Privy Council Appeal No. 14 *of* 1921.

The Union Bank of Australia, Limited - - - - *Appellants*

v.

Eva McClintock and others - - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1921.

Present at the Hearing:

LORD ATKINSON.
LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
LORD PHILLIMORE.

[*Delivered by* LORD SUMNER.]

This appeal relates to 16 drafts of a total value of over £16,000, which one McClintock misappropriated in fraud of the respondents, the plaintiffs in the action. The appellants are a bank, with which McClintock kept an account of his own in the name of Robert Haynes, and as the drafts were paid by him into and collected for him through this account, the bank became the unwitting and innocent instrument of his fraud. The plaintiffs sued in conversion, or alternatively, the tort being waived, for the proceeds of the drafts as money had and received to their use. The jury returned a general verdict for the defendants and judgment was entered for them accordingly, but on appeal the verdict and judgment were set aside and judgment was entered for the plaintiffs for £17,378 9*s.* 7*d.*, being the amount of the drafts with undisputed interest at the rate of 6 per cent.

McClintock was the plaintiffs' manager. The frauds began in October, 1916, shortly after his appointment, when he paid into his " Robert Haynes " account an open cheque for £415 3*s*. 11*d*. drawn by the respondents on their then bankers, the Commonwealth Bank of Australia, in favour of R. Haynes or order. In all the other cases the respondents' cheques on the Australian Bank of Commerce, at which they subsequently kept three accounts, were, at the instance of McClintock, exchanged for drafts (called " bank cheques ") drawn by that bank upon itself for equivalent amounts, and these drafts McClintock then paid into his " Robert Haynes " account, through which the amounts of them were collected for him by the defendants. Of this series of 15 bank cheques the second, drawn for the amount of £1,000, was made payable to G. Tallis or order, and the respondents alleged that the endorsement " G. Tallis " was forged by McClintock, and that through it the appellants could derive no title or defence. The other bank cheques were all drawn in favour of R. Haynes, Robt. Haynes, Robert Haynes, or Robert Haynes, Esq. It is therefore necessary to consider separately the facts as to the cheque for £415 3*s*. 11*d*. ; the bank cheque for £1,000 in favour of G. Tallis or order ; and the remaining 14 bank cheques, among which no distinctions were drawn.

As to the first, the plaintiffs gave clear evidence that the cheque, which was duly drawn in their name and did not belong to McClintock in any way, was endorsed in his handwriting in the name of Robert Haynes and paid by him into his own account. This the defendants were not in a position to contradict. It appeared from the plaintiffs' case that in the course of their business they were indebted, at the time when this cheque was drawn, to a firm of lawyers in Perth, West Australia, named Richard S. Haynes and Company, for costs amounting to £415 3*s*. 11*d*. Neither party called McClintock ; neither called anyone from the firm of Richard S. Haynes and Company ; but, after the defendants had closed their case and the plaintiffs had recalled a member of the firm of accountants who audited their books, the defendants put in a document of even date with the cheque, which was produced out of the plaintiffs' custody and purported to be a receipt, signed by Haynes, for £415 3*s*. 11*d*. Their Lordships have not seen this document, but the signature is said to have been one hard to decipher, which might have been R. S. Haynes or Rd. (*i.e.* Richard) Haynes. No evidence was given as to the handwriting. No evidence was given to show that after the date of this receipt Richard S. Haynes and Company had asked for or had been paid their account, but the defendants argued that, if they had, it would have been proved, and if they had not, they must have been paid on or about the date of the receipt. The document itself had been produced to the accountants, when next they examined McClintock's accounts after October, 1916, as a voucher for the application of the cheque, and had been accepted by them without question for the purposes of their audit.

The appellants have contended that the jury's general verdict in their favour must, as regards this cheque, be deemed to be an acceptance of their argument that, simultaneously with his misuse of the plaintiffs' cheque, McClintock applied the proceeds of it to their use by discharging their debt for the same amount, and they say that either the jury found that there was no conversion of the cheque but only a legitimate application of its proceeds, though for some unexplained reason it was irregularly cashed, or that the plaintiffs at least suffered no damage and therefore no actionable wrong. On appeal the Full Court of the Supreme Court of New South Wales, though not agreed as to the other drafts, unanimously held, as to this cheque, that the verdict could not stand, and their Lordships are now of the same opinion.

The defence to the case of conversion rested entirely on the inference to be drawn from this receipt. On its face it was dated the 20th October, 1916, and yet the receipt stamps which it bore were revenue stamps of West Australia, and not of New South Wales. The cheque, drawn in Sydney, was dated the 20th October, and next day was paid by McClintock into the account which he had just opened in a false name and thereafter continued to use for fraudulent purposes of his own. It could not well be that a cheque only created on the 20th October should have been preceded by a post-dated receipt signed and stamped in West Australia in advance, and the course of post made it impossible that it should have been stamped in West Australia on the same day on which it was signed in New South Wales. It is idle to speculate upon circumstances in which Mr. R. S. Haynes might have found himself in Sydney with stamps of West Australia in his pocket and no available bank account through which to pass the cheque. No such hypothesis will explain why McClintock, and not Mr. R. S. Haynes, should have endorsed the cheque, a point on which the evidence was all one way. Finally, all that is known of the history of this ambiguous document is that it was used by McClintock to satisfy auditors, from whom in a long series of subsequent transactions he systematically concealed his own rogueries by various deceptions.

Apart from this receipt the defendants had nothing to stand on, for the point that Haynes and Company had never asked for their money since 1916 rested on argument and not on evidence. Their Lordships think that this receipt is not evidence such as twelve reasonable men could rest any verdict upon, if indeed with the signature unproved it is evidence at all; and on this point they agree that the plaintiffs proved their case.

As to the bank cheque drawn in favour of G. Tallis or order, the facts are short. The plaintiffs called a witness, Mr. Tonkin, who said that he knew a Mr. George Tallis and that the endorsement was not in his writing, but that he did not know that there might not be other George Tallises or G. Tallises about. The counterfoil of the cheque, in exchange for which this bank cheque was issued, was filled up " Geo. Tallis Instalment Russell Street

property, due the 15th October, 1917, time extended till to-day," a statement of the purpose for which the cheque was drawn which, fully pursued, might have led to some identification of the payee of the cheque with the gentleman whom Mr. Tonkin knew. Their Lordships do not find in the record that this was done. The accountant to the trustees " knew of a Mr. George Tallis as having business with the trustees," but carried the matter no further. Mr. George Tallis may have been so well known in Sydney that it was not thought necessary to give evidence as to his business, but no assumption can be made on the subject. The matter was for the jury. It was for them to say whether they were satisfied that the endorsement " G. Tallis " on this bank cheque was a forgery, and their general verdict must be taken to mean that they were not.

There follows an important question, which is also one of fact, as to the actual authority given by the plaintiffs to McClintock. The business which the plaintiffs carried on, as trustees of the estate of John Norton, deceased, was that of publishing a newspaper in several States of the Commonwealth and in New Zealand. They were four in number. Two were ladies, one being McClintock's wife ; one was a journalist resident in Queensland ; the occupation and address of the remaining trustee are not stated. Mr. Perel, the Queensland trustee who was called, evidently knew little of the details of the business. According to him the trustees appointed McClintock " manager " in 1916, shortly after Mr. Norton's death. The plaintiffs' clerks said he was " general manager." No evidence was given as to the authority that is in fact customarily given to a manager of a newspaper business, and this authority is not matter of law. No doubt a manager manages, but how and under what restrictions must be proved. It was proved that one of McClintock's duties was to keep or be responsible for keeping the books of the business, but there was little else in evidence. From the beginning he was never authorised to draw on the trustees' bank account by himself ; another signature, though not that of another trustee, was always required. In September, 1917, before the date of the earliest of the 15 bank cheques, the trustees made a further arrangement, namely, that cheques on their accounts should not only bear a second signature—that of Mr. Marsh or Mr. Conolly—as well as McClintock's, but should be countersigned by Messrs. Starkey and Starkey, the firm of accountants who acted as their auditors, and these gentlemen had to be satisfied by McClintock (though to a considerable extent they took his word) as to the purpose for which cheques were drawn.

It is common in Australia for banks, when requested, to issue to customers " bank cheques," in form drawn by themselves on themselves, in favour of a named payee or order or bearer. Such cheques are convenient in transactions where a creditor for some reason prefers not to take his debtor's own cheque. McClintock, having obtained the second signature and the accountant's counter-signature to cheques drawn by himself in the name of

the trustees on the Australian Bank of Commerce and made payable to that bank itself, used to send them to the bank endorsed with a request, signed by himself alone but on behalf of the estate of John Norton, for the issue of a bank cheque, which was always to be in favour of Haynes, except in the one case of the Tallis cheque. A bank cheque was accordingly returned in exchange. This McClintock, sometimes at once, sometimes a little later, paid into his Haynes account with the defendants, and so he got the money. How he concealed his depredations from the auditors for so long does not appear, nor does it matter. It is evident, however, that this procedure largely undid the instructions given in September, 1917, as to the form of the trustees' cheques, and McClintock might almost as well have been authorised to operate on the trustees' accounts by himself. So far as these items were concerned, all that was gained was that he had to impose on the vigilance of the accountants on each occasion by some plausible falsehood, and to make the procedure by which he ultimately purported to vouch the transaction, tally with the original lie. The plaintiffs sought to infer that his authority as general manager included the disposal at his own discretion of the proceeds of cheques, signed and counter-signed with so much precaution, but in their Lordships' opinion the obvious construction, and certainly a reasonable construction, to put on the matter is that McClintock was no less audacious than dishonest, and resolutely took advantage of any unguarded loophole which he found in his employers' system of business. Their Lordships think that it would require positive and substantial evidence to show that in fact he had actual authority to obtain these bank cheques in exchange whenever he thought fit to do so.

Of evidence, however, there was remarkably little. It was proved that "there is a very large business done by means of bank cheques," but "the bulk of them are on solicitors' settlements and things of that sort, purchases of property and so on." Whatever effect this evidence might have in the case of the transaction with G. Tallis, if there ever was such a transaction, it does not apply to the other bank cheque transactions, as to which the counterfoils of the trustees' cheques only show that they purported to be in payment for paper or in reduction of an overdraft or for transfer to loan account. This evidence was used to show that, as in some cases it might be necessary—or at least common and advantageous—to obtain a bank cheque, it must be deemed to have been within a general manager's actual authority to do so whenever he thought proper. It is enough to say that it was for the jury, if they thought proper, not to accept either the contention or the grounds for it, and their Lordships think that their general verdict for the defendants shows that they negatived the plaintiffs' case on this issue, namely, that the bank cheques were theirs when their agent and manager obtained them but were forthwith converted by the appellants. This case plainly was put to the jury both by counsel and by the trial judge, as

a prior alternative to ratification, and the jury did not accept it. This being so, the respondents fail to establish any conversion of their property by the appellant bank, which can be treated independently of their dealings with McClintock as their customer.

The plaintiffs' next, and indeed their main, ground was that in asking for the bank cheques McClintock purported to act for them, even though he had no authority to do so, and that if they failed in showing that the cheques were theirs from the time when they were issued, they were, at any rate, entitled to make the cheques their own retrospectively by ratification, and that by the writ and the claim for money had and received they had done so. It was, of course, not contested that the plaintiffs could not both approbate and reprobate—that is to say, that they could not ratify one part and refuse to adopt another part of anything that was really an integral whole—but the difficulty (which is one of fact) is to say what the whole is and what is only a part. The respondents claimed to ratify McClintock's proceedings in getting the bank cheques but to disown his paying them into his own account. Thus they stopped short before the cheques reached the bank, and made the bank's collection of them a proceeding unauthorised by themselves, as owners of them, so that as against themselves there was a conversion.

There can be no doubt that McClintock's whole train of action, beginning with his endorsing on the trustees' cheques a request for the issue of bank cheques for the same amount, and going on to his paying them into his own account with the appellants' bank, was the execution of a preconceived and fraudulent scheme to transfer his employers' money into his own pockets. This feature gives unity to the whole series of events, but it is not necessary to consider whether it also binds them together into one transaction, which must be wholly repudiated or adopted wholly, for the actual form of the transactions carries the matter considerably further. McClintock's requests did not indicate whether the bank cheque was to be a cheque to order or to bearer, but the cheques issued, apparently in accordance with the bank's custom and, at any rate, without objection by McClintock, were cheques to bearer and crossed " Not negotiable." The only exception is the G. Tallis cheque already dealt with. Unless the bank cheques, when obtained, were to be wholly fruitless and idle, it was necessary to pay them into some bank for collection, and although in truth they were passed into McClintock's own account for a fraudulent object, the proceeds so obtained might have been applied by him to the trustees' use had he been an honest man. It follows that the selection of his own bank account as the means of collecting the cheques instead of the bank account of the trustees was rather an incidental irregularity than a fresh departure, and when his action in obtaining each cheque has been covered by the respondents' subsequent authority since *mandato priori æquiparatur*, the authority covers both his action in obtaining the cheque and his action in collecting the proceeds,

and both were done, however improperly, within the limits of the authority conferred by ratification, and were not beyond its limits altogether. It follows on the facts that the plaintiffs fail to prove a conversion by the defendants of cheques which they seek to make their own by ratification, for, if they ratify at all they ratify the bank's collection of the proceeds for account of McClintock, and if they do not ratify, nothing has been converted that ever belonged to them.

This conclusion, that in respect of the bank cheques no conversion is proved, makes it unnecessary to deal with the defences which the appellants raised at the trial under Sections 8, 10 and 88 of the Commonwealth Bills of Exchange Act, 1909, and their Lordships' Board desires not to be taken as expressing or as having formed any opinion upon these questions. The result on the whole is as follows :—Except as to the first cheque the appeal succeeds ; and, the amount of the first cheque being trivial relatively to the whole claim, the appellants should have the costs of this appeal, nor should they pay any of the costs of the motion to the Full Court, which is now appealed against. Accordingly the rule entered by the Full Court should be wholly set aside, and in lieu thereof it should be ordered that the verdict and judgment should be entered for the plaintiffs in the action for £370 3*s*. 11*d*., being £415 3*s*. 11*d*. less £45, which remained in McClintock's account and had not been misapplied, together with interest at 6 per cent. on that amount from the date of the writ until to-day. The plaintiffs should have the costs of the issue as to the first cheque down to the conclusion of the trial, but otherwise the appellants should have the costs of the action and of the motion to the Full Court.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE UNION BANK OF AUSTRALIA, LIMITED,

v.

EVA McCLINTOCK AND OTHERS.

DELIVERED BY LORD SUMNER.

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