STANDARD BANK OF S.A. LTD. v. SHAM MAGAZINE CENTRE.

(APPELLATE DIVISION.)

1976. *November* 1, 16. HOLMES, J.A., JANSEN, J.A., MILLER, J.A., JOUBERT, A.J.A., and GALGUT, A.J.A.

Bills of exchange.—Cheque.—Markings on.—Choice of.—Effect of various markings.—When still transferable.—Cheque crossed and marked "not negotiable" and "a/c payee only".—Such cheque remains transferable, subject to equities.—Drawer wishing to make a cheque completely non-transferable should simply mark it boldly "non-transferable".—Act 34 of 1964, secs. 6 (3), (5), 75 (1), 80, 81.

1. The drawer of a cheque who wishes to cross it generally, has the following options – (*a*) He may place across its face two parallel transverse lines simply; section 75 (1) (*b*) of Act 34 of 1964. This means that the banker on whom it is drawn shall not pay it to any person other than a banker; section 78 (1). In other words it cannot be paid over the counter. (*b*) He may, in addition, place between these lines the words "and Company" or any abbreviation thereof; section 75 (1) (*a*). This takes the matter no further. (*c*) He may, either in the case of (*a*) or (*b*), add the words "not negotiable" between the two lines. If he does this, the payee is not thereby precluded from transferring the cheque but, if he does so, the transfer is subject to equities. This is because section 80 (which is peculiar to crossed cheques) provides that the transferee shall not have, and shall not be capable of giving a better title to the cheque than that which the person from who he took it had. The words "not negotiable" also give the drawer some protection if the crossed cheque is lost or stolen; section 81. (*d*) He may also, by established practice and custom, although not by statutory sanction, add the words "a/c payee" or "a/c payee only" between the parallel crossing lines. These words have no effect on the transferability of the cheque. They may operate as some safeguard if the cheque should fall into wrong hands. They are, in effect, a direction to the collecting banker that the specified payee should receive the money. These words cease to have any operation if the payee specified in the cheque transfers it (e.g., by special endorsement) because thereupon the specified payee parts with his right to receive the money.
2. In general, if the drawer wishes to render a cheque completely non-transferable – (i) He could boldly write or print across the face of the cheque the words "not transferable", so that he who runs may read. These words need not be between the two parallel lines: they are not part of the statutorily defined crossing. (ii) He could also omit "order" and "bearer", when adding the words "not transferable". In this connection it should be noted that, in terms of section 6 (3) of Act 34 of 1964, a cheque expressed to be payable to a particular person, without the word "order", is nevertheless regarded as being payable to order if it does not contain words prohibiting transfer or indicating an intention that it should not be transferred. 'Not transferable" would be words of such prohibition or indication. (iii) The suggested precautions in (i) and (ii), *supra*, are not necessarily the only way of effecting the prohibition or indication referred to in section 6 (3) and (5) of the Act.
3. If the drawer wishes the cheque to be transferable only on the footing of section 80 of the Act (subject to equities, as it is called), he should cross it and *not* mark it "not transferable", but "not negotiable"; and place these latter words between the crossing lines. This will also give him some protection under section 81 if the cheque is lost or stolen.
4. If the drawer wishes the cheque, whether crossed or not, to be completely transferable (free from equities, as it is called) he should neither mark it "not transferable" nor "not negotiable"; and he could make it payable to the payee or order.

Thus, when a cheque is crossed and bears the words "not negotiable a/c payee only" and "order", it still remains transferable, subject to the equities.

The decision in the Witwatersrand Local Division in *Standard Bank of S.A. Ltd.* v. *Sham Magazine Centre*, reversed.

Appeal from a decision in the Witwatersrand Local Division (HIEMSTRA, J., and VAN REENEN, J.), dismissing an appeal from a magistrate's court. The facts appear from the judgment of HOLMES, J.A.

S. W. Kentridge, S.C. (with him *J. V. Lazarus* and *D. M. Fine*), for the appellant: The issue in this appeal is whether a cheque made payable "to the order" of a named payee, crossed generally and marked "not negotiable" is rendered not transferable by the further marking "a/c payee only", or whether it remains transferable either subject to or free from equities. In the magistrate's court and in the Transvaal Provincial Division it was held that the words "a/c payee only" rendered the cheque non-transferable. Consequently the appellant could not sue as holder of the cheque.

The relevant sections of the Bills of Exchange Act, 34 of 1964, are sec. 6 (which is to be compared with sec. 8 of the English Bills of Exchange Act, 1882); sec. 71 (sec. 73 of the English Act); secs. 75, 76, 77, 78, 79 and 80 (secs. 76 to 81 of the English Act). The word "negotiable" in sec. 6 means "transferable". See *O.K. Bazaars (1929) Ltd.*, v. *Universal Stores Ltd.*, 1972 (3) S.A. at p. 180G; Paget, *Law of Banking*, 8th ed., p. 227. In the case of a cheque, as distinct from a bill, the words "not negotiable" do not restrict transferability: See *O.K. Bazaars (1929) Ltd.* v. *Universal Stores Ltd., supra* at p. 179B; Cowen, *Law of Negotiable Instruments in South Africa*, 4th ed., p. 435; cf. *Hibernian Bank Ltd.* v. *Gysin & Hanson*, (1939) 1 K.B. at p. 488. In holding that words "a/c payee only" were words indicating an intention that the cheque should not be transferable, both the magistrate and the Court *a quo* followed the judgment of SNYMAN, J., in *Dungarvin Trust (Pty.) Ltd.* v. *Import Refrigeration Co. (Pty.) Ltd. and Another*, 1971 (4) S.A. 300.

The correctness of that judgment is called into question. The appellant makes the following submissions: (*a*) The words "a/c payee only" (hereinafter referred to as "the words") do not restrict either the transferability of the cheque or its negotiability. The words are not part of the crossing, nor a direction to the paying banker, but merely a direction to the collecting banker (with whom the drawer has no contractual link) as to how he wishes the proceeds of the cheque to be applied, after collection. (*b*) Alternatively, the words do not restrict either the transferability of the cheque or its negotiability when (as in the present case) they appear in conjuction with the express direction to "pay to the order of" the named payee. In order to restrict transferability the drawer of an instrument must use clear words. In case of doubt the presumption is in favour of transferability. See *R. Barkhan Finance Corporation* v. *Dabros (Pty.) Ltd.*, 1968 (2) S.A. at p. 691C-D, H; *Dungarvin's* case, *supra* at pp. 305H-306C. Anyone intending to qualify the operation of a bill of exchange must do so "by plain and intelligible language". See *Meyer & Co. Ltd.* v. *Jules De Croix, Verley et Cie*, 1891 A.C. at pp. 525, 529. The words relied on by the respondent as restricting transferability are words which at least since 1891 were well understood in England and in South Africa as being words which do *not* restrict transferability. Until the decision in the *Dungarvin* case, no authority will be found to have regarded the words as restricting transferability, either as a matter of law or by custom.

The English authorities: These authorities are overwhelmingly to the effect that the words are to be regarded as "a mere direction" (in the sense of a non-obligatory indication) to the collecting bank as to how the money is to be dealt with on receipt, and not as constituting any restriction on transferability. See *National Bank* v. *Silke*, (1891) 1 Q.B. at pp. 483-440; *Akrokerri (Atlantic) Mines Ltd.* v. *Economic Bank*, (1904) 2 K.B. at p. 472; *Morison* v. *London County and Westminster Bank Ltd.*, (1914) 3 K.B. at pp. 373-374; *A. L. Underwood Ltd.* v. *Bank of Liverpool & Martins*, (1924) 1 K.B. at pp. 793-4; *Importers Co.* v. *Westminster Bank Ltd.*, (1927) 2 K.B. at pp. 307, 309; *Universal Guarantee (Pty.) Ltd.* v. *National Bank of Australasia Ltd.*, (1965) 2 All E.R. at p. 102; (1965) 1 W.L.R. at p. 697; Chalmers, *Bills of Exchange*, 9th ed., p. 312; Chalmers on *Bills of Exchange*, 13th ed., p. 316; Byles on *Bills of Exchange*, 23rd ed., p. 280; Halsbury, *Laws of England*, 4th ed., vol. 3, para. 114; *Paget*, *supra* at p. 256; McLoughlin, *Introduction to Negotiable Instruments* at p. 144; Jacobs on *Bills of Exchange*, 4th ed., pp. 67-69, 250-251; Chorley, *Law of Banking*, 6th ed., pp. 103; 133-134; *Questions and Answers on Banking Practice (U.K.)*, 6th ed. (1909), pp. 70-72. The justification for the view adopted by the English authorities appears to be that the words are not part of the crossing and could never have been intended as an instruction to the paying bank which has nothing to do with the application of the money after it has once been paid to the collecting bank. The words could also not place a binding obligation on the collecting bank because of the absence of contractual privity and could accordingly only have been intended as an intimation of the drawer's wishes. However, it follows from the English doctrine of conversion, that but for the statutory protection now provided, banks which collect stolen cheques, however innocently, would be liable to the true owner. Failure to regard the intimation conveyed by the words "a /c payee only" may be negligence, and may deprive the collecting bank of its statutory protection. See *Bevan* v. *National Bank*, (1906) 23 T.L.R. at p. 68; *Ladbrake & Co.* v. *Todd*, (1914) 11 L.T.R. 43; *House Property Company of London Ltd.*, v. *London County and Westminster Bank*, (1915) 84 L.J.K.B. at p. 1848; *Importers Co.* case, *supra; Universal Guarantee (Pty.) Ltd.* case, *supra*. None of the English authorities have treated the words as prohibiting transfer or indicating an intention that the instrument should not be transferable within the meaning of sec. 81 of the English Act though it appears to be implicit that the drawer has indicated a desire that the money should be placed in a particular account only. *Jacobs*, *supra*, correctly sums up the position. Further, the effect of the English authorities is that the words are insufficient in all circumstances (and especially on a bearer or order instrument) to prohibit transfer or indicate an intention of non-transferability. On the history of crossing of cheques and "a /c payee" markings, see *Chorley*, *op. cit.*, pp. 58-59; Holden, *Law Relating to Cheques*, (1951) 14 *Modern Law Review* at pp. 41-44. For the position in Canada see Falconbridge, *Banking & Bills of Exchange*, 7th ed., p. 478; in Australia see Riley, *Bills of Exchange*, (1953) pp. 248, 268; *Universal Guarantee (Pty.) Ltd.*, case, *supra*.

The South African authorities: Up to 1971 the South African understanding of the words did not differ from that stated in the English

authorities: See *Hill* v. *The Colonial Bank & Trust Co.*, 1927 T.P.D. at p. 149; Emmett, *The Law of Negotiable Instruments in South Africa*, (1938), pp. 55, 155-6; Cowen, *The Law of Negotiable Instruments in South Africa*, (1964), pp. 115-116; Morgan Evans, *The Law of Bills of Exchange and Banking*, (1931) 3rd ed., p. 25; *Questions and Answers on Banking Practice (South Africa)*, (1939), 3rd ed., pp. 49-50. However in *Dungarvin Trust (Pty.) Ltd.* v. *Import Refrigeration Co. (Pty.) Ltd.*, 1971 (4) S.A. 300, SNYMAN, J., while purporting to accept the correctness of the English cases (as distinct from the English text-book writers), concluded that the words did indicate an intention that the instrument should not be transferable though they had to yield to clear indications elsewhere on the instrument that it was transferable. On the facts, where the words "or bearer" had been deleted, SNYMAN, J., held that there was no warrant for interpreting the words other than according to their ordinary grammatical meaning. This case has been referred to with approval in *Rhostar (Pvt.) Ltd.* v. *Netherlands Bank of Rhodesia Ltd.*, 1972 (2) S.A. at p. 705, and has been applied also to the case where the instrument is an order instrument. See *Browmen Investments (Pty.) Ltd.* v. *Delmas Hotel Off-Sales* (T.P.D. MELAMET, J., 15.8.1975, unreported). Cf. *National Insurance Brokers (Pty.) Ltd.* v. *Carlton Township Development Co. Ltd.* (D. & C.L.D. *per* KRIEK, J., 1976, unreported). The *Dungarvin* case, *supra*, has been criticised: see J. Sinclair, *The South African Law Journal*, vol. 90, at pp. 378-379; *The Annual Survey of South African Law*, 1971, pp. 301-303. The effect of the English cases is to lay down as a general rule that the words do not affect transferability or negotiability. See *Universal Guarantee (Pty.) Ltd.* case, *supra*, to which SNYMAN, J., was apparently not referred. The English cases are irreconcilable with the *Dungarvin* decision. The words, when considered in context, have no clear meaning and a South African Court should not depart from a meaning attributed to them for over 80 years in England and in South Africa: *Gordon* v. *Tarnow*, 1947 (3) S.A. at p. 540; *Moti & Co.* v. *Cassim's Trustee*, 1924 A.D. at p. 747. The words in context have no clear meaning: The words are found between the parallel transverse lines of the crossing and *prima facie*, therefore, might seem to be intended to form part of instructions to the paying bank – the sole object of a crossing being to give a direction to the paying bank: see sec. 78 of the Bills of Exchange Act, 1964; *Smith* v. *Union Bank of London*, (1875) 1 Q.B. at p. 34; the *Akrokerri* case, *supra* at p. 472; *Discounting & Shipping Co. (Pty.) Ltd.* v. *Franskraalstrand (Pty.) Ltd. and Others*, 1962 (2) S.A. at p. 562. But the words cannot be regarded as part of the crossing: see sec. 75 of the Act; the *Akrokerri* case, *supra* at p. 472; *Paget*, *supra* at p. 256; *Cowen*, *supra* at p. 423; and as the paying bank is, in any event, unable to carry out the instruction, the words can be ignored by it. The payee cannot be expected to look to the crossing for indications of the drawer's intention as the crossing contains no instruction intended for him. The collecting bank is entitled to ignore an instruction which neither purports to be given to it nor is able to bind it. In South African law it may or may not be negligence for the collecting bank to ignore this instruction. Conversion is no part of our law and it is at least doubtful whether a collecting bank has any duty to the drawer of a cheque. See *Yorkshire Insurance Co. Ltd.* v. *Standard Bank of S.A. Ltd.*, 1928 W.L.D. 251; cf. *Rhostar* case, *supra*.

The words are also ambiguous in themselves. They may be an attempt simply to emphasize that the money must not be paid over the counter. See 1971 *Annual Survey*, *supra* at p. 301.

This is particularly so if the word "payee" was intended to refer either to the person originally named as payee or any person who might become entitled to payment by reason of a negotiation to him. But see *House Property Company* case, *supra*. In *Hill's* case, *supra*, GREENBERG, J., regarded the words as an insufficient indication of an intention that the instrument should not be transferable. If the words are ambiguous either in themselves or in their context, it should be assumed that the user intended them to have the meaning which has been attributed to them and accepted in banking circles in England and South Africa over a long period. Accordingly the words have no effect either upon the transferability or the negotiability of the cheque. Assuming, however, that the words are something more than a mere direction, the further question is whether they are words indicating the requisite intention with sufficient clarity so as to render the instrument non-transferable in terms of sec. 6 (5). As the instrument in question is an order instrument it is *prima facie* negotiable in terms of sec. 6 (1) of the Act unless sec. 6 (5) applies: *R. Barkhan Finance Corporation* v. *Dabros (Pty.) Ltd.*, 1968 (2) S.A. at p. 691H. To indicate the requisite intention plain words must be used. *Meyer & Co. Ltd.* v. *Jules De Croix, Verley et Cie*, 1891 A.C. at pp. 525, 529; *National Bank* case, *supra*; *Hill's* case, *supra*; *House Property* case, *supra* at p. 1848. If the words are ambiguous a Court should decide in favour of transferability: *Dungarvin* case, *supra* at pp. 305F-306C: *National Insurance Brokers* case, *supra*. If regard be had further to the fact that the instrument is expressly made payable "to order" and is crossed "not negotiable", both of which are *prima facie* indications that the instrument is transferable, the words are ambiguous in their context. It is correct, as VAN REENEN, J., pointed out in the Court below, that the deletion of the word "order" does not in itself make a cheque anything other than a cheque payable to order: see sec. 6 (3) of the Act; *Van Schalkwyk* v. *White Ryan*, 1913 C.P.D. 376; *O.K. Bazaars* case, *supra* at p. 181B. But the retention of the words "pay to the order of", where they could have been deleted, adds to the confusion, and introduces ambiguity, even if there were none otherwise present. See the *National Insurance Brokers* case, *supra*; cf. the *Dungarvin* case, at pp. 303G, 305E.

The clear and obvious way to indicate an intention that the cheque should not be transferable would be to delete the words "to the order of" and to insert "only" after the payee's name. The Court *a quo* accepted the view of SNYMAN, J., that the words were unambiguous and indicated an intention that the instrument should be non-transferable: It concluded that it was irrelevant whether or not the instrument was an order instrument, even though it seems clear that SNYMAN, J., would have reached the opposite conclusion on the basis of his reasoning in the *Dungarvin* case. A post-dated cheque is valid as a cheque on or after the post-date: *Cowen*, *supra* at p. 60; *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B. at p. 718; *Stegmann* v. *London & Scottish Assurance Corp. Ltd.*, 1924 O.P.D. at p. 292; *Bank of Baroda* v. *Punjab National Bank*, (1944) 2 All E.R. at p. 91E-H; cf. *Paget*, *supra* at p. 223; *Hill's* case, *supra* at p. 147, 1927 A.D. at p. 494.

A. J. Horwitz, for the respondent: It is important to note the use of the phrase "contains words" in sec. 6 (5) of the Bills of Exchange Act, 34 of 1964. This implies that a less strict interpretation should be placed on the meaning of a bill. Notwithstanding the appearance of the words "or order" or "to the order of", on a bill, if the bill *contains* words prohibiting transfer or indicating an intention that it should not be transferable, the Court should give effect to these words. This would be in accord with what was said by HOLMES, J.A., in *R. Barkhan Finance Corporation* v. *Dabros (Pty.) Ltd.*, 1968 (2) S.A. at p. 691H. See, however, *National Bank* v. *Silke*, (1891) 1 Q.B. 435, where a view contrary to the above view appears to be expressed. Do, then, the words "Not negotiable a/c payee only" indicate an intention that the cheque should not be transferable? The question as to whether words do or do not indicate a particular intention is one of fact and not of law, and is answered by reference to the ordinary, grammatical meaning of the words employed. Further, in seeking the answer to this question, one must now consider the composite effect of the words "Not negotiable a/c payee only". *Dickinson* v. *S.A. General Electric Co. (Pty.) Ltd.*, 1973 (2) S.A. at p. 629D. There is, in this respect, very little to be gleaned from the authorities on the joint effect of the phrases "Not negotiable" and "Account payee only" on a crossed cheque; they are helpful really only to the extent of interpreting each phrase independently. Moreover, the cases were all concerned with actions against banks based on negligence. With few exceptions, the Courts were concerned with crossed order cheques bearing simply the words "account payee". Accordingly, whatever meaning may have been attributed over the years to these words, no practice has developed in regard to the two phrases together, and certainly not in South Africa. At any rate, whatever the practice or the meaning of the words may be, this has evolved in regard to the duties of a bank in dealing with moneys collected under such a cheque, and not in regard to the rights of an alleged holder against the drawer. See Paget, *Law of Banking*, 8th ed., p. 418; *A. L. Underwood Ltd.* v. *Bank of Liverpool and Martins*, (1924) 1 K.B. at p. 793, *Importers Co. Ltd.* v. *Westminster Bank Ltd.*, (1927) 2 K.B. at p. 309. In such a case the person requested to "present and get the cheque cleared" would be constituted the agent of the payee as contemplated in *Hibernian Bank* v. *Gysin & Hanson*, (1939) 1 All E.R. 166. See also, Byles, *Bills of Exchange*, 23rd ed., p. 280. In *Universal Guarantee (Pty.) Ltd.* v. *National Bank of Australasia Ltd.*, (1965) 2 All E.R. 98, the Court was concerned with an instrument similar to the one presently in issue, and the Court stated as a general rule that a cheque marked "account payee only" was nevertheless transferable. As authority for this view was quoted the *Underwood* case, *supra*. Further the approach adopted in the *Universal Guarantee* case is not correct: it is the composite effect of the two phrases "not negotiable" and "account payee only" together that indicate the drawer's intention. Similarly, the view expressed by Paget in *Law of Banking*, 8th ed., p. 257, that the words "account payee" have no effect upon the negotiability of a cheque, is subject to the same criticism. Two cases which concerned cheques similar to that presently in issue are *Dey* v. *Mayo*, (1920) 2 K.B. 346 (C.A.); *Sutters* v. *Briggs*, (1922) 1 A.C. 1. The Courts in those cases were more

concerned with the interpretation of sec. 2 of the Gaming Act, 1835, rather than with an enquiry into the negotiability of the cheques. Whilst *Paget*, *supra*, does (at p. 259) refer to the latter case, he does not refer to it as authority for the view that the cheque was negotiable. Generally speaking, the words "not negotiable" do restrict transferability of a bill, for at least they do indicate an intention that it should not be transferable. *Hibernian Bank* v. *Gysin & Hanson*, (1939) 1 All E.R. 166.

In regard to crossed cheques, see sec. 80 of the Bills of Exchange Act. Nowhere in the Act, not even in sec. 80, are the words "not negotiable" defined. All that sec. 80 by implication does is to provide that, notwithstanding the appearance of the words "not negotiable" on a crossed cheque, the cheque shall remain transferable, but subject to equities. The importance of the stress on the word "remain" lies in the fact that the Act does not define "not negotiable" to mean "transferable". The words retain their ordinary meaning. All the Act has done is by implication to provide that if one places those words on a crossed cheque, one has not used sufficiently forceful language to give effect to one's intention. This would not mean that one has not gone part of the way towards giving effect thereto: the words "not negotiable" if used in conjunction with other words may cumulatively indicate with sufficient clarity an intention to restrict transferability, even though these latter words may in themselves be held to not indicate a clear expression of intention to restrict transferability. Therefore, if the above proposition is accepted, there can be no reason why an uncrossed cheque bearing the words "not negotiable" should be in any different a position from a bill bearing those words. See Cowen, *The Law of Negotiable Instruments in South Africa*, 4th ed., p. 435, note 509. If one draws a cheque "Pay X only" one has clearly expressed an intention that the cheque should be not transferable. By inserting a crossing on a cheque one has manifested an intention that the cheque should be paid through a banking account. If one now inserts the words "account payee" on a crossed cheque one has merely reiterated the intention already expressed by way of the crossing. The phrase "account payee only" can only mean that the drawer intends the cheque to be non-transferable and that in accordance with the crossing the bank should pay same into the payee's bank account.

Even if the above submission be wrong, namely, that the Court should examine the effect of the words "not negotiable account payee only" independently of the words "or order" but rather that the Court should investigate the overall effect of all the words together, the Court should nevertheless come to the same conclusion on the cheque forming the subject-matter of this case. In *Hibernian Bank* v. *Gysin & Hanson*, (1939) 1 K.B. 483, the Court was concerned with a bill payable to the order of a given payee (as in the instant case) which had been crossed and marked "not negotiable". The word "only" also appeared on the bill, but the Court made no reference thereto. The appearance of the words "account payee only" on the cheque presently in issue would place it in the same category as the bill forming the subject-matter of the *Hibernian Bank* case. In that case the bill was held to be non-transferable, the words "to the order of" to be read subject to the words "not negotiable". This, however, did not render the words "to the order" meaningless: they were merely

limited to the case where the money was to be paid to someone as agent for the payee and no more. See also Byles, *Bills of Exchange*, 23rd ed., p. 75. Indeed, the Bills of Exchange Act contemplates that a situation of agency may arise in regard to banks, see sec. 78 (2). Applying them, the approach in the *Hibernian Bank* case, *supra*, if the restrictive phrase "not negotiable" on a bill overrides the effect of the words "to the order of" then by a parity of reasoning the restrictive words "not negotiable A/c payee only" on a cheque should override those same words.

Kentridge, S.C., in reply.

Cur. adv. vult.

Postea (November 16)

HOLMES, J.A.: The issue in this test case is whether a cheque which is –
(*a*) made payable "to the order" of a named payee;
(*b*) crossed generally;
(*c*) marked – "not negotiable a/c payee only"
is thereby rendered non-transferable.

The magistrate's court and, on appeal, the Transvaal Provincial Division, held that the words "a/c payee only" rendered the cheque non-transferable, and therefore that the appellant, to whom the cheque had been specially endorsed, was not the legal holder of it. Leave was granted to appeal to this Court. As will appear, the main question relates to the effect of the words, "a/c payee only".

The facts are few and pleasantly uncomplicated:

(i) The respondent, Sham Magazine Centre, of Turffontein, had a banking account with the Standard Bank at its Rosettenville Branch in Johannesburg.

(ii) The respondent, on or before 9 December 1974, drew a cheque calling upon such bank to "pay to the order of" Transvaal Watch (Pty.) Ltd., the sum of R732,53, and delivered it to such payee. The cheque was post-dated to 27 January 1975.

(iii) The cheque was crossed with two parallel transverse lines in the top left-hand corner, between which lines were the words: "not negotiable a/c payee only".
These words, as well as the words "pay to the order of" were printed, not hand-written or put there by means of a rubber stamp.

(iv) On 9 December 1974 Transvaal Watch Co. (the specified payee) delivered the cheque to the appellant bank, to which it was indebted in respect of overdraft facilities; and endorsed the cheque specially to the appellant. The latter gave value for the cheque.

(v) Upon presentation to the respondent's bank on 27 January 1975 the cheque was dishonoured by non-payment on the same day for want of funds; and was marked with the dread words, "refer to drawer".

(vi) It is common cause that the appellant, if it is a holder of the cheque, is not a holder in due course.

(vii) The appellant sued the respondent in the magistrate's court for R732, 53, claiming to be the legal holder of the dishonoured cheque.

(viii) The respondent, in its plea, denied that the appellant was the legal holder of the cheque. We were informed that a further plea (that in any event the cheque was discharged by the respondent's payment of the full amount to the liquidator of the payee) was abandoned in the Court *a quo*.

(ix) No evidence was led before the magistrate, the parties being content to rely on the facts which were common cause, *supra*, by virtue of the pleadings and an agreed statement of facts.

The appeal turns in the main on sec. 6 (5) of Act 34 of 1964, which provides that a bill is not negotiable if it contains words *prohibiting* transfer, or *indicating* an intention that it should not be transferable. (I shall refer later to the meaning of "negotiable" in that sub-section, and to the position of a crossed cheque, as distinct from a bill, under sec. 80). The crucial issue in the case is whether such prohibition or indication is provided by the words "A /c payee only". If the answer is in the affirmative, the appellant cannot be the legal holder of the cheque and the appeal must fail. The magistrate and the Court *a quo*, in answering this question in the affirmative, relied substantially on the judgment of SNYMAN, J., in *Dungarvin Trust (Pty.) Ltd.* v. *Import Refrigeration Co. (Pty.) Ltd. and Another*, 1971 (4) S.A. 300 (W). The correctness of the latter judgment is called into question in this appeal.

At this stage I set out certain provisions of the Bills of Exchange Act, 34 of 1964.

Sec. 1.

"Cheque means a bill drawn on a banker payable on demand."

Sec. 2 (1).

"A bill of exchange is an 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 a specified person or his order, or to bearer."

Sec. 6. Negotiability of bills.

"(1) A bill must be payable either to bearer or to order to be negotiable.

(2) A bill is payable to bearer if it is expressed to be so payable, or if the only or last indorsement on it is an indorsement in blank.

(3) A bill is payable to order if it is expressed to be so payable, or if it is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(4) If a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option.

(5) If a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties to the bill, but is not negotiable."

Chapter II

Sec. 71. Applicability to cheques of certain provisions relating to certain other bills.

"Except as otherwise provided in this chapter, the provisions of this Act applicable to a bill payable on demand apply to a cheque."

Sec. 75. General and special crossings on cheques.

"(1) If a cheque bears across its face an addition of –

(*a*) the words 'and Company', or any abbreviation thereof, between two parallel transverse lines, either with or without the words 'not negotiable'; or

(*b*) two parallel transverse lines simply, either with or without the words 'not negotiable',

that addition constitutes a crossing and the cheque is crossed generally.

(2) If a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable', that addition constitutes a crossing and the cheque is crossed specially and to that banker."

Sec. 77.

"A crossing authorised by this Act is a material part of the cheque, and it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter such a crossing."

Sec. 80. Effect of crossing and addition of words "not negotiable" on rights of holder.

"If a person takes a crossed cheque which bears on it the words 'not negotiable', he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

With regard to sec. 75, as a matter of interest the history of the crossing of cheques is summarised in Cowen, *The Law of Negotiable Instruments in South Africa*, 4th ed., pp. 420-421, as follows:

"The practice of crossing cheques originated in the London Clearing House towards the end of the eighteenth century; the clerks of the different bankers who did business there being accustomed to write the names of their employers across the cheques so as to enable the clearing-house clerks to make up their accounts. In the course of time the practice spread outside the Clearing House. It became customary for drawers to cross their cheques by writing upon them the names of the payee's bankers; and if they did not know where the payee banked, they simply wrote '& Co.' between two lines on the cheque. The drawer's intention in the former case was that payment should be made only to the banker named in the crossing, and in the latter, that the cheque should be paid only if presented through some bank. Gradually the practice received judicial, and later statutory recognition; and in modern commerce it is widely used as a means of giving a measure of protection to bankers and others against loss resulting from cheques getting into the wrong hands."

Dealing first with the words "not negotiable" between the lines of crossing, in the context of negotiable instruments and of the Bills of Exchange Act, 34 of 1964, "negotiable" is a word of fairly wide import. In a specialised connotation it means fully transferable in the sense that the transferee becomes a holder *free from equities*, as it is said, i.e., untainted by any defect attaching to the predecessor's title. This, as Prof. Cowen remarks in *The Law of Negotiable Instruments in South Africa*, 4th ed., p. 6, "constitutes the major privilege of negotiability". See, for example, sec. 27 (1) of the Act, in relation to a holder in due course. In another connotation, "negotiable" means transferable in the sense that the transferee becomes a holder *subject to equities*, i.e., subject to any defects attaching to the predecessor's title. See *Cowen, ibid.* at pp. 114-115. For example, the effect of sec. 80 is that a crossed cheque (as distinct from a bill), bearing on it the words "not negotiable", is nevertheless transferable, but the transferor cannot give a better title to the cheque than the person from whom he took it had; see the discussion on the matter by CORBETT, J., in *O.K. Bazaars (1929) Ltd.* v. *Universal Stores Ltd.*, 1972 (3) S.A. 175 (C) at p. 179B-E, and Paget, *Banking*, 8th ed., 1972, at p. 251, and *Cowen, ibid.* at p. 435.

Sometimes the Act and the cases do not make it immediately clear in what sense the word "negotiable" is used. Sec. 6 (5) of the Act provides an illustration:

"If a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties to the bill, but is not negotiable."

There the concluding words, "not negotiable", must mean "not transferable"; see Paget, *Law of Banking*, 8th ed., p. 227, in relation to the almost identical provision in sec. 8 (1) of the English Act of 1882.

In this Court the main argument by counsel on behalf of the appellant was:

(*a*) In the present case the cheque was crossed generally because it bore across its face two parallel transverse lines with the words "not negotiable"; see sec. 75 (1) of the Act, *supra*.

(*b*) In terms of sec. 80 the statutory effect of the foregoing is that the cheque was nevertheless transferable, but subject to equities.

(*c*) The remaining words, "a/c payee only", are not words, within the meaning of sec. 6 (5), prohibiting transfer or indicating an intention that the cheque should not be transferable. Hence the cheque was transferable (subject to equities, because of sec. 80).

Contentions (*a*) and (*b*) are correct, because of the statutory provisions cited.

As to contention (*c*), which is the nub of the appeal, counsel for the appellant relied on a line of English cases from 1891 onwards; on the support of the English text-books; on the support of the South African text-books; on the fact that for 80 years, until the *Dungarvin* case in 1971, the position in South Africa was regarded as settled, as above; and on his submission that the decision in the *Dungarvin* case was wrong.

I proceed to examine the foregoing, starting with the views of writers on the subject in South Africa.

Prof. Cowen, in his work on *The Law of Negotiable Instruments in South Africa*, 4th ed., pp. 440-441, puts it thus:

"It has become common for drawers to add to a crossed cheque such words as 'account payee', 'account payee only', 'for the account of A.B.' or 'account A.B. only'. There is no statutory recognition of this practice, and its legal effect is by no means settled. It would seem that these words do not form part of the crossing, and do not restrict the negotiability of the cheque.

The topic has assumed importance in English law in connection with the provision of the English Act which protects a banker, collecting a lost or stolen crossed cheque for a customer, from a claim made by the true owner. The presence of these words places the collecting banker under a duty of exercising care to ensure that the customer, whose account is credited, is really the payee. Accordingly, receipt of the proceeds of the cheque by the collecting banker for anyone other than the payee is not 'without negligence' and precludes the banker in English law from the protection of sec. 82 of the Bills of Exchange Act, 1882. In South Africa, however, as we have seen, the liability of the collecting banker to the true owner is not based on negligence but on knowledge. The topic would, therefore, not appear to have the same significance as in English law.

It would seem that the drawer's mandate to the drawee banker is unaffected by the words 'account payee'."

Prof. Emmett, *The Law of Negotiable Instruments in South Africa*, (1938), cites *National Bank* v. *Silke*, (1891) 1 Q.B. 435, in support of his statement at p. 55:

"It has further been decided that the words 'account payee' (and impliedly 'account payee only') do not render a bill not negotiable."

And at p. 155, dealing with crossed cheques:

"The Act does not deal with the addition of the words 'a/c payee' (account payee), so that it does not form part of the crossing of a cheque. As we have seen, the words do not restrict the negotiability of the instrument on which they are placed."

The Principles and Practice of Banking in South Africa by Barker, 3rd ed., 1952, states, at p. 45, that there is no warrant in the Act for an "a/c payee" crossing; and adds:

"It would perhaps have been well had it never been countenanced. Such a crossing does not destroy either the negotiability or the transferability of a cheque."

The Institute of Bankers in South Africa published a book entitled *Questions and Answers on Banking Practice in South Africa*, 1939. The answers were often based on opinions from counsel. One such opinion expresses the view, at p. 49:

"The words 'account payee only' added to the crossing are not in any sense an addition to the crossing, and they are in no way authorised by the Act. A crossing is a direction to the paying bank to pay the money generally to a bank, or to a particular bank, as the case may be, and when this has been done the whole purpose of the crossing has been served. The paying bank has nothing to do with the application of the money after it has been paid to the proper receiving bank. The words 'account payee only' are a mere direction to the receiving (collecting) bank as to how the money is to be dealt with after receipt."

The conclusion expressed was that the words "account payee only" do not limit the negotiability of the cheque.

Prof. Gibson, *South African Mercantile and Company Law*, 3rd ed., 1975, at p. 470 *in fin.* to 471, refers to the decision in the *Dungarvin* case (namely that a cheque crossed "not negotiable, a/c payee only" is not transferable and that only the payee has the right to hold the cheque or claim payment under it) and makes the following comment:

"The decision is, however, with respect, contrary to the general view of the effect of the addition of the words 'account payee only' to a cheque.The words do not form part of a crossing and have no effect on the transferability or negotiability of a cheque. . . . They are merely a directive to the collecting banker. . . .

The Annual Survey of South African Law, 1971, includes a section, commencing at p. 289, on negotiable instruments written by June Sinclair. At p. 301 the learned writer criticises the decision in the *Dungarvin* case. And the *South African Law Journal*, 1973, publishes an article by the same writer reiterating her submission that the *Dungarvin* decision is "not convincing and possibly incorrect", adding:

"The better view, it is submitted, is that these contentious words (a/c payee only) do not in any way affect the transferability of an otherwise transferable instrument, but serve merely as a direction to the collecting bank to collect the amount of the instrument for the payee's account."

Prof. Beuthin, in a letter to *The South African Chartered Accountant* of 8 July 1972, found the decision in the *Dungarvin* case "not entirely convincing". He expressed himself thus:

"In terms of sec. 6 (3) a bill is payable to order if it is expressed to be so payable or if it is expressed to be payable to a particular person (as is the case in the present problem) and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. The crucial question, accordingly, seems to be whether the words 'account payee only' do indicate such an intention with sufficient clarity. Bearing in mind that in the case of ambiguous language the Court should favour transferability, it can be argued strongly that they do not."

Wille and Millin, *Mercantile Law of South Africa*, 17th ed. (1975), does not specifically refer, in the chapter on bills of exchange, cheques and promissory notes, to the effect of the words "a/c payee" or "a/c payee only"; but at p. 573 it does refer, uncritically, to the *Dungarvin* case. As the work is expressed in the preface to state the law as at the end of 1972, the learned editors may not have had the advantage of reading the criticism of the decision in the 1973 *Law Journal*, *supra*, which also refers to the comments of Prof. Beuthin.

Finally, to complete the picture in regard to South African writers, I would add that Morgan Evans, in *The Law of Bills of Exchange, Promissory Notes, Cheques and Banking in South Africa*, 3rd ed., 1931, states at p. 25:

"Marking a cheque 'a/c payee' does not restrict its negotiability".

To sum up with regard to the South African writers, the general *consensus* is that the words "a /c payee" or "a /c payee only" on a crossed cheque do not affect the question of its transferability.

The English Text-books

A *A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities*, by Chalmers. He was the draftsman of the English Bills of Exchange Act of 1882, which is the basis of our legislation on that subject. The edition here cited is the ninth (in 1927) being the last edition by *Chalmers* only.

B At p. 14 the learned author says:

"Of recent years the practice has sprung up of marking cheques with the words 'account payee'. This is not an addition to the crossing, but is a direction to the collecting banker that the proceeds of the cheque when collected are to be placed to the credit of the payee specified in the cheque."

The authority cited for the foregoing is *Morison* v. *London County and* C *Westminster Bank Ltd.*, (1914) 3 K.B. at p. 373 (C.A.).

The learned author continues:

"It has further been held that the marking 'a/c payee' does not restrict the negotiability of the cheque. . . ."

The authority relied upon is *National Bank* v. *Silke*, (1891) 1 Q.B. 435 (C.A.).

D The learned author concludes:

"Where a cheque is marked 'a/c payee only, not negotiable' and the payee indorses it to his banker for collection, the banker is a holder and indorsee of the cheque."

Consistent with all of the foregoing, the 13th edition of *Chalmers* (by *Smout*, published in 1960), puts the position thus:

"Where the words 'account payee' are . . . added to a crossing they serve as but a E direction to the collecting banker. They do not constitute an imperative direction to the paying banker or restrict the negotiability of the cheque, but they do put every holder and the collecting banker upon inquiry."

An additional authority (to those cited in the 9th edition) is *Akrokerri Mines* v. *Economic Bank*, (1904) 2 K.B. 465 at p. 472.

Byles on *Bills of Exchange*, 23rd ed., 1972, has this to say at p. 280:

F "The practice has arisen in recent times of adding to the crossing 'account payee' or similar words. Though they have no statutory sanction, the addition is not prohibited by sec. 78, since they are a mere direction to the receiving banker. Though the word 'payee' means the person designated in the cheque as payee, and not the owner of the cheque at the time when it is presented, the words 'account payee' are not sufficient, in the case of a cheque drawn to order or bearer, to make it non-transferable within the meaning of sec. 8 (1) of the Code."

G Sec. 8 (1) is the English counterpart of our sec. 6 (5) of the Act, which is crucial in the present case. Sec. 78, referred to, is the English counterpart of our sec. 77. An additional authority cited is that of *Importers Ltd.* v. *Westminster Bank Ltd.*, (1927) 2 K.B. 297.

Chorley, *Law of Banking*, 6th ed., 1974, is to the same effect. It cites, H at p. 69, *National Bank* v. *Silke*, (1891) 1 Q.B. 435, as holding that the words on a crossed cheque, "Account of J. Moriarty, Esq., National Bank, Dublin," were merely a direction to the National Bank to place the proceeds of the cheque to the account of the payee, and were not prohibitive of transfer within sec. 8 (1) (of which our sec. 6 (5) is the counterpart).

Dealing with the position where the instrument is crossed "account payee" the learned author says at p. 103:

"Although at first sight such a crossing would appear to be a direction given by the drawer to the paying banker, since it is only between these two that a contractual relationship exists, the decisions show that it is addressed to the collecting banker, and would therefore not appear to be any concern of the paying banker. Indeed it would manifestly be impossible for a paying banker to satisfy himself that the money paid should actually reach the account of the payee, except in the accidental circumstances of his also being the collecting banker; at the most he could only obtain an assurance from the collecting banker as to the action proposed on his part. It does not even appear to have been argued that the obligation goes so far as this."

And at p. 133:

"The words 'account payee' or 'account payee only' or 'account John Smith' (the last-named formula being most commonly used in bearer instruments) are now frequently found upon crossed cheques. The practice of marking crossed cheques in this way originated at any rate before 1852, but has only become common during the present B century. Each set of words seems to have exactly the same effect, and this is to put upon the bank the duty of making a careful and satisfactory inquiry before collecting the instrument for the account of any person other than that of the payee indicated."

McLoughlin, *Introduction to Negotiable Instruments*, 1975, crisply puts it thus at p. 144:

"The words 'a/c payee' and 'a/c payee only' sometimes appear with a crossing. C Neither of these inscriptions forms part of the crossing, for a crossing is a direction to the paying banker. . . . The words do not prohibit transfer of the cheque, for to do that words must be plain and unambiguous. Nor do they affect its negotiability under sec. 8 (1). The only effect the words can have is on the collecting bank."

Halsbury, *Laws of England*, 4th ed., 1973, vol. 3, sums up the position in para. 114: D

"The marking to a particular account as 'account payee' or 'account of A.B.', has no warrant or recognition in the Bills of Exchange Act, 1882. It does not affect the transferability of the cheque. Nor, it is submitted, does it affect its negotiability. This particular crossing has been in use too long for it to be disregarded, and it must be taken to convey an intimation to the collecting banker that the proceeds of the cheque are only to be placed to the specified account. . . . The words 'account payee only' have no different significance except perhaps where they are put on by the drawer or are on the cheque as E printed."

The suggested possible exception just mentioned is further discussed in the notes, but it is not substantiated.

Paget, *Law of Banking*, 8th ed., 1972, discusses at some length the effect of words such as "account payee", added to the crossing of a cheque. The learned author indicates, at p. 256 *in fin.* and p. 257, that it may be pre- F sumed that the Court of Appeal in *National Bank* v. *Silke*, (1891) 1 Q.B. 435, did not consider the full negotiability of the cheque to have been in any way affected. In that case the cheque was payable to the order of M. and crossed "account of M., National Bank." M. endorsed it to the National Bank, i.e. the plaintiff. G

Also at p. 257 the learned writer states:

"As a matter of fact it has never, of recent years, been seriously contended that the words 'account payee' have any effect on the negotiability of a cheque, and in *A. L. Underwood Ltd.* v. *Bank of Liverpool*, (1924) 1 K.B. 775, SCRUTTON, L.J., definitely adopts the view that they have not."

At p. 258 the learned author deals with the question of "account payee" H and subsequent indorsements; at p. 259 with "account payee only"; and at p. 417 with "account payee". On a consideration of these pages as a whole I do not find any departure in principle from what is said in the passages quoted from pp. 256 and 257, *supra*.

Jacobs, *The Law of Bills of Exchange, Cheques, Promissory Notes and Negotiable Instruments Generally*, 4th ed., revised, 1948, discusses the effect of a general crossing between two lines containing the words "& Co." and "a/c payee". With regard to the latter words, the learned

author expresses the view at p. 250 that their complete effect has yet to be determined, but that the decisions indicate at least that they do not restrict the negotiability of the cheque.

At p. 68 *in fin*, the learned writer refers to sec. 8 (1) of the English Act (of which our sec. 6 (5) is the counterpart) and sums up the position crisply as follows:

"The real question that arises in each case is as to the sufficiency of the words employed to prohibit transfer or indicate an intention of non-transferability. If the instrument states in so many words that it is not to be transferable or if it states that it is payable to none other than the payee mentioned (e.g., 'to X only' or 'to payee only') no trouble can arise. But sometimes words are used which are in themselves ambiguous, or two expressions are used, one of a prohibitory nature, the other suggestive of transferability, and then occurs a difficulty of interpretation."

That is the position in the present case, in which the cheque bears the medley of words "not negotiable, a/c payee only" and "order".

To sum up with regard to the English writers, their strong *consensus* is that the words "a/c payee" or "a/c payee only" on a crossed cheque do not restrict its transferability.

Judicial decisions in England

1. *National Bank* v. *Silke*, (1891) 1 Q.B. 435 (C.A.). The defendant, Silke, drew a cheque payable "to the order of J. F. Moriarty". It was crossed by the drawer "account of J. F. Moriarty, Esq., National Bank, Dublin". It was delivered to the payee who endorsed it and sent it to the plaintiff (the National Bank, Dublin), directing them to credit his account, which was overdrawn. This the plaintiff did, and sent the cheque for collection. It was dishonoured. The plaintiff, claiming to be the holder of the cheque, successfully sued the drawer for the amount thereof. The drawer's appeal to the Court of Appeal failed. The drawer, relying on sec. 8 (1) of the Bills of Exchange Act, 1882, (of which our sec. 6 (5) is the counterpart) contended that nobody except Moriarty could acquire any right to sue on the cheque. LINDLEY, L.J., after making certain assumptions in favour of the defendant, said at p. 439:

"Now do the words in the present case prohibit transfer of the cheque, or indicate an intention that it shall not be transferable. It cannot be contended that they prohibit transfer, and I do not think that they indicate an intention that the cheque should not be transferable. They amount to nothing more than a direction to the plaintiff to convey the amount of the cheque to Moriarty's account when they have received it."

BOWEN, L.J., was of the same opinion.

FRY, L.J., after also making certain assumptions in favour of the defendant, said at p. 439 *in fin.*:

"I am clearly of opinion that that the words used in the present case neither prohibit transfer nor indicate an intention that the cheque should not be transferable. Much more definite words must be used to counteract the effect of the cheque being expressed to be payable to order."

It is generally accepted that these *dicta* of LINDLEY, L.J., and FRY, L.J., were *obiter*.

2. *Akrokerri (Atlantic) Mines Ltd.* v. *Economic Bank*, (1904) 2 K.B. 465.

Action on a cheque. The facts are not relevant. In the course of his judgment BIGHAM, J. (who, as will appear later herein, was regarded as "a very great authority" in this field), made the following remarks at p. 472:

"A crossing is a direction to the paying bank to pay the money generally to a bank or to a particular bank, as the case may be, and when this has been done the whole purpose of the crossing has been served. The paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words 'account A.B.' are a mere direction to the receiving bank as to how the money is to be dealt with after receipt."

3. *Morison* v. *London County and Westminster Bank Ltd.*, (1914) 3 K.B. 356 (C.A.).

With regard to crossed cheques, READING, C.J., said at p. 373 *in fin.* to p. 374:

"The words 'account payee' are a direction to the banker collecting payment that the proceeds when collected are to be applied to the credit of the account of the payee designated on the face of the cheque."

4. *A. L. Underwood Ltd.* v. *Bank of Liverpool and Martins*, (1924) 1 K.B. 775 (C.A.).

Some of the cheques were crossed "account of payee", one with the addition of the word "only". As to this, SCRUTTON, L.J., observed at p. 793 *in fin.* to p. 794 that this addition did not affect the negotiability of an order or bearer cheque.

5. *Importers Co.* v. *Westminister Bank Ltd.*, (1927) 2 K.B. 297 (C.A.).

At p. 307 ATKIN, L.J., said:

"What is the meaning of a cheque marked 'account payee only'? I do not know any better statement of it than that made by BIGHAM, J., a very great authority on questions of commercial, and particularly banking practice, in *Akrokerri (Atlantic) Mines and Economic Bank*, that 'the paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words "account A.B." are a mere direction to the receiving bank as to how the money is to be dealt with after receipt.' "

6. *Universal Guarantee (Pty.) Ltd.* v. *National Bank of Australasia Ltd.*, (1965) 2 All E.R. 98 (P.C.).

At p. 102F Lord UPJOHN mentioned that the statutes of England and Australia appeared to speak with one voice as to the effect of crossings on a cheque. On the same page, at G-H, he observed:

"The addition of the words 'a/c payee' or 'a/c payee only' refer to the payee named in the cheque and not to the holder at the time of presentation . . . but they do not prevent, at law, the further negotiability of the cheque. . . . These words do not cast on the paying bank, paying the cheque to a banker, any additional obligation to satisfy itself that the collecting bank is collecting it on behalf of the named payee. That is entirely the responsibility of the collecting bank."

To sum up with regard to the English decisions, while a scrutinous analysis might reveal one or two eddies of inconsistency, the mainstream is all in the same direction, namely, that the words "a/c payee" or "a/c payee only", appearing on a crossed cheque:

(i) do not restrict its transferability;
(ii) form no part of the drawer's mandate to his drawee bank;
(iii) amount to a mere direction to the collecting bank that the proceeds of the cheque should go to the account of the payee named therein.

Judicial decisions in South Africa

The question of the interpretation and effect of "a/c payee" or "a/c payee only" was slow to reach the Courts in this country. Judicial interpretation has been more frequent in England. This was because of the law of conversion in that country, involving enquiry as to negligence on the part of bankers faced with the words "a/c payee" or "a/c payee only". See Cowen, *The Law of Negotiable Instruments in South Africa*, at p. 440, quoted earlier in this judgment. That accounts for the comparative frequency of such cases in England; but it does not render inapplicable or

inappropriate in this country the meaning given to those banking expressions by the English Courts.

1. Thus, in *Hill* v. *The Colonial Banking & Trust Co.*, 1927 T.P.D. 138, GREENBERG, J. (as he was then), said at p. 149:

"Another question arises through the fact that the cheque in this case which is made payable to the African Life Assurance Society Ltd. or order, is crossed 'a/c payee only'. In *The National Bank* v. *Silke*, (1891) 1 Q.B. 435, it was held that a cheque payable to the order of M. and crossed 'account of M. National Bank' was transferable. In that case the crossing did not contain the word 'only', but the *obiter dicta* by LINDLEY and FRY, L.JJ., apply to the present case."

That was an application of the English decision referred to earlier herein.

GREENBERG, J., went on to observe that he agreed with the conclusion arrived at in Paget on *Banking* that every cheque on which the word "order" appears remains a negotiable instrument unless crossed "not negotiable". That was an *obiter* observation which is not relevant to the arguments in this case.

I would add that the appeal in *Hill's* case was dismissed (see 1927 A.D. 488) but the judgment contains no further discussion on the point now at issue.

2. *Dungarvin Trust (Pty.) Ltd.* v. *Import Refrigeration Co. (Pty.) Ltd.*, 1971 (4) S.A. 300 (W). The drawer of the cheque made it payable to M. A. Gokal and Son (Pty.) Ltd., and –

(i) struck out the words "or bearer";
(ii) crossed the cheque;
(iii) added, between the crossing lines, the words "not negotiable – a/c payee only".

For the first time in South Africa it was held, by SNYMAN, J., that such a cheque is non-transferable – "the drawer has unmistakably indicated his intention to prohibit transfer of the cheque" – at p. 306G. The learned Judge recognised that the words "not negotiable" of themselves would not preclude transfer subject to equities – at p. 306D-E. He reached his conclusion as to non-transferability because of the words "a/c payee only". These words, he held, at p. 305C, "could only have been intended to prohibit the transferability of the cheque".

At p. 302G the learned Judge said:

"Now it seems to me that if I were to take the meaning of these words according to their ordinary grammatical meaning, then they are words indicating an intention that the cheque should not be transferable. I see it as a clear instruction to the banker to pay the amount stated to the account of the payee only. The instruction is either a direct prohibition against transfer of the cheque or the words indicate an intention that it should not be transferred by the payee to anyone else."

In other words, the learned Judge held that the words "a/c payee only" in their *ordinary grammatical meaning* were a clear instruction to the banker to pay the amount to the account of the payee only; and that such instruction was a prohibition or an indication of intention against transferability; and that certain English judicial decisions and text-books do not reflect the true position.

3. In *National Insurance Brokers (Pty.) Ltd.* v. *Carlton Township Development Ltd.*, the Durban and Coast Local Division was confronted with a cheque made payable to a named payee "or bearer". The latter two words were in print, whereas the name of the payee was in manuscript. The cheque was crossed generally and bore the words "not negotiable a/c payee only". It was contended that the cheque was not transferable.

KRIEK, J., in an unreported judgment, came to the conclusion that, on all the facts, the cheque did not "convey a clear and definite prohibition against transfer". The conclusion would appear to be correct but the *ratio*, as will appear later, was flawed by the notion, gleaned from the *Dungarvin* case, *supra*, that "a/c payee only" was in nature prohibitive of transferability.

4. In the unreported Transvaal case of *Browmen Investments (Pty.) Ltd.* v. *Delmas Hotel Off-Sales* (15 August 1975) the cheque was drawn in favour of a named payee and was crossed, the lines containing the words "account payee only, not negotiable". The printed word "bearer" had been deleted and the cheque was made payable to order. The cheque was endorsed over to the plaintiff. The transferee (the plaintiff) sued the drawer on it. It was contended by the defendant that the cheque was not transferable. MELAMET, J., concluded that there was no basis for departing from "the principles laid down in the case of *Dungarvin*"; and dismissed the claim of the plaintiff for provisional sentence.

5. In a Rhodesian case, *Rhostar (Pvt.) Ltd.* v. *Netherlands Bank of Rhodesia Ltd.*, 1972 (2) S.A. 703 (R), GOLDIN, J., expressed himself, at p. 705H, as being in respectful agreement with the judgment of SNYMAN, J., in the *Dungarvin* case.

6. The Court *a quo*. The conclusion of VAN REENEN, J., was that the drawer had crossed the cheque, noted it as not negotiable and requested that the payee only should be paid; and that the drawer had thus clearly indicated an intention that the cheque should not be transferable, with particular reference to the effect of the words "a/c payee only".

HIEMSTRA, J., was also of the opinion that

"the words 'a/c payee only' certainly indicate an intention that the cheque should not be transferable."

He expressed his agreement in particular with the following passage in the *Dungarvin* case at p. 306D-G:

"Now the effect of the crossing is that the cheque had to be paid into a banking account. The words 'not negotiable' make the cheque subject to the equities. The words 'a/c payee only', read in conjunction with the crossing, can only mean that it is to be paid into the banking account of the payee only. So what the drawer has said is that it issues the cheque subject to the equities and requires that it shall be paid into the banking account of the payee only. These words are of course not a direct instruction prohibiting transfer, but fall into the meaning of the second part of the section – that is that they are words indicating an intention that the cheque should not be transferable. There seems to me to be no ambiquity in this or any suggestion of non-transferability. In my view the crossing and the words convey a clear and definite prohibition against transfer."

The *Ratio* in this Court

As already indicated, the basic *ratio* in the *Dungarvin* case was that the words "a/c payee only" must be given their ordinary grammatical meaning In my view it is inappropriate to endeavour to solve the problem by reference to the ordinary grammatical meaning of those words, divorced from the context of banking practice and judicial interpretation over very many years. One is not here dealing with ordinary language which is susceptible of interpretation by reference to considerations of grammar and plain meaning. One is dealing with an evolved mystique of hieroglyphs, such as transverse parallel lines; snatches from words, such as

"and Co."; verbless expressions such as "a/c payee only"; and an inscription such as "not negotiable" which has one meaning in relation to a bill of exchange and another meaning in relation to a crossed cheque, although a cheque is statutorily defined by reference to a bill, and both are classified as negotiable instruments. Over very many years the foregoing words and symbols have acquired a significance and meaning understood in banking practice in regard to negotiable instruments, and so interpreted by the Courts in England; and some of them have received statutory recognition. To regard any one of them in isolation and *in abstracto*, endeavouring to interpret it by reference to rules as to plain and ordinary grammatical meaning, would be, in my view, an unrewarding academic exercise. I see no reason for discarding the judicially established English meanings, seeing that the English Bills of Exchange Act of 1882 was so closely followed in the pre-Union legislation of the former Colonies in this country (see *Gordon* v. *Tarnow*, 1947 (3) S.A. 525 (A.D.) at p. 540 *in fin.*), and is still substantially reflected in our Bills of Exchange Act, 34 of 1964, of the Republic. I agree, with respect, with the observation of DE VILLIERS, J.A., (later Chief Justice) in *Moti and Co.* v. *Cassim's Trustee*, 1924 A.D. 720 at p. 747:

> "As long ago as the year 1759 Lord MANSFIELD, C.J., in *Luke* v. *Lyde*, 2 Burr. 883, declared the law respecting bills of exhcange and promissory notes, forming part as it does of the law merchant, to be in great measure not the law of a single country but of the whole commercial world: *non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et apud omnes gentes et omni tempore una eademque lex obtinebit.* More than a century afterwards in 1882 the English law on the subject was codified in the Bills of Exchange Act of that year. The Transvaal Bills of Exchange Proclamation, 11 of 1902, like the Cape Act, 19 of 1893, is, with slight modifications, taken over *verbatim* from the English Act. Under the circumstances it appears to me a sound principle, where the wording of our statutes is the same as that of the English Act, to follow the construction which English Courts of law have placed upon it."

Indeed, until the decision in the *Dungarvin* case a few years ago, there was no judicial hint in this country of any departure from the safe anchorage of meanings inherited from England; and the general *consensus* of our text-books and academic writers is against any such departure. I therefore conclude that it is safely appropriate to follow English judicial decisions and text-books on the subject, as well as the writers in this country, to the effect that the words "a /c payee only" on a crossed cheque do not prohibit transferability.

In this Court counsel for the respondent pressed the "plain meaning" approach with this argument:

> "It is submitted that if one draws a cheque 'pay X only' one has clearly expressed an intention that the cheque should be not transferable. By inserting a crossing on a cheque one has manifested an intention that the cheque should be paid through a banking account. If one now inserts the words 'account payee' on a crossed cheque one has merely reiterated the intention already expressed by way of the crossing. The phrase 'account payee only' can, it is submitted, only mean that the drawer intends the cheque to be non-transferable and that in accordance with the crossing the bank should pay same into the payee's bank account."

In my view this argument must yield to what I have said above. Furthermore, the submission that "the drawer intends the cheques to be non-transferable" is at variance with the words "not negotiable" which, as we have seen, mean transferable subject to equities in this context, i.e., of a crossed cheque, as distinct from a bill.

It was also contended by counsel for the respondent that what is decisive in this case is the *cumulative* effect of the two inscriptions "not negotiable" and "a/c payee only". It was submitted that such effect outweighed the word "order". As to that, if "a/c payee only" means, as submitted, that the cheque is not transferable at all, this would be at variance with the words "not negotiable", since the latter's effect (in view of sec. 80) is that the crossed cheque *is* transferable subject to equities. In the result the cumulative approach would not seem to aid the respondent.

The second major premise of the *ratio* in the *Dungarvin* case is that expressed at p. 306D-G, just quoted herein in para. 6, headed "The Court *a quo*". In my view the passage loses sight of the following:

(*a*) The words "a/c payee only" are not, statutorily, part of the crossing – see sec. 75 of the Act.

(*b*) The words cannot be a mandate by the drawer to his drawee bank. In this connection it bears repetition that (as quoted earlier herein under the heaing of "Judicial Decisions in England"), in the case of *Importers Co.* v. *Westminster Bank Ltd.*, (1927) 2 K.B. 297 (C.A.), Lord Justice ATKIN quotes with approval a passage from a judgment of BIGHAM, J., whom he described as

"a very great authority on questions of commercial, and particular banking practice".

ATKIN, L.J., asks

"What is the meaning of a cheque marked 'account payee only'? I do not know any better statement of it than made by BIGHAM, J."

That statement reads:

"A crossing is a direction to the paying bank to pay the money generally to a bank . . . and when this has been done the whole purpose of the crossing has been served. The paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words 'account A.B.', are a mere direction to the receiving bank as to how the money is to be dealt with after receipt."

(*c*) Once it is grasped that "a/c payee only" does not affect transferability the statement in the *Dungarvin* case, namely:

"The words 'a/c payee only', read in conjunction with the crossing, can only mean that it is to be paid into the banking account of the payee only"

is incomplete. It overlooks the fact that, if the payee transfers the cheque (e.g., by endorsing it specially) he is thereupon not entitled to the proceeds; and the words "a/c payee only" fall away.

In the result, for all the reasons mentioned above, I conclude that the approach in the *Dungarvin* case, namely that "a/c payee only" on a crossed cheque, is inconsistent with transferability, does not correctly reflect the law and should not be followed. That applies, too, to the decisions which followed it, including that of the Court *a quo*.

I am fortified in this view by the decision in this Court in *R. Barkhan Finance Corporation* v. *Dabros (Pty.) Ltd.*, 1968 (2) S.A. 686 (A.D.). The defendant contended that the promissory notes sued upon were not negotiable: it was argued that the payee's name was followed by the word "only", in defacement of the original word "order". At p. 691C-D the Court referred to the provisions of sec. 6 (1) and (5) of Act 34 of 1964, and continued:

"As to the provision '. . . contains words . . . indicating an intention that it should not be transferable . . .' in my view such words should be sufficiently legible and clear to indicate the intention with reasonable certainty on a perusal of the document with ordinary care. Anything less would facilitate shifts of deceptive concealment and require of holders an unreasonable degree of scrutinous care."

That case turned on the legibility of words, but the principle applies equally to the clarity of meaning of words.

The Court concluded, at p. 629D:

"At the end of the whole case it was clear that the printed word 'order' had not been struck out. Hence the notes are negotiable in terms of sec. 6 (1) of the Act, unless the notes contain words indicating an intention that they should not be transferable. If it is doubtful whether they contain such words, the negotiability under sec. 6 (1) remains; and the appellant, as indorsee in possession, has discharged the *onus* and is the holder."

In the present case there is therefore force in the contention on behalf of the appellant bank that the drawer, if he had intended to exclude transferability, could and should have indicated such intention with reasonable certainty on a perusal of the document with ordinary care; that he could have done this by using unequivocal words, for example by writing or printing "not transferable" across the face of the cheque; and that, as "a/c payee only" does not fall within such category, sec. 6 (5) has no application, and the cheque is transferable.

To sum up:

1. The drawer of a cheque who wishes to cross it generally, has the following options –

   (*a*) He may place across its face two parallel transverse lines simply; sec. 75 (1) (*b*) of Act 34 of 1964. This means that the banker on whom it is drawn shall not pay it to any person other than a banker; sec. 78 (1). In other words it cannot be paid over the counter.

   (*b*) He may, in addition, place between these lines the words "and Company" or any abbreviation thereof; sec. 75 (1) (*a*). This takes the matter no further.

   (*c*) He may, either in the case of (*a*) or (*b*), add the words "not negotiable" between the two lines. If he does this, the payee is not thereby precluded from transferring the cheque but, if he does so, the transfer is subject to equities. This is because sec. 80 (which is peculiar to crossed cheques) provides that the transferee shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. The words "not negotiable" also give the drawer some protection if the crossed cheque is lost or stolen; sec. 81.

   (*d*) He may also, by established practice and custom, although not by statutory sanction, add the words "a/c payee" or "a/c payee only" between the parallel crossing lines. These words have no effect on the transferability of the cheque. They may operate as some safeguard if the cheque should fall into wrong hands. They are, in effect, a direction to the collecting banker that the specified payee should receive the money. These words cease to have any operation if the payee specified in the cheque transfers it (e.g., by special endorsement) because thereupon the specified payee parts with his right to receive the money.

2. In general, if the drawer wishes to render a cheque completely non-transferable:

   (i) He could boldly write or print across the face of the cheque

the words "not transferable", so that he who runs may read. These words need not be between the two parallel lines: they are not part of the statutorily defined crossing.

(ii) He could also omit "order" and "bearer", when adding the words "not transferable". In this connection it should be noted that, in terms of sec. 6 (3) of Act 34 of 1964, a cheque expressed to be payable to a particular person, without the word "order", is nevertheless regarded as being payable to order if it does not contain words prohibiting transfer or indicating an intention that it should not be transferred. "Not transferable" would be words of such prohibition or indication.

(iii) The suggested precautions in (i) and (ii), *supra*, are not necessarily the only way of effecting the prohibition or indication referred to in sec. 6 (3) and (5) of the Act.

3. If the drawer wishes to cheque to be transferable only on the footing of sec. 80 of the Act (subject to equities, as it is called), he should cross it and *not* mark it "not transferable", but "not negotiable"; and place these latter words between the crossing lines. This will also give him some protection under sec. 81 if the cheque is lost or stolen.
4. If the drawer wishes the cheque, whether crossed or not, to be completely transferable (free from equities, as it is called) he should neither mark it "not transferable" nor "not negotiable"; and he could make it payable to the payee or order.

I would add that it was not disputed that this post-dated cheque became valid as a cheque on or after the period of the post-date; see *Cowen*, p. 60.

In the result:

1. The appeal is allowed and the order of the Court *a quo* is set aside.
2. The order of the magistrate's court is altered to one in favour of the plaintiff (the bank) for payment of R732,53.

Mainly because this is a test case, the appellant Bank does not ask for costs in any of the three Courts.

JANSEN, J.A., MILLER, J.A., JOUBERT, A.J.A., and GALGUT, A.J.A., concurred.

Appellant's Attorneys: *Sims, Zeigler, Peter Soller and Young*, Johannesburg; *Israel and Sackstein*, Bloemfontein. Respondent's Attorneys: *Roy Bregman*, Johannesburg; *McIntyre and Van der Post*, Bloemfontein.

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