[HIGH COURT OF AUSTRALIA.]

THE CITY BANK OF SYDNEY . . . APPELLANTS;
DEFENDANTS,

AND

McLAUGHLIN . . . . . RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 9, 10, 13, 14, 17.

Griffith C.J., Barton and Isaacs JJ.

Principal and Agent—Power of attorney executed by lunatic—Unauthorized act of agent—Ratification—Adoption—Money borrowed by wife of lunatic—Deposit of title deeds—Expenditure for husband's benefit—Right of lender to stand in place of creditor of husband—Banker and customer—Accounts—Contract by lunatic—Equitable estoppel.

In October 1900 the plaintiff, who was then insane, executed a power of attorney in favour of his wife. The wife, purporting to act under the power of attorney, lodged certain title deeds of property of the plaintiff with the defendant bank, at which the plaintiff then had a current account, and in November 1900 executed a mortgage over this property as security for advances to be made by the bank to her. Cheques were drawn on this account by the wife, and with the moneys so obtained she made payments for necessaries for herself and the plaintiff, and also paid the sum of £2,100 to a trust account, of which the plaintiff was a trustee, in repayment of a sum which the plaintiff had taken out of the trust account and paid into his own private account, and the sum of £1,775 in settlement of claims made against the plaintiff by a client for whom the plaintiff had acted as solicitor. In March 1903 the plaintiff recovered his sanity, and in 1907 brought this suit against the bank seeking to recover the title deeds lodged by his wife, and to set aside the mortgage, upon the ground that the power of attorney was void. The bank in its statement of defence set up the power of attorney as a valid instrument, and further alleged that by means of advances obtained from the bank the wife discharged the plaintiff's debts and obligations, and that the plaintiff had accepted the benefit of the advances so made, and had adopted

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and ratified his wife's action in obtaining them. There was no evidence that after recovering his sanity the plaintiff had made any claim upon the trust estate or his client for restitution of the respective sums paid to them by his wife.

Held, following *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1 C.L.R., 243), that the power of attorney was void.

Held, by *Griffith* C.J. and *Barton* J., that there was evidence that the payments of the sums of £2,100 and £1,775 were made for the benefit of the plaintiff, and that the plaintiff had accepted the benefit of these advances, and had adopted and ratified his wife's action in obtaining them, and that the bank was entitled to have an account taken of the amounts which it had disbursed for the plaintiff's benefit.

Held, also, that as at the date when the plaintiff recovered his sanity his account was in credit, an account should also be directed as to whether advances subsequently made by the bank to the plaintiff were, to his knowledge, made on the faith of the security held by the bank.

Held, by *Isaacs* J., that the plaintiff had adopted the payments of £2,100 and £1,775 as payments made for his benefit, but that these sums were not advanced to the plaintiff by the bank, but were repayments of money lent to the bank by the plaintiff, and that as the plaintiff had not ratified his wife's conduct in lodging the deeds and executing the mortgage, the plaintiff was entitled to recover the deeds free from the mortgage, but that the bank was entitled to an account.

Blackburn Building Society v. *Cunliffe, Brooks & Co.* (22 Ch. D., 61), and *Bannatyne* v. *MacIver* ((1906) 1 K.B., 103), considered.

Per *Griffith* C.J. and *Barton* J. A contract purporting to be made for a principal by a person assuming to act as his agent, but without authority, is not binding upon the alleged principal, but is capable of ratification by him. A contract made by a lunatic is not void, but may become binding upon him if by his subsequent conduct he precludes himself from denying its validity.

If a person knows that others have for his benefit put themselves in a position of disadvantage from which if he speaks or acts at once they can extricate themselves, but from which after a lapse of time they can no longer escape, his mere inaction under such circumstances may be convincing evidence of ratification and adoption of acts done in his name, but without his authority. This principle is applicable to the case of contracts purporting to be made on behalf of a lunatic, and of which after recovery he continues to enjoy the benefit.

Decision of *Street* J., *McLaughlin* v. *City Bank of Sydney* (9 S.R. (N.S.W.), 319; 26 W.N. (N.S.W.), 53), reversed.

APPEAL from the decision of *Street* J.

A suit was brought by John McLaughlin against the City Bank of Sydney, asking that a mortgage which the defendant bank claimed to have over a residential property at Waverley belonging to him might be declared to be null and void, and that the defendant bank be ordered to deliver up the title deeds and, if necessary, to reconvey the property to him free from incumbrance.

The defendant bank by way of counterclaim offered to discharge the mortgage or to reconvey the mortgaged property to the plaintiff upon certain alternative conditions, and claimed to be entitled to payment of certain sums of money to them by the plaintiff.

The suit was heard by *Street* J., who found for the plaintiff on the claim and on the counterclaim, and made a decree by which it was declared that the mortgage executed in favour of the defendant bank was null and void, and the defendant bank was ordered to deliver to the plaintiff the title deeds of his property, and the counterclaim was dismissed: *McLaughlin* v. *City Bank of Sydney* (1).

The defendant bank now appealed to the High Court from this decree upon the following grounds:—

"1. That under the circumstances the defendant is entitled to an inquiry whether any and if so what sums of money were advanced by the defendant bank and were used or applied (*a*) in or towards payment of debts and obligations of the plaintiff; (*b*) in or towards providing necessaries for the plaintiff his wife or children; (*c*) in or towards the protection of the plaintiff's person or estate; and is entitled to an order (*d*) for the payment of the sums if any found to have been so advanced and so used or applied with interest from the respective dates of such advances; and (*e*) declaring that the defendant bank are entitled to hold the title deeds of the property and the property included in the mortgage in the pleadings mentioned to secure repayment of such advances and interest: 2. That the defendant bank alleged and proved items to an extent sufficient to entitle the defendant bank to the aforesaid inquiry and order: 3. That his Honor in effect held that the defendants were not entitled to the aforesaid inquiry or order without proof of the whole of the items claimed

(1) 9 S.R. (N.S.W.), 319.

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by the defendant bank: 4. That his Honor in effect allowed the plaintiff to approbate and reprobate the authority of Ada Amanda McLaughlin under the power of attorney and otherwise in the pleadings referred to: 5. That his Honor did not give proper effect to the evidence of admissions of the plaintiff contained in the order of the Court and the plaintiff's books of account put in evidence."

The material facts appear sufficiently in the judgments hereunder.

Langer Owen K.C. and *Mann*, for the appellant bank. Under the counterclaim, which is not merely a defence to the action but an independent claim, the bank was entitled to an account against the respondent with respect to the payments of £2,100 and £1,775. There was evidence that these sums were debts due by the respondent, or that liabilities of the respondent were discharged by them, and that money borrowed from the bank on the security lodged by Mrs. McLaughlin was used for the respondent's benefit. The respondent, having received and retained the benefit of these payments, cannot now be heard to say that they were improperly made, or that the contract under which the security was lodged with the bank was invalid and unauthorized: *Bannatyne* v. *MacIver* (1). There must be some nexus between the person who pays money on behalf of another and the person for whose benefit the money is paid. This is supplied by the relationship between the parties and the circumstances under which the payments were in fact made.

[ISAACS J. referred to *Ram Tushul Singh* v. *Bieswar Lall Sahoo* (2).]

It is not necessary, at this stage, as was held by *Street* J., that the bank should prove payment of an enforceable legal debt. There was sufficient *primâ facie* evidence to entitle the bank to an account. With regard to the trust moneys there was evidence of a breach of trust by the respondent. Where trust moneys are shown to have been paid by a trustee into his own private account the Court would at once order the money to be replaced. If the appellants fail in this suit the matter is *res judicata* as

(1) (1906) 1 K.B., 103. (2) L.R. 2 Ind. App., 131.

regards the bank. The respondent having come into equity to ask for relief, the Court will compel him to do what is just and equitable. The appellants should not be precluded from having an inquiry into the validity of these payments. There is no evidence that the respondent has made any claim against the trust estate or McSharry in respect of these payments. It was admitted that after his recovery the respondent had not ratified or acquiesced in what had been done by Mrs. McLaughlin. This admission was intended to apply only to positive acts of adoption or ratification. But mere lapse of time, in the absence of positive acts, may be sufficient evidence of adoption and ratification. Money supplied by a third person for the benefit of a lunatic can be recovered if the lunatic has had the benefit of it: *In re Wood* (1); *Nelson* v. *Duncombe* (2); *In re Rhodes* (3). Secondly, the bank is entitled to an equitable lien on the deeds deposited by Mrs. McLaughlin for the advances *bonâ fide* made on the faith of the security, where the money advanced has been applied for the benefit of the respondent: *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (4).

[ISAACS J. referred to *In re National Permanent Benefit Building Society* (5).]

The mere lodging of the deeds created no security, but where money has been advanced on the faith of a security and the Court sees that the money has been applied for the benefit of the respondent, the Court will not deprive the lender of the benefit of the security to the extent to which the respondent has benefited by the loan. If the lodging of the security would have been authorized by the Court, if application had been made for this purpose, the Court will now authorize and approve of it after it has been done.

Loxton, Watt, and *Clive Teece,* for the respondent. First, the respondent is entitled to an order for the delivery of the deeds. It was admitted that after the respondent's recovery there was nothing in his conduct which afforded any evidence of ratification or acquiescence in what was done by Mrs. McLaughlin, and the

(1) 1 DeG. J. & S., 465.
(2) 9 Beav., 211.
(3) 44 Ch. D.. 94.
(4) 22 Ch. D., 61.
(5) L.R., 5 Ch., 309.

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effect of this admission was far wider than is now contended by the appellants. It was not regarded as merely referring to positive acts of adoption, and the respondent's case was conducted on this footing. Further, there was no evidence of the acceptance of a benefit by the respondent. The principles applied in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1); *In re Wrexham, Mold and Connah's Quay Railway Co.* (2); and *In re Cork and Youghal Railway Co.* (3), have no application to the present case. Those cases are distinguishable for the reasons stated by *Street* J.

[GRIFFITH C.J.—When the respondent recovered his sanity his account was in credit. If afterwards he chose to overdraw his account, was the bank not entitled to a lien on the deeds which had been previously deposited with it?]

The respondent took the view that the deeds were lodged with the bank merely for safe custody. If the amounts improperly withdrawn from his account had been replaced, the subsequent withdrawals by the respondent would not have created an overdraft.

[GRIFFITH C.J. referred to *Kirkwall* v. *Flight* (4)].

In that case the deeds were executed by the lunatic. Here the alleged contract was made by an unauthorized agent of the repondent, and there was therefore no contract by the respondent unless he adopted the act of the agent. Secondly, there was no evidence of the payment of a debt due by the respondent. The payment of portion of the trust moneys into his own private account might have been justified by the terms of the trust, and the respondent in his evidence said that he had never committed a breach of trust or failed to account to the trust estate for moneys for which he was accountable.

[GRIFFITH C.J.—The evidence is that a trustee has paid trust moneys into his own pocket. That is *primâ facie* a breach of trust. Upon that he is liable to be ordered to pay the money into Court.]

That order would not be made if the trustee claimed to be entitled to the money: *Neville* v. *Matthewman* (5); *Lewin on*

(1) 22 Ch. D., 61.
(2) (1899) 1 Ch., 440.
(3) L.R., 4 Ch., 748.
(4) 3 W.R., 529.
(5) (1894) 3 Ch., 345.

Trusts, 11th ed., pp. 1225, 1228. Until the trust accounts were taken the Court was not in a position to determine whether the payment was properly made. The onus was upon the bank to prove that this was an unauthorized dealing with the trust moneys. There was no evidence of any debt due to McSharry, or that the respondent was benefited by the settlement. The relationship between the bank and the respondent was that of banker and customer. The bank, being the respondent's debtor, is not entitled to an account until it is proved that it has repaid all moneys lodged with it by the respondent, and that there remains a balance due: *Foley* v. *Hill* (1); *Reid* v. *Rigby* (2).

Langer Owen K.C., in reply, referred to *Selby* v. *Jackson* (3); *Anson on Contracts*, 9th ed., 227; *Fry on Specific Performance*, 4th ed., p. 734; *Howard* v. *Digby* (4).

Cur. adv. vult.

GRIFFITH C.J.—The judgment I am about to read is that of my brother *Barton* and myself.

December 17.

This was a suit on the equity side of the Supreme Court, in which the plaintiff claimed an order that the defendants (the appellants) might be directed to deliver up to him the title deeds of certain land, and to discharge a mortgage upon it, and reconvey the land to the plaintiff. The case made by the statement of claim was that the mortgage was executed and the deeds were delivered to the appellants by the plaintiff's wife, assuming to act under a power of attorney from him, as a security for advances to be made by the bank to her as such attorney, and that the power of attorney was void having been executed by him while he was in fact insane.

The defendants in their statement of defence set up the power of attorney as a valid instrument, and alleged that at its date the plaintiff had a current account at the bank upon which his wife operated; that she had arranged for an overdraft on the security of a mortgage of the land in question, which was given as security for advances to be made by the bank to her; and

(1) 2 H.L.C., 28.
(2) (1894) 2 Q.B., 40.
(3) 6 Beav., 192.
(4) 2 Cl. & F., 634.

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that by means of such advances she discharged the plaintiff's debts and obligations. They also alleged that the plaintiff had accepted the benefit of the advances, and had adopted and ratified his wife's action in obtaining them.

They further alleged, and it is admitted, that at the date of the execution of the power of attorney a sum of £1,537 5s. stood at the credit of the plaintiff's current account, that sums amounting to £4,743 1s. 4d. were subsequently credited to it, and that the bank paid cheques drawn by Mrs. McLaughlin upon the account to the amount of £6,230 10s. 7d. There was consequently, when she ceased to operate on the account, a credit balance of about £50. But the appellants alleged that the account was at the time of suit in debit to the extent of £2,000 and upwards, for which they claimed to retain the mortgage and the title deeds as security. It is convenient to state at this point that after the date of the plaintiff's return to sanity, which is said to have been in March 1903, (but the date seems doubtful), he himself operated upon the account, and that the alleged debit balance is due to his operations after allowing for the credit balance of £50.

The defendants counterclaimed asking for an account, and for an order that the plaintiff might pay them the proper amount payable to them under the circumstances.

The validity of the power of attorney was the subject of discussion in this Court in the case of *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1), and it was agreed that the findings of fact made by this Court in that case should be accepted as binding in the present case. It follows that the deed of mortgage purporting to have been executed by Mrs. McLaughlin as attorney for her husband is void as a conveyance. But it does not follow from anything decided in that case that the contract made by her to give security by deposit of deeds for advances made to her for the benefit of her alleged principal is so absolutely void as to be incapable of affirmance.

At the trial the defendants endeavoured to establish that the disbursements represented by the payments made by them upon Mrs. McLaughlin's cheques drawn on the current account, and

(1) 1 C.L.R., 243.

representing the sum of £6,230 10s. 7d. already mentioned, were payments made by her for the plaintiff's benefit and in discharge of his obligations, and that they were entitled to stand in the place of the creditors whose debts were discharged by the payments. They adduced evidence in detail as to some of the payments amounting to nearly £4,000, and claimed to be entitled to an inquiry as to the whole of the disbursements. The learned Judge thought that they had not established a case as to any such sum as would show a possible balance against the plaintiff. He accordingly gave judgment for the plaintiff, and dismissed the counterclaim.

The appellants' counsel referred to the principle which is thus stated by *Romer* L.J. in the case of *Bannatyne* v. *MacIver* (1):—"That principle is one that is well recognized in the present day; and is binding upon us. Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had been originally borrowed by the principal."

In the same case the learned Lord Justice said (p. 110):—"Take, for instance, the case where a wife purports to borrow money for the purpose of paying for necessaries. There the borrowing would not make the husband liable at law, even though the money had been, in fact, applied in paying for necessaries for the wife; yet in equity it has been decided that if the money borrowed has, in fact, been applied in the payment of necessaries for the wife, for which the husband would have been legally liable, to that extent the husband is liable to the lender of the money."

In that case the Court professed to follow the principle laid down by Lord *Selborne* in *Blackburn Building Society* v. *Cunliffe, Brooks & Co* (2), and cited by *Collins* M.R. (3):—"Regarded in that light, it is consistent with the general principle of equity,

(1) (1906) 1 K.B., 103, at p. 109. (2) 22 Ch. D., 61, at p. 71.
(3) (1906) 1 K.B., 103, at p. 108.

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that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts."

Before referring further to this argument I will quote an observation by *Giffard* L.J. in *In re National Permanent Benefit Building Society* (1):—"A class of cases has been referred to on that subject, the principal of which are *In re German Mining Co.* (2), and *In re Cork and Youghal Railway Co.* (3), the latter of which was before the Lord Chancellor and myself a short time ago; I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognized in old cases, beginning with *Marlow v. Pitfield* (4), where there was a loan to an infant, and the money was spent in paying for necessaries; and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held, that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into the Court of Equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from."

In this passage that very learned lawyer, Lord Justice *Giffard*, appears to put the right on the basis of subrogation, but this view has since been doubted. See *In re Wrexham, &c., Railway Co.* (5). In the company cases the doctrine of subrogation might reasonably have been invoked, or it might have been held that there was evidence of a tripartite agreement by which one party agreed to pay a debt due by a second to a third, and to become creditor of the second in place of the third.

The principle stated in *Bannatyne* v. *MacIver* (6) is, we think, only an instance of the application of the larger doctrine of

(1) L.R. 5 Ch., 309, at p. 313.
(2) 4 D.M. & G., 19.
(3) L.R. 4 Ch., 748.
(4) 1 P. Wms., 558.
(5) (1899) 1 Ch., 440.
(6) (1906) 1 K.B., 103.

equitable estoppel. In such cases as *Reid* v. *Rigby* (1) and *Bannantyne* v. *MacIver* (2) the estoppel arose from the mere fact of acceptance and retention of the benefit arising from the acts of the person assuming to act as agent. In all the cases the estoppel operated to prevent the person who enjoyed the benefit from denying his authority to enter into the transaction on his behalf, so far as it could be lawfully entered into, either in the form which it purported to take, or, if that form were *ultra vires* of the principal, (as in the *Blackburn Case* (3)), in some other form which would have been within his competence, and would have produced substantially the same result.

But the doctrine of equitable estoppel by acceptance and retention of a benefit is not in its application confined to such cases. It extends, in our opinion, to all cases of assumed agency in which the necessary conditions exist.

In the manifold variety of human affairs it often becomes necessary, using that word in the sense of "highly expedient" (*Australasian Steam Navigation Co.* v. *Morse* (4)), that one person shall assume to act as agent for another without any actual authority. Equity, as well as law, recognizes that things are what they are. And if, in such a case, the person for whom another assumes to act receives and keeps any benefit which may have resulted from the act done, we think that he must be taken to have adopted and ratified it. In general a man is not bound actively to repudiate or disaffirm an act done in his name but without his authority. But this is not the universal rule. The circumstances may be such that a man is bound by all rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in a position of disadvantage, from which, if he speaks or acts at once, they can extricate themselves, but from which, after a lapse of time, they can no longer escape. Under such circumstances mere inaction is convincing evidence of ratification or adoption. See, for example, *per* Lord *Hatherley* in *Phillips* v. *Homfray* (5). These principles are especially applicable to the case of contracts

(1) (1894) 2 Q.B., 40.
(2) (1906) 1 K.B., 103.
(3) 22 Ch. D., 61.
(4) L.R. 4 P.C., 222.
(5) L.R. 6 Ch., 770, at p. 778.

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purporting to be made on behalf of a lunatic, and of which after recovery he continues to enjoy the benefit.

In our opinion a contract made by a lunatic is not void, although it is voidable, (except in the case of necessaries), that is to say, it may become binding upon him if he by his subsequent conduct precludes himself from denying its validity. A contract purporting to be made for a man by a person assuming to act as his agent without authority is not binding upon the alleged principal, but is capable of ratification by him. In the case of a contract purporting to be made on behalf of a lunatic by a person assuming to act as his agent both difficulties stand in the way, but they can both be obviated by ratification. In cases of what have been called continuing contracts or representations made by an infant, (which are voidable), the infant must repudiate within a reasonable time after attaining his majority, or he will be bound: *Edwards* v. *Carter* (1). We think that the same principle applies to the case of a lunatic regaining his sanity, although no case has been cited to us in which it has been formally so laid down. And we think that it is of no avail for him to protest, however emphatically, that he disapproves of all that has been done, if he nevertheless continues to enjoy the benefit of it. In such a case we think it must be said that he "protesting he would ne'er consent consented." If, for instance, during the lunacy claims are made against the lunatic which are settled by one assuming to act as his agent, and he after recovery with knowledge of the facts lies by until the time for asserting the claims if they have not been settled has elapsed, we think that he must be taken to have acquiesced in and ratified the terms of the settlement. For this purpose full means of knowledge are equivalent to actual knowledge.

We proceed to apply these principles to the facts of the present case. The power of attorney was executed on 24th October 1900, and there is no doubt that the appellants acted on the faith that it was valid. Mrs. McLaughlin began to operate on the plaintiff's bank account on 11th September 1900 by a small cheque in favour of the Australian Jockey Club. On the same day she drew another small cheque, (for an amount under

(1) (1893) A.C., 360.

£2), and on 28th November she drew upon the account for £2,100 under the following circumstances.

McLaughlin, a solicitor, was one of two trustees of an estate spoken of as the McQuade Estate. It appeared upon an investigation of the accounts of that estate made in 1900, before his insanity, that on 10th October 1894 a sum of £2,000 standing at fixed deposit in a bank in the name of the trustees of the estate had been withdrawn, with £100 accrued interest, and paid to the credit of McLaughlin's trust account with his bank, (by which we understand the separate account which solicitors ordinarily keep of trust moneys temporarily in their hands, so as not to mix them with their own moneys). On 22nd October 1894 this amount of £2,100 was withdrawn by McLaughlin from his trust account and placed to the credit of his private banking account. This was, *primâ facie* at least, a breach of trust, and, so far as appears, it had continued until November 1900. On the facts being brought to Mrs. McLaughlin's notice she drew the cheque for £2,100, and repaid the money to the credit of MacQuade's trustees in their bank. On the same day on which the cheque was drawn McLaughlin's banking account was replenished by a deposit bringing the credit balance up to a little more than the amount necessary to meet the cheque.

It cannot, therefore, be said that this payment was in strictness made by the appellants out of their own moneys, so as to bring the case exactly within the *Blackburn Building Society's Case* (1), and we do not apply that case as an authority in dealing with the matter. But, for other reasons which we will state, we regard this fact as immaterial. Upon the evidence as it stands McLaughlin was in November 1900 under an immediate obligation to replace the £2,100 in proper custody, and this right could have been enforced against him immediately, notwithstanding his mental condition. His conduct in so dealing with the fund would certainly, in the absence of explanation, have exposed him to the animadversions of the Court, if not to more serious consequences: see *e.g.*, *In re Chandler* (2); and it was therefore, *primâ facie*, for his benefit that the trust fund should be restored at the earliest moment. The reasons on which we rely are these: When

(1) 22 Ch. D., 61. (2) 22 Beav., 253.

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he recovered his sanity and resumed operations upon the bank account he must be taken to have become aware of these facts. From that day to this he has, so far as appears, done absolutely nothing to claim a refund of the money from MacQuade's trustees, which he could have done if he had any claim to its restitution. It is said to have been admitted that after his restoration to reason there was nothing in his conduct which afforded any evidence of ratification of or acquiescence in what had been done by his wife. We can only take this admission as referring to positive acts of adoption or ratification, and the appellants protest that it was so understood. So far as his lying by and enjoying the advantage of the payment made for his benefit is material, the admission would be of a matter of law, and not of a matter of fact. In our judgment, if no more appears, the Court is bound to hold that he has by his inaction adopted and ratified the transaction, that is to say, he has by ratification affirmed his wife's authority to apply the money standing to his credit with the appellants to the purpose of this payment. We do not think that for these purposes protests, however emphatic, if not followed by active measures, are of any avail. If this is so, the amount must be left out of consideration on each side, or taken into consideration on both sides, in ascertaining the balance, if any, due to or by the plaintiff.

Another large payment of £1,755 was made by Mrs. McLaughlin under these circumstances. McLaughlin had been for many years solicitor for one McSharry, for whom he had conducted a long and costly litigation extending over a period of years, and on whose account he had received large sums of money amounting to between £50,000 and £60,000. He had never delivered any bills of costs, but had sometimes rendered statements of account, showing moneys received with deductions for "Costs to date." In August 1900 McSharry obtained an order on McLaughlin for delivery of his bill of costs before 31st December. Before that date McLaughlin, as already stated, was incapacitated from obeying the order. McSharry claimed that a large balance was coming to him, and it is clear that he could have maintained an action for money had and received, to which the defence would have been a set-off for costs, which it would have been difficult

to establish. Under these circumstances McLaughlin's managing clerk, Coghlan, appears to have gone into the matter of the costs, and the result was that on 27th February 1901 a cheque for £1,775 was drawn by Mrs. McLaughlin on McLaughlin's bank account, and paid to McSharry in settlement of all claims. On the same day a deed purporting to contain mutual releases was executed by McSharry and Mrs. McLaughlin as attorney for her husband.

On McLaughlin's recovery of sanity he must be taken on the evidence to have become aware of these facts, and from that time he has done nothing to disaffirm the transaction or set aside the releases. McSharry has lost his right to assert his original claim. The plaintiff now says that McSharry was indebted to him on a balance of account, but that is, at best, an expression of opinion. In our judgment this transaction was *primâ facie* for his benefit—perhaps it was not so beneficial as it might have been —and it was capable of ratification by mere inaction, if there was a duty to act. We come to the same conclusion with respect to it, and for the same reasons, as in the matter of the McQuade trust moneys.

Mrs. McLaughlin also drew upon the bank account for various sums of money which she placed to a separate account in her own name, on which she operated for domestic purposes in respect of which McLaughlin was *primâ facie* liable as for necessaries.

It was also proved that she paid by cheques drawn upon the account some debts of McLaughlin's.

The account, which was sometimes in credit and sometimes in debit, was fed by deposits of money which were the property of McLaughlin. It was before and during his incapacity, and after his recovery, treated as a single account.

The appellants claim that they are entitled under these circumstances to have an account taken of the amounts which they disbursed on Mrs. McLaughlin's cheques for the benefit of her husband. We doubt whether on the admitted facts any account was necessary, but, as it is suggested that other facts may be available, which will qualify McLaughlin's apparent ratification by inaction, we think that it should be directed, with an inquiry whether after his recovery he, having knowledge of the payments,

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and having received the benefit of them, continued to retain that benefit.

We now come to another branch of the case, the validity of the charge created by deposit of the title deeds.

As already stated, when McLaughlin resumed operations upon his bank account it was in credit. He knew that the deeds were held by the bank, and if he is to be taken to have ratified by subsequent acquiescence his wife's dealings with the account, we think that the ratification must be taken to extend to the whole transaction, including the agreement under which she obtained permission to overdraw upon the security of the mortgage. And, as the account was then in credit, he must be taken to have known that he could have then demanded the deeds from the bank, whether he did or did not repudiate the charge. He did not withdraw the deeds, and went on drawing on the account. Under these circumstances we think that the question whether the bank is entitled to retain them as security for the overdraft created by himself between March and November 1903 must depend upon whether the advances thus made to him were to his knowledge made on the faith of the supposed security. If they were so made to his knowledge, he is not entitled to any relief in a Court of Equity in respect of them.

It is, as a general rule, very inadvisable that a Court of final appeal should assume the functions of a Court of first instance, and decide questions of fact not decided by the Court appealed from. The appellants do not ask us to do so in this instance.

For the reasons given we think that the judgment appealed from must be discharged, except so far as it declares the deed of mortgage given by Mrs. McLaughlin to the appellants null and void, and that in lieu thereof the following account and inquiries should be taken and made.

(1) An account of all moneys paid by the appellants in respect of cheques drawn by Mrs. McLaughlin upon the plaintiff's bank account after 11th September 1900.

(2) An inquiry whether the moneys so withdrawn by Mrs. McLaughlin, or any part of them, were applied for the benefit of the plaintiff or in discharge of his obligations, legal or equitable.

(3) An inquiry whether having received the benefit of any

and which of such payments he afterwards, with knowledge of the payments, retained and continued to enjoy the benefit of them.

(4) An inquiry whether after 24th June 1902 the plaintiff, with knowledge of the possession by the appellants of the title deeds of the land, and of their claim to retain them as security for any moneys which they might advance on his account, and without repudiating that claim, obtained advances from them on that footing to any and what amount, and what balance, if any, is due from the plaintiff to the defendants in respect of such advances.

Further consideration should be reserved.

With this order the case must be remitted to the Supreme Court.

ISAACS J. This proceeding divides itself into two distinct parts, separated by a clear line of demarcation. The appellants' case, so far as it seeks to make any claim against the respondent, whether of a personal nature or by way of security over his land in respect of any of Mrs. McLaughlin's acts, rests on the principle found in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), and most recently acted upon in *Bannatyne* v. *MacIver* (2). The *Blackburn Case* (1) is an authority for three positions material to the present appeal: It stated the central proposition upon which the liability of the respondent in respect of his wife's acts depends, it determined the non-applicability of *Clayton's Case* (3), and by the formal order of the Court it placed a clear and practical interpretation on the doctrines enunciated in the judgment.

Every one of these aspects is material here. The proposition is that stated by Lord *Selborne* L.C. (4), in these terms:—"It is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit, so as, in substance, to make those other people pay their debt."

(1) 22 Ch. D., 61.
(2) (1906) 1 K.B., 103.
(3) 1 Mer., 572.
(4) 22 Ch. D., 61, at p. 71.

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In *Bannatyne* v. *MacIver* (1), Lord *Collins* (then Master of the Rolls) thought it sufficient to quote Lord *Selborne's* words. Other learned Judges have stated the same thing in somewhat varying language. I am content to accept the rule propounded by the learned Lord Chancellor as containing all the essentials, and to examine and then apply it. The proposition when dissected imposes liability where the party charged (1) pays, (2) legitimate demands which he is bound to meet, (3) thus taking the benefit of other people's money advanced to him for that purpose. If those conditions concur, then, having the benefit, he must recoup the other persons, so as not to make the latter pay his debts.

The expression "pays" involves some election on the part of the person charged either to apply the money or to treat it as applied to the satisfaction of his liabilities. The mere fact that a benefit is conferred on him does not suffice to make him chargeable. The Privy Council said in *Ram Tushul Singh* v. *Bieswar Lall Sahoo* (2): "It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A. of B's. debt."

And so in *Abdul Walud Khan* v. *Shaluka Bibi* (3), a party was held by the Judicial Committee not liable for any portion of costs incurred by the other party and which resulted in the reversal of a decree against both, a reversal of which the party charged of course got the benefit. The Privy Council said: "The fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiffs."

The case of *The Liddesdale* (4) is an instance of a person benefiting by another person's outlay without any liability to recoup, because, having no power to reject the benefit without abandoning his property altogether, which he could not be

(1) (1906) 1 K.B., 103, at p. 108.
(2) L.R. 2 Ind. App., 131, at p. 143.
(3) L.R. 21 Ind. App., 34.
(4) (1900) A.C., 190.

expected to do, the circumstances raised no case of adoption or election or assent.

Consequently we have, in such a case as the present, to see whether the respondent directly or indirectly has so conducted himself as to have assented to and adopted the actual application of the money which was made in his name, and therefore, in fact, to have "paid" his obligations: *Belshaw* v. *Bush* (1); *Kemp* v. *Balls* (2); *Keighley, Maxsted & Co.* v. *Durant* (3). Unless there is something in the nature of adoption, the attempted payment is not really a payment, for the debtor might refuse to accept it, and insist on paying his debts himself, leaving the first person to get back his money as best he could.

Whether he did so conduct himself or not depends on the facts. Express assent is not necessary. Conduct, active or passive, may establish it. Silence, where there is a duty to speak, may be excellent evidence of assent.

The next element in Lord *Selborne's* proposition is that the payment must be of a legitimate demand which he was in some way bound to meet. It is necessary at this point to remember that, in case of a company borrowing in fact, but *ultra vires*, the original transaction cannot be adopted *simpliciter*, that is, the obligation to recoup cannot be rested on mere ratification *in toto* of the original borrowing. In the case of an individual it can, and whether the ultimate use of the money be legitimate or illegitimate, whether it be applied to paying debts or to making gifts, is immaterial if the principal ratifies the original borrowing as a distinct and independent transaction. But where he does not do that, and where the lender has, as here, in consequence of the admissions made, to rely not simply on ratification or adoption of the original borrowing, but on the nature of the application of the money which is acquiesced in, then if it is applied for some other person's use in some way in which the principal is under no obligation to apply it, the case does not come within the equitable doctrine of the *Blackburn Case* (4), because he has had no benefit in law.

The third requirement is that whatever benefit the principal

(1) 11 C.B., 191, at p. 207.
(2) 10 Ex., 607.
(3) (1901) A.C., 240.
(4) 22 Ch. D., 61.

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receives must be out of "other people's money." Here it must be the bank's money—otherwise it cannot be said to have been "advanced."

That is the effect of the proposition of Lord *Selborne*.

Then it was also decided that *Clayton's Case* (1), does not apply to such a case. That of course is a disadvantage to the creditor, here the bank. It means that he cannot at his will appropriate sums paid in to the customer's credit so as to pay moneys advanced which were not applied to the payment of the customer's debts or obligations, and leave standing as unpaid those that were. The burden is on the bank to prove that the moneys so applied were *its* moneys, and not moneys standing to the credit of the customer, and it must for that purpose take the state of the account as it stood in fact at the time the money was withdrawn. If in fact there was at that time a credit, then to the extent of that credit the withdrawal was of the customer's money and not the bank's money, and the banker is not allowed to treat the account as one blended fund, and claim the appropriate payments in as he likes, even up to the time of bringing his action. To apply *Clayton's Case* (1) to such a state of things would be contrary to the intention of the parties and to the real facts of the case, and that is not permissible: see *The "Mecca"* (2).

Lastly, the Court of Appeal in the *Blackburn Case* (3), held that securities originally lodged to secure the borrowed money should stand as security for the moneys applied by the society to payment of legitimate demands, but only such moneys as were really advanced by the bank, that is since the society ceased to have a credit balance in its banking account. This portion of the curial order was not appealed from, and was not dealt with by the House of Lords, but as Lord *Blackburn*, who suggested no doubt as to its correctness, said (4): "It retains its full force as a decision of the Court of Appeal not appealed against." I would respectfully add that it stands as a decision of a very powerful Court of Appeal. An adoption of the borrowing *pro tanto* includes, as it seems to me, an adoption of the security given. It would often be a very ineffectual remedy otherwise.

(1) 1 Mer., 572.
(2) (1897) A.C., at p. 296, *per* Lord *Macnaghten*.
(3) 22 Ch. D., 61.
(4) 9 App. Cas., 857, at p. 867.

But there are observations of the same learned Lord strongly supporting that portion of the order of the Appeal Court which limited the liability of the society to moneys withdrawn since the credit balance ceased. Lord *Blackburn* says (1):—"In all banking accounts the bankers, so long as the balance of the account is in favour of the customer, are bound to pay cheques properly drawn, and are justified, without any inquiry as to the purpose for which those cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance, or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent; when they do so the legal effect is that they lend the surplus to the customer, and if the person drawing the cheque is authorized to borrow in this way on account of the customers, the bankers can charge the amount against those customers and their principals, and can make available any securities which, either from the general custom of bankers or from a special bargain, they have to secure their account."

So Lord *Watson* (2):—"I must confess my inability to understand the proposition that an advance made by a banker to a customer, whose account is overdrawn, does not constitute a borrowing and lending, in the strict sense of the words."

This is of course a clear position, as was determined by *Foley* v. *Hill* (3), where Lord *Cottenham* C. said that money paid in by the customer is the money of the banker, but he is answerable for it, and contracts *to repay* the customer, when demanded, a sum equivalent to that which has been placed in his hands. The banker, says Lord *Cottenham*, is a debtor.

It follows in discharging his contractual obligation he is not advancing—that is lending—any money to the customer, he is discharging his own debt.

Consequently there cannot, as I conceive, be any *liability* in the respondent in respect of any moneys withdrawn from the bank and not in excess of the amount then standing to the credit of his account.

(1) 9 App. Cas., 857, at p. 864. (2) 9 App. Cas., 857, at p. 858.
(3) 2 H.L.C., 28.

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The burden of proving the respondent's liability under those principles lies upon the bank, and the question is whether it has made a *primâ facie* case or has absolutely proved one or more items, in which case, as Lord *Selborne* points out in the *Blackburn Case* (1), an inquiry would follow.

The selected items include two sums of considerable magnitude to which I shall in the first place refer. The sum of £2,100 was withdrawn from the respondent's banking account and applied to the replacement of that amount in the McQuade trust estate, *i.e.*, to the credit of the banking account of that estate in the name of the two trustees. The learned primary Judge as to this says (2):—"It is true that, as between the plaintiff as trustee and his *cestuis que trust*, the fact that trust funds were found in his possession would throw upon him the onus of proving that they were properly there." So far I agree. Then his Honor says that this only applies between the respondent and his *cestuis que trust*, and not as between him and the bank. I cannot help thinking that there is a fallacy in this. The bank must for this purpose rely for its own right on the obligations of the respondent towards his *cestuis que trust*, and if as between him and them there was an obligation to restore at once and unconditionally, and without the necessity of taking accounts, the trust funds, in wrongful possession of which he was found, the bank has so far satisfied the burden it undertook. I say the possession was wrongful because it was money which should have been in the custody and under the control of both trustees, and yet was not merely in the sole custody of one, but had been placed by him into a private account used for his own purposes. The facts I have no doubt disclose a *primâ facie* case of obligation to restore the £2,100 to the trust estate, and this was what Lord *Selborne* calls "a legitimate demand which he was bound to meet."

And further, as the respondent, during the years which have elapsed since his recovery, has known of the application of the money withdrawn from his account to that purpose, and has never attempted in any way to satisfy the demand, or to reobtain the sum so paid in, there is also a *primâ facie* case of

(1) 22 Ch. D., 61, at p. 72.

(2) 9 S.R. (N.S.W.), 319, at p. 338.

adoption of the withdrawal of the £2,100 from his banking account, and the satisfaction therewith of the claim of the trust estate to restoration.

But it is quite another question whether the sum so withdrawn was an advance by the bank. As *Street* J. points out, the account was in credit when that withdrawal took place, and in my opinion it cannot be properly said that it was an advance by the bank, or, in other words, that it was the bank's money which satisfied the respondent's obligation to the trust estate. I am of opinion that the £2,100 must be eliminated entirely from consideration in this branch. Mr. *Owen* admitted that beyond all question the account was then in credit, so that further inquiry as to that was not to be thought of.

I have already said that, in view of the bank's admission in the course of the case, it cannot rely upon ratification of the original transaction of borrowing—that is, of the original mortgage covering all future advances. No such case is made by the statement of claim. Paragraph 7, read with the other paragraphs, is manifestly directed to such ratification and adoption as the law would imply from the acceptance of the benefits referred to. There is in paragraph 11 a statement of the balance of the account down to the time of action, but it is assumed that the plaintiff's personal acts had no effect other than altering the ultimate balance due. No case is rested on any security given by the plaintiff himself, or any adoption *ab initio* of his wife's borrowings, or even of any claim of banker's general lien on the deed for subsequent amounts advanced to him, and such a claim would obviously depend on the circumstances in which the plaintiff allowed the deeds to remain in the bank. It was admitted in argument before us, though it does not very clearly appear from the accounts in evidence, that up to that time the total credits were £1,537 1s. 3d. plus £4,743 1s. 9d., that is £6,280 2s. 9d., and the total debits were £6,230 10s. 7d., and therefore that when the plaintiff resumed banking operations he was in credit about £50, that is according to the bank's view. Unless, therefore, he subsequently expressly or impliedly allowed a general banker's lien to arise, a point not suggested or fought, there is

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nothing as it seems to me which can make him liable to the bank's claim.

If he had ratified the acts of his wife *ab initio*, then the application of the moneys becomes quite immaterial—that being a matter between him and her alone. It is only because of the way the case was conducted that the *Blackburn Case* (1) was relevant, and the parties are bound by the way they conducted it: *Nevill* v. *Fine Art and General Insurance Co.* (2) and *Browne* v. *Dunn* (3). The admissions, as stated by *Street* J., at pp. 268 (f. 839) and 276 (f. 896) appear to me to exclude any notion of wholesale recognition of his wife's acts. He has from first to last taken pains to repudiate those, and it is only by means of the equitable doctrine relied on relating to specific benefits accepted that the bank has ever claimed to bind him, that is by reason of his adoption *pro tanto* of the transaction.

As to the sum of £1,775, when this sum was withdrawn it left his account about £1,022 in debit. But subsequent credits have paid off this indebtedness, and if *Clayton's Case* (4) is not applied, this advance is paid. Apart from payment, I think that the respondent's conduct in retaining the deed of release with full knowledge of what was done, or the means of it, and his abstention, despite his business and legal knowledge, from repudiating the release, or settling accounts with McSharry, or taking any steps with regard to the order for delivery of a bill of costs—which, as he said, he did not know had been discharged—affords strong *primâ facie* evidence of adoption of the transaction, an adoption which, *uno flatu*, had the double effect of creating the obligation and accepting the benefit of its discharge. The subsequent payments in, however, as I think, terminate this liability if it existed.

There are some moneys expended for necessaries, which I may assume were instances of his liability: see *McLaughlin* v. *Freehill* (5). But, again, the credit balance of £50 or thereabouts, after all his wife's transactions were completed, appears to me to discharge his indebtedness.

(1) 22 Ch. D., 61.
(2) (1897) A.C., 68.
(3) 6 R., 67.
(4) 1 Mer., 572.
(5) 5 C.L.R., 858.

In short, unless his whole banking account can be considered as one indivisibly blended account, and as if he himself had either personally operated on it throughout or had antecedently authorized his wife's transactions, (and ratification *in globo* would of course be equivalent), the bank must fail in the first branch. As they have not raised any such case, and on the contrary have disclaimed it, and as they have set up no claim to security over his deeds, based on his own drawings, I think their case as to lien fails, and the plaintiff should have a decree substantially as prayed for in the first four paragraphs of his prayer.

But there is still one phase of the matter which is very material to the result of this case, so far as the defendants' counterclaim is concerned.

Although the bank in their counterclaim make no case of security in respect of his own drawings, they do claim an account of what is due from him, and payments of the sum found to be owing. The respondent, while not disputing his own drawings, asserts that he is entitled to start with a credit balance of £1,537, the amount to his credit when he became ill, to have the benefit of all sums since paid in to his credit because they are admittedly his, and to utterly ignore all subsequent withdrawals down to his resumption of personal drawings. That would leave him free of liability and with a good credit balance still.

For the reasons already stated, there might be disclosed on examination of the banking operations by Mrs. McLaughlin and the application of the money that the respondent is in debt to the bank by reason of his personal drawings, and if so the bank would be entitled to payment, though not to any security over his property. I mean that if the bank, though not entitled to regard the £2,100 as an advance, could show he assented to its application for any purpose, that would use up his credit *quo tanto*. So also as to about £700 of the £1,775 and the promissory note for £20 and payments for necessaries. Then if, in addition, the bank could, on the principle of the *Blackburn Case* (1), go still further and establish liability for other withdrawals sufficient to reduce his admitted credits so far as to make his own subsequent withdrawals an overdraft, the bank would so far succeed in proving

(1) 22 Ch. D., 61.

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his indebtedness in respect of those subsequent withdrawals. But that is all. It must get rid of his credits, and for part of that it apparently needs the *Blackburn Case* (1) to prove assent, because there is no suggestion of active ratification of the dealings with the moneys withdrawn.

The accounts, though between banker and customer, are sufficiently complicated and beset with equitable consideration as to make them a proper subject for interposition of a Court of Equity. I think *Street* J. would have allowed the counterclaim on this footing if he had not considered it was presented merely as a bar to the respondent's claim, and therefore as a means of protection only. But it is more; it is a substantive claim, in which the bank are entitled to relief irrespective of the question of security, and to this extent I am of opinion that the appeal should be allowed.

Appeal allowed.

Solicitors, for appellants, *Leibius & Black.*
Solicitor, for respondent, *J. H. McLaughlin.*

C. E. W.

(1) 22 Ch. D., 61.