Present: Fisher C.J. and Drieberg J.

ADAICAPPA CHETTY *v.* THOS. COOK & SON.

64—D. C. Colombo, 27,296.

Cheque—Loan transaction—Payment guaranteed by agent of bank—Liability of bank—Authority of agent—Power of attorney—Money had and received—Stamp Ordinance, No. 22 of 1909, s. 37 (1)—Document filed with plaint—Registration of Business Names Ordinance, No. 6 of 1919—Trading in partnership.

The plaintiff, in pursuance of an agreement to lend money to P, gave him certain cheques drawn in favour of the defendant bank, the proceeds of which were placed to P's credit at the bank. At the same time P drew four cheques in favour of the plaintiff, which were endorsed by D, an agent of the bank, as follows: "Payment of cheque guaranteed—*Per pro* THOS. COOK & SON (BANKERS). (*Signed*) D."

Held (in an action on the cheques brought by the plaintiff against the bank), that the cheques were converted into bills of exchange by the endorsement of D, but that the bank was not liable as D had no authority to bind the bank.

Held also, that the plaintiff had no cause of action to recover the amount of the cheques from the bank as for money had and received or money paid under a mistake.

Held further (on a construction of the power of attorney given to D by the bank), that the power to draw and endorse bills of exchange did not include authority to accept a bill.

Where a document which has been filed with the plaint is referred to in the course of the evidence and considered by the Judge, it must be deemed to have been admitted in evidence, and no objection can afterwards be raised against its reception on the ground that it has not been properly stamped.

Where a Chetty managed the business of his father acting as his agent, the father and son did not constitute a "firm" as defined in the Registration of Business Names Ordinance, No. 6 of 1918.

THIS was an action brought by the plaintiff to recover from the defendant bank a sum of Rs. 170,000 on four cheques drawn by a person trading as Phillip & Co., on the bank in favour of the plaintiff and endorsed by an agent of the bank as follows:—

> "Payment of this cheque on March 5, 1928, guaranteed—*per pro* THOMAS COOK & SON (BANKERS), LTD. (*Signed*) J. M. DAVIS."

The claim was based upon four causes of action. In the first cause of action, the plaintiff stated that in consideration of a sum of Rs. 170,000 paid to the bank by the plaintiff the bank agreed to pay him the amount of the cheques.

The first alternative cause of action treated the endorsement on the cheques as an acceptance of bills of exchange and claimed the money on that basis.

The second alternative cause of action was a claim based upon a promise by the bank to repay the money.

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The third alternative cause of action was for money had and received by the bank.

The fourth alternative cause of action alleged that under the mistaken belief that the bank had accepted the cheques and agreed to pay the sums due on them, the plaintiff paid the said sum of money of Rs. 170,000 to the bank. The learned District Judge found against the defendant on the grounds of money had and received and money paid under a mistake and gave judgment in favour of the plaintiff for a sum of Rs. 155,000.

F. A. Hayley, K.C. (with him *Keuneman* and *Ferdinands*), for defendant, appellant.—The fact that certain of the cheques which comprised the total sum of Rs. 170,000 in dispute were drawn in favour of the defendant bank does not alter the real nature of the transaction, which was a loan to Peiris by the plaintiff, who was under the impression that Davis' guarantee bound the defendant bank. Davis had in fact no power, express or implied, to bind the defendant bank by his acts on January 3, 1928. His power of attorney on behalf of the bank had been cancelled on December 30, 1927, and the fact that the plaintiff had no notice of this cancellation does not alter the case. Davis' endorsements were *per procuration* and, under section 25 of the Bills of Exchange Act, No. 18 of 1882, an endorsement *per procuration* puts a person on his notice with regard to any defects in an agent's power to bind his principal.

The learned District Judge has held that Davis' guarantee of payment on the face of Peiris' cheques constituted an acceptance by Davis of those cheques, each of which was thus converted into a bill of exchange payable at a future date. If that be so, the plaintiff's action on the " bills of exchange " is not maintainable, as they were not properly stamped in accordance with the requirements of the Stamp Ordinance, No. 22 of 1909 (Schedule A, item 13).

The terms of Davis' power of attorney gave him authority only to " draw, endorse, retire, pay, or satisfy " bills of exchange, so that even if his power of attorney had been in force on January 3, 1928, he would have had no authority under its terms to " accept " bills of exchange on behalf of the bank. This is made clear when Davis' power of attorney is compared with that given to his superior officer Humphreys, who is specifically given authority to " accept " bills of exchange in addition to the restricted powers conferred on Davis.

The alternative cause of action for money had and received by the bank is not available to the plaintiff. Such a cause of action presupposes an agreement which, if properly fulfilled, would have created good consideration (*Aitken v. Short*[1]. In this case the bank received no consideration whatever. Nor can the plaintiff plead

[1] *52 J. L. Exch. 321.*

payment by mistake. The mistake should be one which led the plaintiff to suppose that he was under a legal obligation to pay the money to the bank (*In re Bodaga Co., Ltd.* [1] and *Chambers v. Miller* [2]). The proper test to be applied where payment by mistake is pleaded is the purpose for which the money was given to the defendant. In this case, the plaintiff gave money to the bank for the specific purpose of paying it into Peiris' account. As soon as this was done, the bank's obligations were discharged. This circumstance differentiates the present case from *Jones v. Waring & Gillow*, [3] where the plaintiffs had paid the defendants money for what they thought was a car contract which, if it had existed in fact, created a legal obligation to pay (*vide* also *East India Co. v. Tritton*,[4] *Kerrison v. Glyn, Mills, Curry & Co., Ltd.*[5]). The bank would not be liable under the present circumstances unless the money was still in its possession.

H. V. Perera, for plaintiff, respondent.—Assuming for the moment that Davis had authority to bind the bank, it is submitted that the bank's obligation is a primary one, inasmuch as privity of contract was established between the plaintiff and bank.

Davis' guarantee of payment in the face of Peiris' cheques entitled the plaintiff to look to the bank for payment in the first instance. The learned Judge was right in holding that Davis' endorsement converted Peiris' cheques into bills of exchange. The acceptance of a cheque, though unusual, is legal (*Keene v. Braid*,[6] *Bellamy v. Marjoribank*,[7] *Robinson v. Bennet*,[8] and *Paget on Banking (3rd ed.), p. 192*). The objection to the contravention of the requirements of the Stamp Ordinance, No. 22 of 1909, comes too late. Under section 37, once a document is "in evidence" the objection that it has been improperly stamped is deemed to have been waived.

Even if Davis had no authority, the evidence shows that his superior officers acquiesced in his conduct. Davis acted for the bank's benefit, and the bank did in fact benefit with regard to the cheques totalling Rs. 155,000 which were drawn in its favour. The bank had discretion to use the money which went to its own account as it liked. So long as the money went in the first instance to the bank for whom it was intended, it was a matter of no concern to the plaintiff what the bank did subsequently with the money. The evidence shows that each cheque which was paid to the bank was used to pay off Peiris' overdrafts to the bank, which received benefit from the transaction to that extent.

With regard to the question whether Davis did in fact have express authority to bind the bank, I submit that his power of attorney should be construed *per se*, and not with reference to the

[1] *(1904) 1 Ch. 276.*
[2] *(1862) 13 C. B. (N. S.) 125.*
[3] *(1926) A. C. 670.*
[4] *3 B. and C. 280.*
[5] *(1911) 81 L. J. K. B. 465.*
[6] *(1900) 8 C. B. (N. S.) 372, at p. 380.*
[7] *(1852) 7 Ex. 389.*
[8] *2 Tounton 388.*

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force of other powers of attorney. Davis was given authority to "pay cheques." He therefore had authority to undertake to pay a customer's cheque at a future date, irrespective of the condition of that customer's account at the future date.

In any case, an agent can have implied authority to bind his principal in addition to the express powers conferred upon him. Davis was *de facto* manager of the bank, which honoured previous guarantees made by him, and which therefore held him out as competent to act as he did. Where a principal knows that his agent is acting beyond his authority, and closes his eyes to it, the principal cannot plead that his agent has exceeded his powers (*Thompsons v. Bell* [1]). A bank is bound by the fraudulent misrepresentations of its manager acting in the ordinary course of business (*Berwick v. Joint Stock Co. Bank*,[2] *Sawyer v. Francis* [3]).

The transaction which is the subject-matter of this suit was one of a series of similar transactions, the earlier ones of which had been adopted by the bank. The revocation of Davis' authority on January 3, 1928, being a secret act of the bank which had not been brought to the plaintiff's notice is therefore of no avail to the bank. A principal is bound by his agent's acts after the termination of the agency, unless he gives notice to outsiders to whom the agent has been held out as such in previous transactions of a similar nature (*Willis v. Joyse*, [4] *Bowstead on Agency* (*7th ed.*), *article 143*).

The bank's position is that it received the money from the plaintiff to be used in a particular way. I therefore contend that even if Davis had no authority to bind the bank, the bank cannot adopt a part of the plaintiff's contract with Davis and repudiate the rest (*Hovil v. Pack*,[5] *Bristowe v. Whitman*[6]).

The plaintiff is entitled to rely on his plea of payment by mistake. His payment was not a voluntary one. The payment was, at the lowest estimate, based on a supposed contract creating a supposed obligation. The principal of *Jones v. Waring & Gillow* (*supra*) therefore applies.

[FISHER C.J.—What is the plaintiff's position if we hold that the bank's obligation is not primary, but secondary ?]

A surety can be sued in the first instance unless he claims his benefit (*Maasdorp 3359*).

Hayley, K.C., in reply.

January 27, 1930. FISHER C.J.—

The claim of the plaintiff in this case is primarily founded on certain transactions which took place on January 3, 1928. On that day, which was a bank holiday, one Peiris, who carried on

[1] (*1854*) *L. J. 23 Ex. 321.*
[2] (*1867*) *L. R. 2 Ex. 259.*
[3] (*1877*) *3 A. C. 106.*
[4] (*1911*) *104 L. T. 576.*
[5] (*1806*) *7 East. 166.*
[6] (*1861*) *9 H. L. 399.*

business under the name of Don Phillip & Co. and had an account at the defendant bank under the name, one John Davis, who up to December 30, 1927, had held a power of attorney on behalf of the defendant bank, and Somasunderam, the agent of the plaintiff, who was then away in India, met in a godown belonging to Don Phillip & Co.

Since December 29, 1925, the plaintiff had been lending money from time to time to Peiris on cheques drawn on the defendant bank, Davis facilitating the loans; and the evidence of David and Somasunderam (Peiris having died before the hearing of the action) shows that the object of the meeting on January 3 was that Peiris might obtain a loan of Rs. 170,000. On this occasion five cheques for a total amount of Rs. 170,000 were drawn by Somasunderam—four cheques in favour of the defendant bank for a total amount of Rs. 155,000 and one in favour of Peiris for Rs. 15,000 which Peiris forthwith cashed at the plaintiff's office. Four other cheques for a total sum of Rs. 170,000 were drawn on the same occasion by Peiris on the defendant bank in favour of the plaintiff, each of which was endorsed by Davis " Payment of this cheque (on March 5, 6, 7, and 8, respectively) guaranteed. *Per pro* THOMAS COOK & SON (BANKERS). (*Signed*) JOHN DAVIS." On the presentation of these cheques the defendant bank refused to cash them, Don Phillip & Co.'s account having been closed on January 27, and on this refusal the first claim of the plaintiff is founded. One of the alternative claims put forward by the plaintiff, the second alternative claim, was that the Rs. 170,000 comprised in the five cheques drawn by Somasunderam was a loan to the bank, and the learned Judge apparently formed the opinion that such was the case (see last part of the answer to issue 15). It is not easy to understand the reason for such a transaction, from which the defendant bank got no benefit under the circumstances, and the evidence points to the conclusion that the loan was by the plaintiff's agent to Peiris. It is clear that Rs. 15,000 of the Rs. 170,000 was paid in cash to Peiris. It is clear too that he paid interest to the plaintiff to the amount of Rs. 5,997.09. It is also clear that after the bank reopened Rs. 155,000 was credited to Don Phillip & Co.'s account, the four cheques comprising that amount having been presumably taken to the bank by Peiris. It is also clear that in so crediting the amount of the cheques the bank acted in accordance with Somasunderam's intention when he drew the cheques and in accordance with the practice which had prevailed for several months with regard to cheques similarly drawn. It is furthermore clear that Peiris operated on the proceeds of these cheques, very largely in favour of the plaintiff, and the learned District Judge has so found (see answer to issues 13 and 14), and when Don Phillip & Co.'s account was closed the whole of that credit, except Rs. 825.21

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which was then paid out to Peiris, had been dealt with by Peiris for his own purposes or for the purposes of Don Phillip & Co. It seems to be clearly established therefore that the Rs. 170,000 comprised in the five cheques drawn by Somasunderam was a loan to Peiris.

That being so, the question of the endorsements on the cheques drawn by Peiris becomes material. As to the effect of the endorsements, it would seem to be clear that the endorsements constituted acceptances of bills of exchange and that the four cheques, from being merely cheques under section 73 of the Bills of Exchange Act, 1882, which is the enactment applicable to the case, became bills of exchange under section 3 (1) of the Act, and on that footing the plaintiff claimed that the liability of the defendant bank is a primary liability notwithstanding the use of the word "guaranteed." The appellant's Counsel contended that these four documents being bills of exchange, no action could be brought on them inasmuch as they were not stamped in accordance with the requirements of the Stamp Ordinance, No. 22 of 1909 (see Schedule A, item 13). I think, however, that this contention is met by section 37 (1) of the Ordinance. These documents were put to two witnesses without any objection having been taken; they have been considered and dealt with by the learned District Judge for the purposes of his judgment, and they were therefore in my opinion "admitted in evidence" within the meaning of the sub-section last referred to. The point, however, is immaterial, if the view I take of this case is correct.

The substantial objection raised to the claim of the plaintiff on these documents is that the endorsements do not bind the defendant bank because Davis was not their agent for the purpose of making them. On this part of the case the important question is whether on January 3 Davis had authority to bind the defendant bank by the endorsements which he made. He certainly had no actual or express authority to bind the defendant bank. On December 30, owing to the discovery of Mr. Humphreys that he had given a guarantee to another bank in respect of some shipping documents, he had been summarily suspended, his power of attorney had been cancelled, and although after that date he occasionally drew pay, probably in the nature of a subsistence allowance, and attended the bank occasionally when his attendance was essential in connection with business in which he had a hand, on January 3 he had, in the words of the learned District Judge, "for all practical purposes been dismissed."

As against this it is contended that Davis was acting within the powers which had been vested in him by the power of attorney and that inasmuch as the plaintiff had no notice on January 3 of the cancellation he is entitled to hold the bank responsible on Davis '

endorsements. The authority of Davis depends upon the construction of the power of attorney, the terms of which were known to the plaintiff, who relied upon them in his dealings with Davis. That is clearly established by the evidence. On three occasions the plaintiff had inspected the power of attorney, and on one occasion he took a legal opinion upon it, though it does not appear that he specifically asked his legal adviser whether endorsements in the terms of those under consideration would bind the bank. He, moreover, inspected the power of attorney of Mr. Humphreys, who had given the power of attorney to Davis. He said in his evidence "I saw the power of attorney (Davis') myself and I explained to Somasunderam that I had seen it and told him that Davis had the power to act for the bank."

Clause 4 of the power of attorney is the material clause to be considered. It gives power to "draw, endorse, negotiate, retire, pay, or satisfy any bills of exchange, &c."; the power to accept, which figures in the corresponding clause of Humphreys' power of attorney (clause 7), is not included in clause 4 of that of Davis It was argued that the two final clauses of Davis' power of attorney, which are in general terms, supply the omission. These two clauses must in my opinion be read subject to the specific provisions in clause 4 and cannot be construed as making good the omission of the word "accept" in that clause. In my opinion, therefore, the power to accept bills of exchange on behalf of the bank was not vested in Davis by his power of attorney. As to the plaintiff not having received notice of the cancellation of the power of attorney, the point seems in the circumstances to be immaterial. No question of holding out or estoppel is involved, and absence of notice would at the most merely entitle the plaintiff to assume that the power of attorney was still in force.

Apart from the plaintiff having had express notice of the limitation of Davis' authority, an argument was addressed to us by the appellant's Counsel that section 25 of the Bills of Exchange Act, 1882, would be an obstacle to the case of the plaintiff. It was contended in reply by the respondent's Counsel that, having regard to the fact that section 97 (3) (*b*) of that Act provides that the Act shall not affect the provisions of the Companies Act, 1862, and amending Acts, section 77 of the Companies (Consolidation) Act, 1908, was an answer to the appellant's argument. That section, however, merely shows what signatures on promissory notes or bills of exchange which purport to have been made, accepted, or endorsed on behalf of a Company will bind a Company. It does not affect the operation of section 25, and cannot, in my opinion, prevent a Company from availing itself of the protection of section 25 where, as in this case, the signature is by procuration. But it is not necessary to pursue this question. There was a further contention

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that the bank was bound by Davis' endorsement on the ground that he was the *de facto* manager of the bank. There was no specific issue on this point, nor does the evidence support it. In any case the position taken up by the plaintiff was, as pointed out by the learned District Judge, that he relied on Davis' authority under his power of attorney. In my opinion plaintiff's contention that the bank is bound by the endorsements cannot prevail.

But there were further alternative grounds, which admittedly cannot support the claim to recover the Rs. 15,000 received by Peiris, upon which the plaintiff sought to impose liability on the defendant bank. They are the third and fourth alternative grounds of claim in the plaint. The third ground is that " on the said January 3, 1928, a sum of Rs. 170,000 belonging to the plaintiff passed into the possession of the defendant company without any consideration proceeding from the defendant company to the plaintiff and the defendant Company became liable to repay the said sum of money to the plaintiff . . . . " The answer to this claim lies, in my opinion, in the fact that the Rs. 170,000 was a loan to Peiris. The Rs. 155,000 was impressed with an obligation on the bank to place that amount at the disposal of Peiris, and that obligation was discharged.

The fourth ground is that " the plaintiff in a mistaken belief that the defendant had accepted the said cheques . . . . had agreed to pay to the plaintiff or his order the said several sums . . . . paid to the defendant company a sum of Rs. 170,000," and the plaintiff claims that he is therefore entitled " to claim repayment from the defendant company of the said several sums of money aggregating the sum of Rs. 170,000 as money had and received by the defendant company for the use of the plaintiff or as money paid for a consideration which has failed or as money paid under a mistake of fact." To this claim also, in my opinion, the fact that the money was a loan to Peiris is an answer. It is no doubt true to say that had the plaintiff's agent not been under the impression that he was secure in making the loan by reason of the endorsements made by Davis he would not have lent the money to Peiris. But there was no evidence to show that the money was advanced to Peiris under a mistaken belief that there was a legal obligation on the plaintiff to make the advance. It was a case of the plaintiff doing a thing which he was not bound to do by reason of the fact that he thought himself secure in doing it. It is clear that no part of the Rs. 155,000 was applied by the bank to adjust any liability of Peiris to the bank, and the complete answer to this claim seems to be that the whole of the Rs. 155,000 was dealt with by the bank in accordance with the intention with which Somasunderam drew the cheques and was used by Peiris for his own benefit or the benefit of Don Phillip & Co. The bank therefore

was in the position of an agent to whom money is paid for a specific purpose and who has applied the money in accordance with that purpose.

There remains the point based on the Registration of Business Names Ordinance which was in the nature of a preliminary objection and was reluctantly argued by the appellant's Counsel. In the course of the hearing we indicated our view that it could not prevail. In my opinion the learned Judge is right when he says that " The plaintiff is merely managing his father's business, and in accordance with well-known and recognized custom when he acts for his father he prefixes the *vilasam* to his own name, thus indicating that he is acting in a fiduciary capacity. "

I would therefore set aside the decree of the learned District Judge and order that the plaintiff's action be dismissed with costs in this Court and in the District Court.

DRIEBERG J.—

The claim of the respondent, so far as it is based on the averment of the direct liability of the appellant on the cheques A, B, C, and D, is stated in the first and first alternative causes of action.

In the first cause of action the respondent pleads that in consideration of Rs. 170,000 paid to the appellant by the respondent the appellant agreed to pay the respondent the amount of these cheques.

The first alternative cause of action treats the endorsement on these cheques as an acceptance of bills of exchange, and the money is claimed on that basis.

The second alternative cause of action is merely a claim on a promise by the appellant to repay Rs. 170,000 received from the respondent and has no reference to the cheques.

On the back of cheque A is this endorsement: " Payment of this cheque on the 5th March 1928 guaranteed. *Per pro* THOMAS COOK & SON (BANKERS), LTD.—J. M. DAVIS." Similar endorsements appear on cheques B, C, and D, payment being guaranteed for March 6, 7, and 8, respectively.

The account which stood in the name of Phillip & Co. was Peiris' account, and I shall refer to it as such.

So far as the first and first alternative causes of action are concerned, the questions which arise for consideration are the nature of the cheques A, B, C, and D after the endorsements of Davis, whether Davis had authority to endorse them in this manner, and whether the bank received the consideration of Rs. 170,000.

The manager of the bank was H. B. Smith, who was also head of the local branch of the tourist agency business of Thomas Cook & Son, Limited. Both businesses were carried on on the same premises. All the banking business was done by Davis, and though he was Smith's assistant, the latter does not appear to have exercised

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much supervision over him. Both Smith and Davis acted under powers of attorney from Humphreys, the manager of Thomas Cook & Son (Bankers), Ltd., for India and Ceylon. I shall refer later to these powers of attorney.

I might first deal with the question of consideration. The practice of cashing cheques is nothing more than an ordinary transaction of loan, the borrower receiving from the lender a cheque on an account in funds and giving him a cheque bearing the same date but payable on a future date agreed on, interest for the period being either deducted at the time or paid by the borrower by another cheque.

On this occasion Somasunderam, who was representing the respondent's business, on January 3 drew four cheques for Rs. 50,000, Rs. 50,000, Rs. 35,000, and Rs. 20,000, respectively (P 148 to P 151), amounting to Rs. 155,000, and gave, as he says, at Davis' request, Rs. 15,000 in cash to Peiris. The cheques were drawn by Somasunderam in the name of the respondent on the National Bank of India in favour of the appellant and were crossed "Payee's *a/c only.*" Somasunderam says that when three cheques were drawn the request was made for cash. Davis then gave Somasunderam the memo. (P 152), which refers to one cheque for Rs. 20,000 and the Rs. 15,000 cash.

These cheques (P 148 to P 151) were given to Davis, who handed them to Peiris, into whose account they were passed on January 4 and 5 and with the sum of Rs. 15,000 constitute the consideration referred to.

At the same time the cheques A, B, C, and D, amounting to Rs. 170,000, were given by Peiris to the respondent. Peiris also gave the respondent a cheque for Rs. 5,977.09 for which the respondent got payment on January 6.

The trial Judge was not prepared to hold that the respondent intended that the money should be placed to Peiris' credit or that the respondent's knowledge that it was so place amounted to instructions so to use the cheques. I think this finding is wrong. He had previously found that the respondent was artificial and inaccurate when he alleged that he lent the money to the bank, and this is undoubtedly so when the respondent's account of how these transactions began is examined.

Davis says that before July 29 and 30, 1925, he allowed Peiris small overdrafts. Though they were at first small, on June 18 his account was overdrawn to the extent of Rs. 5,930.68. He brought the account up to a credit of Rs. 3,032.38 on June 22, but by the 29th it was again overdrawn to the extent of Rs. 6,505.32. On June 30 his account showed a credit of Rs. 494.68 as the result of the bank crediting him with two sums of Rs. 3,500. Davis says he did this on his own responsibility and took two promissory notes

for the amount. The account thereafter showed a credit, though Peiris was in fact indebted to the bank. On July 15 the account showed a credit of Rs. 6.24, but this was raised to Rs. 7,632.08 by being credited with the Rs. 14,625.84 advanced on the shipment of tea and by being debited with the Rs. 7,000 which had been credited on June 30. Between July 15 and October 9 Peiris' account was at times in credit, but it was also overdrawn, the greatest debt being Rs. 2,295.39.

On October 9 Peiris was debited with Rs. 14,625.84 as the result of the consignees at Port Said having refused to take the tea. This overdraft continued until October 17, when the account was at credit as the result of Ramachandra's cheque for Rs. 16,500.

Whether Smith expressly authorized these overdrafts is not clear. He says that Davis was not entitled to give overdrafts without his sanction, but that in fact he allowed him to do so without express sanction for small amounts. He does not say whether he regarded the overdrafts before October, 1925, as small. It is clear, however, that after October, 1925, Davis was forbidden to allow overdrafts to Peiris and that Davis concealed from Smith the fact of Peiris' indebtedness to the bank by falsifying the till book. After this date Smith says he took care to look into the account. There were overdrafts appearing in the account, but these were usually liquidated within the day or on the following day. This was due to the account getting credit against cheques which had been presented but not credited in the account. Where the overdrafts did extend for a few days they were for very small amounts. When the account was overdrawn by Rs. 14,625.84 Smith insisted on its being cleared, and on October 17 Davis induced Smith to believe that it was cleared by showing him a cheque for Rs. 16,500 by Ramachandra which Peiris sent to be credited to his account. This was the first of the loans by which Peiris was financed.

Mr. Ramachandra, who is a Proctor, says that Peiris asked him to cash a cheque of Don Phillip & Co. He does not expressly say so, but it is clear that it was a cheque payable on a future date, there would be no purpose in Peiris going to a Proctor in Colombo to cash a cheque for a large amount when he could have as easily gone to the bank if his account could meet it. Ramachandra, who knew Peiris' past history—for he had appeared for him in his insolvency proceedings—said that he would not do so unless the bank guaranteed payment of the cheque. Peiris accordingly brought him a cheque for Rs. 17,000 on the back of which Davis had written guaranteeing payment. This cheque has not been produced; it was to be presented on December 17, and Ramachandra, gave Peiris his cheque for Rs. 16,500 which was passed to Peiris' account on October 17. The difference of Rs. 500 was taken by Ramachandra as interest.

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Davis showed this cheque to Smith, who was satisfied that the overdraft had been met.

On December 17, 1925, when the cheque in favour of Ramachandra was due, Peiris had in his account only Rs. 4.12. Davis met this difficulty by crediting the account with Rs. 17,000 under the heading " Cash ex selves, " and to keep the balance in the till book right, he there entered Rs. 17,000 as being in the safe. This entry in the till book continued until December 29, when the respondent's first loan to Peiris, Rs. 20,000, was made. Peiris' account was then credited with Rs. 3,000 and the entry in the till book omitted.

Whether Smith had or should have had knowledge of this has some bearing on some issues in the case. It was Smith's duty to check the till book periodically, but unless he examined it on a day when such entry appeared he could find out nothing. Though in fact Rs. 17,000 was being lent to Peiris, there was nothing to show that his account was overdrawn, and no interest was charged on the account.

The respondent was seen on December 15 by Peiris, who inquired whether he would cash a cheque of his firm for Rs. 20,000. This was merely a request for Rs. 20,000 against a cheque to be presented on a future date. The trial Judge has explained this method of lending which is due to the idea that the lender would be in a better position if he held a cheque than a promissory note. The respondent would not agree, and Peiris later asked him whether he would give the money if the manager of the bank guaranteed that the cheque would be paid on the due date. Peiris took the respondent to Davis, who agreed to guarantee payment. The respondent says that he asked Davis why the bank should do so and was told that it was because Peiris had for a long time been doing a big business with the bank. Peiris then wrote out the cheque for Rs. 20,000, on the back of which Davis wrote " Good for payment, 12th January, 1926, " and signed it *per pro* Thomas Cook & Son (Bankers), Ltd. The respondent then wrote out his own cheque (P 1) in favour of Peiris, and when he was about to give it to Peiris, Davis said the cheque should be given to him as the bank was responsible for the payment of the money. Davis took the cheque and gave the respondent the receipt (P 2) acknowledging receipt of the cheque for the credit of Don Phillip & Co.

On January 12, 1926, Peiris' account had a credit of Rs. 1,417.94, and in order to meet the respondent's cheque Davis credited the account with Rs. 19,000, making an entry in the till book that Rs. 19,000 was in the safe. Peiris continued to obtain loans from the respondent on this footing, though the falsification of the till book was not resorted to when Peiris' account was in funds. There

was no falsifying of the till book after September 20, 1927. It was about this time that the auditor, Mr. Teesdale, arrived.

In May, 1927, when Somasunderam was in charge of the respondent's business a change was effected. The cheques were drawn, not in favour of Don Phillip & Co., but in favour of the bank and crossed " Payee's *a/c* only " or " Payee's credit only." The manager of the Colombo Stores, a limited liability Company, was said to have borrowed money without authority, and the idea current in Sea street, where the Chetty money lenders live, was that the Company would be liable on any cheque drawn in its favour and crossed " Payee's credit only. "

Somasunderam says that he told Davis that in future he would draw cheques in this form, but he does not say he gave him a reason. He was certain, however, that he did this only for the purpose of better binding the bank and that he was carrying on the same business as before but on a safer footing. Davis says that he did not notice the change. The respondent, however, who was not here at the time—he returned in August—suggests that this effected a complete change in the nature of the transactions and that the bank could thereafter use the cheques in any way it liked; but this is not true, and is only said to support his contention that the sums sued for were loans to the bank and not to Peiris.

Somasunderam and the respondent say that thereafter Davis gave no receipts for the cheques, but Davis says that he continued giving receipts as before. The trial Judge has expressed a strong belief of the respondent's evidence on this point, but I am not very sure that he is right. It seems to me very probable that this is merely an endeavour of the respondent to support the case that the loans, at any rate after May 23, 1927, were to the bank. It is in the respondent's favour, however, that one receipt produced (P 152), which is for part of the Rs. 170,000, is not in the same form as (P 2), but states that the money was received for the credit of the bank. This matter, however, is not of much importance in view of the evidence of Somasunderam, who was responsible for the change, that it did not alter the real nature of the transactions.

In August, 1927, another change was made. On the 26th a guaranteed cheque for Rs. 50,000 had to be presented by the respondent. Peiris saw the respondent in the morning and asked him not to present it but to present an ordinary cheque of his of that date for that amount (P 5); he said that this would save him the paying of commission. The respondent says that Davis confirmed Peiris' statement and thereafter, with the exception of the cheques A, B, C, and D, no guaranteed cheques were presented. The respondent had been previously told that the bank was charging commission for guaranteeing these cheques, which amounted ultimately to two and a half million rupees. I find it difficult to

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believe that the respondent accepted this statement that the payment of commission to the bank could be avoided by the simple device of presenting another cheque in lieu of the guaranteed one. The conduct of the respondent in this connection and in the examination of Davis' power of attorney leaves a strong impression that he was disposed to assist in keeping these transactions secret.

The respondent saw Davis' power of attorney in 1926, but in October, 1927, he took his Proctor, Mr. Kandiah, to the bank to examine it. It is not very clear why he did this. He had altered the system, as he says, to ensure the liability of the bank by making the cheques payable to the bank and Peiris' substituted cheques were all being met. He says that he wished Mr. Kandiah to know the facts. He did not, however, show the cheques or describe them to Mr. Kandiah, but asked him whether Davis could pay or endorse cheques which he accepted and whether he could accept cheques for payment. The word " accepted " had never been used in the endorsements. The trial Judge says the respondent has a fair but not adequate knowledge of English. One would imagine that the respondent would have shown or described one of these guaranteed cheques to Mr. Kandiah and inquired whether Davis could bind the bank by his signature.

I understand that the trial Judge had no doubt that up to May 23, 1927, it was agreed between Peiris, the respondent, and Davis that the respondent's cheques should go to Peiris' account, for the receipts up to the date given by Davis state that he received them for that purpose. But the Judge says that after that date, as the result of the new system, the respondent changed the legal aspect of the transaction and that the respondent's position from that time was that he was giving the money to the bank and that the bank could do what it liked with it; and though the respondent believed that the bank would give it to Peiris, the bank would be doing so on its own authority and not as the result of a mandate from the respondent. If this is so, the cheques given to Davis were nothing more than loans to the bank, which the Judge has held they were not.

But it was not the respondent but Somasunderam who affected this change, and it is clear from Somasunderam's evidence that this was not intended to alter the nature of the transactions but was adopted only to make more certain the liability of the bank to pay what were, as before, the loans to Peiris.

So far from leaving it to the bank to do what it liked with the cheques, I think the respondent, who was receiving substantial interest from Peiris for these sums, would have regarded it as a gross breach of faith on the part of the bank if it did not credit Peiris with them. For this sum of Rs. 170,000 Peiris gave respondent his cheque for Rs. 5,977.09, being interest from January

3 to the date on which the guaranteed cheques, A, B, C, and D were payable. This cheque was debited to Peiris' account on January 6. We do not know the date of the cheque, but Somasunderam, speaking of the usual course of this business, said that Peiris drew his cheque for interest at the same time as the respondent's cheques and the guaranteed cheques were drawn. It seems to me that this interest would not have been so paid unless there was a definite arrangement between Davis, the respondent, and Peiris that Davis should pass these cheques to Peiris' account.

There is one matter which the trial Judge has not dealt with but which was argued before us. That is, that in the course of these transactions Peiris had not, in some cases, the full benefit of the respondent's cheques and that the bank had used these cheques wholly or partly for its own benefit. This charge, of course, is not brought as regards the cheque of January 3, 1928.

There is, however, no foundation for this. In some cases where Peiris' account had not been credited with the full amount of the respondent's cheques, this was due to his being credited only with the difference between the amount of the cheque and the amount previously credited by the false till book entry. An instance of this occurs on December 29, 1925, in Peiris' account (P 9).

It was said that the full amount of the cheques (P 10), (P 12), (P 13), and (P 14), amounting to Rs. 155,000 was not passed to Peiris' account, but this can be explained in the same way. For example, in the case of (P 10) of July 28, 1927, for Rs. 20,000 only Rs. 9,500 was credited, for the reason that the balance Rs. 10,500 went to restore a till book entry for that amount. Davis gave a similar explanation regarding (P 13) of August 18, 1927, and (P 14) of September 6, 1927.

It was also contended that in some cases the bank met the demand on the guaranteed cheques by issuing its own cheque in payment. An instance of this is the case of the cheques (P 105) and (D 85). (D 85) was a cheque of Peiris' for Rs. 60,000 dated September 7. 1927, and was presented in lieu of a guaranteed cheque for that amount. It is crossed " not negotiable, " but Peiris cancelled that and wrote " pay cash. " In payment of this Davis and Robson drew a cheque (P 105) for the same amount, payable cash, on the bank's account in the Hong Kong and Shanghai Bank and gave it to the respondent. But Davis explained that this was done because the respondent wanted payment in notes of denominations which were not available at the appellant bank. This explanation receives support from the fact that (D 85) shows that it was drawn with a view to obtaining cash. But Peiris' account was debited with the amount of (D 85).

The appellant derived no benefit from the respondent's cheques, though Davis was able, when it was necessary, to avoid the continued

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falsifying of the till book. When the false entries were made in the till book the bank derived no benefit from the credit given to Peiris for these sums. The only time he was charged with interest on overdrafts was on October 31, 1925, when he was debited with Rs. 63.59 as interest for the half year. Before this date the account did show that it was over drawn, for when Peiris was debited with the advance on the tea shipment on October 9, and until the respondent's cheque for Rs. 16,500 was paid in on October 17, the account was overdrawn to the extent of Rs. 16,144.23. After October, 1925, no charge for overdrafts was made, for so far as the account showed there were none except those I have referred to, and all that was done was to charge Peiris a bank fee, slightly higher than usual, of Rs. 10.

It is clear that while these were loans by the respondent to Peiris, the respondent made them on the assurance of repayment given by the bank. He did not set himself to consider whether the bank's liability was a primary or secondary one, and the steps which he took to emphasize or place beyond question the bank's liability to him in no way affected the undoubted arrangement that these were loans to Peiris.

So far as the cheques for Rs. 155,000 are concerned, the appellant got no direct benefit from them. At this time Peiris' account was not overdrawn, and the Rs. 155,000 did not go to reduce any liability of Peiris to the bank. It did, however, serve one purpose. On January 3 the respondent held three similarly guaranteed cheques, one for Rs. 35,000 drawn on December 17, 1927, and payable on January 16, 1928, and two cheques for Rs. 50,000 each, drawn on December 27, 1927, and payable on January 7 and January 21, 1928, respectively. Peiris' account on January 4, 1928, opened with a credit of only Rs. 652.26, but on the same day it was brought up to Rs. 70,000.26 by two of the respondent's cheques of January 3 for Rs. 50,000 and Rs. 20,000 being paid in. This enabled the respondent to obtain payment on January 5, which the account (P 9) shows he could not otherwise have done, for one of the guaranteed cheques of December 27 for Rs. 50,000. Similarly the respondent obtained payment of the other cheque for Rs. 50,000 of the same date on January 6, and this would not have been possible except for Peiris having sent in on January 5, two of the respondent's cheques for Rs. 35,000 and Rs. 50,000 of January 3.

The same observation applies to Peiris' cheques for interest on the loans of January 3, and to the cheque for Rs. 25,000 of January 6, which it is admitted, went to the respondent. The respondent makes no claim in respect of Rs. 135,000 cheques of December, 1927, and it is admitted that he received the balance, Rs. 10,000 from Peiris.

It should be noted, however, that the guaranteed cheques of Rs. 50,000 and Rs. 50,000 were not presented for payment, but fresh cheques from Peiris for the same amounts and bearing no endorsement by Davis were presented. This fact is important in connection with another aspect of the case.

The appellant, therefore, derived no benefit from the Rs. 155,000 placed to Peiris' credit unless it is to be regarded as then being under a liability to meet the respondent's claims on the guaranteed cheques he held for Rs. 135,000. For reasons I shall give I am of opinion that the bank was not liable on those guaranteed cheques, but apart from this, the guaranteed cheques themselves were never presented for payment; in lieu of them, ordinary cheques, on which the bank was under no obligation to the respondent, were presented by the respondent and payment obtained on January 5 and 6 from Peiris, and before the liability, if any, of the bank accrued, which would have been on January 7 and 21.

The cheques A, B, C, and D, after Davis' endorsement, ceased to be cheques. All cheques are bills of exchange, but all bills of exchange are not cheques. If Davis had authority to do what he did, their whole character as cheques was lost; they ceased to be payable on demand, their acceptance gave the holder a right of action against the appellant, and the bank would have been obliged to pay on its acceptance though the drawer countermanded payment. While it is not usual for a cheque to be used, it is not possible to regard these cheques as other than accepted bills of exchange. They conform in character and form in every respect to such bills, and whether the appellant is liable on them must depend on whether Davis had authority to accept bills.

Now, while Davis under his power of attorney had authority to draw and endorse bills, he had no authority to accept them, whereas Smith, the manager, who with Davis derives his appointment from Humphreys, the manager of the appellant bank for the whole of India and Ceylon, had this power. The trial Judge thought that the omission was not intended—a " typist's error "—and did not believe Humphrey's statement that this power was advisedly omitted from Davis' power of attorney. Mr. Hayley, for the appellant, moved to submit an affidavit from Humphreys that special instructions in writing had been given to the solicitor in Bombay who prepared Davis' power to omit this and asked to be allowed to submit this letter. He said that this letter, which was in Bombay, was not available to Humphreys when he gave evidence in Colombo. It was not necessary to admit this evidence, for Davis' power of attorney must be taken as it appears, and if the power to accept bills was omitted, it must be taken that it was not expressly given. Mr. Perera, for the respondent, agreed that the

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power must be so read. The point is of importance, however, for in another connection Humphreys conduct fell under suspicion, as I think, wrongly.

The power to accept a bill is different from the power to draw one. It is true that the drawer is liable to the holder and indorser, but the nature of the liability is not the same, the drawer being only in the position of a surety to the acceptor. Further, the drawer of a bill can do so negativing or limiting his liability to the holder, and I imagine that in drawing bills for the purpose merely of arranging payments a banker would do so. The same consideration applies to the power to indorse, in which case too the liability can be negatived. The power to accept bills and the liability following on acceptance stand on a different footing.

Under section 25 of the Bills of Exchange Act, Davis having signed per procuration, the appellant would be bound only if he was acting within the actual limits of his authority, and the power of accepting bills was not given to him. Nor can the power to pay bills, where acceptance is not authorized, imply the power to accept, for payment by a bank of a bill can be made otherwise than as acceptor.

It was argued that if Davis had the power to pay cheques he had the power to agree to pay them on a future date and to mark them for such payment. What was done here was very different from the marking of the cheques tendered by Peiris in payment of Customs dues a large number of which have been put in evidence. These were for comparatively small amounts and were endorsed by Davis "approved for payment." All these cheques were dealt with in the ordinary course of business and presented for payment within a day or two of issue, and they must have been intended to be so presented.

No special practice has arisen in Ceylon regarding the marking of cheques, and such marking will not give the holder a right of action against the bank, unless there was an undertaking to pay him, or an admission that the money was held for his use (*Prince v. Oriental Bank Corporation* [1]). The bank, however, would be entitled to retain funds to meet the cheques marked for payment, dishonouring, if necessary, other cheques for the purpose. Whether the customer could countermand payment would depend on whether it was marked at his instance or of the holder (*Paget on Banking (3rd ed.), chapter XI*). Even if the marking for payment in this manner of the cheques to the Collector of Customs was an act within the power given to Davis to pay cheques, the guaranteeing of Peiris' cheques to the respondent is an act of an entirely different nature.

[1] *(1878) 3 A. C., at p. 331.*

Regarding the undertaking to pay Peiris' cheques out of the bank funds when Peiris could not meet them, it should be noted that Davis' power did not authorize his giving overdrafts, though it is agreed that Smith could do so under his power as manager. I do not think the power to invest moneys given in clause 3 would allow Davis to give overdrafts. The power to pay cheques must mean payment of them in the ordinary course of business out of customers' funds, and cannot extend to the payment of the cheques A, B, C, and D, which lost their character of cheques.

It was contended that the respondent was entitled to presume that Davis had authority to accept bills, and in this connection the case of *Dey. v. Pullinger Engineering Company* [1] was referred to. In that case one of the objects, according to the memorandum of association under which the Company was established, was " to draw, accept, endorse, and negotiate . . . . bills of exchange, &c., " and in the articles of association power was given to the directors to appoint a managing director to exercise any duties which the directors could have exercised, and the directors themselves were able to exercise all such powers and do all such acts on behalf of the Company as might be exercised and done by the Company. There were certain exceptions to this power which did not affect the case. The managing director drew a bill of exchange on behalf of the Company, and this was accepted by the secretary of the Company on behalf of the Company. The bill was endorsed by the drawer to the plaintiff. The managing director had been duly appointed in accordance with the articles, but it did not appear from the minute books of the Company that any resolution had been passed by the directors authorizing the managing director to draw bills of exchange on behalf of the Company.

It was held that anyone looking at the memorandum and articles of association would see that the managing director might have the power to draw and endorse the bill and that such person could not be expected to know what went on in the Company's board room and whether the directors had or had not authorized the drawing or endorsing of that bill; that a person dealing with the managing director in these circumstances must look to the articles. and if he sees that the managing director might have power to do what he purports to do, that is enough for a person dealing with him *bona fide*.

It is not possible to regard section 77 of the Companies' Act as entirely taking away the effect of the provisions of section 25 of the Bills of Exchange Act. In the present case the respondent was obliged to examine, and did in fact examine, the written authority which Davis had, and I cannot see that the case of *Dey*

[1] *(1921) 1 K. B. 77.*

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v. Pullinger Engineering Company (*supra*) is any authority for the proposition that he is not bound by the limitation of the agent's authority to be gathered from that instrument.

For these reasons I am of opinion that the respondent's action on the first and first and second alternative causes of action must fail.

At the argument before us objection was taken that the cheques A, B, C, and D were not duly stamped and that the action founded on the acceptance of them could not be maintained. Under the Stamps Ordinance, No. 22 of 1909, as bills of exchange payable otherwise than on demand they would have to bear a stamp of fifty cents for the first thousand rupees and fifty cents for each further thousand rupees or part thereof. They are in fact unstamped, though as cheques they have paid duty through the bank as provided by section 5 (1) (*b*) of the Ordinance; this is six cents, which is the stamp duty on bills of exchange payable on demand. If the objection had been taken in the District Court before the documents had been admitted in evidence, it would not have been possible for the respondent to have supplied the deficiency of duty and the Court would have been obliged to reject them—section 36. Under section 37 such an objection cannot be taken after the documents are admitted in evidence. The respondent contends that they were never admitted in evidence. These documents were not produced for the first time in the course of the trial, but as documents on which the action was founded they were produced and filed with the plaint as required by section 50 of the Civil Procedure Code; they were shown to Somasunderam and identified by him without objection by the appellant, they have been considered by the Judge, and it cannot be said that they were not admitted in evidence.

There is another point on which the right of the respondent to bring this action was questioned. The respondent, Adaicappa Chetty, is the only son of Arunasalem Chetty. Arunasalem Chetty carries on business as a money lender and rice and general merchant under the *vilasam* or trade name of O. A. P. R. M. A. R., which corresponds to the Tamil letters Oona Ana Peyna Reena Moona Ana Roona. As this was a business carried on by him not in his own name he had it registered as required by the Registration of Business Names Ordinance, No. 6 of 1918, describing himself as sole owner under his full name Muttiah Chetty Arunasalem Chetty, *i.e.*, Arunasalem Chetty, son of Muttiah Chetty. Certain statements of the respondent as to his interests in the business of O. A. P. R. M. A. R. and his relations with his father led to the objections that the requirement of the Ordinance had not been complied with, that the respondent was carrying on business under a name other than his own, that there

was a partnership between himself and his father and that the respondent was not registered as the owner of the business. Under section 9 of the Ordinance a default of this nature renders any rights of the defaulter arising out of any contract made by him in relation to the business unenforceable.

The respondent said that the business belonged to him and his father; that they were the proprietors of it, but he denied that they were partners. They are Hindus from South India, among whom joint family system prevails. It was no doubt difficult for the respondent to state his position more definitely, but it is clear that he and his father do not constitute a firm as it is defined in the Ordinance, that is to say, two or more individuals who have entered into partnership with one another with a view to carrying on business for profit. Such interest in the business as the respondent has was acquired at birth (*Annamaly Chetty v. Thornhill* [1]). It cannot be said that he and his father entered into partnership. The respondent according to the well established custom among Chetties is carrying on the business of O. A. P. R. M. A. R. as its agent by prefixing that *vilasam* to his own name, and under that name he can enter into contracts and can sue or be sued.

It was contended that the agreement of the bank to pay the guaranteed cheques was a collateral one, and that the action could not be maintained unless the legal representative of Peiris, the principal debtor, was made a party. An objection of this nature should have been taken specifically. " The creditor is not obliged to excuss the principal debtor as a matter of course; he is only obliged to do so if the surety avails himself of the benefit by way of exception or dilatory plea " (*Maasdorp, Institutes of Cape Law, vol. III. p. 359*). This was not done in the answer, which contained a general plea that Peiris was necessary as a party to the action " for the determination of the various issues involved." Regarded as bills of exchange, it must be taken that the appellant was the principal debtor and Peiris stood in the position of surety.

But even if they be not regarded as accepted bills of exchange, I do not think the undertaking of the bank can rightly be regarded as a secondary liability. It was a promise to pay out of the debtor's account, and presumably with the debtor's money—at any rate out of an account which it lay within the power of the bank to keep in funds. The principle on which the cases of *Andrews v. Smith* and *Guild & Company v. Conrad* [3] were decided appears applicable to such a case.

The other causes of action are based on an obligation to pay the Rs. 170,000 arising from the circumstances apart from the express promise of payment by Davis, and are, therefore, not affected by

[1] *(1927) 29 N. L. R., at p. 229.* [2] *(1835) 2 C. M. & R. 627.*
[3] *(1894) 2 Q. B., 885.*

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the question of Davis' authority. They are the third alternative cause of action, which is for money had and received, and the fourth alternative cause of action, in which it is alleged that under the mistaken belief that the appellant had accepted the cheques A, B, C, and D, and agreed to pay the sums due on them, the respondent paid to the appellant the sum of Rs. 170,000. He claims payment of this amount as money had and received for his use or as money paid for a consideration which has failed or as money paid under a mistake of fact.

An issue, No. 9 of the paper marked "X," was also admitted, namely, whether the transaction of January 3, 1928, was one of a similar series of transactions adopted by the appellant in connection with which endorsements similar to those on the cheques, A, B, C, and D were made. This issue was intended to raise the question of ratification on which the trial Judge has held against the appellant.

Issues Nos. 10 and 11 and No. 12 (3) are additional issues proposed by the respondent which were intended to raise the question of estoppel by negligence. These were not allowed as this had not been pleaded, and this question does not arise.

The trial Judge has found on the grounds of money had and received and mistake against the appellant, and that the respondent is entitled to the sum of Rs. 155,000. He excludes the sum of Rs. 15,000 paid in cash by Somasunderam to Peiris. He holds that these cheques were given to Davis, that the respondent did not intend that they should be placed to Peiris' credit, that it could not be said, in view of the special crossing of them, that the appellant was instructed so to deal with the cheques; that if this was otherwise, then by repudiating the agency the whole transaction failed and what remained was the money in possession of the appellant which the respondent had a right to demand to be given back to him.

This involves findings of fact which I think are wrong, and I have stated reasons for holding that these sums were loans by the respondent to peiris and regarded as such by Peiris, who paid interest on them direct to the respondent, and who for a long time prior to January, 1928, repaid them by his own cheques independently of the bank's guarantee, and in some cases before the liability of the bank to pay arose.

In the case of this sum of Rs. 170,000, Somasunderam says that it was Peiris who asked him to cash him cheques for that amount and he agreed. What he did say in effect was, "Will you give me Rs. 170,000, and I will give you my cheques for that sum payable on March 6, 7, and 8, payment of which the bank will guarantee, and I will pay you interest for that period." Davis was present and approved and took the cheques. It must follow that the respondent's intention, and his implied direction, if he did not expressly say so, was that the money should be placed to peiris'

account. The real nature of the transaction cannot be affected by the fact that in giving respondent the receipt (P 152) for one Rs. 20.000 cheque and Rs. 15,000 cash, Davis wrote " received to our credit, " nor can it be affected by the form in which the cheques were drawn.

The Rs. 15,000 noted in (P 152) as cash was paid to Peiris by Somasunderam by a separate cheque. Peiris received the benefit of the Rs. 155,000 as well as the Rs. 15,000. If the appellant's responsibility is to be decided by the form of (P 152) it should extend to the Rs. 15,000 as well. Davis says that he handed the cheques for Rs. 155,000 to Peiris, and it must be taken that they were presented by Peiris—the paying-in slips (D91) to (D94) are produced—Davis' power of attorney had then been cancelled, but though under suspension he was being paid his salary and was assisting in settling past work. There is no proof that Davis gave instructions that these cheques were to be paid to Peiris' account, and no proof that any responsible officer of the bank gave such instructions. The manager of the Hong Kong and Shanghai Bank said that if a reliable customer were to bring a cheque payable to the bank and ask that it be placed to his account this would be done without the drawer's authority being asked. In view of the frequency with which similar cheques were so paid into Peiris' account since May, 1927, without question, it may be that the cashier so dealt with them without asking for special instructions. But however this was done, the bank must take responsibility for the payment of these cheques to Peiris.

For the purposes of those causes of action, other than that of adoption or ratification, the facts are that following on a direct contract of loan with Peiris, in consideration of substantial interest to be paid thereon to him by Peiris, the respondent gave to Davis cheques which the appellant placed to Peiris' account; that the respondent intended that the cheques should be so placed in fulfilment of his agreement with Peiris; that interest on this loan was paid direct by Peiris to the respondent—the rate on which sum to March 8 is about 19½ per cent.; that the respondent would not have entered into this contract with Peiris but for the mistaken belief that Davis had authority to bind the bank to meet Peiris' cheques on March 6, 7, and 8—I mean by this the lack of authority under his power of attorney and not the entire absence of authority following on the revocation of his power; no publicity whatever was given to that revocation and it cannot affect old customers of the bank, who were entitled in the circumstances to assume that the power of attorney was in force; that this mistaken belief was not induced by any representation made by the appellant, who derived no benefit from these cheques or from the Rs. 15,000 paid direct to Peiris. The respondent's case does not get support from the authorities cited. In *Jones v. Waring & Gillow* [1] it was intended

[1] (1926) A. C. 670.

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that plaintiff's money should be held by the defendants for International Motors, from whom plaintiffs believed that they were buying the cars, on the misrepresentations of Bodenham. Believing that the cheque for £5,000 was paid by Bodenham for the furniture bought by him, the defendants accepted the cheque in payment of his debt and released his furniture which was under seizure.

In the present case the bank carried out the intention and obligation of the respondent in paying the money to Peiris, but the respondent's position is that he would not have entered into an agreement to pay Peiris except for his mistake as to Davis' authority. The payment was the result of no mistake as to whom it was to be paid or for what purposes it was to be paid, but a mistake which led to his entering into an obligation to give Peiris the money.

It is possible to regard the appellant as an agent of the respondent for the purpose of paying over these cheques to Peiris. The respondent intended that these cheques should go to Peiris, not that they should remain with the appellant, whereas in *Jones v. Waring & Gillow* (*supra*) the plaintiffs believed that the payment to the defendants was in fact payment to the International Motors.

Nor does the case of *Baylis v. The Bishop of London*, [1] which is relied on by the trial Judge, afford any help. There a sequestrator was appointed by the bishop for the collection of the tithes and other emoluments of a rector who was adjudged bankrupt. A person, whose trustees were the plaintiffs, had to pay tithe rent charge for his freehold land and another land of which he had a lease. One payment was made for both, but by mistake payment was recovered by the sequestrator for the leased land after the lease had expired. These moneys were paid to the defendant and were held to be recoverable. A point was made of the fact that "the money reached its destination when it came to the hands of the bishop through his agent the sequestrator." It was held that it was no defence that the money had been duly applied by the bishop in accordance with his duty, unless he could establish that he received the money as an agent and paid it over to his principal.

The money in the present case reached its destination when it passed into Peiris' account. If my view of the facts is correct, what the respondent says to the appellant is this, "I gave Rs. 170,000 to you to be given to Peiris and you have carried out my instructions, but I would not have given it to you for this purpose had I not made a mistake as to Davis' authority." Apart from considerations of the mistake having been induced by misrepresentations by the bank, it is not easy to see how recovery can be claimed from it on the ground of money had and received for the use of the respondent or as money paid for a consideration which had failed or as money paid under a mistake of fact.

[1] *(1913) C. A. Ch. 127.*

In receiving these cheques drawn in its favour the bank was not acting as a principal but as agent of the respondent and Peiris as well. If the bank acted as agent it could not be made liable on the ground of payment by mistake if before the mistake was discovered it paid over the money to the principal.—Lord Atkinson in *Kleinwort Sons & Company v. Dunlop Rubber Company.*[1]

There is a suggestion in the judgment that Smith and Humphreys may have known before January 5, 1928, of the guaranteed cheques of that month and authorized the crediting of the respondent's cheques to Peiris' account. But I do not think there is foundation for this suggestion.

Davis was suspended as soon as it was known that he was guaranteeing for Peiris to the National Bank of India the completion of Peiris' shipping documents. It was not necessary for any purpose of the appellant, if Smith knew the facts, to allow a repetition of a loan transaction on January 3, and to permit the respondent's cheques to be passed to Peiris' account, for they were not needed to reduce any indebtedness to the appellant. It must be taken that when the appellant credited the respondent's cheques of January 3 to Peiris' account neither Smith nor Humphreys knew of the circumstances in which they were given.

The trial Judge has found in favour of the respondent on issue No. 9 on the paper "X." He says that he accepts the statement that Smith did not know what was being done and that Davis did his best to keep the irregularities from him. Except for the till book entries Smith could not have known what was going on, and even as regards these entries, the statements that certain sums of money were in the safe would have meant nothing unless a check was made of the bank's cash on the very day on which an entry was made. Peiris' ledger account, manipulated as it was by Davis, would have disclosed nothing. Smith admits that when he was in England he received an anonymous letter that Davis was guaranteeing cheques and that he mentioned it to the Head Office. He does not appear to have questioned Davis about it, but this is not unusual conduct when a senior officer receives anonymous letters complaining against his own assistants. In any case this cannot constitute adoption and ratification, which can be done only with full knowledge of facts.

The question of estoppel by negligence does not arise for consideration.

In my opinion the respondent's action cannot succeed. I agree with the order made by my Lord the Chief Justice.

Appeal allowed.

[1] *(1907) 97 L. T., at p. 265.*