C.A. No. 129091

NOVA SCOTIA COURT OF APPEAL
Cite as: Newell v. Royal Bank of Canada, 1997 NSCA 196

Hallett, Bateman and Flinn, JJ.A.

BETWEEN:

MAXWELL PHILIP NEWELL	)	
	)	William P. Burchell
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Lee Anne MacLeod
	)	for the Respondent
ROYAL BANK OF CANADA	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	October 16, 1996 and
	)	December 11, 1996
	)	
	)	Judgment Delivered:
	)	January 8, 1997
	)	
	)	

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Flinn, J.A. concurring; and, Bateman, J.A. concurring by separate reasons.

BATEMAN, J.A.: (Concurring)

This is an appeal by Maxwell Philip Newell from the order of a trial judge, holding him responsible to the respondent Bank, for the amount of certain cheques forged by his wife.

Background:

The appellant Maxwell Newell and Rita (MacDonald) Newell married in 1975. They had two children.

In 1988 Mr. Newell opened a Royal Moneymaker account at the main branch of the Royal Bank on Charlotte Street, Sydney, Nova Scotia. It was opened as a joint account with his son Christopher Newell, who was then approximately thirteen years of age. Between 1991 and April, 1993 numerous cheques were written on that account, drawn in the name of Max Newell, and payable to Rita Newell or to several other payees.

Rita Newell performed all of the Mr. Newell's banking requirements during this time-frame, as he was working long hours as a labourer in the construction industry and was not available to attend at the Bank during regular banking hours.

In early April, 1993 Mr. Newell made a visit to the main branch of the Royal Bank of Canada, to check into his Royal Moneymaker account. He had noticed that the type-face of recent entries in the pass-book was different from the earlier entries. It was during that visit to the Bank that he learned that the balance of this bank account was much less than was indicated in the pass-book.

He immediately brought the discrepancy to the attention of Linda Boudreau, the Assistant Manager of Personal Banking for that branch. She asked him to return the following week after the Bank had time to look into the matter. Mr. Newell returned on April 7, 1993. After presenting him with copies of the cheques written on the account and discussing the matter it was determined that Mrs. Newell had forged Mr. Newell's name on approximately 40 cheques totalling $58,341.76. Ms. Boudreau prepared a

letter, dated April 7, 1993, which was executed by Mr. Newell on that day. This letter provides:

> In the matter of the above account I have chosen to accept full liability and responsibility for all items which may have been signed fraudulently by my spouse, Rita Newell. Items in question are dated between June 12, 1991 and August 24, 1992 and total $58,341.76.

Mr. Newell continued to bank at the Royal Bank Main Branch after April, 1993. He attended at the Bank on October 15, 1993 to make a deposit to his bank account. At that time, in reviewing his pass-book, he noted that three loan payments in the amount of $1,948.80 had been taken from that account. Two of the payments had been corrected and his account credited for those amounts, but one payment remained debited to his account at that time. On that visit the plaintiff met with Bill Ives, the Area Manager for personal banking in Industrial Cape Breton. Mr. Ives arranged for Mr. Newell to come back to meet with the Branch and Area Manager Jim Gillis the following week.

On October 18, 1993, the Mr. Newell met with Jim Gillis and Bill Ives, as well as Linda Boudreau. He was presented with and executed a letter dated October 15, 1993, confirming that he had not known about or signed for the loan on which the payment had been made. His account was then credited for the loan payment, and the Bank thereafter absolved him of any responsibility for the loan debt.

After October 18, 1993, the bank personnel heard nothing further from Mr. Newell until his solicitor wrote to the Bank on February 9, 1994, requesting copies of documentation relative to the loan and cheques. On September 26, 1994 the solicitor wrote to the Bank demanding that Mr. Newell be reimbursed for the cheques. The Bank refused. This action was commenced on November 16, 1994. The trial judge held that the Bank was not required to return the funds to Mr. Newell.

Grounds of Appeal:

The grounds of appeal are restated in the factum of the appellant as the following issues:

> A. Did the Learned Trial Judge err in applying the doctrine of adoption of the Appellant's purported acceptance of responsibility for the forged cheques?
>
> B. Did the Learned Trial Judge err in failing to set aside the letter of April 7, 1993, prepared by the Respondent Bank and signed by the Appellant, as being unconscionable?
>
> C. Did the Learned Trial Judge err in failing to find that the Respondent Bank owed a duty to the Appellant in the circumstances to investigate and to disclose to the Appellant all material fact about activities involving the Appellant's accounts when the forgeries were first exposed?

Analysis:

The **Bills of Exchange Act**, R.S.C. 1985, c. B-4, s. 48, is relevant to this matter and provides:

> 48. (1) Subject to this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, **unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.**
>
> (2) Nothing in this section affects the ratification of an unauthorized signature not amounting to a forgery.
>
> (3) Where a cheque payable to order is paid by the drawee on a forged endorsement out of the funds of the drawer, or is so paid and charged to his account, the drawer has no right of action against the drawee for the recovery of the amount so paid, nor any defence to any claim made by the

> drawee for the amount so paid, as the case may be, unless he gives notice in writing of the forgery to the drawee within one year after he has acquired notice of the forgery. (emphasis added)

The first issue considered in the decision of the trial judge was whether, pursuant to s. 48(1) of the **Bills of Exchange Act**, Mr. Newell was "precluded from setting up the forgery". If not precluded, he would be entitled to return of his money.

The trial judge held that Mr. Newell, having adopted the forgeries in the letter of April 7, 1993, was bound to accept responsibility for the forged cheques. In the words of s. 48(1), he was "precluded from setting up the forgery". He held, as well, that there was no unconscionable conduct on the part of the Bank, and that the Bank owed no duty to Mr. Newell to investigate the propriety of other transactions by Mrs. Newell. The trial judge wrote:

> Turning next to s. 48(1), **there is a question as to whether the plaintiff is precluded from establishing the forgery**. Crawford and Falconbridge, *Banking and Bills of Exchange*, Eighth Edition., Volume 2, pp.1371-2 enumerates five different types of fact situations in which a party may be precluded from setting up a forgery. These are: adoption, negligence, estoppel, silence, and other forms of preclusion.
>
> Adoption is often confused with ratification: **Union Bank v. Farnsworth et al.**, (1886), 19 N.S.R. 82 (S.C.) However, they are different concepts. A forgery cannot be ratified: **Bank of Nova Scotia v. Steeves** (1987), 84 N.B.R. (2d) 217 (Q.B.) at p.225. A forgery can be adopted. In the present case, there is evidence amounting to adoption of the forged signatures on the cheques.
>
> . . .
>
> **There is clear evidence that the plaintiff adopted the forged signatures on the cheques.** He signed a written acknowledgement of responsibility for the total face value of all the forged cheques. Although he did not have the benefit of legal advice before signing it, I find that he did not ask for time to obtain such advice and, in any event, he understood the nature and consequences of his signing. If he lacked sleep, was worried about his money, and had

ingested painkillers, it would not affect the quality of his acceptance of responsibility. Moreover, I find that, although of limited formal education and experience, he was not as lacking in sophistication in business as his counsel suggests. I find no evidence of unconscionable conduct on the part of the bank officials and, therefore, no reason to set aside the letter which he signed. His acknowledgement of responsibility was followed by a period of approximately three months during which he continued doing business with the bank; this reinforced his acknowledgement of responsibility.

He testified that he would not have signed the acknowledgement if the bank official to whom he reported the forgery had also mentioned to him the existence of the promissory note for a $70,000 loan which was in his name, of which he had no knowledge because his wife had also forged his signature on that document, and of which he did not become aware until approximately six months later. Upon becoming aware that his signature had been forged with respect to a large number of cheques, it may well be that the bank official should have forthwith reviewed with him all recent purported dealings between him and the bank. But I am not prepared to say that there is a general duty upon a bank to do so in all cases. In any event, I do not accept the plaintiff's assertion long after the fact that he would not have signed the written acknowledgement of responsibility if he had also been aware at the time of the forged promissory note. **The evidence clearly shows that he signed the written acknowledgement of responsibility in order to protect his wife from the possibility of criminal charges for forgery, which the bank said it intended to lay if he did not sign the letter acknowledging responsibility.** The plaintiff confirmed that he said that he did not want the mother of his children going to jail. The additional forgery of the promissory note would not have made any difference in achieving that stated purpose. I find that he would have signed the written acknowledgement of responsibility even if he had been then aware of the forged promissory note in addition to the forged cheques.

When in October he went to the bank to complain about amounts improperly deducted from his account, and he then became aware for the first time of the forged promissory note, a bank official asked him to sign the forged cheques in order to confirm his acknowledgement of responsibility in April, and he acceded to the request. He now says that the bank officials hovered over him and

> created pressure to sign forthwith, that he did not know what he was doing, and did not have the opportunity of obtaining legal advice. In my opinion, there was no legal reason or need to confirm the acknowledgement of responsibility and no legal significance should be attributed to the placement of valid signatures upon the cancelled forged cheques. I accept the evidence of the bank officials that the plaintiff was not pressured, that he did not request time to consider the matter or to obtain legal advice, and that he signed the cheques which were laying on the desk in front of him when he was requested to do so. The plaintiff's willingness to sign indicates further confirmation of his previous acknowledgement of responsibility.
>
> **I hold that the plaintiff adopted the forged signatures on the cheques. In so doing, he accepted liability for them.** (emphasis added)

The terms "adoption" and "ratification" are used interchangeably in many cases. According to Crawford and Falconbridge *Banks and Bills of Exchange*, 8th edition, Canada Law Book Inc., Toronto, 1986 at p. 1382, however, there is a distinction and ". . . the law appears to be that the intended principal cannot ratify when the signer professes to be the principal, but only when he professes to act on his behalf." In the former case, the act cannot be ratified, but can be adopted.

The confusion of these terms is exemplified in a passage from **Scott v. Bank of New Brunswick** (1894), XXIII S.C.C. 277. This case involved both a forgery and a fraudulent representation of agency, by the forger. The court wrote at p. 282:

> . . . I think the law is clear that if the payment of money is obtained from a debtor by one falsely representing to the debtor that he is the agent of his creditor, from whom he in fact has no authority, and thereby a fraud upon the debtor is committed, yet if the creditor afterwards **ratifies and confirms** the payment so made he thereby **adopts** the agency of the party who has received the money and it becomes equivalent to a payment made by the debtor to a person having proper authority to receive it. (emphasis added)

Scott, **supra** is often cited as authority for the proposition that a forgery can be ratified. In that case the Chief Justice of Canada, for the unanimous court, at p. 282, quotes with approval from the decision of Lord Blackburn in **M'Kenzie v. British Linen Co**. (1881), VI H.L.(Sc.) 82, as follows:

> . . . I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. **But if the person, whose name was without authority used, chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it**. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another. (emphasis added)

This passage further exemplifies the confusion of the terms, ratification and adoption.

Chief Justice Strong continued at p. 283 and accepted the following as a correct statement of the law:

> Upon principle there does not seem to be any reason, upon grounds of public policy or otherwise, why such an act should not be susceptible of confirmation by a party whose conduct is free from any taint of illegality in favour of another party equally blameless, **provided the adoption does not involve any agreement or undertaking on the part of either to forbear from a criminal prosecution**. (emphasis added)

Applying **Scott v. Bank of New Brunswick, supra**, this court confirmed in **Re De Blois Estate** (1915), 22 D.L.R. 731 (N.S.S.C. en banc) (at p. 732), that a forgery could be ratified but not if it involved an agreement to stifle a prosecution. (This is to be distinguished from a promise to forbear from civil suit, which can be good consideration: **Crears v. Hunter** (1887), 19 Q.B.D. 341.)

In my view, for the purposes of this case, it is irrelevant whether Mr. Newell is said to have ratified or adopted the forgeries. Clearly, as found by the trial judge, the only reason Mr. Newell signed the letter of April 7, 1993 acknowledging responsibility for the cheques was because bank official, Linda Boudreau, effectively told him that if he did not, his wife would be prosecuted. Ms. Boudreau testified, in response to a question from the respondent's solicitor:

> Q. How was it presented to him [Mr. Newell]?
> A. If . . . if the Bank was to refund Mr. Newell his money, the bank turns all fraudulent activities over to the authorities, that is the policy. If he accepted responsibility for them, then it is no longer an issue between the bank and the authorities, it is an issue between Mr. and Mrs. Newell.

On grounds of public policy, and on the authority of **Scott, supra**, the Bank cannot enforce Mr. Newell's agreement to accept responsibility for the forged cheques. In view of the way in which the Bank presented the situation to Mr. Newell, the only reasonable inference, as was found by the trial judge, was that he accepted responsibility solely to protect his wife from prosecution. This was, then, an agreement to stifle a criminal prosecution which is an illegal contract and unenforceable. Mr. Newell is entitled to return of the funds.

I add that none of the above case law was brought to the attention of the trial judge. It was not argued before him nor before us that such a bargain was unenforceable, as against public policy.

Disposition:

I would set aside the judgment of the trial judge and allow the appeal. The appellant is entitled to return of the $58,341.72 together with prejudgment interest thereon at the rate of 5% from September 26, 1994, the date his solicitor requested

return of the funds. The appellant shall have costs on the trial, in the amount fixed by the trial judge, together with disbursements, and costs of the appeal, which I would fix at 40% of those at trial, together with disbursements.

Bateman, J.A.

HALLETT, J.A.:

I agree with Justice Bateman that the appeal should be allowed.

In my opinion the learned trial judge erred when he found that Mr. Newell had adopted the forged cheques as his own; for Mr. Newell to be bound by his acceptance of responsibility for the cheques, there would have to have been valuable consideration flowing from the Bank to him. There was none other than the illegal consideration that the Bank would not prosecute Mr. Newell's wife. I will set forth my reasons for coming to this conclusion and why ratification ought to be distinguished from adoption when considering cases of unauthorized signatures by agents which are ratified by the principal and cases of outright forgery. This is relevant because s. 48(2) of the **Bills of Exchange Act** seems to preserve the distinction between the consequences that flow from the ratification by a principal of an agent's unauthorized signature in contrast to the consequences that flow from an outright forgery. This distinction is sometimes overlooked in the decisions on the subject and has given rise to somewhat contradictory statements in judgments.

Case Law

I will review, in chronological order, cases relevant to the issue in this appeal.

In **Williams v. Bayley** (1866), L.R. 1 H.L. 200, a father executed a mortgage to a bank in settlement of the liability of his son, who had forged his father's name to notes held by the bank. No prosecution had been started and there was no direct threat of the same, but it was stated to the father that the son was liable to be prosecuted. The House of Lords held that the fair inference was that the father executed the mortgage to save his son from prosecution. Such a transaction amounted to an agreement to stifle criminal proceedings and was hence illegal.

In **Brook v. Hook**, [1871] L.R. 6 Exch. 89 the defendant Hook's name was forged by one Richard Jones to a joint and several promissory note made in favour of the plaintiff. While the note was current the defendant signed a memorandum that he would be responsible in order to prevent the prosecution of the forger, Mr. Jones, who was his brother-in-law. At the same time he denied that he had signed the note. At trial of an action against Mr. Hook on the note the judge ruled that his memorandum was a ratification and the only question for the jury was whether the defendant Hook had signed it. As it was admitted that he did sign the memorandum a verdict was entered for the plaintiff. On appeal, the majority of the Court held that the memorandum was not a ratification at all but an agreement by the defendant to treat the note as his own and become liable upon it in consideration that the plaintiff would forbear to prosecute his brother-in-law Jones. The majority held that such an agreement was against public policy and void as founded upon "illegal consideration".

In **Union Bank v. Farnsworth et al.**, [1886] 19 N.S.R. 82, the predecessor of this Court in a decision involving promissory notes, the issue was whether the notes had been signed by one of the co-defendants or forged. The Court concluded that the conduct of the defendant in question amounted to an adoption and ratification of the signature to the notes that he was liable thereon. The Court, in its decision, seemed to use the terms "adoption" and "ratification" interchangeably.

In **Merchants Bank of Canada v. Lucas**, [1889-91] 18 C.S.C.R. 704 the Supreme Court of Canada affirmed a decision of the Ontario Court of Appeal that a forgery cannot be ratified. The Ontario Court of Appeal recognized that adoption of a forged document is distinct from ratification.

In **Jones v. Merionethshire etc. Soc.**, [1892] 1 Ch. 173: the secretary of a building society, threatened with prosecution for embezzlement, applied to the plaintiffs,

relatives of his, and they gave their written undertaking and also signed two promissory notes to cover the greater part of the debt to the Society, the express consideration being the forbearance of the Society to bring a civil action against the debtor for the amount of the debt. The plaintiffs, in giving their undertaking, were actuated by a desire to prevent the prosecution, and that was known by the directors of the Society, but no promise was made that the prosecution should be dropped. The Society brought action on the notes and it was held that there was an implied term of the agreement that there should be no prosecution and therefore the agreement was founded on an illegal consideration and was void.

In the **Peoples Bank of Halifax v. Johnson**, [1892] 20 S.C.R. 541 the Supreme Court of Canada affirmed a decision of the Supreme Court of Nova Scotia *in banco* that the bank could not succeed in its claim made under a bond signed by Mr. Johnson, the father-in-law of a Mr. Locke who had embezzled money from the bank. The bond was given in consideration of the agreement by the bank not to prosecute Mr. Locke. Ritcey C.J. concluded his comments with the following statement at p. 545:

> "Inasmuch as I can discover no other consideration for the defendant entering into this contract with the plaintiff but the clear intimation that if he did not do so criminal proceedings would be instituted against the embezzler, and the irresistible inference from the evidence being that if he did nothing would be done in the matter, and the contract now sought to be enforced having been entered into under these circumstances, I am of opinion that such consideration was unlawful and no court can be asked to enforce a contract based on such an unlawful consideration."

Strong J. at p. 546 stated:

> "The case is in all respects like that of *Jones v. Merionethshire Building Society*, [1892] 1 Ch. 173."

Taschereau J. stated at p. 546:

> "The evidence, it seems to me, leaves no room for another conclusion as to this fact, and it is settled law that "any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void." Per Lord Lyndhurst in *Egerton v. Earl Brownlow*, 4 H.L. Cases 1, 163. The case of *Jones v. The Merionethshire Permanent Building Society* has, since the judgment in the present case, been affirmed by the Court of Appeal. I refer to it."

In **Scott v. Bank of New Brunswick** (1894), XXIII S.C.C. 277 the Chief Justice of Canada for a unanimous court reviewed the judgments in **Brook v. Hook** and approved that part of the majority decision to which I have referred.

In **Greenwood v. Martins Bank Ltd.**, [1932] 1 K.B. 371 the Court held that the plaintiff in that case owed a duty to the bank to disclose the forgeries when he became aware of them and therefore, the plaintiff was estopped from asserting that the signatures to the cheques were forgeries and he was not entitled to recover the money taken from his account by his wife's drawing for his cheques on the account. In the course of the decision, both Scrutton L.J. and Greer L.J. made certain *obiter* comments respecting the matter of ratification. Scrutton L.J. stated at p. 378-79:

> "I do not think 'ratification' has any applicability to a forged signature. For ratification to be effective the act ratified must purport to be done by an agent for the person who ratifies: *Keighley, Maxsted & Co. v. Durant*, [1901] A.C. 240. It is true that Lord Blackburn in *M'Kenzie v. British Linen Co.*, a Scotch case, says that in civil cases a man may ratify a forgery, but in *Brook v. Hook*, the majority of the Court pointed out that a forgery which does not profess to be executed by a person as agent cannot be ratified by the alleged principal, and in my opinion this is the correct view of the law. A forgery can however be adopted. The supposed signer may say, 'I will recognize this signature as my own; you may debit my account with these cheques", and in that case the Bank which has acted on this statement could successfully object to the customer's endeavouring to withdraw his adoption."

Greer L.J. stated at p. 385:

> "It is well established by a number of cases that where one person makes a contract without intending or purporting to make it on behalf of another, the contract is incapable in law of being ratified: see *Kelner v. Baxter* (1866) L.R. 2 C.P. 174; In *re Empress Engineering Co.* (1880) 16 Ch. D. 125; *In re Northumberland Avenue Hotel Co.* (1886) 33 Ch. D. 16 in the Court of Appeal. On these grounds it was decided in *Brook v. Hook* that a forged signature to a joint and several promissory note was incapable of ratification. Notwithstanding the great authority of any opinion expressed by Lord Blackburn, I think it must be held that his dictum to the contrary effect in *M'Kenzie v. British Linen Co.* cannot be regarded as authoritative. Lord Blackburn's opinion is only a dictum, inasmuch as the House of Lords decided that no facts were proved which would amount to ratification if ratification were possible in law. As regards adoption, there was no evidence in the present case on which it could be held that the plaintiff had adopted the transaction in the sense that he had entered into a contract to be bound by his wife's unauthorized drawings."

While Scrutton L.J. stated that a man may adopt a forgery, he does not state that the normal requirement for consideration for the adoption is negated.

It is implicit from the remarks of Greer L.J. that consideration flowing from the bank to the adopter is required to enforce an agreement pursuant to which a bank's customer adopts a forged cheque as if the cheque was that of the customer.

The decision of the Court of Appeal in **Greenwood v. Martin** (supra) was appealed to the House of Lords and in a decision reported in [1933] A.C. 51 the House of Lords dismissed the appeal essentially affirming the reasons of the Court of Appeal. In the course of his decision Lord Tomlin commented on the question of ratification and adoption. He stated at p. 57:

> "Now it may be said at once that there can be no question of ratification or of adoption in this case. The necessary elements for ratification were not present, and adoption as

> understood in English law requires valuable consideration, which is not even suggested here."

The aforesaid remark, like most of the statements, made by the Courts with respect to the matter of distinguishing ratification from adoption, were *obiter dicta* as were the remarks of Lord Blackburn in **M'Kenzie v. British Linen**. In **Scott v. The Bank of Nova Scotia**, Lord Blackburn's statement that a forgery can be ratified was quoted with apparent approval by the Chief Justice of Canada. **Scott** was not a case involving an outright forgery but a case involving a so-called "pretended agent"; in such a case the principal can unilaterally ratify the unauthorized signature of an agent purportedly made on his behalf. He is bound by the ratification and there is no requirement for consideration for such ratification. Despite the approval of the statement of Lord Blackburn in **Scott** the Chief Justice also approved the majority decision in **Brook v. Hook** that an agreement to forego prosecuting a forger in consideration of another accepting responsibility is founded upon illegal consideration and is unenforceable on the grounds of public policy.

A forgery, which does not profess to be executed by a person as agent, cannot be ratified by the alleged principal. But it can be adopted (**Greenwood v. Martins Bank Limited** (supra)).

There seemed to be some confusion in the case law as to whether adoption is unilateral or bilateral in character. In (1933), 11 C.B.R. 632 S.E. Smith commented on the judgments of Scrutton L.J. and Greer L.J. in **Greenwood v. Martins Bank** (supra) with respect to whether or not there is a requirement for consideration with respect to the adoption of a forged cheque. He stated at p. 634:

> "Lord Tomlin considered the law relating to adoption as inapplicable because "adoption as understood in English law requires valuable consideration which is not even

> suggested here." The mention of consideration indicates that adoption involves a contract by the adopter of a particular transaction, to which neither he nor his agent was a party, to implement it. For example, if the plaintiff in the principal case upon discovery of the forgeries had gone to the bank and said: "If you relinquish your cause of action against my wife in respect of the forgeries I will consider the forged cheques as my own" and the bank accepted this offer, the result would be an adoption. Whereas ratification is unilateral in character, adoption in this sense is bilateral. In the Court of Appeal in the *Greenwood* case Greer, L.J., also read into the term "adoption" the concept of contract when he stated: "As regards adoption, there was no evidence in the present case on which it could be held that the plaintiff had adopted the transaction in the sense that he had entered into a contract to be bound by his wife's unauthorized drawings." But Scrutton, L.J., after discussing ratification, said: "A forgery can however be adopted. The supposed signer may say, 'I will recognize this signature as my own; you may debit my account with those cheques', and in that case the Bank which has acted on this statement could successfully object to the customer's endeavouring to withdraw his adoption. I see no evidence in this case that the husband ever adopted these cheques as his own. He delayed in telling the Bank they were forged but never said they were his . . . . . This, however, is getting near the defence of estoppel." This statement contemplating merely an unilateral act on the part of the plaintiff or an identification of adoption with estoppel when compared with those of Greer, L.J. and Lord Tomlin, demonstrates that there is diversity of opinion with respect to the content of the term, "adoption.""

In **Hawkes v. Waugh**, [1948] 3 D.L.R. 397, the Appeal Division of the New Brunswick Supreme Court considered and applied the decisions in **Williams v. Bayley** (supra) and **Jones v. Merionethshire** (supra).

Conclusion

A cheque, drawn on a bank account upon which the signature of the purported drawer is a forgery, is inoperative (s. 48(1) **Bills of Exchange Act**). If the customer's bank on which the cheque is drawn cashes the cheque, the bank, on discovery of the

forgery, must credit the account of the customer for the amount previously debited unless the customer is precluded from setting up the forgery (s. 48(1) **Bills of Exchange Act**).

Considering the case law, I am of the opinion that if a bank wishes to enforce an agreement by a customer to accept responsibility for forged cheques drawn on the customer's account, unless the customer is otherwise precluded from raising the forgery, there is a requirement for valuable and lawful consideration flowing from the bank to a customer. This must be so as the customer is clearly taking on responsibility for something for which he is not liable. As stated by Friedman in **The Law of Contracts**, 2nd edition, 1986 at p. 8 "consideration is the hallmark of contract".

There is a distinction in the case law between a ratification and an adoption. Ratification by a principal of an agent's unauthorized signature on the principal's behalf does not require consideration; as ratification is a unilateral act. But if the principal accepts responsibility for cheques upon which the principal's signature has been forged, this is an adoption of the cheque as his own and the principal must receive valuable and lawful consideration for his undertaking.

A forged cheque cannot be adopted if the consideration from the bank to the customer for accepting responsibility for the cheque is the agreement of the bank not to criminally prosecute the forger; such consideration is unlawful as being contrary to public policy (**Brook v. Hook** (supra); **Jones v. Merionethshire etc. Soc.** (supra); **Peoples Bank of Halifax v. Johnson** (supra)).

As stated by Ritcey C.J. in **The Peoples Bank of Halifax v. Johnson** (supra) "It is clear that a consideration must not only be valuable but it must be a lawful consideration and not repugnant to law or sound policy or good morals". The reasons for the public policy is expressed by Ritcey C.J. at p. 544:

> "Where the fact comes to the knowledge of a party, as this most assuredly did, that a felony has been committed, if it is not his duty to compromise or compound the felony, because by so doing he is thereby enabled to secure to himself a pecuniary advantage by obtaining security for the amount embezzled or stolen. Considering that embezzlement is rampant at the present day, if we may judge from the cases from day to day detailed in the public print, one would think the banks especially would endeavour to put a stop to such practices instead of practically encouraging them by hushing the offence up on being secured the pecuniary loss they would otherwise sustain.
>
> If they will not prosecute is it not right and proper that courts should not allow them to benefit by agreements made to compensate their loss by letting the offender go free in consideration of their not prosecuting? Surely it is the duty of banks and monetary institutions, and one would think their interest, to prosecute and to bring offenders of this sort to justice rather than, by concealing and stifling prosecutions, if not to encourage practically not to discourage such offences, all parties being well aware by confessions of the embezzler that a large amount of the plaintiff's money had been embezzled."

One must ask the question, should different policy considerations apply in the 1990s than those that were applied in the 1890s. I tend to think that there are as many persons who are prepared to forge cheques today as there were a hundred years ago. The policy considerations that dictated the unwillingness of courts to enforce agreements founded on illegal consideration ought not to be changed.

Disposition

The learned trial judge found that:

> "The evidence clearly shows that he (Newell) signed the written acknowledgement of responsibility in order to protect his wife from the possibility of criminal charges for forgery, which the bank said it intended to lay if he did not sign the letter acknowledging responsibility. The plaintiff confirmed that he said that he did not want the mother of his children going to jail. The additional forgery of the

> promissory note would not have made any difference in achieving that stated purpose. I find that he would have signed the written acknowledgement of responsibility even if he had been then aware of the forged promissory note in addition to the forged cheques."

Mrs. Newell did not purport to be signing the cheques on her husband's account as agent on his behalf; her signature on the cheques were outright forgeries of his signature. There could be no ratification by Mr. Newell as Mrs. Newell did not profess to be signing the cheques as his agent. Therefore, Mr. Newell could only be bound by his acceptance of responsibility for the cheques if there was a valid contract between Mr. Newell and the Bank whereby he adopted the cheques as his own. To be enforceable by the Bank, valuable and lawful consideration would have to flow from the Bank to Mr. Newell. The only consideration flowing from the Bank to Mr. Newell was an agreement not to turn the matter over to the authorities. In other words, not to report his wife's crime which presumably would lead to a criminal prosecution. On the authority of the aforesaid cases, the Bank's consideration was illegal. Therefore, there was no contract with Mr. Newell that the Bank could enforce.

Mr. Newell was not bound by his acceptance of responsibility for the cheques drawn by his wife, because there was no valuable consideration flowing from him to the Bank. Nor was Mr. Newell, otherwise, "precluded from setting up the forgery" as those words are used in s. 48(1) of the **Bills of Exchange Act**. As a consequence, he is entitled to require the Bank to credit his account for the amount drawn out by his wife.

The learned trial judge erred when he held that the plaintiff had adopted the forged signatures on the cheques.

There was no money that changed hands by reason of Mr. Newell having signed the letter of April 7th, 1993, as the Bank simply did not credit his account for the amount

of the forged cheques which it was required to do absent Mr. Newell's agreement. Therefore, there is no need to consider cases which prohibit the recovery of money paid under illegal contracts.

Mr. Newell is entitled to have his bank account credited for the sum of $58,341.72.

I agree with Justice Bateman that the appeal ought to be allowed. I also agree with her disposition with respect to pre-judgment interest and costs.

Hallett, J.A.

Concurred in:

Flinn, J.A.

C.A. No.129091

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

MAXWELL PHILIP NEWELL	)	
Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
ROYAL BANK OF CANADA	)	
	)	HALLETT, J.A.
Respondent	)	
	)	BATEMAN, J.A.
	)	(Concurring by
	)	Separate Reasons)
	)	
	)	
	)	