

The National Bank Ltd v O'Connor & Bowmaker (Ireland) Ltd

(1969) 103 ILTR 73 (11 November 1963)

Budd J.

1. The matter in issue in this case is as to the legal ownership of a sum of £12,000 at present lodged in Court to abide the result of the action. The contest as to ownership lies between the plaintiffs and the first named defendant. The second named defendants were originally joined as parties because, at the time when the proceedings were launched, they actually held the moneys. But by an order of the Court however of the 11th February, 1963, it was ordered by consent that they the defendants Bowmakers (Ireland) Ltd. were to lodge the sum of £12,000 in Court together with an agreed sum of £917 for interest to the 31st January, 1963, and that all further proceedings against them be stayed. The Court reserved the question of the liability of the Company for the said interest.

2. The basis on which the plaintiffs allege that they are entitled to recover the moneys in question are briefly stated in the pleadings but the surrounding circumstances are of a most unusual nature and I shall have to deal with them later in some detail. The claim in so far as pleading is concerned may be paraphrased in the following fashion.

3. On the 28th August, 1961, the plaintiffs through their Tuam Branch issued two bank drafts. The first No. 10899 was for £6,000 in favour of C. Melvin. The second, No. 10900 was for £11,000 in favour of the first named defendant. The plaintiffs say that they received no consideration in respect of the issue of either of these drafts and that they were induced to issue the same by the fraud of one J. E. Thornton and in the mistaken belief of fact that two other bank drafts produced by the said J. E. Thornton and drawn on the Bank of Ireland for the respective sums of £13,000 and £9,000 were valid bank drafts whereas in fact these drafts had been forged by the said J. E. Thornton and were worthless. To clarify matters it should be stated that the said J. E. Thornton was at the time an official of the plaintiff Bank, holding the position of teller in their Tuam Branch. The said J. E. Thornton it is said gave the two first mentioned drafts to the defendant O'Connor, who is alleged to have given no

consideration in respect of either to the said J. E. Thornton or at all and it is further alleged that O'Connor knew or ought to have known that these drafts had been obtained by Thornton from the plaintiffs by fraud, were delivered to O'Connor in mistake of fact and it is claimed they remained at all times the property of the plaintiffs, who received no consideration therefor. Alternatively it is claimed that these first named drafts were wrongfully converted by O'Connor to his own use.

4. It is then further alleged that the defendant O'Connor on the same date the first mentioned drafts were issued proceeded to the Athlone Branch of the plaintiff Bank and knowing the same had been obtained in the manner set out presented them there for payment having endorsed on the first draft the names "C. Melvin" and "Joseph O'Connor", and on the second draft the name "Joseph O'Connor". The plaintiffs then say that in purported payment of the said drafts and at the request of the first named defendant they issued to him on the same date a further bank draft No. 14492 for £12,000 drawn on the College Green, Dublin office, of the Bank in favour of the second named defendant. That draft the plaintiffs say was also issued in mistake of fact and remained the property of the plaintiffs who received no consideration in respect thereof. Alternatively it is claimed that the first named defendant wrongfully converted the draft to his own use.

5. After the events narrated it is alleged that the first named defendant placed the proceeds of the draft for £12,000 on deposit with the second named defendant who at the time of the issue of the proceedings still retained the money, which the plaintiffs claim remained at all times their property. On discovery of the alleged fraud the plaintiffs demanded the return of the proceeds of the draft for £12,000 but the first named defendant refused to comply with the request or to allow the second named defendant to do so.

6. The plaintiffs claim a declaration that the proceeds of the draft for £12,000 are and were at all material times the property of the plaintiffs and payment of the said proceeds with interest thereon. They also claim repayment of the said moneys as moneys had and received by the first named defendant to the use of the plaintiffs or as money paid under a mistake of fact or as

money paid to the first named defendant the consideration for which has totally failed.

7. On the presentation of the case and the final arguments based on the facts adduced the plaintiff's claim to recover or to be paid the moneys in question rested on three main contentions. First that the plaintiffs were entitled to recover the moneys because they were obtained by O'Connor, when he was a privy to Thornton's fraud when the bank drafts were obtained in Tuam, not on the basis that he knew of the actual fraud perpetrated but because he ought in all the circumstances of the case to have known that the drafts obtained in Tuam were obtained by fraudulent means. The allegation was that he had implied knowledge of the fraud in that he had or should have had a well grounded suspicion that some fraud was being perpetrated and a fraudulent determination not to learn of it or having the means of knowledge of it wilfully disregarded it. Put in another way that when his suspicions were aroused, he in fact deliberately shut his eyes and abstained from the type of proper inquiry open to him and called for in the circumstances. Secondly that the moneys were obtained under such a mistake of fact as to render them recoverable in law. Thirdly that they could properly be recoverable on a claim in rem by what is known as the doctrine of tracing. This is on the basis first that the moneys can be clearly traced in Messrs. Bowmakers Ltd. hands as there held to the first named defendant's credit. Secondly that where money has been transferred under a voidable transaction or under voidable transactions and the owner then discovers facts entitling him to avoid the transactions he may do so and re-vest the moneys in himself and recover them. In the view which I take however of the law applicable and the facts of the case I do not find it necessary to come to a decision on the arguments presented on this aspect of the case.

8. The first named defendant answers the plaintiff's claim by a number of pleas but those relevant to the case as finally presented and argued may be summarized as follows. It is pleaded and submitted on the facts adduced that the defendant O'Connor did not and could not have known that the drafts issued in Tuam were obtained by fraud on the part of J. E. Thornton. It is denied that the drafts issued in Tuam were obtained by fraud on the part of J.

E. Thornton. It is denied that the drafts issued in Tuam and the draft for £12,000 issued in Athlone were issued in mistake of fact and further submitted that if the drafts were issued under any mistake of fact it was not such a mistake as would in law entitle the plaintiffs to recover the moneys in question. It is denied that there was any act of conversion on the part of the said defendant or any lack of consideration. There were also certain pleas of estoppel contained in the defence but as this line of defence was not pursued at the hearing I need not deal with it. The first named defendant also asserts that all the relevant drafts issued were valid drafts and on delivery to him became his property.

9. There is no controversy as to the actual issue of the drafts at Tuam or as to O'Connor obtaining value for them at Athlone but I should say to begin with that it was established beyond doubt in my view that the drafts in question issued at Tuam were obtained by Thornton from the plaintiffs by fraud. I will refer briefly to the method of the fraud later. The question has however to be determined in the first place whether the defendant O'Connor ought to have known that the drafts issued in Tuam were obtained by fraud, in such fashion and to such extent that he should be held privy to the fraud in a manner that would disentitle him to retain that portion of the proceeds of the drafts sought to be recovered by the plaintiffs, namely that portion represented by the issue of the draft in Athlone.

10. In order to arrive at a determination of this issue and others it is necessary to consider the history of the events leading up to the obtaining of the drafts in Tuam. This involves investigating a very extraordinary series of transactions taking place between Thornton and O'Connor between the year 1953 and August 1961 inclusive. The transactions were complex. Thornton and O'Connor are not agreed on many points and there are various discrepancies and contradictions in the evidence of each, which makes the case a difficult one to deal with.

11. Thornton had joined the service of the Bank in 1940 and was in 1950 transferred to the Nenagh branch of the Bank when he came in contact with the defendant Joseph O'Connor, who was a customer of the bank at that

branch. He became on friendly terms with him. In July of 1953 he was transferred to the Newbridge branch and later in October, 1956, he was transferred to the Tuam branch, where he held the position of teller. He still held that position in the Autumn of 1961 and it was at that time that the events occurred with which I have particularly to deal. The defendant Joseph O'Connor is a wholesale fruiterer and confectioner in Nenagh, apparently in a very successful way of business. During the course of these series of transactions between Thornton and O'Connor, O'Connor advanced considerable sums of money to Thornton for the purpose of their being invested in an enterprise which O'Connor says that Thornton induced him to believe in the existence of and which in brief it is alleged had to do with the purchase of vehicles at a low price and their resale at exceptionally advantageous terms which enabled profits to be earned of such an amount that resulted, as O'Connor alleged, in Thornton being able to pay an altogether unusual rate of interest to O'Connor on the moneys he advanced. The moneys were supposed to have been used by a group which Thornton had contact with. At a later stage in their dealings according to O'Connor the moneys advanced were held in the form of bank drafts which secured the transactions of the group. While it was not definitely proved that no such group ever existed, the evidence leads strongly to the belief that it never existed and in my view the proper inference on all the facts is that it never did. Thornton apparently had dealings with other persons of a character similar to those with O'Connor but just precisely what Thornton did with the moneys and how he operated was never clearly shown, his examination being necessarily restricted by the rule protecting witnesses from having to answer questions the answers to which might expose them to proceedings of a criminal nature. But the most probable explanation of Thornton's activities is that he got himself involved gradually in large borrowing transactions and used one person's money to pay off another. In fact part of his evidence was such as to lead to that conclusion.

12. The transactions commenced in 1953 while Thornton was at Newbridge. According to O'Connor Thornton arranged for O'Connor to give him a lift to Dublin. Thornton's object in going to Dublin was as I believe to arrange a loan. He did not succeed. Thornton and O'Connor are not agreed as to what then occurred but I prefer as regards this incident to accept the major part of

O'Connor's account. Thornton I believe told O'Connor that he could make £75 into £100 in ten weeks. That an uncle had given him an opportunity to invest, the nature of which investment he could not disclose. The money was advanced and an agreement made to share the profits. The money was repaid as arranged with £12.10.0 profit.

13. Similar transactions I am satisfied took place later at intervals. After a short time the length of investments increased to three month periods. After eighteen months to two years or so the amounts invested increased probably to the extent of roughly £500 and by 1956 were probably between the £500 and the £1,000 mark. By 1958 the advances were according to O'Connor about £4,000.

14. Sometime about 1956 O'Connor became concerned about the question of security, and there was talk of the assignment of a life policy by Thornton but that did not take place. O'Connor was also concerned as to how he would prove the loans made for investment if anything happened to Thornton. He says that Thornton told him he had left a document with his will showing the amounts owing. In any event from about 1956 onwards Thornton and O'Connor appeared to have agreed that Thornton should give receipts or promissory notes to O'Connor in respect of amounts advanced and this procedure was thenceforth operated. The amounts advanced carried interest sometimes indicated on the promissory notes or receipts or deducible therefrom or from the evidence. That interest was I am satisfied in the neighbourhood of 20% for a three months period, higher on occasions. Most of these promissory notes were destroyed so that much documentary evidence is not available. Payment of the amounts advanced plus interest appears to have been regularly made up to the end of 1960 or beginning of 1961. Thornton says he paid in cash save on one occasion but O'Connor says that after 1955 he got repayment by way of bank drafts as the result of advice given to him by his Bank Manager Mr. Ross relating to the danger of carrying large sums of money by car from Tuam. Some payments were I believe made by way of bank drafts as O'Connor says.

15. The amount of the advances in 1960 increased considerably. Thornton had, according to O'Connor, given him the impression that the group was prepared to allocate to them a larger share in the investment. O'Connor at that time appears to have endeavoured to increase his overdraft as he says for the purpose of raising more money to invest. Mr. Ross the local manager in Nenagh would not agree. O'Connor had in fact according to Mr. Ross told him about 1958 that he had money invested in connection with the purchase of lorries and that Thornton was the go between with those concerned in the transactions. As a result of the differences O'Connor had moved his account to another bank. O'Connor then in August 1960 saw Mr. Redmond, who was the Advances Manager of the National Bank, Mr. Elliott his deputy being present at the interview. Mr. Redmond deals with advances to the Bank's customers throughout the country. The upshot of the interview was that the limit of O'Connor's overdraft was lifted from £2,500 to £6,000.

16. At this interview O'Connor appears to have claimed that he was making a profit of £4,000 per year in his business. He did not produce accounts, according to Mr. Redmond, but did say that he had investments in connection with the sale of lorries to County Councils and intimated that he got 50% of the profits which were very substantial. The money involved he said was held by a bank as security. Mr. Redmond appears to have agreed to the increased limit on the overdraft for the purpose of O'Connor's business and to enable him to pay off a debt to a building society without interfering with the investments but not for the purpose of increasing the investments. Mr. Redmond incidentally said that O'Connor told him he had not disclosed these investments to the Revenue which O'Connor agrees was stated. The form of application for an advance that came up from the Manager as a result of this interview stated that O'Connor had invested £14,000. This was changed in the form giving sanction to the increased overdraft to £17,500. O'Connor stated in his evidence that he told Mr. Redmond that he was dealing with a cashier in a bank in connection with the investments. Mr. Redmond's evidence implies that this was not disclosed and Mr. Elliott stated that O'Connor could not have stated that the person concerned was in a bank.

17. As a result of the increased overdraft O'Connor stated that in August 1960 he was enabled to increase the advances to Thornton by the sum of £2,347.10s. and he also indicated that he was enabled to put in something in excess of £600 that would normally have gone into his current account. Round about the same period that I have been dealing with O'Connor also involved two friends in the investments, Mr. Gerald Claffey of Portumna and ex Superintendent Murphy of Portlaoighise. £5,000 came from Mr. Claffey and £1,000 from Mr. Murphy, which sums were duly included in the current investment amounting to about £14,000. The balance was provided by O'Connor, some of it coming he says from his increased overdraft. At this time O'Connor says that he again raised the question of security with Thornton and asked him if the business he was engaged in was legitimate above board safe and sound. He says that Thornton told him that the money never left the bank and that it was in the form of a draft. Thornton he says put it to him that surely a person in his position would not do anything wrong and ruin his family. This he says reassured him. He says that he suggested putting the money in their joint names. O'Connor says that Thornton said he would have to ask the group about that but later communicated their agreement. As a result an arrangement was come to whereby a draft and the contracts supposed to be related to the alleged group's activities were to be placed in a sealed envelope in the Bank of Ireland in Tuam. That was done, and a receipt given for the envelope deposited in their joint names. Also a stop was to be placed on the draft. O'Connor says he examined the draft which was made out in the name of Lee. Later it appeared that this draft was for £14,000.

18. According to O'Connor the amount then invested in September 1960 was £14,000, but £17,500 was to be repaid on 6th December 1960 which included £3,500 interest. A receipt for this amount from Thornton was produced. O'Connor says he received £5,500 from Thornton on the date arranged representing £3,500 interest and £2,000 capital. He says he distributed part of the interest in proportion to Mr. Claffey and Mr. Murphy. That transaction left £12,000 owing but O'Connor says he returned £2,000 to Thornton on the 1st or 2nd of January 1961 and that brought the amount owed up to £14,000. He says he got a new receipt for £14,000 repayable with interest

at 20% £16,800 on the 12th January 1961, which was also produced. The money was to be repayable on the 24th April, 1961.

19. O'Connor then says that at this stage early in January Thornton explained that they were to enter into new contracts. They went to Tuam and he says that Thornton opened the envelope and put in what he said were additional contracts. Thornton said there was no need to change the draft.

20. Later it appears from what O'Connor said that Thornton told him that a member of the group had died and that as a result there was about £8,000 or £9,000 of merchandise to be taken up. It was suggested that O'Connor should raise the money. He in fact did so by obtaining a loan of £8,000 less interest, £7,640 net from the Hire Purchase Company of Ireland. Of this O'Connor says he gave Thornton £6,500. A promissory note for £10,000 payable on the 24th April and dated the 20th January 1961 was produced but not positively identified as covering this transaction. This note is dated January 19th and contained a promise to pay £10,000 one month after date but it had the words and figures "Due April 24th 1961" on top. This note was not satisfactorily explained as I have said but O'Connor suggested that it was part of a series of notes. The suggestion was made that O'Connor was forcing Thornton to give him a promissory note for more than was then owing. But O'Connor stated he was to receive £1,300 profit on the £6,500, making £7,800. That would make a total of £24,600 due. But O'Connor says that Thornton agreed to let him have two sums £150 and £250 more for his trouble in raising money and in respect of extra interest making a total of £25,000 due eventually. A further visit was paid to Tuam and a draft in the name of Lee, this time for £9,000 was placed in the envelope.

21. Thornton's evidence did not agree with O'Connor's as to the amounts due at the time of the final reckoning and as to how the figures were made up. The figures he gave would not show the same result as that achieved by O'Connor. I do not however propose to set out these figures or attempt to elucidate them because Thornton finally stated that they agreed that £17,000 was due which was O'Connor's final claim. I have only this to say as a result of listening to the evidence of both of them that the impression created in my

mind was that it was O'Connor who really was the dominant one of the two in determining the figures as to the amounts repayable and I do not accept his suggestion that he accepted in all instances Thornton's figures. Most of the promissory notes produced appear to have been in O'Connor's handwriting.

22. There were then according to O'Connor two holdups in the repayment. First Thornton said repayment could not be made until May 28th and later that the date of repayment would be 30th July, 1961. Meantime the time for repayment to the Hire Purchase Company of Ireland arrived on April 25th. O'Connor says that to meet his commitment to them he then obtained an advance from Bowmakers of £8,000 out of which he discharged his obligations to the Hire Purchase Company of Ireland. The date of repayment was to be August 8th with three days grace to 11th August, 1961. Thornton later, O'Connor says, told him there would be a further delay in the repayment and he got an extension from Bowmakers to August 17th, 1961. O'Connor says then that on Thornton's assurance that he would send him a cheque he sent a cheque of his own to Bowmakers on August 12th. It appears that an arrangement about this cheque was come to and a further extension granted by Bowmakers to August 26th, additional interest to be charged. O'Connor says that he saw Thornton on August 14th and explained the seriousness of his position with Bowmakers. He says Thornton produced a post dated cheque for £24,000. Thornton says he gave O'Connor a cheque for £25,000 but it was given back and destroyed. Then on Friday 25th August O'Connor says that he went to Tuam and Thornton gave him a cheque for £8,000. It was signed B. P. Canavan and was duly sent to Bowmakers. The cheque was in fact forged by Thornton. That would leave £17,000 due, according to O'Connor's figures. O'Connor then saw Thornton in Nenagh on Saturday August 26th. He says that Thornton told him it was time for him to meet the group. O'Connor replied that he was interested in completing the transaction and not in meeting the group. They were to meet on the following day to complete the transaction but the meeting was postponed to Monday 28th August, 1961.

23. O'Connor and Thornton duly met in Tuam early on the morning of Monday 28th August. O'Connor was in fact on his way to Dublin that day intending to go on holidays. They went to the Bank of Ireland and withdrew the

drafts. The amount that would have been due on the figures given by O'Connor would have been £17,000 made up as stated, that is of course allowing for the payment of the cheque for £8,000. O'Connor says they were agreed on the figure. Sometime before ten o'clock Thornton having gone back to the National Bank came out with a draft for £6,000 payable to "C. Melvin". O'Connor said he had given Thornton drafts for £22,000 and demanded payment of the rest of his money. He says he returned the draft and Thornton rushed into the Bank. He says he telephoned to Thornton later, Thornton having said he would have to telephone to the group. Thornton said he would see him at 12.30. He later handed him the draft already mentioned and another in O'Connor's favour for £11,000 at about 12.45. There was some discussion O'Connor says about cashing the drafts. He says that Thornton thought the Tuam branch might not have the money but they could be cashed in Dublin.

24. The defendant O'Connor having had this discussion with Thornton as to the cashing of the drafts then left for Dublin, where he was going in any event that day, but on the way as he says he decided that, as the bank in Dublin would be closed by the time he got there he would cash the drafts in Athlone. He therefore proceeded to the Athlone branch of the National Bank. He presented himself to the acting manager Mr. Caulfield and introduced himself as a customer of the Bank at Nenagh. The drafts were according to Mr. Caulfield's recollection endorsed when he received them. O'Connor says that he endorsed the drafts in Mr. Caulfield's presence. On the direct he stated that he endorsed the one in his own name with his signature and address on the back and the other in the name of C. Melvin with the signature "C Melvin", in addition to his own signature and address. On cross-examination he admitted that his address on both drafts was not in his handwriting. He requested that the drafts should be met by the lodgment of £4,000 to the account of Ursula Claffey at the Loughrea branch of the Hibernian Bank, £1,000 to the credit of Murphy's account at the Portlaoighise branch of the Munster and Leinster Bank, and after discussion with Mr. Caulfield it was arranged that the remainder of the drafts should be met by the issue of a draft in favour of Bowmakers (Ireland) Ltd. for £12,000 drawn on the College Green branch of the National Bank. O'Connor stated that he intended to place the amount on deposit with Bowmakers and subsequently did so. The actual processes

involved was that the Bank met the draft and paid the amount to Messrs. Bowmakers. O'Connor says that he told Mr. Caulfield that C. Melvin was a fictitious name. Mr. Caulfield's recollection as given in direct examination was that he asked who C. Melvin was and that O'Connor said he was a business acquaintance. On cross-examination however he obviously had doubts and finally said he could not recollect if O'Connor did say there was a C. Melvin a business acquaintance. Mr. Caulfield was satisfied that the drafts presented were proper, that is to say issued with proper authority from Tuam.

25. Having thus dealt with matters at Athlone O'Connor proceeded on to Dublin and Colwyn Bay. He later returned as a result of a telephone call from the Chief Inspector of the National Bank when the frauds had been discovered on Thornton's disclosures.

26. I should at this stage refer to Thornton's part in the events of August 28th. There is no need to dwell on this in detail as it is quite clear what occurred and there is no doubt that it was through his fraudulent actions that the drafts for £11,000 and £6,000 were issued. No controversy arises as to this. He had previously taken out with the Tuam branch of the Bank of Ireland two bank drafts in favour of A. Lee and A. G. Lee fictitious persons for the amounts of £13 and £1 respectively. These drafts were fraudulently altered to read as if they were for the sums of £13,000 and £9,000 respectively, making a sum of £22,000 in all.

27. Purporting to act on the instructions of B. P. Canavan, Thornton on August 18th, 1961, then presented these drafts to the senior officials of the National Bank at Tuam together with forged requisitions purporting to be signed in the name of Canavan seeking two drafts on the Bank's Dublin branch one in favour of J. O'Connor for the sum of £11,000 and the other in favour of C. Melvin a fictitious person, for the sum of £6,000. The requisitions were duly initialled by Thornton, which conveyed to the officials concerned that the customer seeking the drafts was in funds or had provided funds to meet the drafts. This I should say is the usual method of indicating that funds are in hands. These drafts were subsequently handed to O'Connor by Thornton. The

balance of £5,000 was disposed of in various ways with which I am not concerned in these proceedings.

28. Thornton later abstracted the two drafts from the letter containing the remittance sheet going to Dublin that night and destroyed them. He substituted a cheque drawn on his account in the Bank of Ireland at Nenagh for £22,000. He also appears to have perpetrated further frauds in connection with Canavan's affairs but as these transactions are not relevant to the claim and issues which I have to decide I refrain from dealing with them as they would tend merely to confuse the main narrative.

29. It has only to be added in respect of these matters that Thornton was charged in connection with several of the matters narrated. He pleaded guilty *inter alia* to forging the Canavan cheque for £8,000, to forging the requisitions for the drafts for £6,000 and £11,000 in the name of B. P. Canavan, to uttering the two forged bank drafts for £13,000 and £9,000 respectively and to receiving the Bank drafts for £6,000 and £11,000 with intent to defraud. He is now in respect of these and other offences serving sentences of penal servitude and imprisonment.

30. I should say at this stage that while the acts of a fraudulent nature which Thornton pleaded guilty to related to 1961 there can, I think be no doubt that the proper inference to draw from all the evidence is that he commenced some form of fraudulent activities at a very early stage of the transactions that took place between himself and O'Connor.

31. Returning again to the transactions between the two, it was put to O'Connor in cross-examination that Thornton had in fact paid him £5,000 between April and August, 1961. O'Connor said he had completely forgotten this until he heard Thornton's evidence. Finally it was admitted that he received £2,000 from Thornton on May 31st 1961 and a further £3,000 by way of bank draft at the end of July or beginning of August. It was pointed out that on April 24th the balance due would have been £24,750. Adding the additional £250 agreed to be added later would make £25,000. On the other hand the amount of the Bank drafts totalling £17,000 together with the Canavan cheque

of £8,000 and the payment of £5,000 by Thornton would make a repayment of £30,000 or £5,000 more than was due. O'Connor's ultimate explanation of this was to suggest that it represented interest on the amount outstanding after April, 1961, that he had to pay interest to others and could not pay it unless he received it but it was a very belated explanation. The suggestion was that while the money was invested it would earn interest. He was asked did it not seem to him that this was rubbish when he knew it was deposited in Tuam. He said it did not. He was asked how he reconciled a statement that he had made that on the day he got the drafts he insisted on getting the additional £11,000 because he thought Thornton was investing to his own advantage. Why should he think that if he were in fact getting interest as formerly? Thornton, he replied, could be getting greater interest.

32. O'Connor was also asked had he made substantial investments during the years 1958 and 1959. He agreed he had. The profit he agreed would be between 18% and 20%. The evidence indicated that 20% interest was the most usual rate during the greater period of the transactions, sometimes however going higher. As to the amounts invested in the period before 1960 he said he had no records and could not recall figures. In the latter end of the preceding period he agreed that £5,000 per quarter would be the figure but later said he could be inaccurate about that. He was asked about previous transactions but professed to what I can only describe as a remarkable lapse of memory. I do not suggest that he should be expected to carry detailed figures in his mind but having regard to the nature of the whole transaction I am satisfied that his powers of recollection and business capacity would have enabled him, had he chosen to do so, to give a very fair approximation of the amounts involved and the resultant interest. Such evidence as was forthcoming leads me to the belief that there was a fairly steady increase in the amounts invested and that very substantial profits were made before the transactions at the end of 1960 and the beginning of 1961.

33. It was strongly suggested to O'Connor in cross-examination that in the final transactions no real capital of his was involved or at most £3,000 and that he was really using interest gained or profits and other peoples' money. This was not substantiated to the extent of satisfactory proof as to an actual figure,

but O'Connor's answers on this topic were to my mind deliberately evasive and uncandid.

34. I believe that he could well have given much more detailed information even if of an approximate character and that he did not make fuller disclosure because it would have involved showing that in fact he had made such large sums in interest as would have gone far to show that he was not risking a great deal of his own moneys above what he had received in the form of interest. That is I consider the proper inference that should be drawn from the evidence and his attitude. Taking the evidence by and large it is clear that a substantial proportion of moneys reinvested at the end of 1960 or beginning of 1961 could be fairly said to have represented interest in the sense that interest of a large amount had gone into O'Connor's pocket and being mixed with his own moneys was available to provide further investments.

35. O'Connor was challenged about the amounts he had received over the years by way of interest. He was asked in detail as to the amounts of interest involved in the last 20 months of the transactions. Allowing for possible inaccuracies it seems to be a fair conclusion that, without considering compound interest, interest was received to an amount in the neighbourhood of £15,000 during the period of 20 months before August, 1961. The figures were gone into in detail and a figure of over £15,000 agreed to. It was suggested that this was a return obtained on £30,000. On my tot of the moneys that were put to him as advanced the figure would be over £54,000. The explanation may be that the sums of £14,000 are in a sense a duplication. If the total of advances was £54,000 the position would be that the rate of interest would be less but even then the rate would be in the neighbourhood of 25%. If £30,000 were the proper figure for money advanced during the period the rate would be about 50% that is assuming payment at three month intervals. O'Connor having agreed to the above figures of over £15,000 stated however that he regarded £20,500 in January as producing £4,250. I assume from his evidence and the figures that he was referring to the advances of £14,000 and £6,500 which would make £20,500. These were to produce £2,800 and £1,300 making £4,100 to which apparently he was adding the sum of £150 for trouble or extra interest making the figure of £4,250 in all or approximately

20%. It was suggested to him that the sum mentioned was actually producing £9,500 by July. That I gather on the run of the evidence to be made up of £5,000 received from Thornton and the above figure of £4,250 plus the £250 later agreed for interest. He agreed that he had earned £9,500 between January and August. That would be well over 40%. Assuming however in O'Connor's favour that the interest of £5,000 should be taken as payable on the total sum, including interest, of £24,250, the rate of interest would still be over 20%.

36. Although O'Connor agreed to the figures first stated I would not feel that any definite finding as to percentage should be made on them beyond saying that given the opportunity O'Connor did not, on the challenge as to the figures above mentioned accepted by him, seek to show in any satisfactory fashion that the large rate of interest had not been obtained in a short period. However I think it quite safe to say that a rate of interest of 20% and sometimes even higher over a three months period was not in any way displaced.

37. Advances for investment purposes were continued fairly regularly. Although exact figures were not established they were increasing and by 1960 had reached to very large sums in the neighbourhood £14,000 and it is now relevant to consider how this state of affairs came about. Why should a business man apparently successful and presumably therefore of some shrewdness as I believe he is make such very large advances to a person in Thornton's position without any more security than promissory notes. The evidence does not reveal that O'Connor could have any reason to believe that Thornton had any resources outside a teller's salary. What then induced O'Connor to make the advances?

38. O'Connor obviously must at an early stage as a business man have given serious consideration as to what was being done with his money, how safe it was in Thornton's hands and how such a high rate of interest could be obtained. As to be expected he raised the matter with Thornton. Their accounts do not agree as to what passed between them, but reviewing the evidence as a whole I have come to the conclusion that Thornton in a series of

conversations with O'Connor said so much or agreed with things said by O'Connor as would have left O'Connor under the impression that Thornton wished him to believe that the money was being invested through a group, that an uncle of his of means was one of the group, some highly placed person connected with the government was another and that a third was someone who had contacts with the business involved. The business involved I believe was intimated to be broadly speaking the purchase of motor vehicles at low prices and their resale at a very large rate of profit. I believe also that Thornton at several stages intimated that he was bound to maintain secrecy as to the nature of the transactions. How far O'Connor accepted or should have accepted the story is another matter.

39. The question of the legitimacy of the alleged investments continually cropped up. O'Connor appears to have constantly asked if the investments were legitimate and above board. He alleged that he would be put off by ridicule, that Thornton would reply that he must think him a fool and would not risk ruining himself and his family by doing anything wrong. But apparently when the investments were about the £1,500 mark O'Connor alleges that Thornton told him that the group was in contact with Fords of Cork, that over production on a particular car schedule might take place and that the contact in Cork could buy the over produced cars at a greatly reduced price. It was further suggested that the person connected with the government or in a governmental department would know when tenders were required for the supply of vehicles to government departments and then through Thornton's uncle a tender would be sent in which would be smaller than other tenders because the contact in Cork could purchase at greatly reduced prices. O'Connor however stated that he made inquiries about this story through a friend who was able to make inquiries from a retired manager of Fords and was informed that no such arrangement could or did exist. He then challenged Thornton he said on this information. The answer was to the effect that Thornton was under an oath of secrecy and could not reveal the exact thing but that it was similar in nature to the investments the group were conducting.

40. On another occasion O'Connor said that Thornton told him that lorries were being got for the Echo in Cork. Asked further about this Thornton is

alleged by O'Connor to have said that they were securing the merchandise by means of a draft, while it left the place of manufacture until it reached its destination. The merchandise had to be paid for three months in advance and a stop would be put on the draft as for three months in advance. What this meant is obscure but I take it to mean that the drafts securing the transaction could not be cashed during the three months period during which they provided security in some fashion not clear to me. It was apparently not clear to O'Connor because he queried Thornton on the matter and was told that the head office of the Bank of Ireland were notified of the stop and that the person supplying the merchandise knew that there was actual money there which could not be drawn until the merchandise was paid for. Thornton and he were only securing the payment. Actual payment would be in another form. When the merchandise reached its destination the stop on the draft would be released and O'Connor would get his share as a result of having secured the merchandise.

41. The allegations against O'Connor as finally relied on were not that he actually knew that the two drafts for £6,000 and £11,000 respectively were obtained by Thornton's fraud but that the evidence showed that he had or should have had a suspicion of fraud on the part of Thornton, that he then shut his eyes to what was obvious to him or ought to have been obvious to him and fraudulently determined not to learn the truth or wilfully disregarded the means of knowledge open to him, that he chose instead to continue his dealings with Thornton while having a well grounded suspicion that Thornton was acting fraudulently without taking proper steps to assure himself that his suspicions were unfounded and thus was privy to Thornton's fraud. In short that knowledge of the fraud should be implied to him. That the doctrine of implied or constructive notice applies to commercial transactions such as those appertaining to negotiable instruments appears clear from the case referred to below.

42. Referring to this type of notice and the implication of knowledge of fraud that it carries with it there are several observations of eminent judges to which I should like to refer.

43. In the case of *London Joint Stock Bank v. Simmons* [1892] A.C. 201 Lord Herschell at p.221 having stated that he would be sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments but that regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith, he added

If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

44. Goddard C. J. in *Ellis v. Hinds* [1947] 1 K.B. 475 at page 482, said

If a man deliberately shuts his eye to the obvious, he has as much knowledge as if he were expressly told the fact to which he has closed his eyes.

He qualifies that however by saying.

But it is quite another thing to say that because a man has means of knowledge of which he does not avail himself, therefore he has knowledge.

45. As to what amounts to closing one's eyes the observations of Willes J. in *Raphael v. Bank of England* 17 C.B. 161 at p. 174 are very relevant. He was referring to what had been said by Parke B. in *May v. Chapman* 16 M. & W. 355 and approved of the view that

'notice and knowledge' means not merely express notice, but knowledge, or means of knowledge to which the party wilfully shuts his eyes,—a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded.

46. Byles, J. in *Oakley v. Ooddeen* 2 F. & F. 656 at p. 657 put it in this fashion

"That is, did he either know it, or suspect it, and, having *means* of knowledge, wilfully shut his eyes to it? It is not necessary that the party should know of the *specific* fraud, or know all the circumstances of it. If he

suspected a fraud, and chose not to ask, *lest he should know*, he had sufficient notice”.

47. I also refer to the proposition evidently approved of by Shadwell V.C. in *Jones v. Smith* 1 Hare 43 that what is required to fix a person with implied knowledge of fraud is a suspicion of the truth and a fraudulent determination not to learn of it. Wilfully abstaining from enquiries when suspicion is aroused is much the same thing and has much the same result as will be seen from the observations of Lord O'Hagan in *Jones v. Gordon* [1877] 2 A.C. 616 at page 625.

48. Most of the cases dealing with implied notice in the case of negotiable instruments are cases of persons suing on such instruments. If, however, a person suing on an instrument cannot recover if it is not taken in good faith it seems logically to follow that a person can also sue to recover the proceeds of a negotiable instrument which was not taken in good faith. It was indeed held in the case of *R. E. Jones Ltd. v. Waring & Gillow Ltd.* [1926] A. C. 670 to which I later refer, that the payee of a cheque must refund the proceeds as money paid under a mistake of fact, when payment of the cheque came about through the fraud of a third party even though the fraud was that of the third party and the payee was quite innocent.

49. There are however other considerations which must be borne in mind. The presumption in a case of fraud is always in favour of innocence. The onus is of course on the plaintiff and care and caution should be exercised by the court in dealing with matters of fraud as the Lord Chancellor pointed out in *Bowen v. Evans* (1848) 2 H.L. Cas. 257 at p. 281. Lord Denning in *Bater v. Bater* [1951] P. 35 said at p. 37

“A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established”.

50. The degree of proof is not as high as in a charge of a criminal nature but still it does require a degree of probability commensurate with the occasion. Fraud must be strictly and clearly proved but it is not necessary that direct affirmative proof be given. Frequently the only sort of evidence that can be

given is circumstantial. Fraud may be inferred from established facts. It is enough however if the Court is satisfied that from the conduct of the party it can draw a reasonable inference of fraud and ought, bearing in mind the high degree of proof required, from the circumstances and facts proved, draw that inference. These remarks apply equally well to cases of implied knowledge of fraud.

51. Applying the above quotations and observations to the facts of the present case it would seem to me that the plaintiffs must satisfy me, first that the facts proved and the conduct of O'Connor show with a high degree of probability that O'Connor had suspected that Thornton was carrying on a fraud and was fraudulently obtaining the moneys which he gave to him or at least that there was a high probability that O'Connor had real suspicions of the same kind. Secondly that he deliberately shut his eyes to this state of affairs and fraudulently, because he suspected or had good reason for suspecting the truth, failed to make such proper inquiries as were open to him which would have revealed the truth to him or wilfully disregarded means of knowledge and deliberately continued the transactions with O'Connor with well grounded suspicions unresolved instead of ceasing to deal with him as an honest man should. Thirdly that the knowledge that ought to be imputed to O'Connor being of the nature indicated continued to August 28th 1961, and that he continued deliberately to shut his eyes and fraudulently failed to make proper inquiries or wilfully disregarded means of knowledge to the same state instead of ceasing to deal with Thornton. Fourthly, that bearing in mind the high degree of proof that is required in all the circumstances the proper and reasonable inference to draw was that he ought to have known, not precisely what Thornton did on the morning of August 28th 1961, but that he was obtaining the drafts in question in some fraudulent fashion and still continued to shut his eyes to well grounded suspicions and chose to go through with the transactions on that date with his suspicions unresolved.

52. Before dealing with the circumstances relied on to fix O'Connor with suspicion that a fraud was being perpetrated, and that he was a privy to it in the sense of shutting his eyes to it, I should say that I am unable to accept a great deal of O'Connor's evidence. To state cogent examples I do not believe

for one moment that he ever forgot that Thornton had given him £5,000 in the Summer of 1961. He knew in early September 1961 that it was alleged that Thornton had committed a fraud on the Bank and that a very large sum of £17,000 which he had obtained was involved. He then had every reason to consider all his transactions with Thornton at that stage many of which were quite fresh in his mind and it is quite incredible that he could not have remembered these payments, one occurring just a month before and involving £3,000. These payments from Thornton involved the admission that he had got £30,000 from Thornton during the Summer of 1961, which he did not reveal in his original calculations as being composed partly of this £5,000, a most suspicious omission of something he knew full well. Nor do I believe he had forgotten that he had given Mr. Claffey £1,000 shortly before the impeached transactions. Another example of his evidence that I do not believe is his statement that Thornton told him in the later stages that he would go to the directors of the Bank to gain time for repayment. Having regard to what O'Connor says about Thornton's anxiety to hide his activities from the bank, his is altogether incredible. These are but examples and by no means exhaustive.

53. Further I consider that O'Connor was something more than evasive in his answers with regard to the transactions that he had with Thornton before 1960 which were not proved by documentary evidence. I believe that as a keen business man he must have known at least roughly what he had invested and received in those years and could have given far more information on these transactions than he actually did and that he was altogether lacking in candour as to his answers.

54. I am satisfied that he had a dishonest motive in failing to give more figures even of an approximate variety than he did, that motive being that fuller information would have demonstrated that he had received very large sums by way of interest from Thornton during the years before 1960 and approximately how much they were.

55. Having regard to these and other matters and his general attitude and demeanour in the witness box I was forced to the conclusion that O'Connor was not a trustworthy witness as to many parts of his evidence. I mention this

because it has affected my view as to the proper inferences to draw, bearing in mind of course that the onus is on the plaintiff and that a high degree of proof is required. In particular I did not accept his professed acceptance of the assurances given to him as to the honesty of the transactions that Thornton was involved in or supposed to be involved in.

56. I turn then to deal with the circumstances from which it was suggested either by way of submission or by way of implication in the course of cross-examination that the inference should be properly drawn that O'Connor was privy to the fraud in the sense I have indicated.

57. First there was the quite fantastic rate of interest received by O'Connor. On his own showing round about 20% on a great number of three month transactions. This is said to be equivalent to 80% per annum. It would be more correct to say that if the same £100 were invested at the rate of 20% every three months that would produce a 80% return but there can be no gainsaying that the rate of 20% for three months was fantastically high and sometimes the rate went even higher. He also said that the arrangement with Thornton was that they were splitting profits fifty fifty. If that were so the profits were of an even more incredible nature. According to O'Connor also the group had to get its share before they did, which meant that the alleged profits were even higher and the whole thing the more incredible still. It is submitted that it was obviously in the highest degree improbable that any large number of honest transactions would give that return over a long period. The possibility of it was so unlikely that any reasonably intelligent person, as O'Connor obviously is, would have been put on immediate inquiry and make a demand for full and true information and if he did not get it then his suspicions should have been the stronger and such that would cause an honest person to cease having these transactions.

58. Further there was, it was pointed out, the extraordinary statement by Thornton to the broad effect that the transactions of the supposed group were only being secured by the two of them by means of drafts lying in the Bank of Ireland at Tuam, which apparently lay in a sealed envelope in the later stages of the transaction. How O'Connor could have believed that any business

transactions of the kind deposed to by him could have been aided in this way it was said passed beyond reasonable comprehension. Likewise it is asked how could O'Connor have believed that that form of security could have produced the rate of interest paid, particularly during a period when as O'Connor says he was told that there was a hold up in the alleged groups activities during the Summer of 1961.

59. Then during the later stages of the transaction there were supposed to be contracts enclosed in the sealed envelope. Again it appears to be a more than suspicious circumstance that O'Connor did not demand to see these documents. If the suggestion is made that the circumstances indicate that Thornton would have refused to let him see them then the obvious answer is that in the circumstances he should have insisted on seeing them and acquainting himself with the true facts and if refused he should again have had his suspicions further increased and refused to have further dealings with Thornton.

60. There was also the matter of Thornton's position. He was a teller in a bank. O'Connor must have known that his salary could not be large and he makes no suggestion that he was aware of or thought that Thornton had other financial resources. Yet he was content to advance these very large sums with no security beyond promissory notes. As a teller Thornton would have large sums of money under his control and O'Connor must have known that well. Further there was the element of secrecy about the activities of the group. It is difficult to see, it was suggested, how O'Connor could have believed that such long continued transactions of the type he alleges he was told of could ever have been kept from the light of day in modern business life. Taking it that he did believe that secrecy was being insisted on and maintained it was suggested that it was assuredly another reason to call for suspicion and inquiry. Secrecy in transactions without indication of good reason therefor is at least an element that should call for some investigation and it is submitted that the reasons given for not pursuing further inquiries were far from satisfactory in many respects.

61. Apart from these specific matters there is a general overriding factor which is relied on. The whole story that O'Connor professes to have believed in that a group existed which could make such enormous profits as to enable them to pay him through Thornton such large profits out of dealings in motor vehicles was in itself it is said of such a nature as to raise immediate suspicions as to the existence of such a group and the possibility of such transactions being legitimately carried on.

62. There are however certain factors in the case which it was said or might be said on the face of them to indicate innocence and to weigh in O'Connor's favour in that they appear to be inconsistent with a suspicion of dishonest activities. I have naturally considered these matters very carefully and considered what weight I should give to them. The most convenient course to take with regard to them is to make such comments on them as I proceed as are the result of my consideration of each of them.

63. To begin with there is Thornton's statement that O'Connor did not know what he was doing. That was said but it seems to me to be beside the point on the matter I am considering. The question is should his suspicions have been aroused or were they aroused and did he then take the steps that an honest man would have or choose to shut his eyes. Other shrewd persons were also apparently deceived by Thornton. I also accept that Thornton was of the highest reputation. While these are matters to be taken into serious account what I have however to determine is the proper inference to be drawn from the circumstances and O'Connor's actions or lack of action. The question is still, even if Thornton was of high reputation and others also deceived by him, ought O'Connor to have had his suspicions aroused by what he knew or did he have his suspicions aroused and yet close his eyes and proceed suspecting a fraud. It was pointed out that he raised money from the Bank to aid in the investments and also, that he raised moneys first from the Hire Purchase Company of Ireland and after that from Bowmakers (Ireland) Ltd., of a substantial amount. He was thus involving himself in a liability, which could be said an unlikely thing for anyone to do if he considered the transactions he was involved in were of a fraudulent nature which might result in his not being paid. But that all leaves out of consideration the fact that he had as I believe made very substantial

sums already so that he was not in reality ever risking any great amount of his original capital. In so far as it may be said that he was unlikely to risk the very large sums that were involved in the later transactions if he had good reason to mistrust Thornton it is to be observed that to then Thornton had always repaid him over a long period and that was all calculated to lead him to believe that whatever Thornton was in fact doing with the money, he would be again repaid.

64. He had furthermore, it was pointed out, mentioned to other people such as Mr. Redmond and Mr. Ross that he was making investments in transactions that had to do with the purchase and sale of vehicles. That would be likely to put him in the position later on if anything turned out to be wrong in these transactions that he could be shown to have stated that he was involved in them. But as against that these statements placed him in no worse position than he was going to be in in any event if it transpired that the whole thing was fraudulent. His answer would be just the same as it is now that he in fact knew nothing about anything fraudulent in the whole affair.

65. He had also in the latter stages involved two friends to a substantial extent in the affair. Would he be likely it is asked to do this and risk claims by them if he was acting fraudulently. Again it would seem to me that the answer would be the same. I knew nothing of the fraud. There was also one significant statement that O'Connor made that he was giving Murphy less than he got himself in interest, the significance of which is obvious.

66. Having considered all these matters and given them all the proper weight which I think should be attached to them I have to say that they are not such as to shake my views as to the conclusions I should come to, taking the evidence as a whole, which I will next state.

67. I accept the following allegations against O'Connor. First that the rate of interest received and profits supposed to be gained by the alleged group should of itself have roused the suspicions of any reasonable man. Secondly that the story that the transactions were being financed in the later stages by means of drafts deposited in a bank and that securing the alleged transactions

in that fashion could have so aided the alleged transactions as to enable the enormous amount of interest received to be paid should have had the same effect on O'Connor. Thirdly that the element of secrecy as to the nature of the transactions combined with a knowledge of Thornton's position and means should have added to those suspicions. Fourthly that these factors combined with the utter unlikelihood of the whole story of a group existing that could have carried on such transactions for such a length of time in secrecy should have carried conviction to the mind of O'Connor that something definitely wrong and dishonest was being done.

68. That all these findings and inferences are correct is borne out by what O'Connor said himself. On his own showing he continuously asked Thornton if everything was legitimate honest and above board. The fact is as I believe that not only should his suspicions have been aroused but that they were aroused. He showed his suspicions by asking his friend Mr. Claffey to inquire about the alleged transactions with Fords of Cork and the reply showed that the story was false. I do not believe that his suspicions were ever allayed by Thornton's evasive and improbable explanations.

69. Further I take the view that from Thornton's evasions and attitude of secrecy, and his whole attitude and the surrounding circumstances he should have suspected and must have suspected that Thornton was a party to whatever was going on and which he suspected was not of a legitimate nature.

70. Having regard to these conclusions I take the view that being suspicious and having well grounded reasons for his suspicion O'Connor should have forced the issue with Thornton. In other words he should have used the means of acquiring knowledge open to him and not been put off by Thornton's stories, which I do not believe he could ever really have accepted as true, and when he found that he was not getting the information which an honest man would have felt bound to get in the circumstances, he should have taken the step that an honest man would, namely to cease to have further dealings with him. He should have done that in my view long before 1961. Instead of that he chose in my view to close his eyes, and take a chance that an honest man with his knowledge and suspicions would not have taken.

71. I am therefore forced to the conclusion that O'Connor by acting in the way he did put himself in the position that knowledge of dishonest dealings of some sort on the part of Thornton ought properly in law be implied to him so as to make him privy to Thornton's wrongdoings before August 1961.

72. The question still remains as to whether implied knowledge that some sort of fraud was still being perpetrated should be imputed to him in regard to the actual transactions that have given rise to the proceedings. Despite the knowledge that I am satisfied should be imputed to him there may still be some reason why I should not on the evidence continue to draw these same inferences against him as to these particular events. I pass then to consider the circumstances leading up to and including what occurred on August 28th, 1961, with the particular view in mind of considering whether any fresh circumstances appear that would call for a finding that his actions were innocent in respect of them, that is whether it can be said that it has not been satisfactorily shown that the state of knowledge, that I have found should be imputed to him, continued right through.

73. There was in the light of the circumstances then existing an unusual occurrence on Friday 25th August. O'Connor had been pressed by Bowmakers and communicated this fact to Thornton. Thornton then produced on that day a cheque signed B. P. Canavan for the exact amount owing. O'Connor asked who B. P. Canavan was and was told that they were people in Tuam. Thornton says he asked him was it all right and that he said it was. He left it at that. It must however have struck O'Connor that it was at least peculiar that he had received a cheque for the exact amount with an entire stranger's signature to it.

74. As his suspicions should in my view have before then been thoroughly aroused and had indeed long since been aroused, this method of payment should have increased those suspicions and obviously called for investigation. Yet O'Connor apparently took no effective steps to investigate the matter with Thornton and ask how it came about that this stranger was supplying the

money at this very opportune moment. He did not in my view make the inquiries that were demanded in the surrounding circumstances.

75. Also on this occasion according to O'Connor Thornton told him that the time had come for him to know who the group were. Now O'Connor had always been anxious to know this and was, as I believe, for long in a state of suspicion about them. Here was Thornton apparently willing to make disclosure. One would naturally suppose that O'Connor would have been only too anxious to get the information, vital information which he should have insisted on getting long before. From what O'Connor stated an actual meeting with the group appears to have been suggested. But O'Connor, instead of pressing for information which could scarcely have been refused if he was about to meet them or agreeing to meet them, took the attitude that if meeting them meant extending the period for repayment he did not want to meet them. I regard this matter as most important. O'Connor was then in my view in a state of mind when suspicion long existing must have increased. Further inquiry or insistence on the offered meeting was clearly called for but O'Connor neither pursued the inquiry nor insisted on the interview and to my mind again showed that his real attitude was to avoid forcing the issue and compelling the disclosure of facts that he ought to have insisted on finding out if honest in the matter.

76. When it came to the actual day August 28th when the drafts were obtained, O'Connor received at first a draft for £6,000 in the name of Melvin. That called for explanation. Why should the draft not be made out to him? Again no proper inquiry is made and no proper investigation although the position was as I have stated that O'Connor should and I believe did have suspicions for a long time and knew then that Thornton had been putting him off and was apparently in difficulties. He then insisted on obtaining the second draft for £11,000. There was delay about that. O'Connor himself says he made the point to Thornton that he had given him drafts for £22,000 and why should he not have the balance. Thornton had incidentally told O'Connor on the Tuesday before that he would have the money in the morning. Thornton's attitude and delay when he apparently had the money should again in all the circumstances have surely conveyed and I believe must have conveyed to

O'Connor that Thornton was in difficulties and that all was not as it should be. That in my view, again in the circumstances, called for inquiry but no inquiry of the nature called for was made. An explanation about telephoning the group for permission to pay was very facilely accepted.

77. O'Connor must also on that morning have known that by the time he got to Dublin the banks would be closed. The National Bank in Tuam was within easy reach. He wanted the money quickly. Why then did he not cash the drafts in Tuam?

78. Having regard to the history of events the only rational explanation is that he had some motive and in the absence of a convincing explanation I can only attribute his failure to cash the drafts then and there in the Tuam branch to a strong suspicion on his part that there was distinct risk that if he did so inquiries might well be made that would reveal something wrong.

79. I wish to make it clear before stating my conclusions with regard to the events that took place on August 28th that I have given careful consideration to two particular factors of the case.

80. In the first place it has been pointed out that O'Connor walked openly into the Bank at Athlone and when obtaining value for the Tuam drafts candidly stated who he was and gave his name and address. It was submitted that this was very strong evidence of his having an entirely innocent frame of mind. But this must in my view be put in its proper perspective. He was after all in the position that he knew he could not be fixed with actual knowledge of any fraud perpetrated. I drew the inference on what appears to me to be the strong probability that that fact must materially have affected his decision and given him a sense of safety in what he was doing. He had on his own showing got bank drafts before from Thornton and they had gone through all right and I think that the most probable explanation and the proper inference to draw is that he hoped that the same would happen again and that having regard to the large amount involved he decided to take the chance. I do not therefore regard this open presentation of the drafts as having the force which it is sought to give it. Secondly it is submitted that it was not even sought to be proved that

O'Connor had any knowledge of the actual nature of the fraud perpetrated by Thornton on August 28th. But as to this I have to point out that it is implied knowledge of some sort of dishonest dealing, not knowledge of the precise nature of any fraud, that it is sought to impute to O'Connor.

81. In my view the events of August 28th cannot and should not be regarded in isolation. They must be viewed in proper perspective and in particular in light of what had gone on before and my findings as to previous events. Suspicion and lack of proper inquiry on O'Connor's part in my view continued right through to the transactions of August 28th, 1961. Nothing had occurred before then which could have lessened his suspicions or made inquiry less imperative. On the contrary the surrounding circumstances indicating that Thornton was in obvious difficulties and the events that I have narrated as taking place on and immediately before August 28th should and could only have increased O'Connor's suspicions and made inquiry more than ever necessary. But he still studiously avoided it despite the opportunity given to him by Thornton just immediately before. If Thornton after making the offer he did had given him names or produced alleged members of the group the field for inquiry was wide open. If Thornton turned about and failed to do either after offering to do so suspicion of something illegitimate must have turned to certainty and a very searching inquiry as to what was going on and where all this money had come from was all the more to be called for. No inquiry was pursued.

82. Having regard to what I have said I am forced therefore to the conclusion that O'Connor with his suspicions aroused as to some form of dishonesty on Thornton's part continued to shut his eyes to the end and failed to take the proper steps of inquiry open to him right to the end.

83. He chose never to force the issue with Thornton but chose to continue dealing with him with suspicions unresolved and accepted through his instrumentality and virtually from him a very large sum in the form of the drafts.

84. In all the circumstances I must find that a case of implied knowledge of fraud has been made out against O'Connor which has in law the effect of making him privy to Thornton's fraud. That being so he has no good title to retain moneys obtained clearly by fraud and the plaintiffs are entitled to recover the proceeds of the draft issued in Athlone.

85. While the decision that I have reached is sufficient to determine the case, it is one with unusual features. I feel therefore that as other cogent grounds have been put before me on which it is submitted that the plaintiffs are entitled to succeed, I should deal with at least one of these grounds so that my findings thereon may be known in case the matter should go further. In doing so I wish to make it clear that I am not thereby to be taken as indicating that I harbour doubts on the first branch of the case.

86. The plaintiffs claim also to be entitled to recover the £12,000 ultimately lodged with Bowmaker (Ireland) Limited to the defendant Joseph O'Connor's credit, being the moneys paid by the National Bank in respect of the draft for £12,000 issued in favour of Bowmaker (Ireland) Ltd. in the Athlone branch of the plaintiff Bank, on the basis that it was recoverable in law as money paid under a mistake of fact.

87. The relevant facts relating to this branch of the claim are these. The drafts for £11,000 and £6,000 issued in Tuam in the defendant O'Connor's name and in the name of Melvin were in themselves valid drafts intended to enable the payee or holder to collect their value. They were expressed to be for value received. As between the plaintiffs and the defendant O'Connor no consideration moved from O'Connor to the Bank. These drafts came into existence as a result of the fraudulent misrepresentations made by James Thornton to the senior officers of the Bank at Tuam. These misrepresentations operated on the minds of these senior officials in issuing the drafts. They resulted in a mistake in the minds of the officials concerned that their customer was in funds or had put the Bank in funds to meet the drafts and that the Bank had received consideration for them. Both drafts were received by O'Connor as original payee or holder.

88. The plaintiffs contend but it is not agreed on behalf of O'Connor that the draft issued in Athlone for £12,000 resulting in the credit created with Bowmaker (Ireland) Ltd. was issued, and the moneys transferred as a result thereof, under a mistake of fact. They first rely on a mistake of fact taking place at Athlone. The essential mistake relating to the payment of the draft in Athlone the plaintiffs say was that value had been provided for the draft and that there was thus a legal liability or, at least, a supposed obligation on the Bank to pay. They would not have been paid by the Bank if it was known that no value had been received. That mistake was one they say between the Bank and O'Connor. The defendant O'Connor contends that the credit in Bowmakers as a result of the Athlone transactions was not in itself created under any mistake of fact. Any mistakes of fact that occurred were, it is contended, in Tuam and were not between the Bank and O'Connor in Athlone. The plaintiffs say that the mistakes above mentioned which occurred in Tuam also relate to the ultimate issue of the draft in Athlone and that they are entitled to rely on these mistakes to recover the proceeds of the Athlone draft because such mistakes resulted in a mistaken belief that the bank was under an obligation or supposed obligation to Canavan to make payment by way of the issue of drafts to a third party, namely O'Connor in Athlone. They also go further and say that there was also such a mistake of fact occurring between the Bank and O'Connor in Tuam as would entitle them to recover.

89. To develop the matter further as regards the issue of the drafts in Tuam Mr. Kenny, for the defendant O'Connor, says that in law moneys can only be recovered under a mistake of fact where the mistake amounts to a wrong belief on the part of the payer that he is liable in law to make the payment to the payee. But Mr. O'Neill for the plaintiffs says that in law moneys may also be recoverable when paid by the payer to a third party even when there has been no liability to the third party to pay him, had the mistaken fact been true but the payer was under a belief that he was under an obligation to pay someone and further believed that that payment to the payee would discharge the obligation.

90. In the particular facts of this case it is said that if the Bank's customer Canavan had in fact provided funds to meet the Tuam drafts and had signed

the requisitions for the drafts in favour of O'Connor, the Bank having accepted the funds would have been under a liability or an obligation to issue the drafts to O'Connor under Canavan's instructions and having issued these drafts by reason of the mistakes made by reason of Thornton's misrepresentations resulting in a supposed obligation would be entitled to recover the moneys ultimately paid to O'Connor's credit as moneys paid under mistake of fact, since the mistakes in Tuam led to the payments in Athlone.

91. It thus becomes necessary to ascertain under what circumstances in law money paid under a mistake of fact may be recovered. Is it confined to such a mistake, as would, if the mistaken fact were true, have placed on the payer, as between him and the payee, a liability to pay the money? If not, does the right extend to cases other than those where there would have been no liability as between payer and payee to make the payment if the mistaken fact were true, and if so, is the present case within the category of cases where such right arises. Must the mistake be one *inter partes* and, if so, does that mean between payer and payee or has it a wider significance?

92. I now turn to deal with what I consider to be the most relevant cases in point. I should first perhaps refer to *Kelly v. Solari* 9 M. & W. 54 relied on originally by the plaintiffs as containing a statement of the law by Parke B. expounding the law on which they claim they would be entitled to succeed but which the defendant O'Connor contends in reality supports his submissions. The action was to recover certain moneys paid to a widow on a life policy on her deceased husband's life. The policy had in fact lapsed by reason of the non payment of a premium but payment was made, the officials of the Insurance Company said because they had forgotten that the policy had lapsed. A new trial was directed on certain issues not here relevant, the importance of the case being because of a statement as to the relevant law made by Parke B. at p. 58 which is as follows:

I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against

conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake.

93. While the plaintiffs rely on the broad proposition stated it is pointed out on behalf of the defendant O'Connor that the statement of the law quoted contains the words "which would entitle the other to the money" and it is submitted that this means that the payer must have been under a liability to pay the payee if the mistaken fact were true.

94. Since *Chambers v. Miller* 13 C. B. N. S. 125; L. J. C. P. 30 is referred to in several of the cases cited and was referred to in the argument it will be convenient to refer to it at this stage. The action was actually one for assault and false imprisonment. The plaintiff presented a cheque drawn on a customer's account on the defendant's banking house. The amount the cheque was made out for was paid over by the cashier as the Court found. The cashier then having discovered that the drawer's account was overdrawn demanded the money back and upon the plaintiff's refusal, detained him and took it by force. The main finding was that the property in the money had passed and the plaintiff succeeded since a plea of justification failed. The case is however relevant to certain observations made with regard to the recovery of money paid under a mistake of fact. Erle C. J. distinguished the case of *Kelly v. Solari* pointing out that as between the parties there was no manner of mistake. William J. pointed out that the cashier had paid out the money under the impression that the plaintiff was the bearer of a genuine cheque. The facts were as he apprehended them to be and there was no mistake at least *inter partes*. True the cashier might not have paid if he had at the time been aware of the state of the customer's account. Reading both of the reports of the case together it is said that the proper deduction is that the view of the Court was that to sustain a plea that the money can be recoverable as paid under a mistake of fact such mistake must be one between the parties. The case is not I think in accordance with what was decided in *Jones Ltd. v. Waring and Gillow Ltd* [1926] A. C. 670 which shows, as I will indicate later, that money paid to a person under a mistake amounting to a supposed obligation to someone else, and that the payment will discharge that obligation, is recoverable from the payee.

95. In *Weld Blundell & Others v. Synott* [1940] 2 K. B. 107 the facts were that the plaintiffs and the defendant were first and second mortgagees of the same property. The mortgagor made default and the plaintiffs sold the security. Having paid themselves, they accounted to the defendant for the debt due to him but in doing so over paid him to the extent of £112.10.0. They claimed to recover as money paid under a mistake of fact. The defendant contended first that the mistake was between the plaintiffs and the mortgagor and not between the plaintiffs and himself and also relied on estoppel. It was held that, even if the mistake was originally between the plaintiffs and the mortgagor it was also *inter partes* and entitled the plaintiffs to recover. There was also no estoppel. The relevant portion of the judgment of Asquith J. relied on on behalf of the defendant as indicating that if money is to be recoverable as paid under a mistake of fact, the mistake must have been one between payer and payee and as affecting the liability as between payer and payee is as follows: (at p. 112):

It is notoriously difficult to harmonize all the cases dealing with payment of money under a mistake of fact, but the ground on which, in *Chambers v. Miller* (32 L.J. (C.P.) 30) it was said that the mistake was not one between the parties was that it did not affect the liability as between the payer and the payee: i.e., that it was not such a mistake that, if the mistaken assumption of the payer had been true, there would have been a legal right in the payee to demand, and a legal obligation in the payer to pay, the money in question.

More concretely, if the bank's customer in that case had had in his account assets sufficient to meet the cheque, as the bank wrongly supposed he had at the time when it paid, there would still have been no legal right in the payee to demand payment from the bank, whereas in *Kelly v. Solari* (9 M. & W. 54) where the mistake was presumably held to be a mistake between the payer and the payee, or otherwise the plaintiff could not have recovered, the mistake was one which did affect liability as between them. If the life policy of the deceased man had still been valid, as the payer mistakenly imagined, he would have been bound to pay the insurance moneys to the executrix of the deceased man. In *Aiken v. Short* (25 S.L.J. (ex.) 32) the plaintiff failed to recover the money, and here again, although the Court did not refer under that name to the distinction between mistakes which are between the parties and mistakes which are

not, Bramwell B. in his judgment seems to have had this distinction in mind when he says that to make the money recoverable the mistake must be as to a fact which, if true, would have made it obligatory on the payer to pay the payee, and that it is not enough if it is merely a mistake as to a fact which, if true, would make it desirable for the payer to make the payment.

When a mistake is of the first class, one affecting obligation, I think it is between the parties. It is perhaps not easy at first sight to square this conclusion with such cases as the *Deutsche Bank (London Agency) v. Beriro and Co.* (73 L.T. 669) but, as Lord Sumner says in *R. E. Jones Ltd. v. Waring and Gillow Ltd.* ([1926] A. C. 679) that case was decided on the basis of a contractual duty owed by the payer to the payee. Whether there is such a comparable duty in the present case I will consider in a moment when dealing with estoppel. Apart from that, there is much in Lord Sumner's judgment in that case to support the view which I have expressed as to the meaning of a mistake between the parties. For instance he says ([1926] A.C. 670 at p. 691): 'They', that is R. E. Jones Ltd. 'issued it', the cheque for £5,000 'to discharge their obligation, and there being no obligation in fact, the money was paid to Waring and Gillow Ltd. under a mistake of fact, a mistake arising directly between these two companies'. The only basis on which it has been argued that in the present case the mistake is not of this character is that it was or arose from a mistake as to what the mortgagor owed the plaintiffs, and therefore was a mistake between the mortgagor and the plaintiffs, and not between the plaintiffs and the defendant. I cannot see why it should not be both. Where what A. owes to B. depends on what A. is owed by C., and A., owing to a mistake as to the latter amount, automatically makes a mistake as to the former amount there is, in my view, a mistake not only as between A and C., but as between A. and B. as well. I, therefore hold that the defence that the mistake was not *inter partes* fails.

96. Later in his judgment he states that there is a duty on a first mortgagee who sells the mortgaged property to hold the balance of the proceeds after satisfying his own debt in trust for the encumbrancers ranking after him.

97. I have quoted a somewhat lengthy portion of the judgment, because it is relied on as supporting the proposition that before moneys paid under a mistake of fact can be recovered the mistake must be *inter partes* and such, as

would if the mistaken fact were true, have placed on the payer, as between him and the payee, an obligation or liability to pay the money. It is to be however noted that he did not actually state these propositions as firmly established but rather proceeded on the basis of accepting them for the purposes of the case. There is also the striking feature of the case that the mistake made with the mortgagor was carried through to the second mortgagee.

98. The next case relied on by Mr. Kenny is that of *Morgan v. Ashcroft* [1938] 1 K. B. 49. The plaintiff was a bookmaker and had betting transactions with the defendant. The plaintiff claimed that his clerk in making out the defendant's account overpaid him £24.2.1. and sued for the amount. The Court of Appeal dismissed the claim on two grounds. The first relating to the provisions of the Gaming Act, 1845, I am not here concerned with. The second ground of dismissal was however that in order to succeed on a claim for money paid under a mistake of fact the mistake must be fundamental and that assuming the supposition of overpayment to be true the plaintiff would have been under no liability, to make the payment which was in law only a voluntary payment and on that ground the claim failed also. At page 63 the Master of the Rolls refers to the actual words used by Bramwell B. in *Aiken v. Short* 1 H. & N. 210, 215.

In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact, which, if true, would make the person paying liable to the money; not where, if true, it would merely make it desirable that he should pay the money.

99. He then refers to cases where the judgment was referred to with approval but always he thinks by way of *dictum*. Returning to the words of Bramwell B. the Master of the Rolls says at p. 65 (of *Morgan v. Ashcroft*):

In the first case which he mentions, namely, that where the supposed fact if true would have made the person paying liable to pay the money, the mistake is a mistake as to the nature of the transaction. The payer thinks that he is discharging a legal obligation whereas in truth and in fact he is making a purely voluntary payment. Such a mistake is to my mind unquestionably fundamental or basic and may be compared, at least by way of analogy, with the class of case in which mistake as to the nature of

the transaction negatives intention in the case of contract. But the second case which he mentions, namely, that where the supposed fact would, if true, merely make the payment desirable from the point of view of the payer, is very different. In that case the payment is intended to be a voluntary one and voluntary payment it is whether the supposed fact be true or not. It appears to me that a person who intends to make a voluntary payment and thinks that he is making one kind of voluntary payment whereas upon the true facts he is making another kind of voluntary payment, does not make the payment under a mistake of fact which can be described as fundamental or basic.

100. He concludes by finding that the payment was voluntary and that the appeal must be allowed. His views as to the payment being voluntary were shared by Scott L. J. The case therefore supports the view that a voluntary payment does not come within the class of cases where money can be recovered as paid under a mistake of fact. But it must be read in the light of the decision of *Jones Ltd. v. Waring and Gillow Ltd.* It cannot be suggested that it overruled the House of Lords decision.

101. Reference was also made to *Barclay & Co. Ltd. v. Malcolm & Co.* 133 L.T.R. 512. In that case two associated Polish Companies who owed large sums of money to the defendants, instructed their local Bank, the Bank of Warsaw to pay the defendants £2,000. The Warsaw Bank telegraphed to the plaintiffs their London agents to pay the amount to the defendants, which they did. The Warsaw Bank then wrote a letter confirming the telegram.

102. The plaintiffs did not notice that the letter was one merely confirming the telegraphed instructions but treated it as a direction to pay a further sum of £2,000 which they paid to the defendants, making a payment of £4,000 in all. Even with that payment one of the Polish companies still remained indebted to the defendants. Believing that only £2,000 had been paid instructions were given to the Bank of Warsaw to arrange to arrange to pay another £1,000. Instructions were sent by the Bank of Warsaw to the plaintiffs to pay the defendants the further £1,000 but the instructions were lost in transmission. When the plaintiffs discovered all the facts they informed the defendants that the £2,000 was paid in mistake of fact. They offered to credit the defendants with the £1,000 which they knew the Polish company wished to

pay but claimed to recover the balance of £1,000 as money paid under a mistake of fact.

103. Roche J. felt it unnecessary for him to examine into all the cases dealing with money paid under a mistake of fact. The relevant portions of his judgment reads (at p. 513)

It is not contrary to good conscience that the defendants should be allowed to keep the money in question. The mistake was in no way due to them, the mistake which was made concerned only the plaintiffs and the Warsaw Bank by whom the plaintiffs were instructed, and it was not a mistake with regard to the liability of one person to pay or the right of another person to receive.

104. Since the relevant case law was not discussed I find it unnecessary to dwell at any length on the judgment beyond saying that it would appear to support in a general way the proposition that before moneys alleged to be paid under a mistake of fact can be recovered the mistake must be one as to liability to pay. It is also probably to be implied that the mistake must be one *inter partes*.

105. On behalf of the plaintiffs reliance was chiefly placed on the House of Lords decision in *R. E. Jones Ltd. v. Waring and Gillow Ltd.* [1926] A. C. 670. The facts of the case are set out by Viscount Cave L.C. at the beginning of his speech as follows (at p. 677);

My Lords, this action arose out of circumstances which ARE fortunately unusual. A man named Bodenham obtained from the respondents, Messrs. Waring & Gillow, Ltd., furniture and other goods of the value of about £13,800 upon the terms of a hire-purchase agreement dated November 29, 1919, by which he agreed to pay £5,000 down and afterwards a monthly sum until the whole purchase money was paid.

He gave his cheque for the £5,000 but it was dishonoured; and the respondents sued him upon the cheque and retook possession of the furniture. Bodenham, being without means, called at the London office of the appellants, Messrs. R. E. Jones Ltd., and told them that he represented a firm of motor manufacturers bearing the name of International Motors

who had the control of a car called the "Roma" car; he produced an illustrated prospectus and specification of the car, and offered on behalf of International Motors to appoint the appellants agents for the sale of the car in South Wales and the south-west of England. There was at that time a large demand for cars, and after a short negotiation the appellants accepted the proposal. Bodenham then put before the appellants a form of agency agreement to be signed by International Motors and the appellants, one term of the agreement being that the appellants should purchase not less than 500 "Roma" cars and should upon the execution of the agreement deposit with International Motors the sum of £5,000, being £10 per car upon the 500 cars. The appellants demurred to paying this large sum to Bodenham or to International Motors (whom they did not know), and Bodenham then told them (to quote the statement of counsel for the plaintiffs at the trial, which was accepted by the defendants as correct) 'that the people who were financing the thing and who were the principals behind him in the matter were Messrs. Waring & Gillow, the well known Oxford Street firm', and that if the agency agreement were signed the deposit of £5,000 might be paid to them. This statement satisfied the appellants who knew Messrs. Waring & Gillow as a firm of high standing; and they signed the agreement (which was dated December 31, 1919) and handed to Bodenham two cheques payable to the order of the respondents, one being a cheque for £2,000 dated December 31, 1919, and the other a cheque for £3,000 post dated January 14, 1920. Bodenham then called on the respondents, to whom he had previously stated that he expected large payments under some valuable contracts, and handed the two cheques to them as a payment of his deposit of £5,000 under the hire purchase agreement. The respondents' chief accountant noticed that the cheques were signed by one director only for the appellant company, although the form of cheque was adapted for signature by two directors and the secretary, and also that one of the cheques was post dated; and in a telephone conversation between the representatives of the appellants and the respondents, in which nothing was said about the purpose of the payment, it was arranged that the two imperfect cheques should be returned to the appellants and a fresh cheque for £5,000 duly signed and posted to the respondents. This was accordingly done, and the respondents cashed the cheque for £5,000 and on the faith of this payment restored to Bodenham the furniture which they had seized and let him have some more. On January 15, the appellants not having heard from Bodenham about the cars, their secretary called upon the respondents, and thereupon the

whole fraud was exposed. There was no firm called International Motors and no “Roma” car; and the statements made by Bodenham to the appellants as to the car and as to the connection of the respondents with it were a tissue of lies, concocted by Bodenham with a view to getting £5,000 paid to the respondents and representing it to be the deposit under his hire purchase agreement. The respondents then again took possession of the furniture and Bodenham has since been sentenced to a term of imprisonment for another fraud.

106. Although the Lord Chancellor dissented from the view of the majority on other grounds not relevant to this case, he dealt with the plaintiff's claim in so far as it was based on a claim to recover the £5,000 as money paid under a mistake of fact in the following fashion which seems to me highly relevant to the facts of the present case. At p. 679 Viscount Cave L.C., stated:—

My Lords, the ground upon which the plaintiffs (the appellants) have rested their case before your Lordships is, that they are entitled to recover the £5,000 as money paid under a mistake of fact; and I apprehend that, but for the special defences raised by the defendants, to which I will refer later, there could be no doubt as to their right to succeed on this ground. The plaintiffs were told by Bodenham that he represented a firm called International Motors which was about to be formed into a company, that the firm had control of a car called the ‘Roma’ car which he described as an existing car, and that the defendants were financing the firm and were the principals behind him and behind International Motors in the matter. Believing these statements to be true, the plaintiffs entered into an agreement which bound them to pay a deposit of £5,000 on 500 Roma cars; and still believing them to be true, and that the respondents as the nominees of International Motors could give a good receipt for the £5,000 they paid that sum to the respondents. In fact the statements were untrue from beginning to end; and the money was, therefore, paid under a mistake of fact induced by the false statements of a third party and, apart from special circumstances, could be recovered. As to the general principle, it is sufficient to refer to the well known case of *Kelly v. Solari* (9 M. & W. 54), and to the more recent decisions in *Colonial Bank v. Exchange Bank of Yarmouth Nova Scotia* ([1885] 11 Art. Cas. 84) and *Kerrison v. Glyn Mills, Currie & Co.* (17 Com. Cas. 41).

107. Lord Atkinson concurred from which I conclude that he agreed with the above statement of the Lord Chancellor although dissenting from the view of the majority on the other grounds on which the Lord Chancellor dissented.

108. Lord Shaw of Dunfermline was of opinion that the respondents, Waring & Gillow Ltd. should repay the sum of £5,000 paid by the appellants to them under mistake in fact. Again what he said with regard to Bodenham's representations is relevant by way of analogy to the facts of the present case. (at p. 685) They are as follows:—

What Bodenham represented was (1) that there was a firm called 'International Motors'; (2) that they were putting upon the market an existing car called the 'Roma' car, of which he exhibited a sketch and specifications; (3) that by an agreement which Bodenham induced them to sign they became the purchasers of 500 of these cars, in respect of each of which a deposit of £10 was made, making in all £5,000; and (4) that Messrs. Waring & Gillow were the financial backers of the International Motors, and that accordingly it was appropriate and suitable that, as such, a cheque for the sum should be made payable to them. The plausibility of Bodenham, who is now a convict and was then an accomplished rogue, succeeded on these representations in inducing this payment to be made.

109. It is to be noted that he stated that the fourth representation involved that it was "appropriate and suitable" that payment should be made to Messrs. Waring and Gillow. It is significant that he did not say that any legal liability to pay would have arisen if the facts previously stated as relied on were true. His view was that the demand for the refund of the contents of the cheques was sound.

110. Lord Sumner also sets out the facts at the beginning of his speech. I refer to what he says in the report at (*b*) on page 691.

Jones Ltd., would not have issued the £5,000 cheque if they had not thought that they were bound to deposit that sum with somebody under the contract signed with International Motors on December 31, 1919, and also that payment to Waring & Gillow Ltd., would discharge their obligation in a manner that would safeguard themselves.

110. It is further to be particularly noted that he added at the end of paragraph (*b*)

They issued it to discharge their obligation, and there being no obligation in fact, the money was paid to Waring and Gillow Ltd. under a mistake of fact, a mistake arising directly between the two Companies.

He also held R. E. Jones Ltd. entitled to recover the £5,000 as money paid under a mistake of fact.

111. Lord Carson took the view that the mistakes of fact which were induced by the false statement of Bodenham were such mistakes of fact as to entitle the appellants to recover the money which they had paid on a belief that these facts were true.

112. It is clear from the facts of the case that R. E. Jones Ltd. were under no legal liability to pay Waring and Gillow Ltd. The liability was to International Motors. They paid because they believed that they were under an obligation to pay someone and that it would be appropriate to pay Waring and Gillow Ltd. to discharge their supposed obligations and because they believed that they could get a good receipt from them. They did all this because of the fraudulent representations of Bodenham.

113. The decision is on my understanding of it, an authority for the proposition that when payment is made to a person, because of a supposed obligation to pay someone, induced by the frauds of another, and because it is believed that payment to that person is appropriate and suitable or will discharge the supposed obligation, and there is no obligation, the money paid may be recovered as paid under a mistake of fact. The mistaken belief which must be shown to exist before money paid under and in a mistake of fact can be recovered need not amount to a belief on the part of the payer that he was under an obligation to pay the payee but extends to cases where the mistaken belief on the part of the payer was that payment to the payee, in the belief that such payment was appropriate and would discharge the obligation, is sufficient.

114. Finally on the authorities which I feel it relevant to refer to I come to the case of *Larner v. London County Council* [1949] 2 K. B. 683, a case before the Court of Appeal in England. The London County Council resolved to pay all their men who went to the war the difference between their service pay and their civil pay. The employees were to be responsible for informing the Council of changes arising in their pay. The plaintiff did not keep the Council accurately informed of changes in his service pay and the Council over paid him. Subsequently they made deductions to recoup themselves. The plaintiff sued for the amounts deducted. The Council counterclaimed for the balance over paid and succeeded. The Council made the overpayments due to a mistake of fact and it was submitted that the mistake on which a person can recover money paid must relate to a fact which if true would have rendered the party under the mistake liable to pay the money. Reliance for the proposition being placed on the *dictum* of Bramwell B. in *Aiken v. Short* already referred to. Denning L. J., as he then was, delivered the judgment of the Court. He pointed out that the *dictum* above referred to cannot be taken as exhaustive of the law. As I understand it he treated the payments made as being made under a promise by reason of the resolution, pointing out however that it might be that in strictness there was no consideration for the promise but he did say that the payments were made as a matter of duty. Later however he stated that these payments were sums which the Council never promised the plaintiff and which they would never have paid him had they known the true facts. He said they were paid under a mistake of fact and the plaintiff was bound to repay them unless other considerations arose which are not relevant.

115. It is not easy to state a precise proposition of law as emerging from the judgment but I think that the statement that the *dictum* of Bramwell B. was not exhaustive of the law, taken in conjunction with the finding that the overpayments were sums which the Council never promised to pay, do indicate that the Court did not find that the sums were recoverable on the basis they were paid under a mistake of fact which if true would have rendered them liable to pay. The words "They were sums which the Council never promised Mr. Larner ..." seem to negative that. On the other hand the view of the Court was that there was a duty to make the payments of genuinely existing differences in pay. Taking the judgment as a whole I do not think that I can go

all the way with Mr. O'Neill's contentions that it is an authority for the proposition that voluntary payments made under a mistake of fact can be recovered. It can I think be properly said however that the *dictum* of Bramwell B. was held not exhaustive of the law and that it goes this far that money paid under a mistake of fact may in some instances be recovered where the mistake does not relate to a fact, which if true, would have rendered the party under the mistake liable to pay the money. Such instances would apparently extend to cases where there existed a duty, as distinct from a liability.

116. It is not easy to reconcile all the decisions with regard to the recovery of money paid under a mistake of fact. It is therefore difficult to arrive at a precise statement as to when in law money thus paid is recoverable. Reviewing the authorities cited and others it can however, I think, safely be said that it can be so recovered in the following circumstances. First where it has been proved that it has been paid under a mistake of fact. It must be a fundamental mistake but no question really arises here as to that because such mistakes as arose were obviously of that nature in this case. It is of course necessary, in order to establish a mistake of fact to show that the fact supposed to be true was untrue and that the money would not have been paid if it was known that the fact was untrue. Secondly it must be shown that the mistake was as to a fact, which if true, would make the payer either liable or under a duty to pay the money. Having regard to the decision in *Waring and Gillow Ltd.* I am satisfied, however, that the mistake has not to be shown to be a mistaken belief on the part of the payer that he was under a liability to pay the payee. It is sufficient if it be shown that the payer was under a mistaken belief that he was under an obligation to pay someone and that payment to the actual payee would be appropriate and would discharge the obligation.

117. There is then another matter to be considered. It is urged on the part of the defendant O'Connor that the mistake must be *inter partes* and there is a good deal to support this in the cases cited. But just what it means is difficult to say. I am not satisfied that it must necessarily exist as between payer and payee exclusively. There seems to be no logical reason why it should be so confined. There would seem no logical reason why a mistake between the payer and the person to whom the supposed obligation exists should not also involve a

mistake as between payer and payee. In other words why a mistake between the payer and the other two parties should not be equally well a mistake *inter partes* as regards both.

118. Moreover the case of *Jones Ltd. v. Waring and Gillow Ltd.* indicates that where the supposed obligation is to pay someone and a person to whom such supposed obligation does not exist, but who it is supposed can give a discharge, is paid, the money is recoverable. I now turn to deal with the application of these conclusions to the facts of the case.

119. The production of the Tuam drafts in Athlone had the consequence that they were met and paid in the form of the Dublin draft being issued in Athlone in favour of Bowmakers (Ireland) Ltd. and the other directions for other payments to be made given by O'Connor. Although drawn on the College Green Branch of the Bank, it does not seem to me to make any difference whether the Tuam drafts were met or paid in Athlone or Dublin. The draft for £12,000 created a credit of £12,000 in O'Connor's favour with Messrs. Bowmakers and has since been lodged in Court. So far I do not think that there would be any material controversy on what I have stated but there are further facts to be considered which bear vitally on the matter of liability.

120. It is not I think to be doubted that the Tuam drafts were issued under a mistake of fact that consideration had been received therefor. The Manager of a bank or his deputy does not sign a draft until assured that funds have been in some way provided to buy the draft and the teller's initials on the requisition form indicated that funds have been provided. These Tuam drafts are expressed to be for value received. It seems to me the proper inference from the facts that the drafts would not have been honoured in Athlone and paid or the equivalent in value given unless it was believed that the drafts were in order, that what was stated on them was true and that value had been received therefor. It follows that they can only have been paid in the belief that there was a liability on the Bank to pay them. In fact no consideration had been given for the drafts and there was thus no liability to pay them.

121. There was thus in my view a mistake of fact between the Bank and O'Connor, as a result of which the Athlone draft was issued for £12,000. That was clearly a mistake *inter partes*. The mistake of fact was the belief that value had been received by the Bank for the two drafts held by O'Connor whereas no value had been received. That mistake was of a fundamental nature. If the fact were true that value had been received the Bank would have been under liability to pay. The drafts would not have been paid if it was known that value had not been received. In my view therefore the plaintiffs are legally entitled to recover this sum of £12,000 from the defendant O'Connor as money paid under a mistake of fact even in accordance with the view of the law extracted from the decisions as stated on behalf of the defendant O'Connor.

122. What I have so far decided is again sufficient to enable the plaintiffs to succeed but since it is at least open to argument that the mistake arose in the issue of the drafts in Tuam and as the incidents in Tuam and Athlone are to such an extent interwoven I feel that I should deal with that aspect of the case also. The Plaintiffs contend that even if the correct approach be that the mistake occurred in Tuam the case still falls within the authorities and the principles to be deduced from them in such fashion as to enable them to recover.

123. Before I deal with this second branch of the case relating to the claim to recover the moneys in question under claim as to a payment made under a mistake of fact I wish to make my attitude clear so as to avoid any appearance of inconsistency. It is my view that the plaintiffs are entitled to succeed on the first findings I have made on this branch of the case as to the mistake made in Athlone. But it is obvious that this is an unusual and difficult case. If I am wrong in my first view it may well be that the plaintiffs are entitled to succeed in their second line of contention. Indeed I think it goes further than that because it may well be that the plaintiffs are entitled to succeed equally well on both contentions, in that the mistakes made in either Athlone or Tuam could both equally well entitle them to succeed.

124. On this branch of the case the relevant contentions which, if sustainable, would as I see it enable the defendant O'Connor to succeed are twofold. First

that moneys paid under a mistake of fact can only be recovered when the mistake amounts to a belief on the part of the payer that he was liable to make the payment to the payee. Secondly that any mistake that occurred at Tuam was not *inter partes* the plaintiffs and O'Connor but between them and their customer Canavan.

125. On the first point my view is that the case of *R. E. Jones Ltd. v. Waring and Gillow Ltd.* is quite conclusive against the defendant O'Connor and it is a decision of the highest authority and I have not been shown any reasons which satisfy me why I should not accept and follow it even though not binding on me. With great respect I entirely concur with that decision of an obviously just and equitable nature.

126. The analogy between the case just referred to and the present case is I think reasonably clear. In this case if the Bank's customer Mr. Canavan had provided funds to meet the Tuam drafts and had signed the requisitions for the drafts and the Bank had accepted the funds in whatever form provided the Bank would have been under obligation to their customer to issue the drafts according to his instructions. In the case of *R. E. Jones Ltd. v. Waring and Gillow Ltd.* the contract was between Jones Ltd. and International Motors under which Jones Ltd. were obliged to pay the deposit. The deposit was in fact paid to Waring and Gillow Ltd. but with them there was no contract and no obligation to pay them, the liability was to International Motors. In this case the Bank were under no obligation to O'Connor to issue the drafts to him but on the supposed state of facts would have been under an obligation to their customer Canavan to issue the drafts to the payees named or supposed to be named by him, that is O'Connor and Melvin. Although the minority of the House of Lords held in favour of Waring and Gillow on grounds of estoppel the view of the House of Lords was that the money was paid by R. E. Jones Ltd. to Waring and Gillow Ltd. under such mistake of fact as would entitle R. E. Jones Ltd. to recover from Waring and Gillow Ltd. notwithstanding that R. E. Jones Ltd. was under no liability to pay Waring and Gillow Ltd. Applying the analogy to the facts of this case the Bank were under no liability to O'Connor to issue the Tuam drafts to him. Their obligation to do so was to Canavan. Applying the House of Lords decision therefore to the facts of this case, the legal position in

this case is that it is not essential to enable the Bank to recover to show that the Bank, through its officials, issued the drafts to O'Connor under any mistaken belief that the Bank was under an obligation to him to issue the drafts. There are of course differences on the actual facts between the cases but I do not think that they affect the matter of principle. Money was not actually paid, drafts were issued, but from the point of view of the principle, drafts of the nature issued would be equivalent to the passing of a cheque or money. It is true that one draft also was issued in the name of C. Melvin, a fictitious person, but the draft was handed to O'Connor as original holder and I am unable to see that the fact that the draft was thus made out has any bearing on the contention that the mistake, to enable moneys to be recoverable, must amount to a wrong belief on the part of the Bank as payer that the Bank was bound to make payment to the payee. As I have said my view is that the case of *R. E. Jones Ltd. v. Waring and Gillow Ltd.* negatives that contention with the result that the defendant O'Connor cannot succeed on this point.

127. It may be said that this first point however also involves another issue, namely whether an actual liability would have existed to issue the drafts to Canavan, assuming the supposed facts to be true. and that I have wrongly assumed this to be so. I will therefore deal with this. In my view the liability would have existed if the supposed facts were true in that the Bank, if it accepted the customers money for a certain purpose would have been bound to act on his instructions, but it is not necessary to go so far.

128. Applying the decision in *Larner v. London County Council*, [1949] 2 K.B. 683, which I accept as a well justified extension of the law relating to the recovery of money paid under a mistake of fact it would be quite sufficient if the Bank thought that they were under a duty to their customer to issue the drafts, which would clearly be the position if they accepted his money to be applied for a specific purpose.

129. The second point to be dealt with is as to whether or not the mistakes of fact made at Tuam in the issuing of the drafts there were *inter partes* the Bank and the defendant O'Connor. The state of affairs existing at Tuam when the

drafts were issued there was undoubtedly that the Bank officials were under the mistaken belief that their customer Canavan had provided the funds to buy the draft and had signed the requisitions. It is therefore the fact that there were mistakes of fact between the Bank and Canavan. But does that end the matter? Although this point has caused me considerable reflection I have come to the conclusion that the fact that mistakes existed between the Bank and Canavan does not by any means preclude the existence of mistakes between the Bank and the defendant O'Connor also. Since Canavan had not in fact provided funds to enable the drafts to be issued to O'Connor there was no justification for the issue of the drafts to him. Asquith J. in *Weld Blundell v. Synott* appears to have taken the view that there is no reason why a mistake of the type relevant on the part of the paying party should not be made with two other parties. The drafts were actually handed direct to O'Connor as original holder. It would seem to me that in this case there was not only a mistake as between the Bank and Canavan but also as between the Bank and the defendant O'Connor because he would have no right to receive the drafts unless the funds were provided to pay for them and they were not. Again I think that an analogy with the case of *Jones Ltd. v. Waring and Gillow Ltd.* is to be drawn. The supposed obligation was in reality to International Motors but Waring and Gillow Ltd. were paid. The supposed obligation here was to Canavan but O'Connor received the equivalent of payment. R. E. Jones Ltd. were in an analogous position to Waring and Gillow Ltd. The mistake in R. E. Jones v. Waring and Gillow Ltd. must have been held to be sufficiently *inter partes* to enable R. E. Jones to recover since they did so. There was therefore in my view a mistake *inter partes* the Bank and O'Connor in the issue of the drafts at Tuam or at least such a mistake as would on the analogy of the *Jones v. Waring and Gillow* Case have entitled the plaintiffs to succeed in so far as relationship between them is concerned. That mistake carried right through to the transactions later taking place between the Bank and O'Connor at Athlone ultimately resulting in the creation of the credit in O'Connor's favour at Bowmaker's, so that it can properly be said that the £12,000 gained by O'Connor arose from the mistakes of fact made at Tuam.

130. With regard to what occurred in Tuam it is only necessary to add a few observations. The drafts were issued in Tuam under mistakes of fact, namely

that funds to pay for the drafts had been provided when in fact they had not and that Canavan had signed the requisitions. If they had been provided and the requisitions signed the bank would have been liable or under a duty to issue the drafts for the reasons I have already stated. It is obvious that the drafts would not have been issued if it was known that the funds had not been provided. The mistake was fundamental. The facts which must be proved in order that money paid under a mistake of fact can be recovered are therefore established assuming that the mistakes resulted in the defendant O'Connor obtaining the credit with Messrs. Bowmaker of £12,000, which is equivalent to receiving the amount of money, which I think is clear.

131. In the result of the plaintiff's second line of contention on this branch of the case as to the events at Tuam I find that the plaintiffs would be also entitled to recover the £12,000 by reason of my findings with regard to the incidents taking place at Tuam.

132. I will await hearing counsel's views before stating the precise form which the order should take.