[IN THE PRIVY COUNCIL.]

1932 *Present :* **Lord Atkin, Lord Tomlin, and Lord Macmillan.**

ADAIKAPPA CHETTIAR *v.* THOMAS COOK & SON LTD.

Bank—Cheque guaranteed by manager—No authority—Action for money had and received—Bank as mandatory.

The plaintiff lent money to P by issuing four cheques to the value of Rs. 170,000 in favour of the defendant Bank under an arrangement entered into between the plaintiff, P, and the manager of the defendant Bank by which the proceeds of the cheque were placed to P's credit at the Bank.

Plaintiff received in return the cheques, sued upon, drawn by P in his favour and each endorsed by the manager of the Bank, as follows:—

Payment of this cheque is guaranteed: John Davis *per pro* Thos. Cook & Son (Bankers), Ltd.

Held, that the manager had no authority in terms of his appointment to bind the Bank in respect of the guarantee and that the Bank was not liable.

Held, further, that the Bank was in the position of a mandatory, who has fully performed his mandate before any mistake had been discovered.

November 25, 1932. Delivered by LORD ATKIN.—

THIS is an appeal from the Supreme Court of the Island of Ceylon[1] in an action in which the plaintiff sought to recover from the defendants the sum of Rs. 170,000 on four cheques or alternatively as money had and received.

The action was tried in the District Court of Colombo, where the plaintiff recovered judgment. On appeal to the Supreme Court the judgment of the District Judge was reversed and the action dismissed with costs. The plaintiff is a money-lender carrying on business at Colombo, and the dispute arises out of a series of transactions in which the plaintiff, one M.S. Peiris, now deceased, carrying on business as Don Philip & Co., and, as is alleged, the defendants, acting through John Davis, their acting manager, were engaged. Peiris was a trader who before the events in issue had become insolvent; his certificate had been suspended for seven years, but he continued to trade through a former servant in the name of Don Philip & Co. In 1924 the defendant Bank was registered. It took over the banking business of the well known tourist agency. The agency business and the banking business were conducted in the same building. Mr. Smith controlled both businesses; but the banking business under Smith's general control was managed by Mr. John Davis. In 1925 Mr. Davis was given a power of attorney by the Company's general representative in the East, Mr. S. E. Humphreys. One of the questions in idispute is whether the terms of the power of attorney authorized Davis to bind the bank to perform the obligations which the plaintiff seeks to enforce. Mr. Peiris, as Don Philip & Co., appears to have had dealings with the defendant Bank before Davis came on the scene. He appeared to be doing an active business as a produce broker, and Davis allowed him a small overdraft. In June, 1925, Davis made Peiris an advance against shipping documents of tea. The consignees refused to take up the documents, and the result of the transaction was that Peiris' account was overdrawn to the extent of over Rs. 16,000. Mr. Smith appears throughout to have disapproved of advances being made to Peiris, and he instructed Davis to take steps to have the overdraft paid off. In October Peiris borrowed the money from one Ramachandra, who was only willing to advance on the terms that the Bank guaranteed payment. On October 17, 1925, Peiris drew a cheque on the defendant Bank for Rs. 17,000 in favour of Ramachandra, and Davis wrote on the back of the cheque "Good for payment on December 17, 1925", or words to that effect, and signed it *per pro* Thos. Cook & Sons (Bankers), Ltd., John Davis. In exchange for this document Ramachandra made the agreed advance of Rs. 16,500 by his cheque of October 17. On December 17 Peiris' account was only in credit Rs. 4. Davis could not ordinarily allow the cheque to be paid without debiting Peiris' account and thus re-establishing the overdraft which he had been directed to end. Accordingly, when the cheque was met, Davis directed a transfer

[1] 31 *N. L. R.* 385.

to Peiris' account of a credit entry "Cash ex selves, 17,000", and made a fictitious entry in the Bank's Till book "Safe, 17,000," which served to avoid discovery of what had taken place.

This was obviously but a temporary device and measures had to be taken to give a better appearance of regularity to the transaction. On December 29, 1925, Peiris entered into the first of a series of transactions with the appellant which culminated in January, 1928, in the negotiation of the documents in suit. Peiris asked the appellant to cash a cheque of Don Philip & Co. drawn on the bank; the appellant refused, but on being told on a later occasion that the bank would agree to pay the cheque on a future date, he agreed. Accordingly Peiris gave the appellant a cheque dated December 29, 1925, for Rs. 20,000, drawn in the name of Don Philip & Co. on the bank, endorsed "Good for payment on January 12, 1926, *per pro* Thos. Cook & Son (Bankers), Ltd., John Davis". In return the appellant gave to Peiris a cheque of even date in favour of Don Philip & Co., which was cleared through the Bank. Davis gave to the appellant at the same time a memorandum, "Received for credit of Don Philip & Co. cheque on National Bank of India for Rs. 20,000," with the same signature as to the indorsement. Rs. 3,000 was placed to the credit of Don Philip; the balance was used to put the Bank books in order by cancelling the fictitious entry of "17,000 in safe." On January 12 the Don Philip account was not in sufficient credit to meet the guaranteed cheque. Another fictitious entry had to be made, until January 21, 1926, when another similar cheque transaction was entered into for Rs. 37,500, with a bank guarantee for payment on February 4. This was further met by a third cheque transaction on February 4 for Rs. 18,000, payable on March 5.

So the transactions went on month by month: sometimes the cheques being plainly renewals in whole or in part: sometimes constituting fresh advances; in all cases where there was not immediate renewal the account of Don Philip was kept in credit by a fictitious entry until the necessary cheque arrived of the appellant.

Some of the apparent increase in advances no doubt represented interest; in other cases the interest charges were paid by separate cheques of Don Philip & Co. Between December 29, 1925, and January 3, 1928, 75 cheques had been exchanged, varying in amount from Rs. 5,000 to Rs. 75,000. In May, 1927, the appellant changed the system and thenceforth drew his cheques in favour of Thos. Cook & Son, crossing them "Account payee only". This seems to have been the result of a local case in which a person who received cheques drawn in favour of his employers and so crossed was held to be unable to negotiate them so as to make the drawer liable. The effect, if any, of this change of procedure will be considered later. In September, 1927, Peiris came to the appellant with a request that he would not present the cheques indorsed by Davis, but would take in substitution a cheque drawn by Don Philip bearing the due date, and on payment of such cheque would return the indorsed cheque. The story told by Peiris was that in this manner he would escape paying

commission to the Bank. Davis, on being applied to, confirmed this remarkable explanation, and the appellant acceded to the request. We now come to the final stage of these transactions.

On January 3, 1928, there were outstanding in the appellant's possession three cheques of Don Philip indorsed by the Bank for payment on various days:—

(1) December 17, 1927, for Rs. 35,000, payable by the Bank on January 16, 1928.
(2) December 23, 1927, for Rs. 50,000, payable by the Bank on January 7, 1928.
(3) December 23, 1927, for Rs. 50,000, payable by the Bank on January 21, 1928.

But Davis had ceased to enjoy the Bank's confidence. Some inquiry into his alleged practice of giving guarantees on behalf of the Bank had been made in October, though nothing had been done. But on December 29, 1927, Mr. Humphreys learned that Davis had written a letter to another Bank guaranteering the production of certain shipping documents (apparently a completely genuine transaction). He suspended Davis and there and then revoked his power of attorney, marking it as cancelled.

On January 3 the balance of Don Philip's account was only Rs. 652. The outstanding cheques would have to be met. The appellant was willing to renew and even to make a fresh advance on receiving the usual Bank guarantee. January 3 was a bank holiday. The appellant's manager, Somasunderam, met Peiris and Davis at Peiris' warehouse. Somasunderam received four cheques drawn by Don Philip in favour of the appellant and dated January 3, 1928, for Rs. 35,000, Rs. 50,000, Rs. 35,000, and Rs. 50,000, each indorsed respectively. "Payment of this cheque on March 5 (6, 7, and 8), 1928, guaranteed, *per pro* Thos. Cook & Son (Bankers), Ltd., John Davis." In return Somasunderam gave to Davis or Peiris cheques dated January 3, 1928, for Rs. 35,000, Rs. 50,000, Rs. 50,000, and Rs. 20,000 drawn in favour of Thomas Cook & Son (Bankers), Ltd., or order, crossed "Not negotiable, payee's account only," and a fifth cheque drawn as open cheque to Don Philip & Co. for Rs. 15,000, as Peiris said he desired that amount of cash. In respect of the cheque for Rs. 20,000 and the open cheque for Rs. 15,000, Davis at Somasunderam's request gave a receipt, "Received to our credit the sum of Rs. 35,000 as per reverse, *per pro* Thomas Cook & Son (Bankers), Ltd., John Davis", and on the reverse—

"Rs. 15,000 cash
20,000 cheque balance

Rs. 35,000."

On January 4, 1928, Peiris or someone on his behalf paid into Don Philip's account with the Bank the four cheques making Rs. 155,000. No one seems to have thought it unusual that he should be paying in cheques drawn to the order of the Bank. The cheques were stamped on

the face with Thomas Cook's stamp, apparently at the Clearing House or for Clearing House purposes, and were credited to Don Philip's account and served to meet the outstanding cheques falling due in January, for which, as before, the unendorsed cheques of Don Philip were substituted. In March the cheques for Rs. 155,000 were presented, but were returned "Account closed". On January 27, 1928, the Bank had closed Don Philip's account and had paid over the then credit balance of Rs. 825.

In proceeding to discuss the liability of the Bank, it has to be remembered that the Courts have negatived any lack of good faith on the part of the appellants, and that Davis was not cross-examined to suggest that he derived any personal advantage from his proceedings. A specific issue as to whether the plaintiff or his agents had knowledge of a conspiracy by Davis and Peiris to defraud the Bank was negatived by the trial Judge.

The case against the Bank was made under two heads:—

(1) The Bank were liable on the contract contained in the cheques because Davis had actual authority to make such a contract.

(2) If no such contract was in fact made, then the Bank were liable in the amount of the cheques for money had and received either as money paid for no consideration, or on a consideration which had wholly failed, or for money paid under a mistake of fact.

The first question to determine is what was the contract made between the parties. The plaintiff alleged that he lent the money to the Bank. In support of this view he relied on the fact that his later cheques, including those that he gave on the transaction in question, were drawn in favour of the Bank, marked "Not negotiable" and "Payee's account only". Their Lordships, however, are clearly of opinion that the money throughout was lent to Peiris. He drew the cheque in repayment, and he paid the interest. The plain business was that money was lent to Peiris and purported to be guaranteed by the Bank. Had then Davis actual authority to guarantee payment of these loans by Peiris? This depends primarily upon the construction of the power of attorney, though it is also possible that beyond the express powers of the power of attorney there might be actual implied authority necessarily arising from the service of Davis as acting manager of the Bank. The plaintiff faintly suggested such an authority, but mainly relied on the express words of the power of attorney. Oddly enough, both parties contended that the words on the cheques were an acceptance of the cheque. The plaintiffs sought to read the word "accept" into clause 4 of the power of attorney, suggesting that it had been omitted by a copyist's error in copying the clause from the power of attorney given to Mr. Humphreys on August 1, 1924. Though this construction found favour with the District Judge, it appears to their Lordships quite inadmissible. There is no principle of construction which permits a document contrary to its actual wording to be read as though it followed a proposed precedent unless between the parties it has been rectified or at least is such as would by the Court be rectified. In the present case, however, there seems to be little doubt that the omission was intentional. The defendants, relying upon the omission, seek to make the promise an acceptance in order to place it

outside the authority given by the document. They say that the writing was in the terms of section 17 (1) of the Bills of Exchange Act, the signification by the drawee of his assent to the order of the drawer, and that as by section 19 an acceptance may be qualified as to time, all the requirements of a valid acceptance are present. So far as is relevant to this point the statutory provisions in force in Ceylon at the material dates were equivalent to those of the Bills of Exchange Act, 1882. No doubt as between the immediate parties to a bill an acceptance may express only a contract of guarantee, which in reality, as has been said, this was. No doubt also a cheque may be accepted, however unusual such a transaction is. Anything less like the ordinary business conception of an acceptance in form and intention than this contract it would perhaps be difficult to find. Their Lordships find it unnecessary to decide whether this was an acceptance or not, for whatever it be called it appears to them not to be within any of the express powers given by the power of attorney. It was said to be an exercise of the power to " endorse ". In their Lordships' view, this power of attorney should not be construed as giving Davis the power to sign otherwise than as drawer or acceptor or holder so as to cause the Bank to " incur " the liabilities of an indorser " under section 56 of the Bills of Exchange Act. It never was intended that the Bank servant should " back " bills on behalf of the Bank. Equally unwarranted is the suggestion that the power to " pay " cheques, &c., involves the power to promise to pay. The general words in clauses 9 and 10 must be read with the special powers given in the earlier clauses, and cannot be construed so as to enlarge the restricted powers there mentioned. It follows that Davis had no actual authority given him by the power of attorney to guarantee payment of these loans by Peiris. Their Lordships are also quite satisfied that his position in the Bank was not such as to make it necessary to imply the power to enter into these transactions on the part of the Bank. They appear on the evidence and according to ordinary banking usuage to be quite outside a manager's general authority. This last consideration would dispose of any question of ostensible authority; but as the plaintiff twice examined the power of attorney and plainly relied only on the evidence of actual authority, any reliance on ostensible authority was properly negatived in the Courts below, and was not pressed before their Lordships.

It remains, therefore, to consider the question of the plaintiff's rights if any, on the footing that no contract was in fact made between him and the Bank. If, as the plaintiff contended, the apparent contract was that the money had been lent to the Bank, or that the Bank otherwise was to have the disposition of the money, there could be no doubt as to the plaintiff's right. He would have performed his part of the contract, relying upon a supposed effective promise of the Bank to repay. On proof that such promise was not made he could recover the money as having been paid without consideration. Whether he could recover it as money paid under a mistake of fact is not so clear. It is necessary to establish this cause of action that the mistake should be as to some fact causing a liability to pay. Cash handed over under a voluntary

contract hardly comes within that description. It was ingeniously contended by Counsel for the plaintiff that while plaintiff's cheque may not have been handed over under any mistaken belief that he was bound to part with it, payment of his cheque was made under the mistaken belief that he was bound to honour it under a binding contract with the Bank. It seems unnecessary to discuss this refinement, for if the Bank received the money at their own disposal under a mistake by the plaintiff as to the supposed agent's authority, they would have to return it. But, in fact, the Bank received the money on the terms that it should be placed to Peiris' credit. The transaction was one by which the supposed contract as between the three parties required that the money represented by the cheque drawn in favour of the Bank should be made available to Peiris in his account kept with the Bank. In no other way in the circumstances could Peiris fairly become indebted to the plaintiff so as to be liable on the cheque which Peiris drew and the Bank guaranteed or become liable to pay interest, as in fact he did. In no other way could the cheques of the plaintiff serve to effect a renewal (as undoubtedly was intended) of the outstanding cheques for Rs. 135,000 replaced in accordance with the practice of the parties by the cheques of Peiris alone. The Bank dealt with the plaintiff's cheques precisely as they were intended to deal with them under the supposed contract. They collected them for Peiris' account, placed the entire proceeds to Peiris' credit, and out of the proceeds the outstanding cheques in favour of the plaintiff were met. The Bank are in the position of a mandatory who has fully performed his mandate, before any mistake has been discovered. In these circumstances the Bank are not liable to repay money to the plaintiff which they have disposed of according to the plaintiff's wishes in accordance with the supposed contract.

As a final bit of salvage, Counsel for the plaintiff contended that at any rate as the result of the series of transactions the Bank received, from the plaintiff's money, payment of the original Rs. 17,000 which in December, 1925, they had paid to Ramachandra. The answer to this is that that advance had long before been repaid to the Bank by Peiris by the numerous credit payments which he had made since that date in accordance with the ordinary principles applicable to appropriation of payments.

The simple result is that the plaintiff is found to have advanced money to Peiris on an invalid security, and that he and not the Bank must bear the loss. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

PRINTED AT THE CEYLON GOVERNMENT PRESS, COLOMBO