[FULL BENCH.]

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Present : Pereira J., Ennis J., and Shaw J.

DODWELL & CO. *v.* JOHN *et al.*

461—D. C. Colombo, 35,626.

Manager paying his personal debts by cheques drawn upon his master's account without authority—Is master entitled to recover the value of cheques from payee?—Prescription—Discovery of manager's fraud by master several years after the commission of fraud—When does prescription begin to run?—Joint stock company having registered office in England—Manager carrying on business in Ceylon—Is company a "person" "absent beyond the seas"?—Concealed fraud.

The manager of plaintiff company drew upon the plaintiff company's banking account, without their authority, two cheques in June and October, 1909, and two cheques in May, 1910, and delivered the same to defendants in payment of his personal liabilities. The plaintiff company discovered the fraud in October, 1911, and brought this action to recover the value of the cheques from defendants within two years from that date.

Held, (1) That the defendants had acquired no right to the money represented by the cheques, and were liable for the amount of them to plaintiff company.

Held, (2) *per* PEREIRA J. and SHAW J. (*dissentiente* ENNIS J.). That plaintiffs' claim was not prescribed in the circumstances of this case.

Per ENNIS J. and SHAW J.—The plaintiffs' claim falls under section 10 of the Prescription Ordinance.

Per PEREIRA J.—The present claim does not fall under section 10. It can only be brought under section 11.

Per PEREIRA J. and SHAW J.—A person seeking relief from prescription on the ground of concealed fraud is entitled to avail himself in all cases (and not only in cases relating to real property) of the fraud, not only of the defendant himself, but of any person through whom he claims.

A joint stock company registered in England and carrying on business in Ceylon under the management of a local manager is not a person absent beyond the seas within the meaning of the Prescription Ordinance.

APPEAL from the judgment of the Acting Additional District Judge of Colombo (T. F. Garvin, Esq.).

The plaintiff company was a joint stock company registered in London and having its chief office there. Their business in Ceylon

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was carried on by R. H. Williams, who was appointed manager under a power of attorney. R. H. Williams bought rubber shares for himself from the defendants, who were share brokers, and for certain of these shares he paid the defendants cheques drawn by him on the plaintiff company's banking account at the Hong Kong and Shanghai Bank. Two of these cheques were dated June and October, 1909, and two May, 1910. They were signed: (1st and 2nd) "Dodwell & Co., Ltd., R. H. Williams, Acting Manager," and (3rd and 4th) "Dodwell & Co., Ltd., R. H. Williams, Manager." In October, 1911, the plaintiff company discovered these frauds. Williams was promptly prosecuted thereafter. Williams was also declared an insolvent, and the plaintiff company proved their claims against him and obtained a dividend of 2½ per cent. In January, 1913, the plaintiff company brought the present action against the defendants for the recovery of the amount of the cheques.

Bawa, K.C. (with him *F. J. de Saram* and *Canekeratne*), for the plaintiffs, appellants.—Williams had no authority to draw cheques upon the plaintiff company's banking account for paying his personal debts. On the face of the cheques it was clear that Williams was paying plaintiff company's money and not his own. The defendants cannot retain plaintiffs' money, which had been unlawfully paid to them. *The London Joint Stock Bank v. Simmons*[1] *Morison v. The London County, and Westminster Bank, Ltd.*[2]

The plaintiffs' claim is not prescribed. The plaintiff company is a joint stock company having its registered office in London. The plaintiff company is therefore a person who is "absent beyond the seas," and can therefore claim the bar against prescription under section 15 of the Prescription Ordinance. The term "person" includes a corporation: see Ordinance No. 22 of 1901, section 3 (*b*). The registered office of a company is the place where it resides. (*Dicey, Conflict of Laws, 154-156.*) The appointment of an agent in Ceylon does not put an end to the disability. (*9 N. L. R. 368, 11 N. L. R. 95, 5 Moore's Indian Appeals 234.*)

The plaintiffs' claim does not fall under section 10 of the Prescription Ordinance. Section 10 refers only to actions for personal injuries—"injury, loss, or damage." If it were intended to include all actions for tort, the word "damages" would have been used. *Williams v. Baker*[3] ought not to be followed. An action for wrongful conversion falls within section 11.

The plaintiff company discovered the fraud in October, 1911, and prescription did not therefore commence to run till then. *Halsbury's Laws of England, vol. XIX., p. 172; Gibbs v. Guild.*[4] The plaintiff may seek relief, not only against the person who has himself perpetrated the fraud, but against those who claim under him. See *Huguenin*

[1] (1892) *A. C. 201.*
[2] (1914) *3 K. B. 356.*
[3] *8 S. C. C. 165.*
[4] (1882) *9 Q. B. D. 59.*

v. Baseley,[1] *McCullum v. McCullum*,[2] *Thorne v. Heard*,[3] *Bowen v. Evans*,[4] *Shofield v. Templar*.[5]. To constitute concealed fraud it is not necessary that there should be active concealment. *Oelkers v. Ellis*,[6] *Bull Coal Mining Co.*[7]

Elliott (with him *Drieberg* and *Hayley*). for defendants, respondents.—The action is prescribed. The plaintiff company had a manager here who had full powers. The plaintiff company cannot be said to have been absent beyond the seas.

In any case section 15 of the Prescription Ordinance cannot apply to a corporation or a joint stock company. The context shows that the word " person " in sections 14 and 15 refers to a natural person or human being; the disabilities referred to are " infancy, idiotcy. unsoundness of mind, lunacy, or absence beyond the seas. " The section also speaks of the " death " of the person. The claim falls under section 10, and is prescribed. See *Williams v. Baker*.[8]

An action for money had and received would not lie, as the defendants merely received the money as agents and paid it over to the vendors. In an action for money had and received the plaintiffs must acknowledge that the receipt of the money was lawful; and if the receiver paid it over, he is not accountable to the owner of the money.

Fraud to operate as a bar to prescription should be the fraud of the person who pleads the statute as a bar. See *Pollock on Torts, 8th ed., p. 213; Kerr on Fraud, 4th ed., p. 346.*

Plaintiffs had knowledge of the transaction before 1911. The plaintiffs have already got judgment against Williams in the insolvency proceedings, and they cannot therefore sue the defendants now.

The judgment in the insolvency proceedings is a bar to this action.

There is evidence in this case to prove the custom that the manager of a business may draw cheques on his master's account to pay his personal debts.

Bawa, in reply.—Payment is a defence to an action for money had and received only when the principal pays money to a person for the purpose of being paid over to another. If Williams brought an action against the defendants such a plea may be good. Moreover, the defendants were not agents. Williams owed them money, and they sent the cheque to their own account.

Proof in insolvency proceedings of the claim is not a bar to proceedings against the defendants. Plaintiffs got a very small dividend, and they are entitled to get the balance from the defendants. *4 Maasdorp 13, 14*: Suspicion is not a sufficient ground to take away the right to equitable relief on the ground of fraud. *17 Bombay 341*

Cur. adv. vult.

[1] *14 Ves. Jun. 273.*
[2] *(1901) 1 Ch. 143.*
[3] *(1895) A. C. 495.*
[4] *(1846) 2 H. L. C. 257.*
[5] *1 Johns. 155.*
[6] *(1914) 2 K. B. 139.*
[7] *(1899) A. C. 351.*
[8] *8 S. C. C. 165.*

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March 8, 1915. PEREIRA J.—

The plaintiff company sue the defendants to recover from them the amounts of four cheques drawn on the Hong Kong and Shanghai Banking Corporation, Colombo, by one R. H. Williams as manager of the plaintiffs' business in Colombo.

The dates and amounts of the cheques respectively are as follow:—15th June. 1909, Rs. 11,517.50; 12th October, 1909, Rs. 20,102.50; 3rd May, 1910, Rs. 67,500; 5th May, 1910, Rs. 46,740.

The first question in the case is whether Williams had the authority to sign the cheques on behalf of the plaintiffs. The cheques are signed as follows:—(The 1st and 2nd) " Dodwell & Co., Ltd., R. H. Williams, Acting Manager, " and (the 3rd and 4th) " Dodwell & Co., Ltd.. R. H. Williams, Manager. "

The plaintiffs are a joint stock company registered in England under the Joint Stock Companies Acts, having its registered office in London.

Williams was the manager of the plaintiffs' business in Colombo under (from and since 1905) the authority of a power of attorney dated the 28th December, 1905.

The first issue framed in the case appears to me to be the most important, namely, whether the cheques were drawn or delivered by Williams wrongfully and unlawfully and without authority from the plaintiff company.

As regards this main issue, if it is to be answered in the negative, the law (and here there appears to me to be no difference between the English law and the Roman-Dutch) is that embodied in the rule set forth by Lord Herschell in the case of *The London Joint Stock Bank v. Simmons*,[1] which is cited by the District Judge in his judgment, that is to say, when a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against the owner, though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. The exception to the general rule in the case of negotiable instruments mentioned by Lord Herschell has no application to the present case. It refers to the negotiation of negotiable instruments in which the party liable appears with certainty on the instrument itself. True, as held in the case of *Lloyd's Bank Co. v. Cooke*,[2] according to the definition given in section 31, sub-section (1), of the Bills of Exchange Act, the expression " negotiation " would apply even to the original operation of transferring a bill to the payee; but the liability of any person depends on the fact that there is no doubt as to the execution by

[1] *(1892) A. C. 201*

[2] *(1907) 1 K. B. 794.*

that person of some part of the instrument. In the present case the plaintiffs do not admit having issued the cheques in question; and if Williams had no authority to bind them in the matter of these cheques, it is clear that, subject to the conditions mentioned in the rule laid down above, they would on no account become liable to any holder into whose hands the cheques might come in the course of negotiation.

The question, then, is whether Williams had authority, actual or ostensible, to issue the cheques in question in the plaintiffs' name for the payment of his own debts, and if he had no such authority, whether there is, as contended by the defendants' counsel, a trade usage that justified the use of these cheques.

As regards a trade usage, the evidence is of the flimsiest possible character. The evidence of Mr. Wardrop on the point does not prove the existence of any such usage. He says that in the case of his own company, in order to encourage thrift, European officers are allowed to open deposit accounts with the company, on which they are allowed 6 per cent. interest, and that he is not aware of any extensive practice of the payment of their private debts by managers with firm cheques, except when there is such a deposit system. As regards the other evidence on this head, I need only refer to the observations of the District Judge. It is clear that the so-called usage pleaded is not notorious, certain, or reasonable. Moreover, usage can only apply to admitted contractual relations, but there was no such relation between the plaintiffs and the defendants. The defendants might have taken advantage of a custom similar to the alleged usage, but no such custom has been proved or pleaded.

Then, as regards actual authority, I am quite at one with the District Judge in thinking that within the four corners of the power of attorney P 2 there is no power given to Williams to apply the plantiffs' funds towards the payment of his own private debts, nor is there any evidence at all that the plaintiffs held Williams out as an agent having such power, or that they ratified his action in issuing the cheques in question; and on these points I agree with the District Judge in the conclusions arrived at by him.

The cheques on the face of them showed that the money that was being transferred by their means was money of the plaintiffs. It is, I think, beyond question, as, indeed, the District Judge has held, that it was well within the knowledge of the defendants that the debts, in payment of which the cheques were tendered, were debts of Williams and not of the plaintiffs, and the most cursory examination of the cheques would have shown the defendants that Williams was giving them the plaintiffs' money in payment of his own debts. That being so, if Williams had no authority from the plaintiffs to issue those cheques, the defendants acquired no right to the money represented by them. The District Judge observes

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that all the defendants say that they were not conscious that Williams had sent them cheques drawn on the funds of Dodwell & Co., Ltd., in settlement of his personal cheque account. It is in vain to say this after Mr. John's statement in evidence: "If I had been aware at the time these cheques reached us, I should have made no inquiries. We looked upon Williams as a fully accredited manager enjoying the confidence of Dodwell & Co., and it would not have dawned on me to question his authority." This statement narrows the issue down to one of authority, actual or ostensible, and, in the face of it, pleas such as the unconscious receipt of the cheques can be of no avail. In this connection I may say that the learned District Judge has taken an early opportunity of placing on record his opinion that there is not in the case "one line of evidence or one single circumstance which reflects in the slightest degree upon the integrity of the defendants, either individually or as a firm." I put the question direct to the appellants' counsel whether he charged the defendants with participation in the fraud of Williams. The answer was: "I do so and I do not do so. It was participation by negligence." I can well understand counsel's embarrassment. Whatever may be said on the question as to intentional participation, it is, I think, beyond doubt that the action of the defendants was, to say the least, calculated to help and encourage Williams in the heartless and unblushing perpetration of a series of frauds (involving altogether, as the evidence shows, a sum of about ninety thousand pounds sterling) that is almost without parallel in the criminal annals of the Colony. This fact has a bearing on the question as to the commencement, as against the defendants, of the term of prescription to be discussed later.

Practically the only question of importance that remains to be decided is whether the plaintiffs' claim is wholly or partially prescribed. What is the term of prescription applicable to the case? Is it two years or three? And has section 15 of the Prescription Ordinance any application? The answer to this last question is dependent on the question whether the plaintiffs' claim falls under section 10 of the Ordinance, or under either of the sections 8 and 11. If it falls under section 10, section 15 cannot apply. It would be otherwise if it fall under section 8 or section 11. The defendants contend that this is an action "for loss, injury, or damage" falling under section 10. The plaintiffs, on the other hand, say that they are entitled to make their choice between treating the action as one for the recovery of money had and received falling under section 8, and treating it as an action for wrongful conversion falling under section 11. The difficulty in connection with this question arises from the fact of mention being made in our Prescription Ordinance of certain particular forms of action in use in England before the Judicature Acts, and even here before the passing of the Civil Procedure Code, but which have been

completely wiped out by the Code. It is not necessary that we should now classify an action as belonging to a particular class, or as requiring a particular form and name. It is sufficient now merely to set forth facts in the plaint which under the law applicable give rise to a cause of action. In view of my decision to be given later on the question of the applicability to this case of section 15 of the Prescription Ordinance, it is not necessary that I should decide whether this action is one for wrongful conversion, or for the recovery of money had and received by the defendants for the use of the plaintiffs; but I should like to say a word on the question whether an action for wrongful conversion falls within the purview of section 10 of the Prescription Ordinance. In my own opinion it does not. Section 10 provides for the period of prescription in the case of an action "for any loss, injury, or damage." I cannot help thinking that what is contemplated here is an action for, or rather in respect of, some physical injury or damage caused, or for loss accruing from such cause, and that is, perhaps, the reason why the section is excluded from the operation of section 15. Possibly it was thought that it would be inexpedient to allow delay in the institution of such an action. "Damages" as distinguished from "damage," which is the word used in the section, means, of course, the pecuniary compensation given by process of law to a person for a wrong that another has done him, and if section 10 were intended to cover all cases of tort or delict, why either of these words was not used in it appears to me to be inexplicable. The present claim does not in my opinion, fall under it. It can only be brought under section 11, and that being so, if the plaintiffs can be said to have been under the disability of "absence beyond the seas" the period of prescription cannot be said to have commenced to run against them at all. I would, however, if it were necessary, consider myself bound by the decision in the case of *Williams v. Baker*,[1] but, as explained above, the question is immaterial in view of my decision on the question of the applicablity to this case of section 15.

It has been strenuously argued that section 15 does not apply to corporations, because the disabilities of infancy, idiotcy, unsoundness of mind, &c., are inappropriate with reference to corporations. That may be so, but if any one of the disabilities mentioned is appropriate with reference to corporations, I see no reason why the provision so far as regards that disability should not be allowed operation. Now, the plaintiffs' corporation is registered in England, and it has its registered office in London. The domicil of a trading corporation is said to be its principal place of business, that is to say, the place where the administrative business of the company is conducted. That being so, it may well be argued that the plaintiff company is absent beyond the seas; but in the circumstances of this case, that contention can hardly be upheld in view of the

[1] *8 S. C. C. 165.*

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opinion expressed by the Earl of Halsbury L.C. in the case of *La Compagnie Generale Transatlantique v. Thomas Law & Co.*,[1] as to where a corporation may be said to reside; and I hold that, in the face of the evidence led in the case, the plaintiff company cannot be said to be " absent beyond the seas."

But the more important question is, at what point of time in a case like this can the period of prescription be said to commence to run? Is it from the date of the commission of the fraud, or from the date of its detection by the victim of the fraud? Our Ordinance enacts (section 11) that the action " shall be commenced within three years from the time when the cause of action shall have accrued." In cases of concealed frauds Courts in England have always given a plaintiff equitable relief against the Statutes of Limitation when he remained ignorant of the fraud (*Gibbs v. Guild.*[2] See *The Laws of England, vol. XIX., p. 172*, and cases there cited). Similar relief was given even where the defendant had taken no steps to conceal the fraud, so long as the plaintiff was not guilty of laches or other default in discovering the fraud (*Oelkers v. Ellis*[3]). The question has in this connection been raised whether the relief is not confined to cases in which the actual prepetrator of the fraud is the defendant. In some cases, e.g., *Gibbs v. Guild*,[2] it was not necessary to discuss the question whether a person claiming through the perpetrator of the fraud is equally affected by the fraud, and therefore the findings therein have reference to the fraud of the defendant only; but there are numerous cases in which it has been affirmed that in cases of fraud the plaintiff is entitled to the equitable relief referred to above, not only against the immediate perpetrator of the fraud, but against those who claim under him. No doubt some of these cases are cases under section 26 of 3 and 4 William IV., ch. 27. But that section, while it gives a plaintiff relief in a case of fraud committed on him or any person through whom he claims, does not expressly provide that he is entitled to relief as against any person claiming through the perpetrator of the fraud; and yet the Courts have held that such a person is in no better position, except, of course, in the case expressly provided for in the concluding part of the section. In *Bowen v. Evans*[4] the Lord Chancellor (Lord Cottenham) observed: " Upon fraud clearly established no lapse of time will protect the parties to it or those who claim through them against the jurisdiction of equity depriving them of the effects of their plunder "; and in the case of *Huguenin v. Baseley*[5] the Lord Chancellor (Lord Eldon) observed: " I should regret that any doubt could be entertained whether it is not competent to a Court of Equity to take away from third parties the benefit which they have derived from the fraud, imposition, or undue influence of others."

[1] *(1899) A. C. 431, 433.*
[2] *(1882) 9 Q. B. D. 59.*
[3] *(1914) 2 K. B. 139.*
[4] *(1848) 2 H. L. C. 257.*
[5] *14 Ves. Jun. 273.*

True there are later cases in which the Judges in enunciating principles similar to the above speak only of the actual perpetrator of the fraud, but that apparently was done because in those cases it was not necessary to carry the principle further, the parties sued being the actual perpetrators of the fraud and not any person or persons claiming through them.

Similar relief was given even where the defendant had taken no steps to conceal the fraud, so long as the plaintiff was not guilty of laches or other default in discovering the fraud (*Oelkers v. Ellis*[1]).

In the present case the evidence shows that in the books of the defendants there was a separate account between them and Williams showing a large debit against him. That was a debt payable to them by Williams, and in liquidation of that debt they received the cheques in question. The defendants had every reason to know that the money that was being paid them was money of the plaintiffs, and they had no reason to suppose that Williams had any authority to give them the plaintiffs' money in payment of his own debt. That being so, the plaintiffs were, to say the least, guilty of such gross negligence and carelessness in making no inquiry as to the authority of Williams that perfect *bona fides* can hardly be attributed to them in law, and the authorities cited above show that they can be in no better position than Williams as regards the equitable relief that the plaintiffs are entitled to with reference to the commencement of the period of prescription.

This Court has often pointed out that our Courts (in Ceylon) are Courts of Law and Equity, and it would be quite in order to give here the same relief as is given in England in cases of fraud. The point has hardly been contested, but the District Judge appears to have thought that the plaintiffs had forfeited the right to this relief by reason of laches or other default to discover the fraud. I do not think that the evidence shows that the plaintiffs have been guilty of any laches whatsoever. It has been said that the plaintiffs should have had their books audited periodically by local auditors rather than by auditors in England. Mr. Dodwell, the first witness called by the plaintiffs, says on this point that he preferred audit in England to local audit, and he gives his reasons for his preference. Whether they are sound or not, the plaintiffs cannot be blamed for adopting methods of audit that seemed to them to be preferable, so long as the audit was carried out by competent accountants. There is no evidence of any act of the plaintiff company indicative of laches in the detection of the fraud. Adopting the language of their Lordships of the Privy Council in the case of *Habibhoy v. Turner*,[2] I may say that the mere fact that " some clues and hints " reached Mr. Dodwell which, perhaps, if " vigorously and acutely followed up might have led to a complete knowledge of the fraud," is insufficient to render the plaintiffs guilty of laches, in the absence

[1] *(1914) 2 K. B. 139.*

[2] *17 I. L. R. Bom. 341.*

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of some disclosure that informed the mind of the corporation that it had been defrauded by Williams. In my opinion, the term of prescription should be deemed to have commenced in this case at the time of the actual detection of the fraud, that is to say, in October 1911. In that view the claim in respect of none of the cheques is prescribed, whether the term be taken to be three years or two years.

There is one other point that I should touch upon, namely, the contention that has found favour with the District Judge, that an action for money had and received does not lie at the suit of a third person against an agent who has accounted to his principal for the money received by him for the principal's use from such third person before notice not to part with it. This contention is, no doubt, justified by the authority cited by the District Judge from *The Laws of England, vol. VII., p. 479;* but the principle involved has no application whatever to the present case. The "principal" referred to by the District Judge was the seller of the shares, in respect of which money became due from Williams to the defendants; but no money was ever paid by the plaintiffs to the defendants for the use of the seller. The principle might well apply to the relation between Williams and the defendants; but, as regards the cheques in question, there was no privity of contract between the plaintiffs and the defendants, and there was no understanding between them that the amounts of the cheques were to be handed by the defendants to anybody at all. The money was held by the defendants (if for anybody's use) for the use of the plaintiffs and the plaintiffs alone.

I should like to say a word here with reference to the contention that the defendants could not in fact be said to have received any money from Williams, but that they were no more than a mere conduit pipe to convey to the sellers of the shares whatever was given by Williams. This idea of a conduit pipe would, at its best, have the merit of plausibility had the defendants simply endorsed the cheques and passed them over to the sellers. In that case the sellers would have received the cheques at their risk; but what the defendants did was to reduce the proceeds of the cheques in the first instance into their own possession, and then, so to say, to hand the money over to the sellers without any intimation to them that it was the money of the plaintiffs that Williams was paying in discharge of liabilities arising from his own private speculations.

On the minor questions in the case I agree with the District Judge.

For the reasons given above, I think that the judgment appealed from should be set aside, and judgment entered for the plaintiffs as claimed, that is to say, for the sums of Rs. 145,960 and Rs. 37,216.09, with interest on Rs. 145,860 at 9 per cent. per annum from the date of action until date of decree, and then on the aggregate at the same rate from the date of decree until payment, *minus*

the sum of Rs. 3,804.15, being the dividend decreed in the plaintiffs' favour in the insolvency proceedings against Williams.

The plaintiffs should, I think, have their costs in both Courts.

ENNIS J.—

I agree with my learned brother Pereira and with the learned District Judge that the cheques were wrongfully drawn and delivered by Williams without authority from the plaintiff company; that the way in which the cheques were drawn should have put the defendants on their guard; that the defendants knew that they were being used by Williams for his personal account, and that the defendants were *primâ facie* liable for the full amount of the cheques which they cashed. In these matters the case is very similar to the case of *Morison v. The London, County, and Westminster Bank, Ltd.*[1]

In my opinion, however, the action is entirely barred by prescription.

The rule that time runs from the discovery of the fraud, in actions based on fraud, undoubtedly applies where the defendant is the person who perpetrated the fraud and where the defendant has obtained a benefit from the perpetrator of the fraud. *Gibbs v. Guild*,[2] *Charter v. Trevelyan*,[3] *Huguenin v. Baseley*,[4] *Oelkers v. Ellis*.[5] In such cases the Courts have decreed restitution of the "benefit" or "plunder" received, but no case has been cited to us to show that the rule applies where the defendant is free from participation in the fraud and has obtained no benefit from it. It is conceivable that the principle may be extended in certain cases where the plaintiff is entirely free from laches so as to rebut any presumption that the fraud could have been discovered earlier, but, in my opinion, the principle cannot be extended to such a case as this. The defendants, admittedly, had acted throughout in good faith. They accepted the cheques in the ordinary course of business, they were passed through their office and paid into the bank without any of the defendants personally seeing them, and the proceeds were applied for the benefit of Williams, from whom they were received.

It is instructive to compare the facts in the present case with the facts in *Morison v. The London, County, and Westminster Bank, Ltd.*[1] In that case the defendant bank acted in good faith, and had not retained any of the plunder. The question of prescription did not arise, but certain circumstance were held to be a ratification by the plaintiff of the defendant's acts. The plaintiff had discovered a shortage in the accounts. He instructed accountants to go into them, suggesting that the losses should be proved by cheques that

[1] *(1914) 1 K. B. 356.*
[2] *(1882) 9 Q. B. D. 59.*
[3] *11 Clark & Finnely 714.*
[4] *14 Vesey 273.*
[5] *(1914) 2 K. B. 139.*

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must have been drawn. The accountants failed to find out that the plaintiff's manager, Abbott, had been paying cheques to his own private account, and the shortage was debited partly to the manager and partly to the plaintiff. On this the Chief Justice (Lord Reading) observes: "The plaintiff at that time knew of the dishonesty of his servant, but thought, in his own words, that Abbott was not dishonest at heart, and would go straight after a severe lesson and would retrieve his position. If the plaintiff did not know all the details of the dishonesty, it was because he was content to leave it to the accountants." Phillimore L.J. says: "As to knowledge it is unnecessary to decide what inference should be drawn when a principal knows so much that it is the policy of an ostrich to know no more." Buckley L.J. says: "The fact is that after these proceedings Morison, whose fault or misfortune it is that he employed a dishonest agent, is seeking to throw the consequences of his dishonesty upon the persons who are not in any way responsible for that dishonesty, persons who dealt with the cheques in the ordinary course of business and, it is admitted, in perfect good faith."

In the present case Mr. Dodwell observed in the 1909 accounts that Williams was drawing from the bank against goods in excess of the invoice price, and wrote D 11 on the 18th October, 1910: "I must say I do not like this; if the banks knew that you were drawing for more than you were paying for the goods, there would be some very strong talking."

In his evidence Mr. Dodwell explains: "I meant by 'strong talking' that the bank would have called it fraud," and he adds, "I think I was justified in keeping Williams on, despite his drawing in excess of the invoice value, because I do not think he intended to defraud." The articles of association of the plaintiff company provide for an annual audit of the accounts, and lay down that the auditors should examine the balance sheet "with the accounts and vouchers relating thereto," and I entirely agree with the finding of the learned District Judge, which has not been challenged on appeal, that if this had been done "the audits for 1909 should have discovered the breach of trust in regard to the earlier cheques."

The position, then, is this. At the end of 1910 Mr. Dodwell knew that Williams had been making misrepresentations to the bank, which would ordinarily be called fraudulent, and had there been an audit such as was required by the articles of association the full extent of William's fraud would have been discovered. There is very little between the position of the plaintiffs and defendants in this case and the plaintiff and defendant in *Morison v. The London, County, and Westminster Bank, Ltd.*[1]

I am not convinced that there has not been a ratification of the 1909 cheques in this case, notwithstanding that it may be argued it was *ultra vires* for a company to give such a ratification; but, in

[1] *(1914) 1 K. B. 356.*

my opinion, Mr. Dodwell's means of knowledge and inaction in failing to take investigation and in retaining the services of and promoting Williams after he was aware of Williams's misrepresentations, which " the bank could have called fraud, " is the action of the company, and bars them from asking, to use the words of the learned District Judge, " for equitable relief from the provisions of an Ordinance which bar their right to recover. As to whether the case falls within section 10 of the Prescription Ordinance, I consider myself bound by the decision in *Williams v. Baker.*[1] "

In my opinion the appellants fail, and the respondents are entitled to have the plaintiffs' action dismissed.

SHAW J.—

I entirely agree with the finding of the District Judge that the four cheques were drawn and delivered to the defendants wrongfully and unlawfully and without authority from the plaintiff company. Williams's authority on behalf of the company is contained in his power of attorney of the 28th December, 1905. That document gives him no authority to draw cheques upon the company's banking account, or otherwise to use the company's money in payment of his personal liabilities. The trade usage that the defendant have attempted to prove, authorizing managers to draw cheques on their principals' banking accounts in discharge of their private debts, cannot extend the specific authority given by the power of attorney, and I agree with the District Judge that the evidence is insufficient to establish any such universal usage, and that such a usage, even if proved, would not be one such as the Courts would recognize. I also agree with the findings that the defendants knew, or had reason to believe, that Williams had no authority to draw the cheques, and that they received the same and appropriated the proceeds thereof wrongfully and unlawfully. The evidence, in my opinion, clearly shows that they knew that the purchases of shares in respect of which the cheques were given were private speculations of Williams, and had they looked at the face of the cheques they would have at once seen that he was giving the company's cheques for his personal debts. The fact that owing to press of business none of the partners in the defendant firm actually examined the cheques or noticed on what account they were drawn does not seem to me to better their position.

The general rule of law applicable to the facts of this case is stated by Lord Herschell in his judgment in the case of *The London Joint Stock Bank v. Simmons.*[2] It is that when a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no property is acquired against the owner, unless the person taking it can show that the

[1] *8 S. C. C. 365.*

[2] *(1892) A. C. 201.*

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true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so.

In the present case I do not think that the plaintiffs can be held to have so acted as to mislead the defendants into the belief that Williams had their authority to draw the cheques. In fact they did not discover that he had drawn cheques on the company's banking account in payment of his private liabilities until October, 1911, and although a better system of audit might perhaps have discovered the fraud in respect of the first two cheques at the end of the year 1909 and before the last two cheques were drawn, and although, as the facts have turned out, they were unwise in placing so much confidence in their manager without a better system of supervision, I do not think that such negligence on their part is shown as should estop them from showing what Williams's authority in fact was. I also do not think that the facts of this case bring it within the exception, referred to by Lord Herschell in the case cited, relating to negotiable instruments, and the defendants cannot say that they were *bona fide* holders of the cheques, they having received them from Williams under such circumstances that they must be taken to have known that they were drawn and given in respect of his personal liabilities unlawfully and without authority from the company.

The defendants having received the cheques in the circumstances mentioned above, and having paid them into their banking account, I am of opinion that the cases of *The London Joint Stock Bank v. Simmons*,[1] *Morison v. The London, County, and Westminster Bank*,[2] and the cases cited by Lord Reading in his judgment in the latter case show that they are *primâ facie*, and, except in so far as they may establish any other defence, liable at the suit of the plaintiffs for wrongful conversion.

A further defence set up by the defendants is that the action, in so far as it is a claim in respect of wrongful conversion, is prescribed as to all four cheques, and in so far as the plaintiffs can claim in respect of money had and received, it is prescribed as to the first two cheques.

The first two cheques were given by Williams to the defendants in June and October, 1909, more than three years before the action was commenced, and the last two in May, 1910, more than two years before the action.

By section 8 of the Prescription Ordinance, 1871, the period of limitation in respect of actions for money had and received is three years. By section 10 "no action shall be maintainable for any loss, injury, or damage unless the same shall be commenced within two years from the time when the cause of action shall have arisen." In my opinion this section is intended to apply to actions in respect of torts generally, and includes an action for wrongful conversion,

[1] (1892) *A. C. 201.*

[2] (1914) *1 K. B. 380.*

as has been already decided in this Court in the case of *Williams v. Baker*,[1] the cause of action in such a case being for the loss and damage sustained by the plaintiff in consequence of the wrongful act of the defendant.

In answer to the defence of prescription two contentions are raised by the plaintiffs. First, it is said that a company is a " person " within the meaning of section 10 of the Ordinance which deals with the extension of time on account of disabilities, and that the plaintiff company being registered in England is and always must be " absent beyond the seas " within the meaning of the section, and accordingly prescription can never run aganst it in this Colony, except where the cause of action falls within section 10 of the Ordinance.

In consequence of my opinion that an action for wrongful conversion falls within section 10, and of the view that I take of the plaintiffs' second contention in answer to the Prescription Ordinance, which I shall refer to later, it is, perhaps, unnecessary to say anything on this point, but it seems to me to be a startling proposition that the suits of a company owning property and carrying on business in the Colony under the management of a local manager can never be prescribed, and I think the contention is one we should not be driven to accept unless it is absolutely necessary. It is contended that by reason of section 3 (*b*) of the Interpretation Ordinance, 1901, the expression " person " in section 14 of the Prescription Ordinance must be read to include a company. It seems to me to be at least doubtful whether this contention is correct. Section 3 (*b*) of the Interpretation Ordinance says " unless a contrary intention appears," and there seems to me to be considerable force in the argument that a contrary intention does appear in section 14 of the Prescription Ordinance, that section being inapplicable to bodies corporate, and all the disabilities mentioned in it being such as are eventually terminable by the death of the " person, " an event that cannot occur in the case of a corporate body. But, however this may be, I do not think that the plaintiff company was " absent beyond the seas " within the meaning of the section. It is true that it is registered in England, but it has a permanent office here, where it carries on an extensive business under a manager, who holds almost unlimited powers of conducting its local affairs, and I think the same principles apply to the present case as were applied in the case of *Compagnie Generale Transatlantique v. Thomas Law & Co.*,[2] where it was held that a company carrying on business under similar circumstances was resident in the country where it carried on that business for the purpose of being served with process. Lord Halsbury in his judgment in that case says: " It appears to me that as a consequence they are resident here in the only sense in which a corporation can be resident; they are here, and as they are here they may be served here. " To apply this language to the

[1] *8 S. C. C. 165.*

[2] *(1899) A. C. 431.*

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present case the plaintiff company is here, and therefore cannot be "absent beyond the seas." To the same effect as this case see *Dunlop v. Cuddon.*[1]

The second point raised by the plaintiffs in answer to the defence of prescription is that the cause of action was concealed from them by the fraud of Williams and not discovered until October, 1911, less than two years before action brought, and the defendants are, therefore, not entitled to avail themselves of the Prescription Ordinance, their only claim to the proceeds of the cheques being through Williams, who was responsible for the fraud.

In answer to this it was contended on behalf of the defendants that the equitable doctrine of concealed fraud preventing the running of a Statute of Limitation applies only where the fraud is that of the person himself who desires to avail himself of the protection of the Statute, and that the only cases where the fraud of another person can be set up are those relating to real property, where the fraud is that of some predecessor in title of the defendant, and where the defendant is seeking to retain the property acquired by such fraud. It was further contended that the protection given to the plaintiff extended only up to the time when the fraud might by the exercise of reasonable diligence have been discovered. and that in the present case the plaintiff company ought to have discovered the frauds long prior to October, 1911.

I have felt considerable difficulty with regard to the first of these contentions. The text books cited on behalf of the defendants, *Pollock on Torts, 8th ed., p. 213,* and *Kerr on Fraud, 4th ed., p. 346,* appear to lay down the general rule that the fraud must be the fraud of the person himself who seeks to avail himself of the protection of the Statute, and the judgments of Lord Coleridge and Brett J. in the case of *Gibbs v. Guild,*[2] and of Lord Herschell in *Thorne v. Heard,*[3] appear to support that proposition. In view, however, of the cases of *Huguenin v. Baseley,*[4] *Bowen v. Evans,*[5] *McCullum v. McCullum,*[6] and the judgment of Lindeley L.J. in *Thorne v. Heard,* in the Court of Appeal,[7] I think that the proposition has been stated too narrowly, and that the person seeking relief from prescription on the ground of concealed fraud is entitled to avail himself in all cases, and not only in cases relating to real property, of the fraud, not only of the defendant himself, but of any person through whom he claims; and I think the law is correctly stated by Lindeley L.J. in the last-mentioned case, when, referring to the case of *Willis v. Earl Howe,*[8] he says "that case has an important bearing on the present, for the statutory enactment on which the case turned is a legislative recognition and expression

[1] *(1902) 1 K. B. 342.*
[2] *(1882) 9 Q. B. D., at pp. 65 and 69.*
[3] *(1895) A. C. 493.*
[4] *14 Ves. Jnr. 288.*
[5] *2 H. L. C. 282.*
[6] *(1901) 1 Ch. 143.*
[7] *(1894) 1 Ch., at p. 605.*
[8] *2 Ch. 545.*

of previously well-settled principles in equity, and those principles were and are applicable to all kinds of property and not to real property alone. "

With regard to the question whether the plaintiffs should have discovered the frauds earlier than they did, I have already partly discussed the matter when dealing with the question of estoppel. The law on the subject is set out in the judgment of the Privy Council in the case of *Rahimbhoy Habibhoy v. Turner* [1]: "Their Lordships consider that when a man has committed a fraud and has got property thereby, it is for him to show that the person injured by the fraud and suing to recover the property has a clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring the suit. That is attempted in the present case. But their Lordships consider, and in this they agree with both Courts below, that all that Rahimbhoy has done is to show that some clues and hints reached the assignee in the year 1881, which, perhaps, if vigorously and acutely followed up might have led to a complete knowledge of the fraud, but that there was no disclosure made which informed the mind of the assignee that the insolvency estate had been defrauded by Rahimbhoy of these assets in the year 1867. "

In the present case the plaintiffs might, had they had a better system of audit, have possibly discovered Williams's frauds earlier, but it by no means follows that this would have been the case, for Williams would probably not have hesitated to forge the necessary vouchers; they might also very probably have discovered the frauds earlier had they made a full investigation of his management of the business when they found he was late with his accounts, and when they discovered that he was largely overdrawing the company's banking account; but I do not think that the evidence shows anything that can be considered as constructive knowledge on the part of the plaintiff company that he was using their money for his private purposes before the time they actually discovered the frauds in October, 1911.

In my opinion, therefore, the defence of the Prescription Ordinance cannot be sustained, and the plaintiffs' claim in respect of the wrongful conversion is not barred by lapse of time.

A long argument has been addressed to us for the purpose of showing that, under the circumstances of the case, the plaintiffs cannot recover on the claim for money had and received. In view of my opinion that the claim in respect of the wrongful conversion is not prescribed, it is unnecessary to consider what the plaintiffs' rights might have been had they been driven to this alternative claim.

The plaintiffs having recovered in Williams's insolvency a dividend of 2¼ per cent. on the amount of his defalcation, the damages that

[1] *17 I. L. R. Bom. 341.*

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they have suffered from the wrongful conversion is reduced by that percentage of the amount of the cheques.

In my view the appeal should be allowed with costs, and the judgment of the District Judge should be set aside, and judgment entered for the plaintiffs with costs for the amount of the four cheques, less the amount received in respect of them in the insolvency proceedings.

Varied.