

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND HAYNE JJ

ROUMALD CHARLES PARSONS

APPELLANT

AND

THE QUEEN

RESPONDENT

Parsons v The Queen (M42-1998) [1999] HCA 1
9 February 1999

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation:

G D Wendler with R T A Waddell for the appellant (instructed by Allan McMonnies)

P A Coghlan QC with R A Elston for the respondent (instructed by Solicitor for Public Prosecutions (Victoria))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Roumald Charles Parsons v The Queen

Criminal law – Dishonestly obtaining property belonging to another by deception – Whether cheque is property belonging to another – Whether bank cheque is property belonging to another.

Criminal law – Dishonestly obtaining property belonging to another by deception with intention of permanent deprivation of property – Whether person capable of intending to permanently deprive another of cheque.

Cheques – Nature of cheque – Mandate – Contract.

Crimes Act 1958 (Vic), ss 71, 81.

Cheques and Payment Orders Act 1986 (Cth) (now *Cheques Act* 1986 (Cth)), ss 25, 71.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. On 7 May 1997, the appellant pleaded guilty in the Melbourne County Court to five counts of dishonestly obtaining property by deception contrary to s 81(1) of the *Crimes Act* 1958 (Vic) ("the Crimes Act"). The offences were committed in the period between May and September 1994.

2 Notwithstanding his pleas of guilty, the appellant applied to the Victorian Court of Appeal for leave to appeal against his conviction. He contended that in all the circumstances there had been a miscarriage of justice within the meaning of s 568(1) of the Crimes Act because, on the admitted facts before the County Court, he could not in law have been convicted of the offences charged¹. The Court of Appeal (Winneke ACJ, Tadgell and Ormiston JJA)² held that in law the appellant could have been convicted and dismissed the application. From that dismissal this appeal is brought by special leave.

The facts and submissions

3 At all material times the appellant was employed by Canyon Bay Pty Ltd ("Canyon Bay") as its "national co-ordinator". The company was engaged in the sale and distribution of imported pens, primarily within Victoria and generally to authorised newsagents in the Melbourne metropolitan area. However, the offences arose from representations by the appellant that Canyon Bay would procure for each of certain newsagents substantial quantities of cheap copy paper from a supplier in South East Asia.

4 The directors and shareholders of Canyon Bay left the running of the business to the appellant. However, between August 1991 and August 1994, the appellant was an undischarged bankrupt and as such could not be a signatory to the company's bank account. The current account of the company was conducted at the Braeside Branch of the Australia and New Zealand Bank Limited ("the ANZ Bank"). The sole signatory was Mr Carl Nessel, one of the directors and principal shareholders of the company. It appears that at the appellant's request, Mr Nessel adopted a practice of signing blank cheques to be completed by the appellant.

5 The appellant represented to the newsagents that he had arranged contracts for the supply of the low priced copy paper to purchasers and that, if the newsagents placed orders for the copy paper, they could take over the benefit of

1 See *R v Tait* [1996] 1 VR 662 at 665-666.

2 *R v Parsons* [1998] 2 VR 478; (1997) 97 A Crim R 267.

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those contracts. These representations were false. However, by means of them, the appellant persuaded the newsagents to make substantial prepayments to Canyon Bay for purchases of the copy paper which the newsagents expected to resell at a profit.

6 The appellant obtained cheques totalling over \$160,000 from five Victorian newsagents and they were paid into the account of Canyon Bay with the ANZ Bank. The representations had been that these funds would be used by Canyon Bay to procure the required copy paper. In fact, no orders for copy paper were made, no supplies of copy paper in commercial quantities were imported and the funds were dissipated. The proceeds of some of the cheques obtained from the newsagents were used to pay legitimate business expenses of Canyon Bay. Many of the Canyon Bay cheques which Mr Nessel had signed in blank were drawn for cash and endorsed for payment in the handwriting of the appellant.

7 The five counts to which the appellant pleaded guilty were drawn in like form. Each specified that the appellant had dishonestly obtained from a named person a cheque or cheques in or totalling particular amounts payable to Canyon Bay with the intention of permanently depriving that person of the cheque or cheques by deception. The deception was identified as false representations relating to the supply by Canyon Bay of certain copy paper. In the Court of Appeal, Winneke ACJ observed that there was no allegation that the cheques were property belonging to the person from whom the appellant obtained them, but said that it must be accepted that the appellant had acknowledged his guilt of this element of the offence under s 81(1)³.

8 Most of the cheques to which the counts referred were payable to Canyon Bay "or bearer" and some of them were bank cheques. The cheques fell into one or other of those classes. The argument in this Court was conducted on the footing that, where a bank cheque was involved, the newsagent in question would have procured the issue by a bank of an instrument made payable to Canyon Bay or bearer and then handed or otherwise delivered that instrument to the appellant. In the other cases, the newsagent drew the cheque on its bank account, made the cheque payable to Canyon Bay or bearer, and handed or otherwise delivered it to the appellant.

9 The Court of Appeal rejected the submission for the appellant that the cheques identified in the five counts to which he pleaded guilty were not property belonging to another, which, by deception, the appellant dishonestly obtained with

3 [1998] 2 VR 478 at 483; (1997) 97 A Crim R 267 at 272-273.

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the intention of permanently depriving the other person of it within the meaning of s 81(1)⁴. Authority for his submission had been said by the appellant to flow from the construction placed by the House of Lords in *R v Preddy*⁵ upon s 15(1) of the *Theft Act* 1968 (UK) ("the Theft Act"). In our view, the Court of Appeal correctly rejected the propositions advanced by the appellant and the appeal to this Court should be dismissed.

The Crimes Act

10 Section 81 was introduced into the Crimes Act by the *Crimes (Theft) Act* 1973 (Vic). It states relevantly:

- "(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
- (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and '**obtain**' includes obtaining for another or enabling another to obtain or to retain."

Section 81 is found in Div 2 (ss 71-192) of Pt 1 of the Crimes Act. Division 2 of Pt 1 of the Crimes Act is headed "Theft and Similar or Associated Offences" and s 81 is headed "Obtaining property by deception". The other offences for which Div 2 provides include obtaining financial advantage by deception (s 82) and falsification of documents (s 83A).

4 [1998] 2 VR 478 at 485-488, 489-491, 491-492; (1997) 97 A Crim R 267 at 274-278, 279-281, 281.

5 [1996] AC 815.

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11 Section 71(1) provides that, in that Division:

"property" includes money and all other property real or personal including things in action and other intangible property".

Further, s 71(2) states:

"In this Division property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest)."

12 The appellant obtained possession or control of the instruments being the respective cheques and bank cheques and therefore, it would appear to follow, he obtained property within the meaning of s 81(1). Further, those instruments had "belonged" to the newsagent who drew the cheque or purchased the bank cheque because, within the meaning of s 71(2), that party had had possession or control of those instruments.

13 However, the appellant submitted that he did not obtain "property belonging to another". The cheques and bank cheques were said to constitute choses in action of the bearer and, because these instruments represented the creation of new property rights, they could never have belonged to the newsagents who drew the cheques and purchased the bank cheques. The appellant further contended that he cannot have had an intention of permanently depriving the drawer of the cheques because, after presentation for payment by the respective banks upon which the newsagents had drawn them, they would be returned to the newsagents and any diversion from that course had not been within the power of the appellant.

The common law

14 A starting point for the consideration of the submissions raised by the appellant with respect to the construction of s 81, including the definition provisions in s 71, is the common law as it had developed with respect to the offence of larceny. It was against that background that various statutory provisions in Victoria and other jurisdictions have been enacted. Those statutory provisions, in particular s 81, remove many of the complexities and distinctions drawn in the common law. To accept the submissions for the appellant would reintroduce some of them into the law of Victoria and the submissions should be rejected.

5.

15 The common law, as understood in Australia, was described by Jordan CJ in *R v Ward*⁶. His Honour said⁷:

"The essentials of the crime of larceny consist of a composite thing made up of the taking away of a chattel belonging to another person, coupled with a purpose on the part of the taker permanently to deprive the owner of the property in the thing taken. If such a taking for such a purpose occurs without the consent of the owner, and not under a genuine claim of right, the crime of larceny is committed: *Lake v Simmons*⁸."

16 Jordan CJ continued by saying⁹:

"Difficulties are apt to occur when, by the fraud of the alleged thief, the owner has been induced to express consent to his having possession of the chattel for some purpose. In such a case the question is whether the circumstances are such that the consent prevents the taking from amounting to larceny.

... If a person, not intending to enter into any real transaction with the owner of a chattel at all, fraudulently induces him to enter into a pretended transaction pursuant to which the owner consents to his taking possession, but not acquiring ownership of it, and he takes possession of it ostensibly for the purposes of the transaction but really with the intention of treating it as his own, then, for the purposes of the criminal law, larceny is regarded as being committed notwithstanding the owner's consent. That consent is regarded as being, for this purpose, void, by reason of the fraud which induced it, irrespectively of whether the bailment would be civilly void: *Lake v Simmons*¹⁰; Pollock and Wright on Possession¹¹.

6 (1938) 38 SR (NSW) 308.

7 (1938) 38 SR (NSW) 308 at 311. Barwick CJ spoke to similar effect in *Croton v The Queen* (1967) 117 CLR 326 at 328, 330.

8 [1927] AC 487 at 511-512.

9 (1938) 38 SR (NSW) 308 at 311-313.

10 [1927] AC 487 at 503-504.

11 at 218-219.

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If English law were a strictly logical system, instead of a body of rules of gradual and not always consistent development, it might have been expected, by parity of reasoning, if the pretended transaction into which the trickster induces the owner to enter is one which, if genuine, would involve the other party acquiring not merely possession but also property in the chattel, and the other party does acquire the chattel in these circumstances with intent to treat it as his own, that, in this case, too, the expression of consent would be regarded as a nullity for the purposes of the criminal law, and the crime of larceny as being committed. But this is not so: Pollock and Wright on Possession¹²; article by C J Hamson¹³. The law of larceny received its definition when society was in a relatively primitive state. The criminal law then protected a man from being deprived of his goods against his will; but from mere cheating he was expected to protect himself. Hence cheating, as such, was not a crime at common law. It followed that, if a man were induced to consent to part with his property in goods to a cheat by a deception, however fundamental, a consent of this kind made the taking not merely not larcenous but not criminal. However fraudulently the proposal may have been made by the cheat, there is no larceny if the owner knowingly gave his consent to that proposal."

Statements are made concerning the fundamental assumption of English law that possession can be usurped despite the intention of the owner of the property whilst property rights are normally not lost without a transfer¹⁴. On a charge of larceny, it is necessary to prove a "taking ... from the prosecutor or from someone whose possession was the possession of the prosecutor"¹⁵. Larceny is described as a crime against possession¹⁶ and is compared with modern statutory offences which establish crimes against the rights of an owner¹⁷.

12 at 219-225.

13 (1935) 51 *Law Quarterly Review* 653 at 656-658.

14 Ferris, "The Origins of 'Larceny by a Trick' and 'Constructive Possession'", (1998) *Criminal Law Review* 175 at 181.

15 *Slattery v The King* (1905) 2 CLR 546 at 554.

16 *Ilich v The Queen* (1987) 162 CLR 110 at 123-124, 134-135.

17 Ferris, "The Origins of 'Larceny by a Trick' and 'Constructive Possession'", (1998) *Criminal Law Review* 175 at 176.

7.

- 17 In *Croton v The Queen*¹⁸, Barwick CJ observed that, apart from special statutory provision, "larceny can only be committed of property which is capable of physical possession and removal" and observed that paper money or coin to a stated face value might properly be the subject-matter of a charge of larceny expressed as a number of dollars. His Honour continued¹⁹:

"But, though in a popular sense it may be said that a depositor with a bank has 'money in the bank', in law he has but a chose in action, a right to recover from the bank the balance standing to his credit in account with the bank at the date of his demand, or the commencement of action. That recovery will be effected by an action for debt. But the money deposited becomes an asset of the bank which may use it as it pleases ... Neither the balance standing to the credit of the joint account in this case, nor any part of it, as it constituted no more than a chose in action in contradistinction to a chose in possession, was susceptible of larceny".

- 18 In *Slattery v The King*²⁰, Griffith CJ said that under English law larceny "was subject to many peculiar rules". Fine distinctions were drawn between choses in action and choses in possession, and between chattels real and chattels personal. Documents relating to the title to land, in particular deeds which would show or help to show a good root of title, and which passed, with the realty itself, to the heir at law²¹ "savour[ed] of the realty" and could not be the subject of larceny²². In 1827, by s 23 of the statute 7 & 8 Geo IV c 29, a misdemeanour was created in respect of the stealing of written instruments, which evidenced the title or part of the title to any real estate. The section required that the writings be taken under such circumstances as would have amounted to a larceny had they been the subject of that felony²³.

18 (1967) 117 CLR 326 at 330.

19 (1967) 117 CLR 326 at 330-331. See also *Grant v The Queen* (1981) 147 CLR 503 at 509.

20 (1905) 2 CLR 546 at 554.

21 See, for example, *Maddison v Alderson* (1883) 8 App Cas 467 at 471.

22 *Halsbury's Laws of England*, 1st ed (1909), vol 9, par 1288.

23 *R v John* (1836) 7 Car & P 324 [173 ER 144].

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8.

19 It was accepted by Parke B in *R v Morris*²⁴ that the chattel the subject of a charge of larceny "must be assigned of some value". In that case, Parke B ruled that it was sufficient to sustain an indictment for larceny of a sheet of paper (a blank form document used to certify quantities of coal) that it had cost more than a farthing to the owner of it²⁵. The ruling by Gurney B in *R v Bingley and Law*²⁶ would suggest that, even if the paper had no intrinsic value, it was sufficient that the paper be of value to the person from whom it had been taken by reason, for example, of it containing a memorandum of a debt owed to that person.

20 On the other hand, it was stated in *Hawkins' Pleas of the Crown*²⁷, under the heading "Things of no intrinsic Value at Common Law, Choses in Action, &c":

"Larceny at common law could not be committed of goods which had not some worth in themselves, and did not derive their value from relationship to some other; thus, bonds, bills, notes, and securities for money, *per se* were of no value, and not the subject of larceny."

East²⁸ said that instruments "which concern mere choses in action, were not the subjects of larceny at common law; being of no intrinsic value, and not importing any property in possession of the person from whom they are taken". Both writers referred to various statutory interventions in the matter, beginning in 1729 with s 3 of the statute 2 Geo II c 25. This deemed to be a felony the stealing or taking by robbery of various instruments including exchequer bills, bank notes, South Sea bonds, East India bonds, bills of exchange, promissory notes "notwithstanding any of the said Particulars are termed in Law a *Chose* in Action".

21 Further statutory intervention followed, particularly in the United Kingdom by the *Larceny Act* 1861 (UK)²⁹. The provisions of that legislation as they affected dealings in bills of exchange and promissory notes were considered in such

24 (1840) 9 Car & P 349 at 350 [173 ER 864 at 864].

25 (1840) 9 Car & P 349 at 352 [173 ER 864 at 865].

26 (1833) 5 Car & P 602 at 603 [172 ER 1118 at 1118].

27 8th ed (1824), vol 1 at 195.

28 *Pleas of the Crown*, (1803), vol 2 at 597.

29 24 & 25 Vict c 96.

authorities as *R v Gordon*³⁰, *R v Bowerman*³¹ and *R v Governor of Brixton Prison; Ex parte Stallmann*³².

- 22 It would not be of immediate profit to consider authorities which construed provisions other than those of the Crimes Act which are in issue here. What is to be derived from the foregoing discussion is some insight into the fashioning of the definition of "property" in s 71(1) and of the definitional material in s 71(2), together with the text of s 81 itself. For example, the statement that the definition of "property" includes things in action is a response to the common law notion that instruments creating or evidencing choses in action could not be the subject of larceny because they were of no "intrinsic value" and did not import any property in possession of the person from whom the instruments were taken. Likewise s 71(2), in stating that property shall be regarded as belonging to a person who has (i) possession or control of it or (ii) any proprietary right or interest in it responds to the distinction to which Jordan CJ referred in *R v Ward*³³ as being drawn by the common law between those tricksters who induced the innocent party to part with possession in a chattel and those who acquired not merely possession but property in the chattel.

The Cheques Act

- 23 Before further considering the application of s 81 of the Crimes Act and the supporting definitions to the facts, it is convenient to consider the legal relationships for which the *Cheques Act* 1986 (Cth) ("the Cheques Act")³⁴ provided in respect of the various cheques and bank cheques, the dishonest obtaining of which was the subject of the counts to which the appellant pleaded guilty.

30 (1889) 23 QBD 354 at 359, 360.

31 [1891] 1 QB 112 at 116, 117.

32 [1912] 3 KB 424 at 445, 449-451. See also J C Smith, "Obtaining Cheques by Deception or Theft", (1997) *Criminal Law Review* 396 at 402-404.

33 (1938) 38 SR (NSW) 308.

34 The short title to the Cheques Act was originally the *Cheques and Payment Orders Act* 1986 (Cth) but by force of s 3 and item 1 of Pt 1 of Sched 1 to the *Cheques and Payments Orders Amendment Act* 1998 (Cth) ("the Cheques Amendment Act") the statute is now to be known as the *Cheques Act* 1986 (Cth).

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- 24 It is convenient first to deal with the particular character of bank cheques. In *Fabre v Ley*³⁵, reference was made in the joint judgment of the whole Court to the practice in Australia for a considerable number of years of bankers issuing what have become known as "bank cheques" at the request of customers who have some reason to provide cash or its equivalent in commercial transactions³⁶. Their Honours said³⁷:

"These are drafts drawn by a bank usually on itself but occasionally upon another bank: in either case they are issued in the form of cheques. It has been questioned whether a draft of this kind is a cheque within such a provision as s 78 of the *Bills of Exchange Act*³⁸. The question arose because the definition of cheque incorporates that of bill of exchange and a cheque drawn by a bank upon itself is not 'addressed by one person to another' within the latter definition (which is now contained in s 8(1) of the *Bills of Exchange Act*): see *McClintock v Union Bank of Australia Ltd*³⁹. In 1932, s 88A was inserted in the *Bills of Exchange Act* making a banker's draft payable on demand drawn by or on behalf of a bank upon itself a cheque for the purposes of the crossed cheque provisions of the *Bills of Exchange Act*. However, although it may be more accurate to refer to a bill of exchange drawn by a bank on itself as a banker's draft, the nomenclature 'bank cheque' is, and has for long been, used in Australia to describe instruments of this kind."

- 25 The Bills of Exchange Act has not, since the Cheques Act came into operation, applied to an instrument to which the Cheques Act applies⁴⁰. However, s 5(1) of the Cheques Act provides that, with certain specified exceptions, and

35 (1972) 127 CLR 665.

36 (1972) 127 CLR 665 at 670.

37 (1972) 127 CLR 665 at 670-671. See also Weerasooria, "The Australian Bank Cheque – Some Legal Aspects", (1976) 2 *Monash University Law Review* 180.

38 Section 78 of the *Bills of Exchange Act* 1909 (Cth) ("the Bills of Exchange Act") identifies a cheque as a bill of exchange drawn on a banker payable on demand.

39 (1920) 20 SR (NSW) 494.

40 Sections 2 and 3 of the *Bills of Exchange Amendment Act* 1986 (Cth).

unless the contrary intention appears, a reference in that statute to a cheque includes a reference to a bank cheque or a bank draft⁴¹.

26 Secondly, the cheques themselves were, within the meaning of the definition in s 10 of the Cheques Act, unconditional orders in writing addressed by the newsagent concerned to its bank, signed by the newsagent and requiring the bank to pay on demand a sum certain in money. The cheques were not wanting in any material particular necessary to render them complete on their face, and so were not inchoate instruments (s 18). Rather, they were bearer cheques and thus were to be taken to require the bank to pay the sum ordered to be paid by the cheques to bearer (s 22).

27 Thirdly, the drawing of the cheques did not of itself operate as an assignment of funds available in the hands of the drawee bank for the payment of the cheque (s 88). As indicated by Barwick CJ in the passage from *Croton v The Queen* set out earlier in these reasons, the right of the drawer to recover from the bank the balance standing to the credit of that party in the account with the bank was a chose in action but the effect of s 88 is to emphasise that the drawing of a cheque does not of itself operate as an assignment of that chose in action or of part thereof. Rather, the generally accepted concept of a cheque is that of a "mandate", addressed by the drawer to the banker directing the banker to effect a *pro tanto* satisfaction of the indebtedness of the banker to the drawer by honouring the cheque drawn on the banker⁴². In this sense, a cheque "is merely a mandate, not a transfer of rights"⁴³.

28 Fourthly, in its character as such a mandate, the bearer cheques, once drawn, and even in advance of delivery, had intrinsic value as instruments whereby the sums they specified might be drawn from the banks in question⁴⁴.

41 Section 5 was repealed on 1 December 1998 and a fresh s 5 substituted by s 3 and item 13 of Pt 1 of Sched 1 of the Cheques Amendment Act but nothing turns upon this change for present purposes.

42 See Weaver and Craigie, *The Law Relating to Banker and Customer in Australia*, vol 2, par 9.400.

43 Tyree, *Banking Law in Australia*, 3rd ed (1998), §5.92.

44 cf *Morison v London County and Westminster Bank, Limited* [1914] 3 KB 356 at 379.

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12.

29 Fifthly, arising out of the drawing of the cheque, there was, by force of the Cheques Act (ss 25, 71), a contract, incomplete and revocable until delivery, whereby the drawer, the newsagent in question, undertook to compensate the holder or an indorser of the cheque who was compelled to pay it if it were dishonoured when duly presented for payment⁴⁵. Further, s 76 provides that, where a cheque (including by dint of s 5(1) a bank cheque) is dishonoured, the holder, being the bearer in respect of cheques payable to bearer, may recover as damages, from any person liable on the cheque, the face value of the cheque and the amount of interest that in accordance with Regulations made under the Cheques Act is payable in respect of that sum⁴⁶.

30 In *R v Preddy*⁴⁷, Lord Goff of Chieveley said:

"I start with the time when the cheque form is simply a piece of paper in the possession of the drawer. He makes out a cheque in favour of the payee, and delivers it to him. The cheque then constitutes a chose in action of the payee, which he can enforce against the drawer."

The reference in that passage to the chose in action of the payee which can be enforced against the drawer is to be understood, in the Australian context, by reference to ss 25 and 71 of the Cheques Act. However, as indicated in the points made above, a cheque has characteristics which render it more than a chose in action held by the payee against the drawer. The submissions by the appellant rested upon a contrary assumption, and that should not be accepted in construing s 81 of the Crimes Act.

31 Moreover, the Cheques Act speaks, for example in s 116, of an action or proceeding being brought in a court "on a cheque", and provision is made in s 116

45 Section 3(1) defines "holder" as meaning:

- "(a) in relation to a cheque payable to order – the payee or an indorsee who is in possession of the cheque as payee or indorsee, as the case may be; and
- (b) in relation to a cheque payable to bearer – the bearer".

46 The entitlement to interest is subject, by s 76(2), to the power of the court, if it be of opinion that justice so requires, to direct that the interest be withheld in whole or in part. Damages recoverable under s 76 are deemed to be liquidated damages (s 76(3)).

47 [1996] AC 815 at 835. See also at 836-837.

whereby, on terms, the court may order that the loss or destruction of the cheque not be set up as a defence. Further, it is the cheque as an item *in specie* which is essential to the operation of negotiability. So, in the present case, every cheque, including any bank cheque, might be transferred by negotiation until it was discharged, the transfer being from the holder to another person in such manner as to constitute that other person the holder within the meaning of the Act (ss 39, 40)⁴⁸.

32 In addition, in respect of wrongful dealings by a third party with those instruments (including dealings with bank cheques⁴⁹), for example dealings by a collecting bank, the "true owner" would have its rights for damages in an action for conversion of the chattels in question⁵⁰. In *Marfani & Co Ltd v Midland Bank Ltd*⁵¹, a fraudulent employee of the plaintiff company obtained through the medium of the collecting bank payment to himself of a cheque drawn by the plaintiff on its bank in favour of another party as payee. Diplock LJ observed⁵² that it might seem odd that the basis of the liability of the collecting bank was that a piece of paper on which the cheque was written was "goods" belonging to the plaintiff and that the act of the collecting bank in accepting possession of that piece of paper from the employee, in presenting it to the drawee bank and in accepting payment of it, constituted an unjustifiable denial by the collecting bank of the title of the plaintiff to its goods, from which damage flowed. His Lordship pointed out that this result, however, was the common law of England. It was the consequence of the application of the historic origin of the tort of conversion to negotiable instruments by treating them as "goods".

33 This development of the common law by treating as the chattel converted the piece of paper representing the cheque and the value of the chattel converted as the money received in payment of the cheque suggests some weakness in the earlier

48 Sections 39 and 40 are not included among those provisions specified in s 5(1) as not to be read as referring to bank cheques.

49 See *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 587; *Yan v Post Office Bank Ltd* [1994] 1 NZLR 154 at 160.

50 There might also be, in such circumstances, an action for money had and received: *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251 at 264.

51 [1968] 1 WLR 956; [1968] 2 All ER 573.

52 [1968] 1 WLR 956 at 970; [1968] 2 All ER 573 at 577.

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14.

analysis, by such authorities as East⁵³, that securities, including bills of exchange, which concern mere choses in action were not the subject of larceny at common law because they were of no intrinsic value and did not import any property in possession of the person from whom they were taken. However that may be, there is every reason not to reinstate now such an analysis when construing the terms of the Crimes Act, in particular the definition of "property" in s 71(1).

Section 81(1) of the Crimes Act and the present case

34 The contracts arising by operation of ss 25 and 71 of the Cheques Act in respect of the bank cheques had been rendered complete and irrevocable upon their delivery to the newsagent by whom they had been purchased. There is thus no scope for any argument that when, in turn, possession and control of the bank cheques was taken by the appellant there was no pre-existing "choses in action" which the holder could enforce against the drawer, here the bank of the newsagent concerned.

35 As to the cheques, at the time of their delivery to the appellant by the newsagents who had drawn them on their banks, the law of negotiable instruments now represented in the Cheques Act imparted to the cheques various legal characteristics giving them then a value beyond what otherwise was their quality as mere pieces of paper. The cheques, being complete in form, contained a mandate by the respective drawer to its bank to reduce the credit of its account by payment in favour of a person answering the statutory description of a holder. Further, arising out of the drawing of the cheques, there was, albeit incomplete and revocable until delivery, the contract by the drawer referred to in ss 25 and 71 of the Cheques Act.

36 It follows that both the bank cheques and the cheques, at the time they were, by a deception, dishonestly obtained by the appellant, were property within the meaning of the definition in s 71(1) of the Crimes Act. These instruments were property belonging to the newsagents within the meaning of s 71(2) because the newsagents had possession or control of them and, in accordance with the above analysis, also had proprietary rights or interests therein.

37 Possession or control of these instruments was "obtained" by the appellant and the terms of s 81(2) make it plain that it is no denial of that proposition to say (if it had been the case) that the appellant did so "for" Canyon Bay into whose account with the ANZ Bank the instruments were deposited. Further, the

53 *Pleas of the Crown*, (1803), vol 2 at 597.

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characteristics which the Cheques Act and the law with respect to conversion attached to the instruments in the hands of a bearer would support the conclusion that there was also an obtaining of what in s 81(2) is called "ownership".

38 However, the appellant submitted that he could not have had the intention of permanently depriving the newsagents of these instruments so that, on that ground alone, the elements of the offence in s 81(1) were not satisfied. The appellant founded this submission upon the observation in *R v Preddy*⁵⁴:

"[T]here can have been no intention on the part of the payee permanently to deprive the drawer of the cheque form, which would on presentation of the cheque for payment be returned to the drawer via his bank."

The appellant here proceeded upon an assumption as to an identity between banking law and practice in England and in Australia. As to the former, in *Charles v Blackwell*, Cockburn CJ said⁵⁵:

"A cheque taken in payment remains the property of the payee only so long as it remains unpaid. When paid the banker is entitled to keep it as a voucher till his account with his customer is settled. After that, the drawer is entitled to it as a voucher between him and the payee."

⁵⁴ [1996] AC 815 at 836-837.

⁵⁵ (1877) 2 CPD 151 at 162-163.

Gleeson CJ
Gaudron J
McHugh J
Gummow J
Hayne J

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Earlier, in *R v Watts*, Wilde CJ had said⁵⁶:

"It has always been held that a cheque when paid belongs to the drawer, and that he has a right to have it delivered up to him; and on this ground notice to produce a cheque, which had not been returned from the banker, was held sufficient to warrant the admittance of secondary evidence of its contents."

However, in Australia, banks have asserted the right to retain possession of paid cheques, apparently on the footing that this is an ordinary incident in this country of the relationship between banker and customer⁵⁷. In any event, it is not the practice that cheques be returned, after they have been honoured, to the drawer by the drawer's bank.

39 Section 68 of the Cheques Act makes provision with respect to the matter which, for present purposes, is inconclusive. Once the drawee bank obtains possession of the relevant cheque, it must retain it unless possession is claimed by the drawer. In that case a copy must be kept for seven years after the date of the cheque (s 68(3A))⁵⁸. However, that obligation is stated not to be taken to affect any right that the drawer has against the drawee bank to possession of the cheque (s 68(5)(a)).

40 Accordingly, it may be doubted whether the appellant could deny any intention on his part permanently to deprive the newsagents of the cheques on the footing that, on their presentation for payment by the ANZ Bank as collecting bank for Canyon Bay, the cheques would in the ordinary course be returned to the newsagents by their banks. Nor, in any event, would the English law and practice upon which the appellant relies appear applicable to the bank cheques which he obtained.

56 (1850) 19 LJMC 192 at 195 (*arguendo*). See also *Lever v Maguire* [1928] VLR 262 at 264.

57 See Tyree, *Banking Law in Australia*, 3rd ed (1998), §5.121.

58 Section 68(3A) was repealed on 1 December 1998 and a fresh s 68(3A) substituted by s 3 and item 24 of Sched 2 to the Cheques Amendment Act but nothing turns upon this change for present purposes.

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41 Further, as Tadgell JA pointed out in the Court of Appeal⁵⁹:

"The slip of paper that is returned to the drawer's bank has ceased to be a valuable security. Rather, it has become a record of what the valuable security was."

Applying this reasoning to the terms of s 81(1) of the Crimes Act, and their application to the instruments with which this case is concerned, the intention spoken of in that provision is one of permanently depriving "the other", namely the newsagents, of those instruments by putting them to a use which will leave them spent and deprived of those characteristics which led or significantly contributed to their classification as property⁶⁰.

Conclusion

42 The appeal should be dismissed.

59 [1998] 2 VR 478 at 491; (1997) 97 A Crim R 267 at 281.

60 cf J C Smith, "Obtaining Cheques by Deception or Theft", (1997) *Criminal Law Review* 396 at 403-405.