Lipkin Gorman v Karpnale

HOUSE OF LORDS

LIPKIN GORMAN (A FIRM)(ORIGINAL APPELLANTS AND CROSS-RESPONDENTS)

v.

KARPNALE LIMITED

(FORMERLY PLAYBOY CLUB OF LONDON LIMITED)(ORIGINAL RESPONDENTS AND CROSS-APPELLANTS)

AND OTHERS

Lord Bridge of Harwich Lord Templeman Lord Griffiths Lord Ackner Lord Goff of Chieveley

LORD BRIDGE OF HARWICH

My Lords,

I have had the advantage of reading in draft the speechesof my noble and learned friends Lord Templeman and Lord Goff ofChieveley. I agree with their conclusion that the appeal should beallowed and the cross-appeal dismissed with the consequence thatthe appellants become entitled to judgment for the principal sumof £154,695 inclusive of the sum to which the cross-appeal relates.All questions with respect to the amount of interest to be awardedon this principal sum and with respect to the costs of theproceedings must, unless the parties are able to agree, be deferredto enable counsel to make further submissions.

With respect to the view that prevailed in the Court ofAppeal I cannot see that the respondents are in any better positionto resist the appellants' claim to recover the money which Mr.Cass stole from them and gambled away in the casino by reasonof the fact that cash was exchanged for gaming chips before beingwagered at the gaming tables. The respondents were neverthelessmere volunteers who gave no consideration for the stolen money.This was the common sense view expressed in the dissentingjudgment of Nicholls L.J. Both my noble and learned friends havethoroughly analysed this issue and I agree with the reasoning inboth their speeches.

I agree with my noble and learned friend Lord Goff ofChieveley that it is right for English law to recognise that a claimto restitution, based on the unjust enrichment of the defendant,may be met by the defence that the defendant has changed hisposition in good faith. I equally agree that in expresslyacknowledging the availability of this defence for the first time itwould be unwise to attempt to define its scope in abstract terms,but better to

allow the law on the subject to develop on a caseby case basis. In the circumstances of this case I would adopt thereasoning of my noble and learned friend Lord Templeman for theconclusion that the respondents can only rely on the defence to

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the extent that it limits their liability to the appellants to theamount of their net winnings from Mr. Cass which must have beenderived from the stolen money.

The respondents submitted that the appellants' claims failedon the ground that they had no title to the money which was thesubject of the appeal or to the banker's draft which was thesubject of the cross-appeal. The arguments in support of thissubmission are examined in the speech of my noble and learnedfriend Lord Goff of Chieveley. I agree with his reasons forrejecting them.

LORD TEMPLEMAN

My Lords,

Cass was a partner in the appellant firm of solicitors,Lipkin Gorman ("the solicitors"). Cass withdrew £323,222.14 fromthe solicitors' bank account. The sum of £100,313.16 wasreplaced, recovered or accounted for, but the balance of£222,908.48 was money which Cass stole from the solicitors andproved to be irrecoverable from him. Cass staked £561,014.06 atthe gaming tables of the Playboy Club, a licensed casino ownedand operated by the respondent, Karpnale Ltd. ("the club"). Casswon £378,294.06. After making adjustments for certain cheques,the club agreed that the club won and Cass lost overall, in amatter of months, the sum of £174,745. The parties also agreedthat the maximum gross personal resources of Cass amounted to£20,050 and that at least the sum of £154,695 won by the cluband lost by Cass was derived from money stolen from thesolicitors. The club acted innocently throughout and was notaware that the club had received £154,695 derived from thesolicitors until the solicitors claimed restitution. Conversion doesnot lie for money, taken and received as currency: see Orton v.Butler **(1822) 5 B. & Ald. 652** and **Foster v. Green** (1862) 7 H. &N. 881. But the law imposes an obligation on the recipient ofstolen money to pay an equivalent sum to the victim if therecipient has been "unjustly enriched" at the expense of the trueowner. In **Fibrosa Spolka Akcyjna v. Fairbairn Lawson CombeBarbour Ltd.** [1943] AC 32, 61, Lord Wright said:

"It is clear that any civilised system of law is bound toprovide remedies for cases of what has been called unjustenrichment or unjust benefit, that is to prevent a man fromretaining the money of or some benefit derived fromanother which it is against conscience that he should keep."

The club was enriched as and when Cass staked and lost to theclub money stolen from the solicitors amounting in the aggregateto £300,000 or more. But the club paid Cass when he won and inthe final reckoning the club only retained £154,695 which wasadmittedly

derived from the solicitors' money. The solicitors canrecover the sum of £154,695 which was retained by the club ifthey show that in the circumstances the club was unjustly enrichedat the expense of the solicitors.

In the course of argument there was a good deal ofdiscussion concerning tracing in law and in equity. In my opinionin a claim for money had and received by a thief, the plaintiffvictim must show that money belonging to him was paid by thethief to the defendant and that the defendant was unjustlyenriched and remained unjustly enriched. An innocent recipient ofstolen money may not be enriched at all; if Cass had paid £20,000derived from the solicitors to a car dealer for a motor car pricedat £20,000, the car dealer would not have been enriched. The cardealer would have received £20,000 for a car worth £20,000. Butan innocent recipient of stolen money will be enriched if therecipient has not given full consideration. If Cass had given£20,000 of the solicitors' money to a friend as a gift, the friendwould have been enriched and unjustly enriched because a donee ofstolen money cannot in good conscience rely on the bounty of thethief to deny restitution to the victim of the theft. Complicationsarise if the donee innocently expends the stolen money in relianceon the validity of the gift before the donee receives notice of thevictim's claim for restitution. Thus if the donee spent £20,000 inthe purchase of a motor car which he would not have purchasedbut for the gift, it seems to me that the donee has altered hisposition on the faith of the gift and has only been unjustlyenriched to the extent of the secondhand value of the motor carat the date when the victim of the theft seeks restitution. If thedonee spends the £20,000 in a trip round the world, which hewould not have undertaken without the gift, it seems to me thatthe donee has altered his position on the faith of the gift and thathe is not unjustly enriched when the victim of the theft seeksrestitution. In the present case Cass stole and the club received£229,908.48 of the solicitors' money. If the club was in the sameposition as a donee, the club nevertheless in good faith allowedCass to gamble with the solicitors' money and paid his winningsfrom time to time so that when the solicitors' sought restitution,the club only retained £154,695 derived from the solicitors. Thequestion is whether the club which was enriched by £154,695 atthe date when the solicitors sought restitution was unjustlyenriched.

The club claims that the club gave consideration for thesum of £154,695 by allowing Cass to gamble and agreeing to payhis winnings and therefore the club was not enriched or,alternatively, was not unjustly enriched. The solicitors claim thatthe club acquired £154,695 under void contracts and that asbetween the club and the solicitors from whom the money wasderived, the club is in no better position than an innocent doneefrom the thief, Cass. The resolution of this dispute depends onthe true construction of section 18 of the Gaming Act 1845, ananalysis of the relationship between the club and Cass and theconsideration of the authorities dealing with gaming and theauthorities dealing with unjust enrichment.

Section 18 of the Gaming Act 1845, so far as material,provides:

"all contracts or agreements, whether by parole or inwriting, by way of gaming or wagering, shall be null andvoid; and that no suit shall be brought or maintained in anycourt of law or equity for recovering any sum of money orvaluable thing alleged to be won upon any wager, or which

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shall have been deposited in the hands of any person toabide the event on which any wager shall have been made .

. . "

The club contends that the club received money from Cassunder a contract with him which was not a contract "by way ofgaming or wagering" and is not rendered null and void by section18 of the Act of 1845. Alternatively, even if the club receivedthe money under a contract by way of gaming nevertheless, it isargued, the club was not unjustly enriched because, in the beliefthat the money tendered by Cass was his own personal money, theclub accepted the money and altered the position of the club tothe detriment of the club by allowing Cass to gamble and bypaying his winnings when he won; the club, it is said, wasenriched, but not unjustly enriched, and may retain the moneywhich the club fairly and lawfully won. It is well settled thatsection 18 of the Act of 1845 does not enable a gambler torecover money which he has lost and paid.

The club was a proprietary club and Cass was a member.Cass was not bound to gamble but if he contemplated doing so hewas bound to advance cash. Cass could pay cash to the clubcashier. In return for cash the cashier issued credit vouchers witha face value equal to the money received. If Cass tendered acredit voucher to a croupier at a gaming table, Cass would beissued by the croupier with plastic chips amounting to the facevalue of the voucher. Cass could, if he wished, instead oftendering a voucher to a croupier, pay cash to a croupier andreceive plastic chips for cash. Gaming on the table was conductedwith chips. Cass was not bound to gamble and the croupier wasnot bound to allow Cass to stake a chip at the table. If Cassstaked and lost, the croupier kept the chip which had been staked.If Cass staked and won. the croupier paid out the winnings withchips. If Cass paid cash for a credit voucher which he did notexchange for chips, he could cash the credit voucher with thecashier. If Cass changed a credit voucher for chips or if Casspaid a croupier for chips, then the cashier would cash any chipswhich Cass did not stake. If Cass acquired chips by winning at atable or acquired chips from a fellow member, the cashier wouldcash the chips for Cass. If Cass ordered refreshments at the club,he could pay in chips. Thus within the club chips were treated ascurrency and on leaving the club Cass could exchange chips formoney whenever he chose to do so. The chips themselves wereworthless and at all times remained the property of the club butthe club would redeem them for cash.

The club argues that when Cass paid, for example, £5,000 incash to the cashier or to the croupier, there came into existencea contract which was not a gaming contract. In consideration for£5,000 paid by Cass, the club agreed to cash any chips retained,won or

otherwise acquired and at any time presented for payment.This was a contract, so it was said, in contemplation of gamingand not a contract by way of gaming. If Cass staked a chip andthe croupier accepted the stake and played the game, there cameinto existence a second contract. For example, if the game wereroulette, in consideration of the club promising to pay Cass if theball fell into a red pocket, Cass promised to pay the club if theball did not fall into a red pocket. When Cass lost he forfeitedhis staked chip and forfeited the right to the money represented

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by that chip. When Cass won he was entitled to the return of hisstaked chip and to his winnings in chips. But there were,according to the club, two separate contracts. By the firstcontract, Cass exchanged cash for chips and that was not acontract by way of gaming.

My Lords, when Cass paid money to the cashier, he wasissued with a receipt in the form of a credit voucher and then inthe form of a chip. The chip did not oblige Cass to avail himselfof the facilities of the club and did not oblige the club to allowCass to gamble or take advantage of any other facilities of theclub. If a thief deposits stolen money in a building society, thevictim is entitled to recover the money from the building societywithout producing the pass book issued to the thief. As againstthe victim, the building society cannot pretend that the buildingsociety gave good consideration for the acceptance of the deposit.The building society has been unjustly enriched at the expense ofthe victim. Of course the building society has a defence if thebuilding society innocently pays out the deposit before the buildingsociety realises that the deposit was stolen money. But in thepresent case the club retained some of the stolen money. Theclub cannot as against the solicitors retain the stolen money saveby relying on the gaming contracts which, as between the club andCass, entitled the club to retain the solicitors' money which Casslost at the gaming table. Those gaming contracts were void. Theclub remains unjustly enriched to the extent of £154,695.

If Cass had been gambling with his own money, the gamingsystem operated by the club would have ensured that Cass paid hisgambling losses contemporaneously and that the club paid theirgambling losses in arrears. The gaming contracts were void butsection 18 of the Act of 1845 does not, as between gamblers,prevent a gambling loss from being paid contemporaneously or inarrears. A gambling loss, whenever paid, is a completed voluntarygift from the loser to the winner. But Cass was gambling withthe money of the solicitors who have never gambled and nevermade a voluntary gift to the club.

Another way of analysing the situation is this. When Cassentered the club as a member, the club made to him a revocableoffer to gamble with him in the manner and upon the termsdictated by the club. Those terms required Cass to pay hisgambling stakes in advance and to allow the club to pay theirgambling losses in arrears. The revocable offer by the club wasaccepted by Cass when he staked a chip and became irrevocablewhen the croupier accepted the chip as a stake. There was onlyone contract and that was a gaming contract.

The club claims that even if the only consideration given bythe club was a gambling consideration, nevertheless the clubaltered its position to its detriment because the club allowed Cassto gamble and the club paid his winnings. This is another way ofrelying on a void gaming contract justifying the retention of thesolicitors' money. The club has not suffered any detriment. Ifthe club pays £154,695 to the solicitors as a result of this appeal,the club will be in exactly the same position which would haveobtained if Cass had not gambled away the solicitors' money. Itis true that the club would have been in a better position if Casshad been gambling away his own money, but that plaintive

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observation does not entitle the club to retain the solicitors'money by which the club remains unjustly enriched to the extentof £154,695.

Cass staked with the club money which he had stolen fromthe solicitors. The solicitors have been content to assume that inaddition Cass staked £20,050 of his own money. Cass also stakedmoney which from time to time he won from the club during thecourse of his doomed gambling. At the date when the solicitorsclaimed restitution the club had recovered all its own money andwere left with £174,745 net winnings. The club is entitled toassert and the solicitors cannot disprove that £20,050 of the netwinnings was money which had belonged to Cass. There remained£154,695 which must have been money stolen from the solicitors.My conclusion is that the club has no right to retain stolen moneyreceived by the club from the thief. Repayment by the club tothe victim, limited to the net amount of stolen money which theclub retains, will not inflict a net loss on the club as a result ofthe transactions between the club and the thief. In the presentcase money stolen from the solicitors by Cass has been paid toand is now retained by the club and ought to be repaid to thesolicitors. The solicitors will recover part of their stolen moneyand the club will only lose the winnings the club was not entitledto make out of the solicitors' money.

Counsel produced a number of relevant authorities whichmust be considered. In **Miller v. Race (1758) 1 Burr. 452**, a banknote made out to bearer and payable on demand was treated ascurrency. Conversion did not lie because there is no property incurrency. Lord Mansfield said, at pp. 457-458:

"So, in the case of money stolen, the true owner cannotrecover it, after it has been paid away fairly and honestlyupon a valuable and bona fide consideration: but beforemoney has passed in currency, an action may be brought forthe money itself."

In the present case the money was received by the clubfairly and honestly but not upon a valuable and bona fideconsideration.

In **Clarke v. Shee and Johnson (1774) 1 Cowp. 197** a servantstole money from his master and bought lottery tickets. Lotterieswere illegal and void under the Lottery Act 1772. The masterrecovered from the defendants who were the holders of the lotteryand had innocently received the stolen money. The defendantsunsuccessfully argued that there was no contract between themaster and the defendants and that the defendants had

givenconsideration for the receipt of the money. It was argued thatthough the defendants were fortunate in that the lottery ticketsissued for the stolen money were not winning tickets, thedefendants ran the risk "and therefore performed their part of theagreement: consequently, there is no foundation for an action torecover back the money paid." Lord Mansfield said, at p. 200:

"Here the plaintiff sues for his identified property, whichhas come to the hands of the defendants iniquitously andillegally in breach of the Act of Parliament. Thereforethey have no right to retain it; and consequently theplaintiff is well entitled to recover."

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Mr. Lightman, who appeared on behalf of the club, soughtto distinguish this authority on the ground that the Lottery Act1772 made the contract between the servant and the defendantsillegal and not merely void and imposed a criminal penalty forbreach of the statute. For present purposes, however, it does notseem to me to matter whether the contract upon which thedefendant relies as affording consideration for receipt of stolenmoney is illegal as provided by the Lottery Act 1772 or void asprovided by the Gaming Act 1845. In each case the contractcannot be relied upon to support the retention by the defendant ofstolen money derived from the plaintiff.

In **Aubert v. Walsh (1810) 3 Taunt. 277** there was a wageron 15 September 1808 that the war with France would end before1 July 1810. One party to the wager withdrew in October 1808and was held entitled to recover his stake from the other party.Lord Mansfield said, at p. 283:

"why should not a man say, you and I have agreed so andso, but the agreement is good for nothing; I cannot bindyou, and you cannot bind me, therefore I desire, before theevent happens, that you will pay me back my money:"

In the present case Cass could not bind the solicitors soboth before and after the event, they can recover their money tothe extent that as between the club and the solicitors, the stakesunjustly enriched the club and were retained by the club.

In **Hudson v. Robinson (1816) 4 M. & S. 475**, a partnerfraudulently contracted in the names of the partnership to sellgoods to the plaintiff. The fraud received the purchase price fromthe plaintiff and defaulted in delivery of the goods. It was heldthat the plaintiff could recover the purchase price from the fraudas money had and received. Lord Ellenborough C.J. said, at p.478:

"It is said that an action for money had and received is notmaintainable in this case. But an action for money had andreceived is maintainable whenever the money of one manhas, without consideration, got into the pocket of another.Here the money of the plaintiffs has got into the pocket ofthe defendant; and the question is whether this has beenwithout any consideration. The consideration was thesupposed right of the defendant to dispose of the goods aspartnership property, which was the inducement to theplaintiffs to give this bill, under which they have beenobliged to pay the money. The defendant had no such

right;therefore the absence of any consideration entitles theplaintiffs to maintain this action, and still more so wherethe money has got into the defendant's pocket through themedium of a fraud."

Here the money of the solicitors got into the pocket of theclub without any consideration.

In **Bainbrigge v. Browne (1881) 18 Ch.D. 188**, the plaintiffchildren, under the influence of their father, charged by deed theirreversionary interest under a settlement as security for advances

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made by the defendants to the father. Fry J. held, at p. 197,that undue influence:

"operates against the person who is able to exercise theinfluence (in this case it was the father) and in myjudgment, it would operate against every volunteer whoclaimed under him, and also against every person whoclaimed under him with notice of the equity thereby createdor with notice of the circumstances from which the courtinfers the equity."

On the facts the defendants who were not volunteers didnot have the requisite notice and were entitled to enforce theirsecurity. In the present case the club is in the same position as avolunteer.

In **Shoolbred v. Roberts [1899] 2 Q.B. 560**, an undischargedbankrupt played a match at billiards for £100 a side, the moneybeing deposited with stakeholders. The bankrupt was the winner.It was held that the trustee in bankruptcy of the winner wasentitled to recover from the stakeholder the bankrupt's stake of£100 but not the stake of the loser. Phillimore J. held, at p. 564,that on the authorities:

" ... I am bound now to hold . . . that where peopleembark in a perfectly lawful game and contest of skill, nottrusting to fortune but to skill, to ascertain the comparativeeminence of the two persons, the sums which they depositto make a joint award are to be considered by the law assums deposited by way of wagering, the contract is null andvoid, and the winner cannot recover the fund."

A fortiori, the club, as against the solicitors, is not entitledto retain the solicitors' money on the grounds that the club mighthave lost and paid its wager with Cass.

Phillimore J. also held in **Shoolbred v. Roberts**, at pp. 564-565, that the £100 staked by the bankrupt was his money and waspart of his property which his trustee in bankruptcy had a right torecover from the stakeholder. If the bankrupt at any timereceived from the stakeholder the stake of £100 which had beendeposited by the loser, that receipt "must be in the eye of thelaw a voluntary gift by the stakeholders" or by the loser orpossibly by both to the bankrupt; and if the loser should receive itof the bounty of the winner or of the bounty of the stakeholdersor at the bounty of both, so far it would not go to the trustee inbankruptcy.

When Cass lost and paid £154,695 to the club as a result ofgaming contracts, he made to the club a completed gift of£154,695. The club received stolen money by way of gift fromthe thief; the club, being a volunteer, has been unjustly enrichedat the expense of the solicitors from whom the money had beenstolen and the club must reimburse the solicitors.

In **Black v. S. Freeman & Co. (1910) 12 C.L.R. 105**, theHigh Court of Australia held that money stolen by a husband andhanded over to his wife by way of gift to her could be recoveredby the victim. O'Connor J. said, at p. 110:

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"Where money has been stolen, it is trust money in thehands of the thief, and he cannot divest it of thatcharacter. If he pays it over to another person, then itmay be followed into that other person's hands. If, ofcourse, that other person shows that it has come to himbona fide for valuable consideration, and without notice, itthen may lose its character as trust money and cannot berecovered. But if it is handed over merely as a gift, itdoes not matter whether there is notice or not."

Although the decision in this case went on the grounds oftrust, the reasoning applies equally to a claim for money had andreceived.

In **Banque Beige pour l'Etranger v. Hambrouck [1921] 1 K.B.321**, money stolen by a thief was paid, by way of gift, into thebank account of a woman with whom he was living. When thevictim made a claim against the woman and her bankers, therestood to her credit the sum of £315 representing part of themoney stolen from the victim. The victim was held entitled tothe £315. In that case the woman, as a donee, had becomeunjustly enriched by the receipt of money stolen from the victimand retained £315, part of that money. She was bound toreimburse the victim. It was argued in favour of the woman, whohad no notice of the theft, that she obtained a good title to themoney because it was a gift to her from the thief and the factthat she had paid the money into her banking account preventedany following of the money and that an action for money receivedwould therefore not lie. Bankes L.J. said, at p. 327:

"To accept either of the two contentions with which I havebeen so far dealing would be to assent to the propositionthat a thief who has stolen money, and who from fear ofdetection hands that money to a beggar who happens topass, gives a title to the money to the beggar as againstthe true owner - a proposition which is obviously impossibleof acceptance."

The judgments deal with the case on the basis of following trustassets but Atkin L.J. said, at p. 335:

"as the money paid into the bank can be identified as theproduct of the original money, the plaintiffs have thecommon law right to claim it, and can sue for money hadand received."

In my opinion the club in the present case are in no betterposition than the donee in the Banque Beige case.

In Transvaal & Delagoa Bay Investment Co. Ltd, v. Atkinson**[1944] 1 All E.R. 579**, money stolen from a company was paid bythe thief into a bank account of his wife. All the money wasexpended, mostly by being returned to the husband. The difficultquestions which arise when a donee innocently disposes of stolenmoney do not arise in the present case where the stolen moneyhas been retained by the club.

In the instant case Alliott J. declined to extend thecategories of quasi contract so as to enable the owner of stolen

property to recover the stolen money from the person to whomthe thief has lost it gambling: see **[1987] 1 W.L.R. 987**, 992-993.But the contracts under which the club received the stolen moneywere void under section 18 of the Act of 1845 and the club wasin no better position than a donee. On principle and on authoritya donee is bound to reimburse the victim for stolen moneyreceived and retained by the donee and, in the circumstances, theclub was unjustly enriched to the extent that the solicitors' moneywas retained by the club. The decision of Alliott J. was upheldby the Court of Appeal (May and Parker L.JJ., Nicholls L.J.dissenting) **[1989] 1 W.L.R. 1340**. May L.J. held that the clubgave valuable consideration for the stolen money when the clubissued Cass with chips which enabled him to gamble and when theclub undertook to cash the chips. Parker L.J. considered that acontract by the club to pay cash for gaming chips wasconsideration for the payment by Cass of cash for the use ofgaming chips. The judgments of the majority appeared also torely on the power of Cass to purchase refreshments with chips.But neither the power to purchase refreshments nor the exerciseof that power could constitute consideration for the receipt of£154,695. In my opinion the chips transaction was part of a singlecontract by virtue of which Cass gambled away money stolen fromthe solicitors. If there was a separate chips contract it was acontract which was designed and effective to enable money to begambled, won, lost and paid and as such it was a contract by wayof gaming. Nicholls L.J. said, at p. 1383:

"the chips were not money or money's-worth; they weremere counters or symbols used for the convenience of allconcerned in the gaming. As tokens, the chips indicatedthat the holder had lodged cash with the club or, when acheque had been used, had been given credit by the club, tothe extent indicated by the tokens. It is as though thecustomer had been given a series of receipts in respect ofthe money handed over by him prior to beginning to play.The money was to go to the winners, or be returned to thecustomer if not spent on gaming. When the customerplayed at the table he was playing with the money he hadbrought with him to the casino, just as much as if he hadused the banknotes themselves rather than the chips forwhich he had exchanged the banknotes preparatory to thestart of play. I do not believe that this internal,preliminary, preparatory step, of issuing chips for cash,adopted for considerations of practical convenience, canhave the effect in law that the club gave valuableconsideration for the money it received, when the

positionin law under the statute is that if money rather than tokenshad been used at the table, the club would not have givenvaluable consideration. I find such a conclusion repugnantto common sense."

I agree and would allow the appeal.

Included in the sum of £154,695 is £3,735 representing abanker's draft made out to the solicitors and indorsed by Cass tothe club for chips which Cass then gambled and lost. The Courtof Appeal held that the club had not become holders of the draftin due course and gave judgment for the solicitors. In this Housethe club cross-appealed. In my opinion the draft represented

money derived from the solicitors which has unjustly enriched theclub. There is no difference between the cash and the draftreceived by the club and the cross-appeal must be dismissed.

In the result I would order judgment to be entered for thesolicitors for the sum of £154,695.

LORD GRIFFITHS

My Lords,

I have had the advantage of reading the speeches of yourLordships. I agree that for the reasons given by Lord Templemanand Lord Goff of Chieveley the appellate solicitors can recoverthe sum of £150,960 from the respondent club as representingmoney stolen from the solicitors and the proceeds of the banker'sdraft lost by Cass in gaming at the respondent club.

I agree that for the reasons given by Lord Goff ofChieveley, the club converted the banker's draft made out to thesolicitors' and that the cross-appeal fails.

LORD ACKNER

My Lords,

I have had the advantage of reading in draft the speechesof my noble and learned friends. Lord Templeman and Lord Goffof Chieveley. I agree that the appeal should be allowed for thereasons set out in both these speeches. I have also had theadvantage of reading in draft the speech of my noble and learnedfriend, Lord Bridge of Harwich. I agree with the views which heexpresses as to the availability of the defence of change ofposition to a claim for restitution based on unjust enrichment asdeveloped by my noble and learned friend, Lord Goff of Chieveleyin his speech.

I also agree that for the reasons given by my noble andlearned friend, Lord Goff of Chieveley the cross-appeal should bedismissed.

LORD GOFF OF CHIEVELEY

My Lords,

The appellants, Lipkin Gorman ("the solicitors"), are a firmof solicitors. Norman Barry Cass was a partner in the firm from1978 to 1980. He had the authority of his partners to draw uponthe solicitors' client account, on his signature alone. The accountwas held at the branch of Lloyds Bank ("the bank") at 62 BrookStreet, London W.1.

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Cass proved to be a compulsive gambler. He gambledregularly at the casino at the Playboy Club ("the club") which wasowned by the respondents, though he also gambled elsewhere.Such was his addiction to gambling that he found his ownresources insufficient; and so he helped himself to money in theclient account. Without his partners' knowledge, between Marchand November 1980 he misappropriated large sums of money fromthe client account.

Cass used various methods to lay his hands on the money inthe client account. His principal method was to have a chequemade out by the solicitors' cashier (a man named Chapman who,as the judge found, had been suborned by Cass), drawn on theclient account and made payable to cash; Cass would then sign thecheque and Chapman would cash it at the bank and hand the cashto Cass. In addition, Cass caused building society accounts openedby him in the name of the solicitors to be credited with cashdrawn from the client account by means of cheques made payableto various building societies; a total of £40,000 was credited tobuilding societies in this way, during the relevant period. Cassthen drew cash from the building society accounts. When Cassfinally absconded, there was only £600 left in the building societyaccounts (excluding interest). Lastly, on one occasion Cassprocured the issue of a banker's draft for £3,735 ("the banker'sdraft") drawn on the bank in favour of the solicitors; this he didby issuing a cheque in favour of the bank drawn on the clientaccount. Chapman took delivery of the draft and passed it toCass. By these means Cass dishonestly acquired a total of£323,222.14 from the client account. From time to time,however, he paid back into the client account various sums,totalling £100,313.16, to cover up shortfalls caused by hiswithdrawals, leaving a net shortfall of £222,908.98. It is acceptedthat a substantial part of the money so misappropriated by Cass,or of sums derived from it, was exchanged by Cass for gamingchips at the club, as was the banker's draft. In other words,these sums were gambled away by Cass. Indeed the total sumstaked by Cass at the gaming tables of the club was no less than£561,014.06. This sum included some money of his own; but itwas no doubt so large because of his restaking sums which he wonfrom time to time, his total winnings amounting to £378,294.06.It has been agreed by the club that the net sum won by the cluband lost by Cass over a period of about 10 months was £174,745.Over that period, the maximum resources of Cass were £20,050.On the basis that credit is given for the whole of that sum, it hasbeen agreed that at least £154,695 won by the club and lost byCass was derived from money obtained by Cass from the solicitors'client account.

At the club, Cass would present cash either at the cashdesk or at the gaming tables. At the cash desk, he would begiven a so-called "cheque credit slip" in exchange for cash: hewould then exchange the slip for plastic chips of variousdenominations. If he presented cash at a gaming table, he wouldbe given chips in exchange for the cash. These chips at all timesremained the property of the club. Bets were normally made byputting down chips at the gaming table, but cash could be putdown at the gaming table and if so would be accepted for bets,without any chips being used. Chips could also be accepted in lieuof cash for refreshments at the club; but their actual use for this

purpose at the club appears to have been very rare, and there wasno evidence that Cass ever used them for that purpose. Anyunused chips, together with chips representing sums won in gaming,could be exchanged either for cash or a "winnings cheque" drawnon the club's bank. Cass however returned to the club all thewinnings cheques he received, receiving in their place fresh chequecredit slips which he then exchanged for chips for the purposes ofgaming.

Cass absconded to Israel. In due course he was extraditedfrom Israel; and on 8 June 1984 he was convicted at the CentralCriminal Court on 21 counts of theft of money from the solicitors'client account and sentenced to three years imprisonment.

The solicitors commenced proceedings against both therespondents and the bank. Their claim against the respondents wasfor the recovery, on various grounds, of the money taken by Cassfrom the current account and gambled away at the club. Theyalso claimed damages for conversion of the banker's draft. Theirclaim against the bank was for damages for conversion or forbreach of contract, or alternatively as constructive trustees.Before Alliott J., the solicitors' claim against the respondentsfailed, except for the claim for damages for conversion of thebanker's draft **[1987] 1 W.L.R. 987**. Their claim against the banksucceeded in part. In the Court of Appeal the solicitors' appealfrom the judge's decision dismissing their claim against therespondents in respect of the money was dismissed by a majority(May and Parker L.JJ., Nicholls L.J. dissenting) **[1989] 1 W.L.R.1340**. I shall refer in due course to the grounds for this decision;though I wish to record at this stage that Nicholls L.J. would haveheld the respondents liable in damages for conversion of themoney. The respondents' cross-appeal in respect of the banker'sdraft was also dismissed, but the cross-appeal of the banksucceeded. Your Lordships' House has been concerned only withthe appeal of the solicitors from the dismissal of their claimagainst the respondents, and the respondents' cross-appeal inrespect of the banker's draft. The solicitors' claim against thebank has no longer been pursued.

Before the Court of Appeal, and again before yourLordships' House, the solicitors' claim against the respondents wasfor the full sum of £222,908.98 as money had and received. Itwas not a claim for conversion of the money; and, despite theview expressed by Nicholls L.J. in his dissenting judgment, I do notconsider that such an alternative claim was open to the solicitors.Before the Court of Appeal, though not before the judge, thesolicitors relied strongly on **Clarke v. Shee and Johnson (1774) 1Cowp. 197**, Lofft. 756, in

support of their claim. The majority ofthe Court of Appeal however distinguished that case and rejectedthe solicitors' claim on the ground that the respondents receivedthe money in good faith and for valuable consideration, suchconsideration arising first (per May and Parker L.JJ.) from thefact that the club supplied chips in exchange for the money, thecontract under which the chips were supplied not being avoided asa contract by way of gaming or wagering under section 18 of theGaming Act 1845; and second (per Parker L.J.) from the fact that,although the actual gaming contracts under which Cass gambledaway the money were void under the Act, nevertheless he obtainedin exchange for the money the chance of winning and of then

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being paid and so received valuable consideration from the club.So far as the solicitors' claim for conversion of the banker's draftwas concerned, the Court of Appeal rejected a contention by theclub that they could escape liability on the ground that they wereholders in due course of the draft. I shall consider first thesolicitors' appeal in respect of the money, and then therespondents' cross-appeal in respect of the draft; though, as willappear, the appeal and cross-appeal share certain common features.

The solicitors' appeal

I turn then to the solicitors' appeal in respect of themoney, which they claim from the respondents as money had andreceived by the respondents to their use. To consider this aspectof the case it is, in my opinion, necessary to analyse with somecare the nature of the claim so made.

The solicitors' claim is, in substance, as follows. They say,first, that the cash handed over by the bank to Chapman inexchange for the cheques drawn on the solicitors' client accountby Cass was in law the property of the solicitors. That isdisputed by the respondents who say that, since the cheques weredrawn on the bank by Cass without the authority of his partners,the legal property in the money immediately vested in Cass; thatargument was however rejected by the Court of Appeal. If thatargument is rejected, the respondents concede for present purposesthat the cash so obtained by Cass from the client account waspaid by him to the club, but they nevertheless resist the solicitors'claim on two grounds: first, that they gave valuable considerationfor the money in good faith, as held by a majority of the Courtof Appeal; and second that, in any event, having received themoney in good faith and having given Cass the opportunity ofwinning bets and, in some cases, recovering substantial sums byway of winnings, it would be inequitable to allow the solicitors'claim.

At the heart of the **solicitors' claim lies Clarke v. Shee andJohnson (1774) 1 Cowp. 197**, Lofft. 756. In that case theplaintiff's clerk received money and negotiable notes from theplaintiff's customers, in the ordinary course of the plaintiff's tradeas a brewer, for the use of the plaintiff. From the sums soreceived by him, the clerk paid several sums, amounting to nearly£460, to the defendant "upon the chances of the coming up oftickets in the State Lottery of 1772," contrary to the Lottery Act1772. The

Court of Queen's Bench held that the plaintiff wasentitled to recover the sum of £460 from the defendant as moneyhad and received by him for the use of the plaintiff. Thejudgment of the court was delivered by Lord Mansfield. He said,1 Cowp. 197, 199-201:

"This is a liberal action in the nature of a bill in equity;and if, under the circumstances of the case, it appears thatthe defendant cannot in conscience retain what is thesubject matter of it, the plaintiff may well support thisaction . . . the plaintiff does not sue as standing in theplace of Wood his clerk: for the money and notes whichWood paid to the defendants, are the identical notes andmoney of the plaintiff. Where money or notes are paidbona fide, and upon a valuable consideration, they never

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shall be brought back by the true owner; but where theycome mala fide into a person's hands, they are in thenature of specific property; and if their identity can betraced and ascertained, the party has a right to recover. Itis of public benefit and example that it should; butotherwise, if they cannot be followed and identified, becausethere it might be inconvenient and open a door to fraud.**Miller v. Race**, 1 Burr. 452: and in **Golightly v. Reynolds(1772) Lofft. 88** the identity was traced through differenthands and shops. Here the plaintiff sues for his identifiedproperty, which has come to the hands of the defendantiniquitously and illegally, in breach of the Act ofParliament, therefore they have no right to retain it: andconsequently the plaintiff is well entitled to recover."

It is the solicitors' case that the present case is indistinguishablefrom **Clarke v. Shee and Johnson**. In each case, the plaintiff'smoney was stolen - in that case by his servant, and in the presentcase by a partner - and then gambled away by the thief; and theplaintiff was or should be entitled to recover his money from therecipient in an action for money had and received. It is therespondents' case that the present case is distinguishable on one ormore of the three grounds I have mentioned. I shall considerthose three grounds in turn.

Title to the money

The first ground is concerned with the solicitors' title tothe money received by Cass (through Chapman) from the bank. Itis to be observed that the present action, like the action in Clarkev. Shee and Johnson, is concerned with a common law claim tomoney, where the money in question has not been paid by theappellant directly to the respondents - as is usually the case wheremoney is, for example, recoverable as having been paid under amistake of fact, or for a consideration which has failed. On thecontrary, here the money had been paid to the respondents by athird party, Cass; and in such a case the appellant has to establisha basis on which he is entitled to the money. This (at least, as ageneral rule) he does by showing that the money is his legalproperty, as appears from Lord Mansfield's judgment in Clarke v.Shee and Johnson. If he can do so, he may be entitled to succeedin a claim against the third party for money had and received tohis use, though not if the third party has received the money ingood faith and for a valuable consideration. The cases in whichsuch a claim has succeeded are, I believe, very rare (see

thecases, including **Clarke v. Shee and Johnson**, collected in Goff andJones, The Law of Restitution, 3rd ed. (1986), p. 64, note 29).This is probably because, at common law, property in money, likeother fungibles, is lost as such when it is mixed with other money.Furthermore, it appears that in these cases the action for moneyhad and received is not usually founded upon any wrong by thethird party, such as conversion; nor is it said to be a case ofwaiver of tort. It is founded simply on the fact that, as LordMansfield said, the third party cannot in conscience retain themoney - or, as we say nowadays, for the third party to retain themoney would result in his unjust enrichment at the expense of theowner of the money.

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So, in the present case, the solicitors seek to show that themoney in question was their property at common law. But theirclaim in the present case for money had and received isnevertheless a personal claim; it is not a proprietary claim,advanced on the basis that money remaining in the hands of therespondents is their property. Of course there is no doubt that,even if legal title to the money did vest in Cass immediately onreceipt, nevertheless he would have held it on trust for hispartners, who would accordingly have been entitled to trace it inequity into the hands of the respondents. However, your Lordshipsare not concerned with an equitable tracing claim in the presentcase, since no such case is advanced by the solicitors, who havebeen content to proceed at common law by a personal action, viz.an action for money had and received. I should add that, in thepresent case, we are not concerned with the fact that moneydrawn by Cass from the solicitors' client account at the bank mayhave become mixed by Cass with his own money before hegambled it away at the club. For the respondents have concededthat, if the solicitors can establish legal title to the money in thehands of Cass, that title was not defeated by mixing of the moneywith other money of Cass while in his hands. On this aspect ofthe case, therefore, the only question is whether the solicitors canestablish legal title to the money when received by Cass from thebank by drawing cheques on the client account without authority.

Before your Lordships, and no doubt before the courtsbelow, elaborate argument was advanced by counsel upon thisissue. The respondents relied in particular upon two decisions ofthe Privy Council as showing that where a partner obtains moneyby drawing on a partnership bank account without authority, healone and not the partnership obtains legal title to the money soobtained. These cases. **Union Bank of Australia Ltd, v.** McClintock[[1922] 1 A.C, 240 and Commercial Banking Co. of Sydney Ltd, v.Mann [1961] AC 1, were in fact concerned with bankers' cheques:but for the respondents it was submitted that the same principlewas applicable in the case of cash. The solicitors argued thatthese cases were wrongly decided, or alternatively sought todistinguish them on a number of grounds. I shall have to examinethese cases in some detail when I come to consider therespondents' cross-appeal in respect of the banker's draft; and, aswill then appear, I am not prepared to depart from decisions ofsuch high authority as these. They show that, where a banker'scheque payable to a third party or bearer is obtained by a partnerfrom a bank which has received the authority of the partnership topay the partner

in question who has, however, unknown to thebank, acted beyond the authority of his partners in so operatingthe account, the legal property in the banker's cheque thereuponvests in the partner. The same must a fortiori be true when it isnot such a banker's cheque but cash which is so drawn from thebank by the partner in question. Even so, I am satisfied that thesolicitors are able to surmount this difficulty, as follows.

It is well established that a legal owner is entitled to tracehis property into its product, provided that the latter is indeedidentifiable as the product of his property. Thus, in Taylor v.Plumer **(1815) 3 M. & S. 562**, where Sir Thomas Plumer gave adraft to a stockbroker for the purpose of buying exchequer bills,and the stockbroker instead used the draft for buying Americansecurities and doubloons for his own purposes, Sir Thomas was able

to trace his property into the securities and doubloons in the handsof the stockbroker, and so defeat a claim made to them by thestockbroker's assignees in bankruptcy. Of course, "tracing" or"following" property into its product involves a decision by theowner of the original property to assert his title to the product inplace of his original property. This is sometimes referred to asratification. I myself would not so describe it; but it has, in myopinion, at least one feature in common with ratification, that itcannot be relied upon so as to render an innocent recipient awrongdoer (cf. **Bolton Partners v. Lambert (1889) 41 Ch.D. 295**,307, per Cotton L.J. - "an act lawful at the time of itsperformance [cannot] be rendered unlawful, by the application ofthe doctrine of ratification.")

I return to the present case. Before Cass drew upon thesolicitors' client account at the bank, there was of course noquestion of the solicitors having any legal property in any cashlying at the bank. The relationship of the bank with the solicitorswas essentially that of debtor and creditor; and since the clientaccount was at ail material times in credit, the bank was thedebtor and the solicitors were its creditors. Such a debtconstitutes a chose in action, which is a species of property; andsince the debt was enforceable at common law, the chose inaction was legal property belonging to the solicitors at commonlaw.

There is in my opinion no reason why the solicitors shouldnot be able to trace their property at common law in that chosein action, or in any part of it, into its product, i.e. cash drawn byCass from their client account at the bank. Such a claim isconsistent with their assertion that the money so obtained by Casswas their property at common law. Further, in claiming themoney as money had and received, the solicitors have not soughtto make the respondents liable on the basis of any wrong, a pointwhich will be of relevance at a later stage, when I come toconsider the defence of change of position.

Authority for the solicitors' right to trace their property inthis way is to be found in the decision of your Lordships' House in**Marsh v. Keating (1834) 1 Bing. (N.C.) 198**. Mrs. Keating was theproprietor of £12,000 interest or share in joint stock reduced 3 percent. annuities, standing to her credit in the books of the Bank ofEngland, where the accounts were entered in the form of debtorand creditor accounts in the ledgers of the

bank. Under whatpurported to be a power of attorney given by Mrs. Keating to thefirm of Marsh, Sibbard & Co., on which Mrs. Keating's signaturewas in fact forged by Henry Fauntleroy, a partner in Marsh,Sibbard & Co., an entry was made in the books of the Bank ofEngland purporting to transfer £9,000 of Mrs. Keating's interest orshare in the stock to William Tarbutt, to whom, on theinstructions of Henry Fauntleroy, the stock had been sold for thesum of £6,018 15s. In due course, the broker who conducted thesale accounted for £6,013 2s.6d. (being the sale price lesscommission) by a cheque payable to Marsh & Co. Upon thediscovery of the forgery, Mrs. Keating made a claim upon theBank of England; and the bank requested Mrs. Keating to prove inthe bankruptcy of the partners in Marsh & Co. in respect of thesum so received by them. Mrs. Keating then commenced anaction, pursuant to an order of the Lord Chancellor, for the

purpose of trying the question whether the partners in Marsh &Co. were indebted to her, in which she claimed the sum soreceived by Marsh & Co. as money had and received to her use.The opinion of the judges was taken, and their opinion was to theeffect that Mrs. Keating was entitled to succeed in her claim.Your Lordships' House ruled accordingly. It must follow a fortiorithat the solicitors, as owners of the chose in action constituted bythe indebtedness of the bank to them in respect of the sums paidinto the client account, could trace their property in that chose inaction into its direct product, the money drawn from the accountby Cass. It further follows, from the concession made by therespondents, that the solicitors can follow their property into thehands of the respondents when it was paid to them at the club.

Whether the respondents gave consideration for the money

There is no doubt that the respondents received the moneyin good faith; but, as I have already recorded, there was an acutedifference of opinion among the members of the Court of Appealwhether the respondents gave consideration for it. Parker L.J.was of opinion that they did so, for two reasons:

(1) The club supplied chips in exchange for the money.The contract under which the chips were supplied was a separatecontract, independent of the contracts under which bets wereplaced at the club; and the contract for the chips was not avoidedas a contract by way of gaming and wagering under section 18 ofthe Gaming Act 1845.

(2) Although the actual gaming contracts were void underthe Act, nevertheless Cass in fact obtained in exchange for themoney the chance of winning and of then being paid and soreceived valuable consideration from the club.

May L.J. agreed with the first of these two reasons.Nicholls L.J. disagreed with both.

I have to say at once that I am unable to accept thealternative basis upon which Parker L.J. held that considerationwas given for the money, viz. that each time Cass placed a bet atthe casino, he obtained in exchange the chance of winning andthus of being paid. In my opinion, when Cass placed a bet, hereceived nothing in return which constituted valuable

consideration.The contract of gaming was void; in other words, it was binding inhonour only. Cass knew, of course, that, if he won his bet, theclub would pay him his winnings. But he had no legal right toclaim them. He simply had a confident expectation that, in fact,the club would pay; indeed, if the club did not fulfil its obligationsbinding in honour upon it, it would very soon go out of business.But it does not follow that, when Cass placed the bet, he receivedanything that the law recognises as valuable consideration. In myopinion he did not do so. Indeed, to hold that consideration hadbeen given for the money on this basis would, in my opinion, beinconsistent with **Clarke v. Shee and Johnson (1774) 1 Cowp. 197**,Lofft 756. Even when a winning bet has been paid, the gamblerdoes not receive valuable consideration for his money. All that hereceives is, in law, a gift from the club.

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However, the first basis upon which Parker and May L.JJ.decided the point is more difficult. To that I now turn.

In common sense terms, those who gambled at the clubwere not gambling for chips: they were gambling for money. AsDavies L.J. said in **C.H.T. Ltd, v. Ward [1965] 2 Q.B. 63**, 79:

"People do not game in order to win chips; they gamein order to win money. The chips are not money ormoney's worth; they are mere counters or symbols used forthe convenience of all concerned in the gaming."

The convenience is manifest, especially from the point of view ofthe club. The club has the gambler's money up front, and largesums of cash are not floating around at the gaming tables. Thechips are simply a convenient mechanism for facilitating gamblingwith money. The property in the chips as such remains in theclub, so that there is no question of a gambler buying the chipsfrom the club when he obtains them for cash.

But this broad approach does not solve the problem, which

is essentially one of analysis. I think it best to approach the

problem by taking a situation unaffected by the impact of theGaming Acts.

Suppose that a large department store decides, for reasonsof security, that all transactions in the store are to be effectedby the customers using chips instead of money. On entering thestore, or later, the customer goes to the cash desk and obtainschips to the amount he needs in exchange for cash or a cheque.When he buys goods, he presents chips for his purchase. Before heleaves the store, he presents his remaining chips, and receives cashin return. The example may be unrealistic, but in legal terms itis reasonably straightforward. A contract is made when thecustomer obtains his chips under which the store agrees that, ifgoods are purchased by the customer, the store will accept chipsto the equivalent value of the price, and further that it willredeem for cash any chips returned to it before the customerleaves the store. If a customer offers to buy a certain item ofgoods at the store,

and the girl behind the counter accepts hisoffer but then refuses to accept the customer's chips, the storewill be in breach of the contract for chips. Likewise if, before heleaves the store, the customer hands in some or all of his chipsat the cash desk, and the girl at the cash desk refuses to redeemthem, the store will be in breach of the contract for chips.

Each time that a customer buys goods, he enters into acontract of sale, under which the customer purchases goods at thestore. This is a contract for the sale of goods; it is not acontract of exchange, under which goods are exchanged for chips,but a contract of sale, under which goods are bought for a price,i.e. for a money consideration. This is because, when thecustomer surrenders chips of the appropriate denomination, thestore appropriates part of the money deposited with it towards thepurchase. This does not however alter the fact that anindependent contract is made for the chips when the customeroriginally obtains them at the cash desk. Indeed that contract isnot dependent upon any contract of sale being entered into; thecustomer could walk around the store and buy nothing, and then be

entitled to redeem his chips in full under the terms of hiscontract with the store.

But the question remains: when the customer hands over hiscash at the cash desk, and receives his chips, does the store givevaluable consideration for the money so received by it? Incommon sense terms, the answer is no. For, in substance and inreality, there is simply a gratuitous deposit of the money with thestore, with liberty to the customer to draw upon that deposit topay for any goods he buys at the store. The chips are no morethan the mechanism by which that result is achieved without anycash being handed over at the sales counter, and by which thecustomer can claim repayment of any balance remaining of hisdeposit. If a technical approach is adopted, it might be said that,since the property in the money passes to the store as depositee,it then gives consideration for the money in the form of a chosein action created by its promise to repay a like sum, subject todraw-down in respect of goods purchased at the store. I howeverprefer the common sense approach. Nobody would say that thestore has purchased the money by promising to repay it: thepromise to repay is simply the means of giving effect to thegratuitous deposit of the money with the store. It follows that,by receiving the money in these circumstances, the store does notfor present purposes give valuable consideration for it. Otherwisea bank with which money was deposited by an innocent donee froma thief could claim to be a bona fide purchaser of the moneysimply by virtue of the fact of the deposit.

Let me next take the case of gambling at a casino. Ofcourse, if gaming contracts were not void under English law byvirtue of section 18 of the Gaming Act 1845, the result would beexactly the same. There would be a contract in respect of thechips, under which the money was deposited with the casino; andthen separate contracts would be made when each bet was placed,at which point of time part or all of the money so depositedwould be appropriated to the bets.

However, contracts by way of gaming or wagering are voidin English law. What is the effect of this? It is obvious thateach time a bet is placed by the gambler, the agreement underwhich the bet is placed is an agreement by way of gaming orwagering, and so is rendered null and void. It follows, as I havesaid, that the casino, by accepting the bet, does not thereby givevaluable consideration for the money which has been wagered bythe gambler, because the casino is under no legal obligation tohonour the bet. Of course, the gambler cannot recover the moneyfrom the casino on the ground of failure of consideration; for hehas relied upon the casino to honour the wager - he has in lawgiven the money to the casino, trusting that the casino will fulfilthe obligation binding in honour upon it and pay him if he wins hisbet - though if the casino does so its payment to the gambler willlikewise be in law a gift. But suppose it is not the gambler butthe true owner of the money (from whom the gambler has perhaps,as in the present case, stolen the money) who is claiming it fromthe casino. What then? In those circumstances the casino cannot,in my opinion, say that it has given valuable consideration for themoney, whether or not the gambler's bet is successful. It hasgiven no consideration if the bet is unsuccessful, because itspromise to pay on a successful bet is void; nor has it done so if

the gambler's bet is successful and the casino has paid him hiswinnings, because that payment is in law a gift to the gambler bythe casino.

For these reasons I conclude, in agreement with NichollsL.J., that the respondents did not give valuable consideration forthe money. But the matter does not stop there; because thereremains the question whether the respondents can rely upon thedefence of change of position.

Change of position

I turn then to the last point on which the respondents reliedto defeat the solicitors' claim for the money. This was that theclaim advanced by the solicitors was in the form of an action formoney had and received, and that such a claim should onlysucceed where the defendant was unjustly enriched at the expenseof the plaintiff. If it would be unjust or unfair to orderrestitution, the claim should fail. It was for the court to considerthe question of injustice or unfairness, on broad grounds. If thecourt thought that it would be unjust or unfair to hold therespondents liable to the solicitors, it should deny the solicitorsrecovery. Mr. Lightman, for the club, listed a number of reasonswhy, in his submission, it would be unfair to hold the respondentsliable. These were (1) the club acted throughout in good faith,ignorant of the fact that the money had been stolen by Cass; (2)although the gaming contracts entered into by the club with Casswere ail void, nevertheless the club honoured all those contracts;(3) Cass was allowed to keep his winnings (to the extent that hedid not gamble them away); (4) the gaming contracts were merelyvoid not illegal; and (5) the solicitors' claim was no different inprinciple from a claim to recover against an innocent third partyto whom the money was given and who no longer retained it.

I accept that the solicitors' claim in the present case isfounded upon the unjust enrichment of the club, and can onlysucceed if, in accordance with the principles of the law ofrestitution, the club was indeed unjustly enriched at the expense ofthe solicitors. The claim for money had and received is not, as Ihave previously mentioned, founded upon any wrong committed bythe club against the solicitors. But it does not, in my opinion,follow that the court has carte blanche to reject the solicitors'claim simply because it thinks it unfair or unjust in thecircumstances to grant recovery. The recovery of money inrestitution is not, as a general rule, a matter of discretion for thecourt. A claim to recover money at common law is made as amatter of right; and even though the underlying principle ofrecovery is the principle of unjust enrichment, nevertheless, whererecovery is denied, it is denied on the basis of legal principle.

It is therefore necessary to consider whether Mr. Lightman'ssubmission can be upheld on the basis of legal principle. In myopinion it is plain, from the nature of his submission, that he is infact seeking to invoke a principle of change of position, assertingthat recovery should be denied because of the change in positionof the respondents, who acted in good faith throughout.

Whether change of position is, or should be, recognised as adefence to claims in restitution is a subject which has been much

debated in the books. It is however a matter on which there is aremarkable unanimity of view, the consensus being to the effectthat such a defence should be recognised in English law. I myselfam under no doubt that this is right.

Historically, despite broad statements of Lord Mansfield tothe effect that an action for money had and received will only liewhere it is inequitable for the defendant to retain the money (seein particular **Moses v. Macferlan (1760) 2 Burr. 1005**), the defencehas received at most only partial recognition in English law. Irefer to two groups of cases which can arguably be said to restupon change of position: (1) where an agent can defeat a claim torestitution on the ground that, before learning of the plaintiff'sclaim, he has paid the money over to his principal or otherwisealtered his position in relation to his principal on the faith of thepayment; and (2) certain cases concerned with bills of exchange, inwhich money paid under forged bills has been held irrecoverable ongrounds which may, on one possible view, be rationalised in termsof change of position: see, e.g. **Price v. Neal (1762) 3 Burr. 1354**,and London and River Plate Bank Ltd, v. Bank of Liverpool **[1896]1 Q.B. 7**. There has however been no general recognition of anydefence of change of position as such; indeed any such defence isinconsistent with the decisions of the **Exchequer Division inCurrant v. Ecclesiastical Commissioners for England** and Wales**(1880) 6 Q.B.D. 234**, and of the Court of Appeal in Baylis v.Bishop of London **[1913] 1 Ch. 127**. Instead, where change ofposition has been relied upon by the defendant, it has been usualto approach the problem as one of estoppel: see, e.g. R. E. JonesLtd, v. Waring and Gillow Ltd. **[1926] A.C. 670**, and **Avon CountyCouncil v. Hewlett [1983] 1 W.L.R. 605**. But it is difficult to seethe justification for such a

rationalisation. First, estoppelnormally depends upon the existence of a representation by oneparty, in reliance upon which the representee has so changed hisposition that it is inequitable for the representor to go back uponhis representation. But, in cases of restitution, the requirement ofa representation appears to be unnecessary. It is true that, incases where the plaintiff has paid money directly to the defendant,it has been argued (though with difficulty) that the plaintiff hasrepresented to the defendant that he is entitled to the money; butin a case such as the present, in which the money is paid to aninnocent donee by a thief, the true owner has made norepresentation whatever to the defendant. Again, it was held bythe Court of Appeal in **Avon County Council v. Hewlett thatestoppel cannot operate pro** tanto, with the effect that if, forexample, the defendant has innocently changed his position bydisposing of part of the money, a defence of estoppel wouldprovide him with a defence to the whole of the claim.Considerations such as these provide a strong indication that, inmany cases, estoppel is not an appropriate concept to deal withthe problem.

In these circumstances, it is right that we should askourselves: why do we feel that it would be unjust to allowrestitution in cases such as these? The answer must be that,where an innocent defendant's position is so changed that he willsuffer an injustice if called upon to repay or to repay in full, theinjustice of requiring him so to repay outweighs the injustice ofdenying the plaintiff restitution. If the plaintiff pays money tothe defendant under a mistake of fact, and the defendant then,

acting in good faith, pays the money or part of it to charity, it isunjust to require the defendant to make restitution to the extentthat he has so changed his position. Likewise, on facts such asthose in the present case, if a thief steals my money and pays itto a third party who gives it away to charity, that third partyshould have a good defence to an action for money had andreceived. In other words, bona fide change of position should ofitself be a good defence in such cases as these. The principle iswidely recognised throughout the common law world. It isrecognised in the United States of America (see Restatement ofRestitution, para. 142, and Palmer on Restitution, vol. III, para.16.8); it has been judicially recognised by the Supreme Court ofCanada (see Rural Municipality of Storthoaks v. Mobil Oil CanadaLtd. (1975) 55 D.L.R. (3d) 1); it has been introduced by statute inNew Zealand (Judicature Act 1908, section 94B (as amended)), andin Western Australia (see Western Australia Law Reform (Property,Perpetuities and Succession) Act 1962, section 24, and WesternAustralia Trustee Act 1962, section 65(8)), and it has beenjudicially recognised by the Supreme Court of Victoria (see **Bankof New South Wales v. Murphett [1983] 1 V.R. 489**). In theimportant case of Australia and New Zealand Banking Group Ltd,v. Westpac Banking Corporation **(1988) 78 A.L.R. 187**, there arestrong indications that the High Court of Australia may be movingtowards the same destination (see especially at pp. 162 and 168,per curiam). The time for its recognition in this country is, in myopinion, long overdue.

I am most anxious that, in recognising this defence toactions of restitution, nothing should be said at this stage toinhibit the development of the defence on a case by case basis, inthe usual way. It is, of course, plain that the defence is not opento one who has changed his position in bad faith, as where thedefendant has paid away the money with knowledge of the factsentitling the plaintiff to restitution; and it is commonly acceptedthat the defence should not be open to a wrongdoer. These arematters which can, in due course, be considered in depth in caseswhere they arise for consideration. They do not arise in thepresent case. Here there is no doubt that the respondents haveacted in good faith throughout, and the action is not founded uponany wrongdoing of the respondents. It is not however appropriatein the present case to attempt to identify all those actions inrestitution to which change of position may be a defence. Aprominent example will, no doubt, be found in those cases wherethe plaintiff is seeking repayment of money paid under a mistakeof fact; but I can see no reason why the defence should not alsobe available in principle in a case such as the present, where theplaintiff's money has been paid by a thief to an innocent donee,and the plaintiff then seeks repayment from the donee in anaction for money had and received. At present I do not wish tostate the principle any less broadly than this: that the defence isavailable to a person whose position has so changed that it wouldbe inequitable in ail the circumstances to require him to makerestitution, or alternatively to make restitution in full. I wish tostress however that the mere fact that the defendant has spentthe money, in whole or in part, does not of itself render itinequitable that he should be called upon to repay, because theexpenditure might in any event have been incurred by him in theordinary course of things. I fear that the mistaken assumptionthat mere expenditure of money may be regarded as amounting to

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a change of position for present purposes has led in the past toopposition by some to recognition of a defence which in fact islikely to be available only on comparatively rare occasions. Inthis connection I have particularly in mind the speech of LordSimonds in **Ministry of Health v. Simpson [1951] A.C. 251**, 276.

I wish to add two further footnotes. The defence of changeof position is akin to the defence of bona fide purchase; but wecannot simply say that bona fide purchase is a species of changeof position. This is because change of position will only avail adefendant to the extent that his position has been changed;whereas, where bona fide purchase is invoked, no inquiry is made(in most cases) into the adequacy of the consideration. Even so,the recognition of change of position as a defence should bedoubly beneficial. It will enable a more generous approach to betaken to the recognition of the right to restitution, in theknowledge that the defence is, in appropriate cases, available; andwhile recognising the different functions of property at law and inequity, there may also in due course develop a more consistentapproach to tracing claims, in which common defences arerecognised as available to such claims, whether advanced at law orin equity.

I turn to the application of this principle to the presentcase. In doing so, I think it right to stress at the outset that therespondents, by running a casino at the club, were conducting aperfectly lawful business. There is nothing unlawful aboutaccepting bets at a casino; the only relevant consequence of thetransactions being gambling transactions is that they are void. Inother words, the transactions as such give rise to no legalobligations. Neither the gambler, nor the casino, can go to courtto enforce a gaming transaction. That is the legal position. Butthe practical or business position is that, if a casino does not paywinnings when they are due, it will simply go out of business. Sothe obligation in honour to pay winnings is an obligation which, inbusiness terms, the casino has to comply with. It is also relevantto bear in mind that, in the present case, there is no question ofCass having gambled on credit. In each case, the money was putup front, not paid to discharge the balance of an account kept forgambling debts. It was because the money was paid over, that thecasino accepted the bets at all.

In the course of argument before your Lordships, attentionwas focused upon the overall position of the respondents. Fromthis it emerged, that, on the basis I have indicated (but excludingthe banker's draft) at least £150,960 derived from money stolen byCass from the solicitors was won by the club and lost by Cass.On this approach, the possibility arose that the effect of changeof position should be to limit the amount recoverable by thesolicitors to that sum. But there are difficulties in the way ofthis approach. Let us suppose that a gambler places two betswith a casino, using money stolen from a third party. Thegambler wins the first bet and loses the second. So far as thewinning bet is concerned, it is readily understandable that thecasino should be able to say that it is not liable to the true ownerfor money had and received, on the ground that it has changed itsposition in good faith. But at first sight it is not easy to see howit can aggregate the two bets together and say that, by payingwinnings on the first bet in excess of both, it should be able to

deny liability in respect of the money received in respect of thesecond.

There are other ways in which the problem might beapproached, the first narrower and the second broader than thatwhich I have just described. The narrower approach is to limitthe impact of the winnings to the winning bet itself, so that theamount of all other bets placed with the plantiff's money would bereoverable by him regardless of the substantial winnings paid bythe casino to the gambler on the winning bet. On the broaderapproach, it could be said that, each time a bet is accepted bythe casino, with the money up front, the casino, by accepting thebet, so changes its position in good faith that it would inequitableto require it to pay the money back to the true owner. Thiswould be because, by accepting the bet, the casino has committeditself, in business terms, to pay the gambler his winnings ifsuccessful. In such circumstances, the bookmaker could say that,acting in good faith, he had changed his position, by incurring therisk of having to pay a sum of money substantially larger than theamount of the stake. On this basis, it would be irrelevantwhether the gambler won the bet or not, or, if he did win thebet, how much he won.

I must confess that I have not found the point an easy one.But in the end I have come to the conclusion that on the facts ofthe present case the first of these three solutions is appropriate.Let us suppose that only one bet was placed by a gambler at acasino with the plaintiff's money, and that he lost it. In thatsimple case, although it is true that the casino will have changedits position to the extent that it has incurred the risk, it will inthe result have paid out nothing to the gambler, and so primafacie it would not be inequitable to require it to repay the amountof the bet to the plaintiff. The same would, of course, be equallytrue if the gambler placed a hundred bets with the plaintiff'smoney and lost them all; the plaintiff should be entitled torecover the amount of all the bets. This conclusion has the meritof consistency with the decision of the Court of King's Bench in**Clarke v. Shee and Johnson (1774) 1 Cowp. 197**, Lofft. 756. Butthen, let us suppose that the gambler has won one or more out ofone hundred bets placed by him with the plaintiff's money at thecasino over a certain period of time, and that the casino has paidhim a substantial sum in winnings, equal, let us assume, to onehalf of the amount of all the bets. Given that it is notinequitable to require the casino to repay to the plaintiff theamount of the bets in full where no winnings have been paid, itwould, in the circumstances I have just described, be inequitable,in my opinion, to require the casino to repay to the plaintiff morethan one half of his money. The inequity, as I perceive it, arisesfrom the nature of gambling itself. In gambling only an occasionalbet is won, but when the gambler wins he will receive much morethan the stake placed for his winning bet. True, there may be noimmediate connection between the bets. They may be placed ondifferent occasions, and each one is a separate gaming contract.But the point is that there has been a series of transactions underwhich all the bets have been placed by paying the plaintiff'smoney to the casino, and on each occasion the casino has incurredthe risk that the gambler will win. It is the totality of the betswhich yields, by the laws of chance, the occasional winning bet;and the occasional winning bet is therefore, in practical terms, the

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result of the casino changing its position by incurring the risk oflosing on each occasion when a bet is placed with it by thegambler. So, when in such circumstances the plaintiff seeks torecover from the casino the amount of several bets placed with itby a gambler with his money, it would be inequitable to requirethe casino to repay in full without bringing into account winningspaid by it to the gambler on any one or more of the bets soplaced with it. The result may not be entirely logical; but it issurely just.

For these reasons, I would allow the solicitors' appeal inrespect of the money, limited however to the sum of £150,960.

The respondents' cross-appeal in respect of the banker's draft

The Court of Appeal unanimously affirmed the decision ofthe judge that the respondents were liable in damages for theconversion of the banker's draft. Two main issues arose on thisaspect of the case. The first issue was whether the legal title tothe draft was vested in the solicitors so as to enable them toclaim that the draft was converted by the respondents, or thatthey were alternatively liable, on the basis of waiver of the tortof

conversion, to pay to the solicitors the amount of the draftreceived by them from the bank as money had and received forthe use of the solicitors. The second issue was whether, if suchlegal title was vested in the solicitors, the respondents could thendefeat their claim on the ground that they were holders in duecourse and so protected by section 38(2) of the Bills of ExchangeAct 1882. The judge held that the banker's draft, having beenoriginally obtained for a lawful purpose and then improperlyindorsed by Cass, was at all material times the property of thesolicitors. He further held that, on the facts of the case, therespondents did not become holders in due course. He thereforeheld the respondents liable in damages for conversion **[1987] 1W.L.R. 987**, 994-995. In the Court of Appeal, May L.J. upheld thejudge's decision, expressly affirming his conclusion that on thefacts the respondents were not holders in due course **[1989] 1W.L.R. 1340**, 1360; and Parker L.J. likewise upheld the judge'sdecision, expressly affirming his conclusion that the solicitorsobtained a good title to the draft. Nicholls L.J. agreed withParker L.J., at p. 1387 that, for the reasons given by him, thesolicitors obtained a good title to the draft; and he further heldthat, since (as with the cash exchanged for chips) the respondentsdid not give value for the draft, they could not become holders indue course under the Act.

I wish to say at once, in agreement with Nicholls L.J. andfor the reasons I have already given, that the respondents nevergave value for the draft, any more than they gave valuableconsideration for the solicitors' money paid to them by Cass. Itfollows that the respondents were never holders in due course ofthe draft. The only question remaining is whether the solicitorsobtained title to the draft.

On this aspect of the case, the respondents relied stronglyon the decision of the Judicial Committee of the Privy Council in**Commercial Banking Co. of Sydney v. Mann** [1961] AC 1, inwhich the Board consisted of Viscount Simonds, Lord Reid, LordRadcliffe, Lord Tucker and Lord Morris of Borth-y-Gest, the

advice of the Board being given by Viscount Simonds. In thatcase, the respondent Mann carried on his profession as a solicitorin Sydney in partnership with a man called Richardson. Mann andRichardson maintained a "trust account" in the name of thepartnership with a branch of the Australian and New Zealand Bankin Sydney ("the A.N.Z. bank"). Under the partnership agreement,all the assets of the partnership were the property of Mann, butcheques might be drawn on the partnership bank account by eitherpartner, Mann having given the necessary authority to the A.N.Z.bank to enable Richardson to draw on the partnership account withit. Richardson, in purported exercise of that authority, drew anumber of cheques on that account, in each case there beeninserted, after the word "Pay" in the printed form of cheque, thewords "Bank cheque favour H. Ward" or "Bank cheque H. Ward;" healso filed application forms for bank cheques in favour of H. Wardto a like amount, purporting to sign them on behalf of the firm.He took the documents to the A.N.Z. bank, which in each casedebited the firm's account and issued a bank draft of an equalamount in the form "Pay H. Ward or bearer." Each cheque wasthen taken by Ward to a branch of the appellant bank, and cashedover

the counter. In due course, each of the cheques was paid bythe A.N.Z. bank to the appellant bank. From first to last thepart played by Richardson was fraudulent; Ward was not a clientof the partnership, nor had any client authorised the payment tohim of any money held in the trust account. Mann then sued theappellant bank for conversion of the bank cheques, or alternativelyto recover the sums received by it from the A.N.Z. bank as moneyhad and received to his use. He succeeded in his claim before thetrial judge, whose decision was affirmed by the Court of Appeal ofNew South Wales. The Privy Council however allowed the appeal,holding (1) that Mann never obtained any title to the cheques, and(2) that he could not obtain title by ratifying the conduct ofRichardson in obtaining the cheques from the A.N.Z. bank, withoutat the same time ratifying the dealings in the cheques by Wardand the appellant bank (a conclusion which could, in my opinion,have been reached on the alternative basis that Mann could not,by ratifying the conduct of Richardson in obtaining the cheques,thereby render the innocent appellant bank a wrongdoer). Itfollowed that Mann's claim for damages for conversion failed, andthat his alternative claim for money had and received also failed.In so holding, the Board applied the previous decision of the PrivyCouncil in **Union Bank of Australia Ltd, v.** McClintock **[1922] 1A.C. 240**, which they held to be indistinguishable on both pointsfrom the case before them.

It was the submission of the respondents in the presentappeal that both cases are indistinguishable from the present case,and accordingly that in the present case the solicitors never hadsufficient title to the banker's draft to found an action fordamages for conversion against the respondents (or a claim formoney had and received), and further that they could not makegood their title by ratification of Cass's action in obtaining themoney from the solicitors' client account at the bank without alsoratifying his action in using the money for gambling at the club.

It is of some interest to record the process of reasoning bywhich the Board in Mann's case reached their conclusion on theissue of title. Viscount Simonds said [1961] AC 1, 8:

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"It is important to distinguish between what wasRichardson's authority in relation on the one hand to theA.N.Z. bank and on the other to Mann. No question arisesin these proceedings between Mann and the A.N.Z. bank. Itis clear that Mann could not as between himself and thebank question Richardson's authority to draw cheques on thetrust account. The position as between Mann andRichardson was different. Richardson had no authority,express or implied, from Mann either to draw cheques onthe trust account or to obtain bank cheques in exchange forthem except for the proper purposes of the partnership. Ifhe exceeded those purposes, his act was unauthorised andopen to challenge by Mann. It is in these circumstancesthat the question must be asked whether, as the judge held,the bank cheques were throughout the property of Mann. Itis irrelevant to this question what was the relation betweenRichardson and Ward and whether the latter gave anyconsideration for the bank cheques that he received and atwhat stage Mann learned of the fraud that had beenpractised upon him. The proposition upon which therespondent founds his claim is simple enough: Richardsonwas

his partner and in that capacity was able to draw uponthe trust account and so to obtain from the bank itspromissory notes: therefore the notes were the property ofthe partnership and belonged to Mann, and Richardson couldnot give a better title to a third party than he himselfhad."

He then referred to the previous decision of the Privy Council inMcClintock's case [1922] 1 AC 240 and continued, [1961] AC 1,

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"This is a direct decision that, if the acts of McClintockwere unauthorised in the relevant sense of that word, thebank cheques did not when issued become the property ofthe plaintiffs. It appears to their Lordships that themajority of the full court in McClintock's case erred inregarding as decisive the fact that as between the plaintiffsand the bank McClintock was authorised to obtain bankcheques, whereas the relevant question was whetherMcClintock was as between the plaintiffs and himselfauthorised to obtain the particular cheques that wereconverted. Upon the verdict of the jury that he was not soauthorised, they should have come to the oppositeconclusion. In the same way in the present case the judge,having found that Richardson obtained the bank cheques inquestion in fraud of Mann and without his authority, shouldhave gone on to hold that they did not become the propertyof Mann. Whether they became his by his subsequentratification of the acts of Richardson is another question,which their Lordships will examine just as it was examinedin McClintock's case. Upon what has been called the mainquestion they observe that they could not hold that therespondent acquired a property in the bank cheques withoutdirectly contradicting a decision which has in 40 years beenthe subject of no adverse comment. And they would addthat it appears to be in accordance with principle. Theyagree with the analysis of the transaction which wassubmitted by counsel for the appellant. In effect

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Richardson, by means of unauthorised cheques,misappropriated moneys in the trust account and used themto acquire bank cheques from the A.N.Z. bank which boundthat bank to pay Ward or bearer out of its own money theamounts specified in the cheques. Their Lordships were notreferred to any case in which in such circumstancesproperty so acquired has been held to belong automaticallyto the party defrauded. In the present case, as inMcClintock's case, counsel sought to rely on such cases as**Cundy v. Lindsay** [**(1878) 3 App. Cas. 459**, H.L.], but itappears to their Lordships as it must have done to theBoard in McClintock's case, that the principle that thepurchaser of a chattel takes it, as a general rule, subject towhat may turn out to be informalities of title has noapplication to a case of misappropriation of funds by anagent and their subsequent application for his own purposes.That there is a remedy, perhaps more than one, available tothe person defrauded is obvious, but that is not to say thatthe property so acquired at once belongs to him so that hecan sue in conversion a third party into whose hands it has

come."

In the Court of Appeal, Parker L.J. stated that he had greatdifficulty in following the reasoning in the two cases **[1989] 1W.L.R. 1340**, 1371 F-G. I feel bound to say that I find thereasoning in the passage I have quoted completely clear. Beforeyour Lordships, Mr. O'Brien for the solicitors was bold enough tosuggest that your Lordships should hold that these cases werewrongly decided. It would take a great deal to persuade me to doso, having regard to the distinction of the judges involved; and Ihave heard no argument that persuades me to do so. In myopinion, the crucial question is whether, on the facts of thepresent case, the solicitors have succeeded in distinguishing Mann'scase [1961] AC 1 on acceptable grounds.

The judge distinguished the case as follows. He held thatthe draft was originally obtained by Cass for a lawful purpose; hetherefore received the draft with the authority of his partners, andthe draft then became the property of the solicitors. This findingwas strongly challenged by the respondents, both before the Courtof Appeal and before your Lordships, on the ground that the pointwas never pleaded, and that there was in any event no evidence tosupport the judge's conclusion. Parker L.J. simply rejected therespondents' argument on this point without reasons; but havingheard full argument upon it, I am satisfied that the respondentsare justified in their complaint. It is plain that the point wasnever pleaded; indeed the solicitors' pleaded case was that thedraft was obtained by Cass as part of his fraudulent design to lootmoney from the solicitors' client account for his own purposes. Ifthe point had been pleaded, it would have been a matter forinvestigation at the trial whether the draft had indeed beenobtained for a proper purpose, for example for the purpose ofcompletion of a conveyancing transaction. As it was, there wasno investigation of this point, and there was no evidence tosupport the judge's finding.

Parker L.J. sought to distinguish Mann's case [1961] AC 1on another ground, viz. that the draft had been obtained from thebank by Chapman and then handed by him to Cass; and that when

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Chapman received the draft, it was his duty to hand it to thesolicitors and the property therefore passed to the solicitors whenhe obtained possession of it. The difficulty with this approach isthat it appears to proceed on the assumption that Chapman wasacting innocently in obtaining the banker's draft from the bank andhanding it to Cass; whereas the judge held that he had beensuborned by Cass: see **[1987] 1 W.L.R. 987**, 1018. In my opinion,the receipt by Chapman of the banker's draft was no differentthan the receipt by Cass himself, and the introduction of Chapmaninto the picture makes no difference.

However, before your Lordships Mr. O'Brien for thesolicitors submitted that Mann's case could be distinguished fromthe present case because the banker's cheques in that case weremade payable to a third party (Ward) or bearer, whereas in thepresent case the banker's draft was made payable to the solicitors.Now it is true that, in Mann's case, it cannot have been theintention of the A.N.Z. bank that the property in the banker'scheques should, on delivery to Richardson, immediately pass toWard. Even so,

the point seems to me to be of crucialimportance. For the effect of the banker's draft in the presentcase having been made payable to the solicitors is, in my opinion,that the solicitors had the immediate right to possession of thedraft against any other person, including, of course, Cass. On thisbasis, as it seems to me, the solicitors had vested in them, asfrom the moment when the banker's draft was delivered to Cass(through Chapman) by the bank, sufficient title to enable them tobring an action for damages for conversion of the draft.Authority for this proposition is to be found in Bute (Marquess) v.Barclays Bank Ltd. **[1955] 1 Q.B. 202**. In that case one McGaw,the manager of three farms belonging to the plaintiff, applied tothe Department of Agriculture for Scotland for certain subsidies inrespect of the farms. After McGaw had left the plaintiff'semployment, the department sent to him, in satisfaction of theapplication, three warrants in respect of the subsidies. Thewarrants were made payable to McGaw, but elsewhere on themappeared the words "for the Marquess of Bute." McGaw paid thewarrants into his own personal account at a branch of defendantbank, which forwarded them for collection and paid the proceedsinto his account, upon which he then drew. It was held by McNairJ. that the plaintiff was entitled to succeed in an action againstthe defendant bank for damages for conversion. McNair J. heldthat the words "for the Marquess of Bute" had the effect that, inthe circumstances, the warrants were payable to the Marquess ofBute through McGaw. He further held that, in order to succeed inan action for conversion, it was enough that the plaintiff couldprove that, at the time of the alleged conversion, he was entitledto immediate possession; and that, as McGaw's employment hadterminated before he received the warrants, the plaintiff wouldhave been entitled to require McGaw to deliver the warrants tohim when they were received. So also in the present case, assoon as the bank handed over the banker's draft, the solicitorswere entitled to require its delivery to them, the draft being madepayable to them and neither Chapman nor Cass having any right toretain it against them. It is of some interest to observe that,consistent with this approach, the banker's draft could not betransferred without indorsement by or on behalf of the solicitors;and that when Cass used the draft at the casino, he purported toindorse it on behalf of the solicitors, although of course he did sowithout authority.

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For this reason, which constitutes another ground upon whichParker L.J. relied in the Court of Appeal, I am of the opinionthat the solicitors had sufficient title to enable them to proceedin an action of conversion against Cass, or, in due course, againstthe respondents. It follows that since, for the reasons I havealready given, the respondents cannot claim to have been holdersin due course of the banker's draft, their cross-appeal must fail.

I understand that (failing agreement between them) counselfor the parties will make submissions to your Lordships on interestand costs after judgment has been delivered.

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