Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Charles Banks Nelson v. *The King from the Court of General Gaol Delivery of the Isle of Man, delivered the* 12*th February* 1902.

Present:
THE LORD CHANCELLOR.
LORD ASHBOURNE.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
LORD LINDLEY.

[*Delivered by the Lord Chancellor.*]

This was a charge against the Defendant of having fraudulently appropriated to his own use money of the Dumbells Banking Company. Their Lordships are of opinion that there was no sufficient legal evidence against the Defendant of that offence, and under those circumstances their Lordships will recommend that this part of the conviction, the only one on which leave to appeal has been given, should be set aside.

It is impossible not to notice that the mode in which the question has been propounded from time to time, both by Counsel, and, one regrets to say, also by the learned Deemster himself who presided, confuses what is the nature of the charge made, with the general charge of irregularity in the conduct of the proceedings of the Bank. That is not the criminal charge which was preferred by the indictment, and which ought to have been found by the Jury. The charge was of fraudulently appropriating money of the Bank.

The facts sufficiently show that for a period of some years, beginning at all events as early as

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1887, and going down to 1893, the person convicted was in the habit of drawing partly upon his own private account, and partly on an account which was called a Trust Account, but still in his name, and that from time to time that account was operated upon in the ordinary and natural way in which the account of a customer of a Bank is treated. Money was paid in and money was paid out, at one time a very large overdraft, and at another time that overdraft reduced to an amount of something like 300*l.* or 400*l.*, down to the period of two or three years after the Trust Account had first begun. Then it is suggested that after a period of six years altogether has elapsed it is possible to pick out some of the earlier drafts that have been made under the circumstances, and treat a particular draft as having been itself an offence, that is to say, a misappropriation of the money of the Bank to the use and purposes of the person who drew it. The real truth is that if what is suggested as the offence had been committed, every cheque was itself a theft. I use the phrase compendiously, because, although it is not stealing in the language of the Statute, the elements of stealing must exist in it, and in order to determine whether this offence has been committed in the sense which the law requires in order to sustain the conviction, one must see whether it is true to say that every one of those cheques so drawn, and the money obtained by reason thereof, was a theft.

Their Lordships are of opinion that there was no legal evidence of any such proposition. It may have been extremely irregular, and may have been wrong, and was wrong under the circumstances of this Bank to allow the account to have been entered into at all. The Board ought to have been consulted, and the Board ought to have given its consent in writing that

such an account should be entered into, or at all events that overdrafts should not have been allowed on it; but that each of these transactions which is made the subject of indictment was practically a stealing of the money obtained by the cheque, there appears to be no evidence whatever, and their Lordships are unable to see that the question was ever properly before the Jury at all. It was a natural and proper enquiry by the Jury which they made of the learned Deemster, whether or not they ought to have some guidance as to what was a fraud within the meaning of the law, because as they explained they were anxious to learn. Some of them thought there could be no fraud at the time, because the person was solvent who was drawing these cheques, to which enquiry no answer apparently was given by the learned Deemster in the language which the Jury required, but he goes on to say that it is not conclusive that the Defendant was not guilty because he was solvent,—an entire inversion, their Lordships regret to observe, of what ought to have been told the Jury at the time. Strictly, and as a matter of verbal accuracy, indeed it is not conclusive that the person was not guilty; but the question which the Jurymen obviously desired to have answered was whether or not, given the circumstances of this case, the man being perfectly solvent at the time, and having ample assets to answer the cheque which he was drawing, they ought to infer from the nature of the transaction that it was a taking or misappropriation within the meaning of the Statute. Upon that it is impossible to say the Jury received any guidance whatever.

In the result their Lordships are of opinion that there may have been ample evidence that the account was improperly obtained, and it may have been in one sense fraudulently obtained,

but there is no evidence justifying the charge that this money was appropriated to the use of the person who drew the cheque in fraud of the right of the Bank to have the money, and therefore *that* the offence contemplated by the Statute was committed, or at all events there was no evidence of its being committed so as to justify the verdict of "Guilty." For these reasons their Lordships will humbly advise His Majesty that the conviction of the 19th November 1900 should be set aside.

There will be no Order as to Costs against the Crown.