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PRESIDENT &C. OF THE SHIRE OF TUNGAMAH *v.* MERRETT.

Solicitors, for the appellants, *Boothby & Boothby* for *J. A. Hargrave*, Yarrawonga.

Solicitors, for the respondents, *Gillott & Moir.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CREAK . . . . . APPELLANT;
DEFENDANT,

AND

JAMES MOORE & SONS PROPRIETARY LIMITED . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 10, 11, 21.

Griffith C.J., Barton and Isaacs JJ.

Conversion—Sale of stolen goods—Recovery of value of goods from purchaser—Payment by cheque—Proceeds of cheque afterwards coming to hands of owner of goods—Obligation to elect to affirm or disaffirm sale.

If a man, having received a sum of money which is identified as being in fact the proceeds of goods of his that have been sold without his authority, afterwards becomes aware of the fact, he is, as between himself and the purchaser of such goods, *primâ facie* bound to elect whether he will affirm or disaffirm the sale, and the obligation to elect continues until the happening of some new fact which would alter his position to his prejudice if he were still called upon to elect.

If a man, whose servant has stolen his goods and has also stolen his money, afterwards receives from the police money found upon the thief, he is not entitled, without inquiry as to the source of the money, to appropriate it in satisfaction of the stolen money, to the prejudice of the purchaser of the stolen goods, so as to exclude the obligation to elect above stated.

So *held* by *Griffith* C.J. and *Barton* J., *Isaacs* J. dissenting.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court at Melbourne by James Moore & Sons Proprietary Limited against Charles William Creak claiming by the plaint £32 16s. for money owing by the defendant to the plaintiffs for the value of two tons of galvanized iron belonging to them and converted by him to his own use. At the close of the plaintiffs' case, by consent leave was given to the defendant to counterclaim against the plaintiffs for £31 money had and received by them to his use, and leave was given to the plaintiffs to amend their particulars of claim by substituting for it a claim for damages for conversion of their goods. The County Court Judge gave judgment for the plaintiffs on their claim for £32 16s. without costs, and for the appellant on his counterclaim for £31 with costs.

From this judgment, so far as it directed that the plaintiffs should be allowed no costs of their claim and that there should be judgment for the defendant on the counterclaim with costs, the plaintiffs appealed to the Supreme Court, and the defendant cross-appealed against the judgment except so far as it dealt with the counterclaim.

The Full Court allowed the appeal of the plaintiffs with costs and dismissed the cross-appeal of the defendant with costs, and directed that so much of the order of the County Court Judge as directed that the plaintiffs should be allowed no costs of their claim should be varied by ordering the defendant to pay the plaintiffs' taxed costs of their claim, and that the order on the counterclaim should be set aside and that judgment for the plaintiffs on the counterclaim with costs should be substituted therefor.

From this judgment the defendant, by special leave, now appealed to the High Court.

The facts of the case are fully stated in the judgments hereunder.

Jacobs and *Reginald Hayes*, for the appellant. When the respondents got actual knowledge that the £46 received by them from Lonsdale included the proceeds of the sale of the stolen goods, they were bound to elect whether they would waive the

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conversion or not. By retaining the money at that time, they must be taken to have elected to waive the conversion: *Brewer* v. *Sparrow* (1). When the respondents received the £46 they knew that Quine and Watson had stolen their goods and had sold them to the appellant, and they must be taken to have had constructive notice that the £46 included the proceeds of that sale, for they had the means of knowledge of that latter fact and they wilfully shut their eyes: *Jones* v. *Gordon* (2); *Thomson* v. *Clydesdale Bank Ltd.* (3); *Clough* v. *London and North Western Railway Co.* (4); *Black* v. *S. Freedman & Co.* (5); *Moses* v. *Macferlan* (6); *Phillips* v. *London School Board* (7); *Marsh* v. *Keating* (8); *Reid* v. *Rigby & Co.* (9); *Bannatyne* v. *MacIver* (10).

[ISAACS J. referred to *Jacobs* v. *Morris* (11).

GRIFFITH C.J. referred to *McLaughlin* v. *City Bank of Sydney* (12).]

The property in the cheque for £31 or the proceeds of it never passed from the appellant but Quine was a trustee of it, and, as the proceeds can be identified, the appellant is entitled to follow them: *Underhill on Trusts*, 6th ed., p. 143; *In re Hallett's Estate*; *Knatchbull* v. *Hallett* (13). There was no debt due by Watson or Quine to the respondents, but, at most, an implied obligation to repay the value of the goods he had stolen. The £46 was not paid by Watson to the respondents for valuable consideration. The doctrine of appropriation does not apply here because there were not two debts owing by Watson to the respondents.

[GRIFFITH C.J. referred to *Deeley* v. *Lloyds Bank* (14).]

If it does there is no evidence of appropriation, nor was notice of appropriation communicated to the debtor: *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"* (15). [They also referred to *Burn* v. *Morris* (16); *Rice* v. *Reed* (17); *Zeeb* v. *Bank*

(1) 7 B. & C., 310.
(2) 2 App. Cas., 616, at p. 625.
(3) (1893) A.C., 282, at p. 287.
(4) L.R. 7 Ex., 26.
(5) 12 C.L.R., 105.
(6) 2 Burr., 1005, at p. 1012.
(7) (1898) 2 Q.B., 447.
(8) 1 Bing. N.C., 198, at p. 219.
(9) (1894) 2 Q.B., 40.
(10) (1906) 1 K.B., 103.
(11) (1901) 1 Ch., 261; (1902) 1 Ch., 816.
(12) 14 C.L.R., 684.
(13) 13 Ch. D., 696.
(14) (1910) 1 Ch., 648.
(15) (1897) A.C., 286, at p. 294.
(16) 2 Cr. & M., 579.
(17) (1900) 1 Q.B., 54.

of New South Wales (1); *Healey* v. *Bank of New South Wales (No. 2)* (2); *Mayne on Damages*, 8th ed., p. 477.]

Starke (with him *Cussen*), for the respondents. This case falls within the principle laid down in *Thomson* v. *Clydesdale Bank Ltd.* (3), that a person who receives money in payment of an existing debt is not bound to inquire into the source whence the money comes, and is entitled to retain it, although he afterwards discovers the money has been fraudulently acquired by the debtor: *Collins* v. *Stimson* (4); *Foster* v. *Green* (5); *Robertson & Moffatt* v. *Belson* (6); *Redgrave* v. *Hurd* (7).

[ISAACS J. referred to *Ex parte Dewhurst*; *In re Vanlohe* (8); *Roe* v. *Mutual Loan Fund Ltd.* (9).]

Once it is established that the money was received in good faith, there is an end of the case. The doctrine of constructive notice has never been applied to negotiable instruments or money. The *Rule in Clayton's Case* (10) does not apply except where there is a current account. There cannot be a trust in favour of the appellant here. See *Underhill on Trusts*, 7th ed., p. 4. If the £31 was trust money, and the appellant were seeking to follow it, he would have to plead that distinctly in the County Court. The money could only be recovered by the appellant from Watson on rescinding the contract, and no trust arose in respect of it: *Cundy* v. *Lindsay* (11).

[ISAACS J. referred to *Eichholz* v. *Bannister* (12).]

The principle of *In re Hallett's Estate*; *Knatchbull* v. *Hallett* (13) assumes an affirmance of the transaction, and therefore does not apply here. A trust arises out of some confidence, but there was none here. If there was a trust, the respondents took the money without knowledge of the trust. The evidence for the appellant does not show that the respondents did not take the money in the manner most favourable to them. The respondents had an election at any time to apply the money to their debt,

(1) 1 S.R. (N.S.W.), 167.
(2) 24 V.L.R., 694; 20 A.L.T., 200.
(3) (1893) A.C., 282, at p. 287.
(4) 11 Q.B.D., 142.
(5) 7 H. & N., 881.
(6) (1905) V.L.R., 555; 27 A.L.T., 48.
(7) 20 Ch. D., 1, at p. 24.
(8) L.R. 7 Ch., 185.
(9) 19 Q.B.D., 347.
(10) 1 Mer., 572, at p. 608.
(11) 3 App. Cas., 459.
(12) 17 C.B.N.S., 708.
(13) 13 Ch. D., 696.

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and it has been applied to a particular debt. [He referred to *Lewin on Trusts*, 11th ed., p. 1125.]

Jacobs, in reply.

Cur. adv. vult.

Oct. 21.

The following judgments were read :—

GRIFFITH C.J. This case raises a singular question, which, so far as I know, is free from direct authority, and must be determined by the application of general principles of law. The respondents had in their employ a salesman named Watson, who in August 1911 stole from them, amongst other things, 21 cases of galvanized iron, of which 15 cases were afterwards recovered. The total value of the goods stolen was apparently about £70. He also early in August embezzled from them about £47. On 3rd August one Quine, who was Watson's accomplice, sold 4 of the stolen cases of galvanized iron to the defendant for £31, giving his name as Johnson. The defendant paid the money by cheque, which was paid into Watson's account at the Melbourne Savings Bank, where he had a credit balance of 2s. 3d. Shortly afterwards the balance of £31 2s. 3d. was transferred to Watson's credit at a Government Savings Bank at Sydney. Early in August Watson and Quine absconded from Melbourne to Sydney, where they were apprehended by Detective Lonsdale of the Victorian Police. After the apprehension Watson gave him an order on the Savings Bank for the £31 2s. 3d, together with a sum of £7 in cash. Quine gave him an order on the Savings Bank for £5, and £3 in cash. Lonsdale collected the amounts from the bank, and afterwards on 7th September paid the whole amount, £46, to plaintiffs. At this time Watson and Quine had been brought before justices in Melbourne, but their examination had not been concluded. They were afterwards committed for trial and indicted for larceny, and pleaded guilty.

On these facts there is no difficulty in identifying the £31 paid by defendant as part of the money received by plaintiffs from Lonsdale.

Plaintiffs became aware on 14th August that defendant had bought the iron at the price of £31, and defendant was examined

as a witness for the prosecution. It does not appear, however, whether they then knew the precise sources from which the sum of £46 which they received from Lonsdale, had been derived.

On 15th December 1911 the plaintiffs brought this action in the County Court, claiming £32 16s. for "money owing by the defendant to plaintiff" for the value of goods converted by the defendant to his own use, namely, four cases of iron. The plaint was afterwards amended to a claim for conversion of plaintiffs' goods, namely, &c. On 20th December defendant's solicitors wrote to plaintiffs' solicitors informing them of the fact that defendant had paid Quine the £31 by cheque, which was paid into Watson's account, and that the amount so paid in was afterwards handed over by Watson to Lonsdale, and by the latter to plaintiffs. They then became aware, if they did not already know, that the money which they had received from Lonsdale included the £31 paid by defendant to Quine.

At the trial defendant, with other defences, alleged that the plaintiffs had adopted the transaction, *i.e.*, the sale of the iron by Watson, and were estopped from receiving the amount claimed, and alternatively that the plaintiffs had received £31 of the defendant's money which was paid in respect of the purchase of the goods, and that he was entitled to have that amount deducted from the claim.

By consent the defendant was also allowed to counterclaim for the £31 as money had and received for his use. In answer to the counterclaim the plaintiffs, with a denial of the debt, said that they took the money *bonâ fide* and for valuable consideration.

Under these circumstances the question arises whether the plaintiffs are entitled to recover the value of the goods and also to keep a sum of money which was in fact the actual proceeds of the goods when sold by the thief.

During the argument, I put the case of an agent employed to sell goods and collect money, who remits to his principal a sum of £100, being in fact indebted to him to a larger amount, and on the following day informs the principal that £50 of the £100 represents the price of property of the principal which he had sold without authority, and I asked whether in such a case the principal would be bound to elect to affirm or disaffirm the sale,

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that is to say, whether he could keep the £50 and also recover the property sold or its value. To my mind the answer seems plain enough. Although the receipt of the £100, including the £50, was right and proper at the time, the retention of it would not be consistent with common honesty unless the principal intended to affirm the sale, or unless in the meantime some new fact had occurred which had altered his position with regard to the debtor.

Cases in which, although the receipt of money is innocent, its retention may become unjustified are not unknown to the law. *Reid* v. *Rigby & Co.* (1) is a somewhat remarkable instance. In that case money which had been borrowed in the defendant's name without his knowledge or authority and applied for his benefit, was held to be recoverable as money had and received to the use of the plaintiff. Possibly the decision might have been put on the ground of ratification of the borrowing, but it was not so put by the learned Judges who decided it. See also *Western Bank of Scotland* v. *Addie* (2).

In my opinion the owner of stolen goods which have been sold by the thief may follow the fund representing the proceeds, if they can be identified, into the hands of a third person who cannot set up a better title, as was done apparently without objection in the case of *Rice* v. *Reed* (3), and as this Court did in the case of *Black* v. *S. Freedman & Co.* (4). If, in this case, the money had not been handed over to Lonsdale and by him to the plaintiffs, the Court before which Watson was convicted would have ordered it to be paid to them. (See sec. 496 of the Victorian *Crimes Act*, corresponding to sec. 100 of the English *Larceny Act*, the provisions of which have been adopted in all the Australian States).

In the present case the proceeds of the stolen goods are sufficiently "earmarked," so it is said, and are identified in the hands of the plaintiffs, who were also the owners of the goods. The question is whether they can set up a better title to the money than as such owners. The title set up is that they received the money as part payment of a debt and in ignorance of their in-

(1) (1894) 2 Q.B., 40.
(2) L.R. 1 H.L., Sc., 145.
(3) (1900) 1 Q.B., 54.
(4) 12 C.L.R., 105.

dependent equitable title to it. If they so received it, they in fact came into possession of a sum of money to which they were already entitled, although they did not then know it.

In my opinion the following proposition is good law:—If a man, having received a sum of money which is identified as being in fact the proceeds of property of his that has been sold without his authority, afterwards becomes aware of the fact, he is *primâ facie* bound to elect whether he will affirm or disaffirm the sale. That is to say, he cannot keep the money and recover the full value of the goods.

How long then does the obligation to elect continue? If it ever exists, the only limit that can be set is the happening of some new fact which would alter his position to his prejudice if he were still called upon to elect. Merely spending the money would not be such a fact. Possibly the same principle would be applied that is applicable in the case of an agent who has received money which he may under certain circumstances be personally liable to return, and who before notice of any such circumstance has paid it over to his principal.

In this case the plaintiffs are in no better position than the principal in the case supposed, for an agent acting without authority is a wrongdoer, and it is immaterial whether the wrong does or does not include criminal intent.

I proceed to apply this rule to the present case.

The suggested change in the plaintiffs' position is that they had, before discovering the truth, appropriated the £46, including the £31, in discharge of Watson's liability for the money embezzled. The real nature of the transaction was that they received the £46 by way of restitution of stolen property, including both goods and money, or including goods stolen by both Watson and Quine. It would be absurd to regard it as a mercantile transaction to which mercantile rules apply. In my judgment, the doctrine of appropriation, commonly referred to as the *Rule in Clayton's Case* (1), does not apply in such a case, but, if it did, the foundation of its application would be a presumption of the creditor's intention. (*Deeley* v. *Lloyds Bank* (2)). In this case any intention on the part of the plaintiffs to appropriate the

(1) 1 Mer., 572, at p. 608.

(2) (1910) 1 Ch., 648.

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£31 to satisfaction of the embezzled money, as distinguished from the stolen goods, is excluded by the facts. But I must not be supposed to say that I think that even if a rule, not the same as, but analogous to, the *Rule in Clayton's Case* (1), were applicable it would be an answer.

I am of opinion that if a man whose servant has stolen and sold his goods, and has also stolen his money, afterwards receives from the police money found upon the thief (which is practically this case), he is not entitled, without inquiry as to the source of the money, to appropriate it in satisfaction of the stolen money to the prejudice of the purchaser of the stolen goods, so as to exclude the obligation to elect already stated; but he is not, of course, bound to account for any greater sum than he has actually received out of the earmarked proceeds: *Rice* v. *Reed* (2).

The plaintiffs knew the actual facts not later than 20th December. They certainly knew them at the trial. Under these circumstances I am of opinion that, if they then elected to disaffirm the sale, they were bound to give credit for the earmarked proceeds. On the whole I think that they must be taken to have so elected. This view seems to have commended itself to *à Beckett* J.

The principles which I have stated are not new, although the application of them may be novel.

I said at the outset that I do not know of any authority directly in point. Perhaps the nearest is the Eighth Commandment.

In my judgment the appeal should be allowed.

BARTON J. Watson, after his arrest, handed to Detective Lonsdale, as part of the £46 disgorged by him and his accomplice, an order on the Savings Bank in Sydney for the amount of his deposit there, £31 2s. 3d., which included the £31 paid by the appellant to Quine for the iron and deposited by Quine to Watson's credit. It is not shown that Lonsdale told the respondents, and he may not have known, that the proceeds of the appellant's cheque were part of the £46. Lonsdale, accompanied by another detective, handed the respondents the £46 in cash during the

(1) 1 Mer., 572, at p. 608. (2) (1900) 1 Q.B., 54.

examination before the magistrates, late in August or early in September. Their position at that time was that they knew of Watson's embezzlement, committed early in that month; they also knew from the appellant's evidence before the magistrates, if not previously, that Watson and Quine had sold four cases of iron, being two tons, to the appellant, who had paid them £31 for the iron. At this time they also knew that there was other loss, but its amount was not known to them when Lonsdale handed over the £46.

Lewis Moore, a director of the respondent company, seems to have been in control. As to the £46 he said in the County Court: "It has been applied to the general defalcation"—meaning, I think, in partial recoupment of the respondents' whole shortage both by theft and embezzlement, for, if he had meant merely the embezzlement, he would not have applied the adjective "general" to it. Lonsdale, when examined for the appellant, said that when he handed over to the respondents the money extracted from the thieves, there was a conversation. He or detective Coonan (who was with him) said: "We have got £46 which the prisoners have given us in order to hand over to you as part of the deficiency"; and then there was handed to the detectives a receipt for the money.

Lawson, the respondents' accountant and assistant manager, says it was he who received the money from Lonsdale. He does not say that the detectives said anything about the deficiency. What Lonsdale told him, as he relates, was that the prisoners, when arrested in Sydney, had some money in cash and some in the Savings Bank, and that the total recovered from them was £46, which sum was handed to Lawson in gold and notes.

This is all the evidence that I can gather from the notes of the learned County Court Judge as to the state of the respondents' knowledge when they received the £46 and as to the disposal of the money.

Apart from the question whether the *Rule in Clayton's Case* (1) applies, it is clear that this evidence does not show any appropriation by the respondents, or any intention to make any specific appropriation, of the £46 either to the loss by embezzle-

(1) 1 Mer., 572, at p. 608.

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ment or to the loss by theft; though they knew that portion of the iron had been converted into money and that the appellant had paid one of the confederates £31 for it. For aught they knew, the money might have partly represented embezzlement and partly the proceeds of stolen goods, or it might have been, all of it, embezzled money.

After they had become aware that the proceeds of the stolen iron were included in the sum they had received, the respondents brought this action. It is plain that the £31 is a sum identified as part of the £46 disgorged by the thieves, and that before bringing this action the respondents had made no specific appropriation of any of that £46.

Under these circumstances I cannot but think that it was incumbent on the respondents to affirm or disaffirm the sale by Quine to the appellant. It would, I think, be monstrous to hold that they are entitled to keep both the money and the goods. By actions that speak louder than words, a person who insists on such a claim is *allegans contraria*. The effect of upholding such a position would be to give a judicial sanction, not hitherto bestowed upon it, to a course of action which is quite repugnant to the moral sense. I am convinced that the Court which decided the case of *Reid* v. *Rigby & Co.* (1) would have sustained this appeal. The £31 here was, I think, as the money in that case was held to be, money received by the respondents for the use of the appellant. Either the respondents have adopted the sale to the appellant and accepted the proceeds *pro tanto*, or, if they have disaffirmed that sale, the sum of £31 is not their money. In either case the decision of the learned County Court Judge should be restored.

ISAACS J. In my opinion the judgment of the Supreme Court of Victoria was correct and should be affirmed.

The appellant's contention in the main was an appeal to a suggested sense of unfairness in permitting the respondent to retain £31 originally coming from Creak, and yet to insist on taking from him the iron for which he had given the money. Undoubtedly it is hard on Creak, but so it is on any man defrauded, and

(1) (1894) 2 Q.B., 40.

hardship on him is not the test of Moore & Sons' responsibilities. A Judge is neither an Eastern Cadi nor an arbitrator. He expounds the law which fixes the standard of right, and to that, whatever it may be, the Judge adheres. When a man claims a right or sets up a defence in a Court of justice he must, apart from statutory provisions, be able to point to some definite principle of the common law which creates the right or permits the defence. Otherwise, rights and liabilities, unless rigidly defined by Statute, would vary with the moral intensities of the Judges. Some recent references to this subject by the highest tribunals may with advantage be recalled.

In *Blackburn, Low & Co.* v. *Vigors* (1) Lord *Macnaghten* said: —"I apprehend that it is not the function of a Court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights." In the *Ruabon Steamship Co. Ltd.* v. *London Assurance* (2) Lord *Halsbury* L.C. observed: —"It seems to me a very formidable proposition indeed to say that any Court has a right to enforce what may seem to them to be just, apart from common law or Statute." In *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (3), the Privy Council said:—"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." Lastly, in *Dewar* v. *Goodman* (4), Lord *Loreburn* L.C. said:—"It may be a hard case on the plaintiff, but like *Jelf* J., 'I do not feel at liberty to decide the case upon the ground of expediency or morality.'"

Now, on what principle of law can the appellant succeed? In the County Court he obtained judgment on a distinct and intelligible ground. The learned Judge thought that the property in the cheque or its proceeds never passed from Creak. This fundamental error was expressly corrected by *Hood* J. It is still insisted on before us, and must be dealt with.

By the contract between Quine and Creak the former agreed

(1) 12 App. Cas., 531, at p. 543.
(2) (1900) A.C.. 6, at pp. 9, 10.
(3) L.R. 2 Ind. App., 131, at p. 143.
(4) (1909) A.C., 72, at p. 76.

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to transfer the iron, and the latter the money. Want of Quine's title to the iron prevented it from passing, but, as Creak could give a good title to the money, that passed. The contract was what Lord *Cairns* in *Cundy* v. *Lindsay* (1) calls "a *de facto* contract." Creak could, if he rescinded the contract (*Towers* v. *Barrett* (2)) for breach of condition (sec. 17 (1) of the *Sale of Goods Act* 1896), recover back from Quine or from Watson, for they were one, the price he paid—that is, the amount of it as a debt—as upon a failure of consideration: *Eichholz* v. *Bannister* (3) and sec. 58 of the Act. But the £31, nevertheless, was not stolen, and so the property in it, when it was given with the intention to transfer it, passed from him—notwithstanding any false pretence. The distinction between the two—theft and false pretence—is definitely marked by the Court of Appeal in *Whitehorn Brothers* v. *Davison* (4). *Vaughan Williams* L.J., after referring to larceny, then, in speaking of the case before him, says:—"It may be treated as obtained by false pretences, but that is a very different thing, because in that case, if the goods are transferred to a third person, he takes under a contract which, though voidable, is not void, and is valid till avoided."

Buckley L.J. (5) defines larceny by a trick, and then false pretences. He says, further (6), that a man "cannot steal a contract; he can only steal a chattel." So, too, *per Kennedy* L.J. (7).

The Creak-Quine contract was therefore good till avoided, and Creak could have recovered damages for breach of warranty of title to the iron.

The second position put for the appellant is really dependent on the first. It was that the £31 was trust money in Watson's hands for Creak, and Creak can follow it because traceable. For this *In re Hallett's Estate*; *Knatchbull* v. *Hallett* (8) was cited. But that case has its limitations. It is not a panacea for every instance of unfair dealing. It has no application unless you satisfy the basis on which it rests by first establishing a fiduciary position. Sir George *Jessel* M.R himself, when it was cited to him

(1) 3 App. Cas., 459, at p. 464.
(2) 1 T.R., 133.
(3) 17 C.B.N.S., 708.
(4) (1911) 1 K.B., 463, at p. 474.
(5) (1911) 1 K.B., 463, at p. 479.
(6) (1911) 1 K.B., 463, at p. 480.
(7) (1911) 1 K.B., 463, at p. 485.
(8) 13 Ch. D., 696.

in *Kirkham* v. *Peel* (1), refused to apply it to the case of an agent who sold his principal's goods, but who, by the course of trade, was entitled to treat the proceeds received as his own, and to account merely as debtor for the amount to his principal.

Now, on 7th September, when the £46 was paid over to respondents, Creak's contract with Quine still stood. Creak still claimed the goods, and therefore held to his contract; this necessarily involved the position that he did not even assert any claim to the £31. That was Watson's property, and so it passed into Moore's possession free from any trust or fiduciary obligation.

If, then, the appellant has any case, some other principle must be found to rest it on.

It was next said that Moore & Sons were put to their election, whether to waive the tort, and so adopt the sale to Creak, or else to treat the £31 as still Creak's money, and return it to him as money received to his use, or, what is the same thing, suffer the damages for conversion to be reduced by that sum. This is an issue the affirmative of which lies on the appellant. If Moore & Sons were put to election, the question is when and how? Take, first, the moment when the money was received—7th September. So far as it is necessary for the appellant to rely on the respondents' knowledge or belief at that stage that the money was originally Creak's, or on any actual appropriation of the money to the iron transaction, or non-application to other defaults, he fails, because at the trial he deliberately shut out evidence on these points which the respondents offered. On elementary principles of justice he cannot now insist on any such position. This, of course, does not debar the latter from relying on the distinct and uncontroverted evidence the other way. I will refer to it now.

Detective Lonsdale said that all he told the respondents—and the learned County Court Judge adopted his statement—was this: that the money was handed over "as part of the deficiency." Lewis Moore, respondents' director, says: "It has been applied to the general defalcations—none appropriated to Creak's account." So that when the money became Moore's, it was received without

(1) 28 W.R., 941.

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any intimation that it had come from Creak, and was not applied to make good any deficiency relative to the iron. The only evidence as to its source is contained in the officer's statement to Lawson that he "got some money back," part of which was on the culprits and some in the Savings Bank. It might all have been Moore's. Watson had absconded on 8th August 1911, having on that day embezzled £47 odd, which was more than sufficient of itself to cover the £46. Up to the end of August the deficiency known was £54. After that, and by a date not fixed—the appellant has the onus of that—but, in view of the respondents' evidence as to application already quoted, before the money was received, other amounts were discovered, which in any event totalled more than £46, independently of the iron transaction, and against which the money could be, and was, received without adopting the sale to Creak. The obligations of Watson and of Quine to restore moneys of which they had defrauded respondents, were debts, and on receipt of their moneys were *pro tanto* cancelled. And, as the appellant has not sustained the burden of proving that *at the time the moneys were received there had been an election* to affirm the sale of the iron, and as the contrary appears, *there was then no debt* and no money obligation in respect of that, and so, *ex necessitate*, the debts cancelled must have been other items, and it is immaterial whether, as between them, appropriation can be said to have been made or not. And so Moore & Sons held the £31 by a right entirely independent of and distinct from the Creak-Quine contract, and had given valuable consideration by cancelling indebtedness *pro tanto*. *Thomson* v. *Clydesdale Bank Ltd.* (1) establishes, *inter alia*, that creditors receiving money rightfully in the first instance in discharge of an existing debt—which distinguishes the matter from the agency case suggested by the learned Chief Justice—are entitled to *retain* it, even after discovering their debtor's fraud on another whose money has gone to pay the debt. The contrary doctrine would unsettle all business relations. But morally there is no difference between that and the present case, because in each, the creditor retains money, after he learns that it is the product of his debtor's fraud on the original owner.

(1) (1893) A.C., 282, at p. 287.

The appellant then passes on to another argument. He says that, at all events, when in December 1911 his solicitor informed respondents the £31 had come from him, they were bound to elect whether they would have the money or the goods—and that they could not have both. But why? If the iron was still theirs, the title never having passed; and if the money was theirs since 7th September for the reasons above mentioned, where was the necessity of election? The principle of what is called "approbate and reprobate" was stated by *Honyman* J. in *Smith* v. *Baker* (1) in these terms—that a man "cannot say at one time that the transaction is invalid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage." The word "thereby" is all important. This was accepted as the true principle by the Court of Appeal in *Roe* v. *Mutual Loan Fund* (2).

The present case is untouched by that. The sum of £31 was not obtained by Moore saying the sale was valid, but in respect of another legal right; and so there is nothing inconsistent in retaining that sum, and at the same time in still insisting, as they always have insisted, on maintaining their title to their own property—the iron. A man is not called on to elect between two items of his own property. And so far as forming and announcing an actual intention to apply the money to liabilities of Watson other than the iron is concerned, that was done in the most unmistakable manner before any notification was received by the respondents that the money represented Creak's payment for the iron. In respondents' letters to Creak of 25th October and 13th November they claimed from him the value of the goods. This could only be consistent with the appropriation of the whole £46 to other delinquencies than the theft of the iron. And of itself it destroys all otherwise possible basis for the argument that, after the receipt of the letter of 20th December, it was too late to so appropriate the money. Lord *Macnaghten* said in *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"*; *The "Mecca"* (3):—"Where the election is with the

(1) L.R. 8 C.P., 350, at p. 357. (2) 19 Q.B.D., 347, at 350.
(3) (1897) A.C., 286, at p. 294.

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creditor, it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money." As no appropriation had been made by the debtor, the election was with the creditor, and, even if no prior appropriation or definite application of the £46 had been made, yet in the face of the letters of October and November, no question can arise as to whether or how it was exercised. Lord *Macnaghten* in *The "Mecca"* (1) said, the creditor "is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain." This principle of giving effect to the actual intention of the creditor was acted on in *Deeley* v. *Lloyds Bank* (2), referred to by the learned Chief Justice. The result is, then, the respondents have a double position with respect to appropriation. First, by carrying the moneys originally to a credit of general defalcations which at that time did not include the iron, they satisfied Lord *Selborne's* words in *In re Sherry* (3) on the subject of appropriations; and next, by the letters of October and November, they satisfied the first quoted words of Lord *Macnaghten* in *The "Mecca"* (4).

These last two observations, though decisive as to the unsubstantiality of the appellant's contention, are by no means necessary to the respondents' case. That rests on the broad fact that the money, when received, was so received in good faith and not in respect of the iron transaction, but of other delinquencies; and in my opinion that ends the matter. It ends it for this, among other reasons, that once honestly received from Watson as his money by Moore & Sons in payment for something other than the iron, its identity was lost because it became instantly an undistinguishable part of Moore's possessions. The only thing that could prevent this result would be the old heresy of "trust fund," so as to retain its original and identifiable character in Moore's hands.

The letter of 20th December consequently becomes immaterial; there was nothing to prevent the claim for the iron, irrespective

(1) (1897) A.C., 286, at p. 294.
(2) (1910) 1 Ch., 648.
(3) 25 Ch. D., 692, at p. 702.
(4) (1897) A.C., 286.

of the £31. For these reasons I am of opinion that the appeal should fail.

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Appeal allowed. Order appealed from discharged. Appeal from County Court dismissed with costs. Judgment of County Court restored.

Solicitor, for the appellant, *P. J. Ridgway.*

Solicitors, for the respondents, *Gillott & Moir.*

B. L.

Foll *Walker v Commissioner for ACT Revenue* (1994) 28 ATR 1268

Appl *Walker v Commissioner for ACT Revenue* (1994) 35 ALD 194

[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT;

AND

THE BULLFINCH PROPRIETARY (W.A.) LIMITED . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1912.

PERTH, *October* 29.

Griffith C.J., Barton and Higgins JJ.

Stamp duty—Transfer upon sale—Contract for sale of gold mine—Consideration, partly in shares and partly in cash—Value of consideration—Stamp Act 1882 (*W.A.*) (46 *Vict. No.* 6), *ss.* 46, 49.

Where the consideration for the sale of certain gold mining leases was expressed in the agreement of sale to be £400,000, to be paid by the issue of 300,000 shares of £1 each, fully paid up, and £100,000 cash, which in the agreement of sale the vendor agreed to immediately expend in the purchase of 100,000 shares, and the value of the shares had increased between the date of the sale and that of the actual transfer :

Held, that for the purpose of assessing stamp duty under sec. 46 of the *Stamp Act* 1882 (W.A.) in respect of the transfer, the consideration was to be taken to be £400,000.

Decision of the Supreme Court of Western Australia affirmed.