THE AUSTRALIAN BANK CHEQUE— SOME LEGAL ASPECTS

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During the past few years a series of elaborate frauds have been committed in Australia by the use of forged, counterfeit or stolen bank cheques.[1] More recently the New South Wales Supreme Court and the Court of Appeal have been confronted with difficult legal issues connected with such cheques and the liability of banks issuing them.[2] The courts have also remarked that "although bank cheques are well-known in Australia, the legal qualities of such cheques are not fully understood by all bankers".[3] In September 1973, in a note on the Commercial Causes Court of New South Wales, which he contributed to the *Australian Business Law Review*, Mr Justice Macfarlan observed

> "In our court there has been a recent illustration of recognition *for the first time* of a custom with respect to bank cheques. Whether the custom in Sydney is identical with the custom in all States I do not know, nor do I know whether it is the same in England or North America or other parts of the British Commonwealth. However, I believe that *there is not any reported decision of the courts upon the degree of acceptance which the business community gives to a bank cheque.* Recently one of the judges who constitute our Commercial Court prepared a judgement which recognized the reliance which the business community now places upon bank cheques. This judgement has so far escaped the inevitable critical comment of a court of appeal but this escape is no doubt only

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1 E.g. news item in The Herald 16th October 1974 p. 6 as to how a con-man purchased a legitimate bank cheque for $50 and by a photographic process raised the amount to $50,000 and the result looked so authentic that it fooled even the bank clerks until the forgery was detected owing to the absence of watermarks on the cheques.

2 See two unreported decisions of Mr Justice Macfarlan *viz* (i) *Capri Jewellers Pty Ltd* v. *The Commonwealth Trading Bank of Australia* (judgment delivered in June 1973. Commercial Case No. 2478); and (ii) *Sidney Raper Pty Ltd* v. *The Commonwealth Trading Bank of Australia* (judgment delivered in April 1974. Commercial Case No. 5107). This case went on appeal and Macfarlan J's judgment was set aside by the New South Wales Court of Appeal. See *Commonwealth Trading Bank of Australia* v. *Sidney Raper Pty Ltd & Ors* (unreported judgment delivered 15th April 1975 C.A. 113 of 1974). See also *National Bank of Australasia* v. *Lewis* unreported decision of Mr Justice Muir in the District Court of Sydney 12th May 1971, where it appeared that eight blank bank cheque forms had been stolen from a branch of the National Bank in New South Wales and thereafter forged and circulated in Victoria.

3 *Per* Macfarlan J. in *Sidney Raper Pty Ltd* v. *The Commonwealth Trading Bank of Australia supra.*

because at the date of writing this note the judgement has not been delivered."[4]

The term "bank cheque" is a technical expression that has gained a popular meaning by the practice of Australian banks over a long period of time, the practice having commenced about the 1890s. The term is peculiar to Australia. In the United States they are called "cashiers' cheques"[5] and in the United Kingdom and Canada the equivalent is the "bank draft".[6]

Bank Cheques displacing "Marked" or "Certified" Cheques

In Australia, the bank cheque has taken the place of the "marked" or "certified" cheque. In the latter case, the bank on which the cheque is drawn certifies that the drawer's account is sufficiently in funds to provide for payment of the cheque. This is effected by writing "marked good for

[4] The Honourable Mr Justice Bruce Macfarlan, "The Commercial Causes Court—A Judge's View", (1973) *1 Australian Business Law Review* 192. The italics in this passage are the writer's. Firstly, Mr Justice Macfarlan appears to have erred (as will be shown in this article) when he speaks of a recognition of a custom with respect to bank cheques "for the first time". Secondly, the judgment on bank cheques to which Macfarlan J. adverts to may be his own judgment in *Capri Jewellers Pty Ltd* v. *The Commonwealth Trading Bank of Australia* which was Case No. 2478 of 1970 of the Commercial Causes Court of the Supreme Court of New South Wales. He delivered that judgment in July 1973. The note in the *Australian Business Law Review* was published in September 1973 but would have been written and submitted to the editor of the journal prior to July 1973. A subsequent judgment of Mr Justice Macfarlan relating to bank cheques was *Sidney Raper Pty Ltd* v. *The Commonwealth Trading Bank of Australia*—Case No. 5107 of 1965, judgment being delivered on 19 April 1974. This judgment which is discussed later on in this article was reversed by the Court of Appeal. See note 2 *supra*. All these judgments remain unreported except for short references to them in the *Australian Current Law Digest*. See (1973) A.C.L.D. 152 and (1975) A.C.L.D. 214.

[5] In the United States the cashier of a bank is the chief administrative officer and a distinction is drawn between (i) a cashier's cheque (a cheque drawn by a bank upon itself) and (ii) a banker's cheque or draft (a cheque drawn by one bank upon another). Some American courts, however, have not adopted this distinction in terminology and have used the term "cashier's cheque" or "banker's cheque" to include both types. See 107 *American Law Reports Annotated* pp. 1463-1468.

[6] Of the English texts on banking the best discussion of bank drafts is found in J. Milnes Holden, *The Law & Practice of Banking* Vol. 1, *Banker & Customer* (Pitman, London, 1970) pp. 287-329 and in L. C. Mather *Banker and Customer Relationship and the Accounts of Personal Customers* [4th (Revised) ed. 1971, Waterlow & Sons Ltd] pp. 190-194. In all the appeals to the Privy Council from the Australian courts where disputes relating to bank cheques were involved, the Privy Council referred to them as bank drafts. In *Commercial Banking Co. of Sydney* v. *Mann* (1961) A.C. 1, 4, Viscount Simonds observed "Bank cheques are similar to 'bank drafts' as known in the United Kingdom." J. K. Manning and D. Farquharson, *The Law of Banker and Customer in Australia* (The Law Book Co. of Australasia Pty Ltd, 1947) p. 38 states "A form of instrument which has become common in Australia is the bank cheque; that is a draft by the bank upon itself issued in the form of a cheque. Bank officers, especially juniors, and the public, too, are apt to draw a distinction between bank cheques and bank drafts, founded on the form and colour of the instrument, but which has no substantial foundation in law". This text which was the only text on the banker-customer relationship in Australia has been out of print since about 1955. It was based on an earlier work on the same subject by the late F. A. A. Russell K.C. published originally in 1925. See *Perel* v. *Australian Bank of Commerce* (1923) 24 S.R. (N.S.W.) 62; *Varker* v. *Commercial Banking Co. of Sydney Ltd* (1972) 2 N.S.W.L.R. 967.

payment" or "certified good" across one corner of the customer's cheque and adding the bank's official stamp initialled by the teller.[7] The legal effect of such marking has been judicially stated to be to give "the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn".[8]

It appears that in about 1895 bank cheques and marked cheques were both in use in Sydney but gradually the bank cheque displaced the marked cheque and, about the year 1900, the practice of marking cheques as "good" by banks had disappeared. The use of bank cheques was steadily and constantly extended until it became the general practice of all Australian banks.[9] It may be noted that the practice of marking cheques, except as between banks for clearing purposes, has been condemned by the London Clearing Bankers and it has ceased in England and is on the decline in the United States and Canada as well, where a more formal method of "certification" has been developed under which the customer's account is debited at the time the cheque is certified.[10]

In the recent New Zealand case of *Southland Savings Bank* v. *Anderson*[11] the issue arose whether a cheque *marked by the ledger keeper of a bank* at the request of a customer constituted a "marked" or bank cheque. It was held that the marking by the ledger department was different in character and in custom from what is generally referred to in banking practice as a "marked" or "bank" cheque. "It was no more than the practice which is generally followed in trading banks of notifying the teller that there are sufficient funds at that time to meet the cheque which is presented for payment."[12]

Judicial Recognition of Bank Cheques

Although not defined or even mentioned in the Commonwealth *Bills of*

[7] "Marking" for payment can take place firstly at the instance of the bank's customer; secondly, at the request of the payee or holder and thirdly as between bankers. The first was the most common. This practice of marking must, however, be distinguished from the practice between banks to mark cheques for purposes of clearance.

[8] *Gaden* v. *Newfoundland Savings Bank Ltd* (1899) A.C. 281, 285-6. See also *Bank of Baroda Ltd* v. *Punjab National Bank Ltd* (1944) A.C. 176; *Adaicappa Chetty* v. *Thomas Cook & Sons* (1932) 34 *Ceylon New Law Reports* 443 (a decision of the Privy Council unreported in the English law reports). M. J. L. Rajanayagam, "Marking or Certification of a Cheque by the Drawee Bank—The Legal Consequences", (1970) 12 *Malaya Law Review* 298-307.

[9] Manning and Farquharson, *op. cit.* p. 38. While cheques were "marked" free of charge as part of customer service, a fee (presently 40 cents in Victoria) is levied by trading banks for the issue of bank cheques. Additionally they are subject to State stamp duty (e.g. presently 9 cents in Victoria).

[10] Lord Chorley, *Law of Banking* (6th ed., London, Sweet & Maxwell, 1974) pp. 50-52; M. Megrah and F. R. Ryder, *Paget's Law of Banking* (8th ed., London, Butterworth, 1972) pp. 318-321. Marking is however not uncommon in the merchant banks throughout the world. *Paget's Law of Banking, op. cit.* p. 318.

[11] (1974) 1 N.Z.L.R. 118.

[12] Ibid., 121.

Exchange Act 1909-1974 the bank cheque has been judicially recognized and explained on more than one occasion by the highest judicial tribunals of the country. In 1921, in *Union Bank of Australia Ltd.* v. *McClintock*[13] the Privy Council observed "It is common in Australia for banks, when requested, to issue to customers 'bank cheques' in form drawn by themselves on themselves, in favour of a named payee or order or bearer . . ."

More recently, in 1972, in *Fabre* v. *Ley*,[14] a Full Bench of the High Court stated

> "It appears that for a considerable number of years there has been a practice in Australia of bankers issuing what have come to be known as 'bank cheques' at the request of customers who have for some reason to provide cash or its equivalent in commercial transactions. They are drafts drawn by a bank usually on itself but occasionally upon another bank. In either case, they are issued in the form of cheques. Although it may be more accurate to refer to a bill of exchange drawn by a bank upon itself as a banker's draft, the nomenclature 'bank cheque' is, and has for long been used in Australia to describe instruments of this kind."

Statutory Recognition of Bank Cheques

The use of bank cheques in Australia has not only received judicial sanctity but also statutory recognition. For instance, s. 73(c)(ii) of the Commonwealth *Electoral Act* 1918-1966 which requires candidates for election to the House of Representatives to make a deposit of $100 enacts that such deposit may be made by legal tender or by a banker's cheque for that amount. In *Fabre* v. *Ley*[15] it was argued that the term "banker's cheque" as used in the *Electoral Act* was not the same thing as a "bank cheque" as known in Australian banking practice. The High Court rejected this contention. The Court while conceding that the expression "banker's cheque" may be somewhat wider in meaning than a "bank cheque" in that it may include a cheque drawn by a bank upon another bank, as well as a "cheque" drawn by a bank upon itself, held that it is clear that both expressions "banker's cheque" and "bank cheque" refer only to a cheque which is drawn by a bank and will not include for instance, a personal cheque of a bank's customer.

Common Use and Acceptance of Bank Cheques

Bank cheques have an important influence in the professional, trading and business activities conducted throughout the country in all the States.

[13] (1922) A.C. 240; For other Privy Council appeals from Australia where the use of bank cheques have been judicially recognized, see *Bank of Commerce Ltd* v. *Perel* (1926) A.C. 737; *Commercial Banking Co. of Sydney Ltd* v. *Mann* (1961) A.C.1; see also *McClintock* v. *The Union Bank of Australia Ltd* (1920) 20 S.R. (N.S.W.) 494; *Perel* v. *Australian Bank of Commerce* (1923) 24 S.R. (N.S.W.) 62.

[14] (1972) 127 C.L.R. 665, 670.

[15] Ibid. There a prospective candidate had tendered to the electoral officer a personal cheque for $100 as the required deposit which the officer had refused to accept and it was argued that since a personal cheque was also drawn on a bank it came within the definition of a " banker's cheque" in the statute.

They are commonly used and accepted inter alia (i) by solicitors in the settlement of transactions including real property transactions; (ii) in settlements in the short term money market; (iii) by persons engaged in business and trade where it is inconvenient to use and carry cash; (iv) in payments, where the creditor wishes for some further assurance of payment than the debtor's personal cheque; and (v) by persons concerned in the business of hire-purchase, pawnbroking, buying and selling second-hand motor vehicles, selling by retail jewellery and precious stones and furs and by travel agents.[16]

Bank Cheques regarded as Equivalent to Cash

Businessmen, professional people and members of the public alike accept bank cheques without inquiry as to their genuineness, validity and authenticity; they do not consider them to be subject to the risk of forgery and regard them as equivalent to money. Shopkeepers recognize a bank cheque when they are given one by a customer in payment of goods. In such cases, the customer is not asked to wait, nor is delivery of the goods postponed, until the bank which had issued the cheque is contacted (by telephone or otherwise) and the authenticity of the cheque is verified. As Macfarlan J. stated in *Capri Jewellers Pty Ltd* v. *The Commonwealth Trading Bank of Australia*

> "The representation conveyed by the printed name of the bank on the form is accepted as a guarantee of its authenticity. The identity of the signatures (there are normally two on a bank cheque) is of minor significance. The presence of signatures is important but the identity of the signatory (like in the case of a cheque of a personal customer) is unimportant. The point of significance is the presence of signatures upon *a form which has on it the name of a bank* . . . It is a situation in which the bank prints a document and by completing it to the needs of a particular transaction engages to pay a sum of money which is stated, and by this act consciously and deliberately injects life and facility into the performance of business transactions."[17]

As far back as 1923 in *Perel* v. *Australian Bank of Commerce*[18] Street C.J. observed that "bank cheques payable to bearer are to all intents and purpose equivalent to cash", and in appeal, the Privy Council confirmed this view when Viscount Cave L.C. stated,[19] "a bank cheque issued by a responsible bank is treated as equivalent to cash and is used for any purpose for which cash or its equivalent is required . . ." In 1972, in *Fabre* v. *Ley*[20] it was noted that s. 73(c)(ii) of the *Electoral Act* 1918-1966 stipulates that the $100 deposit of a candidate for election to the Federal Parliament should be *by legal tender or by a banker's cheque*. "The plain intention

[16] *Capri Jewellers Pty Ltd* v. *The Commonwealth Trading Bank of Australia* note 2 *supra* and cases cited at note 12 *supra*.
[17] Ibid. (Italics added by writer.)
[18] (1923) 24 S.R. (N.S.W.) 62, 75.
[19] *Australian Bank of Commerce Ltd* v. *Perel* (1926) A.C. 737, 740.
[20] (1972) 127 C.L.R. 665.

of the Paliament in enacting s. 73(c)(ii)", observed the High Court, "is that cash or *its equivalent* shall be deposited with the nomination paper. When the divisional returning officer declares the nominations as required by s. 79(2), there must be no question that the amount of the deposit is or will without doubt be in hand".[21] It is submitted that all reported Australian decisions on bank cheques have taken a similar view that they are equivalent to cash.[22]

The Australian banks also have never expressly denied or disclaimed this recognition that is given to their cheques. They do not caution traders or the public to verify the authenticity of their cheques and not to accept them at their face value. True, the banks do not openly advertise their cheques as being equivalent to cash as they do, for instance, in the case of bank credit cards.[23] But although there is no such express advertisement or "holding out", nevertheless by long and continued usage and well-established commercial practice, bank cheques have acquired a quality or even a notoriety as "documents" which could be relied on. It is interesting to note that in 1961 in *Commercial Banking Co. of Sydney* v. *Mann*[24] (where the bank was sued for alleged negligence in the collection of a bank cheque) the Privy Council was informed by counsel appearing for the bank "that bank cheques are treated as equivalent to cash and the questions arising in the appeal were of such importance to bankers in Australia that in the event of success, the bank would not ask for costs of the appeal". Counsel's statement before the Privy Council was a clear admission that the Australian banks also regard their bank cheques as being equivalent to cash.

Manning Committee's Comments on Bank Cheques

It is significant to note that the Manning Committee[25] had also recognized the special features of the Australian bank cheque when recommending amending legislation. The Australian Bankers' Association had submitted to the Committee that the definition of "cheque" should be extended so as to apply the whole of the law as to cheques to bank cheques as well. This seemed to the Committee to raise questions of considerable difficulty. While the submission of the Association and the reasons given were appreciated, the Committee concluded that it would be undesirable to adopt the

21 Ibid., 671.

22 For a recent unreported case when a different view was expressed see *Commonwealth Trading Bank of Australia* v. *Sidney Raper Pty Ltd & Ors* note 2 *supra*. See also note 36 *infra*.

23 The banks openly advertise their bankcards as being equivalent to cash and state that the bankcard "saves you from the frustration of carrying too little cash and the disquiet of carrying too much . . . It puts your bank in your pocket" and so on.

24 (1961) A.C.1, 4.

25 The Committee appointed by the Commonwealth Government to review the *Bills of Exchange Act* 1909-1958. Its chairman was Mr Justice J. K. Manning of the Supreme Court of New South Wales. The Committee issued its *Report* in May 1964.

proposal. This conclusion was based on broad grounds. A bank cheque has for many years been used universally as the equivalent of cash and they have come to be regarded as instruments which are not subject to the restrictive provisions affecting cheques, but are certain to be paid without conditions or restrictions of any kind. The Manning Committee felt that the introduction of a provision applying the whole of the law as to cheques to these instruments might well result in the development of a different outlook, and that this would be most undesirable. For practical reasons the special nature and status of a bank cheque should be preserved and the Committee considered that this would best be done by continuing to limit the applicability of the law as to cheques to the rules relating to crossings and the duties and liabilities of banks.[26]

Legal Position of a Bank Cheque

Strictly speaking bank cheques are not "cheques" within the meaning of the *Bills of Exchange Act*. This is because in the case of a bank cheque drawn by a bank upon itself, there is no separate drawer and drawee.[27] However certain protections of the *Bills of Exchange Act* have been expressly extended to bank cheques. This was done by an amendment to the Act in 1932 which provided that for certain purposes a "cheque" includes a banker's draft payable on demand or by or on behalf of a bank upon itself whether payable at the head office or at some other office of the bank. The result is that a banker's draft (i.e. a bank cheque) may now be crossed and the banker who pays it is protected by the provisions of the Act just as though it were in fact within the description of a cheque.

The present provisions of the Act relating to a banker's draft are found in ss. 88A, 88B(2), 88C(2) and 88D(4). These provisions relate to the protection given to banks in the payment and collection of cheques. The Manning Committee observed that some doubts had been expressed as to whether all or, if not all, which of the sections of the statute giving protection to banks apply in the case of bank cheques. The Committee was inclined to think that substantially all do apply, but in any event concluded that such proposed provisions as relate to the protection to be afforded to banks dealing with cheques should apply to bank cheques and that the proposed provisions as to crossings should also apply.[28]

The courts have offered the view that "In legal significance, bank cheques are promissory notes made and issued by the bank."[29] The courts have also described them as bills of exchange drawn by a bank upon itself and

[26] *Manning Committee Report* paragraphs 261-263.
[27] *London City & Midland Bank* v. *Gordon* (1903) A.C. 240 (H.L.); *McClintock* v. *Union Bank of Australia Ltd* (1920) 20 S.R. (N.S.W.) 494 (Gordon J. dissenting); cf. *Ross* v. *London County & Westminster Bank* (1919) 1 K.B. 678.
[28] *Manning Committee Report* paragraphs 258-260. These proposals were given effect to by amending legislation in the *Bills of Exchange Act* 1971.
[29] *Per* Viscount Simonds in *Commercial Banking Co. of Sydney Ltd* v. *Mann* (1961) A.C.1, 7.

accepted in advance by the act of their issuance. They therefore possess none of the characteristics of a mere order to pay money. It is a primary obligation of the bank. It becomes the obligation of the issuing bank as much so as if the bank had given a promissory note instead of its cheque. By way of analogy bank notes are also in legal significance regarded as promissory notes of the issuing bank. Accordingly, the legal status of a bank cheque may be equated to that of a bank note.[30]

Bank Cheque Not Liable to be Countermanded

It is also important to note that a bank cheque (unlike a personal cheque of a customer)[31] is not liable to countermand of payment. There are no English decisions specifically in point but several American decisions on cashiers' cheques have established that since the instrument is one of primary obligation on the part of the bank, there can be no right of countermand of it such as exists when the document constitutes a mere direction or order to pay.[32] The difference is a most material one and strengthens the reliability of a bank cheque and its acceptance as equivalent to cash.

A recent Australian decision which considered whether a bank cheque can be countermanded is *Sidney Raper Pty Ltd* v. *The Commonwealth Trading Bank of Australia*.[33] In that case, one Jacobsen who had emigrated from the United States to Australia, had brought with him a cashier's cheque for U.S.$66,998 drawn and issued in his favour by the Bank of California. On 28th April 1965 he opened an account with the Commonwealth Trading Bank and the cashier's cheque was converted into Australian currency and credited to his account. Subsequently on 11th May 1965, Jacobsen obtained a bank cheque from the Commonwealth Trading Bank for a sum of $29,500 in favour of Sidney Raper Pty Ltd (a firm of real estate agents) as part payment for a block of flats he was purchasing. However, when the plaintiff firm presented the cheque for payment it was dishonoured by the bank on the following grounds: (i) that about the same time the cashier's cheque was issued to Jacobsen, the United States Inland Revenue Service had served writs on the Bank of California attaching monies in his bank account for non-payment of income tax with the result that the monies in his account had become subject to a statutory revenue lien; (ii) accordingly, Jacobsen had not given value or consideration for the cashiers' cheque as

[30] *Banco De Portugal* v. *Waterlow & Sons Ltd* (1932) A.C. 452 (H.L.); *Miller* v. *Race* (1758) 1 *Burr* 452; *Suffell* v. *Bank of England* (1882) 9 Q.B.D. 555; M. Megrah and F. R. Ryder, *Byles on Bills of Exchange* (23rd ed., London, Sweet & Maxwell, 1972) pp. 294-295. Although formerly the Australian trading banks were empowered to issue their own bank notes, Part V of the *Reserve Bank Act* 1959-1973 provides that the issue of Australian notes be the monopoly of the Reserve Bank.

[31] s. 81(a) *Bills of Exchange Act* 1909-1974.

[32] *Causey* v. *Eiland* 56 *American Law Reports Annotated* 529 and annotation therein.

[33] note 2 *supra*.

a consequence of which the bank cheque came to be given; and (iii) in dishonouring its cheque, the Commonwealth Trading Bank was acting in conformity with a cabled request from the United States Inland Revenue Service.

As against the bank it was argued that the revenue lien did not attach to the cashier's cheque as the writ was served after the cheque was issued, and that in any event the cashier's cheque was equivalent to cash and once issued could not be countermanded. It was further argued that the Commonwealth Trading Bank had a good claim as a holder in due course against the Bank of California for its payment and therefore could not dishonour its own bank cheque. At the trial Macfarlan J. upheld these arguments and held that the dishonour was wrongful and entered judgment in favour of the plaintiff for the amount of the bank cheque with interest. The Court of Appeal however reversed his decision. In doing so it held that since the American cashier's cheque was dishonoured owing to Jacobsen's account being frozen by the statutory revenue lien, there had been a total failure of consideration for the issue of the bank cheque by the Commonwealth Trading Bank and the bank was therefore entitled to dishonour it on presentation.[34]

This judgment of the New South Wales Court of Appeal in the *Sidney Raper* case runs counter to the American decisions on the subject and the generally accepted view in Australia that a bank cheque once issued cannot be countermanded by the issuing bank—at least not to the prejudice of third parties who have taken it in good faith and for value. Even if the consideration for the bank cheque had failed, the issuing bank's right of action (if any) should be against the person (i.e. the customer) to whom it issued the cheque. It is well-known that no bank issues a bank cheque until it has received cash for it from the customer for whom the cheque is issued. If cash itself is not taken, the bank will require the customer's personal cheque for the amount of the bank cheque and immediately debit the customer's account. The facts in *Sidney Raper* were unusual. There, instead of taking cash from the customer for the equivalent of its bank cheque, the Commonwealth Trading Bank accepted a cashier's cheque drawn by the Bank of California which was later dishonoured. It is submitted that the Commonwealth Trading Bank ought not to have issued its bank cheque *until* the cashier's cheque had been realized and the money credited to its bank. It expected the cashier's cheque to be honoured as a matter of course. It took no *unusual risks* but yet it took *a risk* and if it turned out (as it did) that the money for the cashier's cheque was not forthcoming, it is the Commonwealth Trading Bank and not the innocent holder who should bear the loss. The use and efficacy of bank cheques and the reliance which solicitors, stockbrokers and traders place on them would

[34] Ibid.

be seriously affected if it is realized that such cheques are liable to be countermanded because of a failure of consideration. If it were so, in future, every person who wishes to accept a bank cheque in payment will have to verify from the bank issuing it whether the cheque is good and value had been given for it.[35]

In the *Sidney Raper* appeal Mr Justice Moffitt made certain observations relating to bank cheques which are inconsistent with earlier decisions. He conceded that depending on the financial dependability of those who issue them, in practical terms, bank cheques approximate in many respects to monetary currency. However he stated (i) that a bank cheque is subject to the same law relating to bills of exchange, cheques or promissory notes and (ii) that although many people regard bank cheques as the equivalent of or as good as cash, yet these circumstances do not change the nature of the bank cheque as a negotiable instrument; that it is still a cheque and not cash; and it is an unwarranted assumption to regard it as cash merely because those who tender and those who accept such a cheque never advert to the possibility of it not being honoured. It is submitted that these observations are erroneous. They were made without any consideration of earlier decisions of the Privy Council and the High Court which have clearly held (i) that bank cheques are *not* cheques within the meaning of the Bills of Exchange Act and (ii) that they are regarded as cash or its equivalent.[36]

Do Bank Cheques infringe s. 44 of the Reserve Bank Act?

The question arises whether bank cheques contravene s. 44 of the *Reserve Bank Act* 1959-1973 which enacts that "A person shall not issue a bill or note for the payment of money payable to bearer on demand and intended for circulation."

As stated earlier a bank cheque is the equivalent of the banker's draft as known in England and the English textwriters on banking are quite clear that "a bankers' draft must not be drawn payable to bearer".[37] This is because the *Bank Charter Act 1844*, Section II made it unlawful "for any banker to draw, accept, make or issue, in England or Wales, any bill of exchange or promissory note, or engagement for the payment of money payable to bearer on demand . . ." Such an instrument would be a bank note. The Bank of England has the exclusive right of note issue in England and Wales.

All bank cheques issued in Australia are payable to bearer. In printing their bank cheque forms the Australian banks may not have realized the

[35] Even *marked* cheques which were replaced by the bank cheque (see note 9 *supra*) are not liable to countermand. "The view among bankers is that the customer has no power to countermand payment of a cheque which a banker has marked at his request, and this is probably correct." *Paget's Law of Banking op. cit.* 322.

[36] notes 16 and 22 *supra.*

[37] *Paget's Law of Banking, op. cit.* 271; J. Milnes Holden, *Law and Practice of Banking op. cit.* p. 288.

significance of s. 44 of the *Reserve Bank Act*. On the other hand, the banks have informed the writer that they feel that the section will not apply to bank cheques because they are all printed with the crossing "not negotiable" and this would necessarily imply that they are not intended for circulation as provided for in the statute. However it is submitted that the "not negotiable" crossing[38] does not prohibit or impede the circulation of a bank cheque and the issue of infringement of the statute remains an open one.

Issue of Bank Cheques to Unauthorized Persons

Banks ought to exercise due care when issuing bank cheques in exchange for customers' cheques.If precautions are not taken, the issuing bank can become "an unwitting and innocent party to a fraud". *Perel* v. *Australian Bank of Commerce*[39] is a good illustration. Under a trust account maintained at the defendant bank, all cheques had to be signed by one McClintock as manager, *and* another specified signatory, and had to be further countersigned by a firm of accountants who acted as the auditors for the trustees. McClintock conceived an elaborate plan to defraud the trustees. He opened an account with the Union Bank of Australia in the assumed name of Robert Haynes. Thereafter from time to time, over a period of over one year he drew fifteen cheques on the trust account to the total value of over £16,000. The fifteen cheques were all properly signed and countersigned as required by the mandate. No fraud was suspected by the other signatories because McClintock had filled up the butt end of the fifteen cheques indicating that they were drawn for some proper purpose in connection with the administration of the trust. The cheques were also drawn not in favour of any individuals but in favour of the trustees' bankers and were crossed "Not Negotiable. Bank Account Payee Only". McClintock himself then presented each cheque at the bank and obtained from it in exchange for an equivalent value, a bank cheque drawn by it in favour of R. Haynes—his assumed name. He then paid in these bank cheques to his account at the Union Bank and the latter bank collected the bank cheques from the issuing bank and credited the account with the proceeds. McClintock then misappropriated the money.

When this elaborate fraud was discovered, the trustees sued their own bank alleging that it had acted negligently in issuing the bank cheques to McClintock. The Supreme Court of New South Wales held that the bank had been negligent in issuing the bank cheques to McClintock in the circumstances in which they were requested by him. In each case, the bank cheque had been issued without inquiry from the drawers of the cheques.

[38] For the effect of which on cheques, see *Commissioners of State Savings Bank of Victoria* v. *Permewan Wright & Co. Ltd* (1914) 19 C.L.R. 467; *Great Western Railway Co.* v. *London and County Banking Co.* (1901) A.C. 414. "The 'not negotiable' crossing is often misunderstood, many people believing that a cheque so crossed is not transferable. . . The effect is that the cheque remains transferable, but is deprived of the full character of negotiability." *Paget's Law of Banking, op. cit.* pp. 250-1.

[39] (1923) 24 S.R. (N.S.W.) 62; on appeal to the Privy Council (1926) A.C. 737.

The bank had led evidence to show that it had been the usual practice in Sydney with some bankers to issue bank cheques in exchange for its customer's cheques on the request of a responsible employee (e.g. at the instance of a customer's clerk known to the bank), and that requisitions for bank cheques were never signed by all the signatories to the cheque for which it was to be exchanged. While doubting the correctness of this practice, the Court observed that if it turns out that the agent had no authority to obtain or receive a bank cheque in that form, the bank could not escape liability by pleading that it was a banking practice to issue bank cheques in that manner. Street C.J. observed, "A banker may be perfectly safe in issuing a bank cheque on the request of an employee if he issues it in favour of the same payee and in the same form as the cheque of the employer presented to him for the purpose, but a request for a cheque in another form and in favour of another payee is a very different thing." The Court preferred the view expressed by a banking expert from The Commercial Banking Co. of Sydney who stated that if a bank cheque was asked for payable to some other payee than the one named in the cheque for which it was to be exchanged, the bank ought to require the written authority of the drawers of the cheque; otherwise the bank would be taking a risk.

The Privy Council affirmed the decision of Street C.J. and held that the bank was in clear breach of the mandate given to it when it handed the bank cheques to McClintock at his sole request and enabled him to deal with them as he thought fit. Nor could it be maintained that McClintock as manager had implied authority to specify the services which the bank was to render in return for the cheques properly drawn in its favour, and in so doing to request it to issue the bank cheques in question. The Privy Council noted that it was the practice of some Australian banks to issue bank cheques on the request of any "responsible representative" of the customer. Their Lordships felt that the banks were taking a risk in doing so and added "if such a course is followed in face of definite instructions such as those which were given in the present case, the bank following that course is acting without authority."

In *Perel's* case it was also held that where a cheque is drawn "Not Negotiable, Bank Account, Payee only" it is "merely a direction to the bank to hold the amount for which it is drawn and to await further instruction as to its disposal ." In such a case the bank becomes a trustee for the drawer of the cheque and must take instructions only from the drawer or his authorized agent.

Perel's case should act as a red light to all bankers *who issue bank cheques in exchange for customers' cheques.*[40] A bank cheque must only be issued in favour of the payee named in the customer's cheque. If no

[40] *Bank of Montreal* v. *Dominion Gresham Guarantee and Casualty Co. Ltd* (1931) A.C. 659 where the bank was held liable for issuing bank cheques to an unauthorized person in circumstances very similar to *Perel's* case.

payee is named or in case of doubt, the banker ought to obtain specific instructions of the customer's agent or employee unless the bank is certain of his authority.

Liability of a Bank for Forged or Stolen Bank Cheques

The New South Wales Supreme Court had to decide this very issue in the recent case of *Capri Jewellers Pty Ltd* v. *The Commonwealth Trading Bank of Australia.*[41] On the facts, one Di Santi, an Italian migrant who had worked as an accountant in Italy, had obtained employment as a cleaner in the Stores Branch of the Commonwealth Trading Bank in Sydney. While working there he stole a bank cheque form from the stock maintained by the bank. He then filled in the blank space of the cheque with his own handwriting, forged the signatures of fictitious bank officers and tendered the bank cheque to the plaintiffs, a firm of Sydney Jewellers in payment for diamonds to the value of $13,900. As was the common practice, the plaintiffs accepted the bank cheque without inquiring as to its authenticity and delivered the diamonds to him. Having committed this fraud, Di Santi returned to Italy and in the absence of a treaty of extradition between the two countries, no action could be taken against him. On the other hand, when Capri Jewellers presented the cheque for payment, the bank refused to pay on the ground that it was a forgery of a bank cheque form which had been stolen. On the refusal to pay, the plaintiff sued the bank to recover the sum of $13,900.

At the trial both parties conceded that there was no reported case in any country where a bank's liability with respect to a lost or stolen blank bank cheque form has been considered. It was argued that the bank owed a legal duty to the general public (including the plaintiff) to take reasonable care to insure the security of its blank bank cheque forms and to see that such cheque forms did not get into the possession of unauthorized persons who could use them to the detriment of the business community (as had happened in this case).[42] Further, that the bank had committed a breach of its duty by engaging Di Santi as a cleaner in its stores department where the blank cheque forms were stored, thereby giving him an opportunity to steal a cheque form and defraud the plaintiffs.[43] On the other hand, the bank contended that it owed no such legal duty; that although it adopts the highest standard of care with respect to the custody of blank bank cheque forms, it nevertheless does this only for business reasons and not because

[41] note 2, *supra.*

[42] Plaintiff's counsel relied strongly on the general duty of care laid down by Lord Atkin in the celebrated case of *Donoughue* v. *Stevenson* (1932) A.C. 562, 582 and the observations of Lord Reid in *Home Office* v. *Dorset Yacht Co. Ltd* (1970) A.C. 1004, 1026. Although Macfarlan J. felt that "counsel's argument had a prima facie attraction because it accorded well with 20th century concepts of law and justice", he did not uphold it.

[43] This argument was however not pressed because the plaintiff was unable to prove that the bank had acted negligently in employing Di Santi as a cleaner in its stores department.

it is bound by a legal duty to do so; and, that in any event, it had taken all necessary and possible precautions.

Having considered both these views and examined the evidence as to the security measures that the bank had taken, the court held that the bank was not liable. It accepted the evidence of the stores manager and the assistant stores manager of the bank that all precautions were taken to prevent unauthorized persons from entering the area where the blank forms were stored and even the cleaners (there were five of them, of whom Di Santi was one) had access to this area and had to do their work only during the "ordinary working hours" of the bank in the presence of the other bank staff. Accordingly, even assuming (without conceding) that the bank owed a legal duty to keep its blank bank cheques safely, it had not committed a breach of that duty.

The court's finding that the bank had not been negligent is open to criticism.[44] The evidence indicated that the blank bank cheque forms had not been stored in a safe or vault (like the bank's cash and other valuable documents) but had been kept in the cheque stores in packages together with the customers' blank cheque forms. In the case of larger branches all these cheque forms were packaged and lodged on steel shelves while in the case of smaller branches, the blank bank cheque forms were enclosed in paper sleeves in pairs. It was from one of these sleeves that the cheque had been stolen (presumably) by Di Santi.

Although the law does not recognize different degrees of negligence it acknowledges different degrees of care. The greater the hazard (i.e. the risk of loss, or forgery) the greater the care that ought to be taken. In *Capri Jewellers* it was conceded that the public confidence in bank cheques lay in the assumption that the banks "so guarded their blank forms as not to permit them to get into unauthorized hands" and if they were lost or stolen, that forgery is not only facilitated but highly probable. But yet the bank took no greater precautions in the safe-keeping of their blank cheque forms than of their customers' blank cheque forms. The bank also led no evidence of other bankers as to whether this was the common practice among Australian banks. Moreover the precautions that the bank took must be weighed against the character of the thief. The blank form was allegedly stolen not by a complete stranger (e.g. a burglar) but by an employee of the bank—although he was acting outside the scope of his employment.[45]

Capri Jewellers case is a hard decision. It is submitted that the one

[44] The plaintiff's solicitors have informed the writer that an appeal was lodged but withdrawn due to lack of funds.

[45] Cf. *Lloyd* v. *Grace Smith & Co.* (1912) A.C. 716. An analogy is where a bank can be liable if valuables deposited for safe custody by a customer are stolen by an employee of the bank who had nothing to do with the bank's safe custody service, e.g. a typist. J. Milnes Holden, *Law and Practice of Banking op. cit.* p. 329.

ground on which the firm of jewellers could have been denied relief is if it had been a party to the fraud or if it had been shown that it was unusual for such a firm to part with $13,900 worth of diamonds in the way it did. No such allegations were made, nor did the bank challenge the firm's complete innocence and honesty in the transaction. In fact, evidence was given (and not contradicted) that it was quite normal for Sydney traders to accept bank cheques for such amounts without inquiry.

Nor was this a case of a court having to decide as to which of two innocent parties had to bear the loss. If both the plaintiff and the bank were equally innocent it may be contended that the loss should remain where it lay, i.e. with the plaintiff. But in this case, there were not two but only one innocent party, namely the plaintiff. Although the court held that the bank was not negligent it is difficult to argue that the bank was also innocent like the plaintiff. It was innocent only to the extent that it was ignorant until the plaintiff presented the cheque for payment that one of its blank cheques had been stolen.[46]

If properly appreciated, this decision deals a blow to the efficacy of bank cheques and the confidence that the public hitherto had in them. If there is a possibility of blank bank cheque forms being stolen and forged, they can no longer be accepted in payment *without inquiry as to their genuineness*. ". . . if the salt hath lost its savour, wherewith shall the salt be salted? It is thenceforth good for nothing, but to be cast out. . ."[47]

[46] Cf. *Kepitigalla Rubber Estate Ltd* v. *National Bank of India Ltd* (1909) 2 K.B. 1010, (a case relating to forged entries in a customer's bank statement) where the court, in holding against the bank, observed "The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible."

[47] *St. Matthew* 5, 13.