CA — Conversion — money had and received — Finding of fact by Trial Judge (Marsh J.) — whether evidence adduced by pltf/RESPONDENT cogent enough to satisfy burden of proof as to claim. (re quantum of damage — Respondent's Counsel states that $5,140 inadvertently deducted from certified sum — Mr challenged by appellant) C.A. enters judgment for full amount in substitution of amount in Court below. Subject to above variation — APPEAL DISMISSED.

IN THE COURT OF APPEAL

JAMAICA

SUPREME COURT CIVIL APPEAL # 24/85

COR: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN	BANK OF NOVA SCOTIA (JAMAICA) LTD.	APPELLANTS
AND	ANDREW BROWN	RESPONDENT

J. Leo-Rhynie, Q.C., and E.P. DeLisser for Appellants

J.W. Kirlew, Q.C., for Respondent

29th, 30th April; 1st May &
19th June, 1987

CAREY, J.A.:

Mr. Andrew Brown, a copra manufacturer, carried on his business near Port Morant in the parish of St. Thomas. Assuming that he is still alive, he must by now be well over 100 years old. Marsh J., in the Court below, said that the respondent would have been 100 years old in the year he gave judgment, i.e., 1984, but more importantly, he described him in these terms - "man of inner strength, strong character, firm conduct. I was amazed at his strength and the force with which he gave his evidence."

In an action filed by him, as long ago as December 1978, he claimed against the appellants (the Bank) the sum of $83,119.69 which represented the total of a number of cheques drawn in his favour over a period of time and which he had agreed with the Bank should be used to

reduce a loan with them, and the balance lodged to his savings account, but which the Bank converted, by lodging the cheques to an account with them other than his.

In his statement of claim, he pleaded (so far as is material) as follows:

"3. The PLAINTIFF in the month of December 1975 obtained a loan of FIFTEEN THOUSAND FOUR HUNDRED AND TWENTY DOLLARS ($15,420.00) which included interest at the rate of 9½% per annum and costs of loan the details whereof are set out in a Mortgage by the PLAINTIFF to the DEFENDANT to which the PLAINTIFF will at the hearing of this action refer this Honourable Court.

5. The PLAINTIFF arranged with the Officers of the Defendant's Bank dealing with the matter at the Morant Bay Branch that all cheques payable to him by the Coconut Industry Board would be lodged to his account in the said Bank at Morant Bay aforesaid and the said Bank was to deduct the quarterly payments under the aforesaid Mortgage from the amounts lodged as aforesaid.

6. The PLAINTIFF has prior to and since the date of the aforesaid Mortgage lodged with the DEFENDANT's Bank at its Morant Bay Branch aforesaid a number of cheques drawn by the Coconut Industry Board in favour of the Plaintiff which were crossed and all these said cheques were lodged by the Plaintiff at the Morant Bay Branch of the Defendant's Bank for the purposes aforesaid.

7. The Defendant without the authority of the Plaintiff credited the amounts of a number of the aforesaid cheques mentioned in paragraph 6 hereof to different accounts in the name of CLARENCE BROWN and such accounts were numbered 962/10, 973-14 and 101-539 respectively and the Bank refuses to give information as to the identity of the said CLARENCE BROWN or why the amounts of the said cheques were paid or lodged to the accounts aforesaid.

11. In the premises the Defendants have converted the said cheques to their own use and wrongfully deprived the Plaintiff of the same whereby the Plaintiff has suffered damage.

12. Alternatively the said sums set out in paragraph 6 hereof totalling $83,119.69 are payable to the Plaintiff by the Defendant as moneys had and received by the Defendant to the Plaintiff's use.

AND the Plaintiff claims:

(a) $83,119.69.

"(b) Interest at such rate and for such period as the Court in its discretion shall think fit.

(c) An account

(d) An injunction restraining the Defendant whether by himself or by his servants, agents or any of them or otherwise from effecting a sale of the said mortgaged property pending the final determination of this action.

(e) Such further and other relief as may be just.

(f) Costs."

The Bank in its defence averred thus:

"3. In answer to paragraph 3 of the Statement of Claim the Defendant says that on the 3rd day of March, 1976 a loan was made to the Plaintiff Clarence Brown and Inez Brown the said loan being made up as follows:

Amount loaned	$12,000.00
Interest	3,420.00
Amount of Note	$15,420.00

4. The Defendant admits that the real estate mentioned in paragraph 4 of the Statement of Claim was part of the security given by the parties to effect the loan.

5. The Defendant denies that there was any arrangement either oral or in writing between the plaintiff and any officer of the Defendant's Company as stated in paragraph 5 of the Statement of Claim. The promissory note signed by the parties to the loan stated that the loan should be repaid at $430.00 monthly for 35 consecutive months and $370.00 on the 36th month.

6. The Defendant in answer to paragraph 6 repeats the allegation in paragraph 3 of the Defence that the loan was made on the 3rd March, 1976. Further the Defendant makes no admission to the various payment made purportedly to the loan account.

7. Paragraph 7 of the Statement of Claim is denied.

11. The Defendant denies that it converted any cheques as alleged or deprived the Plaintiff of same.

12. The Defendant denies that it has the sum alleged or any sum for the benefit of the Plaintiff."

The action which began before Marsh, J., on 17th November, 1983 was completed on 23rd February, 1984 when the judge held that the respondent's

claim succeeded, and gave judgment accordingly.

Apart from the plaintiff who gave evidence in proof of his case, a witness from the Coconut Industry Board was called to testify about cheques payable to the respondent by the Board. In support of its case, the Bank on the other hand produced a number of documents which were explained by Bank personnel, but none of the officers who had played any role whatever in the transaction which gave rise to the litigation. In the circumstances, Mr. Leo-Rhynie was prompted to intimate to us that the appellant was relying on the principle that this Court was in as good a position as the learned judge below, to draw inferences from primary facts, and he said that if those facts were analysed, the Court would be driven to conclude that there was no evidence of conversion and that the verdict in the plaintiff's favour, was unreasonable. That renders it incumbent on me to examine the facts in some detail.

According to Mr. Brown, he was minded to purchase a plot of land adjoining one he owned, and acceded to a suggestion of his son Cephas, that he obtain a loan from the Bank. He attended on the appellant's Bank. He was accompanied there by Cephas. In the course of the discussions with the Bank, he indicated that the debt would be cleared from the proceeds of cheques which he would receive each month from the Coconut Industry Board. He also requested that the balance should be credited to his savings account with the Bank. He signed some documents on that day and indeed was the only one to do so. Subsequently, he deposited registered titles as added security in respect of the loan. He delivered the documents through Cephas. The cheques were lodged to the Bank by his son. He never, however, authorised anyone to sign the Coconut Industry Board's cheques nor did he himself endorse any of them. Indeed, in the course of his examination-in-chief, he was invited to affix his signature which he did, three times, and the document bearing his three signatures was admitted in evidence. The record of payment

card was put in by consent. That bank document shows Clarence Brown, Andrew Brown and Inez Brown as the debtors with respect to the loan which the respondent acknowledged he had borrowed. But he made a most astonishing statement regarding that document. He denied knowing either Clarence or Inez Brown and stated categorically that he was entirely ignorant as to how either name came to be there. He also said in evidence that Cephas was not called Clarence. He had heard that Cephas had a wife whose name he was not aware of. On the occasions he had seen her, they exchanged only a "how-de-do."

It is interesting to note that the application for the Scotia Plan loan shows a "Clarence Cephas Brown". It is, I think, clear from the respondent's testimony that Clarence or Cephas, the respondent's son received the cheques and lodged them to his own account, endorsing his father's name on them. The savings account which the respondent had with the Bank, was in his name and also that of a grand-daughter. The savings book itself had been kept at the respondent's home but in 1976 it was taken away by Cephas. A new book was subsequently issued to him. Cephas, he said, had, without his authority, dealt with his cheques against his interest.

The learned judge who as I have already stated was more than impressed with this unusual centenarian, found that he was guilty of "a mere excess of language", when he said he knew no Clarence Brown, because as an irate father, he had been compelled to the view, that his son was a traitor. This finding by the learned judge is, in my view, fatal to the submission of Mr. Leo-Rhynie that the direct evidence of the respondent was unreliable. The respondent had maintained that at all material times, he had a savings account with the Bank and its officers had steadfastly maintained throughout the trial that that was not the case. In the event, however, learned counsel, upon instructions received at the end of the hearing of the appeal, candidly advised us that it was the fact that the respondent had a savings account with the Bank in 1969. It is

right to note that although the learned judge was deprived of this evidence, he, nevertheless, accepted the word of the respondent and it is now manifest that he was perfectly correct in doing so.

The Bank produced their records to show that a Scotia Plan loan was made to Clarence Brown, Andrew Brown and Inez Brown, with the first named being the principal borrower, a view which the learned judge correctly, as I think, dismissed as ridiculous. The cheques, 38 in all, which were tendered, showed that they were crossed in the usual way "& Co." and were payable to the respondent. One of the Bank's witnesses John Giscombe explained the system as respects loan. But although he knew the loan account of Clarence Brown, Andrew Brown and Inez Brown, all of whom were personally known to him, he was not involved in the negotiations with them, but became concerned with the account when it became "non-current" in February 1978. He stated that if there had been an arrangement for debiting the loan account and lodging the balance in Andrew Brown's savings account, the cheque would be drawn in favour of the Bank for account Andrew Brown. The cheques which were tendered were, but for one, paid into Clarence Brown's account. All the cheques bore endorsements apparently by Andrew Brown and Clarence Brown. The witness said that Andrew Brown had no Savings account with the Bank.

That mistaken view would doubtless colour his evidence when he explained the various documents. It should be noted that he was also not able to speak to the genuineness of the endorsements on the cheques for he had never seen either Andrew or his son Clarence sign their names. This witness gave some support to the respondent's evidence that the arrangement was for his cheques to be lodged to his account and used to settle the debt because on one of the Bank's documents viz., a ledger card, it bore ink-written note - "standing order", which he explained could be used where the customer had a savings account.

The other witness on behalf of the Bank was a Mary Narcisse who was emphatic that the respondent had no savings account with the Bank.

But she was emphatically mistaken in that regard and I for one am not able to see how her opinion as to the Bank's records, coloured by that error, can be at all reliable. The learned judge was not impressed. I would not disagree, and he was in a better position to assess her demeanour.

The situation amounts to this:

1. The respondent who had a savings account with the Bank, obtained a Scotia-Plan Loan.

2. He agreed that the loan would be repaid from the proceeds of cheques payable to him by the Coconut Industry Board.

3. Cheques totalling $82,316.98 in his name and bearing signatures of Clarence Brown and Andrew Brown were received by Bank and credited to Clarence Brown's account.

4. The respondent had neither endorsed the cheques nor authorised their endorsement on his behalf. His signature was a forgery, perhaps done by his son Clarence.

5. Some of the cheques were used to reduce the debt with the Bank.

In order to establish conversion in the Bank, in the circumstances of this case, the respondent was required to show that the Bank paid the cheques on a forged indorsement. Smith v. Union Bank of London (1875) L.R. 10 Q.B.D. 293, 295 affirmed 1 Q.B.D. at page 35. Mr. Leo-Rhynie argued that the respondent had not proved that there had been a forgery to the standard required. He noted also that the learned judge had not determined conversion on the basis of the cheques being forged, but on the footing that the Bank, in breach of its agreement with the respondent, had lodged his cheques to his son's account without his authority.

It is quite true that at the end of the case, the judge suggested to counsel for the respondent that he might consider an amendment to the claim by pleading a breach of contract. Indeed, the judge appears to have been guided by counsel who appeared for the Bank. It would seem then that all counsel involved below and the judge himself

were of one mind on this point. But it is right to call attention to the note of his judgment which has the following stated therein:

> "The plaintiff says that his son was taking cheques to bank. He admits that, but he says he was totally unaware that those cheques when they got to the bank instead of being lodged to his loan account were first being lodged to Clarence Brown's account. Question of impression and looking at the matter the way I believe a jury would look at it, I believe the plaintiff."

I think that the learned judge must have been implying that the action of Clarence Brown was wholly without his father's authority or consent and that must involve a finding that the cheques were forged.

The real question is whether the evidence adduced was cogent enough to satisfy the burden of proof upon the respondent. There was evidence that the endorsement on the cheques was not that of the respondent nor had he authorised their affixation. He gave copies of his signature which, doubtless, must have been examined by the judge, when the exercise of signing took place before him, and he also had the cheques as exhibits before him. There is no evidence contra. The cheques were not put to the respondent at trial by counsel for the appellant. No suggestions regarding the authenticity of the signatures on the cheques were put to the respondent. The evidence was really all one way. The Bank did not call any witness who had any intimate knowledge of the transaction with the respondent. For my part, I would have little difficulty in holding that the evidence attained the required standard.

The only remaining question is the quantification of the amount of damages. The amount should be the sum of the cheques wrongly paid into Clarence Brown's account. Mr. Leo-Rhynie also thought that those cheques paid prior to the disbursement of the loan should also be discounted. But with all respect to learned counsel, those cheques were and were cheques payable to the respondent/which were without authority paid into Clarence Brown's account, by the Bank.

It should also be pointed out that the amount of judgment below

was certified by the Registrar upon an enquiry ordered by the judge. Mr. Kirlew said that an amount of $8,140.00 was inadvertently deducted from the certified sum. This has not been challenged by the appellant. In the result, we should enter judgment in the full amount of $82,316.98 in substitution of the amount in the Court below. Subject to that variation, I would dismiss the appeal with costs to the respondent.

CAMPBELL J.A.

The appellant loaned the respondent the sum of $15,420.00 inclusive of interest under a joint promissory note executed on March 26, 1976. The loan was secured by a mortgage of even date given by the respondent. The loan was repayable by 35 consecutive monthly instalments of $430.00 commencing on 30th April, 1976 with a final instalment of $370.00 payable on 30th March, 1979. The promissory note contained the usual default clause and the mortgage instrument expressly incorporated the statutory powers of sale under the Registration of Titles Act.

Default was made in the payment of the instalments after a total sum of $8,140.00 had been paid. The mortgaged property was sold to recover the balance outstanding sometime in 1980 after protracted efforts of the appellant to sell the same. The respondent claims that during this protracted period in which the appellant was scouting for prospective purchasers, he first became aware of the fact that his financial straits resulting in the-threatened sale of his property was occasioned by the appellant who had improperly credited the accounts of one Clarence Brown, who was unknown to him, with cheques of which he the respondent was the payee. Specifically, the respondent said that he had a savings account with the appellant from a time antecedent to the commencement of his negotiation for the loan which was in August, 1975. His arrangement with the appellant's agent who processed this loan was that the repayment thereof would be effected from cheques which he the respondent expected to receive from the Coconut Industry Board which cheques he undertook to lodge with the appellant. Balances remaining from these cheques after the instalment payments were deducted were to be credited to his savings account. Pursuant to this arrangement, crossed cheques from the Coconut Industry Board drawn in the respondent's favour on The Royal Bank Jamaica Limited, 37 Duke Street, Kingston, were collected from the post by the respondent's son "Cephas" and lodged with the appellant. The total value of these cheques was $82,316.98. These cheques, the respondent claims, were credited

to three different accounts in the name of Clarence Brown without his the respondent's authority or consent. Based on the discovery of these facts, the respondent sued the appellant claiming inter alia damages for conversion or alternatively repayment of these sums with interest as money had and received by the appellant to the use of the respondent.

The gist of the appellant's defence is a denial that the accounts of Clarence Brown were credited without the authority and or consent of the respondent. The accounts of Clarence Brown who was the son of the respondent were credited because the respondent had no account into which the cheques could be lodged. Accordingly, no liability existed for any conversion or for money had and received to the use of the respondent.

Before the learned trial judge the respondent testified that he had a savings account with the appellant. He said the original pass book was last in the possession of Cephas who since the discovery of the lodgments to the credit of Clarence Brown had sedulously kept away from him. He further testified that the first time he saw the cheques in dispute, was when they were handed to him by the Coconut Industry Board as retired cheques. He had never told Cephas or anyone else to sign his name to any cheque nor had he signed any of the cheques in question. It was suggested to him that in 1975 he never had a savings account with the appellant. This suggestion he denied. This apart, he was never challenged on his evidence that he had not signed nor otherwise authorised anyone to sign his name to the said cheques. He voluntarily signed his name on a piece of paper ostensibly for comparison with the impugned signature. This paper was tendered in evidence as an exhibit. The respondent admitted knowing John Giscombe who, he said, used to work with the appellant. He further gave evidence that Giscombe came to his house one day and told him the loan account was in arrears and that he told Giscombe that he would pay no more money to the appellant until he knew how much money from the Coconut Industry Board had been lodged to his account. He was not cross-examined on this piece of evidence which was vital to dispel any suggestion

that it was only when he was seriously threatened with the sale of his property that he first complained of sums not having been credited to his account. Mr. Giscombe's evidence for the appellant in this regard is that he last visited the respondent at his house on October 18, 1977 and that the loan account became "non-current" only on 28th February, 1978, on and afterwhich date, recovery of the loan balance would normally be pursued by and through sale under the mortgage instrument.

The defence evidence came primarily from Mr. Giscombe who admitted that he was at the appellant's branch in Morant Bay between 1977 and 1979. By inference he was saying that he was not present at the inception of the loan and so could not affirm that the documents constituting the loan transactions recorded correctly in all respects what was orally agreed to by the respondent. He however expressed as his opinion as a banker that there could be a standing order against a savings account. Mrs. Narcisse tendered documents relating to the loan transaction but she admitted that documents in the joint names of the respondent and others could have been signed at different times by the respective parties so that the respondent, an illiterate, need not know that others had signed the promissory note which he had signed. This is consistent with the assertion of the respondent that he alone signed the documents presented to him for signature by the appellant.

On the evidence highlighted above, Marsh J. gave judgment for the respondent. The amount was subsequently certified by the Registrar in the sum of $74,176.98 with interest.

Against this judgment, the appellant appeals principally on the ground that the learned trial judge erred in accepting the respondent as a witness of truth, as this was against the weight of the evidence given on the appellant's behalf and that there was no evidence or reliable evidence of a conversion of the appellant's cheques.

Before us Mr. Leo-Rhynie submitted that the respondent was shown to be an unreliable witness if not positively untruthful. This was so he said because he gave evidence that he did not know Clarence Brown and Inez Brown in the teeth of firstly the promissory note which he signed which had the names of Clarence and Inez Brown as co-promissors, and secondly the mortgage repayment card tendered by him which also had these names thereon. In my view there was no reliable evidence from which it could be inferred that, to the knowledge of the respondent, it was his son "Cephas" who had signed the promissory note and that he was one and the same person who was assuming the name of Clarence Brown. This could have been inferred had there been evidence of the presence of "Cephas" when the promissory note was signed by the respondent. No evidence was adduced from any witness with personal knowledge to establish that Clarence was also one of the names of "Cephas" and that the respondent was often heard addressing "Cephas" as Clarence. Incidentally it appears rather odd that Mr. Giscombe for the appellant should have tendered Exhibit 10 a loan ledger card captioned with the name of Clarence Cephas Brown (underlining mine) when on his own admission he knew Clarence by no other name, and neither the application of Clarence and Inez Exhibit 12, nor the promissory note Exhibit 13 contained the name "Cephas". The promissory note and the mortgage repayment card prove nothing as against an illiterate, in the absence of evidence that his son Cephas did, in his presence, sign the promissory note, from which as earlier stated the inference could be drawn that Cephas signed as Clarence. Another ground on which Mr. Leo-Rhynie relied to show that the respondent was untruthful related to the savings account. However, in the light of the additional evidence consisting of the pass-book relating to this account which we admitted, Mr. Leo-Rhynie quite properly did not proceed with, nor rely further on this submission because the additional evidence fully confirmed the respondent's evidence given at trial that at the material time he did have a savings account.

Mr. Leo-Rhynie submitted further that the respondent's endorsement on the back of some of the cheques belied the fact that he did not know Clarence and further that he did not know that the cheques were being credited to the account of Clarence Brown. He complained of the learned trial judge not having made a comparison of these endorsements with the signature voluntarily subscribed by the respondent in court.

In my opinion, there is a presumption that the learned judge in considering all the evidence and exhibits before him would have compared these signatures even though he did not expressly say so in his judgment. Further, even if he had not done so, he would not have been in error because the respondent's evidence that he had not signed any of the cheques which purportedly carried his signature was not challenged in cross-examination nor was any evidence to the contrary adduced by the appellant.

The learned trial judge found that a great deal of the evidence given on behalf of the appellant was confused and contradictory. In particular on the crucial issue as to whether or not the respondent knew that the cheques which were delivered to the appellant by Cephas were being first lodged to Clarence Brown's account, he stated that there were too many loose ends in the case to warrant the drawing of any inference from the documents in evidence without first closely scrutinizing them. After considering the documents in relation to the oral evidence given by and on behalf of the parties, the learned trial judge concluded thus:

> "The result is there is no oral testimony to refute the Plaintiff's allegations, and the documentary evidence relied on to do so, is in my judgment unreliable and unsafe for this court to draw the inferences therefrom which it has been invited to do. I am satisfied on a balance of probabilities that the agreement between Plaintiff and Defendant was that the Plaintiff's debt must be liquidated from cheques made payable to him and presented by him to the bank. I also find that there was never any agreement by the Plaintiff for the cheques and by the cheques I mean all the Coconut Board cheques to be lodged to the Account Clarence Brown."

In the light of the pieces of evidence culled from the record and highlighted herein, I am of the opinion that there was ample evidence to justify the learned trial judge's conclusion as stated above in relation to the facts.

As regards to the law applicable to the facts the learned trial judge said:

> "There is also the further point that by lodging the Plaintiff's cheques in Clarence Brown's account in breach of its agreement with the Plaintiff they converted those cheques. I have come to the conclusion and so hold that the Plaintiff's case for conversion and money had and received is valid."

Mr. Leo-Rhynie submits that the learned trial judge was in error in concluding that on the premise stated in the judgment there was in law a conversion. He further submitted that since prima facie the cheques were regularly endorsed over to Clarence Brown by the respondent, the latter was no longer the owner of the cheques. It was Clarence Brown who as the holder in due course was the owner and he alone was competent to sue for conversion.

Neither of these submissions is well-founded. The fact that the constituent facts disclose a breach of contract do not preclude them from also providing a basis for an action for conversion. The warehouse keeper who contracts to store the goods of A and to deliver them up to him on demand is in breach of his contract if whether deliberately or negligently he delivers up the goods to B without the authority express or implied of A. The warehouse keeper is on the same facts equally liable in conversion since he has exercised dominion over the goods which is inconsistent with the rights of A, the owner. In the present case the appellant has exercised dominion over the proceeds of the respondent's cheques inconsistent with the rights of the respondent by crediting the amounts to the accounts of Clarence Brown.

With regard to the competence of the respondent to sue for conversion, his case is that he remains the true owner and not Clarence Brown because his signatures have been forged. It is irrelevant, so far as his status to sue is concerned, whether or not the appellant knew of the forgery. Once the appellant has credited the proceeds of the cheques to the accounts of Clarence Brown which is not denied, it has exercised dominion over the proceeds inconsistently with the rights of the respondent. He has alternative remedies either for conversion or for money had and received to his use.

Finally Mr. Leo-Rhynie submits that inasmuch as the learned trial judge based his finding of conversion on the breach by the appellant of the contract relating to the loan, some 12 cheques which predated that contract ought not to have been included in the sum found to be converted. Also the amount found to have been utilised by Clarence Brown to make instalment payments on behalf of the respondent under the loan agreement ought also to be deducted.

In relation to the cheques which predated the loan transaction, the learned trial judge expressly included them, when in his judgment he stated as already mentioned that there never was any agreement for the cheques which he said meant "all the Coconut Board Cheques" to be lodged to the account of Clarence Brown. His judgment admittedly is not clear, as to whether it was a judgment for conversion or for money had and received since the claims are alternative. However, inasmuch as he did conclude that "the plaintiff's case for conversion and money had and received is valid" it may reasonably be inferred that he intended judgment for recovery of the total of the cheques lodged to the account of Clarence Brown which were not authorised so to be lodged, partly based on conversion in respect of the post loan agreement period and partly on money had and received to the preloan agreement period. The learned trial judge was thus not in error in not excluding the cheques predating the loan.

The claim made in the submission of Mr. Leo-Rhynie relating to deduction from the sum found to have been converted of the loan repayments would be appropriate if Clarence Brown had been sued. Once the appellant has credited Clarence Brown's account, the conversion is complete as far as it is concerned. Clarence Brown, in so far as he has appropriated the proceeds knowing that the said proceeds was owned by the respondent is himself liable in an action for conversion. In any such action he could however claim a rebate for the sum which he had used to repay the respondent's loan. This would however not apply to the appellant who in order to recover would have had to counterclaim for the balance of the loan. True enough it was part of the converted proceeds which was utilised to the use and benefit of the respondent but the critical matter is that it was not the appellant but rather Clarence Brown who had utilized the same. No unjustifiable enrichment arises by not allowing the deduction because, on principle, the amount sought to be deducted is recoverable subject if applicable to the special defence of limitation in an action to recover the balance of the loan. There was no counterclaim for this sum, accordingly this court in my opinion cannot in effect give judgment for the same.

Mr. Kirlew has with leave of the court adduced additional evidence and made submission showing that the deduction of the sum of $8,140.00 from the sum found to have been converted was predicated on the mortgaged property still remaining unsold. As the said property has been sold by the appellant to recover the balance then owing, the full amount found to have been converted should be that for which judgment is given. I think there is merit in this submission which will be acceded to.

For the reasons herein given the appeal ought to be dismissed and the judgment of the court below affirmed subject to a variation in the sum for which judgment is given by substituting $82,316.98 for $74,176.98.

DOWNER J.A. (AG.)

Who lent whom and on what basis? Those were the initial questions which arose in these proceedings before Marsh J., and his answer was that the Bank of Nova Scotia lent Andrew Brown the sum of $15,420.00 on the security of a mortgage. The further question was whether the bank was liable in conversion for paying into Clarence Brown's account the proceeds of crossed cheques drawn in favour of Andrew Brown. Marsh J., found the bank liable and it was in the light of those findings that the Bank has appealed from his judgment.

In order to appreciate the judgment, it is necessary to rehearse the evidence adduced in the court below. The plaintiff Andrew Brown, a copra manufacturer, some time in 1975 desired to acquire a parcel of land adjoining his farm, and sought a loan for that purpose from the Morant Bay Branch of the bank. The amount loaned was $12,000.00 which attracted charges of $3,420.00 and therefore totalled $15,420.00. As security for that loan two parcels of land in St. Thomas owned by Andrew Brown were mortgaged and the arrangements for payment as found by the Court was that cheques payable to Andrew Brown from the Coconut Board would be used to pay the instalments and the residue was to be credited to his savings account. Although the Bank doubted the existence of such a savings Account, during these proceedings an account was traced.

The answers given by Andrew Brown under cross-examination are of significance. He stressed that he alone signed the Promissory Note, and that he did not know how the names of Clarence Brown and Inez Brown appeared on that document or any other in connection with the loan. He also pointed out that he had not signed any of the cheques exhibited in Court, and that when he questioned his son Clarence Brown about the cheques which he had collected on his behalf for lodgment, he was told that his signature was unnecessary. It is noteworthy that although he was asked to put his signature on paper which was admitted as Exhibit 3, no attempt was made by the Bank to have that signature compared with those on the back of the cheques purporting to be that of Andrew Brown, so that there was no evidence

from the Bank on that vital issue.

The Bank's version was that the loan was made to Clarence Brown as the principal borrower. As against the oral testimony of Andrew Brown, the Bank relied on the signatures on the Promissory Note purporting to be signed by Clarence, Andrew and Inez Brown and the mortgage instrument signed by Andrew Brown. However, no officer who prepared the Bank's documents relating to loan gave evidence. Cephas whom the judge found was the son of Andrew was present at the initial interview but he was not called by the Bank.

The learned trial judge was impressed by Andrew Brown who was then ninety-nine years of age and commented favourably on the strength and force with which he gave his evidence, and he decided in favour of the plaintiff as regards the circumstances of the making of the loan. This finding was not seriously challenged and in any event it ought not to be disturbed.

As regards repayment, the Court accepted Andrew Brown's version that his cheques from the Coconut Industry Board were to be used to pay the instalments. At this point it is appropriate to emphasize that apart from being able to sign his name Andrew Brown was virtually illiterate, but it does not appear that he lacked business acumen. He convinced the court that, Clarence Brown, his son, acted as his errand boy to collect and lodge the cheques which were exhibited. On the other hand the Bank credited all thirty eight cheques to the account of Clarence Brown, although they were drawn in favour of Andrew Brown. All were crossed but while some were endorsed on the back by a signature purporting to be that of Andrew Brown, some were purported to be signed by both Andrew and Clarence Brown jointly and some by Clarence Brown alone. The Bank credited these cheques on the basis adverted to previously, that Clarence was the principal borrower. It must be noted that the learned judge accepted Andrew Brown's testimony that he did not endorse any of those cheques and the judge had good reasons for doing so, as the Bank did not even put them to the plaintiff during the course of the trial to ascertain his response to the signatures bearing his name. It was

the failure of the Bank to apply the proceeds of the cheques as outlined by Andrew Brown that gave rise to this dispute. From the bank's point of view, the loan payments were to be met by Clarence Brown, but as the Court below accepted Andrew Brown's evidence, it was rightly found that the Bank had misapplied the proceeds of the cheques. It was in those circumstances that the Bank attempted to enforce its powers of sale under the mortgage instrument and Andrew Brown put a caveat on the title. He also secured an interim injunction to restrain a sale, but in the event it does appear that one of the properties was sold by the Bank. It is of interest to note that the property sold was owned by Andrew Brown.

The issue on appeal was whether the legal challenge mounted by Mr. Leo-Rhynie on behalf of the Bank could upset the order of the court in favour of the plaintiff. That order dated 3rd June, 1985 stated that the defendant bank had converted the plaintiff's cheques or alternatively was in breach of contract and liable to the plaintiff for $74,176.98 as damages with interest at the rate of 3% as from 27th December, 1978 with costs.

The settled law is that once the Bank paid cheques made out in the name of Andrew Brown and credited them to another account namely that of Clarence Brown then it was liable in conversion unless it could avail itself of the defences pursuant to the Bill of Exchange Act. This proposition was developed in cases cited below and reiterated before us, and it is appropriate to examine them to determine how they are to be applied to the facts and circumstances of this case. Perhaps the most frequently cited case is A.D. Underwood Ltd., v. Bank of Liverpool & Martins (1924) All E.R. 230 where Underwood paid cheques drawn in favour of Underwood Ltd., to his private account and the bank followed his instructions without making the appropriate enquiry as to why these sums were to be so credited, when the payee was a limited company. It was held that the Bank was liable in conversion to the liquidator of the company and Section 82 of the Bill of Exchange Act would not be a defence as the Bank was negligent in failing to make a proper enquiry. A recent application of the principles of this case is to be found in Baker v. Barclays Bank Ltd., (1955) 2 All E.R. 571 where

Mr. Jeffcott lodged cheques, the property of partnership of whom Mr. Bainbridge was a member to his private account at Barclays Bank. Both Bainbridge and Jeffcott had endorsed the cheques. It should be noted that the partnership was styled "Modern Confections" and the bank should therefore have been put on enquiry as to why these sums were so lodged, as the explanation given by Mr. Jeffcott to the Bank Manager was not satisfactory. The explanation was that he Jeffcott was handling the financial side of Bainbridge's business. This was found to be unsatisfactory by Devlin J., and the bank was found liable in conversion. This case also illustrates the scope and limit of the defence that the Bank was a holder in due course and it is pertinent to quote Devlin J., who puts it thus at p. 580:

> "I shall take, first, the submission that the bank became a holder in due course. That submission is based on s. 29 and s. 30 of the Bills of Exchange Act 1882. Section 29 (1) defines 'a holder in due course' and reads:
>
> > 'A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely -
> >
> > .....
> >
> > (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.'
>
> As to the burden of proof on that point the bank relies on s. 30, which reads:
>
> > '(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value. (2) Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted,

> " 'unless and until the holder proves that, subsequent to the alleged fraud of illegality, value has in good faith been given for the bill'. "

The evidence the judge accepted was that Clarence Brown collected the cheques as an agent of the plaintiff to lodge to the plaintiff's account and the agreement with the Bank was that from the proceeds, the instalments from the loan should be paid. By directing that the proceeds be paid to his own account he practiced a fraud on his father and the Bank ought to have been aware of that. So the bank was not a holder in due course as they had notice of the defect in the title and they did not take for value. Moreover, pursuant to section 30 once there is fraud then the onus is shifted and here again it is instructive to cite the words of Devlin J., in this regard. At page 581D he states:

> ".....but I think it is worth referring to Fitch v. Jones (14) which was decided before the Act was passed, because Lord Campbell, C.J., shows what is the true position of a man in the position of Mr. Jeffcott in this case. Lord Campbell C.J., said (5 E & B at p. 244):
>
> > 'The other question is one of general importance. It is, whether is such a case as this it lies on the plaintiff to show that there was consideration for the indorsements, or on the defendant to show that there was none; or in other words whether the facts proved raised a presumption that there was no consideration. It is clear that, when there is illegality or fraud shown in a previous holder, a presumption that there is no consideration for the indorsements does arise; for the person who is guilty of illegality or fraud, and knows that he cannot sue himself, is likely to hand over the instrument to some other person to sue for him. It is not properly that the burthen of proof as to there being consideration is shifted, but that the defendant, on whom the burthen of proof that

> " 'there was no consideration lies, has by proving fraud or illegality in the former holder raised a prima facie presumption that the plaintiff is agent for that holder, and has therefore, unless that presumption be rebutted, proved that there was no consideration.' "

It is clear from the facts of this case that neither the Bank nor Clarence Brown gave consideration in this case for the cheques in question and because of the fraud on the part of the son the onus lay on the Bank to prove that subsequent to the fraud, value in good faith had been given. The Bank failed to discharge this burden. Tellers who handled the cheques were not called. The evidence the bank relied on was documentary and its witnesses who put in the documents were not even at the branch when the transactions took place. Aditionally one witness admitted that it was an irregularity to lodge the crossed cheques to Clarence Brown's account without any prior authorization from Andrew Brown the payee. Sections 29 and 30 of the Bill of Exchange Act are of no assistance to the Bank in this case as was contended.

The position in law therefore is that the leanred judge's reasons were sound, despite Mr. Leo-Rhynie's submissions, and the order in the court below must be affirmed subject to the amount of $8,140.00 being added to the Registrar's account. This amount was deducted from the damages because of an error in failing to take into account that one of the mortgaged properties was sold and the proceeds of that sale credited to the bank.