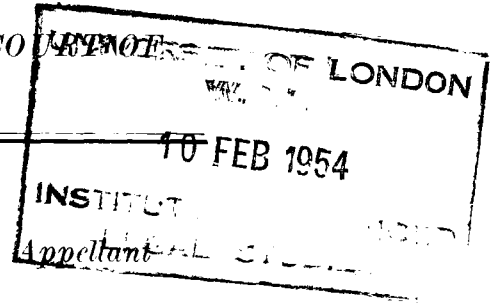


# In the Privy Council.

33812

## ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES.



BETWEEN

BANK OF NEW SOUTH WALES (Defendant)

AND

WALTER RICHARD JAMES LAING (Plaintiff) . Respondent.

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## Case for the Respondent.

RECORD.

1. This is an appeal brought by leave of the Full Court of the Supreme Court of New South Wales conditionally granted on the 14th October 1952 and finally granted on the 7th January 1953 from an order of the said Court dated the 7th October 1952 dismissing the appeal of the Appellant in an action which was tried before the Honourable Mr. Justice McClemens on the 19th and 20th May 1952 in which the jury was by consent dispensed with at the trial wherein His Honour found a verdict for the Respondent the Plaintiff in the said action for £19,412 10s. 9d. judgment being entered accordingly.

p. 37.  
p. 38.  
p. 22.

p. 20.

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2. The circumstances giving rise to the action were as follows:—

(A) From January 1947 to February 1951 the Respondent was a customer of the Appellant Bank having a current account in its Haymarket Branch.

(B) Over the period very substantial sums far in excess of the amount claimed in the action were placed by the Respondent to the credit of that account.

(C) The Respondent claimed that between July 1948 and June 1949 eight forged cheques totalling £19,412 10s. 9d. had been wrongly debited to his account. Particulars of the said cheques were supplied to the Appellant as appears by the correspondence between the parties tendered in the action and marked Exhibit "B."

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(D) The Appellant neither admitted nor denied that the said cheques were forgeries.

(E) The Respondent made a demand on the Appellant for repayment of the said sum by drawing eight cheques payable to

p. 53. himself each cheque dated 8th February 1950 such cheques corresponding to the eight alleged forged cheques and by having the same presented to the Appellant through the Bank of Australasia.

p. 53. (F) These cheques were dishonoured by the Appellant each being endorsed "Refer to Drawer. Bona fide dispute state of account arising alleged forged cheques."

(G) On the 12th February 1951 the Appellant wrote to the Manager of the Bank of Australasia a letter in the following terms:—

p. 53. " 12th February, 1951. 10

" The Manager,  
" Bank of Australasia,  
" Wentworth Avenue,  
" Sydney.

" Dear Sir,

" W. R. J. LAING.

" With reference to certain cheques itemized hereunder,  
" bearing date 8th February, 1951, drawn by W. R. J. Laing,  
" presented by you for payment and returned to you herewith  
" with the answer 'Refer to Drawer—Bona fide dispute state 20  
" 'of account arising alleged forged cheques' endorsed thereon,  
" we advise that certain funds which the drawer may have  
" considered were at his disposal and which would have been  
" sufficient to meet such cheques are the subject of a bona fide  
" dispute arising out of alleged forgeries.

" No. 841474, for £2,950,  
" 841471, ,, 2,950,  
" 841473, ,, 2,210.18.9,  
" 841472, ,, 2,950,  
" 841475, ,, 2,338. 0.8, 30  
" 841476, ,, 890.15.8,  
" 841477, ,, 2,225. 5.4,  
" 841478, ,, 2,897.10.4.

" You are authorised to communicate this information to  
" your client.

" Yours faithfully,

" (Signed) C. F. COSTELLO,  
" Manager."

p. 1. 3. On the 16th February 1951 the Respondent instituted an action  
p. 2. by specially endorsed writ against the Appellant claiming £19,412 10s. 9d. 40  
pp. 2-3, for money lent and by his declaration dated 1st March 1951 claimed the  
said amount under a common money count for money lent. Endorsed  
on the writ were particulars of the cheques alleged to have been wrongly  
debited to the account.

p. 3, ll. 37-38. 4. To this declaration the Appellant pleaded a plea of "never  
" indebted " to which the plea Respondent joined issue.

5. The following Rules as to pleading made under the Common Law Procedure Act 1899 (New South Wales) are material :—

“ Rule 65—

“ To causes of action to which the plea of ‘ never was indebted ’ is applicable, as provided in the Third Schedule to the Common Law Procedure Act, 1899, and to those of a like nature, the plea of *non assumpsit* shall be inadmissible, and the plea of ‘ never was indebted ’ will operate as a denial of those matters of fact from which the liability of the defendant arises.

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“ *Exempli gratia*.—In actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact ; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

\* \* \* \* \*

“ Rule 67—

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“ In every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Exempli gratia*—Infancy, coverture, release, payment, performance, illegality of consideration either by statute or Common Law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

\* \* \* \* \*

“ Rule 71—

“ The plea of ‘ *nil debet* ’ shall not be allowed in any action.

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“ Rule 72—

“ All matters in confession and avoidance shall be pleaded specially, as above directed in actions in simple contracts.

“ Rule 73—

“ Payment shall not be received in evidence, in any case in reduction of the debt or claim, without a plea of payment. Provided that in respect of any sum for which the plaintiff has specifically given credit in his particulars of demand, or in the special indorsement, if any, on the summons, no such plea shall be necessary.”

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6. At the trial the Respondent tendered :—

(A) The correspondence marked Exhibit “ B ” to prove that at all material times the relationship of banker and customer

pp. 39-57.

existed between the parties, the result of such relationship being that any money lent by the Respondent to the Appellant was repayable on demand.

Appendix,  
Exhibit "A".

(B) The original current bank account of the Respondent kept by the Appellant to prove that moneys in excess of the amount claimed had been lent by the Respondent to the Appellant.

Appendix,  
Exhibit "C".

(C) The eight cheques referred to in paragraphs 2 (E) and (F) hereof to prove that a demand for the amount claimed in the writ had been made on the Appellant by the Respondent before action brought.

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p. 53.

(D) The letter referred to in paragraph 2 (G) hereof to prove a refusal by the Appellant to repay the amount or any part thereof.

pp. 7-10.

7. The Appellant called no evidence but at the close of the Respondent's case asked that a verdict be entered for the Appellant on the ground that the Respondent had not proved that at the date of the demand there were sufficient funds owing by the Appellant to the Respondent to meet such demand.

p. 13.

8. His Honour rejected the application on the ground that the money claimed having been lent by the Respondent to the Appellant the plea of never indebted did not raise the issue as to whether at the date of the demand there were sufficient funds to meet such demand and that such an issue could be raised only by a plea of confession and avoidance.

p. 14  
p. 20

9. His Honour found a verdict for the Respondent on the ground that on the only issues raised by the pleadings proof that the money claimed had been lent that a demand for repayment thereof had been made and that such demand had been refused entitled the Respondent to a verdict.

p. 21.

10. By notice of motion in the Full Court of the Supreme Court of New South Wales dated the 28th May 1952 the Appellant moved that the said verdict and the judgment entered thereon be set aside and that a verdict and judgment be entered for the Appellant the substantial grounds of appeal being that on the evidence His Honour should have held that at the date of the demand made by the Respondent upon the Appellant there was no money due and owing by the Appellant to the Respondent to meet such demand and that such a finding was open to His Honour on the issues raised by the pleadings.

11. On the hearing of the appeal the Appellant argued :—

(A) That the onus was on the Respondent to show that at the time the demand was made the Appellant owed to the Respondent the money claimed.

(B) That the bank account tendered by the Respondent showed that at the date of the demand there were insufficient funds to meet it.

(C) That the Respondent could not rely upon the credit side of the account as showing that the money was lent and at the same time ignore the debit side.

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(D) That in the circumstances a plea of payment was inapplicable.

12. The contentions of the Respondent were :—

(A) That to an action for money lent a plea that the Defendant never was indebted as alleged alleges no more than that before action brought no payable debt for the amount pleaded to had ever arisen.

(B) That the plea admits that if a payable debt did arise it has not been paid.

10 (C) That a Plaintiff taking issue on such a plea is entitled to a verdict on proof that a payable debt did arise before action brought.

(D) That the bank account proved that money in excess of the amount claimed had been lent by the Respondent to the Appellant.

(E) That as the relationship of banker and customer existed between the parties such money was repayable on demand.

20 (F) That if the allegedly forged cheques or any of them were in fact genuine a payable debt arose for the amount of each such genuine cheque when presented to the Appellant for payment, i.e., when the demand was made.

(G) That if the allegedly forged cheques or any of them were in fact forgeries a payable debt arose in respect of the amount of such forged cheques when the cheques mentioned in paragraphs 2 (E) and (F) hereof were presented for payment, i.e., when the demand was made.

30 (H) That since no plea of payment was pleaded in respect of the money claimed (represented by the alleged forged cheques) no facts other than those proved were material to the issues raised by the pleadings and that the debit side of the bank account was irrelevant to such issues.

13. The appeal was heard by the Full Court of the Supreme Court of New South Wales (Street, C.J., Owen and Herron, JJ.) on the 17th and 18th September 1952. Judgment was delivered on the 7th October 1952. p. 23-36.

14. The Full Court unanimously dismissed the appeal.

15. The reasons given by the learned Judges constituting the Court may be summarised as follows :—

*Street, C.J., held—*

40 (A) That the plea of never indebted denied the loan and nothing more. p. 25, ll. 22-23.

(B) That the debit side of the bank account was irrelevant to any issue raised by the pleadings. p. 26, ll. 37-42.

p. 26,  
ll. 23-24.

(C) That the Appellant could not rely upon repayment not having pleaded it.

*Owen, J., held—*

p. 27.

(A) That the plea of never indebted denied the loan and that the demand for repayment had been made.

p. 27,  
ll. 33-37.

(B) That the debit side of the bank account was irrelevant to any issue except in so far as it provided additional evidence that the money had been lent.

p. 28,  
ll. 35-37.

(C) That the defence sought to be raised by the Appellant could be raised only under a plea of payment. 10

*Herron, J., held—*

p. 35.

(A) That the plea of never indebted denied the loan and nothing more.

p. 36, ll. 8-10.

(B) That the debit side of the account was irrelevant to any issue.

p. 36, ll. 3-8.

(C) That the fact that there was insufficient money in the Respondent's account at the date of the demand could be raised only by a plea of payment.

16. The Respondent respectfully submits that the Supreme Court of New South Wales was right in holding that on the issues raised by the 20 pleadings the Respondent was entitled to succeed in the action.

17. Accordingly the Respondent submits that this appeal should be dismissed with costs for the following amongst other

## REASONS.

- (1) BECAUSE the plea of never indebted in the circumstances of the present case denied at most—
  - (A) that the money claimed was lent; and
  - (B) that before action brought it became payable.
- (2) BECAUSE the plea admits that if the money was lent and repayment demanded before action brought it had 30 not been repaid.
- (3) BECAUSE no plea in confession and avoidance was pleaded.
- (4) BECAUSE the Appellant admits that the money was lent that repayment was demanded and (by the plea) that it had not been repaid.
- (5) BECAUSE the order appealed against is right and should be affirmed.

K. A. FERGUSON,  
*Counsel for the Respondent.*

**In the Privy Council**

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**ON APPEAL**

*from the Full Court of the Supreme Court  
of New South Wales.*

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BETWEEN

**BANK OF NEW SOUTH**

**WALES** (Defendant) . *Appellant*

AND

**WALTER RICHARD**

**JAMES LAING** (Plaintiff) *Respondent.*

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**Case for the Respondent.**

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