*JUD/*1912*HCA6 -*

R v Brown

(1912) 14 CLR 17

(1912) 18 ALR 111

[1912] HCA 6

High Court of Australia — Full court
Griffith CJ, Barton and Isaacs JJ
26-29 February, 11 March 1912

Griffith CJ.

This was a petition of right brought against the Crown by the respondents, claiming to be assignees of a sum of £710, which one Pigott became entitled to receive from the Government of Victoria in 1893. The Statute of Limitations is not set up. The relevant facts of the case lie in a small compass, and are not in dispute, and in my judgment the real points for decision lie in an equally small compass, although much time was occupied in discussing other points. In May, 1892, the Government of Victoria by advertisement called for tenders for the supply of coal to certain Government departments and works. One of the conditions mentioned in the advertisements was as follows: — "Security will be required in cash, Government debentures or bank deposit receipt in favour of the Secretary of the Tender Board." The amount of security for each service was specified in the advertisements. The security was to be completed and the contract to be signed within ten days of acceptance of tender.

- H.C. Pigott, trading under the firm name of Pigott Bros and Co, was the successful tenderer for several services, in respect of which the total security required was £710. Two contracts were then signed, both dated 19th May, 1892, and expressed to be made "between Pigott Bros and Co of the first part and W. Kemp, Secretary of the Tender Board of Victoria, for and on behalf of Her Majesty and Her Majesty's Government of the said Colony, of the second part." The contracts incorporated the tenders, which in turn had incorporated the terms of the advertisements. The giving of the security appears to have been delayed, but it was given on 30th May by lodging with the Secretary of the Tender Board a single fixed deposit receipt for £710 (being the aggregate amount of security under the two contracts), issued by the London Chartered Bank of Australia in favour of the Secretary of the Tender Board.

  The deposit was expressed to be for twelve months, and the receipt had in the margin the words — "Deposit receipt not transferable. Repayable 30th May, 1893." I note, in passing, that by the conditions of the advertisements, the deposit receipt might have been for a deposit at current account instead of for a fixed period, but as the currency of the contracts was from 1st July, 1892, to 30th June, 1893, the advantage of making a fixed deposit bearing interest was obvious. On the same day the Secretary of the Tender Board gave a receipt as follows: —

  Tender Board Offices,

  Treasury, Melbourne, 30/5/1892.

  Received from Messrs. Pigott Bros & Co, a Fixed Deposit Receipt on London Chartered Bank of Australa, No 40/16102, dated 30/5/92, for the sum of seven hundred and ten pounds, the same being deposited with me as security for and until completion of the contract for coal, 1892–93, in accordance with the conditions of tender.

  £710.

  WILLIAM KEMP,

  Secretary Tender Board.

- N.B. — This receipt to be handed to the Secretary Tender Board when applying for the return of the deposit.

The term of twelve months expired on 30th May, 1893, after which date the money lay to the credit of the Secretary of the Tender Board, and could at any time, as between him and the Bank, have been withdrawn. The contracts were duly completed on 30th June, 1893. The contracts did not contain any express stipulation as to the return of the deposit, but they did contain some stipulations with respect to it. Under one of them it was provided that a refusal to execute orders or repetition of irregularity in quality or quantity or in delivery should subject the contractor to such mulct not exceeding £50 as the Treasurer might direct, "such mulct to be deducted from the contractor's account or the security money."

The other contract contained a provision that should an order not be complied with within forty-eight hours it should be competent for the Department concerned to purchase at the contractor's risk, and to deduct from the contractor's account or the security money the extra expense over and above the contract price. Both contracts contained a provision that in the event of the contractor failing to carry on the contract, "the contract security money will in that case be absolutely forfeited."

The respondents contend that on the due completion of the contracts the contractor became entitled to a return of what is spoken of in the contracts as the "security money." If he had been unfortunate enough to commit a breach of contract and to incur a forfeiture of part of that money, it is conceded that he would have been entitled to a return of the balance. But it is contended that, for some reasons which, I fear, I fail to comprehend, if he does not forfeit any part he is not entitled to a return of anything but to some different right. The formal legal position after the issue of the deposit receipt in the name of the Secretary of the Tender Board and his acceptance of it was that the Bank were his debtors in respect of the money, although the debt was not repayable until 30th May, 1893. After that date they were simply his debtors in respect of a debt payable on demand.

The source from which Pigott obtained the money to make the deposit is quite irrelevant. He, in fact, paid in his own cheques drawn on the same Bank, but as between the Bank and the creditor in whose favour they issued the receipt they cannot be allowed to deny that they received money from him. It is a fact that Pigott's account was then overdrawn, but it is also a fact that he was in the transaction with the Government agent for a firm known as J and A. Brown, of Newcastle, in New South Wales, one of the largest firms of coal-owners in that State, and now represented by the respondents, John Brown and William Brown, and that he had shortly before paid into his account moneys belonging to that firm largely exceeding the amount of £710. These facts are, in my opinion, equally irrelevant. There is not a scintilla of evidence to suggest that the Bank had any equitable rights as against Pigott with respect to the "fund," as it has been called, in respect of which they were debtors to the Secretary of the Tender Board. All the rights of all the parties were purely legal. The Bank lent the money to Pigott on his own cheque. They accepted his cheque as cash received from the Secretary of the Tender Board, who in turn accepted the deposit in his name as equivalent to cash.

The action for money had and received lay whenever the defendant had received money which in justice and equity belonged to the plaintiff, and when nothing remained to be done except pay over the money. Even in the case of an express trust, if nothing remained to be done but pay over money, the trustee by his conduct, as for instance by admitting that he had money to be paid over, might make himself liable to this action — see *Pardoe v Price,* 16 M. & W. 451, 458. When money is paid by one person to another to be retained by him until the happening of a given event and no longer, an implied obligation arises to repay it when that event happens. This may be called a "trust" in one sense. But it is none the less a legal obligation to pay the money, and may be enforced as such. I do not know any definition of debt that does not include such an obligation.

By a deed dated 31st October, 1906, Pigott assigned to the plaintiffs, John Brown and William Brown, his claim against the Secretary of the Tender Board, or against the Government or the Crown in respect of the £710 and of the deposit receipt, and all claims whatsoever against the Crown or any person or corporation in respect thereof. Formal notice in writing of the assignment was given to the Government of Victoria before action. If there is no more in the case, the plaintiffs are plainly entitled to recover.

Before considering the answer attempted to be made, I will dispose of two formal objections. The appellant contends, first, that the action should be brought against the personal representative of Kemp, who is dead. As already stated, the contracts were expressed to be made with him "for and on behalf of Her Majesty and Her Majesty's Government of the said colony." Moreover, a head of a Government Department, contracting on behalf of the Government, is never personally responsible unless the terms of the contract plainly show that it was so intended. There is, therefore, nothing in this objection. The appellant also contends that a

chose in action, consisting of a right against the Crown, cannot be assigned so as to entitle the assignee to present a petition of right. No authority was cited for the contention. The contrary was assumed in the case of *King v Victoria Insurance Co Ltd,* (1896) AC 250, where the validity of such an assignment was contested on other grounds. In my opinion, it is quite untenable.

I will proceed to deal briefly with the contentions set up by the appellant in answer to the plaintiffs' plain and straightforward case. Early in 1893 the Browns had sent a Mr W. B. Ranclaud to Melbourne to take over the agency of their business there from Pigott, which he had done. Pigott had introduced him to Kemp as Browns' representative. On 8th June, *ie,* before the contracts were completed, Pigott signed and delivered to Ranclaud an order in the form following: —

Form H.

ORDER TRANSFERABLE BY ENDORSEMENT.

To the Secretary, Tender Board. 8th June, 1893.

Sir, — I beg to request that you will pay to W. B. Ranclaud (whose signature appears in the margin), or order, the sum of seven hundred and ten pounds … . shillings and … . pence, being the amount of deposit on contracts for coal year 1892–1893.

Signature of Claimant — Pigott Brothers & Co.

Signature of person or firm to whom order is given — W. B. Ranclaud.

- 1d.Stamp — W.B.R — 8/6/93.

  It appears that this form, called Form H, was a form prescribed by regulations under the "Audit Act," to be used for the purpose of payment of money due by the Government to "others than principals." I cannot entertain any doubt that this order was intended to operate as an assignment by Pigott to the Browns of his legal interest in the deposit, and that it did so operate as between them. The learned Chief Justice was of that opinion, and indeed founded his judgment upon it.

  In July Ranclaud tendered this order to Kemp, and asked for cash or a cheque. Kemp offered to return the deposit receipt — I suppose, endorsed with an order to pay Ranclaud — though this is not expressly stated. It appears that it was not unusual to return in this manner money lodged on fixed deposit as security for the due execution of Government contracts, and that the Bank did not generally insist upon the non-transferability of the receipt. But I can find no evidence of any contract express or implied that the depositor was bound to accept the receipt with such an endorsement as repayment. The same course would, no doubt, have been followed in the present case but for the fact that the London Chartered Bank had shortly before suspended payment. The Bank, however, soon afterwards resumed business, after what is called a "reconstruction," under the name of the London Bank of Australia, and all deposits were paid in full. Ranclaud refused to accept the deposit receipt, and there the matter rested for some years. The plaintiffs contended that sufficient notice of the assignment effected by the H. Order was given to Kemp, and that the Government were therefore bound by the assignment. Madden, C.J, seems to have inclined to that view. I think that Kemp, who was the hand to pay, was the proper person to whom to give notice of the assignment, and I have little doubt that he knew perfectly well that Ranclaud asked for the money as agent for the Browns and not for Pigott, but I am unable to find sufficient evidence of such notice as is necessary to perfect an equitable assignment so as to bind the debtor.

  In 1898 the new Bank asked the Government to deliver up the deposit receipt to them on representations that they had an equitable claim to the money as having been obtained by a cheque on Pigott's overdrawn account, and that they held a written lien from him which expressly covered the document. Both these representations were without foundation in law. The Government, however, acceded to the request, taking an indemnity from the Bank, who are the real appellants. It is admitted that no defence can be founded on this transaction.

The appellant contended, first, that the only obligation incumbent upon the Government was to return the deposit receipt with an order to pay Pigott or Ranclaud, but this contention was practically abandoned. It was then contended that the obligation was not to pay Pigott, but at most to bring an action against the Bank on his behalf. If this had been done, it is said that the Bank might have pleaded a set-off against Pigott, so that the plaintiff would have recovered nothing. Why an action should be brought when an order, which would, no doubt, have been honoured could be given, passes my understanding. I doubt, however, whether the Bank could have pleaded a set-off under the circumstances.

As at present advised, I think that such a defence cannot be set up when the obligation of the plaintiff to the alleged *cestui que trust* is already complete, and is independent of his recovery in the action, as, *eg,* the case of an agent who has received money for his principal, and paid it into his own bank account. Any other view would enable a debt to be applied without the sanction of the creditor in payment of a debt due by him — a summary mode of garnishment. In the cases relied upon, the plaintiff was under no present pecuniary obligation to his alleged beneficiary, but would, if he recovered in the action, and not till then, be liable to pay the money over to him. Alternatively, the case is put that the Government would have satisfied their obligation under the contracts by assigning to Pigott the debt owed them by the Bank, so as to put him in the way of recovering it for himself. And, it is said, if he had sued the Bank upon the assignment the Bank would have a set-off.

As a matter of common sense, as well as of law, when one person has to his credit in a bank a sum of money of which he is bound to give another the benefit, the ordinary and obvious way of making an assignment of it would be to give to the person entitled an order for payment, in the form of a cheque or bill of exchange, whichever is appropriate. If, therefore, the obligation was to make an assignment as distinct from paying cash, I think it was a further term of the obligation that the assignment should be made in the way ordinarily adopted in such cases, and not in some other way which would be likely to deprive the creditor of the benefit of it. It cannot be suggested that bringing an action against the Bank to recover the deposit was in the contemplation of the parties at the time of making the contract between Pigott and the Government. But on these foundations it is contended that Pigott, and the plaintiff as his assignees, cannot prove more than nominal damages. For, it is said, the plaintiffs as assignees are in no better position than Pigott. If there were anything in the contention, regard should be had to the probabilities of the case. It is plain that the Government were willing to assign direct to Ranclaud as agent for the Browns. If they had insisted upon their now suggested right, and assigned to Pigott, it is equally plain that he would have immediately assigned to the Browns. In that case the Bank could not have claimed to set off the debt due to them by the mesne assignee — see *per* Lord Selborne, L.C, and Cotton, LJ, in *Re Theys,* 25 Ch D 587, pp 592, 593. Even, therefore, if there were any foundation for what I cannot but regard as somewhat fantastic arguments, it would not in the result make any difference. In my opinion the case is a simple one, of a debt due by the Government which has not been paid, and to which there is no defence. It is not competent for a bare trustee of a sum of money to refuse to pay his *cestui que trust* on the ground that it is trust money. But I think that the judgment should be formally entered in favour of the plaintiffs, John Brown and William Brown, the assignees of the debt under the deed of October, 1906.

Barton J.

Two points apart from the merits may as well be referred to at once. The contracts are between Pigott Bros and Co and "William Kemp, Secretary of the Tender Board of Victoria, for and on behalf of Her Majesty and Her Majesty's Government." There is not a word in either contract from which it can be deduced that Kemp assumed any personal responsibility or claimed any personal right. The contracts were for the supply of coal and coke to all the Departments of Government except the Railways. Moreover, it may be observed that the exhibits cannot be read without seeing that the responsibility for the contract and the epistolary defence of the Government as contractee

were frankly undertaken by the Treasury. The contention, therefore, that Kemp, being dead, his personal representatives and not the Crown, should have been sued, cannot be sustained.

The "Crown Remedies and Liability Act 1890" prescribes in s 21 that if the matter disclosed in a petition of right would be the ground of an action had such matter arisen between subject and subject, the proceedings shall be conducted in the same manner as in an action, and a law officer for His Majesty shall plead, as any subject would be bound to plead. And s 26 provides that only a claim or demand founded on and arising out of some contract entered into on behalf of Her Majesty, or by the authority of her local government, shall be deemed a claim or demand within the meaning of Part II. of the Act, to which s 21 belongs. I do not see how it can reasonably be contended that a claim founded on an implication arising out of the terms of a contract, that a deposit of money became a debt to one of the contracting parties on the happening of a certain event, would not be the ground of an action if the claim arose between subject and subject. Nor can it be said that if such a chose in action were effectively assigned by one subject to another the assignee could not sue a fellow-subject if he were the debtor. And if he could, why should not a petition of right lie where the alleged debtor is the Crown? I cannot understand what right of the Crown, not surrendered by the "Crown Remedies Act," exists to warrant the contention that such a chose in action, arising out of contract, as can be effectively assigned so that the assignee can sue the debtor, if the debtor be a subject, cannot be assigned with the like result and effect where the debtor is the Crown. And unless there be some such right, it is difficult indeed to see on what the contention rests, for the terms of the Statute are strongly against it.

The facts have been so fully stated that nothing material remains for narration. The questions raised depend purely on the legal complexion of these facts, and I think that in substance there are only three questions. The first is whether Pigott had a right to demand and receive £710 and certain interest from the Government when his contracts were completed at the end of June, 1893; the second is whether Pigott has assigned that right to the suppliants, or some of them; and the third is whether the notice given to the Government was such as to render the assignment effective as against it, and to render it liable to the assignees for the money. I agree in thinking that these questions ought all to be answered in the affirmative. The main question is the first, and depends on the implication from the contracts when applied to the subject-matter. Is the necessary implication such that when Pigott's contracts had been fully executed on the 1st July, 1893, the Crown, in the absence of any circumstances giving it the right to make any deduction or forfeiture, was bound to pay Pigott on demand £710 and the interest which had accrued on that sum while it was lying in the Bank at fixed deposit, such deposit having become payable to the Crown on the 30th May at the expiration of the fixed period. It was a condition precedent to the Government's entrance into the contracts that the prescribed security, amounting to £710, should be given "in cash, Government debentures, or bank deposit receipt in favour of the Secretary, Tender Board." The contract does not expressly say that the security shall be given back on the due completion of the contract, but the provisions for mulcts and deductions and for partial forfeitures of "security money" in conditions 12 and 15 to the contract for steam coal, and in conditions 2, 6 and 8 to the contract for house coal, Smith's coal and coke, clearly imply that balance of the "contract security money" remaining after any mulcts, deductions, or partial forfeitures, is to be returned on the completion of the contract, and the provisions for total forfeiture, including the named paragraphs and para 17 of the first set of conditions, and paras 8 and 10 of the second set, as clearly imply that the whole of the "security money," if it has escaped forfeiture or deduction, shall be returned. But these conditions show also, not only by the constant recurrence of the expressions, "contract security money" and "security money," but by the very right given to take mulcts and deductions out of it for certain defaults, and to forfeit the whole or part of it for others, that if any of such defaults occurred and were visited as prescribed, that which was returnable on the completion of the contract was a money balance. But while so much does not seem to be impugned, it is contended that as the Government had made no mulcts, deductions or forfeitures, all that it was bound to return was the paper called a fixed deposit receipt, whether endorsed or not — in fact, at one stage it seemed to me to be contended that there was no right to anything more than the bare piece of paper, without endorsement. But if, in the case of a deduction or partial forfeiture, the Crown is confessedly bound to return the balance in money, is it seriously urged that there is anything in the contract which prescribed expressly or by implication a different course where the amount of the security money has not been reduced by such actions?

The Bank agreed to hold the £710 at the Tender Board's disposal, though the Board's right to claim it in cash was suspended till the 30th May, 1893, interest being allowed on the debt in the meantime. After the 30th May, 1893, the Bank owed the Board the amount with interest in cash, and the Board's order for the amount must have been honoured to the extent of the Bank's funds. As between Pigott and the Board, on behalf of the Government, I think that in consideration that Pigott would leave with the Board this deposit receipt to become payable to the Secretary in cash, with interest, at a period concurrent with or anterior to the completion of the contracts, the Board agreed that it would on their completion (having power to obtain the specified amount from the Bank) pay to Pigott a sum equal to his deposit in the Bank, with any accrued interest. The Board was not bound to give Pigott even an order on the Bank which gave the receipt, for it would have completely discharged its obligation to Pigott by handing him, after making any deduction to which it had a right, the cash or, at his option, a cheque on any bank holding adequate funds at the credit of the Government.

This is only an expanded way of saying that £710, with interest, was a debt from the Bank to the Government, payable on demand from the 30th May, 1893, and that a like amount, subject to deduction, if any, was from the 30th of June,

1893, a debt from the Government to Pigott, payable on demand. That is, I think, the substance of the transaction, and it is unnecessary to consider any complication which would have arisen had certain events happened, which never did happen. What every contract contemplates is that the obligations which flow from it will be fairly and promptly met as they arise, and not that litigation will ensue.

The remaining questions may be very briefly dealt with. First as to what is called the "H." order. I think it was the clear intention that that order should operate as an assignment of the debt to Ranclaud for the Browns' firm. But to operate as an assignment between Ranclaud, or the firm, and the Board, such notice was necessary as would bring home to the latter, the debtor, that the order was intended to operate as an assignment, and not as a mere authority to pay. I do not think there was such notice, for to the eye of the Government authority it was probably at the least doubtful in which way the immediate parties intended it to operate, and the debtor was entitled to something plainer than that before he could be held bound to act on the assignment.

But the matter did not end with the "H." order, though it might have done so had the Statute of Limitations applied and been pleaded. After thirteen years, namely, in October, 1906, Pigott executed a deed assigning and confirming to the plaintiffs' firm —

All that his claim against the Secretary of the Tender Board or against the Government or the Crown, or whatever person or persons, company or companies, corportion or corporations, who or which may be liable to him in respect of the hereinbefore mentioned sum of £710, and of the receipt given for the same,

&c. The receipt had eight years before been given up by the Government to the Bank, wholly without warrant, as, I think, has scarcely been denied. But the right in respect of £710 remained as a Crown debt to Pigott, and was clearly assigned by Pigott to the plaintiffs, John Brown and William Brown, the then firm of J and A. Brown. In 1910 notice of this assignment was given to the Government through the State Treasurer by letter from the solicitor to the firm. That notice was explicit and complete, and the debt from the Crown to Pigott had undergone no change in the meantime. Hence, the firm became the creditors of the Crown in respect of the debt in question. I think the judgment should be entered in favour of John and William Brown, who constituted the firm at the material dates, instead of in favour of John Brown alone, and with that variation I agree that the appeal should be dismissed.

Isaacs J.

In my opinion, this appeal should be allowed. Several important questions of law are involved at various stages, but the cardinal point on which the case turns is one that applies to many relations of life. It may be thus stated — Where one man places his property in the power of another for a specific purpose, the power must not be exercised for any other purpose. When Pigott tendered, he had to give security by handing to the Secretary of the Tender Board cash or Government debentures, or a bank deposit receipt in favour of the secretary. In my view, it is perfectly immaterial, for the application of the doctrine I have formulated, which of these three kinds of security Pigott chose to give. In each case it would have been as "security," and as nothing else. For clearness of investigation let us suppose the depositary to be a private person. It cannot be supposed he was at liberty to spend the cash in the purchase, say of a motor-car, or to sell the debentures and buy mining shares, or assign the Bank deposit to another. That would be substituting his own credit for the depositor's property — a wholly unwarranted proceeding. In the event of the depositor being eventually entitled to full restoration, the only difference between the three named classes of security would be in the nature of the depositary's obligation. If cash were given, cash must be returned; if debentures, they must be restored; if a deposit receipt in favour of the Secretary, and untransferrable — since that involves exclusive power to receive the depositor's money from the Bank — the power must be restored so far as it is then capable of restoration. That qualification is important. But with the greatest possible deference to the contrary opinion, I am wholly unable to assent to the view that on the termination of the contract the money represented by the deposit was the general property of the Government, and that the depositor could ignore the existence of that fund, and the capacity of the Bank to repay it, and could demand an equivalent amount out of the consolidated revenue as an ordinary simple debt.

Having elected to trust to the solvency of the Bank, and its promise to repay the amount lodged, with interest, instead of cash, it would be completely altering the method selected to disregard the ability of the Bank to repay, and claim as if cash had been lodged directly with the Secretary. All the depositor could claim was the release of his own money temporarily impounded by his own act and — the title to which, as a specific and clearly identifiable fund, always as between him and the Crown remaining in himself — subject to partial or total divestiture on stipulated conditions, which had not occurred. Kemp was entrusted with the legal custody, not of the money, for that was left in the Bank, but with the means of obtaining it, and only after twelve months' time, and then on behalf of the person or persons

who, according to the stipulated events which might occur, should prove to be the rightful claimant or claimants of the whole or distributive portions of it. It might then be wholly payable to the Crown, or wholly to Pigott, or partly to one and partly to the other. As it happened, it belonged wholly to Pigott, free from any adverse claim, the Crown never having had any interest in it beyond the right of security, ceasing to have even that. Kemp was bound, in my opinion, on Pigott's request, to endeavour to obtain from the Bank on behalf of and as trustee for Pigott whatever as between Pigott and the Bank, the latter was liable to pay. A donee of a deposit note cannot sue in his own name — *per* Lindley, LJ, in *Dillon's Case,* 44 Ch D at p 83 — and the holder by merely writing his name on the document and delivering it to another, confers no legal right on the person to whom he gives it — *per* May, C.J, in *Moore v Ulster Bank,* 11 Ir.R CL 512. Kemp, therefore, was impliedly bound when so required, to take steps to obtain the money from the Bank for Pigott, and if received to hand it to him, but was not bound to pay him the amount out of his own or Government moneys, as if it were a simple debt.

It is said that an obligation to pay money is a debt. I assent to that, provided the obligation is to pay out of one's own money; that is a simple money obligation. No one can be supposed to pay his debts out of money which belongs to someone else. There is a passage in Comyns's *Digest,* Vol III., p 387, Debt (B), which is a distinct authority that the mere obligation to return money does not constitute a debt. It is this — "If the property be not altered by the bailment, debt does not lie, as if a man delivers money to *B* in a bag unsealed, he cannot have debt for it." The principle is that the property in the money was never intended to pass to the bailee; and if the trust was to pass the property only on a condition which has failed, the same result ensues. The fund is the bailor's, and that is what he is entitled to claim. If a person to whom I am bound to hand over money demands it in the form of a "debt," he intends to claim payment out of my money. But an obligation to procure or assist in procuring it from another is not a debt, but a specific obligation sounding in damages. Blackstone says — Vol III., p 155 — "Nothing but a sum of money, for which I have personally contracted, is properly considered as my debt." The money to be recoverable in debt must be payable in respect of a direct, as well as an immediate liability — see CL Commissioners 1852 1st Rept. p 31; and see, *per* Lord Campbell, C.J, in *Sunderland Marine Insurance Co v Kearney,* 16 QB at p 937.

The notion of the Crown being Pigott's debtor connotes its liability to pay the sum demanded out of the general funds of the Crown, as distinguished from a specific claim by Pigott to be the owner of the funds in the hands of the Bank. If, however, Kemp had been a private individual and had become bankrupt, would Pigott, after the termination of the contracts have been restricted to a claim upon Kemp's estate, leaving the deposit money divisible among the general creditors? I should say certainly not. If Kemp's trustee in insolvency had claimed the fund as against Pigott he would have been called upon when once Pigott had shown its source to explain how the beneficial interest was intended to pass to Kemp. In the recent case of *McEneaney v Shevlin* (1912) 1 Ir. R at p 36 — where a claim was made to a deposit as a gift, Ross, J, says —

I had thought that the law as to deposit receipts was well settled. It is briefly as follows: — If the owner directs a new deposit receipt to be taken out in the names of other persons, there is a resulting trust in favour of the owner, and the other persons are merely trustees for him. The onus is upon the other persons to show that the beneficial interest also was intended to pass to them.

Any attempt to show the beneficial interest was intended to pass to Kemp would have failed. Further on the learned Judge says — "The Bank is not required to go into any question of trust. It need only recognise the person named in the deposit receipt unless restrained by a court of Equity." But Kemp's trustee in insolvency would have been restrained from dealing with the money contrary to Pigott's wish. After the termination of the contract he could have asserted his clear title as against Kemp to the identical fund which had always been his property subject to an encumbrance, for security, then at an end — *Re Gothenburg Commercial Co,* 29 WR 358; In *re Drucker,* (1902) 2 KB 55 & 237; and particularly *Re Rogers,* 8 Morr. 243. The special purpose for which the deposit had been made having terminated, it reverted absolutely to Pigott, clear even of any cross claim which Kemp might have had against Pigott on other accounts — *Stumore v Campbell,* (1892) 1 QB 314. Consequently had cash been handed to Kemp, Pigott would have been entitled to follow it, and claim it as a specific fund, because of the trust impressed on the cash. It should not have been paid into consolidated revenue fund, but, unless retained by Kemp, have been paid into the trust fund — see "Audit Act," s 22. Similarly, and by force of the same principle, when Pigott chose not to place the cash in Kemp's hands, but so to speak, deposited it in a box in the Bank's custody, handing Kemp the key upon trust to resort to the box only in a certain event, then to assume that the money was ever actually in Kemp's hands as part of the Crown's general assets, and not in the hands of the Bank, is to fundamentally alter the nature of the deposit, and to fictionally accuse Kemp of breaking the terms of his trust. No doubt, Kemp at the termination of the contract had the power to obtain the money and interest from the Bank, subject to any cross claim of the Bank, because, as found by Madden, C.J, and urged by the appellants, the Bank had made no special contract in relation to the deposit. And if he had done so, Pigott might have claimed it either *in specie* if traceable, or *in numero.* But though Kemp had the power, its exercise, except at the request of Pigott, and for the sole purpose of handing it over to Pigott, as its true owner would have been unconscientious, there being no default on the part of the latter which made resort to the security necessary or permissible to satisfy a claim against him.

It was argued that Kemp might have given Pigott a cheque on the account. If that were accurate, it would not affect the matter of liability, because that would only have been a formal method of enabling Pigott to get back his own money. If that were the only method, however, it might affect the amount of damages. But it is not accurate, for a Bank does not undertake to honour cheques drawn on a deposit account — see *Head v Head,* (1894) 2 Ch 236, particularly the judgment of Lopes, LJ; also Grant on *Banking* (6th ed), p 270, which summarises the matter thus — "It (the deposit account) usually carries interest, it is repayable only on delivery up of the deposit receipt, and on giving any stipulated notice, and it cannot be drawn upon by the customer's cheques" — see also Hamilton on *Banking* (2nd ed), p 72.

Shortly, then, the money was never in fact drawn by Kemp at all, and was never in his hands; he was never entitled to draw it as Crown money, or otherwise than on behalf of Pigott, and so how can the Crown be Pigott's debtor in respect of it? I agree with Madden, C.J, that there was no debt, and on general principles of law it appears to me the circumstances preclude it. But it is also clear that Pigott never intended there should be such a debt. He always regarded that deposit as his own against Kemp, and as Brown's against himself. If it had been Kemp's he could, by arrangement with the Bank, have surrendered the interest and withdrawn the deposit or discounted it next day — or he could have kept the interest as the fruit of his own money, without any obligation to pay interest to Pigott, for he had not contracted to do so. And if the money in the Bank belonged to Pigott up to June 30, 1893, it did not cease to be his after the termination of the contract; on the contrary, his right was then indefeasible; and if so, his only right was to get that money from the place where he had left it, and not a similar amount of Crown money. Pigott in his account rendered to Brown on May 30, 1892, the very day of the deposit, debits Brown with the deposit in these words — "To cash deposit receipt, say 13 months from May 30, 1892, to 30th June, 1893, at 4½ per cent. p a., for Government contract 1892–3 … £710." That means that, assuming the Government contract was fully performed, Brown will, in say 13 months, be entitled to received £710, with interest at 4½ per cent. per annum, represented by and on the authority of the cash deposit receipt.

In other words, he says, the receipt is Brown's, subject only to Government security. That is, of course, as between Pigott and Brown. But it shows clearly that Pigott never for a moment contemplated that the receipt and the money it represented were Kemp's finally and absolutely, or that the only claim he or Brown would have would be against Kemp for £710 as a debt, and as a debt without interest. The reference to thirteen months is important, and is supported by the fact that though the receipt itself fixed only twelve months as the term, the words — "After which date interest will cease to accrue," were apparently struck out. White's evidence says those words were not in the receipt. The term of twelve months was evidently inserted for banking convenience, so as not to include the fraction of a year, and is quite consistent with interest continuing for another month. Kemp's obligation was, as I have said, to assist Pigott to get back his money from the Bank, when so requested; that is to endeavour to get it upon demand, and if refused, then to sue.

The inclination of my mind on reading the letter of August 28, 1893, notwithstanding the reply to it, is that no demand was made upon him to draw the money, but rather a claim was made upon the Government direct with a suggestion that a claim by the Government on the Bank would be met in full. But that is not important, because in 1898 the Government surrendered the deposit receipt itself to the Bank upon an indemnity, and the Bank used it to cancel the debt by which it directly originated. Pigott, in May, 1892, while heavily overdrawn, was permitted to draw another cheque for £710, and upon this cheque or its proceeds the deposit receipt was immediately issued. Ideal justice was done by this cancellation, but the Government had no legal warrant for doing it. Technically it was a breach of contract, and a *quasi* breach of trust, and in this I agree in substance with the learned Chief Justice of Victoria. His Honour observes that when the contracts were duly performed, Kemp became trustee of at least the deposit receipt as the key to the fund of Pigott. That, in my view, is correct.

If there was a debt due from the Government direct to Pigott, the respondents' case is clear, because there was an assignment in 1906, and necessary notice. The mere fact that it was a debt due from the Crown is no objection on the authority of *Wells v Foster,* 8 M. & W. 149, and subsequent cases enforcing assignments of pensions. But on the assumption of a direct debt, there was no wrong to Pigott in returning the deposit receipt in 1898, for *ex hypothesi* he had no interest in it. That assumption, however, besides being wrong on the facts, as already shown, is wholly inconsistent with the attitude taken by Brown in October, 1904 (Ex M), where it is claimed that the Supply and Tender Board were "holders in trust for such deposit" to recover from the Bank, and is inconsistent with the view presented by their solicitors in their letter of November 28th, 1904.

Pigott was at liberty to pay off his own debt to the Bank in any manner he pleased, and unless he selected the deposit for that purpose he had the right to insist on the full amount of the deposit being recovered for him. Therefore, Pigott was entitled to look to the Government for recoupment of whatever loss he suffered by the surrender of the indicium of the fund. What then was that loss? Plainly whatever amount the Bank was bound to pay, for it cannot be presumed it would have paid more than it was bound to pay.

Now, as I have stated, and as Madden, C.J, said, Kemp was the trustee for Pigott as soon as the contracts were completed; it was therefore in Pigott's right he must have sued. It is not correct to say the Crown's prerogative could

ever have secured payment in full. The Crown's prerogative of priority is to protect what are really Crown moneys, and, as Lord Macnaghten, speaking for the Judicial Committee in *Palmer's Case,* [(1907) AC 179], says — "It only means that the interests of individuals are to be postponed to the interests of the community." But the prerogative cannot, even though the nominal plaintiff be a Crown official, be lent to a subject to give him priority over other subjects. Even where the Attorney-General sued, having no independent rights of his own, as in the case of a public charity, the prerogative cannot be invoked — *Mary Magdalen v Attorney-General,* 6 H.LC 189 at 210. The court looks at the real litigants in the case. The discrimination which the court will exercise in order to discover how far Crown property is involved, so as to apply the prerogative, is exemplified in *West London Commercial Bank,* 38 Ch D 364. Therefore, the matter must be regarded from the ordinary standpoint. In that position the doctrine of *Thornton v Maynard,* LR 10 C.P 695, applies. In that case the holder of a bill, who had been partly paid by the drawer, sued the acceptor, who set off a debt due to him by the drawer to an amount equal to the part payment to the holder. The second proposition laid down by Lord Coleridge, C.J, at p 699, is as follows: — "Where the plaintiff is suing merely as trustee, and the defendant has a claim against the *cestui que trust,* which but for the intervention of the trust, could have been set off at law, such claim can be set off in equity." In *Ex parte Morier,* 12 Ch D at p 496, James, LJ, phrased it in this way — "The only exception that equity has introduced into the principle of legal set-off is when the money is really and truly the property of one man in the name of another."

That leads to the next step, namely — What claim of set-off could have been insisted upon by the Bank against Pigott? Mr Mitchell made it plain that the Bank was entitled to set off the advance of £710 which existed prior to any attempted assignment. The case of *Biggerstaff v Rowatt's Wharf,* (1896) 2 Ch 93, shows this. And Pigott has not for twenty years paid, and as far as appears, never will pay, his indebtedness to the Bank. If, therefore, he be regarded as the *cestui que trust* for whom Kemp would demand and afterwards sue for payment, nothing would be recovered, and consequently no damages were sustained by Kemp's breach of contract. But, said Mr Irvine, if Kemp be looked upon as nominal plaintiff, the real and ultimate *cestui que trust* must be found in Brown, and no right of set-off would then exist. That, however, is a fallacy Not only would Kemp's real *cestui que trust,* that is the person for whom he impliedly contracted to sue, be Pigott — the contract being untransferable — but even if Brown's claim be rested on the fact of his being undisclosed principal alone, it is met by a plain and well-established principle of law. Brown permitted Pigott for years to assume the position of principal, and to deal with the Bank in that guise, as well as to contract with the Government in his own name. If so, whatever be the state of accounts between the Bank and Pigott, based on fair dealing, and an honest belief by the Bank that Pigott was really the principal — and the circumstances all clearly, consistently and irresistibly point to that situation — Brown is not at liberty to disturb them to the Bank's disadvantage. It would be absurd as well as unjust for Brown, in adjusting his rights with the Bank, to treat the cheque drawn for the £710 as Pigott's own private business, and the deposit of the money directly produced by the cheque as Brown's The two things, so far as the Bank is concerned, are practically different portions of the one transaction. But in any case, the Bank, acting on its manifest belief that Pigott was a principal, permitted him to overdraw and deposit that sum.

There are few doctrines in the law better fixed than that which supports this position. It is based on what Wilde, C.J, in *Fish v Kempton,* 7 C.B 687, calls "the real honesty and justice of the case." In *Montagu v Forwood,* (1893) 2 QB at p 355, Bowen, LJ, thus states the formula —

If *A* employs *B* as his agent to make any contract for him, or to receive money for him, and *B* makes a contract with *C,* or employs *C* as his agent, if *B* is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by *C* to be acting as an agent for anyone, *A* cannot make a demand against *C* without the latter being entitled to stand in the same position as if *B* had in fact been a principal. If *A* has allowed his agent *B* to appear in the character of a principal he must take the consequences.

So *per* Lord Halsbury, L.C, in *Cooke v Eshelby,* 12 AC at p 275, Lord Watson, speaking for the Privy Council in *Union Bank of Australia v Murray-Aynsley,* (1898) AC at p 699 — a case where a set-off of another person's money was allowed — referred to what he termed — "The broad legal distinction between the relation of an agent, habitully entrusted with the disposal of their money by his principals, to his own bankers, and his relation to the principals themselves."

If, instead of undisclosed principal, Brown contemplates the possible position of assignee, he fares no better. This eventuality assumes that Kemp, the nominal owner of the fund, formlly assigns to Pigott the real and true owner, so as to give him the legal as well as the equitable title, and that Pigott thereupon assigns to Brown, who claims only what Kemp had. In these circumstances, as on the principle of *Thornton v Maynard* and *Ex parte Morier (above)* there would always have been an equity in the Bank to set up Pigott's overdraft against a claim by Kemp, the condition stated by Cotton, LJ, at the end of his judgment in *They's Case,* 25 Ch D at 593, would have been satisfied, and Brown would fail. The claims sought to be enforced in *They's Case* were not those of Hutter, as pointed out by the Privy Council in *The Newfoundland Case,* 13 AC at p 211, whereas here the claim which on assignment Brown would seek to enforce would be really Pigott's, who corresponds with Hutter.

There were other points argued, but their determination is unnecessary, except that as to any personal liability of Kemp, I refer to my judgment in *Sargood's Case,* 16 ALR at p 500.

In my opinion, the respondents should fail; they are not entitled even to the ordinary 1s. nominal damages, because the contract for breach of which Pigott would have been entitled to it, was not transferrable, and as Brown claims to be the undisclosed principal, it was made non-transferrable by his authority.

Order

Appeal dismissed. Judgment varied by entering judgment for John Brown and William Brown, and as so varied affirmed, with costs.