[PRIVY COUNCIL.]

1918.

Present: Viscount Haldane, Lord Shaw, and Sir Walter Phillimore, Bart.

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

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 and carrying on business in Colombo by a local manager—Absence beyond the seas—Concealed fraud.

The manager of plaintiff company drew upon the plaintiff company's banking account 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 manager, though he had authority to draw cheques in the name of the plaintiff company, had no authority to draw cheques for his private transactions. The plaintiff company discovered the fraud in October, 1911, and brought this action in January, 1913, to recover the value of the cheques from defendants.

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.

(2) That the claims in respect of the 1909 cheques were barred by prescription, and that the claims in respect of the 1910 cheques were not barred.

When an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is in a fiduciary position, and any third person

taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer, holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract.

A claim for conversion falls under section 10 of the Prescription Ordinance, 1871, and is barred in two years. As the claim in the present case is not merely for conversion, but alternatively to recover what is in effect a trust fund, it falls within section 8 (three years), or else within section 11 (three years). It cannot be said in this case that the cause of action had not arisen in respect of the claims until the fraud was discovered by the plaintiff company.

To enable a plea of concealed fraud to be relied on as giving a new cause of action, the fraud must be shown to be fraud either of the defendant himself, or of some one for whose action in the matter in question he has assumed responsibility.

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.

THE facts are set out in the judgment of the Privy Council. The judgment of the Supreme Court is reported in *18 N. L. R. 133.*

February 11, 1918. Delivered by VISCOUNT HALDANE:—

This is an appeal from a judgment of the Supreme Court of Ceylon. The question is whether the respondents were entitled to recover from the appellants the whole or part of a sum of Rs. 145,860, being the aggregate of the amount of four cheques, drawn by one Williams, as the respondents' manager, in favour of the appellants.

The facts of the case are shortly these. The appellants are partners in the firm of E. John & Co., carrying on business as share and produce brokers in Colombo. The respondents area a company incorporated and registered in England, and carrying on business as import and export merchants at various places, including Colombo, through branch offices. Williams had acted as their manager of that branch since 1905. He held a power of attorney, which enabled him to conduct the business of the respondents at Colombo, and for that purpose conferred on him wide powers, including the drawing of cheques on their bankers. The respondents had transacted business with the appellants, relating in the main to the purchase and sale of produce. The latter had in their books an account with the respondents, and they had also opened a separate account with Williams, who employed them in the purchase and sale of shares. With Williams the appellants thus came into business relations in two capacities: in general business he dealt with them as the respondents' agent; but so far as his dealings in shares were concerned, these were private transactions on his own account as principal, and not as agent. He was reputed to have made a good

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deal of money by dealings of this kind, and he owned shares, on which the appellants were able to procure advances for him when he needed them.

Williams had bought and sold shares largely in both of what were known as the rubber booms of 1905 to 1906 and 1909 to 1010. He had employed the appellants and other brokers in these transactions. In the period of the second boom his dealings through the appellants were large, and in the course of these dealings he paid to them large sums for purchases, and was credited with large sums for sales. Among the sums he paid to them were the amounts of the cheques in question. These were drawn as follows:—

		Rs. c.
June 15, 1909 ...	...	... 11,517 50
October 12, 1909	...	... 20,102 50
May 3, 1910 ...	...	... 67,500 0
May 5, 1910 ...	...	... 46,740 0
	Total	... 145,860 0

These cheques were drawn by Williams under his power of attorney in the name of the respondents and on their bankers, but they were in fact drawn, not in the conduct or for the purposes of the business of the respondents, but in the private interest of Williams himself to be used in his own transactions. The employment of the funds of the respondents for this object was plainly outside the general authority entrusted to Williams. In so using them he was guilty of fraud; and when the respondents, his principals, discovered what he had done, they not only claimed against him and proved in his subsequent insolvency, but took criminal proceedings against him, which ended in a conviction.

At the trial before the District Judge of Colombo it was found that the appellants were neither in fact dealing with Williams as the respondents' agent, nor believed themselves to be so. The District Judge held, however, equally clearly, that the appellants were not personally aware that they had received among the items paid over to them for the purchase money of the shares which they bought for Williams, as his brokers, cheques fraudulently drawn on the respondents' funds, and that they took the cheques honestly, without noticing the names of the drawers, and without thinking of them as in a different position from the other cheques received in the course of their transactions with him. But it is obvious that the appellants' clerks, who brought the cheques to the partners for endorsement, must have seen that the name of the drawers was that of the respondents. However little the clerks may have known of Williams's real transactions, and however innocently the cheques were brought and endorsed, the knowledge of the names on the part of the clerks was the knowledge of the appellants. That the cheques so tendered by Williams should have been accepted by the appellants and paid

into their own account to enable them to provide the prices due to the sellers of the shares is not strange, for Williams was reputed to be a rich man, and he occupied a position of trust under the respondents, whose representative he was in Colombo. With Williams the appellants, like other brokers, had had many transactions, and none of them had resulted in any difficulty. What he was doing might have been loose practice, and not in the ordinary course of business, but it was not uncommon for employers to allow considerable latitude as regards drawing cheques to their confidential agents. However, it is none the less clear that, innocent of fraud as the appellants were found to be, they, by the action of their clerks, took an unmistakable and grave risk in the transactions in question. On the face of these, Williams was, without showing authority to do so, drawing cheques for his own purposes on the respondents funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was *primâ facie* a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction. For when an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer, holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of Courts which administer equity, whether in the form in which the Court of Chancery in this country applied it to trusts, or in the form which later developments of the Roman law have recognized. It is, therefore, clear that, excepting in so far as the lapse of time or some other special circumstance afforded them a defence, the appellants could not withhold the money in question from the respondents if they chose to claim it.

The respondents did claim it, and commenced an action on January 10, 1913, to enforce their claim. The claim as formulated in their plaint was alternative. In the first alternative, they expressed it as for money had and received; in the second, as for a conversion; in the third, as for cheques received with notice of Williams's fraud. In the judgment in the Courts below it was the first and second of these alternative forms of claim which received attention. Their Lordships are of opinion that the course so taken was unnecessary. It would have been, in their opinion, sufficient to

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have disposed of the case on the footing that the money was, in the circumstances, what may properly be called trust money, consistently with principles of jurisprudence based in part, though not wholly, on a foundation of Romna law. If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondents. It is on this footing that their Lordships propose to deal with the question. The case was not disposed of in this way in the judgments below, but the facts proved and the pleadings admit of its being thus dealt with.

It may well be true that the principles of the English common law have been so far recognized in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place. If so, undoubtedly there was a conversion according to these principles. But in that view difficulties might arise as to the time limited for bringing the action for conversion under the Prescription Ordinance, to which reference will be made later on. If the case is regarded, on the other hand, as similarly it may be, from the point of view of money had and received to the respondents' use by the appellants, the difficulty is less, for the period of limitation prescribed by the Ordinance is three years instead of two, as in the alternative of conversion, and this would have rendered the transaction still actionable in the case of the two cheques latest in date. But a point would arise, if the claim were treated, as it was in the argument at the Bar, as one for money had and received, which is not unattended with difficulty. The cheques were paid by Williams to the appellants with instructions to apply them in payment of the price of the shares. This the appellants actually had done before receiving from the respondents notice not to do so. The action for money had and received is, according to the law of England, in its nature one of assumpsit, founded on implied or imputed contract, and depends on a waiver of any tort committed, and on the correlative affirmance of a contractual relation. But what is the effect and extent of such affirmance? In a simple case, such as that of a wrongdoer having taken property of the plaintiff and sold it at a price beyond its ordinary market value, there is no difficulty. The question of affirmance here concerns only the relation between two persons: the owner and the tortfeasor, and, by waiving the tort and treating the latter as his agent in selling, the owner secures the advantage of the high price received. But what if between the owner and the tortfeasor there has intervened an agent for whom alone the tortfeasor has acted, and whose directions he has carried out, say, by paying over the price to him before he received notice from the true owner not to do so? Does the waiver of the tort ratify the action of the agent in giving instructions to the person who would, apart from ratification, have been a wrongdoer, so as to justify what would otherwise have been the wrongful act of paying over the price in accordance with

the direction given by the agent? Can the contractual relation be split up and only part of it be approbated while the rest is reprobated, and can any obligation based on his contract be imputed to the person whose tort is waived inconsistent with the actual contract which he, in point of fact, made with the intermediary? Can the agent's intervention be eliminated if ratification of a contract is implied when a claim for money had and received is made? Reference was made at the Bar, and also in the judgment of the learned Judge who tried the case, to the dictum of Sir Walter Phillimore at the end of his judgment delivered by him when a Lord Justice of Appeal in *Morison v. London County and Westminster Bank, Limited*,[1] to the effect that in action for money had and received it is assumed that there was no wrongful act in receiving the money, and that, therefore, the plaintiff cannot complain if it is properly paid over before a license to do so is revoked. It is, in the view their Lordships take, unnecessary to consider how far the principle of this dictum would extend in circumstances such as those of the present case, or what is the true view of the scope of the ratification which this action implies by the English common law. For under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases "where the defendant has received money which *ex æquo et bono* he ought to refund." If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, inasmuch as every Court can treat the question as one not merely of contract, but of trust fund where necessary, there is no difficulty in extending the remedy to all the cases covered by the words just quoted. Lord Mansfield, who used them in his judgment in *Moses v. Macferlan*,[2] went far in this direction, so far as appearances are concerned. But, as has been pointed out by Lord Sumner in his judgment in *Sinclair v. Brougham*,[3] it is by no means clear to what extent he really can be taken to have intended to import equitable principles into the jurisdiction of the Courts of common law in entertaining this action. Undoubtedly it is one based on contract, for the common law could take no notice of any trust; but the contract imputed may conceivably have become so much the creature of legal fiction that it can be imputed without reference to all the circumstances of the whole of the relations of the parties, and accordingly in such a fashion as to exclude the effect of the directions of the intervening agent in a case like the present. The learned Judge who tried the case did not adopt this view, but apparently thought that the entirety of the actual contract must be treated as affirmed. But the point is one which their Lordships are reluctant

[1] *(1914) 3 K. B. 353.* [2] *2 Burr. 1005.*

[3] *(1914) A. C., at page 454.*

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to deal with unnecessarily in an appeal from a Court which was not confined to administering the common law of England, and as they are of opinion that the present appeal can be disposed of on the other principle referred to, they abstain from expressing any view of the result of the argument addressed to them about the scope of the alternative claim for money had and received.

The next question to be dealt with is that which was raised under the Prescription Ordinance (No. 22 of 1871). Section 10 of this Ordinance, like sections 8 and 11, contains provision for limitation of the time within which the actions that fall within it may be brought, and does not purport to extinguish the obligation as in the case of prescription properly so called. It provides that no action is to be maintainable for any loss, injury, or damage, unless within two years from the time when the cause of action has arisen. Their Lordships think that the words used are to be interpreted as covering a conversion, and not as in their meaning restricted to personal loss, injury, or damage, and that an action for a conversion would therefore be barred after two years from its cause. Section 8 gives a three-year period for limitation of the actions falling under it. It extends, *inter alia*, to actions for the recovery of any movable property, or for money received by a defendant for the use of a plaintiff, or for money due on an unwritten promise or contract. As the claim in the present case is not merely for conversion, but alternatively to recover what is in effect a trust fund, it falls within this section, or else within section 11, which allows a three-year period in cases not expressly provided for. The present action was, therefore, brought in time so far as concerns the two cheques latest in date, but it was out of time as regards the two earlier cheques, unless a fresh cause of action arose later than the dates on which the appellants dealt with them.

It was argued that the fraud committed and concealed by Williams was such a cause of action, and that where a Court is proceeding in accordance with equitable principles, the cause of action can be treated as not having arisen until the fraud was discovered, and the plaintiff was able to elect as to the course which he should adopt. In such a case the concealment of the fraud would be itself a fraud, giving rise to a new cause of action. This is true, unless there is some statute of limitation which binds the Court of equity to treat the cause of action as arising when the actual fraud takes place. If there is such a statute, it must receive effect. Under the law of England the statute of limitations did not apply to any jurisdiction of Courts of equity which was not strictly concurrent with the jurisdiction of the Courts of common law over causes of action which were within it.

The statute did not apply to jurisdiction which was concurrent merely by analogy, although equity in such cases followed the analogy of the statute, and even this second analogy was not applied

when the jurisdiction was really exclusive. Courts of equity in this country ignored the analogy of the statute in cases of trust to which it did not apply. The Prescription Ordinance of Ceylon governs the whole of a jurisdiction which is general, including law and equity in one system, and therefore the Ordinance is operative in the present case to bar the claim to the extent of the two earlier cheques, unless the cause of action can be shown to have arisen later than their dates because of discovery for the first time of a concealed fraud. Now, no doubt Williams himself concealed a fraud. But the appellants were innocent, excepting in so far as they must be taken to have had notice to the extent already referred to. Where the cause of action is for concealed fraud, must the fraud be that of the defendant personally, or of some person for whose action in doing so he is directly responsible? No authority from Ceylon was cited at the Bar on this question, but their Lordships think that on principle the answer must be in the affirmative. Mere notice of want of title is not enough, unless there is such notice of actual fraud as extends to the defendant a fiduciary obligation to disclose what it becomes fraudulent on his part to conceal. This appears to have been the view held by the Roman lawyers, on whose system the law of Ceylon is founded. In book 44, title 4, of the *Digest*, there are collected the opinions of Ulpian and other jurists on the "*Exceptio Doli Mali.*" Among these opinions and the illustrations which their authors offer are the following:—

Section 2 (1).—"*Non in rem 'si in ea re nihil dolo malo factum est,' sed sic 'si in ea re nihil dolo malo actoris factum est.' Docere igitur debet is, qui obicit exceptionem, dolo malo actoris factum, nec sufficiet ei ostendere in re esse dolum . . . . . .*"

Section 4 (17).—"*In hac exceptione et de dolo servi vel alterius personæ juri nostro subjectæ excipere possumus et de eorum dolo, quibus adquiritur, sed de servorum et filiorum dolo, si quidem ex peculiari eorum negotio actio intendatur, in infinitum exceptio obicienda est; si autem non ex peculiari causa, tum de eo dumtaxat excipi oportet, qui admissus sit in ipso negotio quod geritur, non etiam si postea aliquis dolus intervenisset; neque enim esse æquum servi dolum amplius domino nocere, quam in quo opera ejus esset usus.*"

Mr. Upjohn, in arguing the case of the respondents, with conspicuous fairness, drew their Lordships' attention to these passages in the *Digest*. They think that they illustrate a general principle, applicable in Ceylon or in England, that to enable the defence of concealed fraud to be relied on as giving a new cause of action, the fraud must be shown to be the fraud either of the defendant himself, or of some one for whose action in the matter in question he has assumed responsibility. In the Roman law, where the doctrine of agency was never fully developed, illustrations taken from the relations of master and slave or father and son are often, as here, of much value as illustrations of a principle which in later systems became widely applied. The passage quoted shows that the doctrine of imputed fraud was closely confined in its application by

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the Roman jurists to the defendant either actually guilty of or legally responsible for the fraud. Their Lordships are, therefore, of opinion that, according to the law of Ceylon, the cause of action accrued, under the circumstances of this case, at the dates when the cheques were received and dealt with by the appellants, and that the respondents are accordingly entitled to succeed as regards the last two cheques, those of May 3 and 5, 1910, but not as regards the two earlier cheques dated in 1909.

The learned District Judge of Colombo, Mr. Garvin, in his very careful judgment, held that sections 14 and 15 of the Prescription Ordinance, which enact that, if the person entitled to sue is beyond the seas, time is not to run until this disability is removed in cases falling within sections 6, 7, 8, 9, and 11 of the Ordinance, did not apply to a corporation having its registered office outside Ceylon, if it had a residence and carried on business inside the Island. With this view, which was also that adopted in the Court of Appeal, their Lordships concur.

The learned District Judge held that the claim was in reality one for money had and received, and that on this footing the respondents had, by waiving their right to proceed on the footing of tort, ratified the payments made to the sellers of the shares by the appellants before they had notice not to make these payments. As the result he held that the liability of the appellants was limited to Rs. 14,751, part of the amount of the two later cheques, which had not been paid over to the sellers, but had been applied in liquidation of Williams's indebtedness to the appellants. But their Lordships have already intimated the opinion that the liability extends to the entire amount of the two latest cheques, and this liability can be diminished only by the amount which the respondents have already received by proving in Williams's insolvency. With what the learned Judge said in refusing to accept the argument for the appellants as to estoppel by the proof of the respondents in the insolvency, and by their dilatoriness, their Lordships are in agreement.

The Supreme Court varied the decision of the District Judge. By a majority they held that the cause of action arose when Williams's frauds were discovered in October, 1911, that the Prescription Ordinance therefore did not bar the claim, and that the respondents were entitled to the entire amount of the four cheques, a total of Rs. 145,860, with interest up to the date of the plaint, and with further interest until payment, *minus* only the amount recovered by proof in the insolvency. They thought that, in order to prevent the cause of action being held to have arisen when the cheques were dealt with, it was sufficient to show that the appellants had obtained them from a person who had committed a fraud and concealed it, although the appellants themselves had not been guilty of fraud. They were influenced in coming to this conclusion by decisions of the English Court of Chancery, such as that of Lord Eldon in *Huguenin*

v. Baseley,[1] who said, in his judgment, that he 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." But their Lordships have to point out that Lord Eldon was not there speaking of any new cause of action arising from a concealed fraud. No such question had arisen. He was simply illustrating the view taken by Courts of equity in England when ordering the restitution of what they treated as a trust fund, and so exercising a jurisdiction which was exclusive, and to which no statute of limitation had any application. In the present case there is a statute of limitation, and in order to escape from its application it is necessary to show that there is a subsequent and independent cause of action, which arises from the concealment of the fraud. Such a separate cause of action arises, as Their Lordships have already said, only out of the conduct of a person who is held to have been responsible for the fraud, and has in breach of his duty concealed it. Such cases are very different from what Lord Eldon was dealing with in *Huguenin v. Baseley*,[1] where, in applying the exclusive jurisdiction of the Court of Chancery to decree restitution of property affected by a fiduciary obligation, he quotes with approval an expression of Lord Chief Justice Wilmot defining the only doctrine he was himself affirming: "Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

In the result Their Lordships think that the respondents were not entitled to recover from the appellants more than the amounts of the two later cheques, with interest at the usual rate until the date of the action, and from that date at the rate of 9 per cent. until October 2, 1914 (the date of the decree of the District Court), and interest on the aggregate sum at the rate of 9 per cent. until payment, less the sum of Rs. 3,804.15, being the dividend recovered by the respondents from William's estate in the insolvency proceedings, as on the date when it was actually received by the respondents. The District Judge made no order as to costs, and on this point his judgment should be restored. The respondents succeeded rightly, to a limited extent, in the Supreme Court, and the appellants have succeeded to a substantial extent in this appeal. Their Lordships think that justice will be done if they leave the respondents entitled to the costs of the appeal to the Supreme Court, which the judgment of that Court gave them, but order them to pay the appellants' costs of the present appeal. The costs of an application to postpone the hearing of the appeal, which were ordered to be borne by the appellants in any event, will be set off against the latter costs.

They will humbly advise His Majesty in accordance with this opinion.

Varied.

[1] *14 Ves. 273.*