

**Kennison v. Daire**

High Court of Australia

[1986] HCA 4; (1986) 160 CLR 129

February 20, 1986

GIBBS C.J., MASON, WILSON, DEANE, DAWSON JJ.:

The appellant was convicted of larceny . . . . He was the holder of an Easybank card which enabled him to use the automatic teller machine of the Savings Bank of South Australia to withdraw money from his account with that bank. It was a condition of the use of the card that the customer's account could be drawn against to the extent of the funds available in that account. Before the date of the alleged offence, the appellant had closed his account and withdrawn the balance, but had not returned the card. On the occasion of the alleged offence, he used his card to withdraw \$200 from the machine at the Adelaide branch of the bank. He was able to do so because the machine was off-line and was programmed to allow the withdrawal of up to \$200 by any person who placed the card in the machine and gave the corresponding personal identification number. When off-line the machine was incapable of determining whether the card holder had any account which remained current, and if so, whether the account was in credit.

2. It is not in doubt that the appellant acted fraudulently with intent permanently to deprive the bank of \$200. The appellant's submission is that the bank consented to the taking. It is submitted that the bank intended that the machine should operate within the terms of its programme, and that when it did so it gave effect to the intention of the bank.

3. In the course of an interesting argument, Mr Tilmouth pointed out that if a teller, having the general authority of the bank, pays out money on a cheque when the drawer's account is overdrawn, or on a forged order, the correct conclusion is that the bank intends that the property in the money should pass, and that the case is not one of larceny . . . . He submitted that, in effect, the machine was invested with a similar authority and that if, within the instructions in its programme, it handed over the money, it should be held that the property in the money passed to the card holder with the consent of the bank.

4. With all respect we find it impossible to accept these arguments. The fact that the bank programmed the machine in a way that facilitated the commission of a fraud by a person holding a card did not mean that the bank consented to the withdrawal of money by a person who had no account with the bank. It is not suggested that any person, having the authority of the bank to consent to the particular transaction, did so. The machine could not give the bank's consent in fact and there is no principle of law that requires it to be treated as though it were a person with authority to decide and consent. The proper inference to be drawn from the facts is that the bank consented to the withdrawal of up to \$200 by a card holder who presented his card and supplied his personal identification number, only if the card holder had an account which was current. It would be quite unreal to infer that the bank consented to the withdrawal by a card holder whose

account had been closed. The conditions of use of the card supplied by the bank to its customers support the conclusion that no such inference can be drawn. It is unnecessary to consider what the position might have been if the account had remained current but had insufficient funds to its credit. . . .

5. For these reasons . . . the appeal should be dismissed.