CHAPTER FIVE

CHEQUES AND OTHER DOCUMENTS INTENDED TO ENABLE A PERSON TO OBTAIN PAYMENT

The law relating to cheques is contained in the *Bills of Exchange Act*[1]. This Act reproduces the provisions of the *Bills of Exchange Act* 1882[2] of England which set out "to codify the law relating to *Bills of Exchange*". In other words the *Bills of Exchange Act*[3] is, in fact, a code. And because it is a code special rules of interpretation apply.

A. RULES OF INTERPRETATION OF A CODE

The proper rules of interpreting a code such as the *Bills of Exchange Act*[4] were laid down by Lord Herschell in *Bank of England v Vagliano Brothers*[5] in words which deserve to be quoted at length:

> ...the proper way to deal with such a statute as the *Bills of Exchange Act*, which was intended to be a code of the law relating to negotiable instruments. I think the proper course in the first instance is to examine the language of the statute and to ask what its natural meaning, uninfluenced by any considerations derived from the previous state of

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1 Cap. 76

2 45 & 46 Vict c.61

3 *Supra* n.1

4 *Ibid*

5 [1891] AC 107

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the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination for the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a *demurrer* to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in construction of the provisions of the code. If, for example a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground. One further remark I have to make... *The Bills of Exchange Act* was certainly not intended to be merely a code of the existing law. It is not open to question that it

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> was intended to alter and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment.[6]

All that is quoted above can be summarised using the words of Lord Halsbury L.C. in the same case. He said:

> It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, that where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.[7]

These rules will be used in interpreting the *Bills of Exchange Act*.[8] Case law will only be used as examples of the application of the Act.

B. DEFINITION OF A CHEQUE

A cheque is the customer's mandate to his banker to pay. Section 73(1) of the *Bills of Exchange Act*[9] defines a cheque as a bill of exchange drawn on a banker payable on demand." Section 3(1) of the act defines a bill of exchange as

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6 *Ibid* at pp. 144-145

7 *Ibid* at p. 120

8 Cap. 76

9 *Ibid*

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> unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.[10]

The section goes on to provide that an instrument which does not comply with these conditions or which orders any act to be done in addition to the payment of money is not a bill of exchange.[11]

An order to pay out of a particular fund is conditional. But an unqualified order to pay coupled with an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount or a statement of the transaction which gave rise to the bill is unconditional.[12]

There are certain characteristics of a bill as defined above which are not part of a cheque. Therefore, a definition of a cheque is only possible if certain requirements of S.3 (i) are combined with those s.73 (i). Thus a cheque can be defined as an unconditional order in writing drawn by one person upon another who is a banker to pay on demand a sum certain in money to or to the order of a specified person or to bearer.[13]

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10 Also see *African Overseas Trading Co. v Bhagwanji, Harjiwan* [1960]E.A 419 and *Orbit Mining Co. v Westminster Bank Ltd* [1963] 1 Q.B. 794 at 821-822

11 s.3(2)

12 s.3(3) See *Thairlwall v Great Northern Rly Co.* [1910]2 KB 509.

13 C.F. *The Stamps Act* Cap 172 s.2 which defines a cheque to mean a bill of exchange drawn on a specified bank and not expressed to be payable otherwise than on demand.

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By this definition there are three parties to a cheque. The person who draws the cheque known as the drawer. The banker on whom the cheque is drawn who is called the drawee banker or paying banker. And the person who is supposed to receive payment or the payee. If the drawer is the one to be paid then the drawer and the payee are the same person. The order must be unconditional. In *Bavins Jnr & Sims* v *London and South Western Bank Ltd*[14] an instrument was in the form of cheque but with the order followed by the words "provided the receipt form at the foot hereof is duly signed." The court held that the receipt requirement was a condition which made the instrument not a cheque.

A cheque must be addressed by one person as a drawer to another, being a bank as drawee. The *Financial Institutions Statute*[15] provides that a bank means any company licensed to carry on banking business and includes all branches and offices of that company in Uganda. Therefore, a bank being a company is one legal entity. It follows that drafts drawn by one branch on another or the head office are not cheques or bills because they are not addressed by one person to another. But s.5(2) of the *Bills of Exchange Act*[16] provides in part that where in a bill drawer and drawee are the same person, the holder may treat the instrument as a bill of exchange or as a promissory note. And s.50(2)(c) provides that notice of dishonour is dispensed with as regards the drawer where the drawer and drawee are the same person.

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14 (1899)81 L.T. 655

15 No.4 of 1993 s.2

16 Cap. 76

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This means that even though such an instrument is not really a bill, the holder may treat it as one.[17] Section 2 of the Act[18] defines a holder to mean the payee or endorsee of a bill or note who is in possession of it or the bearer thereof. The holder is not obliged to give notice of dishonour to the drawer.

A cheque must be payable on demand. But modern cheque forms do not include the words "on demand". This omission is remedied by s.10 of the Act[19] which stipulates that a bill is payable on demand

(a) which is expressed to be payable on demand, or at sight, or on presentation; or

(b) in which no time for payment is expressed.

If the cheque form contains instructions that it should be presented within a given period if it is to be paid that does not mean that it is not payable on demand.[20] A cheque must have a drawer, a drawee or paying banker and a payee or if no payee then a bearer. Thus s.7(1) provides that where a bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty.

C. FICTITIOUS OR NON-EXISTING PERSON

Section 7(3) of the Act provides that where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer. The House of Lords considered this provision in *Bank of*

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17 See *London City and Midland Bank Ltd v Gordon* [1903] A.C. 240

18 CAP 76

19 *Ibid*

20 *Thairlwall v Great Northern Railway Co.* [1910]2 KB 509

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England v Vagliano Brothers and held by a majority of five to two that:

> The effect of sect 7 sub-sec.3...is that a bill may be treated as payable to bearer where the person named as payee and to whose order the bill is made payable on the face of it is a real person but has not and was never intended by the drawer to have any right upon it or arising out of it; and this is so though the bill (so called) is not in reality a bill but is in fact a document in the form of a bill manufactured by a person who forges the signature of the named drawer, obtained by fraud the signature of the acceptor, forges the signature of the named payee, and presents the document for payment, both the named drawer and the named payee being entirely ignorant of the circumstances.[22]

Lord Halsbury L.C said that if s.7(3) is read together with s.7(1) means that:

> ... where a bill was not payable to bearer, the person to whom payment was intended to be made was to be named or otherwise indicated upon the face of the instrument with reasonable certainty; but where there was no real payee the bill might be treated as payable to bearer.... The real meaning of the subsection is to imply the unreality of any person who is named upon the face of the instrument as the payee of the bill. The statute itself uses the phrase 'payee'.That cannot mean in truth the payee, because

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21 [1891]AC 107

22 *Ibid,* headnote p. 107

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payee, and dealing, as the statute was, with the form of the instrument, and enacting that if a name which appeared as payee on the face of the instrument was a fictitious person, the bill may be treated as payable to bearer, if expressed in popular words, though perhaps not very felicitously chosen, its meaning accordingly.[23]

Difficulties have arisen in interpreting s7(3) because of the use of the words "a person" therein.

As the Earl of Selborne said:

> The difficulty to my mind arises out of the fact that the legislature has here described "*a person*" as "fictitious or non-existing" instead of saying "where the payee is fictitious or non-existing.[24]

Lord Watson was of the view that:

> the language of the sub-section, taken in its ordinary significance, imports that the bill may be treated as payable to bearer in all cases where the person designated as payee on the account of it is either non-existing or being in existence, has not and never was intended to have any right to its contents.[25]

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23 *Ibid* pp. 121 and 122

24 *Ibid*, headnote p. 107 *Ibid* At p. 129. The author agrees But Lord Herschell says that there is no substantial difference in the meaning of the two phrases. Ibid at p.153

25 *Ibid* at p.134

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Lord Herschell expressed the opinion

> Do the words"where the payee is a fictious person" apply only where the payee named never had a real existence? I take it to be clear that by the word 'payee' must be understood the payee named on the face of the bill; for of course by the hypothesis there is no intention that he shall be the person to receive payment; is it doing violence to language to say that the payee is a fictitious person"? I think not.
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> I do not think that the word "fictitious" is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts, we do not mean that the entry has no real existence, but only that it purports to be that which it is not - that it is an entry made for the purpose of pretending that the transaction took place which is represented by it..... Turning to the interpretation of the word "fictitious"... I find amongst the meanings given are "counterfeit", 'feined'. It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is feined or pretended, or, in other words, a fictitious person"].[26]

He concluded by saying:

> ..Whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person

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26 *Ibid* at pp. 152 and 153

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within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer.[27]

Finally Lord Magnaghten gave his views that:

> The proper meaning of the word is "feigned" or "counter feit". It seems to me that the "C. Petride & Co" named as payees on these pretended bills were strictly speaking, fictitious persons. When the bills came before Vagliano for acceptance they were fictitious from beginning to end. The drawer was fictitious; the payee was fictitious; the person indicated as agent for presentation was fictitious. One and all they were feigned or counterfeit persons put forward as real persons, each in a several and distinct capacity; whereas, in truth, they were make-believes for the persons whose names appeared on the instrument. They were not, I think, the less fictitious because there were in existence real persons for whom these names were intended to pass muster.[28]

The application of the subsection does not depend on a condition that the acceptor should be aware that the payee was a fictitious or non-existing persons.[29] The Earl of Selborne put it in these words:-

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27 *Ibid* at p. 153

28 *Ibid* at p. 161. Pass muster means to be accepted as satisfactory.

29 *Ibid* at p. 120 Per Lord Halsbury L.C

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I cannot, however, [redacted] the cases which do fall within the 3rd sub-section of sect 7 knowledge on the part of the acceptor that the payee is fictitious or non-existing person is necessary such a qualification of the express words of the statute cannot, in my judgment, be implied from earlier authorities which treated knowledge as necessary.[30]

In *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*[31] the Supreme Court of Canada stated the law in similar terms. The court said;

> The concept of a non-existent person within the meaning of s.20(5) was well settled: if the payee on a cheque was a matter of pure invention and not a real person then such payee was non-existent. There was no support for the proposition that that was a subjective test based on what the signor of a cheque believed was true; rather it was an objective question of fact of whether the payee was an invention of the employee.[32]

The rationale of the rule was stated by the court to be that:

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30 Ibid at pp. 129-130 Under American Law knowledge is necessary according to *Hertford Accident and Indemnity Co. v Middle town National Bank* 126 Conn 179, *Snyder v Corn Exchange National Bank* 221 Pa 599. See also Supreme Court of Liberia's decision in *Marpleh v Liberia* 1972(1) ALR Comm. 242.

31 (1997)23 CLB 740

32 *Ibid* p. 739

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The fictitious payee rule set out in s.10(5) of the *Bills of Exchange Act*, by which a cheque made out to a fictitious or non-existing person was to be treated as payable to bearer and could be negotiated by simple delivery, was an exception to the normal rule of *nemo dat quod non habet* and threw the loss on the drawer. The policy underlying the fictitious payee rule was that if a drawer drew a cheque payable to order, not intending that the payee receive payment, the drawer lost, by his conduct, the right to the protection afforded to a bill payable to order and there was no reason why the defence of fictitious payee was not available to a collecting bank. Where the payee was the name of a real and therefore existing person the defence could be invoked if the person creating the instrument did not intend that the payee should receive payment, but it could not be invoked if the person creating the instrument intended that the payee should receive payment by falsely representing to the drawer of the bill that the payee was entitled to the sum represented by the face value of the bill.[33]

In *Bank of England v Vagliano Brothers*,[34] a series of documents were manufactured and were made payable at the accepter's bank, and the amounts were paid over the counter to the forger or his agent by the bank *bona fide* and in pursuance of letter of advice signed by the acceptor, whose signature thereto was fraudulently obtained by the forger, who was a clerk in the employment of the acceptor. It was held that the bank was entitled

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[33] *Ibid* p. 737 *nemo dat quod non habet* means No one gives who possesses not.

[34] [1891]AC 107

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to debit its customer, the acceptor, with the amounts, although paid to the forger or his agent and not to a *bona fide* holder of the documents for value or to any person who could sue the accepter upon them.

In *Clutton v Attenborough & Sons*[35] an employer was fraudulently induced by the clerk to draw cheques in favour of a non-existent payee whose endorsement was forged by the clerk in favour of a *bonafide* transferee for value. The third party, the transferee, who acted in good faith obtained payment of the cheques. Clutton, after discovering the fraud sued the third party for the money they had received. The House of Lords held that s.7(3) applied and the money could not be recovered.

In *Vinden v Hughes*[36] a clerk fraudulently induced his employers to draw a number of cheques in the names of customers of his employers. He obtained the firm's signature, forged the endorsements and negotiated the cheques to an innocent third party who obtained payment from the firm's bankers. When the third party was sued for the money the court held that at the time the cheques were drawn the employer believed that they were being drawn in the ordinary course of business for the purpose of the money being paid to the named payees. Accordingly, the payees could not be regarded as fictitious or non-existing. *In North & South Wales Bank v Macbeth*[37] a fraudulent person, White, induced Macbeth to draw a cheque in favour Kerr, an existing person who was intended to have the benefit of the cheque. The House of Lords accordingly held that s.7(3) did not apply because the drawer of the cheque intended that the payee or his transferee should receive the money. The payee was not fictitious. The House

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35 [1897]A.C 90

36 [1905]1 KB 795

37 [1908]A.C. 137

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explained the case of *Bank of England v Vagliano Brothers*[38] and *Clutton v Attenborough*[39] in these words:-

> I will not discuss the former of those authorities beyond saying that it was not a case in which the drawer intended the payee to receive the proceeds of the bill. And in the latter authority the payee was a non-existent person whom no one either could or did mean to be the recipient of the proceeds of the cheque.[40]

It appears, therefore, that where a cheque is payable to a fictitious or non-existing person, it becomes as against a bonafide holder, negotiable without endorsement, and is to be treated as if in terms made payable to bearer, so that the drawer will be liable upon it and the loss will fall on him. And a payee may be fictitious without being non-existent, provided he has no interest to receive it.[41] Treating such an instrument as being payable to bearer means that any endorsement forged on it may be disregarded. If it was not disregarded the instrument would be caught by s.24 which provides in part:

> where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative.

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38 [1891] A.C. 107

39 [1897]A.C. 90

40 *Ibid* at pp 139-140

41 *Marpleh v Liberia* 1972(1) ALR Comm 242 pp 147-148

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The decision in *Bank of England v Vagliano Brothers*[42] is not very relevant to cheques because of s24. If the drawer's signature is forged the paying bank will be liable unless the customer is estopped from denying the genuiness of the signature. And the bank is further protected by s.60 of the Act.[43] It should also be noted that if the cheques in *North & South Wales Bank* v *Macbeth*[44] had been crossed the bank would have been protected by s.82 of the Act which states that where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

According to the learned authors of *Paget's Law of Banking*[45] the following principles can be extracted from the cases discussed above.

1. The primary factor is the state of mind and intention of the drawer of the bill or cheque; if his mind is directed to a specific existing individual, whom he intends to receive the money, such a payee is not a fictious or non existing person, even though by reason of fraud on the part of a third party in obtaining the instrument, such individual never acquired or exercised any rights in relation thereto;

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42 [1891]A.C. 107

43 Cap. 76

44 [1908] A.C 137

45 Hapgood Mark Ed. *Paget's Law of Banking op.cit* p 365

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If by fraud of a third party, a person is induced to draw a bill or cheque in which the name inserted as the payee's is that of an imaginary person (although people of that name may exist), such payee is 'a non-existing person' although the drawer contemplated someone of that name receiving the money;

Where a cheque falls within the subsection, it may be treated as payable to bearer not only by a holder for value but by anyone else whose interest it is so to treat it, e.g, a banker who has paid such a bill on a forged indorsement.[46]

IMPERSONAL PAYEES

Under s.7(3) a cheque is treated as being payable to bearer only when the payee is a fictitious or non-existing person. The word "person" is defined in s.2 as including a body of persons whether incorporated or not. Obviously this definition does not cover impersonal payee such as instruments drawn in a cheque form to order or bearer in favour of 'cash'.

This issue came up for decision in *Khan Stores v Delawer*.[47] The document in question was a cheque drawn on the National Bank of India signed by the applicant, directing the bank to pay "cash or bearer" the sum of Shs. 2,000/=. The word 'cash' was in manuscript, the word 'bearer' was printed. Law J. as he then was, held that:

> A person who uses cheque forms made out to blank" or bearer" and who fills in the blank either the word 'cash' or with the name of specified person

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[46] *Ibid.*

[47] [1959] E.A 714

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without deleting the word 'bearer', must be presumed to intend that the words "or bearer" should remain. Such a document is a bill of exchange, being payable to bearer and complying with the other requirements of s.3(1)... and the plaintiff/respondent, as the person in possession of the cheque, was the holder thereof within the meaning of the terms bearer and holder in s.2.[48]

The cases of *North & South Insurance Corporation v National Provincial Bank*[49] and *Cole v Milsome*[50] were distinguished. Law J. said:

> Mr. Chaddah relies on *North and South Insurance Corporation v National Provincial Bank* [1936] 1.K.B 328 which decided that a document made out to 'cash or order' was not a cheque, because it was not a bill of exchange as defined in the Bill of Exchange Act; and that the words "or order" being inconsistent with the intention of the drawers should be disregarded. Mr. Chaddah submits that in this case, by writing 'cash' in the place specified for the name of the payee, the applicant intended the equivalent of a cash payment, and not that the cheque should have effect as a bill of exchange, and he submits that the words "or bearer" should be disregarded. Mr. Kesaria relies on *Cole v Milsome* [1951]1 ALL E.R 311 in which it was held that a document payable to cash or order was not payable

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48 *Ibid* At p. 716

49 [1936]1KB 328

50 [195]1 I ALL.E.R 311

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to a specified person, or bearer within the meaning of s3(1) of the *Bills of Exchange Act*... and he submits that by necessary implication a cheque made payable to 'cash or bearer is a bill of exchange. I agree"[51].

In East Africa the law is that a cheque made payable to "cash or bearer" is a bill of exchange payable to bearer, that is to the person in possession of it. Such a bill does not need endorsement. But a document made payable to 'cash or order' is not a bill of exchange. Because an 'order' bill would need endorsement and 'cash' cannot endorse it. However this distinction does not appear to be of any significance for payment purposes as was said in *North and South Insurance Corporation v National Provincial Bank* Ltd,[52] thus:

> It cannot have been intended that 'cash' which is a purely impersonal collection of letters, should indorse this draft. That being so the four words "Pay cash or order" cannot be read so as to give any sensible meaning to the whole four, and the result is that the printed words "or order" must be disregarded and we *have a direction to pay cash-by necessary implication, to pay to the bearer of the document*[53]

Such a document is taken to mean that the drawer intended his banker to effect payment to the person presenting the document. But this does not mean that payment in this form was payment to

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51 [1950]EA 714 at pp 715-716

52 [1936] I K.B. 328

53 *Ibid* at pp 335-336

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bearer. Thus in *Orbit Mining & Trading Co. Ltd v Westminster Bank Ltd*[54] the Court of Appeal said:

> In order to be a cheque within s73, the document must be a bill of exchange. This is defined by section 3(1) of the Act... under which there must be a sum payable "to the order of a specified person or to bearer" clearly 'cash' is not a specified person, and I do not think that unless made expressly in favour of the bearer it is enough to argue that, cash or order' in the end as a matter of construction means "bearer" and I agree with the judge below that the mandate to pay bearer must be expressed and not implied.[55]

But as Smart says "instruments in this form are *not* to be regarded as payable to bearer, although for some purposes the practical effect is the same as if they were".[56]

The most important difference between a document drawn "cash or bearer" and one drawn "cash or order" is that the former is covered by the *Bills of Exchange Act*[57] and is fully negotiable whereas that latter is not.

According to *Chamberlain v Young and Tower*[58] a cheque drawn 'Pay... order' and endorsed by the drawer is a good cheque

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54 [1963]1 Q.B. 794

55 *Ibid* at pp. 821-822

56 Smart R.E. Ed. *Chorley & Smart Leading Cases in the Law of Banking op.cit* pp. 43-44

57 Cap. 76

58 [1893]2 Q.B. 206

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because it is interpreted to mean Pay to my order". But a cheque drawn "Pay... or order" is not a bill of exchange because there is no payee.[59] A cheque drawn 'Pay self or Order' is a good bill authorised by S.5(1) of the Act which states that a bill may be payable to or to the order of the drawer or it may be drawn payable to or to the order of the drawee.

E. ANTE-DATING AND POST DATING

It was generally thought that a post dated cheque would not have qualified as a cheque because S.73 defines a cheque inter alia as being payable on demand. The argument was that in the absence of S.13(2), which provides that a bill is not invalid by reason only that it is ante-dated or post-dated, a post dated cheque would not be a cheque as it is not payable on demand. However, in *Hodgson & Lee Pty Ltd v Mardonius Pty Ltd*[60] after analysis of statutory provisions corresponding to SS.3, 10 and 11 of the *Bills of Exchange Act*[61] the Court came to the conclusion that a post-dated cheque is not payable at a fixed or determinable future time and must therefore be paid on demand. It appears, therefore, that post dated cheques are within the meaning of S.73 and S.13(2) was not necessary to make them cheques. The provision that a bill is not invalid by reason only that it is post-dated has been interpreted to include a proposition that a cheque shall not be invalid by reason only of its being post-dated. A post dated cheque can be negotiated between the date of its issue and its maturity date (the date it bears) and for a reasonable time thereafter.[62]

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59 *R v Randall* [1893] 2 Q.B. 206.

60 (1986)5 NSWLR 496

61 CAP 76

62 *Hodgson & Lee PTY Ltd v Mardonius Pty Ltd op.cit.*

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However, post-dated cheques should always be handled with care as they can be both "troublesome and dangerous for the banker"[63]. First, under S.75 the death of the customer which comes to the knowledge of the banker determines the customer's mandate and consequently all outstanding cheques cannot be honoured by the banker. If a banker pays on such a mandate then he would be liable and accountable to the personal representatives of the deceased and the holder of the post-dated cheque will have to prove as an unsecured creditor on the estate. Secondly S.75 gives the customer the right to determine the banker's duty and authority by a countermand of payment; that is to withdraw his mandate before the cheque has been honoured. That means that the person holding the cheque cannot get payment from the bank.

This happened in *Thaker Singh (Electrician) and Sons v Quarbanlite Ltd.*[64] The respondent sold and delivered certain goods to the appellant and received three post-dated cheques, payable at monthly intervals to cover the whole purchase price of the goods. Before the respondent had received any money, however, the appellant countermanded payment of the first cheque. The Court of Appeal of Kenya held that;

> When, as in the present case, a negotiable instrument was taken in *lieu* of money payment; there was a presumption that the parties intended it to be a conditional discharge only, and that their original rights were to be restored if the cheque were dishonoured or if the drawer acted in a manner inconsistent with giving of the cheque such as by

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63 Smart P.E. Ed *Chorley & Smart, Leading Cases in the Law of Banking* 6th Ed *op.cit.*, p.129

64 1978(2) ALR Comm 324 see also *Jetha Ismail Ltd v Somani Brothers* [1960] E.A. 26

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countermanding payment. Since...the three cheques were given in satisfaction of one debt, the appellants action in countermanding payment..amounted to repudiation of the agreement.[65]

In such a situation, according to the Supreme Court of Uganda's decision in *Esso Standard (Uganda) Ltd v Uganda Commercial Bank*,[66] one may sue for the price of goods sold and delivered for which the cheques were issued.

Thirdly, the bankruptcy of the customer may create problems for the banker because of the doctrine of relation back. That is bankruptcy is deemed to have started on commission of the first available act of bankruptcy.

Fourthly, if the banker mistakenly honours a post-dated cheque and dishonours other cheques drawn on him by the customer, he will be liable to the customer for wrongful dishonour. This is the reason why the bankers generally and especially when they have never dishonoured the customer's cheque will not dishonour the cheque until they have ascertained whether or not a post-dated cheque has been paid by mistake.

F. NOTICE OF DISHONOUR

Section 48 provides that when a bill, such as a cheque has been dishonoured notice of dishonour, unless excused under S.50 (2) (c), must be given[67] to the drawer. If it is not given the drawer will be discharged from liability both on the cheque and on the

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65 *Ibid* at p.325

66 Civil Appeal No.14 of 1992, Supreme Court, unreported

67 See *Nanji Khodabhai v. Sohan Singh & Anor* (1957) E.A.291, *Lombard Banking Ltd v. Ghandhi & Anor* [1965] E.A. 12.

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consideration for which it was given. This position can be gathered by implication from the case of *Emile Habib Bateekha v. Rosen Alam Eddin*[68] where the Court of Appeal of the Sudan said:

> The holder of a dishonoured bill, note or cheque may sue an immediate party liable thereon on the consideration as well as on the instrument, and where a negotiable instrument has not been protested for non-payment and thus cannot be sued upon, the drawee can use the instrument as evidence in an action on the consideration, and if there have been presentment and notice of dishonour the instrument will be *prima facie* evidence, though otherwise it may not be sufficient.[69]

The notice of dishonour must be given by a person entitled to call for payment and must convey to the recipient that the cheque has been dishonoured and that he will be held responsible.[70]

G. PAYMENT BY A CHEQUE

Simply stated the law seems to be that when there is payment by cheque the presumption is that the parties intended it to be a conditional discharge only and that their original rights are to be restored if the cheque were to be dishonoured or if the drawer

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68 1970(1) ALR 205 pp. 206-207.

69 *Ibid* emphasis added.

70 *Abdul Aziz v. Pioneer Agencies Ltd* [1975] E.A. 479 at 480 quoting *Caunt v. Thompson* (1849) 18 L.J.C.P. 125 See Also *Govind Ukeda v. Dramji Nanki* [1960] E.A. 410.

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acted in a manner inconsistent with giving of the cheque such as by countermanding payment.[71] The rule was succintly stated by the Court of Appeal of the Sudan in *Mirghani Shebeika v. Mohammed Ahamed*[72], thus:

> The general rule is that payment by cheque or other negotiable instrument is conditional payment and the debtor is not discharged unless and until the cheque or other instrument is honoured, but there is nothing to prevent a negotiable instrument from being given and taken as absolute payment if the parties so intend, and the creditor may receive the instrument in absolute discharge of the debt, trusting solely to his remedies on the instrument.[73]

A good example is provided by the facts of this case. A judgment debtor issued cheques to the judgment creditor. He waited for six months before presenting the cheques for payment and they were dishonoured. Relying on S. 44 of the Sudan's *Bills of Exchange Ordinance* which is similar to S.45 *Bills of Exchange Act*[74] of Uganda, the court held:

> If a creditor takes a bill or a note as a conditional payment, and he is guilty of

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71 *Tharker Singhi (Electrician) and Sons v. Quarbanlite Ltd* 1978(2) ALR Comm 324.

72 1972 (1) ALR Comm. 346.

73 *Ibid* at pp. 349-350.

74 Cap. 76.

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laches in respect of it, who takes a cheque and takes an unreasonable time is presenting it, whereby his debtors position in altered, the bill or note is then treated as absolute payment, and as between debtor and creditor the debt is discharged; and six months is not a reasonable time for the payee of a cheque to wait before presenting the cheque for payment.[75]

Nigerian Courts on the other hand have taken the view, as expressed by the Supreme Court in *Buko v. Nigerian Pools Company Ltd*,[76] that:

> The fact that the bank had endorsed the cheque as a stale cheque in no way altered the right of the appellant to sue on the cheque, as it has long been held since *Laws v. Rand*[77] that as between the drawer and the holder of a cheque, the former is not discharged by any delay in its presentation short of six years, unless some loss or injury is occasioned to him by such delay.[78]

A similar view was expressed in *Ingyengierfaka v. Giodom*[79] that failure to present a cheque within reasonable time does not

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75 *Ibid* at 350-351.

76 1966 (2) ALR Comm.200.

77 140 E.R 812. This case was decided in 1857 before the enactment of the Bills of Exchange 1882

78 1966 (2) ALR Comm 200 at p.202

79 1963 (3) ALR Comm 40

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discharge the drawer, a right of action subsists against him and is barred only by the operation of the relevant statute of limitation.

The High Court of Uganda has held that when a creditor takes a bill of exchange or a promissory note on account of a debt, then the question:

> whether this operates as a conditional payment and suspends the remedy for the debt until the maturity of the instrument in the hands of the creditor is one to be decided in the light of the particular circumstances and the terms of the whole transaction; and though the law implies an agreement to suspend the remedy where the bill or note is taken on account of a simple contract debt and nothing is said at the time, no such implication arises in a case where the remedy for the debt is a better remedy than an action on a negotiable instrument, as where the debt is for rent and is therefore recoverable by distress or is a specialty debt or secured debt.[80]

The preferred position is that taken by the Court of Appeal of the Sudan as it is based squarely on the interpretation of the relevant provisions of the *Bills of Exchange Ordinance*. Be that as it may, a bill of exchange or promissory note is to be treated as cash and must be honoured unless there is some good reason to the contrary[81]. But giving a bill of exchange or a promissory note as

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[80] *Multi Holdings Ltd & Anor v. Uganda Commercial Bank* (No.2) 1971 (1) ALR Comm. 219 at 219.

[81] *Arab Bank v Ross* [1952]2 Q.B. 216

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collateral security for a debt leaves the existing remedies for the debt untouched.[82]

H. OTHER DOCUMENTS TO ENABLE A PERSON TO OBTAIN PAYMENT

Other documents enabling a person to secure payment inlcude promissory notes, treasury bills, dividend and interest warrants.

Section 83(1) of the *Bills of Exchange Act*[83] states that a promissory note is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of a specified person or to bearer.

The effect of this section has been considered in a number of cases. In *Lombard Banking v Vithaldas Gordlandas*[84] the documents were worded: "At one hundred and twenty (120) days after date I pay to M/S Ghusalal Revji & Sons Ltd K'la the sum of Shs. five thousand for value received as per invoice NO. 45" It was argued that because the usual words "I promise to pay" were not used these documents were not promissory notes. The court held that no particular form of words is essential to the validity of the note provided the requirements of the section are fulfilled. But it must be such as to show the intention to make a note. The rules of grammar must give way to the rules of good sense, and, where a reasonable interpretation of the whole instrument requires that

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82 *Multi-Holdings Ltd & Anor v Uganda Commercial Bank op.cit* pp.236-237.

83 Cap. 76

84 [1960] E.A 345

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grammar should be departed from, it must be, and constantly is, departed from. In the event, it was held that as the words 'I pay' in the note could fairly be construed as saying colloquially "I promise to pay" it was a valid note. But the omission of the words ' I promise to pay' by not including the word 'pay' was vital and it could not be considered a valid promissory note.

In *Shirley v Tanganyika Tegry Plastics*[85] the court held that the addition of the reference to the invoice after the words "for value received" on the note was unusual but unobjectionable so long as it was not intended to impose a condition.

The maker of the promissory note is the principal debtor or the party primarily liable on the note for the debt. A promissory note should be distinguished from an IOU. An IOU is an account stated and is not a negotiable instrument unless it also contains an unconditional promise to pay.

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[85] [1968] E.A 529

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