IN THE COURT OF APPEAL [1994] QCA 258

SUPREME COURT OF QUEENSLAND

C.A. No. 88 of 1994

Brisbane
[R v. Capewell]

THE QUEEN

v.

CLAIRE FRANCES CAPEWELL

(Appellant)

The Chief Justice
Mr Justice McPherson
Mr Justice Pincus

Judgment delivered 13/07/1994

Each member of the Court delivering separate reasons. Mr Justice Pincus dissenting.

APPEAL AGAINST CONVICTION DISMISSED. APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED.

CATCHWORDS:	CRIMINAL LAW - dishonest application of property - bank mistakenly transferred amount to customer - whether a chose in action thereby transferred - whether chose belonged to bank or customer - nature of credit entries in bank statements discussed. BANKING - nature of mistaken credits in customer's account.
Counsel:	Mr R. Lynch for the appellant. Mr W. Clark for the respondent
Solicitors:	Legal Aid Office (Queensland) for the appellant. Director of Prosecutions for the respondent
Hearing Date:	16/05/94

REASONS FOR JUDGMENT - THE CHIEF JUSTICE

I have had the advantage of reading the reasons prepared in this matter by McPherson J.A. and with a view to avoiding unnecessary repetition I adopt the formal recital of the facts and issues there contained.

The words of the charge contained in the indictment allege a dishonest application by the appellant of a chose in action of the value of $3,500 belonging to her daughter, Fleur. This allegation, if proved, would constitute an offence under s. 408C of the Criminal Code which applies in the case of:

> "(1) Any person who dishonestly applies to his own use or to the use of any person -
>
> (a) property belonging to another ... "

The trial judge's summing up committed the matter to the jury's consideration on the basis that Fleur, on the date alleged, did, in fact, possess a chose in action which consisted of Fleur's "right to enforce the obligation of the bank to honour a withdrawal application in the amount up to the customer's credit balance".

Further, the jury were directed to consider the matter on the basis that there was property of Fleur, the chose in action, which could be regarded as dishonestly applied even though the property came to Fleur "by mistake, which mistake the bank would be entitled to rectify".

The appellant was found guilty.

The jury were not asked to turn their minds to any alternative verdict which might have been open on the charge as laid (cf. s. 581 of the Code) and on the appeal we are not concerned to direct attention to any different charge on which it might have been open to the Crown to proceed accepting the facts which it was alleging.

It might then be thought that, if it cannot be regarded as correct that Fleur had property consisting of a chose in action of a value of $3,500 immediately before the withdrawal of that sum and the transfer of it into the appellant's account, the verdict brought in by the jury would not have

been open to them. Counsel for the respondent on the appeal accepted that this would be the result.

Additional reference should now be made to certain features which emerged at the trial.

In the Crown Prosecutor's opening address, the record shows that he told the jury that, subject to any correction by the trial judge, if a person has a credit balance in a bank account, that person has a claim on the bank for the amount of that balance, the entitlement being called a chose in action. He said the position in the case was that $4,000 was meant to be transferred from one account to another but it actually got transferred to a third account, that belonging to Fleur. He said the law was that as soon as the sum was credited to Fleur's account, she was allowed to make a claim against it and that was her chose in action. He explained that relevant entries constituting the debiting and credit which had occurred were carried out electronically. The record of proceedings does not show that, during the trial, anyone challenged the prosecution's statement of the law and the judge's direction to the jury in the course of his summing up was consistent with it. No redirection was asked for at the conclusion of the summing up.

An employee of the branch of the bank from which the funds were transmitted gave evidence at the trial explaining how, in accordance with one customer's instructions, he intended to cause a credit to be recorded electronically in an account at another branch of the bank and, after an initial difficulty with the transmitting signal, he made some minor alteration and the transfer was shown as accepted by the computer. It seems that he thought the acceptance was in accordance with the customer's instruction. In fact, later investigation showed that this was the point at which, as a result of the alteration in the transmission signal made by the employee, the credit in question was mistakenly posted to Fleur's account which was also kept at that second branch of the bank. To the extent that it may be thought to affect the outcome, certain aspects may be summarised in this fashion: the credit in Fleur's account was made by the bank's own employee when he deliberately, although mistakenly, entered an instruction in the computer to credit an account number which turned out to be Fleur's; no fraud of any kind had occurred up to this point and

Fleur had not participated in the actions which achieved the result mentioned.

The next relevant step occurred when Fleur and her mother, the appellant, together called at the second branch. The appellant made an enquiry of an employee at that branch and in response the appellant and Fleur were told that $4,000 had been credited to Fleur's account. They exhibited a little surprise initially but the appellant then instructed that $3,500 be transferred from Fleur's account into her own account with the bank, and Fleur signed a transfer form to enable this to be done.

At the trial, no attempt was made to prove any standard banking practice or any particular contractual arrangement which might be regarded as operative between the bank concerned and Fleur. The matter of the rights of Fleur and the bank as between themselves were left as though governed by the general law. In view of the course of the trial, it can be accepted that in these circumstances there was no need for the judge to give detailed instructions to the jury on the relevant general banking law that might determine the nature of Fleur's right at the critical time when the withdrawal was made from Fleur's account and the transfer of a corresponding amount was made into the appellant's account. However, in view of the matters discussed before us, it is necessary to turn to this law.

Banking law in the area of the mutual rights of banker and customer consists of established principles of a general kind which can be modified in their effect by special terms agreed between the contracting parties. The broad explanation of the position prevailing between banker and customer found in R v. Davenport (1954) 1 W.L.R. 569 at 571 is a useful starting point. However, it is not accurate to say that the relevant rights and obligations in respect of money accepted by a bank from a customer begin and end with an exact objectively correct calculation of the amount of the bank's debt which results from the acceptance. This is because the balance as actually posted in the bank's ledgers, at least in the case when it is notified to the customer, is given a weight and effect of its own. No doubt this has come about because of the demands of commerce and the need not to impede it. The principle which relates the rights of the customer to the form of the entry which

appears in the bank's records finds expression in the cases from time to time: see e.g. Bank of New South Wales v. Laing (1954) A.C. 135, Capital and Counties Bank Ltd v. Gordon (1903) A.C. 240 at 249 and Holland v. Manchester and Liverpool District Banking Co. Limited (1909) 25 T.L.R. 386. The first mentioned case at 154 refers to the "peculiar" relationship between banker and customer which determines that the bank is indebted to the customer in the amount shown as standing to the customer's credit in the bank's records. One further illustration of the effect given to the state of the balance as actually posted in the records may be seen in the fact that the familiar right of a bank to consolidate a customer's account in debit with an account in credit appears to be subject to a liability in the bank, up to the time a notice is given, to honour any cheque drawn up to the limit of the balance in the account in credit: see the view offered by Lord Cross of Chelsea in National Westminster Bank Ltd v. Halesowen Presswork and Assemblies Ltd (1972) A.C. 785 at 810 summarised by Mason J. in Inglis v. Commonwealth Trading Bank (1973) 47 A.L.J.R. 234 at 235 first col. Something which might be regarded as the reverse side of the same coin which provides a further illustration of the significant effect given to the state of the ledger balance as distinct from the calculated total of the funds actually received from the customer, appears in Marzetti v. Williams (1830) 1 B & Ad 415. It was there held that a bank was entitled to a reasonable time to credit funds paid in even when paid in as cash (no question of time to clear cheques was involved in the case), and so the bank was not liable for dishonouring the customer's cheque presented at the counter in the interval after the cash was received but before the ledger credit entry had been made.

It is not intended to convey any suggestion that a bank is not entitled to correct a credit entry mistakenly entered. What is more precisely involved in the present case is the nature of a customer's right, if any, based on an entry mistakenly made in his favour by the bank and notified to him: that is, the nature of his right in the period before the bank discovers its error and perhaps seeks to correct it. I consider that the customer has a right that in this interval is conveniently and accurately described as a chose in action which is one based on the credit balance shown in the bank's records as notified to him. The fact that the bank will be entitled to move unilaterally to

correct the entry before the customer has drawn or relied on it, does not defeat this conclusion since that aspect of the relationship merely looks at the state of the mutual rights at a later point in the chain of happenings. The conclusion stated as to the customer's right is not affected by the fact that, if the customer has, in the meantime, drawn the money, there may be an independent right of recovery in the bank, for example by a common law action for money had and received designed to recover money as an amount paid under a fundamental mistake of fact leading to an unjust enrichment. On this last aspect reference can conveniently be made to Australia and New Zealand Banking Group Ltd v. Westpac Banking Corporation (1988) 164 C.L.R. 662 especially at 673, but the considerations there dealt with do not arise in the present case.

The extent to which a bank, with powerful de facto control over the state of its records, might be disposed to resort to self-help and, whatever the customer might wish, correct those records unilaterally on discovery of an error, is a matter which should not be permitted to distract attention from the legal aspect that is relevant here. When a mistake is made in entering a total in its records, the bank will be free to correct it but its entitlement may be subject to some special right of the customer based on estoppel when he has altered his position to his detriment on the faith of the entry. Speaking generally, mistakes may occur as a result of simple error or be induced by fraud; they may be in the customer's favour or against it; they may be detected and corrected before being notified to the customer or only afterwards and they may involve some corresponding entry in another account or this may not be the case.

The bank's right, if not estopped, to correct the ledger entry or to commence proceedings for recovery are remedial steps open to the bank at its election to pursue, but these options do not compel a conclusion that the earlier state of affairs, in effect, never existed, nor that the special considerations illustrated by the cases cited above and applicable in banking law will not provide the answer.

The verdict of the jury below established that at the relevant time the appellant was acting dishonestly and therefore there can be no question arising of any justifiable reliance by her on the

accuracy of the credit balance stated for Fleur's account. There is no finding in respect of Fleur's state of mind but, in view of her age and her collaboration with her dishonest parent, there is no reason to think that any separate consideration in respect of it arose in this case. The Crown case at trial alleged a chose in action vested in Fleur and the defence case, while denying any dishonesty, in its effect asserted the right also. It should be accepted that this view was correct and that such a right at relevant times existed.

The case of R v. Thompson (1984) 1 W.L.R. 962 which at first sight might appear to be in conflict with the conclusion just stated is distinguishable. There the entries electronically introduced into the bank's records were not made by the bank's officers but were fraudulently made by a wholly unauthorised outsider. They may have been a source of subsequent mischief but they could have no immediate effect on the rights inter se of banker and customer. Here the crediting of Fleur's account was deliberately carried out by the bank's own officer even if it was induced by an error on his part, and the notification of the resulting credit amount was deliberately communicated to Fleur and her mother again by an officer of the bank. The bank and its officers thus controlled these vital steps and that feature distinguishes the present circumstances from Thompson's case. Other cases which have come before the courts have depended on the effect of a statutory provision in the Theft Act 1968 (U.K.), or its equivalent, that "any assumption of the rights of an owner" will amount to an appropriation for the purposes of an offence of dishonest appropriation: see (Wille (1987) 86 Cr. App. R. 296 and R v. Chan Man-Sin (1988) 1 W.L.R. 196. But those cases do not assist. They seem principally to have depended upon the point that some assumption, as opposed to a full assumption, of the rights of an owner would, for the purposes of the statute, suffice.

On the further, and indeed the principal point argued in the present appeal, namely whether under s. 408C of the Code it was open to the jury to convict the appellant even though she appears to have acted with the consent of the owner of the property, Fleur, I agree with the conclusion stated by McPherson J.A. and his reasons for it and have nothing to add.

I agree, also, with what McPherson J.A. has said in respect of the application for leave to

appeal against sentence.

The appeal against conviction should be dismissed and the application for leave to appeal against sentence should be refused.

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered the Thirteenth day of July 1994

The appellant Mrs Capewell and her 13 year old daughter Fleur each had accounts at the Kippa-Ring branch of Metway Bank. In early March 1992, when the amount in Fleur's account was only 68 cents, a sum of $4,000 was deposited to the credit of her account. Its source was a joint account in the names of Mr & Mrs Hughes of Bundaberg. The deposit was in fact intended for credit of an account at the Bank in the name of a Mr Graham Hughes, but it was credited to Fleur's account through a clerical error.

The appellant became aware of the credit of $4,000 in Fleur's account when she received a bank statement on or before 9 March 1992. On that day she went to the Kippa-Ring branch and arranged to transfer $3,500 from Fleur's account to her own. She did this by presenting the necessary transfer form signed by Fleur. The result was to raise a credit balance of $3521.46 in the appellant's own account with the Bank. Over the ensuing 11 days, the appellant used the facility of an automatic teller machine to make nine separate withdrawals from her account of amounts totalling $3,900. Part of what she withdrew may have been contributed by a sum of $776.90 representing pension payments credited to the account; but otherwise the amount withdrawn was attributable to the credit that originated in the transfer from Fleur's account on 9 March of the sum of $3,500.

The appellant was found guilty in the District Court on an indictment charging her under s.408C of the Criminal Code with having on 9 March 1992 dishonestly applied to her own use property, namely a chose in action of the value of $3,500, belonging to Fleur Capewell. At the trial the appellant testified to believing that the sum of $4,000 deposited to the credit of Fleur's account had come from someone who owed money to her late husband. The verdict shows that the jury rejected that explanation. They must instead have accepted that, in arranging to transfer the amount from Fleur's account to her own, the appellant was acting dishonestly. She knew there had been a mistake and proceeded to take advantage of it. On the evidence at the trial, there was ample justification for such a finding.

This is an appeal by Mrs Capewell against her conviction. The sole ground of appeal is that the trial judge was wrong in directing the jury that she could be convicted even though the appellant evidently acted with the consent of the owner of the property, who was Fleur. By having $3,500 transferred to her own account with the Bank the appellant was alleged by the Crown to have applied it in terms of s.408C(1) to her own use. It is clear that Fleur must have consented to that being done; indeed, it is probably correct to say that in signing the transfer form and otherwise participating in the transaction she acted as the appellant's agent.

> Section 408C(1) of the Criminal Code creates a crime of misappropriation of property, which is committed by a person "who dishonestly applies to his own use or to the use of any person -"(a)property belonging to another; or
>
> (b)property belonging to him, which is in his possession or control ... subject to a trust, direction or condition or on account of any other person ...".

The word "property" is defined in s.408C(3)(a) to include money and all other property "including things in action and other intangible property". In this it follows s.4(1) of the Theft Act 1968 (U.K.), from which the Queensland legislation appears to have drawn some of its inspiration. In *Lawrence v. Metropolitan Police Commissioner* [1972] A.C. 626, it was held that there could be a dishonest appropriation of property constituting theft under s.1(1) of the Theft Act even though the appropriation took place with the consent of the property owner. See also *R. v. Gomez* [1993] A.C. 442; [1992] 3 W.L.R. 1067. To constitute the offence of theft under that Act there must be an appropriation of "property" which by s.3(1) includes an assumption of the rights of an owner. That is a requirement which goes beyond what is needed to establish the offence of misappropriation in Queensland. The decisions in *Lawrence v. M.P.C.* and *R. v. Gomez* therefore afford some, if indirect, authority for arriving at a similar result in Queensland. If the owner's consent is not a requisite for an appropriation under the Theft Act, there is even less reason for saying it is needed under s.408C.

Quite apart from anything in the English decisions, it is clear from the language and structure of s.408C that property may be applied under s.408C(1) irrespective of the owner's consent. Consent of the owner or its absence will often be critical in deciding whether or not it has been applied dishonestly. But there is nothing at all to justify interpreting the word "applies" in s.408C(1) as meaning more or less than it says. A person charged under the section must be proved

to have applied property to his own or someone else's use, and to have done so dishonestly. Because the owner consents does not mean that the property is not applied within the meaning of the section.

This disposes of the only express ground of appeal. However the argument before us also raised the question of what it was that the appellant had applied to her own use. In the charge against her it is alleged to be "a chose in action of the value of $3,500 belonging to" Fleur Capewell. The question is whether such a chose in action existed on 9 March 1992, which was the date on which the appellant is alleged to have applied it to her own use; and if so whether it then had a value of $3,500. To sustain the conviction it may not be critical to prove the value alleged: *R. v. Lindsay* [1963] Qd.R. 386, 400-401; but the existence of the chose in action is essential to sustain the conviction.

Whether or not on 9 March Fleur had a chose in action for $3,500 which the appellant then applied to her use falls to be determined by the rules of banking law. It is now well settled that the relation between banker and customer in operating a current account is that of debtor and creditor. Money banked to the credit of the account is not held by the banker as agent or trustee for the customer but becomes the property of the bank. See *R. v. Davenport* [1954] 1 W.L.R. 569; [1954] All E.R. 602, 603, adopted in *Croton v. The Queen* (1967) 117 C.L.R. 326, 330-331. The underlying theory is that the bank borrows the amount from the customer, and undertakes to repay it on demand: *Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110, 127; *National Australia Bank Ltd. v. K.D.S. Construction Services Ltd.* (1987) 163 C.L.R. 668, 676. The debt owed by the bank to the customer is a chose in action, which is "property" within the meaning of s.408C(3)(a) and as such capable of being stolen, misappropriated, or in Queensland "applied" : *Attorney-General's Reference (No. 1 of 1983)* [1985] 1 Q.B. 182, 187, 188.

The sum, if any, for which a bank is indebted to a customer on current account varies according to the amounts deposited to and withdrawn from the account. It is, however, the credit balance in the account from time to time that constitutes the customer's chose in action. The decisions in England approach the matter in this way: see *Kohn* (1979) 69 Cr.App.R. 395, 407, *Wille* (1988) 86 Cr.App.R. 296, 301; *Chan Man-Sin v. The Queen* [1988] 1 W.L.R. 196, 199; so do the courts in America : *Tracy v. Lucik* 189 So. 430, 435 (1939) Fla. S.C. The amount of the credit balance

appears from the passbook or bank statement in respect of the account. As against the bank, entries in the statement are prima facie evidence of the balance (if any) due to the customer: *Holland v. Manchester & Liverpool District Banking Co.* (1909) 14 Com.Cas. 241, 245-246. Of course, the bank is entitled to rectify mistakes by correcting or adjusting entries in the statement; but the right to do so may be lost because, for example, the bank is estopped; or because it has knowingly ratified an erroneous entry; or because the money was applied in discharging a debt : *ANZ Banking Group Ltd. v. Westpac Banking Corporation* (1988) 164 C.L.R.662; or because an event such as insolvency supervenes, as happened in *Momm v. Barclays Bank International Limited* [1977] Q.B. 791.

In the present case the bank statement (ex. 5) with respect to Fleur's account with Metway Bank disclosed an opening credit in her favour on 3 March 1992 of .68 cents followed by a further credit that day of $4,000, which was the amount misdirected from the Bundaberg branch. The total credit remained unchanged until 9 March, when the signed form of transfer was lodged, and the sum of $3,500 was transferred to the appellant's account. That left a credit of $500.68 which was reduced by successive withdrawals to $354.11 on 21 April. Entries in ex. 5 show that was when the Bank closed the account after debiting $500, which reduced it to a debit balance of $145.89. The sum of $500 was what remained of the original $4,000 mistakenly credited to the account after transferring $3,500 to the appellant's account on 9 March 1992.

The bank statement (ex. 4) in respect of the appellant's own account with the Bank reveals a corresponding state of affairs. On 9 March 1992 the credit balance was a mere $21.46 when the transfer of $3,500 from Fleur's account was credited raising a balance of $3,521.46. The series of almost daily withdrawals of $500 through automatic teller machines then ensued which, after some pension payments were credited, was reduced to a credit balance of only .26 cents on 21 April 1992. On that day the Bank closed the account, although a further operation was permitted on 23 April 1992 to withdraw a pension payment deposited that day. The final entry in ex. 4 shows a debit balance against the appellant of $3,499.64.

The decision of the English Court of Appeal in *R. v. Thompson* [1984] 1 W.L.R. 962, 967, suggests it might be arguable that there never was on 9 March 1992 a credit balance of $4,000.68 in Fleur's account from which $3,500 was transferred to the appellant's account on the same date. That would be quite inconsistent with the bank entries in exs. 4 and 5; but in *Thompson* it appears to have

been accepted that a credit balance created fraudulently and capable of correction by the Bank was not "property" which could be obtained by deception under the Theft Act 1968. May L.J. on behalf of the Court of Appeal said (at 967):

"We do not think that one can describe as a chose in action a liability which has been brought about by fraud, one where the action to enforce that liability is capable of immediate defeasance as soon as the fraud is pleaded."

That meant, according to the decision in the case, that the subject property had not been obtained by the appellant in Kuwait, where he fraudulently created the credit balances, but rather in England where, it was said (at 965), "in each instance he received into a particular bank account the sterling equivalent of the credit balance in an account in Kuwait, which the bank [there] transferred by telex as the result of the appellant's letters" sent from England.

What is surprising about the reasoning and decision in that case is that the Court was apparently prepared to treat the credits as property after (although not before) their transmission from the account in Kuwait to that in England. In the present case the sum of $4,000 found its way into Fleur's account on 3 March 1992 not as the result of fraud but of a mistaken transfer of an admitted credit in the joint account of Mr & Mrs Hughes in Bundaberg. In technical terms there was an assignment to Fleur of a valid chose in action against the Bank that belonged to Mr & Mrs Hughes. On that point *R. v. Thompson* is distinguishable. If anything it provides authority for saying here that the credit of $4,000.68 in Fleur's account on 9 March was, like the credits transmitted to England from Kuwait, "property" capable of being misappropriated or applied contrary to s.408C(1) of the Code.

In so far as anything in the reasons in *R. v. Thompson* suggests that entries in a bank account may simply be ignored if the transactions they record are a nullity capable of being reversed by the bank, it is not easy to reconcile with the later decisions of the Court of Appeal in *Wille* (1987) 86 Cr.App.R. 196 and of the Privy Council in *Chan Man-Sin v. The Queen* [1988] 1 W.L.R. 196. In both cases convictions for theft of a customer's chose in action, consisting of the debt due from the bank, were upheld although the bank had no authority at all to debit the accounts and the customer was entitled to insist on the debit entry being reversed. The fact that the correct state of affairs had to be restored, and the customer would in the end not have been deprived of anything, did not

mean that there was no misappropriation or property application consisting of the credits in the accounts.

It is true that if on 9 March 1992 Fleur had sued the Bank for the debt of $4,000.68 apparently owing to her on that day, her action would, if the Bank had known then what it later learnt and now knows, have been defeated by proof that the $4,000 had been credited in error and that the entry in the bank statement was therefore not evidence of the indebtedness of the Bank. However, despite what was said by May L.J. in the passage from *R. v. Thompson* quoted above, it cannot be correct to test the existence of a chose in action at a particular date in the past by asking, with the benefit of hindsight, whether the plaintiff would have obtained judgment then. Few choses in action would satisfy that test. Here both the Bank and the appellant have at all times material to these proceedings recognised and acted on the footing that Fleur had a chose in action in the form of a credit in her account on 9 March having a value of at least $3,500. What they differed about was the right of the applicant to retain that credit or its benefit. Ever since the Bank discovered the mistake, the appellant has been claiming that she came by the credit honestly and was entitled to keep it.

The Bank's assertion to the contrary has now been vindicated by the verdict of the jury. It does not follow there never was a chose in action in an amount of $4,000 of which $3,500 was transferred to the appellant. On the contrary the bank statements (exs. 4 and 5) show that there was such a credit, and that the Bank has always recognised that there was. On discovering the error, it set out to rectify it. It did not literally "reverse" the error if by that is meant eliminating the erroneous credit from the beginning as if it had never been there. Accrued interest of $3.43 credited to Fleur's account on 31 March 1992 has never been disturbed. What the Bank did was to adjust the balances shown in the bank statements so that they reflected the Bank's right to recover what had been paid by mistake. It might perhaps have debited all of the $4,000 to the account of Fleur as the one who had originally been credited with it; instead, however, the Bank so far acknowledged the validity of the initial transfer of $4,000 to Fleur's account, as well as her power to deal with the resulting credit, that it debited $500 to her account and the balance of $3,500 to the account of the appellant. That process of adjustment assumes that the transfer to the appellant on 9 March was an effective assignment of the right to a credit in that amount. In short, the Bank has always accepted

the entries in the bank statements as correct, while claiming to make further entries to reflect its right to repayment of the amount previously credited by mistake. It has never claimed the right to act as if there had never been a credit of $4,000 in the account.

Of course, there was nothing the Bank could or did do that was capable of altering the legal rights and duties of the parties. In my opinion, however, the attitude and the actions of the Bank accurately reflected the operations on the account and the rights and duties arising from them. It is a term of the contract between banker and customer that the bank will honour demands up to the amount of the balance standing to the customer's credit. *Commissioner of Taxation v. English Scottish & Australian Bank* [1920] 683, 687. The moment a bank places money to its customer's credit, the customer is entitled to draw on it. In saying this in *Capital & Counties Bank v. Gordon* [1903] A.C. 240, 249, Lord Lindley went on to add "unless something occurs to deprive him of that right". Here something occurred when the Bank discovered the error. It then took steps to obtain restitution of the amount paid by mistake, to which by law it was entitled : *Bank of New South Wales v. Murphett* [1983] V.R. 489. As against the appellant it was within its rights in tracing the $3,500 into the appellant's account and claiming the amount from her : *Banque Belge v. Hambrouck* [1921] 1 K.B. 321. To the extent of their respective liabilities to make restitution, the Bank proceeded to debit the accounts of the two customers with the amounts repayable to it. A bank has authority to do this in the exercise of the right of set off conferred on it by general law. See *Roxburghe v. Cox* (1879) 17 Ch.D. 520; *Re Morris; Coneys v. Morris* [1922] 1 I.R. 136, 138.

That was done on 21 April, when the amounts of $3,500 and $500 were debited respectively to the accounts of the appellant and Fleur. In so acting the Bank plainly, and one might think irrevocably, acknowledged the validity of the chose in action or credit of $4,000 in Fleur's account which, as to $3,500, was, as the Bank also acknowledged, assigned to the appellant on 9 March 1992. The assignment of that credit constituted under s.408C(1) an application by the appellant to her own use of the chose in action of $3,500 thereby transferred to her account.

The appellant was therefore rightly convicted of appropriation of a chose in action of $3,500 belonging to Fleur. The appeal against conviction should be dismissed. The application for leave to appeal against sentence has, in my view, little to commend it and should also be dismissed. The appellant was subject to an existing probation order for another offence of dishonesty at the

time she committed this offence, and she received an adverse report from her probation officer. In those circumstances a sentence of imprisonment for six months for this offence cannot be considered excessive.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 13 July 1994

I have had the advantage of reading the reasons prepared by McPherson JA and adopt his Honour's explanation of the facts of the case and the issues raised. The indictment charged that the appellant dishonestly applied to her own use "property namely a chose in action of the value of $3,500 belonging to one Fleur Monique Capewell" (emphasis added). The $3,500 which was transferred out of Fleur's account by the appellant had been, as McPherson JA has explained, credited to Fleur by a clerical error.

It is my opinion that a mistaken credit entry in a customer's account at a bank does not, without more, make the bank a debtor of the customer in the amount credited; nor does a mistaken debit entry decrease the bank's indebtedness to the customer. The same position arises where the entry is made not by mistake, but as a result of fraudulent action by a bank official, as in Thompson (1984) 1 W.L.R. 962. In an explanation and discussion of that case in (1986) Crim.L.R. 356 at p. 366, Edward Griew said:

"The fraudulently made computer entries were like forged entries in old fashioned ledgers. The apparent credits in D's accounts were no credits at all. D did not obtain things in action by his programming tricks. This is surely correct. A book entry which inflates the amount standing to the credit of a customer's account, but which is not founded in any transaction or entitlement, is not to be treated as representing a payment into the account (unless, indeed, the customer has altered his position in reliance on the entry). In one case such an entry was made by a bank manager, in order to conceal from the bank's auditors the fact that the customer had been allowed to exceed his overdraft limit. It was held to have no substantive effect on the account".

The "one case" referred to is British and North European Bank Ltd v. Zalzstein [1927] 2 K.B. 92; in his reasons at pp. 97 and 98, Sankey J repudiates the suggestion that the mere appearance of a

credit entry in a bank passbook necessarily creates any right in the owner of the passbook. Sometimes the bank will be precluded, in particular by reason of estoppel, from denying the correctness of the entry; but in general, a mistaken entry in favour of or against a customer in the bank's records appears to have no greater or lesser effect, as between the bank and the customer, than a mistaken entry in favour of or against a customer in the books of any other business. No question of estoppel arises in the present case, nor is it suggested that any custom or practice of the banking industry is relevant here.

In Chan Man-sin v. The Attorney-General of Hong-Kong [1988] 1 W.L.R. 196, the appellant fraudulently withdrew money from his employers' bank accounts. He was charged with and convicted of the theft of choses in action, namely debts owed by the bank to the employers. The point taken for the appellant was that the money had been got out of the employers' accounts by use of forged cheques and therefore the debits to the employers' accounts were nullities - so the debts owed by the bank to the employers were unaffected. The case was complicated by the circumstance that some of the convictions related to cheques which had been drawn on accounts in overdraft.

The appellant's argument was rejected, but on a special ground which has no application here. This was that under the relevant statute the appellant's guilt, in the circumstances, depended upon his having appropriated property belonging to another, and appropriation was defined so as to include "any assumption by a person of the rights of an owner...". This meant that there could be a theft although the thief's activities did not affect the state of the accounts, i.e., were nullities; by drawing, presenting and negotiating cheques on the employers' accounts the appellant assumed the employers' rights. It was not held that the appellant's argument could be met merely by pointing out that debits appeared in the employers' accounts with the bank; if the appearance of those debits were thought to have affected the legal relationship - the state of indebtedness - between the bank and the employers, that would have been a simpler basis on which to uphold the convictions.

If there was a chose in action belonging to Fleur, as the indictment alleged here, it consisted of a right to recover money from the bank - in short, a debt; but the bank did not owe Fleur any

money, except for the 68 cents which was in truth in her account before the mistaken credit appeared. The indictment alleged in effect that the $3,500 belonged to Fleur, but it did not. To uphold the conviction, we would have to hold that a computer error adding, say, a few zeros to the balance in a customer's bank account substantially changes the amount of the debt due; I have found no authority in favour of that view.

The present appears to me to be a case in which the indictment was wrongly framed; the appellant could, it seems, have been charged with stealing from the bank: Kennison v. Daire (1985) 160 C.L.R. 129, Evenett [1987] 2 Qd.R. 753. It is conceded for the respondent that unless there was, at the time of transfer of the $3,500, a relevant chose in action belonging to Fleur the appeal must be allowed, and reference to Hempenstall (1937) St.R.Q. 343, McCoy (1938) St.R.Q. 249 and Mumbray (1938) Q.W.N. 31, suggests that the concession was rightly made. In my view it would not be possible for this Court to amend the indictment so as to replace the charge made by one which would be supported by the facts proved.

In my opinion the appeal against conviction should be allowed and the conviction quashed.