[HIGH COURT OF AUSTRALIA.]

McLAUGHLIN . . . . . APPELLANT;
PLAINTIFF,

AND

THE CITY BANK OF SYDNEY . . . RESPONDENTS.
DEFENDANTS.

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

AND

McLAUGHLIN . . . . . RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *April* 2, 3, 4, 10, 11, 12, 15, 26.

Griffith C.J., Barton and Isaacs JJ.

Lunatic—Payments by wife of lunatic for his benefit—Money borrowed by wife—Deposit of title deeds by wife as security for loan—Ratification by lunatic when sane—Money lent by Bank to wife—Accounts—Evidence.

The wife of A., while he was temporarily insane, applied certain money standing to his credit with a Bank to replace certain trust moneys which before his insanity A. had paid to his own account with the Bank. After recovering his sanity A. did nothing for 4½ years by way of claiming a refund of the money from the trust estate.

Held, that evidence that the trust estate or the beneficiaries was or were indebted to A. was irrelevant to an enquiry whether the payment by his wife was for his benefit and whether having received the benefit he continued to enjoy it.

Held, also, that A. had ratified the payment by his wife.

The wife during the period of A.'s insanity pledged the title deeds of A.'s land with the Bank in order to raise money to pay certain of A.'s debts, and paid them. After his recovery A. did nothing for a period of 4½ years to suggest to the creditors that he did not assent to the payment.

Held by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that A. had thereby necessarily ratified the payment. *Held*, further, (*Isaacs* J. dissenting) —(1) that such ratification extended to the pledging of the deeds, and (2) that, as the Court, if applied to during the period of A.'s insanity, might have authorized the pledging of the deeds, A. should not be allowed to compel the delivery up by the bank of the title deeds without repaying the money borrowed on them.

Before A. became insane he had begun an action against B. for a sum of £971, and B. had thereupon obtained an order that A., who for many years had been B.'s solicitor, should deliver a bill of costs for taxation. Subsequently to A. becoming insane, on the application of B., and with the consent of counsel purporting to act on behalf of A., the order for the delivery of a bill of costs was set aside, judgment of *non pros.* was entered in the action and a sum of money was borrowed from the Bank by A.'s wife and paid by her to B. by way of compromise and full settlement of the claims of A. and B. against each other. After recovering his sanity A. informed B and the Bank that he repudiated what had been done by his wife but did not take any steps to set aside the order of the Court made during his insanity.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting)—(1) that evidence tending to show that upon taxation it would have appeared that nothing was due from A. to B. was irrelevant to the inquiry whether the payment to B. was for A.'s benefit; (2) that under the circumstances the payment was for A.'s benefit; (3) that whether the payment was or was not for A.'s benefit was immaterial while the order of the Court, which was voidable and not void, stood; and (4) that the Bank was entitled to recover the money from A.

When A. recovered his sanity his account at the Bank was to his knowledge overdrawn by reason of the operations on it of A.'s wife, and the Bank held A.'s title deeds as security for the overdraft. A. subsequently drew cheques on the account and thereby obtained further advances from the Bank.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that on the evidence the Bank was entitled to hold the deeds as security for the further advances.

Decision of the Supreme Court of New South Wales (*Street* J.) in part affirmed and in part reversed.

APPEAL and CROSS APPEAL from the Supreme Court of New South Wales. On the hearing by the High Court of an appeal

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

from a judgment of *Street* J. in an action brought by John McLaughlin against the City Bank of Sydney a reference was made to the Master in Equity of the Supreme Court to make certain enquiries: *City Bank of Sydney* v. *McLaughlin* (1). The Master having held the enquiries made certain findings, and on summons to review these findings *Street* J. varied the Master's certificate in certain respects.

From portion of the decision of *Street* J. the plaintiff by leave now appealed to the High Court, and from another portion the defendants brought a cross appeal.

The facts are sufficiently set out in the judgments hereunder.

On the appeal of the plaintiff:

The *appellant* in person, and afterwards *Clive Teece* (with him *Rowland*), for the appellant.

Langer Owen K.C. (with him *Mann*), for the respondents.

Clive Teece, in reply.

Reference was made to:—*City Bank of Sydney* v. *McLaughlin* (1); *Rogers* v. *Kelly* (2); *De Bussche* v. *Alt* (3); *Marsh* v. *Joseph* (4); *Foley* v. *Hill* (5); *Imperial Bank of Canada* v. *Bank of Hamilton* (6); *Hirachand Punamchand* v. *Temple* (7); *Gandy* v. *Gandy* (8); *In re Lart*; *Wilkinson* v. *Blades* (9); *Kent* v. *Freehold Land and Brick-making Co.* (10); *Halsbury's Laws of England*, vol XIII., pp. 364, 395; *Edwards* v. *Carter* (11); *Carter* v. *Silber* (12); *Great North-West Central Railway Co.* v. *Charlebois* (13); *Baldwin* v. *Smith* (14); *Phillipson* v. *Hayter* (15); *In re Wrexham, Mold and Connah's Quay Railway Co.* (16); *Ormerod's Case* (17).

(1) 9 C.L.R., 615.
(2) 2 Camp., 123.
(3) 8 Ch. D., 286, at p. 314.
(4) (1897) 1 Ch., 213.
(5) 8 Jur., 347; 2 H.L.C., 28.
(6) (1903) A.C., 49.
(7) (1911) 2 K.B., 330.
(8) 30 Ch. D., 57, at p. 78.
(9) (1896) 2 Ch., 788.
(10) L.R. 3 Ch., 493.
(11) (1893) A.C., 360.
(12) (1892) 2 Ch., 278, at p. 283.
(13) (1899) A.C., 114.
(14) (1900) 1 Ch., 588.
(15) L.R. 6 C.P., 38.
(16) (1899) 1 Ch., 440
(17) (1894) 2 Ch., 474.

On the cross appeal of the defendants :

Langer Owen K.C. and *Mann*, for the appellants.

Clive Teece (with him *Rowland*), for the respondent.

Langer Owen K.C., in reply.

Reference was made to:—*Davidson* v. *Wood* (1); *Grant on Banking*, 6th ed., p. 301; *Brandao* v. *Barnett* (2); *Deare* v. *Soutten* (3); *In re Rhodes*; *Rhodes* v. *Rhodes* (4); *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (5); *In re Wood's Estate* (6); *Bannatyne* v. *McIver* (7); *Knox* v. *Bushell* (8); *Read* v. *Legard* (9); *Halsbury's Laws of England*, vol. XVI., p. 420; *Morel Bros. & Co. Ltd.* v. *Earl of Westmorland* (10); *Drew* v. *Nunn* (11); *Brinsmead* v. *Harrison* (12); *Valentini* v. *Canali* (13); *Haddow* v. *Morton* (14); *Wilson* v. *Ford* (15); *Wylde* v. *Radford* (16); *Hamilton* v. *Bank of New South Wales* (17); *Dale* v. *Bank of New South Wales* (18); *Chambers* v. *Davidson* (19); *In re London and Globe Finance Corporation* (20); *Hamilton on Banking*, 2nd ed., p. 134; *Farhall* v. *Farhall* (21); *In re General Provident Assurance Co.*; *Ex parte National Bank* (22); *In re Trethowan*; *Ex parte Tweedy* (23); *Lucas* v. *Dorrien* (24).

Cur. adv. vult.

April 26.

The following judgments were read:—

GRIFFITH C.J. The facts of this case are to some extent set out in the judgment of this Court upon the defendant's appeal from a judgment of *Street* J. dismissing their counterclaim: *City Bank of Sydney* v. *McLaughlin* (25). I will briefly summarize

(1) 32 L.J. Ch., 400.
(2) 12 Cl. & F., 787, at p. 806.
(3) L.R. 9 Eq., 151.
(4) 44 Ch. D., 94, at p. 97.
(5) 22 Ch. D., 61.
(6) 1 D.J. & S., 465.
(7) (1906) 1 K.B., 103.
(8) 3 C.B.N.S., 334.
(9) 6 Ex., 636, at p. 641.
(10) (1904) A.C., 11.
(11) 4 Q.B.D., 661.
(12) L.R. 6 C.P., 584.
(13) 24 Q.B.D., 166.
(14) (1894) 1 Q.B., 565.
(15) L.R. 3 Ex., 63.
(16) 33 L.J. Ch., 51.
(17) 15 N.S.W. L.R. (L.), 100.
(18) 2 V.L.R. (L.), 27.
(19) L.R. 1 P.C., 296.
(20) (1902) 2 Ch., 416.
(21) L.R. 7 Eq., 286; L.R. 7 Ch., 123.
(22) L.R. 14 Eq., 507.
(23) 5 Ch. D., 559.
(24) 7 Taunt., 278.
(25) 9 C.L.R., 615.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

them, with such additional statement as is necessary for the understanding of the points raised by the present appeals.

About the latter end of August 1900 the plaintiff, who was then a solicitor in Sydney, and had apparently a considerable practice, became of unsound mind, but a formal declaration of his insanity was not made until 2nd August 1902, when a Mr. McCulloch was appointed Committee of his estate. On 10th March 1903 an order (spoken of as a *supersedeas*) was made declaring that he had recovered his sanity. During the long interval between August 1900 and August 1902 he was substantially under restraint, and was incapable of managing his affairs, but his wife, who appears to have been always hopeful, did her best to keep his practice together, and to maintain his home and family.

At the latter date the aid of the Court was invoked and obtained. The plaintiff's affairs and accounts appear to have been at this time in a very confused and involved condition. He was one of the trustees of an estate called the McQuade estate. In January 1898 he had engaged Mr. M. W. Hawkins, a public accountant, to make up the accounts of this estate from the beginning of the trust, and incidentally to go through all his own accounts. This work was not completed in August 1900, and Mr. Hawkins, under Mrs. McLaughlin's instructions, proceeded with the work and made up a complete set of books as far as possible, which came into plaintiff's possession on his recovery of sanity, and have ever since been in his possession. It does not appear that he ever disputed their accuracy before the commencement of this suit, which was brought in November 1907.

On 24th October 1900 the plaintiff executed a power of attorney in favour of his wife, the validity of which was the subject of decision in the case of *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1). From that time onward she assumed to act as his agent in the management of his affairs, and it cannot be disputed that she did her best under very difficult circumstances. The appellant, indeed, who at first appeared in person, in his somewhat incoherent address to the Court, invited it to believe that he was never of unsound mind, and that while under restraint he was the victim of a conspiracy between his wife and

(1) 1 C.L.R., 243; *id.*, 479.

her medical advisers, but this contention is contrary to the plain facts of the case. It is agreed that the facts as found in the *Daily Telegraph Case* (1) shall be accepted as to plaintiff's insanity. The result of that decision is that the respondents cannot set up the power of attorney as a valid deed, but they are not precluded from relying, as they do, upon any other authority which Mrs. McLaughlin may have possessed by implication of law, or which is established by any subsequent ratification by the plaintiff of her acts purporting to be done on his behalf, although done without his antecedent authority.

For the purpose of carrying on plaintiff's practice Mrs. McLaughlin, purporting to act on his behalf, made an agreement of partnership with Mr. C. A. Coghlan, who had been his managing clerk, and the practice was for some time carried on under the name of McLaughlin & Coghlan.

For the purpose of finding money to maintain the plaintiff's household and pay some of his pressing debts she proposed to operate upon a current banking account which he had with the defendant Bank. On 27th November 1900 McLaughlan & Coghlan wrote a letter to the Bank in the following terms:—

"The Manager, City Bank of Sydney.

"Dear Sir,—Referring to our several interviews on the subject of your granting an overdraft upon Mr. John McLaughlin's current account with your Bank and to the deposit of deeds made this day, we have to request that you will make advances upon this account to the extent of One thousand five hundred pounds.

"Yours faithfully,

"McLaughlin & Coghlan."

Mrs. McLaughlin also executed a mortgage over the land comprised in the deeds deposited. The mortgage is dated 26th November 1900, but from the internal evidence of the letter of 27th November I assume that it was executed after that day and antedated. The defendants thereupon allowed her to operate upon the plaintiff's account and to overdraw it on the faith of this security. It is to be noted that the limit of the overdraft asked for was £1,500.

(1) 1 C.L.R., 243; *id.*, 479.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

Among other things discovered by Mr. Hawkins was the fact that in October 1894 plaintiff had withdrawn a sum of £2,000 standing at fixed deposit in a Bank in the name of himself and another as trustees of the McQuade Estate, together with £100 accrued interest, and had paid it to his own trust account with his Bank. In the same month plaintiff had withdrawn the amount from his trust account and placed it to the credit of his private Bank account, where it had since remained mixed with his own moneys.

When the plaintiff became of unsound mind his account with the Bank was in credit to the extent of a little more than £1,500. On 22nd September 1900 and 1st November 1900 small sums were placed to the credit of the account by the Colonial Treasurer, and on 28th November a further sum of £560 was paid in, apparently by Hawkins on behalf of Mrs. McLaughlin, making in all a credit balance of £2,122. On the same day Mrs. McLaughlin, purporting to act as plaintiff's attorney, drew a cheque for £2,100, which was at once repaid to the McQuade trust account.

The plaintiff claims that this payment was made without his authority, and that he is therefore entitled to have his account with the Bank taken on the assumption that his credit balance was not diminished by the withdrawal of the £2,100. This transaction was considered and dealt with by this Court on the former appeal in this case. After pointing out (1) that a contract made by a lunatic is not void although it is voidable, that is to say, that it is capable of ratification, I said, speaking for my brother *Barton* and myself:—"When 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 McQuade's trustees, which he could have done if he had any claim to its restitution. . . . 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 pro-

(1) 9 C.L.R., 615, at p. 626.

tests, 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." After dealing with another item the Court directed an inquiry whether "the moneys . . . 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," and 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." The inquiries have now been made, and it appears that the plaintiff has never even communicated with the new trustees of McQuade's estate on the subject. The only argument which he has used is that in 1894 the trust estate was indebted to him for costs and advances, and that, if an account had been taken, the balance would have been in his favour, or, if against him, would have been less than £2,100. The Master refused to admit evidence on this point, being of opinion that this Court had already decided it. It is clear, however, that evidence of such a kind was irrelevant. A trustee is not entitled to lay hands on a trust fund on the pretext that the beneficiaries are his debtors. Moreover, the facts which the plaintiff told us that he wished to prove would have shown that the claims, if any, which he had against any one in 1894 when he took the money were claims for different sums against separate beneficiaries, and that they had all been satisfied before 1900.

When a man who, on his return from a long absence (whether physical or mental) finds that during his absence some friend, purporting to act on his behalf, has discharged his pressing debts, I think that very slight evidence of ratification of the agent's acts is sufficient, and I certainly think that, if he fails for a long time to communicate with the creditors whose claims against him have been satisfied, the inference of ratification is irresistible. The lapse of time in the present case was from March 1903 to November 1907—4½ years. In the face of such delay protests made by the plaintiff to the Bank, or to his wife, are unavailing. As between himself and the creditors he ratified his wife's agency,

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

and such ratification is equivalent to original authority. This sum must, therefore, be taken to have been drawn from the plaintiff's account by his authority.

The next operation upon the account was by a cheque for £454 10s. 1d., drawn on 4th December, to purchase a draft on London in payment of a debt due by plaintiff to one of the beneficiaries of the McQuade estate in respect of trust moneys received on his behalf. At this time the account had been replenished to the extent of £225, but the result of the cheque was to overdraw it to the extent of about £200. The only objection which the plaintiff has ever offered to this payment is, we are told, that it should have been taken from an account which he had at another bank. After his recovery he did nothing to suggest to his creditor that he did not assent to the payment of the debt. This transaction and its results are, so far, on substantially the same footing as the payment of the £2,100. But in my judgment a further consequence follows, namely, that the plaintiff by ratifying his wife's action in making the payment also ratified the action on her part by which alone it became possible for her to make it, that is to say, the pledging of his title deeds to the Bank to secure the advance by which she was enabled to make the payment. There is a further ground on which I think the validity of the security may be maintained as to this item, but, as it is applicable to several other items, I will defer what I have to say upon it until I have dealt with them.

I will next refer to an item of £1,775, called the McSharry item, which also was to some extent dealt with by this Court on the former appeal. I said (1):—"Another large payment of £1,775 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

(1) 9 C.L.R., 615, at p. 628.

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."

To this statement of facts must now be added that McLaughlin had commenced an action against McSharry for £971, and that the order for taxation, which was dated 21st August, had directed a stay of proceedings in the action. It appeared also on the evidence taken before the Master that consequent upon the compromise the order of the Supreme Court for delivery of the bill of costs was discharged. The formal order is not in evidence, but we have obtained extracts from the Prothonotary's Book recording the proceedings in the Supreme Court, from which it appears that on Tuesday, 24th August 1900, three days after the order was made, and while plaintiff was apparently still of sound mind, counsel for him informed the Full Court (by which the order had been made, after elaborate argument in which the plaintiff was represented by three eminent counsel) that there was a dispute between the parties as to drawing up the order. The Prothonotary's formal entry is "Matter mentioned and adjourned till first motion day of next term." The matter was again before the Full Court on 1st March 1901, two days after the date of the release of 27th February. The entry is as follows:—"On application of Mr. Delohery for Mr. McSharry, Mr. Garland for Mr. McLaughlin consenting, order of 21st August 1900 set aside; further that in action McLaughlin v. McSharry No. 1178 judgment of *non pros.* to be entered."

The plaintiff said in his evidence before the Master that he became aware of this order shortly after the order of *supersedeas.*

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

He has never taken any steps to re-open the matter as between himself and McSharry or to get the order set aside, and it is still in force.

Upon the inquiry before the Master plaintiff sought to go into evidence to show that the compromise was not for his benefit, in the sense that if the costs had been taxed it would have been found that nothing was due by him, or, if anything, a less sum than £1,775, but the Master refused to admit the evidence.

For the purpose of determining the question of admissibility the Court is entitled to consider the evidence sought to be put in. From the voluminous affidavits recited in the order of 21st August it appeared that McSharry alleged, and McLaughlin did not deny, that the latter had often been asked for a bill of costs, but had always made excuses, the principal one being that the preparation of the bill would occupy so much of his time and attention that he would be unable to attend to McSharry's interests in the litigation still going on.

It also appeared that McLaughlin, in order to establish that anything was coming to him, would have had to prove that McSharry's costs of the litigation as between solicitor and client exceeded by very many thousands of pounds his costs as taxed between party and party. Anyone familiar with costs, as Coghlan, plaintiff's managing clerk, may be assumed to have been, would recognize the difficulty of such a task.

But in determining whether a compromise is for the benefit of the person who makes it, or for whom it is made if he is under incapacity, the question is not what would have been the result if the litigation compromised had been fought to its end, but whether, under the circumstances, it was for the benefit of the party to buy peace on reasonable terms.

Under the circumstances of the present case it was manifestly to the plaintiff's advantage to do so. McLaughlin was not in a condition to prepare the bill of costs, or to establish the correctness of it on taxation. McSharry could not be kept waiting indefinitely. If, therefore, nothing had been done an action might have been brought in which judgment must have gone against McLaughlin by default. If I were called upon to form an opinion on the question of fact I should say that the amount payable by

him would have been found to be much more than £1,775. Moreover, the expense and difficulty of preparing the bill of costs, if it could have been prepared at all under the circumstances, would have been enormous. Mr. *Teece* contended that the Master could not answer the inquiry whether the compromise was beneficial without taxing the bill, and this was in substance what the Master was asked to do. I think that he was right in refusing, although I do not think that the plaintiff was precluded by anything said by this Court from offering evidence to show that the compromise was not beneficial for some other reason. In my judgment the compromise was beneficial as a matter of fact.

But I think that, as to this item, the question whether it was or was not beneficial has become immaterial. Under the order of 21st August 1900 the plaintiff became subjected to a very onerous obligation, which could only have been discharged by the expenditure of much time, labour and money, with the probable, and, I think, almost certain, result of a large pecuniary liability. An application was then made to the Supreme Court to set aside the order, the result of which would be to discharge him from this obligation. Although the application was in form made on behalf of McSharry and consented to on behalf of plaintiff, its effect is, of course, the same as if he had himself asked for it.

The sum of £1,775 was, therefore, the price paid for this benefit.

If all that the plaintiff contends could be established the Court would, perhaps, on his application, if made soon after his recovery, have rescinded the order of 1st March 1903 and restored that of 21st August 1900, though I much doubt it. But the order was, at most, voidable and not void. It was an order made in regular course, in a proceeding pending in the Court, in which plaintiff was represented by counsel. The contention that an order made in the course of a suit, in which one of the parties is, unknown to the other, of unsound mind, is absolutely void is too absurd to be discussed.

The order being voidable only, it lies on the party objecting to it, and not on the party who wishes to affirm it, to move in the matter. In such a case *beati possidentes*.

All that the plaintiff can say in answer to this is that he told

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

McSharry that he repudiated everything that had been done by his wife under the power of attorney. In the case of an executory contract which a party to it is entitled to elect to avoid on the ground of fraud or any other ground, a mere notification of his election is sufficient. But, if the contract has been executed to his advantage, in whole or in part, and he retains the benefit, such a notice is not sufficient. See *per* Lord *Cairns* L.C. in *Kent* v. *Freehold Land and Brick-Making Co.* (1). The same principle applies to a contract purporting to be made by an agent and which is capable of ratification at the option of the ostensible principal. If he accepts and retains any advantage under the *de facto* contract he cannot afterwards elect to avoid it. *A fortiori* in the case of an order made in his favour by a Court of Justice. The result is that plaintiff had before this suit received and kept the consideration which McSharry gave for the £1,775, and had by so doing ratified his wife's act in paying that sum and drawing it from the Bank to purchase that advantage. The Court cannot now weigh the consideration, which was at any rate of some value. Moreover, McSharry, who was not called upon to take any action upon what he might well have regarded as McLaughlin's mere declamation without deeds to support it, has long since lost the opportunity of effectually asserting the rights which he had under the order of August 1900.

In addition to these considerations, I am of opinion that so long as the order of 1st March 1903 stands the Court will not allow the plaintiff, who enjoys the benefit of it, to deny that it was made with his authority. The case of *Gandy* v. *Gandy* (2), although not on all fours, lays down a principle which I think is conclusive on this point.

When the cheque for £1,775 was drawn plaintiff's account was in credit to the extent of about £450. In order, therefore, to procure the £1,775 it was necessary to overdraw, and there is no doubt that the overdraft was allowed on the faith of the security which the Bank thought they held. As I have already said with reference to the item of £454, I think that by ratifying the payment the plaintiff also ratified his wife's action in pledging his deeds to enable her to make it.

(1) L.R. 3 Ch., 493.

(2) 30 Ch. Div., 57, at p. 77.

From this date the plaintiff's account was never again in credit, and all cheques drawn upon it by his wife were honoured on the faith of the supposed security.

The next items in question in the inquiry were two cheques for £250 and £100 respectively, drawn on 16th and 23rd May 1901, which, as appears from plaintiff's books as made up by Mr. Hawkins, were debited to Mrs. McLaughlin in a ledger account between her and her husband against a debt of £500 due by him to her in respect of money received by him for her in 1883. The plaintiff admits the receipt of the money, but asserts generally that he had made payments for her or with her consent which would satisfy it. He gave no particulars. The Master was not, nor was *Street* J., satisfied with his explanation. I see no reason to differ from their conclusions. For the rest these items stand on the same footing as the £2,100 and the £454.

Another matter in question was as to three sums of £75, £176 9s. 0d. and £80 17s. 0d., drawn by Mrs. McLaughlin's cheques in February and June 1902. As to these it appears from the evidence that they were paid into the Bank account of McLaughlin & Coghlan, and were fully accounted for to the committee of plaintiff's estate. He has, therefore, in effect, actually received the money. No attempt has been made to dispute the committee's accounts, and plaintiff cannot now be heard to say either that the money was not expended for his benefit, or that he has not ratified the borrowing.

As to another item of £436, it appears that it represents a like amount paid into plaintiff's account in error, and almost immediately after drawn out by Mrs. McLaughlin's cheque and paid into another account standing in plaintiff's name, on which, after his recovery, he personally operated by drawing out the balance at his credit.

The only remaining matter relates to several items, amounting in all to £1,218, which were drawn out from time to time by Mrs. McLaughlin's cheques, and paid to a private account in her own name, upon which she operated to discharge the necessary expenses of maintaining the plaintiff's home and paying his medical and nursing expenses. It is not in controversy that she

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

expended the whole of this sum (except perhaps a sum of £210 which was expended on a premium for the plaintiff's son's articles of clerkship, and to which all objection was withdrawn) for the benefit of the plaintiff, or that she had authority to pledge her husband's credit for the money so drawn. Nor is it disputed that the defendant Bank having advanced her this money for this purpose are entitled in equity to claim repayment of it from the plaintiff: *Deare* v. *Soutten* (1). But the plaintiff contends that, as in this case her agency was created by the mere relation of husband and wife, so that her action did not need any ratification by him, it is a simple case of debtor and creditor, and the Bank cannot claim to be secured creditors in respect of these advances. She had, he contends, full authority to borrow the money without security, and therefore none can be implied to borrow upon security. And, as he could not successfully object (although he now most strenuously objects) to her action in borrowing, it follows, he says, that his subsequent assent is immaterial and cannot operate as a ratification of the pledging of the deeds.

To this argument several answers are given.

First, it is contended that the foundation of the authority of a wife who from misfortune finds herself charged with the burden of maintaining the family of a husband of unsound mind is the necessity of the case. It is said in reply that the authority arises from the relationship of husband and wife. Both propositions are in my opinion true, but the extent of the authority conferred by the relationship depends upon circumstances. If, for instance, the husband were a pastoralist in the interior of Australia, possessed of flocks or herds but without any ready money, I cannot doubt that the authority of a wife so circumstanced would extend to selling cattle or sheep in sufficient quantity to keep the estate going. The expenditure would be in the nature of salvage. In the case of land, however, a difficulty arises from the positive rules of conveyancing. Recourse must, therefore, be had to some other principle in aid of the suggested authority arising from necessity.

Sec. 149 of the New South Wales *Lunacy Act* 1898 authorizes the Court to order the property of an insane person to be sold

(1) L.R. 9 Eq., 151.

charged mortgaged dealt with or disposed of as the Court thinks most expedient for the purpose of raising or securing or repaying money which is to be or has been applied to any of the following purposes (*inter alia*), (*a*) for payment of the insane person's debts or engagements, (*c*) payment of any debt or expenditure incurred for his maintenance or otherwise for his benefit. If the Court had been asked to make an order under this section during the pendency of the proceedings in lunacy, there is no doubt that it would have done so and that the Bank would have obtained the benefit of their security. Under these circumstances I think that, when the Court is appealed to in its equitable jurisdiction to compel the delivery up of the security without payment, it ought to apply principles analogous to those applied when a trustee has without the authority of the Court done an act which he might have done with such authority, and that the person benefited should not be allowed to obtain equitable relief without doing equity. (See, for instance, *Brown* v. *Smith* (1)).

The plaintiff's counsel denied the power to pledge the deeds on the further ground that there was no necessity to do so, since there was another alternative, namely, that the plaintiff's wife might before incurring any expense have taken proceedings to have him declared a lunatic. I think, as I intimated when the argument was advanced, that the Court would not be so inhuman as to hold a wife to any such course.

Another answer given is that the inaction of the plaintiff for a period of more than four years, which operated as a ratification of his wife's action in making the payments already discussed, and in borrowing the money upon the security of the title deeds for the purpose of making them, cannot be divided up and treated as several distinct acts of ratification of several borrowings and pledgings, but operates as an adoption of the single contract between his wife and the Bank, including the deposit of the deeds, on the terms that they should be held as security for any sum which she might draw against them. I think this contention is sound. Although, therefore, no ratification may have been necessary to create a mere liability to repay the sum, still it was competent for him to ratify the express contract under

(1) 10 Ch. D., 377.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

which she obtained the means of borrowing it, and I think that upon the facts he must be held to have done so.

There is still another argument, which is applicable to all the payments in question except the £2,100, and to which I have already promised to refer.

In the case of *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), in which bankers had advanced money on security to the plaintiffs by way of loan, the contracting of which was *ultra vires* of the Society, Lord *Selborne* L.C., delivering the judgment of himself, *Jessel* M.R. and *Cotton* L.J., said (2):—"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 debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing. Well, applying that in the present case we think that, as far as it can be made out that the moneys which were advanced by the bankers simply went to pay the legitimate debts and liabilities of the society, the bankers ought to have the benefit of their security."

The principle so enunciated covers all the payments made in this case except the first. It is suggested that it is not good law, but, as Lord *Blackburn* said in an appeal from other parts of the judgment, it has the authority of a decision of the Court of Appeal not appealed from. I am prepared to follow it until it is overruled by a Court of higher authority.

For all these reasons I am of opinion that the Bank are entitled to hold the title deeds as security for all the sums in question. The law of England is generally consistent with common sense and common honesty, and if there are any exceptions I am not disposed to take an original part in adding to the list.

The result of Mrs. McLaughlin's operations on the account was that at the end of June 1902, when she ceased to operate, there

(1) 22 Ch. D., 61. (2) 22 Ch. D., 61, at p. 71.

was a debit balance of £666 2s., for which, in my judgment, the defendant Bank are entitled to hold the title deeds as security with interest calculated according to the ordinary banking terms.

The result is that the plaintiff's appeal fails and must be dismissed.

I pass now to the defendants' Cross Appeal.

After plaintiff's recovery he resumed operations upon the same account.

The fourth inquiry directed by the Court on the former appeal was:—"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" (1).

At that time, owing to some mistake, arising apparently from an ambiguous allegation in the statement of defence, the Court was under the impression that when Mrs. McLaughlin ended her operations on the account it was in credit. The actual fact, however, is, as I have just stated, that it was overdrawn to the extent of £666. The question whether the plaintiff with knowledge of the defendant's claim to hold the title deeds as security for further advances and interest and without repudiating that claim obtained advances from them on that footing is equally important in either view of the facts, although the fact that he knew (as he must be taken to have known) that the account was in fact largely overdrawn affects very materially, and adversely to him, the effect to be given to the alleged repudiation on his part. He says that he repudiated the whole of his wife's transactions, asserted that his account was in credit and that the Bank held his deeds as mere custodians, and challenged them to dishonour a cheque drawn by him at their peril. The Bank apparently did not take his assertions seriously, and, after listening to him for three days, I am not surprised that they did not. The

(1) 9 C.L.R., 615, at p. 631.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

alleged repudiation began with a conversation in September or October 1902, while he was a declared lunatic. *Street* J. seems to have thought this quite sufficient to destroy any claim by the Bank to hold the deeds as security for any further drawings. I cannot assent to this view. I think that they were not bound to give any serious attention to a conversation which took place under such circumstances.

As to what he says as to his conversation with the bank manager in March or April 1903 after the *supersedeas* the question is one of fact, *i.e.*, of the proper inference to be drawn from the evidence. The account was in fact overdrawn, and the plaintiff knew it. It is not proved that he received his passbook, but someone took it from the Bank, presumably by his authority. He did not open a fresh account, but insisted on operating on the overdrawn account. Mr. *Teece* contends that the effect of the plaintiff's conversations is the same as if a fresh account had been opened on which the plaintiff was to be at liberty to overdraw, with no stated limit, and on the terms that the advances should be made to him on his personal credit without security. It is quite clear that nothing of the kind was intended by the Bank, and equally clear to me that the plaintiff knew it. It cannot be doubted that the further advances were in fact made by the Bank on the faith of the security.

Without referring to the evidence in detail I content myself with saying that the inference of fact which I draw from it is that the position taken up by the plaintiff was, throughout, based on Mrs. McLaughlin's alleged want of authority to give security over the land, and was treated as contingent upon that want of authority, so that the question of security or no security for further drawings was to abide the event of the final determination of that question. I find as a fact that it was never contemplated by either party that the further advances to be made, and in fact made, to the plaintiff were to be regarded, if they turned out to be advances, and not payments out of the plaintiff's funds, as made upon his personal security. This view is confirmed by the plaintiff's own action when reminded on 21st November 1903 that the limit of £1,500 (mentioned in McLaughlin & Coghlan's letter of 27th November 1900) was

nearly reached. He at once ceased drawing on the account—thus tacitly acquiescing in the defendant's position, while, if he had insisted upon the view which he now sets up, he might have been expected at least to have protested against this limitation of the agreement which he alleges to have been made.

On the contrary he merely replied by a letter of 23rd November in the following terms:—

"Sydney, 23rd Nov., 1903.

"The Manager of the City Bank of Sydney.

"Dear Sir,

"I am in receipt of your letter of the 21st and deny that my account with your bank is overdrawn.

"Cheques are charged to my account which you know I did not sign or authorize and the proceeds of my shares in your bank should have been placed to my credit and not paid away to others against my positive instructions.

"You hold my Deeds of Yanko worth at least £15,000 at present for safe custody, but should I overdraw you will of course have the usual Banker's security and lien. I must refer you to my former correspondence. At present I am very busy and when I have time shall again try to effect a final settlement with your Bank amicably.

"Yours faithfully,

"Jno. McLaughlin."

In my judgment, therefore, it should have been found that all the advances made to the plaintiff after June 1902 were made on the footing of the security.

The defendants on their appeal from the Master's Certificate also set up a banker's lien in respect of these advances. A banker's lien arises, in a proper case, by implication of law in the absence of an express agreement inconsistent with it. In the facts of this case a right to hold the deeds, which were already pledged as security for a current account, as security for further advances on the same account would arise by another implication, partly of law and partly depending on an inference of fact, in the absence of an agreement inconsistent with it. In my opinion, if the facts relied upon to establish such an inconsistent agreement do establish it, they would also establish an agreement inconsis-

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Griffith C.J.

tent with the existence of a lien. It is not, therefore, necessary to consider the question whether a banker's lien extends to deeds of title to real property.

But, for the reasons I have given, I am of opinion that the cross-appeal must be allowed, and that the certificate of the Master should be varied by substituting in respect of the fourth inquiry a finding that all the advances made to the plaintiff after 30th June 1902 were obtained on the footing mentioned in that inquiry. The order of *Street* J. must be varied accordingly, and also by directing the plaintiff to pay to the defendants all the costs of both summonses to vary the Master's Certificate.

The plaintiff must pay the costs of the appeal and cross-appeal.

BARTON J. I have had the opportunity of reading the judgment just delivered, and am closely in agreement with the conclusions which his Honor has reached, and after consideration I do not think that a separate judgment would make clearer what in my view has already been made clear. My only doubt has been as to the Bank's claim to be treated as secured creditors in respect of the items making up the sum of £1,218 5s.; but the perusal of his Honor's judgment has removed that doubt. I think that in view of sec. 149 of the *Lunacy Act* 1898 there is a true analogy to the principle on which the Court will protect the action of a trustee who has done, without prior authority from the Court, that which he might have done had the authority been obtained. Also I am not at all sure that the argument of the plaintiff's counsel is a sound one, that because Mrs. McLaughlin had authority to borrow the money without security, there could be no authority implied to borrow upon security. That depends on the circumstances. If a wife whose husband is of unsound mind is able to borrow without security, I take it she is not justified in giving it. But if she finds herself quite unable to raise the money without giving security, I am inclined to think that the necessity thus established may justify the giving of it, since without such a power disaster might befall the husband's interests.

I have only this to add. The plaintiff, while arguing on his own behalf, seemed to think that by the previous judgment of

this Court some reflection on his integrity, especially in relation to the sum of £2,100 belonging to the McQuade estate, was implied, and therefore that the evidence which he tendered before the Master was necessary in order to clear him as a solicitor and an officer of the Court. For myself I may say that nothing in the joint judgment of the Chief Justice and myself was intended to have such a meaning, and what was said as to the £2,100 was said purely in relation to the legal aspect of the case. Breaches of trust are sometimes committed by punctiliously honorable men. It may very well be that the plaintiff, though he mistook the law, thought himself morally justified in transferring this sum of money as he did, and on the facts before us I see no reason, and certainly there is no necessity for the purposes of the case, to say that Mr. McLaughlin's honor is impeached, however I may think that he might have taken a more reasonable view of the conduct of those who acted for him during his inability to act for himself. I agree with the orders proposed.

ISAACS J. McLaughlin's appeal, apart from the McSharry item, should be dismissed. As to the McQuade item £2,100, while I am quite satisfied there was no moral fault, there was a clear legal duty to replace the money in the proper custody. The appellant's personal belief that he had sufficient justification for his action is immaterial. He had none in law. The duty of restoration existed, and as was said by Lord *Halsbury* in *Wyman* v. *Paterson* (1):—"People who undertake a duty are bound to know what their duty requires."

With regard to the McSharry item £1,775, the Master and *Street* J. have, in accordance with some observations in the course of delivering the judgment in this Court, felt themselves bound to find that the appellant adopted what is called "the benefit" of the transaction. *Street* J. held that being bound to follow the opinion expressed of the majority of the Court, the express repudiation of the appellant both to the Bank and McSharry of his wife's action was insufficient because no active methods had been taken by him. He says:—"I also agree with the Master in thinking that the contention that the plaintiff could not sue to

(1) (1900) A.C., 271, at p. 278.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Isaacs J.

recover back the moneys as by so doing he would be admitting the validity of the power of attorney or ratifying what had been done under it is not open to him in the face of the judgment of the High Court. If there was a duty to act if he wished to avoid the transaction, it cannot be contended that action taken for that purpose would afford evidence of ratification." In the judgment of my learned brother the Chief Justice it was stated (1) that the McSharry transaction was "capable of ratification by mere inaction, if there was a duty to act." And then putting it on the same footing as the McQuade trust moneys, the opinion is that McLaughlin should have claimed the moneys from McSharry, and without that there could be no disaffirmance of the transaction.

Now, although this item was one which was selected in the pleading for final decision so as to establish the right to an account, yet neither *Street* J. nor this Court did then in fact finally decide it. The learned Chief Justice (1) was careful to say:—"In our judgment this transaction was *primâ facie* for his benefit," and I said (2) there was "strong *primâ facie* evidence of adoption," and that was enough for the purpose of the day. It had to go back for final decision. In my opinion, Mr. McLaughlin was entitled, as he contends here, to give further evidence as to the state of accounts between him and McSharry, if, as claimed by the respondents, the actual state of those accounts is a material circumstance in determining this adoption of the compromise.

The judgment now appealed from and this judgment constitute for the first time the final determination of the matter (see *McDonald* v. *Belcher* (3)); and before it is finally closed, the appellant should have the opportunity to adduce all available evidence in matters considered relevant.

In my view it is not material what the actual state of the account was; the question is, did McLaughlin in fact and in law adopt the new transaction into which his wife entered and in respect of which she paid £1,775 ?

The appellant says he did not, and as to this contends:—

(1) 9 C.L.R., 615, at p. 629. (2) 9 C.L.R., 615, at p. 638.
(3) (1904) A.C., 429.

(1) That his wife's act was solely based on the power of attorney and was utterly void, as he was at the date of the compromise admittedly insane, that it was admitted as well as proved that he had not adopted his wife's acts *in globo*, and it was an error in law to hold him bound, notwithstanding his express disavowal of the transaction to the Bank and to McSharry, merely because he did not proceed to sue McSharry for the money, or to set aside the order obtained by McSharry discharging the order of 21st August 1900.

(2) That he had not in fact in any way adopted the transaction.

If the reasons above referred to as stated in the judgment of the learned Chief Justice in the former appeal constitute a *res judicata* or estoppel, the appellant must fail as to this item, because there is no doubt the judgment appealed from strictly followed those reasons.

Mr. *Owen* relied on the case of *Gandy* v. *Gandy* (1). That case, however, not only is no authority for his position but is inferentially very much against him (see the judgment of *Cotton* L.J. at p. 80). The general rule is that whatever was in issue and determined by the judgment—that is, the curial order itself as distinguished from the reasons for the judgment—is *res judicata*. But, as stated in *Lord Halsbury's Laws of England*, vol. XIII., at p. 340, the reasons work no estoppel. It is there said, and the authorities cited support the passage, "It is not sufficient, to create an estoppel, even *inter partes*, if the finding relied on is only discoverable from a perusal of the Judge's reasons." See also p. 356, note (*e*).

Reasons cannot be appealed from, as was pointed out by Lord *Herschell* L.C. in *Concha* v. *Concha* (2).

The point was definitely dealt with in *Re Allsop & Joy's Contract* (3), where *Chitty* J. says:—"It is new to me that on the doctrine of estoppel either side can rely upon the reasons which the learned Judge gives for his coming to a conclusion upon any point. . . . It is the conclusion that constitutes the estoppel."

Here the conclusion is contained in the directions for inquiries

(1) 30 Ch. D., 57.

(2) 11 App. Cas., 541, at p. 552.

(3) 61 L.T., 213, at p. 215.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Isaacs J.

read by the light of the pleadings. But there is nothing whatever in the judgment—that is the curial decision—which decides that in the absence of proceedings to obtain the £1,775 from McSharry or to set aside the later order, McLaughlin must be deemed to have ratified or adopted the transaction of compromise with the payment of the money.

Taking then the appellant's first contention, it appears on the face of the deed of compromise that it was executed by his wife solely under the supposed authority of the power of attorney. So too the cheque for £1,775 was signed by Mrs. McLaughlin thus "John McLaughlin by his attorney A. McLaughlin." The facts relating to the execution of the power, as admitted by the Bank [see the judgment of *Street* J. in original transcript (f. 838)] make applicable the law as declared by this Court in the *Daily Telegraph Case* (1), namely that the power of attorney was absolutely void and gave no more authority than if it had been forged (276).

The Privy Council in *Daily Telegraph Newspaper Co.* v. *McLaughlin* (2) considered the document and Lord *Macnaghten* speaking for the Judicial Committee (3) agreed with that view and applied Lord *Cranworth's* language in *Elliott* v. *Ince* (4) that if the donor of the power of attorney was of unsound mind when that instrument was executed "the substratum was removed." Lord *Macnaghten* proceeded (3):—"Now, if the power of attorney is mere waste paper, it is difficult to see how anything which rests on it as the foundation and groundwork of the whole superstructure can be of any validity, whether the transaction is beneficial to the lunatic or not." So that we must take the McSharry compromise as null and void—not voidable. Then as to ratification. In my judgment in the former appeal (5) I referred to the way the case was conducted and the admissions made by the Bank that there was no wholesale recognition by the appellant of his wife's acts. I might have added a further reference to fol. 846. *Street* J. adheres to that view at p. 107 of the present transcript. If this were not so, a finding that there

(1) 1 C.L.R., 243.
(2) (1904) A.C., 776.
(3) (1904) A.C., 776, at p. 780.
(4) 7 D.M. & G., 475.
(5) 9 C.L.R., 615, at p. 638.

was a general adoption of his wife's acts puts an end to the case and makes every other question immaterial.

As to adoption by inaction: I agree that to have sued McSharry for the return of the £1,775 would have been to court inevitable disaster. He must have failed *in limine* in such a claim, unless the money was his before McSharry received it. But the money never was his unless his wife was his duly authorized attorney; and if she was, the compromise was effective, and he stood defeated. *Quacunque via* he never could recover *that* money from McSharry.

To set aside a release which is an inseparable part of a transaction, founded on what the Privy Council terms waste paper, would be a work of superogation; and the same may be said of the order discharging the order of August 1900. He was no party to either of these documents, or the events they recorded. Of the latter we have no evidence that it was ever formally drawn up. All we know from the Registrar's entry is that on 24th August 1900, three days after the original order was made, counsel informed the Court there was a dispute between the parties with regard to the way the order had been drawn up, and the matter was adjourned till the motion day of the next term. Before that day arrived the appellant was placed under restraint, he was treated as insane, and all his affairs were taken charge of by others. On 1st March 1901, during his infirmity of mind, an entirely new and independent application having no apparent connection with the one made by McLaughlin's authority, and plainly incidental to the compromise, was made by counsel on behalf of McSharry, counsel stated to appear for McLaughlin consenting, and the order of August 1900 was set aside and judgment of *non pros.* directed to be entered in the action against McSharry. Later the appellant was by formal order found to be lunatic, and only in March 1903 became restored to mental health.

At this point great injustice would be done to the appellant unless considerable allowance be made for the unusual situation in which he stood. A revolution had taken place in his affairs. His business had been taken over and had disappeared. His banking account had been operated on so as to convert it from a

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Isaacs J.

substantial credit to a considerable debit. His property had been dealt with, his books written up with numerous and complicated entries, some without vouchers as foundations to refer to, and, altogether, he stepped into what must have been to him a bewildering maze of confusion. To demand of him the same prompt and regular action as is expected of a man in an ordinary and undisturbed course of life would be unreasonable in the extreme. He found the document of compromise left behind among some papers, and kept it apparently, and most naturally, as some evidence of what had happened in his absence. He says he never destroys documents. The retention of this in view of what he did is clearly no proof of adoption. He struck at what must have seemed to him, as it seems to me, the root of the matter. He told McSharry most distinctly, and as soon as he could, that he disavowed all that had been done by Mrs. McLaughlin under the power, and that included the release and the payment of the £1,775. He told the Bank the same thing. Neither the Bank nor McSharry was therefore under any misapprehension. There was no acquiescence, no lulling of the Bank or McSharry to security. If McSharry has lost any rights, he has done so with full knowledge of McLaughlin's disavowal. McSharry had actively procured the order of 1st March 1901, and if he chose after the intimation given he could have had it cancelled. The inaction was his. As far as McLaughlin was concerned it was a nullity. In *Great North West Central Railway Co.* v. *Charlebois* (1) Lord *Hobhouse*, for the Privy Council, stated the position in regard to a judgment based on an *ultra vires* company contract what is very apposite to an order based on a power of attorney which has been described as "waste paper." I refer to the passage beginning "But the difficulty is to reconcile our opinion that the contract is *ultra vires* with our opinion that a judgment obtained as this was a binding judgment"; and ending "Such a judgment cannot be of more validity than the invalid contract on which it was founded."

Thus the point was that the judgment was founded on an "invalid contract." The reason of its invalidity is immaterial. Here, the order of 1st March 1901 resting on what the Privy

(1) (1899) A.C., 114, at pp. 123, 124.

Council has called "waste paper," the same result follows. The Court on the face of the proceedings did not decide that the appellant was sane or that the transaction was valid. It simply registered the wishes of those who came before it. That is not really an adjudication on contested matters; and though between proper parties it would doubtless operate as an effectual estoppel, the difference is material as affecting McLaughlin. The identical principle of the *Charlebois Case* has been applied in other cases. One class analogous to the present is that of judgments on warrants of attorney. A Statute declared that no warrants of attorney made in a certain way "shall be of any force." In several cases a judgment entered up on such a warrant of attorney has been regarded as a nullity. In *Cocks* v. *Edwards* (1) *Coleridge* J. said:—". . . the judgment then has nothing on which to rest. It is as if entered up by an unauthorized stranger, and time cannot render such a judgment of any greater effect than it was when first signed." In *Gripper* v. *Bristow* (2) *Alderson* B. says:—"The warrant of attorney being without validity, and the judgment therefore signed without authority, it is a strange thing to say it can stand—not merely by reason of an ordinary irregularity, but because the foundation on which it rests is wholly without validity."

In *Hirst* v. *Hannah* (3) *Patteson* J. says:—"It is very difficult to separate the judgment from the warrant of attorney which the Act says shall be of no force." That case also left it open whether fresh dealings and the alteration of position on the faith of the judgment would estop the defendant. *Patteson* J. apparently thought not, but Lord *Campbell* C.J. thought they could, if clearly made out.

In McLaughlin's case, however, there was no fresh dealing and no alteration of position on the faith of the later order. In *Roe* v. *Mutual Loan Fund Ltd.* (4) Lord *Esher's* judgment and his quotation from the judgment of *Honeyman* J. indicate what is meant by the doctrine of approbation and reprobation, which is the ground upon which the order of 1st March 1901, bringing with it the whole of the compromise and its momentous conse-

(1) 2 Dowl. N.S., 55, at p. 58.
(2) 6 M. & W., 807, at p. 813.
(3) 17 Q.B., 383, at p. 389.
(4) 19 Q.B.D., 347.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Isaacs J.

quences in spite of his vigorous repudiation, is sought to be fastened on to McLaughlin. The mere fact that he did not deliver his bill is the cobweb by which this gigantic whale is sought to be secured. That is, he did not do so when he recovered his equilibrium and his freedom, over two years and a half after the final date fixed by the Court for its delivery in the order of August 1900, after the extraordinary intervening complications, and at a time McSharry was not merely, as McLaughlin believed, impecunious, but was evidently in effect refusing any longer to recognize the earlier order. His abstention was clearly not by reason of the order of 1st March 1901, because he expressly abjured the compromise and all it involved, and he took no advantage under it. His abstention is otherwise accounted for. I cannot see, therefore, how he is estopped in respect of it. He was not called upon, in my opinion, to spend time, trouble and money, and to risk more, in trying to set it aside. He had disclaimed everything on which it depended, and I think that was enough.

The position seems to me covered by what was said in the House of Lords in *Clarke* v. *Hart* (1), Lord *Chelmsford* said:—"Where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right, except by acts which are equivalent to an agreement or to a licence." The rights McLaughlin is said to have abandoned are legal rights admittedly vested in him.

Though the plaintiff in *Clarke* v. *Hart* (2) gave a rather equivocal intimation of his intention—not at all as clear and distinct as McLaughlin's—he was held not bound by inaction in suing to set aside the alleged forfeiture. The Lord Chancellor (3) said that, as the plaintiff had given a distinct intimation that he insisted on his rights, and did not lie by and allow the partners to think he acquiesced, that was enough. Lord *Wensleydale* (at p. 671) said:—"Now looking at the conduct of the respondent in this case it appears to me perfectly clear that it cannot be considered as amounting to acquiescence of that sort (that is estoppel). From the very first he disputed the right of

(1) 6 H.L.C., 633, at p. 656. (2) 6 H.L.C., 633.
(3) 6 H.L.C., 633, at pp. 659, 660.

the appellants to declare the forfeiture of his share, he has been complaining of them from that day to this, and it is impossible to regard his conduct as amounting to an implied agreement, or an implied representation that they might go on with the concern for their benefit and that he would not claim any share of the profits." This law was approved and acted on by the Judicial Committee in *Garden Gully United Quartz Mining Co.* v. *McLister* (1); and the passage first quoted adopted by the Privy Council in *Palmer* v. *Moore* (2) where the facts showed the necessary agreement or license, which was acted on.

Then as to the second objection he raised, viz. that he had not otherwise adopted the compromise:—It is to be observed that this item stands in clear contradistinction to the McQuade money. The latter by the appellant's own act before his illness was already a liability. The transactions intervening up to his recovery may be disregarded and he, finding his liability discharged by the bank's money, allowed it to so remain. That makes evidence of assent to the discharge of an unquestionable liability. But in the McSharry case, the attempted compromise purported to obliterate all the transactions as they existed at the end of 1900, and to create an entirely new relation by which £1,775 was, upon the accounts stated, found to be due to McSharry. There was no such obligation at all unless McLaughlin adopted the compromise and I so expressed my view in stating on the former appeal that his adoption, if such existed, did *uno flatu* create and discharge this obligation.

In McQuade's trust case the acceptance of the Bank's money in discharge of the pre-existing debt is a clear consideration for the promise to repay it. In McSharry's case, until the debt is created there is nothing to pay off, and McLaughlin expressly refused to create the debt.

Reliance was placed on the language of Lord *Selborne* in the *Blackburn Building Society Case* (3), as entitling the Bank to hold McLaughlin to have retained the benefit of the payment to McSharry even without adoption on his part. I can only refer to my reasons for rejecting that argument as contained in *City*

(1) 1 App. Cas., 39, at p. 57. (2) (1900) A.C., 293, at p. 298.
(3) 22 Ch. D., 61, at p. 71.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Isaacs J.

Bank of Sydney v. *McLaughlin* (1). In illustration of the observation by the Privy Council that no obligation arises from the voluntary payment by A. of B.'s debt I would add a reference to the judgment of *Parke* B. in *Simpson* v. *Eggington* (2).

In my opinion, therefore, the appellant should succeed as to the McSharry item.

As to the merits of the dispute between McLaughlin and McSharry, culminating in the order of 21st August 1900, if important, it appears from the affidavits to have been very confused. The appellant received at various times large amounts all of which were accounted for by payment either to McSharry's bank, or to his other creditors, except a sum of £7,138, and about three other items amounting, roughly speaking, to £1,500. The sum of £7,138 had been received and retained by McLaughlin since 1888, that is, about twelve years before the order was made, and he swore that it had been retained and taken in settlement by McSharry's consent. McLaughlin's own testimony as to this was certainly all important. Similarly as to the other items there was a distinct conflict of statement between them as to McSharry's consent.

McLaughlin also stated in his affidavit that a detailed bill would show a very large sum coming to him; but as McSharry even then had no means to pay, it would have, in the appellant's view, been worse than useless to proceed for it.

It is enough to say there was apparently a *bonâ fide* claim by McLaughlin after considering both sides of the account compared with which the making out of a bill though onerous was small. It is therefore impossible to predicate that the compromise was necessarily beneficial; but, even if it was, it cannot, in my opinion, be forced upon McLaughlin, and a new obligation created without his consent. Whether that compromise was in fact beneficial it is not my province to enquire, even if I had all the evidence before me; but the Privy Council distinctly held (3) that when the substratum was gone it mattered not if the transaction was in fact beneficial. And as to the order of 1st March

(1) 9 C.L.R., 615, at p. 632. (2) 10 Ex., 844.
(3) (1904) A.C., 776, at p. 780.

1901 being beneficial without reference to the rest of the compromise that, of course, is impossible.

Then as to the cross-appeal. *Street* J. has held that the Bank has no right to retain the deeds in respect of the drawings made by McLaughlin personally. The Bank's claim is based on banker's lien, and special agreement. I am clearly of opinion that the circumstances are not such as give rise to a banker's lien. The deeds were not deposited by McLaughlin, or by his authority at all; no relation of banker and customer was ever created between them in respect of the deeds; and any security over them which the Bank possesses against him arises not under the law merchant but under the equitable doctrine which extends no further than its immediate object.

Special agreement is out of the question. *Street* J. has so carefully and elaborately stated the situation as the facts disclose it, that I simply adopt his narration, and quote his summation of the position. He says: "I think the plaintiff's statement ought to have been a sufficient intimation to the Bank that he repudiated his right to security over the deeds, and I think that probably the Bank would have treated them as such but for the fact that Mr. Henderson did not take Mr. McLaughlin's statement seriously." I desire to make one qualification, which strengthens the conclusion at which the learned Judge arrives. Henderson's statement that he never took McLaughlin's objection as serious refers to the drawings made by Mrs. McLaughlin; he nowhere says that he did not take as serious McLaughlin's unequivocal announcement that his own future drawings were to be free from any security. The Bank has to affirmatively establish a contract, it has not shown any assent on McLaughlin's part to his deeds being held as security for his own drawings; on the contrary the undisputed evidence is that he refused; contending—erroneously it may be, but still contending—that as his account was in credit, he claimed to draw without even incurring indebtedness, much less security for indebtedness. He ran the risk of repayment on recognized principles of equitable justice, but not the risk of special security.

That is how the matter would stand even if all the moneys drawn by Mrs. McLaughlin, and for which McLaughlin is liable,

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Isaacs J.

were covered by the deeds. But that is not so. The sum of £1,218 called "necessaries" is not in my opinion lawfully covered by the security of the deeds. There is an indebtedness for it—so much is not now contested; but what is urged is that it is an unsecured indebtedness. No doubt exists as to McLaughlin's ability to pay; but if he has the legal right to get his deeds, there is no reason why the Court should refuse them to him, and make him pay the costs of an action in which he asserted a legitimate claim.

The money was drawn by his wife from time to time by virtue of her assumed attorneyship. Henderson says that the account was operated upon by Mrs. McLaughlin's cheques, she claiming to do so under the power of attorney. That was the only authority upon which Mrs. McLaughlin acted and which the Bank recognized. That being void, and there being admittedly no adoption by McLaughlin of these borrowings the Bank falls back on a new contention namely that the husband being insane the wife was his agent of necessity, and as such had power to pledge his deeds as security for money borrowed for necessaries. I pass by any question of whether in face of the express contract under which the Bank took the security it can be allowed to set up another of a totally different nature, and I deal with the argument on its merits.

In my opinion the doctrine contended for cannot be maintained. No decision and no judicial expression has been pointed to which indicated that a wife, without the express or implied authority in fact of her husband can deal with his property.

We cannot enlarge the common law. That has been long since fully formed, and though its acknowledged principles are applicable to new circumstances the principles themselves are immutable except by Parliament. The principle applicable to this branch of the case is that where a husband is insane, the wife if not otherwise provided for by him has authority by law to pledge his credit for her necessary maintenance: *Read* v. *Legard* (1). But it is his *credit* only which she may pledge. See for instance *Bazeley* v. *Forder* (2). In *Eastland* v. *Burchell* (3),

(1) 6 Ex., 636.

(2) L.R. 3 Q.B., 559, at pp. 562, 564.

(3) 3 Q.B.D., 432, at pp. 435, 436.

Lush J. said:—"If he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit." And it must be borne in mind that *Read* v. *Legard* (1) is based on the foundation that where the husband is a lunatic he is in the same position as a husband omitting to furnish necessaries. This is confirmed by *Richardson* v. *Du Bois* (2). In *Debenham* v. *Mellon* (3), *Bramwell* L.J. confines her power to pledging her husband's credit. In the House of Lords *Debenham* v. *Mellon* (4) Lord *Selborne* L.C. speaks of "a mandate by law, making the wife (who cannot herself contract, unless so far as she may have separate estate) the agent in law of her husband, to bind him, and to pledge his credit, by what otherwise would have been her own contract, if she had been a *feme sole*." He says there is no such mandate from marriage, except in the particular case of necessity, as from desertion, or misconduct. Now in that passage the learned Lord Chancellor touches the mainspring of the matter. When the law was fixed on this subject, a wife could not contract, but if she were deserted, or turned out, or her husband were lunatic, she not being able to contract and yet without authority in fact actual or presumed might starve. Therefore the law irrebuttably endowed her with a capacity to make a contract for necessaries, not on her own behalf, but as representing her husband and to the extent of his marital obligation to provide her with them (see *Comyns's Digest*, "Baron & Feme" (Q.)).

But the common law went no further. In *Knox* v. *Bushell* (5) it was decided that a husband is not liable for money lent to his wife though it be afterwards applied by her in procuring necessaries for the supply of which he would have been liable.

This shows the limit of her legal authority. If she has at law no authority to borrow she has *a fortiori* no authority to pledge her husband's property for it.

But having the authority at law to procure necessaries, equity applied to that authority—a doctrine which may be conveniently called subrogation. It did not attempt to supplement it with an

(1) 6 Ex., 636.
(2) L.R. 5 Q.B., 51.
(3) 5 Q.B.D., 394, at p. 398.
(4) 6 App. Cas., 24, at p. 31.
(5) 3 C.B.N.S., 334.

H. C. OF A. 1912.

McLAUGHLIN v. CITY BANK OF SYDNEY.

CITY BANK OF SYDNEY v. McLAUGHLIN.

Isaacs J.

additional authority at law to pledge property to secure the debt —that was entirely outside the province of equity—but it did complement and effectuate the legal power of procuring necessaries, by permitting the lender whose money was actually applied in the purchase of the necessaries to stand in the place of the man who supplied them. It was so ruled in 1718 in *Harris* v. *Lee* (1) by *Jekyll* M.R. That case was adopted and made the basis of the decision in *Jenner* v. *Morris* (2), which may be regarded as the highwater mark of the husband's liability. *Campbell* L.C. and *Turner* L.J. rested their judgments on the ground I have stated. The Lords Justices relied on the ancient jurisdiction of the Court of Chancery to go beyond the forms of law to look behind the advance, and enter into the application of the money.

But beyond this no Court has ever gone, and it appears to me, having regard to the reasons given, there is no warrant to go further. Merely calling the authority one of necessity does not enlarge it. The authority still remains what it is, namely, one to pledge credit only, and if it were extended it would be doing more than Lord *Campbell* L.C. said when he declared the lender should stand in the shoes of the tradespeople who furnish the necessaries and to have a remedy for the amount against the husband.

The fact that the legislature has thought fit to entrust the Court in Lunacy with power to deal with the lunatic's property is no reason, as far as I see, for attributing similar powers to the wife on her own discretion.

I am therefore of opinion that the cross appeal should be dismissed.

Appeal dismissed with costs. Cross appeal allowed. Master's certificate varied accordingly.

Solicitor, for the appellant McLaughlin, *J. H. McLaughlin.*
Solicitors for the respondent Bank, *Leibius & Black.*

B. L.

(1) 1 P. Wms., 482. (2) 3 DeG. F. & J., 45.