

Got ^{Re} 2/15

30, 1960

IN THE PRIVY COUNCIL

NO. 33 OF 1960

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N

THE COMMERCIAL BANKING COMPANY
OF SYDNEY LIMITED (Defendant) APPELLANT

- and -

EDWARD ROLF MANN (Plaintiff) RESPONDENT

RECORD OF PROCEEDINGS

BELL, BRODRICK & GRAY,
The Rectory,
29, Martin Lane,
Cannon Street, E.C.4.
Solicitors for the
Appellant.

LIGHT AND FULTON,
24, John Street,
Bedford Row,
London, W.C.1.
Solicitors for the
Respondent.

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EDWARD ROLF MANN (Plaintiff) RESPONDENT

E3915

RECORD OF PROCEEDINGS

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LIST OF ORIGINAL EXHIBITS TRANSMITTED TO PRIVY
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Exhibit Mark	Description of Document
A.	Tellers account slips
B.	Authority for the opening of the Account of H.G. Ward with The Commercial Banking Company of Sydney Limited, Maroubra

Exhibit Mark	Description of Document
C.	Bundle of Bank cheques
D.	Bundle of requisitions for Bank cheques
E.	Bundle of cheques drawn on Trust Account of E.R. Mann & Co.
F.	Partnership Agreement of E.R. Mann & Co.
G.	Authority for the opening of the Trust Account of E.R. Mann & Co. with the Australia & New Zealand Bank Limited, Pitt and Hunter Streets, Sydney
H.	Bundle of butts of cheques drawn on the Trust Account of E.R. Mann & Co.
J.	List of extracts from cheque butts forming Exhibit H.

LIST OF DOCUMENTS NOT TRANSMITTED TO PRIVY COUNCIL

No.	Description of Document	Date
1.	Declaration, Pleas, Replication and Notice of Trial	2nd July 1958
2.	Chamber Summons to enter in list of Commercial Causes	6th August 1958
3.	Affidavit of Maxwell Sutherland Edwards in support thereof	6th August 1958
4.	Order pursuant thereto	20th February 1959
5.	Notice of Motion for leave to Appeal to Privy Council	6th May 1960
6.	Affidavit of Maxwell Sutherland Edwards in support thereof	6th May 1960
7.	Consent Order for handing out exhibits	9th May 1960
8.	Rule Granting Conditional Leave to Appeal	12th May 1960
9.	Notice of Motion for final leave to Appeal to Privy Council	

No.	Description of Document	Date
10.	Affidavit of Maxwell Sutherland Edwards in support thereof	
11.	Prothonotary's Certificate of Compliance with Conditional Order	

IN THE PRIVY COUNCIL

NO. 33 OF 1960

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N

THE COMMERCIAL BANKING COMPANY
OF SYDNEY LIMITED (Defendant) APPELLANT

- and -

EDWARD ROLF MANN (Plaintiff) RESPONDENT

RECORD OF PROCEEDINGS

10

No. 1

In the Supreme
Court of New
South Wales

WRIT OF SUMMONS

IN THE SUPREME COURT)
OF NEW SOUTH WALES) 901 of 1958.

No.1

BETWEEN: EDWARD ROLF MANN Plaintiff

Writ of
Summons,
4th February
1958.

- and -

THE COMMERCIAL BANKING
COMPANY OF SYDNEY LIMITED Defendant

20

ELIZABETH THE SECOND, by the Grace of God, of the
United Kingdom, Australia and her other realms and
Territories Queen, Head of the Commonwealth,
Defender of the Faith.

To The Commercial Banking Company of Sydney
Limited

of 343 George Street Sydney in the State of New
South Wales

WHEREAS the abovenamed Plaintiff has commenced an
action against you in this Court:

30

WE command you that if you desire to contest
his claim you do, within ten days after service of
this writ upon you, file in the office of the
Court a notice of appearance in the form prescribed

In the Supreme
Court of New
South Wales

—
No.1

Writ of
Summons,
4th February
1958 -
continued.

by the rules of Court and serve a copy thereof on the plaintiff or his solicitor.

AND take notice that such notice of appearance may be filed on your behalf by a solicitor of this Court or by yourself in person, in which latter case the address given therein for service of documents upon you must be within two miles of the General Post Office, Sydney.

AND take notice that if you fail to file such notice of appearance within the time limited for your appearance the plaintiff may proceed with the action as provided by the Common Law Procedure Act, 1899, and the rules made thereunder.

10

WITNESS - the Honourable SIR KENNETH WHISTLER STREET, K.C.M.G. Chief Justice of our said Court at Sydney, this 4th day of February 1958.

For the Prothonotary
(Sgd) J.W. BAGGOTT
Clerk of the Supreme
Court.

20

This writ was issued by EDWARD ROLF MANN of 42 Bridge Street, Sydney.

The address for service of documents is C/- Messrs. E.R. Mann & Co. 42 Bridge Street, Sydney.

The Plaintiff claims three thousand five hundred and five pounds (£3505) and nine pounds twelve shillings (£9.12.0) for his costs together with the fees properly paid for service of this writ upon you and if those sums be paid to him or his solicitor within the time above limited for your appearance further proceedings in this action will be stayed.

30

E.R. MANN,
Plaintiff

No. 2

ISSUES FOR TRIAL

In the Supreme
Court of New
South Wales

IN THE SUPREME COURT)
OF NEW SOUTH WALES)

No. 901 of 1958.

No.2

Issues for
Trial,
2nd July 1958.

BETWEEN: EDWARD ROLF MANN Plaintiff

- and -

THE COMMERCIAL BANKING
COMPANY OF SYDNEY LIMITED Defendant

ISSUES FOR TRIAL

10 Writ issued 4th day of February, 1958.
Declaration dated 19th day of February, 1958.

SYDNEY) EDWARD ROLF MANN in person sues the
TO WIT) Commercial Banking Company of Sydney
Limited being a company duly incorporated
and liable to be sued in and by its said
name and style for money payable by the
defendant to the plaintiff for money
received by the defendant for the use of
the plaintiff.

20 2. And for a second count the plaintiff
also sues the defendant for that the
defendant converted to its own use or
wrongfully deprived the plaintiff of the
plaintiff's cheques, namely bank cheque
number 60183 dated 24th December 1954 for
the sum of £200 drawn by the Australia and
New Zealand Bank Limited; bank cheque
number 61060 dated 4th February 1955 for
30 the sum of £160 drawn by the said Bank;
bank cheque number 61120 dated 11th
February 1955 for the sum of £150 drawn
by the said Bank; bank cheque number 61487
dated 7th March 1955 for the sum of £300
drawn by the said Bank; bank cheque number
62603 dated 26th April 1955 for the sum of
£245 drawn by the said Bank; bank cheque
number 1252 dated 1st July 1955 for the
sum of £150 drawn by the said bank; bank
cheque number 1860 dated 15th July 1955
40 for the sum of £250 drawn by the said
Bank; bank cheque number 1389 dated 11th
August 1955 for the sum of £200 drawn by

In the Supreme
Court of New
South Wales

No.2

Issues for
Trial,
2nd July 1958
- continued.

by the said Bank; bank cheque number 3759 dated 16th December 1955 for the sum of £150 drawn by the said Bank; bank cheque number 003916 dated 2nd December 1955 for the sum of £400 drawn by the said bank; bank cheque number 785 dated 13th January 1956 for the sum of £300 drawn by the said Bank; bank cheque number 3615 dated 3rd April 1956 for the sum of £500 drawn by the said Bank; bank cheque number 3948 dated 8th May 1956 for the sum of £500 drawn by the said Bank.

10

Particulars filed the 19th day of February 1958.

The following particulars are supplied pursuant to Order X Rule 6.

The following are particulars of the plaintiff's demand:

The plaintiff claims that the defendant received payment of the undermentioned bank cheques for itself and that the said cheques were the property of the plaintiff and that the defendant had no title to them or to the proceeds thereof. The plaintiff seeks to recover the moneys which the defendant has received in respect of such cheques. Particulars of the abovementioned cheques are as follows:

20

Bank cheque number 60183 dated 24th December 1954 for the sum of £200 drawn by the Australia and New Zealand Bank Limited; bank cheque number 61060 dated 4th February 1955 for the sum of £150 drawn by the said Bank; bank cheque number 61120 dated 11th February 1955 for the sum of £150 drawn by the said Bank; bank cheque number 61487 dated 7th March 1955 for the sum of £300 drawn by the said bank; bank cheque number 62603 dated 26th April 1955 for the sum of £245 drawn by the said Bank; bank cheque number 1252 dated 1st July 1955 for the sum of £150 drawn by the said Bank; bank cheque number 1860 dated 15th July 1955 for the sum of £250 drawn by the said Bank; bank cheque number 1389 dated 11th August 1955 for the sum of £200 drawn by the said Bank; bank cheque number 3759 dated 16th December 1955 for the sum of £150 drawn by the said

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Bank; bank cheque number 003916 dated 2nd December 1955 for the sum of £400 drawn by the said Bank; bank cheque number 785 dated 13th January 1956 for the sum of £300 drawn by the said Bank; bank cheque number 3615 dated 3rd April 1956 for the sum of £500 drawn by the said Bank; bank cheque number 3948 dated 8th May 1956 for the sum of £500 drawn by the said Bank.

In the Supreme
Court of New
South Wales

No.2

Issues for
Trial,
2nd July 1958
- continued.

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Pleas dated 4th day of March 1958.

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED by JOHN GORDON CROWTHER its Attorney as to the first count of the Declaration says that it never was indebted as alleged.

20

2. And for a second plea the Defendant as to the first count of the Declaration says that the Plaintiff's claim under the said count arises in respect of certain cheques drawn by the Australia and New Zealand Bank Limited in favour of H. Ward and crossed generally and the Defendant is a Banker and the said H. Ward was at all material times a customer of the Defendant and the Defendant received payment of the said cheques in good faith and without negligence for the said H. Ward within the meaning of Section 88 of the Bills of Exchange Act 1909 (as amended).

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3. And for a third plea the Defendant as to the second count of the Declaration says that it is not guilty.

4. And for a fourth plea the Defendant as to the second count of the Declaration says that the cheques set forth in the said second count were not the property of the Plaintiff.

40

5. And for a fifth plea the Defendant as to the second count of the Declaration says that the cheques referred to in the said count were drawn by the Australia and New Zealand Bank Limited in favour of H. Ward and crossed generally and the Defendant is a Banker and the said H. Ward was at all material times a customer of the Defendant and the Defendant received payment of the said cheques in good faith and without negligence for the said H. Ward within the meaning of Section 88 of the Bills of Exchange Act 1909 (as amended).

In the Supreme Court of New South Wales

No.2

Issues for Trial, 2nd July 1958 - continued.

6. And for a sixth plea the Defendant as to the second count of the Declaration says that the cheques referred to in the said count were drawn upon the authority and with the consent of the Plaintiff by the Australia and New Zealand Bank Limited in favour of H. Ward or Bearer and the Defendant paid the value of the said cheques to the said H. Ward upon their delivery by the said H. Ward to the Defendant without negligence and without notice of the interest (if any) in the said cheques of the Plaintiff.

10

Replication dated the 2nd day of July 1958.

M A N N

v.

COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED.

The Plaintiff joins issue upon the Defendant's pleas and each of them.

DATED this second day of July 1958.

E. R. MANN.

Plaintiff's Attorney, 42, Bridge Street, SYDNEY.

20

No.3

Transcript of Evidence, 9th March 1960.

No. 3

TRANSCRIPT OF EVIDENCE

IN THE SUPREME COURT OF NEW SOUTH WALES IN COMMERCIAL CAUSES)

EM/4

CORAM: WALSH, J. Wednesday 9th March, 1960.

MANN v. THE COMMERCIAL BANKING COMPANY OF SYDNEY LTD.

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MR. MCINTOSH Q.C. and MR. BAINTON appeared for the Plaintiff.

MR. HOLMES Q.C., MR. HOPE, and MR. LLOYD appeared for the Defendant.

.....

IRVINE CLIVE MCLAUGHLAN On Subpoena duces tecum:

MR. MCINTOSH Q: What is your name? A. Irvine Clive McLaughlin.

- Q: You are an officer of the Australia and New Zealand Bank Ltd.? A. Correct.
- Q: Do you produce a subpoena and certain cheques?
A. I do.
- Q: You have listed the cheques you produce. You produce "The latest authority allowing Gordon Arthur Richardson to operate on the Trust Account of E.R. Mann and Co."? A. Yes.
- Q: "The cheques drawn on the Trust Account"? A. Yes.
- 10 Q: Except for two? A. Yes. There are two missing.
- Q: I think they are in my possession. "The requisitions for Bank cheques in exchange therefor and the Bank cheques issued pursuant thereto"?
A. Yes.
- Q: You produced them all, with the exception of two? A. Yes.
- Q: And you have listed those which you produce?
A. Yes.

In the Supreme
Court of New
South Wales

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No. 3

Transcript of
Evidence,
9th March 1960
- continued.

(Witness retired.)

- 20 MR. MCINTOSH: The Plaintiff is a Solicitor. He was carrying on business as a Solicitor under the name of E.R. Mann and Co., and still is, of course, back in 1954, 1955, 1956, and subsequent dates. At that time he had a partner named Richardson. The evidence we will put before your Honor is that Richardson was a partner in the profits, but had no interest in the assets of the partnership. He had authority to sign cheques on the Bank Accounts of E.R. Mann and Co., which were then and still
- 30 are in the Australia and New Zealand Bank, corner of Pitt and Hunter Streets. He drew over a period, a number of cheques, which he entered up in the butts - they will be before your Honor - in the form, the date, the name of the estate represented in the Trust Account, the matter in relation to which the money was being disbursed, and then the name of the person in whose favour the cheque on the trust account was drawn. He wrote on the cheque, "pay bank cheque", in favour of a man
- 40 named Ward. That apparently went to the Bank and the Bank issued a bank cheque in the same amount. They crossed it "not negotiable", and issued it

In the Supreme
Court of New
South Wales

No.3

Transcript of
Evidence,

9th March 1960

- continued.

as their bank cheque, in favour of Ward or bearer. This aspect may not have much materiality.

That cheque found its way ultimately, back to the A.N.Z. Bank, but it was cashed over the counter of the Commercial Banking Co. of Sydney Ltd., at Maroubra Junction.

Our claim is based on two counts, in the declaration, one for money had and received, and the other one is conversion of the cheques in question, on the basis that the bank cheques, which the bank purchased, that is the Commercial Banking Co. of Sydney Limited, they converted when they accepted them, from whoever gave them to them, and the monies they have received when they got them paid by the A.N.Z. Bank, was the plaintiff's money. There is a number of pleas on file, but if my friend might tell your Honor, if he is relying on all of them, or only some of them. I understand there was some slight discussion in relation to some of them.

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HIS HONOR: I have had a look at the pleadings.

MR. MCINTOSH: Three of them, I think, are obviously demurrable. I think the "not guilty" and "never indebted", are sound; on any system of law as I understand it, the pleas in relation to the "no negligence" -

HIS HONOR: There are two relating to Section 88.

MR. MCINTOSH: Which seem to have nothing to do with the situation. The other one is that the cheques were not our property. That would be material. That is really, I suppose, the real issue.

30

HIS HONOR: When you say they are demurrable, I am not sure that I follow what you mean. Do you mean because these were not cheques within the meaning of the Bills of Exchange Act?

MR. MCINTOSH: Yes. They are not cheques. They are bank cheques. Section 88 applies to bank cheques in certain circumstances but only in relation to part of it. But the Bank purported, if they were real cheques, to be holders in due course.

40

HIS HONOR: I gather from what you have said so far, on your case it will not be a case where a Bank was collecting a cheque for a customer?

In the Supreme
Court of New
South Wales

MR. MCINTOSH: No.

No. 3

HIS HONOR: That would be a matter of evidence rather than of demurrability.

Transcript of
Evidence,
9th March 1960
- continued.

10 MR. MCINTOSH: I suppose it would be. It is the same thing as if someone took one of these cheques and got it cashed by the greengrocer or someone else. Even a Banker does not make it any different.

HIS HONOR: On certain facts it would not, I suppose, but on others it would.

20 MR. MCINTOSH: I would not agree with that, even, but I want to know whether my friend is going to deal with it, because I will, if necessary, argue that when a Bank buys a cheque and pays over the counter, they are not collecting under section 88. They are acting as an ordinary person who says, "I will give you a value for that cheque."

HIS HONOR: That may be so, but I do not know whether it is admitted that these cheques were bought over the counter.

30 MR. MCINTOSH: We have tried to cut corners, by cutting down the oral evidence to be put before your Honor to a minimum. I would say all the facts I have stated to your Honor can be proved by tendering the necessary things and calling Mr. Mann to fill in the details in relation to the partnership.

(Tellers' slips in relation to bank cheques, called for; thirteen tellers' deposit slips produced; tendered; admitted and marked Exhibit "A").

40 My friend and I are in agreement that when a man goes into the Bank and says to the teller, "will you cash this cheque?", the teller writes on the back of a bit of paper, which is one of these paying-in slips. Your Honor will see on that one - which has a lot on it - about 8 or 10 cheques. Three from the bottom you will see "A.N.Z., Pitt Street, £500." Somebody has written on the right hand side, I think, somebody's name. The inference

In the Supreme
Court of New
South Wales

No.3

Transcript of
Evidence,
9th March 1960
- continued.

or fact to be drawn is that in the case of the cheques I am speaking about, they were cashed over the counter by the teller of the defendant Bank.

(Copy of Ward's Bank Account called for.)

HIS HONOR: In every case, does the slip include some one or more items other than the disputed cheque?

MESSRS. MCINTOSH AND HOLMES: Yes.

MR. HOLMES: Take one with a number on it. There will be an A.N.Z. Bank cheque accounted for. The other cheques have nothing to do with this case at all. There is only one cheque on each deposit slip which has anything to do with this case.

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HIS HONOR: It is not suggested that these other items were in respect of cheque cashed with the disputed cheque, by the same man at the same time? They are other transactions?

MR. HOLMES: Yes.

MR. MCINTOSH: We would not know that. Your Honor will see written there some names which I assume are the persons for whom the cheques were cashed. On the one I showed your Honor, £500 has not anybody's name, I think. The last two, I would say, would be Ward cheques.

20

(Instructions by H. Ward to defendant Bank to open account, and copy of that account, called for. New account deposit slip; and copy of account, with Affidavit, produced.)

(New account form in name of Harry Ward, 17/12/54 tendered; admitted and marked Exhibit "B".)

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(Abovementioned copy account, m.f.i. l.)

(Thirteen bank cheques drawn by A.N.Z. Bank Ltd., 24/12/54 to 8/5/56, being cheques set out in particulars, tendered; admitted and marked Exhibit "C".)

MR. MCINTOSH: Your Honor will notice they are bank cheques. On the back is an endorsement,

"Harry G. Ward," and on a number of them, there are figures, either in pencil or in blue pencil, showing how the Bank officers paid. They also show, with a stamp, that they were paid through the Commercial Banking Company, Maroubra Junction. For what it is worth, it appears that the signature on Exhibit "B" and those on the back of the cheques, are the same signatures.

In the Supreme
Court of New
South Wales

—
No. 3

Transcript of
Evidence,

9th March 1960
- continued.

10 MR. HOLMES: I think you were going to admit
identity?

MR. MCINTOSH: Yes.

MR. HOLMES: There is no question about identity.

(Series of documents called "Requisitions for Bank cheques" dealing with 13 Bank cheques comprising Exhibit "C", Tendered; admitted and marked Exhibit "D".)

20 (Thirteen cheques drawn on Trust Account of E.R. Mann and Co., and purporting to be signed by G.A. Richardson, two from possession of Mr. McIntosh, with a list of cheques tendered; admitted and marked Exhibit "E".)

MR. MCINTOSH: One of those should correspond with the requisition, and the requisition with the Bank cheque. There should be 13 of each. That is the history, from Richardson to Commercial Bank.

HIS HONOR: I suppose all these trust account cheques are in identical form?

30 MR. MCINTOSH: Yes, I think so, drawn in the same way, crossed, signed in the same way, and all payable to "Ward or Bearer" - "issue bank cheque".

HIS HONOR: "Pay Bank cheque H. Ward," sometimes "pay bank cheque favour H. Ward."

MR. MCINTOSH: There is no doubt between my friend and myself, that that was the way the thing went. The inference to be drawn is another matter.

PLAINTIFF

Sworn, examined as under:

MR. MCINTOSH Q: What is your full name? A. Edward Rolf Mann.

In the Supreme
Court of New
South Wales

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No. 3

Transcript of
Evidence,

9th March 1960
- continued.

- Q: You are a solicitor of the Supreme Court of New South Wales? A. Yes.
- Q: And you have been trading for many years as a Solicitor? A. Yes.
- Q: Under the name of E.R. Mann and Company, how long? A. Most of the time, E.R. Mann and Co.
- Q: Going to before the last war, at the beginning of the last war, were you trading as E.R. Mann and Co.? A. Yes.
- Q: Were you then banking with the predecessor of the A.N.Z. Bank, which would have been - - A. The Union bank. 10
- Q: The Union bank of Australia. Did you have at that time, more than one account with that Bank? A. Yes.
- Q: You had - - A. I had a Trust Account, Ordinary Account in my own name, not in the firm's name, but the firm used it, my own private account, and then, others connected with other things.
- Q: The particular one in which we are interested is the Trust Account, and that was in the name of E.R. Mann - - A. And Company. 20
- Q: At the beginning of the war, what partners did you have? A. G.A. Richardson and W.H. Mann.
- Q: That was your brother? A. Yes.
- Q: After the war, what partners did you have? A. G.A. Richardson and Joseph Munro.
- Q: When did Munro leave the partnership? A. Early 1954, I think, from memory.
- Q: From the point of view of this, he was no longer a partner, when this took place? A. No. 30
- Q: With regard to the partnership arrangements between you and Richardson what was the position in relation to the partnership bank before the war? Was there any written partnership agreement signed? A. Not signed.
- Q: Was one prepared? A. Yes.

- Q: And did you and Richardson work on that un-
signed Agreement? A. Yes.
- Q: You had agreed with him; and then, when your
brother came in, was he brought in - - A. Just
verbally.
- Q: Were they on the same terms? A. Yes, the same
terms, except for the percentage of profits.
- Q: Your brother had gone out during the war?
A. Yes.

In the Supreme
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South Wales

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No. 3

Transcript of
Evidence,
9th March 1960
- continued.

- 10 Q: When Richardson came back and during the period
he was away at the war, were you carrying on
with him as a partner, on the same basis as you
had before the war? A. No. He did not make
regular drawings, because he was in the Army
and he was getting drawings there. He was get-
ting regular payments, but of a different amount.
- Q: I will take you to the time after Munro went
out, and just before these transactions took
place. What was the partnership agreement then
20 between you and Richardson? A. Just the same,
except for sharing of profits.
- Q: Have you a document which sets out the terms at
each one of those times? A. Yes, but not at
each one of those times.
- Q: The document has had ink put on it? A. Yes.
That ink was -
- Q: Let me have it first, and I will show it to Mr.
Holmes. (Produced.) You can remember roughly
what the terms were upon which you worked?
30 A. Yes. (Evidence objected to if subject of
written document).
- Q: Was it on the terms of this document that you
were in partnership with him? A. Yes.
- Q: Tell us about the alteration as to profits. At
the time these transactions took place, what was
the alteration as to profits? A. I was drawing
a small amount and he was drawing all profits.
- Q: You had other interests at this time? A. Yes.
- Q: You say apart from that - A. And I think I

In the Supreme
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South Wales

No.3

Transcript of
Evidence,

9th March 1960
- continued.

should say, in fairness to him, that I had another Solicitor working in the office doing most of the work I would normally have done.

HIS HONOR Q: On a salary? A. On a salary.

MR. MCINTOSH Q: Not a partner? A. No.

Q: You have all those pinned together. The only matter that is important is what I might call the top document of these three? A. Yes.

Q: Would you look at that document? Would you explain? The agreement you entered into originally with Richardson was what? A. The typing only. 10

Q: What about the ink writing at the end of the document? A. All that ink was put in for the purpose of -

Q: Was that in relation to Richardson, or in relation to your brother coming? A. In relation to when my brother came in.

Q: What the arrangement originally was, is the typewritten portion of that document? A. Yes. 20

Q: After Munro went out of the picture, that agreement was the agreement, subject only to one thing, and that was that he was getting all the profits? A. Not when Munro came in.

Q: After Munro went out? A. Yes.

HIS HONOR Q: You say you were then back to the typed terms, except for - A. A share of the profits. When Munro came in, I just took a nominal amount. They shared the profits between them. 30

MR. MCINTOSH Q: When Munro came in, he was sharing certain profits with Richardson? A. Yes, but a less proportion.

Q: When Munro went out, Richardson took all the profits? A. Yes.

Q: And paid you something in the nature - - A. Well, I paid him the profits.

(Unsigned Partnership Agreement tendered; admitted and marked Exhibit "F".)

MR. MCINTOSH: This authority apparently does not relate to the Trust Account. I shall ask the Bank to have the right one sent up.

In the Supreme
Court of New
South Wales

MR. HOLMES: If you alter that back to the way it was before, you can use the copy.

No.3

(Copy Trust Account Authority tendered;
admitted and marked Exhibit "G".)

Transcript of
Evidence,
9th March 1960
- continued.

10

MR. MCINTOSH: This copy authority had struck out on it, the words "or by", in the clause relating to endorsement, and there was nothing filled in before the words "is authorised." I wrote in "or by", after crossing out the printed words "or by", and "authorised person", to make it conform with the other one, and then we found we were not copying the right one.

Q: What was the system adopted in your office in relation to the entering up of butts, in relation to cheques drawn on the trust account of E.R. Mann? (Objected to; allowed).

20

Q: What was the system in relation to the filling-in of the butt? A. The first line of the butt would show the name of the person whose money was being used.

Q: That would be the money you held? A. In trust for him. The second line would be object, and the third line the person paid.

Q: And then there would be a date on the top, and the money, on the bottom. A. Yes.

30

Q: In relation to the cheques which are Exhibit "E", which are the relevant Trust Account cheques, you have all your Trust Account cheque butts there? A. Yes.

Q: Have you 456? A. Yes.

Q: In whose writing is the butt of C.492456, dated 23rd December, 1954? A. Richardson's.

(Abovementioned cheque butt tendered;
objected to; admitted as part of Exhibit "H".)

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Q: With regard to all these cheques in the list - I am afraid the dates are wrong - - have you 673, 681, and - - A. They are dated here.

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Q: Pass them down and we will sort them here.
Are all those cheques, 456, 673, 681, 705,
782, 451, 475, 501, 235, 202, 268, 186 and
233 all in Richardson's writing? A. 233
does not affect this case, I do not think.

Q: I think it does. Have you 233? A. It is
there with you.

Q: Would you look at it? A. Yes.

Q: (Approaches witness.) That is the cheque
relevant to that butt? A. Yes.

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HIS HONOR Q: What is the date?

MR. MCINTOSH: 7th May, 1956. Mr. Mann says it
went through the Commonwealth Bank.

HIS HONOR: I suppose you regard it as corres-
ponding with the Bank cheque of 8th May?

MR. MCINTOSH: Yes. Might I have a short adjourn-
ment? The dates are different and need alter-
ing.

HIS HONOR: You wish to alter the date on the
typed list of cheques?

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MR. MCINTOSH: Yes. The date of requisition
would be correct.

(SHORT ADJOURNMENT).

(Butts of cheques comprising Exhibit "E"
tendered; admitted and marked Exhibit "H".)

MR. MCINTOSH Q: In relation to those butts, and
the names of the clients, which are written in
by Richardson, as the money being drawn against,
were those clients' accounts debited in the
books against the particular persons concerned?
A. Yes.

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Q: Have you had to make recompense - (objected to).

MR. MCINTOSH: In respect of those cheques, all
except two have been paid by Mr. Mann to the
persons concerned. In respect of one, there
has been a payment, but there is still a dis-
pute with the client as to the balance of the

account. In relation to the other, no money has yet been paid, as there is a dispute as to the balance of the account, as to the liability which Mr. Mann has, but the liability as to these cheques, is not in dispute. I am only trying to show that in effect, his loss would be the full amount. I have told my friend the position and if he wants to pursue it, no doubt he will.

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- 10 Q: Was Ward a client of your firm? A. No.
- Q: Did he have any monies in your Trust Account?
A. No.
- Q: Did Richardson have any monies in your Trust Account? A. No.
- Q: Did anyone of the persons whose accounts were debited instruct your firm to pay their monies to Richardson for his personal use, of this lot? A. Not to my knowledge.
- 20 Q: Or to pay monies from the Trust Account to Ward?
A. No. They all disputed.
- Q: I think we have agreed that none of the persons listed on the butts, who were debited or charged in the ledger, in fact authorised these payments?
A. No.

(Summary showing number of cheques; date of Bank cheque; amount of cheque, and person debited in ledger, tendered; admitted and marked Exhibit "J".)

MR. HOLMES: No questions.

- 30 MR. MCINTOSH: What is your knowledge, as regards your business, in relation to Bank cheques which have been issued on Trust Account and not used? A. They are re-banked to the Trust Account; to the Trust Account credit.

Q: The Bank always takes them back? A. They always have.

(Witness retired.)

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MR. HOLMES: I do not propose to call any evidence.

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- continued.

(By consent, Mr.Holmes to address first.)

(A short discussion ensued regarding lack of order dispensing with Jury. His Honor formally ordered that this matter be tried without a Jury).

(Counsel addressed.)

HIS HONOR: I propose to consider what I shall do in this case. There has been some discussion along the lines of whether it makes any difference as to what was the history of this transaction. In the sense that Ward came into it before the bank cheques were issued, or afterwards - as to which there is no evidence. If I proceed to hear the case Mann v. Ward to-morrow; there will be evidence of some of those matters, in which case I shall have to disregard all such evidence in the present case. I assume no one agrees to any of the evidence in the other case being imported into this case?

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MR. HOLMES: I am not in that case, and could not agree.

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MR. MCINTOSH: I am in that case, as is Mr.Healy, who is present. The evidence I want to give will be similar to that given today. Your Honor's decision in this matter may have some material effect on the other matter, on the principles of law, I have put forward today. My case starts before the banking case, and really when Richardson disposed of the Bank cheque. I would anticipate the same result - if it was not Mann's cheque, all wrong. I do not know what Mr.Healy would like to do about the matter.

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HIS HONOR: I see no reason why the decisions cannot be kept separate if that is desired. I did not know whether the parties wanted to make some bargain, which would have the effect of these two cases being treated together. I am not asking that that be done.

MR. MCINTOSH: Mr. Healy wants the other case heard, I understand.

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HIS HONOR: Very well. I will go ahead and hear it.

MR. MCINTOSH: I cannot see, apart from extra documents, that the proof of the other case will involve anything more than was involved in this case.

MR. HEALY: That might be a bargain we can strike, so that we can go straight ahead with argument.

HIS HONOR: You and Mr.McIntosh can discuss the matter, and take such course tomorrow as seems to you, proper.

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JUDGMENT OF WALSH J.

IN THE SUPREME COURT }
 OF NEW SOUTH WALES }
 IN COMMERCIAL CAUSES }

Coram: Walsh J.

27th April 1960

MANN v. THE COMMERCIAL BANKING COMPANY OF
SYDNEY LIMITED

JUDGMENT

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10 HIS HONOR: In this action, which has been tried
 without a jury as a Commercial Cause, the plaintiff,
 a solicitor, claims £3,505 from the defendant bank.
 The declaration contains two counts, one being for
 money had and received, and the other for conversion.
 The property alleged to have been converted consists
 of thirteen bank cheques drawn by the A.N.Z. Bank,
 for amounts totalling £3,505. The common money
 count is intended merely as an alternative method of
 claiming for the same loss as that claimed in the
 20 other count. The defendant has not argued that the
 plaintiff is bound, at this stage, to elect between
 these alternative claims. See United Australia Ltd.
 v. Barclays Bank Ltd., 1941 A.C., 1.

In addition to pleading the appropriate plea of
 the general issue to each count, the defendant has
 pleaded that the cheques were not the property of
 the plaintiff. It raised also, by the second and
 fifth pleas, defences based upon s.88 of the Bills
 of Exchange Act, but at the trial it did not seek to
 rely upon these defences. It is questionable
 30 whether these bank cheques are cheques within the
 meaning of that section. See McClintock v. Union
 Bank, 20 S.R. 494 at 502, 514, 523. But in any
 event, the cheques here in question were not cheques
 in respect of which the defendant bank "Received
 payment for a customer". They were cashed over the
 counter and the bank received payment not for the
 customer but for itself.

The sixth plea was not abandoned, but it was
 not suggested that it constituted a defence separate
 in its legal character from that arising under the

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plea that the cheques were not the property of the plaintiff. The real issues upon which the case was debated at the hearing may be stated as being whether the defendant acquired a title to the cheques which was, as against the plaintiff, sufficient to prevent it from incurring liability for conversion, and whether the plaintiff had such a title to the cheques as was necessary to enable him to sue for conversion of them.

The case is one of the not uncommon ones in which it is necessary to determine which of two innocent parties must bear a loss brought about by the dishonesty of a third party. Before referring to the facts, it should be stated that this case does not appear to be complicated by the necessity to consider questions of estoppel or of ostensible authority as contrasted with actual authority. It was argued as being confined to the question of title, that term being used, of course, to include within its scope questions concerning the title which it is necessary for a plaintiff to have to support an action for conversion. 10 20

At all relevant times there was a partnership between the plaintiff and a solicitor named Richardson. Their agreement had never been signed but, according to the evidence of the plaintiff which was not challenged, they were partners substantially upon the terms contained in the document Exhibit F, subject to certain variations which need not be set out. The substance of these arrangements, so far as is material, was that Richardson received the profits or most of them but Mann was the sole owner of the assets of the partnership, including all moneys to the credit of the partnership accounts with its bank. But the agreement provided that cheques on those accounts might be drawn by any one party, and Mann was to give the necessary authorities to enable this to be done. Such authorities were given to the bank - see Exhibits G and K. 30

According to Mr. Mann's evidence, the system in the office 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. 40

The transactions which led ultimately to the

defendant bank obtaining and dealing with the 13 bank cheques drawn by the ANZ Bank Limited, were all similar. In each case Richardson signed a Trust Account cheque drawn on the firm's Trust Account with the ANZ Bank. 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. These cheques are Exhibit E, to which is attached a statement of the dates and amounts so drawn. Each cheque was accompanied by an application upon a printed form, for a bank cheque for the corresponding amount, in favour of H. Ward. This application was signed by Richardson for E.R. Mann and Co. In each case a bank cheque was issued in the form "Pay H. Ward or bearer". It was crossed and was marked "Not negotiable". These bank cheques were taken by Ward to the defendant's branch at Maroubra, where Ward had an account which was opened on 17th December 1954. The Bank cashed the cheque, noting the transaction on a teller's deposit slip, (see Exhibit A). The cheques were, in due course, paid by the ANZ Bank.

Ward was not a client of the firm of E.R. Mann and Co., and no money was held on his behalf or on behalf of Richardson in the firm's Trust Account. There is no evidence as to what connection Ward had with Richardson, or as to the reasons for which Richardson applied for the issue of bank cheques in Ward's favour. But it is clear that his doing so was in fraud of Mann.

Richardson made entries on the butts of the Trust Account cheques which, in accordance with the system to which I have referred, were taken to indicate the client to be debited and the payee. The details of these entries are set out in Exhibit H (a) which, however, includes some other transactions with which this case is not concerned. Debits against the clients' accounts, based on these butt entries, were entered in the ledger. There is evidence that none of them had instructed the firm to pay money to Richardson personally or to Ward. No evidence was given to show whether Ward was handed the bank cheques or was handed the documents, that is the Trust Account cheques and the applications for bank cheques which would enable him to obtain them. Neither party suggested that this made any difference to the legal result of these transactions, as between the plaintiff and the defendant.

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It is convenient to discuss the case in relation to the count for conversion. If the plaintiff can establish that cause of action, I am of opinion that he can obtain, by way of damages, the amount represented by the face value of the bank cheques, although what was actually converted was the pieces of paper and not the money of the plaintiff. Alternatively, he can succeed in the action for money had and received if the defendant, by converting the cheques, procured money in respect of which a corresponding debit was made by the plaintiff's bank against his account. The theoretical arguments raised before me against the validity of the first of these propositions cannot prevail against the authorities. See *Morison v. London County Etc. Bank* (1914) 3 K.B. 356 at 365, 379; *Lloyds Bank v. Chartered Bank of India* (1929) 1 K.B. 40 at 55. The alternative remedy for money had and received has also been recognised in the authorities.

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Conversely, in the circumstances of the present case, if the count for conversion fails, the plaintiff cannot succeed on his count for money had and received. For unless the defendant's action in obtaining and dealing with the cheques was wrongful as against the plaintiff, the defendant could not be said to have received the money thus obtained to the use of the plaintiff. See *Bullen and Leake* 3rd Edn., 48.

I shall now attempt to analyse the transactions which led to the defendants ultimate purchase of bank cheques from Ward, for which it proceeded to obtain payment from the ANZ Bank. This attempt will be made without pausing to discuss the relevant authorities, to some of which reference will later be made.

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The first step is that Richardson drew a Trust Account cheque accompanied by a request for a bank cheque. Looking at the position when he has just done this and the documents are still in his hands, I think that there is no doubt that Richardson at that time, had no title to the Trust Account Cheque. If Mann, upon then becoming aware of what Richardson was doing, had called for the handing over of these documents, he would have been entitled to possession of them. The mere fact that Ward's name appeared on them could not have conferred any title or

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interest upon Ward. It seems clear also, that Richardson would have had no title which he could assert against Mann. Let it be assumed that these documents were then handed to Ward. I put aside any question which might, in other circumstances, arise out of Richardson's ostensible authority. It seems clear that Richardson had no actual authority, either by express grant or arising from his position as a partner in the firm, to hand them to Ward. Ward had no dealings with the firm and to hand a trust account cheque to him could not have been something done in the course of the partnership business. Nor could the conferring by Mann upon Richardson of authority to draw cheques on the Trust Account, constitute an authority to him to draw cheques and hand them over to a stranger in circumstances unconnected with the partnership business. Thus it would seem that Ward could not have acquired, on the assumptions here being considered, any title to the Trust Account cheque, or the accompanying document.

Let it next be assumed that Richardson himself, as seems probable, obtained the bank cheque and had it in his hands. Now it is my opinion that, as between Mann and the firm's bank, Richardson had authority to obtain the bank cheque in exchange for a cheque drawn upon Mann's account. There is, indeed, no express evidence in this case that the authority to draw cheques carried with it or was accompanied by an authority to obtain a bank cheque but I consider that this can properly be inferred, particularly when one is dealing with a solicitor's Trust Account. There was no attempt by cross-examination or evidence, to dispute that this was so. Richardson was a partner in the firm. He had authority to sign cheques without obtaining any other signature. On this point, the facts are quite different from those which were held in McClintock's case, (1922) 1 A.C. 240, (and see Australian Bank of Commerce v. Perel, (1926) A.C. 737), to negative the proposition that the bank was warranted in issuing, upon McClintock's sole request, bank cheques in exchange for his employer's cheques. But as between Mann and Richardson, there was no authority for the obtaining of these particular bank cheques. A general authority to carry out transactions of this kind, in the course of and for the purposes of the firm's business, could not confer authority in a particular instance, for a transaction which had no connection with the firm's business and was for the

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furtherance of Richardson's private purposes. It is my opinion that, at this stage, Mann was the owner of the bank cheque, and although he did not have physical possession of it, Richardson's possession was really Mann's possession and Mann had the right to the immediate possession of the cheque.

Some of the argument addressed to me was based upon the distinction between larceny and embezzlement. It was said that Richardson had obtained property which he could not be said to have stolen since he obtained it, although wrongfully, pursuant to the arrangements with the bank, made by Mann. It was said that this gave Richardson a title or at least a right to possession which he could assign. I think the argument should be rejected. I think that the case was not one in which Richardson obtained a voidable title, but one in which he obtained no title at all, in his own right. It would seem, however, that if he did obtain a voidable title, what he afterwards passed on may still have been a voidable title, which would not here avail the defendant. See *Great Western Railway Co. v. L. and C. Bank*, (1901) A.C. 414, to which more detailed reference will be made later. In any event, I consider that Mann had then a right to immediate possession of the cheque, which would have entitled him to maintain trover in respect of it against Richardson. The analogy which has been made to the distinction between larceny and embezzlement might be important in a trespass action, but not, I should think, in an action for trover, i.e. so far as Mann's title to sue is concerned. See generally the discussion of this subject in *Penfolds Wines Ltd. v. Elliott*, 74 C.L.R. 204. 10 20 30

There is not, in the case of these bank cheques, any element of negotiability. The bank cheques were not negotiable instruments. Neither Ward nor the bank could obtain, in the circumstances of this case, any greater rights from the subsequent assignments than Richardson had. The reasons for this last statement will appear more fully later. 40

The foregoing approach is founded upon the view, which I consider the correct one, that each of these particular transactions was an authorised one, as between Mann and the bank, up to and including the time when Richardson had in his hands, the bank cheque, whilst at the same time being a transaction

which was unauthorised as between Mann and Richardson. Upon this view it appears that when the bank cheque is obtained, Richardson holds it for and on behalf of the partnership, and since Mann is sole owner of the partnership assets, this means that he holds it as Mann's property. This view eliminates any difficulty as to the sufficiency of Mann's title to sue, but it leaves one further question outstanding. This is whether or not the further step of handing over the bank cheque to Ward must also be deemed to have been authorised, so that Mann cannot complain of it or of subsequent further dealings with the bank cheque.

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Now it seems plain to me that the handing over of a bank cheque so obtained, to Ward, was not actually authorised. It can be treated as having been authorised only if, firstly, it is necessary for Mann, in order to be entitled to sue, to be taken as having ratified the obtaining of the bank cheque and secondly, if he must be deemed, in consequence of this, to have ratified also the further act of disposing of it. But upon the hypothesis now being considered, that the obtaining of the bank cheque was initially authorised as between Mann and the bank, there is no need for Mann to resort to the doctrine of ratification in order to establish a title to found his action and, therefore, no room for a contention against him that he cannot do this without approbating, at the same time, the further step in the transaction.

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Although I have not yet discussed the main authorities, the foregoing analysis has been along lines which have been suggested mainly by McClintock's case and by arguments based by both parties upon it. Before turning to that case, there are some other authorities which were not relied upon by counsel, which seem to me to be of importance and to which reference should first be made.

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The first is Great Western Railway Co. v. L. and C. Bank, (1901) A.C. 414. This was a case of an ordinary cheque, not a bank cheque, and in the judgments a good deal of attention is given to the section corresponding to s.87 of the Bills of Exchange Act (Cth.). For the purpose of this discussion, I assume that the bank cheques do not fall within the ambit of that section. If this be so, then according to the opinion of Isaacs J., the

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common law liability of anyone who deals in any property to which another has a title, is not different from that of a person who takes a cheque which, apart from s.87, would be negotiable, but is one to which that section applies. In both cases the taker acquires no better title than that which the person had from whom he took it. S.87 does not add some additional liability. It merely leaves untouched and operative, in cases to which it applies, the common law liability applicable to property generally. See the analysis of this subject made by Isaacs J. in *Commissioners of State Savings Bank v. Permewan Wright & Co.*, 19 C.L.R. 457 at 473-478. Reverting to the *Great Western Railways* case, it is to be observed that it was contended on one side that there had been a larceny of the cheque and, on the other, that it had been obtained by the misdemeanour of false pretences and not by larceny. In an action against the bank to which the wrongdoer had passed the cheque, the House of Lords was of the opinion that the distinction made no difference to the plaintiff's right to recover. It was said that it mattered not whether the title of Huggins, the wrongdoer, was "void or voidable". But the reasons of their Lordships emphasise the express provisions of s.87 of the Act and it may be that it is really because of these provisions that the statement was made that it matter not if the title was voidable, and that this ought not to be taken as of general application, notwithstanding what was said by Isaacs J. in the case cited above. The real point of the decision, in its application to the present case, is that the man who got a cheque from the plaintiff, by false pretences, in circumstances in which it was never intended to vest any property in him for his own benefit, was regarded as having no real title to it at all: see per Lord Davey (1901) A.C. at 419-420, and see *Cundy v. Lindsay*, 3 A.C. 459.

It is true, of course, that in some circumstances a person who has a "voidable" title may confer upon a third party, a title which will be held to be good against him who had a right to avoid, but had not exercised it at the time the third party made the dealing on which he relies. Thus, if a contract for the sale of goods is induced by fraudulent misrepresentation, but either by the contract itself or by delivery pursuant to it, the property passes and the goods are then resold, the

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ultimate purchaser may have a good title against him who was induced by fraud to sell. See *Cundy v. Lindsay*, 3 A.C. 459 at 464. But in circumstances such as the present, there is no transaction by which Mann divests himself of a title to property and transfers it to Richardson, and the principle just stated appears to have no application here, just as it was regarded as having no application in the Great Western Railway case.

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10 In *Morison's* case, (1914) 3 K.B. 356, an employee was given authority to draw and sign cheques for the purposes of the plaintiff's business. He drew and signed a number of cheques and paid them into his own bank account with the defendant bank which collected the proceeds. All the members of the Court of Appeal regarded this as a conversion of the cheques in respect of which the plaintiff could sue in conversion or, alternatively, for money had and received. Lord Reading said, at p.364:

20 "On these facts the plaintiff, in my judgment is entitled, prima facie, to recover the sum claimed, either as damages for conversion or as money had and received. Lord Ellenborough in *M'Combie v. Davies* said: "A man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?" This principle has been frequently applied in actions to recover the proceeds of cheques or other negotiable instruments for the payment of money, collected by a bank without authority ... The cheques were at all times, until issued, the property of the plaintiff. They never were the property of Abbott, who had no title to them ... In my judgment the defendant's title to such cheques was defective as Abbott issued them to the defendants in fraud of the plaintiff. The

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40 defendants dealt with them in a manner inconsistent with the rights of the plaintiff, who was the true owner, and are liable to him for the conversion of his property."

His Lordship went on to assert that damages for such conversion can be awarded to the amount of the face value of the cheques. Buckley L.J., at 375, said:

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"Having regard to what Lord Halsbury said in Great Western Railway v. London and County Banking Co. it seems to me that I ought not to draw a distinction between the title to the cheque itself and the title to the money obtained or represented by it."

Phillimore L.J. said, at 378-379:

"The plaintiff, in my judgment, has made out a prima facie case for recovery in trover against the defendant bank for the conversion of his cheques and to obtain as damages the face value of the cheques. I say his cheques, and I make out his right in the following manner. The cheques as originally drawn were instruments whereby the plaintiff, or a person to whom the plaintiff was bound or desired to pay money, could obtain, out of the moneys standing to the plaintiff's credit with his bank, the sum specified on the face of the cheque. The cheques were the plaintiff's instruments till he chose - or till Abbott on his behalf chose - to issue them to some outside person ... In Abbott's hands they were still his employer's property and Abbott could not, and did not, give to the defendant bank any title in them. Therefore, they were the plaintiff's cheques at the time when they came into the possession of the defendant bank."

It will be noticed that Phillimore L.J. speaks of the cheques being the plaintiff's until they were issued, that is passed on to some outside person. The implication from what he says is that it would be otherwise after they had been issued to an outside person. The reason for this is that in that case, the Court was dealing with instruments which were negotiable instrument, under which an assignee of the cheque could obtain title even if the title of his assignor was defective or non-existent. But that is not so in the present case.

In Lloyds Bank Ltd. v. Chartered Bank of India, (1929) 1 K.B. 40, one finds another case of an employee having authority to draw cheques for his employer's purposes, who took advantage of this authority to send cheques fraudulently to his own bank, to be credited to his own account. Again it was held by the Court of Appeal that there was a

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conversion of these cheques for which the employer could sue. Without quoting from the judgments I refer to the discussion by Scrutton L.J. at Pages 56-57, of the manner in which a dealing with a cheque has been treated by the Court as a conversion of a chattel, and its value as being the money received under it. I refer also to the discussion by Sankey L.J., at pages 67-69, of the argument that the defendant obtained a good title although the customer's title may have been voidable. I should mention also that, at p.56, Scrutton L.J. referred to the principle that a person dealing, without notice of fraud, with an agent, who has ostensible authority, is not prejudiced by the fact that, as between the principal and the agent, the agent is using the authority for his own benefit and not for that of his principal. This rule is, of course, well recognised. But it seems to me to have no relevance to the present case, since the defendant did not rely in any way on Richardson's ostensible authority and there is nothing to show that Ward relied upon it. They took bank cheques upon which there was nothing to indicate that they had come into being pursuant to an exercise, by Richardson, of any authority vested in him and there is nothing to show that, in handing them to Ward, Richardson was purporting to act on behalf of the firm.

I come now to consider McClintock's case - 20 S.R. 494; and, on appeal, (1922) 1 A.C. 240. M. was the manager of the business carried on by the plaintiffs, who were trustees. M. could not alone draw cheques, but had to have another signature, and the cheques had to be countersigned by an accountant. Upon a number of cheques M. procured the necessary signatures, these cheques being drawn on the plaintiff's bank and made payable to that bank. He sent these with a request signed by himself, on behalf of the estate for which the plaintiffs were trustees, for the issue of a bank cheque, to be in favour of Haynes. He paid the bank cheques into an account with the defendant bank which was in the name of R. Haynes, but which was his own. The action was brought for conversion of the cheques and for money had and received.

The question was much debated as to whether, when M. obtained the bank cheques they were his property or were the property of the plaintiffs.

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This question seems to have been treated as depending for its answer, upon the nature and extent of M's. authority (as manager), and on whether it could be said that the act of procuring the bank cheque was within the scope of this authority, either initially or by ratification. A verdict of the jury in favour of the defendant was treated by the Privy Council as negating the plaintiffs' case that the bank cheques were theirs when the manager obtained them. In this Court, Pring J. treated the case as one in which M. had the possession of the property of his employers (the original cheques) and exchanged that property for other property. He considered that the plaintiffs then had a right to the immediate possession of that other property, sufficient to support an action for conversion. The principle of ratification could not and need not, in his opinion, be applied. Gordon J., in dealing with the question of the plaintiffs title to sue, posed the two questions which are set out at p.510 of the report, which he described as being of considerable difficulty. His answers to them, expressed in terms of doubt, are given at p.512. His opinion comes to this. The plaintiffs could either have repudiated the obtaining of the bank cheques or ratified it. If a third party acquired rights by transfer, the plaintiffs could not then ratify so as to affect rights acquired by the bank which were good against M. Ferguson J. treated the bank cheques as being the property of the plaintiffs as soon as they were issued by the bank. The delivery of them by the bank to M., was a delivery to the plaintiffs.

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In the Privy Council the first main question discussed was whether there was an actual authority in M. to obtain the bank cheque. It seems to have been supposed that unless that authority existed, the result necessarily followed that the cheques, when issued, were M's. and were not the plaintiffs. It is to be noticed that the trial had been conducted upon the footing of the correctness of this supposition and that, therefore, the question of the existence of this authority was the issue which was put to the jury and decided by it. See (1922) 1 A.C. at 246-247.

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The next matter discussed by their Lordships, which was described as "the plaintiffs main ground" was whether the plaintiffs could make the cheques

their property retrospectively, by ratification. The plaintiffs claimed to ratify M's. proceedings up to and including the getting of the bank cheques, but to disown his subsequent step of paying them to his own account. Their Lordships held that this could not be done. The reason was that the paying of the cheques to an account was regarded as a necessary step in the transaction, since the cheques were in a form which made it necessary to pay them into some bank for collection. Therefore it was said, the selection by M. of his own bank account as a means of collecting the cheques was "rather an incidental irregularity than a fresh departure." The result was that a ratification of the obtaining of the cheques must carry with it, as part of the authority conferred by ratification, an authority to pay the cheques to M's. bank for collection.

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An argument which has been submitted here is that when Richardson, having Mann's money in his possession (in the sense of having authority to operate on the bank account) exchanged that money for other property, namely the bank cheques, that other property did not become instantly, the property of Mann. He had a right, when he discovered the facts, to elect to take the property or to repudiate the transaction and hold Richardson to account. Until he did so, on this argument, no property vested in him. I should have thought that this line of reasoning had no application to the facts of the present case. If Richardson had, by means of the cheques, drawn cash from the bank, I feel no doubt that the money would have belonged to Mann. If then Richardson had used that money to buy some other property, e.g., a piano, it may well be that the property in the piano would pass from the vendor to Richardson and would not pass instantaneously to Mann. But that is not what happened. Richardson did not draw cash and then buy other property with it. Instead of drawing cash, he obtained, for the Trust Account cheque, a bank cheque. This is not really a case of exchanging one form of property for another form of property, by an independent transaction of a kind which would divest title from the owner of that other form of property and vest it in Richardson. It was a case in which the bank, at the request of the firm of E.R. Mann & Co., handed bank cheques to that firm, the hand which took them being the hand of Richardson. In such circumstances, although indeed his act in making

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that request was not authorised as between himself and Mann, I am of opinion that the cheques belonged to Mann. I consider that confusion may easily arise from a failure to keep steadily in mind the distinction between what was "authorised" as between Mann and the bank, and what was "authorised" as between Mann and Richardson. When the question whether McClintock's action in obtaining the bank cheques was "authorised" was discussed by Gordon J. and the Privy Council, and when there was discussion also of the plaintiffs' option to repudiate or affirm that action, what was under consideration was whether his action was "authorised" as between the plaintiffs and their bank. If, in that sense, the action was unauthorised, then the plaintiffs could have repudiated or disaffirmed as against the bank and held the bank liable, as indeed they afterwards did: See Australian Bank of Commerce v. Perel (1926) A.C. 737. So Gordon J. says (20 S.R. at 513):

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"The question seems to be whether the plaintiffs can, by their election, (i.e. to ratify) free the A.B.C. Bank and McClintock from the consequences of the unauthorised act of McClintock and throw any resultant loss upon the defendant bank."

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But if the issuing bank had proper authority to issue the bank cheques to Richardson, as I have held, then the reasoning both in this Court and in the Privy Council, in McClintock's case, suggests that the result is that the plaintiff obtained an immediate title to the cheques in the hands of Richardson. No question of election could arise, in the sense of a decision to accept the cheques on the one hand, or to treat the issuing bank as having issued them without authority on the other, and the issue of them as not binding upon the plaintiff.

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In these circumstances, I consider that Mann can show title to the cheques, at the time they were in Richardson's hands, without any recourse to the doctrine of ratification.

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If, however, he had to rely upon that doctrine, I consider he would nevertheless succeed. The vital question would then be whether Mann can be treated as having ratified the act of Richardson in obtaining the bank cheques and, at the same time, can be permitted to disavow the further act of the

passing of these cheques to Ward. I am of opinion that this question should be answered in favour of the plaintiff. As in McClintock's case, it may have been essential if actual payment, in the ordinary way, of the bank cheques was to be obtained, that they should go to a bank for collection. But I see no reason why it was essential that they should be passed on to Ward. There is evidence which is not disputed, that the issuing bank would have taken back such bank cheques and placed the amounts of them to the Trust Account credit. Further, I cannot see that a bank cheque expressed to be payable to "H. Ward or Bearer" could not be collected through a bank other than one in which Ward had an account. Therefore, upon this view of the case, I consider that the facts are distinguishable from those in McClintock's case, in which the author of the fraud paid the bank cheques directly to a bank. Here there was the intervention of Ward before the cheques got to a bank. The handing over of the cheques to Ward should, in my opinion, be regarded as "a fresh departure" (see (1922) 1 A.C. at 248), and I consider that it is not necessary to treat Mann as having adopted this fresh departure, by reason of his having adopted the act of obtaining the cheques.

For the reasons given, I am of the opinion that the plaintiff should succeed in the action. The defendant has not contended that the plaintiff must elect between his two causes of action prior to verdict and judgment. In the circumstances, although it seems to be of no practical importance whether the plaintiff receives a verdict on one only or on both counts, I find a verdict for the plaintiff on both counts, for £3,505. I direct that judgment may be entered accordingly.

No. 5

ADDENDUM TO JUDGMENT

ADDENDUM TO JUDGMENT DELIVERED 6th MAY 1960

HIS HONOR: Since my reasons for judgment were published I have discovered an error which does not affect my decision or the essential reasons for it, but to which I think I should draw attention.

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In referring to the point that the defendant did not seek at the trial to maintain its defences based upon s.88 of the Bills of Exchange Act I said:

"It is questionable whether these bank cheques are cheques within the meaning of that section. See *McClintock v. Union Bank*, 20 S.R. 494 at 502, 514, 523".

But the doubts upon this point which existed when *McClintock's* case was decided were removed by the subsequent enactment of s.88A of the Act, so that the statement just quoted was erroneous. 10

But the second reason which I gave for regarding s.88 as not applicable is not, of course, affected by that error.

Later in my reasons I discussed the case of *Great Western Railway Company v. London & County Bank* (1901 A.C. 414) and, in doing so, I said:

"For the purpose of this discussion, I assume that the bank cheques do not fall within the ambit of that section." 20

The reference there was to s.87 of the Bills of Exchange Act, which by reason of S.88a is applicable to bank cheques.

Insofar as the judgments in the *Great Western Railway* case are of assistance in the determination of the present action, it appears to me that the assumption quoted above was unfavourable to the plaintiff rather than to the defendant. If the assumption was erroneous, this error does not in any way invalidate my conclusions in favour of the plaintiff. 30

I shall direct that this statement be appended to the reasons for judgment given by me on 27th April, 1960.

I certify that this and the preceding page are a true copy of the reasons for the Judgment herein of His Honour, Mr. Justice Walsh.

(Sgd.) Darryl Goode
Associate.

