

This is an action by the Commonwealth of Australia against William Milne, Andrew Milne and Martin Luther Milne trading under the name of Milne Bros.

The plaintiff's claim as endorsed on the writ is:-
"for the sum of twenty-nine thousand six hundred and sixty-two pounds
"eleven shillings and five pence (£29,662:11:5) being money payable by
"the defendants to the plaintiff for money received by the defendants
"for the use of the plaintiff, particulars whereof are as follows:-

"To amount paid by the plaintiff to the defendants for certain goods falsely and fraudulently represented by the
"defendants to have been supplied by the defendants to the
"Commonwealth Naval Dockyard, Cockatoo Island, Sydney, in
"the State of New South Wales between the first day of November in the year one thousand nine hundred and seventeen,
"and the first day of August one thousand nine hundred and
"nineteen which said goods were not supplied by the defendant
"to the said Dockyard".

No pleadings were filed in the action. By an interlocutory order made on the 27th. July last the Chief Justice directed that the issue (a) of payment of money to the defendant William Milne and (b) of non-delivery of goods in respect of which such money is alleged to have been paid be tried by a jury of four the form in which these issues are left to the jury to be settled by the justice before whom the action is tried.

At the trial before me I settled the issues as follows:- (1). Whether the sums mentioned in the particulars or any of them were paid by the plaintiff to the defendant William Milne, (2). whether any part of such money was paid for goods not delivered to the plaintiff.

On the 6th. day of trial counsel consented to the discharge of the jury and to the determination of the issues by me. No evidence was given on behalf of the defendants and ^{the} counsel did not address me on the facts. I found that the sum of £29,662:11:5 ^{was} ~~were~~ paid by the plaintiff to the defendant, William Milne, and that this sum was paid for goods not delivered to the plaintiff. I entered judgment against William Milne for this amount, with costs.

The question of the liability of the other defendants was then argued and I reserved judgment.

The relevant facts from which this question emerges are shortly as follows:-

From November 1917 to August 1919 - the period covered by the payments mentioned - the Naval Dockyard at Cockatoo Island was engaged in building refitting and repairing ships. For these purposes a variety of articles are required such as are supplied by engineers machinery and metal merchants. The defendants at this time were carrying on in co-partnership such business, and were contractors to the Dockyard for the supply of such requisites as are used in the construction and repair of ships. The course of business adopted at the relevant times by the dockyard authorities in connection with the supply of goods by contractors was as follows:- A written order for goods was sent to the firm signed by the stores officer. In due course these goods came to the Dockyard by lighter as a rule and were either accompanied by a contractor's invoice form in triplicate, or that form followed very

shortly afterwards. The storeman gave the lighterman a receipt for a number of packages, the goods were taken into the receiving room ~~and~~ in the stores, where they were checked by the receiving storehouseman and the staff and the receiving storehouseman then signed the original and duplicate C.I. form. The triplicate C.I. ~~form~~ is the form of receipt to the contractor and is signed only by the store officer. While in the possession of the receiving storehouseman the goods were examined by the inspecting officer, who signed the CI's as to quality.

Next, the goods together with the C.I's were taken to the section of the store where they are stored away. The sectional storehouseman, after checking the goods and putting them into proper bins signed the original and duplicate C.I to the effect that the goods mentioned had been taken on charge. The goods remained in the store and the C.I.^s in triplicate were sent to the stock ledger clerk and by him posted into the stock ledger. Thence they went to the store officer who signed all three. The triplicate was in form a receipt addressed to the contractor, to whom it was returned.

The duplicate remained in the Store Office, and the original was sent to the costing office in the Accounts Branch.

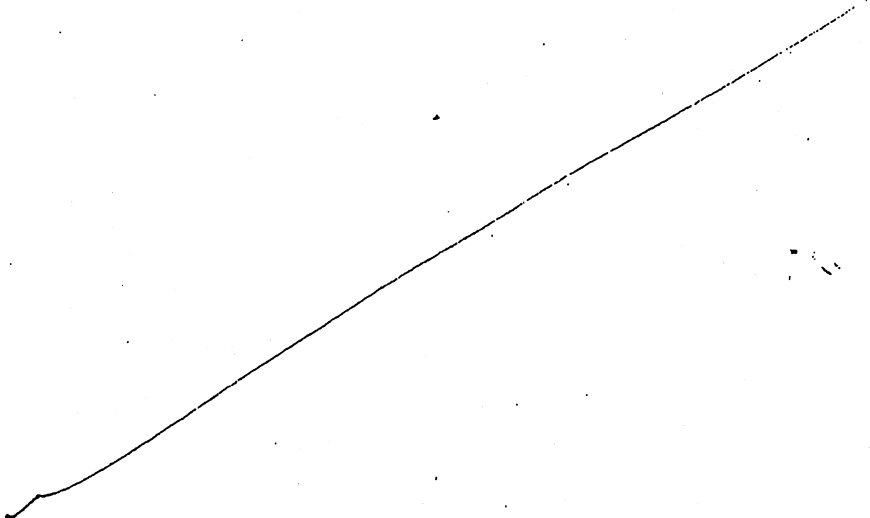
Then the contractor renders his voucher in duplicate - a Commonwealth Contingency Voucher in common form - for the goods which he had delivered. ⁷⁶~~that~~ he prepared³ himself, signs it as claimant and sends it to the dockyard. There it went first to the examining branch for registration and thereafter was sent by the examiner to the Store officer in order that the Certificate ^a as to correct delivery of the goods &c. might be given. At the Store the duplicate C.I. was attached to the voucher; The ledger clerk certified on the voucher that the goods enumerated thereon ^{in the Store accounts.} had been received and taken on charge. The documents then went to the Store Officer who affixed his certificate to the voucher as the "person incurring the expenditure". From the Store Officer the voucher was returned to the examiner of accounts, who marked it back in his books and, with his staff, checked it arithmetically.

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and generally against the quotation for the goods, the order, and the requisition; seeing also that the rate and extensions were correct. His duty was also to mark off in the office copy of the rota of orders full particulars of all accounts so that no duplicate payment in respect of that order might be made. After examination and any necessary alterations on the arithmetical side, the examiner and his officers initialled the voucher as certificate of the correctness of the calculations &c. and ~~thereas~~ sent it to the costs office where it was checked to see that ~~the~~ the expenditure had been accounted for under the various headings - the voucher and original C.I. were compared and checked in all particulars including particulars of goods ordered and the amount paid. . This done, the costing clerk ~~xxx~~ certified on the duplicate copy of the voucher that everything was in order and sent the vouchers back to the examiner, who, if there ^{was} ~~are~~ several claims by one firm, ^{made} ~~XXXX~~ out a summary in the form of what is known as a covering voucher and prepared the

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account for the certificate of the certifying officer and for final payment. The sub-vouchers, with the covering voucher or summary, were then sent to the certifying officer who would personally scrutinize them. His duty was to see that each step had been taken as regards the voucher, and that the initials of the officer supporting each step appeared thereon. Providing everything was in order the account was certified and approved for payment. The paymaster thereupon drew the cheque.



Towards the end of 1917 one of the defendants, William Milne, who it appeared usually represented the firm of Milne Bros. in its business with the Dockyard, discussed with one Blake, an officer of the Crown and Examiner of Accounts at the Island, the means whereby advantage could be taken of the methods employed there to defraud the Commonwealth. He learned from Blake that the stock-books had been done away with and C.I.s used in their place, and that thereby a proper account of the stock could not be kept. ^{He was} ~~there~~ thereupon suggested that money might be made by adding to genuine C.I.s and Vouchers for goods actually supplied ^{quantities or} additional lines of goods which were not delivered. At that time the dockyard required an enormous amount of material for war purposes, and orders were given for very large quantities. In many cases, owing to the exigencies of war conditions, goods were delivered piecemeal, and thus many separate deliveries would be referable to the same Order Number. Blake lent his assistance, and the plan they followed was as follows:

At night, or at other times when the office staff had gone, Blake went to the office of Milne Bros. and in William Milne's presence prepared the necessary documents. First he typed out a C.I. in triplicate and a voucher in duplicate to accord therewith showing the order number and the proper amount of goods ~~supplied~~ supplied. As a rule no extension of the cost was made at that time in the C.I. and in many cases in the voucher the extension for the genuine transaction was incorrectly made so as to enable a correct extension to be made when the amount of goods was altered. The voucher was then signed by William Milne as claimant. The ~~documents~~ documents then went to the Island in the usual course of business. Blake next would appropriate the original C.I. from the costs office and the voucher from the store. At that time they would ^e have the certificates of the stores officer as to the delivery of the goods, the quantity and the rate. The voucher also bore at that time the certificate of the stores officer that the account was correct as

to "computations, castings, rates of charge, and faithful performance of services charged", though, by arrangement at the Island all responsibility for the correctness of the extensions in the money column and for the additions was left to the examiner (Blake) who did not handle the voucher until after the stores officer had signed it. ^{Blake} ~~He~~ then took them back to Milne's office, and in the latter's presence either increased the amount of the goods already shown and certified, or added new lines of goods, or both. In case of the additions of new lines a reference was always given to a genuine ^{order} number.- The order books covering the period during which these transactions took place together with all the duplicate vouchers and many of the original C.I.s were destroyed by Blake prior to the discovery of the frauds.- The correct extensions were ~~then~~ put in the money column and the voucher totalled. Blake then took the documents back to the Island, replaced the original C.I. in the costs office and the voucher in the store. Thence the

latter came to him in the course of his duty, was initialled by him, by one of his assistants endorsed "calculations correct", and passed on to the costs office where it was checked with the original C.I., and by the costs office passed on ^{to} the certifying officer for payment. In due course a covering voucher for a number of these sub-vouchers was prepared at the Island and the ~~sum~~^{cheque} was paid to William Milne who signed the receipt on behalf of the firm. It was customary at the Island to pay contractors only once a month on 21st, and payment was usually made by crossed cheque. William Milne however represented to the paymaster that he wanted his money quickly and he was paid more frequently. He represented also that ^{firm} he was working on an over draft account which had been exceeded, and that he would like his cheques left open as he had to pay wages and was afraid to let the cheque go through the bank as they would not allow him to draw against it. On these representations he was paid by open cheque until, towards the end of the period of the *1st*

a regulation was issued compelling payment of all accounts by crossed cheque to order. Three of these latter cheques were handed to William Milne who paid them to his private account. A certified copy of William Milne's account with the Commonwealth Bank showed that it was not over drawn on any occasion during the relevant period, while examination of the firm's books and bank pass book showed the cheques for wages were invariably drawn on the firm's account which was kept at the London Bank of Australia.

When the cheques were opened they were cashed across the counter at the Commonwealth Bank, the amount for the genuine transaction was then paid by William Milne in cash to the credit of the firm's account with the London Bank of Australia and the balance to his own private account. In the case of crossed cheques they were paid to William Milne's private account, and subsequently the amount due for the genuine transactions was withdrawn and paid in cash into the partnership account. The firm's books disclosed

full particulars of the genuine ~~transactions~~^{but} ~~and~~ nothing of the fraudulent ~~transactions~~.

In December 1920 the defendant William Milne ~~xxx~~ and Blake were charged at the Central Criminal Court with conspiring together and with persons unknown to defraud the Commonwealth. Both were convicted, Milne being sentenced to two years imprisonment and Blake ~~x~~ to one year. On that occasion, as on this, Blake was called by the Crown and gave evidence against Milne.

Of the cheques paid to William Milne in respect of claims by vouchers which are the subject of this action about £2000 represented payment for goods actually delivered and £29,662-11-5 payment ~~xxxxxxx~~ fraudulently obtained for goods not delivered.

No evidence was adduced by the plaintiff to prove that the defts. Andrew Milne and Martin Luther Milne were parties to or cognisant of these ^{then} frauds. I must therefore treat them as innocent parties. The claim ^{as} against them is that as partners they are, notwithstanding their innocence of the frauds, responsible by virtue of the partnership for the ~~consequences~~ consequences of the wrong doing of the defendant William Milne. Counsel for the defendants A. Milne and Martin Luther Milne admitted that if the frauds had been committed in the first sending in of the contractor's notes and vouchers to the dockyard their clients would on the authority of Lloyd v Grace Smith and Co. 1913 A.C. 716 have been liable. They contended, however, that when the crime was committed the defendant W. Milne ceased to be the agent of the firm and in support of this contention cited Mintz v Silverton 36 T.L.R. 399. Under the N.S.W. Partnership Act 1892 a partner is liable for the fraud of his co-partner. No doubt the co-partner in order to make the firm liable must have been acting in the ordinary course of ^{the} business of the firm. The question, therefore, is whether the defendant William Milne was acting in the

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ordinary course of the business of his firm. There is no dispute that in selling goods to the dockyard and getting payment for them William Milne was acting for his firm in the ordinary course of his business. The distinction sought to be set up by the other defendants is that although William Milne was the agent of the firm for the purpose of putting in vouchers for payment in the first instance his work in that respect for the firm was completed once the voucher was lodged and that accordingly any conspiracy between William Milne and Blake to tamper with the vouchers in order to obtain over-payments was so far as the partnership was concerned to be regarded as the act of strangers to the partnership. This contention seems to me not warranted by the facts. W. Milne was not merely agent of the firm to put in the claims but also to get the claims paid. The fraudulent ~~steps~~ steps he took were taken for this purpose. I, therefore, hold that the defendants' contention cannot be supported on the facts.

I would add that the endorsement on the writ contains so to speak two counts - one for money ^{by the D.K. for the use of the plaintiff} ~~had and~~ received and the other for false representations. The plaintiff's claim can in my opinion, be

supported on both counts. I give judgment for the amount claimed with costs against all the defendants.

W. Moorey
Associate

24/5/21.