of a third undivided share in the remaining stands together with payment of whatever profit has been made. If the account should show after making all proper allowances for interest and expenses that money is due to Bennett and Trimble, then Goldberg must pay his proper proportion, and only upon that payment is he entitled to transfer.

CURLEWIS, J., concurred.

Appellant's Attorneys: *Findlay, MacRobert & Niemeyer;* Respondents' Attorneys: *Hutchinson, Sons & Russell.*

EVANS v. RICHMOND.

1905. *May* 16. INNES, C.J., and MASON and BRISTOWE, J.J.

Cheque.—Notice of dishonour to drawer.—When dispensed with.—Irregularity of drawer's signature.—Bills of Exchange Act, sec. 48.

E sued R in the magistrate's court on a dishonoured cheque. The cheque had twice been presented to the bank, and had each time been returned unpaid to the holder, who was also the drawee. On the face of the cheque appeared the words "No account," but there was no evidence to show by whom they had been written. R pleaded want of notice of dishonour; E relied upon Proclamation 11 of 1902, sec. 48, sub-sec. 2 (*c*) (4). *Held*, that since E had failed to prove that the words "No account" had been written by the bank, the fact of this indorsement did not show that the bank was under no obligation to pay the cheque.

The name of the drawer was Richmond, but the signature on the cheque was "Richmonond." *Held*, that the variance of signature was sufficient to relieve the bank of any obligation to pay the cheque, and therefore that notice of dishonour was dispensed with.

Appeal from the Second Civil Magistrate of Johannesburg.

On the 27th June, 1904, Richmond gave Evans a cheque payable to bearer for £222, 0s. 9d. Within a few days Evans

presented this cheque for payment at the bank upon which it was drawn, and the bank refused payment. Two or three weeks later the cheque was again presented at the bank by a notary, and a second time payment was refused. Thereafter Evans sued Richmond upon the dishonoured cheque without having given the defendant due notice of dishonour. Though defendant's correct name was Richmond, the cheque was signed "Richmonond." The face of the cheque bore the words "No account," but there was nothing to show by whom those words were written.

Benson, for the appellant: The holder of a cheque is excused from giving notice of dishonour to the drawer in five cases under Proclamation 11 of 1902, sec. 48, sub-sec. 2 (*c*). In this case clauses 4 and 5 of the sub-section are applicable, because (1) the bank's answer of "No account" proves that the bank was under no obligation to pay that cheque, and (2) the irregularity of the signature was equivalent to a countermand of payment. With respect to the words "No account," this answer is such a universal custom in banking procedure that a court must take judicial notice of it: it is presumed to have been written by the bank unless proof to the contrary is adduced: see Paget's *Law of Banking*, pp. 43, 70, 228. Evans is excused from notice of dishonour because Richmond well knew, when issuing such cheque with an irregular signature, that the bank would dishonour it, whether he had an account there or not.

de Wet, for the respondent: Any person may have written the words "No account" on this cheque; they may have been written by some third person since the bank returned it to the holder on the second occasion. The appellant has failed to prove that this was the answer of the bank, and he must therefore suffer the consequences of his own negligence: in any case, notice of dishonour should not be excused.

Benson in reply.

INNES, C.J.: I think it is clear that the cheque was presented and was dishonoured: it certainly was not paid, and it comes out of the possession of the plaintiff as holder. But it is equally clear that no notice of dishonour was given; we have to decide

whether such notice ought to have been given. Notice of dishonour is dispensed with, as regards the drawer, where the drawee is, as between himself and the drawer, under no obligation to accept or pay.

The question is whether the bank was under an obligation to accept or pay this cheque. As far as the words "No account" upon the cheque are concerned, if they had been proved to be written by the bank I think there would have been sufficient evidence to show that the bank was not obliged to pay the cheque. But in the absence of proof, which might very easily have been supplied by the plaintiff, that the words "No account" were written by the bank, I am not prepared to say that upon that point the magistrate was wrong. But I think it is clear he was wrong in giving absolution from the instance when, upon the face of the cheque, the drawer's signature was incorrect; that is to say, where it was not the name of the man who purports to be the drawer. The man's name is Richmond; the cheque is drawn by somebody who signs his name "Richmonond." Clearly the bank was under no obligation to cash that cheque against the account of Richmond, even if there were such an account. That being so, I think sub-sec. 4 of sec. 48 applies, and the magistrate ought not to have granted absolution from the instance. I think it is a pity that by the course he adopted these further costs have been incurred.

With regard to the costs of the appeal, as this point was not taken in the court below, although it was obvious upon the face of the document, there should be no order as to the costs of appeal. The appeal will be allowed, and the case remitted to the magistrate for hearing on the merits.

MASON, J.: I concur. I think the magistrate should have recalled the witness from the bank at once so as to have settled the question. The witnesses were there ready, and it would have been fair to all the parties to have done so.

BRISTOWE, J.: I concur.

Appellant's Attorney: *F. K. Loewenthal;* Respondent's Attorneys: *Wagner & Klugsbrun.*