35, 1953

In the Privy Council.

No. 15 of 1953.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

BANK OF NEW SOUTH WALES ... (*Defendant*) *Appellant*

AND

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

RECORD OF PROCEEDINGS

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In the Privy Council.

No. 15 of 1953.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

BANK OF NEW SOUTH WALES ... (*Defendant*) *Appellant*

AND

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

RECORD OF PROCEEDINGS

In the Supreme Court.

No. 1.
Issues for trial.
16th March, 1951.

No. 1.
Issues for Trial.

WRIT ISSUED : The 16th day of February, 1951.
APPEARANCE ENTERED : The 21st day of February, 1951.
DECLARATION DATED : The 1st day of March, 1951.

WALTER RICHARD JAMES LAING by LEWIS GEORGE WILLIAMS his Attorney sues BANK OF NEW SOUTH WALES a body corporate and liable to be sued in and by its said corporate name and style for money payable by the Defendant to the Plaintiff for money received by the
10 Defendant for the use of the Plaintiff and for money payable by the Defendant to the Plaintiff for money lent by the Plaintiff to the Defendant.

AND THE PLAINTIFF CLAIMS THE SUM OF NINETEEN THOUSAND FOUR HUNDRED AND TWELVE POUNDS TEN SHILLINGS AND NINEPENCE (£19,412 10s. 9d.).

L. G. WILLIAMS,
Plaintiff's Attorney.

In the Supreme Court.

No. 1. Issues for trial. 16th March, 1951— *continued.*

PLEAS DATED : The 12th day of March, 1951.

The Defendant by WILLIAM JAMES BALDOCK its Attorney says that it never was indebted as alleged.

REPLICATION AND JOINDER OF ISSUES DATED : The 16th day of March, 1951.

The Plaintiff joins issue on the Defendant's Plea herein.

Dated this 16th day of March 1951.

L. G. WILLIAMS,
Attorney for the Plaintiff,
28 Martin Place,
Sydney.

No. 2. Amended Issues for trial.

No. 2.

Amended Issues for Trial.

Writ issued : The 16th day of February, 1951.

Special Endorsement To amount due by the Defendant to the Plaintiff for money lent by the Plaintiff to the Defendant and for money received by the Defendant to the use of the Plaintiff and dealt with by the Defendant in the following manner :

	£	s.	d.
To amount of forged cheque dated 5th July 1948 for the amount of £2,950 0s. 0d. debited by the Defendant to the Plaintiff's Banking Account with the Defendant	2,950	0	0
To amount of forged cheque dated 26th November 1948 for the amount of £2,950 0s. 0d. debited by the Defendant to the Plaintiff's Banking Account with the Defendant	2,950	0	0
To amount of forged cheque dated 20th January 1949 for the amount of £2,210 18s. 9d. debited by the Defendant to the Plaintiff's Banking Account with the Defendant	2,210	18	9
To amount of forged cheque dated 1st February 1949 for the amount of £2,950 0s. 0d. debited by the Defendant to the Plaintiff's Banking Account with the Defendant	2,950	0	0

	£	s.	d.
To amount of forged cheque dated 25th February 1949 for the amount of £2,338 0s. 8d. debited by the Defendant to the Plaintiff's Banking Account with the Defendant	2,338	0	8
To amount of forged cheque dated 21st April 1949 for the amount of £890 15s. 8d. debited by the Defendant to the Plaintiff's Banking Account with the Defendant	890	15	8
To amount of forged cheque dated 30th May 1949 for the amount of £2,225 5s. 4d. debited by the Defendant to the Plaintiff's Banking Account with the Defendant	2,225	5	4
To amount of forged cheque dated 27th June 1949 for the amount of £2,897 10s. 4d. debited by the Defendant to the Plaintiff's Banking Account with the Defendant	2,897	10	4
	£19,412	10	9

Appearance entered : The 21st day of February, 1951.
Declaration dated : The 1st day of March, 1951.

WALTER RICHARD JAMES LAING by LEWIS GEORGE WILLIAMS his Attorney sues BANK OF NEW SOUTH WALES a body corporate and liable to be sued in and by its said corporate name and style for money payable by the Defendant to the Plaintiff for money received by the Defendant for the use of the Plaintiff and for money payable by the Defendant to the Plaintiff for money lent by the Plaintiff to the Defendant.

AND THE PLAINTIFF CLAIMS THE SUM OF NINETEEN THOUSAND FOUR HUNDRED AND TWELVE POUNDS TEN SHILLINGS AND NINEPENCE (£19,412 10s. 9d.).

L. G. WILLIAMS,
Plaintiff's Attorney.

Pleas dated : The 12th day of March, 1951.

The Defendant by WILLIAM JAMES BALDOCK its attorney says that it never was indebted as alleged.

Replication and joinder of issues dated : The 16th day of March, 1951.

The Plaintiff joins issues on the Defendant's Plea herein.

L. G. WILLIAMS,
Attorney for the Plaintiff,
28 Martin Place,
Sydney.

In the Supreme Court.

No. 3. Notes of Evidence and of Submissions by Counsel. 19th May, 1952.

No. 3.

Notes of Evidence and of Submissions by Counsel.

Coram : McClemens, J. and a Jury of Four.

Monday, 19th May, 1952.

Laing *v.* Bank of New South Wales.

Mr. Ferguson, Q.C., with Mr. Taylor appeared for the Plaintiff.

Mr. Shand, Q.C., with Mr. Asprey, appeared for the Defendant.

His Honor : Do you want me, Mr. Shand, to ask if any of the Jurors has an interest in the Defendant ?

Mr. Shand : It might be as well.

His Honor : Gentlemen, the Defendant in this case is the Bank of New South Wales. Have any of you gentlemen any shares in the Bank ?

(No response.)

His Honor : Apparently there is none.

(At this stage the Jury was empanelled and at 10.20 a.m. Mr. Ferguson opened to the Jury.)

(Mr. Ferguson called for the book of the Bank containing the records of the current account of the Plaintiff, Walter James Laing, from 1st January, 1947, to date ; Mr. Shand produced an account dating back to July, 1946 ; account tendered and marked Exhibit A.)

(Mr. Ferguson called for a letter of 27th October, 1950, together with enclosures ; produced ; tendered. Mr. Shand objected to the enclosure, and the Jury retired during argument. Mr. Shand said the ground of his objection was that the enclosure purports to be a statement by a man called Harborne who says, " I forged a number " of the cheques the subject of this action." Mr. Shand said that was no better than hearsay evidence. Mr. Ferguson said he was not putting it forward as evidence of forgery, but merely as part of the correspondence. He said that Mr. Harborne had now committed suicide, that Mr. Harborne had an account with the Bank and that they knew his signature. The original of this document was available. Mr. Ferguson submitted that forgery was not in issue. Mr. Shand submitted that it was. Mr. Ferguson submitted that he had only to prove that the Defendant had received the sum of £19,412 10s. 9d. the amount claimed, and that the Plaintiff had not got that amount back. He submitted that since the passing of the Common Law Procedure Act in 1852 when " never indebted " is pleaded, it is denial that there ever was a debt. The documents were handed to His Honor. The letter dated 27th October, 1950, was admitted and marked Exhibit B. Mr. Ferguson said he had not tendered the

enclosure as a declaration against interest because it was only a copy. He tendered it on the basis that one had to examine the Defendant's attitude.)

HIS HONOR: It does not appear to me at this stage that it is admissible. You can repress your tender later on. There is nothing before me on which I could hold that the Bank ever, by express statement or by its behaviour, accepted the accuracy of what appears in this document.

Mr. FERGUSON: I am not tendering it for its accuracy or for any evidence of what is in it. I am only tendering it to show that the Bank was so informed. (Argument ensued.)

HIS HONOR: What is the basis on which you are putting it?

Mr. FERGUSON: The basis on which I am putting it is that it is part of the correspondence between the parties before action, that the documents are referred to from time to time in the correspondence—there is another document too—and that it is evidence that the Bank was informed that Harborne, who was alleged to have forged the cheques, admitted that he had forged them.

HIS HONOR: It appears to me that the mere fact that a document is part of the correspondence between the parties before action does not make it material or admissible unless certain conditions are fulfilled, for instance, that the document by its nature calls for a reply or that the person to whom it is sent, by admission or by his behaviour, indicates an acceptance of it.

Mr. FERGUSON: I would agree with that if I was tendering it as an admission.

HIS HONOR: I am not shutting you out from re-tendering this enclosure, but it does appear to me that it is not admissible on the first ground. With regard to the second ground, that the document is referred to from time to time in the correspondence, if you can show me in the correspondence anything that makes this document in my opinion material and admissible, then you are entitled to press it later. With regard to the third count, that it is evidence that the Bank was informed that Harborne who was alleged to have forged the cheques admitted he had forged them, at present I am unable to see any ground upon which I could hold that that mere knowledge was relevant in this action. I will have the document marked for identification.

(The document enclosed with the letter of 27th October, 1950, was m.f.i. 1.)

(The Jury returned to Court.)

(Mr. Ferguson called for the letter of 1st November, 1950, together with the enclosure; produced; tendered. Mr. Shand objected to the enclosure. The letter was admitted and made part of Exhibit B and the enclosure was m.f.i. 2.)

(Mr. Ferguson called for, and Mr. Shand produced, letters from the Plaintiff's solicitors bearing the following dates: 9th November, 1950; 14th November, 1950; 21st November, 1950; 29th November, 1950; 4th December, 1950; 13th December, 1950; 2nd January,

In the Supreme Court.

No. 3. Notes of Evidence and of Submissions by Counsel. 19th May, 1952— *continued.*

1951 ; 16th January, 1951 ; and 2nd February, 1951. These letters, together with a letter from the Defendant to the Plaintiff's solicitors dated 14th November, 1950, and letters from the Defendant's solicitors to the Plaintiff's solicitors dated 1st December, 1950 and 15th January, 1951, were tendered and added to Exhibit B.)

(Short adjournment.)

(Mr. Ferguson tendered eight cheques, all dated 8th February, 1952, drawn by the Plaintiff on the Bank of New South Wales, Haymarket Branch. Mr. Shand objected. He said he did not object on the ground that they drew a number of cheques instead of one cheque for the full amount. Mr. Shand said the Plaintiff is bound by his claim in the writ and by his particulars given in the writ. He said that the Plaintiff did not sue on the cheques nor did he sue in respect of any debt which accrued due as at the date of those cheques. He submitted the cheques were irrelevant. Mr. Ferguson said he was tendering the cheques to show that a demand had been made.)

HIS HONOR : You say your cause of action arose when the Bank paid out your money to somebody who was not entitled to it ?

Mr. FERGUSON : My cause of action is that I lent certain moneys to the Bank, that I made a demand on the Bank and the Bank refused to pay. I am tendering these cheques to show that I made a demand. The particulars first of all say, " I lent you money and you are holding that on my behalf. Now I am suing for some of that money and I tell you it is represented by certain debits you have made to my account wrongly, which you had no right to do."

(Argument ensued.)

HIS HONOR : I propose to admit the cheques.

(Mr. Shand asked to have it noted that Mr. Ferguson said he did not apply for an amendment.)

HIS HONOR (to Jury) : Gentlemen, I wish you to understand very plainly, that these cheques themselves are not the cause of action sued on here. You heard what Mr. Ferguson said during the course of discussion. The cause of action sued on is in respect of the debiting of the Plaintiff's bank account in respect of eight cheques, according to Mr. Ferguson. Whether he makes that out is a matter you will have to consider later in the case. The only thing Mr. Ferguson seeks to prove, I understand, is that these cheques are a demand by the Plaintiff on the Defendant.

(Eight cheques tendered and marked Exhibit C.)

(Mr. Ferguson called for the Bank's Dishonour Book ; produced. Mr. Shand said he would admit that the whole eight cheques in Exhibit C were dishonoured. Mr. Ferguson said the reason set out was " Refer to Drawer. Bona fide dispute state of account arising alleged forged cheques.")

(Mr. Ferguson called for all records of the Bank relating to the dishonour of the cheques and the reasons for dishonour forwarded in respect of each cheque to the Bank of Australasia ; copy letter dated

12th February, 1951, from the Manager of the Haymarket Branch of the Bank of New South Wales to the Manager of the Bank of Australasia produced, tendered and marked Exhibit D.)

(*Case for the Plaintiff closed.*)

Mr. SHAND : I ask for a non-suit on the ground that the claim is for money had and received.

(Short adjournment.)

Mr. SHAND : I am going to ask for a direction verdict. I think you said, Mr. Ferguson, to get the issue clear, that at the time of the pleadings you were not suing on those last cheques that were put in.

Mr. Ferguson : No.

Mr. SHAND : But you were putting them in to show that there had been a demand.

Mr. FERGUSON : That is so.

HIS HONOR : I think I made it plain.

(Argument ensued.) (Mr. Shand submitted that money had and received does not lie once the relationship of debtor and creditor has been established. Argument ensued.)

HIS HONOR : Is your submission that this is an action for money allegedly had and received on the date not of the cheques which are Exhibit C, but at the time of certain undated cheques set out in the particulars ?

Mr. SHAND : Money had and received, and the particulars of the money had and received are those in the writ, which are the earlier cheques that are said to be forged, and not the later ones.

(Argument ensued. Mr. Shand submitted that no cause of action arises because a Bank debits its clients account with certain unauthorised debits.)

HIS HONOR : Do you want the Jury back at 2 o'clock ? Strictly they have to be here to hear the whole of the argument, or at least while you formally make a submission, and they certainly have to be here while I rule on it, but I do not want to bring them back unnecessarily.

Mr. SHAND : No. I would leave it to the Jury.

Mr. FERGUSON : I do not mind.

(His Honor told the Jury to return at 3 p.m.)

(*Luncheon adjournment.*)

Mr. SHAND : My third submission is really one which is not dependent on any form of action whatsoever. It is dependent upon the evidence before Your Honor, and the case as it stands could not succeed in any circumstances whatever. What is in evidence is the bank account of the Plaintiff in the Defendant bank and that shows nothing at the last entry. When those cheques (Exhibit C) were presented, on the material before Your Honor there was nothing to meet it . . . . The Bank says, " We " are not going to pay because we say that there are not any forged cheques

In the Supreme Court.

No. 3. Notes of Evidence and of Submissions by Counsel. 19th May, 1952— *continued.*

" and you are claiming that there are." Still the onus of proving the cheques are forged rests upon the Plaintiff. In the letter they say that there are no funds there : it might be that there were funds but there are not. At least the Plaintiff must prove that there were in the bank funds of his so as to create the possibility of a debt arising. That is not what he has done here . . . .

HIS HONOR : The money had and received, if Mr. Ferguson is right, is £19,000, not cheques at all.

Mr. SHAND : I have dealt with the question of money had and received . . . .

HIS HONOR : I dare say your submission comes back to this, there is no evidence before me of the bank having one penny of money to which Mr. Ferguson's client has any legal right.

Mr. SHAND : Yes, that is my last submission. There is not the slightest evidence we have paid any money wrongfully away. There is nothing to show Your Honor there is anything wrong in the account . . . .

(Mr. Ferguson argued on submissions to His Honor.)

Mr. FERGUSON : The particulars must import a claim for money lent. If Your Honor is in doubt about that, I ask for an amendment.

Mr. SHAND : I do not know whether my friend is asking for an amendment yet.

HIS HONOR : I understood you to ask for it, Mr. Ferguson. I do not think you ought to put the onus on me because after all this may have to be dealt with by other minds than my own and I do not want to put you in a position, perhaps, in some other place, of being prejudiced by the onus that I took on myself or did not take on myself. If you want me to rule on it as it stands my view is that on what has been said by Mr. Shand and what has been said by you, it does appear to me that that £19,412 is a comprehensive way of showing how this claim for money had and received is made up.

Mr. FERGUSON : Perhaps I had better ask Your Honor to amend the particulars. I would ask Your Honor to amend the writ to " amount " due by the Defendant to the Plaintiff for money lent by the Plaintiff " to the Defendant and dealt with by the Defendant in manner following :"

HIS HONOR : Does that mean you are limiting your claim now to money lent or do you want to keep it on the wider basis of money had and received ?

Mr. FERGUSON : I do not mind very much. Perhaps if I say, " For " money lent by the Plaintiff to the Defendant and money had and received " by the Defendant for the use of the Plaintiff and dealt with by the " Defendant in manner following : "

Mr. SHAND : What do you mean by " manner following " ?

Mr. FERGUSON : " Debited our account with." I might point out this is only to clearly indicate to the Defendant the moneys which we say are still owing to us with the Defendant refusing to pay. I point this out, that there is no cause of action nor do I claim there is any cause of action because of the fact that the Defendant debited our account.

HIS HONOR: So your client is fully protected, is this the amendment you want me to make—to amend the writ by putting in these words—" Amount due by the Defendant to the Plaintiff for money lent by the " Plaintiff to the Defendant and money had and received by the Defendant " for the Plaintiff and dealt with by the Defendant in manner following : " ?

Mr. FERGUSON: Yes.

HIS HONOUR: You want me to insert that between the word " claim " where it appears in the writ and the words " of amount of forged cheque." Is that what you want ?

Mr. FERGUSON: Yes. Perhaps I could read it. " The following " are the particulars of the Plaintiff's claim: To amount due by the " Defendant to the Plaintiff for money lent by the Plaintiff to the Defendant " and for money received by the Defendant for the use of the Plaintiff " and dealt with by the Defendant in manner following : "

HIS HONOR: Do you oppose that amendment ?

Mr. SHAND: I admit Your Honor is obliged to make the amendment. It is a question of terms and I submit the terms would be that the Plaintiff pay the costs to date.

(Questions of costs argued by Mr. Shand.)

HIS HONOR: You could not assure me fairly that if such a claim had been presented originally you would not have gone to trial ?

Mr. SHAND: If the proper claim had been presented we would not have gone to trial. We say a plea of never indebted.

HIS HONOR: Do you want an adjournment ?

Mr. SHAND: No, Your Honor.

HIS HONOR: I give Mr. Ferguson leave to make the amendment he seeks. In respect of costs in my view the proper order is this, that the Plaintiff in any event is to bear any increased costs in the action which the amendment has occasioned.

Mr. SHAND: I am still submitting that the Plaintiff cannot succeed on the action. It does not touch my third point but on the first point I still submit the Plaintiff cannot recover by his plaints and particulars.

(Mr. Ferguson continues to argue his submissions.)

Mr. SHAND: I would like my friend to indicate as to the date when he alleges any claim of his became due.

Mr. FERGUSON: I have not alleged anything as to when it became due.

HIS HONOR: I think Mr. Shand is entitled to the date on which you allege there was at least a liability to pay.

(Further argument ensued.)

Mr. FERGUSON: I will give you credit in this action for every debit to the account except in respect of the debits enumerated.

HIS HONOR: As far as the debits are concerned you urge no criticism in respect of any one of those debits except 8 and those eight debits are those you set out in the writ ?

Mr. FERGUSON: That is so, Your Honor.

(Mr. Ferguson continues arguing his submission.)

HIS HONOR: Your argument is " My case consists in looking at the

In the Supreme Court.

No. 3. Notes of Evidence and of Submissions by Counsel. 19th May, 1952— *continued.*

" credit side of this bank account. That shows that I have paid you some " moneys. I am seeking to recover back some of the money I have paid " you The only defence you can have to that is one of payment or " confession and voidance or something of that sort ? "

Mr. FERGUSON : Yes, that is all. The debits against that account are not debits against us. They are book entries made by the bank Confession and voidance must be specially pleaded.

(Mr. Ferguson continues his argument.)

(Mr. Shand replied to the submissions of Mr. Ferguson.)

Mr. SHAND : I want it noted that the Plaintiff's particulars do not cover the specific cheques at the end, yet. 10

(Mr. Shand continues his argument.)

(Mr. Ferguson replies.)

(The jury returned to Court.)

HIS HONOR : Gentlemen, arising out of the argument that has taken place this afternoon, I propose to think this matter over overnight and I propose, on this application that has been made here by Mr. Shand, if I direct a verdict in favour of the Defendant, to give my reasons at 10 o'clock to-morrow morning.

(The jury left at this stage.) 20

(His Honor ordered that new issues be filed before 10 o'clock to-morrow morning and served on the Defendant.)

(Both parties agreed to dispense with the jury in this matter.)

(Further hearing adjourned until 10 a.m. on Tuesday, 20th May, 1952.)

No. 4. Judgment. McClemens, J. on Submissions. 20th May, 1952.

No. 4.

Judgment of McClemens, J. on Submissions by Counsel.

Coram : McCLEMENS, J., and a Jury of Four.

Tuesday, 20th May, 1952.

LAING *v.* BANK OF NEW SOUTH WALES. 30

JUDGMENT

(On submissions by Counsel.)

HIS HONOR : In this matter at the close of the Plaintiff's case an application was made by Mr. Shand to me to direct a verdict in favour of the Defendant.

It is almost impossible to imagine a case which on the evidence had been left in a more unsatisfactory position. The real issue here, according

to both the Plaintiff and the Defendant, is whether eight cheques totalling some £19,000 odd were forged. That appears abundantly from the point of view of the Plaintiff in this file of correspondence, Exhibit " B," and from the point of view of the Defendant in the notations that appear on the backs of the eight cheques which constitute Exhibit " C." Both of the parties have very carefully skirted around the real issue, and not one word of evidence has been directed to that issue. The only matter that really, on the way both parties put their cases, here arises to be considered is a pleading point, namely, whether the proper plea was " never " indebted " or some plea of confession and avoidance.

Mr. Ferguson opened the case at some length, and after mentioning to the jury the circumstances under which money was paid into the bank, went on to say that Laing had a very large account in the Bank of New South Wales, at one time in excess of £100,000, and that was established by Exhibit " A " when it was put in evidence. He said that in October, 1950, Laing noticed irregularities in the account. Then he dealt with the letters and then he went on to allege that there was a number of forgeries. But, as I say, not one word of evidence was adduced as to whether the first eight cheques which totalled the amount of the writ here were forgeries. He did not seek in evidence to prove any of those matters, but contented himself with tendering the current account of the Plaintiff, which became Exhibit " A " and a file of correspondence in which the Plaintiff claims that one Harborne forged eight cheques, and in which the Defendant neither admitted nor denied the claim but merely sought an opportunity of investigation. So far as the letters that emanated from the Plaintiff's solicitors were concerned, the last of those is dated 2nd February, 1951, and after dealing with eight cheques and another matter affecting another company, which is not material here, went on :—

> " The amount of each of the cheques above-mentioned has " been debited by the Bank to our client's respective accounts as " indicated and our client's money has been used to pay them so " that to the extent of the total amount of these cheques, funds " which would otherwise have been to our client's credit with the " Bank are no longer available to him. We should be glad if " you would be good enough to confirm this no later than Tuesday, " next, 6th instant.
>
> " In the event of your confirmation not reaching us by that " date, our client will draw and present cheques to the Haymarket " Branch of the Bank for amounts equal to each cheque on the " respective accounts mentioned and take steps to close these " accounts with the Bank. Naturally our client and ourselves " would prefer to have your confirmation as requested within the " time mentioned, as the matter has already been unduly " protracted."

In fact at that date, 2nd February, 1951, according to Exhibit " A,"

In the Supreme Court.

No. 4. Judgment. McClemens, J. on Submissions. 20th May, 1952— *continued.*

the amount standing to the credit of the Plaintiff in the Bank was £231 8s. 3d., and apart from a few very, very small items, the account was finally closed on 10th April, 1951.

Following on that letter the Plaintiff drew eight cheques which were presented to the Bank and returned with the seal of the Bank of New South Wales, Haymarket, Sydney, on the back of them and this notation, " Refer to drawer—bona fide dispute state of account arising alleged " forged cheques." That notation appears immediately under the stamp of the Bank of New South Wales, and the stamp of the other Bank, the Bank of Australasia, appears on the front of the cheques.

On 12th February, 1951, a letter was sent by the Manager of the Haymarket Branch of the Bank of New South Wales to the Manager of the Bank of Australasia, Wentworth Avenue, which is now Exhibit D, in which the Manager of the Bank of New South Wales says :

> " 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 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."

Then the eight cheques are itemized.

On this material Mr. Ferguson rests his case as establishing a *prima facie* case of money had and received and money lent. During the course of his argument he sought leave to amend his particulars to read as follows :

> " To amount due by the Defendant to the Plaintiff for money
> " lent by the Plaintiff to the Defendant and for money received by
> " the Defendant to the use of the Plaintiff and dealt with by the
> " Defendant in the following manner."

Then the original eight cheques were set out. Mr. Shand not opposing the amendment, I allowed it subject to certain terms as to costs.

Mr. Shand at the end of the Plaintiff's case moved for a non-suit, and subsequently altered his application to a motion for a verdict by direction.

Mr. Ferguson's argument was that the relationship of the Bank to the Plaintiff was that the money paid into the current account was lent by the Plaintiff to the Bank. He said that the moneys sued for were lent by the Plaintiff to the Defendant. He said that the effect of the tender of the Bank's statement was that it was evidence that the Bank had received the money from the Plaintiff. He said that the debit items are not evidence in the Bank's favour, nor against his client. I am unable to agree with the submission on the evidence as stated by Mr. Ferguson. I think that, this exhibit, Exhibit "A " having been called for by him, and put in by him, he

must take the document as it stands and cannot rely on part of it as an admission against the Bank, and completely disregard the qualifications that the document shows on its correct side.

Mr. Ferguson then went on to argue that the proper plea here was payment and that the plea of " never indebted " filed by the Defendant was completely inapplicable. He then went on to say that the Defendant's only defence was in reality this : " I received certain moneys. I paid them " all back. I am left with none." Mr. Ferguson said that on the pleadings this has not been raised.

The reliance that Mr. Ferguson placed on Exhibit " C " was as establishing the fact of the demand for money the Bank was holding and the refusal to pay. (See Hart's Law of Banking, p. 189).

Mr. Shand's argument was—and I am reading the notes I made : " I received certain moneys. I paid them all back. I am left with none. " I have never had the parcel of money you now claim. There is nothing to " which I could plead payment. I could not plead payment to Exhibit ' C ' " because you never sued on those cheques."

Mr. Shand then went on to argue that the Plaintiff failed in form and in proof of his case, because, according to him, there is no proof of the essential thing, namely enough money in the bank to meet the cheques if presented.

Not without considerable doubts I have come to the conclusion that there is some scanty evidence here sufficient to justify a jury in finding in the Plaintiff's favour. It is established, firstly, that the Plaintiff had over a long period been making payments into the current account. Then a dispute arose. After that dispute arose the Plaintiff drew the eight cheques which are now Exhibit " C " as constituting his demand. Those cheques on being presented to the Bank of New South Wales were referred to drawer, and referred to drawer with the notation that appears on the backs of them, and with the letter of 12th February, 1951. In my opinion, that notation coupled with the letter supporting the view that the Defendant's real case is this : " I have paid you what I owe you. There is " now a dispute associated with the alleged forged cheques as to whether " I owe you any more."

It does seem to me here that the real defence is payment and not " never indebted." " Never indebted," in my view is a defence now of very limited application. It is pointed out in Bullen and Leake on Pleadings Third Edition (1868) p. 460, in relation to the general issue that—

> " It is no longer a denial of the Defendant's liability to the " action generally, but is limited to a traverse of the most essential " or characteristic allegation in the declaration according to the " particular form of the action."

It may be that under the old system of pleading it might have been possible to have raised the matters that Mr. Shand wants to raise under a defence of " nil-debet " ; that is now abolished by Rule 71 of the Supreme Court Rules. The limited application of " never indebted " appears from Rule 65 ; and Rule 67 of the Supreme Court Rules provides :

In the Supreme Court.

No. 4. Judgment. McClemens, J. on Submissions. 20th May, 1952— *continued.*

" In every species of action on contract, all matters in con-
" fession 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 pleaded."

Then a great number of examples are given, including release, payment and performance.

It does seem to me, therefore, that here there is some evidence to submit for the consideration of the jury that money was lent, that the money was demanded back, and that the money has not been paid.

Mr. SHAND : We have agreed to dispense with the jury.

HIS HONOR : Well, I formally hold that there is a case to answer. That is all I do at the moment. In view of the application that has been made to dispense with the jury, I can dispense with the jury.

(At this stage His Honor discharged the jury.)

No. 5. Further Submissions by Counsel. 20th May, 1952

No. 5.

Further Submissions by Counsel.

Coram : McCLEMENS, J.

Tuesday, 20th May, 1952.

LAING *v.* BANK OF NEW SOUTH WALES.

Mr. SHAND : Your Honor has held that no evidence could be offered at all in favour of the Defendant because there was no plea of payment.

HIS HONOR : I have not held that. All I have held is that I think there is some evidence to go to the jury. That is all I have held so far.

Mr. SHAND : If Your Honor has not held that under its pleadings the Defendant is debarred from setting up any defence, then the only question that is left that I can see is a question of fact that arises in this way. Your Honor will remember my argument that the crucial date, if there is a crucial date, is not the date that is given in the particulars. The crucial date when any indebtedness arose would be the date of the presentation of the cheques.

HIS HONOR : I agree with that.

Mr. SHAND : I will assume, as far as I am entitled to assume at the moment, that the whole of the account is regular. No portion of it has been proved. The account that is in is *prima facie* regular. So there is nothing in that. The crucial date, although not mentioned in the particulars is when the cheques are presented. *Prima facie*, the account being correct,

there is no money left to meet the cheques. I could never plead payment of those cheques, because there has been no payment. If there is no money left—and the only evidence in the case shows that there is no money left at all in the account—let us assume it is irregular. Then when the cheques came along the only evidence before Your Honor is that there is no money to meet them and no debt ever arises on the cheques presented, and when they are presented, there is no money left.

On the accounts I failed to read on in Taylor on Evidence, Tenth Edn., p. 523, para. 726. I referred Your Honor to para. 725. Paragraph 726 starts off, " Simple as this rule appears, its practical " application is not without difficulty . . . . in evidence of the " Defendant's set-off." That is not pleaded here. " Though the Plaintiff " will generally be at liberty . . . . which appear on the debtor side." If one takes the position on the evidence, there is a debtor and creditor account with debits and credits. The only question of fact that could arise, it seems to me, and one which Your Honor would determine, is this. In para. 725, just below the middle of the paragraph it says, " But " though the whole of what he said at the same time, and relating to the " same subject, must be given in evidence "—that was the whole admission and whatever goes with it—" it does not follow that all the parts of the " statement should be regarded as equally deserving of credit . . . . as " those making against them."

The present issue is a simple one now that we have the whole of the evidence. It is inconceivable, although still remaining a question of fact, that a jury, or Your Honor sitting as a jury, would say that the debits are less reliable than the credits. It is true that it is a matter that has to be decided, but it is inconceivable that that should take place in fact. Suppose Your Honor says, " *Prima facie* there is debtor and creditor, and I find " as a fact that on the evidence before me there was nothing in the account, " and when these cheques were presented no debt could ever arise on them, " because a debt could only arise if, when cheques were presented, there " was sufficient to meet them." The Plaintiff has to prove there is sufficient to meet them. Instead of doing that he has done the opposite. Although the onus is on him to prove sufficiency, he has proved insufficiency.

So once that question of fact, which is in these circumstances an academic one, is determined, that on the evidence there was nothing in the account when these cheques, Exhibit C, were presented, then a debt never arose at all, and it would be a legal and logical impossibility to say that we paid, because no debt has arisen. Your Honor will remember the 1921 case cited on that point, that the presentation of a cheque is necessary to create a debt which is payable, and the only evidence here is that there is nothing in the account to meet those eight cheques. There is that one question of fact that Your Honor would have, I submit, only formally to decide, namely, that Your Honor would say, " On the question of facts " I find that the amounts the bank has debited should be just as reliable " in the ordinary sense as the amounts it has credited."

HIS HONOR: This may assist you in your argument. Had it not been

In the Supreme Court.

No. 5. Further Submissions by Counsel. 20th May, 1952— *continued.*

for those cheques, I think I made this plain—the evidence was scanty, but I think there arises from those cheques and the notations on the backs of the cheques, and this letter of 12th February . . . .

Mr. SHAND : All that shows is that the Plaintiff has said, " These " cheques were forged," and the Defendant has said, " I do not admit they " are forged at all."

HIS HONOR : It is some slight evidence.

Mr. SHAND : If Your Honor thought there was the slightest evidence there, there is a further question of fact. That is that the Plaintiff is here in Court. He is available to give evidence. We know from the correspondence that he has had the cheques inspected and has inspected them himself. And he calls no evidence. Your Honor knows that the inference to be drawn from that fact that a witness, particularly a party, fails to give evidence on a point on which he can give evidence, is that no evidence which he can give will assist his own case. If Your Honor thought there was the slightest evidence—I do not want to repeat myself on that, because I submit there is none—how could Your Honor find . . . .

HIS HONOR : I have not found there was forgery.

Mr. SHAND : I know that. Your Honor said there was slight *prima facie* evidence.

HIS HONOR : No. There was *prima facie* evidence of a dispute as to whether payment should be made or not. That is the *prima facie* evidence.

Mr. SHAND : Of course, that does involve forgery.

HIS HONOR : I do not know what it involves. That is what you said, " There is a dispute here." Your own cheques and your letter said so.

Mr. SHAND : Yes, they can only be looked at this way. There would be another question of fact arising. It can only be that the Plaintiff says, " I take this position. There is a dispute about these cheques. I offer no " evidence that they are paid out without authority. You, the Defendant, " do not admit they are paid out without authority. But there is a dispute " between us." The onus is on the Plaintiff to show that that account was wrong at the end, wrong to the extent of the dishonoured cheques. There has never been a case to my knowledge. The only thing to do is to offer some evidence that the account is wrong because an amount has been paid out wrongly on a forgery. There is no other way to do it, except to prove that some amounts were paid out without authority, because the Plaintiff puts a question in, or offers some *prima facie* evidence, that payments were made without authority, and the only issue here right throughout, as Your Honor put it, is : Forgery or no forgery. Nothing else. Everything else is excluded. I am precluded now from calling evidence. I took up a position when I asked for a verdict by direction.

If there was the slightest evidence—my submission is that there was not—then Your Honor has the other fact that a person with an interest of £19,000 had a full opportunity of seeing the cheques and has inspected them and says in a letter that they are obvious forgeries, and then sits in Court and does not either himself give evidence or call the expert who also inspected them. Unless there was a tittle of evidence how could Your Honor find that the Plaintiff has discharged the onus in such circumstances ?

I submit it is overwhelming when looked at on the evidence before Your Honor. No evidence has been offered as to where the cheques went, and Your Honor will remember that it is the Plaintiff who knows whether they are forgeries. Your Honor will remember he claimed it was his employee who forged them. The Defendant is in the position that cheques have been presented that may look perfectly good, and if there is any inference to be drawn from anything on the cheques, how could Your Honor possibly be satisfied when Your Honor comes to decide this issue as a question of fact, that the Plaintiff, who sat in court and failed to call any evidence, including that of himself, discharged the onus that rests on him to prove that there is a forgery ? The Bank obviously believed the cheques were all right, because they paid them.

The onus being on the Plaintiff, I submit it is overwhelming on a question of fact or inference from fact, against the Plaintiff.

Mr. FERGUSON : My submission is that there is now no question of fact at all but that it is a matter of law. Your Honor must find a verdict for the Plaintiff. My friend has spoken about when a debt arises, and he has told Your Honor that the debt arises only when a cheque is presented.

Mr. SHAND : Only to show that it is payable.

Mr. FERGUSON : You said " a debt."

Mr. SHAND : Only to show it is payable.

Mr. FERGUSON : There is a considerable difference between money becoming payable and there being a debt. A debt arises as soon as money is advanced to the Bank, because the Bank then owes that amount of money to the Plaintiff. You can have a debt payable *eo præsenti*. You can have a debt payable *in futuro*. You can have a debt payable on a condition. It is still a debt, and the relationship between the man who lends and the man who receives is the relationship of debtor and creditor.

In this case it is most important to see exactly what the issues are. There is no issue of forgery here and the issues are to be determined entirely by an examination of the pleadings. I have proved that a considerable deal of money was lent to the Defendant and that the Defendant is a bank. That establishes the relationship of debtor and creditor. I have proved that more money than is claimed was lent to the bank. What does the Defendant say to that ? The Defendant says, " never indebted." What are the issues that arise by " never indebted " ?

I might go back before dealing with that to what is alleged in the common money count. The first thing that is alleged in the common money count is that money is payable by the Defendant to the Plaintiff ; then " for money lent." The only thing the Plaintiff has to prove under that is that the money claimed was lent and that that money became payable by reason of a demand having been made. To that my friend has pleaded " never indebted." That raises only two things : that the money was not lent and that no demand was made. That is all.

The plea admits what it does not deny. Every pleading admits what it does not deny. So it admits that if I prove that money was lent and if I prove that a demand was made, the Plaintiff is entitled to a verdict.

In the Supreme Court.

No. 5. Further Submissions by Counsel. 20th May, 1952— *continued.*

No question of forgery or anything else arises in this case at all on the pleadings. Had it been necessary, I had plenty of evidence as to whether or not these cheques were forged and I might tell Your Honor that we wrote . . . .

HIS HONOR: I do not think I should be told.

Mr. FERGUSON: I submit whether they are forgeries or not is quite immaterial. On the evidence no question of fact now arises. It is admitted that the money was lent. It is admitted that the demand was made. On the pleadings it is admitted that if those facts are proved the Plaintiff is entitled to a verdict. Your Honor, of course, has already found virtually that there should have been a plea of payment. I submit there should have been a plea of payment. As soon as a plea of payment is put on, then the question as to whether or not the cheques were forged becomes material, and most material, because the question then is whether the payment was made on the mandate of the Plaintiff.

My submission is that as a matter of law Your Honor must find a verdict for the Plaintiff. My friend has moved for a verdict and failed. Your Honor has said there is some evidence, and Your Honor must find a verdict for the Plaintiff. It is not a question of fact at all. It is purely a question of law.

Mr. SHAND: My friend's submission has made it much easier, I think, to answer him. My friend does not rely on any evidence of fact at all. He says, "I am entitled as a matter of law to a verdict." I want to repeat the proposition he put and to examine it. He says in the first place, "I have proved that a large amount of money was lent to the Defendant."

Mr. FERGUSON: Including this amount.

Mr. SHAND: He says that more money than is claimed in the action was lent. My friend now is taking all the credit items and disregarding the debit items. Your Honor has already given a ruling on that. It cannot be done. That covers the first proposition and Your Honor has found on that as a matter of law. Then he says that only two things have to be proved by the Plaintiff. The first is that money was lent. No one can quarrel with that. Money was lent. The second one is that the money became payable by virtue of a demand, and I do not for a moment quarrel with that. The money became payable by virtue of a demand. The facts he has shown are that when he presented the cheques there was nothing virtually to meet them.

The only evidence left by him—I am dealing now with his legal arguments and not any question of fact—is that when he said to the Bank, "give me £19,412 10s. 9d." the Bank had nothing. How could the evidence that my friend has offered stand up to his second requirement, namely that the money became payable by virtue of a demand? No money became payable, ever became payable, if the Bank had no money; and he said that the Bank had no money.

Those are his propositions. I accept the proposition, but the fact is that in the case there is no evidence that the money became payable. If there was any evidence that the Bank had the money to meet these

Exhibit C cheques, it would have become payable, but the only evidence is that it had not. I am dealing with this as a pure question of law, because that is how my friend invited Your Honor to deal with it. I will come back to what I put to Your Honor before.

I take his last proposition. I suppose it could not be disputed, without looking at any pleadings, that if there was no money due to the Plaintiff at the crucial time, then the Defendant can say, " I never was indebted " to you." My friend says it is only appropriate in two cases. The first is if the money is not lent. Yes, very well. The second is if no demand was made. There has been no money lent here as against these cheques. It is all settled in the question before. There is no money lent to which those cheques can apply and make the money payable. The only evidence is that there is practically nothing in the Bank—£34. The Bank could never plead payment. It said, " I did not have any money. You had " not lent me any money at this time, taking the debits and credits in the " account," which has to be done. " At the time you presented the cheques " in Exhibit C you had not lent me any money that became payable by the " presentation of those cheques. Therefore I was never indebted, but I have " not any money of yours that you could make become due and payable."

That is on the pure question of law that my friend invites Your Honor to deal with. My friend does not invite Your Honor to say—although I have no doubt he would not object to Your Honor saying it—that there is some evidence that the money by forgery was wrongly taken out of the account. He says it is a pure matter of law under this pleading, and the answer is that when these cheques at the crucial time were presented the evidence shows—we do not have to prove it, but my friend has proved the opposite—that there was not enough money to meet them.

I return, and this is outside my friend's argument, and just briefly repeat this. Only two questions of fact arise. One is as to the debits being less reliable than the credits. The other is if Your Honor thought there was a scintilla of evidence to be spelt, as Your Honor has found, out of the notation of the Bank when the cheques were presented—I do not repeat myself on that. I submit that on the facts the evidence is overwhelming against any such proposition, particularly when the onus is on the Plaintiff.

His Honor: To protect you fully, Mr. Shand, I have had a note taken. Is there anything you would like to add ?

Mr. Shand: When I raised the argument that " money had and " received " was not appropriate, although I specifically mentioned it, Mr. Ferguson did not apply for an amendment. Then he applied for and obtained an amendment, and we have before us now what I assume to be the final shape that this action takes. I put it to Your Honor that it is impossible for the Plaintiff to succeed on his particulars. He is bound by his particulars. He has had them amended. What does he say ? Where is there the slightest mention . . . .

Mr. Ferguson: This is quite new.

Mr. Shand: No. I mentioned it before.

In the Supreme Court.

No. 5. Further Submissions by Counsel. 20th May, 1952— *continued.*

HIS HONOR : I will see if what Mr. Shand wants to have recorded is in the notes already.

Mr. SHAND : I want more than that, but I have not addressed Your Honor on this amendment.

HIS HONOR : That was discussed yesterday morning, at p. 6 of the transcript. Is there any additional note you want arising out of that ?

Mr. SHAND : I can put it shortly. This is the amendment I got only this morning, although it was foreshadowed yesterday. The Plaintiff claims that there is money lent—I will disregard the other part—and dealt with by the Defendant in the following manner. What he must be taken to be saying is this, if it had any significance at all, and this is his claim, " By virtue of the fact that I lent you £2,950 and you paid it out of your " account a debt was created," and so on with the other cheques. That is what he is claiming now. He said the debt accrued due in 1951 when he presented the other cheques, going right outside these. That being the position, he cannot succeed.

HIS HONOR : Is there anything you want noted, Mr. Ferguson ?

Mr. FERGUSON : No.

No. 6. Judgment of McClemens, J. 20th May, 1952.

No. 6.

Judgment of McClemens, J.

Coram : McCLEMENS, J.

Tuesday, 20th May, 1952.

LAING *v.* BANK OF NEW SOUTH WALES.

JUDGMENT.

HIS HONOR : It does appear to me here that in view of the course the pleadings took I have no alternative but to enter a verdict in favour of the Plaintiff. As I said earlier, I feel that the whole course of these proceedings has been most unsatisfactory by reason of the course taken in the pleadings and by the scantiness of the evidence that has been called. I am of the opinion that the matters that were sought to be raised here should properly have been raised on a plea of confession and avoidance. I take it that I have no power, as a single judge sitting without a jury under the Supreme Court Procedure Act, to refer the matter to the Full Court.

In my view, therefore, for the reasons I have indicated there must be a verdict here for the Plaintiff for the amount of £19,412/10/9.

I grant a stay of proceedings for 21 days without security.

No. 7.

Defendant's Notice of Appeal.

In the Full Court of the Supreme Court of New South Wales.

No. 7. Defendant's Notice of Appeal Filed. 28th May, 1952.

TAKE NOTICE that this Honourable Court will be moved before the Court sitting at the Supreme Court House, King Street, Sydney, on the first day on which the Court sits in Banco after the expiration of sixteen days from the filing of this notice at ten o'clock in the forenoon or so soon thereafter as the course of business will permit by Counsel on behalf of the abovenamed Appellant that in this action which was tried before His Honour Mr. Justice McClemens without a jury at the Supreme Court, Sydney, on the nineteenth and twentieth days of May One thousand nine hundred and fifty-two and wherein His Honour found a verdict for the abovenamed Respondent in the sum of £19,412 10s. 9d. and entered judgment accordingly the said verdict and judgment be set aside and a verdict and judgment therein be entered for the Defendant or for such further or other order or orders as to this Honourable Court may seem fit on the following amongst other grounds, namely :—

1.—THAT His Honour was in error in holding that there was some evidence to justify a jury finding in the Plaintiff's favour.

2.—THAT His Honour was in error in holding that the notations on the backs of the cheques comprised in Exhibit " C " coupled with the letter marked as Exhibit " D " supports the inference that the Defendant's real case is this : " I have paid you what I owe you. There is now a dispute " associated with the alleged forged cheques as to whether I owe you " any more."

3.—THAT His Honour was in error in holding that the real defence was " payment " and not " never indebted."

4.—THAT His Honour was in error in holding that there was some evidence to submit for the consideration of a jury that money was lent, that the money was demanded back and that the money had not been paid.

5.—THAT His Honour should have directed a verdict for the Defendant.

6.—THAT His Honour should have held that upon the Plaintiff's own case there was no money due and owing by the Defendant to the Plaintiff to meet the demand made by the Plaintiff upon the Defendant pursuant to the cheques comprised in Exhibit " C."

7.—THAT the finding by His Honour that prior to the demand made by the Plaintiff upon the Defendant that the money demanded by the Plaintiff of the Defendant had not been paid back was against the evidence and the weight of evidence.

8.—THAT His Honour was in error in holding that in view of the course of the pleadings he had no alternative but to enter a verdict in favour of the Plaintiff.

In the Full Court of the Supreme Court of New South Wales.

9.—THAT His Honour was in error in holding that the matters sought to be raised by way of defence in this connection should properly have been raised upon a plea of confession and avoidance.

Dated this twenty-eighth day of May, 1952.

K. W. ASPREY,
Counsel for the Appellant
(Defendant)

No. 7. Defendant's Notice of Appeal Filed. 28th May, 1952— *continued.*

NOTE: This Notice of Appeal is filed by Messrs. Iceton, Faithfull & Baldock of No. 28 O'Connell Street, Sydney, the Solicitors for the abovenamed Appellant.

No. 8. Rule Dismissing Defendants' Appeal. 7th October, 1952.

No. 8.

Rule Dismissing Defendant's Appeal.

Tuesday the seventh day of October one thousand nine hundred and fifty-two.

UPON MOTION made to the Court on the Seventeenth and Eighteenth days of September last past WHEREUPON AND UPON READING the Notice of Motion dated the Twenty-eighth day of May last past and the Appeal Book both filed herein AND UPON HEARING what was alleged by Mr. J. W. Shand of Queen's Counsel with whom was Mr. K. W. Asprey of Queen's Counsel and Mr. A. F. Mason of Counsel on behalf of the abovenamed Appellant and Mr. K. A. Ferguson of Queen's Counsel with whom was Mr. R. L. Taylor of Counsel on behalf of the abovenamed Respondent IT WAS ORDERED on the eighteenth day of September last past that the judgment of the Court be reserved and that the matter stand for judgment and the same standing in the list for judgment this day accordingly IT IS ORDERED that the appeal herein be and the same is hereby dismissed AND IT IS FURTHER ORDERED that the costs of the said Respondent of and incidental to the said appeal be taxed by the proper officer of this Honourable Court and that such costs when so taxed and allowed be paid by the said Appellant to the said Respondent or to his Attorney Lewis George Williams.

BY THE COURT
FOR THE PROTHONOTARY

R. T. BYRNE, (L.S.)
Chief Clerk.

William James Baldock,
Attorney for the Appellant,
28 O'Connell Street,
Sydney.

No. 9.

Judgments.

In the Full Court of the Supreme Court of New South Wales.

No. 9. Judgment of (*a*) Street, C.J. 7th October, 1952.

(*a*) STREET, C.J.

From January, 1947, until February, 1951, the Respondent, Laing, was a customer of the Appellant Bank, having a current account with its Haymarket Branch, and over that period very substantial sums were placed to the credit of that account and large withdrawals were made by cheque. The Respondent asserted that between July, 1948, and June, 1949, eight cheques on which the Respondent's name had been forged were paid by the Bank and his account had been depleted without authority to the extent of the total amount of these cheques, namely, £19,412 10s. 9d. According to the correspondence tendered in evidence, the Respondent became aware of this fact in October, 1950, and from then until February, 1951, letters passed between the parties dealing with the matter. The Respondent demanded that the Bank should restore to him the sums of money which he alleged had been wrongly debited to his account, and the Bank, while neither admitting nor denying liability, sought time for further investigation.

On the 8th February, 1950, the Respondent drew eight cheques payable to himself, the amount of each cheque corresponding to one of the eight alleged forgeries. This was done for the purpose of making a demand upon the Bank for repayment of moneys which the Respondent alleged should be standing to his credit at that date, though according to the Bank's books, after charging the Respondent's account with the alleged forged cheques, the amount to his credit balance at that date was only £18 3s. 3d. The eight cheques so drawn by the Respondent, and amounting in all to the sum of £19,412 10s. 9d., were dishonoured by the Bank, each being endorsed " Refer to Drawer. *Bona fide* dispute state of account arising alleged " forged cheques." The Respondent thereupon brought an action against the Bank to recover the full amount of the alleged forged cheques, and a jury having been dispensed with during the course of the trial, the learned trial Judge directed judgment to be entered for the Respondent for the full amount claimed.

The course which the proceedings took was as follows : The Respondent originally sued for money had and received to his use, but at the trial the endorsement on the writ was amended to include a claim for an " amount " due by the Defendant to the Plaintiff for money lent by the Plaintiff " to the Defendant," and then there followed the particulars of the eight alleged forged cheques presented in 1948 and 1949. The declaration for money payable for money lent followed the same form, and to this the Defendant Bank pleaded that it never was indebted as alleged, and issue was joined on this plea.

When the matter came on for hearing the Respondent tendered the whole of the Bank's statements showing the entries made by the Bank in respect of his account from January, 1947, until it was closed in April,

In the Full Court of the Supreme Court of New South Wales.

No. 9. Judgment of (*a*) Street, C.J. 7th October, 1952— *continued.*

1950. He then tendered certain correspondence passing between the parties which clearly established that he was a customer of the Bank and identified the cheques which were in dispute, and he also tendered the dishonoured cheques of the 8th February, 1951, solely for the purpose of proving his demand for payment. These documents were admitted in evidence, and no question now arises as to the propriety of their admission. The Respondent thereupon closed his case, and the Bank asked first for a verdict by direction, the jury not having been dispensed with at this stage, and later, when this had taken place, asked that judgment be entered in its favour. After hearing argument, His Honor declined to accede to the Bank's submissions and directed judgment to be entered for the Respondent for the full amount claimed, namely, £19,412 10s. 9d., and from that order this appeal is now brought.

The matters argued before this Court were entirely technical and had no relation to the merits of the case nor was the real dispute as to the alleged forgeries ever raised for consideration. For the Bank it was argued that the crucial date to which regard must be paid in determining whether any money was owing to the Plaintiff was the date of the demand, namely, the 8th February, 1951, and at that date the Bank's statement tendered by the Plaintiff, who thereby, it was said, put both the debit and credit items in evidence, showed only an available credit balance of £18 due to the Respondent, and showed that the moneys claimed in the writ and declaration were not owing to the Plaintiff at that date. The cheques were dishonoured because a bank cannot make a partial payment of a cheque and is entitled to refuse payment when the amount of the cheque is in excess of the actual available credit balance.

At the outset, and before considering the pleadings, it is desirable to state certain well accepted principles applicable to banking transactions. It is the business of a bank, *inter alia*, to receive money from a customer with the obligation to repay the same on demand or when drawn upon by a cheque. If a banker receives money on current account the money becomes the bank's property and the relationship between it and the customer is that of debtor and creditor in respect of the moneys placed by the customer to the credit of his current account. If the bank has the necessary funds in hand in the customer's account it is bound to honor his cheques, if drawn in legal form, debiting his account with the amount of the cheques as they are paid. But, subject to certain exceptions not material for consideration at this moment, if a bank pays a cheque drawn without authority, or which is a forgery, then it cannot debit the customer's account with the amount of such cheque.

A forged cheque is not a cheque at all; it is a mere piece of paper Where forgery or other want of authority is alleged by the customer in regard to any cheque paid by the bank, the onus is on the bank to prove the authenticity of the signature on the cheque in question or to prove the existence of the necessary authority for its payment. A bank is bound to know its customer's signature and fails in its duty to the customer if it does not detect a forgery. The burden does not rest upon the customer to

prove that the signature is a forgery. A bank may, however, escape liability in some cases by proving a failure on the part of the customer to discharge some duty resting upon him toward the bank, or something in the nature of adoption or an estoppel may protect a bank. There are some defences open to a bank which has failed to prove the genuineness of a customer's signature on a disputed cheque, but they were not raised in this case.

Coming now to the pleadings in the action, the relationship of the parties being that of creditor and debtor, the cause of action was properly framed as an action in debt in the form of a count for money lent. To this count there might be many and various defences, but the only plea put on the file was one of " never indebted " and this defined the issue between the parties. The count for money payable for money lent involves the allegation that money was in fact lent to the Defendant under a contract, express or implied, in terms capable of giving rise to a presently payable debt, and it involves also the allegation that in fact the money was payable at the time when the action was brought. The plea of " never indebted " in the case of an express contract denies the contract of loan, that is, it denies that the money was lent on a promise capable of requiring repayment at the date when the action was brought.

In the case of an implied contract, such as the present, which arises out of the proved relationship of banker and customer, it denies the matters of fact from which a promise to repay was capable of being inferred. In other words, it denies the loan, and nothing more. Though the money is owed by the bank when it has been received from the customer, it is not in fact repayable until demand is made, but the assertion of the making of the necessary demand is contained in the allegation that the money was " payable," as this performs the same function as the allegation in a count framed *in assumpsit* that " all conditions were fulfilled and all things " happened and all times elapsed necessary to entitle the plaintiff " to sue. A plea of " *non assumpsit* " does not put this allegation of performance of conditions precedent in issue any more than it puts in issue the breach alleged. No question arises here, however, in this respect, as the Respondent in fact proved the demand, and having proved the relationship of banker and customer and the deposit of large sums of money, far more than sufficient to meet the cheques of the 8th February, 1951, he thereby provided *prima facie* proof of a debt payable at the time of action brought. There being no allegation of non-performance of the condition that demand should be made before the money was payable, and there being no plea analogous to a denial of breaches, the Respondent proved more than the issue which lay on him under the pleadings as they stood. He proved both the demand and the refusal to pay by tendering the dishonoured cheques, and he then closed his case.

The Bank now argues that the Respondent, having put in evidence the whole of the Bank's statements relating to his account, both the credit and the debit sides, he must fail because he has proved that at the date of the demand the Bank only owed him a balance of £18. The Appellant's argument is that the Bank's statement shows that there was not sufficient

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No. 9. Judgment of (a) Street, C.J. 7th October, 1952— *continued.*

money owing to the Respondent at the crucial date to meet the cheques drawn on the 8th February, 1951. This argument is fallacious. Constant reference was made to the balance shown in the books of the Bank on the 8th February, but this means nothing by itself. It does not represent a deposit by the Respondent nor a payment by the Bank. It is merely the arithmetical result of a mechanical addition of both the debit and the credit entries, and is a mere summary of the arithmetical effect of those entries. It results from the fact that the books purport to show that while large sums have been paid in by the Respondent, other large sums have also been paid out to him by the Bank, and the balance is reached by reason of the assertion that, while the Bank admits receiving money, it also paid out to the Respondent practically the same total as that paid in. It is true that there are cases where both sides of an account, even if tendered by a party for the purpose of using one side only, must be taken into account also in favour of the other party; but these are cases where both sides of the account are relevant to the issues raised between the parties by the pleadings.

In such a case the whole of the account might be taken together and be read for or against the respective parties. But this general principle with regard to the admissibility of the items shown in an account is subject to the general and overriding principle that " no utterance irrelevant " to the issue is receivable " (Wigmore on Evidence, 3rd Ed., para. 2113).

Now, a defence of payment in an action of debt must be specially pleaded, and a defendant cannot rely on this defence without such a plea. (Rule 67 of the Rules made under the Common Law Procedure Act.) Nothing can disguise the fact that this is what the Defendant is seeking to rely upon in this case without pleading it. It is apparently the Bank's real defence, and if the pleadings had been framed so as to raise for determination the real dispute between the parties, then the Bank would have had to begin and prove, as it is bound so to do, that it properly paid the disputed cheques.

The plea which was filed denying the loan by the Respondent is, on the Bank's own books, admittedly unsupportable, for they record the payments to the Bank relied upon by the Respondent. To seek to assert that, despite these substantial payments to the Bank, only £18 was owed on the 8th February, 1951, involves necessarily the assertion that money had been repaid to the Respondent in such amounts as to reduce his credit balance to that figure. But having obtained the actual statements from the Bank which showed both sides of the account and having tendered them, and there being no plea of payment on the file, and this issue not being raised by the Bank in answer to the Respondent's claim, the items showing payment out were irrelevant to any issue which could be relied upon by the Bank under the pleadings as they stand. The Bank's real answer would appear to be that all cheques paid by it, including the eight alleged forgeries, were properly paid, and this being so, the Bank was discharged from its obligations to the Respondent. The proof of these payments rested upon the Bank, and if it was desired to rely on this defence, then

it should have been raised by candid pleading. Instead, the Bank preferred to stand upon what it regarded as a good technicality to defeat the Plaintiff's claim, regardless of the merits, and that technicality fails ; and with that failure goes all opportunity of raising and deciding the obvious matter of contention between the parties.

It is greatly to be regretted that the Appellant chose to conduct the trial on the pleadings as filed, in an attempt to escape the burden which would have rested upon it if the real issue between the parties had been properly raised and defined by the necessary plea of payment.

In my opinion the appeal fails and should be dismissed with costs.

CHOLMONDELY DARVALL,
Associate to the Chief Justice,
7th October, 1952.

(*b*) OWEN, J.

(*b*) Owen, J. 7th October, 1952.

In my view the question which arises for decision can be stated in simple terms. If A lends money to B and, when A demands its repayment, B replies that he has already repaid it either to A himself or on A's instructions to C and D, can B, in answer to an action for money lent, set up this reply which is nothing more or less than a defence in confession and avoidance without pleading payment ? In my opinion he cannot do so and where, as here, the only plea to a common money count for money lent is one of never indebted, evidence that B has already repaid the moneys for which A is suing is irrelevant except insofar as it may constitute an admission by B that the money was lent.

The Plaintiff here had to prove that he had lent money to the Defendant. This he did by tendering one of the Defendant's books containing a record of his current account. This showed that he had deposited with the Defendant moneys totalling more than the amount claimed in the writ. Since the relationship between the parties was that of banker and customer, it was necessary also for the Plaintiff to prove a demand for repayment (*Joachimson* v. *Swiss Bank Corporation* (1921) 3 K.B. 110), and this he did. Both these facts were undisputed and no other issue arose under the plea of never indebted. Any entries in the Defendant's books purporting to show that it had paid out the moneys lent to it, either to the Plaintiff or according to his instructions, even if capable of constituting evidence of the fact of payment in the Defendant's favor, were irrelevant to the issue except for the purpose stated earlier.

The plea of nil debit disappeared from the law over a century ago, but the present case seems to be an attempt to resurrect it. The form of that plea was that " the Defendant *does* not owe the money," and under it matters in confession and avoidance, as well as in denial of the allegation of the facts capable of giving rise to the simple contract debt sued for, could be raised. But the plea of never indebted which replaced *nil debet* has the same operation as had a plea of *non assumpsit* where the Plaintiff

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No. 9. Judgment of (*b*) Owen, J. 7th October, 1952—*continued.*

claimed in *indebitatus assumpsit.* A count of *indebitatus assumpsit* alleged the debt, a promise to repay it and a breach of that promise sounding in damages, and *non assumpsit* denied the promise but not the breach. The operation and effect of the plea of *nil debet* in an action of debt and of the plea of *non assumpsit* in an action of *indebitatus assumpsit* and the effect of the alterations made in England by the pleading rules of 1834 and 1853, which were adopted in New South Wales and now appear in Rules 64–78 and 79–87 made under the Common Law Procedure Act, will be found not only in various parts of Bullen and Leake but, in a more expanded form, in Chitty on Pleading 7th Ed. Vol. 1 pp. 492–510. In the same volume at pp. 110–129 the learned author discusses the distinction between the action of *indebitatus assumpsit* and the action of debt.

It is true, as Mr. Shand has submitted, that a banker is bound only to honour his customer's cheque if there are in fact sufficient funds to the customer's credit to meet it. But where, as here, the banker's refusal to honor the customer's demand is based solely on the fact that he claims to have already repaid the loan and that the balance to the customer's credit is, for that reason, insufficient to meet the demand, the proper plea is one in confession and avoidance, namely, a plea of payment, and a bank " cannot " charge the Plaintiffs with a payment made, however innocently, on " a void instrument or a payment for which they cannot show a mandate " from the Plaintiffs to pay . . . ." (per Wright, J. in *Slingsby* v. *District Bank Ltd.* (1931) 2 K.B. 588 at 599).

On the issues raised by the pleadings in the present case the only relevance of the debit entries made by the Bank against the Plaintiff in its books was, as I have said, to corroborate the Plaintiff's claim that he had lent money to the Defendant, and the same comment applies to the correspondence which was put in evidence. On the undisputed facts that the Plaintiff did deposit money with the Defendant and later demanded its repayment, a sworn plea of never indebted should never have been filed, and the fact that it was wrongly placed on the record has, I think, brought some confusion into the case resulting in the discussions during argument as to the onus of proof and in the contention that it was for the Plaintiff to show that the debt sued for had not been repaid before action brought. A debtor who admits the making of a loan to him and claims merely that he has repaid it can defend an action to recover the loan only by pleading payment and accepting the onus of proving that plea. Had the Defendant here pleaded payment, as it should have if it wished to set up that it had dealt with the moneys paid into the Plaintiff's account in accordance with his instructions, no confusion as to the onus would have arisen. It would have been for the bank, which admitted the loan and that a demand had been made for its repayment, to show that at the date of demand nothing was owing because the loan had already been repaid.

Perhaps one way of testing the soundness of the Defendant's arguments is to enquire what estoppel by judgment would have arisen on these pleadings if a verdict had been given for the Defendant. The Plaintiff would certainly have been forever estopped from alleging that the money

claimed had been lent, although the making of the loan is not only proved but admitted. And the verdict and judgment giving rise to the estoppel would have been based on a finding that the loan had been repaid, a finding which would itself admit the lending of the money.

In the Full Court of the Supreme Court of New South Wales.

In my opinion the appeal should be dismissed with costs.

No. 9.
Judgment of (b) Owen, J. 7th October, 1952—*continued.*

Certified true copy of His Honour's judgment,

WALTER J. HOLT,
Associate.

(c) HERRON, J.:

(c) Herron, J. 7th October, 1952.

I would dismiss this appeal.

The learned trial Judge said that the proceedings had been most unsatisfactory by reason of the course taken in the pleadings and by reason also of the scanty nature of the evidence called. In saying that the trial Judge was justified, these criticisms being properly made with respect to the plea and method of conducting its case by the Appellant Bank.

The trial originally was commenced before a jury of four. I can well imagine the difficulty that must have been experienced if it had had to be explained to them that the determination of this important case, involving a sum of over £19,000, rested ultimately upon a technicality. This technicality involved consideration of an ancient system of pleadings the complete understanding of which is, I suggest, denied to most lawyers practising in this State, and which must be puzzling indeed to most who practise in other States of the Commonwealth.

However, before coming to the issues that were argued on this appeal, based on a purely technical view of the pleadings, let me survey the broad issues that presented themselves to the Judge and, at the commencement of the trial, to the jury.

In its analysis the broad issue was one of forgery or no forgery. The Plaintiff's solicitors, on 27th October, 1950, wrote to the manager of the Haymarket Branch of the Bank of N.S.W., where the Plaintiff's account had been kept, saying that ten cheques had been drawn on his account and paid by the Bank, and that investigations at that time indicated that these ten cheques had not been drawn by the customer, Laing. The letter further said that their client, Laing, was satisfied that the amounts of the cheques were paid without his authority, and that he was holding the Bank responsible for the loss sustained. In a later letter the name of a man called Harborne was mentioned as having a connection with the transaction.

On the 14th November the manager of the Haymarket Branch replied that the matter required consideration both by the Bank and its legal advisers, and promised to reply fully later. Before any such reply was

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No. 9. Judgment of (c) Herron, J. 7th October, 1952—*continued.*

made the Plaintiff's solicitors wrote, on the 21st November, saying that four further cheques had been discovered to have been drawn on Laing's account, the signatures to which were forged by Harborne. This letter also alleged that a particular cheque, dated January, 1948, for £2,950 was " drawn " by Harborne. The letter further said that three further cheques had been forged, on the 23rd August, 7th September, and 7th October, 1949, but that no details were then available to the Plaintiff. The Plaintiff's solicitors claimed that these cheques were drawn without Laing's authority, and that the Bank was responsible for these additional three cheques, as well as for those mentioned on the 27th October. The Plaintiff's solicitors reserved any claim with respect to the four cheques when details were available.

Again, on 29th November, 1950, the Plaintiff's solicitors also claimed that a further cheque was, on the 11th March, 1948, forged by Harborne, the Plaintiff's former accountant, for a sum of £2,950, and made formal demand for this amount.

To these several allegations of forgery the Bank's solicitors replied on 1st December, 1950. They referred to the position that Laing had not then been able to identify all the cheques claimed to have been forged by Harborne. The solicitors, in effect, asked for details of the matter as one entire claim so that the Bank could consider the whole of the matters together, and asked for a statutory declaration verifying the cheques alleged to have been forgeries.

It appears that a statement by Harborne was supplied to the Bank, but it was not put in evidence at the trial. On the 13th December the Plaintiff's solicitors gave more details of cheques said to have been forged, the details of some of which were apparently taken from Harborne's own statement, and it seems to me to be a fair inference from this letter that Harborne had admitted to forgery on a large scale. A further letter of 2nd January, 1951, from the Plaintiff's solicitors referred to further details of forgeries of a large number of cheques, and further stated the willingness of Laing and his manager and solicitor to verify these matters by statutory declarations. In point of fact, these declarations were prepared by the Bank's solicitor and were duly made.

Finally, details of cheques which were said to be forgeries were again given on 2nd February, 1951. These numbered some sixteen in all. The letter states :

> " The amount of the cheques abovementioned has been
> " debited by the Bank to our client's respective accounts as
> " indicated and our client's money has been used to pay them, so
> " that to the extent of the total amount of these cheques funds
> " which otherwise would have been to our client's credit with the
> " Bank are no longer available to him . . . . Our client will
> " draw and present cheques to the Haymarket Branch of the
> " Bank for amounts equal to each cheque on the respective
> " accounts mentioned and take steps to close these accounts
> " with the Bank."

Accordingly, on the 8th February, the Plaintiff drew eight cheques on one particular account with which this appeal is concerned, each cheque corresponding in amount to one said to have been forged. Each was dishonoured, being marked " Refer to Drawer. *Bona fide* dispute state of " account arising alleged forged cheques."

A letter of considerable importance is that of 12th February, 1951, from the manager of the Appellant Bank, addressed to the manager of the Bank of Australasia, who had by then become the bankers for Laing. It is in the following terms :

" 12th February, 1951.

" 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 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.
" No. 841471,	,,	2,950.
" 841473,	,,	2,210.18.9.
" 841472,	,,	2,950.
" 841475,	,,	2,338.-.8.
" 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.*

" Encl."

The Plaintiff thereupon issued his Writ on 16th February, 1951, with respect to eight cheques which, I assume, related to one of his several accounts with the Appellant Bank.

I set out the special endorsement on the writ :

" To amount due by the Defendant to the Plaintiff for money lent by

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" the Plaintiff to the Defendant and for money received by the " Defendant to the use of the Plaintiff and dealt with by the " Defendant in the following manner :

	" £	s.	d.
" To amount of forged cheque dated 5th July, " 1948 for the amount of £2,950 0s. 0d. debited " by the Defendant to the Plaintiff's Banking " Account with the Defendant	2,950	0	0
" To amount of forged cheque dated 26th Novem- " ber, 1948 for the amount of £2,950 0s. 0d. " debited by the Defendant to the Plaintiff's " banking account with the Defendant ...	2,950	0	0
" To amount of forged cheque dated 20th Janu- " ary, 1949 for the amount of £2,210 18s. 9d. " debited by the Defendant to the Plaintiff's " banking account with the Defendant ...	2,210	18	9
" To amount of forged cheque dated 1st February, " 1949 for the amount of £2,950 0s. 0d. debited " by the Defendant to the Plaintiff's banking " account with the Defendant	2,950	0	0
" To amount of forged cheque dated 25th Febru- " ary, 1949 for the amount of £2,338 0s. 8d. " debited by the Defendant to the Plaintiff's " banking account with the Defendant ...	2,338	0	8
" To amount of forged cheque dated 21st April, " 1949 for the amount of £890 15s. 8d. debited " by the Defendant to the Plaintiff's banking " account with the Defendant	890	15	8
" To amount of forged cheque dated 30th May, " 1949 for the amount of £2,225 5s. 4d. debited " by the Defendant to the Plaintiff's banking " account with the Defendant	2,225	5	4
" To amount of forged cheque dated 27th June, " 1949 for the amount of £2,897 10s. 4d. debited " by the Defendant to the Plaintiff's banking " account with the Defendant	2,897	10	4
	" £19,412	10	9 "

The declaration followed the endorsement on the writ as set out. I note that it had been amended at the hearing.

On this history and on these facts it is clear that the Plaintiff tendered to the Defendant a claim stated simply in this way : " You, the bank, " were the custodian of my money as your customer, and you deducted " from such money in your hands the amount of eight cheques, the signatures " to which were forged, and I claim the sums so deducted, amounting in

" all to £19,412 10s. 9d." To this claim the Bank said that it never was indebted as alleged.

In New South Wales a Defendant is required to swear to the truth of plea to a specially endorsed writ. This was done in this case. What fact or facts was this general plea designed to dispute ? There are eminent lawyers who are familiar with the old system of common law pleadings who assert that in these modern times if the system is to be retained a Defendant must set out a denial of the facts upon which his plea of the general issue is founded. There is much to be said for such a reform. In the Practice and Procedure Relating to the District Court of N.S.W., Rule 106 provides that where the Plaintiff proceeds by default summons a mere denial of the debt shall not be sufficient, and a defence in denial must deny specifically some matter of fact ; for example, the rule says: " In an action for goods bargained and sold or for goods sold and delivered " the defence must deny the order or contract or the delivery " and so on. It also provides that in actions upon bills of exchange, promissory note or cheques, a defence in denial must deny some matter of fact ; for example, the drawing, making, accepting, presenting, or notice of dishonour of the bill or note or cheque. I mention this method of procedure only to emphasize that if the Appellant Bank had been called upon to set out with particularity an expanded meaning of its plea of " Never indebted," it undoubtedly would have said something to the following effect : " The Defendant " disputes that the eight cheques were forged. It claims, on the contrary, " that these were properly debited in your account on proper mandates and " with the due authority of you, our customer." No other possible defence was ever suggested, and, indeed, none was ever forecast during the searching argument on this appeal.

The reply of the Appellant Bank, in effect, is : " It is for you, the " customer, to prove that these were forgeries." This contention is, apart from questions of mere pleading, opposed both to law and commercial good sense. An agent who is called upon to account for his principal's money and which has been demanded from him cannot be heard to say : " I have no longer got it, and it is for you, my principal, to prove how and " when I disposed of it. I, as your agent, cannot be called upon to account " for my stewardship."

It is to be remembered further that here there was no general claim for accounts, such as might in proper cases be made in a court of equity. This was a claim in a court of common law that with regard to eight specified payments the agent had misapplied the moneys other than according to the order of the principal. The law is, and always has been, that the agent, and not the principal, must prove his authority to pay when this is his ground for refusing to pay the principal on the proper demand of the latter.

There may be cases in which some special contract renders this general rule inapplicable, but that is not the case here. The customer says : " Please pay me my money." The Bank says : " We have already " disbursed it according to your lawful written order." It is clearly the

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No. 9. Judgment of (c) Herron, J. 7th October, 1952— *continued.*

Bank which must prove such a contention. It is a clear case of a plea in confession and avoidance. It must not be thought that there was any difficulty in the path of the Appellant Bank in providing such evidence. The manager of the branch where the Plaintiff had his account, who must have been familiar with the signature and who had, presumably, specimen signatures available in the Bank's records, could have been called to say that, looking at the eight cheques, the signatures thereto were those of the Respondent Laing. But there was no evidence given at the hearing which made it appear more probable than not that the payments out by the Bank of the £19,000 odd were authorised by the Plaintiff. Indeed, the material that was before this Court seems to warrant even a contrary inference.

Where a case at common law comes before the court, all that a court can do is to make a finding " Yes " or " No " on the issues of fact raised and pronounce judgment for the Plaintiff or the Defendant on that finding. It is not like a court which functions under the judicature system, where orders and declarations incidental to general findings are appropriate. In this behalf it must be observed that the issue of fact upon which the court of common law in this case was asked to affirm or deny was whether the payments that had been made by the Bank on these several cheques were duly authorised by the Plaintiff's signature or not. No other issue was ever suggested as relevant.

The result that was reached by the trial Judge was, upon the broad issues, a just result, and I would uphold it unless compelled to do otherwise on a consideration of the pleadings, but these, in my opinion, support the Plaintiff's view. The relationship between banker and customer is that of debtor and creditor: (Halsbury, 2nd Ed. Vol. 1, p. 796; *Joachimison* v. *Swiss Bank*, 1921, 3 K.B. 110; see also *Foley* v. *Hill*, 2 H.L. cases, 28). The proper view of a banker and customer transaction is that a debt arises immediately on the loan being made to the banker, although it does not become payable until after a demand has been made. In this case the writ was issued after the demand was made by the cheques drawn by the Plaintiff. On this demand the money hitherto owing became payable. The proper allegation in the declaration was for money lent, at the same time adding the necessary allegation that the money was payable. In this case the following matters only could have been relevant:

1. That the relationship of the parties was not that of banker and customer at all.
2. That money to the extent of the demand was not lent.
3. That the debt was a specialty.
4. That no debt was capable of arising until some specified happening or fixed time according to some special term of the contract.
5. That the money was not repayable except on demand.
6. That no demand was made.
7. That there was at the time of the demand insufficient money in the hands of the Plaintiff's banker to meet the demand.

The plea of " Never indebted " denies matters 1, 2, 3 and 4. It does not cover matters 5, 6 and 7. The matters in paragraphs 3 and 4 are not a possible view in this case ; there was no such special condition nor was there any deed. As to the issue taken on matters 1, 2 and 3, all were properly proved at the hearing. They could not be and were not disputed at the trial or on this appeal.

The allegations made by the common *indebitatus* count in this case amount to this, that the money was lent under a contract which was capable, in law, of giving rise to a presently payable simple contract debt, and that in fact the money was, according to the contract, payable at the date of the writ. So that the only allegation of fact inherent in the plea of " Never indebted " is that there never was such a contract, either because the contract contained terms which precluded the possibility of the money becoming due or that the money was never lent at all. It cannot be disputed that once the relationship of banker and customer is proved there must arise a contract, and the banker cannot say that the contract was upon terms which precluded the possibility of the money being payable at the date of the writ, for the only implied term is that the money will become immediately payable on demand, so that the only issue of fact open to the Defendant on a plea of " Never indebted " amounted to a statement that the money was never lent, and in an action at common law, as I have pointed out, the Judge or jury can only answer this question " Yes " or " No." Any other defence to the action for money lent must be specially pleaded.

Where the claim at common law is made by way of *indebitatus assumpsit*, this amounts to a claim in the nature of damages, and the plea of *non assumpsit* is analogous to the plea of " Never indebted." *Non assumpsit* operates merely as a denial of the contract or of the right ; it does not deny the breach. Such a plea denies the existence of a contract in such terms that it is capable of giving rise to a presently payable debt. The Common Law Procedure Act, 1899, and rules made under it, provide for the general issue of " Never indebted " to be pleaded ; but defences of confession and avoidance must be pleaded specially. A plea of denial admits the truth of all allegations not denied.

The common money count contains, in a short form, every essential allegation required in a special count for debt. The expression " money payable " is equivalent to a statement that there was a contract capable of supporting the action, the performance of conditions precedent and the breach, which is the non-payment of the money. A plea of " Never indebted," just as a plea of *non assumpsit* did to a special count, denies that there ever was a contract in the terms declared upon, but admits the performance of conditions precedent and the facts alleged as constituting the breach. So that it is clear that in this case the plea of " Never indebted " did not deny that a demand was made or that there was insufficient money to the Plaintiff's credit to meet the demand at the time it was made.

Both these allegations amount to a statement that a condition precedent was not fulfilled, and such allegations have still, as always, to

In the Full Court of the Supreme Court of New South Wales.

No. 9. Judgment of (c) Herron, J. 7th October, 1952—*continued.*

be specially pleaded by way of confession and avoidance. In point of fact, the Plaintiff proved that the demand was made. On the issues as they stood he need not have accepted this onus. As to there being insufficient money in the Plaintiff's account at the time, this could have only been established, strictly speaking, by a plea of payment and the proof by the Defendant Bank that the moneys lent for which it was required to account to the Plaintiff had been reduced by valid warrants withdrawing them from the Defendant's hands. The mere fact that in the copy of the Plaintiff's account, when tendered, it appeared that this claim had been made by the Defendant had no effect upon the issues then to be tried.

The Defendant could have, if it had wished to do so, set up a plea of payment even at the last minute at the hearing, and I have no doubt that the learned trial Judge would have allowed such a plea to be put on so as to raise the real issue. Counsel for the Defendant Bank, however, resolutely set his face against putting on such a plea and preferred to argue the matter as it was argued on this appeal, namely, that it was his opponent, and not he, who had to bear this burden of proof.

In my opinion, he was in error in this contention, and his effort to cast upon the Plaintiff the burden of proving these matters must be held to have failed.

The decision of the Judge at the trial was a correct one, and the appeal should be dismissed, with costs, and judgment for the Plaintiff affirmed.

No. 10. Judgment for Plaintiff after Verdict. 7th October, 1952.

No. 10.
Judgment for Plaintiff after Verdict.

Thursday the first day of March One thousand nine hundred and fifty-one.

SYDNEY TO WIT { WALTER RICHARD JAMES LAING by LEWIS GEORGE WILLIAMS his Attorney sues BANK OF NEW SOUTH WALES the Defendant for that, &c.

JUDGMENT FOR PLAINTIFF AFTER VERDICT.

	£	s.	d.
Verdict	19,412	10	9
Taxed Costs			
Interest	403	3	4
£			

Judgment signed this Seventh day of October One thousand nine hundred and fifty-two.

For the Prothonotary,

L. G. WILLIAMS,
Attorney for the Plaintiff,
28 Martin Place,
Sydney.

H. C. COOMBS, (L.S.)
Clerk of the Supreme Court.

No. 11.
Order granting conditional leave to Appeal to Her Majesty in Council.

In the Full Court of the Supreme Court of New South Wales.

No. 11. Order granting conditional leave to Appeal to Her Majesty in Council. 14th October, 1952.

Tuesday the fourteenth day of October, One thousand nine hundred and fifty-two.

UPON MOTION made this day to this Honourable Court on behalf of the Appellant (Defendant) pursuant to Notice of Motion filed herein on the thirteenth day of October last WHEREUPON AND UPON HEARING READ the said Notice of Motion and the Affidavit of William James Baldock sworn herein on the thirteenth day of October last and filed herein AND UPON HEARING what was alleged by Mr. K. W. Asprey of Queen's Counsel with whom was Mr. A. F. Mason of Counsel for the Appellant and by Mr. K. A. Ferguson of Queen's Counsel with whom was Mr. R. L. Taylor of Counsel for the Respondent (Plaintiff) THIS COURT DOTH ORDER that leave to appeal to Her Majesty in Her Majesty's Privy Council from the Judgment and Order of this Court be and the same is hereby granted to the Appellant UPON CONDITION that the Appellant do within three months from the date hereof give security to the satisfaction of the Prothonotary in the amount of Five hundred pounds (£500.0.0) for the due prosecution of the said Appeal and the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting it final leave to Appeal from the said Judgment and Order or of the Appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the said Appeal as the case may be AND UPON FURTHER CONDITION that the Appellant do within fourteen (14) days from the date hereof deposit with the Prothonotary the sum of Twenty-five pounds (£25.0.0) as security for and towards the costs of the preparation of the transcript record for the purposes of the said Appeal AND UPON FURTHER CONDITION that the Appellant do within three months of the date hereof take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Prothonotary to certify that the said index has been settled and that the conditions hereinbefore referred to have been duly performed AND UPON FURTHER CONDITION finally that the Appellant do obtain a final order of this Court granting it leave to Appeal as aforesaid AND THIS COURT DOTH FURTHER ORDER that the costs of all parties of this application and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order do follow the decision of Her Majesty's Privy Council with respect to the costs of the said Appeal or do abide the result of the said Appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject however to any orders that may be made by this Court up to and including the said final order or under any of the Rules next hereinafter mentioned that is to say Rules 16 17 20 and 21 of the Rules of the Second day of April one thousand nine hundred and nine regulating appeals from this Court to Her Majesty in Council AND THIS COURT DOTH FURTHER ORDER that the costs incurred in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by any

In the Full Court of the Supreme Court of New South Wales.

No. 11. Order granting conditional leave to Appeal to Her Majesty in Council. 14th October, 1952—*continued.*

party to this Appeal be taxed and paid to the party to whom the same shall be payable AND THIS COURT DOTH FURTHER ORDER that so much of the said costs as become payable by the Appellant under this order or any subsequent order of the Court or any order made by Her Majesty in Council in relation to the said Appeal may be paid out of any moneys paid in to Court as such security as aforesaid so far as the same shall extend AND that after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the Appellant AND THIS COURT DOTH FURTHER ORDER that pending the said Appeal all proceedings under the said Judgment and verdict or otherwise in this cause be and the same are hereby stayed AND that each party is to be at liberty to restore this matter to the list upon giving two days notice thereof to the other for the purpose of obtaining any necessary rectification of this order.

By the Court,
For the Prothonotary,
R. T. BYRNE, (L.S.)
Chief Clerk.

No. 12. Order granting final leave to Appeal to Her Majesty in Council. 7th January, 1953.

No. 12.

Order granting final leave to Appeal to Her Majesty in Council.

IN THE SUPREME COURT OF NEW SOUTH WALES. No. 595 of 1951.

Between

BANK OF NEW SOUTH WALES ... ... *Appellant (Defendant)*

and

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

Wednesday the Seventh day of January one thousand nine hundred and fifty-three.

UPON MOTION made this day to the Honourable Mr. Justice McClemens a Judge of this Honourable Court sitting as Vacation Judge as and for this Honourable Court on behalf of the Appellant (Defendant) pursuant to Notice of Motion filed herein on the Thirtieth day of December last WHEREUPON AND UPON HEARING READ the said Notice of Motion and the Affidavit of William James Baldock sworn on the Twenty-ninth day of December last and filed herein AND UPON HEARING what was alleged by Mr. A. F. Mason of Counsel for the Appellant and Mr. L. G. Williams Attorney for the Respondent (Plaintiff) THIS COURT DOTH ORDER that final leave to appeal to Her Majesty in Her Majesty's Privy Council from the Judgment of this Honourable Court given and made herein on the Seventh day of October One thousand nine hundred and fifty-two be and the same is hereby granted to the Appellant AND THIS COURT DOTH FURTHER ORDER that upon payment by the Appellant of the costs of preparation of the Transcript Record and dispatch thereof to England the sum of Twenty-five pounds (£25.0.0) deposited in Court by the Appellant as security for and towards the cost of the preparation of the Transcript Record on Appeal be paid out of Court to the Appellant.

JOHN H. McCLEMENS, *Judge.*

EXHIBITS.

Exhibits.

"B."—Correspondence.

"B."
Plaintiff's Solicitors to Defendant. 27th October, 1950.

Letter, Plaintiff's Solicitors to Defendant, 27th October, 1950.

R. C. Cathels & Co.

Bull's Chambers,
28 Martin Place,
Sydney.
27th October, 1950.

LGW : LF

The Manager,
Bank of New South Wales,
Haymarket Branch,
Haymarket.

Dear Sir,

We act for Mr. W. R. J. Laing a customer of your Bank who has consulted us with regard to certain cheques drawn on his account and paid by the Bank. Our client instructs us that his attention was drawn on Wednesday to what appeared to be certain irregularities in his accounts and these irregularities were of such a nature that he was prompted to make an investigation as a result of which as you know he asked you to turn up for inspection by him a number of cheques drawn on his account with your Branch of the Bank. He has now inspected these cheques and we regret to inform you that his investigations up to the present time indicate that ten of the cheques were not drawn by him.

All particulars of these cheques, with the exception of two, are contained in a copy of the enclosed statement which we have obtained from Mr. D. S. Harborne who was formerly employed by our client as an accountant. Our client's investigations are not yet complete, but he is satisfied that the amounts covered by the cheques in question were paid by the Bank without his authority and he holds the Bank responsible for the loss he has sustained as indicated by these cheques and by any further cheques which have similarly been paid without his authority.

In view of our client's long and happy association with your Bank we regret very much to have to write to you in this strain, but circumstances leave no other alternative.

Yours faithfully,

R. C. CATHELS & Co.,
L. G. WILLIAMS.

Exhibits.

"B." Plaintiff's Solicitors to Defendant. 1st November, 1950.

Letter, Plaintiff's Solicitors to Defendant, 1st November, 1950.

R. C. Cathels & Co.

LGW : LF

Bull's Chambers,
28 Martin Place,
Sydney.
1st November, 1950.

The Manager,
Bank of New South Wales,
Haymarket, N.S.W.

Dear Sir,

Re W. R. J. Laing.

With further reference to this matter and following upon our conversation with your Mr. Costello yesterday we now enclose herewith copy letter which the writer received from Harborne. Our client has instructed us to draw your attention to the fact that the cheque dated 5th July 1948 for £2,950 is No. 848997 and not 848987 as mentioned in the copy statement which we handed to you on 27th ultimo.

Yours faithfully,
R. C. CATHELS & Co.,
L. G. WILLIAMS.

Plaintiff's Solicitors to Defendant. 9th November, 1950.

Letter, Plaintiff's Solicitors to Defendant, 9th November, 1950.

R. C. Cathels & Co.

LGW : LF

Bull's Chambers,
28 Martin Place,
Sydney.
9th November, 1950.

The Manager,
Bank of New South Wales,
Haymarket.

Dear Sir,

Re W. R. J. Laing.

We have had no acknowledgment from you of our letters of 27th October and 1st November. We should be glad if you would be good enough to advise us without any further delay what your Bank intends to do with regard to the matter.

As you will recollect in our letter above referred to we informed you that our client held the Bank responsible for the loss he had sustained and although we made no formal demand on the Bank we anticipated that the matter would have been determined before this and we should be glad to receive an early reply.

Yours faithfully,
R. C. CATHELS & Co.,
L. G. WILLIAMS.

Letter, Defendant to Plaintiff's Solicitors, 14th November, 1950.

Exhibits.

"B." Defendant to Plaintiff's Solicitors. 14th November, 1950.

Bank of New South Wales,
Haymarket,
Sydney.
14th November, 1950.

EM.

Messrs. R. C. Cathels & Co.,
Solicitors,
28 Martin Place,
Sydney.

Dear Sirs,

Attention Mr. L. G. Williams.

Re W. R. J. Laing—Haymarket.

We wish to acknowledge receipt and thank you for your letters of 27th ultimo and 1st and 9th instant and the enclosures which accompanied your two earlier letters respectively.

While we are appreciative of the courtesy of your client and yourselves in this matter, we know that you will readily understand that, from the Bank's point of view, the matter calls for careful consideration and for the reference of certain legal aspects of this matter to our Solicitors. We hope, however, to be able to reply fully to your letters now under acknowledgment during the course of the ensuing week or ten days.

Yours faithfully,
C. F. COSTELLO,
Manager.

Letter, Plaintiff's Solicitors to Defendant, 14th November, 1950.

Plaintiff's Solicitors to Defendant. 14th November, 1950.

R. C. Cathels & Co.

Bull's Chambers,
28 Martin Place,
Sydney.
14th November, 1950.

LGW : LF.

The Manager,
Bank of New South Wales,
Box 68 C,
P.O. Haymarket, N.S.W.

Dear Sir,

Re W. R. J. Laing.

We are in receipt of your letter of even date for which we thank you. While we understand that the matter requires careful consideration from

Exhibits.
"B."
Plaintiff's Solicitors to Defendant, 14th November, 1950—*continued.*

the Bank's point of view, we should be glad if it could now receive your early attention.

We are instructed that the matter was first called to your attention on 26th ultimo.

Yours faithfully,
R. C. CATHELS & Co.,
L. G. WILLIAMS.

Plaintiff's Solicitors to Defendant. 21st November, 1950.

Letter, Plaintiff's Solicitors to Defendant, 21st November, 1950.

R. C. Cathels & Co.

Bull's Chambers,
28 Martin Place,
Sydney.
21st November, 1950.

LGW : LF.

The Manager,
Bank of New South Wales,
Box 68 c,
P.O. Haymarket.

Dear Sir,

Re W. R. J. Laing.

With further reference to this matter we have now been informed by our client and we understand that he has also informed the Bank that he has discovered that there are four further cheques drawn on his account, the signatures of which were forged by Mr. D. S. Harborne. One cheque in particular was drawn in January 1948 for an amount of £2950 and in view of the similarity of this amount with the amounts of other cheques our client has no doubt that this cheque was drawn by Harborne.

We are further instructed that there are three further amounts that have been paid by the Bank in respect of cheques that were also forged on 23rd August, 7th September and 7th October 1949, but at the present time our client is not certain of the amounts or the actual dates of these cheques. He has instructed us to inform you that he holds the Bank responsible for the payment of these additional cheques, all of which were paid without his authority and with regard to the cheques particulars of which were given by us to you in our letter of 27th October last we have been instructed to make formal demand on the Bank for the repayment to our client of the total amount of these cheques forthwith.

Unless you advise us by the end of this present week that the Bank is prepared to repay the amount to our client we are instructed to inform you that our client will institute such proceedings in respect of the matter as he may be advised. This demand is made without prejudice to our client's rights in respect of the four further cheques above mentioned,

particulars of which will be supplied to you by us as soon as they have been ascertained and our client expressly reserves his rights in respect of these and any further cheques which he may discover have been paid without his authority.

We regret the necessity of having to write to the Bank in this manner, but the Bank has had the matter under consideration since 27th ultimo and our client is not prepared to allow it to be held up any longer.

Yours faithfully,
R. C. CATHELS & Co.,
L. G. WILLIAMS.

Letter, Plaintiff's Solicitors to Defendant, 29th November, 1950.

Plaintiff's Solicitors to Defendant. 29th November, 1950.

R. C. Cathels & Co.

LGW : LF.

Bull's Chambers,
28 Martin Place,
Sydney.
29th November, 1950.

The Manager,
Bank of New South Wales,
Haymarket Branch,
Box 68 C,
P.O. Haymarket.

Dear Sir,

We act for Mr. W. R. J. Laing who was, at the date of the cheque here undermentioned, the sole proprietor of a firm known as Canadian Fur Company, the Bank Account in respect of which firm was kept at your branch of the Bank.

We understand that you have been informed that a cheque No. 948 dated 11th March 1948 for an amount of £2,950 drawn to a number, was forged by Mr. D. S. Harborne formerly employed by our client as an Accountant. The number mentioned being the last three figures of the actual cheque number.

We desire to place on record that the amount of this cheque was debited by the Bank to the account of our client's firm and that our client's money was used to pay it and the sum of £2950 which otherwise would have been to our client's credit with your Bank is accordingly no longer available to him.

Your confirmation of the above is required and we should be glad if you would let us have your acknowledgment of its correctness within 48 hours. We may add that we have been instructed to make a formal demand on the Bank for the repayment to our client of the amount mentioned.

Yours faithfully,
R. C. CATHELS & Co.,
L. G. WILLIAMS.

Exhibits.

"B."
Defendant's Solicitors to Plaintiff's Solicitors. 1st December, 1950.

Letter, Defendant's Solicitors to Plaintiff's Solicitors, 1st December, 1950.

Iceton, Faithfull & Baldock.

South British Building,
28 O'Connell Street,
Sydney.

WJB.BR

1st December, 1950.

Messrs. R. C. Cathels & Co.,
Solicitors,
28 Martin Place,
Sydney.

Dear Sirs,

Attention Mr. L. G. Williams.

Re Bank of New South Wales and W. R. J. Laing.

We have been handed your letters to the Bank dated 21st and 29th instant in this matter and we confirm our telephone conversation with you that we have instructions to act on behalf of the Bank. Your client is, of course, at liberty to commence such proceedings as he may be advised, but if he is still desirous of having this matter adjusted by the Bank without recourse to litigation, then we suggest that your client afford the Bank a proper opportunity of giving consideration to this matter. According to our instructions your client has not yet been able to identify for the Bank *all* the cheques which he claims to have been forged by Mr. Harborne during the course of his employment.

You can scarcely expect that the Bank would deal with a matter involving such large amounts and spread over such a period of time on a piecemeal basis. We would also remind you that if these cheques are forgeries, then your client, having regard to his business capacity and facilities, took an undue length of time in noticing such large defalcations from his accounts particularly in view of the fact that pass sheets were regularly delivered to him by the Bank. We think that the Bank is entitled to have Mr. Laing and Mr. Williams (who had authority to operate on Mr. Laing's account) specify Mr. Laing's claim precisely, and in its entirety, and when the Bank is able to view this claim as a whole, then it will be able to inform Mr. Laing whether or not it proposes to accede to that claim or some part thereof. Furthermore, when exact particulars of Mr. Laing's claim are known to the Bank you surely must expect that in a matter of this importance the Bank should have a reasonable opportunity of conducting its own enquiries to satisfy itself as to the action which the Bank should take. The fact, of course, that a signature on a cheque may be forged is not of itself sufficient to make the Bank liable to Mr. Laing.

In all the circumstances, therefore, having regard to the matters which we have mentioned we think that the Bank is entitled to have Mr. Laing and Mr. Williams verify on statutory declaration the cheques, the signatures

upon which Mr. Laing and Mr. Williams claim to be forgeries. The Bank is prepared to afford both Mr. Laing and Mr. Williams every opportunity to verify the signatures on such cheques as they may require to inspect for this purpose.

We should be glad to hear from you hereon in due course.

Yours faithfully,

ICETON FAITHFULL & BALDOCK,

W. J. BALDOCK.

Exhibits.
"B."
Defendant's Solicitors to Plaintiff's Solicitors. 1st December, 1950—*continued.*

Letter, Plaintiff's Solicitors to Defendant's Solicitors, 4th December, 1950.

Plaintiff's Solicitors to Defendant's Solicitors. 4th December, 1950.

R. C. Cathels & Co.

Bull's Chambers,
28 Martin Place,
Sydney.

LGW : LF

4th December, 1950.

Messrs. Iceton Faithfull & Baldock,
Solicitors,
28 O'Connell Street,
Sydney.

Dear Sirs,

W. R. J. Laing & Bank of New South Wales.

We are in receipt of your letter of 1st instant, contents of which we have referred to our client for his instructions. We are instructed to say that our client contends that the Bank has had a proper opportunity of giving consideration to this matter. As you are aware we have supplied the Bank with the dates and the amounts of each one of the cheques and we have also forwarded to the Bank a copy of the statement Harborne made in connection with the matter.

It is true that two cheques have not yet been traced, but of course in this connection our client is obliged to rely on the Bank's assistance to enable him to trace the cheques. All we are asking the Bank to do is reply to our earlier letters indicating its attitude, which the Bank in its letter to us of 14th ultimo said that it would do.

It is noted that in the first paragraph of your letter you said that our client claims that the cheques were forged by Harborne during the course of his employment. No such claim has been made by our client and it is of course obvious that in forging the cheques Harborne was not in any way acting in the course of his employment.

Exhibits.

"B."
Plaintiff's Solicitors to Defendant's Solicitors. 4th December, 1950.
—*continued.*

With regard to the second paragraph of your letter we agree that the Bank should not be asked to deal with the matter on a piecemeal basis and we are not asking that this be done. Surely by this time the information we have given and the facilities which are at its disposal have been sufficient for the Bank to satisfy itself as to whether or not the cheques are forgeries.

We are instructed to deny that our client took an undue length of time in noticing the defalcations from his accounts. We think there is little to be gained by endeavouring to shift any portion of the blame to our client. Surely the Bank is bound to know its customers' signatures. A scrutiny of the cheques involved shows that the forgeries are obvious ones.

In view of the long association between our client and the Bank our client is, as the Bank has already been advised, prepared to assist the Bank in any way he can. Accordingly he, and the writer, are both prepared to furnish Statutory Declarations as to the signatures on the forged cheques.

We should be glad therefor if you would be good enough to telephone the writer and make an appointment so that the arrangements for this may be put in hand at once.

Yours faithfully,

R. C. CATHELS & Co.,

L. G. WILLIAMS.

Plaintiff's Solicitors to Defendant's Solicitors. 13th December, 1950.

Letter, Plaintiff's Solicitors to Defendant's Solicitors, 13th December, 1950.

R. C. Cathels & Co.

Bull's Chambers,
28 Martin Place,
Sydney.

LGW : LF

13th December, 1950.

Messrs. Iceton, Faithfull & Baldock,
Solicitors,
28 O'Connell Street,
Sydney.

Dear Sirs,

Re W. R. J. Laing & Bank of N.S.W.

With further reference to this matter we are, as arranged, writing to give you particulars of the cheques which the writer and our client desire to inspect prior to making the declarations required by you on

behalf of the Bank. For the purpose of convenience the first part of the undermentioned list comprised eight cheques referred to in Harborne's statement, copy of which we forwarded to the Bank. These are as follows :

7th July 1948	848997	£2950. 0. 0
26th November 1948	295714	2950. 0. 0
20th January 1949	295743	2210.18. 9
1st February 1949	295754	2950. 0. 0
25th February 1949	294771	2338. 0. 0
21st April 1949	497897	2225. 5. 4
30th April 1949	497913	890.15. 8
27th June 1949	497921	2897.10. 4

The next cheque which our client desires to inspect is dated 2nd September 1949 cheque No. 484 for £565.4.8. This cheque was drawn on the account of Hexham Textiles. In this instance we understand that the number given is the last three figures of the actual number of the cheque.

The further cheques which our client desires to inspect were drawn on the account of the Canadian Fur Company and they comprise thirteen cheques as follows :—

11th March 1948	3948	£2950. 0. 0
27th July 1948	4156	498.14. 0
13th May 1948	4012	402. 8. 6
20th May 1948	4016	403.12. 2
2nd August 1948	4247	282. 7. 6
11th June 1949	4719	647. 0. 0
27th August 1948	4217	151. 2. 9
16th June 1949	4724	98.14. 0
2nd August 1948	4176	350. 0. 0
13th August 1948	4193	301. 4. 3
9th September 1948	4253	590. 0. 0
25th October 1948	4379	520. 0. 0
2nd September 1949	4835	244. 2. 4

With regard to this list of cheques we are instructed that in two instances the signature of our client's manager, Mr. J. Roberts, was forged. These cheques are those dated 2nd August 1948 No. 4247 and dated 27th August 1948 No. 4217.

There are two further documents which our client desires to inspect both of which relate to amounts that were paid to the credit of Harborne's account with the Liverpool Street Branch of the Bank. Our client desires to inspect the deposit slips in respect of two deposits as follows :

23rd August 1949 in respect of an amount of £546.17.5 and 17th October 1949 in respect of an amount of £1954.19.5.

Our client has reason to suspect that these deposits included forged cheques, but he is unable to give any particulars from the information in his possession. In support of our request that our client be permitted

Exhibits.

"B."
Plaintiff's Solicitors to Defendant's Solicitors. 13th December, 1950—*continued.*

to inspect these deposit slips we would direct your attention to the fact that on some occasions it appears to have been Harborne's practice to pay the forged cheque and certain further amounts to the credit of his account.

Our enquiries reveal that he did this in respect of one amount of £2950 which he deposited to the credit of his account with the Rural Bank on 12th March 1948. Our client has succeeded in tracing this cheque which is No. 3948 in the last list above mentioned. We should be glad if the matter could receive your prompt attention as our client is very concerned about the position and desires to take steps to have it cleared up as soon as possible.

In all the circumstances we have no hesitation in anticipating your co-operation.

Yours faithfully,

R. C. CATHELS & Co.,

L. G. WILLIAMS.

Plaintiff's Solicitors to Defendant's Solicitors. 2nd January, 1951.

Letter, Plaintiff's Solicitors to Defendant's Solicitors, 2nd January, 1951.

R. C. Cathels & Co.

Bull's Chambers,
28 Martin Place,
Sydney.

LGW : LF

2nd January 1951. (sic)

Messrs. Iceton, Faithfull & Baldock,
Solicitors,
28 O'Connell Street,
Sydney.

Dear Sirs,

Re W. R. J. Laing.

Following upon our conversation with your Mr. Baldock to-day, we are instructed by our client that he has visited the Haymarket Branch of the Bank and made a close inspection of the cheques in question. If you will refer to our letter of 13th ultimo you will find that there is a list of eight cheques. All these cheques were drawn on our client's own account and our client will declare that the signatures on each of these cheques, with the exception of one, are forged.

The exception is cheque dated 26th November 1948 for £2950 and our Mr. Williams will declare that this cheque is a forgery. We trust that you will appreciate our reasons for not repeating the list.

Our client will also declare that a cheque dated 6th September 1949, No. 484 for an amount of £565.4.8 drawn on the account of Hexham Textiles is a forgery. The further cheques relate to the account of Canadian Fur Company and in this connection our client will declare that the following cheques are forgeries :—

16th June 1949	4724	£98.14. 0
3rd August 1948	4176	350. 0. 0
3rd August 1948	4193	301. 4. 3
2nd September 1949	4835	244. 2. 4
11th June 1949	4719	647. 0. 0

However, with regard to the last cheque above mentioned, we are instructed that this was a telegraphic transfer in favour of McMillan & Moore in London and value was received by our client for the cheque.

The further cheques on the account of the Canadian Fur Company which our client's manager, Mr. Roberts, will declare are forgeries are as follows :

27th August 1948	4217	£151. 2. 9
7th September 1949	4253	590. 0. 0
25th October 1948	4379	520. 0. 0
2nd August 1948	4247	282. 7. 6

We are instructed that the cheque lastly above mentioned was a telegraphic transfer to Messrs. McMillan & Moore and our client received value for that particular cheque.

For the purpose of enabling you to complete the necessary declaration to submit to us we have to advise that our client's full name and description is Walter Richard James Laing, of Sydney, Company Director ; that of his Manager is James Reginald Roberts of Sydney, Business Manager and the full name of the writer is Lewis George Williams. We should be glad to receive the declarations at your earliest convenience as our client is desirous of bringing the matter to a conclusion as soon as possible.

Yours faithfully,

R. C. CATHELS & Co.,

L. G. WILLIAMS.

Exhibits.

"B."
Defendant's Solicitors to Plaintiff's Solicitors. 15th January, 1951.

Letter, Defendant's Solicitors to Plaintiff's Solicitors, 15th January, 1951.

Iceton Faithfull & Baldock.

South British Building,
28 O'Connell Street,
Sydney.

WJB.BR

15th January, 1951.

Messrs. R. C. Cathels & Co.,
Solicitors,
28 Martin Place,
Sydney.

Dear Sirs :

Attention Mr. L. G. Williams. J.
Bank of New South Wales and W. R. J. Laing.

We refer to prior correspondence and as arranged in connection with the Bank's investigation of this matter we are enclosing for completion by your client, Mr. W. R. J. Laing, his Manager, Mr. James Reginald Roberts, and your Mr. L. G. Williams, the Statutory Declarations referred to in your letter to us of 2nd instant.

Upon your returning to us the enclosed Declarations duly completed, we will at once forward the same to the Bank for its consideration and request its further instructions.

Yours faithfully,
ICETON FAITHFULL & BALDOCK,
W. J. BALDOCK.

Plaintiff's Solicitors to Defendant's Solicitors. 16th January, 1951.

Letter, Plaintiff's Solicitors to Defendant's Solicitors, 16th January, 1951.

R. C. Cathels & Co.

Bull's Chambers,
28 Martin Place,
Sydney.

LGW : LF

16th January 1951.

Messrs. Iceton, Faithfull & Baldock,
Solicitors,
28 O'Connell Street,
Sydney.

Dear Sirs,

W. R. J. Laing to Bank of N.S.W.

We are in receipt of your letter of 15th instant, together with the enclosure therein mentioned and now return herewith declarations by

Messrs. Laing & Roberts and the writer, duly completed. We thank you for forwarding us copy of these declarations which we have retained for our records.

The only matter to which we desire to direct your attention is the last reference in Mr. Robert's declaration to cheque No. 4253. We are instructed that the correct date of this cheque is 7th September, 1948 and we have amended declaration accordingly.

We should be glad to know as soon as possible what the Bank intends to do with regard to our client's claim. We would ask that the matter receive urgent attention and in particular, that, unless of course the Bank proposes to admit our client's claim, that we be supplied with replies to our letter of 29th November last.

Kindly acknowledge receipt of the declarations.

Yours faithfully,

R. C. CATHELS & CO.,

L. G. WILLIAMS.

Letter, Plaintiff's Solicitors to Defendant's Solicitors, 2nd February, 1951.

R. C. Cathels & Co.

Bull's Chambers,
28 Martin Place,
Sydney.

LGW : LF

2nd February, 1951.

Messrs. Iceton, Faithfull & Baldock,
Solicitors,
28 O'Connell Street,
Sydney.

Dear Sirs,

Re W. R. J. Laing & the Bank of New South Wales.

With further reference to this matter we are again writing to give you particulars of cheques debited to our client's accounts with the Haymarket Branch of the Bank all of which are forgeries. We are doing this because we understand from you that there are some slight discrepancies in the declarations of Messrs. Laing and Roberts, which were completed at your request, with regard to some of the cheques.

Exhibits.

"B."
Plaintiff's Solicitors to Defendant's Solicitors. 2nd February, 1951—*continued.*

The cheques debited to our client's personal account as as follows :—

5th July 1948	848997	£2950. 0. 0
26th November 1948	295714	£2950. 0. 0
20th January 1949	295743	£2210.18. 9
1st February 1949	295754	£2950. 0. 0
25th February 1949	295771	£2338. 0. 8
21st April 1949	497897	£890.15. 8
30th May 1949	497913	£2225. 5. 4
27th June 1949	497921	£2897.10. 4

Those cheques debited to the account styled Canadian Fur Company are as follows :—

3rd August 1948	4176	£350. 0. 0
3rd August 1948	4193	£301. 4. 3
27th August 1948	4217	£151. 2. 9
7th September 1948	4253	£590. 0. 0
25th November 1948	4379	£520. 0. 0
16th June 1949	4724	£98.14. 0
2nd September 1949	04834	£244. 2. 4

and as you are aware the cheque for an amount of £565.4.8 dated 6th September 1949 No. 505484 was debited to the account styled Hexham Textiles.

The amount of each of the cheques above mentioned has been debited by the Bank to our client's respective accounts as indicated and our client's money has been used to pay them, so that to the extent of the total amount of these cheques, funds which otherwise would have been to our client's credit with the Bank are no longer available to him. We should be glad if you would be good enough to confirm this no later than Tuesday next 6th instant.

In the event of your confirmation not reaching us by that date, our client will draw and present cheques to the Haymarket Branch of the Bank for amounts equal to each cheque on the respective accounts mentioned and take steps to close these accounts with the Bank. Naturally our client and ourselves would prefer to have your confirmation as requested within the time mentioned, as the matter has already been unduly protracted.

Yours faithfully,

R. C. CATHELS & Co.,

L. G. WILLIAMS.

" D."—Letter, Defendant to Manager, Bank of Australasia, 12th February, 1951.

Exhibits.

" D."
Letter, Defendant to Manager, Bank of Australasia. 12th February, 1951.

12th February, 1951.

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 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. -. 8,
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.

Encl.

In the Privy Council.

No. 15 of 1953.

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

BETWEEN

BANK OF NEW SOUTH WALES
(*Defendant*) *Appellant*

AND

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

RECORD OF PROCEEDINGS

BELL, BRODRICK & GRAY,
The Rectory,
29 Martin Lane,
Cannon Street, E.C.4,
Solicitors for Appellant.

BLYTH, DUTTON, WRIGHT & BENNETT,
112 Gresham House,
Old Broad Street,
London, E.C.2,
Solicitors for Respondent.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
(A61547)