legislature, as is to be gathered from the Ordinance, that this court can deal, and I am clear, for the reasons given by my brother McDonnell that such writs were not intended to be issued.

Case stated answered in the negative.

SOLOMON v. REGEM

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): January 29th, 1923

[1] **Banking — accounts — larceny — servant's misappropriation of money unlawfully drawn by him from employer's banker not larceny by servant because employer has no property in money in bank account:** The property in money deposited in a bank account passes to the bank, the banker being merely the debtor of his customer and not accountable to him as a trustee; so that if a servant, who has authority to draw money from his employer's bank account, misappropriates the money he withdraws, he does not commit the offence of larceny by a servant since the property in the money withdrawn passed from his employer to the bank when it was deposited (page 63, lines 11—38; page 64, line 40 — page 65, line 6).

[2] **Banking — banker and customer — relationship that of debtor and creditor — money paid into bank becomes bank's property:** See [1] above.

[3] **Criminal Law — larceny — elements of offence — taking without consent — no larceny if owner intends property to pass even if would not so intend if knew real facts:** It is an essential element of the offence of larceny that goods should be taken against the owner's will so that if the owner intends the property in the goods to pass the offence cannot amount to larceny, even if he would not so intend had he knowledge of the real facts (page 65, lines 6—15).

[4] **Criminal Law — larceny — larceny by servant — employer's goods in custody of servant can be subject of larceny by servant — employer has constructive possession and retains property in them:** Since an employer retains the property in his goods and has constructive possession of them while they are in the custody of his servant, it is possible for the servant to steal goods which are in his custody (page 63, lines 1—4).

[5] **Criminal Law — larceny — larceny by servant — principal's money in possession of agent — misappropriation from agent by principal's servant is larceny by servant:** The property in money deposited with his agent by a principal remains in the principal, so that if his servant, who has authority to draw money from the agent, misappropriates that money, he commits the offence of larceny by a servant (*per* Purcell, C.J. page 68, lines 4—28).

[6] **Criminal Law — larceny — larceny by servant — servant's misappropriation of money drawn by him from employer's bank account not**

larceny by servant because money is bank's property, not employer's: See [1] above.

[7] **Criminal Procedure — charges — form of charges — larceny — charge should correctly name owner of property stolen:** When a charge of larceny names the wrong person as the owner of the stolen property the defendant cannot properly be convicted of the offence (page 63, line 40 — page 64, line 2).

The defendant was charged in the Supreme Court with larceny as a servant.

The prosecutor employed the defendant to superintend his business during his absence from Sierra Leone. He informed both the defendant and his own banker, a Mr. Genet, that the defendant had authority to draw from Mr. Genet any money required to carry on the business.

During his employer's absence, on the pretext of obtaining money for the purposes of the business, the defendant required Mr. Genet to pay a sum of money to the defendant's wife, which she then used to pay a personal debt of the defendant. The payment was recorded as a business payment on behalf of the prosecutor.

The defendant was charged with larceny as a servant. The trial judge (Purcell, C.J.) directed the assessors that if the defendant caused money to be paid by the prosecutor's agent so that it was ultimately permanently transferred to the defendant, the transaction would amount to a "taking" and the defendant could properly be convicted of larceny from the prosecutor; he did not, however, direct the assessors on two of the essential elements of the offence of larceny, *i.e.*, the intention permanently to deprive and the fact that the taking should be against the will of the owner.

The defendant was convicted and a case was stated to the Full Court seeking a ruling on the question whether the assessors had correctly been directed that the defendant might be convicted of larceny from the prosecutor if he caused money to be permanently transferred by the prosecutor's agent, from the prosecutor to himself.

The appeal was allowed.

Cases referred to:

(1) *Foley v. Hill* (1848), 2 H.L.C. 28; 9 E.R. 1002, applied.

(2) *R. v. Ashwell* (1885), 16 Q.B.D. 190; 53 L.T. 773.

(3) *R. v. Cooke* (1871), L.R. 1 C.C.R. 295; 24 L.T. 108, applied.

(4) *R. v. Prince* (1868), L.R. 1 C.C.R. 150; 19 L.T. 364, applied.

(5) *R. v. Smith* (1855), 6 Cox C.C. 554.

C.E. Wright for the defendant;
Kempson for the Crown.

McDONNELL, Ag. J.:

The case stated by Purcell, C.J. is as follows:

"The defendant was employed by the prosecutor, one Alfred Marcus Woods, to superintend his business, which was that of a general merchant at Hangha, in the Sierra Leone Protectorate, during the prosecutor's absence in England. In pursuance of this arrangement the defendant proceeded to Hangha and took sole charge of the said business on May 1st 1921, and continued in charge until the month of October 1921, when the prosecutor returned to Hangha from England.

It would appear that without the prosecutor's consent and immediately after his departure from Hangha, the defendant opened a ledger account with the prosecutor's firm, with the result that between May 5th and October 6th he had drawn a sum from the coffers of the prosecutor's business amounting to £357.1s.7d.; and it is to be observed that so far as this transaction is concerned the defendant paid no money into the credit of this account at all. It appears that in the course of his business the prosecutor had dealings with one Albert Genet — a merchant in Freetown — who acted as his agent in the sale of produce and who kept a ledger account for the prosecutor, and amongst other things acted as his banker. Mr. Genet received instructions from the prosecutor that the defendant would be in charge of his business, and that he was to supply the defendant with any money that he might require, and the defendant was authorised by the prosecutor to draw from Mr. Genet whatever money was necessary to enable him properly to carry on the prosecutor's business during his absence. On July 2nd, 1921, the defendant sent the following telegram to Mr. Albert Genet, Freetown: "Pay Mrs. Solomon sixty pounds. Third receipt posted yesterday's train." And on the same day he sent the following telegram to his wife, Mrs. Solomon: "Apply Genet receive sixty pounds pay Betts."

In pursuance of these instructions Mr. Genet paid Mrs. Solomon a cheque for £60 drawn on his own account and signed by him, which cheque she subsequently cashed and the proceeds were used for a private purpose unconnected with the prosecutor's business.

Mr. Genet debited this sum to the prosecutor in his ledger account, and it was subsequently paid by the prosecutor to Genet. The defendant also debited himself with this sum in the ledger account already referred to, which he opened without the prosecutor's knowledge with the prosecutor's firm.

I directed the assessors that if they found that the defendant paid his debts out of the prosecutor's money — without the prosecutor's consent and without at such time having either the intention or ability to repay such money and without having any money to his credit with the prosecutor — that these were facts from which they might infer an intent to defraud.

I further directed the assessors that if the defendant by a series of acts — carried out for that express purpose — caused money to be paid by the prosecutor's agent, which in the ultimate result permanently transferred such money from the coffers of the prosecutor to the coffers of the defendant, such a transaction would amount to a "taking," and the defendant could properly be convicted of larceny.

The assessors expressed their opinion that the defendant was guilty of larceny. The court convicted the defendant of larceny.

The question which the Court of Appeal is invited to express its opinion with regard to, is whether such direction was right and whether in the circumstances as set out in this special case the defendant was properly convicted of larceny."

The whole of this case seems to me to hinge upon the question whether the property stolen was correctly laid in Woods instead of Genet; in other words whether the learned Chief Justice was correct in his direction to the assessors when he spoke of a transfer of money from the coffers of the prosecutor to the coffers of the defendant.

The matter is embarrassed with the meaning of the word "possession" which is, to use the words of Erle, J in *R. v. Smith* (5) (6 Cox C.C. at 556) — "the most vague of all vague terms."

What is laid down in *R. v. Cooke* (3) is that a servant has only the charge or custody of his master's goods and can be indicted for stealing things in his custody, but in his master's constructive possession, and still remaining the property of the master.

The servant is said to have the physical, the master the legal, possession of the property concerned. A bailee on the other hand has more than custody or physical possession. His position is that temporarily he has the legal as well as the physical possession of the goods entrusted to him. Here it is said that "special property" in them alone passes.

What is the position of a banker? It is clear that the legal and physical possession of money entrusted by a depositor with a banker passes from the former to the latter — does the property also pass?

In *R. v. Prince* (4) where an amount equal to a depositor's balance was by a false pretence withdrawn from a bank, the Common Serjeant convicted the prisoner of larceny, not on the counts laying the ownership in the depositor, but on one of those laying the ownership in the bank.

It is true that the conviction was quashed on the ground that the offence was not larceny but false pretences, but that the Common Serjeant was right in holding that the property was in the bank, and not the depositor, appears from the judgments of several of the judges of the Court of Crown Cases Reserved.

Bovill, C.J. says (L.R. 1 C.C.R. at 153; 19 L.T. at 365): "The cashiers of a bank are the only persons authorized to part with the money *of the bank.*" [Emphasis supplied.]

Blackburn, J. says (*ibid.*, at 155; 366): "So, in the present case, the cashier holds the money *of the bank* with a general authority from the bank to deal with it." [Emphasis supplied.]

Lush, J. says (ibid., at 156; 366): "The cashier is placed in the bank for the very purpose of parting with the money *of the bank.*" [Emphasis supplied.]

As laid down as long ago as 1848 in *Foley v. Hill* (1) the receipt of money by a banker from, or on account of, his customer constitutes him merely the debtor of the customer; he is not a trustee for the customer and the latter has no right to enquire into or question the use made of the money by the banker.

In view of these authorities it seems to me fully established that the property was wrongly laid in Woods. If at a trial it appears that the property has been incorrectly laid, unless the error be amended

the defendant must on this technical ground be acquitted.

I am of opinion that the accused in this case was not properly convicted of larceny.

SAWREY-COOKSON, J.:

On a first reading of this case, as stated by the learned Chief Justice, it appeared clear to me that the opinion of this court was sought as to whether both directions (beginning with the words, "I directed the assessors" and ending with "could properly be convicted of larceny") were right or wrong. But the learned Chief Justice has now pointed out that such was not his intention, but that the only expression of opinion which he desired to have from this court was to be confined to the points set out in the passage:

> "I further directed the assessors that if the defendant by a series of acts — carried out for that express purpose — caused money to be paid by the prosecutor's agent, which in the ultimate result permanently transferred such money from the coffers of the prosecutor to the coffers of the defendant, such a transaction would amount to a 'taking' and the defendant could properly be convicted of larceny."

The exact form in which the question thereon is left is as follows:

> "Whether such direction was right and whether in the circumstances as set out in this special case the defendant was properly convicted of larceny."

In turning to those circumstances I find one which has very considerable bearing on the question as to whether this conviction of larceny should be allowed to stand, and it is the simple fact or circumstance that one Albert Genet acted as the prosecutor Woods' banker, upon whom the defendant as the prosecutor's servant was entitled to draw for the purposes of his master's business. Genet was also authorised "to supply the defendant with any money that he might require on the prosecutor's behalf." Another circumstance of the greatest importance is that the sum in connection with which the charge of larceny was concerned, *viz.* £60, was paid over to the defendant's nominee as a result of two telegrams, one sent to the banker Genet and the other to the person (the defendant's wife) named in that telegram to Genet, instructing her to apply to Genet for that sum.

Dealing first with the circumstance that the relationship of banker and customer existed between Woods and Genet, it follows

on the most ample authority that Genet thereupon became merely Woods' debtor in the eye of the law at the time he paid over £60 on the defendant's authority. He was not handing over Woods' money to the defendant, but his own, and that fact in itself would, in my opinion, dispose of the charge of larceny of Woods' money by the defendant. But there is also the fact that what Genet parted with to the defendant was parted with in no sense against his will, and need I add that it is essential in larceny that property must be taken by the defendant from the owner against the will of the owner. In the words of Blackburn, J. in *R. v. Prince* (L.R. 1 C.C.R. at 155; 19 L.T. at 366): "[I]f the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny. . . ."

Another essential ingredient of "taking" in larceny is that there must, at the time of the taking, be the intention on defendant's part permanently to deprive the owner of the property in the goods taken.

I cannot find that in the passage I have quoted above the attention of the assessors was drawn to either of these essential ingredients in a charge of larceny; but on the contrary they appear to me to have been merely directed that if in the circumstances indicated the defendant was responsible for the passing of money from Woods' account with Genet to his (the defendant's) nominee, then the defendant was guilty of "taking" to the extent of justifying a conviction of larceny of Woods' money.

Independently, therefore, of the fact that the money which thus passed was not Woods' in the eye of the law, I am of opinion that the direction was wrong (there was non-direction inasmuch as the direction did not go far enough), and that, therefore, the defendant was improperly convicted of larceny.

PURCELL, C.J.:

Before proceeding to express an opinion as invited on the question raised in the special case I would crave leave to correct a misapprehension which seems to have arisen in the minds of the two other members of the court, due no doubt to the fact that I inadvertently used the word "directed" in two separate paragraphs.

I desire to state as plainly as possible, in order that there shall be no possible mistake about it hereafter, that the only question

I have invited an expression of this appeal court's opinion on is contained in the following paragraph of the special case, *viz.:*

> "I further directed the assessors that if the defendant by a series of acts — carried out for that express purpose — caused money to be paid by the prosecutor's agent which in the ultimate result permanently transferred such money from the coffers of the prosecutor to the coffers of the defendant, such a transaction would amount to a 'taking' and the defendant could properly be convicted of larceny."

I have *not* invited the appeal court's opinion on any other question — although in stating this case I used the words "I directed" with regard to another matter on which I entertained no doubt whatever, which is contained in the previous paragraph, which runs as follows:

> "I directed the assessors that if they found that the defendant paid his debts out of the prosecutor's money — without the prosecutor's consent, and without at such time having either the intention or ability to repay such money and without having any money to his credit with the prosecutor — that these are facts from which they might infer an intent to defraud."

The evidence given in the case was to my mind conclusive on all these points, *viz.:*

(i) That the defendant did in fact pay his debts out of the prosecutor's money;

(ii) That the defendant did not obtain the prosecutor's consent before doing so;

(iii) That the defendant had not the ability to repay this money;

(iv) That the defendant had not in fact any money to his credit with the prosecutor; and

(v) Lastly, that so far as it is humanly possible to gauge a man's intentions by his acts — by such a standard the defendant had no more intention of repaying this money than he had of trying to swim from Freetown to — let us say — the River Plate, in South America.

I directed the assessors that if they found (on the evidence given in the course of the case) on these facts that the defendant either did or omitted to do these several things, that these were facts, when found, from which an intent to defraud might be inferred.

The assessors found — as indeed they were bound to do — all these facts against the prisoner, and therefore inferred an intent

to defraud, and with regard to that particular matter I have not invited any expression of opinion from this appeal court for the best of all reasons, that it is a matter on which I have never entertained the smallest shadow of a doubt.

Having cleared the way by this explanation I will now come to close quarters with the question propounded in the special case. The first question which arises in my mind regarding this matter is this — on what basis was this transaction carried out? Whose money did all the parties believe they were dealing with? Woods' money, or Genet's money? It is quite clear beyond all possible doubt that they all knew they were dealing with Woods' money, and it is only for the purpose of at all hazards extricating the defendant from his present desperate position that it has been argued with such insistence that it was really Genet's money. I will pause here to recall those admirable words of the late Lord Coleridge in the course of his judgment in *R. v. Ashwell* (2) because they do appear to me to be so much in point in the matter under discussion: Lord Coleridge said (16 Q.B.D. at 224; 53 L.T. at 786):

> "But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt, unless the giver and receiver intend to give and to receive respectively what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do — to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn. I agree with my Brother Stephen that fictions are objectionable, and I desire not to add to them, but it seems to me, with diffidence, that he creates the fiction who holds that a man does what he does not know he does and does not mean to do, not he who says that an act done by an intelligent being for which he is to be responsible is not an act of that being unless it is an act of his intelligence."

Bearing in mind these most pregnant words, what, I ask again, was the basis of this transaction as intended and believed in by all the parties to it?

The defendant was left in full charge of the prosecutor's business and was to get the necessary money for carrying it on from Genet, the prosecutor's agent. Whose money was the defendant to get? Well, the prosecutor's money, of course, which Genet as the prosecutor's agent had in his hands to his credit.

What money did Genet think he was paying over to the defendant when the defendant applied to him for it by the telegram of July 2nd, 1921. Well, to be sure, the prosecutor's money. Can anyone really suppose that Genet would have paid the defendant a farthing of his own money? Certainly not. The defendant received and Genet paid over what they both believed and knew to be the prosecutor's money, and the present suggestion that it was ever anybody else's money would never have been made except for the express purpose I have already adverted to. "Dangerous diseases require desperate remedies."

The money then in all sense and reason being — as it seems to me — the prosecutor's money, as soon as ever it was paid over to the defendant for the purpose (and for the only purpose he had a right to receive it) of carrying on the prosecutor's business — he determined to misappropriate it and spend it on his own private purpose — and in so doing he was unquestionably guilty of larceny on the authority of *R. v. Cooke* (3) because in such circumstances the goods or money at the time they are taken are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master.

The present case is very much on all fours with the case of *R. v. Cooke*, the only difference being that in that case the money was received from the prosecutor's cashier, and in this case the money was received from the prosecutor's agent who had money in his hands to the prosecutor's credit, and had instructions to pay it to the defendant who, when he received it and misappropriated it, committed larceny in the manner I have already dealt with.

I have read the case of *R. v. Prince* (4) and carefully considered it from every standpoint, and in my opinion it has no bearing whatever on the case under discussion; it deals with the distinction between larceny and false pretences (a question which does not arise here), and also deals with the general authority of bank cashiers.

For the reason I have just given I answer the question propounded in the affirmative, and as a consequence I consider that this conviction was correct and should be upheld.

Case stated answered in the negative.

THOMPSON, SMITH and JOHNSON v. G.B. OLLIVANT AND COMPANY LIMITED

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): January 29th, 1923

[1] **Agency — authority of agent — power of attorney — formal power of attorney not essential to authorise person within jurisdiction to take out letters of administration — informal document may be sufficient:** Although an executor who is outside the jurisdiction may authorise someone within it to take out letters of administration by a formal power of attorney, an informal document which clearly purports to give such authority will also be effective; failure to register such a power of attorney does not therefore invalidate the grant of administration (page 75, lines 9—14).

[2] **Contract — form — note or memorandum in writing — sale of land — receipt naming parties and containing main terms of agreement sufficient memorandum — not necessary to mention terms which neither party considers essential:** The written note or memorandum of agreement required by the Statute of Frauds need not be a technically precise document and a receipt for a part payment which identifies the parties and the property concerned and contains the main terms of the agreement is sufficient; it is not necessary to mention any terms which neither party considers essential to the contract (page 72, line 36 — page 73, line 3; page 74, lines 1—6; page 75, lines 1—8).

[3] **Land Law — conveyancing — written agreement or memorandum — receipt naming parties and containing main terms of agreement sufficient memorandum — not necessary to mention terms which neither party considers essential:** See [2] above.

[4] **Succession — executors and administrators — doctrine of relation back — grant of administration to attorney relates back to validate acts on behalf of estate after date of his authority — contract made during that time valid:** When a grant of administration is made to a person who is authorised by a power of attorney to take out letters of administration with the will annexed, it will relate back to acts done by him on behalf of the estate after receiving his authority but before obtaining the grant and a contract made during that time will therefore be valid (page 74, lines 21—25).

[5] **Succession — executors and administrators — liability in contract —**