ation, although insufficient alone to hold that the rule in *Andrews* v *Partington* applied to the compound gift, was certainly a sufficient incentive to the court to look for other factors which supported the application of the rule in this case.

Those "other factors", it is submitted, Sir Robert Megarry found in the discussion of terms in the authorities canvassed in argument in *Re Edmondson's Will Trusts*. In that case the only expression out of five apparently equally similar ones which excluded the rule in *Andrews* v *Partington* was the expression "whenever born". The expression, for example, "the children of X as many as there might be" could not be looked at in the same light as "such of the children of X whenever born" although, it is submitted, that most laymen and many lawyers would, at first sight at least, find little to distinguish the two.

What that decision shows, it is submitted, is the courts' determination to find the rule in *Andrews* v *Partington* excluded only in the very clearest circumstances and only when all inguistic arguments in favour of importing the rule have been exhausted. Viewed in this way Sir Robert Megarry's excursion into "uncharted terrain", although exploratory, seems to benefit from the use of tested instruments to keep him on course.

As far as the second argument raised by counsel for the Trustees was concerned, Sir Robert Megarry did not seem to think that it raised a new point of law. His view was that the argument did not accord with the accepted test as expounded in *Re Wernher's Settlement Trusts*: Was it impossible to make the words of the settlement march in step with the rule? Improbability did not equal impossibility therefore the argument failed. An analysis of the relevant authorities must, it is submitted, have produced this answer to the Trustees' second argument. On a purely linguistic basis alone it is irrefutable.

Thus Sir Robert Megarry examined the relevant law and extended it consistently with the existing authorities and attitudes of Chancery. A question which remains, however, is how far he reflected the settlor's true intention by his decision? That will probably never be known. What is known, however, is that rules of construction (or convenience), of which *Andrews* v *Partington* is one, enable a court to ascertain a settlor's intention in so far as it is able to do so from the language he uses and that such rules are invaluable in the efficient administration of Chancery matters. The extension of such rules in decisions the calibre of *Re Clifford* make for every confidence on the part of settlors, beneficiaries and lawyers alike in this area of the law.

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A BANK'S DUTY OF CARE

The recent decisions in *Manthel Holdings Ltd and Manthel Motors Ltd* v *Broadlands Finance Ltd and Australia & New Zealand Banking Group Ltd* [Supreme Court, Wellington, 14 May 1979, A 559/77], *Remfor Industries Ltd* v *Bank of Montreal* (1979) 90 D.L.R. (3d) 316 and *Barclays Bank Ltd* v *W. J. Simms Son & Cooke (Southern) Ltd* [1979] 3 All E.R.

522 serve to illustrate important aspects of a banks' rights and obligations vis-a-vis its customers and third parties.

In the *Manthel Holdings* case (supra), a rogue called Clive Green purported to sell a stolen motor vehicle to Manthel Motors. Green had in his possession a certificate of registration in the name of B. A. Green and he explained that the registered owner was his mother. Not thinking it unusual for a relative to arrange the sale of a vehicle on behalf of the owner, Manthel Holdings issued a cheque payable to the order of B. A. Green which was delivered to Clive Green by Manthel Motors for the purchase of the vehicle. The cheque was crossed and marked "A/c Payee only". When Green reported this cheque lost he was issued with a second cheque, in the same form, and the first cheque was stopped. Green delivered the second cheque to Broadlands to reduce his indebtedness to them and Broadlands lodged the cheque, which was unendorsed with the Australia and New Zealand Banking Group Ltd (A.N.Z.) for collection from the drawee bank, the National Bank. On presentation of the cheque, the National Bank paid the cheque.

Some time later the Police took possession of the vehicle and plaintiffs, realising that the cheque had been fraudulently obtained, claimed, inter alia, that A.N.Z. on receipt of a cheque marked "A/c Payee only" was placed under an obligation to make a full enquiry as to the ownership of the cheque before collecting the cheque for an account other than that of the named payee. This duty, they alleged, A.N.Z. had negligently failed to discharge.

A.N.Z. replied that it was under no liability to either plaintiff in that it had collected on behalf of its customer, Broadlands, in good faith and without negligence and so was entitled to the protection afforded by section 5 of the Cheques Act, 1960. However the evidence disclosed that A.N.Z., far from inquiring about the named payee, was satisfied by an assurance from Broadlands that if anything went wrong the Bank would have recourse. An officer of the Bank admitted that the extent of any inquiry made by him depended on the party to whom the cheque was to be credited. Accordingly White J. had no hesitation in finding that A.N.Z. Bank was negligent in collecting on an unendorsed cheque tendered for an account other than that of the named payee.

Thus the effect of the crossing "A/c Payee only" or "A/c Payee" (see *Universal Guarantee Pty. Ltd* v *National Bank of Australasia Ltd* [1965] 2 All E.R. 98 at 102) is to put the collecting banker on enquiry. This crossing does represent something of a legal anomaly, since by means of it the drawer of a cheque can impose a duty of inquiry upon the collecting bank, notwithstanding that in the majority of cases there will be no contractual nexus between the drawer and the collecting bank, as in the case under discussion. However, in practice it is the collecting bank, and not the paying bank, which is in a position to see that the drawer's direction is obeyed.

The collecting banker does not lose the protection afforded by section 5 of the Cheques Act if its inquiries are reasonably answered. As Diplock L.J. commented in *Marfani & Co Ltd* v *Midland Bank Ltd* [1968] 2 All E.R. 573 at 578:

> . . . the intention of the subsection and its statutory predecessors is to substitute

for the absolute duty owed at common law by a banker to the true owner of a cheque . . . a qualified duty to take reasonable care to refrain from taking any such step which he foresees, or ought reasonably to have foreseen, was likely to cause loss or damage to the true owner. [Discussing section 4 of the Cheques Act, 1957 (U.K.), an equivalent provision to section 5 of the Cheques Act 1960 (N.Z.).]

What is reasonable is a question of fact to be determined in light of all the circumstances of the particular case. However it is clear that current banking practice is a standard by which a particular bank's actions or omissions will be measured. (See, for example *Commissioner of Taxation* v *English, Scottish and Australian Bank* [1920] A.C. 683; *Marfani & Co Ltd* v *Midland Bank Ltd* supra at 584; and *Day* v *Bank of New South Wales* (1978) 19 A.L.R. 32.) Furthermore the onus is on the bank to establish that it was not negligent (*Francis and Taylor Ltd* v *Commercial Bank of Australia Ltd* [1932] N.Z.L.R. 1028).

Obviously, then, it will be prima facie evidence of negligence for a bank to collect a cheque crossed and marked "account payee only" for any account other than that of the payee without due enquiry. A collecting banker is under a duty to see that it collects for the named payee or for someone who has the payee's authority, and the existence of this obligation must surely be highlighted when a bank is asked to collect on an unendorsed cheque made out to some third party — although, it should be noted, that a banker is not negligent by reason only of his failure to concern himself with the absence of an endorsement. [Section 5(3), Cheques Act 1960.] The crossing "account payee only" is the subject of much adverse criticism, (indeed in the case under discussion counsel for Broadlands accused Manthel Holdings of taking refuge "under the umbrella" of this crossing), but it is clearly a most useful additional protection to the customer, however inconvenient it may be for collecting bankers.

When payment of a cheque is countermanded or "stopped" the banker's duty and authority to pay it are terminated, and replaced by a duty to refuse payment. What constitutes an effective countermand, was the subject of the Ontario Court of Appeal's consideration in *Remfor Industries Ltd* v *Bank of Montreal* (supra). In this case, plaintiff company advised defendant bank to stop payment of a post-dated cheque for $10,853 before the arrival of the post date. The defendant bank's account manager at the branch with which the company had its account was advised of the date of the cheque, the cheque number and the name of the payee; however, he was informed incorrectly that the cheque was for $10,800. In accordance with the bank's standard practice, a stop payment order reflecting the amount of the cheque and the account number was programmed into a central computer. However, because of the manner in which the computer was programmed, the clerks of the bank would only be alerted to a stop payment if the amount of the cheque presented for payment was exactly the same as was programmed into the computer.

As this was not the case, the cheque was certified without inquiry almost 3 weeks after the countermand of payment was given.

Reversing the decision of the court *a quo,* Dubin J.A., delivering the judgment of the Court of Appeal, held, at 320:

. . . (t)he bank's internal procedure in limiting the information supplied to its computer, by reference to account number and the amount of the cheque only,

> cannot relieve the bank of its duty where the customer has supplied such precise additional information.

While the omission of the cheque number, being the most certain factor of identification, is inexcusable, it is to be hoped that the decision in *Remfor Industries* will be limited in application to cases where the countermand is unequivocally referable to a particular cheque. A consideration of cases involving carelessly drawn cheques such as *London Joint Stock Bank* v *Macmillan and Arthur* [1918] A.C. 777; *Varker* v *Commercial Banking Co of Sydney Ltd* [1972] 2 N.S.W.L.R. 967; and *National Bank of New Zealand Ltd* v *Walpole and Patterson Ltd* [1975] 2 N.Z.L.R. 7, (where it has been recognised that a customer's negligence associated with the drawing of a cheque — thus facilitating fraud — may exonerate a banker from liability), point to the need for a customer to make his orders clear and unambiguous. Since a bank may incur liability by refusing to pay, it is entitled to have an unambiguous description of the cheque set out in the countermand, and if the customer has given instructions which are ambiguous, the customer cannot hold the bank liable for proceeding on the basis of an interpretation which the bank reasonably and *bona fide* assumes it to bear (*Westminster Bank Ltd* v *Hilton* (supra) at 126; *Giordano* v *Royal Bank of Canada* (supra) at 194). Indeed, having regard to the volume of business conducted by banks today, one wonders whether it would not be more equitable to demand of customers an absolute regard for accuracy rather than to demand that a bank inquire as to whether the instructions it has received from its customer are accurate or not.

Finally, a case of considerable importance to bankers is *Barclays Bank Ltd* v *W. J. Simms Son & Cooke (Southern) Ltd* (supra) where the question, before an English court for the first time, was whether a bank which has overlooked its customer's instructions to stop payment of a cheque and in consequence pays the cheque on presentation, can recover the money from the payee as having been paid under a mistake of fact.

Robert Goff J. held (at 535) that where a mistake of fact caused a bank to pay a cheque, it was prima facie entitled to recover the amount from the payee as money paid under a mistake of fact. A distinction is drawn between the situation where the bank pays in the mistaken belief that the customer has funds available to meet the cheque, and the situation where the bank pays having overlooked its customer's notice of countermand. Although each payment is in consequence of a mistake by the bank, in the former situation the bank is impliedly extending to its customer overdraft facilities and the payment is therefore within the bank's mandate. Thus the bank can debit its customer's account and the customer's obligation to the payee is discharged. The learned judge comments (at 539-540).

> It follows that the payee has given consideration for the payment, with the consequence that, although the payment has been caused by the bank's mistake, the money is irrecoverable from the payee unless the transaction of payment itself is set aside.

In the latter situation, where the bank overlooks notice of countermand given by the customer, the bank is entitled to recover because the bank is acting without mandate and so the payment is not effective to discharge the drawer's obligation on the cheque; thus the payee gives no consider-

ation for the payment and cannot defeat the bank's claim on that ground.

However, this general right of recovery was subject to the following qualifications:

(i) If the bank intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law to so intend, then the bank's claim must fail. (See *Kelly* v *Solari* (1841) 9 M & W 54 at 58-59; *Morgan* v *Ashcroft* [1938] 1 K.B. 49);

(ii) A bank's claim may be unsuccessful if payment is made for good consideration. (See *Aiken* v *Short* (1856) 1 H & N 210; *Kerrison* v *Glyn, Mills, Currie & Co* (1911) 81 L.J.K.B. 465.)

(iii) A bank's claim could fail if the payee has changed his position in good faith, or is deemed in law to have done so. (See *Kleinwort, Sons & Co* v *Dunlop Rubber Co* (1907) 97 L.T. 263.)

The question of money paid under mistake of fact has already been the subject of judicial consideration in New Zealand in *Thomas* v *Houston, Corbett and Co* [1969] N.Z.L.R. 151 where it was held that money paid under mistake of fact was prima facie recoverable. The Court of Appeal held that the right to recover money paid under a mistake of fact arises from the payment and receipt of money. It is necessary and sufficient for the plaintiff to establish that he has paid money to the defendant, and that this money was only paid because of a mistake of fact which plaintiff made.

Turner J. stated (at 167) that if both these requirements are present:

> . . . then there is by virtue of their presence the 'privity' between the parties which is required to constitute one liable to the other under the contract which the law implies between them. No intention to enter into legal relations . . . is necessary when quasi-contract, and not contract itself, is set up. It is the situation that matters; when parties by their conduct have placed themselves in the necessary relation to each other, then a contract is implied between them, not as a matter of implied agreement, but as a matter of law.

The Court of Appeal would admit to only two defences to an action to recover such money, i.e. true estoppel and the application of section 94B of the Judicature Act 1908 as inserted by section 2 of the Judicature Amendment Act 1958. This section provides that where a payee has received a payment made under mistake in good faith and has altered his position in reliance on the validity of the payment, it is equitable that the court in its discretion, should grant the payee relief according to the circumstances of the case.

Given the high standard of vigilance demanded of banks and the peremptory nature of a bank's obligation to meet cheques drawn on it, the decision in the *Barclays Bank* case is to be welcomed. While it is firmly established and, indeed, essential that banks should exercise all reasonable care, some latitude should be allowed for the changed circumstances of today. It is necessary to strike a balance between the need to protect the customer and third parties on the one hand, and the necessity to preserve the efficient functioning of banks, on the other. Caution must therefore be exercised lest the burden placed upon banks to take care does not unduly inhibit them in the performance of their legitimate and vital commercial function.

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LAW REFORM

A NOVEL PROCEDURE FOR LAW REFORM PROPOSALS FOR SECURITIES REGULATIONS

Section 70 of the Securities Act 1978 authorises the making of regulations for a number of purposes, primarily in connection with the issuing of prospectuses and the advertising of financial offers. The section contains some novel provisions viz:

> Section 70(1). The Governor General may from time to time, by Order in Council, in accordance with the recommendations of the Commission, make regulations for all or any of the following purposes . . .

and

> Section 70(3) Before making any recommendation for the purposes of subsection (1) or subsection (2) of this section, the Commission shall —
> (a) Do everything reasonably possible on its part to advise all persons and organisations, who in its opinion will be affected by any Order in Council made in accordance with the recommendation, of the proposed terms thereof; and give such persons and organisations a reasonable opportunity to make submissions thereon to the Commission; and
> (b) Give notice in the Gazette, not less than 14 days before making the recommendation, of its intention to make the recommendation and state briefly in the notice the matters to which the recommendation relates; and
> (c) Make copies of the recommendation available for inspection by any person who so requests before an Order in Council is made in accordance therewith;
> Provided that this subsection shall not apply in respect of any particular recommendation if the Commission considers that it is desirable in the public interest that the recommendation be made urgently:
> Provided also that failure to comply with this subsection shall in no way affect the validity of any Order in Council made under this section.

One commentator has noted "The procedure for consultation is a real advance on anything tried in New Zealand before and it is to be hoped that the example will be adopted in other fields" (Geoffrey Palmer, *Unbridled Power* 103).

The Securities Act was introduced into Parliament as the Securities (Advertising) Bill and in this form contained no provisions for a Securities Commission, although in his introduction speech the Honourable D. F. Thomson, the then Minister of Justice, did say that he would welcome submissions on the question whether there should be a Commission. The Bill was referred to the Statutes Revision Committee.

In the event the weight of submissions overwhelmingly favoured the introduction of a Commission, and once that had been accepted, it became clear that many of the detailed provisions of the Bill could be dropped, and replaced by a power to recommend regulations. This carried not only the advantage of increased flexibility, but also the fact that the wide commercial experience of the yet-to-be appointed Commissioners could be harnessed to the task of framing the recommendations.

Concern was expressed in some quarters that the extensive use of regulation in these important areas could lead to accusations of "legislation by stealth". This was met by the introduction of the statutory procedure