[HIGH COURT OF AUSTRALIA.]

JAMES AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

OXLEY AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1938, *Dec.* 2, 5, 6.

MELBOURNE, 1939, *Feb.* 9.

Latham C.J., Rich, Dixon, and McTiernan JJ.

Money Count—Money had and received—Money paid by cheque to solicitors' clerk—Specific purpose—Knowledge of principals—False statement by clerk—Disbursement by principals—Misappropriation by clerk.

A clerk to the defendants, who were a firm of solicitors, obtained from the plaintiffs, without the knowledge of his employers, a cheque for £425 for the purpose of handing it over to a supposed mortgagor, upon the security of whose mortgage the plaintiffs supposed they were investing the money. The cheque was drawn payable to the defendants' firm and was crossed not negotiable. The clerk, who had authority to indorse cheques on behalf of the firm, indorsed it and caused it to be paid into the firm's trust account. One of the defendants became aware that the money had been paid in, but he accepted a statement by the clerk that another person had asked that a cheque for £425 should be exchanged for two cheques of the firm. That defendant drew the two cheques and gave them to the clerk, who cashed them and appropriated the money to his own use.

Held that in these circumstances the plaintiffs were entitled to maintain against the defendants an action for money had and received in respect of the sum of £425.

Decision of the Supreme Court of New South Wales (Full Court): *Oxley* v *James*, (1938) 38 S.R. (N.S.W.) 362; 55 W.N. (N.S.W.) 140, affirmed.

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APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales, John Oxley and Raymond Kimberley Paul, as executors and trustees of the will of John Champion deceased, sued Arthur Henry James and Arthur Bernard James, who at all material times carried on business in partnership as solicitors under the firm name of James and James, for money payable by the defendants to the plaintiffs as such executors and trustees for money received by the defendants for the use of the plaintiffs as aforesaid; for money found to be due from the defendants to the plaintiffs as aforesaid on accounts stated between them; and for interest on such money. The plaintiffs claimed the sum of £425 said to have been advanced by the plaintiffs to the defendants for investment on mortgage on behalf of the plaintiffs at seven per cent interest.

The defendants denied indebtedness.

It was part of the business of the defendants, as solicitors, to arrange for loans by clients who desired to lend money on mortgage to clients who desired to borrow it. The defendants had in their employ a clerk named Rees who was about fifty-two years of age. He sometimes described himself as managing clerk, but the defendants denied that he was managing clerk and said that they did not know that he had so described himself. They classified him as the senior clerk. It was not disputed by the defendants that Rees had their authority to indorse cheques for payment into their account with the Commercial Banking Co. of Sydney Ltd. at its Newcastle branch. He, in common with other clerks employed by the defendants, had authority to give receipts on the defendants' behalf. The plaintiffs gave evidence that on two occasions, namely, in 1932 and 1933, Rees had initiated discussions with them which had resulted in their lending money on mortgage to clients of the defendants. For the purposes of these transactions they had handed cheques to Rees; and mortgages to the plaintiffs by clients of the defendants had been prepared by the defendants. According to the defendants it was they and not Rees who had initiated and in the main carried through these genuine transactions.

Towards the end of 1933 Rees told the plaintiffs that his employers, the defendants, had been asked by a client to obtain a loan on the

security of property situate at Bull Street, Mayfield. They inspected the property, told Rees they would make the loan, and in January 1934, at the defendants' office, handed Rees a cheque dated 10th January 1934 for £425 drawn on the Union Bank of Australia Ltd., Newcastle, in favour of the defendants James & James, the words "or bearer" being struck out. This cheque was crossed "not negotiable." Rees gave the plaintiffs one of the defendants' receipt forms dated 12th January 1934, with a printed signature initialled by himself, for the sum of £425, which sum was expressed to be a loan to the client on the security of the property in question for four years; the interest payable thereon was shown at seven per cent per annum. A document purporting to be a mortgage from the client to the plaintiffs was produced by Rees and signed by the plaintiffs. This was retained by Rees. The cheque was indorsed by Rees "p.p. James & James, Percy M. Rees" and on 12th January 1934 was deposited to the credit of the defendants' trust account with the Commercial Banking Co. of Sydney Ltd. at Newcastle, the pay-in slip being signed by one Alexander, who was articled as a clerk to one of the defendants. It contained the usual notification that cheques were not to be drawn against until collected. After this, sums corresponding with the interest payable on the supposed mortgage were paid by Rees to the plaintiffs' bank account until 1936. It was then discovered that no money had ever been advanced to the client and that he had not given any mortgage to the plaintiffs. The defendants denied all knowledge of the transaction.

In his evidence in chief Arthur Bernard James, who at that time was the only active partner, said that about 10th or 12th January 1934 he saw an entry in the firm's trust account of a credit of £425 to a man named Murphy, and that he asked Rees what the credit was for, and was told that a cheque drawn upon another bank for this sum had been paid in by Murphy in order that it might be cleared and that the sum was to be paid out by way of two cheques, one in the sum of £325 to Murphy, and the other in the sum of £100 to a man named Frith, a brother-in-law of Murphy. It appeared, however, from James' cross-examination, that no entries were made in any trust account book or ledger with respect to this transaction,

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and that the only entry made—apart from those at some stage presumably made by the bank in the firm's pass book—was one made by Rees on a cheque butt, presumably in the course of payment out of the money. Relying upon Rees' statement Arthur Bernard James signed and gave to Rees two cheques, one in the sum of £325 and the other in the sum of £100. These cheques were cashed by Rees, who failed to account for the proceeds.

The record kept by the bank of the defendants' trust account with it showed that prior to 12th January 1934 that account was neither in credit nor in debit; that on 12th January 1934, a sum of £425 was credited to the account; that on 13th January 1934 the sum of £325 was debited to the account, and that on 19th January 1934, the sum of £100 was debited to the account. The account then again was neither in debit nor in credit until a sum was credited to the account on 31st January 1934.

At the conclusion of the evidence counsel for the parties agreed that the following questions should be put to the jury:—(*a*) Was Rees authorized by the defendants to arrange and complete the loan of £425 from the plaintiffs to be secured by a mortgage on the property in Bull Street in January 1934? and (*b*) if not, then did the defendants hold Rees out as having such an authority? It was also agreed that if the jury should answer such questions adversely to the plaintiffs, the judge should decide the claim for money had and received, and should determine any remaining questions of fact necessary to be determined for the purpose of adjudicating upon that claim. The jury answered both questions in the negative and the judge, after hearing further argument, entered a verdict for the defendants.

The plaintiffs did not challenge the findings of the jury, but by virtue of sec. 5 of the *Supreme Court Procedure Act* 1900 (N.S.W.), as amended, appealed to the Full Court of the Supreme Court against the verdict and judgment of the trial judge.

The Full Court set aside the verdict and judgment for the defendants and entered a verdict and judgment for the plaintiffs in the sum of £425: *Oxley* v. *James* (1).

From that decision the defendants appealed to the High Court.

(1) (1938) 38 S.R. (N.S.W.) 362; 55 W.N. (N.S.W.) 140.

Wallace, for the appellants. The appellants neither knew nor should have known that the money in their trust account was the money of the respondents. True it is that the appellants received the respondents' money. At that point an action for money had and received may have been maintained, not on the ground of privity, but on the mere ground of following the cheque and its proceeds. However, before such action was maintained the appellants discharged themselves of the property and proceeds by accounting for it to the person who put it in their charge (*Gowers* v. *Lloyds and National Provincial Foreign Bank Ltd.* (1)). The clerk did not have any authority to receive the money, his authority only extended to legitimate transactions, as was found by the jury ; thus this case is distinguishable from *Lloyd* v. *Grace, Smith & Co.* (2). The appellants did not themselves receive any benefit from the money. It is obvious that the respondents had notice, constructive or otherwise, that the clerk's actions did not come within the scope of his authority ; therefore they are estopped from claiming the money as money had and received by the appellants to their use (*Jacobs* v. *Morris* (3)). This case is distinguishable from *Marsh* v. *Keating* (4), discussed in *Lindley* on *Partnership*, 10th ed. (1935), pp. 212, 217 et seq., as here the clerk had no authority to receive the money or to pay it into the bank ; his knowledge was not the knowledge of the appellants. Action for money had and received is not rigid ; it is a flexible form of claim (*Dominion Coal Co. Ltd.* v. *Maskinonge Steamship Co. Ltd.* (5)). It, however, is necessary for a plaintiff to show that such action is founded upon an implied agreement, a mistake of fact, or fraud (*Morgan* v. *Ashcroft* (6)). Mistake of fact was dealt with in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (7). A person who in good faith pays away money at the behest of the person from whom he received it, that is, his principal, is not liable to the true owner of that money (*Gowers* v. *Lloyds and National Provincial Foreign Bank Ltd.* (8) ; *Pollard* v. *Bank of England* (9) ; *Greenway* v. *Hurd* (10) ;

(1) (1938) 54 T.L.R. 550.
(2) (1912) A.C. 716.
(3) (1902) 1 Ch. 816.
(4) (1834) 1 Bing. N.C. 198 ; 131 E.R. 1094.
(5) (1922) 2 K.B. 132, at pp. 139, 140.
(6) (1938) 1 K.B. 49.
(7) (1926) A.C. 670.
(8) (1938) 54 T.L.R., at p. 553.
(9) (1871) L.R. 6 Q.B. 623.
(10) (1792) 4 T.R. 553 ; 100 E.R. 1171.

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Bavins Junr. & Sims v. *London and South Western Bank Ltd.* (1); *Owen & Co.* v. *Cronk* (2)).

Stuckey, for the respondents. The meaning of the jury's findings should first be determined. The terms of the questions submitted to the jury preclude the appellants from asserting that all facts were intended to be covered by the submission of the questions to the jury. The transaction referred to in those questions means investment on mortgage. Shortly, the respondents employed the appellants through a member of the appellants' staff to invest on mortgage money of the respondents. This the appellants did not do; therefore the respondents are entitled to have the money returned to them. The position is either that the appellants took the money, the clerk having accepted it within the scope of his authority as a clerk, in which case they are actionable, or that they are actionable because the money went into their account and payment was made therefrom. Either the clerk established privity or the appellants took and converted the cheque of the respondents, and the respondents are entitled to get the proceeds of that cheque as money had and received for their use. The questions to, and the answers by, the jury do not conclude the matter. It is still open to the respondents to contend that the facts show that the clerk had authority to receive the money on behalf of the appellants. A judge or court is empowered by sec. 5 of the *Supreme Court Procedure Act* 1900 (N.S.W.) to make findings of fact. A receipt of money by a clerk or servant authorized or held out is a receipt by the master. If such a clerk or servant receives money fraudulently the master is liable, and would be liable whether it got into the bank account or not (*Lloyd* v. *Grace, Smith & Co.* (3)). The money was received by the clerk either in the course of his employment or under an authority to receive it and was paid into the appellants' trust account; therefore the respondents are entitled to have the money repaid to them, irrespective of the jury's findings (*Stephens* v. *Badcock* (4)). The appellants knew that the money had been paid into their trust account. The fact that the appellants did not themselves receive any

(1) (1900) 1 Q.B. 270, at p. 278.
(2) (1895) 1 Q.B. 265, at pp. 273, 274.
(3) (1912) A.C. 716.
(4) (1832) 3 B. & Ad. 354, at pp. 361, 362; 110 E.R. 133, at p. 136.

benefit from the respondents' money is immaterial (*Baylis* v. *Bishop of London* (1))—See also *Farquharson Brothers & Co.* v. *King & Co.* (2). A person who pays away for a consideration money which is in fact stolen money is not liable, but if he parts with such money without consideration then he is liable (*Miller* v. *Race* (3) ; *Calland* v. *Loyd* (4)). The money was not retained or used by the appellants in discharge of an obligation (*Thomson* v. *Clydesdale Bank Ltd.* (5)). The money was obtained by the appellants in fact and is therefore recoverable ; it was paid into their account as the proceeds of a fraud which gave the clerk no title to the money (*Sinclair* v. *Brougham* (6) ; *Ogden* v. *Benas* (7) ; *Fine Art Society Ltd.* v. *Union Bank of London Ltd.* (8)). The principles which governed *Arnold* v. *Cheque Bank* (9) are applicable in this case.

[DIXON J. referred to *Bradford & Sons Ltd.* v. *Price Brothers* (10).]

There was not any agency as between the clerk and the respondents as to the disposal of the money (*R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (11) ; *Baylis* v. *Bishop of London* (12)). The money was under the control of the appellants, who neglected to make proper inquiries concerning it (*Marsh* v. *Keating* (13) ; *Morison* v. *London County and Westminster Bank Ltd.* (14)). In the circumstances, especially having regard to the fact that the money was trust money, the appellants are estopped from asserting that they did not know to whom the money belonged. As the result of the omission by the appellants to take proper precautions the respondents suffered damage. The decision in *Jacobs* v. *Morris* (15) was based on estoppel, but apart from that the court held that the money could be recovered. The question of money had and received was considered in *John* v. *Dodwell & Co. Ltd.* (16) ; *Reckitt* v. *Barnett, Pembroke & Slater Ltd.* (17) ; and *Midland Bank Ltd.* v. *Reckitt* (18). *Morgan* v. *Ashcroft* (19) was a case of mistake and has no application to the circum-

(1) (1913) 1 Ch. 127, at p. 133.
(2) (1902) A.C. 325.
(3) (1758) 1 Burr. 452 ; 97 E.R. 398.
(4) (1840) 6 M. & W. 26 ; 151 E.R. 307.
(5) (1893) A.C. 282, at pp. 287, 289-291.
(6) (1914) A.C. 398, at pp. 418, 419.
(7) (1874) L.R. 9 C.P. 513, at p. 516.
(8) (1886) 17 Q.B.D. 705, at p. 709.
(9) (1876) 1 C.P.D. 578.
(10) (1923) 129 L.T. 408.
(11) (1926) A.C., at pp. 681, 682, 686.
(12) (1913) 1 Ch., at p. 133.
(13) (1834) 2 Cl. & Fin. 250, at pp. 284, 288 ; 6 E.R. 1149, at pp. 1162, 1163.
(14) (1914) 3 K.B. 356, at p. 371.
(15) (1902) 1 Ch. 816.
(16) (1918) A.C. 563.
(17) (1929) A.C. 176.
(18) (1933) A.C. 1.
(19) (1938) 1 K.B. 49.

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stances before this court, nor has *Bavins Junr. & Sims* v. *London and South Western Bank Ltd.* (1) any bearing upon those circumstances. Compliance by the bank with the intention of the Crown agents in *Gowers* v. *Lloyds and National Provincial Foreign Bank Ltd.* (2) renders that case distinguishable from this case. Some or all questions of fact may be determined by a judge and, on appeal, by the court of appeal: See *Supreme Court Procedure Act* 1900 (N.S.W.) secs. 3, 5.

Wallace, in reply. On the question of the agency of the clerk, see *Bowstead* on *Agency*, 9th ed. (1938), art. 109; *Kennedy* v. *Green* (3); *J. C. Houghton & Co.* v. *Nothard, Lowe & Wills Ltd.* (4). The power of the court to determine facts and to draw inferences of fact was considered in *Schumacher Mill Furnishing Works Pty. Ltd.* v. *Smail* (5).

[DIXON J. referred to *Edmond Weil Incorporated* v. *Russell* (6).]

In *Stephens* v. *Badcock* (7) the court held as a matter of fact that the clerk there concerned clearly had authority to do what he did, and in *Calland* v. *Loyd* (8) the bank still had the money in its possession and would have been successful if it could have established a binding contract; therefore those cases are distinguishable from this case. The money was not stolen until after it came out of the appellants' account; this is contrary to the position in *Miller* v. *Race* (9).

Cur. adv. vult.

1939, Feb. 9. The following written judgments were delivered:—

LATHAM C.J. The appellants are members of a firm of solicitors and were defendants in this action for money had and received. The plaintiffs were trustees of the estate of a deceased person and had money to invest. In January 1934 they saw one Rees, a clerk of the defendants, and, upon his false statement that the defendants would invest money upon mortgage of a certain property, they gave

(1) (1900) 1 Q.B. 270.
(2) (1938) 54 T.L.R. 550.
(3) (1834) 3 My. & K. 699; 40 E.R. 266.
(4) (1928) A.C. 1.
(5) (1916) 21 C.L.R. 149.
(6) (1936) 56 C.L.R. 34, at p. 46.
(7) (1832) 3 B. & Ad. 354; 110 E.R. 133.
(8) (1840) 6 M. & W 26; 151 E.R. 307.
(9) (1758) 1 Burr. 452; 97 E.R. 398.

to Rees a cheque for £425. The evidence showed that Rees had authority to receive moneys and to indorse cheques on behalf of the defendants. He indorsed the cheque with the defendants' firm name, and another clerk paid it into the defendants' trust account. Rees made a note of the amount of the cheque on the back of a cheque butt. Upon this note being seen by one of the defendants, Rees gave a false explanation that it was money received from one Murphy and that, in order to convenience Murphy, it was desired that the firm should provide two cheques, one for £325 and one for £100, in exchange for the cheque for £425. This was done. The cheques were given to Rees, who appropriated the proceeds to his own use. Till October 1936 the dishonest clerk paid the plaintiffs moneys as for interest upon the supposed mortgage. When the plaintiffs discovered that there was no mortgage in existence and the clerk's dishonesty was revealed, they sued the defendants for money had and received. It was not disputed at the trial that the defendants knew nothing of the actual dealings between Rees and the plaintiffs and that they had not authorized that particular dealing. They did not know that the money came from the plaintiffs or that it was intended to be invested upon mortgage through their office. The plaintiffs contended, however, that, though the specific transaction by Rees was not expressly authorized, his authority to receive money and to indorse cheques on behalf of the defendants, his position upon the defendants' office staff, and certain prior dealings with the defendants with which Rees was associated, were such as to confer upon him authority to deal with clients or proposed clients of the firm in relation to mortgage transactions. Alternatively it was contended that, if Rees had not any such authority in fact, the defendants had held him out as having such authority. Two questions were put to the jury. They were as follows :—" 1. Was Rees authorized by the defendants to arrange and complete the loan of £425 from the plaintiffs to be secured by a mortgage on the property in Bull Street in January 1934 ? 2. If not, then did the defendants hold Rees out as having such authority ? " The jury answered these questions in the negative. The parties agreed that any other questions of fact should be determined by the trial judge. If the answers of the jury to the questions submitted to them had been in

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the affirmative, then the cheque would have been received in the course of the business of the defendants' firm. Upon such a basis the liability of the defendants would, I think, have been clear, for sec. 11 (*b*) of the *Partnership Act* 1892 (N.S.W.) provides that where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss. But the findings of the jury exclude this simple method of deciding the case. The plaintiffs contend that, notwithstanding these findings, they are entitled to judgment. The learned trial judge gave judgment for the defendants, but the Full Court reversed this decision and ordered that judgment be entered for the plaintiffs. The defendants now appeal to this court.

It was contended by the plaintiffs that the defendants must be treated as if they had the knowledge which Rees had when he indorsed the cheque as their agent. This contention depended upon Rees being the agent of the defendant in the transaction.

The learned trial judge, by reason of the findings of the jury, declined to accept this view, and held that Rees was really the plaintiffs' agent for the purpose of giving the defendants instructions to deal with the plaintiffs' money, with the result that the plaintiffs were defrauded by their own agent and not by the defendants or by an agent of the defendants. Upon this basis judgment was given for the defendants.

The learned Chief Justice in the Full Court based his judgment upon evidence that Rees " had general authority from the defendants to receive money on their behalf and to accept instructions as to purposes for which moneys so received were to be applied " and upon further evidence that he " had also authority to accept cheques intended to be collected by the defendants and to indorse them upon the defendants' behalf so that the amount of the cheques might be collected for the defendants by the bank and held to their credit." Thus his Honour said that " when the plaintiffs handed the cheque to Rees they handed it to a person authorized to receive it on their behalf and to indorse it for collection." This fact alone was, in his Honour's opinion, sufficient to render the defendant's liable to

the plaintiffs for any money which might be collected by means of the cheque. The other members of the court took the same view, in substance, as the Chief Justice.

In my opinion, with all respect to the views of the Full Court, this manner of dealing with the case does not give adequate effect to the findings of the jury, which were not attacked in any way. Indeed, they were accepted by the plaintiffs in the Full Court. It has already been stated that it was not contended at the trial that Rees had express authority to do the precise thing which he did. The contest was as to whether Rees had authority to take the plaintiffs' money for investment and to pay it into the defendants' bank account by reason of the general authority which he admittedly had to receive money and to pay money into the defendants' account. The jury definitely negatived the existence of such authority. If the answers given by the jury are accepted without reserve, it must, I think, be taken that Rees had no authority from the defendants to do what he did. It appears to me, therefore, that proper weight is not attributed to the findings of the jury if the case is decided upon the facts (though these facts are not contested) that Rees had authority to receive moneys, to indorse cheques, and to pay moneys into the defendants' account. The jury declined to draw what may seem to be the obvious inference—and, as already stated, the findings of the jury not only were not attacked but were expressly accepted by the plaintiffs before the Full Court.

In my opinion the case can be decided without making any decision as to the authority of Rees. The findings of the jury deal only with the authority of Rees. In my opinion the authority of Rees is an irrelevant circumstance. The evidence clearly shows that one of the defendants, a partner in the defendant firm, became aware that the defendants had £425 in their bank account which did not belong to them. He was content to accept the statement of Rees that this money had been received from Murphy and that it would be properly dealt with if it were paid out by cheques drawn in favour of the two named persons. The statement of Rees was false. Any inquiry which proceeded beyond Rees would have resulted in the discovery that the statement was false. Rees was not shown to be the agent

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of the plaintiffs for any purpose. He was purporting to act throughout on behalf of the defendants and in relation to their business. Thus the plaintiffs cannot be made responsible in any respect for this false statement of Rees. But the defendants, knowing that they had money belonging to some other person or persons, took the responsibility of dealing with it in such a way that Rees got it. They had no authority from the plaintiffs to do so. The result is that they have not duly accounted for moneys belonging to the plaintiffs which were in their possession. The position would have been exactly the same if the defendants had never paid the money out of their account to any person. In *Marsh* v. *Keating* (1) the House of Lords adopted the opinion of the judges, delivered by *Park* J., to the effect that money paid into the banking account of a firm was *ipso facto* money which was completely under the control of the firm. The moneys in question represented stock dishonestly sold by a partner. He paid the proceeds of the sale into the firm's banking account, without the knowledge of his partners. The judges were of opinion that the money was actually received by the other partners to the use of the defrauded plaintiff. They had the means of knowing that it was the money of the plaintiff, even though the receipt of and the dealing with the money were not recorded in the books of the firm. They "might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business." In *Jacobs* v. *Morris* (2) *Stirling* L.J., referring to what *Farwell* J. (3) had said in his judgment in that case with respect to *Marsh* v. *Keating* (1), said: —"*Farwell* J. has held that the principle involved in the opinion given by the judges who advised the House of Lords in that case requires that two things should be established, first, that Messrs. Morris's money went into the plaintiff's account, and, secondly, that the plaintiff knew or had the means of knowledge, while it remained to the credit of that account, that it was the money of the defendants, Messrs. Morris. I agree with *Farwell* J. in taking this view of *Marsh* v. *Keating* (1)."

(1) (1834) 2 Cl. & Fin. 250; 6 E.R. 1149.
(2) (1902) 1 Ch., at p. 833.
(3) (1901) 1 Ch. 261.

If a partner wrongfully disposes of the money or property of another person while it is in the custody of the firm the other partners are liable for his wrongful act if the money or property was received in the course of the business of the firm: the knowledge or means of knowledge in the other partners in relation to the transaction is not material (*Partnership Act* 1892 (N.S.W.), sec. 11; *Pollock, Digest of the Law of Partnership*, 9th ed. (1909), p. 50). But in the present case the findings of the jury exclude the acceptance of the proposition that the plaintiffs' money or property was received in the ordinary course of business of the defendants' firm. Thus it cannot be assumed in the present case that the elements of knowledge or means of knowledge in the members of a firm are not material. They may be essential to liability "in cases where the transaction is not in the ordinary course of business" (*Pollock, Digest of the Law of Partnership*, 9th ed. (1909), p. 50). Upon the basis that such elements are material in this case, the liability of the defendants would seem to me to be established. The plaintiffs' money went into the defendants' account and the defendants had the means of knowledge, while it remained to the credit of that account, that it was the money of the plaintiffs.

It is immaterial that the money was received in the form of a cheque: an action for money had and received will lie where the plaintiffs' complaint is that the defendants have wrongfully failed to account for the proceeds of a cheque (*Spratt* v. *Hobhouse* (1)). In *Marsh* v. *Keating* (2) the question of liability arose with respect to the proceeds, in the form of money, of dealing with another person's stock as distinct from the stock itself. It was held that an action for money had and received would lie. So also in the present case such an action will lie for money the proceeds of a cheque for which the defendants have not accounted to the plaintiffs.

But it was argued for the defendants that they were really in the same position as involuntary bailees of a chattel, and they were, it was said, entitled to deal with the proceeds of the cheque in accordance with the directions of Rees, from whom they had received it. This is not a case of dealing with a chattel which has been bailed,

(1) (1827) 4 Bing. 173, at p. 178; 130 E.R. 734, at p. 736.

(2) (1834) 2 Cl. & Fin. 250; 6 E.R. 1149.

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but, upon the assumption that the law relating to involuntary bailments of chattels may possibly, at least by analogy, assist the defendants, I proceed to consider the argument of the defendants that they should be treated as if they were involuntary bailees.

The defendants rely upon statements such as the following, made by *Blackburn* J. in *Hollins* v. *Fowler* (1) : " I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the bona-fide belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or entrusted with their custody." (See also *Salmond* on *Torts*, 8th ed. (1934), p. 317, note *n*, and p. 327 and cases there mentioned.) Upon the basis of such authorities as these it is urged that, as the defendants received the plaintiffs' cheque from Rees, they were entitled either to return it to him or to deal with it or its proceeds according to his directions.

In the first place it must be remembered that the general rule laid down in *Hollins* v. *Fowler* (2) is that " any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion." Further, *Blackburn* J. in *Hollins* v. *Fowler* (2) approves the very definite statement of Lord *Ellenborough* in *Stephens* v. *Elwall* (3) that " a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it."

If the first statement quoted (1) is limited to dealing with the custody of property, as distinct from disposing of property with intent to affect the title to the property, all the statements quoted can be reconciled : See *Salmond* on *Torts*, 8th ed. (1934), pp. 326, 327. But in the present case the defendants did not merely deal or purport to deal with the custody of what was in fact the plaintiffs'

(1) (1875) L.R. 7 H.L. 757, at pp. 766, 767.
(2) (1875) L.R. 7 H.L. 757.
(3) (1815) 4 M. & S. 259, at p. 261; 105 E.R. 830, at p. 831.

money. They paid it away with intent to dispose of it, to pass the title to it. Thus, in my opinion, they cannot claim the benefit of the suggested exception to the general rule.

It may be added that Sir *John Salmond* is not inclined to accept in favour of an involuntary bailee an absolute exception to the general rule. He says (*Salmond* on *Torts*, 8th ed. (1934), p. 317, note *n*): "Is not an involuntary bailee entitled to return the goods" (to the person who deposited them with him) "and does he owe any duty to the owner save one of reasonable care?" (See *Elvin and Powell Ltd.* v. *Plummer Roddis Ltd.* (1), referred to in *Salmond* on *Torts*, 8th ed. (1934), p. 317.) According to this view a person who involuntarily found himself in possession of the goods of another person could not discharge himself as against that other person by merely acting bona fide in accordance with the directions of the person from whom he received the goods. He would also have to show that he took reasonable care in what he did with the goods. In the present case the plaintiffs did not seek or obtain any finding that they exercised reasonable care. The evidence does not, in my opinion, show that they exercised reasonable care. They merely acted upon the statements of Rees. They checked none of those statements. If they had simply ascertained the names of the drawers of the cheque, the fraud of Rees would at once have been discovered. Thus the defendants cannot bring themselves within the exception suggested by Sir *John Salmond*.

Accordingly, in my opinion, there was no defence to the action. The judgment of the Full Court was right and the appeal should be dismissed.

RICH J. This appeal challenges the correctness of a decision of the Full Court of New South Wales by which the members of a firm of solicitors practising at Newcastle were held liable to some trustees who had confided a cheque for a sum of £425 to the chief clerk of the firm for the purpose of handing it over to a supposed mortgagor, upon the security of whose mortgage they believed they were investing the money. The transaction took place in the solicitors' office. The clerk had presented to the trustees a fictitious mortgage and the

(1) (1933) 50 T.L.R. 158.

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business presented all the appearances of a regular piece of conveyancing in the ordinary course of a solicitor's business. The trustees, who are the plaintiffs in the action, made their cheque payable to "James and James, Solicitors," crossed it "not negotiable," and struck out the words "or bearer." They, therefore, took every precaution to see that the solicitors obtained the money, relying upon them to place it in the hands of the intended mortgagor. The transaction, however, was fictitious in the sense that there was no borrower, and the security which the trustees had been shown was not made the subject of a genuine mortgage. The clerk had devised the plan for the purpose of stealing the money. If he had been unable to practise a further deception upon his employers the form of the cheque might have proved an insuperable obstacle to the success of his fraud. As the senior or head clerk he had been given authority to indorse cheques on behalf of the firm, but he had no authority to draw on the firm's bank account. The authority which he possessed enabled him to pay the cheque into the firm's trust account for the purpose of collection without his employers becoming aware who were the drawers of the cheque, as they would have become if the indorsement of a member of the firm had been required. The clerk's only problem was to get the money out again from the bank account. This problem he solved without much difficulty. In recording the payment in he wrote the word "Murphy" against it and told his principal that one Murphy with whom the firm had business relations had asked that the cheque be put through the account for the purpose of splitting the amount between himself and his brother-in-law, one Frith. He drew a cheque for Murphy and another for Frith, together making up £425, obtained his principals' signature on the firm's behalf as drawers of the cheque, presented the cheques, obtained the money, and embezzled it.

The trustees brought an action of money had and received against the solicitors. On the trial of the action the jury were asked two questions to each of which they answered: No. The questions were as follows:—"(1) Was Rees" (the clerk) "authorized by the defendants to arrange and complete the loan of £425 from the plaintiffs to be secured by mortgage on the property in Bull Street in January 1934? (2) If not, then did the defendants hold Rees out

as having such authority ? " We heard a great deal of argument as to the effect of the answers to these questions. It was said on behalf of the solicitors that we should regard them as putting the clerk for all legal purposes in the position of a stranger to the solicitors. I must confess that I have been puzzled at the form of the questions and at the fact that the plaintiffs' counsel did not in the Full Court treat the answers as open to attack, whatever meaning was given to the questions. The responsibility of the solicitors for the clerk's acts depends upon the nature of his duties and of the work delegated to him. Whether what he did was within the scope of his employment is almost entirely an inference of law from those matters when and if established. The steps in the transaction by which the plaintiffs were defrauded really required separate consideration—some of them obviously were within the scope of the clerk's employment; about others there might be more doubt. However, what has happened puts us in the position of having to regard all the elements which upon a proper understanding of the questions are covered by the jury's answers as excluded or withdrawn from our consideration. For the rest the parties agreed that the judge should draw inferences of fact and decide matters of law; and this we may do, that is, assuming the parties have not placed themselves outside the machinery of appeal by such an arrangement: See *Schumacher Mill Furnishing Works Pty. Ltd.* v. *Smail* (1).

However that may be, I think the conclusion that the solicitors were liable to the trustees for money had and received was perfectly right, however little authority the clerk possessed to do business on behalf of the firm with the trustees. He had complete authority to indorse cheques and thus instruct the bank to collect them. He exercised that authority, with the result that the solicitors' bank collected on their behalf the trustees' money from the trustees' bank. I cannot see how it could be pretended, if the matter stopped there, that the solicitors were not bound to pay it back to the trustees. Whether you say that the trustees paid the money under a mistake of fact as to the security or as to the clerk's authority or more simply that they gave a cheque intending it to reach the solicitors' bank and the money to be applied at their directions, it is quite clear that

(1) (1916) 21 C.L.R. 149.

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they gave a cheque which was intended to put the solicitors in funds for a purpose in which the solicitors had no beneficial concern and all beneficial interest remained with the trustees. The solicitors got possession of the money and, in my opinion, then held it to the plaintiffs' use. The fact that afterwards on the same or the next day they were cheated by their own clerk into giving him cheques for the like amount, which he stole, is no doubt a great misfortune for them, but has nothing to do with the plaintiffs.

In my opinion the appeal should be dismissed with costs.

DIXON J. As the findings of the jury were not attacked, and as it is clear from the summing up that they were intended to cover every part of the question what was the real or ostensible scope of the employment of the clerk Rees, who committed the fraud, we should, in my opinion, accept the assumptions of fact and law involved in the conclusion that it was outside the course of his employment both real and apparent to seek or receive from his masters' clients or intending clients money for investment on mortgage or, without recourse to or instructions from one of his principals, to deal with and do the business of clients or intending clients willing to invest money on mortgage.

Rees had been employed by the defendants for a very long time, and he was their senior clerk. In 1934, when the fraud was committed, there were two other clerks, both articled clerks apparently. Although the firm still consisted of the two partners who are sued, father and son, two or three years earlier the father had retired from active practice at Newcastle and the son was the only principal who attended the office. The office consisted of three rooms in a row, with communicating doors. The principal occupied one, which contained the office safe and the telephone, Rees occupied that adjoining, and in it were seats for the two other clerks. The third was a waiting-room, but was used also for work. The practice was not a large one, but it was confined to no particular kind of work. The duties of Rees must be taken to be those of a solicitor's general clerk acting under supervision, and they included the typewriting of documents. For over twenty years the firm's bank had been authorized to accept his indorsement on behalf of the firm of cheques

and negotiable instruments payable to the firm when lodged for collection or credit to the firm's account. The existence of Rees' authority to indorse cheques in this manner was evidently the factor determining the form which his fraud took. He had resolved, as I gather, or at any rate assume, to obtain from the plaintiffs, who are the respondents in the appeal, the sum in question under colour of investing it upon mortgage and then to appropriate it to his own use. He applied to them for a loan on behalf of a fictitious borrower, sent them to inspect a property as the security offered, and prepared a fictitious mortgage. The transaction was completed in the firm's office, the plaintiffs believing that in dealing with Rees they were dealing with the defendants. The plaintiffs handed over a cheque for the amount, drawn payable not to bearer but to the firm, and crossed not negotiable. As Rees could not deal with the cheque unless it was indorsed on behalf of the firm, and as his authority to indorse cheques was for the purpose of lodging them with the firm's bank, it was necessary for him to pay in the cheque to one of the firm's accounts and then by some means to obtain the withdrawal of the amount. As he had no authority to sign cheques on behalf of the firm, he could regain the amount from the bank only by a cheque signed by his principal. He indorsed the plaintiffs' cheque himself and caused one of the articled clerks to pay it into the firm's trust account. A separate cheque-book was kept for the trust account, and, in order to maintain a continuous record of the amount for the time being there at credit, the practice was adopted of noting on the back of the counterfoils the sum last at credit, further sums paid in and the withdrawals by the cheques. Rees in this fashion noted the payment in of the £425 as being on behalf of one Murphy. He explained on that or the ensuing day to his principal, the younger defendant, that Murphy, a man whom the latter knew and with whom the firm had had some dealings, had asked that a cheque for £425 should be exchanged for two cheques, one payable to Murphy for £325, and another payable to one Frith, Murphy's brother-in-law, for £100. Something of the sort had occurred previously, and the defendant expressed some objection to its being done again, but he drew the two cheques and gave them

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to Rees, who cashed them and appropriated the money to his own use. But on these facts I am of opinion that the defendants are liable to the plaintiffs in money had and received, notwithstanding that Rees' actual receipt of the money from the plaintiffs may have been outside the real and ostensible scope of his employment. This conclusion is based upon the simple ground that when the amount of the cheque was collected by the defendants' bank from the plaintiffs' bank, and the defendants' trust account was credited therewith, the defendants had received the plaintiffs' money to the use of the latter and that the liability was not discharged or affected by the withdrawal of the amount by the cheques payable to Murphy and Frith and cashed by Rees.

When the plaintiffs handed over their cheque to Rees they gave an instrument to a person assuming to act on behalf of the defendants, but, as we are to suppose, having no authority to receive it. The instrument, being legally payable only to the plaintiffs' order through a bank, was not at that stage negotiable, and the property in it could pass only to the defendants. No doubt when he received the cheque, as the transaction was outside the scope of his employment, his possession could not be considered that of the defendants, and until adoption by them the property in the instrument would not pass to them. But the bank received it after indorsement, and therefore in the form of a negotiable instrument, and they received it as the bankers of the defendants with instructions to credit their account with the proceeds, or at all events with the amount. The cheque was doubtless credited at once to the trust account before it was cleared, and in this sense it was the amount that was credited rather than the proceeds. But the pay-in slip negatived the right to draw against cheques before they were cleared, and, if it be material, the bank acted as agents for collection rather than transferees for value: See *In re Farrow's Bank Ltd.* (1). The money when collected and lying at the defendants' credit was received by them and from the plaintiffs. It is true that the defendants were unaware of the fact that it was the plaintiffs' money. But the plaintiffs had intended to invest them with the temporary control

(1) (1923) 1 Ch. 41, particularly at p. 48.

or legal property in the money for a purpose implying no beneficial enjoyment by the defendant of the fund or interest therein. The defendants had given Rees authority to put the bank in motion to collect on their behalf cheques drawn to their order. The cheque had been so drawn by the plaintiffs as to ensure that its proceeds were obtained only by the defendants or under their authority. The defendants' actual receipt of the plaintiffs' money into their trust account was therefore pursuant to a chain of authority, that is, the indorsement of the instrument by Rees and its collection by the bank. Suppose that, having instructed Rees to obtain an investment, the plaintiffs had directly paid in the money into the defendants' trust account. Would the defendants any the less have held it to the use of the plaintiffs because it was outside the scope of Rees' authority to receive the instructions ? In such a case a question might perhaps be raised whether the bank had authority to accept the deposit, but no such question can arise in the present case, because Rees' indorsement operated to give the bank complete authority to collect the cheque. The purpose of the payment being to entrust the defendants with the money to pay to the supposed mortgagee and not to confer any title to retain it for the defendants' own use, they were, in my opinion, immediately liable as persons receiving it to the use of the plaintiffs. No doubt, if the transaction had been genuine and the mortgagee had given authority to the firm to receive the money on his behalf, the receipt would have been to his use and not to that of the plaintiffs. But there was no mortgagee. The intention of the plaintiffs was to place the money under the firm's control to pay over to the mortgagee whether as their agent or as his, but in neither case were they to take the fund beneficially. To my mind the important thing is that there was a fully authorized receipt of the plaintiffs' money into the defendants' bank account upon which no one could draw except under their authority. If the amount had remained in that account, it appears to me to be clear that the defendant would have been accountable to the plaintiffs, not only in equity, but also at law in the form of action declared upon.

The case therefore comes to depend upon the drawing of the amount in the two cheques in favour of Murphy and Frith.

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This was a dealing by the younger defendant himself. It was not a dealing by Rees. He relied upon Rees as his clerk to inform him of the true ownership of the money and what he ought to do with it. Rees' deception of him was clearly a fraud committed as the firm's servant. It induced him to part with money which had been, as the plaintiffs intended it should be, reduced into the firm's effective control and exclusive control. There is a difficulty when an agent acting outside the scope of his authority or a servant outside the course of his employment pays the money of a stranger into a bank account in the name of his principal or master and then withdraws it under a general authority to sign cheques on the account which the principal or master has conferred upon him. As the money has been credited to the principal or master, it has been placed at least theoretically under his control and received on his behalf. But it is evident that in such a case the agent may from first to last retain the power of dealing with the money as he chooses. Though the bank account is in the name of his principal, the latter may have no effective means of controlling the money and excluding the agent. In *Jacobs* v. *Morris* (1) an attorney under power managing a branch office in London of a Melbourne merchant borrowed a sum of money, assuming to act under the power, but without actual or ostensible authority to do so. He paid it into a bank account upon which he had power to operate, an account in his principal's name. He then drew out the money and applied it to his private purposes. The principal was held not to be liable to the lender in an action of money had and received, chiefly on the ground that the lender had a full opportunity of acquainting himself with the fact that the loan was outside the power of attorney. But *Farwell* J. and, in the Court of Appeal, *Stirling* L.J. and, perhaps, *Cozens-Hardy* L.J. attached importance to the fact that the principal did not and could not know that the money was placed to the credit of the bank account in his name. Obviously it was at all times within the control of the attorney, and that control was in fact, though not in law, exclusive. Their Lordships placed some reliance on *Marsh* v. *Keating* (2), a partnership case in which a fraudulent partner forged powers of

(1) (1902) 1 Ch. 816; (1901) 1 Ch. 261.
(2) (1834) 1 Bing. N.C. 198; 131 E.R. 1094; 2 Cl. & Fin. 250; 6 E.R. 1149; 8 Bli. (N.S.) 651; 5 E.R. 1084.

attorney for the transfer of stock which clients of the firm had placed under its control, and sold and transferred the stock, the proceeds of which were paid into the firm's bank account, whence he drew it for his own purposes. The innocent partners were held liable on the ground that, leaving aside the forgery, selling stock of clients and receiving the proceeds, by the course adopted, fell within the scope of the business and that the misappropriation of the money by the copartner afforded no answer, since the money had been received and the other partners might have known by the exercise of reasonable diligence that the money had been paid in. In delivering the opinion of the judges summoned to advise the House of Lords, *Park* J. said: "If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires" (1). The case is discussed by Lord *Lindley* in his *Law* of *Partnership*, 1st ed. (1860), pp. 244, 249; 5th ed. (1888), pp. 155, 160; 9th ed. (1924), pp. 223, 230, for the purpose of emphasizing the fact that "it was the business of the firm there to sell through their broker stock belonging to their customers and to receive and remit the proceeds: and the money for which the firm was held answerable did arise from the sale of the stock of a customer though it was sold under a forged power of attorney." Sir *Frederick Pollock*, in his *Digest of the Law of Partnership*, 7th ed. (1900), p. 47; 12th ed. (1930), p. 52, note *m*, makes the following remarks on Lord *Lindley's* comment:—"If his comment is right, as it clearly is, one can hardly see what the knowledge or means of knowledge of the partners had to do with it; they were liable because money representing their customer's property had come, in an apparently regular course, though in truth by wrong, into the custody of the firm. The point is treated as material in the opinion of the judges. The truth is that the rule . . . by which the ordinary course of business is the primary test of the firm's liability was developed only by later decisions." In *Jacobs* v. *Morris* (2) *Vaughan Williams* L.J. said: "I am not sure that in *Marsh* v. *Keating* (3) either the House of Lords or the judges whose opinion

(1) (1834) 8 Bli. (N.S.), at p. 688; 5 E.R., at p. 1097.
(2) (1902) 1 Ch., at p. 830.
(3) (1834) 2 Cl. & Fin. 250; 6 E.R. 1149.

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was taken meant to decide either that ignorance and want of means of knowledge will exonerate a person through whose account a sum of money has passed from responsibility, or that knowledge of the fact is essential to liability."

The explanation of the introduction into the question of the element of "means of knowledge" may lie in the peculiarity of the position of partners in relation to a partnership bank account upon which each partner may be empowered to draw by himself. In substance, money, though temporarily there, may never be in the actual *de-facto* control of any member of the firm except the fraudulent partner. He may pay a cheque to the credit of the account and immediately draw against it. In such circumstances the technical "receipt" by the firm may be considered as insufficient to make payment into the account a receipt to the use of the plaintiff unless the other partners knew or ought to have known of the credit and of its nature. In the same way, if an agent who operates on his principal's account free of his actual control or supervision pays in money fraudulently obtained from a stranger and forthwith draws it out again, the principal may be regarded as never having really received it to the use of the stranger unless he knew or ought to have known of its presence before it was withdrawn. But, whatever view is ultimately taken of the element of knowledge or means of knowledge, it does not appear to me to have any place in the present case. For the principal himself, that is, the younger defendant, drew out the money knowing that it had been received and held for the use of someone who had dealt with the firm through Rees, and he invoked and relied on his servant's guidance as to its disposal.

In my opinion the appeal should be dismissed with costs.

McTIERNAN J. In my opinion the appeal should be dismissed. I agree with the judgment of my brother *Dixon*.

Appeal dismissed with costs.

Solicitors for the appellants, *Johnston & O'Neill*, Newcastle, by *McDonell & Moffitt*.

Solicitor for the respondents, *P. Charlton*, Newcastle, by *S. E. Cook & Son*.

J. B.