29th January, 1923.

HENRY CLEMENT SOLOMON - - *Appellant.*

v.

REX - - - - - - - - - *Respondent.*

Larceny as a clerk and servant—Laying the property in the correct person—Bankers' position in relation to depositors' funds—Taking of property against will of owner—Intention permanently to deprive owner of property.

Case stated by Purcell, C.J., in the Supreme Court of the Colony of Sierra Leone.

CASE STATED.

The Defendant, Henry Clement Solomon, was tried and convicted before me sitting with Assessors at the last May Criminal Sessions holden at Freetown on an Information for Larceny as a Clerk and Servant.

I sentenced the Defendant to nine months' imprisonment with hard labour, and respited judgment pending the decision of the Court of Appeal with regard to the matters now raised in this special case.

The material facts can be summarised as follows:—

The Defendant was employed by the prosecutor, one Alfred Marcus Woods, to superintended 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 Defendant proceeded to Hangha and took sole charge of the said business on the 1st May, 1921, and continued in charge until the month of October, 1921, when 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 5th May and 6th October 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 the 2nd July, 1921, the Defendant sent the following telegram to Mr. Albert Genet, Freetown:—

" Solomon to Genet.

" 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:—

" Solomon to 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 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.

(Sgd.) G. K. T. PURCELL,
Chief Justice.

Wright for the Appellant cites:—

Russell on Crimes, pp. 1177, 1178 (Note H.), 1207, 1209, 1210, 1280.
Archbold, p. 536.
R. *v.* Prince, L.R., I.C.C.R., p. 150.

Kempson for the Crown cites:—
R. *v.* Cook, L.R., I.C.C.R., p. 295.

McDONNELL, Acting J.

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 Defendant.

The matter, to use the words of Erle, J., in Reg. *v.* Smith (6 Cox 554) is "embarrassed with that vaguest of all vague "questions, the meaning of the word 'possession.'"

What is laid down in Rex *v.* Cooke (L.R., I.C.C.R., at p. 300) 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 Reg. *v.* Prince (ibid., p. 151) 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: " The cashiers of a bank are the only " persons authorised to part with the money *of the bank.*"

Blackburn, J., says: " In the present case the cashier holds " the money *of the bank* with a general authority from the bank " to deal with it."

Lush, J., says: " The cashier is placed in the bank for the " very purpose of parting with the money *of the bank.*"

As laid down as long ago as 1848 in Foley *v.* Hill (13 L.J. Ch., p. 182) 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 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

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" 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 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 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 Defendant's nominee as a result of two telegrams, one sent to the banker Genet and the other to the person (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 Defendant's authority. He was not handing over Woods' money to Defendant, but his own, and that fact in itself would, in my opinion, dispose of the charge of larceny of Woods' money by Defendant. But there is also the fact that what Genet parted with to 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 Regina *v.* Prince (L.R. 1868, C.C.C.R., at p. 155), " if " the owner intended the property to pass, though he would not " 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 that 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 (Defendant's) nominee, then 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 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, 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 Regina *v.* Ashwell, because they do appear to me to be so much in point in the matter under discussion.

Lord Coleridge said:—

> "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 intelli-"gence 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 diffi-"dence, 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, Prosecutor's agent. Whose money was he (Defendant) to get? Well, 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 he (Defendant) applied to him for it by the telegram of 2nd July, 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 Reg. *v.* Cooke, 1, C.C.C.R. 295, 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 Reg. *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 Prosecutors' 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 Reg. *v.* Prince, L.R. 1, C.C.C.R. 150, 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.