

~~G.D.3 G.S.~~

30, 1960

IN THE PRIVY COUNCIL

No. 33 of 1960.

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

50916

BETWEEN

THE COMMERCIAL BANKING COMPANY
OF SYDNEY LIMITED ... Appellant

- and -

EDWARD ROLF MANN ... Respondent

CASE FOR THE APPELLANT.

RECORD

10 1. This is an appeal by leave of the Supreme
Court of New South Wales from a final judgment
of that Court dated the 27th day of April, 1960,
which said judgment was entered by the direction
of Walsh, J., exercising the power of the
Supreme Court pursuant to the provisions of
Section 5 of the Supreme Court Procedure Act,
1907. The said judgment was entered in an
action tried as a commercial cause before
20 Walsh, J., without a jury, in which the above-
named respondent Edward Rolf Mann sued the
appellant the Commercial Banking Company of
Sydney Limited in the sum of £3,505. The
respondent claimed to be entitled thereto as a
result of the cashing by the appellant and the
receipt by the appellant of the proceeds of
certain bank cheques issued upon the application
of one Richardson, a partner of the Respondent
by the Australia & New Zealand Bank Limited in
30 favour of H. Ward a customer of the appellant.
Walsh, J., found a verdict for the respondent in
the sum of £3,505 and directed that judgment
therefor be entered accordingly.

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2. The respondent instituted this action by
unendorsed writ in the Common Law jurisdiction

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pp.3-6 1.2 of the Supreme Court of New South Wales dated 4th February, 1958, in which he claimed the sum of £3,505 from the appellant. By his Declaration dated the 19th day of February 1958, the respondent sued the appellant on two counts namely, for money had and received, and for the conversion of certain bank cheques. The particulars of the moneys alleged to have been received indicated that they were the moneys received by the appellant in respect of the bank cheques. By its pleas the appellant pleaded to the first count as follows, namely:- 10

- p.19. (a) That it was never indebted as alleged;
- (b) The provisions of S.88 of the Bills of Exchange Act, 1909 (Commonwealth) as amended;

To the second count the defendant pleaded as follows, namely:-

- (a) That it was not guilty;
- (b) That the said bank cheques were not the property of the respondent; 20
- (c) The provisions of Section 88 of the Bills of Exchange Act, 1909 as amended;
- (d) That the bank cheques were drawn upon the authority and with the consent of the plaintiff by the Australia & New Zealand Bank Limited in favour of H. Ward or bearer, and the appellant paid the value of the said bank cheques to the said H. Ward upon their delivery to the appellant without negligence and without notice of the interest, if any, in the said bank cheques of the respondent. 30

p.6. By his replication the respondent joined issue upon the appellant's pleas.

3. The question of importance to be decided in this appeal is whether a bank or any other person obtaining a bank cheque from the person named as payee therein bona fide and for value will obtain a good legal title to that bank cheque notwithstanding that the owner of the moneys used to recoup the bank issuing the bank 40

cheque has not authorised the use of those moneys for that purpose.

10 A bank cheque is a form of bank draft commonly used in Australia, being in the nature of a cheque drawn by the bank upon itself in favour of a named payee or order or bearer, the bank paying the cheque out of its own funds and being recouped therefor out of moneys previously obtained by it either from a customer's account or some other source.

20 4. The said action related to banking, and application was accordingly made under the provisions of the Commercial Causes Act, 1903-1957, for the entry thereof in the list of Commercial Causes in the Supreme Court. The Commercial Causes Act, 1903-1957, provides that either party to a Supreme Court common law action may by summons call upon the other party to show cause before a Judge in Chambers why such action should not be entered in the list of commercial causes. The Judge may thereupon order the action to be so entered and may give directions for the speedy determination of the questions in the action really at issue between the parties, and may in this regard, inter alia, settle the issues for trial and order the trial to be with or without a jury. Upon the hearing of the said application upon 20th February, 1959, Walsh, J., directed that the said cause be entered in the list of Commercial Causes and thereafter settled the issues appearing upon the pleadings as the issues for trial and on the hearing on 9th March, 1960, by consent directed that the trial of those issues be heard without a jury. Although tried without a jury, the action was tried as a Common Law Action and no equitable claims or defences were before the Court. pp. 3-6 pp.6-18

40 5. The said cause came on to be heard before Walsh, J., on the 9th day of March, 1960. According to evidence given by the respondent, he was a Solicitor carrying on practice at the time when the bank cheques were issued in partnership with another Solicitor named Richardson under the name of E.R. Mann & Company. A document had been drawn up to regulate this partnership but had never been signed. The substance of the arrangement between them was that Richardson received most of the profits of the partnership but the respondent was the sole owner of the assets pp. 6-18 pp. 7 & 11,12-17

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of the partnership including all moneys to credit of the partnership accounts with its bank, but cheques on those accounts might be drawn by any one party and the respondent was to give all necessary authorities to enable this to be done. In fact the respondent gave an authority to Richardson to draw cheques on the Trust Account of the partnership with the Australia & New Zealand Bank Limited, Pitt and Hunter Streets, Sydney and a written authority to this effect was given to the Australia & New Zealand Bank Limited Bank. The system in the office of the said partnership in relation to the drawing of trust account cheques was to record upon the butt of each cheque the name of the client for whom or for whose benefit the cheque was being drawn, the purpose of the withdrawal and the payee of the cheque. 10

6. The respondent's action was concerned with thirteen bank cheques which were all issued at the request of Richardson in similar circumstances. In each case Richardson signed a Trust Account cheque drawn on the partnership Trust Account with the Australia & New Zealand Bank Limited. After the printed word "pay" was written "bank cheque H. Ward" or "bank cheque favour H. Ward". The words "or bearer" were not struck out. Each cheque was accompanied by an application upon a printed form for a bank cheque for the corresponding amount in favour of H. Ward. In each case a bank cheque was issued by the Australia & New Zealand Bank Limited in the form of "pay H. Ward or bearer". Each cheque was crossed and marked "not negotiable". The bank cheques were taken by H. Ward to the appellant's branch at Maroubra where the said H. Ward had an account which had been opened by him on the 17th of November 1954. The appellant cashed each bank cheque; paying the amount thereof to the said H. Ward, and subsequently was paid the amount of each bank cheque by the Australia & New Zealand Bank Limited. 30 40

7. It has been the practice in Australia since some time before 1900 to use bank cheques in transactions where the person receiving the cheque is for some reason not prepared to accept the payee's own cheque.

8. The practice is described in "The Law of Banker and Customer in Australia" by Manning 50

and Farquharson at p.38 as follows:-

10 " Bank cheques are particularly used to obviate the handling of cash where large cash payments are required as between solicitors on settlement of conveyancing transactions; the cheque being the bank's promise and as good as cash, it becomes safe on receipt of the bank-cheque to hand over title deeds and the like; thus bank cheques are frequently given for scrip, bond warrants, bills of lading, and for making cash deposits to Government departments, as by contractors, or in settlement of customs duties to obtain the prompt release of goods from bond, and in settlements with brokers."

20 The practice in respect of bank cheques is for the bank's customer to draw a cheque on his account in the manner in which Richardson drew the bank cheques referred to above and to apply to the bank for the issue of the bank cheque. The bank then debits the customer's account with the amount of the bank cheque to be issued and credits an account of its own called Bank Cheques Suspense Account with that amount. The bank then issues a cheque drawn on itself in favour of the person referred to in the customer's cheque. Although bank cheques are usually drawn at the request of customers 30 they may be obtained by any person who gives to the bank the amount of money necessary to cover the bank cheque and pays the charge made by the bank for issuing the bank cheque.

40 9. Richardson made entries on the butts of the partnership trust account cheques which in accordance with the said partnership practice were taken to indicate the client to be debited and the payee. None of these clients had in fact authorised the payment of any of the said cheques and the respondent had not authorised any such payments. No evidence was adduced as to the nature of the transactions between Richardson and H. Ward and there was no evidence whether the bank cheques or any of them were handed by the Australia & New Zealand Bank Limited to Richardson or directly to H. Ward. Each bank cheque was, however, handed to the Maroubra branch of the appellant by H. Ward and at his request was cashed by that branch 50 in lieu of being collected by the appellant on his behalf. Whilst it is more usual

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for bank cheques to be collected and not cashed, they are in fact sometimes cashed where the customer is known to the bank and requests that they be cashed.

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10. The appellant abandoned at the hearing the pleas based on Section 88 of the Bills of Exchange Act, 1909-1936. This section appears in Division 2 of Part III of the said Act which said Division deals with Crossed Cheques. Section 88 gives certain protection to banks who collect cheques on behalf of its customers. Section 88A was inserted in the said Division in 1932 to provide that for the purposes thereof "cheque" includes a banker's draft payable on demand drawn by or on behalf of a bank upon itself, whether payable at the head office or at some other office of the bank. It was considered that the appellant had not collected the said bank cheques for its customer Ward but had collected them on its own behalf after having cashed them for its said customer and that accordingly this section did not apply. 10
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11. At the hearing the appellant claimed:-

(a) that if the issue by the Australia and New Zealand Bank Limited of the said bank cheques upon the request of Richardson was not within the scope of the authority given by the respondent the decision of the Privy Council in McClintock v. Union Bank of Australia Limited 1922 A.C. 240. was direct authority for the proposition that the respondent could not succeed against the appellant. 30

(b) That if the issue of the said bank cheques by the Australia & New Zealand Bank Limited upon the request of Richardson was within the scope of the authority given by the respondent then:- 40

(i) The authority of the Australia & New Zealand Bank Limited extended to the delivery of the said bank cheques to Ward.

- (ii) The authority of Richardson extended to the delivery of the said bank cheques to Ward;
- (iii) The title to the said bank cheques at no time vested in the respondents but upon their delivery to Ward vested in Ward;
- (iv) Alternatively that the respondent was precluded as against the appellant from denying Ward's title to the bank cheques;
- (v) That the respondent's right to recover the bank cheques from Richardson at any time whilst they were in Richardson's hands would depend upon some fiduciary or equitable obligation which would not affect the appellant's title.
- (vi) That the procuring of the bank cheques by Richardson was essentially a similar transaction to the purchase by Richardson of any other form of personal property with money stolen or misappropriated from the respondent and that the respondent obtained no title to the bank cheques simply because the money used for their purchase was his.

30 12. At the hearing the respondent claimed:-

- (a) That the issue by the Australia & New Zealand Bank Limited of the said bank cheques upon the request of Richardson was within the scope of the authority given by the respondent and that when Richardson received the bank cheques he received them solely as agent for and on behalf of the respondent.
- (b) That neither Richardson nor the Australia and New Zealand Bank Limited had any authority to deliver the said bank cheques to Ward.
- (c) That Ward obtained no title to the bank cheques;
- (d) That there was no occasion to apply

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the doctrine of ratification and that accordingly the decision in McClintock v. Union Bank of Australia (supra) had no application.

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13. Walsh, J., by his judgment delivered on the 27th day of April, 1960, held as follows:-

- (a) That the application by Richardson for the bank cheques and the issue thereof in Ward's favour was in fraud of the respondent; 10
- (b) That the right of the respondent to recover the amount represented by the face value of the bank cheques depended in respect of both the count for money had and received and the count in conversion on whether the appellant's action in obtaining and dealing with the bank cheques was wrongful as against the respondent; 20
- (c) Richardson had no authority to draw cheques and hand them over to a stranger such as Ward in circumstances unconnected with the partnership business but as between the respondent and the Australia & New Zealand Bank Limited Richardson was authorised to procure the issue of bank cheques; 30
- (d) That if the bank cheques were handed by the Australia & New Zealand Bank Limited to Ward, Ward would obtain no title to them and the title would remain in the respondent.
- (e) That if Richardson obtained the bank cheques directly from the Australia & New Zealand Bank Limited, he received the cheques on behalf of the respondent and they became and remained the respondent's property. 40
- (f) That since the issue of the bank cheques was authorised as between the Australia & New Zealand Bank Limited and the respondent, the respondent had no occasion to resort to the doctrine of ratification in

order to found his action, and therefore it was not necessary to consider whether the respondent was bound to ratify any further step in the transaction.

- (g) That if Richardson had by means of the cheques drawn cash from the bank the money so drawn would have belonged to the respondent.
- 10 (h) That the procuring of the issue of the bank cheques was not substituting a form of property for the cheques by an independent transaction but was a case in which the Australia & New Zealand Bank Limited at the request of the firm of E.R. Mann & Co. handed bank cheques to that firm, the hand that took them being the hand of Richardson.
- 20 (i) Accordingly the bank cheques belonged to the respondent.
- (j) That if the respondent had to rely upon the doctrine of ratification he was entitled to ratify the issue of the bank cheques without ratifying the handing of the cheques to Ward which was a fresh departure and not merely something incidental to the original issue.
- 30 (k) Accordingly the respondent was entitled to judgment in respect of the whole amount claimed by him.

14. The matters which are material to be decided in this appeal were considered by the Privy Council in The Union Bank of Australia Ltd. v. McClintock (1922) A.C. 240 (reversing the decision of the Full Court of the Supreme Court of New South Wales, reported sub nomine McClintock v. The Union Bank of Australia 40 20 S.R. (N.S.W.) 494). In that case the plaintiffs as trustees of a will conducted the business of newspaper proprietors and employed McClintock as General Manager of their business. McClintock opened an account under the fictitious name of "Robert Haynes" with the defendant bank by a cash deposit. Shortly afterwards he paid into this account an open cheque of the plaintiffs drawn on their bank and duly signed

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and countersigned in accordance with their instructions to their bank. Later on at different times fifteen cheques were drawn on the plaintiffs' bank in favour of that bank or order and crossed "not negotiable" and were duly signed and countersigned. With possibly one exception the counterfoils of the plaintiffs' cheques contained entries showing that the cheques purported to be in payment for paper or in reduction of an overdraft or for transfer of loan account, that is to say, in connection with matters relating to the plaintiffs' business. McClintock obtained from the plaintiffs' bank the bank's own cheques in exchange for these cheques and paid them into the "Robert Haynes" account with the defendant bank with endorsements purporting to be those of the respective payees. McClintock operated on this account from time to time and in some cases withdrew money before the bank cheques had been cleared. In an action by the plaintiffs against the defendant bank for the conversion of the cheques, tried before a Judge and jury, the jury returned a verdict for the defendant. It was held by the Full Court of the Supreme Court of New South Wales upon motion for a new trial that as regards the open cheque the verdict was against the evidence, and further by Pring and Ferguson, JJ., Gordon, J., dissenting, that McClintock as such general manager acted within the scope of his authority in obtaining the bank cheques, that he received them solely as the servant of the plaintiff, and that accordingly without any application of the doctrine of ratification the bank cheques were the property of the plaintiffs and had been converted by the bank. Gordon, J. held that McClintock was not authorised to obtain bank cheques in favour of someone not designated by the persons who had to countersign the cheques any more than he was authorised to receive cash for a cheque; that probably the plaintiffs could not ratify the unauthorised acts of McClintock in obtaining the bank cheques so as to affect the rights already acquired by the Union Bank of Australia in those bank cheques; and that in any event the Union Bank of Australia was entitled to rely on the provisions of S.88 of the Bills of Exchange Act 1909, as amended. The Union Bank of Australia appealed to the Privy Council and in that appeal the decision of the Supreme Court in relation to the bank cheques was

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10 reversed. Their Lordships held that the verdict of the jury in favour of the Union Bank was a finding that McClintock was not authorised to procure the issue of the bank cheques, semble as regards the plaintiffs, and that the plaintiffs by ratifying the procuring of the bank cheques by McClintock must also be taken to have ratified the payment by McClintock of the bank cheques to the fictitious account in the name of "Robert Haynes".

15. Walsh, J., in his judgment assumed that what their Lordships said in McClintock's Case as regards the finding of the jury in relation to McClintock's authority was concerned with his authority vis-a-vis the bank issuing the bank cheques, namely, the Australian Bank of Commerce, but it is submitted that their Lordships were in fact concerned with McClintock's authority vis-a-vis the plaintiffs. In the present case there is no question that the procuring of the issue of the bank cheques was not in fact authorised by the respondent or by any of the persons beneficially entitled to the relevant moneys in the respondent's trust account. It is accordingly submitted that the title to the bank cheques at no time vested in the respondent and that the respondent could only obtain such a title by ratifying and adopting as his acts what Richardson had done without authority.

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16. Any ratification by the respondent of Richardson's unauthorised acts took place long after the appellant had acquired the bank cheques for value and without notice of the respondent's rights (if any) and been paid the amount thereof by the Australia & New Zealand Bank Limited. It is submitted that no ratification by the respondent could operate to divest or otherwise prejudicially affect the appellant's rights in respect to the bank cheques which it acquired before that ratification: Donnelly v. Popham (1807) 1 Taunt. 1; Bird v. Brown (1850) 4 Exch. 786; Re Gloucester Municipal Election Petition, 1900 Ford v. Newth (1901) 1 K.B. 683; Halsbury, Laws of England, 3rd ed. Vol. 1 at p.181. It is further submitted that any ratification by the respondent of the issue by the Australia & New Zealand Bank Limited of bank cheques in favour of Ward would necessarily extend to the delivery of those cheques to Ward, for the only purpose of the issue of such cheques would be

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their delivery to Ward and such delivery would necessarily be contemplated by the issue of bank cheques naming Ward as payee.

17. On a proper analysis of the procuring by Richardson of the issue of the bank cheques it is submitted that Richardson in reality misappropriated the cheques drawn on the trust account or the moneys in the trust account used to pay for the bank cheques, and then purchased a new form of property, namely, bank cheques, by means of the cheques or moneys which he had no misappropriated. The bank cheques were the cheques of the Australia & New Zealand Bank Limited under which it was bound to pay Ward with its own moneys the amounts specified in the cheques. It is submitted there is no difference between these transactions and a situation where Richardson had in fact cashed the cheques and purchased money orders from the Post Office payable to Ward in equivalent amounts.

18. If contrary to the submissions made above the relevant authority to be considered in determining whether the issue of the bank cheques must be regarded as having been made to the respondent through his agents is the authority of the Australia & New Zealand Bank Limited, then it is submitted that the procuring of the issue of bank cheques payable to a named payee or bearer was not within the scope of that authority, and that the respondent could only acquire a title to the bank cheques by ratification. If the issue of the relevant bank cheques was within the scope of the authority of the Australia & New Zealand Bank Limited then, on the assumption that this is the relevant authority to consider:-

(a) the Australia & New Zealand Bank Limited issued the bank cheques to Ward or to Richardson as Ward's agent and they were never in fact delivered to Richardson as Mann's agent.

(b) The delivery of the bank cheques by the Australia & New Zealand Bank Limited to Ward would be within the scope of this authority and it is consistent with the evidence that they were so delivered. If the issue and delivery of the bank cheques to Ward

by the Australia & New Zealand Bank Limited was authorised then Ward would get a good title to the bank cheques.

19. If the authority given by the respondent to the Australia & New Zealand Bank Limited extended to the issue by that bank, on the request of Richardson, of bank cheques payable to a named payee, the respondent by giving the bank and Richardson that authority allowed Richardson to procure the issue of and that bank to issue documents of title, namely, the bank cheques, showing Ward to be the apparent owner thereof. The appellant dealt with Ward bona fide and for value on the basis of the correctness of these apparent indicia of title and it is not open for the respondent thereafter to set up his own title in the bank cheques as against the appellant: Henderson & Co. v. Williams (1895) 1 Q.B. 521. It is submitted that the present case is one where one of two innocent persons must suffer, and that that party should suffer who by his own act and conduct has enabled the other to be imposed upon. Although this last proposition is a compendious statement of the general result produced by the operation of independent principles and is not itself a rule of law (cf. Thomson v. Palmer (1933) 49 C.L.R. 507 at 545). There is an independent principle which it is submitted applies in the present case to preclude the respondent from setting up his title. It is not a case of Richardson having any ostensible authority to procure the issue of the bank cheques for the appellant had no knowledge of Richardson; it is a case where the respondent by giving an authority extending to the issue of bank cheques payable to Ward, has placed Ward in a position to set himself up as the true owner of those cheques, and so to mislead the appellant by the apparent indicia of title in Ward's hands.

20. The appellant therefore submits that the decision of the Supreme Court given by Walsh, J., is erroneous and ought to be reversed, and that this appeal should be allowed and the judgment of the Supreme Court set aside and judgment entered for the appellant for the following (among other)

R E A S O N S

50 (a) BECAUSE the respondent's title to the bank cheques depended upon his

ratification of Richardson's acts, and any such ratification by the respondent could not operate to divest or otherwise prejudicially affect the appellant's rights which vested prior to any such ratification.

- (b) BECAUSE the title of the respondent to the said bank cheques depended upon his ratification of Richardson's acts, and this ratification would necessarily extend to the delivery of the bank cheques to Ward, and thus to Ward's title to the bank cheques. 10
- (c) BECAUSE if the authority given by the respondent to issue the bank cheques extended to the issue of bank cheques in favour of a named payee, the authority given by the respondent must be taken to extend to the delivery of the bank cheques to that named payee. 20
- (d) BECAUSE no property in the bank cheques was ever vested in the respondent and the property in those cheques vested in Richardson or Ward according as whether the cheques were delivered to Richardson or Ward in the first instance.
- (e) BECAUSE the respondent having authorised the issue of bank cheques in favour of Ward and so allowed Ward to appear as the owner thereof is precluded from setting up his title as against the appellant who dealt with Ward on the basis of his apparent title. 30

J.D. HOLMES

R.M. HOPE

No. 33 of 1960

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B E T W E E N

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CASE FOR THE APPELLANT

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