Present: Bertram C.J. and De Sampayo J.

1922.

THE EASTERN GARAGE AND COLOMBO TAXI-CAB CO., LTD., *v.* SILVA.

189—D. C. Colombo, 2,363.

Cheque—Payment by cheque of a third party—Notice of dishonour—Accommodation cheque.

When an account is paid by the cheque of a third person and that cheque is dishonoured, the creditor loses his right of recourse against his debtor, unless prompt notice of dishonour is given to that debtor. If the cheque is an accommodation cheque, notice of dishonour is dispensed with.

THE facts appear from the judgment.

Pereira, K.C. (with him *L. V. Loos*), for the appellant.

Jayawardene, K.C. (with him *L. M. de Silva*), for respondent.

January 13, 1922. BERTRAM C.J.—

This is an extremely unsatisfactory case. The action is brought on a bill for repairs to a motor car. It appears that the defendant left his motor car for extensive repairs at the garage of the plaintiffs, and that finally the bill for the repairs was paid in the first instance by a cheque—a cheque not of the defendant himself, but drawn in his favour by a young man, D. V. de Silva, and endorsed by the defendant. That cheque was dishonoured. Later Rs. 1,000 was paid on account of the liability by D. V. de Silva. The balance was demanded from the defendant by the plaintiffs, and the plea was a plea of payment. It was suggested that the cheque had been taken in discharge of the liability. For the first time, when the parties came into Court, a new plea was raised, namely, that notice of dishonour had not been given to the defendant. It is quite plain that this point had up to that time occurred to neither side.

The plea of failure to give notice of dishonour arises under the law of merchant now codified in the Bills of Exchange Act. It is based upon the custom of merchants, and relates to a department of law which every merchant is supposed to know. It is not to be expected that either the manager of a motor garage or a boutique-keeper in Ambalangoda should be acquainted with the rules of the law merchant in this particular, or should be aware that these rules, originally evolved with reference to bills of exchange, also apply to

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cheques. As I have said, it is quite clear that neither the plaintiff company's manager nor the defendant thought anything about the question of the notice of dishonour. Nevertheless, the point was taken in the District Court, and has to be dealt with.

In my opinion it would have been better if, before an issue was framed on the subject, an amendment of the pleadings had been ordered, and if an adjournment had been taken so as to enable the plaintiffs to consider this new aspect of the case. As it was, the case went to trial. Various pleas were put forward, and one was that D. V. de Silva was held out as the agent of the defendant. That plea clearly was not substantiated. Another point made was that notice of dishonour had, in fact, been given, because the defendant was present with D. V. de Silva at the time when the dishonoured cheque was handed back to the latter within a day or so after its dishonour. Plaintiffs' manager cannot speak positively to the presence of the defendant on that occasion. If he had been able to do so, no doubt that circumstance would have been decisive. As he cannot do so, the point fails.

There was, however, a most material point which ought to have been considered, and that was whether the cheque tendered in payment of the account was, as alleged by the defendant, a cheque which he had really bought for valuable consideration from D. V. de Silva, or was only an accommodation cheque given by D. V. de Silva for the benefit of the defendant. If the cheque was an accommodation cheque, notice of dishonour would be dispensed with. Yet, strange to say, neither of the parties, nor the Court itself, ever seriously considered that question. It is only when the case came before us in appeal that that question is discussed. Under the circumstances, we must decide that question upon the evidence appearing on the record.

The defendant has sworn that he gave full value for the cheque. He appears to have had no banking account. He says that D. V. de Silva was already indebted to him to a certain extent, that he gave him a cheque for Rs. 1,000, and cash for the balance. Now, this is undoubtedly very loose evidence. But it was not challenged and sifted in the Court below as it ought to have been. The defendant's books were not called for. The evidence was accepted, and it appears to me that, under the circumstances, although there is evidence to the contrary by D. V. de Silva, yet, in view of the fact that the learned Judge has generally accepted the evidence of the defendant, we, in appeal, cannot take upon ourselves, not having heard the parties, to say he was wrong. We must, therefore, take it that the cheque was not an accommodation cheque, but a cheque given for consideration.

The result is that a legal point, of which both parties were ignorant, was taken when the case came on for trial, and the Court must give its decision upon that legal point. That decision can

only be that notice of dishonour was not given, and the plaintiffs unfortunately for themselves must pay the penalty. This case will, no doubt, serve as a lesson that, when an account is paid by the cheque of a third person, and that cheque is dishonoured, the creditor loses his right of recourse against his debtor, unless prompt notice of dishonour is given to that debtor. In my opinion the appeal must be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.