BEN SMITH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1961

*Oct. 5, 6, 10
Dec. 12

STANLEY I. SCHONBRUN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

D. CHARLES STUART .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

SOL R. RAUCH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Theft—Essential elements—Accused charged with theft of cheque forged and issued against account of company controlled by accused—Series of fraudulent transactions culminating in issue of cheque—Whether cheque property of company—Whether company had special property or interest in cheque—Criminal Code, 1953-54 (Can.), c. 51, s. 269.

The appellants were convicted by a jury on a charge of stealing money and securities or other property or a valuable security to the value of $960,000 belonging to B Mines Ltd. By an elaborate fabrication, including the fabrication of minutes of meetings that never took place, the

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Judson and Ritchie JJ.

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forgery of a cheque in the name of the company by the appellants and the sale of shares without the knowledge of the optionee, the company was fraudulently deprived of $960,000 from its bank account. All documents purporting to be signed by the company were signed by two of the appellants representing themselves as president and treasurer and the corporate seal was used where necessary. The convictions were affirmed by the Court of Appeal, and the appellants obtained leave to appeal to this Court.

Held: The convictions should be quashed.

The real case for the Crown was that the appellants stole the cheque, but the verdict of the jury indicated that they were satisfied beyond a reasonable doubt that the cheque was an integral and necessary part of an elaborate scheme of fraud to which the appellants were parties and that none of the appellants could have thought that the company had given its consent.

It was implicit in the findings of the jury that the cheque was a false document, known to be false by the parties to this scheme and made with the intent that it was to be used or acted upon as genuine to the prejudice of the company. On these findings the cheque was a forgery.

The company did not have any ownership or special property or interest in the cheque. The fact that the name of the company was fraudulently inscribed on the cheque, and that loss might result to the company, did not vest in the company any proprietary rights or special property or interest therein. It would be creating a new and strange mode of acquisition of property to hold that if A's signature is forged by B on a document, A for that sole reason could as owner recover that document from B. Possession of the cheque was not at any material time that of the company. It was the possession of those who created it to defraud the company. Therefore the cheque could not have been stolen.

APPEALS from a judgment of the Court of Appeal for Ontario[1], affirming the appellants convictions on a charge of theft of a cheque. Appeals allowed.

G. A. Martin, Q.C., for the appellant Smith.

C. L. Dubin, Q.C., for the appellant Schonbrun.

G. McLean, for the appellant Stuart.

S. R. Rauch, in person.

Peter White, Q.C., and *R. Shibley*, for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Pursuant to leave granted by this Court, under s. 597(1)(*b*) Cr.C., the appellants appeal from a unanimous judgment of the Court of Appeal for Ontario[1] dismissing an appeal from their conviction on the first of several counts contained in the indictment preferred against

[1] (1961), 131 C.C.C. 14.

them. The Crown had elected to proceed on this count. As amended at the close of the case for the prosecution, by the insertion of the words here italicized, this count reads as follows:

that Ben Smith, D. Charles Stuart, Stanley I. Schonbrun, Sol R. Rauch and Harold D. Rauch during the year 1957, at the City of Toronto in the County of York and elsewhere, did steal money and securities *or other property or a valuable security* to the value of $960,000 more or less, the property of Brilund Mines Limited, contrary to the Criminal Code.

The case for the Crown is not that these accused stole money or securities which were the property of Brilund Mines Limited. In essence, the case is that these appellants, by an elaborate fabrication, obtained for their own use and benefit the sum of $960,000 from the company's bank account. Stuart obtained a blank cheque at the counter of the Bay Street Branch of the Imperial Bank in Toronto and filled in the body of the cheque, payable to his order, for $960,000. Schonbrun and Sol R. Rauch signed the cheque representing themselves on its face as president and treasurer of the company. On May 1, 1957, this cheque was deposited to the credit of Stuart's bank account at the above-mentioned branch of the Imperial Bank. The real case for the Crown is that the appellants stole this cheque.

These dealings are recited at length in the address of the learned trial judge to the jury and in the reasons for judgment delivered by Laidlaw J.A., for the Court of Appeal. As full a recital, however, is unnecessary for the understanding of the questions of law to be considered on this appeal. A simple and, I think, a true outline of the case for the prosecution will sufficiently emerge from the following summary of the interdependent and interlocked transactions carried out by the appellants and their ultimate result, all of which happened within the four days from April 29 to May 2, 1957.

Prior to April 29, out of the 2,800,000 shares of the company issued and outstanding in the hands of some 1,800 shareholders, the appellant Ben Smith, with his brother Harry, owned or controlled 600,000 shares, of which 300,000 were in escrow. The market price of the company's shares on the Toronto Stock Exchange had been steadily declining for some time and was about 47 cents per share. At that price the total value of 600,000 shares was below $300,000. The company had a credit balance of $577,000 in its account at the King and York Streets Branch of the Imperial Bank

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in Toronto and a readily marketable block of shares in New Chamberlain Petroleum Company Limited and Spooner Oils Limited. The company had granted to Chapco Investments Corporation irrevocable and still exercisable options to purchase these shares. The exercise of the options would bring in $455,000 and thus increase the company's credit balance to over one million dollars.

The appellant Stuart, a resident of North Bay, Ontario, had for some years dealt in mining claims and was at that time the owner of 21 unpatented mining claims acquired by him within the year at a cost of $5,800 which, on the submission of the Crown, represented the maximum value of these claims.

Knowing that Ben Smith had considered selling his interest in the company, Stuart sought and obtained the confirmation that the "Brilund deal" was still available. With the assistance of two "finders", he then invited to Toronto the two appellants Schonbrun and Sol R. Rauch and the brother of the latter, Harold Rauch, who were all three associated in a company called Capital Funding Corporation, with offices in New York State. Upon their arrival in Toronto on April 30, these three were introduced to Smith and within 48 hours the following interlocked and interdependent transactions were arranged and completed:

(i) *A sale by Smith of the 600,000 share "control block" in the company to Stuart or his associates or both for a price of $900,000, which was three times their indicated value on the stock exchange.* For the payment of this price, Stuart, who had a credit balance of $16 in his account at the Bay Street Branch of the Imperial Bank in Toronto, drew a cheque on that account for $900,000 payable to the order of Ben Smith. He and Sol R. Rauch arranged with Udell, the Manager of that Branch, to certify this cheque but not to deliver it until he had in his possession a cheque for $960,000 expected by Stuart as a result of the transaction mentioned in the next paragraph (ii) and a cheque for $1,010,000 which the company was to draw in its favour on the completion of the transaction set out in paragraph (iii) in order to transfer its bank account from the King and York Streets Branch to the Bay Street Branch.

(ii) *A sale by Stuart to the company of his 21 unpatented mining claims, having a maximum value of $5,800 for the price of $960,000.* In payment for these claims, the cheque

which is the subject-matter of the amended count of the indictment was issued. Dated May 1, 1957, it was drawn on the new account of the company at the Bay Street Branch of the Bank in the amount of $960,000, made payable to the order of Stuart and signed for the company by Schonbrun and Sol R. Rauch, purporting to act as president and treasurer.

(iii) *A sale by the company to Ben Smith of the Chamberlain and Spooner shares for $460,356.* Carried out without the knowledge of the Chapco Investments Corporation, which had options on these shares, this sale was made on the condition that, in the event of the exercise of the options, Smith would surrender the shares to the optionee and be repaid by the company the amount paid by him for their acquisition. This cheque for $460,356, issued by Smith in favour of the company, was given by him to Findlay, his bank manager, with instructions that it was to be used only if the sale of the 600,000 shares was completed. Subsequently deposited to the King and York Streets Branch account of the company, this cheque increased the credit balance of the company's account to $1,010,000 before that account was transferred to the Bay Street Branch.

These transactions were all interlocked and mutually dependent. Stuart's cheque for $900,000 could only be paid if the company's cheque to his order for $960,000 was deposited to his credit. The company's cheque to Stuart for $960,000 could only be paid if the credit balance of $577,000 in the company's bank account was sufficiently increased. This increase could only be achieved by the deposit to the company's account of the cheque for $460,356 issued by Smith in favour of the company in payment of the Chamberlain and Spooner shares; and Smith's cheque could not be used until the sale by him of his 600,000 shares was completed.

All documents purporting to be signed by the company were signed by Schonbrun and Sol R. Rauch representing themselves as its president and treasurer. The corporate seal of the company was used wherever it was found necessary. However, on the submission of the Crown, the minutes of the meetings purporting to have been held on May 1, 1957 and recording the election of Schonbrun and Sol R. Rauch as directors and as president and treasurer of the company, the banking or other resolutions purporting to authorize

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them to sign for the company in the capacity aforesaid, and all documents wherein the veracity of these facts was represented, were false documents fabricated by the appellants for the attainment of their dishonest purpose.

The ultimate result of all these transactions, as related in respondent's factum, was that Ben Smith received $900,000 from Stuart for the sale of 600,000 shares of the company, half of which were in escrow; Stuart received 200,000 shares of the company, half of which were in escrow and retained about $4,000 cash in his bank account; Schonbrun and Sol R. Rauch or Capital Funding Corporation received 400,000 shares of the company of which 200,000 were in escrow, together with $6,000 in United States funds; and each of the two "finders" received $25,000. All the moneys thus distributed were derived from the $960,000 obtained from the company in exchange for the 21 unpatented mining claims of Stuart, valued at $5,800.

Such, in the main, are the facts relied on by the prosecution,—and which, for the purpose of this appeal, are assumed to have been found by the jury—as justifying in law the verdict of guilty returned against the appellants on the charge of having stolen the cheque for $960,000, the property of the company.

Two of the questions raised at the trial and on appeal were whether this cheque was the property of the company or whether the company had any special property or interest in it notwithstanding that its signatories had no authority to issue or deliver the same. With respect to these questions, the learned trial judge gave the following instructions to the jury:

> Now, I have explained the difference between the former indictment and the present indictment, and I have explained that you cannot convict any accused for stealing money or securities. All that is open to you now is to convict or acquit with respect to stealing other property or a valuable security, the property of Brilund.
>
> The charge, "a valuable security to the value of $960,000 more or less, the property of Brilund . . ." would certainly include the cheque for $960,000, Exhibit 49. If you have any doubt about that, it seems to me to be concluded by another provision of the Criminal Code which reads in this way, in part:
>
> "In this Act . . ."
>
> That is, in the Criminal Code,
>
> "a valuable security includes an
>
> order for the payment of money."

Now, the second point is this: did Brilund have any special property or interest in that cheque? If you find that Schonbrun and Sol Rauch signed that particular cheque purporting to act for Brilund, even without the authority of Brilund, then I tell you that Brilund did have a special property or interest in it before it was delivered to Stuart for negotiation. If you decide they signed it in furtherance of a dishonest purpose, they were not acting as officers for Brilund but in their own personal interests; but even so, Brilund would have a special interest in that cheque, if for no other purpose, to try to get it back before it was cashed. In any event, between the time the cheque was signed and when it was handed over to Udell or Stuart it was in the possession of Brilund, and that possession would be a special interest within the Code."

On appeal and with reference to the same matter, Laidlaw J.A., speaking for the Court, said:

It was contended first that the signatures Stanley I. Schonbrun and Sol R. Rauch on the cheque for $960,000 in favour of D. Charles Stuart were forgeries and that their acts in signing the cheque did not constitute a corporate act of the company; in other words there was no issue or delivery of the cheque in question by the company as a corporate body; that the paper bearing the forged signatures Stanley I. Schonbrun and Sol R. Rauch was not a "valuable security" within the meaning of that word as defined in sec. 2(42) of the Criminal Code as follows:

"a . . . order . . . for the payment of money." I do not accept that argument. In my opinion, Schonbrun and Rauch signed the cheque as officers of the company with ostensible authority and thereafter the cheque became a valuable security and the property of the company. Even if it be assumed that Schonbrun and Rauch had no authority in law or in fact to sign the cheque, nevertheless, in my opinion and in the opinion of the learned trial Judge, the company had a special property or interest in it and which could be the subject of theft.

The questions of law upon which leave to appeal to this Court was granted are:

1. Did the trial judge err in holding that Brilund Mines Limited did not consent to the issue and delivery of the cheque for $960,000, or, alternatively, did he err in holding that the cheque was nevertheless the property of Brilund Mines Limited?

2. Did the trial judge err in holding that there was no contract between Brilund Mines Limited and Stuart for the transfer of the twenty-one mining claims?

3. Did the trial judge err in holding that Brilund Mines Limited had a special property or interest in the cheque, notwithstanding that the signatories to the cheque had no authority to issue and deliver the same?

4. Did the trial judge err in instructing the jury that the interest of the corporation in seeing the cheque was not cashed constituted a special property or interest in the cheque?

I find it necessary to deal only with the two questions whether the learned trial judge erred in holding, and instructing the jury, that the cheque for $960,000 was the property of the company or that the company had a special

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property or interest therein. With the greatest deference to the learned judges of the two Courts below, my opinion is that there was error in both these instructions to the jury. On the directions given to the jury as to each of the essential elements of the offence of theft and as to the various circumstances in which a person may be held to be a party to a criminal offence, the verdict of the jury against the four appellants indicates that they were satisfied beyond a reasonable doubt that the cheque was an integral and necessary part of an elaborate scheme of fraud to which all appellants were parties and that none of the appellants could have thought that the company gave a corporate consent to the purchase of these mining claims for $960,000 or to the signing and delivery of the cheque purporting in appearance to be given in payment thereof. These findings, involving each of the appellants as *particeps criminis* in this fraudulent and indivisible scheme, constitute the background against which must be considered the two questions of law to be determined.

On the definition of theft given in s. 269 Cr.C., a thing cannot be said to have been stolen unless it appears that the thing was taken or converted

> . . . with intent to deprive . . . the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it.

The special property or interest, like the property itself, must be in the very thing alleged to have been stolen. The interest a person may have in protecting himself against loss or damage resulting from the use of a document forged by and in the possession of another is neither property nor "special property or interest" in the forged document. It is also clear from the section that the property or the "special property or interest" must exist at the time at which the theft, either by taking or conversion, is committed.

It is implicit in the findings of the jury that this cheque purporting to have been made by the company was a false document (s. 268-e Cr.C.), known to be false by the parties to this fraudulent scheme and made with the intent that it was to be used or acted upon as genuine to the prejudice of the company. On these findings this cheque was a forgery (s. 309 Cr.C.).

The company did not have any ownership or special property or interest in the blank cheque picked up by Stuart at the public counter of the bank; nor could it have any immediately prior to the instant at which, after signing it, Schonbrun and Sol R. Rauch delivered it to Stuart. The company acquired no property and no "special property or interest" in this cheque while it was under the control of any of the parties to this fabrication nor upon its delivery by Stuart to Udell. The fact that the name of the company was fraudulently inscribed on this cheque in the circumstances and for the purposes aforesaid, and that loss might result to the company, does not vest in the company any proprietary rights or special property or interest therein. It would be creating a new and strange mode of acquisition of property to hold that if A's signature is forged by B on a document, A, for that sole reason, could, as owner, recover that document from B. Had the appellants elected to destroy the cheque before handing it over to Udell or had Udell destroyed it upon its receipt, nothing whatever could be held to have been lost to the company or stolen from it. Possession of this cheque was not at any material time that of the company. It was the possession of those who created it to defraud the company. Possession of this cheque was never entrusted to them by the company. And if it was not entrusted to them by the company, they could not, while having it under their control, steal it by conversion any more than by taking.

In *The King v. Phipoe*[1], it was decided that to obtain from a person his note of hand, by threats, is not a felonious stealing of the note, for the reason that the note was never of value to or in the peaceable possession of such person.

Being of the view that the two questions of law extracted from the points on which leave to appeal was given and set out above must be answered in the affirmative and that there was no taking or conversion of this cheque by the appellants, I would allow the appeals, quash the convictions and direct a verdict of acquittal to be entered on count (1) of the indictment and the record to be returned to the Clerk of Assize of the Supreme Court of Ontario at Toronto.

Appeals allowed, convictions quashed.

[1] (1796), 2 Leach 673, 168 E.R. 438.