THE TERMINATION OF THE DUTY AND AUTHORITY OF A BANK TO HONOUR ITS CUSTOMER'S CHEQUES AND OTHER INSTRUCTIONS FOR PAYMENT, INCLUDING THE BROADER IMPLICATIONS FOR A BANK OF SECTIONS 341(2) AND 348 OF THE COMPANIES ACT 1973

Kenneth John Douglas

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DECLARATION

I declare that this thesis is my own, unaided work. It is being submitted for the degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other university, nor has it been prepared under the aegis or with the assistance of any other body or organisation or person outside the University of the Witwatersrand, Johannesburg.

K J Douglas

31 May 1985

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SUMMARY

The bank customer relationship consists of a contract of mandate and one or more contracts of loan from time to time. It is a *naturale* that cheques are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act, whether the cheques were drawn before or after the loss. If payment is made to the customer himself it is similarly effectual despite the customer's loss of capacity. The position is the same in regard to payment instructions given otherwise than by cheque.

In the case of sequestration and winding-up a *concursus creditorum* is established and it is not possible to contract out of the consequences of a *concursus*. The above *naturale* is therefore void in the case of sequestration and winding-up except to the extent the consequences of a *concursus* are modified by s 73(*c*) of the Bills of Exchange Act and s 22 of the Insolvency Act. Section 73(*c*) effectively excludes the consequences of the *concursus* in the case of cheques, and in the case of other payment instructions s 22 excludes such consequences in some but not all respects. Both sections apply not only on sequestration but also on winding-up.

Section 348 of the Companies Act deems a winding-up to commence on presentation, ie filing, of the winding-up application and s 341(2) avoids all dispositions by the company of its property thereafter unless the court otherwise orders. In the case of cheques s 73(*c*) takes precedence, excluding the effect of ss 348 and 341(2), but in the case of other payment instructions, and also of many other transactions between a bank and its customers, the sections have important consequences.

Payment to the company is not a disposition. Payment to a third party in accordance with the company's instructions has been held by

the English Court of Appeal to be a disposition recoverable from the payer, but the better view is that it is recoverable from the third party only. In this country, unlike in other countries with similar statutory provisions, the contract of loan arising from a payment instruction not drawn against a credit is also a disposition. So too is the giving of a suretyship or security.

An extensive and often unsatisfactory case law has developed in other countries in regard to the circumstances in which the court will validate a disposition. Generally, it is said that a transaction entered into and completed in good faith and the ordinary course of business after presentation of the winding-up application should be validated to avoid the paralysis of the company's business. However, a more satisfactory criterion is that the discharge of an obligation should be validated to the extent such discharge is relied on by the other party in good faith in himself discharging an obligation owed to the company. Any normal, arm's length contract should likewise be validated.

The English Court of Appeal has furthermore held that a bank should freeze a customer's account as soon as the bank becomes aware of the winding-up application unless the bank institutes safeguards to ensure that payments are only made in the ordinary course of the company's business, that preferential payments are not made to certain creditors and that the company only continues to operate its account as long as it is in the interests of the creditors that the company does so. The imposition of such an onus is, however, not justified and overlooks the fact that the bank may be in breach of contract if it freezes the account.

Remedial legislation is desirable to eliminate the uncertainties in regard to the position on the customer's loss of capacity and to repeal ss 348 and 341(2).

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CASE INDEX

CHAPTER 1 - INTRODUCTION

Section 73 of the Bills of Exchange Act[1] provides:

'The duty and authority of a banker[2] to pay a cheque drawn on him by his customer[3] are determined by -

(a) countermand of payment;
(b) receipt of notice of the customer's death;
(c) receipt of notice of the customer having become insolvent.'

This list is, however, not exhaustive. Cowen[4] lists several further circumstances in which a bank's duty and authority to pay terminate:

(i) Notice of the customer's insanity (to which may be added the customer's inability to manage his affairs and declaration as a prodigal);[5]

(ii) Closing of the account;

(iii) Notice of liquidation or judicial management;

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(1) 34 of 1964.

(2) The Act does not define 'banker' beyond stating that the term includes a body of persons, whether incorporated or not, who carry on the business of banking - see generally D V Cowen & L Gering Cowen on the Law of Negotiable Instruments in South Africa 4th ed (Cape Town 1966) 357-63; F R Malan Bills of Exchange, Cheques and Promissory Notes in South African Law (Durban 1983) # 314.

(3) 'Customer' is similarly undefined - see generally Cowen op cit 363-5; Malan op cit # 343.

(4) Op cit 416-420.

(5) Prodigality could also be classified under (iv).

(iv) Order of court;

(v) Prescription;

(vi) Dissolution of the bank.[6]

Several of these cases give rise to considerable difficulty and in Part I the problems that arise in regard to loss of capacity to act due to insanity, inability to manage one's affairs, prodigality, sequestration and winding-up are examined. The principal difficulty is to establish a legal basis, where s 73 does not apply, for the assertion that the bank's duty and authority terminate on notice of the loss of capacity to act, and not simultaneously with the loss of capacity.

In the case of the winding-up of a company it is also necessary to have regard to ss 348 and 341(2) of the Companies Act.[7] These sections backdate a winding-up to the date of presentation of the winding-up application and avoid all dispositions by the company thereafter unless the court otherwise orders. This backdating has serious ramifications for banks both in relation to the continued operation by a company of its bank account after presentation of the winding-up application and in relation to other banking business generally. In Part II these ramifications are examined specifically in relation to the continued operation by the company of its bank account but also with reference to the broader implications for a bank of the sections concerned.

In Part III remedial legislation is proposed to deal with the problems identified in Parts I and II.

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(6) Cowen also lists s 38 of the Transvaal Diamond Trade Ordinance 63 of 1903(T) (wrongly cited as Ordinance 64 of 1903(T)) but the Ordinance was repealed by the Precious Stones Act 73 of 1964.

(7) 61 of 1973.

(iv) Order of court;

(v) Prescription;

(vi) Dissolution of the bank.[6]

Several of these cases give rise to considerable difficulty and in Part I the problems that arise in regard to loss of capacity to act due to insanity, inability to manage one's affairs, prodigality, sequestration and winding-up are examined. The principal difficulty is to establish a legal basis, where s 73 does not apply, for the assertion that the bank's duty and authority terminate on notice of the loss of capacity to act, and not simultaneously with the loss of capacity.

In the case of the winding-up of a company it is also necessary to have regard to ss 348 and 341(2) of the Companies Act.[7] These sections backdate a winding-up to the date of presentation of the winding-up application and avoid all dispositions by the company thereafter unless the court otherwise orders. This backdating has serious ramifications for banks both in relation to the continued operation by a company of its bank account after presentation of the winding-up application and in relation to other banking business generally. In Part II these ramifications are examined specifically in relation to the continued operation by the company of its bank account but also with reference to the broader implications for a bank of the sections concerned.

In Part III remedial legislation is proposed to deal with the problems identified in Parts I and II.

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(6) Cowen also lists s 38 of the Transvaal Diamond Trade Ordinance 63 of 1903(T) (wrongly cited as Ordinance 64 of 1903(T)) but the Ordinance was repealed by the Precious Stones Act 73 of 1964.

(7) 61 of 1973.

PART I

TERMINATION OF A BANK'S DUTY AND AUTHORITY

(EXCLUDING ss 348 AND 341(2) OF THE COMPANIES ACT)

CHAPTER 2 - THE BANK CUSTOMER RELATIONSHIP

Synopsis

The bank customer relationship consists of a combination of a contract of mandate - the underlying bank customer contract - and one or more contracts of loan from time to time. The underlying bank customer contract is a contract of mandate in that the bank undertakes to render various services for the customer, especially to repay monies lent and advanced to it by the customer, and to advance monies lent by it to the customer, in accordance with the customer's directions. The contract contains certain unique terms and it is to this extent sui generis, but it nevertheless remains a contract of mandate. The loans contemplated by the bank customer contract come into existence each time the customer deposits money to his account, the account being in credit (a loan by the customer to the bank), or withdraws money from the account, the account being in overdraft (a loan by the bank to the customer).

Cheques and other payment instructions serve various functions depending on the circumstances. If a cheque is drawn or other payment instruction is given within the scope of a credit in the customer's account, it is a demand for repayment of a portion of the loan constituted by the deposits to the account and a direction regarding to whom payment is to be made. If it is drawn or given within the scope of an overdraft facility, it is the exercise of an option to borrow, a demand for the advance of monies lent and a direction regarding to whom payment is to be made. If it is drawn or given outside the scope of such a credit or overdraft facility, it is an offer to borrow, a demand for the advance of monies lent if the offer is accepted and a direction regarding to whom payment is to be made.

If a cheque or other payment instruction is drawn or given within the scope of a credit in the customer's account or of an overdraft facility the bank is obliged, ie it is under a 'duty', to honour the cheque or payment instruction and it has the corresponding right or 'authority' to do so. Where a cheque or other payment instruction is drawn wholly or partially outside the scope of such a credit or overdraft facility the bank is not under a duty to honour the cheque or payment instruction but it does have the authority to do so.

The expression 'termination of the bank's duty and authority' is used loosely to refer sometimes to permanent termination and other times to temporary suspension; sometimes to the customer's cheques generally and other times to only one or more specific cheques or to such cheques as are drawn by the customer personally as opposed to by his legal representative; and sometimes to both the duty and authority of the bank and other times to its duty only and yet other times to its authority only.

* * * * * * * *

(1) Classification of the bank customer relationship

Because of the many facilities offered by banks,[1] the relationship between a customer and its bank may comprehend a number of different contracts. For the purposes of this thesis, however, it is only necessary to examine the classification of the relationship insofar as current accounts[1a] are concerned.

The conventional description of the bank customer relationship in relation to current accounts is given by Cowen[2] as follows :

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(1) eg current accounts, investment accounts, leasing, factoring, discounting, insurance broking, safe deposit facilities, etc.

(1a) It is not proposed to examine to what extent savings and other accounts may be subject to similar considerations: cf P Takirambudde 'The Legacy of the Savings/Current Account Dichotomy in Banking and Negotiable Instruments Law' 1981 SALJ 359.

(2) Negotiable Instruments 365-6. See too N Willis Banking in South African Law (Cape Town 1981) 30-31; W A Joubert The Law of South Africa vol 19 'Negotiable Instruments' by L Tager (Durban 1976-) ¶ 154; P Millin & G Wille Wille and Millin's Mercantile Law of South Africa 18th ed by J F Coaker & D T Zeffertt (Johannesburg 1984) 730-31; S J van Jaarsveld et alii Suid-Afrikaanse Handelsreg 2nd ed (Johannesburg 1983) vol 2 p 396; C Smith 'The banker's duty of secrecy' 1979 MB 24 at 25-6; J J Goodey Aspekte van die aanspreeklikheid van die Bankier in die Suid-Afrikaanse TJekreg (unpublished thesis, Pretoria University 1978) at 153-6; E E Bekker Die Aanspreeklikheid van 'n Bank vir die Verkeerdelike Dishonering van 'n Kliënt se TJek (unpublished dissertation, University of Stellenbosch 1976) 8-14.

> 'The primary relationship has been described ... as that of debtor and creditor in respect of the payment of money (the banker being the debtor, and the customer the creditor) with a superadded obligation to discharge the debt in a particular way, namely by paying cheques drawn by the customer .... The normal relationship may, however, be reversed; for a bank frequently grants overdrafts to its customers, and so becomes a creditor.'

This description had its origin in the English cases[3] but has also been adopted by the courts of this country.[4] It is, however, a purely functional description which does not indicate into which category or categories of contract the relationship falls.[5]

How, then, is the relationship to be categorised? The answer is, it is considered, that the relationship is a combination of a

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(3) See eg Joachimson v Swiss Bank Corporation [1921] 3 KB 110(CA) at 126-7; London Joint Stock Bank Ltd v Macmillan and Arthur [1918] AC 777(HLE) at 789.

(4) See eg S v Kearney 1964(2) SA 495(A) at 502H-503A; S v Kotze 1965(1) SA 118(A) at 124H-125A.

(5) The description is, with respect, also misleading in its emphasis on the relationship of debtor and creditor. The bank customer relationship may come into existence before any debt is owed by either party to the other - eg the bank's duty of secrecy would not be suspended until the first deposit to or withdrawal from the account - and may continue during periods when no debt is owed by either party to the other eg a bank could not, it is considered, refuse to accept further deposits to the customer's account and to honour cheques drawn against such deposits on the sole ground that the customer's account happened temporarily to have a nil balance at the time the deposits were tendered, without first giving reasonable notice terminating the bank customer contract. (On notice of termination generally see eg Joachimson v Swiss Bank Corporation [1921] 3 KB 110(CA) at 127; National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd [1972] 1 All ER 641(HL) at 662f-g; Malan Bills of Exchange # 328.)

contract of mandate - the underlying bank customer contract - and one or more contracts of loan from time to time.[6]

De Wet & Yeats[7] define the contract of mandate (lasgewingsooreenkoms) as follows :

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(6) Malan Bills of Exchange # 320; F R Malan 'The liberation of the cheque' 1978 TSAR 107, 201; J C Stassen 'Die regsaard van die verhouding tussen bank en kliënt' 1980 MB 77; J C Stassen 'Banke en hul kliënte' 1983 MB 80. See too Joubert Law of South Africa vol 19 'Negotiable Instruments' # 154; M Megrah & F R Ryder Paget's Law of Banking 9th ed (London 1982) 12ff and 70ff.

An unfortunate practical consequence of the classification of the bank customer contract as a contract of mandate is that it is brought into a category of contract which, because of its historical development as a gratuitous favour undertaken by one friend for another, was not highly developed in Roman and Roman-Dutch law as a commercial contract - see eg J E de Villiers & J C Macintosh The Law of Agency in South Africa 3rd ed by J M Silke (Cape Town 1981) 4ff and D J Joubert Die Suid-Afrikaanse Verteenwoordigingsreg (Cape Town 1979) 17-18. The position is, moreover, aggravated by the fact that the contract of mandate and the power of one person to represent another in the performance of juristic acts were not clearly distinguished - J C de Wet & A H van Wyk De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg 4th ed (Durban 1978) 85 - with the result, it is thought, that notions applicable to powers of representation coloured the treatment by the old authorities of the contract of mandate to which they really had no relevance - see further 38 n 24 below. One solution would be to seek to classify the bank customer contract under a different category such as locatio conductio operarum or locatio conductio operis - as some of the old authorities did when the contract was not gratuitous - see 68 n 108 below - but the weight of authority is against such an approach and the proper solution is, it is thought, to develop the contract of mandate to fulfil its modern role by shedding its anachronistic features. This has happened to an extent already in the recognition that remuneration can freely be agreed upon - see eg Gowan v Bowern 1924 AD 550 at 563 - but as will be shown below (at 37ff) there is a clear need for this process to be carried further.

(7) De Wet & Yeats Kontraktereg 340-41. See also H Grotius The Jurisprudence of Holland translated by R W Lee (Oxford 1926)

(Footnote continued on next page)

'[Mens het] nie met 'n dienskontrak te doen waar iemand vir 'n ander besondere dienste lewer sonder om hom onder die gesag van die werkgewer te stel nie. Ooreenkomste vir die lewering van sulke dienste behoort tot die klas "lasgewingsooreenkoms". 'n Lasgewingsooreenkoms is 'n ooreenkoms kragtens welke die lashebber onderneem om 'n opdrag uit te voer vir die lasgewer. Die opdrag kan wees om enigiets te doen mits dit maar geoorloof is, bv. 'n opdrag om namens die lasgewer 'n ooreenkoms te sluit, of 'n opdrag om vir die lasgewer 'n koper te soek, of 'n opdrag aan 'n medikus om die lasgewer of iemand anders medies te ondersoek of te behandel, e.d.m. Trouens enige opdrag om dienste te verrig, aangeneem deur die persoon aan wie die opdrag gerig is, skep 'n lasgewingsverhouding, tensy dit van so 'n aard is dat dit onder 'n ander soort ooreenkoms tuisgebring kan word.'

When a bank agrees to permit a person (the customer) to operate a *current account* the bank undertakes to render a number of services for the customer, the principal service being that the bank will not merely discharge its indebtedness to the customer by payment to the customer himself but that it will do so by way of payment either to the customer himself or to third parties as directed from time to time by the customer. Another important service undertaken by the bank is that it will collect cheques and other bills deposited to the account.[8] *There are, moreover, many other* services which the bank impliedly undertakes pursuant to the underlying bank customer

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3.12.2; S van Leeuwen Commentaries on Roman-Dutch Law revised and edited by C W Decker and translated by J G Kotzé (London 1886) 4.26.1; S van Leeuwen Censura Forensis translated by S H Barber and W A Macfadyen (Cape Town 1896) 1.4.24.1; J Voet The Selective Voet being the Commentary on t^ Pandects translated by P Gane (Durban 1955-8) 17.1.2; J van der Linden Institutes of the Laws of Holland translated by G T Morice 2nd ed (Cape Town 1922) 1.15.14; A Beyleveld Die essensiële vereistes vir die ontstaan van die kontraksvorme mandatum, locatio conductio operis en locatio conductio operarum; 'n prinsipiele onderskeid (unpublished thesis, Pretoria University 1978) 198ff.

(8) See eg Joachimson v Swiss Bank Corporation [1921] 3 KB 110(CA) at 127; Stassen op cit 1983 MB 80 at 82-5.

contract and which do not depend on separate contracts,[9] eg, it is suggested, to remain open at certain hours, to have reasonable quantities of cash readily available for immediate withdrawal, to allow the customer to make withdrawals in notes and coins of such denominations as the customer may reasonably select, to transfer monies telegraphically, to issue bankers' drafts, to keep, and to furnish copies to the customer of, statements reflecting all transactions on the customer's account, etc.

All these services are, it is considered, typical of the subject matter of a contract of mandate. Insofar as the bank's undertaking to pay withdrawals to third parties if so directed by the customer is concerned, there is authority dating back to Roman law that an agreement in terms of which a debtor undertakes to discharge his indebtedness by payment to a third party is a contract of mandate.[10] Grotius,[11] moreover, specifically categorises bills of exchange under this head:

> 'A bill of exchange is a written mandate whereby one person charges another with paying a certain sum of money to a third party for the mandator's account.

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(9) Such services are to be distinguished from services which are dependent on separate contracts such as leasing, factoring, discounting, etc, the importance of the distinction being that the bank would not be entitled during the subsistence of the bank customer contract to refuse services to which the customer is entitled under the bank customer contract whereas it would be freely entitled to refuse any service dependent on a separate contract.

(10) Digest 17.1.22.7; 17.1.45.4.

(11) 3.13.1 and 2. Cf too 4 Hollands Consultatien (Rotterdam 1660) 381; Voet 46.3.2; D G van der Keessel Voorlesinge oor die Hedendaagse Reg i.e Aanleiding van De Groot se 'Inleiding tot de Hollandse Rechtsgeleerdheyd' translated by P van Warmelo et alii (Amsterdam 1966) vol 4 at 297-9, but see J G Heineccius Grondbeginselen van het Wisselrecht translated into Dutch by K K Reitz (Middelburg 1774) 3.1ff especially at 3.3.

'This contract, like other mandates, is concluded by the acceptance of the charge.'

Pothier[12] is even more specific, relating the rule directly to the bank customer contract:

'Le contrat entre le tireur et celui sur qui la lettre est tirée, est un vrai contrat de mandat, mandatum solvendae pecuniae: il intervient et se contracte par l'acceptation que fait de la lettre de change celui sur qui elle est tirée, ou même avant cette acceptation, par le consentement qu'il donne par lettre missive au tireur de tirer sur lui. Ce contrat paraît aussi tacitement contracté, lorsque celui sur qui la lettre est tirée, est un banquier qui a reçu du tireur des fonds pour accepter et acquitter ses lettres.'[13]

This categorisation of the bank customer contract has been recognised on a number of occasions by the courts. In the early case of Bank of Africa v Evelyn Gold Mining Company Ltd[14] Kotzé C J said:

'Pothier ... draws a distinction between expenses and payments made by the mandatory in the execution of his mandate ... and payments made in connection with the mandate .... there is no doubt that the banker, who has paid out the amount of the bill to the forger who has forged my signature, must bear the loss, "for" (says Pothier) "the general mandate which I have given the

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(12) R J Pothier Traité du Contrat de Change edited by M Siffrein Oeuvres de Pothier (Paris 1821) vol 3 para 91.

(13) The contract between drawer and drawee of a bill of exchange is a true contract of mandate, mandatum solvendae pecuniae: it comes about and is contracted by the drawee's acceptance of the bill, or even before the acceptance by consent which he gives by letter to the drawer to draw upon him. This contract may also appear tacitly contracted when the drawee is a banker who has received funds from the drawer to accept and discharge his bills.

(14) (1894) 1 Off Rep 24 at 27.

banker, to accept and pay bills drawn by me upon him, is applicable only to bills which issue from me ....'

Similarly, in Burns v Forman[15] *Roper J said:*

'... the bank, being in the position of a mandatory, is entitled to be reimbursed by its mandator (the customer) for all expenditure incurred in the execution of its mandate...'

In OK Bazaars (1929) Ltd v Universal Stores Ltd[16] Corbett J, as he then was, said:

'... between the customer and banker there is a contractual relationship of mandatum ...'[17]

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(15) 1953(2) SA 226(W) at 229B-C.

(16) 1973(2) SA 281(C) at 288H.

(17) For further examples see Estate Ismail v Barclays Bank (DC&O) 1957(4) SA 17(T) at 26G; Stapelberg NO v Barclays Bank DC&O 1963(3) SA 120(T) at 126H. Similar terminology, although of course not necessarily with the same meaning, is to be found in the English cases - see eg London Joint Stock Bank Ltd v Macmillan and Arthur [1918] AC 777(HLE) at 814 and 830. See too the authors referred to in note 6 above. Cowen is apparently of the same view for he states (Negotiable Instruments 367 n 85):

'The use of cheques is, in large measure, governed by principles of the law of agency; for a cheque, in addition to being a bill of exchange, is a mandate given by the customer to his banker authorising the latter to discharge his indebtedness in a particular way.'

The bank does not hold a customer's deposits as the customer's agent (Foley v Hill (1848) 2 HLC 28 at 36; R v Davenport [1954] 1 All ER 602 (CCA) at 603D), nor does it act as the *customer's agent when* it honours a cheque drawn or other payment instruction given in favour of a third party (De Villiers NO v Kaplan 1960(4) SA 476(C) at 478H; Joubert Verteenwoordigingsreg 138-9), but it is not an essential of the contract of mandate that the mandatary should have the power to represent the mandant as agent:

'*An agent in the strict sense must be distinguished from a* mandatory. The former is a person clothed with authority to create, vary or discharge contractual relations between his

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The contract is not one of employment (locatio conductio operarum) because the bank does not place itself under the control of the customer in regard to the manner of carrying out the services.[18] Nor is it locatio conductio operis, the essence of which is, it is considered, a piece of work with a physical subject matter such as the erection of a house.[19]

The fact that the underlying bank customer contract is classified as a contract of mandate does not necessarily mean that it cannot have unique features of its own. For example, it could be argued that the customer's right to direct payment by way of cheques drawn on the bank is unique to the bank customer contract and that the bank customer contract is to this extent sui generis, but even if this argument is correct[19a] it does not follow that the contract is therefore not one of mandate; on the contrary, the essentials for the existence of a contract of mandate are still

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principal and a third party .... A mandatory is a person who, by contract with the mandator, undertakes to carry out a task entrusted to him. Surgeons, attorneys and bankers ... are mandatories'

(E Kahn Contract and Mercantile Law through the Cases (Cape Town 1971) 316). See also Stassen op cit 1980 MB 77 at 82; De Wet & Yeats op cit 341; Joubert Law of South Africa vol 17 'Mandate and *Negotiorum Gestio*' by D J Joubert & D H van Zyl # 3; Clarke v Durban and Coast SPCA 1959(4) SA 333(N) at 336A-B; Beyleveld op cit 157.

(18) Cf Colonial Mutual Life Assurance Society Ltd v MacDonald 1931 AD 412; De Wet & Yeats Kontraktereg 338. But see n 6 above.

(19) Cf Van Jaarsveld Handelsreg vol 2 p 251; Beyleveld op cit 203; but see Kahn Contract 316; Joubert Law of South Africa loc cit # 5; *JTR Gibson Wille's Principles of South African Law* 7th ed (Cape Town 1977) 435-6.

(19a) A contrary argument would be that just as the object sold under a sale may vary so may the services rendered under a mandate, without that fact causing the contract to be labelled as sui generis in any way.

present and the right to direct payment of the bank's indebtedness to the customer by way of cheques drawn on the bank should be seen as no more than an *additional term imported into the contract of* mandate by trade usage.(20)

Certain of the services undertaken by a bank under the bank customer contract are rendered automatically - eg the rendition of statements - or must be kept available at all times - eg keeping open at certain hours - whether or not the customer elects to avail himself of any particular service. Other services, on the other hand, are only rendered if the customer does elect to avail himself of the service concerned eg payment to a third party in accordance with the customer's directions. The question may be asked, however, whether the right to services in this latter category is not an option which on exercise gives rise to a separate, specific contract

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(20) But cf Cowen Negotiable Instruments 367-8 who concludes his discussion of the nature of the bank customer relationship with the view:

> 'Probably the only satisfactory solution is to recognise that the contract is sui generis, containing elements of several contracts.'

See too C Smith 'The banker's duty of secrecy' 1979 MB 24 at 25-6 and in G C Oosthuizen et alii Professional Secrecy in South Africa (Cape Town 1983) 82 ff; Van Jaarsveld Handelsreg vol 2 p 396. However, as Stassen points out (op cit 1980 MB 77 at 79) it is important not to conclude too readily from the fact that a contract has unique features that it is sui generis and cannot be classified into any of the recognised categories of contract. Such classification is important because it determines what terms will automatically be incorporated in the contract as natural incidents of the contract in the absence of agreement to the contrary. Because of the conservatism of our law a contract is rather regarded as a slight deviation from an existing type of contract than as an entirely new type of contract - De Wet & Yeats Kontraktereg 5-6.

of mandate in addition to the general contract of mandate. Or should the exercise of the right to such services be seen simply as taking place pursuant to the general contract of mandate?

The better view is, it is suggested, that there is a single contract of mandate providing for a range of services of which the customer may avail himself from time to time without the need to construe a separate contract of mandate each time he does so, although the consequences would, it is thought, in any event be the same even if a separate contract occurs each time.[21] Many contracts confer rights of which a party may or may not avail himself as he pleases,[22] but it would not be appropriate to construe every such right as an option which on exercise gives rise to a separate contract. 'Option' in this sense is, it is suggested, best reserved to describe rights which on exercise give rise to an entirely new category of contract, rather than any right of which a party may at his election avail himself. If a right is an inherent part of a contract its exercise is best not regarded as the exercise of an option bringing a new contract into existence.

The bank customer relationship is also comprised of one or more contracts of loan (mutuum) from time to time.[23] If the customer

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(21) As Kahn Contract points out (at 12) an option could be seen simply as a contract with the obligation of the grantor being subject to a potestative suspensive condition, namely the exercise of the option by the grantee. But cf Venter v Birchholtz 1972 (1) SA 276 (A) at 283 E-H. See too J W Wessels The Law of Contract in South Africa 2nd ed edited by A A Roberts (Durban 1951) ## 1311 ff especially at ## 1322 ff.

(22) eg a lease which confers the right on the tenant to erect advertising signs outside the leased premises, a prospecting contract which confers the right on the prospector to erect temporary housing on the prospecting area, etc.

(23) The reasons for taking the view that there is not a single, general contract of loan are dealt with below (at 19-21).

makes a deposit to his account at a time when the account is not in overdraft, a loan by the customer to the bank occurs:

> 'Any *amount* deposited to the credit of the customer immediately upon receipt becomes a loan to the bank and is not held in trust for the customer'

(per Hill J in Kearney NO v Standard Bank of South Africa Ltd[24]).

Similarly, if the customer makes a withdrawal from his account at a time when the account is in overdraft[25] a loan by the bank to the customer occurs:

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(24) 1961(2) SA 647 (T) at 650G. See too Attorney-General for Canada v Attorney-General for the *Province of Quebec* [1947] AC 33(PC) at 44. Cowen Negotiable Instruments 366-7 raises 2 objections to the mutuum classification. Firstly, he states that 'the intention of the parties in the case of mutuum is ordinarily to benefit the borrower, whereas the contract *between banker* and customer is normally intended to benefit both parties'; however, with respect, this is not a valid objection in our law in which it is well-recognised that loans may be freely entered into for the benefit of both parties - see eg Grotius 3.10.10; Voet 12.1.18; CIR v Lever Bros & Anor 1946 AD 441 at 450-1. Secondly, he asserts that 'the contract with a banker differs from mutuum, inter alia in that the money deposited with a banker may be reclaimed on demand without notice, whereas in the case of mutuum the lender must give reasonable notice of a claim for repayment'; however, as Stassen (op cit 1980 MB 77 at 81) points out, reasonable *notice is not an essential* element of mutuum but merely a natural incident which may be excluded by agreement - see eg Mackay v Naylor 1917 TPD 533 at 538. Cowen also points out that not all aspects of the bank customer relationship can be explained in terms of mutuum and he cites the duty of secrecy as an example. This is clearly correct.

(25) Stassen (op cit 1983 MB 80 at 83-4) takes the view that even where the account is in credit a claim arises in the bank's favour when a withdrawal is made from the account and that this claim is set-off against the bank's indebtedness to the *customer. With respect, however, the payment* of the withdrawal

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'Die respondent [the customer] betoog dat die appellant [the bank] onregmatig gehandel het *deur die verleende fasilitette [an* overdraft] sonder voorafgaande kennisgewing in te trek. Om die juistheid van hierdie betoog te kan beoordeel, is dit nodig om allereers die inhoud te bepaal van die kontrak wat die respondent met die appellant aangegaan het. Dit was 'n leningskontrak;(26) maar wat die appellant onderneem het om te doen, was nie om die £300 in 'n enkele bedrag voor te skiet en die respondent onmiddelik met daardie bedrag te debiteer nie. Die verpligting wat die appellant op hom geneem het, was om *tjeks binne gemelde bedrag uit te betaal wanneer hul aangebied* word, d.w.s. om van tyd tot tyd die geld voor te skiet wat nodig is om so 'n tjek by aanbieding uit te betaal'

(per Steyn C J in Volkskas Bpk v Van Aswegen(27)).

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is itself a pro tanto discharge of the indebtedness - see Joubert Verteenwoordigingsreg 138-9. This is a material distinction because set-off may be prevented for an extraneous reason. The significance of this may be illustrated by the case of sequestration. As already pointed out, under s 73(c) of the Bills of Exchange Act, a bank's duty and authority to honour a customer's cheques only terminate on receipt of *notice of the customer's having become insolvent*. Payment of cheques between the grant of the sequestration order and the bank's receiving notice thereof is therefore valid and pro tanto discharges the bank's indebtedness to the customer if the account is in credit. If the payment were only to give rise to a claim by the bank against the customer, set-off would be prevented by the establishment of the concursus creditorum - see eg Thorne & Anor NNO v The Government 1973(4) SA 42(T) at 45C-H, confirmed on appeal sub nom The Government v Thorne & Anor NNO 1974(2) SA 1 (A) at 9E-G.

(26) Cf 19-21 below where it is suggested that the grant of an overdraft facility is better viewed as the grant of an option to borrow than as an actual contract of loan.

(27) 1961(1) SA 493(A) at 495 G-H. A question which may be asked is whether the bank customer relationship could not be classified as mandate alone without the need to refer to mutuum as well. The answer is, it is thought, in the negative. While it is no doubt true that in certain circumstances a mandant may pay

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This aspect of the relationship is not commodatum (loan for use) because in commodatum the identical property is returned at the end of the period of the loan,[28] which is not the case in the bank customer relationship in which it is not necessary that the identical notes and coins be returned. It is also not depositum, the essence of which is that the the deposited property is deposited for safekeeping and that the identical property is returned at the end of the period of the deposit,[29] neither of which conditions are

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monies to the mandatary to be dealt with in terms of the mandate without any other contract being involved, this is, it is suggested, only possible where the payment of the monies is merely incidental to the mandate eg where a mandant pays monies to the mandatary to enable the mandatary to purchase goods for the mandant. This is not the case in the bank customer relationship, an important feature of which is that the bank may use the monies deposited with it pending their being required for performance of the mandate. This, it is considered, clearly indicates the presence of mutuum in addition to mandate. The fact that interest may be paid by the bank to the customer on monies deposited with the bank and the fact that the monies to be dealt with in terms of the mandate may in fact be made available by the bank on overdraft both reinforce this indication. The essentials of mutuum are present in the bank customer relationship and it would be forced to endeavour to explain this aspect of the relationship simply in terms of the contract of mandate. Cf, however, Joubert Law of South Africa vol 19 'Negotiable Instruments' # 154.

(28) Grotius 3.9.1; Voet 13.6.1; Attorney-General for Canada v Attorney-General for the Province of Quebec [1947] AC 33 (PC) at 44.

(29) 'Deposit is a contract whereby one person delivers a thing to another for the purpose of safe custody and the latter gratuitously or for reward undertakes to take care of the thing and restore it on demand .... The agreement must be that the identical thing shall be returned'

(Joubert Law of South Africa vol 8 'Deposit' by D H Bester # 68); Grotius 3.7.2; Voet 16.3.1.

met in the bank customer relationship. True, as Cowen[30] points out, there is an irregular form of deposit, depositum irregulare, in which these conditions are not essentials and there is support among the old authorities[31] for the classification of the bank customer relationship under this head. However, this classification was expressly rejected by Connor C J in In re White v Brown (Standard Bank):[32]

> '[The plaintiff] argued, ingeniously, that lodgments with a banker came within the head of our law known as depositum ... and there is no doubt but that there is authority for saying that, when it is agreed between a person depositing money and the depositary that the latter shall return as much, there is an implied authority to the depositary to use the monies, and that, though such a transaction lacks the most noted marks of depositum, still that it is considered such in an irregular way (Voet 16.3.1; Mackeld s. 405; Dig. 16.3.24,25 (1) and 19.2.31 med.). It is, however, also stated to have been settled that, if there be an express agreement that the depositary may use the money, then that the transaction becomes one of loan, and not depositum .... I should think that it would greatly disturb banking relations here, if we were to regard the implied contract on a lodgment, to be such as would introduce the peculiar rules of the law of depositum, instead of ordinary

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(30) Negotiable Instruments 367.

(31) See eg Schorer's note 331 to Grotius - H Grotius Introduction to Dutch Jurisprudence with selections from the notes of W Schorer translated by A F S Maasdop 2nd ed (Cape Town 1868) 579-80 - in which he draws a distinction between deposits on which the bank does not pay interest and those on which it does. The former he classifies under depositum and the latter under mutuum. Cf too U Huber Praelectionum Juris Civilis (Frankfort 1749) 16.3.11.

(32) (1883) 4 NLR 88 at 90-2, since followed in Ormerod v Deputy Sheriff, Durban 1965 (4) SA 670 (D & CLO) at 673D; De Hart NO v Kleynhans & Others 1970 (4) SA 383(O) at 387B. Cf too Equitable Trust and Insurance Co of S A Ltd v Registrar of Banks 1957 (2) SA 167(T).

debtor and creditor relations, so far as applicable to banking transactions ....

'Pothier, writing on old French Law, says (Depot. oeuvr., vol. 5,5.83) that in practice the depositum irregulare was the same in effect as loan. V.D. Linden, in writing (p.564) of the Bank of Amsterdam, does not connect it in any way with the peculiarities of the Roman Law of depositum; though that law might, I presume, be very fairly applied to what is not uncommon, deposits of plate, &c., in a Bank for safe custody. Huber, no doubt (ad Dig. 16.3.11), seems to refer to Banks in connection with depositum; but then they were evidently public places of deposit, corresponding with the care of monies lodged in Court ....

'I have dealt with this point at some length, because, I apprehend, it might cause no little disquiet if we were to intimate a doubt as to not applying the peculiar rules connected with depositum to banking transactions.'

It is stated above that a separate contract of loan comes into existence each time a deposit is made to an account in credit or a withdrawal is made from an account in overdraft. However, the question may be asked whether the loan element of the bank customer relationship should not be seen as a single general contract of loan, as in the case of the mandate element of the relationship. The answer is, it is suggested, that it is more appropriate to view each deposit or withdrawal as giving rise to a separate contract, although, as already pointed out,(33) the question is one of terminology only and the legal consequences are the same whichever approach is adopted.

It is true that this conclusion is the opposite of the conclusion reached in relation to the mandate element of the relationship, but it is thought that the position in regard to the 2 elements of the relationship differs in several material respects.

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(33) See 14 n 21 above.

In the case of the mandate element, the bank undertakes to render a range of services several of which are rendered, or at least must be kept available,[34] whether or not the customer elects to avail himself of any particular service. It is therefore necessary in any event to construe a general mandate whether or not one separates out various specific mandates, and in this context it seems preferable to view all the services as being rendered pursuant to a single general mandate.

In the case of the loan element of the relationship the position is rather different. Until the customer makes a deposit or withdrawal there is no necessity to construe a contract of loan at all. Moreover, the grant of an overdraft facility may take place at a different time from the establishment of the bank customer relationship and may be varied from time to time. One would therefore need to construe the grant of an overdraft facility and each variation thereof as an amendment of the general contract of loan. Similarly, a cheque drawn or payment instruction given outside the scope of a credit in the customer's account and any overdraft facility granted by the bank is in the first instance an offer to borrow[35] which on acceptance would give rise to yet another amendment to the general contract of loan. It follows, it is thought, that it is simpler and more satisfactory to view each deposit to an account in credit and each withdrawal from an account in overdraft as giving rise to a separate contract of loan.

On this approach the establishment of the bank customer relationship would embrace the grant by the bank to the customer of an option to make loans to the bank in such amounts and at such times as the customer may from time to time elect and

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(34) eg to remain open at certain hours.

(35) Trust Bank of Africa Ltd v Wassenaar 1972(3) SA 139 (D&CLD) at 142G-H; Malan Bills of Exchange # 321 n14.

each deposit would constitute the exercise of this option bringing a separate contract of loan into existence. Similarly, the grant of an overdraft facility would constitute the grant by the bank to the customer of an option to borrow (or reborrow, if earlier borrowings have been repaid) up to the amount of the facility and each withdrawal would constitute the exercise of part of this option again bringing a separate contract of loan into existence.

In conclusion, it is suggested that the expression 'bank customer contract' is best reserved to refer to the contract of mandate between bank and customer, rather than both to the contract of mandate and to the various contracts of loan from time to time. Where it is desired to refer to the broader relationship between bank and customer encompassing both the contract of mandate and the contracts of loan the expression 'bank customer relationship' is appropriate, provided that it is borne in mind that the relationship is not a single contract but consists of a number of separate, albeit interrelated, contracts.(36)

(2) *The functions of a cheque or other payment instruction*

If the customer's account is in credit the customer has lent and advanced monies to the bank, the loan is repayable on demand and the customer is entitled to direct the bank to repay the loan, or any portion thereof, either to the customer himself or to a third party.(37) A cheque drawn or other payment instruction given by

(36) Further discussion of the nature of the bank customer relationship is to be found in the rest of this chapter, in the next chapter (at 28ff below) and in chapter 15 (at 633ff below).

(37) See eg Witbank District Coal Agency v Barclays Bank 1928 TPD 18 at 20; Cowen Negotiable Instruments 368, 371-2; Malan Bills of Exchange ## 320-1.

the customer within the scope of a credit in his account therefore serves a dual function: it is a demand for repayment of portion of the loan and it is a direction[38] regarding to whom payment is to be made.[39] The bank is correspondingly obliged to repay that portion of the loan as demanded and directed by the cheque or payment instruction. In other words the bank is obliged, or under a duty, to honour the cheque or payment instruction and it automatically follows that the bank also has the right or authority to do so (and, with respect, that it is superfluous to expressly so provide).

If an overdraft facility has been agreed, the bank has granted the customer an option to borrow (or reborrow if earlier borrowings have been repaid), up to the amount of the facility[40] and if the option is exercised the bank is obliged on demand to advance the

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(38) A distinction is drawn in this thesis between the expressions 'payment direction' and 'payment instruction': the latter expression is used to refer to any instruction given to the bank, whether by way of cheque or otherwise, to make a payment, while the former expression is used to refer to one of the functions of a cheque or other payment instruction namely the direction regarding to whom payment is to be made.

(39) More precisely it is the exercise by the customer of the right to the services undertaken by the bank in terms of the bank customer contract in relation to withdrawals. As already pointed out (at 8 above), the principal service that the bank undertakes in relation to withdrawals is to discharge its indebtedness to the customer by payment either to the customer or to one or more third parties as directed by the customer from time to time, but this is not the only service. Examples of some of the other services undertaken by the bank are set out at 8-9 above. It follows that even when a customer issues a cheque or other payment instruction in favour of himself he is not merely demanding a repayment on account of his loan to the bank; he is also availing himself of the services undertaken by the bank. The significance of this dual nature even of a cheque or other payment instruction in favour of the customer is referred to at 141 n 295 below.

(40) See 19-21 above.

monies lent and to make payment to the customer or to a third party as directed by the customer.(41) A cheque drawn or other payment instruction given within the scope of an overdraft facility therefore serves a triple function: an exercise of portion of the option, a demand that the monies lent be advanced and a direction regarding to whom payment is to be made. The bank is correspondingly obliged on exercise of the option to advance the monies as demanded and directed by the cheque or payment instruction. In other words in this situation too the bank is obliged and entitled, or has a duty and the authority, to honour the cheque or payment instruction.

If a cheque is drawn or another payment instruction is given outside the scope of any credit in the customer's account and of any overdraft facility granted by the bank, the cheque or payment instruction in the first instance constitutes an offer to borrow which the bank may accept or reject.(42) If the bank accepts the offer it is obliged to advance the monies lent on demand, and to make payment to the customer or a third party as directed by the cheque or payment instruction.(43) Here, too, therefore a cheque or other payment instruction serves a triple function: an offer to borrow, a demand that the monies lent if the offer is accepted be advanced and a direction regarding to whom payment is to be made. If the bank accepts the offer it is correspondingly obliged to advance the monies as demanded and directed by the cheque or payment instruction. As the bank is not obliged to accept the offer, it is not under an obligation to honour the cheque or payment instruction but it does have the right to do so if it so wishes.

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(41) See eg Volkskas Bpk v Van Aswegen 1961(1) SA 493(A) at 495H; Cowen op cit 368, 372-3; Malan op cit ## 320-1.

(42) See 20 above.

(43) Generally the acceptance will, it is considered, take place by way of the honouring of the cheque - see 145 below.

A cheque or other payment instruction may also fall into any 2 or all 3 of these categories. If it falls wholly into the first 2, ie if it is drawn or given within the scope partly of a credit in the customer's account and partly of an overdraft facility granted by the bank, the bank is obliged to honour it in accordance with the principles set out above. If, however, any part of it would fall into the third category, ie the bank would have to lend further monies, the bank is not obliged to honour the cheque or payment instruction but it is entitled to do so if it so wishes.(44)

Although a cheque or other payment instruction serves more than one function it does not follow that the functions are divisible; on the contrary the view is taken below(45) that it is implicit in the bank customer contract that the functions are indivisible and take effect and lapse together.

(3) Meaning of 'duty and authority' of bank

As pointed out in the previous section, a bank is obliged to honour a cheque drawn or other payment instruction given within the scope of a credit in the customer's account or of an overdraft facility granted by the bank or partly within the one and partly the other. The bank is therefore under a 'duty' to honour such a cheque or payment instruction and it has the corresponding right or 'authority' to do so.

Where a cheque is drawn wholly or partly outside the scope of any credit in the customer's account and of any overdraft facility granted by the bank, the bank is not obliged, ie it is not under a

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(44) *Trust Bank of Africa Ltd v Wassenaar* 1972(3) SA 139 (D&CLD) at 142G-H; Cowen Negotiable Instruments 371.

(45) See 140-2 below.

duty, to honour the cheque or payment instruction but it does have the right or authority to do so.

It may be noted, however, that the use of the expression 'duty and authority' in s 73 of the Bills of Exchange Act gives rise to a number of difficulties. It has already been noted[46] that this section provides, inter alia, that a bank's duty and authority terminate on receipt by the bank of notice of the customer having become insolvent; in other words, the bank is entitled and, if applicable, obliged to honour the customer's cheques until it receives notice of the customer's insolvency. The difficulty arises from the fact that the section does not make it clear whether the bank has all the rights which would normally flow from honouring a cheque. This gives rise to questions such as: Does the section protect payment to the customer as opposed to to his trustee? Is the bank entitled to its charges for honouring the cheque? If the customer's account is in credit does payment of the cheque constitute a pro tanto discharge of the bank's indebtedness to the customer, and can the bank's charges be set-off against the credit? If the customer's account is in overdraft does the honouring of the cheque give rise to a contract of loan under which the bank can claim repayment of the amount paid together with the agreed interest, and is the bank's claim secured by any security the bank may hold? These questions will be explored further in chapter 4.[47]

(4) Meaning of 'termination' of duty and authority

The expression 'termination of a bank's duty and authority' is used in a variety of senses. It may mean permanent termination[48]

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(46) See I above.

(47) At 161ff below.

(48) eg in the case of death.

or temporary termination, ie suspension.[49] It may refer to one,[50] some[51] or all[52] of the customer's cheques or other payment instructions. It may refer to cheques drawn or other payment instructions given by the customer personally, or by someone authorised by him, as opposed to by his legal representative where he has ceased to have capacity to act,[53] or it may refer to all cheques and payment instructions howsoever drawn or given.[54] Both the bank's duty and its authority may terminate[55] or only its duty,[56] or the bank may not have been under any duty to honour the cheque or payment instruction so that only its authority terminates.[57] The bank's duty on one ground may terminate but be replaced by a duty on another ground.[58] It is also necessary to distinguish termination of the bank's duty and authority and termination of the bank customer contract.[59]

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(49) eg in the case of temporary insanity.

(50) eg in the case of countermand of a specific cheque.

(51) eg in the case of an interdict affecting certain specified cheques.

(52) eg in the case of insolvency.

(53) eg in the case of insanity.

(54) eg where the customer's claim against the bank has prescribed.

(55) eg where the customer countermands payment of a cheque drawn within the scope of a credit in the customer's account.

(56) eg where the credit in the customer's account is judicially attached.

(57) eg where the customer countermands payment of a cheque drawn outside the scope of any credit in the customer's account and of any overdraft facility granted by the bank.

(58) eg where the credit in the customer's account is judicially attached but the cheque is also within the scope of an overdraft facility granted by the bank.

(59) See 38 n 24 below.

(5) Payment instructions other than cheques

Banks make payments not only in accordance with cheques drawn by customers, but also in accordance with customers' instructions given in various other forms. Common forms include requests to make payments by way of stop order, telegraphic transfer, the issue of a bank draft, etc. There is a dearth of authority on a bank's duty and authority to honour payment instructions given in such other forms but it is considered that by trade usage a bank has the same duty and authority to pay such payment instructions as in the case of cheques, provided that they are given in customary and regular form.(60)

(6) Bank charges and interest

Banks make a charge for honouring cheques and other payment instructions. Banks also charge interest on loans made by them. Consideration will accordingly also be given to the effect on a bank's right to such charges and interest if the bank's duty and authority to honour a customer's cheques and other payment instructions terminate.

(7) Unjust enrichment

If a bank's duty and authority to honour a customer's cheques and other payment instructions have terminated, the bank may nevertheless have a claim based on unjust enrichment either against the customer or against the recipient of the payment.(61) This, too will be referred to where applicable but will not be examined in detail.

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(60) If an instruction is not given in customary form the bank would, it is thought, be entitled but not obliged to honour the instruction.

(61) See eg Govender v Standard Bank of South Africa Ltd 1984(4) SA 392(C).

CHAPTER 3 - INSANITY, INABILITY TO MANAGE ONE'S AFFAIRS AND PRODIGALITY

Synopsis

If a customer becomes insane or unable to manage his affairs or is declared a prodigal, he ceases to have capacity to act. This loss of capacity clearly terminates the bank's duty and authority to honour the customer's cheques and other payment instructions but the question arises as to whether the bank's duty and authority terminate on the loss of capacity or only on the bank's becoming aware of the loss. In other words, is it a term of the bank customer contract that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity, or is it necessary that a cheque or other payment instruction should constitute a valid separate authority in its own right?

Before seeking to determine whether the bank customer contract contains such a term, either as a naturale of the contract or as a term implied from the facts relating to any particular contract in question, it is necessary to consider whether this interpretation is not precluded by the general rule that mandates lapse on the mandant's loss of capacity, or, where the cheque or payment instruction constitutes an offer to borrow, by the general rule that offers lapse on the offeror's loss of capacity. It is also necessary to consider whether it is legally possible for a cheque 'drawn' or payment instruction 'given' by the customer after he has ceased to have capacity to act to function as a cheque or payment instruction.

It is generally stated that a mandate terminates on the mandant's loss of capacity. The rule is, however, subject to an exception where the mandatary performs the mandate in ignorance of the mandant's loss of capacity and although the precise scope of the exception is not clear, the better view is that the true formulation of the rule is that a mandate lapses not on the mandant's loss of capacity but on the mandatary's becoming aware of the loss. The rule is therefore consistent with the above interpretation of the bank customer contract. Should this view be wrong, the rule is in any event only a naturale of mandate, and not an essentiale, and the parties are therefore free to

exclude it by agreement. On this approach it is a matter of interpretation as to whether or not lapsing of the mandate is excluded.

The general rule is similarly that an offer lapses on the offeror's loss of capacity; however, the parties are likewise free to exclude lapsing of an offer by agreement eg an option does not lapse on the grantor's loss of capacity. It is, therefore, again a matter of interpretation of the bank customer contract as to whether or not the offer constituted by a cheque drawn or payment instruction given outside the scope of a credit or overdraft facility lapses on the customer's loss of capacity.

In the ordinary course a document signed by a person who has ceased to have capacity to act would be a nullity, but it is once again a matter of interpretation as to whether or not this is so in the case of the bank customer contract because it is not an inevitable requirement of law that a cheque or other payment instruction must constitute a valid separate authority in its own right.

Contractual terms may arise in 3 ways: they may be naturalia of the contract, they may be expressly agreed upon or they may arise by necessary implication from the facts relating to a particular contract. The principal sources of naturalia are legislation and the old authorities but the courts may recognise new naturalia. Banks do not expressly stipulate that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity but the necessary conditions are likely to be present in the case of any particular bank customer contract to enable such a term to be implied; however, in view of the standard nature of the bank customer contract such a term should be recognised as a naturale of the contract rather than requiring proof of an implied term in every case.

If the cheque or payment instruction is in favour of the customer himself the further question arises as to what the bank's position is if it makes payment to the customer as opposed to to his curator. If a term as set out above is recognised it would encompass such a payment which would accordingly be valid. If such a term is not recognised a rule should be recognised in our law that if a debtor pays his creditor in ignorance of the creditor's loss of capacity the debtor is entitled to be indemnified for his negative interest.

If a cheque is drawn or a payment instruction is given by a representative on the customer's behalf the cheque or payment instruction is, even in the absence of a term as set out above, fully effectual if both the bank and the representative are

unaware of the customer's loss of capacity, but if the representative is aware of the loss while the bank is not, the bank is limited to a claim for its negative interest.

Applying these principles, if a term as set out above is recognised a customer's cheques and payment instructions will be *fully effectual as between bank and customer* until the bank becomes aware of the customer's loss of capacity and all the normal consequences will flow. It does not make a difference if the cheque is drawn or the payment instruction is given before or after the loss of capacity, or by the customer personally or by a representative on his behalf, and payment to the customer as opposed to to his curator is effectual.

If a term as set out above is not recognised several situations require to be distinguished.

If a cheque or payment instruction is issued after the customer has ceased to have capacity to act it is a nullity and the bank is limited to such claims as it may have based on unjust enrichment, *subject to what has been said above in regard to the* position if payment is made to the customer and the position if the cheque or payment instruction is issued by a representative on the customer's behalf.

If the loss of capacity occurs after the cheque or payment instruction has been issued but before it is received by the bank 2 situations need to be distinguished. Firstly, if the cheque is drawn or the payment instruction is given within the *scope of a credit or overdraft facility* it constitutes either notice exercising the right to demand repayment of monies lent and advanced and to direct to whom payment is to be made, or notice exercising the right to borrow, to demand the advance of the monies lent and to direct to whom payment is to be made. Although, in the absence of agreement to the contrary, notice exercising a right only takes effect on communication to the addressee, it is only necessary that the addressor should have capacity to act at the time of despatching the notice and not also at the time of communication of the notice to the addressee. The position is therefore the same as where the loss of capacity occurs after receipt by the bank of the cheque or payment instruction, as dealt with below. Secondly, if the cheque is drawn or the payment instruction is given outside the scope of a credit or overdraft facility it is in the first instance an offer to borrow and it is necessary that the customer should have capacity to act at the time of acceptance of the offer, which generally occurs on the honouring of the cheque or payment instruction. The bank will, however, be entitled to its negative interest if it honours the cheque or

payment instruction in ignorance of the customer's loss of capacity.

If the loss of capacity occurs after receipt by the bank of the cheque or payment instruction it is again necessary to draw the distinction drawn in the previous paragraph. If the cheque is drawn or the payment instruction is given within the scope of a credit or overdraft facility it takes effect on receipt by the bank and only lapses when the bank becomes aware of the customer's loss of capacity. The cheque or payment instruction is therefore fully effectual until the bank becomes aware of the loss of capacity and all the normal consequences flow, except that if the cheque or payment instruction is in favour of the customer himself and payment is made to the customer as opposed to to his curator the bank can only recover its negative interest. The position where the cheque is drawn or the payment instruction is given outside the scope of a credit or overdraft facility has been dealt with in the previous paragraph.

Consideration is also given to the possible existence of a more general rule that a person who acts to his prejudice in reliance on another's continued capacity to act is entitled to be indemnified for his negative interest.

If the bank receives information which is insufficient to conclude that the customer has ceased to have capacity to act but which raises the suspicion that the customer may have done so, the bank is under a duty to make further enquiry. If the bank reasonably but wrongly concludes that the customer has capacity to act, the bank will be in the same position it would have been in had it not received any information at all. If the bank reasonably but wrongly concludes that the customer does not have capacity to act, this will not avail it as a defence to a claim for damages for wrongful dishonour except where the claim is framed in delict. Constructive notice of an order of court concerning the customer will not be imputed to the bank.

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(1) Preliminary

A person who becomes insane or unable to manage his affairs, or who is declared a prodigal, loses his capacity to perform juristic acts (capacity to act; active capacity; handelingsbevoegheid),(1)

(1) Molyneux v Natal Land and Colonisation Company Ltd 1905 AC 555 (PC) at 560ff. See generally PQR Boberg The Law of Persons and the Family (Cape Town 1977) 130ff.

and in this section consideration is given to the effect such loss of capacity by a customer has on a bank's duty and authority to honour the customer's cheques and other payment instructions.[2]

If a person becomes insane he automatically loses his capacity to act. It is not necessary that a court should first adjudge him insane or that he should be subjected to the provisions of the Mental Health Act,[3] and even after such 'certification' he will regain capacity to act on recovery, or during lucid spells, without withdrawal of the certification.[4] Certification is, however, not without significance because it transfers the onus of proof: an uncertified person is presumed sane until the contrary is proved, while a certified person is presumed insane until the contrary is proved.[5]

A person may also be unable to manage his affairs for a variety of reasons unrelated to insanity, such as senility, retardation or a stroke. Such a person may have limited or no capacity to act. A curator may be appointed either to supplement such person's capacity or to represent him in all matters, as the case may be. As in the case of insanity, such a person's mental state, and hence his

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(2) It should be borne in mind that in dealing with insanity, inability to manage one's affairs and prodigality one is dealing with termination of the bank's duty and authority to honour cheques drawn and other payment instructions given by the customer personally or by anyone authorised by him, as opposed to by the customer's curator. Moreover, one may be dealing either with permanent termination or with temporary suspension, depending on whether the insanity, inability to manage one's affairs or prodigality is permanent or temporary.

(3) 18 of 1973.

(4) Prinsloo's Curators Bonis v Crafford & Prinsloo 1905 TS 669 at 672; Boberg Persons 131-2.

(5) Ibid.

capacity to act, may fluctuate from time to time.[6]

A person may be declared a prodigal if he squanders his assets threatening to reduce himself and his dependants to destitution. The order of court interdicts him from performing all or certain legal acts, and his capacity to act is limited accordingly. The limitation subsists until the order is withdrawn.[7]

(a) Do a bank's duty and authority terminate on the customer's loss of capacity or only on the bank's becoming aware of the loss?

Cowen[8] refers only briefly to the question of the effect of a customer's insanity on the bank's duty and authority to honour the customer's cheques, saying:

> 'It would seem the duty and authority of a banker to pay his customer's cheques are terminated by notice of the customer's insanity.'

As authority for this proposition he relies on a number of English textbook writers, of whom Paget[9] may be quoted as being representative:

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(6) Pienaar v Pienaar's Curator 1930 OPD 171 at 174-5; Boberg op cit 154ff.

(7) Phil Morkel Ltd v Niemand 1970(3) SA 455 (C) at 460; Boberg op cit 168ff.

(8) Negotiable Instruments 417.

(9) Paget Banking 246. (Cowen cites the 6th ed p 260 which was in similar terms.) WS Weerasooria & FW Coops Banking Law and Practice in Australia (Sydney 1976) # 2619 take the same view in regard to Australian law. I F G Baxter The Law of Banking 3rd ed (Toronto 1981) at 6 states the position in Canada to be as follows:

> 'The position on the insanity of the customer is not clear and probably the banker-customer contract is determined by notice to the bank of the customer's insanity.'

> 'If the customer becomes mentally disordered or otherwise loses contractual capacity the banker should not honour his cheques. If the state of the customer's mind is such that he does not know what he is doing, he can give no mandate and any existing mandate is revoked; but if the banker has no knowledge and no reason to suspect, then the mandate is operative.'

It may be noted that neither Cowen nor Paget distinguishes between cheques issued before and cheques issued after the onset of the mental disorder.

The difficulty, however, in seeking support from the English authorities in regard to the effect of insanity in our law is that English law proceeds from the principle, inimical to our law, that if an insane person purports to enter into a contract he is bound by the contract unless he proves that the other party was aware of his insanity.(10) Paget, moreover, relies on Drew v Nunn(11) in which an agent's ostensible authority to represent his principal was held to continue until the third party becomes aware of the principal's insanity; however, the correctness of this decision has been questioned in England(12) and in any event, in view of the fundamentally different approaches to insanity in English law and in our law, it is doubted whether much weight can be attached to this decision in our law.(13)

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(10) The Imperial Loan Company Ltd v Stone [1892] 1QB 599(CA), but cf G H L Fridman 'Mental Incompetency' (1963) 79 LQR 502 at 509ff.

(11) (1879)4 QBD 661(CA).

(12) Bowstead on Agency 14th ed by F M B Reynolds & B J Davenport (London 1976) 434-5; G H L Fridman The Law of Agency 4th ed (London 1976) 320-1. Cf too Yonge v Toynbee [1910] 1KB 215(CA).

(13) The decision would, moreover, only appear to apply where the cheque is drawn or other payment instruction is given before the onset of the insanity - cf Daily Telegraph Newspaper Company Ltd v McLaughlin [1904] AC 776(PC). Furthermore, the decision relates to the law of representation and not the contract of mandate - cf 11 n 17 above and 97ff below.

Malan[14] states:

'The relationship is not terminated because the customer becomes *insane* or incapacitated. Because a lunatic lacks legal capacity (cf De Wet and Yeats 51-52) cheques "drawn" by him have no legal effect. Cowen 417 takes the view that the bank's duty and authority to pay such a cheque are terminated only by notice of the customer's insanity but it is submitted that *a bank is not* entitled to pay a cheque drawn by a customer who was insane at the time of drawing.'

In the same paragraph, however, he submits that the bank customer contract being a contract of mandate is terminated by the sequestration, liquidation, judicial management or death of the customer. Why, then, he excludes insanity and incapacity to act, which, as will be shown below, also terminate a mandate, is unclear.[15]

The courts in the United States were on several occasions faced with this question before it was regulated by statute[16] and, with one early exception,[17] on each occasion held that a bank which pays a customer's cheques without knowledge that the customer has in the interim become insane, is entitled to be protected. In Poole v Newark Trust Co,[18] for example, the court held:

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(14) Bills of Exchange #328 n143.

(15) Cf too Joubert Law of South Africa vol 19 'Negotiable Instruments' by L Tager # 155 where it is stated that insanity, unlike death and insolvency, does not terminate the bank customer contract, only the bank's duty and authority. See further 38 n 24 below.

(16) Section 4-405(1) of the Uniform Commercial Code now provides that the bank's authority is not revoked until the bank learns that the customer is incompetent and has had a reasonable time to act on that knowledge.

(17) American Trust & Banking Co v Boone 29 SE 184 (SC Ga, 1897).

(18) 8 A2d 10 (SC Del, 1939) at 16; see also the other cases cited there.

'... where a bank deposit is made by a person who is sane and who subsequently draws checks upon the account, the bank will be protected in the payment of the checks even if at the time of payment the depositor be insane, provided the bank had no knowledge of such insanity, or could not be charged with such knowledge. The cases support the clear principle that upon the making of the deposit the relation of debtor and creditor between the bank and the depositor came into existence. When the check of the depositor was presented for payment no new contract came into being between such depositor and the bank, such as would require the bank to ascertain the then mental status of the depositor, but the payment of the check was the mere formal completion of the pre-existing contract which the bank had entered into with one who was sane.... As said in Riley v. Albany Savings Bank[19] "a bank cannot investigate the sanity of a depositor whenever a check is presented."

'In Metropolitan Life Ins. Co. v. Bramlett[20] the Court .... cited with approval the quotation from Brady on Bank Checks, Sec. 205:[21]

> "If a depositor after opening an account becomes insane and draws cheques while insane or if he draws checks while sane and becomes insane before the checks are presented the drawee bank is protected in either case if it pays the checks in good faith and in ignorance of the drawee's insanity. Unless there are facts present putting the bank on notice it is under no obligation to investigate or assure itself of the drawee's sanity."'

Is the position similar in our law? In other words, is a cheque or other payment instruction fully effectual as between bank and customer until the bank becomes aware that the customer has ceased to have capacity to act, notwithstanding that the customer may have ceased to have such capacity before payment of the cheque or payment instruction or even before it was 'drawn' or 'given'?[22] Or is it

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(19) 36 Hun 513, affirmed 103 NY 669.

(20) 140 So 752 (SC Ala, 1932).

(21) JE Brady The Law of Bank Checks 2nd ed (New York 1926).

(22) It is assumed that the loss of capacity occurs after the bank customer contract was entered into and that accordingly there is a valid bank customer contract in existence.

necessary that each cheque or other payment instruction should constitute a valid separate authority in its own right, ie that the customer should have had capacity to act at the time of drawing and issuing the cheque or giving the payment instruction and possibly also at the time of payment?

In seeking the answer to this question several further questions arise. Firstly, does the general rule that mandates lapse on the mandant's loss of capacity to act preclude this interpretation in our law? Secondly, does the general rule that offers lapse on the offeror's loss of capacity to act preclude this interpretation where the cheque or other payment instruction constitutes an offer to borrow in that it is not drawn or given within the scope of a credit or overdraft facility? Thirdly, where the cheque or payment instruction is 'drawn' or 'given' after the customer's loss of capacity to act, is it legally possible for such a 'cheque' or 'payment instruction' to function as a cheque or payment instruction? And fourthly if the answer to the first 3 questions does not preclude this interpretation, is it a term of the bank customer contract, whether as a naturale or as a term implied from the facts, that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act?

Each of these questions will be considered in turn.

(i) The rule that mandates lapse on the mandant's loss of capacity

The bank customer contract is a contract of mandate[23] and the general rule is that mandates ipso facto lapse on the mandant's

(23) See 6ff above.

loss of capacity to act.[24] The general rule is, however, subject to exceptions, the most important of which for present purposes relates directly to the point in question, namely the position of a mandatary who performs the mandate in ignorance of the mandant's loss of capacity. This exception will therefore be considered first because if the effect of the exception is that a mandate in fact lapses not on the mandant's loss of capacity but on the mandatary's becoming aware of the loss, the rule is consistent with the interpretation of the bank customer contract that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity.

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(24) See eg Institutes of Roman Law by Gaius translated by E Poste 4th ed by E A Whittuck (Oxford 1904) 3.160; Institutes 3.26.10; Digest 17.1.26, 58; Grotius 3.12.11; A Vinnius Institutionum Imperialium Commentarius revised by J G Heineccius (Leiden 1726) 3.27.9, 10; Van Leeuwen CF 1.4.24.14, Roman Dutch Law 4.26.11, Dictata 3.27.8; U Huber *The Jurisprudence of my Time* translated by P Gane (Durban 1939) 3.12.42; Voet 17.1.15, 3.3.21; G Noodt Opera Omnia (Leiden 1776) Observationes 2.1; C van Bynkershoek Observationes Tumultuariae edited by EM Meijers, AS de Blécourt & HDJ Bodenstein (Haarlem 1926) I 979; Van der Keessel Voorlesinge vol 4 th 573 # 11 (p 233); Van der Linden 1.15.14; Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation) *1968(1) SA 717(A) at 722H.*

The old authorities - and many of the modern authorities too - do not always draw, or draw clearly, certain distinctions which it is thought are essential to a proper understanding and exposition of the law of mandate (and with it the law of representation).

The first and most important of these distinctions is between the contract of mandate and the power of representation. (It must be borne in mind that when a bank honours a cheque or other payment instruction in favour of a third party it does not make payment to the third party as the customer's representative but as a principal discharging its own

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However, as will be seen, it is not clear that this is in fact the effect of the exception and if the effect of the exception is something less than this it is necessary to consider whether the rule is a naturale of mandate which can be excluded by agreement or

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indebtedness - cf De Villiers NO v Kaplan 1960(4) SA 476(C) at 478H; Joubert Verteenwoordigingsreg 138-9.) As already pointed out (at 11 n 17 above), the contract of mandate is a contract to render a service while the power of representation is the power to perform juristic acts on behalf of another, and a mandatary may or may not also be a representative. The old authorities, however, dealt with these institutions together, with the result, it is suggested, that notions applicable only to representation coloured their treatment of mandate.

This confusion of concepts is, it is thought, especially evident in their treatment of lapsing on the mandant's loss of capacity to act. If a person lacks the capacity to perform a juristic act himself it would not seem conceptually possible that some-one should perform that act on his behalf under his authority, and it follows, it is considered, that a power of representation should in principle lapse on the grantor's loss of capacity - see eg Joubert Law of South Africa vol 1 'Agency and Representation' # 123. (It is not proposed to enter the debate on the question of irrevocable powers of representation.)

No similar consideration, however, arises in the case of the contract of mandate. True, in certain circumstances performance of the mandate may become impossible on the mandant's loss of capacity - eg a mandate to perform an operation will become impossible on death - or the mandate may be of so personal a nature that it is implicit that it lapses on the mandant's loss of capacity. On the other hand the services may be of such a nature that they can be equally well rendered after the mandant's loss of capacity and it may be in neither party's interests that the contract of mandate should lapse.

A further distinction which needs to be drawn is between the lapsing of the contract of mandate and the lapsing of the mandatary's mandate ie the mandatary's right (and obligation) to render the mandated services. This distinction is necessary especially, but not only, where the performance of the mandate entails the exercise of a power of representation.

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whether it is an essentiale which cannot be so excluded, because if it is an essentiale it may preclude the above interpretation of the bank customer contract.

These 2 questions will be considered separately.

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Taking the case where the performance of the mandate entails the exercise of a power of representation first, the lapsing of the power will of course prevent the mandatary from performing of the mandate. It does not, however, necessarily follow that the contract of mandate lapses : the mandant's legal representative could re-clothe the mandatary with the power of representation with the result that the contract can proceed as before, and if the legal representative chooses not to do so, or is unable to do so, it would be a matter of interpretation of the contract as to whether or not the mandatary would have a claim for damages for breach of contract. Cf the position where a contracting party accepts the risk of impossibility - see eg Oerlikon South Africa (Pty) Ltd v Johannesburg City Council 1970(3)SA 579(A) at 585B.)

It is thought, moreover, that similar considerations apply where the performance of the mandate does not entail the exercise of a power of representation; accordingly, the mandatary's mandate would lapse on the mandant's loss of capacity but if the contract does not lapse the mandant's legal representative could re-clothe the mandatary with the authority (and hence the obligation) to proceed with performance, and if the legal representative does not do so it would be a matter of interpretation of the contract as to whether or not the mandatary may claim damages for breach of contract.

A similar distinction arises in the case of revocation. The considerations of public policy which militate against the validity of an agreement that a power of representation is to be irrevocable are, it is thought, also applicable to an agreement that a mandatary's right to proceed with performance of the mandate is to be irrevocable. As Van den Heever J, as he then was, said in Ex p Kelly 1943 OPD 76 at 83 :

> 'It is trite law that on grounds of public policy our Court will not enforce contracts in which one party fetters his own liberty of action unduly. Such restrictions may be too onerous in respect of time, in respect of place, etc.'

It does not necessarily follow, however, that therefore the contract of mandate is also revocable: if the contract were

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(A) Exception where mandatary is unaware of the mandant's loss of capacity.

The rule that mandates lapse on the mandant's loss of capacity to act has been subject to an exception where the mandatary performs

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also revocable the mandatary could have no claim for damages for breach of contract and as Trengove JA said in The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd 1984(2) SA 881(A) at 886F :

> 'Generally speaking, a principal has the right and power to revoke his agent's authority without incurring any liability for damages to the agent, but the particular terms and circumstances of the grant of the authority may show that such a revocation is a breach of contract.'

This was said in relation to a contract of mandate incorporating a power of representation (see at 885H) but is, it is thought, equally apposite where the contract does not include such a power.

It is also necessary to distinguish lapsing of the mandatary's mandate on the one hand and revocation on the other. The parties could, for example, agree that both revocation and the failure of the mandant's legal representative to re-clothe the mandatary on the mandant's loss of capacity with authority to proceed will constitute a breach of the contract, or they could agree that revocation will do so but that the contract of mandate, and with it the mandatary's mandate, will lapse on the mandant's loss of capacity.

In dealing with the termination of a bank's duty and authority to honour a customer's cheques and other payment instructions one is dealing with the termination of the bank's right and obligation to perform its mandate, ie with termination of the bank's mandate, and not with termination of the contract of mandate itself, although termination of the contract may also flow from the customer's loss of capacity. It is also thought that the old authorities in dealing with lapsing of mandates on the mandant's loss of capacity focussed on lapsing of the mandatary's mandate rather than on lapsing of the contract of mandate. Accordingly, references in what follows to the lapsing of a mandate primarily refer to the lapsing of the mandatary's mandate rather than to the lapsing of the contract of mandate (unless otherwise indicated) and may need qualification where the lapsing of the contract of mandate is in issue.

the mandate in ignorance of the mandant's loss of capacity since Roman times.(25) The difficulty, however, is to determine the precise scope of the exception. As will be shown below this difficulty arises partly from the fact that mandates were originally gratuitous and partly from the fact that the old authorities only deal with the question of the mandatary's position if he in fact performs the mandate; they do not consider the position where he fails to perform it or performs it negligently.(26)

It is suggested that there are 3 principal possible interpretations of the rule and the exception.

Firstly, the true formulation of the rule and the exception could be that a mandate lapses not on the mandant's loss of capacity to act, but on the mandatary's becoming aware of the loss.(27) On this approach not only the rights but also the obligations of the parties would continue until the mandatary becomes aware of the mandant's loss of capacity.

Secondly, the scope of the exception could be limited to affording a mandatary who in fact performs the mandate in ignorance of the mandant's loss of capacity, the right to be placed in the same position he would have been in had the mandate not lapsed ie

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(25) Gaius Institutes 3.160; Institutes 3.26.10; Digest 17.1.26, 58.

(26) This question cannot, however, be avoided for present purposes because it is not only termination of the bank's authority that is in issue but also termination of the bank's duty. Although in practice it is *likely to be a rare occurrence* that a bank dishonours a cheque or other payment instruction when it is unaware that the customer has ceased to have capacity to act and when it therefore still believes that it is under a duty to honour the cheque or payment instruction, it is nevertheless necessary to examine whether, if this happens, the bank may be held liable for damages for wrongful dishonour.

(27) This is the view adopted by Kerr, albeit without discussion : AJ Kerr The Law of Agency 2nd ed (Durban 1979) 200-203.

his positive interest. On this approach the mandatary's rights would continue until he becomes aware of the mandant's loss of capacity but his obligation to perform the mandate would terminate.[28]

Thirdly, the scope of the exception could be limited to affording the mandatary the right to be placed in the same position he would have been in had he not performed the mandate ie his negative interest. On this approach the mandatary would be entitled to be indemnified for his expenses and any profit he could have made elsewhere, but he would not be entitled to the remuneration provided for under the contract of mandate.

Although the principal significance of the difference between positive and negative interest lies in the question of whether or not the mandatary is entitled to his remuneration for performing the mandate this is not the only significance eg if a bank is entitled to its positive interest the payment of a cheque or other payment instruction constitutes a direct pro tanto discharge of the bank's indebtedness to the customer,[29] whereas if the bank is entitled to its negative interest only, the payment will give rise to a right of re-imbursement which will constitute only an indirect pro tanto discharge of the bank's indebtedness by way of set-off. The significance of this in turn lies in the fact that set-off may be prevented for some extraneous reason.[30]

In seeking to interpret the old authorities it is necessary to bear in mind that mandate was originally gratuitous by definition and although in time it came to be recognised that this was not an

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(28) Presumably all the other obligations of the mandatary would continue eg the obligation to act in good faith and without negligence.

(29) See 15 n 25 above.

(30) Ibid.

essential element of the contract such recognition generally occurred indirectly with lip service still being paid to the requirement that the contract be gratuitous.(31)

In Roman law(32) mandatum was originally strictly gratuitous and no reward could be claimed under the actio mandati. However, a strong social obligation prescribed that the mandatary should be rewarded with a honorarium and in time the honorarium became enforceable by a cognitio extraordinaria. The honorarium, however, was no part of the contract of mandate and could not be enforced by the actio mandati. On the mandant's death(33) the mandate lapsed(34) but if the mandatary performed the mandate in ignorance of this fact he could still avail himself of the actio mandati to claim his expenses and losses. Authority appears to be lacking, however, on the effect of the lapsing of the mandate on the mandatary's right to avail himself of the cognitio extraordinaria

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(31) Grotius 3.12.2, 6; Vinnius 3.27.13; Van Leeuwen *CF* 1.4.24.13; Roman-Dutch Law 4.26.1; Huber 3.12.5-7, 28, 35; Voet 17.1.2; Van der Linden 1.15.14; R J Pothier Treatise on the Contract of Mandate translated by B G Rogers & B X de Wet (Johannesburg 1979) paras 22ff. But see C van Bynkershoek Quaestionum Juris *Privati* (Leiden 1752) 2.46 (p 247) but cf Obs Tum II 1812; DG van den Keessel Voorlesinge vol 4, th 570 (p 269). In modern law it is accepted that mandates need not be gratuitous - see eg Gowan v Bowern 1924 AD 550 at 563; Joubert Law of South Africa vol 17 'Mandate and Negotiorum Gestio' # 4.

(32) WW Buckland A Textbook of Roman Law from Augustus to Justinian 3rd ed by P Stein (London 1975) 514ff; M Kaser Roman Private Law translated by R Dannenbring 2nd ed (Durban 1968) # 44.I.

(33) The rules applicable on death are equally applicable to any other loss of capacity to act - see eg Pothier Mandate para 111; Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation) 1968(1) SA 717(A) at 722H.

(34) Provided that the mandate was still res integra, ie nothing had yet been done about it, although the precise scope of the proviso is unclear. See further 64-7 below especially *65 n 98*.

procedure to claim his honorarium, although it may be suggested that it would have been assumed that the right to recover the honorarium would follow the fate of the actio mandati. A contrary argument would, however, be that the continuation of the actio mandati was based not on contract - the mandate had lapsed - but on equity[35] and equity demands no more than that the mandatary should suffer no loss, not that he should also receive his profit. This is dealt with further below.

Several of the writers of the Roman-Dutch period refer to the position of a mandatary who performs his mandate in ignorance of the mandant's death.

Vinnius[36] closely follows the Roman law :

'Etsi mandatum morte mandatoris extinguitur, & ideo secundum stricti juris rationem, quamvis mandatarius ignorans mandatorem decessisse mandatum impleverit, agere mandati non potest: tamen utilitatis causa, seu ex bono & aequo, placet impleto per ignorantiam mandato actionem ei dari ....'[37]

He, however, also draws a distinction between the actio mandati and the extraordinary procedure for the recovery of remuneration[38]

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(35) Utilitatis causa.

(36) 3.27.10.4.

(37) Although mandate is extinguished by the death of the mandant, and therefore following the logic of strict law even if the mandatary has performed the mandate in ignorance of the mandant's death he cannot bring an action on the mandate: nevertheless for the sake of expediency or equity, where a mandate has been performed in ignorance [of the mandant's death] a right of action is given ....

(38) 3.27.13.1:

'Etsi vero honorarii sive salarii constitutio mandatum non

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but he does not make it clear whether both the actio mandati and the extraordinary procedure, or only the actio mandati, are available to a mandatary who performs the mandate in ignorance of the mandant's death.

Voet[39] likewise refers to the distinction drawn in Roman Law between the actio mandati and the extraordinary procedure for the recovery of a honorarium but it is not clear whether or not he regarded the distinction as still obtaining in his day. However, in dealing with the rule that mandates lapse on the mandant's death he states[40] that the rule does not apply, *ie not merely that the* action on mandate continues, if the mandatary has in good faith carried the business to its conclusion in ignorance of the death of the mandant. It would seem therefore that whether or not he would have allowed the remuneration to be recovered under the action on mandate he would have allowed it to be recovered where the mandatary performed the mandate in ignorance of the mandant's death.

Huber,[41] like Vinnius, closely follows the Roman law.

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vitiat ... de ipso tamen salario mandati actio non est, sed extra ordinem peti solet.'

Even the fixing of a honorarium or salarium does not vitiate the mandate ... *but the action on mandate is not* available to claim such salarium; however, it is customarily claimed extraordinarily.

(39) 17.1.2.

(40) 17.1.15.

(41) 3.12.43 read with 3.12.28, 35. Although Huber wrote on Frisian law he has always been regarded as an authority in Holland - Hahlo & Kahn Legal System 556.

Pothier[42] states :

'Although the mandate is terminated on the death of the mandant, nevertheless, if the mandatary is unaware of the mandant's death, and in all good faith carries out the business for which he has accepted responsibility, then the mandant's heirs or other residuary successors would be under an obligation to reimburse him and to ratify his actions.... The reason for this is that the mandant contracts an obligation, in the contract of mandate, to indemnify the mandatary in respect of all expenses *incurred in the execution of the mandate*; and notwithstanding the fact that the mandate terminates on the death of the mandant, the obligation contracted by the mandant is passed to his heirs.'

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(42) Mandate para 106. Although Pothier is a French author he was held in high regard by the Roman-Dutch authors and is treated as an important authority by our courts:

> 'Though he was not a writer on the Roman-Dutch law, a mere casual reference to Van der Linden will show that Pothier's treatise on Obligations was considered as an authority of the greatest weight. Pothier has also been regarded by the courts of South Africa as an authority of great weight on the modern aspect of the Roman law of obligation'

(per Wessels J, as he then was, in Kroon v Enschede & Others 1909 TS 374 at 383).

However, it must be borne in mind that his word is not ipso facto the law:

> 'Pothier is of course a great authority on the Civil law, but his authority is merely suasive, his works having weight only as ratio scripta. As an interpreter of the Roman law, our law in subsidio, on questions on which the Dutch jurists are silent, his opinions naturally carry much weight'

(per Van den Heever JA in Gerber v Wolson 1955(1) SA 158(A) at 170H-171A). Perhaps his views are given rather more weight than mere ratio scripta - for example in the same case Fagan JA (at 183D-E) virtually equated the authority of his views with the authority of Voet - but the fact remains that his views are not directly the law and it is necessary to examine the reasons he gives for his views.

It is doubtful, however, whether an inference can be drawn from the fact that Pothier refers only to expenses that he would therefore not have allowed the remuneration to be recovered. He too closely follows the Roman law that where remuneration is agreed this is no part of the contract of mandate but takes place outside it.(43) When, therefore, he states that although a mandate terminates on the mandant's death the mandatary who performs the mandate in ignorance of the death is entitled to be indemnified for his expenses, he is apparently referring only to the mandatary's position under the contract of mandate and not to any right he may have under a collateral agreement to recover his remuneration.

None of the authorities deals with the position where the mandatary neglects to perform the mandate despite the fact that he is unaware of the lapsing of the mandate due to the mandant's loss of capacity.

What conclusions are to be drawn from the aforegoing? The answer is, it is suggested, as follows.

If it is accepted that a mandate lapses on the mandant's loss of capacity, it follows, it is thought, that logically the mandatary should be entitled to his negative interest only. To accord the mandatary his positive interest would be a negation of the fact that the mandate had lapsed. If the mandate has lapsed, equity requires no more than that the mandatary should suffer no loss, not that he should also be entitled to his profit.(44) If the parties are free

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(43) Op cit paras 22ff and 68ff.

(44) See also (3) below (at 145-54): *Excursus: A general rule that a person dealing with another in reliance on the other's continued capacity to act is entitled to be indemnified for his negative interest?*

to exclude lapsing of the mandate on the mandant's loss of capacity to act - as is contended in the next section - there is no reason why the mandatary should be entitled to his positive interest if they do not do so, especially seeing that the mandatary would not be liable for damages for breach of contract if he failed to perform the mandate. Either both the rights and obligations should continue, ie the mandate does not lapse, or the mandatary should be restricted to a claim for his negative interest.

Could the true rule be that a mandate in fact lapses not on the mandant's loss of capacity to act but on the mandatary's becoming aware of the loss? The answer is, it is suggested, in the affirmative. The nature of mandate was gradually changing during the Roman and Roman-Dutch period from a favour undertaken by a friend into a commercially based contract and this development has been completed in modern times.(45) In this context it would seem harsh to deny the mandatary his remuneration if he performs the mandate in ignorance of the mandant's loss of capacity. He has done what he contracted to do and his remuneration may be his means of livelihood. Conversely, there would seem to be no reason why the mandant's estate should not pay for the services rendered when it has had the benefit of the services.(46) Moreover, if the mandatary is entitled to all his rights under the mandate until he becomes aware of the mandant's loss of capacity it logically follows, it is suggested, that he should also be subject to the

(45) See eg Gowan v Bowern 1924 AD 550. See further 7 n 6 above.

(46) If, for example, a rent collection agent has continued to collect the rents in ignorance of the mandant's loss of capacity why should he not be entitled to his commission?

obligations.[47] *Otherwise he would be entitled to his profit if* he performed the mandate but would incur no liability if he neglected to do so causing loss to the mandant's estate.

It is true that there is no direct authority for this approach but it is, it is suggested, the logical and necessary development of the embryonic rules found in the old authorities. As Innes CJ said in Blower v Van Noorden:[48]

> 'There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep *pace with the requirements of changing conditions.* And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature.'

This is particularly true of the contract of mandate which, because of its historical origin as a favour undertaken out of friendship as opposed to a commercial relationship, had not reached *by the end of the Roman-Dutch period* the stage of development necessary to meet the sophisticated needs of modern commerce.[49]

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(47) Pursuing the example in the previous note, why should the agent not be liable for any loss suffered by the mandant's estate if he neglected to collect the rents? It is perhaps not insignificant that in the case of the other exceptions to the rule that mandates lapse on the mandant's loss of capacity it is clear that both the rights and the obligations of the mandatary continue after the loss of capacity - see eg Voet 17.1.15; Pothier Mandate para 107.

(48) 1909 TS 890 at 905.

(49) See 7 n 6 above. It is suggested that it is also not inappropriate to examine what the position would be if one were to approach the matter from the point of view of what term, if any, could normally be implied from the facts. Such an examination is made in detail at 76-91 below in regard

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If this view is accepted, namely that the true rule is that a mandate lapses not on the mandant's loss of capacity but on the mandatary's becoming aware of the loss, it follows that the rule is consistent with the interpretation of the bank customer contract that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity. The position if this view is rejected is dealt with in the next section.

(B) The rule is a naturale not an essentiale of mandate

If, contrary to the view expressed in the previous section, the effect of the exception is not that the mandate continues until the mandatary becomes aware of the mandant's loss of capacity but something less, the rule together with the exception would be inconsistent with the interpretation of the bank customer contract that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity. It does not, however, necessarily follow that this interpretation of the bank customer contract is not legally possible : this would only follow if the rule that mandates lapse on the mandant's loss of capacity is an essentiale of the contract of mandate which cannot be altered by agreement, and the view will be taken in what follows that the rule is in fact not an essentiale but a naturale which can be altered by agreement.

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to the bank customer contract and the conclusion reached there is that it should normally be possible to imply a term from the facts relating to a bank customer contract that it only lapses when the bank becomes aware of the customer's loss of capacity. Moreover, much of the reasoning is, it is suggested, applicable to mandates generally and lends further support to the approach that the true formulation of the rule is that a contract of mandate lapses not on the mandant's loss of capacity but on the mandatary's becoming aware of the loss.

There was not complete unanimity among the old authorities as to whether the rule that mandates lapse on the mandant's loss of capacity is a naturale or essentiale of the contract of mandate. As Van den Heever J, as he then was, said in Ex p Kelly:(50)

'Voet(51) proceeds that the general rule [that a mandate lapses on the mandant's change of status] does not apply where the mandate empowers the mandatory to do something which can only be done after the death(52) of the grantor. In this respect there was a conflict among the authorities. Gerard Noodt (Observ. Lib. 2.C.3) maintained that this mandate to be executed after death is permissible only in affairs having sacristic significance: e.g. raising a monument to the deceased, buying land for his grave, etc. He ascribes the privileged treatment of such mandates to the belief that the spirits of unburied corpses have to wander about unhappily for a century before they can secure passage across the Styx into Hades. (Virgil, Aeneid, vers. 325 et seq.) However that be, no authority goes so far as to suggest that a mandate remains in force after the death of the grantor where this is not expressly stated or does not follow by necessary intendment. Vinnius in his Commentary on the Institutes (3.27,10, n.2) records the common opinion that such mandates remain valid after the death of the grantor if that intention was expressed or if it follows by necessary intendment,(53) e.g. "to arrange for my funeral; to erect a

(50) 1943 OPD 76 at 82. Kelly's case in fact related to a power of representation and not a contract of mandate but the authorities referred to did not distinguish between these 2 institutions - cf 97ff below.

(51) 17.1.15.

(52) It has already been pointed out - see 44 n 33 above - that the authorities hold that insanity has the same effect as death. This could have given rise to a difficulty because much of the reasoning of the authorities dealt with below can only be applied with difficulty to insanity; however, in view of the fact that the conclusion is in any event reached below that the parties can exclude lapsing even on death it is unnecessary to explore the possibility that the effect of death and insanity may not be identical.

(53) It is doubted whether what Vinnius says can be interpreted in this way - see 57-8 below.

monument to me after my death; to buy land for my heirs." He continues: "If, however, the mandate was something which was capable of being carried out during the lifetime of the principal, the mandate is extinguished with his death." As a matter of fact the authorities I have quoted wrote in the dark. The rediscovered Gaius makes it quite clear[54] that there was no such exception to the general rule; that passages from the Corpus Iuris seeming to indicate such exception relate to mandates fortified by the intervention of an adstipulator.'

With respect, however, even in classical Roman law the position regarding the validity or otherwise of a mandate to be performed after the death of the mandant was not as clear as Van den Heever J suggests, although the better view on balance would appear to be that such a mandate was not valid.[55]

The objection in classical Roman law to such a mandate was said to be that an obligatio could not commence in a heres,[56] ie a contract was considered to be personal to the parties and could strictly produce no effect for or against those not parties to it.[57] To circumvent this restriction recourse was had to adstipulatio which was used to reinforce the stipulatio between the actual parties by one made with the promissor by a mandatary, who stipulated for the same thing.[58] If the adstipulator sued on his contract he would be liabl. under his mandate to account for the proceeds to the principal or his heres, as the case might be.[59]

Whether or not the rule that an obligatio could not commence in a heres operated in classical Roman law to invalidate a mandate to be performed after the mandant's death is a matter of controversy

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(54) Apparently a reference to 3.117,158,160.

(55) Watson op cit 135 ff, especially at 147.

(56) Gaius 3.100.

(57) Buckland Roman Law 426 ff.

(58) Gaius 3.117; Buckland op cit 443 ff.

(59) Ibid.

among the authorities, old[60] and modern,[61] on Roman law; however, it would be beyond the scope of this thesis to enter this controversy as the position in classical Roman law is of only limited relevance because it is the law of Justinian and not of classical Rome that was received in Holland.[62] It suffices to quote Buckland[63] on the position in classical Roman law:

> '... in mandate for performance after the death of the mandator, the personal reason does not apply and the rule is not stated by Gaius, though it is by Paul, in the Digest, with the reason that mandate ends by death of either party. One text may imply that a mandate to conduct my funeral gives no actio mandati, but another gives it on a mandate to build my monument, not easily distinguished. Another gives it on a mandate to buy land for my heres after my death, and Gaius gives it for adstipulatio on a stipulatio post mortem. In one text in which the mandate was operative after death of mandator, the reason is assigned that on the facts (the text was written of fiducia) the mandator might have an action in his life so that the obligation did not begin in the heres. In another, corrupt, it is said similarly that mandatary might incur expense, with a right of reimbursement, before the death. It is not clear why it should be possible to incur expense on a monument before the death, and not on other funeraria. In fact, since on almost any mandate it was possible for money to be expended before the death, or, failing this, for the mandator to have some claim, the exceptional case practically negatives the rule, which Justinian abolished.'

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(60) See eg U Huber Eunomia Romana (Franeker 1700) ad Digest 17 (pp 603-5).

(61) See eg A Watson Contract of Mandate in Roman Law (Oxford 1961) 135:

> 'The question of the validity of mandatum post mortem mandatoris in classical law is not so easy and has received a great deal of attention in recent years. The texts on the point are few, but the interpretations of them are so varied that the easiest way to get a clear view of the problem is to begin by summarizing the most important of the modern theories. ...'

(62) See eg J W Wessels History of Roman - Dutch Law (Grahamstown 1908) 128; H R Hahlo & E Kahn The Union of South Africa The Development of its Laws and Constitution (London and Cape Town 1960) 36-7; The South African Legal System and its Background (Cape Town 1968) 517.

(63) Roman Law 517 - 18.

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(63) Roman Law 517 - 18.

Justinian first issued a constitution[64] abolishing the rule that an obligatio could not commence in a heres in 528 AD. This constitution could not have proved sufficient for in 531 AD be issued a second more specific constitution[65] providing:

'In former times, stipulations, legacies and other contracts to be executed after death were rejected, but We have permitted this to be done for the common welfare of mankind, as it appeared to be advisable that this rule, which was adopted in ancient times, should be amended by a more humane custom; for the old jurists did not allow actions to be brought by or against heirs in the case of stipulations or other agreements to be carried out after death. It seems to us to be necessary to abolish this ancient abuse, and to annul this rule, so that suits and obligations can be brought and enforced by heirs and against heirs, in order that the accomplishment of the wishes of the contracting parties may not be frustrated, through the excessive subtlety of the legal terms employed.'

Watson[66] states that although mandates are not expressly mentioned they clearly fall under the constitutions and therefore under Justinian mandates for performance after the mandant's death were valid.[67]

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(64) Codex 8.37 (38). 11.

(65) Codex 4.11.1.

(66) Op cit 135. See too Buckland op cit 518 and Kaser Roman Law 44.1.3.

(67) It must be borne in mind, however, that even if the modern commentators on the Roman law are entirely correct in this respect this is not necessarily the end of the matter:

> 'It would serve no useful purpose for me to examine into the true meaning of these passages [in the Corpus Iuris] because even if, by the light of modern criticism, we are now able to pronounce that the Dutch authorities misinterpreted the passages, we could not on that account alone reject any generally accepted law although founded on such misinterpretation'

(per Lord De Villiers CJ in Green v Fitzgerald & Others 1914 AD 88 at 99).

That mandates for performance after the mandant's death are valid was also the view of the majority of the Roman-Dutch authors who dealt with the question. Grotius[68] states the position succinctly:

'The death of either party, as a rule, determines the mandate in the absence of a clear indication of a contrary intention ....'

Schomaker[69] and Van der Keessel[70] state the position in similar terms.

Other authors could at first sight be understood to limit the validity of mandates for performance after the mandant's death to services which can only be rendered after death *ie if the services* could have been rendered before death but have not in fact been *rendered before* death the mandate will terminate despite agreement to the contrary. Voet,[71] for example, states:

'Nevertheless the above rule [that mandates terminate on the mandant's death] fails if a mandate has been given for something which can only be fulfilled after the death of the mandator....'

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(68) 3.12.11.

(69) J Schomaker Cons'lia et Responsa Juris part 4 (Zutphen 1752) XXVII question 7.

'Of de Volmagt ... door dode van de Constituanten geëindigt is of niet? welkers affirmative in genere na regten buiten contradictie is .... Schoon er evenswel speciale gevallen en uitzonderingen van deze regel zyn, als E.G.

1. Indien een mandaat contineerde, om yts te verrigten na dode van den constituant of mandant....'

(70) Voorlesinge th 573 # 11 - *see below.*

(71) 17.1.15.

Westenberg,[72] Huber[73] and Pothier[74] state the position in similar terms.

Vinnius[75] is even more explicit in limiting the qualification to services which can only be rendered after death:

> 'De illo quaeritur, an mandatum morte mandatoris usque adeo solvatur, ut idem probandum sit, etiamsi nominatim mandaverit quid fieri post mortem suam? Et in eo haec distinctio communiter probata est, ut hujuscemodi mandatum post mortem mandatoris non finiatur, sed omnino implendum sit, si tale sit, quod non nisi post mortem ejus impleri queat; veluti si cui funeris sui curam mandaverit, aut ut post mortem suam sibi monumentum fieret, aut haeredibus suis fundus emeretur. Sin autem quod mandavit, eo

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(72) J O Westenberg Opera Omnia Juridica vol 1 (Hanover 1746) 3.27.18. After stating the rule that a mandate lapses on the mandant's death he qualifies the rule as follows:

> 'Nisi quid mandatum sit, quod non nisi post mortem mandantis perfici potest.'
>
> (Unless something has been mandated which cannot be performed except after the death of the mandant.)

(73) 3.12.45, writing of Frisian law:

> 'There are also some kinds of mandate which are expressly directed to the end that they shall first be carried out after the decease; such pass without doubt to the heirs.'

(74) Mandate para 108, writing of French law:

> 'The principle we have established, namely, that the mandate is terminated by the death of the mandant, of necessity allows of exception when the business forming the subject of the mandate is of such a nature that it can only be carried out after the mandant's death ....'

(75) 3.27.10. Cf, however, Van den Heever J's interpretation in Kelly's case of what Vinnius says - see 52 above.

vivo impleri potuit, mortuo eo mandatum extingui; veluti si jusserit debitorem suum post mortem suam solvere Titio....'(76)

Despite what Vinnius says(77) it is doubted whether a valid distinction can be drawn between a mandate to render a service which *can only* be rendered after the mandant's death and a mandate which provides for a service which can be rendered before or after death and which provides further that it is not to lapse on death, and it is doubted whether this is what the other authors referred to had in mind. The significance of a mandate to do something which can only be done after the mandant's death is that it by implication necessarily excludes the naturale that a mandate lapses on the mandant's death.(78) If what is to be done pursuant to the mandate

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(76) In this connection one may ask whether mandate is dissolved by the death of the mandant to such an extent that the same is true even if he has expressly mandated something to be done after his death? In this case the distinction is generally accepted that a mandate of this kind is not terminated on the death of the mandant but must be performed in its entirety if it is of such a kind that it cannot be performed except after his death, such as a mandate to arrange his funeral or to raise a monument to him after his death or to purchase a farm for his heirs. If, however, what he has mandated could be performed while he was alive the mandate is extinguished by his death, such as if he has ordered his debtor to pay Titius *after his death.*
Cf the different distinctions Donellus and Noodt seek to draw - infra.

(77) Vinnius' views will be referred to again below because, following the Roman law, he requires that the mandate be res integra for it to lapse on the mandant's death, and, as will be shown below, the effect of this on modern mandates is to largely negate the rule that mandates lapse on the mandant's death.

(78) That this is what Voet and Pothier had in mind is, it is thought, supported by the fact that both writers list other exceptions as well - eg the mandate of a factor in charge of a business (Voet 17.1.15; Pothier *Mandate* para 109), a mandate to do something pressing which cannot be delayed or carried
(Footnote continued on next page)

can be done before or after death this implication does not arise, but if the parties expressly agree that the mandate is not to lapse it would be anomalous if it nevertheless did so as there does not seem to be any basis in principle for distinguishing between this situation and the situation where the service to be rendered can only be performed after death.

Van der Keessel,[79] it is thought, had this in mind in saying:

> 'Dis ook by ons die erkende beginsel dat met die dood van die lasgewer alle lasgewing beëindig word. Die skrywer [Grotius] stel egter 'n uitsondering vas indien dit die bedoeling was dat die lasnemer die saak na die dood van die lasgewer moes waarneem, veral indien dit van sodanige aard is dat dit dan eers waargeneem kan word....'

Noodt, as already mentioned, is a notable exception to the general view among the Roman-Dutch writers that mandates for performance after the mandant's death are valid, and although he and Vinnius appear to have stood almost alone among Roman-Dutch writers in holding the view that the right of the parties to exclude lapsing on death is limited, his high standing as a jurist,[80] and the fact that other jurists[81] elsewhere in Europe had similar difficulties, requires an examination of his views.

(Footnote continued from previous page)
out by anyone other than the mandatary because the heirs are absent (Pothier *Mandate* para 107), etc - and in each instance they appear to be referring to cases where lapsing is impliedly excluded, rather than to a closed list of cases which the parties are not free to extend even by express agreement.

(79) Voorlesinge th 573 # 11.

(80) Hahlo & Kahn Legal System 554.

(81) See eg Donellus infra.

Before dealing with Noodt's views, however, it is convenient to first deal with the views of the 2 great French Humanists Cujacius and Donellus, not only because they preceded Noodt chronologically but also because Cujacius challenges the accuracy of the main text on which Noodt's arguments are built and Donellus deals with the same texts as Noodt with particular lucidity.

The 3 texts concerned are all from the Digest:

17.1.12.17 'Marcellus also says that if anyone directs a monument to be erected to himself after his death, his heir can proceed in an action on mandate. Indeed I think that the man who has undertaken the mandate has an action on the mandate if he has used his own money, unless the mandate was to the effect that he should erect the monument at his own expense. For he could have sued the man who gave the mandate to pay the money to him to carry it out, particularly if he had already taken steps to perform the mandate.'(82)

17.1.13 'The rule is the same if I have directed you to purchase a tract of land [for](83) my heirs after my death.'

46.3.108 'Where anyone, in obedience to my mandate, makes a stipulation to be executed after my death, payment will legally be made to him, because such is the law of obligations.

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(82) For the second and third sentences Scott has:

> 'But if the party who received the mandate erected the monument with his own money, I think that he can bring an action on mandate, even if he was not charged to erect the monument with his own money; for the action will also lie in his favor against him who directed him to employ his own money in constructing the monument, and especially is this the case if he had already made preparations for that purpose'

but, with respect, this does not correctly reflect the text:

> 'Illum vero qui mandatum suscepit, si sua pecunia fecit, puto agere mandati, si non ita ei mandatum est, ut sua pecunia faceret monumentum. potuit enim agere etiam cum eo qui mandavit, ut sibi pecuniam daret ad faciendum, maxime si iam quaedam ad faciendum paravit.'

(83) Scott has 'from'.

> Therefore he can legally be paid, even against my consent. But when I have ordered my debtor to pay someone after my death, payment will not be legally made, because the mandate is annulled by death.'

The difficulty lies in the fact that the first 2 texts appear to allow the validity of a mandate to be performed after the mandant's death, while the third text appears not to.

Cujacius[84] takes the view that the third text is the result of words being copied in the wrong order. The latin text reads:

> 'Ei qui mandato meo post mortem meam stipulatus est, recte solvitur, quia talis est lex obligationis: ideoque etiam invito me recte ei solvitur. Ei autem cui jussi debitorem meum post mortem meam solvere, non recte solvitur; quia mandatum morte dissolvitur.'

He would emend the text as follows:

> 'Ei qui mandato meo [post mortem meam] stipulatus est, post mortem meam recte solvitur: quia talis est lex obligationis, ideoque etiam invito me recte ei solvitur. Ei autem cui jussi debitorem meum [post mortem meam] solvere, post mortem meam non recte solvitur: quia mandatum morte dissolvitur.'

He points out that in the case dealt with in the first sentence the mandatary has, in execution of the mandate, entered into an agreement with a third party in terms of which payment is to be made to the mandatary and payment must therefore be made to the mandatary whether or not the mandant is alive and whether or not the agreement refers to payment to the mandatary after the mandant's death. Clearly, Cujacius' suggested emendation of this sentence accurately reflects the position and eliminates the erroneous impression which might otherwise be obtained from the wording that payment can only validly be made to the mandatary after the mandant's death if the agreement with the third party expressly so provides.

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(84) J Cujacius Opera Omnia vol 4 (Naples 1758) Observationes 1.38.

In the case dealt with in the second sentence he similarly takes the view that the words 'post mortem meam' have been placed in the wrong position:

> 'Quae verba videntur aliena esse a principiis juris civilis. Nam si simpliciter jussi debitorem meum solvere, fateor equidem extingui morte mandatum. At si jussi meum debitorem post mortem meam solvere, non video cur morte mandatum finiatur, quod in tempus mortis nominatim collatum est.'(85)

This would certainly bring the text into line with the other Digest texts, and Justinian's constitutions, referred to above.

Donellus(86) takes a different view. He gives(87) as the reason why a mandate lapses on the mandant's death that it is personal to the parties in that a mandate by its nature is undertaken out of friendship for the mandant which may not extend to the mandant's heirs, and also in that the heirs may not want the task to be carried out by the mandatary and the mandant may reasonably be supposed not to have wished to impose the mandate on them. And a contract which is personal to the parties does not pass to the parties' heirs.

He proceeds(88) that this is so much so that even where the parties have agreed that the mandate is not to lapse it nevertheless does so. The authority he quotes for this is the third Digest text

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(85) These words appear to be at variance with the principles of the civil law. For if I have merely ordered my debtor to make payment I concede that the mandate is terminated by death, but if I have ordered my debtor to make payment after my death, I do not see why the mandate is terminated by death, because it is specifically postponed until the time of my death.

(86) H Donellus Opera Omnia Commentariorum de Iure Civili vol 4 (Lucca 1764) 16.23.5ff.

(87) 16.23.5. See too Vinnius 3.27.10.1.

(88) 16.23.6.

quoted above, but he adds that if anyone disputes the text, as several(89) have done, further support is to be had from another Digest text:

> 11.7.14.2 'Mela says that if a testator directs anyone to attend to his funeral and he does not do so after having received money for that purpose, an action on the ground of fraud shall be granted against him; nevertheless, I think, that he can be compelled to conduct the funeral under the extraordinary authority of the Praetor.'

The significance of this latter text lies in the fact that it refers to the actio de dolo (actio doli) not the actio mandati. However, for the difficulties in the way of drawing any inference from this fact, reference may be made to Watson.(90)

He then turns(91) to the first 2 Digest texts quoted above and seeks to distinguish them from the third text and the additional text cited by him on the ground that the first 2 texts deal with

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(89) *Donellus refers to Accursius by name and 3 others.*

(90) Mandate 150-51:

> 'Here it would seem that the deceased gave a mandate (mandaverit) to *X* to bury him. *X* accepted *and failed to* carry out his instructions, and yet Mela will only give the actio de dolo. If there is in fact a mandate it must be unenforceable, otherwise the actio mandati rather than the actio de dolo would be given, and the reason may be that it is a mpm [mandatum post-mortem] mandatoris. But equally the reason may be that the mandatum is still integrum and there is no interesse in its performance. Also it is possible that the principal's directions were contained in his will *(although this does not necessarily follow from the use of* the word testator) and not made known to X until after the testator's death. If this is the case it could not be regarded as a mandate.'

(91) 16.23.7.

matters which do not concern the heirs[92] and therefore the mandates in question do not lapse, while the matters dealt with in the second 2 texts do concern the heirs and therefore the mandates in question do lapse. A payment due to the deceased no doubt concerns the heirs and he takes the view that the arranging of a funeral does likewise because it is the heirs' duty to arrange the funeral. On the other hand, he considers that the erection of a memorial does not concern the heirs because their duty does not go beyond arranging the funeral. Similarly, he considers that a mandate to purchase a farm for the heirs does not concern them because the farm belongs to someone else. He accordingly concludes that mandates in the latter categories do not lapse on the mandant's death because:

'...mandator in his etiam post mortem nihil mandat de re aliena, sed *sua: & quod mandatarius cum id mandatum exsequetur, operam praestabit mandatori, non eius heredibus....*'[93]

But, with respect, the distinction Donellus seeks to draw fails to convince. In all 4 cases the mandate concerns the heirs financially because the cost of performing the mandate will come out of their inheritances, and it is unclear what other distinction can be drawn between what concerns them and what does not.[94]

Donellus also differs[95] from the majority of the Roman-Dutch writers in stating an important qualification to the rule that mandates lapse on the mandant's death, namely, that the rule only

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(92) Ad heredes non pertinet.

(93) ...*the mandant in these cases mandates nothing after his death concerning another person's affairs, but concerning his own, and because when the mandatary executes the mandate he performs a task for the mandant, not for his heirs....*

(94) Cf too the different distinctions that Vinnius and Noodt seek to draw - see supra and infra respectively.

(95) 16.23.8.

applies if the mandate is still res integra[96] at the time of the death:

> 'Sed dum morte mandatoris finietur mandatum, sicut in revocatione mandati, ita hic quoque haec conditio est, si mors mandatoris re integra seu integro mandato intervenerit.'[97]

This qualification existed in Roman Law[98] and is explained by Donellus as follows:[99]

> 'Res integra hic accipienda est, quae & mandanti integra est, & mandatario. Est autem mandatori integra, cum nihildum intervenit, cur mandator quod mandarat, non possit adhuc aeque commode per se aut per alium exsequi.... Mandatario res integra est, cum nihildum ei per caussam mandati abest.'[100]

The effect of this approach in modern conditions where mandates are generally for the benefit of both parties would, it is

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(96) Intact ie nothing has yet been done about the matter.

(97) While a mandate will lapse on the death of the mandant, as in the case of revocation of a mandate here too this is subject to the *condition* that the *death of the mandant* occurs while the matter or mandate is intact.

(98) Institutes 3.26.10; Watson Mandate 129-30. Although only 4 of the 6 texts of the Corpus Iuris dealing with the question refer to the res integra qualification Watson states:

> 'Often when two jurists deal with the same topic, and one mentions a requirement and the other does not, and there is *no evidence* that the matter was disputed, the most probable explanation is that the latter, for one reason or another, did not mention it but would nevertheless hold it an essential.'

(99) 16.23.8.

(100) The matter must be accepted as being intact where it is intact as regards both the mandant and the mandatary. It is intact as regards the mandant when nothing has taken place by reason of which the mandant cannot equally conveniently execute what he has mandated either himself or through another .... It is intact as regards the mandatary when he has incurred no loss as yet as a result of the mandate.

suggested, be to *largely nullify the rule that mandates lapse on* the mandant's death either because the executor or heirs would be unable to equally conveniently perform the task themselves or to arrange for someone else to do so or because the mandatary would suffer some loss, if only of his profit, if the mandate lapsed.(101)

The majority of the Roman-Dutch writers do not refer to any such qualification of the rule that mandates lapse on the mandant's death,(102) although Vinnius(103) is a notable exception:(104)

> '... si mandator integro adhuc mandato decesserit, dicimus, mandatum solvi .... Cur vero in utraque specie [ie lapsing on the mandant's death and lapsing on the mandatary's death] additur, si re adhuc integra mors intervenerit? Non sane quod postquam res integra esse desiit, seu interesse coepit, morte alterutrius interveniente mandatum non solvatur, & adhuc libere perfici possit, quod coeptum est: sed quia obligatio mandati & actio *ante mortem nata post mortem perseverat.* Ut ecce, actio mandati statim competit, cum coepit interesse. Et igitur sive mandatarius decesserit, quo tempore jam interesse coeperat mandatoris, puta cum jam ille eandem rem per alium explicare non poterat, sive decesserit mandator: cum res non amplius integra esset mandatario, quod forte jam sumptus ad negotium exequendum necessarios fecisset, actio mandati semel alterutri quaesita

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(101) *It may* be that the res integra qualification essentially merely refers to circumstances in which, if one were approaching the matter from the point of view of the intention of the parties, lapsing would be impliedly excluded.

(102) Some require that the mandate be res integra in the case of lapsing on the mandatary's death: Grotius 3.12.11; Van der Keessel Voorlesinge th 573 # 11. See too Huber 3.12.44.

(103) 3.27.10.1 and 3. See too A Vinnius Jurisprudentiae Contractae (Rotterdam 1664) 2.76.

(104) M Wesenbeck Paratitla (Amsterdam 1665) ad Digest 17.1.9 also mentions the requirement, but without discussion. Pothier, writing on French law, does likewise: Mandate paras 103-4.

neutrius morte intercidit.'(105)

Although Vinnius states that it is only the obligation and action on mandate that continue where the matter is no longer res integra on the mandant's death, and that the mandate itself lapses, it is not clear whether he has in mind a different result from Donellus.

Noodt argues(106) in the first instance that inasmuch as a mandant *must have an interest in the performance* of the mandate for the mandate to be valid,(107) a mandate cannot survive the death of the mandant because he can have no interest in its performance after his death. He acknowledges that Justinian abolished the rule that an obligatio could not commence in a heres, but takes the view this was not intended to apply to mandate. He then draws a parallel between mandate and precarium, deposit and partnership, all of

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(105) ... if the mandant dies while the mandate is still intact we say that the mandate lapses .... Why is there added in each *case 'if death occurs* while the matter is still intact'? Not indeed because the mandate does not lapse on the death of either party after the matter has ceased to be intact or the interesse has commenced and what has been started can freely be completed, but because the obligation and action on mandate which have arisen before death continue after death. As can be seen the action on mandate is competent when the interesse commences. Therefore if the mandatary dies after the mandant's interesse has commenced eg if he is unable to arrange the same matter through another, or if the mandant dies when the matter is no longer intact as regards the mandatary in that, perhaps, *the mandatary* has already incurred necessary expenses for the performance of the mandate, the action on mandate once having accrued to either party does not lapse on the death of either.

(106) Observationes 2.1.

(107) Digest 17.1.8.6.

which, he says, lapse on death.[108] He considers, moreover, that Digest 46.3.108, being the third Digest text quoted above, makes the position clear.

As pointed out by Van den Heever J in Kelly's case,[109] Noodt argues[110] that the first 2 Digest texts quoted above are limited to mandates with sacristic significance. He deals with the first text as follows:

> 'Verum quod ad Ulpianum [Digest 17.1.12.17] attinet; (nam de eo primum dicam) me liberat respondendi verecundia, quod non proponit Ulpianus exemplum mandatae qualiscumque post mortem rei: sed exemplum mandati post mortem monumenti. Sit enim mihi verisimile, Veteres in tali mandato & simili quod ad funerariam causam spectet, a certa Juris regula idcirco recessisse: quod rigorem benignitate inflecti, suaderet publica utilitas, ne

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(108) It is thought that the support to be derived from these analogies is doubtful eg a precarium (a thing the use of which has been granted gratuitously but is revocable at will) is only a precarium because the parties have not agreed on a period of use ie lapsing can be excluded by agreement. In any event, a closer analogy exists, it is thought, between mandate and locatio conductio operarum and operis, neither of which lapses on the employer's loss of capacity - Digest 19.2.19.8-10; Grotius 3.19.16; Voet 19.2.27; Huber 3.9.12; Van der Linden 1.15.12; R J Pothier Pothier's Treatise on the Contract of Letting and Hiring translated by G A Mulligan (Durban 1953) para 317; Boyd v Stuttaford & Co 1910 AD 101 at 114-115; SR van Jaarsveld & WN Coetzee Arbeidsreg (Johannesburg 1977) 22; but see De Wet & Yeats Kontraktereg 157. In fact, several of the authorities state that if remuneration is stipulated for, a contract which would otherwise be one of mandate is ipso facto one of locatio conductio operarum - Grotius 3.12.6; Van der Linden 1.15.14; Pothier Mandate para 22. Huber 3.12.6 and 7 states that it is either 'verhuiring' or an innominate contract. Cf too Voet 17.1.2.

(109) See 52 above.

(110) *Observationes* 2.2.

insepulta jacerent cadavera; atque, ut Papinianus ait summa ratio esset quae pro religione facit. Nempe credebat vetustas, ineptae plena superstitionis, miserrimam defunctorum, quamdiu insepulti essent, conditionem esse: non enim venire, nisi post sepulturam, ad placidas in morte sedes; sed errare centum annos....

'Sed apparet *Veterum superstitio; simul ratio differentiae inter* mandatum de facienda quali quali re post mortem, & quod ad sepulchri monumentive procurationem pertineat: alterum, quia mandantem nec commodo afficit, nec incommodo, non videtur mandati forma continere: alterum contra, quia ejus salutem trahit, ut valeat, religioni convenit ....'(111)

He similarly limits(112) the second text:

'Transeo ad Gajum [Digest 17.1.13]. Verba Gaji. Idem est & si mandavi tibi, ut post mortem meam heredibus meis emeres fundum.

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(111) As far as Ulpian is concerned (I shall discuss him first), I suggest, with respect, that he is not setting out an instance of *any kind of mandate whatsoever after death, but an instance* of a mandate for a memorial after death. For it looks to me as if in a mandate of that type the old authorities had made an exception to the normal legal principle precisely because the mandate had regard to funeral arrangements: that inflexibility was mitigated on the grounds that public policy required that bodies should not be left lying about unburied; and, as Papinian says, the strongest reason is that which is based on the observance of religious rites. There is no doubt that the *ancients, full of foolish superstitions,* believed the condition of the departed to be most wretched as long as they were unburied, for they would not reach a place where they could rest in peace in death until after burial but would wander for 100 years. ... But the superstition of the ancients is apparent: at the same time the reason is apparent for the difference between a mandate to do anything whatsoever after death, and one which relates to arranging for a tomb or a memorial: the form of a mandate does not seem to encompass the one, because it is neither to the advantage nor disadvantage of the mandant; on the other hand, the other is suited to religion, because it brings his safety, that he may be well ....

(112) *Observationes* 2.3.

> Fert autem mea opinio, continuari a Gajo quaestionem, ab Ulpiano [Digest 17.1.12.17] inchoatam; & hoc indicari primis Gaji verbis, *Idem est & si. Ita non loquitur* Gajus de mandato, quo quis in genere jubeatur, fundum heredibus emere post mortem mandatoris; sed fundum ad hereditarium monumentum.'(113)

He further suggests that an error in transcription occurred and that 'heredibus meis' should read 'hereditario monumento', both of which would have been abbreviated HM, abbreviations being common in early latin texts.

Which approach is to be preferred: that the parties are free to exclude lapsing or that their right to do so is restricted? The answer is, it is thought, that the former approach is preferable.(114) Not only does it enjoy the support of the majority of the Roman-Dutch authorities but also it better serves the needs of parties to contracts of mandate.

The desirability of parties' being able to contract on the basis that the mandate will not automatically lapse if the mandant ceases to have capacity to act is, it is thought, manifest. For example, the mandant may have negotiated for the services concerned to be rendered on favourable terms which cannot be matched by simply

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(113) I now come to Gaius. Gaius' words are: 'The position is the same if I told you to buy a property after my death for my heirs.' My view, however, is that Gaius was continuing the subject left *unfinished* by Ulpian and that this is shown by Gaius' first words, namely 'The position is the same, if ...'. Gaius is not talking about a mandate in which anyone is ordered in general to buy a property after the mandant's death for his heirs, but (to buy) a property as an hereditary memorial.

(114) This is the view of Wessels Contract # 1675 and Kerr Agency 200 - 201. Joubert Law of South Africa vol 17 'Mandate and Negotiorum Gestio' does not deal with the question (see # 16). Cf too De Wet & Yeats Kontraktereg 343; De Villiers & Macintosh Agency 627-32; Joubert Verteenwoordigingsreg 132.

placing the mandate elsewhere and in any event the delay this may cause may itself be prejudicial. Similarly, the mandatary may have turned down other mandates in the meantime or may have negotiated a favourable rate of remuneration which also cannot simply be replaced by obtaining another mandate, etc.

The alternative approach of restricting the parties' right to exclude lapsing is fraught with difficulties. Not only do the views of the authorities who support such an approach vary on what the scope of the restriction is,(115) but in addition the concomitant of this approach is the technical and ill-defined res integra qualification of the rule that mandates lapse on the mandant's loss of capacity. It is far better, it is thought, to opt for the first approach which has been shorn of the technicalities of Roman law and which simply gives effect to what the parties agree.

It is true that it is difficult to reconcile this approach with Digest 46.3.108, although it may be that the text should be emended as Cujacius suggests, or that even if it is not so emended it can still be read in the way Cujacius wants. If not, the text should, it is thought, be taken as reflecting the law at the time Paulus originally wrote the text and not at the time of the compilation of the Corpus Iuris, it not being uncommon that the compilers overlooked updating a text to reflect reforms of the law enacted by Justinian.(116)

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(115) See eg the varying views of Noodt, Vinnius and Donnellus dealt with above.

(116) Cf W Kunkel An Introduction to Roman Legal and Constitutional History translated by J M Kelly 2nd ed (Oxford 1973) 168:

> 'There were supposed to be neither contradictions nor confusions in [the Corpus Iuris]. Every legislator tends to believe this of his work, but hardly any has entertained

(Footnote continued on next page)

It follows that the rule that mandates lapse on the mandant's loss of capacity is a naturale of the contract of mandate which can be excluded by agreement and that the rule is therefore not a bar to the interpretation of the bank customer contract to the effect that a cheque or other payment instruction is fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity.

(ii) The rule that offers lapse on the offeror's loss of capacity

Where a cheque is drawn or another payment instruction is given outside the scope of any credit in the customer's account and of any overdraft facility granted by the bank, the cheque or payment instruction is in the first instance an offer to borrow,(117) and the general rule is that offers lapse on the offeror's loss of capacity to act.(118) This gives rise to the question whether such

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such illusions about the perfection of his work as did Justinian and *his compilers. Considering the casuistic* nature and the monstrous dimensions of the materials they had to handle, and the speed with which the gigantic undertaking was completed, numerous weaknesses were unavoidable. Even where Justinian carried out planned reforms, traces of the older state of the law often remained in more or less hidden corners.'

(117) See 20 above.

(118) Grotius 3.1.6; Voet 5.1.73; Wessels Contract ## 241-250. The reason for the lapsing of the offer is that the offeror lacks the capacity to form the requisite will at the time the contract would come into existence, thus preventing consensus ad idem. *It may be noted, however, that De Wet & Yeats* Kontraktereg 31 in dealing with the effect of an offeror's death on the offer dispute this reasoning. They contend that the continued existence of an offer does not depend on the continued intention of the offeror, as is evidenced by the fact that mere intention to revoke is ineffective if it is not
(Footnote continued on next page)

lapsing can be excluded by agreement between the parties, because if it cannot it would not be possible in our law for a cheque or payment instruction to remain effectual in this respect on the customer's loss of capacity to act.

The answer to this question is, it is considered, that lapsing of an offer on the offeror's loss of capacity to act can be excluded by agreement between the parties. The question of whether an option

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communicated to the offeree, and that therefore the reason generally given for the lapsing of an offer on the offeror's death is invalid. (Cf too the position in Germanic law where the rule 'Belofte maakt schuld' prevailed - J M van Dunné *Normatieve uitleg van rechtshandelingen* (Deventer 1971) 100ff.) De Wet & Yeats nevertheless reach the same conclusion that an offer lapses on the offeror's death on the basis that if the offer has not been accepted before the offeror's death there is no liability which can be proved in the estate.

The distinction between the 2 approaches becomes important when one seeks to determine the effect on an offer if the offeror ceases to have capacity to act due to insanity, *inability to manage one's affairs or prodigality*. On the traditional approach the loss of capacity will prevent consensus ad idem just as effectively as death, but on De Wet & Yeats' approach it is considered that there would, unlike in the case of death, be no cut-off point at which the person's estate is administered and that it would follow that there would be no basis for holding that the offer lapses: E Kahn 'Some Mysteries of Offer and Acceptance' (1955) 72 SALJ 246 at 270. On sequestration and winding-up, on the other hand, there would be such a cut-off point - see chapter 4 (at 161ff).

Kahn op cit 271 states that appealing though the reasoning of the authors is, it may be considered very doubtful if our courts will accept a solution of so novel a character. One can but agree: *the authority for the lapsing of an offer on the* offeror's loss of capacity to act is too explicit for the courts to disregard it - cf, however, the development in this area in France and the Netherlands despite the traditional authority that offers necessarily lapse on the offeror's loss of capacity: see 109ff below.

lapses on the grantor's death arose in Van der Pol v Symington & Anor[119] and Hiemstra J held :

> 'n Opsie is 'n onherroeplike aanbod om te verkoop. Dit verval nie met die dood van die aanbieder nie, en is 'n verbintenis wat 'n las teen sy boedel bly ...'

It is considered that there is no reason why this reasoning should be limited to options or to death, and that therefore any agreement that an offer will not lapse on the offeror's loss of capacity to act is valid.[120]

(iii) Is it legally possible for a cheque 'drawn' or other payment instruction 'given' after customer's loss of capacity to function as a cheque or payment instruction?

Where the customer's loss of capacity occurs not merely before a cheque or payment instruction is honoured but before it is even

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(119) 1971(4) SA 472(T) at 473H. See too Costain & Partners v Godden NO & Anor 1960(4) SA 456(SR) at 459E-F. AD Kerr The Principles of the Law of Contract 3rd ed (Durban 1980) 44 considers that some doubt is raised by the discussion in Stofberg v Estate van Rooyen & Memel Town Council 1928 OPD 38 at 42; however, in that case the court was concerned with the question of what the effect is of a grantor's death on an option for an unspecified period and, while finding it unnecessary to decide this question, the court appears to have accepted that a grantor's death would have no effect on an option for a specified period. With respect, the true position is that no option, whether for a specified or unspecified period, lapses merely by reason of the death of the offeror, unless it is a term, whether express or implied, that it will do so. If the option is for an unspecified period terminable, say, on reasonable notice, notice will still be necessary even if the offeror dies.

(120) Cf too the last paragraph on 75 below.

'drawn' or 'given' the question arises as to whether it is legally possible for such a 'cheque' or 'payment instruction' to be fully effectual as between the bank and customer.

In the ordinary course a document signed by a person who has ceased to have capacity to act, eg because he is insane, would be a nullity. But does it inevitably follow that in the context of the bank customer contract it must also be a nullity? The answer is, it is considered, in the negative.

A separate authority for each payment is only necessary to the extent required by the bank customer contract. No separate authority would eg be necessary where in terms of the bank customer contract it is agreed that regular payments are to be made by the bank to a third party or that payment is to be made against presentation of a claim by a third party. It follows that it is not an inevitable requirement of the law that a cheque or other payment instruction must be a valid separate authority: it is a matter of interpretation of the bank customer contract as to whether this is required or whether the bank's authority arises from some other fact or circumstance, such as that the cheque or payment instruction appears to be regular in all respects and the bank has no knowledge of any fact or circumstance rendering it irregular.

Cheques and other payment instructions function, depending on the circumstances, as demands, the exercise of options, offers to borrow and directions regarding to whom payment is to be made. Could it be argued that this gives rise to a conceptual difficulty in that it would not seem possible that a person who has ceased to have capacity to act can make a demand, exercise an option, make an offer or give such a direction? The answer is, it is thought, that the bank customer contract should not be seen as in fact rendering a cheque 'drawn' or other payment instruction 'given' after the customer's loss of capacity an actual demand, etc, but as entitling

the parties to be placed in the same position they would have been in had it been a valid demand, etc.

(iv) Is it a term, either as a naturale or as an implied term, of the bank customer contract that the bank's duty and authority only terminate when the bank becomes aware of the customer's loss of capacity?

In view of the conclusion reached in the preceding sections that there is no legal bar to the inclusion of a term in the bank customer contract that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act, it is appropriate to return to the central question, namely : Does the bank customer contract contain such a term?

Contractual terms may arise in 3 ways:[121] they may be naturalia of the contract in question which automatically apply unless excluded by agreement, they may be expressly agreed upon and they may be implied from the facts relating to the particular contract in question. The principal sources of naturalia are legislation and the old authorities but, as will be shown below, new naturalia may be recognised by the courts. Express terms arise from the express agreement of the parties. Implied terms[122] arise by necessary implication from the facts relating to the particular contract in question. Trade usage and custom play an important role in the recognition of new naturalia and of implied terms.

(121) Cf Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974(3) SA 506(A) at 531 G-H; Kerr Contract 236; RH Christie The Law of Contract in South Africa (Durban 1981) 146ff.

(122) Often called tacit terms - see the Alfred McAlpine case supra.

In practice banks do not stipulate for an express term in the bank customer contract that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act. It is therefore necessary to examine whether such a term is a naturale of the bank customer contract and, if not, whether such a term can be implied in any particular bank customer contract from the facts relating to that contract.

Both the Bills of Exchange Act and the Roman and Roman-Dutch authorities are silent on the point under consideration; however, although legislation and the old authorities are the most important sources of the naturalia of contracts, they are not the only sources:

> 'Die begrip "stilswyende beding" word in meer as een betekenis gebruik. Die tot dusver aanvaarde betekenis is een waarvolgens die bestaan van die beding gefundeer word op die onuitgedrukte bedoeling, of vermoedelike bedoeling, van die partye. Dit dien onderskei te word van 'n naturalium (sic) van 'n kontrak wat vanaf regsweë geld tensy die werking daarvan uitgesluit is deur ooreenkoms (hetsy uitdruklik of stilswyend) van die partye. Die *naturalia van verskillende kontraksoorte* kan, wat die Suid-Afrikaanse reg betref, in hoofsaak teruggevoer word na begrippe van redelikheid en billikheid wat in die Romeinse reg ontwikkel het, maar kan in 'n lewende regstelsel nie as 'n numerus clausus beskou word nie. By die aanpassing van die reg by veranderde omstandighede en nuwe behoeftes kan dus steeds by wyse van analogie addisionele naturalia erken word'

(per Van Heerden AJA, as he then was, in A Becker & Co (Pty) Ltd v Becker & Others[123]).

That the courts have the power to adapt and develop the law has been frequently recognised by the courts.[124] Schreiner JA

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(123) 1981(3) SA 406 (A) at 419F-G.

(124) See generally Hahlo & Kahn Legal System 304ff.

expressed the position as follows in Die Spoorbond & Anor v South African Railways:[125]

> 'No doubt where new needs require that new remedies should be devised or that the scope of the old ones should be extended there is sufficient elasticity in our law to provide therefor within its basic principles.'

A recent reaffirmation of this principle is to be found in Braun v Blann & Botha NNO & Anor[126] in which Joubert JA said:

> 'I now turn to consider whether or not our common law powers of appointment should be extended to trustees .... It is one of the functions of our law to keep pace with the requirements of changing conditions in our society. To recognize the validity of conferring our common law powers of appointment on trustees to select income and/or capital beneficiaries from a designated group of persons would be a salutary development of our law of trusts and would not be in conflict with the principles of our law. The approach of our Courts is to apply the principles of our law to the development of our law of trusts.'

The principles on which the courts exercise this function are justice, convenience and social policy,[127] but it must not be understood from this that the courts will lay down a new rule whenever it would be just or convenient to do so:

> 'The matter was well put by Judge Tanaka, of Japan, in the International Court of Justice in one of the South-West Africa cases:[128]

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(125) 1946 AD 999 at 1013. See too Daniels v Daniels 1958(1) SA 513(A) at 522G - 523B.

(126) 1984(2) SA 850(A) at 866D and 866H - 877A.

(127) See eg the Spoorbond case supra at 1012; Essa v Divaris 1947(1) SA 753(A) at 765 and 775-6; Union Government v Ocean Accident and Guarantee Corporation Ltd 1956(1) SA 577(A) at 584H and 587F; Hahlo & Kahn Legal System 314-317.

(128) South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) Second Phase ICJ Reports 1966, 6 at 277.

> "We cannot deny the possibility of some degree of creative element in ... judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm."

Many years ago an eminent English judge, Stephen J., put the attitude of judges thus:(129)

> "... in exercising the narrowly qualified power of quasi legislation which the very nature of our position confers upon us, we ought to confine ourselves as far as possible (there may be cases where such a course is not possible) to applying well-known principles and analogies to new combinations of facts or to supplying to general definitions, and maxims, or to general statutory expressions qualifications, which, though not expressed, are, in our opinion, implied."

In short, then, it is only in a secondary sense that a judge makes law. He fashions it as far as possible out of materials at hand. He does not conceive himself as having, like Parliament, a tabula rasa, a blank sheet on which he may write as he wills. By training and tradition he damps down the law-creative side of his activities."(130)

The development of the law by the extension of a principle to a new, analogous combination of facts is, as Stephen J points out, the obvious way in which the courts may develop the law. However, this approach is not available in relation to the present inquiry because there is no analogous principle which could be extended to the bank customer contract. Is there then some other basis on which the courts could conclude that it is a naturale of the bank customer contract that cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware that the customer has ceased to have capacity to act? The answer is, it is suggested, in the affirmative, but it is convenient to first consider whether there is a basis for implying such a term from the facts and then to return to this question.

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(129) The Queen v Coney & Others (1882) 8 QBD 534 at 551.

(130) Hahlo & Kahn Legal System 306.

The cases abound in formulations of the test for the implication of terms from the facts,[131] but 2 of these formulations are clear favourites. The first of these 2 formulations had its origin in Hamlyn & Co v Wood & Co[132] but has been repeatedly adopted in this country.[133] In this case Lord Esher MR said:[134]

> '... the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and *business manner, an implication* necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.'

In the same case Kay LJ said:[135]

> '... the Court ought not to *imply a term in a contract unless* there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied.'

The second formulation had its origin in Reigate v Union Manufacturing Co (Ramsbottom) Ltd & Anor[136] but has also been

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(131) See generally Christie Contract 156 ff.

(132) [1891] 2 QB 488 (CA).

(133) See eg Union Government (Minister of Railways and Harbours) v Faux Ltd 1916 AD 105 at 112; Administrator (Transvaal) v *Industrial & Commercial* Timber & Supply Co Ltd 1932 AD 25 at 32; Mullin (Pty) Ltd v Benade Ltd 1952(1) SA 211 (A) at 214E.

(134) At 491.

(135) At 494.

(136) [1918] 1 KB 592 (CA).

repeatedly adopted in this country.[137] In this case Scrutton LJ said:[138]

> 'A term can only be implied if it is necessary *in the business* sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear."'

This formulation of the test is often stated even more stringently, as in *MacKinnon* LJ's formulation in Shirlaw v Southern Foundries (1926) Ltd:[139]

> 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some *express* provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"'

The first formulation is, with respect, to be preferred.[140] The second formulation is too stringent in 2 respects. Firstly, as Wessels ACJ, as he then was, said in Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd:[141]

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(137) See eg Barnabas Plein & Co v Sol Jacobson & Son 1928 AD 25 at 31; Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd 1932 AD 25 at 32-3; Van den Berg v Tenner 1975(2) SA 268(A) at 277A.

(138) At 605.

(139) [1939] 2 KB 206 (CA) at 227.

(140) But see AJ Kerr 'Implied Provisions in Contracts' (1974) 91 SALJ 121.

(141) 1932 AD 25 at 33. See also Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978(4) SA 901 (N) at 909E.

'The Court is to determine from all the circumstances what a reasonable and honest person who enters into such a transaction would have done ....' (The italics have been added.)

In other words, it is not the answer of the actual contracting parties to the officious bystander's question that is relevant but the answer honest and reasonable contracting parties would have given. Secondly, Scrutton LJ's and MacKinnon LJ's formulations appear to imply a degree of spontaneity in the answer to the officious bystander's question,(142) which, with respect, is unnecessary. It may well be that one, or even both, of the contracting parties would only have concluded that the term was necessary to give efficacy to their contract after careful consideration and possibly even with considerable reluctance, but this would seem to be inadequate reason for refusing to imply a term which is necessary and which reasonable parties would have recognised to be necessary after due consideration.

The common denominator of both formulations of the test is that the term sought to be implied must be necessary and not merely reasonable. When can a term be said to be 'necessary'? If the contract would be frustrated without the term, the term is clearly necessary, but it does not follow that this is the only situation in which a term will be implied:

'Mr. Millin argued that this term cannot be implied unless the agreement would be frustrated without it. This argument is based on statements in judgments such as that, e.g., by Scrutton, L.J., in Reigate v Union Manufacturing Co. (1918, 1 K.B. 592) that "a term can only be implied if it is necessary in the business sense to give efficacy to the contract." If this test were applied, it could be said that the defendants have not proved conclusively that the object of the lease could not have been achieved unless Fawcus got the licence moneys; but, on the other hand, it has not been proved that such object could have been achieved unless he got the licence moneys, because, as it turned out, the Government stipulated for a share of such moneys

(142) Cf Techni-Pak Sales (Pty) Ltd v Hall 1968(3) SA 231(W) at 236H-237A.

> as the price for making possible the laying out of the ground in stands. I think Mr. Millin's argument puts the matter too narrowly. I prefer to apply the test adopted by the Privy Council in Douglas v. Baynes (1908, T.S. 1207), namely, whether there arises from the language of the contract and the circumstances [in] which it was entered into, an inference that the parties must have intended the stipulation in question which draws the Court necessarily to the conclusion that it must be implied. The fact is that when a court of law implies a term in a contract it draws an inference as to what the intention of the parties was. It is not sufficient that the inference is reasonable; it must be necessary. But it is going too far to say, in a case like the present, that the inference can only be necessary if it is shown that Fawcus could not have laid out the land in stands unless the lease gave him the stand licence moneys'

(per Tindall J, as he then was, in Van Boeschoten & Lorentz v Minister of Mines & Anor[143]).

This is well illustrated by Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd.[144] The respondent had applied for and been granted permission to lay out a township on certain land. Prior to the grant trading had been prohibited on the property except under permit. The respondent had sought and been refused a permit. The effect of proclamation of the township was that the trading restriction fell away in the absence of provision to the contrary. One of the conditions of the approval of the township was that erven should be transferred subject to the condition that business would not be conducted thereon, but the conditions contained no express provision prohibiting the respondent township owner from trading on the property pending the transfer of erven and the question in issue was whether such a condition could be implied. The court held that it could. Clearly, it was reasonable on the facts to imply the condition, but it would be wrong to say that the condition was necessary: the grant was fully

(143) 1933 TPD 169 at 177-8.

(144) 1932 AD 25. The case did not relate to contract but it is thought that the principle is the same.

effectual without it. All that could be said to be necessary was that the facts necessarily gave rise to the inference that the grantor intended to prohibit trading by all persons on the property and that the respondent would necessarily have agreed to such a condition had the question been raised at the time.

It is no doubt questions such as these which caused Lord Denning MR to challenge the accepted tests in Liverpool City Council v Irwin:(145)

> 'It is often said that the courts only imply a term in a *contract when* it is reasonable and necessary to do so in order to give business efficacy to the transaction .... Or when it is obvious that both parties must have intended it: so obvious indeed that if an officious bystander had asked them whether there was to be such a term, both would have suppressed it testily: "Yes, of course"....
>
> 'Those expressions have been repeated so often that it is with some trepidation that I venture to question them. I do so because they do not truly represent the way in which the courts act. Let me take some instances ....
>
> 'If you read the discussion in those cases, you will see that in none of them did the court ask: what did both parties intend? If asked, *each party would have said he never* gave it a thought: or the one would have intended something different from the other. Nor did the court ask: Is it necessary to give business efficacy to the transaction? If asked, the answer would have been: "It is reasonable, but it is not necessary." The judgments in all those cases show that the courts implied a term according to whether or not it was reasonable in all the circumstances to do so.'

Lord Denning's judgment was a dissenting judgment and the House of Lords(146) expressly rejected his substitution of a test of

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(145) [1976] QB 319 (CA) at 329F-330F. See too Lord Denning The Discipline of the Law (London 1979) 32ff; The Closing Chapter (London 1983) 91ff.

(146) Liverpool City Council v Irwin & Anor 1977 AC 239 (HLE) at 253H-254A, 257G-H, 262B and 265F-H.

reasonableness for the test of necessity (although it nevertheless upheld his conclusion on the ground that the term sought to be implied was necessary).

What conclusion is to be drawn from the aforegoing? The answer is, it is suggested, that the range of circumstances in which it may be necessary to imply a term in a contract is too broad to admit of a single test which will apply in all circumstances.(147) In any event it is unnecessary for present purposes to endeavour to formulate a test or tests to cover all circumstances. What is necessary is to formulate a test which governs the issue under consideration. The following approach is suggested.

It is not practicable for banks to investigate whether customers still have capacity to act before honouring each and every cheque or other payment instruction. If they were to attempt to do so not only would they be unable to fulfil their normal obligation to honour cheques at once,(148) but also banking would necessarily be seriously disrupted. It follows, it is considered, that the implication necessarily arises that in order to give business efficacy to the contract the parties, as reasonable contracting parties, did not intend the bank to verify the customer's capacity to act before honouring each cheque or other payment instruction.

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(147) As Lord Wilberforce pointed out in the House of Lords in the Liverpool City Council case (at 253F) 'there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process'. See too at 254A where he says: 'The present case, in my opinion, represents a fourth category, or I would rather say a fourth shade on a continuous spectrum'.

(148) Freeman v Standard Bank of South Africa Ltd 1905 TH 26 at 30; Bank of England v Vagliano Brothers [1891] AC 107 at 157; The Governor and Company of Bank of Baroda Ltd v Punjab National Bank Ltd & Others 1944 AC 176(PC) at 184; but cf National Bank v Paterson 1909 TS 322 at 327. See generally Malan Bills of Exchange p 321.

A similar conclusion was reached in an analogous situation by the Hong Kong Court of Appeal in the recent case of Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Others.(149) The question in issue was whether a customer is under a *duty* 'to take such precautions as a reasonable customer in his position would take to *prevent forged* cheques being presented to his bank for payment', or at least 'to take such steps to check his monthly bank statements as a reasonable customer in his position would take to enable him to notify the bank of any items debited therefrom which were not or may not have been authorised by him.' After reviewing the English cases, especially Liverpool City Council v Irwin & Anor,(150) *Cons JA* concluded that a customer does owe its bank such duties, *saying:*(151)

> 'It cannot be said that the imposition of a duty of care on the customer is absolutely essential to the relationship. *The banks* could I think manage to service current accounts without that assistance. So could, I think, the tenant of the high rise flats *have managed* to live there without the benefit of lifts, lights on the staircase or garbage chutes [a reference to the Liverpool City Council case]. But that did not deter their Lordships. They took a more practical view of necessity. They inquired if the transaction would become "futile, inefficacious or absurd" if these amenities were not maintained. For my part I can think of little more futile than for the operator of an active bank *account to throw his monthly statements* in the waste paper basket without ever bothering to look at them; little more inefficacious than to leave the operation of that account to a clerk whose work is never checked; and little more absurd than to expect the bank to insure the honesty of the customer's clerk when the customer deliberately puts into the clerk's hands the weapons with which he can plunder and rob the bank. It cannot be *economically feasible nowadays for a bank* to subject the signature on each and every cheque presented to a thorough examination or comparison with the specimen signature card.

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(149) [1984]1 Lloyds LR 555(HK).

(150) [1977] AC 239.

(151) At 560.

> Banks must look to other protection.(152) Thus, after a great deal of hesitation, I find myself finally led to the conclusion that, in the world in which we live today, it is a necessary condition of the relation of banker and customer that the customer should take reasonable care to see that in the operation of the account the bank is not injured.'

It does not yet follow, however, that the parties necessarily intended that cheques and other payment instructions would be fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act. It is in addition necessary to consider the possibility that the parties may have intended the bank, and not the customer, to bear the risk arising from its not verifying the customer's capacity. In other words, although it is necessary to imply a term in the contract, there are 2 possible terms that can be implied and it is further necessary to determine which one of these 2 terms should be implied. The correct approach to this question is, it is thought, to inquire which of the 2 terms reasonable contracting parties would have intended.(153)

The essence of this inquiry is to determine which party reasonable contracting parties would have intended should bear any loss arising out of the bank's not verifying the customer's capacity. If the outcome of the inquiry is that the customer or his estate should bear the loss then a term is to be implied in the bank customer contract that cheques and payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act, but if the outcome of the inquiry is that the bank should bear the loss no such term will be implied.

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(152) Cons JA should not, it is considered, be understood as intending to convey that banks need not check customers' signatures on their cheques; his point is that it is not practical for them to make a thorough examination of every signature and the risk they run as a result is a factor to be taken into account in determining whether or not the customer should be held to be under a duty to take reasonable care to avoid loss to the bank.

(153) But cf Lord Wilberforce's speech in the Liverpool City Council case supra at 254.

Who, then, should reasonably bear the loss if loss is suffered arising out of the bank's honouring a cheque or other payment instruction after the customer has ceased to have capacity to act? The answer is, it is thought, that the customer should bear the loss. The loss of capacity is a circumstance relating to the customer, not the bank, and it follows, it is suggested, that prima facie the loss should fall on the customer. Further support for this *approach is to be had from* the fact that, as already pointed out, the bank is unable from a practical point of view to take any action to protect itself from the risk of loss, whereas in the case of the customer, the law provides the machinery for the appointment of a legal representative to take charge of the customer's estate and such representative is therefore in a position to take action to prevent or minimise loss to the customer's estate by notifying the *bank of the customer's* loss of capacity to act.(154) It follows, it is thought, that the risk of loss should properly fall on the customer and not the bank and that reasonable contracting parties would, after due consideration, readily accept this.(155)

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(154) Even before the appointment of a legal representative, family, friends, business associates, creditors and others are in a position to, and in practice often do, notify the bank.

(155) *A question which may be asked is whether* it could not be argued that the risk of losses arising from the honouring of cheques and other payment instructions after a customer has ceased to have capacity to act is a risk which is inherent in the carrying on of the business of banking and which the bank accepts by carrying on business. The answer to this argument is, it is thought, that it can equally well be argued that the *customer accepts the risk of such losses by availing himself* of the facilities offered by the bank. Another argument which may be raised is that a parallel can be drawn between losses arising from forgery and losses arising from the honouring of cheques and other payment instructions after the customer has ceased to have capacity to act. However, it is doubted whether the analogy with forgery is valid. Forgery is a fraud perpetrated on the basis that the use of the customer's name is generally essentially accidental: another customer's name would normally serve the same purpose. The loss, therefore, properly falls on the bank and not on the customer. In the case of losses arising from the customer's loss of capacity to

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It follows in turn, it is suggested, that it should be possible on the facts relating to any particular bank customer contract to imply a term that cheques and other payment instructions will be fully effectual as between bank and customer until the bank becomes aware that the customer has ceased to have capacity to act. This presupposes that the cheques and payment instructions are apparently regular in all respects, but subject to this they will be fully effectual as between the bank and the customer notwithstanding that the customer may have ceased to have capacity to act before they were honoured or even before they were drawn or given.

The question, however, remains as to whether such a term should not in any event be recognised as one of the naturalia of the bank customer contract, making it unnecessary to imply the term from the facts in each case. The disadvantage of having to imply a term from the facts in each case is firstly that the term must be proved in every case where there is a dispute and secondly the term that is implied may not be uniform in all cases. In the case of a highly standardised contract such as the bank customer contract a more satisfactory approach is, it is thought, to regard such a term as a naturale of the contract.

The need for flexibility in regard to the recognition of new naturalia in contracts is, it is believed, clear. This is well-illustrated by the case of trade usages. New trade usages are constantly developing and the law takes account of this by readily recognising that trade usages which have achieved a sufficient degree of uniformity and notoriety have been impliedly incorporated by parties in their contracts.(156) However, it would be an

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act, on the other hand, the losses do arise from a circumstance relating to the customer and there is accordingly no obvious reason why the losses should fall on the bank and not the customer.

(156) See eg Coutts v Jacobs 1927 EDL 120 at 127ff; Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd 1973 (2) SA 642(C) at 645H; Kerr Contract 237-9.

exercise in futility to require such trade usages to be proved in every case in which a dispute arises; a vital legal system should obviate such an exercise in futility, and the means of achieving this is to recognise appropriate trade usages as naturalia of the contracts concerned. That a term arising from trade usage may become a naturale of the type of contract concerned, was recognised by Corbett AJA,(157) as he then was, in Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration:(158)

> 'Such implied terms [ie implied by law] may derive from the common law, trade usage or custom, or from statute. In a sense "implied term" is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is a naturalium (sic) of the contract in question ....
>
> 'The implied term (in the above defined sense) is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation.'

Similar considerations are, it is considered, equally applicable where, as in the case under discussion, an implied term arises not from trade usage but from necessary implication as to what reasonable parties to a standard form of contract would have agreed in relation to the point in question.(159)

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(157) In a dissenting judgment but the dissent was not on this point.

(158) 1974(3) SA 506 (A) at 531H and 532G; but cf Christie Contract 150.

(159) Cf Mears v Safecar Security Ltd [1983] QB 54(CA) in which Stephenson LJ said (at 78D-F):

> 'On examination Liverpool City Council v. Irwin [1977] A.C. 239 is not, in my opinion, as helpful to the employee's case as was Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555 to the tenants Mr. and Mrs. Irwin. As I read the speeches of their Lordships in Lister's case,

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It follows, it is thought, that it should be recognised that it is a naturale of the bank customer contract that cheques and other payment instructions are fully effectual as between bank and customer until the bank receives notice of the customer's loss of capacity to act.

(v) Effect of such a term on the bank's duty

A consequence of this interpretation of the bank customer contract is that not only the bank's authority but also its duty, if any, to honour a customer's cheques and other payment instructions continues until it becomes aware of the customer's loss of capacity to act. This is likely to be of little practical significance because a bank is unlikely, except on the rarest of occasions, to dishonour a customer's cheques and payment instructions when it

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particularly those of Viscount Simonds at pp.576-579, and *Lord Tucker at p.594, and in* Liverpool City Council v. Irwin [1977] A.C. 239, particularly those of Lord Wilberforce at pp.254 and 255, Lord Cross of Chelsea at pp.257 and 258, Lord Edmund-Davies at pp.265 and 266 and Lord Fraser of Tullybelton at p.270, the House of Lords has laid down that there are contracts which establish a relationship, e.g. of master and servant, landlord and tenant, *which demand by their nature* and subject matter certain obligations, and those obligations the general law will impose and imply, not as satisfying the business efficacy or officious bystander tests applicable to commercial contracts where there is no such relationship, but as legal incidents of those other kinds of contractual relationship. In considering what obligations to imply into contracts of *these kinds which are not complete*, the actions of the parties may properly be considered. But the obligation must be a necessary term; that is, required by their relationship. It is not enough that it would be a reasonable term.'

It appears therefore that in England in the case of the established categories of contract the courts will more readily recognise a new natural incident than they will imply a term from the facts. Whether our courts, as courts of law and not equity, will do likewise remains to be seen.

still believes that it is under a duty to honour them. However, should it do so and should the customer suffer loss as a result, the bank would be liable for the loss.

It may seem anomalous at first sight that the bank should be obliged to honour cheques and payment instructions which it would not be obliged to honour if it knew of the customer's loss of capacity, but it is suggested that this is not unreasonable. For example, a customer may, either before or after ceasing to have capacity to act, draw a cheque in payment of an insurance premium in circumstances in which non-payment of the premium will result in cancellation of the policy. If the bank honours the cheque after the customer has ceased to have capacity to act it is entitled to a full indemnity and it follows, it is considered, that if it dishonours the cheque without knowing that the customer has ceased to have capacity to act, the equities favour the customer's being entitled to claim his loss rather than the bank's being entitled to raise the customer's loss of capacity to act as a defence. The term to be implied is such term as reasonable contracting parties would necessarily have agreed to had they applied their minds to the point, and it is thought that what such parties would have agreed is that if the bank is to enjoy the privilege of its authority continuing despite the customer's loss of capacity to act its concomitant duty should likewise continue.

(vi) Position if the bank customer contract does not contain such a term

While it is considered that the better view is that the aforegoing interpretation of the bank customer contract is correct, the position is clearly not free from doubt and it is therefore appropriate to also consider what the consequences will be if the courts decline to recognise that it is either a naturale or an implied term of the contract that cheques and other payment

instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act.

In the absence of such a naturale or implied term it would, it is considered, be necessary that each cheque or other payment instruction should constitute a valid separate authority in its own right failing which the bank would have no authority, and would not be under any duty, to honour the cheque or payment instruction. Bearing in mind that a cheque or other payment instruction may serve various functions depending on whether it is drawn or given within the scope of a credit in the customer's account, or within the scope of an overdraft facility granted by the bank, or outside the scope of either such a credit or such a facility, it follows that it is necessary to examine firstly the effect of the customer's loss of capacity to act on each such function and secondly the effect of the lapse of one function on the other functions served by the same cheque or payment instruction.

Fundamental to this examination, moreover, is the point in time at which the loss of capacity occurs: the consequences may be entirely different according to whether the loss of capacity occurs before a cheque is 'issued', or after it is issued but before it is received by the bank, or after it is received but before it is honoured or dishonoured. The point in time at which the bank becomes aware of the loss of capacity is likewise of fundamental importance.

The differing considerations applicable to each of these situations will be considered below.(160)

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(160) See 128ff below.

(b) Capacity to receive payment where cheque is drawn or payment instruction is given in customer's own favour

Cheques and other payment instructions in the customer's own favour give rise to an additional problem in that if the customer has ceased to have capacity to act he lacks the necessary capacity to receive payment pursuant to the cheque or payment instruction.[161] What, then, is the bank's position if it pays such a cheque or payment instruction to the customer and not to his legal representative?

The view has already been taken above[162] that it is a term of the bank customer contract that apparently regular cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act, and if this view is correct such term would, it is suggested, encompass the receipt of payment by the customer and the payment would be fully effectual despite the customer's lack of capacity.

If, however, this view is rejected, the position is more difficult because there is a surprising dearth of authority on what

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(161) Performance of an obligation is a bilateral act requiring capacity to act on the part of both parties: Grotius 3.39.14; Voet 4.4.22, 46.3.5; R J Pothier A Treatise on the Law of Obligations, or Contracts translated by W D Evans (Dublin 1806) para 468; Brath v Mulder (1836) 1 Menz 207; Estate Delponte v Barnes & Anor 1910 CPD 118 at 124; Matador Buildings (Pty) Ltd v Harman 1971(2) SA 21(C) at 25H; Wessels Contract #2156; De Wet & Yeats Kontraktereg 236; HR Hahlo The South African Law of Husband and Wife 4th ed (Cape Town 1975) 159.

(162) See 76-91 above.

a debtor's position is if he performs his obligations without knowledge that the creditor has ceased to have capacity to act. Voet,[163] however, makes certain significant remarks in dealing with the situation of a debtor who, after the death of his creditor, pays his debt not to the true heir but to a possessor of the inheritance.[164] Voet draws a distinction between the situation in which the debtor is negligent in paying the wrong party and the situation in which negligence is absent and proceeds:

> 'In the former case payment cannot avail to release, since a slack and studied ignorance affords nobody an excuse, and no one ought to be ignorant of the condition of him to whom he pays, any more than of him with whom he contracts. But in the latter case good faith accompanied by a just mistake of fact appears to protect the person paying from being forced into making payment over again to the true heir.
>
> The rule which was approved above makes in the same direction, the rule namely that a debtor is released who pays an agent or steward of the creditor after the revocation of his mandate, when he is unaware that it had been revoked.[165] So too does the rule that, just as good faith bestows as much on a possessor as does truth, it appears that in the same way it ought also to excuse one who, being deceived by a just mistake, makes payment to one who is held in general opinion to be such that payment can be rightfully made to him. Particularly is this so since the laws direct us to be more inclined to releasing than to putting under obligation. '

Voet's reasoning is, it is suggested, also applicable to payments made by a debtor to his creditor after the creditor has

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(163) 46.3.5. He seeks support for his statement from Digest 14.6.3 in pr, 14.3.38.1, 50.17.136 and 44.7.47.

(164) This situation cannot of course arise in modern administration of estates law and practice.

(165) Or that it had lapsed by reason of the mandant's loss of capacity to act - see eg Pothier Obligations paras 81 and 475.

ceased to have capacity to act, and such payments should therefore *be similarly protected* if the debtor made payment in good faith, ie without knowledge of the creditor's loss of capacity to act, and without negligence.

It is suggested, however, that the payment should not be seen as being directly valid but rather as giving rise to a right in favour of the payer to be indemnified for his negative interest, which right is then set off against the debt he sought to pay. The payer's rights can only rest on equitable principles and equity requires no more than that the payer should not suffer any loss, not that he should also be entitled to his profit.(166) The difference may be of considerable practical significance. For example, if the payment was intended to be the advance of monies lent the payer would be entitled to recover both the capital and the agreed interest if the payment is directly valid, but would only be entitled to recover the capital together with any interest he could have earned elsewhere had he not made the payment, if he were entitled to his negative interest. The difference is also significant in that set-off may be prevented for an extraneous reason(167) with the result that if the payer is only entitled to his negative interest the payment will not serve to discharge the debt.

The desirability of affording such payments some protection is, it is thought, clear, but whether or not the courts will be willing to recognise a rule that such payments either are directly valid or give rise to a right in favour of the payer to be indemnified for his negative interest remains to be seen.(168) If the courts

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(166) See further (3) below (at 145-54): Excursus: A general rule that a person dealing with another in reliance on the other's continued capacity to act is entitled to be indemnified for *his negative interest?*

(167) Cf 11 n 28 above.

(168) See further 145-54 below.

decline to do so the bank will be limited to such claims as it may have based on unjust enrichment.(169)

(c) Cheques and payment instructions issued on the customer's behalf

It is also necessary to consider whether the position regarding termination of a bank's duty and authority to honour a customer's *cheques* and other payment instructions on the customer's loss of capacity to act is any different where the cheque is not drawn and issued, or the payment instruction is not given, by the customer personally but by another person on the customer's behalf.

The authority of one person, the representative,(170) to perform juristic acts on behalf of another person, the principal, may derive from an act of authorisation by the principal or from some other source such as the representative's capacity as guardian or curator of the principal.(171) However, only the first situation is dealt with here as the second situation is of only very limited practical significance in relation to the termination of a banker's duty and authority to honour a customer's cheques and other

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(169) Cf Voet 4.4.22, 46.3.5; *Pothier Obligations para* 468; Estate Delponte v Barnes & Anor 1910 CPD 118 at 124; Wessels Contract # 2157.

(170) The expression 'representative' is used in preference to 'agent'. When a person draws and issues a cheque or gives a payment instruction on behalf of another he performs a juristic act on behalf of the other. Although the expression 'agent' is often used in this context it is also used in other senses not involving the performance of juristic acts on behalf of a principal - eg in the expression 'estate agent'. It is also not apt to describe various persons who do have the authority to perform juristic acts on behalf of another eg guardians and curators. Cf J C de Wet in Joubert Law of South Africa vol 1 'Agency and Representation' # 101.

(171) J C de Wet op cit # 114.

payment instructions on the customer's loss of capacity to act.[172]

If the view taken above [173] is correct that it is a term of the bank customer contract that apparently regular cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act, it makes no difference whether the cheque was drawn and issued, or the payment instruction was given, by the customer personally or by a representative on behalf of the customer. The only question is whether or not the cheque or payment instruction is apparently regular in all respects. If it is, it is fully effectual and it is immaterial whether it was drawn and issued, or given, by the customer personally or by a representative on the customer's behalf.[174]

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(172) It is difficult to visualise any circumstances in which the second situation could arise on a customer's becoming insane or unable to manage his affairs or his declaration as a prodigal, but on rare occasions it could possibly occur on the customer's insolvency, eg where a minor's estate is sequestrated.

(173) See 76-91 above.

(174) This conclusion is not, it is considered, in conflict with s 23 of the Bills of Exchange Act which provides:

> 'A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.'

The section is, it is thought, only intended to apply where the agent has limited authority and exceeds those limits, not where the agent had sufficient authority but the authority has lapsed. There would, moreover, not appear to be any reason why the principal should not be free to waive the benefit of the section by agreement; accordingly, if the section and the bank customer contract are in conflict the contract will take precedence.

If, however, a cheque or other payment instruction must constitute a valid separate authority in its own right, the answer to the question of whether it makes a difference that the cheque was drawn and issued, or the payment instruction was given, by a representative on the customer's behalf depends on what the position is of a third party, such as the bank in the present case, who is affected by an act performed by a representative on his principal's behalf if either the representative or the third party or both were ignorant of the principal's loss of capacity to act.

This question has received only cursory attention from the authorities, old and modern. Most of the Roman-Dutch authors do not refer to the question at all; however, Voet[175] is an exception for dealing with the rule[176] that mandates[177] lapse on the mandant's death[178] he states :

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(175) 17.1.15.

(176) See 37ff above.

(177) As already pointed out - see 7 n 6 above - mandate is a contract in terms of which one person, the mandatary, undertakes to perform a service on behalf of another, the mandant, and it is not essential that the mandatary should have the power to perform *juristic acts on behalf of* the mandant; in other words, a mandatary may or may not also be a representative. However, the Roman-Dutch authors did not distinguish clearly between the contract of mandate and powers of representation in keeping with the fairly low level of development the concepts of mandate and representation reached in Roman-Dutch law and it is therefore necessary in seeking to develop a coherent and adequate set of rules governing representation generally in the complex conditions of modern *commerce* to adopt and develop the embryonic rules found in Roman-Dutch law especially in the writings on mandate - cf 50 above.

(178) Death is but one instance of loss of capacity and what Voet says is equally applicable by analogy to any other loss of capacity eg due to insanity - cf Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz 1958(1) SA 505(A) at 511H (dealing with the power of representation); Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation) 1968(1) SA 717(A) at 722H (dealing with the contract of mandate).

> '... the above rule [ie the rule that mandates lapse on the mandant's death] fails .... if a mandatary has in good faith carried the business to its conclusion in ignorance of the death of the mandator, for in that case it [ie the performance] still remains valid and is not liable to be upset. Here you may put in the special case given in the passage cited below.'

The passage referred to by Voet reads :(179)

> 'If a father should permit his son to manumit his slave, and, in the meantime, should die intestate, and his son, not being aware that his father was dead, should grant the slave his freedom, the slave will become free through the favor conceded to liberty, as it does not appear that the master changed his mind.'

It is true that Voet's reference to the position of a third party appears to be essentially incidental in that he was focussing on the position of the representative. Nevertheless it is thought that it is clear that he intended to convey that the representative's act is fully effectual, not only as between the principal and the representative but also as between the principal and the third party, despite the principal's loss of capacity to act, and it is further thought that what he says is equally applicable by analogy where the power to represent arises not in connection with a contract of mandate but from some other source.

Pothier(180) deals more directly with the position of a third party:

> '...although the commission terminates by the death of the person giving it, and there appears a repugnancy in supposing me to contract by the ministry of another, who after my death contracts in my name; yet if he contracts in my name after my death, but before it could be known at the place where the contract is made, such contract shall oblige my successor as if

(179) Digest 40.2.4 pr.

(180) Obligations para 81.

> I had actually contracted by the ministry of this agent. For this and the preceding decision we may deduce an argument from its being *legally established,*(181) *that a payment made to an* agent is valid though after the death of a principal, or the revocation of the authority, if the death or revocation were not known.'

It may be noted that Voet focusses on absence of knowledge of the principal's loss of capacity on the part of the representative although it would seem likely that he also had in mind absence of knowledge on the part of the third party. Pothier on the other hand appears to focus on absence of such knowledge on the part of the third party although he too may well have had in mind absence of knowledge on the part of both the representative and the third party.(182)

The modern authors on agency do not present a uniform picture. De Villiers & Macintosh,(183) citing Pothier,(184) state:

> '...transactions entered into with the agent by third parties having no notice of such death or change of status, on the faith of the continuance of the agent's authority, are binding on the principal's estate, whether or not the agent knew that his authority had been revoked.'

As already pointed out, however, it is not clear that Pothier considered the transaction binding even if the representative was aware of the principal's loss of capacity. Moreover the expression 'on the faith of the continuance of the agent's authority' gives rise to considerable difficulty and calls for closer examination.

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(181) Digest 46.3.12.2, 46.3.32ff.

(182) But cf De Villiers & Macintosh's interpretation of what Pothier says - see below.

(183) Agency 628.

(184) Obligations para 81 - see above.

Several situations can be distinguished: Before the principal's loss of capacity he may have held out to the third party that the representative had the authority to represent him.[185] Or before his loss of capacity he may have furnished the representative with a written authority which is only produced to the third party after the loss of capacity. Or before his loss of capacity the principal may have orally authorised the representative to represent him but this may not have been conveyed by the representative to the third party until after the authority had lapsed by reason of the principal's loss of capacity.

In which of these situations can the third party be said to have acted 'on the faith of the continuance of the agent's authority' if the third party was unaware of the principal's loss of capacity? Clearly, in the first situation the third party could be said to have done so and the same is probably true of the second situation. On the other hand it is less clear whether De Villiers & Macintosh had the third situation in mind. In this situation the third party acts on the faith of the incorrect assertion, whether fraudulent or unwitting, by the representative that his authority is still extant; the principal has not held out the representative to the third party as having authority to represent him and it would therefore seem more difficult to say that the third party relies on the 'continuance' of the authority. Especially where the assertion that the authority is still extant is fraudulent the position is, it is suggested, not readily distinguishable from the situation where the person claiming to represent another never had the authority to do so at any time.

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(185) The representative may have had ostensible authority only or both actual and ostensible authority.

Joubert,[186] in dealing with the lapsing of a power of representation *on the principal's loss of capacity* to act, states :[187]

> 'Daar was *in die gemene reg* 'n spesiale reëling ten aansien van die lasgewingskontrak sodat die lashebber wat te goeder trou in onkunde van die lasgewer se dood gehandel het, die lasgewer se boedel kon aanspreek asof die handeling in sy leeftyd verrig is. Hierdie reël dien om die gevolge van die beëindiging van die lasgewingsverhouding te versag wat die *bona fide*-lashebber betref. Hierdie beskerming behoort in die moderne tyd uitgebrei te word sodat 'n handeling wat die boedel bind, ook teenoor derdes van krag sal wees.'

It appears that Joubert has in mind only the situation where both the representative and the third party are unaware of the principal's loss of capacity and he gives no indication of what his view might be in regard to the position where the representative is aware of the loss of capacity but the third party is not, especially where the representative had ostensible authority to represent the principal.

Kerr[188] does not deal with the position of the third party; however, he takes the view that a representative's power to represent his principal only terminates when the representative becomes aware of his principal's loss of capacity and he would, therefore, no doubt hold that the representative's acts are fully effectual as between all 3 parties - principal, representative and third party - until the representative becomes aware of the principal's loss of capacity. He too, however, gives no *indication* of what his view would be in regard to the position where the representative is aware of the principal's loss of capacity but the *third party is not, especially where the representative had* ostensible authority to represent the principal.

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(186) Verteenwoordigingsreg 132-3.

(187) At 132.

(188) Agency 200-203.

J C de Wet[189] unequivocally rejects the concept of a power surviving the principal's loss of capacity to act, but he does not deal with the representative's and third party's positions where either or both of them are unaware of the principal's loss of capacity; however, it is suggested that it does not necessarily follow that because the representative's power has lapsed he and the third party have no remedies. This will be dealt with below.

Little assistance is to be had from English law where the position is similarly unclear. Fridman[190] analyses the cases and concludes :[191]

> 'The result of this investigation of the cases seem[s] to indicate that (apart from statute), whatever the reason for the termination of the agency (except possibly the death of the principal) a third party who deals with the agent without actual or constructive notice of the fact of termination will be protected as against the principal, or the principal's estate and, in some cases, either alternatively or concurrently, will have a remedy against the agent.'

In the United States the power of a representative to bind the estate of his principal after the principal's loss of capacity to act where the loss is unknown to the representative has long been a source of dispute,[192] but the Restatement of the Law of Agency[193] concludes that the better view is that:

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(189) In Joubert Law of South Africa vol 1 'Agency and Representation' # 123.

(190) Agency 319-21.

(191) At 321.

(192) American Law Institute Restatement of the Law Second Agency (St Paul 1958) vol 3 # 120.

(193) Supra vol 1 ## 120, 122 and 124A comment a.

'(1) The death of the principal terminates the authority of the agent without notice to him, except as stated in subsections (2) and (3) and in the caveat.[194]

'(2) Until notice of a depositor's death, a bank has authority to pay checks drawn by him or by agents authorized by him before death.

'(3) Until notice of the death of the holder of a check deposited for collection, the bank in which it is deposited and those to which the check is sent for collection have authority to go forward with the process of collection....

'(1) Except as stated in the caveat,[195] the loss of capacity by the principal [due to insanity] has the same effect upon the authority of the agent during the period of incapacity as has the principal's death....

'If there was apparent authority previously, its existence is unaffected until the knowledge or notice of the termination of authority comes to the third person, except when all agency powers are terminated without notice by death, loss of capacity by the principal or by an event making the authorized transaction impossible.'

The exceptions in the case of banks have been developed by the courts on the grounds of justice and expediency, the protection of business being deemed to take priority over the risks to the customer's estate.[196] Legislation has also been enacted in many states modifying the harshness of the general rule[197] and is recommended by the Restatement.[198]

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(194) The caveat is not relevant for present purposes.

(195) The caveat reads :

'The Institute expresses no opinion as to the effect of the principal's temporary incapacity due to a mental disease.'

(196) Supra vol 1 # 120 comment a.

(197) Supra vol 3 # 120.

(198) Ibid.

What conclusions are to be drawn from the aforegoing? One is compelled, it is suggested, to accept that in principle a power to represent another must lapse if the principal ceases to have capacity to act. If a person lacks the capacity to perform a juristic act himself, it would not seem conceptually possible that someone should perform that act on his behalf under his authority. It is suggested, however, that it does not necessarily follow that the representative and the third party have no remedies if the representative performs the act after the principal's loss of capacity but before the representative or third party or both become aware of the loss.

There is no lack of authority that a mandatary who performs his mandate in ignorance of the mandant's loss of capacity to act is not remedyless.(199) Similarly, in the case of a third party affected by an act performed by the mandatary there is the authority of both Voet and Pothier that he is entitled to be protected. Moreover, it is thought that in the case both of the representative and of the third party this is in accordance with justice and expediency. The only difficulty is, it is suggested, to determine the precise circumstances in which the representative and the third party are entitled to protection and the precise extent of the protection.

A mandatary's position if he performs his mandate in ignorance of the mandant's loss of capacity to act has already been dealt with above(200) and the conclusion reached there is that he is entitled to be indemnified for his positive interest.(201) It is thought,

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(199) See 41-51 above.

(200) Ibid.

(201) Should this view be wrong the mandatary is clearly entitled to be indemnified for at least his negative interest - ibid - and for present purposes the result is the same whether he is entitled to be indemnified for his positive or negative interest.

moreover, that this is not a rule peculiar to the contract of mandate but that it is equally applicable by analogy wherever a person represents another in ignorance of the lapsing of his authority due to the principal's loss of capacity to act.

If the representative is entitled to indemnification, it follows, it is suggested, that juristic acts performed by him on behalf of the principal must be fully effectual as between the principal and the third party because anything less than this would not provide him with a full indemnity. If the representative's acts were not to be fully effectual as between the principal and the third party the representative would be in breach of his implied warranty of authority,(202) and even indemnification for his liability to the third party for damages would not constitute an adequate indemnity because his good name is also at stake. This approach presupposes that the third party is also unaware at the time of relying on the representative's act of the principal's loss of capacity because if the third party is aware of the loss of capacity his bad faith would preclude his acquiring any rights against either the representative or the principal.(203)

Where the representative is aware of the principal's loss of capacity but the third party is not the position is more difficult. If the representative did not have ostensible authority to represent the principal the third party can, it is thought, be in no better a position than he would have been in had the representative never had any authority ie the third party would acquire no rights against the

(202) See eg Blower v Van Noorden 1909 TS 890 at 900-1; Kerr Agency 234ff. It is not proposed to deal with the controversies surrounding this rule - cf Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403(A) at 409 C-D - more especially as in the case of bills of exchange the warranty is statutory - see s 24 of the Bills of Exchange Act.

(203) Cf Digest 50.17.134.1; Principal Immigration Officer v Bhula 1931 AD 323 at 330; Wille Principles 16-19.

principal. However, where the representative had ostensible authority there is much to be said for a rule that the third party should be entitled to be indemnified, although the appropriate indemnification is, it is suggested, for his negative interest only. To accord the third party his positive interest would be a negation of the fact that the representative's authority had lapsed. If the representative's authority has lapsed there can be no contractual basis for the right to indemnification which can therefore only rest on equitable principles, and equity demands no more than that the third party should suffer no loss, not that he should also be entitled to his profit.(204)

Applying these principles to the bank customer contract, if a cheque is drawn and issued, or a payment instruction is given, by a representative in ignorance of the customer's loss of capacity and if the bank is likewise unaware of the loss of capacity at the time of honouring the cheque or payment instruction, the representative's drawing and issuing of the cheque or giving of the payment instruction is prima facie effectual as between bank and customer.

It is however necessary to have regard further to the effect of the customer's loss of capacity on the bank's own mandate. This question has been dealt with above(205) and the conclusion reached there is that the bank's mandate does not lapse until the bank becomes aware of the customer's loss of capacity. If this view is correct the cheque or payment instruction is fully effectual as between bank and customer for all purposes. On the other hand, if this view is wrong and it is held that the bank's mandate does in fact lapse on the customer's loss of capacity and that the exception where the bank performs its mandate in ignorance of the customer's

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(204) Cf 41-51 above especially at 48 dealing with the mandatary's right to indemnification. See further (3) below (at 145-54): Excursus: A general rule that a person dealing with another in reliance on of the other's continued capacity to act is entitled to be indemnified for his negative interest?

(205) See 41-51 above.

loss of capacity is limited to according the bank the right to its negative interest, the efficacy of the cheque or payment instruction will be similarly restricted. In other words, the position is the same as where the customer drew and issued a cheque or gave a payment instruction while of full capacity but before payment of the cheque or payment instruction the customer ceased to have capacity.

Where the representative is aware of the customer's loss of capacity to act but the bank is not, the bank will be entitled to be indemnified for its negative interest. The view has already been taken that where a representative has ostensible authority to represent his principal a third party is entitled to be indemnified for his negative interest if he was unaware of the principal's loss of capacity even though the representative was aware of the loss, and it is thought that in practice in all cases in which a bank honours a cheque drawn and issued, or a payment instruction given, by a representative on behalf of the customer, the customer will have held the representative out as having authority to represent the customer, by furnishing the bank with a written authorisation to this effect.

(d) Rights of an offeree who 'accepts' offer and performs his 'obligations' in ignorance of the offeror's loss of capacity

A cheque drawn or payment instruction given outside the scope either of a credit in the customer's account or of an overdraft facility constitutes in the first instance an offer to borrow,(206) and, as already pointed out,(207) in the absence of agreement to the contrary an offer lapses on the offeror's loss of capacity to act if the offer has not been accepted prior to the loss of capacity.

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(206) See 20 above.

(207) See 72-4 above.

What is a bank's position if, contrary to the view taken above, it is held that a cheque or other payment instruction must constitute a valid separate authority in its own right and in ignorance of the customer's loss of capacity the bank honours a cheque or payment instruction drawn or given outside the scope either of a credit in the customer's account or of an overdraft facility? The answer depends on the answer to the vexed question in our law of whether or not an offeree who purports to accept an offer and performs his 'obligations' under the resulting 'contract' in ignorance of the fact that the offer has lapsed due to the offeror's ceasing to have capacity to act is entitled to be indemnified for his expenses and losses ie his negative interest. If the answer is in the affirmative the bank will be entitled to recover the amount paid together with the interest and charges it could have earned elsewhere had it not honoured the cheque or payment instruction. If the answer is in the negative the bank will be limited to such claims as it may have based on unjust enrichment.

No Roman or Roman-Dutch authority appears to have dealt with this question. The Commentator Baldus,[208] however, takes the view that the offeree is entitled to be indemnified:

> 'Et ideo puto quod si antequam pervenit nuntius vel epistola, moriatur mittens vel efficiatur furiosus, quod tunc non contrahatur obligatio per nuntium vel epistolam quia non durat voluntas nec intervenit consensus tunc temporis ....
>
> 'Puto tamen quod recipiens nuntium vel epistolam si aliquas impensas fecisset vel damna habuisset propter nuntium vel epistolam, ante certiorationem vel scientiam de revocatione mittentis, ad expenses et damna posset agere.'[209]

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(208) Baldus de Urbaldis Opera (Venice 1577-1599) ad D 17.1.1.

(209) 'And I am, therefore, of the opinion that if, before the messenger or letter has arrived, the sender dies or becomes insane, then no obligation is contracted through the messenger
(Footnote continued on next page)

Pothier,[210] is of the same view:

'... if I write a letter to a merchant living at a distance, and therein propose to him, to sell me a certain quantity of merchandise, for a certain price; and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain;[211] or if I die; or lose the use of my reason; although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death or insanity, makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us ....

(Footnote continued from previous page)
or letter because the intention does not persist, nor is there any consensus at that moment ....

I am of opinion that the person receiving the message or letter, if he has on account of that message or letter incurred any expenses or suffered any losses before obtaining certainty or knowledge of the revocation of the sender, has a good ground of action for the expenses and losses.'

(Wessels' translation: Contract ##241 and 244.)

(210) RJ Pothier Treatise on the Contract of Sale translated by LS Cushing (Boston 1839) para 32. See too M Troplong Le Droit Civil De La Vente (Brussels 1841) art 1582 #27.

(211) Loss of capacity to act is generally dealt with in conjunction with this situation, namely the crossing in the post of letters of acceptance and revocation of the offer, and the 2 situations are often simply equated as Pothier does. Whether the 2 situations can be equated is questionable but need not detain us in view of the fact that under our law the problem of the crossing in the post of letters of acceptance and revocation generally does not arise due to the fact that the letter of acceptance takes effect on posting (Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd 1921 CPD 244; Kergeulen Sealing and Whaling Co Ltd v CIR 1939 AD 487), whereas the letter of revocation only takes effect on receipt (Yates v Dalton 1938 EDL 177). It is, however, useful to bear in mind that the authorities discussed in what follows were generally interested primarily in the situation where letters of acceptance and revocation crossed in the post and they only dealt with loss of capacity to act as an adjunct to the discussion of such crossing.

> 'It must be observed, however, that, if my letter causes the merchant to be at any expense, in proceeding to execute the contract proposed; or if it occasions him any loss, as, for example, if, in the intermediate time between the receipt of my first and that of my second letter, the price of that particular kind of merchandise falls, and my first letter deprives him of an opportunity to sell it before the fall of the price; in all these cases, I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity, that no person should suffer from the act of another: Nemo ex alterius facto praegravari debet.'

Although Pothier does not make his view entirely clear it would seem that he has the offeree's negative interest, not his positive interest, in mind.

Pothier's reliance on the rule of equity nemo ex alterius facto praegravari debet as the basis of the rule gives rise to a difficulty in seeking to apply the rule to our law in that equity alone is not a sufficient basis for recognising the existence of a legal right in our law.[212] Nor is there any general legal right corresponding to the maxim concerned: in order to be entitled to recover loss suffered as the result of the act of another it is necessary to be able to bring the facts within one of the recognised categories of legal liability such as unjust enrichment,[213] delict, etc:

> '... reference or lipservice to a vague and nebulous notion is not enough to establish it as a rule of law'

(per Van den Heever JA in Tjollo Ateljees (Eins) Bpk v Small[214]).

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(212) Weinerlein v Goch Buildings Ltd 1925 AD 282 at 295; Wille Principles 17-19.

(213) It may be noted that the offeree's negative interest may well exceed the offeror's unjust enrichment.

(214) 1949(1) SA 856(A) at 865.

Unlike in Germany,[215] the position in France has never been *regulated by statute*; however, the development of the common law by the courts and writers has seen the extension of the protection accorded to offerees to the point where offers for a fixed period are *now* regarded as irrevocable and capable of being accepted during the fixed period despite purported revocation, and offers not for a fixed period will, if revoked before the lapse of a reasonable period, give rise to a claim for damages.[216] The position on death or other loss of capacity is less clear, some authors taking the view that the offer lapses, others that it lapses but that the offeree is entitled to be indemnified and yet others that the offer does not lapse.[217]

The source of the offeror's obligation has also been the subject of much discussion, although the fact of its existence, at least insofar as revocation is concerned, is not questioned. The principal theories are that there is a contract not to revoke the offer, that the obligation not to revoke the offer arises from the unilateral declaration of will by the offeror and that the obligation arises from equity or the offeror's 'civil responsibility'.

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(215) See 115 below.

(216) See generally J Flour Droit Civil Les Obligations (Paris 1975) vol 1, 102-6. For a survey of the position on this point in our law see K M Kritzinger 'The Irrevocable Offer' (1983) 100 SALJ 441.

(217) See eg Flour Obligations 106; E Gaudemet Théorie Général des Obligations (Paris 1937) 41; G Ripert & J Boulanger Traité de Droit Civil d'après le Traité de Planiol (Paris 1957) vol 2, 133; C Aubry & C Rau Cours de Droit Civil Français 6th ed (1942) translated by Louisiana State Law Institute Civil Law Translations vol 1 #343; M Planiol Treatise on the Civil Law 11th ed (1939) translated by Louisiana State Law Institute (1959) vol 2 part 1 #980; G Baudry - Lacantinerie & L Barde Traité Théoretique et Pratique de Droit Civil des Obligations 3rd ed (Paris 1906) vol 1 #34.

Planiol[218] is a supporter of the first theory:

'One can thus analyze the situation. The offer contains two things: a principal proposition which has as its object a bargain to be concluded; a secondary proposition, which accords a delay for reflection. The person to whom the offer is made has no reason for not accepting the latter proposition, it being to his advantage, since in accepting he does not bind himself to anything, and keeps the right to reject the principal proposition. His acceptance regarding the offer of the delay for reflection should, therefore, be presumed, or what amounts to the same thing, a tacit and immediate acceptance of this offer should be admitted.'

Baudry - Lacantinerie & Barde[219] may be quoted as supporters of the second theory:

'Toute offre qui est accompagnée de la fixation d'un délai pour l'acceptation donne naissance par elle-même a deux obligations distinctes: d'abord à l'obligation de maintenir l'offre pendant le délai fixé; puis à l'obligation conditionnelle d'accomplir la prestation qui fait l'objet de l'offre, si celle-ci est acceptée. Ces deux obligations ont pour cause génératrice une manifestation unilatérale de volonté. Et d'abord l'obligation de maintenir l'offre pendant le délai ne peut découler d'une convention; le délai est fixé par le pollicitant seul; il n'est pas convenu entre les parties.'[220]

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(218) Op cit #983.

(219) Op cit #33. Wrongly cited by Wessels Contract #246 for the contrary view.

(220) Every offer which is accompanied by the determination of a delay for acceptance gives rise by itself to 2 distinct obligations: firstly the obligation to maintain the offer during the fixed delay, secondly the conditional obligation to execute the performance which is the object of the offer, if it is accepted. These two obligations have as their source a unilateral manifestation of will. The obligation to maintain the offer during the delay cannot arise from an agreement; the delay is fixed by the offeror alone; it is not agreed between the parties.

Most of the authors cite equity in general terms as underlying the rule, either alone or in conjunction with one of the other theories. This need not detain us, however, as equity alone is not, as already pointed out, a sufficient basis for the recognition of a legal right in our law.

In Germany the position was largely resolved by statute(221) at an early stage in favour of the offer's remaining available for acceptance despite the offeror's loss of capacity to act, but the question nevertheless attracted the interest of the 19th century Pandektists.(222) Jhering in particular dealt with the matter in detail in his Culpa in Contrahendo.(223) His theory is built on

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(221) The German Civil Code (as amended to January 1, 1975) translated by IS Forrester, SL Goren & HM Ilgen (Amsterdam-Oxford 1975) s 153:

> 'The conclusion of a contract is not prevented by the fact that the offerer dies or becomes incompetent to enter legal transactions before acceptance, unless a contrary intention on the part of the offerer may be inferred.'

(222) Special weight is accorded by our courts to the views of the German Pandektists of the 19th century - see Hahlo & Kahn Laws 37.

(223) R v Jhering 'Culpa in Contrahendo' (1860) 2 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1; R von Jhering Oeuvres Choisies translated by O Meulenaere (Paris 1893) vol 2.

certain texts in the Institutes[224] and Digest [225] relating to the sale of things which by law cannot be the subject of a sale eg sacred objects, a free man, an inheritance which is not yet in existence, etc. These texts are not readily reconcilable but the

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(224) 3.23.5: 'Anyone who knowingly purchases land which is sacred, religious, or public, (as, for instance, a forum or a portico), does so to no purpose, even though, having been deceived by the vendor he buys it as private or profane property; and he will be entitled to an action of purchase because he could not obtain it, and may recover indemnity to the amount that it would have been worth to him not to have been deceived. The same rule applies where a party buys a freeman as a slave.'

(225) 18.1.62.1: 'Where a party ignorantly purchases sacred, *religious. or public places, supposing them* to belong to private individuals, it is held that the purchase is void; and an action on sale can be brought against the vendor by the purchaser, to recover the amount of the interest he had in not being deceived.'

11.7.8.1: 'Where a place that is religious is alleged to have been sold as profane, the Praetor grants an action in factum in favour of the party who is interested in the matter against the vendor; and *this action can also be brought against the heir* of the latter, since it resembles an action on a contract of sale.'

18.4.8: 'Where the vendor has no right of succession to an estate, in order to ascertain how much he should pay the purchaser, a distinction must be made, namely: where a right of succession, in fact, exists, but does not belong to the vendor, it should be appraised; but if there is no right of succession at all, with reference to which the agreement appears to have been made, the purchaser can recover from the vendor only the price which he paid, and any expenses which he incurred on account of the property.'

better view is that they give the innocent purchaser the right to be indemnified for his negative interest despite the fact that no contract comes into existence.[226] Jhering argues that the reason for the seller's obligation to indemnify the purchaser is the seller's culpa (whether or not he knew the object was not legally saleable[227]), and having deduced a general rule that parties contracting with one another owe each other a contractual diligentia both in relation to the formation of the contract and in the contract, which if contravened gives rise to a claim for damages, he applies the rule to other situations such as the revocation of an offer and the loss of capacity to act by the offeror. His theory has not, however, met with general acceptance, and it is especially in relation to loss of capacity to act on the part of the offeror that it is criticised on the ground that it is not feasible to attribute culpa to the offeror.[228] Jhering was very conscious of the difficulty and sought to deal with it as follows:[229]

> 'Maintenant, lorsque sans connaître le décès de l'auteur de l'offre, le destinataire accepte celle-ci et exécute le contrat, dans la croyance qu'il est devenu parfait, l'équité exige la reparation du dommage résulté de cette execution. Mais comment justiffier la demande de dommages-intérêts? Du côté du destinataire les conditions de cette action existent toutes, il est vrai, mais comment justifier une culpa dans le chef de l'autre partie? Il est impossible d'appeler le décès une culpa. Je dois avouer que ma théorie se heurte ici à une pierre d'achoppement que je ne puis lui faire surmonter sans l'effort le plus violent. Quant à refuser dans ce cas l'action en

(226) De Wet & Yeats Kontraktereg 77-8.

(227) The texts may give the impression that dolus is required but Jhering shows that this is not so - op cit #7

(228) See eg Goudsmit, infra, 90-92 and Van der Does, infra, 68-75, 81.

(229) At 81-3 of Meulenaere's transation.

dommages-intérêts, mon sentiment du droit s'y oppose de la manière la plus energique, et plutôt que d'exclure ici l'action, je veux croire que dans la construction de ma *théorie j'ai* commis quelque faute dont moi-même je ne me suis pas apercu. Or, du moment qu'on l'accorde, il ne reste plus qu'à déduire la culpa de la manière suivante. Si l'on avait conclu entre présents, la mort n'aurait nullement pu avoir cette influence dommageable. Lors donc qu'un absent veut contracter, il doit, pour garantir l'autre partie contre cette éventualité dommageable, se donner la peine d'aller la trouver en personne; s'il ne le fait point, si au lieu de cela il choisit la voie *plus simple de la communication par* voie de lettre ou d'intermédiaire, il substitue par cela même, dans l'intérêt de ses aises, une forme qui expose l'adversaire au danger dont il s'agit. La culpa consiste donc en ceci qu'au lieu du moyen, seul sûr, de la communication orale en personne, il a eu recours, au peril de l'autre partie, à un moyen incertain.'(230)

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(230) Now, when without knowing of the decease of the author of the offer, the addressee accepts it and performs the contract in the belief that it has become perfected, equity demands the making good of the damage resulting from this performance. But *how can one justify the claim for damages?* From the side of the addressee the conditions for such action all exist, it is true, but how can one justify culpa on the part of the other party? It is impossible to call the decease culpa. I have to admit that my theory knocks against a stumbling block here which I cannot cause it to overcome *without a most violent* effort. As for refusing an action for damages in this case, my feel for right (the law?) objects most strongly, and rather than excluding the action here, I would believe that in the formulation of my theory I have made some mistake which I have not perceived. Now, the moment one accepts this, it only remains to deduce culpa in the following manner. If it had been concluded between persons who were present, death would not have in any way been able to have this damaging influence. *Accordingly, when a person who is absent wishes to contract,* he ought, in order to guarantee the other party against any damaging eventuality, to put himself to the trouble to go to find him in person; if he does not do this at all, if instead of this he chooses the simpler way of communication by way of letter or intermediary, he substitutes thereby, for his own convenience, a form which exposes the other party to the danger in question. The culpa consists therefore in that instead of using the only sure way, communicating orally in person, he had recourse at the peril of the other party to an uncertain way.

However, as Wessels[231] points out:

> 'Surely an offer by letter is quite a normal way of transacting business, and a person who executes such a contract before he knows that his acceptance has reached the offeror is as much guilty of culpa as the proposer.'

One might add that, if culpa is the basis of the liability, the offeree's act in acting on his 'acceptance' of the offer before he knows whether or not the acceptance is effective appears to be an actus novus interveniens destroying the causal chain between the offeror's act and the loss suffered. Similarly, it would seem arguable that the offeree elects to take the risk ie one is dealing with a case of volenti non fit iniuria.[232]

This does not, however, necessarily invalidate the analogy between sales of articles which are legally unsaleable and offers which lapse due to the offeror's loss of capacity to act.[233] If in the case of sales of legally unsaleable articles the seller is liable, despite the absence of a valid contract, to indemnify the purchaser whether or not the seller was at fault in any way, one has another instance in our law where liability does not arise either ex contractu or ex delicto. The question then arises as to whether

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(231) Contract #243.

(232) True, this is to adopt the language of the law of delict and it is clear that Jhering's concept of culpa in contrahendo is far removed from delictual culpability. However, this notwithstanding, it is thought that these problems inevitably apply to the concept of fault in any context.

(233) The analogy lies in the fact that in both cases expenses may be incurred and losses may be suffered by a party in the bona fide belief that a contract exists when due to a technicality of the law no contract in fact exists. But see Wessels Contract #245.

sales of legally unsaleable articles is an isolated exception or whether it is an application of a more general rule, bearing in mind that in Roman law rules are not always stated generally but are to be inferred from specific examples of their application. Windscheid,(234) amongst others,(235) is a strong supporter on this basis of Jhering's conclusions regarding an offeree's right to indemnification even though he does not accept Jhering's culpa theory.(236)

Turning to the Netherlands, the most important writer for present purposes is Goudsmit.(237) He appears to consider that but for the codification of Dutch law the offeree would have had a right to indemnification for his negative interest in the event of revocation but not of loss of capacity to act:

> 'Wel wordt eene zoodanige schadevergoeding voor dergelijk geval in het Romeinsche recht niet uitdrukkelijk vermeld, doch zou ze door de Rom. Juristen vermoedelijk niet zijn uitgesloten geweest, indien bij hen het handelsverkeer onder afwezigen tot dien graad van ontwikkeling ware gekomen als bij ons het geval is.
>
> ['De uitdrukkelijke bepalingen van het Rom. recht betreffen het geval, dat iemand iets beloofd heeft, wat niet in den handel of waarvan de praestatie onmogelijk is .... Eene analogische uitbreding tot ons geval is niet boven bedenking. Ook de

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(234) B Windscheid Lehrbuch des Pandektenrechts 9th ed by T Kipp (Frankfurt 1906) #307.

(235) See the further writers referred to by Windscheid, loc cit.

(236) See also 3 below (at 145-54): Excursus: A general rule that a person dealing with another in reliance on the other's continued capacity to act is entitled to be indemnified for his negative interest?

(237) J E Goudsmit Pandecten-Systeem (Leiden 1866) part 2 at 90-91. Goudsmit is described by AA Roberts A South African Legal Bibliography (Pretoria 1942) as: 'One of the outstanding scholars of Roman Law in the 19th century'.

juridische constructie der actie tot schadevergoeding is nog zeer betwist. De culpa in contrahendo, gelijk ze door Jhering geformuleerd, en later door hem zelf merkelijk gewijzigd is, laat zich inderdaad niet met consequentie doorvoeren.]

....

'Ook dan als *de voorsteller komt te overlijden voor het* tijdstip, dat de aanneming den voorsteller is kenbaar gemaakt, in de gevallen waarin die kennis vereischt wordt, is geen overeenkomst voltrokken, en zijn zijne erfgenamen jegens den bewilliger, die onbekend met diens dood het aanbod had aangenomen, zelfs niet tot praestatie van het negatieve belang gehouden.'

The other early post-codification writers take the view that there is no right to indemnification in the case either of revocation or of loss of capacity to act. Opzoomer[238] and Diephuis[239] rely solely on the provisions of the Civil Code, but Van der Does,[240] who devotes a chapter of his published thesis to the question, considers and rejects various possible theories, including, in particular, Jhering's culpa theory.[241] As in France, however, with the passage of time the law developed in the direction of recognising that an offeror may make an offer

(238) CW Opszoomer Het Burgerlijke Wetboek 2nd ed (Amsterdam 1879) vol 6, 19-20.

(239) G Diephuis Het Nederlandsch Burgerlijk Regt 2nd ed (Gronigen 1886) vol 10, 359-61, 368-9.

(240) A van der Does de Bijde Overeenkomsten gesloten deur middel van Brieven, Boden, Openbare Aankondigingen of Telegrammen (Leiden 1860) 62ff.

(241) The principal theories he considers and rejects are: acceptance takes effect on despatch (64); damages may be recovered under an actio doli or in factum (64,75-6); damages may be recovered on the basis of delict (66-8); Opzoomer's theory (66-68); Jhering's theory (68-75, 81); damages may be recovered on analogy with the position in mandate (64-5, 73-4, 81-2); and the Dutch statutory position (76-79).

irrevocable and that if he does so the offer may be accepted even if he has purported to revoke it. That this is the law was finally settled by the Hoge Raad in 1969[242] and has since been expressly embodied in the new Civil Code.[243] The Hoge Raad did not directly hold what the source of the offeror's obligation is, and little attention is given to this question by the writers.[244] The dominant approach is, however, to see the source of the offeror's obligation as being the offeror's unilateral declaration of will which is construed as a waiver (which may be unilateral under Dutch law) of the capacity to revoke the offer where the offer is for a fixed period.[245]

Strangely, in South Africa there is no reported case law on the question despite the fact that the problem must be of daily occurrence. Wessels[246] deals with the matter in some detail and while he concedes that there 'are many jurists of great weight who have followed Baldus in holding that an indemnity can be claimed from the estate of the offeror', he appears to doubt whether this is so in our law for he says:

> 'It is difficult to see upon what principles we are to base a claim for damages. It seems to be a risk to which all persons who desire to contract are exposed.'

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(242) Lindeboom - Amsterdam 19 December 1969, NJ 1970, 154.

(243) Art 6.5.2.2.

(244) But see Van Dunné Normatieve Uitleg 100ff.

(245) See eg the Lindeboom - Amsterdam case supra especially the note at 376-7; C Asser Handleiding tot de Beoefening van het Nederlandsch Burgerlijk Recht Verbintenissenrecht 6th ed by LEH Rutten (Zwolle 1982) vol 2, 101-3; LC Hofmann Het Nederlands Verbintenissenrecht 8th ed by SN Opstall (Groningen 1959). In the 3rd ed of Asser (Zwolle 1968) 92, the unilateral act of the offeror is likened to the acceptance or rejection of an inheritance, the acknowledgment of a child, a notice of default, etc.

(246) Contract ##243-246.

The only possible basis for such a liability for damages is, he suggests, 'an implied condition in every offer that if it lapses by the death of the offeror, the person who accepts and executes the contract in ignorance of the revocation, death or disability of the offeror shall not suffer any loss thereby'. He does not indicate whether he considers that such a condition may be effectively stipulated unilaterally by the offeror or whether he considers that it is necessary to construe a contract between the offeror and the offeree to this effect.

Kahn[247] similarly states:

> 'Would our courts ... come to the relief of the offeree, who, not knowing of the death of the offeror, believes he has accepted and commences the execution of the putative contract? This has been a vexed question from the time of Baldus, who considered that an indemnity could be recovered from the estate. Wessels appears to conclude that such a claim does not exist in our law. It is difficult to find any basis for it in principle other than a tacit term in the original offer that this indemnity will be paid. It would appear very doubtful if our courts would be astute to read such a term into an offer.'

Kerr,[248] on the other hand, takes the view that a right to indemnification should be admitted, although he does not suggest a basis for the right, while Christie[249] suggests that it is better to let the loss lie where it falls.

What conclusions should, then, be drawn in regard to the position in our law? The following analysis is suggested, albeit with humility in view of the eminence of the jurists who have

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(247) E Kahn 'Some Mysteries of Offer and Acceptance' (1955) 72 SALJ 246 at 271. See also Hahlo & Kahn Laws 452.

(248) Contract 43.

(249) Contract 40.

already expressed their views on the question. The weight of authority is, it is thought, in favour of admitting an obligation on the part of the offeror to indemnify the offeree for his negative interest, on analogy with the position in relation to the sale of articles which are not legally saleable. This obligation is a natural incident of offers and, unless excluded, arises ex lege, not ex contractu or ex delicto. Contract and delict are not the only sources of obligations in our law: obligations may arise from various other sources, such as unjust enrichment, negotiorum gestio, etc; accordingly the recognition of a further category would not do violence to the structure of our law.(250)

If the approach that the obligation arises ex lege is rejected, can it be argued that the obligation arises ex contractu? On this approach an offer would have to be seen as being composed of 2 offers: the principal offer to enter into the contract in question and a subsidiary offer to indemnify the offeree should the offer lapse because of the offeror's loss of capacity to act. The difficulty is how and when the subsidiary offer is accepted. Bearing in mind that the loss of capacity may occur before the offer is received, it would be necessary to hold either that acceptance of the subsidiary offer occurs automatically as soon as the offer is made or that the subsidiary offer does not lapse on the offeror's loss of capacity to act. To hold that the subsidiary offer is deemed to have been accepted as soon as it is made would, even allowing for the fact that it only entails advantages for the offeree, be a fiction inconsistent with the principles of our law of contract, especially in view of the fact that the offeree would not even be aware of the contract until receipt of the offer.

The alternative approach is more arguable, namely that the subsidiary offer does not lapse on the offeror's loss of capacity to

(250) Cf Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 198-9 in regard to the source of a claim by a company against a director for secret profits.

act. True, this would be inconsistent with the rule that offers lapse on the offeror's loss of capacity to act, but it has already been shown[251] that this rule is not an invariable one and is subject to an exception where the parties agree otherwise, as in the case of an option. And, once it is accepted that lapsing can be excluded by agreement, should it not be recognised that lapsing can be excluded by stipulation of the offeror?[252] In other words, the rule that offers lapse on the offeror's loss of capacity to act would be a natural incident of offers but could be excluded by the offeror.[253] Such an approach would introduce a beneficial flexibility into our law, which would be lacking if there is an invariable rule that offers lapse on the offeror's loss of capacity to act irrespective of whether or not the offeror would wish such lapsing to occur. It is not difficult to envisage cases where such flexibility would be beneficial: for example, tenderers often invest considerable sums of money in preparing tenders which must be lodged by a certain time to rank for consideration, and if such tenders were to be automatically invalidated by a loss of capacity on the

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(251) See 72-4 above.

(252) As Christie Contract says (at 39):

> 'When the subjective approach to the formation of contracts prevailed, there could be no doubt about the effect of the death of the offeror or offeree - no contract could come into existence because there was no longer a possibility of consensus between the parties. Thus an offeree could not notify his acceptance to the executor of the offeror, and an offeree's executor could not notify the estate's acceptance to the offeror. Now that our approach is more objective this reasoning will no longer suffice, nor will the rigidity of the rule. Why should an offer not be made in terms which, expressly or impliedly, permit its acceptance by the executor of the offeree or to the executor of the offeror?'

(253) Cf De Wet & Yeats' view at 72 n 118 above on the question of the lapsing of offers on the offeror's death.

part of the tenderer even if the tenderer did not wish such lapsing to occur this would clearly not be in the interests either of the tenderer's estate or of the offeree.

(2) Application of principles

(a) If an apparently regular cheque or other payment instruction is fully effectual

If the view taken above[254] is upheld that it is a term of the bank customer contract that apparently regular cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act the consequences will be as follows.

If a bank is unaware of a customer's loss of capacity a cheque drawn or payment instruction given by the customer will function as :

- a demand and payment direction if it is drawn or given within the scope of a credit in the customer's account;
- the exercise of an option, a demand and a payment direction if it is drawn or given within the scope of overdraft facility;
- as an offer to borrow, demand and payment direction if it is drawn or given outside the scope of either such a credit or such an overdraft facility.[255]

It does not make a difference if the cheque was drawn or payment instruction was given before or after the loss of capacity[256] or by the customer personally or by a representative on his behalf.

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(254) See 76-91 above.

(255) See 21-4 above.

(256) Cf 74-6 above.

It follows that if the cheque is drawn or the payment instruction is given :

- within the scope of a credit in the customer's account, payment of the cheque or payment instruction will constitute a valid repayment on account of the bank's indebtedness to the customer;

- within the scope of an overdraft facility, a contract of loan will come into existence on exercise of the option, payment of the cheque or payment instruction will constitute a valid advance of the monies lent and the bank may recover the loan in accordance with its terms together with the agreed interest;

- outside the scope of either such a credit or such an overdraft facility, a contract of loan will come into existence if the bank accepts the offer to borrow, payment of the cheque or payment instruction will constitute a valid advance of the monies lent and the bank may recover the loan in accordance with its terms together with the agreed interest.

The bank will moreover be entitled to its charges.

Conversely, if the bank dishonours a cheque drawn or payment instruction given within the scope either of a credit in the customer's account or of an overdraft facility, the bank will be in breach of its obligation to honour the cheque or payment instruction and will be liable for such damages, if any, as the customer may suffer as a result.(257)

If the bank becomes aware before honouring or dishonouring the cheque or payment instruction that the customer has ceased to have

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(257) See 91-2.

capacity to act, the cheque or payment instruction will cease to be effectual and the bank's authority and, if applicable, duty to honour the cheque or payment instruction will terminate. If, however, the bank has already performed certain of the services to be performed pursuant to the cheque or payment instruction, the bank will be entitled to the charges relating to those services if they are divisible or to a pro rata share of the total charges if they are not divisible, in accordance with the ordinary principles relating to supervening impossibility where performance has partially taken place.(258)

If the cheque or payment instruction is in favour of the customer himself, the additional question arises as to whether, even if the cheque or payment instruction is fully effectual, payment to the customer, as opposed to to his curator, is effectual. This question has been considered above(259) and the conclusion reached there is that the payment is effectual.(260)

(b) If a cheque or other payment instruction must be a valid separate authority in its own right

If the view taken above(261) is rejected that it is a term of the bank customer contract that apparently regular cheques and other payment instructions are fully effectual as between bank and

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(258) Cf Boyd v Stuttaford & Co 1910 AD 101; De Wet & Yeats Kontraktereg 159.

(259) See 94-7 above.

(260) The alternatives are that the bank is entitled to be indemnified for its negative interest or that it is limited to such claims as it may have based on unjust enrichment - ibid.

(261) See 76-91 above.

customer until the bank becomes aware of the customer's loss of capacity to act and it is held that a cheque or other payment instruction must constitute a valid separate authority in its own right, it is necessary to determine firstly what the effect of the customer's loss of capacity is on each of the functions of the cheque or payment instruction and secondly if one function lapses what the effect is on the other function or functions. Three situations require to be distinguished :

(i) Loss of capacity occurs before cheque or payment instruction is issued

If the loss of capacity occurs before the cheque or payment instruction is issued, the 'cheque' or 'payment instruction' is a nullity and the bank has no duty or authority to honour it. If the bank in fact does so, the bank's rights are, it is considered, limited to such claims as it may have based on unjust enrichment.(262)

Two possible qualifications where the customer's account is in credit call for consideration.(263)

Firstly, where the cheque or payment instruction is in favour of the customer himself and payment is made to the customer in person as opposed to to his curator it is also necessary to have regard to the question of what the position is of a debtor who pays his debt to his creditor in ignorance of the creditor's loss of capacity to

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(262) But see (3) below (at 145-54): Excursus: A general rule that a person dealing with another in reliance on the other's continued capacity to act is entitled to be indemnified for his negative interest?

(263) The qualifications do not arise if the customer's account is not in credit because they are both based on the payer being indebted to the payee which is not the case if the account is in overdraft and the cheque or payment instruction , a nullity.

act. This question is considered above[264] and it is suggested there that a rule should be recognised in our law entitling the debtor to be indemnified for his negative interest.

However, a further difficulty arises in the situation in question in that although the bank is indebted to the customer, if the cheque or payment instruction does not function as a demand and payment direction the debt is not due and payable and the payee has not been determined. Nor does the bank have the right under the bank customer contract to elect at any time to pay a portion, or even the whole of its indebtedness to the customer: it would first have to terminate the bank customer contract on due notice.[265] The performance due by the bank is therefore neither ascertained nor due and payable and payment tendered by the bank to the customer could be rejected by the customer. Would a rule that a debtor is entitled to his negative interest if he pays his creditor in ignorance of the creditor's loss of capacity apply in these circumstances? The answer is, it is suggested, that despite the difficulties raised the rule would apply. Although the customer could have rejected the bank's tender of payment, had he not done so the payment would have constituted a valid payment on account of the bank's indebtedness to the customer, and it is thought that it is in accord with the equitable basis of the rule that it should apply wherever payment would have served to discharge an indebtedness had the customer still had capacity to act.

Secondly, in the case of cheques and other payment instructions in favour of third parties, the third party may be a creditor of the customer and there is authority for the proposition that if one makes payment to one's creditor's creditor this will serve to discharge one's indebtedness to one's own creditor whether or not he

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(264) See 94-7 above.

(265) Cf Joachimson v Swiss Banking Corporation [1921] 3 KB 110(CA) at 125 and 127; Cowen Negotiable Instruments 418; JC Stassen 'Banke en hul kliënte' 1983 MB 80 at 85.

consented to 'the payment, if the payment has the effect that 'the creditor's affair has been advantageously managed without his knowledge', although the precise scope of the rule is far from clear, as is the extent to which it may confer a greater right on the debtor than the ordinary principles of unjust enrichment.(266)

The position where the cheque is drawn and issued, or the payment instruction is given, not by the customer personally but by a representative on the customer's behalf has been considered above(267) and it is unnecessary to repeat here what is said there. The conclusions reached were firstly that if both the representative and the bank are unaware of the customer's loss of capacity the cheque or payment instruction has the same effect as if it had been drawn and issued, or given, by the customer personally before his loss of capacity to act.(268)

The second conclusion reached was that if the bank is unaware of the customer's loss of capacity but the representative is aware of the loss the bank is limited to a claim for its negative interest. The effect of this would be that the bank would be

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(266) Voet 46.3.7; Van der Linden 1.18.1; Pothier Obligations paras 468 and 493; Resnik v Lekhethoa 1950(3) SA 263(T) at 266Dff; C Pettigrew (Pvt) Ltd v Cone Textiles (Pvt) Ltd t/a Darryn Textile Mills 1976 (3) SA 569 (R) at 572D-F; Wessels Contract # 2207; De Wet & Yeats Kontraktereg 234-5; Kerr Contract 301-2; JF Scholtens 'Payment to One's Creditor's Creditor' (1950) 67 SALJ 315; RS Welsh 1950 Annual Survey 85.

(267) See 97-109 above.

(268) The position in regard to such cheques drawn and payment instructions given before the customer's loss of capacity to act is dealt with at 137-45 below.

entitled to recover the amount paid by it from the customer's estate and to set off this claim against any credit in the customer's account, provided that set-off is not prevented for some extraneous reason.(269) The bank would not, however, be entitled to its charges or, where applicable, to the agreed interest, although it would be entitled to the charges and interest, if any, that it could have earned elsewhere had it not paid the cheque or payment instruction. The bank would also not be liable for damages for wrongful dishonour if it dishonoured the cheque or payment instruction, even if it was unaware of the customer's loss of capacity.

(ii) Loss of capacity occurs after cheque or payment instruction is issued but before it is received by bank

Where the loss of capacity to act occurs after the cheque or payment instruction is issued but before it is received by the bank, it is necessary to distinguish between cheques drawn and payment instructions given within the scope of a credit in the customer's account or of an overdraft facility, on the one hand, and cheques drawn and payment instructions given outside the scope of either such a credit or such a facility, on the other. Cheques and payment instructions in the former category constitute the exercise by the customer of rights enjoyed by the customer under the bank customer relationship while cheques and payment instructions in the latter category constitute in the first instance offers to borrow, and as will be shown the considerations applicable to the 2 categories are different.

(A) Customer's account in credit or overdraft facility available

A cheque drawn or payment instruction given by a customer within the scope of a credit in the customer's account constitutes notice

(269) Cf 15 n 25 above.

by the customer exercising the right to demand repayment of monies lent to the bank and the right to direct to whom payment is to be made.[270] A cheque drawn or payment instruction given by a customer within the scope of an overdraft facility constitutes notice exercising the right to borrow, the right to demand the advance of the monies lent and the right to direct to whom payment is to be made.[271]

The first question to arise is : When does notice exercising a right under a contract take effect? Direct authority is available in regard to notice exercising an option: such notice takes effect on communication to the addressee, unless otherwise agreed.[272] Direct authority is, however, lacking on the position regarding notice making a demand or giving a payment direction, but in Swart v Vosloo[273] it was held that notice exercising the right to cancel a contract similarly takes effect on communication to the addressee unless otherwise agreed, and it is considered that the same principle applies by analogy to notice exercising any other right under a contract. It is considered, moreover, that there is no basis for implying a term to the contrary[274] in the bank customer contract, such as that a cheque or other payment instruction takes effect on issue. Such a term would give rise to the unacceptable anomaly that the bank would for a period - the length of which would

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(270) See 21-2 above.

(271) Ibid.

(272) See eg Smeiman v Volkerz 1954(4) SA 170(C) at 176E-F.

(273) 1966(1) SA 100 (A) at 105E and 115.

(274) eg on analogy with contracts concluded through the post - see Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd 1921 CPD 244; Kergeulen Sealing and Whaling Co Ltd v CIR 1939 AD 487; but cf De Wet & Yeats Kontraktereg 32 ff.

be subject to the whim of the holder - be subject to an obligation of which it was entirely unaware.

The second question to arise is : *Is it necessary that the* customer should continue to have capacity up to the time the cheque *or payment instruction* takes effect or does it suffice that he had capacity at the time of issuing the cheque or payment instruction? Direct authority on the point is lacking and 2 competing considerations have, it is suggested, to be weighed up in seeking the answer to the question.

Firstly, approaching the matter from a jurisprudential point of view there is, it is suggested, much to be said for the approach that it is necessary that a person performing a juristic act, such as the giving of notice pursuant to a contract, should still have capacity to act at the time the act takes effect. This is obviously the time when the addressee must have capacity and it is, it is thought, more philosophically *satisfying firstly that the addressor* should have capacity when the notice takes effect and secondly that the addressor and the addressee should have capacity at the same point in time.

On the other hand, practical convenience clearly favours, it is considered, the approach that the addressor need only have capacity to act at the time of *despatching the notice. For* example, if a landlord gives notice of termination of a lease he may enter into a new lease in respect of the premises before the notice is communicated to the tenant and the tenant may enter into a lease of new premises before he becomes aware of the landlord's loss of capacity, with the potential for serious prejudice to both parties if the notice is invalid.

How is one to weigh up these conflicting considerations? The answer is, it is suggested, albeit with some diffidence, that the fairly vague philosophical notions mentioned above should give way

to the hard facts of practical convenience,[275] and that therefore if a customer ceases to have capacity to act after issuing a cheque or other payment instruction but before it is received by[276] the bank the position will be the same as if the loss of capacity were only to occur after receipt by the bank, as dealt with below.[277]

If on the other hand the view is taken that it is necessary that a customer should have capacity to act not only on issuing a cheque or other payment instruction but also on receipt thereof by the bank, the position will be the same as where the customer did not have capacity at the time of issuing the cheque or payment instruction dealt with above.[278]

(B) Customer's account not in credit and no overdraft facility available

A cheque drawn or payment instruction given outside the scope either of a credit in the customer's account or of an overdraft

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(275) Cf the Cape Explosive Works case supra at 265 dealing with a similar problem in relation to the conclusion of contracts through the post. The philosophical difficulties can possibly be overcome by seeing the notice as conditional between despatch and receipt. On this approach the notice would on fulfilment of the condition date back to the time of despatch - cf 361ff below.

(276) For present purposes the expressions 'receipt by' and 'communication to' the bank will be equated but it should be borne in mind that receipt and communication may not take place simultaneously and that it is in fact communication that is the relevant point in time.

(277) See 137-45 below.

(278) See 129-32 above.

facility constitutes in the first instance an offer to borrow[279] and as already pointed out[280] an offer lapses on the offeror's loss of capacity to act if the offer has not been accepted prior to the loss of capacity. Moreover the demand and payment direction functions of such a cheque or payment instruction are dependent upon acceptance of the offer to borrow so that if the offer lapses the other functions necessarily lapse too. It follows that acceptance of the offer is the critical time in determining the bank's position in regard to such a cheque or payment instruction.

It does not necessarily follow, however, that if the bank purports to accept the offer and honours the cheque or payment instruction in ignorance of the customer's loss of capacity it will be limited to such claims as it may have based on unjust enrichment. This question is dealt with above[281] and the conclusion reached there is that the better view is that the bank is entitled to be indemnified for its negative interest ie the bank is entitled to recover the amount paid by it together with the interest it could have earned elsewhere had it not honoured the cheque or payment instruction.

The position in regard to the bank's charges is, it is suggested, similar. If the offer function of a cheque or other payment instruction does not fall away in its entirety but still serves to afford the bank the right to its negative interest, it is suggested that the other functions should do likewise.

Where the cheque or payment instruction is in favour of the customer himself and payment is made to the customer in person as opposed to to his curator, the bank will, it is suggested,

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(279) See 20 and 23 above.

(280) See 72-4 above.

(281) See 109-126 above.

nevertheless be entitled to be indemnified for its negative interest inasmuch as it is entitled to its negative interest both in its capacity as offeree[282] and in its capacity as payer.[283] If this view is incorrect, the bank will be limited to such claims as it may have based on unjust enrichment.

(iii) Loss of capacity occurs after cheque or payment instruction is received by the bank but before it is honoured or dishonoured

Where the loss of capacity to act occurs after the cheque or payment instruction is received by the bank but before it is honoured or dishonoured, it is again necessary to distinguish between cheques drawn and payment instructions given within the scope of a credit in the customer's account or of an overdraft facility, on the one hand, and cheques drawn and payment instructions given outside the scope of either such a credit or such an overdraft facility, on the other.

(A) Customer's account in credit or overdraft facility available

As already pointed out,[284] a cheque drawn or other payment instruction given within the scope of a credit in the customer's account serves a dual function, namely a demand for repayment of a loan repayable on demand and a direction regarding to whom payment is to be made. A cheque drawn or other payment instruction given within the scope of an overdraft facility serves a triple function, namely the exercise of an option to borrow, a demand for the advance of the monies lent and a direction regarding to whom payment is to

(282) See 109-126 above.

(283) See 94-7 above.

(284) See 21-2 above.

be made. All these functions take effect on receipt by the bank of the cheque or payment instruction,[285] but the question arises as to what the effect is on the cheque or payment instruction if the customer ceases to have capacity to act before the bank honours or dishonours it.

In seeking the answer to this question it is necessary to recall that the bank customer relationship consists of a combination of a contract of mandate - the bank customer contract - and one or more contracts of loan from time to time,[286] and that the payment direction function relates to the mandate element of the relationship and the demand and exercise of an option functions to the loan element.[287]

The effect of a mandant's loss of capacity to act on a mandate has been dealt with above[288] and the conclusion reached there is that the better view is that the mandate only lapses on the mandatary's becoming aware of the loss of capacity and not on the loss itself ie the payment direction function of the cheque or payment instruction remains fully effectual until the bank becomes aware of the customer's loss of capacity.[289]

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(285) See 133-4 above.

(286) See 6ff above.

(287) See 21-3 above.

(288) See 37-51 above.

(289) If this view of the effect of a mandant's loss of capacity is incorrect, the alternatives are - ibid - that if the mandatary performs the mandate in ignorance of the loss of capacity he is entitled to be indemnified, although it is not clear whether the indemnity would be for his positive interest or his negative interest. If a mandatary is entitled to his positive interest, the bank would have the same rights it would have had had the customer not ceased to have capacity but would not incur any liability for wrongful dishonour if it dishonoured the cheque or payment instruction. If a mandatary is entitled to his negative interest only, the

(Footnote continued on next page)

What is the effect on a demand of the demandant's loss of capacity? The answer is, it is considered, that a demand would not normally lapse after it had taken effect. There is a dearth of authority on the question but it is considerd that on general principle after a legal act has taken effect it does not lapse if the doer ceases to have capacity to act. There are exceptions, such as offers to contract, but these exceptions arise from their own special circumstances - such as the requirement that there be consensus ad idem at the same point in time, in the case of the conclusion of a contract - which are not applicable to demands. Moreover, to make an exception of demands and other analogous notices would lead to serious anomalies. For example, if a landlord gives notice of termination of a lease he may enter into a new lease in respect of the premises, and the tenant may likewise enter into a lease in respect of new premises; the anomalies that would arise if the notice lapsed on the landlord's loss of capacity to act are manifest.

Similarly, the exercise of the option to borrow would not normally lapse after it had taken effect, if the customer ceases to have capacity to act. A contract comes into existence when the exercise of the option takes effect and in general contracts do not lapse if either party ceases to have capacity to act.(290)

(Footnote continued from previous page)
bank would be entitled to recover the amount paid by it from the customer's estate and to set off this claim against the credit in the customer's account, provided that set-off is not prevented for some extraneous reason. The bank would not, however, be entitled to its agreed charges, but would instead be entitled to such amount as it could have earned elsewhere had it not honoured the cheque or payment instruction. Nor would it be liable for damages for wrongful dishonour if it dishonoured the cheque or payment instruction.

(290) Friedlander v De Aar Municipality 1944 AD 79 at 93.

What, however, is the position in regard to the demand and exercise of an option functions of a cheque or payment instruction if before honouring the cheque or payment instruction the bank becomes aware of the customer's loss of capacity with the result that the payment direction function lapses? Are the demand and exercise of an option functions so closely linked to the payment direction function that if the latter function lapses so do the former functions, *ie the functions are indivisible? True*, if the payment direction function lapses this question is of limited practical significance, but it is not entirely without significance: for example, if the customer's account is in credit and the demand function does not lapse prescription will run,[291] no further demand will be necessary before the institution of action[292] and set-off will operate if there is a reciprocal debt which is similarly due and payable.[293]

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(291) Section 12(1) of the Prescription Act 68 of 1969, but see Malan Bills of Exchange # 328 n 150 who takes the view that prescription in any event commences to run in respect of a deposit as soon as it is made ie even before demand. (Cowen Negotiable Instruments 419-420 takes the same view in relation to the Prescription Act 18 of 1943.) The correctness of this view is, however, doubted. The Prescription Act is designed to penalise a person who can enforce a claim by action but does not do so - Van Vuuren v Boshoff 1964 (1) SA 395(T) at 401D - and it would be an anomaly if a customer were to be penalised for not immediately reclaiming a deposit made by him when the very object of the bank customer contract is that the bank will hold the customer's funds until he demands repayment.

(292) Herbstein & Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed by LdeV van Winsen, JPG Ekteen & AC Cilliers (Cape Town 1979) 101.

(293) Postmaster-General v Taute 1905 TS 582 at 590; Thorne & Anor NNO v The Government 1973(4) SA 42(T) at 45F, confirmed on appeal sub nom The Government v Thorne & Anor NNO 1974(2) SA 1(A) at 9E-F.

The better view is, it is considered, that the payment direction, demand and exercise of an option functions are indivisible and accordingly that if the payment direction function lapses so do the other 2 functions. If the customer's account is in credit and the payment direction function lapses the payee is undetermined and the bank does not have the right under the bank customer contract to elect at any time to pay a portion, or even the whole, of its indebtedness to the customer: it would first have to terminate the bank customer contract on due notice.(294) Accordingly, if the demand were to stand despite the lapse of the payment direction the bank would be under an obligation to make payment but would not know to whom payment should be made. Such an anomaly is unacceptable and it is considered that it follows that it is implicit in the bank customer contract that the demand function must lapse with the payment direction function.(295)

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(294) Cf Joachimson v Swiss Bank Corporation [1921] 3 KB 110(CA) at 127; National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd [1972] 1 All ER 641 (HL) at 662f.

(295) Could it be argued that this reasoning has no application where the cheque or payment instruction is in favour of the customer himself because it serves only one function, namely a demand, which does not lapse? The answer is, it is considered, in the negative. As already pointed out (at 8-9 above), the bank undertakes under the bank customer contract to render various services of which payment to a third party is only one. For example, the bank impliedly undertakes, it is considered, to remain open at certain hours, to have reasonable quantities of cash readily available for immediate withdrawal, to allow the customer to specify what denominations of notes and coins he wants, to keep, and to furnish copies to the customer of, statements reflecting all transactions on the customer's account, etc. When, therefore, a customer issues a cheque or payment instruction in his own favour he is not merely demanding repayment of a loan but is availing himself of these services; in other words the cheque or payment instruction relates both to the loan and mandate elements of the bank customer relationship.

The same is, it is thought, true of the exercise of an option function. If it were otherwise, the anomaly would arise that a contract of loan would come into existence in the amount of the cheque or payment instruction, but, due to the fact that the demand and payment direction functions had not taken effect, it would remain in the discretion of the customer whether or not to demand the advance of the loan. Such a loan would in any event be largely indistinguishable from the option to borrow from which it arises; in fact, the grant of the overdraft facility could, as already pointed out,(296) itself have been categorised as such a loan, but the view taken was that it is better categorised as an option to borrow. In other words, the demand, payment direction and exercise of an option functions are all indivisible.

If the payment direction, demand and exercise of an option functions of a cheque or other payment instruction do not lapse until the bank becomes aware of the customer's loss of capacity it follows that if a bank is unaware of the loss of capacity at the time of honouring a cheque or payment instruction, the payment will constitute:(297)

- a valid repayment on account of the bank's indebtedness to the customer where the customer's account is in credit;

- a valid advance of monies lent where the account is not in credit, and the bank will be entitled to recover the loan in accordance with its terms, together with the agreed interest.

The bank will also be entitled to its charges. Conversely, if the bank dishonoured the cheque or payment instruction despite being

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(296) See 19-21 above.

(297) Subject to what is said below if the payee is the customer himself.

unaware of the customer's loss of capacity, the bank will be in breach of contract and will be liable for such damages, if any, as the customer may have suffered as a result.(298)

If the bank becomes aware of the customer's loss of capacity before honouring the cheque or payment instruction the functions of the cheque or payment instruction lapse and the bank has no duty or authority to honour it; accordingly, if the bank does in fact honour it the bank's rights will be limited to such rights as it may have based on unjust enrichment. If, however, certain of the services to be rendered by the bank in connection with the cheque or other payment instruction have been rendered prior to the customer's loss of capacity the bank will be entitled to its charges up to the time it becomes aware of the loss of capacity. The amount recoverable in respect of its charges will be determinable in the same way as if further performance had become impossible for any other reason: if the services are divisible the bank will be entitled to the charges relating to the services that have been rendered, but if the services are not divisible the bank will be entitled to a pro rata share of the total charges.(299)

Where the cheque or payment instruction is in favour of the customer himself and payment is made to the customer in person as opposed to to his curator it is also necessary to have regard to the question of what the position is of a debtor who pays his debt to his creditor in ignorance of the creditor's loss of capacity to act. This question is considered above(300) and it is suggested there

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(298) On wrongful dishonour generally see Cowen Negotiable Instruments 394-415; Malan Bills of Exchange # 326.

(299) Boyd v Stuttaford & Co 1910 AD 101; De Wet & Yeats Kontraktereg 159.

(300) See 94-7 above.

that a rule should be recognised in our law entitling the debtor to be indemnified for his negative interest. If such a rule is recognised, the bank would be able to recover the amount paid by it from the customer's estate and if the customer's account is in credit to set off the right of recovery against the credit, provided that set-off is not prevented for an extraneous reason.(301) The bank would not, however, be entitled to its charges or, where the account is in overdraft, to the agreed interest, but would be entitled to recover the charges and interest it could have earned elsewhere had it not honoured the cheque or payment instruction. If a rule entitling the payer to his negative interest is not recognised the bank will be limited to such claims as it may have based on unjust enrichment. Whether or not such a rule is recognised, the bank would not incur any liability for damages for wrongful dishonour if it refused payment to the customer.

(B) Customer's account not in credit and no overdraft facility available

The position where a cheque is drawn or a payment instruction is given outside the scope either of a credit in the customer's account or of an overdraft facility has already been dealt with above in dealing with the position where the loss of capacity occurs after the cheque is drawn or payment instruction is given but before it is received by the bank.(302) However, where the loss of capacity occurs after receipt by the bank of the cheque or payment instruction the further possibility arises that the bank may have accepted the offer to borrow, but not have made payment, before the loss of capacity occurs. This possibility accordingly calls for consideration.

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(301) Cf 15 n 25 above.

(302) See 135-7 above.

Generally, a contract comes into existence when the acceptance of the offer is communicated to the offeror, but the parties are free to agree that some other fact or circumstance will constitute acceptance.(303) In the context of the bank customer contract, it is considered that acceptance normally occurs when the bank actually honours the cheque or payment instruction, although acceptance may take place earlier in certain circumstances eg where the customer obtains an advance commitment from the bank that it will honour the cheque or payment instruction. Where this occurs the bank's position will, it is considered, be the same as where the cheque was drawn or the payment instruction was given within the scope of an overdraft facility as dealt with above.(304)

(3) Excursus: A general rule that a person dealing with another in reliance on the other's continued capacity to act is entitled to be indemnified for his negative interest?

(a) Preliminary

It has been seen that the problem of one person's acting to his prejudice in ignorance of another's loss of capacity to act arises in a variety of situations eg where a debtor pays his creditor in ignorance of the creditor's loss of capacity, where an offeree purports to accept an offer and performs his 'obligations' under the resulting 'contract' in ignorance of the offeror's loss of capacity, where a mandatary performs the mandate in ignorance of the mandant's loss of capacity (if the mandate lapses on the mandant's loss of capacity), where a person relies in ignorance of the principal's loss of capacity on an act which a representative with ostensible

(303) See eg Bloom v The American Swiss Watch Co 1915 AD 100 at 102-3; Driftwood Properties (Pty) Ltd v McLean 1971 (3) SA 591(A) at 597C.

(304) See 137-44 above.

authority purports to perform on the principal's behalf, etc. The view has already been taken[305] that in each of these situations the prejudiced party is entitled to be indemnified for his negative interest. The question may be asked, however, whether there is not a more general rule that a prejudiced party is entitled to be indemnified for his negative interest whenever he acts to his prejudice in reliance on another's continued capacity to act, and whether the cases where a right to indemnification is allowed should not rather be regarded as illustrations of the general rule than as separate rules applicable only in specific situations.[306]

The desirability of a more general rule entitling a prejudiced party to indemnification for his negative interest is, it is suggested, fairly clear. It is generally not practicable for parties dealing with one another to verify one another's capacity at all relevant stages of their dealings - eg at the time of the offer, the acceptance, the performance of each obligation under the contract and the giving or receipt of any notice under the contract - and if they were to endeavour to do so the free flow of trade would be severely hampered. And the law should rather seek to avoid than promote such a result.

True, it can be argued that in practice the risk will generally be run irrespective of by whom it is borne, and the question from a practical point of view is therefore rather who should bear the loss

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(305) See 94-7, 109-126, 41-51 and 97-109 above.

(306) The practical significance of a right to indemnification for one's negative interest lies in the fact that if one is entitled to be indemnified for one's negative interest one is entitled to be placed in the same position one would have been in had one not acted as one did; in other words, one is *entitled to recover* one's expenses together with the profit one could have earned elsewhere. In the case of unjust enrichment, on the other hand, one's right of recovery is limited to the extent of the other party's enrichment.

if it occurs. However, even approached from this point of view it is suggested that the risk more properly falls on the estate of the party who ceases to have capacity to act. A legal representative is generally appointed to represent such a person, and the representative can take steps to notify persons with whom the person had dealings that the person has ceased to have capacity to act, thus avoiding or minimising any loss.(307) The party who has retained capacity to act, on the other hand, is in practice generally not able to monitor the other party's capacity to act from time to time, despite the fact that in theory he could do so and that therefore it would seem at first sight equitable that he should bear the loss if he does not do so.

(b) Principal situations in which rule would apply

The principal specific situations in which such a general rule would apply are examined in what follows, with special reference to the state of development of a specific rule covering each situation or, in the absence of such a rule, with reference to the extent to which such a rule can be inferred covering the situation concerned by analogy with other situations where a rule has developed. As will be seen the common feature of all the situations is the reasonable reliance placed by the prejudiced party on the continued capacity to act of the other party.

(i) Offers

In the case of offers to contract it has already been pointed out(308) that the authorities are divided on whether the offeree

(307) In practice, family, friends and business associates often perform the same function on an informal basis pending the appointment of a legal representative.

(308) See 109-26 above.

is entitled to be indemnified for his loss if he purports to accept the offer and performs his 'obligations' under the resulting 'contract' in ignorance of the lapsing of the offer due to the offeror's loss of capacity to act, but the view taken was that the better view is that the offeree is entitled to be indemnified for his negative interest.

On the other hand, if the offeror has ceased to have capacity to act before purporting to make the offer there would not seem to be any scope for the application of a rule entitling the offeree to his negative interest. The basis of the suggested rule is the reasonable reliance by the prejudiced party on the continued capacity to act of the other party, not on his having capacity both ab initio and thereafter. A possible exception would be where there has been a regular course of dealings between the parties, eg where a trader regularly orders goods from a supplier. It would not be practicable for the supplier to verify the trader's capacity to act before accepting and executing each order, and it could therefore be argued that there is scope for the application of such a rule in this situation on the ground of the supplier's reasonable reliance on the continued capacity of the trader.

(ii) Acceptance of offers

Although the acceptance of an offer in general only takes effect on communication to the offeror[309] it is thought that it is only necessary that the offeree should have capacity to act on despatch of the acceptance and not also on communication of the acceptance to the offeror.[310] Should this view be wrong and should the offeror

(309) See 145 above.

(310) Cf 134-5 above dealing [illegible] analogous question in relation to notices exercising [illegible] contracts.

perform his 'obligations' under the 'contract' in ignorance of the lapsing of the acceptance due to the offeree's loss of capacity before communication to the offeror, the offeror should be entitled to his negative interest on analogy with the position of an offeree as dealt with in the previous section.

Where the loss of capacity precedes the purported acceptance there would not seem to be any scope for the application of such a rule, subject to the possible exception dealt with in the previous section where there has been a regular course of dealings.

(iii) Options

The exercise of an option, being a notice exercising a right under a contract, is subject to the same considerations as are dealt with under (v) below.

(iv) Performance of obligations

The position of a debtor who pays his creditor in ignorance of the creditor's loss of capacity has been dealt with above[311] and the conclusion reached there is that a rule should be recognised in our law entitling such a debtor to be indemnified for his negative interest. Moreover, it is considered that similar considerations would apply by analogy to the performance of any other obligation.

(v) Notices exercising rights under contracts

If either party to a contract gives notice to the other party

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(311) See 94-7 above.

exercising any right[312] under the contract it is *obviously* necessary that both the addressor and the addressee should have capacity to act at the time the notice is given. In the case of the addressee this clearly means that he must have capacity at the time of receiving the notice. In the case of the addressor the position is less clear but the view has already been taken[313] that he need only have capacity at the time of despatching the notice. However, whatever the true position, the possibility exists that either party may not have capacity at the required point in time and the other party may act to his prejudice in ignorance of this fact. For example, a landlord, having given notice terminating or *cancelling* the lease, may relet the premises in ignorance of the fact that the notice is ineffectual because the tenant did not have capacity to act at the time of receiving the notice. Similarly, the tenant may hire new premises in ignorance of the fact that the landlord lacked capacity at the time of giving the notice.

As pointed out in the previous section, the view has already been taken[314] that a debtor who performs his obligations in ignorance of the creditor's loss of capacity to act is entitled to be indemnified for his negative interest, and if the performance of an obligation is protected should not the exercise of a right be similarly protected by analogy? And if the addressor is entitled to be protected should not the addressee be too?

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(312) eg notice terminating the contract, notice cancelling the contract by reason of the other party's breach, notice exercising an election, etc.

(313) See 134-5 above.

(314) See 94-7 above.

(vi) Mandates

The position in regard to mandates has been considered in detail above[315] and it is unnecessary to repeat here what is said there. The conclusion reached was that in the absence of agreement to the contrary a mandate in fact only lapses on the mandatary's becoming aware of the mandant's loss of capacity, but that if this view is wrong with the result that a mandate terminates on the mandant's loss of capacity and if the mandatary performs the mandate in ignorance of the mandant's loss of capacity, he is entitled to be indemnified for his negative interest. This would in any event apply where there is an agreement that the mandate will terminate on the mandant's loss of capacity.

Similarly, if the mandant performs any of his obligations in ignorance of the lapsing of the mandate due to the mandatary's loss of capacity he should, it is suggested, likewise be entitled to his negative interest.

(vii) Other contracts which lapse on a party's loss of capacity

Mandates are not the only category of contract to lapse if a party ceases to have capacity to act: all contracts which are personal to the parties do likewise.[316] What, then, is the position of the other party if he performs his 'obligations' under such a contract in ignorance of the fact that the other party has ceased to have capacity to act and therefore the contract has lapsed? It is suggested that if offerees, offerors, debtors,

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(315) See 41-51 above.

(316) Friedlander v De Aar Municipality 1944 AD 79 at 93; R W Lee & A M Honoré The South African Law of Obligations 2nd ed edited by E Newman & D J McQuoid-Mason (Durban 1978) ## 117, 121 and 161.

creditors, and, especially, mandataries, have a right to indemnification it would be difficult to deny a similar right to the party who performs his obligations under such circumstances.

(viii) Representation

A representative who performs a juristic act on behalf of his principal in ignorance of the principal's loss of capacity should, it is suggested, be entitled to the same rights as a mandatary;(317) in fact he will often also be a mandatary.(318)

The position of a third party who in ignorance of the principal's loss of capacity relies on a juristic act performed by a representative on the principal's behalf has been dealt with in detail above.(319) The conclusions reached were that where both the representative and the third party are unaware of the loss of capacity the third party is entitled to be indemnified for his positive interest and not merely his negative interest. The reason for this, however, is that it is necessary, in view of the representative's implied warranty of authority, that the third party be indemnified for his positive interest in order to afford the representative a full indemnity for his negative interest. Where, on the other hand, it is only the third party who is unaware of the principal's loss of capacity he is only entitled to his negative interest, and then only if the representative had ostensible authority to represent the principal ie if there is a basis for the third party's reliance on the continued capacity to act of the principal.

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(317) See 106-7 above.

(318) He may not always be eg he may be a guardian, an executor, etc - see 97 n 170 above.

(319) See 97-109 above.

(c) Negligence in relation to absence of knowledge

In dealing with the position where a debtor pays his debt to the *creditor in* ignorance of the creditor's loss of capacity to act,[320] mention was made of the requirement that, for the debtor to be indemnified for his negative interest, he should not have been negligent. The negligence referred to is negligence in relation to the absence of knowledge *of the creditor's loss of capacity to act*; in other words, the debtor would not be entitled to be indemnified if he either knew or ought to have known of the creditor's loss of capacity.

This requirement of absence of negligence in relation to the absence of knowledge of the creditor's loss of capacity to act arises, it is considered, from the principle that no-one should benefit by his own wrongful conduct.[321] It follows that the requirement would not be limited to performance of obligations but would apply whenever indemnification is sought in terms of the general rule suggested in this section, or, if such a general rule is rejected, then whenever indemnification is sought in terms of any of the specific rules referred to.

(d) Good faith

Good faith is sometimes listed as a requirement[322] but it is doubtful whether this means any more than absence of knowledge of the loss of capacity to act.

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(320) See 94-7 above.

(321) Digest 50.17.134.1; Wille Principles 16-18.

(322) Voet 46.3.5 (payment by debtor); Pothier Mandate para 106 (mandates); Hahlo & Kahn Laws 452 (offers).

(e) Conclusion

The development of commerce from its earliest beginnings has seen a steady movement away from transactions concluded and implemented in person to transactions where personal contact may be infrequent or entirely absent. Moreover, the steadily increasing size of modern communities has resulted in members having less knowledge of what has befallen one another. The possibility therefore of a person acting to his prejudice in ignorance of another's loss of capacity to act is much increased, and the need for the law to accord such a person protection has increased apace. This need was apparently felt both in Roman and Roman-Dutch times giving rise to the tentative development of the rules according protection to debtors, offerees and mandataries. This is a healthy process of development of the law to meet the needs of the community and it is to be hoped that our courts will pursue the process of development to its logical conclusion by holding that there is a general rule of which the above cases are merely illustrations. However, whether the courts will be prepared to take such a step in the absence of legislation remains to be seen.(323)

(4) What constitutes notice of insanity, inability to manage one's affairs or prodigality?

(a) Preliminary

As pointed out above,(324) insanity is a question of fact. 'Certification' serves only to transfer the onus of proof to the party denying insanity. Moreover, insanity is often very difficult

(323) Cf the reluctance of the courts to recognise a general unjust enrichment action - *Nortje & Anor v Pool NO 1966 (3) SA 96(A)*; Joubert Law of South Africa vol 9 'Enrichment' by JG Lotz # 63.

(324) See 31-3 above.

to diagnose even for an expert possessed of all the facts. The position is further complicated by the fact that a person's condition may fluctuate between sanity and insanity. The position regarding inability to manage one's affairs is similar, with the added problem that a person may be partially able and partially unable to manage his affairs. A prodigal, on the other hand, only loses his capacity to act when he is declared a prodigal by the court. In the case of prodigality, therefore, the only question with which the prodigal's bank need concern itself is whether or not such an order has been granted; it is not necessary for the bank to make its own assessment of the prodigal's mental state as it must do in the case of insanity and inability to manage one's affairs.

What is the bank's position if it receives information indicating that a customer has become insane or unable to manage his affairs or has been declared a prodigal, but the information is not conclusive or subsequently proves to be incorrect? Cowen,[325] citing Paget,[326] says in relation to notice of a customer's death for the purposes of s 73 of the Bills of Exchange Act:

> 'Actual knowledge of the customer's death, however acquired, terminates the banker's authority; formal notice, though sufficient, is not necessary. On the other hand, mere rumour would be insufficient for the banker to act upon, though he could not safely disregard any reliable information, for instance, an announcement in a responsible newspaper.'

The position is, however, more complex than this and calls for an examination firstly of the question whether the bank must make

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(325) Negotiable Instruments 417.

(326) Banking 6th ed (1961) at 259-60. The statement relied on does not appear in the 9th ed.

further enquiry if it receives information which is not conclusive, and *secondly of the question whether the bank will be entitled to* any protection if it reasonably but wrongly concludes that the customer has or has not ceased to have capacity to act and if it acts accordingly. These questions will be considered separately in what follows.

Consideration will also be given to the question of whether a bank will be deemed to have constructive notice of any order of court declaring a customer insane or incapable of managing his affairs or a prodigal.

(b) Duty to make further enquiry

If a bank receives information, or observes behaviour, which causes it to suspect, or which would cause a reasonable person to suspect, that a customer has ceased to have capacity to act, must the bank make further enquiry on pain of the forfeiture, if it does not do so, of the protection accorded to a bank if it honours a customer's cheques and other payment instructions without knowledge that the customer has ceased to have capacity to act?

The answer to this question lies, it is considered, in the fact that the bank customer contract is a contract of mandate and that it is a feature of mandates that the mandatary must act in the interests of the mandant pursuant to the mandatary's duty of the good faith.[327] *It follows, it is considered, that if the bank* has cause to suspect that the customer has ceased to have capacity

(327) See eg Gaius 3.155; Van Leeuwen CF 1.4.24.8; Pothier Mandate para 46; S v Heller 1971(2) SA 29(A) at 44A-C; Kerr Agency 134ff; Joubert Verteenwoordigingsreg 215ff.

to act it must endeavour to establish whether or not this is in fact so, with a view to avoiding loss being suffered by the customer.(328)

The same conclusion can, it is considered, also be reached on another basis.

The view has been taken above(329) that it is a term of the bank customer contract that apparently regular cheques and other payment instructions are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity, irrespective of whether or not the customer had capacity to act at the time of drawing the cheque or giving the payment instruction and of whether or not the customer continues to have capacity to act up to the time when the bank honours or dishonours the cheque or payment instruction. The effect of this interpretation is to place the bank in a significantly better position than it would be in if a cheque or other payment instruction must constitute a separate authority, and it is considered that it is implicit in the ratio for the recognition of such a term that the bank must act reasonably to be entitled to the protection afforded by the term. And this duty to act reasonably would, it is considered, extend to the making of further enquiries where the bank has reason to suspect that the customer may have ceased to have capacity to act.

What further enquiries the bank can make will depend on the circumstances. Where prodigality is in question the court records can be inspected to ascertain whether or not an order declaring the customer a prodigal has been granted. The court records can also be inspected where insanity and inability to manage one's affairs are

(328) Failure to do so could well be construed as furthering its own interests in lieu of the customer's.

(329) See 76-91 above.

in question but as already pointed out the existence or otherwise of an order of court is not decisive of the issue. The bank will therefore need to make such further enquiries as discretion permits, the test being, it is considered, what enquiries a reasonable person would make in the circumstances.

(c) What is the bank's position if it reasonably but wrongly concludes that a customer has, or does not have, capacity?

It may well happen that a bank reasonably but wrongly concludes that a customer has or does not have capacity to act and that it acts accordingly, honouring the customer's cheques and other payment instructions despite the fact that the customer has ceased to have capacity to act, or dishonouring the customer's cheques and other payment instructions despite the fact that the customer has not ceased to have capacity to act. The question accordingly arises as to whether the bank is entitled to any protection by reason of the fact that it acted reasonably albeit wrongly.

If the bank reasonably but wrongly concludes that the customer has capacity to act, the answer to this question is, it is considered, that the bank will be in the same position it would have been in had it been entirely unaware of anything untoward in relation to the customer's capacity to act.

On the other hand, if the bank reasonably but wrongly concludes that the customer has ceased to have capacity to act and accordingly dishonours the customer's cheques and other payment instructions, the fact that the bank acted reasonably will not avail it as a defence to a claim for damages for wrongful dishonour.(330)

(330) Except where the claim is framed in delict - see generally Cowen Negotiable Instruments 394ff in regard to claims in contract and delict and the differing requirements for the 2 categories of claims.

(d) Constructive notice

Court records are available for public inspection[331] and the question accordingly arises as to whether constructive notice will be imputed to a bank of any order of court declaring a customer insane or incapable of managing his affairs or a prodigal.

An analogy can, it is considered, be drawn between court records and the records of a deeds registry, which are likewise available for public inspection. A number of early cases[332] held the registration of a deed in a deeds registry to constitute notice to the world of the deed's contents but in Frye's (Pty) Ltd v Ries[333] the Appellate Division held:

> 'It is quite clear, therefore, that registration is intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office. It is obvious that the Deeds Office is a source of information concerning such rights, but the real function of registration is the protection of the persons in whose names real rights have been registered. Such rights are maintainable against the whole world, but that does not mean that every person in the world must be deemed to know the ownership of every real right registered at the Deeds Office ....
>
> 'The owner of a registered servitude is protected not because every person in the world must be deemed to have knowledge of the servitude but because registration has by law the same effect as the express notification to all the world would have.'

(331) Abt v Registrar of Supreme Court & Others (1899) 16 SC 476; CJM Nathan, M Barnett & A Brink Uniform Rules of Court 3rd ed (Cape Town 1984) 370-72.

(332) See eg Smith v Farrelly's Trustee 1904 TS 949 at 961 in which it was said:

> 'One of the objects of registration is to give notice to the world of the creation of the interest, and thus to enable creditors to ascertain the facts and protect their own interests.'

(333) 1957(3) SA 576(A) at 583E and 584H-586A.

It is considered that it follows by analogy that the fact that court records are open for public inspection does not mean that all the world will be deemed to have knowledge of the contents of such records, and it is furthermore considered that there is no rule of law comparable to the one relating to registration in a deeds registry that the availability of court records for public inspection has the same effect as express notification to all the world would have. Constructive notice will therefore not be imputed to the bank of an order of court concerning a customer.

CHAPTER 4 - SEQUESTRATION AND WINDING-UP

Synopsis

As in the case of insanity, a customer's change of status on being placed in sequestration or winding-up terminates the bank's mandate. But, unlike insanity in which the bank's mandate only terminates when it becomes aware of the insanity, sequestration or winding-up establishes a concursus creditorum, the effect of which would, if unqualified, be to invalidate the honouring of any cheque or payment instruction after the sequestration or winding-up. The consequences of the *establishment of a concursus* have, however, been significantly modified by s 73(c) of the Bills of Exchange Act in the case of cheques and by s 22 of the Insolvency Act in the case of other payment instructions. Moreover, no concursus is established if a company which is able to pay its debts is placed in winding-up and the position in regard to such a company is therefore directly analogous to insanity.

Section 73(c) of the Bills of Exchange Act provides that the bank's duty and authority to honour a customer's cheques terminate on receipt of notice of the customer having become insolvent. The section applies both to natural and to artificial persons. 'Cheque' means cheque as defined in the Act. The section applies not only to cheques drawn before the sequestration or winding-up but also to cheques drawn thereafter. 'Having become insolvent' refers to the placing of the customer in sequestration or winding-up, not factual insolvency. *In the case of a company*, the section applies whether or not the company's inability to pay its debts was the ground upon which it was placed in winding-up and whether it was placed in compulsory or voluntary winding-up. In the case of cheques in favour of the customer himself or itself, the section protects the bank even if payment is made to the customer and not to the trustee or liquidator.

If the customer's account is in credit the effect of the section is that payment of a cheque constitutes a valid pro tanto discharge of the bank's indebtedness to the customer and that the bank is entitled to its charges and to set the charges off against any remaining credit in the customer's account. If the customer's account is in overdraft the effect of the section is that a contract of loan comes into existence and payment of the cheque constitutes the advance of the monies lent. The bank can therefore prove a claim for the capital and the agreed interest.

It is also entitled to its charges, and if it holds security its claim for the capital, interest and charges is secured by the security.

Section 73(c) does not apply to payment instructions other than cheques; however, the effect the establishment of a concursus would, if unqualified, have on such payment instructions is modified to a significant degree by s 22 of the Insolvency Act which protects the discharge of pre-sequestration debts made to the insolvent if the debtor was unaware of the sequestration. The section also applies to companies. A debt falls within the section if the contract from which it arises was entered into before sequestration, and it is not necessary that every fact which would have to be proved to establish a cause of action should have occurred before sequestration. Section 22 does not apply to the discharge of post-sequestration debts but it can be inferred from the wording of the section that the discharge of such debts made to the insolvent is in any event not void. Section 22 also protects the discharge of debts made to third parties on the insolvent's instructions.

It follows that if in ignorance of a customer's sequestration or winding-up the bank honours a payment instruction given within the scope of a credit in the customer's account, whether such credit existed at sequestration or winding-up or arose from deposits thereafter, the payment constitutes a pro tanto discharge of the bank's indebtedness. The bank is, moreover, entitled to its charges if the payment instruction was given before the sequestration or winding-up, but not if it was given thereafter, and to set off any charges to which it is entitled against any remaining credit in the account.

If the payment instruction is given within the scope of an overdraft facility it is necessary to distinguish between payment instructions given before and after the sequestration or winding-up. In the former case payment pursuant to the payment instruction is valid under s 22 and the bank can prove a claim for the capital of the loan, the agreed interest and its charges. Moreover, if the bank holds security the claim is secured by the security. In the case of payment instructions given after sequestration or winding-up the insolvent or the ordinary organs of management of the company lack the capacity to exercise the option to borrow on behalf of the insolvent estate or company and the estate or company is therefore not bound. However, the insolvent, or the signatory in the case of a company, is personally liable.

If a payment instruction is given outside the scope of any credit or overdraft facility it is again necessary to distinguish between payment instructions given before and after

the sequestration or winding-up. In the latter case, the insolvent or the ordinary organs of management of the company lack the capacity to make an offer to borrow on behalf of the insolvent estate or the company and the estate or company is not bound. However, the insolvent, or the signatory in the case of a company, will be personally liable. In the former case the insolvent or the ordinary organs of management of the company had the capacity to bind himself or company, as the case may be, at the time of giving the payment instruction but their capacity lapses on sequestration or winding-up and the offer lapses simultaneously. It follows that the bank cannot prove a claim against the insolvent estate or company for the loan. Nor can it hold the insolvent or signatory personally liable. It is therefore limited to such claims as it may have based on unjust enrichment, although any claim it may have against the estate or the company on this basis will be preferent.

The bank's duty to honour a customer's payment instructions other than cheques terminates on the customer's sequestration or winding-up.

It is also necessary to have regard to ss 348 and 341(2) of the Companies Act in the case of a company customer's payment instructions other than cheques. These sections are dealt with in Part II of the thesis.

If the bank receives information which is insufficient to conclude that the customer has been placed in sequestration or winding-up but which raises the suspicion that this has occurred, the bank is under a duty to make further enquiry. If the bank reasonably but wrongly concludes that the customer has not been placed in sequestration or winding-up, the bank will be in the same position it would have been in had it not received any information at all. If the bank reasonably but wrongly concludes that the customer has been placed in sequestration or winding-up this will not avail it as a defence to a claim for damages for wrongful dishonour except where the claim is framed in delict. Constructive notice of the sequestration or winding-up will not be imputed to the bank; in particular, constructive notice of a winding-up will not be imputed to the bank in accordance with the company law doctrine of constructive notice.

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(1) Preliminary

A natural person[1] may be sequestrated by the court either on the application of a creditor[2] on the ground that he has committed an act of insolvency,[3] or that he is in fact insolvent,[4] or on the voluntary surrender of his estate by the person himself.[5] The effect of the sequestration order is to divest the person of his assets and to vest them in a trustee appointed to the person's estate.[6] The insolvent is not deprived of contractual capacity but he cannot bind the insolvent estate.[7]

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(1) The same applies to partnerships (s 1 of the Insolvency Act 24 of 1936, definition of 'debtor'), trusts (Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly & Anor NNO 1984(1) SA 160(W)), other unincorporated bodies (Silverman v Silver Slipper Club 1932 TDP 355) and corporate bodies not having a registered office or place of business in this country (Lawclaims (Pty) Ltd v Rea Shipping Co SA 1979 (4) SA 745 (N)) at 750H-755C.

(2) Section 9(1) of the Insolvency Act.

(3) Section 9(3) read with s 8 of the Insolvency Act.

(4) Section 9(3) of the Insolvency Act. A person is factually insolvent for this purpose if his liabilities exceed his assets - see eg Ohlsson's Cape Breweries Ltd v Totten 1911 TPD 48 at 50; MacKay v Cant 1962(4) SA 193(O) at 196B; Walsh v Kruger 1965(2) SA 756(E) at 759D-E; Venter v Volkskas Ltd 1973(3) SA 175(T) at 178H-179A.

(5) Section 3(1) and (2) of the Insolvency Act.

(6) Section 20(1)(a) of the Insolvency Act. Before appointment of a provisional trustee the assets vest in the Master of the Supreme Court.

(7) Section 23(2) of the Insolvency Act.

A *company*[8] may be placed in compulsory winding-up by the court if it is unable to pay its debts,[9] or if certain circumstances obtain in which it is deemed to be unable to pay its debts,[10] or if certain other circumstances obtain unrelated to inability to pay its debts.[11] The application to court may be made by, inter alia, a member, a creditor, or the company itself.[12] A company may also be placed in voluntary winding-up by special resolution of the company, whether the company is able or unable to pay its debts.[13] The effect of the placing of the company in winding-up is to divest its ordinary organs of management of the control of its assets and the power to represent the company, and to vest such control and power in a liquidator.[14]

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(8) The same applies to other corporate bodies (s 337 of the Companies Act 61 of 1973, definition of 'company'). The company or other corporate body must have a registered office or place of business in this country failing which it must be sequestrated under the Insolvency Act - see the Lawclaims case supra.

(9) Section 344(f) of the Companies Act read with s 345(1)(c). A company is unable to pay its debts for this purpose if it is unable to meet current liabilities in the ordinary course - see eg In re H C Collison Ltd Ex p Collison (1906) 23 SC 721 at 724; Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962(4) SA 593 (D&CLD) at 596F-597F.

(10) Section 344(f) of the Companies Act read with ss 345(1)(a) and (b).

(11) Section 344 (a)-(e) and (g)-(h) of the Companies Act.

(12) Section 346 of the Companies Act.

(13) Section 349 of the Companies Act.

(14) Unlike in sequestration, the assets are not vested in the liquidator, only the control of the assets, unless the court otherwise orders - s 361. In the case of a winding-up by the court s 361(1) vests the control of the assets in the Master until the appointment of a provisional liquidator and in the case of all windings-up s 361(2) vests the control in the

(Footnote continued on next page)

Sequestration and winding-up, like insanity, terminate a mandate :

> '... when any change of status of the principal occurs, which includes the latter's insolvency, the mandate is automatically terminated. A provisional judicial management and a liquidation order would, in my view, have the same effect because that would bring about a change of status as envisaged by the authorities'

(per Potgieter JA in Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation)[15]). The company in question was unable to pay its debts but it is thought that if a judicial management order terminates a mandate the same must be true of the winding-up of a company which is able to pay the debts. The grant of a judicial management order does not establish a concursus creditorum,[16] and the termination of the mandate must therefore flow from the fact that the ordinary organs of management of the company are divested

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Master while the office of liquidator is vacant or he is unable to perform his duties. It clearly follows by implication, although the section is in fact silent on the point, that while there is a liquidator in office who is able to perform his duties the control of the assets vests in him - Henochsberg Companies 636. In the case of voluntary windings-up, s 353(2) expressly provides that the powers of the directors cease as from the commencement of the winding-up, and although there is no similar provision in regard to companies being wound up by the court it has nevertheless been held that the powers of the directors cease on the grant of a winding-up order - Attorney-General v Blumenthal 1961(4) SA 313(T) at 314G-315G; Volkskas Bpk v Darrenwood Electrical (Pty) Ltd 1973(2) SA 386(T) at 389H-390C; S v Cope 1970(3) SA 605(T) at 608D-E.

(15) 1968 (1) SA 717(A) at 722H.

(16) See eg CCA Little & Sons v Niven NO 1965(3) SA 517(RAD)at 519D-520F; Henochsberg on the Companies Act 3rd ed by A Milne et alii (Durban 1975) 746.

of such management.[17] The winding-up of a company which is able to pay its debts similarly divests the ordinary organs of management of the company of the management,[18] although it too does not, it is thought, establish a concursus.[19]

It follows that the bank's mandate is terminated by the customer's sequestration or winding-up. As in the case of insanity, however, the question arises as to whether such termination occurs immediately the customer is placed in sequestration or winding-up or only on the bank's becoming aware thereof. The answer is, it is considered, the same as in the case of insanity insofar as the law relating to mandate is concerned, ie the mandate only terminates *when the mandatary* becomes aware of the mandant's loss of capacity;[20] however, as will be shown below, this is largely overridden by the principles of a concursus creditorum in the case of sequestration and of the winding-up of a company which is unable to pay its debts. But in the case of the winding-up of a company which is able to pay its debts the position is directly *analogous to* the position on insanity;[21] accordingly, the rest of this

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(17) Sections 429 and 430 of the Companies Act; Henochsberg Companies 755.

(18) See 165 n 14 above.

(19) Cf Ruskin NO v Amalgamated Minerals Ltd 1951(1) PH E15(W) at 54-5.

(20) See 41-51 above. The parallel between insanity on the one hand and sequestration and winding-up on the other is not, it is considered, limited to the mandate element of the bank customer relationship, and if a customer is placed in sequestration or winding-up the effect on all aspects of the relationship, and hence on all the functions of a cheque drawn or other payment instruction given by the customer, will be similar to the effect if the customer becomes insane - eg if the cheque or payment instruction constitutes an offer to borrow the offer will, it is considered, lapse - see 207 n 133 below.

(21) The same is true of judicial management.

chapter will be devoted to examining the position in relation only to sequestration and to the winding-up of companies which are unable to pay their debts, and references to the winding-up of a company should be understood as references to the winding-up of such a company, unless otherwise indicated.

The consequences of the establishment of a concursus creditorum in the case of sequestration and of the winding-up of a company which is unable to pay its debts are far-reaching. These consequences are described in Walker v Syfret NO[22] by Lord de Villiers CJ as follows:[23]

> 'The effect of a winding-up order is to establish a concursus creditorum, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors'

and by Innes J, as he then was, as follows :[24]

> 'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'[25]

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(22) 1911 AD 141.

(23) At 160.

(24) At 166.

(25) In the United States the bank's position in relation to cheques drawn before the customer's bankruptcy but honoured by the bank after the bankruptcy without knowledge of the bankruptcy came before the Supreme Court in Bank of Marin v England 385 US 99(1966) and the Supreme Court, reversing the Court of Appeal, denied the trustee's claim to payment of the amounts paid out pursuant to the cheques concerned. After emphasising the inequity that would result if the trustee's claim were to be upheld the court held (at 101-2) :

(Footnote continued on next page)

It is, moreover, not possible to contract out of these consequences.(26)

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'The trustee succeeds only to such rights as the bankrupt possessed...absent knowledge or notice of the bankruptcy by the bank, the contract between the bank and the drawer remains unaffected by the bankruptcy and the right and duty of the bank to pay duly presented checks remain as before.'

This reasoning is criticised by FE Holahan & EC Fisch 'Post Bankruptcy Payment of Checks: Bank of Marin v England' 28 Univ of Pittsburgh Law Rev 579 (1967) at 587 on the ground that while it is true that the trustee only steps into the shoes of the bankrupt this is only true to the extent that the Act does not provide otherwise. They accordingly agree with Harlan J who dissented (at 103ff) from the majority judgment on the ground that the wording of the Bankruptcy Act precluded the reasoning relied on by the majority. The same criticism would, it is considered, be applicable if it were to be attempted to apply the majority's reasoning to the position under our law, inasmuch as the reasoning is irreconcilable with the principles of a concursus. In any event the structure of the Bankruptcy Act in question is too different from our Act for a decision under that Act to constitute more than the 'very slightest persuasive authority' in relation to our Act, in the words of Potgieter JA in Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (in liquidation) 1969(1) SA 660(A) at 671F. (Potgieter JA was actually referring to decisions under the English Bankruptcy Act but the structure of the United States Act concerned is equally different from the structure of our Act and decisions under the United States Act would therefore be of similarly slight persuasive authority.) It may be noted that in the United States the matter has now become academic because s 542(c) of the Bankruptcy Act 11 USC expressly adopts the ruling in Bank of Marin v England. For the position in England see Paget Banking 92ff.

(26) Magill's case supra at 671-2 in which the debtor had the contractual right (coupled with an interest) to discharge his debt by payment to a third party, but the court held that he could no longer validly do so after establishment of the concursus. See further 201-3 below.

There is, however, no general rule that contracts ipso facto lapse on the sequestration or winding-up of one of the parties :

> '...there is nothing in the law of insolvency which affects uncompleted contracts in general; the contract is neither terminated nor modified nor in any other way altered by the insolvency of one of the parties (cf Uys and Another v Sam Friedman Ltd 1935 AD 165) except in one respect, and that is that, because of the supervening concursus, the trustee cannot be compelled by the other party to perform the contract. Put somewhat differently, this means that the contract survives the insolvency and, save in the respect mentioned, the trustee steps into the insolvent's shoes. The rule that a trustee has a right of election whether or not to abide by the contract is no more than one aspect of the application of this legal principle I have enunciated. In a manner of speaking, any party to an executory contract can "elect" whether to carry out his obligations or to repudiate the contract but, of course, should he wrongfully repudiate it the other party may be able to compel performance specifically; so too with a trustee, but with the one exception to which I have referred and that is that, if the trustee decides not to perform, the other party cannot, because of the concursus, compel performance by the trustee but must content himself with a monetary claim either for performance or for damages for non-performance of the insolvent's contractual obligations, as the case may be'

(per Friedman J in Smith & Anor v Parton NO[27]).

If the broad consequences of a concursus as described by Lord de Villiers CJ and Innes J in Walker v Syfret NO were to apply to the bank customer contract without qualification, the honouring of any cheque or other payment instruction after sequestration or

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(27) 1980 (3) SA 724 (D&CLD) at 728H-729C. See also Ward v Barrett NO & Anor NO 1963(2) SA 546(A) at 552B-553B; Somchem (Pty) Ltd v Federated Insurance Co Ltd & Anor 1983(4) SA 609 (C) at 615A-H; Porteus v Strydom NO 1984(2) SA 489(D & CLD) at 492E - 495D; but cf Cohen NO & Others v Verwoerdburg Town Council 1983(1) SA 334(A) at 347E-G in which although the court refused an order for specific performance it appears to have considered that it was not absolutely debarred from doing so.

winding-up would be void, whether the customer's account was in credit or in overdraft. *Where the account was in credit*, the honouring of the cheque or payment instruction would disturb the concursus by reducing the assets available for distribution among the creditors,[28] *and where the account was in overdraft*, the honouring of the cheque or payment instruction would disturb the concursus by increasing the claims against the estate.[29]

These broad consequences of the establishment of a concursus have, however, been significantly modified by s 73(c) of the Bills of Exchange Act in the case of cheques and by s 22 of the Insolvency Act in the case of other payment instructions. As the 2 sections are quite different, cheques and other payment instructions will be dealt with separately in what follows.

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(28) A *possible exception would be where payment is made to a* creditor who would in any event be paid in full eg because his claim is preferent. It is doubted, however, whether an exception in fact exists in this situation because such a payment could nevertheless disturb the concursus in various other ways eg by removing the creditor's claim from the normal procedure for the examination of claims, by depriving the trustee or liquidator of liquid funds needed to continue the insolvent's, or the company's, business, by giving the creditor the advantage of payment in advance of the other creditors of the same class, etc.

(29) It is also arguable that the concursus is not disturbed in this situation if payment is made to a creditor with the *result that the bank is simply substituted as a creditor in* the same amount. Again, however, it is doubted whether this argument holds good inasmuch as such a payment could similarly disturb the concursus in various other ways eg by removing the creditor's claim from the normal procedure for the examination of claims, *by substituting a secured claim for a concurrent* claim if the bank holds security, by substituting more onerous terms and conditions eg if the bank's claim bears a higher rate of interest than the claim which was discharged by the payment, etc.

Before proceeding, however, to this separate examination of the position regarding cheques and other payment instructions ss 348 and 341(2) of the Companies Act call for mention. In the case of windings-up these sections have a potentially profound effect on a bank's position during the period between the presentation of the winding-up application against a customer and the grant of the winding-up order, and Part II of this thesis is devoted to an examination of these sections.

(2) Cheques - s 73(c) of the Bills of Exchange Act

Section 73(c) of the Bills of Exchange Act provides :

'The duty[30] and authority of a banker to pay a cheque drawn on him by his customer are determined by :

...

(c) receipt of notice of the customer having become insolvent.'

The wording of the section, however, gives rise to a number of problems which will be examined in what follows.

(a) Applicability of s 73(c) to artificial persons

Section 73(c) refers to the customer 'having become insolvent', and the question arises as to whether this is restricted to natural

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(30) Although the section does not expressly so state, it is considered clear that the duty referred to is the duty owed by the bank to its customer and not any duty it may owe to the holder, eg because the bank has guaranteed the cheque, and references in this chapter to a bank's duty to honour a customer's cheques and other payment instructions similarly refer to the duty owed to the customer.

persons or whether it also applies to companies and other artificial persons.(31)

Cowen(32) assumes without discussion that s 73(c) does not apply to companies:

> 'The effect of liquidation and judicial management proceedings on a banker's duty and authority to pay a company's cheques is obscure. It would seem that *actual notice of a liquidation* order, or of the commencement of voluntary winding-up proceedings, or of a judicial management order, terminates the banker's duty and authority, but it is not clear whether anything falling short of such actual notice does so.'

It is considered, however, that the reference in s 73(c) to insolvency is in fact capable of referring not only to the sequestration of a natural person's estate but also to the winding-up of an artificial person which is unable to pay its debts.(33) While it is true that the word 'insolvent' is more commonly used to refer to a natural than an artificial person, this is not invariably so and it is not uncommon to refer to a body in

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(31) *It may be noted that the preamble of* s 73 refers simply to the banker's 'customer' without drawing a distinction between natural and artificial persons and although it is clear that sub-s(a) dealing with countermand applies to any customer, whether natural or artificial, sub-s(b) deals with death and therefore by its nature can only apply to natural persons. It follows that no inference can be drawn from the wording of the *preamble as to whether* sub-s(c) refers to both natural and artificial persons or to natural persons only.

(32) Negotiable Instruments 418. Malan's view is not clear: Bills of Exchange # 328 n 143.

(33) It should also be borne in mind that certain artificial *persons are* sequestrated under the Insolvency Act and not wound up under the Companies Act - see 164 n 1 above.

winding-up as 'insolvent'.[34] Moreover, there is no apparent reason for distinguishing between sequestrations and windings-up: s 73(c) is clearly designed to protect banks against the harshness of the position they would find themselves in if their honouring of cheques between the date of a customer's insolvency and their receiving notice thereof were to be invalid, and it is considered that there is no reason why this should apply in the case of *sequestrations but not windings-up*. If, therefore, the word 'insolvent' can reasonably be interpreted to include artificial persons the courts may be expected to do so.[35]

(b) Meaning of 'cheque'

'Cheque' is defined[36] in the Act as a bill of exchange drawn *on a banker* and payable on demand, and 'bill of exchange' is defined[37] as 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.

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(34) Cf Taylor & Steyn NNO v Koekemoer 1982(1) SA 374(T) at 377D-E. The Companies Act, it may be noted, does not use the term 'insolvent' in relation to companies: it refers to companies which are unable to pay their debts - see eg s 339.

(35) If this view is incorrect cheques drawn by artificial persons will be subject to the same considerations as payment instructions other than cheques as dealt with at 183ff below. No assistance is to be gained from the English, Australian, Indian and Canadian Acts which do not contain provisions similar to s 73(c).

(36) Section 1.

(37) Sections 1 and 2(1).

It follows that a document that does not fulfil the requirements of these definitions will not fall within the ambit of s 73(c) even if it is drawn in a form which would ordinarily be called a cheque, eg a 'cheque' payable to 'cash or order'.[38] Conversely, a payment instruction given in a form which would not normally be regarded as a cheque may nevertheless fulfil the requirements of the definitions and hence fall within the ambit of s 73(c) eg a letter may be so framed that it constitutes a cheque.

(c) Cheques drawn after sequestration or winding-up

Section 73(c) applies to cheques drawn by the customer. Does this limit the application of the section to cheques drawn prior to the sequestration or winding-up or does the section also apply to cheques drawn thereafter?

In the case of sequestration, the answer to this question depends on whether the insolvent estate or the insolvent is the 'customer' for the purpose of s 73(c). As already pointed out,[39] on sequestration the insolvent is divested of his assets which vest in the trustee. These assets under the control of the trustee comprise the insolvent estate and in a technical sense, therefore, the estate is the customer under the bank customer relationship. In a more ordinary sense, however, it is suggested that 'customer' more naturally refers to the insolvent and that this is the intention in s 73(c). Section 73(c) is designed to protect banks which unwittingly honour cheques in ignorance of the customer's insolvency and banks are in the same jeopardy in relation to cheques drawn after insolvency that they are in in relation to

(38) Cf Hiles v Venter h/a CH Venter Agencies 1983(4) SA 22(T); Christellis v Brahberg Boerdery (Edms) Bpk 1983(4) SA 87(W); Cowen Negotiable Instruments 72-4.

(39) See 164 above.

cheques drawn before insolvency. Accordingly, the interpretation should be favoured which best gives effect to the object of the section.(40)

In the case of windings-up, the company is not divested of its assets - unless the court specifically so orders - but its ordinary organs of management are deprived of the control of the assets, such control being vested in the liquidator who alone may represent the company.(41) Prima facie, therefore, only a cheque drawn by the liquidator would be a cheque drawn by the company. However, it is suggested that, as in the case of sequestration, 'customer' as used in s 73(c) should be interpreted less technically, and that it should be understood to refer to the customer as it existed prior to the winding-up. In other words, a cheque drawn in a manner which would have bound the customer prior to the winding-up will be a cheque drawn by the customer for the purpose of s 73(c).

(d) Meaning of 'having become insolvent'

Section 73(c) refers to notice of the customer 'having become insolvent'. Thus far it has been assumed that this refers to the placing of the customer in sequestration or winding-up and not to the point in time at which the customer's liabilities first exceed his assets.(42) Is this assumption justified?(43)

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(40) A contrary argument would be that the section was not intended to protect banks against the fraud that would generally be inherent in a customer's drawing a cheque after sequestration or winding-up.

(41) See 165 above.

(42) Or possibly, in the case of companies, to the point in time at which the company becomes unable to meet current liabilities in the ordinary course - cf 165 n 9 above.

(43) Cowen Negotiable Instruments 417 makes the same assumption without discussion.

A number of factors point to the correctness of the assumption. The law does not deprive a person of his capacity to act merely because his liabilities exceed his assets,[44] and it is considered unlikely that the legislature would have intended to partially deprive him of his capacity to act by in effect preventing him from operating a bank account. The object of the section is not to deprive persons of rights as soon as their liabilities exceed their assets, but to protect banks which unwittingly continue to honour customer's cheques without knowledge that the customer has been placed in sequestration or winding-up. Moreover, the point in time at which a person becomes factually insolvent is seldom readily ascertainable: the value of most assets fluctuates with market conditions; rights may be disputed; accounts receivable may not be recoverable; liabilities may be contingent; etc. Accordingly, it is considered unlikely that the legislature would have intended[45] the termination of a bank's duty and authority to depend on so uncertain a circumstance.[46]

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(44) He may commit an offence under s 135(3)(a) of the Insolvency Act if he contracts debts without any reasonable expectation of being able to discharge them, but this does not ipso facto invalidate the contract.

(45) The cardinal rule of interpretation of statutes is, of course, to determine the intention of the legislature from the language in context - see eg Norden & Anor NNO v Ghanki & Others 1974(4) SA 647(A) at 655B; L C Steyn Die Uitleg van Wette 5th ed by S I E van Tonder et alii (Cape Town 1981) 2ff. See too Lord Denning Discipline of the Law 9ff, Closing Chapter 93ff.

(46) Two corrollaries of the approach that s 73(c) refers to legal and not factual insolvency may be noted. Firstly, the bank's duty and authority may terminate in terms of s 73(c) even though the customer is not factually insolvent, inasmuch as the definition of the acts of insolvency in s 8 of the Insolvency Act and of inability to pay one's debts in s 345 of the Companies Act are wider than factual insolvency. Secondly, the expression 'having become insolvent' in s 73(c) will have

(Footnote continued on next page)

(e) Scope of the protection afforded by s 73(c)

Section 73(c) provides that a bank's duty and authority terminate on receipt by the bank of notice of the customer having become insolvent; in other words, the bank is entitled and, if applicable, obliged, to honour the customer's cheques until it receives notice of the customer's insolvency. The section, however, does not make it clear whether the bank has all the rights which would normally flow from honouring the customer's cheques. This gives rise to a number of difficulties which are examined in what follows.

(i) Cheques in favour of the customer

If a cheque is drawn in favour of the customer himself, the authority conferred by the cheque is to pay the customer, and in the normal course this would mean his legal representative if he has ceased to have capacity to act.

If, then, the bank makes payment to the customer himself will the payment be protected by s 73(c)? The answer is, it is suggested, that the expression 'duty and authority' is wide enough to encompass payment to the customer himself, and that there are considerations which militate in favour of such an extended interpretation. The object of the section is, as already pointed out, to protect a bank which unwittingly continues to honour a customer's cheques in ignorance of the customer's insolvency, and an important aspect of this object would be frustrated if the expression 'duty and

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different meanings in the case of natural persons and companies, in that the definitions of acts of insolvency and inability to pay one's debts are different. However, it is considered that these anomalies are not of major significance and that they are insufficient to outweigh the considerations giving rise to the interpretation that s 73(c) refers to legal and not factual insolvency.

authority' were to be given a narrow interpretation excluding *protection for payments* to the customer himself. If, therefore, the expression 'duty and authority' can bear the wider meaning - as it is considered it can - it should be accorded that meaning.(47)

(ii) Customer's account in credit

If the customer's account is in credit the bank is indebted to the customer and it is considered clear that the effect of s 73(c) is that the payment of a cheque to which the section applies will constitute a valid repayment by the bank on account of its indebtedness to the customer.(48)

Less clear, however, is the position regarding the bank's charges for honouring the cheque. Two questions arise: Is the bank entitled to its charges? And, if so, is it entitled to set the charges off against any remaining credit in the account? The answer is, it is suggested, that the section should be interpreted as placing the bank in the same position it would have been in had the cheque been honoured prior to the sequestration or winding-up ie the bank is entitled to its charges and the charges may be set off against the credit.(49)

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(47) If this view is incorrect the payment may nevertheless be protected by s 22 of the Insolvency Act - see 183ff below.

(48) It will be recalled that the view has already been taken - see 15 n 25 above - that payment of a cheque constitutes a direct pro tanto discharge of the bank's indebtedness to the customer and does not give rise to a claim for re-imbursement which is set-off against the indebtedness.

(49) If this broad approach to the effect of the section is rejected, the bank would, it is considered, nevertheless be entitled to prove a claim for its charges on the ground that all the requirements are met for the proof of such a claim. This follows from the fact that - as already pointed out at 41-51 above - the bank's mandate, and hence the bank customer contract, do not lapse until the bank becomes aware of the

(Footnote continued on next page)

(iii) Customer's account in overdraft

If a customer's account is overdrawn, a cheque drawn by the customer serves a triple function: if it is drawn within the scope of an overdraft facility granted by the bank it is the exercise of an option to borrow, a demand for the advance of monies lent and a direction regarding to whom payment is to be made; and if it is drawn outside the scope of an overdraft facility, it is an offer to borrow, a demand for the advance of monies lent if the offer is accepted and a direction regarding to whom payment is to be made. It is considered that the expression 'duty and authority' in s 73(c) encompasses all of these functions and that therefore a contract of loan will come into existence and that payment of the cheque will constitute the advance of the monies lent. It follows, it is considered, that the bank is also entitled to the interest payable on the loan.

If the bank holds security from the customer for the customer's indebtedness will its claim be secured by the security? Section 73(c) is silent on this question but the view has already been taken[50] that the section should be interpreted as placing the bank in the same position it would have been in had the cheque been honoured prior to the sequestration or winding-up fe the bank's claim will be secured.

The bank's right to its charges has been dealt with in the previous section.

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customer's sequestration or winding-up; accordingly, if the bank's authority remains intact in terms of s 73(c) the performance by the bank of its obligations under its mandate is valid and all the requirements for the proof of a claim for its charges are present. This approach would, however, seem to fall short of enabling the bank to set off its claim against the credit.

(50) See the previous section.

(f) Interrelationship between s 73(c) and ss 348 and 341(2) of the Companies Act

What is the position where s 73(c) and ss 348 and 341(2) of the Companies Act[50a] are in conflict? The answer is, it is considered, that s 73(c) will take precedence in accordance with the principle that a specific statutory provision takes precedence over a general provision even where - as in the case of ss 348 and 341(2) - the general provision occurs in a later enactment:

> 'The general maxim is, generalia specialibus non derogant. "When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly...." *per* Lord HOBHOUSE delivering the judgment of the Privy Council in Barker v. Edger ([1898] A.C. at p. 754).'[51]

This, however, only applies to the extent the sections are mutually inconsistent and 2 respects in which they could perhaps be construed as complementing one another call for consideration.

Firstly, if the bank receives notice that a winding-up application has been presented against a customer, will this constitute notice of the customer having become insolvent for the purpose of s 73(c) in view of the fact that s 348 deems a winding-up to commence on presentation of the application?[52] The answer

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(50a) 61 of 1973.

(51) R v Gwantshu 1931 EDL 29 at 31; see generally Steyn Uitleg 188-191.

(52) Cf M Megrah & FR Ryder Byles on Bills of Exchange 25th ed (London 1983) 272 who take the view that notice of presentation terminates the bank's duty and authority independently of a provision such as s 73(c), and Lord Hailsham Halsbury's Laws of England 4th ed (London 1973-) vol 3 'Banking' #64 n 11 where the view is taken that notice of presentation terminates the bank's duty and authority to pay cheques in favour of third parties but not cheques in favour of the company itself. See further chapter 15 (at 633ff) where the question is considered in greater detail.

is, it is considered, in the negative. Section 348 only comes into operation once a winding-up order has been granted. Until then the company is not in winding-up and in fact a winding-up order may never be granted on the application:

> '... Parliament has antedated the operation of a winding-up by the Court, but without such a winding-up there is nothing to antedate. To hold the contrary would lead to manifest absurdity, in that *the mere filing of an application for a winding-up* order, however ill-founded or even vexatious, would ipso jure have the effect of a winding-up order'

(per Margo J in Vermeulen & Anor v C C Bauermeister (Edms) Bpk & Others[53]).

Secondly, should it be held - contrary to the view taken above[54] - that s 73(c) only applies to cheques drawn before the company is placed in winding-up, the question will arise as to whether the company is to be regarded as having been placed in winding-up for this purpose on presentation of the winding-up application or on the grant of the order. The answer to this question depends upon the extent to which s 348 backdates the commencement of a winding-up. This question is considered in chapter 6[55] and the conclusion reached there is that the only *function of s 348* is to define the commencement of a winding-up for the purposes of s 341(2) and, probably, s 359(1)(b) of the Companies Act. It follows, it is considered, that the directors are not deemed to have ceased to hold office on presentation of the winding-up application and that therefore *cheques drawn between presentation of*

(53) 1982(4) SA 159(T) at 162B.

(54) See 175-6 above.

(55) See 255ff below.

the winding-up application and the grant of the winding-up order would be cheques 'drawn by the customer' within the meaning of s 73(c).

(g) Onus of proof

Unlike s 22 of the Insolvency Act, s 73(c) does not specify who bears the onus of proof in regard to the question of whether or not the bank had notice of the customer having become insolvent and the question of onus will therefore follow the ordinary rules of evidence.

(h) Discharge of the customer from sequestration or winding-up

Section 73(c) provides that the bank's duty and authority terminate on receipt of notice of the customer having become insolvent, but it is considered that the bank's duty and authority will nevertheless revive if the sequestration or winding-up is discharged by the non-confirmation of a provisional order or the setting aside of a final order or otherwise and if the cheque has not already been dishonoured.(56)

(3) Other payment instructions - s 22 of the Insolvency Act

Section 73(c) of the Bills of Exchange Act does not apply to payment instructions given otherwise than by way of cheque, and the position in regard to termination of a bank's duty and authority to honour such payment instructions on the customer's sequestration or winding-up must accordingly be determined in the case of sequestration in the light of the provisions of the Insolvency Act,

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(56) Cf Simon v Jackson 1904 TS 116; W H Mars The Law of Insolvency in South Africa by H E Hockly 7th ed by D F Waters & R D Jooste (Cape Town 1980) # 24.5.

and in the case of winding-up in the light of the provisions of the Companies Act including, in particular, s 339 which applies the provisions of the Insolvency Act mutatis mutandis in regard to any *matter not specially provided for* in the Companies Act.[57]

The broad effect of a person's sequestration or winding-up is, as already pointed out,[58] to establish a concursus creditorum which crystallises the position of the *individual or company* concerned. The claim of each creditor must be dealt with as it existed on sequestration or winding-up and no creditor may thereafter do anything which prejudices the other creditors. On the other hand, uncompleted contracts are in general - mandate is an exception - unaffected by the sequestration or winding-up of either party except that the other party cannot claim specific performance from the trustee or liquidator.

The general effect of the establishment of a concursus creditorum is, however, modified to a significant degree for present purposes by s 22 of the Insolvency Act which provides :

> 'Every satisfaction in whole or in part of any obligation the fulfilment whereof was due or the cause of which arose before the sequestration of the creditor's estate shall, if made to the *insolvent after such sequestration, be void, unless* the debtor proves that it was made in good faith and without knowledge of the sequestration.'

In seeking to determine the effect of the principles of a concursus creditorum, as modified by s 22, on a bank's duty and authority to honour a customer's payment instructions a number of questions arise which will be considered in what follows.

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(57) In the case of windings-up regard must also be had to ss 348 and 341(2) of the Companies Act - see Part II of this thesis (at 226ff below).

(58) See 166-71 above.

(a) Applicability of s 22 to windings-up

The Companies Act does not contain any provision comparable to s 22 of the Insolvency Act and the question accordingly arises whether s 22 applies to windings-up in accordance with s 339 of the Companies Act.

Section 339 provides :

> 'In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act.'

The opening words 'In the winding-up of a company' are not entirely apposite to refer to a payment which is in a sense outside the winding-up. However, the payment affects the winding-up, eg by reducing the assets available for distribution, and it is considered that the word 'In' is susceptible of, and should be given, the meaning 'In connection with'.

A more difficult problem is that after winding-up the liquidator alone can validly represent the company.(59) Accordingly, can a payment made otherwise than to the liquidator be said to constitute the 'satisfaction ... of any obligation ... made to the insolvent' as referred to in s 22? Generally, payments made to a company after winding-up will in practice have become part of the assets of the company and even if the monies have been paid out again this would not alter the fact that they did effectively become part of the assets of the company. Similarly, where payment is made to a third party in accordance with the directions of the 'company', the payment will normally enure for the benefit of the company by

(59) See 165 above.

discharging an indebtedness of the company. In these circumstances it is considered that the payments can readily be said to have been made to the company, even though not made to the liquidator.

True, it will not always be possible to show that a payment did enure for the benefit of the company, eg where an erstwhile official of the company misappropriates the payment on receipt, but it is considered that s 22 should nevertheless be liberally interpreted to cover such payments. Section 22 is designed to protect persons who unwittingly make payment or other performance to an insolvent in ignorance of the sequestration, and persons who unwittingly make payment or other performance to a company under winding-up in ignorance of the winding-up are equally in need of protection. Moreover, s 339 of the Companies Act in applying the provisions of the Insolvency Act to windings-up expressly provides that they be applied mutatis mutandis, and payment to the company as purportedly continuing to be managed by the former organs of management is the most closely analogous act to payment 'to the insolvent'.

An analogous problem arose in In re Eros Films Ltd.(60) Section 31 of the English Bankrupcy Act(61) permits the set-off of mutual debts provided that the person who claims the benefit of the section had no notice at the time of giving credit of an act of bankruptcy committed by the bankrupt. Acts of bankruptcy have a special significance under the Bankruptcy Act in that the bankruptcy is deemed to have commenced at the time of the first act of bankruptcy committed by the bankrupt during the 3 months preceding the receiving order, on which act the order is based.(62) Section 317 of the English Companies Act(63) applies the

(60) [1963] Ch 565.

(61) 1914.

(62) Section 37.

(63) 1948.

provisions of the Bankruptcy Act to windings-up, but there is no concept of an act of bankruptcy under the Companies Act which, like our Companies Act, deems a winding-up to commence on presentation of the winding-up application.(64) Under s 1(1)(f) of the Bankruptcy Act it is an act of bankruptcy if one files in court a declaration of one's inability to pay one's debts or if one presents a bankruptcy petition against oneself. The company in question had passed a *resolution to go into voluntary winding-up and did not* therefore file such a declaration or petition. However, it did send a notice in terms of s 293 to its creditors convening a meeting of *creditors* to be held in conjunction with a meeting of members with a view to placing the company in voluntary winding-up. Buckley J in holding such notice to be equivalent to an act of bankruptcy for the purpose of s 31 of the Bankruptcy Act as applied to windings-up said:(65)

> 'It seems to me, therefore, that notice under section 293 does, in fact, amount to a declaration by the company of its inability to pay its debts .... it is quite true that the notice is not given in the manner indicated in section 1(1), (f) of the Bankruptcy Act *which relates to declaring inability to pay* debts by means of a notice filed in the bankruptcy court. Nevertheless, it is a declaration made in the form prescribed by statute and bears an analogy to a notice filed under the Bankruptcy Act .... I would be most unwilling to come to the conclusion that the final words of section 31 of the Bankruptcy Act, 1914, ought to be treated as of no effect when the provisions of that section are applied in winding up, and I do not think that it is either necessary or right to reach that conclusion.'

(64) Section 229 of the English Act and s 348 of the South African Act.

(65) At 574.

The same reasoning is, it is considered, applicable to the question of whether s 22 of the Insolvency Act applies to windings-up and leads to the conclusion that the section does apply.

Section 339 of the Companies Act applies the provisions of the insolvency laws to the winding-up of companies which are unable to pay their debts.(66) This does not mean that the company's inability to pay its debts must have been the ground on which it was placed in winding-up: s 339 will apply to the winding-up of a company which is unable to pay its debts whether or not this was the ground relied on and whether or not the company is placed in winding-up by the court or voluntarily.(67)

What is the position if a company which was able to pay its debts at the commencement of the winding-up becomes unable to do so during the winding-up, or vice versa, due, say, to fluctuation in the market value of the company's assets? This question arose in Taylor & Steyn NNO v Koekemoer(68) in relation to s 415(1) of the Companies Act and in the course of considering the position in regard to various other sections of the Act which refer to companies which are unable to pay their debts, Margo J, in delivering the judgment of the Full Bench, said :(69)

> 'Section 339 invokes the provisions of the law relating to insolvency in the winding-up of a company unable to pay its debts. That is clearly applicable to a company which, though

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(66) See 165 n 9 above regarding what constitutes inability to pay one's debts, but cf 303ff below.

(67) In re Hardwood Timber Co Ltd (in liquidation) 1932 NPD 170; Earl Motors (Pty) Ltd v Estany & Co (Pty) Ltd 1963 (2) SA 234(E) at 236B-D; Taylor & Steyn NNO v Koekemoer 1982 (1) SA 374(T) at 376F-G.

(68) Supra.

(69) At 378B-C.

> able to pay its debts at the commencement of the winding-up, later becomes unable to do so, for example, because the value of its assets has dropped meanwhile. If the insolvency law were not applied by s 339 to such a situation, there would be no other provisions to govern those aspects of the winding-up which are wholly dependent on the Insolvency Act.'(70)

(b) Meaning of 'any obligation...the cause of which arose before the sequestration'

Section 22 refers to the satisfaction of 'any obligation ... the cause of which arose before the sequestration'. The cause of a contractual obligation in this context is, it is considered, the contract itself and not every fact that the claimant would have to prove to establish a cause of action.(71) For example, if the insolvent had granted a loan repayable on demand and demand had not been made prior to sequestration he would have had an incomplete cause of action on sequestration but the obligation to repay the loan would still have been one the cause of which arose before sequestration within the meaning of s 22.(72)

Obligations owed to the insolvent are assets in his estate and the object of s 22 is in the first instance to preserve such assets for the creditors, subject only to protection of debtors who in ignorance of the sequestration discharge their debts to the insolvent instead of to his trustee. The view is, moreover, taken

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(70) This decision is criticised below at 303-11 in relation to s 341(2) but it is thought it is correct in relation to s 22.

(71) But cf Jones v Raad 1940 CPD 376 at 378 where the opposite conclusion was reached in relation to the expression 'cause of debt' in a different statute.

(72) It does not matter that the demand is only made after the insolvent has ceased to be entitled to make the demand, because even in the absence of a valid demand payment made to and accepted by a lender discharges the loan. Payment to the insolvent therefore constitutes the satisfaction of an obligation the cause of which arose before the sequestration.