

[PRIVY COUNCIL.]

J. C.* NELSON APPELLANT ;
 1902
 Feb. 12. THE KING RESPONDENT.

AND

ON APPEAL FROM THE COURT OF GENERAL GAOL DELIVERY
 OF THE ISLE OF MAN.

*Conviction set aside—No evidence of Fraudulent Appropriation—Liability
 of Bank Director.*

Conviction of fraudulently appropriating the moneys of a bank set aside, it appearing that there was no evidence of the convict director, who had overdrawn on a so-called trust account irregularly opened in his name, having misappropriated any one draft to his own use in fraud (within the meaning of the Act) of the bank's right to have the money.

APPEAL from a conviction by the above Court (Nov. 19, 1900) on an indictment charging the appellant with unlawfully and fraudulently taking and applying to his own use and benefit moneys and securities belonging to the Dumbell's Banking Company, Limited, of which he was a director, and against the sentence of five years' penal servitude passed upon such conviction by the said Court. That charge was made under s. 218 of a statute of the Isle of Man Legislature, which section is as follows :—

“Whosoever being a director member or public officer of any body corporate or public company shall fraudulently take or apply for his own use or benefit or for any use or purposes other than the use or purposes of such body corporate or public company any of the property of such body corporate or public company shall be guilty of a misdemeanour and being convicted thereof shall be liable at the discretion of the Court to any of the punishments which the Court may award as hereinbefore last mentioned.”

The charge related to sums drawn upon an account called

* *Present:* THE LORD CHANCELLOR, LORD ASHBOURNE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and LORD LINDLEY.

the "C. B. Nelson Trust Account" between April 5, 1887, and August 7, 1892. It appeared that the cheques were openly drawn at the head office at Douglas upon this account. The account was open to inspection of the bank officials, and was returned amongst other accounts, weekly or monthly, to the head office in Douglas; and in the returns the name of the account and its total amount of indebtedness were set forth.

The overdraft on this account was for the purpose of the purchase of Allsopp's Brewery shares; and on each occasion of the resale of these shares the amount was placed to the credit of the account, and up to December, 1892, moneys were paid into and out of this account.

The appellant at the trial put in, and proved, a statement shewing his financial position on December 31, 1893 (more than sixteen months after the drawing of the last cheque set out in the indictment upon which he was convicted), by which it appears that at that time the appellant's assets exceeded his total liabilities by the sum of 19,123*l*.

Thereupon Deemster Shee remarked, "I don't see the materiality of all this. It does not matter what wealth a man has if he illegally uses the money of the bank." In summing up he said: "Nelson made a strong point: how could he have been fraudulent when he took these overdrafts; he was solvent. If the jury thought it a satisfactory answer that it was not fraudulent it was their duty to say so, and he was entitled to a verdict of 'Not guilty.' But that was a dangerous doctrine. Supposing these securities had been deposited with the bank the argument would have been stronger. It was a dangerous doctrine to allow one director to do what another director could not; even though he thought himself solvent though he was not."

The jury, after being absent for six hours, informed the Court they were divided and unable to come to a verdict. The foreman said, "We differ on what in this case constitutes fraud within the meaning of the law. Some of the jurors are of opinion the defendants were solvent at the time of incurring the liabilities, and therefore not guilty of fraud." Deemster Shee thereupon said, "Is that the only difficulty you have?"

J. C.
1902
NELSON
v.
REX.
—

J. C.
1902
NELSON
v.
REX.
—

and the foreman replied, "I think so, practically." Whereupon the Deemster gave the following ruling:—

Deemster Shee: "Well, solvency alone would not be sufficient evidence they were not guilty. It might be a matter for you to consider, but in my opinion solvency alone would not be evidence they were not guilty of fraud. It is an element for you to consider whether there was fraud. You have to consider the whole of the circumstances in the case: the date of the account; the fact that there were other overdrafts of the defendants; the size of the overdrafts; the way in which they were kept; and the account the prisoners have given of how they embarked in these transactions. All the circumstances in the case have to be taken into your consideration. To say, simply because one of the defendants was solvent, that therefore he could not be guilty of fraud would not be right. You must consider about the circumstances; and, considering the importance of the case, I should advise his Excellency to ask you to retire to consider your verdict again."

Finally a verdict was returned, "Guilty on the Nelson Trust Account only," with a recommendation to mercy.

Lawson Walton, K.C., and *Muir Mackenzie*, for the appellant, contended that there was no evidence that in obtaining the overdraft in question he had any fraudulent intention. It was obtained in the same manner as his overdraft on his private account, in reference to which he had not been indicted. The prosecution was in fact a substitution for civil proceedings. On an analysis of the account it appeared that the 1594*l.* comprised in the first six counts drawn in April, 1887, was repaid by June, 1887, by credit payments amounting to 3899*l.*, and that on the 30th June, allowing for further debits, the overdraft was reduced to 373*l.* Similarly as regards the amounts comprised in seventh to tenth counts and drawn out in July and August, 1887, they were materially reduced by large credit payments during the second half of 1887 and the first half of 1888. The purchases of Allsopp's shares were effected on a joint account on behalf of the appellant and two other solvent co-adventurers. The evidence established that the

appellant, at the time of borrowing the sums mentioned in the indictment, was solvent and able to repay. At the trial he was seriously prejudiced by the misdirection of the Deemster, indicating as it did a misapprehension of the legal nature of the charge and a confusion between the civil and criminal liabilities of a director. The case was allowed to go to the jury in view of the total absence of evidence of either concealment or intention to defraud, or of knowledge on the appellant's part of inability to repay what he had borrowed. No evidence can be referred to as shewing that any one of the drafts making up the overdraft had been fraudulently obtained; or that the appellant had any reason to believe at the time he obtained them that he could not repay, or that he did not intend to repay, them.

Ring (Attorney-General for the Isle of Man), and *C. W. Matthews*, for the respondent, contended that there was ample evidence, and it was not denied by the appellant, that he had taken the sums of money comprised in the indictment and applied them to his own use and profit. The question whether he took them and applied them fraudulently was essentially one for the jury on the evidence placed before them, including that of the appellant, and therefore their finding should not be disturbed. The whole of the facts were left to the jury, and they were directed to consider whether the taking was fraudulent or otherwise; and as a proof that the jury followed this direction and properly applied their minds to the case, it was pointed out that they convicted on ten counts and acquitted on sixteen. The evidence of fraudulent taking consisted of these facts: first, the amounts were withdrawn by the appellant without depositing any security until as late as August, 1899, when he gave a charge upon his property, without the consent or knowledge of any of the other directors, and in contravention of the articles of association, Nos. 6 and 89 (9), which provided for the consent in writing of the board and deprived the appellant of any vote in reference to this transaction, and there was no entry in the minute book of the bank in relation to the said account. The account was wrongly described as a trust account when it was in no sense an account connected

J. C.
1902
NELSON
v.
REX.

J. C.
1902
NELSON
v.
REX.
—

with any trust. It was opened for the purely speculative purposes of the three persons immediately concerned, namely, a speculation in Allsopp's shares in which the bank had no interest. The names of the two latter persons were suppressed in the bank books. All the cheques drawn on the account were signed by the appellant at the head office in Douglas, where the bank books were audited. But the account itself was kept at a branch in Ramsey, where there was no audit. The appellant's counsel at the trial did not object that there was no case to go to the jury, and confined himself to the contention that there was no sufficient evidence of fraudulent intention at the date of the different operations on the account. The Deemster's summing-up left this issue to the jury without any objection from the appellant's counsel.

Mackenzie replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This was a charge against the defendant of having fraudulently appropriated to his own use money of the Dumbell's 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 shew that for a period of some years, beginning at all events as early as 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 inquiry 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,

J. C.

1902

NELSON

v.
REX.

J. C.
1902
NELSON
v.
REX.
—

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 inquiry 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 November 19, 1900, should be set aside.

There will be no order as to costs against the Crown.

Solicitors for appellant: *Hores, Pattisson & Bathurst.*

Solicitors for respondent: *Light & Galbraith.*