

(APPELATE Provincial Division)
(APPELATE Provinsiale Afdeling)

THE STANDARD BANK OF S.A. LTD. Appellant,

VERSUS

SHAM MAGAZINE CENTRE Respondent

Respondent's Attorney

Prokureur vir Appellant ISRAEL

Prokureur vir Respondent

Respondent's Advocate

Advokaat vir Appellant S.W. Kentridge S.C.

Advokaat vir Respondent

J.V. Laga
24 Feb

Set down for hearing on ^{DM sine} ~~the~~ **11-11-1976**
Op die rol geplaas vir verhoor op ~~the~~

(T.P.D.)

24 1 1 2 3

Personen: Holmes, Jansen, Miller JIA, Joubert e Galgut AJA

Kentridge - 9.45-11.00, 11.15-12.04.

Horwitz - 12.04-12.45

Logans - 12.45 - 12.55.

C. A. V.

The Court allows the said appeal, ~~and~~ sets aside the order of the Court a quo, and alters the order of the Magistrates' Court to one

P.T.O.

Bills Taxed—Kosterekenings Getakseer

**Writ issued
Lasbrief uitgereik**

Date and initials
Datum en paraaf

Date Datum	Amount Bedrag		Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

THE STANDARD BANK OF SOUTH AFRICA LTD. Appellant

and

SHAM MAGAZINE CENTRE Respondent

Coram: HOLMES, JANSEN, MILLER, JJ.A.,

et JOUBERT, GALGUT, A.JJ.A.

Heard: 1 November 1976

Delivered: 16 November 1976

J U D G M E N T

HOLMES, J.A. :

The issue in this test case is whether a

cheque which is -

/(a) made

- (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 Magistrates' 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 Rosetten=
ville Branch in Johannesburg.

/(ii) The

- (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 handwritten or put there by means of a rubber stamp.
- (iv) On 9 December 1974 Transvaal Watch Company (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

- (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 Magistrates' 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

Section 1.

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

Section 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."

Section 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

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

Section 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."

Section 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."

Section 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."

Section 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 section 75, as a matter of interest the history of the crossing of cheques is summarised in Cowen on The Law of Negotiable Instruments in South Africa, 4th ed., pages 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

payee's bankers; and if they did not know where the payee banked, they simply wrote '& Co' between two lines on the cheque. The drawers' 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, No. 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., page 6, "constitutes the major

/privilege.....

privilege of negotiability". See, for example, section 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 pages 114 to 115. For example, the effect of section 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 page 179 B - E, and Paget on Banking (eighth edition, 1972) at page 251, and Cowen, ibid, at page 435.

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

/"If a

"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's Law of Banking, 8th ed., page 227, in relation to the almost identical provision in section 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 section 75 (1) of the Act, supra.

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

/(c) The

(c) The remaining words, "A/c Payee Only", are not words, within the meaning of section 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 section 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 textbooks; on the support of the South African textbooks; on the fact that for eighty 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

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., pages 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

other than the payee is not 'without negligence' and precludes the banker in English law from the protection of section 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, in 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 page 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 page 155, dealing with crossed cheques -

"The Act does not deal with the addition of the words 'a/c payee' (account payee), so

/that

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 (third edition, 1952) states, at page 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 page 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

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, in South African Mercantile and Company Law, (third edition, 1975) at page 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

"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 page 289, on negotiable instruments written by June Sinclair. At page 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

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 Section 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's Mercantile Law of South Africa (seventeenth edition, 1975) does not specifically refer,

in the chapter on bills of exchange, cheques and promissory

/notes

notes, to the effect of the words "A/c payee" or "A/c payee only"; but at page 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 (third edition, 1931) states at page 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 TEXTBOOKS

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.

At page 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 Westminster Bank Ltd., (1914) 3 K.B. at p. 373, C.A.

The learned author continues -

/"It has

"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.

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
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

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive one.

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case. Section 78, referred to, is the English counterpart of our section 77. An additional authority cited is that of Importers Ltd., v. Westminster Bank Ltd., (1927) 2 K.B. 297.

Chorley's Law of Banking (sixth edition, 1974) is to the same effect. It cites, at page 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 section 8 (1) (of which our section 6 (5) is the counterpart).

Dealing with the position where the instrument is crossed "Account payee" the learned author says at page

"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 page 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

at any rate before 1852, but has only become common during the present 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's Introduction to Negotiable Instruments

(1975) crisply puts it thus at page 144 -

"The words 'A/c payee' and 'A/c payee only' sometimes appear with a crossing. 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 section 8 (1). The only effect the words can have is on the collecting bank."

Halsbury's Laws of England, 4th ed., (1973) vol. 3,

sums up the position in paragraph 114 -

/"The

"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 printed."

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

Paget's Law of Banking (eighth edition, 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 page 256, in fin, and page 257, that it may be presumed that the Court of Appeal in National

/Bank

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.

Also at page 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 page 258 the learned author deals with the question of "Account payee" and subsequent indorsements; at page 259 with "account payee only"; and at page 417 with "account payee". On a consideration of these pages as a whole I do not find any departure in principle

/from

from what is said in the passages quoted from pages
256 and 257, supra.

Jacobs on The Law of Bills of Exchange, Cheques,
Promissory Notes and Negotiable Instruments Generally
(fourth edition, 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
page 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 page 68, in fin, the learned writer refers to
section 8 (1) of the English Act (of which our section
6 (5) is the counterpart) and sums up the position crisply
as follows -

/"The

"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

JUDICIAL DECISIONS IN ENGLAND1. 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 section 8 (1) of the Bills of Exchange Act 1882 (of which our section 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 page 439 -

/"Now

"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 page 439, in fin -

"I am clearly of opinion 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

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 page 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

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 page 373, in fin, to 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 page 793, in fin, to 794
that this addition did not affect the negotiability of an
order or bearer cheque.

5. Importers Company v. Westminster Bank Ltd., (1927)

2 K.B. 297 (C.A.).

/At page

At page 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 (Privy Council).

At page 102 F 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

"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

- (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 on The Law of Negotiable Instruments in South Africa, at page 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

1. Thus, in Hill v. The Colonial Banking Trust Co.,
1927 T.P.D. 138 Greenberg, J., (as he was then) said at
page 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

"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

transfer of the cheque" - at page 306 G. The learned Judge recognised that the words "not negotiable" of themselves would not preclude transfer subject to equities - at page 306 D - E. He reached his conclusion as to non-transferability because of the words "A/c payee only". These words, he held, at page 305 C, "could only have been intended to prohibit the transferability of the cheque".

At page 302 G 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

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 textbooks 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 ²/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

"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

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 page 705 H, 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 page 306 D - G.

/ "Now

"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 ambiguity 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

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

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 No. 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 page 747 -

"As long ago as the year 1759 Lord Mansfield, C.J., in Luke v. Lyde (2 Burr. 883) declared

/the

the law respecting bills of exchange 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 No. 11 of 1902, like the Cape Act No. 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 textbooks and academic writers is against any such departure.

/I

I therefore conclude that it is safely appropriate to follow English judicial decisions and textbooks 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

In my view this argument must yield to what I have said above. Furthermore, the submission that "the drawer intends the cheque 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 section 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 page 306 D -G, just

/quoted

quoted herein in paragraph 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 section 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 heading of Judicial Decisions in England), in the case of Importers Company 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

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

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 page 691 C - D the Court referred to the provisions of section 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

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 scrupulous 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 page 629 D -

"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 section 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 section 6 (1) remains; and the appellant, as indorsee in possession, has discharged the onus and is the holder."

/In the

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, section 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;
~~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

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 whom 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

(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.....

(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

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.
-

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, page 60.

~~In the result~~

1. The appeal is allowed and the order of the Court a quo is set aside.

/2. The.....

2. The order of the Magistrates' 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.



G.N. HOLMES
JUDGE OF APPEAL.

JANSEN,	J.A.)	
MILLER,	J.A.)	
JOUBERT,	A.J.A.)	ALL CONCUR
GALGUT,	A.J.A.)	