounts to the plaintiff. The plaint does not specify how the weekly statements of accounts were to be sent to plaintiff whether by post or through a representative of the company. The defendant-bank's position was that it normally sent its statements by post.

Acquiescence

In answer to issue 8 the defendant-bank has admitted its obligation to send weekly statements of account to the plaintiff. Now the question arises whether the only way that the bank could have discharged its obligation of sending weekly statements was by post or whether delivery of the bank statements to a representative of the company without any protest from the company was a substituted mode of performing that obligation of sending the monthly statements and was sufficient. The reference to "practice and/or course of dealing by the plaintiff and the defendant" referred to in the plaint and issue 8, is significant. The fact that the plaintiff never objected to the substituted mode of performance by defendant-bank of its obligation tends to show that the plaintiff was satisfied that the defendant-bank should perform its obligation of sending the weekly statements by delivering the same to Ingram on behalf of the company and had waived the defendant's obligation to send by post and that the plaintiff accepted the personal delivery by hand of the monthly statements to Ingram as proper delivery to itself, perhaps because of the special status accorded to Ingram in the company in connexion with its bank matters. The defendant-bank was in the circumstances entitled to assume that the company had acquiesced in the bank/its servants treating Ingram as its accredited representative to receive, on its behalf, the statements from the bank. It is relevant to note that the evidence shows that in its dealings with the bank, the plaintiff employed Ingram to exclusively handle them. In these circumstances it should be held that by its conduct the plaintiff company acquiesced in the bank delivery of its statements to Ingram as regular by it and that thereby the bank discharged its obligation of sending the weekly statements to it. As the plaintiff-company had approbated the handing over of the monthly statements to Ingram from August 1956 it would not be open now for the plaintiff-company after 12 years to disown the delivery of the monthly statements to Ingram as improper and allege want of due performance by the defendant of its obligation of sending the weekly statements of accounts to it.

A waiver or acquiescence must be an intentional conduct with knowledge.

But it was contended that Harasgama, the Managing Director of the plaintiff-company was blissfully not aware that the company received the bank statement through Ingram and that since the Managing

Director of the plaintiff-company had no knowledge of the receipt by Ingram of the bank statements on behalf of the company, the company cannot be credited with knowledge of that mode of delivery of the bank statements. However, the evidence in the case is that Paul Fernando, the Chief Accountant and Lionel Fernando, the Assistant Accountant were aware of the receipt by Ingram of the monthly statements and presumably their predecessors in office in the accounts section of the company must have also been aware of that fact. That Ingram was himself bringing the bank statements to the plaintiff-company seems to have been not only well known in the plaintiff-company but was accepted as the regular thing by those in the plainiff-company whose business it was to receive and scrutinise such documents. Lionel Fernando, an Assistant Accountant of the plaintiff-company to whom Ingram admittedly handed over the alleged bank statements stated that when there was a delay in the receipt of the bank statements Paul Fernando did not get in touch with the defendant-bank, but used to request him to find out from Ingram about such delays. Assuming that Harasgama was speaking the truth, when he testified that he was not aware of the fact of the receipt by Ingram of the bank statements, though it is difficult to believe his evidence on this point, particularly, for the reason that he did not, for such a long period of time, inquire as to how the bank statements of the plaintiff-company which the defendant-bank had been specially requested to send weekly from 1962 and not monthly, were not being received by post while the subsidiary companies of Collettes and the company's other account No. 22201 were receiving their statements by post from the defendant-bank, yet in my view the knowledge of the relevant officers or servants of the plaintiff-company who, in the company's organisation, were in charge of the company's accounts, namely Paul Fernando and Lionel Fernando and their predecessors in office must be attributed to their employer and be deemed in law to be the knowledge of the plaintiff-company, their employer.

Knowledge of servant, when imputed to employer

It is well settled that the knowledge of an agent will generally be imputed to his principal if the agent received the information in question in connection with a transaction in which he is acting for his principal and it is his duty to communicate that information to his principal –

"Where, any fact or circumstance, material to any transaction, business, or matter in respect of which an agent is employed,

comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken. Provided that where an agent is a party or privy to the commission of a fraud or misfeasance upon or against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal." Bowstead on Agency, 12th Ed. pp. 242 and 243.

Atiyah in his Treatise on "Vicarious Liability in the Law of Torts," discussing the topic of imputation of knowledge to an employer, states at page 189 –

"It seems that the servant's knowledge will only be imputed to the employer where the information in question is relevant to the task being performed by the servant, and where it is part of the servant's duties to take any necessary action consequential on the information, or at least to inform his employer of it. Hence information acquired by subordinate staff, even if acquired while they are actually in the course of performing their duties, does not necessarily fall to be treated as known to the employer. However in the case of companies and other corporations, knowledge of directors and managers and other "responsible officials" is normally treated, in accordance with modern principles of company law, as the knowledge of the company itself and this is probably so irrespective of the circumstances in which the knowledge is acquired, so long as it is in connection with the company's business in some way or other."

Lord Parker, L.J., in *John Henshal (Quarries) Ltd. v. Harvey* (14) expressed the view that –

"There is fundamentally no difference between a master who is an individual and a master who is a limited company, save that in the case of a limited company their knowledge must be the knowledge of those whom, in the case of *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* (15) Denning, L.J., referred to as the brains of the company. There is no doubt there are many cases where somebody who is in the possession of the brains-may be a director, managing director, the secretary or a responsible officer of the company - has knowledge, his knowledge has been held to be the knowledge of the company."

In *Applebee v. Percy* (16) Lord Coleridge, C.J., said –

"Where a certain business or the performance of a certain duty is deputed to a servant, a notice to the servant so acting is a notice to the master, because he has placed the servant in his stead to represent him quoad that particular business or duty."

In *Stiles v. Cardiff Steam Navigation Co.* (17) Crompton, J., said –

"I quite agree that the knowledge of a servant representing his masters and acting within the scope of their delegated authority may be competent to affect his masters with that knowledge."

and Shee, J., said –

"Corporations are in this respect in no different position from private owners ; and if it could be shown that the mischievous propensity of the dog was known to any person having the control of the business, or of the yard, or even of the dog, or whose duty it would be to inform the company of what the dog had done, it might do."

In *Penhallow v. Mersey Docks and Harbour Board* (18) Blackburn, J., said –

"If a Corporation cannot know anything except by its servants, it would seem that the Corporation must be liable for the knowledge of its servants and acts of its servants or not liable at all."

In *Sunlife Assurance Co. of Canada v. W. H. Smith & Son Ltd.* (19) Greer, L.J., said –

"A company of course is, as a person, incapable either of being innocent or guilty, but has only a *persona;* for by theory and law it must act by an agent. When the question is as to a libel which has been disseminated or published to some member of the public by a company or an individual whose business it is to exhibit documents similar to that which contained the libel in question, then you will have to consider, was the dissemination innocent ; and if a company leaves it to one of its salesman to sell a paper, or to one of its salesman to exhibit on his stall an invitation to buy a paper, it is just as much responsible for the state of mind the agent has when he disseminated the defamatory matter as if it was there itself as, a person exhibiting the poster or selling the paper, as the case may be."

In *Dodwell & Co. Ltd. v. John* (20) the Manager of the plaintiff-company drew upon the plaintiff-company's banking account four cheques and delivered the same to defendants who were partners of the firm of E. John & Co. carrying on business as share and produce brokers. The Manager had no authority to draw cheques for his private transactions. The Trial Court held that the defendants were not personally aware that they had received among the items paid over to them for the purchase of the shares which they bought for Williams, the aforesaid Manager as his brokers, cheques fraudulently drawn on the plaintiff's funds and that they took the cheques honestly without noticing the names of the drawers and without thinking of them as in a different position from the other cheques received in the course of their transactions with him. The Privy Council however held at page 208 –

> "But it is obvious that the appellants' (defendants') clerks, who brought the cheques to the partners for endorsement, must have seen that the name of the drawers was that of the respondents (the plaintiff-company). However little the clerks may have known of Williams's (the Manager of the plaintiff-company) real transactions and however innocently the cheques were brought and endorsed, the knowledge of the names on the part of the clerks was the knowledge of the appellants (the defendants)."

In the present case the knowledge of Paul Fernando, the Chief Accountant and that of Lionel Fernando Assistant Accountant and their predecessors in office who were the plaintiff's responsible officials in charge of the accounts of the plaintiff-company must be regarded as knowledge of the plaintiff-company and their knowledge should be attributed to their employer, the plantiff-company. In this view of the matter the company should be held to have been aware from 1956 of the delivery to Ingram of the bank statements and to have acquiesced in such delivery to Ingram as respresentative of the plaintiff-company, by the Bank in the discharge of its obligation of sending its weekly statements of accounts to the plaintiff.

Acquiescence

"If a person having a right and seeing another about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it to believe that he assents to its being committed, he cannot afterwards be heard to complain of

the act. This is the proper sense of the term 'acquiescence', and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct" Per Thesiger, L. J., in *De Bussche v. Alt* (21).

> "If a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct . . . I am of the opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous license" Per Lord Campbell, L.C. in *Cairncross v. Lorimer* (22). This passage was quoted with approval by the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha* (23).

An acquiescence is not a question of fact, but of legal inference from facts found. In view of the inference that the plaintiff-company should be deemed to have been fully aware that the defendant-bank was handing over the bank statements to Ingram by way of discharging its obligation to send the documents to the plaintiff, and had acquiesced in such discharge of the obligation, plaintiff is now estopped by twelve years of acquiescence from complaining that the delivery to Ingram is wrongful; it is bound by such performance.

The proposition of law enunciated in Spencer Bower – *Estoppel by Representation* (2nd Ed.) pp. 261-262–as applied to the facts of the present case may be re-formulated thus–

> "Where the plaintiff-company has a legal right to due delivery of the weekly bank statements which has been infringed over a period of years by defendant-bank under the mistaken belief that the Bank's acts of delivering to Ingram are not infringements of plaintiff's rights at all and plaintiff is all the time aware of its own legal rights in the matter and of the bank's infringement of that right and the bank's

erroneous belief that it is not in any way infringing on plaintiff's legal rights but exercising rights of its own and yet with that knowledge, the plaintiff so conducts itself or so abstains from objection, protest or other action as to foster or maintain the erroneous belief in the bank and thus induces the bank to continue in such course of conduct on the faith of the plaintiff's inaction, then the plaintiff cannot be permitted afterwards to assert its own rights or contest the bank's right to have delivered the bank statements through Ingram."

Counsel for the plaintiff-appellant has protested that the plea of estoppel arising from acquiescence was not pleaded in the answer nor raised in the issues and therefore should not be entertained by us. But I find that the trial Judge dealt with the issue of plaintiff's acquiescence when he posed to himself the question "Was there such a course of conduct known to the Chief Executive Harasgama and acquiesced in by him ? Was the bringing of statements by Abeywickrema to Ingram known to Harasgama ? Harasgama says 'No'. I believe him. Was he acquiescing in its coming into Collettes by any process other than the post ? There is no evidence to that effect," and answered "In my view the effort made to lead me to the inference that Ingram's removal of the Bank statements and Harasgama's acquiescence fails." In view of the District Judge's answer to the plea of acquiescence Counsel for the defendant-bank is entitled to canvass in the Appeal Court the correctness of the Judge's finding on the question of estoppel by acquiescence and I hold that the Judge has not looked at the question in the correct perspective and has therefore erred in his answer to the question of acquiescence.

Scope of servant's authority – effect of Prohibition

The evidence shows Abeywickrema was working in the Foreign Department of the defendant-bank as a Ledger clerk from 1955-57 and was working in the Loan Department from 1957-62, as a clerk-in-charge of bank investments, guarantees and security and from 1962 to June 1966 again in the Foreign Department as a clerk-in-charge of checking export documents. Then he was transferred to York Street Branch on 15.6.1966 and worked on Ledger No. 8 where the plaintiff's account was, from June-September 1966. He again worked in No. 9 Ledger from 11.6.68 to 23.8.1968 (plaintiff's account was in this Ledger during this period). He was sent on relief panel on 24.8.1968 and worked in the Savings Department, Foreign Department in Moratuwa and Maradana branches.

Amerasinghe was also working with Abeywickrema from 12.8.1965 and he succeded Abeywickrema as Ledger Clerk-in-Charge of plaintiff's account on 23.8.68 right up to 28.11.68 when Ingram's fraud was discovered. According to the Trial Judge Abeywickrema went out of his way to pilfer plaintiff's bank statements when he was not in charge of plaintiff's account and later when he was in charge of plaintiff's account during the two periods June 1966 to September 1966 and June 1968 to August 1968 he fraudulently handed them over to Ingram ; and Amerasinghe when he was the Ledger Clerk-in-Charge of plaintiff's accounts between August to November 1968 on the advice of Abeywickrema, handed over the bank statements to Abeywickrema to be delivered to Ingram. The plaintiff states that both Abeywickrema and Amerasinghe, the servants of the defendant-bank had fraudulently and/or negligently, acting in the course of their employment and within the scope of their authority, issued the bank statements to Ingram, and that the bank is in law liable for the fraudulent acts of the said servants. Thus the defendant-bank is sought to be made liable vicariously. The trial Judge has held that the extraction of genuine bank statements by Abeywickrema and Amerasinghe and delivery of same to Ingram was not an act done in the course of their duties, and that the bank was hence not liable for their said acts. The District Judge has however, held that during the period Abeywickrema was the Ledger Clerk from June 1966 to 19th August 1968, he was preparing false statements in the course of performance of his duties and that the bank was thereby implicated. The plaintiff has conceded in this court that this conclusion cannot be supported and I have already held, supra, that this finding that Abeywickrema prepared the false statements is untenable ; hence the defendant-bank cannot be cast in liability on this ground.

Counsel for the plaintiff-appellant however persisted in contending that the defendant-bank was vicariously liable as employer for the alleged acts of Abeywickrema and Amerasinghe in handing over the bank statements to Ingram.

For the defendant-bank to be liable for the acts of Abeywickrema and Amerasinghe they must have been committed fraudulently or otherwise in the course of and within the scope of their employment as Ledger Clerks under the defendant-bank.

The Bank of Ceylon Manual of Operations P 253/D 56 sets out the rules of the bank for the despatch of their monthly or weekly statements to their constituents. It sets out :

End of Month Despatch of Statements

"The statements will be initialled by the Ledger Officers after checking them against the end of the month's Trial Balance and passed over to *Adjuster* for despatch to the customers. The Adjuster will obtain a certificate of despatch of statements duly signed by the Ledger officer, clerk enclosing and the post clerk.

Daily or Weekly Despatch of Statements

"The Adjuster will be responsible for the sending out of these statements also . . . The Adjuster will secure the necessary clerical assistance for the enclosure of statements into envelopes. *As far as possible those allotted to this duty must not be connected to the current accounts department* . . . The Ledger officer intials these after verification of the balance and sends them in a book maintained for the purpose to the post clerk. The latter initials for the number of statements received by him after despatch to the customers by post."

Statements that are handed over to customers directly over the counter or to their authorised representative are entered in a book maintained for the purpose by the Ledger Officers and sent to the cheque book clerk to be initialled by him and handed over to the customers on identification."

The Bank rules relating to Ledger operation (D 46) set out the duties of the Adjuster as follows :

"The responsibility for the despatch will come under an independent officer who will be called the "Adjuster". In regard to this aspect of the duties he performs, in a large office there will be no difficulty in selecting *an officer unconnected to current account* to perform this duty in addition to other work. In a small office the Manager himself will perform the duties of an Adjuster."

From the bank rules (P253/D56 and D46) it is clear that the bank had a definite purpose in keeping the Ledger Officer in charge of the current account at a distance away and unconnected from the office of the Adjuster who was responsible for the sending out of the weekly statements of the bank. The bank attached great importance to the fact that the responsibility for the despatching of the statements came under an independent officer called Adjuster who had no connection with the current accounts. In its scheme of distribution and definition of duties the bank was very particular that the office and duties of the Ledger Clerk were distinct and removed from the office and duties of the Adjuster. In fact the Adjuster was purposefully kept remote from the Ledger Clerk. It was not a case of the Ledger Clerk being merely

prohibited from having anything to do with the despatch by post of the weekly statements to the customers. It was a case of delimitation of the area of his work and duties, so that if the Ledger Clerk purported to do any part of the Adjuster's work he did something which did not come within the scope of his employment and which was outside his employment. As far as despatch of weekly statements by post was concerned, as the trial Judge has rightly observed he was an "outsider" and the bank was not bound by his actions. However, the Ledger Clerk was permitted to hand over the weekly statements to a customer or to the agent of the company who has been authorised by the company (an authorised representative)

Abeywickrema has in evidence referred to the bank rule that "the statements that are handed over to customers directly over the counter or to their authorised representative are entered in a book maintained for the purpose by the Ledger Officer and sent to the cheque-book-clerk to be initialled by him on identification and added that Ledger Clerks deviate from the rule, and that in most cases the Managing Director of the company does not come to collect the statements but sends the person who comes to deposit the money to collect the statements and in practice it is accepted, and that he had given such statements not only in Collettes' case but also in the case of other companies to whose representatives the statements were handed over and that it was the normal practice. He also claimed that he had authority to give statements to persons who he thought had the right to receive them.

Mr. Loganathan, the General Manager of the defendant-bank has stated in evidence that an authorised representative of the customer was entitled to ask for those statements of accounts and that "authorised" means authorised to ask for a specific statement or authorised for a specific occasion or on standing instructions ; for a specific statement a writing is necessary ; where there is express or implied authority it is not necessary ; it is like the customer himself coming and getting it ; it depends on the circumstances."

In order to determine whether the proved act of negligence or fraud on the part of a servant is within or without the scope or course of his employment, it needs to be pointed out that it is not enough to decide whether or not what was done was prohibited conduct. The prohibition may either limit the scope of his employment or merely regulate his conduct within the sphere of his employment. "There are

prohibitions which limit the sphere of employment, and prohibitions which only deal with the conduct within the sphere of employment." Per Lord Dunedin in *Plumb v. Cobden Flour Mills Co. Ltd.* (24). In the former case, the employer will not be liable, in the latter he will. Express prohibition of the wrongful act is no defence to the employer, if that act was merely a mode of doing what the servant was employed to do. An example of this kind is *Limpus v. London General Omnibus Co.* (25) where the defendant company was held liable for an accident caused by the act of one of its drivers in driving across the road so as to obstruct a rival omnibus. It was held to be no defence that the company had issued specific instructions to the drivers not to race with or obstruct other vehicles. The driver whose conduct was in question was engaged to drive and the act which did the mischief was a negligent mode of driving for which his employer must answer, irrespective of any authority or of any prohibition.

Another example of the kind is *Canadian Pacific Railway v. Lockhart* (26) where a servant in disregard of a written notice prohibiting employees from using private-owned motor cars for the purpose of the company's business unless they were adequately protected by insurance, used his uninsured private motor car for the purpose of carrying out his duties, and the employers were held liable on the ground that an order to employees not to use uninsured cars merely limited the way in which the work was to be performed, so that the liability of the employer was not excluded if damage is caused when the order is disobeyed. In the course of his judgment, Lord Thanberton at page 468 said

> "If the prohibition had absolutely forbidden the servant to drive his motor car in the course of his employment, it might well have been maintained that he was employed to do carpentry work and not to drive a motor car, and that, therefore, the driving of a motor car was outside the scope of his employment, but it was not the acting as driver that was prohibited, but the non-insurance of the motor car, if used as a means incidental to the execution of the work which he was employed to do." Per Lord Thankerton in *Canadian Pacific Railway Co. v. Lockhart,* (supra)

An example of the other kind is *Twine v. Bean's Express Ltd.* (27), where the employers had expressly instructed their drivers not to allow unauthorised persons to travel on their vehicles and affixed a notice to

this effect on the driver's van. Despite this, the driver gave a lift to a person who was killed by reason of the driver's negligence. The Court of Appeal held that he was acting outside the scope of his employment and accordingly his employers were not liable. The act of giving a lift to an unauthorised person is not merely a wrongful mode of performing an act of a class which the driver is employed to perform but the performance of an act of a class which he was not authorised to perform at all and hence he was acting outside the course or scope of his employment. Where a servant acts outside the course of his employment he ceases pro hac vice to be a servant ; an act done solely for the servant's own interests and purposes, and outside his authority is not done in the course of his employment, even though it may have been done during his employment.

The fact that the servant disobeys the orders of his master does not necessarily mean that he acted outside the course of his employment. The distinction is between an order which limits the scope of the employment, the disobedience to which means that the servant is not acting in the course of his employment and an order which limits the method in which the duties of the servant may be performed the disobedience to which does not mean that the servant is acting outside his employment. Once a prohibition is properly treated as defining or limiting the scope of the employment, any action of disobeying thereof does not constitute a mode of performing an act but is a performance of an act which the servant was not employed to perform.

One matter which may be relevant, in considering the effect of an express prohibition is the reason for the prohibition. If the only reason for the prohibition is that the master wishes, by this means to escape vicarious liability for his servant, it is not likely to succeed. In *Canadian Pacific Railway v. Lockhart* (supra)the only reason for the prohibition was that the employer wished to avoid liability and it was there held that the prohibition did not have the desired effect. A prohibition which indicates what the servant is employed to do will exempt the master from liability for acts done outside the prohibited realm. But one which limits the mode of "performance" leaves the master liable. In the present case it appears to me the defendant-bank had, in its scheme of work, a definite purpose in excluding the Ledger Clerks from the area of work assigned to the Adjuster The Ledger Clerk's area of work was restricted to the preparation of the monthly statements and he had to hand over the prepared statements to the Adjuster to be

posted. The prohibition against the Ledger Clerk transgressing into the Adjuster's duty of getting the statements posted, thus relates to the scope of employment of the Ledger Clerk and not to the mode of performance of his duty. The District Judge has correctly observed that "it will be seen from the instruction (P56) that the personnel in the current accounts departments are to be eliminated from the duty of enclosing the statements in envelopes. . . . . and above all that this duty of despatch or delivery is to be held by a special officer."

When Abeywickrema handed over bank statements to Ingram while he was not functioning as a Ledger Clerk in charge of plaintiff's accounts he did something so remote from his duties as to be altogether outside and unconnected with his employment. Such acts of Abeywickrema therefore should be regarded as outside the relationship of master and servant and as that of a stranger

In Story on Agency, the learned author states in section 452–

> "The general rule is that the principal is liable to a third person in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligence and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise, or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them."

He then proceeded in section 456 :

> "But although the principal is thus liable for the torts and negligence of his agent, yet we are to understand the doctrine with its just limitations that the torts or negligence occur in the course of the agency. For the principal is not liable for torts or negligence of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done or he has subsequently adopted them for his own use and benefit."

These passages from Story were quoted with approval by Lord Macnaghten in *Lloyd v. Grace, Smith & Co.* (28) where the House of Lords held that the principal is liable for the fraud of his agent's act within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

Counsel for the appellant relied heavily on the case of *Uxbridge Permanent Benefit Building Society v. Pickard* (29) where it was held that the defendants, a firm of solicitors were liable for the fraud of their

Managing Clerk in purporting to negotiate a mortgage for a non-existent property with forged title deeds. As in *Lloyds* case (supra) the clerk had full authority to conduct the business of a solicitor's office in the name and on behalf of its principal. It was not within his actual authority to commit a fraud but it was within his ostensible authority to perform the acts of the kind that came within the business conducted by a solicitor. The Managing Clerk put in charge of that office was unquestionably given, in fact full authority to conduct the business of a solicitor's office, on behalf of and in the name of his principal. That authority would cover, not merely acting for clients but also carrying through all transactions which would normally be carried through by a solicitor. So long as he was acting within the scope of this class of action, his employer was bound, whether or not the clerk was acting for his own purposes or for his employer's purposes. In the course of his judgment Greene, M. R. said at page 348 :

> "In the case of a servant who goes off on a frolic of his own, no question arises of any actual or ostensible authority upon the faith of which some third person is going to change his position. The very essence of the present case is that the actual authority and the ostensible authority. . . . were of a kind which, in the ordinary course of an everyday transaction, was going to lead to third persons, on the faith of it, changing their position. . . . . That is within the actual and ostensible authority of the clerk. It is totally different in the case of a servant driving a motor car, or in cases of that kind, where there is no question of the action of third parties being affected in the least degree by any apparent authority on the part of the servant."

In the *Uxbridge* case, the third party was dealing with a Managing Clerk occupying the position of the principal whose authority to deal with the third parties was not denied. But where the issue is one of actual authority or total absence of authority, the case gives no support for an argument that authority need not be proved.

If a servant is expressly prohibited from doing an act he cannot be treated as having either express or implied authority to do the act in question. If therefore the servant commits a tort in the course of doing a wholly prohibited act he will not, prima facie, have been doing an authorised act and the master will not be liable. However a prohibition cannot affect a servant's ostensible authority unless it is known to the

other party. "The essence of ostensible authority is that the employer, by his words or conduct, represents to third parties that his servant has authority to perform certain types of acts on his master's behalf, and once the third party has acted on the faith of that ostensible authority, the master is not entitled to deny that the servant in truth had the authority. It is, in short, a form of estoppel by representation." Atiyah at page 234.

In the *Uxbridge case,* the third party had relied on the ostensible authority of the clerk who was put in charge of the plaintiff's business and hence having full authority to conduct the business of a solicitor's office on behalf of and in the name of his principal. But in the present case there is no evidence that the plaintiff or Ingram relied on any ostensible authority of Abeywickrema to hand over the monthly bank statements or changed their positions upon the faith of it, nor is there evidence of any representation made by the defendant-bank that Abeywickrema did have the authority to deliver the bank statements when he was not working as a Ledger Clerk in charge of plaintiff's accounts. "The whole foundation of liability under the doctrine of ostensible authority is a representation believed by the person to whom it is made, that the person claiming to contract as agent for a principal has the actual authority of the principal to enter into the contract on his behalf." Per Lord Diplock in *Metropolitan Police Commissioner v. Charles* (30) ; vide also similar enunciations of the law in *Freeman and Lockyer (a Firm) v. Buckhurst Park Properties (Mangal) Ltd.* (31) at page 641 by Pearson L. J., and at 646 by Diplock, L. J.

In the above circumstances the defendant-bank cannot be held liable for the pilfering of bank statements and the unauthorised issue of them to Ingram by Abeywickrema during the periods when he was not functioning as a Ledger Clerk, in charge of plaintiff's account, as these acts were not done in the course of his employment. The defendant will not be liable also for the issue of the bank statements by Amerasinghe to Abeywickrema after Abeywickrema left the York Street Branch of the defendant-bank, to be handed over to Ingram as he had no authority to do so. The bank rule (D 56) did not countenance such handing over as Abeywickrema did not purport to be an authorised representative of the plaintiff. But the same cannot be said of the issue of bank statements by Abeywickrema to Ingram during the two spells namely June-September 1966 and 11.6.1968 to 23.8.1968, when Abeywickrema was functioning as Ledger Clerk

working on plaintiff's accounts. It would appear from the above rules that Abeywickrema had, during this period, authority to hand over bank statements to the plaintiff-company or to its accredited representative. If he had negligently, fraudulently or otherwise wrongly assumed that Ingram was an authorised representative of the plaintiff-company and had delivered to him the bank statements, the bank will be liable for such mistaken or wrong exercise or performance by its officer of his duties.

In the recent case of *Kooragang Investments Pvt. Ltd. v. Richardson & Wrench Ltd.* (32) the Privy Council stated that in determining whether an act done by a servant or agent was done in the course or within the scope of his employment in cases *where there was no dealing by the injured third party with the servant or agent* and where the issue was one not of ostensible authority but of actual authority or total absence of authority. It was necessary in order to render the master liable, to prove that he had authorised the act, and authority could not be inferred from the fact that the acts done were of a class which the servant or agent was authorised to do in the master's behalf. In this case the evidence was that the servant, a valuer, did valuations for a group of companies during a period when he was ordered by his employer not to do business with them and it was clear that he had no authority to make the valuations in question and in making them had acted totally outside the course and scope of his employment.

In the case of *United Africa Co. Ltd. v. Saka Owoade* (33) (cited by plaintiff) a transport contractor introduced to the appellants two men representing them as his driver and clerk and stated that when the appellants had goods to be carried they should be given to the two men. Goods were given by the appellants to one of the two men for carrying. But the goods were never delivered. The Privy Council held the contractors liable because fraud was committed in the course of the servants' employment and the true inference from the facts was that the conversion of the goods was done within the course of the servants' employment.

In *London Country Council v. Cattermoles (Garages) Ltd.* (34) (relied on by Plaintiff) the defendant who was the owner of a garage employed 'P' in the garage to assist in moving cars, so as to make way for other cars. 'P' had no driving licence and he was forbidden to drive vehicles. The defendant was held liable for the man's act ; in driving

the van into the highway so as to back it into the garage, clear of the access to the petrol pumps lying on the ground, he was doing an act within the scope of his employment, though he was doing it in an unauthorised way. Although it was illegal for 'P' to drive on the highway as he had no licence the fact that the accident occurred when he took the van off the garage premises on to the highway did not affect the result. "Where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised, had he known of it, in these cases, the master in nevertheless, responsible." Per Lord Phillimore delivering the judgment of the Privy Council in *Goh Choon Seng v. Lee Kim Soo* (35).

Counsel for the defendant-respondent invoked also the principle enunciated in *Biggar v. Rock Life Assurance Co.*, (36) to resist the claim against the bank for the alleged fraud of its officers Abeywickrema and Amerasinghe.

> "His conduct (the agent's) in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself or third persons and against his principal, there is no agency in respect to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal. . . . The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential. . . " (p 525). "The power of the agent would not be extended to an act done by him in fraud of the company and for the benefit of the insured." (p. 525).

Here in this case 'Z' signed the proposal form, riddled with false statements invented by 'Y', an agent of the defendant-Insurance company without reading and he was held disentitled to recover on the policy on the ground that 'Y' invented the answer having really acted not as an agent for the company, but as an agent for 'Z'.

In my view the principles of this case would not apply if the wrongful acts of Abeywickrema and Amerasinghe were (according to the plaintiff's case) not done for the benefit of the plaintiff-company, but for the benefit of Ingram who, according to the plaintiff, was not

collecting the statements as agent for the plaintiff-company. But as Abeywickrema and Amerasinghe acted in the transaction to help Ingram, the issuing of the statements to whom, according to my finding, was acquiesced in, by the plaintiff-company, the plaintiff cannot, according to this principle, claim against the defendant-bank on the basis of the fraudulent acts committed by defendant's agents or servants.

Remoteness of Damages – Novus Actus Interveniens

> "Negligence alone does not give a cause of action , damage alone does not give a cause of action. The two must co-exist." Per Reading, C.J. in, *Munday v. London County Council* (37) cited with approval by Lord Simon in *East Suffolk Rivers Catchment Board v. Kent,* (38)."

It is not the act but the consequences on which tortious liability is founded.

In cases of negligence, damages can only be recovered if the injury complained of, not only was caused by the alleged negligence but was also injury of a class or character foreseeable as a possible result of it. (Vide *Overseas Tankship (U.K.) v. Morsts Docks & Engineering Co. The Wagon Mound No. 1* (39) *Hughes v. Lord Advocate,* (40). "The essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen"

> "In the law of negligence the test of whether the consequences were reasonably foreseeable is a criterion alike of culpability and of consequences."

Per Viscount Symonds in the *Wagon Mound No. 1 (1961)* 1 All E.R. 404 at 415 (supra).

It is not for every consequence of a negligent conduct that a man is responsible in law. The guiding principle is that though the negligence of the defendant may have been one of the inducing causes leading up to the damage (a cause without which damage would not have been suffered-causa sine qua non), he will not be liable unless it was the "actual", "effective", "proximate" cause (causa causans) in the sense that he was blameworthy in being the cause of the plaintiff's damage. The defendant would not be liable, even though his negligence had been proved, if such negligence did not proximately cause that damage. The defendant's negligence should have actually caused the

damage – vide Macintosh and Scoble on Negligence in Delict, 5th Ed. at 77. Lord Wright *in Mclean v. Bell* (41) said "The decision however of the case must turn, not simply on causation, but, on responsibility."

At one time the law was that unforeseeability was no defence (*Re Polemis and Furness Whithy & Co. Ltd.* (42), but the law now is that there is no liability unless the damage is of a kind which is foreseeable. *The Wagon Mound No. 1* (supra). The liability for damage today is thus based on the concept of foreseeability. The damage should have been foreseen by a reasonable man as being something of which there was a real risk, unless the risk was so small that the reasonable man would feel justified in neglecting it.

Although in the law of Negligence the duty to take reasonable care was confined to reasonable, foreseeable dangers, the fact that the danger that actually materialised was not identical with the danmger reasonably foreseeable did not necessarily result in liability not arising. The *Wagon Mound case (No. 1)* seeks only to bar recovery of an unforseeable type of damage. If the damage be of a type that is foreseeable, then recovery is still available, even if the degree of damage is unforeseeable or if the precise manner in which the damage occurs is unforeseeable. Even if the plaintiff proves every other element in tortious liability he will lose his action if the harm which he has suffered is too remote a consequence of the defendant's conduct. Damage may be too remote because it is not in the view of the law caused by the wrong. *Hughes v. Lord Advocate* (supra).

> "Between the act of the wronged doer and the final harmful consequences there may intervene either the act of some person or . . . . some natural force which makes such a contribution to the ultimate result as to immunize the wrog doer's act and, in effect, insulate it from the result complained of. Where such an intervening force becomes a superseding force so as to exonerate the wrong-doer from liability, the latter is entitled to base his defence on the maxim *novus causa interveniens.*" Macintosh and Scoble – Negligence in Delict 4th Ed. 67.

If the intervening act of a third party be malicious or of an intentional character, then it does become a superseding cause, unless the wrongdoer should have realised and appreciated the likelihood of its occurence by reason of the situation created by him – a new cause is not to be regarded as independent if its intervention was a risk inherent in the situation created by the defendant's act.

Onus of Proof

Before enlarging on the subject of remoteness of damage it is relevant to consider the question of onus of proof. Lord Sumner in *S. S. Singleton Abbey v. S. S. Paludina* (43) said "that the plaintiff must show that a particular item of damage is not too remote before he can recover it." Similar statements appear in the judgments of the Court of Appeal in *The Paludina* (44) by Bankes, Scrutton & Atkin L. J J respectively. In the *'Oropesa'* (45) Langton J., treated the onus as being on the plaintiff and Lord Wright in the Court of Appeal (*The Oropesa* (46)) agreed entirely with his judgment. On the other hand, it has been said by Lord Haldane & Lord Dunedin in *Canadian Pacific Railway Company v. Kelvin Shipping Company Limited (47)* that the defendant must show that a particular item of damage is too remote if he is not to be held liable for it. These various dicta were considered by Lord Merriman P., in *The Guildford* (48) and without attempting to resolve the divergence of opinion in the House of Lords, he favoured the view that it was the plaintiff's onus.

In *Mc Williams v. Sir William Arrol & Co.* (49) Viscount Kilmuir, L.C. said at page 626 :

> "The necessity, in actions by employees against their employers on grounds of negligence, of establishing not only the breach of duty but also the causal connection between the breach and the injury complained of is in my view part of the law of both England and Scotland".

And Viscount Symonds said at page 628 – "I do not doubt that it is a part of the law of Scotland as it is part of the law of England that a causal connection must be established between a breach by an employer of his duty at common law or under a statute and the damage suffered by his employee."

Since the plaintiff has to prove that the damage that he has suffered is the "direct", "natural", "the natural, proximate" consequence of the defendant's action, I am of the view that the onus of proof even on issues of remoteness is on the plaintiff. Referring to the question of onus of proof McKerron in his Law of Delict – 6th Ed. at page 128 states –

> " The plaintiff must prove that the damage is traceable to the defendant's act with reasonable certainty, and is not merely a conjectural result of it. He must further prove that the act was either *the* cause or *a* cause, legally responsible for the damage ; in other words, that the damage is not too remote."

"Foreseeability, which involves a hypothetical person, looking with handsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom the duty may be owed, and the consequences for which an actor may be held responsible." Per Lord Wilberforce – *McLoughlin v. O'Brian.* (50).

A consequence is too remote if it follows a break in the chain of causation or is due to *novus actus interveniens.* "It is the quality of the act" said Lord Simonds, "which determines the issue, for it is not every intervening act which breaks what is called the chain of causation. If I throw a squib into a crowd, I am liable to the man who is hurt, though intervening hands have passed it on. When I speak of the quality of the act, I refer in particular to that aspect of it which I believe to be all important in . . . the law of tort, namely whether it is an act which the actor could reasonably have contemplated or foreseen". *Woods v. Duncan* (51). What is new and independent which could not reasonably be foreseen, is generally a supervening human act. "In general" said Lord Sumner "(apart from special contracts and relations and the maxim *respondeat superior*), even though 'A' is in fault, he is not responsible for injury to 'C' which 'B', a stranger to him, deliberately chooses to do. Though 'A' may have given the occasion for 'B's mischievous activity, 'B' then becomes a new and independent cause." Consistently with this it was held that if 'A' writes a libel on 'C', which is published by 'B' over whom 'A' has no control, 'A' is not liable to 'C'. Until publication, no tort at all is committed, and when publication does take place, it is due to 'B' not to 'A' *Weld-Blundell v. Stephens* (52). Lord Reid in *Mc Kew v. Holland & Hannen & Cubitts (Scotland)* (53) at 1623 said –

> "If a man is injured in such a way that his leg may give way at any moment he must act reasonably and carefully. It is quite possible that in spite of all reasonable care his leg may give way in circumstances such that as a result he sustains further injury. Then that second injury was caused by his disability which in turn was caused by the defendant's fault. But if the injured man acts unreasonably, he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is *novus actus interveniens.* The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the defendant's fault or the disability caused by it. Or one may say that unreasonable conduct of the pursuer and what follows

from it is not the natural and probable result of the original fault of the defender or of the ensuing disability. I do not think that foreseeability comes into this. A defendant is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other *novus actus interveniens* as being quite likely. But that does not mean that the defender must pay for the damage caused by the *novus actus.* "

Again in *Home Office v. Dorset Yacht Co. Ltd.* (54) at 298 Lord Reid stated–

"It is said that the respondents must fail because there is a general principle that no person can be responsible for the acts of another who is not his servant or acting on his behalf. . . So the question is really one of remoteness of damage. And I must consider to what extent the law regards the acts of another person as breaking the chain of causation between the defendant's carelessness and the damage to the plaintiff.

There is an obvious difference between a case where all the links between the carelessness and the damage are inanimate so that, looking back after the event, it can be seen that the damage was in fact the inevitable result of the careless act or omission, and a case where one of the links is some human action. In the former case the damage was in fact caused by the careless conduct, however unforeseeable it may have been at the time that anything like this would happen. At one time the law was that unforeseeability was no defence. . . . . But the law now is that there is no liability unless the damage was of a kind which was foreseeable. . . .

On the other hand, if human action (other than an instinctive reaction) is one of the links in the chain, it cannot be said that, looking back, the damage was the inevitable result of the careless conduct. . . Yet it has never been the law that the intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness. The convenient phrase *novus actus interveniens* denotes those cases where such action is regarded as breaking the chain and preventing the damage from being held to be caused by the careless conduct. But every day there are many cases where, although one of the

connecting links is deliberate human action, the law has no difficulty in holding that the defendant's conduct caused the plaintiff loss. . . What then is the dividing line ? Is it foreseeability or is it such a degree of probability as warrants the conclusion that the intervening human conduct was the natural and probable result of what preceded it ? There is a world of difference between the two. . . "

"These cases show that, where human action forms one of the links between the wrong doing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as *novus actus interveniens* breaking the chain of causation. I do not think that the foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrong doing. But if the intervening action was likely to happen, I do not think that it can matter whether that action was innocent or tortious or criminal." (p. 300)

It will have to be shown that the commission of the offence was the natural and probable, as distinct from merely foreseeable result of the defendant's wrong. But where a stranger intended to inflict the damage upon the plaintiff, generally such a wrongful intention on the part of the stranger-third party will relieve the defendant of liability. That this is not always so can, again be illustrated by cases of negligence consisting in a failure to guard against the very act that happened. In *Petrovitch v. Callinghams Ltd.* (55) the defendants, who had been engaged by the plaintiff's husband to carry out decorations on his London house, were held liable for the theft of the plaintiff's jewellery by a thief who had entered the house through the street door left ajar by one of the defendants' painters during the tea break. See also *Stansbie v. Troman* (56) where the theft by a thief was regarded as the kind of thing which was likely to happen ; the defendant was held responsible on the ground that the act of the third person could not have taken place but for the defendant's own fault or breach of duty.

The dictum of Lord Reid in *Home Office v. Dorset Yacht Co. (supra)* that "where damage was caused by intervening human action liability for damage should be limited to that which was "likely" or "very likely" was criticised by the Court of Appeal in *Lamb v. London Borough of Camden* (57) as being not sufficient since that could still extend the defendant's liability beyond all reason and lead to bizarre or ludicrous results. Oliver, L. J. observed that "'likelihood' is a somewhat

uncertain touchstone" and that "it may be that some more stringent standard is required. There may, for instance, be circumstances in which the court would require a degree of likelihood amounting almost to inevitability before it fixes a defendant with responsibility for the act of a third party over whom he has and can have no control". (p. 418)

Watkins, L. J. thought that reasonable foreseeability should always be applied without any gloss and suggested that "a robust and sensible approach to this very important area of the study of remoteness will more often than not produce, I think, an instinctive feeling that the event or act being weighed in the balance is too remote to sound in damages for the plaintiff". (p. 421)

The action or default of the plaintiff may thus serve to extinguish his claim for damage by reason of the fact that he had acted unreasonably or unlawfully. His irrational or felonious act may break the chain of causation between defendant's wrong and his damages. In this context as between the plaintiff and the defendant each is identified with any third party for whom he is vicariously responsible. The rule that negligence of a servant in the course of his employment is imputed to his master applies whether the master is the plaintiff or the defendant. In the instant case, even assuming that the defendant-bank was negligent in failing to take care of the blank forms, it is manifest that the loss and damages sustained by the plaintiff by reason of the misappropriation of the amount of Rs. 1,169,240.93 is attributable to the fraud and misappropriation committed by the plaintiff's own officers, chief among whom was, according to plaintiff, Ingram. The alleged negligence of the defendant-bank might have been causa sine qua non, but it was not sufficient in the circumstances to prevent the fraud of the plaintiff's officers from being the causa causans of the loss. Their fraudulent behaviour provides a glaring example of what a hypothetical reasonable man in the position of the defendant could not have reasonably foreseen as likely to result from the alleged acts of negligence. No bank would reasonably reckon with its customer who is a business-man remaining silent for weeks, months and years together without bringing to its notice that he was not receiving by post the monthly or weekly statements, if there was such a default. It is strange behaviour on the part of plaintiff's officers that even in 1962 when at the plaintiff's request the arrangements had been altered for the statements to be sent weekly and not monthly, they chose to keep silent about this non-receipt by post of the bank statements. The rules of fair dealing between man and man impose a duty on a customer

vis-a-vis his banker to notify the banker of his objection to the non-posting of the statements, if the bank had failed to post them. The defendant-bank was, in the circumstances entitled to assume in the absence of such complaint that the plaintiff had no complaint in the matter of the receipt of the statements by it. The defendant could not have reasonably counted on plaintiff having in its employ or management dishonest or incompetent persons. In any event, the tenuosness of the linkage between defendant's negligence, if any, and the loss suffered by the plaintiff is so apparent that the plaintiff's claim to connect the two as cause and effect strikes me as far-fetched and fanciful. The loss suffered by the plaintiff is remote beyond the pale of defendant's reasonable foreseeability.

In my judgment this is essentially a case in which, as between two innocent persons, one of whom must suffer for the fraud of a third person he should suffer who by his conduct or indiscretion has enabled such third person to commit the fraud or occasion the loss-Vide Lord Halsbury in *Henderson v. Williams* (58). The Directorate of the plaintiff company must be presumed to have known the manner in which the administration of their office was organised and conducted. It reposed exessive confidence in Ingram and placed him in the sole charge of its transactions with the defendant-bank without exercising any effectual supervision over him – if the allegation is true that it did not receive by post the bank-statements – and by acquiescing in his collecting the bank statements held him out to the defendant as having authority to collect the monthly or weekly statements and thereby dispensed with the bank sending such statements by post in performance of its obligation. The plaintiff cannot after the lapse of twelve years now be heard to say that Ingram had no real authority to receive on its behalf the bank statements and that the defendant had defaulted in its obligation to send by post the said statements. The plaintiff had, by its conduct ratified or adopted the delivery of the statements to Ingram on its behalf and thereby had induced the defendant-bank to forbear transmitting the statements by post.

The District Judge has found that the defendant was negligent in that, it had failed to be careful in the storing of blank forms which were to be used for its statements. The evidence shows that the fabricated weekly statements in the possession of the plaintiff company were typed in forms which had been discarded as far back as 1960 and had ceased to be in use after 1960. The trial Judge has held that

Abeywickrema had pilferred the blank forms though "there is no direct evidence of his doing so"– "since he had opportunities for handling them, being an employee of the bank". He has also held that this act of pilfering was obviously not done in the course of the performance of his duties and that the bank is therefore not liable, as Abeywickrema had stolen the forms and given them to Ingram. But he has held that the pilfering by Abeywickrema was possible because of the negligent manner in which the forms were stored or permitted to be availed of by anyone, particularly one working in the bank. I cannot appreciate the rationale of this finding. As a ledger clerk Abeywickrema has necessarily to have access to those forms. It would have been impossible for the bank to insure against its ledger clerks pilfering those forms. For the performance of their duties, they had to be entrusted with these forms and it would be well-nigh impossible to have a check on their disposition of these forms. These forms, by themselves, are of no value and a bank cannot reasonably be expected to expend as much care in their preservation as if they were the property of third parties. It has to be remembered that the bank was the owner of those forms. Pilfering of such property by its employee is bad enough but to make the bank liable for what a thief does with such stolen property would, in any event, offend the rule of remoteness of damage. If somebody steals my revolver from my unlocked drawer and shoots a third person, I cannot be fixed with responsibility for the crime. Similarly a bank cannot be liable for the forgeries committed by a third party on forms stolen from the bank. It is far-fetched then to say that the bank facilitated the forgeries–it would be a clear case of novus actus interveniens. Though the trial Judge has come to the finding of negligence from the act of pilfering, he has however failed to connect this negligence to the loss suffered by the plaintiff How the loss suffered by the plaintiff is caused by this item of negligence has not been examined by the trial Judge. I agree with the Court of Appeal that, even assuming that the defendant was negligent in the storing of the old blank forms, the damage that the plaintiff complains of in this case could not have been contemplated as a reasonably foreseeable consequence of such negligence.

In the *Bank of Ireland v. Evans Trustees* (59) the trustees who were a corporate body called upon the bank to replace a stock sold under a forged power of Attorney bearing the genuine impression of their corporate seal. The defence was that the carelessness of the trustees in the custody of their seal enabled the clerk to impose on the bank

and disentitled them to relief. The court rejected the defence on the ground that the negligence, if there was negligence in the custody of the seal, was only remotely connected with the transfer which the bank set up as good against the trustee.

" If a man should lose his cheque-book, or neglect to lock the desk in which it was kept, and a servant or stranger should take it up, it is impossible in our opinion to contend that the banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion ? " Per Parker,J. at pp. 410, 411.

The District Judge has also held as an item of negligence against the defendant that its failure to have periodical inspection of plaintiff's stock enabled Ingram to carry out the fraud. I agree with Abdul Cader, J. and the Court of Appeal that this finding has no foundation in law. The rule for periodic inspection was a requirement provided for defendant's benefit, to protect its interests. That was a right of the defendant and not a duty owed by it to the plaintiff. Hence failure of the defendant to exercise that right is not a breach of duty owed to the plaintiff and no question of negligence on the part of the defendant arises in the absence of a duty.

The ultimate basis of the trial Judge's finding of negligence against the defendant-bank is the violation by Abeywickrema and other bank officials of the bank's instructions embodied in the bank's Manual of Instructions (D 56) respecting its internal administration ; particularly the manner of delivery of the weekly bank statements of the plaintiff company.

The legal position relating to such rules framed by a bank was considered by the House of Lords in the case of *Lloyds Bank Ltd. v. E. B. Savory & Co.* (60) where Lord Buckmaster stated at page 109 ([1932] All ER).

"These rules and statements are not a legal measure of the liability of a bank. They may fall short, or they may exceed what the court may regard as their duty in a particular case, but they afford a very valuable criterion of obvious risks against which the bank thinks it is their duty to guard."

The question was also considered by Goddard, J. in the case of *Motor Traders Guarantee Corporation Ltd. v. Midland Bank Ltd.* (61).

"But it is said, and said with great force, by Mr. Willink, that, if he shows that the officers of the bank did not obey their own regulations, he goes a very long way to establishing a case of negligence. I think it cannot be taken always as a universal principle, because, if the facts showed that the bank cashier had taken every reasonable precaution to satisfy himself, and that he was satisfied with the information he had got, and that the conclusion which he had been able to draw from that information was such as would satisfy anyone that the bank might safely and properly take that cheque, I do not see how it can be said that, because he had not followed out to the letter the regulations of the bank, because he had not submitted it to the Manager's attention directly, the bank would have been guilty of negligence. . . ."

At page 96 Goddard, J. continued –

"I again say that – I am far from saying that the plaintiffs,. . . . are entitled to rely upon a literal performance, or are entitled to require a literal performance, by the bank of these regulations. The bank does not owe a duty to them to carry out this rule, that rule, or the other rule. Indeed, I doubt whether they owe their own customers the duty of carrying out all the rules which they may lay down as counsels of perfection. The question in every case is not whether the bank requires a particular standard of conduct, but whether the particular acts which are done are enough to discharge the onus which is upon the bank either in respect of their own customer or in respect of some other customer."

In *Orbit Mining & Trading Co. v. Westminster Bank Ltd.* (62) Harman, L. J. approvingly referred to the two cases abovementioned and said –

"So far as the Westminster Bank's rules are concerned, I am of opinion that they are, no doubt counsels of perfection, but the fact they are not always entirely complied with does not convict the bank of negligence, though no doubt where the rules are not kept, the matter needs close attention."

The above dicta emphasise that the rules of a bank are merely counsels of perfection and that, though they afford valuable criteria of the risk against which the bank has to guard against acts done by

themselves, they do not constitute a legal measure of the liability of a bank and that failure to follow strictly any such rules contained in the Manual of defendant-bank's Instructions (D 56), could not by itself render the bank negligent.

The District Judge has erred in law in assuming that –

"when Abeywickrema, Amerasinghe and others chose to avoid compliance with these rules, they were acting negligently" and when he reasoned "as far as the periods before and after Abeywickrema's services in the Ledger Department go, the negligence of the bank arises from the failure of officials to follow important instructions with regard to the delivery of statements."

Directing Mind and Will of the Company

We were treated to a very interesting and attractive argument by Senior Counsel for the defendant-bank that the fraud of Ingram coupled with the misconduct of Samuel, Classen and Wickremasinghe must, in law, be considered to be the fraud of the plaint company as these officials should be identified with the company. According to him they constituted "the directing mind and will of the plaintiff company"

A company is liable in torts for all the wrongful acts of the persons, who control the management of its undertaking, when they are acting as such. These persons may be the directors collectively, or they may be merely some of the directors who in fact manage the company's business, or the governing body may be a single managing director or even manager who is not a director at all. The court is not bound by the formal provision of the company's memorandum and articles in discovering who controls the management of the company's business; the answer in each case will depend on the way the company's affairs are actually managed at the date the tort is committed.

The directors and the members in general meetings are the primary organs of the company between whom the company's powers are divided. However in relation to the internal operation of a company, the general meeting, the board of directors and even a Managing Director have, in effect, come to be treated as organs of the company rather than merely as its agents.

In order to fix a company with liability, the relation of principal and agent or of master and servant must be established between the corporation and the person who commits the tort, in respect of the tort in question.

In general the wide doctrines of agency and vicarious liability developed by English Law enable a company to be held liable whenever justice so requires. But circumstances can arise when a person is not held liable unless he himself is personally at fault. If applied strictly to corporate bodies this would mean that in such circumstances they would never be held liable. To avoid this consequence the courts have evolved the theory that the acts and torts of certain agencies of a company may be regarded as those of the company itself. In effect these agencies are treated as organic parts of the company or as the alter ego of the company, distinct from those who are merely employees or servants. The judicial development of this aspect of corporate personality is traceable to the speech of Lord Haldane in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* (63). In that case a company which owned a ship was seeking to take advantage of the limitation of liability under section 502 of the Merchant Shipping Act, 1894. This limitation is available only where the injury is caused without the owner's "actual fault or privity." The loss resulted from the default of Lennard, its Managing Director, and it was argued that the Manager's fault or privity was not the fault or privity of the company which was the owner and that it must be the actual personal fault or privity of the company. It was contended that Lennard, though he had the supreme control of the technical management of the ship, was nothing more than the agent or servant of the company and that he did not represent the company in the sense of making his fault the fault of the company; in short that he was not the alter ego of the company. In holding the company liable, Viscount Haldane delivering the judgment of the House said at pp. 713, 714–

> "My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation – . . . . If Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was

the action of the company itself within the meaning of section 502 . . . . It must be upon the true construction of that section, in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself."

In the case of *Fanton v. Denville* (64) Greer, L.J. observed at page 329 –

"In actions against companies a general manager of the business is deemed to be the alter ego of the company, and it would be responsible for his personal negligence."

In *Rudd v. Elder Dempster & Co.* (65) Scrutton, L.J. summarised the position as follows :

"The company is liable for the fault or privity of somebody who is not merely a servant or agent for whom the company is liable . . . . because his action is the very action of the company itself."

"A corporation . . . . is liable to its workmen for the negligence only of its governing body, directors, or general manager."

In *H.M.S. Truculent, The Admiralty v. The Divina (Owners)* (66) – The third Sea Lord was held to be the "directing mind"of the Admiralty and that "his fault or privity was the fault or privity of someone who is not merely a servant or agent for whom the Admiralty was liable on the footing of respondeat superior but someone for whom the Admiralty was liable because his action was the "very action of the Admiralty itself". In the case of *The Lady Gwendolen* (67) the fault of the assistant Managing Director of the plaintiff-company was held to constitute "actual fault" of the plaintiff-company. In the course of his judgment Willmer, L. J. said at 294 –

"It is necessary to look closely at the organisation of the company in order to see of what individual it can fairly be said that his act or omission is that of the company itself," and further observed at p. 295 "Where . . . a company has a separate traffic department, which assumes responsibility for the running of the company's ships, I see no good reason why the head of the department, even

though not himself a director, should not be regarded as someone whose action is the very action of the company itself, so far as concerns anything to do with the company's ships." Winn L.J,, said at page 302 . . . "wherever the fault either occurs in a function or sphere of action which the owner has retained for himself or is that of a manager independent of the owner to whom the owner has surrendered all relevant powers of control, it is actual fault of the owner within the meaning of the section."

According to Wilmer & Winn L.JJ. it would appear that a person whose fault is to be taken as personal to the corporation need not necessarily be a director. On this analysis a departmental manager could be treated as alter ego of a corporation in respect of such departmental matters provided the primary control in fact was placed in his hands. Thus it would appear that a company will be liable for the acts and omisions of the "top management". Who constitutes "top management" will have to be decided by careful investigation and analysis of the particular corporation organised in relation to the facts of a particular case. The general principle may involve lifting of the corporate veil to discover the true factual position with respect to the management of the company.

Useful guidelines on how the mind and will of a company may be manifested are also to be found in the judgment of Denning, L. J. in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* (supra) at 630 – where he said in vivid language :

"A company may in many ways be likened to a human body. They have a brain and nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such." A little later he continued at page 630 – "So here the intention of the landlord company can be derived from the intention of their officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case."

In that case the Court held though the directors of the landlord company did not hold any meeting of the board or pass any resolution or record their decisions in any minutes, since the conduct of the company's business was left to the directors individually ; having regard to the standing of the directors in control of the company's business the intention of the directors was held, in the circumstances, to be the intention of the company.

In *Tesco Supermarkets Ltd. v. Nattrass* (68) Lord Reid said, in this connection, at pages 131, 132 :

> "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these ; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability."

Referring to the passage in the judgment of Denning, L.J. quoted above, Lord Reid said :

> "In that case the directors of the company only met once a year ; they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. There have been attempts to apply Denning, L.J.'s words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Denning, L.J. intended to refer to them. He only referred to those who represent the directing mind and will of the company, and control what it does.

I think that is right for this reason. Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn." (p.132).

Lord Morris held in that case that 'C' who was one of the several hundreds of Managers of the appellant company's supermarkets, could not have been identified with the company. He said at page 140 :

"The company had its responsibilities in regard to taking all reasonable precautions and exercising all due diligence. The careful and effective discharge of those reponsibilities required the directing mind and will of the company. A system had to be created which could rationally be said to be so designed that the commission of offences would be avoided. There was no delegation of the duty of taking precautions and exercising diligence. There was no such delegation to the manager of a particular store. He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was employed but he was not a delegate to whom the company passed on its responsibilities. . . . He was a person under the control of the company . . . He was, so to speak, a cog in the machine which was devised : it was not left to him to devise it. Nor was he within what has been called the 'brain area' of the company."

Lord Diplock, posed the question at page 155:

"what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business" and not merely its agents, and the answer "is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company."

Lord Diplock did not extend the "brave and nerve centre" beyond those who by, or by action taken under, the company's articles of association are entitled to exercise the powers of the company. He disapproved the dicta to the contrary in *The Lady Gwendolen* (supra). It is to be noted that Lord Diplock was alone in thus limiting the class of persons whose acts are to be regarded in law as the personal acts of the company itself to those who by, or by action taken under, its Articles of Association are entitled to exercise the powers of the company. The evidence discolses that Ingram, an employee of the plaintiff-company was a Director of the company called Collettes Finance Ltd., which was in fact a subsidiary of the plaintiff company ; that he was a Sales Manager of the plaintiff-company ; he was engaged in various aspects of the banking activities of the plaintiff-company and its subsidiary more particularly in depositing cash and cheques to the credit of the plaintiff company's account, opening of Letters of Credit, preparing stock certificates, regularly checking the bank balances of the plaintiff-company and the loan payments due from the plaintiff-company from the Finance Department of the plaintiff-company and that the plaintiff-company had taken out a fidelity guarantee policy covering Ingram.

The Trial Judge has found that Samuel, together with Ingram was engaged in this fraud and the Court of Appeal has affirmed this finding. Samuel was a Finance Director of the plaintiff-company and was responsible in submitting forged certificates of balances to the auditors of the plaintiff-company. Wickremasinghe and Classen, directors of the plaintiff-company had certified false stock certificates on the basis of which overdraft facilities were obtained from the defendant bank.

Counsel for the defendant-respondent submitted in the light of these facts that the fraud of Ingram and of Samuel, Wickremasinghe and Classen must in law be regarded as the fraud of the plaintiff-company on the ground that they represented "the directing mind and will" of the company and their acts and state of mind are the acts and state of mind of the company itself. Though the evidence discloses that Ingram was a trusted employee of the plaintiff-company and played a number of roles in the activities of the company, I cannot agree with the Court of Appeal in holding that he was "the directing mind and will" of the plaintiff-company or that he was within the "brain area" of the company. He was not holding any position of control in

the company, nor did he share the management of the company. The role he played in the administration of the company was a subservient role, the role of a trusted employee. He was always regarded as the company's servant or agent. He was a person under the control of the company and not in any way in control of the company. He was not in the area of top management and all his activities did not involve managing the company and he cannot hence be identified with the company. The evidence on record is not sufficient to hold that Ingram was a "limb" of the plaintiff-company. The evidence does not show that Ingram could on his own independent initiative take any decision regarding the administration of the company. Even on the question of overdraft it was Harasgama who approached the Chairman of the defendant bank for overdrafts and arranged the overdraft facilities and it was Harasgama whom Loganathan, the Manager of the defendant bank contacted when the discrepancy in the accounts was detected on 28th November 1968. In my view, in no sense can Ingram be described as a "directing mind and will" of the plaintiff-company. Nor can Samuel, or Wickremasinghe or Classen individually or collectively be identified with the company as representing the "the directing mind and will" of the plaintiff company. They were not in actual control of the operation of the company. They cannot be regarded as the Company.

The evidence does not show that in committing the fraud referred to by the counsel for the defendant, they acted as the Board of Directors of the plaintiff-company. The findings of the courts below are that Harasgama, the Managing Director did not participate in the fraud referred to. Certainly his acts would have implicated the plaintiff-company as he would have been, by himself, and along with the persons referred to above, constituted the "directing mind and will"of the plaintiff-company. Abdul Cader J., has dealt fully with the involvement of Harasgama. Though he finds Harasgama guilty of misconduct he does not convict him of any positive fraud. In the circumstances, the invitation of counsel for the defendant to identify Ingram, Samuel, Classen, and Wickremasinghe as the plaintiff-company and to hold the plaintiff-company guilty of fraud and deny it any relief on that ground cannot be upheld. In view of these findings the question of the nature and extent of the applicability of the principle of public policy elaborated in *Smith v. Jenkins* (69) that a wrong-doer is out of court, does not arise for consideration.

Duress

In its answer the defendant-bank stated inter alia, that the plaintiff admitted that the bank statements in its possession P10 were fabricated ; and that at the close of business on the 28th November, 1968, the balance standing to the debit of the plaintiff-company was Rs. 3,403,099.32 by way of over draft, and that a certificate of such balance was duly sent to the plaintiff-company on 05.12.1968 and the company accepted the certificate without protest and that the company made no allegation of fraud on the part of the defendant-bank or its employees and that in respect of the monies over drawn by the plaintiff-company in excess of facilities to which the plaintiff-company was entitled, the plaintiff-company gave a primary mortgage of the premises No. 101, D. S. Senanayake Mawatha, Colombo, with the buildings thereon, at the request of the defendant bank and that the defendant-bank thereafter extended further credit facilities to the plaintiff-company and refrained from stopping facilities to plaintiff and from curtailing existing facilities. Defendant pleaded that in the circumstances the plaintiff company is by its conduct estopped inter alia –

(*a*) from denying that a sum of Rs. 3,403,099.32 had been overdrawn by the plaintiff-company as on 28.11.1968 ;

(*b*) from asserting that the defendant-bank had been guilty of any fraud or negligence ;

(*c*) from asserting any claim for damage on the basis of facts pleaded in the plaint.

By its amended answer dated 23.10.71, the defendant-bank further averred that on 30.12.68, the plaintiff-company expressly admitted to the defendant-bank that as at close of business on 14.12.68, a sum of Rs. 3,381,497.28 was overdrawn by the plaintiff-company and that the said sum was still due or owing to the defendant. Thereafter the plaintiff-company, by further pleadings dated 10.12.71 for the first time, took up the position that the plaintiff - company through two of its directors was induced to sign document dated 30.12.68 (subsequently marked D 132) and mortgaged bond dated 21.12.68 marked D 121 in consequence of deliberate misrepresentation of facts and deliberate suppression made by the defendant-company and by Longanathan, its General Manager, of the existence and contents of documents indicating that the plaintiff

owed much less than the said sum and that the documents in the possession of the plaintiff were genuine, authentic and/or duly received, and also because of duress, undue influence and threat of harm by Loganathan to plaintiff's business and reputation. Plaintiff further pleaded that the defendant bank acted in breach of its fiduciary duty to the plaintiff and Harasgama, its Managing Director in including the plaintiff to sign the said document.

In respect of the above matters the following issues were framed and answered by the District Judge thus :

(25 E) At the close of business on 28.11.1968, had a sum of Rs. 3,403,099.32 been overdrawn by the plaintiff.

Ans. Yes.

(25 F) Was a certificate of balance showing such overdraft of Rs. 3,403,099.32 duly sent to the plaintiff-company on 5.12.1968 ?

Ans. Yes.

(25 G) Did the plaintiff-company accept such certificates ?

Ans. Yes, But under duress.

(25 H) Did the plaintiff thereafter give a primary mortgage of premises No. 101, D. S. Senanayake Mawatha, to cover moneys overdrawn by the plaintiff-company in excess of the facilities which the plaintiff is entitled ?

Ans. Yes.

(25 I) Did the defendant-bank thereafter extend further credit facilities to the plaintiff and refrain from stopping facilities and curtailing existing facilities ?

Ans. Yes.

(25 J) By document under the seal of the plaintiff-company and attested by its directors dated 30.12.68, did the plaintiff-company expressly admit that at the close of business on 14.12.68, a sum of Rs. 3,381,498.28 had been overdrawn by the plaintiff-comapny on its current account ?

Ans. Yes.

(26) Is the plaintiff-company estopped from denying that a sum of Rs. 3,404,099.32, inclusive of interest, expenses and charges had been overdrawn by the plaintiff as at 28.11.68 ?

Ans. No.

(28) Was the plaintiff through two of its directors induced to sign the document dated 30.12.68 (D 132) and the mortgage bond (D 121) referred to in issue 25 H in consequence of deliberate misrepresentation and other matters referred to in 2a to 2c of the plaintiff's further pleadings ?

Ans. Yes.

(29) Did the defendant and its then General Manager, Loganathan, act in breach of its fiduciary duty to the plaintiff and its Managing Director S.T. B. Harasgama in inducing the plaintiff to sign the said documents ?

Ans. Yes. With regard to the forms and disposal of statements.

(30) If issue 28 and/or 29 are answered in the plaintiff's favour is the plaintiff bound in any manner by the documents referred to in issue 28 ?

Ans. No.

The answer to issue 29, as very relevantly remarked in the Court of Appeal, by the Trial Judge is not at all intelligible. Issue 29 related to the signing of documents dated 30.12.68 (D132) and the mortgage bond D121, but the Judge has answered issue 29, "Yes, with regard to forms and disposal of statements." This answer indicates that the Trial Judge had not found that there has been a breach of alleged fiduciary duty in respect of the two documents D121 and D132.

To appreciate whether there is any basis for the allegation of duress made by the plaintiff as vitiating, the documents D121 and D132 it is necessary to refer to certain correspondence that took place between the parties, prior to the dates of the documents.

By the letter dated 5.12.68 the defendant-bank sent to the plaintiff certificate of balance relating to the plaintiff's current accounts No. 22200 and 22201 indicating that the balances standing to the debit of the account of the plaintiff-company (C. A. 22200) on the close of business on 28.11.68 was Rs. 3,403,099.32 and that standing to the credit of the account of the plaintiff (C. A. 22201) on 28.11.68 was Rs. 38,077.30.

By letter dated 7.12.68 (P219) Harasgama wrote to the General Manager of the defendant-bank "first we wish to thank you for all the assistance given by you to check the bank ledger statements for the past several years with the statements we have received from the bank. By letter dated 13.12.68 (P220) Loganathan wrote to Harasgama–

> "As you are aware it was the bank that discovered and reported to you the discrepancy in your current account balance. You then produced at the request of the bank a file of statements alleged to have been sent by the Bank of Ceylon. I pointed out to you after examining those 'statements' which you had in your possession purporting to be Bank of Ceylon statements that they were not genuine bank statements, but were complete fabrications..... subsequently your auditors were given an opportunity of checking the bank ledger with the 'purported' bank statements and it was as a result of that you had been convinced that a fraud had been committed..... On behalf of the bank I would emphatically deny that those documents are genuine bank statements and I would point out that they are complete fabrications....."

By letter dated 15.12.68 (P221) Harasgama wrote to Loganathan "the writer is fully cognizant of the bank's position in regard to the 'bank statements'..... We are fully conscious that the bank's position is and at all times has been that 'bank statements' in our possession are fabrications. As we have explained to you at our discussion, we had every reason to believe that the statements were genuine, but from the points mentioned to us by you and the officers of your bank *we now know that in relation to the bank ledger the statements in question are fabrications.*

The minutes of the Board Meeting (D182) of the plaintiff-company held on 6.12.68, stated –

> "the General Manager informs the Board that a large defalcation had taken place in the books of the company which is in the present stage of investigation, estimated to be 1.2 million rupees. The General Manager recommended that the facilities in the limit application submitted were necessary for the company to continue its business ; although the company had a severe setback the tangible nett worth of the company which as at 31.3.1967 stood at three million would justify these facilities. The General Manager was authorised to take whatever steps he determines necessary to

ensure that the bank interests were adequately protected. He was also authorised to grant them the facilities in the limited applications, submitted and also such other facilities he may consider necessary."

In his complaint to the Police dated 20.12.68 (P236) Harasgama states "the scrutiny that is being carried out by the auditors now reveals that the cash of the company entrusted to him (Ingram) from time to time to be deposited to the company's bank account at York Street and Foreign Department had not been reflected in the bank ledger."

In regard to the mortgage bond D121 or to the letter D 132 it has to be noted that there is no complaint of any compulsion with regard to them in any of the letters written by the plaintiff company to the defendant bank and no complaint in regard to them has been made and no relief claimed in respect of it in the plaint either. In fact the plaintiff in its letter, for example D 143 dated 6th February, 1969 confirms the bond D 121. The first time that such a complaint was made was only by the further pleading dated 10.12.71, almost three years subsequent to the execution of the mortgage bond. The allegation is evidently an after thought. The plaintiff-company has admitted in the written submissions made to the trial Judge that its substantive claim for a declaration that cash and cheques to the value of Rs. 1,273,883.66 were deposited by the plaintiff-company with the defendant-bank, must fail, as the said sum had in fact not been so deposited. With this admission, as the Appeal Court has remarked "the bottom was knocked off the allegations of duress and compulsion." Furthermore the documents D 121 and D 132 had the voluntary approval of the Board of Directors of the plaintiff company ; by their certificate of total borrowings as at 31.12.68 (D 136), the seven directors of the plaintiff-company, including H. V. Perera Q.C., affirmed the amount due to the defendant bank as claimed by the defendant bank.

To give validity to a contract the law requires the free assent of the party who is to become liable under it. It therefore allows him to avoid my promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made or that of his agent. Duress, whatever form it takes, is a coercion of the will which vitiates consent.

Economic pressure can in law amount to duress ; and that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss – *Barton v. Armstrong* (70) and *Pao On v. Lau Yiu Long* at p. 635 (71)–

> "In a contractual situation commercial pressure is not enough. There must be present some factor which could in law be regarded as a coercion of his will so as to vitiate his consent. . . . In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest ; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy ; whether he was independently advised ; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v. Horner,* (72) relevant in determining whether he acted voluntarily or not.
>
> "The compulsion had to be such that the party was deprived of his freedom of exercising his will"

American Law *Williston on Contract,* 3rd Ed. now recognises that a contract may be avoided on the ground of economic duress. The commercial pressure alleged to constitute such duress must, however, be such that the the victim must have entered the contract against his will, must have had no alternative course open to him, must have been confronted with coercive acts by the party exerting the pressure – Williston, 3rd Ed. Vol. 13, Ss 1603. American Judges pay great attention to such evidential matters as the effectiveness of the alternative remedy available, the fact or absence of protest, the availability of independent advice, the benefit received, and the speed with which the vicitim had sought to avoid the contract. Recently two English Judges have recognised that commercial pressure may constitute duress the pressure of which can render a contract voidable. Kerr J. in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti (The "Siboen" and the "Sibotre")* (73) and Mocatta, J. in *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* (74) both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lorships' view, "there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable,

provided always that the basis of such recognition is such that it must amount to a coercion of will which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act". per Lord Scarman delivering the judgment of the Privy Council in *Pao On v. Lau Yiu Long,* (supra) at 635 – 636. Lord Diplock, in *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation* (75) identifying the rationale of the development of the legal concept of duress stated "It is not that the party seeking to avoid the contract . . . . . did not know the nature or the precise terms of the contract at the time when he entered into it . . . . The rationale is that his apparent consent was induced by pressure exercised on him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind." (pp. 75, 76), continued "Commercial pressure, in some degree, exists wherever one party to a commercial transaction is in a stronger bargaining position than the other party. It is not, however, in my view, necessary, nor would it be appropriate in the instant appeal, to enter into the general question of the kinds of circumstances, if any, in which commercial pressure, even though it amounts to a coercion of the will of a party in the weaker bargaining position, may be treated as legitimate and, accordingly, as not giving rise to any legal right of redress". (p. 76).

Lord Scarman, though he dissented on another legal issue, stated the law as follows at page 88 –

> "The authorities . . . . . reveal two elements in the wrong of duress :
>
> (1) pressure amounting to compulsion of the will of the victim ; and (2) the illegitimacy of the pressure exerted.
>
> There must be pressure, the practical effect of which is compulsion or the absence of a choice. Compulsion is variously described. . . . as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him. This is the thread of principle which links the early law of duress (threat to life or limb) with later developments when the law came to recognise as duress first the threat to property and now the threat to a man's business or trade."

The real issue in this appeal is . . . . as to the second element in the wrong duress ; was the pressure applied by the I. T. F. in the circumstances of this case one of which the law recognises as legitimate ? For as Lord Wilberforce and Lord Simon in *Barton v. Armstrong* (supra at p. 121) said –

". . . . the pressure must be one of a kind which the law does not regard as legitimate."

As Lord Wilberforce and Lord Simon remarked. "In life, including life in commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate.

In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support . . . . The present is a case in which the nature of the demand determines whether the pressure threatened or applied, was . . . . lawful or unlawful. If it was unlawful, it is conceded that the owner acted under duress and can recover. If it was lawful, it is conceded that there was no duress and the sum sought by the owners is irrecoverable". P. 89, Lord Scarman proceeded " . . . . the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action; whether it does so depends on the nature of the demand. Blackmail is often a demand supported by a threat to do what is lawful, e. g., to report criminal conduct to the police. In many cases, therefore, 'what (one) has to justify is not the threat but the demand'." (p. 89). *See Thorn v. Motor Trade Association* (76) – Per Lord Atkin. The plea of 'duress' poses the question whether the demand made by the defendant-bank that the plaintiff should accept the certificate of balance showing that the plaintiff had over drawn the sum of Rs. 3,403,099.32 was a legitimate demand in the sense that although compliance with it had been enforced by economic pressure that pressure was in the circumstances lawful,so that there was no duress and the plaintiff-company is not entitled to deny the correctness of the certificate D 132. Here are two commercial institutions wanting to do business with each other. It may be that the defendant-bank was in a

stronger bargaining position than the plaintiff-company ; that does not mean that the defendant-bank, in order to protect or secure itself, should not bargain with the other party and in the process exert some measure of commercial pressure to fortify itself with an admission by the other party that its accounts to date, which it honestly and reasonably believed to be correct, reflected the correct position, and that, according to the said account, a certain amount which was due to it on account of past dealings was in fact correct and represented the liability of the other party. In the present case, with hindsight we know that the defendant's ledgers represented the correct accounts of the plaintiff and the plaintiff itself has admitted in court what defendant had been urging right from 28.11.1968, that the alleged bank statements in plaintiff's possession were fabrications and that the sum of Rs. 3,381,497.28 reflected in defendant's ledger are due from it to the defendant-bank. In its letter dated 15.12.1968 (P 221) Harasgama had voluntarily written to Loganathan that, in relation to the bank's ledger, the statements in the company's possession were fabrications. This letter was written before the letter dated 17th December 1968(P 226) written by Loganathan to Harasgama that "we have today cancelled the overdraft facility of Rs. 3,487,165 granted to your above account." It is to be noted that when the impugned certificate P132 was given on 30.12.68, the plaintiff or Harasgama had no ground to doubt the defendant's accounts and in fact did not contest the correctness of the said accounts at any time. In the circumstances that the parties were placed on 30.12.68, when the certificate P 132 was given by plaintiff the demand of the defendant that the plaintiff give such a certificate, even though supported by certain economic pressure was lawful and no question of duress arises. The demand was neither unconscionable nor unjust. In any event, I am not satisfied that the plaintiff-company was not in such a desperate situation as to have no other practical choice but to accept the certificate. On 30.12.1968 the date of P 132 its financial plight was not so gloomy for it to have no freedom to exercise its will but to succumb to the demand of the defendant-bank ; it had the benefit of independent advice and as stated earlier, it raised no protest or complaint until three years later, when by way of further pleadings it chose to buttress an admittedly false claim.

In my view, there is neither factual nor legal foundation for plaintiff's belated plea of duress or misrepresentation in giving the mortgage bond D 121 and the certificate D 134.

The plaintiff has, in its further pleading, complained that the defendant and Loganathan had, at the time that the document P 121 and P 132 were executed, suppressed from Harasgama certain acts of negligence and irregularities on the part of defendant's officers, insinuating thereby that had he been aware of them at the relevant dates, he would not have signed them. This is an absolutely false averment, false to the knowledge of Harasgama ; for, Harasgama had, prior to the execution of these documents, come into possession of defendant's documents which he got stolen from the defendant bank and had thus become aware of the alleged negligence and irregularities.

In my opinion issue 25 G should have been answered by the District Judge in the affirmative without the qualification "but under duress," and issues 28 and 29 should have been answered in the negative against the plaintiff company.

Estoppel by Convention

Defendant had in issue 26 raised the question of estoppel. The Trial Judge, though he has answered the issue in the negative has not discussed the merits of the plea of estoppel advanced by the defendant. The plea is based upon the documents D 121, D 132 given by the plaintiff-company to the defendant, on the basis of which the defendant-bank continued the overdraft facilities previously extended to the plaintiff company, and afforded the utilisation of such facilities by the plaintiff company. The kind of estoppel relied on by the defendant-bank is what is known as estoppel by convention of the parties.

The principle of the estoppel was formulated by Lord Denning M. R., in the following passage in *Amalgamated Investment and Property Co. Ltd. v. Texas Commerce International Bank Ltd.* (77)as follows :

> "when the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so."

The Court of Appeal in *Keen v. Holland* (78) in the judgment of Oliver, L. J. was of the view that the above proposition was too broadly stated.

Quoting Spencer Bower on Estoppel by Representation–3rd Ed. (1977) pp. 157 to 160–Brandon, L. J. stated in *Amalgamated Investments and Property Co. Ltd. v. Texas Commerce* (supra) at page 591 that–

> "This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed."

The governing principle of this species of estoppel was stated in "Blackburn Contract of Sale" 3rd Edition, page 204 as follows :

> "That when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts and not on truth."

Latham, C. J. in *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (79) said at page 657 :

> When a person obtains advantage by relying upon rights which can exist only upon the basis of an assumed state of facts, he is not permitted there after to rely upon other rights in relation to the same person which are inconsistent with the existence of rights formerly asserted."

Scrutton, L.J. in *Verschures Creameries v. Hull & Netherland Steamship Co. Ltd.* (80) stated the principle :

> A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. This is to approbate and reprobate the transaction."

The evidence discloses that it was on the basis and faith of the documents D121 and D132 that the defendant bank continued to extend to the plaintiff overdraft facilities. The plaintiff, having enjoyed the benefit of such facilities and in every respect acted upon the basis

of the regularity and validity of the aforesaid documents and the correctness of the statements embodied therein, cannot now be permitted to resile from the representations made in the said documents. Departure by the plaintiff company from the assumptions thereon is unjust and unconscionable. I agree with the Court of Appeal that the plea of estoppel by convention is also entitled to succeed.

Before I part with the record I am constrained to record my disapproval of the conduct of Harasgama, the Managing Director of the plaintiff company who conducted the litigation on behalf of the plaintiff company, in employing detectives to steal documents from the defendant-bank. He has admitted that he had done so and in doing so he is certainly guilty of the offence of aiding and abetting theft. The Trial Judge has not taken into account the fact that the man who is guilty of such misconduct, is capable of resorting to any strategy to achieve his object and that his evidence should be regarded with caution. The court should have been wary in accepting his uncorroborated evidence.

Though I deeply appreciate the great pains that the trial Judge has taker over his judgment, I cannot persuade myself to salvage it. I affirm the judgment of the Court of Appeal reversing the judgment of the District Judge and dismissing the plaintiff's action. I dismiss this appeal with costs.

ABDUL CADER, J.

The plaintiff Company which enjoyed an overdraft facility with the defendant-Bank by application P218 of August, 1968, applied to the Bank to grant the Company a much larger overdraft facility than the existing 3 1/2 million. When this application was processed, it was found that the statement made by the plaintiff concerning the sum overdrawn was much less than the sum in fact, overdrawn from the Bank. This was discovered on 28.11.1968. Promptly, Harasgama, the Managing Director of the plaintiff-company, was informed and on his orders the Accountant of the Company, Paul Fernando, took the weekly Bank statements to the Bank and it was found that large sums of money, which, according to the alleged Bank Statements in the Company's possession, had been deposited in the Bank, were not, in fact, deposited and that the weekly statements alleged to have been sent by the Bank to the plaintiff were totally different from ledger accounts in the possession of the defendant

The overdraft facility extended to the plaintiff was up to a sum equal to 100 per cent of the landed costs of the goods in the possession of the plaintiff each month, the total overdraft, in any event, not to exceed 3 1/2 million rupees with an agreed variation after March, 1968, which I shall refer to later. The Bank fixed the overdraft limit on receipt of the stock statements monthly from the plaintiff. It became necessary, therefore, to examine the stock statements sent by the plaintiff to the defendant and Samuel, the Finance Director, turned up that evening with the copies of the stock statements in the possession of the plaintiff-Company. It was now found that the stock statements sent to the defendant month after month did not correspond to the copies of the stock statements in the custody of the plaintiff ; that the former had been overloaded with fictitious stocks ; the Bank had acted on these overloaded fictitious statements and granted the overdraft facility ; and that the plaintiff had operated on and drawn money on the basis of the overdraft limit advices, the fraud running into over a million rupees.

Meanwhile the plaintiff-Company entrusted the entire matter to their own auditors who, after extensive investigation into the documents in the possession of the plaintiff and with the consent of the defendant, the documents in possession of the defendant, submitted their report ' P103 ' in February, 1972. The plaintiff filed this action in November, 1970.

For a principal cause of action, the plaintiff averred that the defendant intentionally caused and permitted the plaintiff to believe that the representations in the counterfoil receipts issued by the Bank on deposits of moneys in the Bank and weekly statements of account were true and to act upon such belief. The plaintiff also averred that cash and cheques to the sum of Rs. 1,275,883.66 which the defendant Bank claimed had not been deposited were, in fact, deposited to the credit of the plaintiff's account and that a sum of Rs. 49,546.16 which had been debited by the Bank as interest was not, in fact, due. On this principal cause of action, the plaintiff prayed for a declaration that the sum of Rs. 1,275,883.66, which the Bank denied, was in fact due to the plaintiff from the defendant and that the sum of Rs. 49,546.16 was not due from the plaintiff to the defendant.

For a first alternative cause of action, the plaintiff averred that the defendant had fraudulently and/or negligently issued incorrect

counterfoil receipts and weekly statements of accounts and facilitated the issue of or fabrication of incorrect receipts and weekly statements of accounts to the plaintiff particularly in that :

(*a*) the defendant being aware that incorrect receipts and weekly statements were issued to the plaintiff, failed to inform the plaintiff and/or to stop that issue and/or to take reasonable precaution,

(*b*) defendant failed to exercise proper care and control of the custody of the blank forms of the statements of accounts,

(*c*) the defendant failed to exercise proper control over the issue and delivery of receipts and weekly statements of accounts and certificates of balances, and

(*d*) the defendant permitted unauthorised persons to have access to such blank forms.

The second alternative cause of action was that, if as claimed by the defendant, this sum of money had, in fact, not been deposited, the defendant and/or its servants jointly with one Ingram and/or other persons unknown to the plaintiff misappropriated that sum of money and, therefore, the defendant was liable in this sum as damages. When issues were framed, issues 1 to 7 covered the principal cause of action ; issues 8 to 13 covered the first alternative cause of action ; issues 14 to 17 covered the second alternative cause of action. Certain consequential issues were framed by Counsel for the defendant. He also raised further points of contest with reference to a primary mortgage given by the plaintiff to the defendant Bank and estoppel based thereon. (Issues 25h to j and 26) whereupon Counsel for the plaintiff raised issues 28 to 30 to meet the charge of estoppel.

Before I go on to the evidence in this case, I wish to make one thing very clear that I cannot appreciate how the plaintiff came to Court with the principal cause of action. This trial went on for a very long period in the District Court and Counsel were involved in a wild goose chase, especially Counsel for the defendant, as a result of the principal cause of action pleaded by the plaintiff. Immediately, this fraud was discovered on 28.11.68, it would have been clear to Harasgama that the fraud had taken place in his office and that this sum of Rs. 1,275,883.66 had not been deposited into the plaintiff's account in the Bank. As I have said earlier, the weekly statements in the custody of the plaintiff had been checked with the ledger of the defendant-Bank

on the morning of the 28th November and it was discovered that the weekly statements did not reflect the true state of affairs in the Bank ledger. That evening, it was discovered that an enhanced overdraft facility had been obtained from the Bank and operated on fabricated stock statements sent by the plaintiff to the defendant. Harasgama was a lawyer and the Managing Director of the Company. It should have dawned on him that the fraudulent original stock statements would have originated only from his Company. He submitted that he suspected that Ingram was the culprit and he started searching for him. In the written submissions, the plaintiff has admitted that Harasgama suspected Ingram on the 29th. Harasgama called in his auditors and they investigated fully and reported their findings 9 months before the plaint was filed that the amount in contention had not been deposited with the Bank to the plaintiff's credit. Therefore, it is indeed amazing that Counsel had settled a plaint in total contradiction of the obvious truth and in disregard of the report of the plaintiff's own auditors, on the basis that this sum had been deposited with the Bank. The plaintiff framed not only issues 1 to 7 on the basis of this obvious untruth, but went on with the trial on these issues until the very end of the trial. Counsel for the defendant was obliged to spend a good deal of his time and energy on meeting these issues, with the result that certain matters relevant to the real dispute between the parties were not fully explored, for which the plaintiff alone should take responsibility.

Before us, Counsel for the plaintiff gave his explanation for this amazing conduct. He put the responsibility on Counsel for the plaintiff, an eminent Queen's Counsel who is no more, that because letter dated 31st December, 1968 (P 228), written by the plaintiff to the defendant, inquiring whether the defendant was "now in a position to confirm or deny the genuineness of the documents in our possession" was not replied to, this cause of action was introduced. By 'D 132' of 30.12.68 (previous day) the Directors of the plaintiff-Company had acknowledged and declared that as at close of business on 14th December, 1968, a sum of Rs. 3,381,497.28 had been overdrawn by the Company on current Account No. 222000. The defendant, therefore, ignored this letter sent by the plaintiff. The plaintiff could not have had any doubt that the relevant documents in its possession were fabricated documents and that the disputed amount was never deposited in the defendant-Bank. In the written submissions to the

District Judge dated 6th August, 1974, filed at the conclusion of the trial, the plaintiff had conceded that issue No. 1 be answered in the negative and issue No. 23 be answered in the affirmative. Issue No. 1 reads as follows :–

(1) "Did the plaintiff between 1.7.57 and 28.11.68 deposit to the credit of its account with the defendant-Bank the various amounts set out in Schedule B to the plaint ?–

The plaintiff has stated as follows :

> "Turquand Young & Company's reports establish that there is no evidence at all that the amounts set out in Schedule B to the plaint had been paid into the Bank."

Issue No. 23 :

> "On 28.11.68, was the plaintiff's account overdrawn by the sum of 3,431,409.99 inclusive of interest, expenses and charges ?"

The plaintiff had intimated this issue has to be answered in the affirmative.

These Reports were available to the plaintiff even before this action was instituted. The question does arise whether the plaint was settled in ignorance of these Reports because they were not handed over to Counsel by Harasgama.

Even a Junior, not to speak of eminent Queen's Counsel, would not ever frame a cause of action based on a mere failure to reply a claim made after the plaintiff had admitted liability by certain documents, especially after plaintiff's own auditors had reported that the monies, had not been deposited. It is an insult to the intelligence of that Counsel and not worthy of consideration at all. Even Harasgama did not put forward this ground as the reason for this fantastic principal cause of action. He said that Counsel had been talking of some form of estoppel, but I do not find any estoppel pleaded either in the plaint or in the issues in respect of this cause of action. It appears to me that Harasgama was so desperate that he was prepared to cling to any straw available so long as he could file a plaint against the defendant and drag it into Court. Even if it be that, the principal cause of action was introduced due to wrong instructions, why did eminent Counsel who conducted the trial proceed with that cause of action after all the facts would have become known to him at his conferences with the

plaintiff. The only reason that can be thought of is the obduracy of Harasgama who did not want to give up his false claim till the defence witnesses had been called. The cause was hopeless, but he persisted at the expense of judicial time. The District Judge had no alternative except to answer the issues 1 to 7 against the plaintiff.

As regards the second alternative cause of action, the District Judge held that it was Ingram, an employee of the plaintiff-Company, who would have misappropriated the money and that neither the defendant nor its employees joined in such misappropriation and, therefore, this second cause of action failed. In fact, plaintiff placed no evidence in support of the allegation that the defendant's employees misappropriated the money or any part thereof. However, strangely, the District Judge answered the issues 14 to 17 in respect of this second alternative cause of action in favour of the plaintiff. This mistake the Court of Appeal corrected by answering these issues against the plaintiff.

Counsel for the plaintiff before us did not question the correctness of the decision on these two causes of action and arguments were addressed to us only in respect of the first alternative cause of action. Issues 8 to 13 relate to this cause of action. Issue 8 that the defendant was under a duty to issue correct counterfoil receipts and to send weekly statements of accounts to the plaintiff was admitted by Counsel for the defendant.

Issue 11 (1) (*a*) charges the defendant with failure to exercise proper control over the custody and issue of blank forms of statements of accounts and forms used for certified balances and other security documents. The District Judge held in favour of the plaintiff. As regards blank forms of weekly statements, it is not something like a blank cheque leaf which any reasonably prudent man should know could be put to a fraudulent purpose. No reasonably prudent man can expect forms discarded in 1960 to be put to use in a complicated fraud and in my opinion the District Judge's finding against the bank on this question is unreasonable. The District Judge has not discussed the question of forms used for certified balances and "other security documents", covered by this issue. I believe that what is meant by "certified balances" is forms used for the certificate of balance. These certificates were sent regularly by the defendant to the plaintiff's auditors. There was no fraud in respect of these certificates of balances till 1965. Thereafter, it was as a result of a

certain fraudulent request on the part of the Finance Director of the plaintiff-Company that these certificates of balance were sent to the plaintiff direct. I shall consider this aspect later on. After 1965, the certificates of balance were received by the plaintiff from the Bank, but they were substituted with fictitious certificates by Ingram, Samuel or by some other employee of the Company to tally with the plaintiff's books or accounts. The fraud, therefore, took place within the plaintiff-Company. Therefore, the "forms used for these balances" do not come into question at all.

The District Judge has not considered any other security document and we were not told what other security documents there were in respect of which the defendant failed to exercise proper control. Therefore, the District Judge was wrong in anwering this issue in the affirmative. The answer should be in the negative.

Issue No. 11 (1) (*b*) relates to the delivery of receipts, weekly statements of accounts and certificates of balances. The District Judge has answered this issue as follows :

"Yes, of weekly statements only."

Therefore, he has held against the plaintiff in respect of counterfoil receipts and certificates of balances. Therefore, the only question that needs consideration in this case is the question of weekly statements and whether the District Judge has answered this issue correctly. This is the only substantial issue in this case, which I shall discuss in detail later.

Although there was no issue directly in point, the District Judge permitted evidence to be led on the question of the inspection of the stocks pledged to the Bank by the plaintiff The District Judge went on to hold that the failure to make such verification "constituted negligence which enabled culprits to draw moneys on inflated, fabricated stock certificates." It is, indeed, surprising that the Bank should be penalised for a fraud perpetrated by the plaintiff's employees, taking advantage of the defendant's failure to inspect and verify the stocks pledged to the Bank when the plaintiff has not raised any issue that the defendant owed a duty to the plaintiff to inspect stocks. It owed no duty to the customer and if the Bank chose not to inspect, it did so at its own risk. In this case, particularly, it was common ground that the plaintiff-Company was being treated as a specially favoured customer–specially for the reason that the plaintiff

and the defendant had at this relevant period the same eminent gentleman, Mr. H. V. Perera, Q. C., as chairman. Under the circumstances, I am not surprised that the Bank did not care to inspect the stocks even after a subject clerk had raised the routine query whether the stocks were to be inspected. This is yet another straw.

I find no negligence on the part of the defendant on which the plaintiff can rely to buttress its hopeless cause.

Yet another episode that the plaintiff put forward in support of its cause is not found among the issues. In March, 1968, by P216 Harasgama requested the Bank that the Company be permitted to enjoy a one million rupee overdraft facility on the security of the "actual selling price of the stocks of spare parts etc. or 2/3rd the value of the selling price of the stocks of spare parts." This request was made on the basis that although a million rupee facility had been permitted on certain other terms, that facility could not be availed of due to certain difficulties referred to in that letter. Consequent to this application, there was a discussion with the Bank officials and De Mel, the Credit Intelligence Officer of the Bank, prepared a minute (D75 dated 25.03.68) to the General Manager. This minute has an interpolation in the penultimate paragraph "or 65 per cent of the selling price whichever is lower". In the course of the discussion with the Bank officials, it had been found that all that the plaintiff was immediately interested in was a further sum of five lakhs which could easily be accommodated by increasing the formula then existing at 100 percent of the landed cost to 125 percent on the basis of Harasgama's statement in the course of the discussion that the company was then utilising a two million rupee overdraft. It has been suggested by the plaintiff that this interpolation was done by the Bank officials after the discovery that the moneys drawn by the plaintiff had, in fact, come up to about three million rupees and realising that if the formula of 125 percent of the landed costs was applied the overdraft facility would exceed the ceiling of 3 1/2 million this interpolation was made to accommodate Ingram and his associates. The plaintiff contends that had the defendant's employee pointed out to Harasgama that the plaintiff-Company had drawn about three million rupees on this overdraft facility and not two millions, the plaintiff would have known in March, 1968, that there was a fraud being perpetrated on the Company and the loss that the Company suffered thereafter could have been avoided.

There appears to be some substance in the plaintiff's assertion that this interpolation is an afterthought. The first 4 paragraphs give a history of the overdraft and this application. The fourth paragraph ends with the following words :

> Their immediate requirements will be met if we grant an overdraft up to the extent of 25 percent of the landed cost of their stocks".

The next paragraph reads as follows :-

> We recommend that the Bank advance against the stocks be increased to 125 percent of the landed cost, *or 65 percent of the selling price whichever is lower* and not the landed cost at present.

What I have emphasised is the interpolation. If we ignore the words emphasised, the last paragraph will be consistent with the previous paragraph, namely, that the immediate need of five lacks could be met by an increase of the 100 percent facility to 125 percent. It would therefore, appear that the interpolated clause was introduced to meet a special situation. It, is no doubt, true that if this had been communicated to Harasgama, he would have become alive to the fraud. But that is no reason to hold that the Bank is liable to the plaintiff for this manipulation. There is no doubt that this new provision was communicated to the Company because immediately thereafter from March, 1968, the stock statements started arriving in the Bank giving the selling price which was a concept originally suggested by Harasgama in P 216 in place of the earlier market price. There was no duty cast on the defendant to communicate to Harasgama personally . Secondly, the plaintiff sought to make out that Hashim, who was the Loans Officer who dealt with this application, should have noticed that discrepancy of two million in the first paragraph of D 75. Hashim was called as a witness by the plaintiff and no questions were addressed to him why he failed to notice this discrepancy, though the next witness was questioned with reference to the duty to check the statement of Harasgama about the overdraft drawn. His statement to the Police does not touch this question. De Mel was cross-examined on this matter and he took the very consistent stand that it was not for Hashim to study the first paragraph of the minute, but all that was expected of Hashim was to carry out the instructions issued to him to calculate the permitted overdraft on the new terms and that he, De Mel, took full responsibility for the interpolation. The District Judge has cast doubts on the integrity of De Mel. This doubt is not warranted as Harasgama who had had dealings with De Mel stated in evidence that

De Mel was an honourable man and he should know better. Thirdly, even if some of the Bank officials were influenced to keep this information away from Harasgama that the plaintiff-company was utilising only a two million overdraft when, in fact, the figure had gone up to three million, it is a situation which has been created by the plaintiff's employees. The defendant Bank enjoyed no benefits thereby. It is possible that some officers in the plaintiff Company and judging by their conduct which I shall refer to later,Samuel, the Finance Director, two other directors of the Company, Wickremasinghe and Classen, and the all important Ingram could have been responsible for this situation. I cannot see how the plaintiff can benefit by a fraud, if it was one, perpetrated by its own directors and officers by influencing the officers of the Bank to commit a wrong. If such a thing was done by the plaintiff's directors, it was as pernicious as the admitted theft of the Copy of D 75 along some other documents by the plaintiff. In my opinion, this episode cannot give rise to any relief against the Bank.

I now come to the real issue in this case on which hangs, in my opinion, the entire case for the plaintiff. Did the Bank fail in its duty to send the weekly statement of accounts to the plaintiff-company ? The burden was on the plaintiff to establish that the defendant failed to send those statements to the company. The plaintiff's Counsel agreed that if it is proved that even one statement had been delivered to the plaintiff, the plaintiff's case would fail. Counsel,however, made it clear that if the statement had been delivered to Harasgama or any other director of the Company then, the defendant would be deemed to have delivered the statement to the Company. But Ingram was not a director of the plaintiff-Company and any delivery to Ingram would not be a delivery to the Company. I am not going into the question as it is not material for the purpose of my judgment.

On the basis of these submissions of Counsel for the plaintiff, has there been delivery of weekly statements to the plaintiff-Company by the defendant-Bank ? Counsel contended that both the lower Courts have decided that there had been no delivery to the Company and that even the written submissions filed by the defendant-respondent before us have accepted the correctness of that finding.

Counsel for the defendant, however, whilst admitting that such submissions have been filed, denied that such submissions would bind the defendant or that the defendant accepted the correctness of that finding. Counsel for the plaintiff urged that this Court should not

disturb the concurrent findings of the two Courts on a question of fact which, according to him, were more or less sacred. The Court of Appeal has gone into this question and after considering several cases set down the principle as follows :

> " . . . . .,where the trial judge's findings on questions of fact are based upon the credibility of witnesses on the footing of the trial judge's perception of such evidence then such findings are entitled to great weight and also the utmost consideration, and should be reversed only if it appears to the appellate court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce evidence and the appellate court is convinced by the plainest consideration that it would be justified in doing so ; that where the findings of fact are based upon the trial Judge's evaluation of facts, the appellate court is then in as good a position as the trial judge to evaluate such facts, and no sanctity attaches to such findings of fact of the trial judge : that, if on either of these grounds it appears to the appellate court that such findings of fact should be reversed, then the appellate court "ought not to shrink from that task."

I am in agreement with that view. The question whether all the statements over the period of 12 years had been delivered or not to the plaintiff-Company was not one which could be decided on evidence alone. A good deal of inference had to be drawn by the District Court before it came to that decision. Even the plaintiff has admitted that the decision was dependent partly on circumstantial evidence. On a consideration of all the material available in the case, it is clear that the District Judge missed this very important aspect of this question, namely, that it is spread over a period of 12 years from 1956 to 1968 during the course of which, it was urged by the plaintiff, not a single statement of accounts had been received by the plaintiff-Company. When dealing with this question, the District Judge states that the Bank statements in the possession of Collettes from 1.7.56 till 30.11.68 appear not to have been sent by post because none of them bore the serial numbers and date-stamp. He failed to consider that if statements were received by post and *substituted after they went to the respective departments or Accounts Department,* obviously the substituted statements would not bear the serial number and the date-stamp He then went on to state that a large number of these statements were not machine-printed The

same reason would apply for the absence of machine-printed statements as, obviously, a substituted fabricated statement would not be machine-printed. He then went on to consider the evidence of Amerasinghe and Abeywickrema. Amerasinghe had assumed office as a ledger clerk only on 19.8.68. There is no doubt that during Amerasinghe's period the weekly statements were delivered to Abeywickrema, but that evidence would only relate to just 3 months, to just 12 weekly statements before the fraud was discovered.

Sirimanne about whose evidence the District Judge had doubts and who the District Judge stated was "made to say certain things" had admitted in answer to the interrogatories that there were about 75 statements that had been handed over by Abeywickrema to the plaintiff. In fact, Abeywickrema in his statement to De Mel (D48) had stated that "he had supplied not less than 10 or more than 75 statements. (the number of statements sent out to Collettes were about 300)". Nevertheless, Sirimanne admitted the maximum 75 in his answer to the interrogatories. This was an admission made by Sirimanne at a time when Sirimanne did not know that the plaintiff had been able to steal a copy of Abeywickrema's statement from the Bank. That alone should have been sufficient to convince the District Judge of the integrity of Sirimanne. When the District Judge stated that Sirimanne had been "made to say", had he asked himself by whom, he would have been confronted with a situation which, I am certain, he would not have been able to answer. Sirimanne was not a minor employee of the Bank, but a gentleman who had reached the pinnacle as General Manager of the Bank and at the time he gave evidence he was not even in office. The Court of Appeal had much to say about the District Judge in respect of the assessment of Sirimanne's evidence with which I quite agree. There was, therefore, direct evidence in respect of 75 statements only. Abeywickrema in his evidence would not even admit the whole of it. However, granted that 75 statements were handed over by Abeywickrema to Ingram, it only means that a fraction of the statements had been handed over to Ingram. Abeywickrema has also referred to 300 statements in D48. 300 statements will cover 6 1/4 years only. Weekly statements commenced in December, 1962. The 300 statements will cover this period only. The period prior to 1962 is not covered at all. Abeywickrema had stated in D48 that he had handed over these statements both during the time he was a ledger officer and also prior to that during the time when he was in the loans department, and

outward bills department. In his evidence in Court, he stated that he handed the statements only when he was the ledger officer and not prior to that. Now Abeywickrema was ledger officer at the York Street office from 15.06.1966 to September, 1966 and from June, 1968 to August, 1968, in charge of plaintiff's ledger. So that all Abeywickrema's evidence would not cover the period prior to 15.06.1966. All that the District Judge held on a consideration of this evidence was that "Abeywickrema and Amerasinghe and others who had made statements available to Ingram had acted in breach of a duty of care which the Bank owed to Collettes." Amerasinghe spoke to only a 3 months of the period in issue, August to November, 1968, after he succeeded Abeywickrema. There is no evidence that other ledger officers had made statements available to Abeywickrema. On the other hand, there is a statement of Bunny who was also a ledger clerk that so far as he was concerned, he did not deliver any statement to Ingram or to Abeywickrema (D192). He stated that he had worked as a ledger clerk for about 5 months ; that no one collected any statements from him. That will cover about 20 weekly statements which should have in the routine gone by post. No other ledger clerks have been called to say that they handed over any statements to Abeywickrema. It is unreasonable to presume that ledger clerks other than Abeywickrema and Amerasinghe followed a course outside the instructions, to accommodate Abeywickrema. The District Judge appears to have then fallen into an error in coming to the view that since there could be no pilfering in the plaintiff's mail room, there was no delivery. He failed to consider that even though there could have been no fraud in the mail room, a statement received by post could be substituted elsewhere in the Company. Such a substitution could have taken place, for instance, in the Accounts Department, and if such a substitution was possible, it cannot be said that the plaintiff had discharged its burden.

To consider whether such a substitution was possible, it is necessary to go into the conduct of several directors and officials of this Company during the relevant period dealt with by the District Judge, namely, 1966-68. The Finance Director, Samuel, entered the fray by directing the Bank to send the certificates of balance from 1966 onwards, yearly, to the plaintiff direct instead of to the plaintiff's auditors with which instructions the defendant Bank complied. This enabled the plaintiff Company to forward to the plaintiff's auditors fabricated certificates of balance in keeping with the fraud that was

being perpetrated by officers of the plaintiff Company. Even the District Judge was constrained to reject Samuel's explanation for this sudden change of routine. Samuel whose duty it was to send to the Bank stock statements month after month, thereafter chose to avoid signing the statements that went to the Bank. Two other Directors came into the scene to assist the commission of this fraud, Wickremasinghe and Classen with knowledge or without knowledge of the fraud, signing as many as 11 and 23 stock statements respectively after January, 1966. These were fabricated statements. These did not bear the initials of the typist. This was a job within the purview of Samuel. Neither Wickremasinghe nor Classen attempted to find out from Samuel whom they met daily in the mail room why this burden had fallen on their shoulders. I am not convinced that they were totally innocent in this transaction. These statements carry certificates. Wickremasinghe and Classen were engineers, not accountants. Their explanation that they were misled by Ingram will, in any event, amount to recklessness.

We have then the evidence of Lionel Fernando who was an Assistant Accountant dealing with these accounts. The District Judge found him truthful and satisfactory as a witnesss. He stated he did not find any evidence which involved him in any objectionable conduct in relation to matters relevant to this case. If the District Judge had considered all the evidence relating to Lionel Fernando dispassionately, he could not have come to that conclusion. In fact, the District Judge has said in a different context that Lionel Fernando said that Ingram telephoned him and he went into Ingram's room and there he found Abeywickrema who gave some statements to Ingram and Ingram handed them to him. Lionel Fernando had an accountancy qualification. He was Accounts Clerk in 1950 in a different firm. He then worked in the Chartered Bank. Then, he joined Mercantile Credit in 1958, and joined Collette Finance in 1959 as Assistant Accountant. Ingram was then Sales Manager. In 1960, he joined Mahajana Finance and in 1967 he joined Collettes Ltd. as Assistant Accountant. With this vast experience of finance and banking, he should be presumed to have known that statements had to be sent to the plaintiff Company by post, but he did not find the statements coming via Abeywickrema and Ingram objectionable. When some statements had been delayed, he had reported it to the Accountant, Paul Fernando, who had told him to check with Ingram. It will be reasonable to presume that if statements do not arrive in time, the

proper authority from whom information should be sought would be the Bank itself. When Ranasinghe was appointed to deposit monies from 1.10.67 in place of Ingram, Ingram changed that arrangement and continued to deposit the cash himself without any protest from Lionel Fernando. Ingram produced counterfoil receipts in respect of cash deposits which were not machine-printed, while the receipts for cheque deposits were machine-printed. That did not arouse his suspicion. Instead, Lionel Fernando was satisfied with Ingram's explanation that he did not wish to wait in the queue. He had not cared to ask Ingram why he should wait at all when it was Ranasinghe's job to do it. From the Bench, the President pointed to two cash deposit receipts in P 15 issued on the same day, one machine-printed and the other not. Some receipts did not bear the account to which the money was deposited or even the name of the branch. He did not think it is a matter worthy of any form of action. In fact, it was by this process that the entire sum in issue in this case had been misappropriated by Ingram. He stated that Ingram telephoned him and got him down to his office and handed over the weekly statements to him and that all the statements from 1.4.67 were received through Ingram. In his statement to the police he had stated the Bank statements were kept under lock and key. But Ingram who masterminded this complicated fraud could not have been deterred by lock and key maintained by the complainant, a fellow officer. Above all, Lionel Fernando's suspicions were not roused when all the statements of the associate companies were coming in one type of forms while the statements of Collettes were in a different set of forms, which were at the trial shown to be discarded forms. There is evidence that Ingram had a free hand in this company and enjoyed a high reputation. Lionel Fernando had worked with Ingram and trusted him to do no wrong. It is even possible that Lionel Fernando was made to believe that whatever Ingram had done had the acceptance of the Company.

Counsel for the defendant urged that Lionel Fernando was also involved in the fraud. It is not necessary to make a decision on that question. It is sufficient for my purpose to hold that though he may not have participated consciously in the fraud perpetrated by Ingram, nevertheless, that Lionel Fernando gave a blind eye to Ingram's activities in the Accounts Department. The fact that the 3 other directors were involved directly or indirectly in this fraud could well have further lulled Lionel Fernando into that sort of inactivity. In these circumstances, Ingram could very well have substituted the fabricated

statements after the statements were received by post (except those that were handed over by Abeywickrema to Ingram) in the Accounts Department This is a probability which I cannot overlook and the burden was on the plaintiff to rebut this probability. The plaintiff had an opportunity to produce the Inward Register of the Group of Companies and the Inward Register of this particular Company to prove that while the other statements were being received by post the statements relating to the plaintiff – company were not received. Although the plaintiff listed these registers in the list of documents, they were not produced. If these registers had been produced, the plaintiff would have been in a position to show very convincingly by contemporary record of evidence that while all the other statements were being received by post, the Collettes' statements were not received. The plaintiff has submitted that no adverse inference should be drawn against the plaintiff for the failure to produce these registers, but without going into the law, it is sufficient for my purpose to agree with the Court of Appeal that "they were of immense value in disproving that the documents which the defendant-Bank contended were received by the plaintiff–company were not, in fact, so received by the plaintiff–company." Instead, plaintiff has relied only on the oral evidence of Lionel Fernando, which is suspect and unreliable and of Abeywickrema which does not extend to more than 75 statements.

As regards the mail room, Rajaratnam, Assistant Secretary, said that "the mail relating to Collettes Ltd. is taken out and left on Mr. Ingram's side . . . ." *Mr. Ingram sorted out the Collettes Ltd. mail* . . . . The mail relating to Collettes Ltd. is opened by Jamaldeen and given to Mr. Ingram for date-stamping . . . . . The entering of the Inward Letter Register is done by me or Mr. Ingram, or Jamaldeen . . . . . Whenever Collettes mail was voluminous I had assisted Mr. Ingram . . . Whenever Mr. Ingram was not available to open the mail Mr. Samuel, Director Finance, took his place . . . . . Up to February, 1968 . . . . . mail was opened in the Board Room in M/D's Office. The opening was done within his sight . . . . . I can say that once a letter is received in the mail bag it is not possible for it to be stolen or misplaced before they are distributed . . . . . In 1965, Mr. Ingram was on two days' leave . . . . . In 1967, 1 1/2 days leave on 8 to 10th April, 3 days from 20th to 23rd April and 5 1/2 days from 28th April to 5th May to go to Singapore

I have quoted as much as are relevant from Rajaratnam's statement D76. He did not give evidence. His statement indicates that Ingram almost exclusively dealt with the Collettes mail when he was present. In all probability he entered the register in respect of Collettes' mail. (As Rajaratnam has not stated who entered which register). Ingram took little leave in 1965, only two days. In 1966 nil and though he took 10 days in April-May, 8 days leave was taken to go to Singapore. The substitute in his absence was none other than Samuel who was himself involved in the fraud. Therefore, Rajaratnam's ipse dixit that it was not possible to pilfer in the mail room may not be after all, to say the least, very accurate. It should be remembered also that the 75 statements handed over by Abeywickrema may have been partly during the days when Ingram was absent. The question also arises why Ingram should have taken so few days' leave, except to pilfer the statements. If Abeywickrema was handing over *all* the statements, Ingram need not have been niggardly in respect of his leave. (The 6 months when Abeywickrema and Amerasinghe were ledger clerks was in 1968 and the 1968 leave particulars are not available in evidence).

The principal witness on whose evidence the District Judge acted was Harasgama. Counsel for the defendant argued vehemently that Harasgama was himself involved in the fraud and, therefore, was a party to manipulation in the mail room. Once again, it is not necessary for my purpose to decide this difficult issue. I will adopt the view that the Court of Appeal took that "Harasgama had placed considerable trust and confidence in Ingram in the conduct of the affairs of the plaintiff–company".

According to Harasgama, all the mails were opened in his presence. Ingram was one of those who opened the mail–as many as 6 of them of whom at least 3 of them were present to open the mail. Collettes and C.M.T. letters were opened by Jamaldeen and passed over to Ingram or whoever else was present for date-stamping ; that he (Harasgama) was not present always when the mail was opened. At page 512, he gave further evidence. "All the mail was opened by Jamaldeen. I did not see Ingram opening the mail . . . . . I have seen Jamaldeen handing the documents to Ingram for the purpose of stamping. *I would not know what Ingram did (with) every document.*" Therefore, Harasgama, too says that Ingram handled the Collettes statements and he did not know what Ingram did with them.

Paul Fernando said that Harasgama told him that Ingram used to open the Collettes mail – a contradiction, this time, from Harasgama himself through Paul Fernando.

Harasgama is honest when he says he did not know what Ingram did with any document. This has to be so, as no person can be expected to watch the progress of hundreds of documents from the envelopes to the respective dockets. This is, in my opinion, a vital admission.

In the light of these circumstances, is this story that pilfering in the mail room was not possible so foolproof ? Add to this the loss that loomed on the horizon for Harasgama who would sustain a direct loss of 40 percent of the 1.2 million involved and possible damage of the balance 60 percent if shareholders sue him for negligence.

The District Judge has not considered all these deficiencies. He had not considered the many other deficiencies in the plaintiff's case, which I shall set down later. Yet Counsel for plaintiff says that Harasgama is a lawyer, a Managing Director of a large firm and above all believed by the District Judge to be an honest and truthful witness, which should not be disregarded. He also says that this finding, too, received further sanctity by the endorsement of the Court of Appeal. But the Court of Appeal has not considered the matter at length. They had set down the failure to produce the Inward Postal Registers, the failure of Harasgama to question why the statements of Collettes only were not coming by post, and says that this could be due to the fact that Harasgama knew that these statements were coming via Ingram. The Court then states that the fact that other documents from the Bank which would have probably arrived by post should have put Harasgama on his guard, and finally ended up by saying that the District Judge had come to the finding that the statements were never received by post and that "this finding is supported by the evidence and the statement of witnesses Abeywickrema and Amerasinghe." But Amerasinghe's evidence covers 3 months and Abeywickrema's at the maximum 75 statements.

Clearly the Court of Appeal has not analysed the evidence of the mail room witnesses nor considered the contradictions, and the admission by Harasgama that he did not know what Ingram did with the Collettes documents that came by post. In any event this decision would relate only to a very short part of the 12 years in issue.

The only reason given by Harasgama for his insistence that the statements did not arrive by post is the absence of the Collettes stamp on the statements in Collettes' possession. The evidence reads as follows (p. 512) :

"Qes. Are you telling the Court that you know personally that no statements from the Bank came by post ?

Ans. If the statements came by post they would be serially numbered and date-stamped.

Qes. Are you telling the Court here on oath that no statements from the Bank came by post ?

Ans. As far as I recall, if the statements came by post, they would have the date – stamp and the serial number.

Qes. Are you telling me here in the witness box that no statements from the Bank came by post ?

Ans. If the statements came by post they would have the date–stamp and the serial number.

Qes. You cannot give any other answer ?

Ans. No."

As against the Honkong & Shanghai Bank, a similar action was filed for a similar failure to send statements. Harasgama's evidence on this subject is revealing. Unlike in this case, he does not know who handed over the statements from that bank to whom and yet he holds the Hongkong Bank, too, liable, probably for the same reason that the weekly statements did not bear the Collettes' stamp. But he has overlooked the fact that if statements came by post, and they were stamped and if the fabrication was done later, the fabricated statements will not have the Collettes' stamp.

Harasgama said this in evidence, page 571 :

"I gave instructions to file the plaint in this case.

Qes. Were your lawyers under the belief that all the moneys were deposited in the Bank of Ceylon ?

Ans. I do not know what their belief is.

Qes. Did you tell them that the money was deposited in the Bank ?

Ans. I told them that we have not got credit for the moneys that were deposited in the Bank.

I brought that to their notice when filing the plaint. I said that some money had not gone to the Bank. Then they mentioned something about estoppel.

Qes. When the plaint was filed your lawyers believed that the money was deposited in the Bank ?

Ans. I know now that the money has not gone to the Bank. I asked them "why are you claiming all this money."

Qes. At the time the plaint was filed, you thought the money had gone to the Bank ?

Ans. I said we had not got credit for this.

Qes. Later on you came to know that the money went to the Hongkong & Shanghai Bank ?

Ans. I don't accept that. I asked my lawyers why they were claiming this amount. They were claiming 4.7 million rupees. Then I recall their mentioning something about estoppel.

Qes. Did you tell the Court that when the plaint was originally filed you were of the view that you have not been given credit for the moneys that went to the Bank of Ceylon ?

Ans. I told my lawyers that, and I also told that "I am now aware that this money had not gone to the Bank of Ceylon".

"I think I told them that after they filed the plaint."

I am of the opinion that the last line is an afterthought.

Having set his lawyers on an incredible path to prove the impossible, even after the cross-examination had brought his case on the principal cause of action crashing down, he yet maintains he was right. At page 496, his evidence is as follows :

"Qes. You still claim this money from the Bank of Ceylon ?

Ans. Yes, because of the utter negligence of the Bank of Ceylon. It is as a result of the negligence of the Bank of Ceylon that they permitted this cheque to be deposited in the Hongkong & Shanghai Bank."

How can the evidence of such a person be trustworthy–one who is likely to conceal the truth in his anxiety to win at any cost.

I will now come to Harasgama's evidence on two incidents which can be checked with reference to contemporaneous documents.

In respect of Ingram's flight to Australia, the first statement made by Harasgama to the I.G.P. was on 7.12.68 (P218). It should be noted that this statement was prepared in advance and handed over to the I.G.P. and, therefore, made after deliberation and probably in consultation with his lawyers. In this statement, he has said, "They informed me *yesterday* (i.e. 6.12.68) that their Singapore office informed them yesterday (i.e. 6.12.68) that they had been asked by one Ingram for the issue of a visa to Australia and wished to have confirmation that they may comply with the request." It would, therefore, appear that Harasgama had been informed by the High Commission on the 6th December that they had been queried about the issue of a visa on the *6th*. In the next statement on 20.12.84, P236, he stated that "Ingram had sought entry into Australia by QF738 on 30th November, 1968." He does not state from where he got this information, but what is important to note is that he states that Ingram had sought entry into Australia on 30th November, 1968. This, too, was a prepared statement. It is difficult to believe that the Singapore office informed the High Commission only on the 6th of a request for a visa for a flight on 30th. The next statement P114 makes this clear, when it is read in its proper context.

The next statement he made was on 27th (P114). This statement was made on 28.12.68. To analyse this statement, it is necessary to reproduce this statement :

"On *30.11.63* I became aware that Mr. Ingram had left the Island. I thereupon inquired from the Australian High Commission Visa Officer whether a Visa had been issued in Ceylon for Australia for one Mr. Ingram. He replied in the negative. *Later in the afternoon* he telephoned and informed me that they received a cable from their Singapore office stating that a Mr. Ingram had asked for the issue of a visa to Australia and whether it was in order to issue one to him. *In the morning when I spoke* to him I did not give him any details for this inquiry. In the afternoon when he telephoned me I went across to the Australian High Commission and told him that Mr. Ingram was under heavy suspicion in respect of a fraud in the Company's

Bank Account and that I would be happy if a visa is not issued him. The officer thereupon explained that such inquiries are at tim only a formality and a visa may already have been issued. *This to place on 6.12.68.* In between I was preoccupied trying to ascert further details and to elicit that information regarding the matte connected with the fraud. I asked him to cable. I asked him to cal and ascertain whether a visa had already been issued and *on t following* day he telephoned and told me that a visa *had alrea been issued* and that *Mr. Ingram had already left for Australia 30.11.68* by flight No. QF. 738."

If one were to read this statement as it stands, it means that he h contacted the Australian High Commission on 30.11.68 mornin that same afternoon (30.11.68) the High Commission informed h that they had received a cable stating that Mr. Ingram had asked the issue of a visa and whether it was in order to issue one. That sar morning when he spoke to the High Commission viz. 30.11.6 Harasgama did not give any details, but in the afternoon when t High Commission telephoned him, he went there and told them th Mr. Ingram was under heavy suspicion and that he would be happy i visa was not issued to him. It would appear that all those took place 30.11.68.

However, this sentence appears at the end of this :

"This took place on 6.12.68."

Counsel for the plaintiff, taking advantage of this single senten submitted that that incident that happened later in the afternoon ref to 6.12.68, while what happened in the morning refers to 30.11.6 This interpretation does not appeal to me. How could the Ambassac have asked Harasgama on the 6th whether a visa could be issue when in fact Ingram had left on the 30th. His statement, "This tc place on 6.12.68" appears to be an afterthought. If, as I hold, t entire conversation took place as 30.11.68, the information that gave the I.G.P. will not be true.

In the evidence before the Magistrate (P115) Harasgama has sta that on the 30th evening, the Australian High Commission rang him and told him that Singapore had contacted them and wanted formal approval to issue a visa to Mr. Ingram. This certainly is conflict with P 218 and contradicts the interpretation placed Counsel for the plaintiff on P114. This evidence accords with interpretation. The District Judge dismissed it all as "confusion thought." I do not agree.

Counsel for the defendant has urged that this confusion on the part of Harasgama is due to the fact that (1) the story of a conversation with the Australian High Commission is totally false to give the impression that Harasgama has made every effort to prevent Ingram from proceeding to Australia or (2) if he made contact with the High Commission, he is not telling the truth as regards when and what happened.

The next allegation against Harasgama is that he had failed to inform the Police at the earliest possible opportunity. The Court of Appeal has gone into this question at length. There is, no doubt, that Harasgama had to be driven to the Police by Loganathan, General Manager of the defendant-bank, and he made his first statement only on the 7th, 10 days after the discovery of the fraud, but even in that statement to the I.G.P. he did not want action. It was only after De Mel told him that he had made a statement to the Police that Harasgama went to the Police on 20.12.68.

The District Judge glossed over this failure and took the view that Harasgama had reported to the auditors, which was sufficient. But he himself has stated in a different context that had investigations commenced immediately the Police would have been able to detect blank forms in Ingram's house. Counsel for the defendant took it one step further and submitted that the Police would have searched plaintiff's premises, too, as it was another likely place where the false returns could have been prepared.

What did Harasgama wish to avoid by his failure to notify the Police, which was the first obvious thing to do ? Why did he not make any attempt to trace Ingram to Nuwara Eliya through the Nuwara Eliya Police on the 28th ? (It was only on the 29th evening that he came to know that Ingram had not gone to Nuwara Eliya). Did he wait till he got information from the High Commissioner that Ingram had gone to Australia to go to the I.G.P. Even then why did he not want any action by the Police ? These are vital questions for which I have not been given an acceptable explanation. The only inference I can draw is that when Harasgama came to know that the fraud had been committed by his own employee, he tried to cover up the fraud. But I will not go on to hold as Counsel for the defendant suggested, that Harasgama gave information to Ingram and assisted him to leave Sri Lanka and the rest was a vast pretence. Rather, he probably thought that had he gone to the Police they would search Ingram's premises and Collettes

premises and pinpoint the fraud on Collettes itself and that they might even make criminal charges against some of his men. He, therefore, played safe by calling in his auditors. But even to his auditors he did not hand over the document P 216 relating to the 65 percent selling price formula and they had to discover the new formula from relevant bank documents. Harasgama was asked to produce his old passports. He gave the lame excuse that he had not preserved them. Had he produced them it would have been possible to check the periods of his trips abroad, and how often he was absent from the mail room.

Assuming that he was present on almost all days or a vast majority of the days, his evidence was that he discussed the contents of the letters with the heads of divisions. A bank statement is an important statement to discuss, as a company which was running on a massive overdraft would have found it necessary to check its balance regularly to conduct its business. Presumably, it is for this reason that in December, 1962, plaintiff requested the defendant to send weekly statements. (Unfortunately this letter has not been produced to check whether Harasgama signed this letter personally). There would be no point in calling for weekly statements unless there was a special need for it and we have not been told of any other reason. Therefore, one would expect Harasgama to discuss these statements with his fellow Directors and to notice their absence if they were not received by post.

Yet another circumstance that would have definitely drawn attention is the fact that the statements of all other associate companies were being received by post. Surely, it should have dawned on any intelligent person that the statements of one particular company were missing week after week, if such statements had not come.

Plaintiff has submitted that Ingram ran a great risk by permitting the statements to go by post. But it is even more true that Ingram ran a greater risk if the statements did not go by post week after week, as Harasgama and the other directors were bound to notice their absence. (This is on the basis that Harasgama did not know that Ingram was receiving direct).

There were yet other statements involved. The limit statements which the bank sent monthly indicating the overdraft permitted, were equally important documents. They, too, were sent by post. Except to say that they were not received after January, 1966, plaintiff has not produced the inward mail register to prove that evidence. The limit

statements up to February, 1968, were sent on the basis of 100 percent landed cost. Counsel stated that Harasgama did not have to look into the limit advice as he knew that the overdraft would be for the full value of the stocks. But this is yet another untenable explanation. The stocks varied from month to month sometimes by several lakhs, as it was bound to in any large commercial establishment. If this explanation is correct, to know the overdraft limit Harasgama would have had to look into the stock statement.But that statement would not be a guarantee that the limit advice would have the same figure, though it is a probability. Besides, the limit operates from the date of the advice and not the date of the statement What is more natural than that, if Harasgama had to look into a document, he would look forward to the limit advice, look into it and discuss it with his fellow directors. How could he have planned his business for the month except by discussions with his co-directors with the limit advice in hand ? It is inconceivable that the plaintiff Company would have remained silent without inquiries from the Bank, had it not received the limit advices after January, 1966. Admittedly, these advices were received by post prior to 1966. How is it that no one noticed their absence in the post in 1966 and thereafter ?

After March, 1968, the limit was worked on a more complicated formula. Harasgama admittedly knew that the basis was 125 percent of the landed value of stocks, (granting that he did not know of the 65 percent formula)–all the more reason for looking into the limit advice rather than the stock statement.

Issue 11 (2) framed by the plaintiff reads as follows :–

" Did the defendant by its servants or agents –

(*a*) acting in the course of their employment and within the scope of their authority and/or

(*b*) for whose acts of omissions the defendant is in law liable and responsible facilitate the issue or fabricate the incorrect receipts or weekly statements of account ?"

Abeywickrema who is alleged to have handed over all the statements was a mere ledger clerk. The defendant knew nothing about it. How much more the contribution of Harasgama, Samuel, Wickremasinghe and Claessen, all directors of the plaintiff Company when they failed to notice the absence in the post of the weekly statements and limit

advices–a failure which would amount to utter negligence, at the least towards facilitating Ingram's fraud, and this failure was taking place to the knowledge of Ingram.

In addition, inasmuch as the above 4 were directors of the plaintiff Company, the negligence of the directors will amount to knowledge on the part of the Company.

Therefore, if there was any facilitation, the negligence of the plaintiff facilitated this fraud rather than the negligence on the part of the defendant's servants, Abeywickrema and Amerasinghe, and such negligence was responsible for the fraud perpetrated on the plaintiff.

But this is academic as I have held that the plaintiff has failed to prove that all the weekly statements were not sent to the plaintiff by post.

Counsel for the defendant contended that the evidence against Harasgama was so overwhelming that we should not hesitate to hold that he, too, was in the fraud. I do not think so in respect of the events before the discovery of the fraud. But in respect of his conduct after the discovery of the fraud, Harasgama had not only attempted to suppress a Police investigation, but had also stooped to steal documents from the Bank, probably assisted by bribery, yet another act of dishonesty. It is sufficient for my purpose to hold that his evidence is not such as to be trusted. I have said enough, I believe, why I cannot, accept the finding of the District Judge or the Court of Appeal that there was no possibility of pilfering in the mail room.

I have also held that there is a probability of the statements being substituted in the accounts department.

Issues 25(*e*), (*f*) and (*g*) to the effect that a sum of Rs. 3,403,093.32 had been overdrawn by the plaintiff and that a certificate of balance showing the overdraft was sent to the plaintiff on 5.12.68 and the plaintiff accepted such a certificate without protest have all been answered by the District Judge in the affirmative. But in respect of the last issue he has answered that the certificate was accepted without protest "under duress". He answered issued 25(*h*) that the plaintiff thereafter gave a primary mortgage to cover the moneys overdrawn by the plaintiff in excess in the affirmative. He then answered issued 25(*j*) in the affirmative, to the effect that the plaintiff Company under its own seal expressly admitted that the sum of

Rs. 3,381,497.28 has been overdrawn by the plaintiff. Issue 26 that the plaintiff was estopped from denying that a sum of Rs. 3,403,099.32 exclusive of interest, expenses and charges had been overdrawn by the plaintiff as at 28.11.68 was also answered in the affirmative.

In response to these issues, Counsel for the plaintiff framed issue No. 28 which reads as follows :

> "Was the plaintiff through two of its directors induced to sign the documents dated 30.12.68 and the mortgage bond referred to in issue No. 25(*h*) in consequence of the deliberate misrepresentations and other matters referred to in paragraph 2(*a*), 2(*c*) of the plaintiff's further pleadings ?"

This paragraph 2 also speaks of the failure of the defendant to inform the plaintiff of various defaults by the defendant referred to in the plaint and in addition duress, undue influence and threats by Loganathan.

The District Judge examined this dispute at length and answered issue 28 in favour of the plaintiff. But he failed to consider the fact that he himself had come to the conclusion, after the plaintiff abandoned the primary cause of action, that a sum of Rs. 1.2 million had not been deposited to the credit of the plaintiff in the plaintiff's account. The balance of the 3.381 million had been moneys admittedly utilised by the plaintiff for its business. I have held that Harasgama knew of this situation even before the plaint was filed especially after its own auditors had revealed that 1.2 million rupees had been misappropriated by plaintiff's own officers. In those circumstances, I cannot see how it can be said that there has been any fraud, inducement or misappropriation by the Bank. The plaintiff needed further moneys for its business. The Bank helped the plaintiff to continue in business by giving a higher overdraft on additional securities. This, the bank had to do not only to ensure to itself the payment of the admitted sum of 3.381 million together with further moneys to be lent, but also to ensure that the business would continue in the interest of the country's economy and the hundreds of employees employed in this firm. If Loganathan took the necessary precautions to take adequate security that was something that he had to do as the Managing Director of the Bank and also in terms of the directions given by the Board. In fact the Bank was helping the plaintiff to extricate itself from a difficult situation and to continue in business.

It may be noted that the landed cost of stocks with Collettes as at May, 1967 was 2,821,000 and ever since there had been a gradual reduction of stocks up to September, 1968, which is the last stock statement available in P103, which was 2,088,550 millions. Therefore, while the need for further money had increased, the stocks had decreased. It was in that situation that the Bank helped out the plaintiff to continue in business and I take the view that the District Judge misdirected himself when he held against the defendant on this issue. In fact, the Bank deserved gratitude instead of allegations of duress.

Counsel for the plaintiff has urged several points in favour of their proposition in the final written submissions to this Court which I shall now consider :

(*a*) The fraud was not detected by the plaintiff Company, its auditors or by its bankers.

The cross-examination of Paul Fernando discloses that cheques meant for one bank were deposited in another Bank, cheques were not deposited in time, cash deposits were not supported by machine-printed receipts and many more. Obviously, this was due to negligence on the part of its own officers. Had they done their duty properly, the fraud could have been detected long, long earlier and stopped. Ingram took advantage of the lapse of his fellow officers. In 1966, 3 directors joined in. The auditors were prevented from doing a proper audit by Samuel's change of routine in 1966. On the other hand, the defendant could not have known of the fraud taking place within the plaintiff Company.

(*b*) The substitution of fabricated statements was an essential element in the concealment of non-deposit of funds. The Bank had nothing to do with it and had no knowledge of it, and

(*c*) The District Judge has found that pilfering of statements at the mail meeting was impossible. It was fraught with a high degree of risk,

I have held against the District Judge's view Risk is always part of a conspirator's armour,

(*d*) Ingram would have preferred a less risky method A reliable mode was through Abeywickrema.

I agree. But there were also other ledger clerks involved whose co-operation was necessary. We have Bunny's evidence that he did not hand over statements. There is no evidence that the other ledger keepers, except Amerasinghe, had not done their official duties correctly and properly,

(*e*) There is direct evidence that Abeywickrema handed over statements–Yes, 75 only.

(*f*) Avoidance of detection was vital.
Yes, only if circumstances permitted.
There is no evidence that the ledger officers, except Amerasinghe and Abeywickrema helped Ingram,

(*g*) Evidence of Amerasinghe supports transmission via Abeywickrema.
This covers only 3 months out of 12 years,

(*h*) Defendant has not adduced evidence that statements were sent by post–no adjuster or ledger officer called to give evidence.

There is no burden on defendant to prove this, as admitted by plaintiff's Counsel.

There is evidence that statements are sent to the adjuster who posts them after making an entry of *the total* number of statements sent. The bank had no means of placing evidence of posting of statements to individual customers,

(i) The Court of Appeal has not said anything contrary to the finding of the lower Court.

I have dealt with this at length that the Court of Appeal merely adopted the view of the District Judge without analysis.

(j) The defendant had not challenged this finding in its written submissions to the Court.

True, Counsel admitted that it was an oversight. He maintained and I agree that that will not debar the defendant from agitating a question that was very much in issue at the trial.

The plaintiff filed this action claiming that no Statements of Accounts had been sent by the Bank to the defendant for a period of 12 years from 1956 to 1968. Even as plaintiff's Counsel admitted, it

involved the task of proving that not a single statement had been received by the normal channel viz. by post. If the plaintiff was to succeed on oral evidence alone, it was almost an impossible task,as the officers who worked during this long period could have retired, gone abroad or passed away. Nevertheless, that was the burden that the plaintiff undertook and the plaintiff cannot succeed unless that task is accomplished. That is why in his written submissions, Counsel for the plaintiff stated, "Since the relevant period extended over a period of 12 years, the evidence relied on by the plaintiff was partly direct and partly circumstantial.

There was no need for the plaintiff to depend on "partly circumstantial" evidence to prove this fact, if the plaintiff had produced contemperaneous records maintained by it in respect of receipt of letters received by post. This the plaintiff for some unknown reason failed to do. Even in respect of the recent period of 1966 to 1968, the inward letters registers, which had appeared on the plaintiff's list of documents, were not produced.

Secondly, if the plaintiff is to succeed on circumstantial evidence, the evidence led in respect of 1966 to '68 should be so convincing that the Court cannot come to any other conclusion except that the modus operandi that was operated in this latter period was the only modus operandi that could have operated prior to 1966 too. But in this case, that is not the only conclusion possible. For instance, statements received by post could have been pilfered in the accounts department of the plaintiff. There is no evidence except that of Lionel Fernando, but that evidence relates to the period after 1965. What possibilities existed prior to 1966 is not spoken to by any witness, and the burden is on the plaintiff to exclude such a possibility.

As regards the possibility of pilfering in the mail room, the only evidence on the subject is that of Harasgama and Rajaratnam. Rajaratnam has not stated when he joined Collettes or when he started duties in the mail room so that his evidence cannot be related to the period prior to 1966. As regards Harasgama I have held that his evidence cannot be accepted with confidence.

In any event, this is academic as I have held that even in respect of the period 1966 - 1968, the plaintiff has failed to exclude the possibility of pilfering in the mail room or accounts department.

At the end of the trial the plaintiff conceded that the moneys alleged to have been deposited with the defendant-bank had been misappropriated by Ingram or some other officers of the Company before moneys were deposited with the defendant-bank.

(1) This was an admission that it was the plaintiff's officials who were the miscreants.

For the purpose of perpetuating their fraud various other fraudulant acts had been committed by the plaintiff's officers,

(2) Non-machine printed fabricated deposit slips purporting to be receipts for payment of moneys deposited with the defendant had been handed over to the Accounts Department of the plaintiff and they had been accepted without verification,

(3) Samuel instructed the Bank to send the Certificates of Bank Ledger balances to the plaintiff direct from 1966 and they had been suppressed and instead certificates fabricated in the office of the plaintiff had been sent to the plaintiff's auditors,

(4) Stock Certificates were fabricated in the office of the plaintiff-company and were signed by two directors of the Company who owed no duty to sign them,

(5) Confirmation slips had been received by post at Collettes and they had been pilfered or suppressed in the office of the plaintiff-company,

(6) Admittedly, overdraft limit advices had been received till the end of 1965. The plaintiff stood nothing to lose by admitting the receipt of overdraft limit by post till 1965, because they tallied with the stock statements sent by the plaintiff to the defendant. Those received after 1965 have been suppressed.

In view of all these circumstances, specially the fraudulent acts committed by the employees of the plaintiff-company themselves, it is surprising that the plaintiff chose to file this action. In my opinion, this is litigation that should not have been embarked on over which several months of judicial time had been wasted.

Counsel for the plaintiff are not to blame as they had to carry out the instructions of Harasgama whose only obsession was to succeed.

So far as the defence was concerned, Counsel for the defendant had to put forward all the defences that were available to them, which is quite natural, as the stakes were high and the reputation of the bank was also involved.

Had I the power to order state costs, I would have done so.

I wish also to add that the various epithets that the District Judge used on Loganathan were unnecessary and uncalled for. Certainly he was entitled to reject his evidence and to give the reasons for rejecting his evidence. But the epithets were unnecessary and should have been avoided.

In response to the plaintiff's case, the defendants raised several pleas of law which led to several weeks of erudite arguments on both sides. I did not deal with these questions of law for the reason that I have held that the plaintiff had failed to prove the primary facts which it was its duty to prove before the need areas to discuss the defences in law raised by the defendant. However I have since had the benefit of reading the Judgment of Sharvananda, J. who in his characteristic manner has dealt with all the matters of law that were submitted before us, and come to certain conclusions with which I respectfully agree.

I agree that the Judgement of the District Judge be reversed and the Appeal dismissed with costs.

RODRIGO, J.

Collettes Ltd. (a firm) is a Colombo-based firm of dealers in commercial motor vehicles and spare parts. It had started as a family concern which had built itself into a prosperous and reputed firm. In May 1962 Mr. Harasgama, a proctor by profession but more successful in business purchased forty per cent of its shares and became its Managing Director. Still later in May 1963, its stars were so propitious that Mr. H. V. Perera, Q.C., the brightest star that ever shone in the legal firmanent of the Island, came into its ken, as its Chairman. Its bankers were the Hong Kong and Shanghai Bank and the Bank of Ceylon The Bank of Ceylon is the premier bank of the country and the Chairman of that too was Mr. H. V. Perera, Q.C. at the

material time. The Firm had substantial overdraft facilities with the Bank of Ceylon from about 1962. Prior to that it had overdraft facilities with the Hong Kong and Shanghai Bank. From time to time the Firm had sent for deposit with the two banks, cash and cheques. As at the end of 1968 the sums so sent and not deposited had amounted to Rs. 1,275,883.66. This was during a period of 12 years. The Firm had not been, during this time, sustained by a cent of this money and had lived and survived on the overdraft facilities – a fact it is alleged was not known to Mr. Harasgama who from May 1962, after he joined the Firm, drew cheques on the Firm's Bank account with the Bank of Ceylon as and when required and found them honoured.

The Firm's upper limit of overdraft facilities with the Bank of Ceylon was Rs. 3.5 million and in August 1968 Mr. Harasgama required an upper limit of 5 million rupees and he made an application to the Bank of Ceylon (Bank) accordingly. On this occasion he had told the Bank that as at that date he had overdrawn only 2 million rupees. The application was thereafter processed and on 28th November 1968 Mr. Sivagnanasothy of the Bank of Ceylon who was the officer who processed that application found that the amount overdrawn had exceeded 3 million rupees and not 2 million as Mr. Harasgama represented. Mr. Sivagnanasothy had not suspected a time bomb hidden in this discrepancy, and as a matter of business communication informed Mr. Harasgama of what he had found in the overdrawn balance of the firm. Mr. Harasgama did not believe it. So, he hurried to the Bank with bank statements collected from his office to contradict Mr. Sivagnanasothy. Then the explosion. The Bank statements were found to be fake. Not one or two of them but the whole lot of them. Mr. Sivagnanasothy was right. The Firm had been diddled for years and years. The Firm had lost a million rupees and more and the Bank was itself a casualty. Thus started an investigation and allegations and counter allegations. The case from which this appeal arises is the result.

The Firm finding itself in this predicament put the blame for its loss on the Bank and perhaps desperately sued the Bank to recover its loss. This is what the Firm said : It had on its staff a Mr. Ingram who had joined the Firm in 1952 at a time when the Firm was in the hands of its founder, the Collette Family. He became the Firm's Sales Manager in 1965. The Firm also had subsidiaries one of which was Collettes Finance Ltd. Mr. Ingram was a Director thereof. He belonged to the

same community as the Collette's family and from even prior to 1956 the year from which the Firm's tale of woe begins had entrenched himself in the confidence of the Firm in his ability and integrity to such an extent that he became its principal and even exclusive banking officer entrusted with all banking business and deposits of the Firm's collections of cash and cheques. Even after Mr. Harasgama became the Firm's Managing Director in May 1962 he had not effectively changed Mr. Ingram's role in the firm. I say effectively because an officer in one Mr. Ranasinghe had been assigned the task of taking cash and cheques to the Bank with a fidelity policy of insurance being obtained in his favour. But in fact, Mr. Ingram had got Mr. Ranasinghe to side-step and carried on as before as the Firm's exclusive Banking Officer. Mr. Ingram had a brother in the Hong Kong and Shanghai Bank and also found himself a brother-in-law in 1956 in the Bank of Ceylon. The Bank supplied statements of accounts monthly till December 1962 when Mr. Harasgama introduced a change in that regard and required statements of accounts to be supplied weekly. It is the Firm's account of what had happened that Mr. Ingram from July 1956 had carried the Firm's cash ostensibly for deposit with the Bank, but on many occasions he had deposited the cash and cheques in his own pocket instead of in the Bank and covered it up with appropriate fabrications of the bank statements. To enable him to do this he had to get hold of the bank statements at some point in their passage from the Bank to the Firm and this he did, though there is controversy as to the point at which he did it. Even this was not enough for a successful fabrication. There was the necessity to get possession of monthly overdraft limit advices and annual confirmation of balance slips. These too were successfully intercepted.

Though there was an accountant he was only a figurehead. He had neither authority nor experience. In any case he had joined the Firm rather late in the day to have been in a position to become wise to what was going on. Mr. Lionel Fernando was for all practical purposes the Accountant. He has been there at all material times. He had the first opportunity and he had the resources to detect that the weekly statements and prior to that the monthly statemens were fakes and fabricated.

Anybody who has a bank account knows that the Banks send a statement usually monthly to its constituents of the state of his current account. It will show the debits and credits and entries relating to

withdrawals, deposits and transfers. This is the normal practice of the Bank. It is useful to the constituent. This did not absolve the constituent from keeping his own account of the transactions with the Bank. In fact the statement requires the account holder to check its entries carefully and bring to the notice of the Bank any error or discrepancy therein promptly. This can be done only if the account holder himself keeps his own account of the transactions. Anyway the Firm had done that and found no errors or discrepancy in the statements. That is because the statements had been fabricated. The Firm, however, blames the Bank for this fabrication. It says that this fabrication was possible because of the conduct of the Bank. The conduct alleged is that the Bank had handed over the monthly and weekly statements to Mr. Ingram instead of sending them by post as is usually done. This departure from practice has enabled or facilitated Mr. Ingram to obtain possession of the statements and fabricate them. If Mr. Ingram had not got possession of the statements this way he would not have been able to fabricate them and prevent the Firm's audit and accountants from detecting on the one hand the misappropriation of money and on the other, Mr. Ingram would not have been able to misappropriate moneys for more than a month the longest. The Bank is also blamed for Mr. Ingram having got possession of blank bank statement forms without which these fabrications would not have been possible.

But the Bank disowns reponsibility. It denies having handed over the statments. It admits that a Mr. Abeywickrama, Mr. Ingram's brother-in-law who was the Ledger Officer in the Bank for two spells of three months each in 1967 and 1968 respectively had handed over to Mr. Ingram the Firm's bank statements and also on a few other occasions but not totalling more than 75 statements. The rest of the statements are said by the Bank to have been sent by post. The statements handed over by Mr. Abeywickrama are said by the Bank, and it is not seriously disputed, to be genuine statements. It is also the case for the Bank that in whatever manner Ingram got possession of the Bank's statements, they were genuine statements at the time Mr. ingram got possession of them. The Firm on its part denies that the statements ever came by post and that they had always been collected by hand from the Bank. If in fact the Bank could establish that the statements had been sent to the Firm by post over the period or for a matter of that, even a few of the statements had been sent by post during the period, then the bottom will drop from the Firm's case.

There is, however, a finding by the Courts below that the statements had been in fact delivered by hand to Mr. Ingram by Mr. Abeywickrema. Counsel for the Bank strenuously challenges this finding and seeks support for the Bank's assertion that the statements other than the seventy five referred to were sent by post from an evidentiary presumption of fact. The Firm had not produced in evidence its inward mail register to disprove the Bank's assertion, though the Firm had listed it as a document to be marked in evidence.

I shall address myself to the question of the Bank's liability on the basis of the finding in the Court below that the statements had been delivered by hand over the period. The despatch of bank statements to customers, though a gratuitous service, is regulated by rules framed by the Bank itself for guidance of its staff. According to them they are despatched by an adjuster to whom the Ledger Officer sends the statements after they are prepared by him. In the case of branches of the Bank the statements are despatched by the Manager himself. They can, of course, be collected at the Bank by the customer himself or an authorised representative of the customer. In that event a Register is maintained for the person collecting the statement to sign an acknowledgment of its receipt.

Mr. Ingram had collected the statements from the Bank but not according to the rules In the result it may be said that Mr. Ingram had collected the statements in the Bank premises but not from the Bank. But then this is taking a very technical view of bank practice. If Mr. Ingram in fact had authority to collect these statements, it could not have mattered that the rules referred to had not been complied with. Mr. Ingram's brother-in-law on the Staff of the Bank had obliged Mr. Ingram by collecting the statements himself and handing them over to him. They had been collected from the Ledger Officer, when he was himself not the Ledger Officer in charge of the Firm's account.

It is this conduct of Mr. Abeywickrema that is at the root of this case. For the Bank it is contended that it is not bound by Mr. Abeywickrema's delivery of statements to Mr. Ingram because it was not part of his job in the Bank. That is to say it was not done within the scope of his employment or in the course of it. For the Firm it is said that the statements never came by post but were always collected by Mr. Abeywickrema and handed over to Mr. Ingram in pursuance of a conspiracy between the two of them to defraud the Firm. But the alleged complicity of Mr. Abeywickrema is only circumstantial. It can

well be that Mr. Abeywickrema was merely obliging his brother-in-law. It is a common experience that a customer will bespeak the good offices of a friend or an acquaintence in the Bank to expedite his business. It must not be forgotten that Mr. Ingram had occasion to come to the Bank practically everyday to deposit cash and cheques and attend to opening of letters of credit and so on. It is not that he came to the Bank only to collect statements. The point however is, assuming that the statements were never posted, whether Mr. Abeywickrema's conduct irrespective of his innocence or guilt is a breach of duty by the Bank, howsoever arising. Normally the statements would have gone by post. Their delivery in this manner was unauthorised though some customers collect them over the counter rather irregularly. But this is generally overlooked. Where an officer dishonestly or even innocently but in a manner that is not authorised and outside the scope of his employment delivers them over the counter, is the Bank liable to a customer for any loss occasioned thereby ? This is the crux of the problem. In *Foster v. Essex Bank* (81) (approved in *Giblin v. McMullen* (82)) the Cashier and Chief Clerk of the Bank fraudulently took and absconded with specie deposited by a customer. The Court held that the Bank was not responsible for their fraud or felony as when they abstracted the customer's gold from the cask in which it was contained, they were not acting within the scope of their employment ; and added :

> "The Bank was no more answerable for their act than it would have been if they had stolen the pocket book of any person who might have laid it upon the desk while he was transacting some business at the bank."

So that apart from negligence facilitating such an act on the part of the Bank, a Bank is not liable for the loss of a customer's goods by the fraudulent felony of members of its staff. What has happened here is no different at the worst to the statements being stolen by Mr. Abeywickrema. It must be the same if the delivery of the statements by a member of the staff was innocently done actuated by a desire to be helpful to the customer. It makes no difference that Mr. Abeywickrema innocently thought that Mr. Ingram was in fact taking these statements to the Firm. He may well have thought so, as there was never a protest over this long period of twelve years from the Firm about Mr. Ingram's bringing them from the Bank by hand. True it is Mr. Ingram was fabricating the statements and Mr. Abeywickrema's

conduct was facilitating Mr. Ingram to do so. But where was the negligence of the Bank apart from Mr. Abeywickrema's conduct to facilitate the fabrication by Mr. Ingram ? It is in evidence that it was administratively impossible for the bank to oversee the despatch of individual statements to the different customers. They are entered in a register in bulk by the adjuster. So that if a particular statement is abstracted and delivered separately there is no way of detecting it. This is not negligence on the part of the Bank. There is yet another aspect to this matter. There is no negligence without a duty. The ordinary duty of the Bank is to repay the money deposited and honour the customer's cheques. The sending of statements by the Bank is a gratuitous service. Where an expectation is created gratuitously in the customer that statements will come regularly from the Bank showing the state of his account the Bank is only obliged to do its best with what it has got. It must use all facilities of which it is possessed, but it is not bound to do more. It is not bound to provide at its own expense the means of ensuring a higher degree of performance. See *Giblin v. McMullen* (supra at p. 339). The relationship of the banker to customer is one of debtor and creditor only. It excludes any fiduciary relations in the banker with regard to the current account. See *Foley v. Hill* (83). This is because the banker does not hold the customer's money in trust for the customer. The banker is the borrower of the money which he is free to spend as he likes like any other borrower. Normally the Money Lending Ordinance would have applied here to bankers as well but for ss. 7 an 8 thereof as amended. So that there is no statutory duty for the bank even to keep accounts and much less to furnish statements of account. It is the business of banking that had brought into being these practices which do not make the banker a professional accountant for the customer. The statements being abstracted and delivered in an unauthorised manner to an unauthorised person by a member of the staff not acting within the scope of his employment without the Bank itself being negligent in facilitating such conduct, I have already said, does not involve the Bank in any liability for the loss sustained by the Firm by Mr. Ingram's misappropriation and fabrication of the accounts. This will be more so, if as Mr. Abeywickrema says the number of statements delivered was only seventy-five most of which were during two spells of three months each as stated earlier. If Mr. Abeywickrema's evidence is true then the genuine statements that went by post would have had to be intercepted by Mr. Ingram in their passage to the Firm. If that were so the fabrications have been committed without the Bank's unwitting

assistance to facilitate them. If the Bank cannot be faulted for the delivery, in the premises of the Bank, of the statements to Mr. Ingram by Mr. Abeywickrema the case for the plaintiff Firm in my view runs into a blind alley. What is the position arising from the failure on the part of the Firm to produce its inward mail register to disprove the assertion by the Bank that other than the seventy-five statements referred to the statements had always been sent by post in the normal course of its business? There is no direct evidence of Mr. Abeywickrema handing over the statements other than those referred to. It is only circumstantial. One circumstance that breaks the chain is the evidence of Bunny, the Ledger Clerk who says that no statements were collected by Mr. Abeywickrema from him. For the Firm it had been contended that the presumption arising from the failure to produce, the inward mail register is rebutted by exceptions that are applicable to the facts of this case. If I had to reach a decision on this aspect of the matter I am not sure that I would not have been inclined to apply the presumption. In the view, however, I have taken that taking the facts at its worst for the Bank in this regard, still no liability attaches to the Bank, I do not consider it necessary to decide this point.

The Courts below have reached a finding of fact that the bank statements had in fact not been posted but all along collected in the Bank premises by Mr. Ingram. The Bank sought to build an argument based on that finding of fact to the effect that Mr. Ingram had implied authority from the Firm to collect the statements. In the Court of Appeal, he was labelled an accredited representative. In support of this argument authorities were cited at length invoking such principles of law as estoppel among others. This, in the first instance, is wholly contradictory of the assertion by the Bank that the statements other than the 75 referred to had been posted and that the inward mail register, had it been produced, would have clinched that assertion. On an examination of the evidence it appears to me that this argument slurs over what has emerged as a basic fact that the statements, if they had been collected as they would appear to have been over a long period of time, had been so collected by Mr. Ingram from Mr. Abeywickrema who had delivered them to him in an unauthorised manner to oblige Mr. Ingram as a friend and brother-in-law. This line of argument compelled the Bank to bring in a symbiotic argument that the corporate veil of the Firm had to be lifted to look closer to ascertain the real standing of Mr. Ingram in the Firm's set-up. The argument is

that Mr. Ingram though the Sales Manager of the Firm from 1965 and a Director of Collettes Finance Ltd. from 1963 was in practice on a par with the Directors of the Firm by reason of his long association with the Firm and the trust and confidence thereby enjoyed by him. He was therefore not merely a Senior Executive, the argument ran, but in fact was a directing mind of the Firm capable in law to bind it by his conduct. Thus, when he took delivery of the statements from an officer of the Bank, it was in effect the same thing as the company or the Firm itself taking delivery. Anyway, at the least, it is said, Mr. Ingram thus became the accredited representative of the Firm to collect the statements though there was no written authority granted to him, by the Managing Director of the Firm. This line of argument opened the flood gates to no end of authorities and works on jurisprudence and the juristic nature of corporations and to decided instances of when and how the corporate veil could be lifted to look behind the stage. The submission, however, ran into inevitable difficulties in the factual matrix of the case. The Bank itself had not authorised the delivery of the statements to Mr. Ingram. They had been collected and delivered through what appears like a family arrangement. It was never the Bank's affirmative case that its Senior Executive Officers or anybody high up in its hierarchy was aware of the collection of the statements by Mr. Ingram and that they had given the practice its stamp of approval in the normal course of its business. There was no evidence given by any bank officer including Mr. Sirimane or Mr. Loganathan to attach that kind of character to Mr. Ingram's conduct and neither has such a position been even adumbrated in the pleadings or in the answers. I have touched on this in deference to Counsel who took some time in expounding the law on this matter. But it is unnecessary in my view to further consider this question or examine the authorities cited since there is no factual foundation for this contention. I have already said that the manner in which the statements were delivered and collected did not involve the Bank in any liability for the reasons referred to.

Then the Bank turned to yet another ground to absolve itself from this alleged liability namely to a wholesale fraud on the part of every director and every principal officer in the Firm other than the Accountant who it was said was only a figurehead as I had indicated. The argument is not that the Bank by any omission or commission on its part facilitated Mr. Ingram to commit a fraud on the Firm but the Firm itself from the Managing Director downwards to three other

directors and its accounts officer including M.. Ingram was engaged in defrauding the shareholders of the Firm and the Bank itself. Though the submission was vague as to the respective share of the spoils of the active participants in the fraud it was pointed in the direction that Mr. Ingram did not take the money beyond the front door of the Firm but made an about turn at the front door and found his way back to the room of the Managing Director. Support is derived for this from the admitted fact that from early 1966 the Stock Sheets of the Firm sent to the Bank which was the basis of the overdraft facility were dishonestly inflated to show a false stock position to obtain overdrafts which otherwise it would not have got. These Stock Sheets had been signed by two Directors Mr. Claessen and Mr. Wickremasinghe which was unusual for them. They should have been normally signed by Mr. Samuel, another Director but he did not. Dishonesty is alleged against the three of them. I have already pointed out that Mr. Claessen and Mr. Wickremasinghe might well have signed the statements not necessarily through dishonesty but through misplaced confidence in Mr. Ingram. To avoid risks of detection, it was said that Mr. Samuel required certificates of balances coming from the Bank's Auditors direct to the Firm's Auditors to be diverted to the Firm itself thus by-passing its Auditors. Then there were the monthly limit advices. These were not collected by Mr. Ingram. They should have come by post. But there is no evidence as to what happened to them assuming they came by post in ordinary course and there is no satisfactory evidence that they did not come by post or otherwise reach the Firm. The same was the position as to the fate of the Annual Confirmation Slips. The inference of fraudulent conduct on the part of the Managing Director himself acquires added weight, it is said, from the conduct of the Managing Director himself subsequent to the disclosure of the fraud by the Bank on 28 November 1968 in that he allowed Mr. Ingram to take flight from the Island on 29 November and deliberately delayed till 19 December to make a detailed complaint to the Police though he had sent a tentative communication to the Police on 7 December.

The point in this exercise is to invoke a principle that will absolve the Bank from liability if it were otherwise liable. The basic Roman Dutch Law maxim that enunciates this principle is ex turpi causa non oritur actio which in English Law finds its expression in the form ex dolo malo non oritut actio. The principle derived from this maxim, based as it is on public policy, is to deny the assistance of the Court to a plaintiff to

extricate himself from the difficulties in which his own improbity has placed him. See *De Zilva v. Cassim* (84). It must however arise in a transaction which is either illegal, immoral or in the nature of a fraudulent confederacy. See Broom's Legal Maxims–9th Ed. page 473. Does this principle then apply in the circumstances of this case ? I think not. The cases cited such as *Gray v. Barr* (85) wherein cases like *Colburns v. Patmore* (86) and *Hardy v. Motor Insurers' Bureau* (87) cited and referred to in the Court below are not applicable to the facts of this case. There is no general principle that whenever the plaintiff is the wrong-doer in his own conduct without being involved in a conspiracy he cannot succeed in his claim or that it provides a defence to the defendant. If it were otherwise it will lead to the absurd result that if you stole a bottle of whisky from me that I had purchased in the Duty Free Complex without a duty free entitlement, I cannot sue you successfully. If the plaintiff's Firm here is seeking to establish its own fraud as part of its cause of action against the defendant-Bank the maxim, of course, will apply. But the Firm is seeking to do no such thing. In fact though the claim of the plaintiff has magnitude in terms of money, the issue in the case has hardly any. The issue is in inverse ratio to the magnitude of the claim. The crux of the complaint of the Firm is this : It tells the Bank : "See what somebody in your Bank has done. He has handed over the statements of account to a scoundrel in our Firm. This has enabled him to misappropriate cash and cheques of the Firm and keep us in the dark as to the true position of our account by a fabrication of the statements." to which the Bank says "He had no business to do it. He had done it on his own. We are not bound by it." Whether this was a correct reply is what the Court has to decide. See also "Selected Essays" on the Law of Torts by H. S. Davis (1924) pages 558 to 571. I am of the view therefore that it was not necessary for the Bank to use this principle based on public policy to resolve this simple issue of alleged liability of the Bank. The Bank does not have a need to concern itself with the fraud committed by servants of the Firm, be they exalted or low. It is true that the Bank itself had been defrauded by inflated stock sheets. But it had not made any counter claim for the fraud practised and it has no direct link to the ground of claim of the Firm. It is therefore an error in my view to identify the Firm itself in the alleged fraud on the part of its servants. There is no direct evidence that Mr. Ingram misappropriated the monies of the Firm or that he fabricated the statements. It is the

circumstances that suggest strongly that he has. The fact of Mr. Claessen and Mr. Wickremasinghe signing the Stock Sheets which were false and inflated will make the Firm answerable to the Bank. But to argue that they by that fact itself are proved to have signed the statement fraudulently is not tenable. The principle of *Derry v. Peek* (88) has been invoked to clothe the conduct of Messrs. Claessen and Wickremasinghe in fraud. *Derry v. Peek* is much misunderstood. See *Le Lievre v. Gould* (89). I do not think that *Derry v. Peek* (supra) will assist when it comes to invoking the maxim ex turpi causa non oritur actio. As I have said this is simply a case of some servants, highly placed in the Firm misappropriating the monies of the Firm. Not one of them had committed a fraud on the Bank though the Firm is answerable to the bank for the conduct of its servants in respect of the Stock Sheets. Mr. Ingram and Mr. Samuel had deceived the two Directors into signing the Stock Sheets. Mr. Ingram's purpose in engineering false Stock statements was not so much to defraud the Bank as to defraud the Firm by providing a cover-up for misappropriation by him. It is by no means a case of fraudulent conspiracy between the Bank and the Firm. Hence the total inapplicability of the maxim referred to, to the facts of this case, which can be decided without regard to any such maxim. It is also a principle of law that where a dispute can be decided without invoking the principle of public policy it should be decided without invoking it.

The Bank then relied on a mortgage bond executed in favour of the Bank after the discovery of the fraud to furnish additional security as a condition for continued availability of the overdraft facility from the Bank. This, it was said, contains an admission by the Firm that the Bank does not owe anything to the Firm. For the Firm it was argued that the mortgage bond was given under duress and therefore the admissions contained therein are void. In the view I have taken and referred to earlier in this Judgment that the Bank has not facilitated the commission of the fraud by Mr. Ingram and so the Bank is not liable, it is not necessary to consider this submission.

would therefore dismiss this appeal with costs.

Appeal dismissed.