

with costs, but their Lordships consider that there should be one set of costs only as between the several respondents.

Solicitors for appellant : *Blake & Redden.*

Solicitors for respondents (other than Owens and Madeleine Kennedy) : *Harrison & Powell.*

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[PRIVY COUNCIL.]

LOUIS EDOUARD LANIER APPELLANT ;

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AND

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THE KING RESPONDENT.

Oct. 16, 17 ;
Nov. 5.

ON APPEAL FROM THE SUPREME COURT OF SEYCHELLES.

*Criminal Law—Embezzlement—Seychelles Penal Code (Order 10 of 1904),
s. 216—Nature of Offence—Criminal Intent—Conviction set aside.*

The Seychelles Penal Code provides : “ Embezzlement, s. 216 (1.) : Whoever embezzles, squanders away, or destroys, or attempts to embezzle, squander away, or destroy, to the prejudice of the owner, possessor, or holder thereof, any goods, money, valuable security, bill, acquittance, or other document containing or creating an obligation or discharge which has been delivered to such person merely in pursuance of any lease or hiring, deposit, agency, pledge, loan (*prêt à usage*) or for any work, with or without a promise of remuneration, with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment and a fine not exceeding three thousand rupees (Rs.3000).” The appellant was convicted of an offence under the above section :—

Held, (1.) that the offence defined by the above section is not limited to cases in which the accused is under a legal duty to return the specific goods, money, or document delivered to him ; to constitute the offence, however, there must have been a wilful appropriation, squandering, or destruction of the property of another.

(2.) That the conviction of the appellant and the sentence upon him should be set aside upon the ground that the facts did not on any just or legal view warrant a conviction, and that justice had gravely and injuriously miscarried.

APPEAL by special leave from a conviction and sentence pronounced by the Supreme Court of Seychelles (July 5, 1911).

An information was preferred against the appellant charging

* *Present*: LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and SIR SAMUEL GRIFFITH.

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him, under the Seychelles Penal Code, s. 216, that he did wilfully, fraudulently, and unlawfully embezzle to the prejudice of the minors Lablache, the owners thereof, the sum of 34,191 rupees, which sum had been delivered to him merely in pursuance of a deposit with the condition that the same should be returned or produced.

On July 5, 1911, the appellant was tried by the Acting Chief Justice without a jury; he was convicted and sentenced to eighteen months' imprisonment with hard labour.

The facts of the case and of the proceedings appear from the judgment of their Lordships. The appeal involved questions as to the scope and effect of the Seychelles Penal Code, s. 216. The following were the arguments upon these questions.

E. M. Pollock, K.C., and *R. W. Lee*, for the appellant. Though the offence charged against the appellant is termed embezzlement in s. 216 of the Code, it is not the offence so named in English law. It has its origin, through the Mauritius Penal Code, s. 333, in the French Penal Code, art. 408, where it falls under the head of "abus de confiance." The offence consists of the embezzlement (détournement in the French Code), squandering away, or destruction of a specific thing delivered to the accused under one of the contracts specified: Dalloz, Codes Annotés (ed. 1881), Code Pénal, p. 744, § 19. The offence is committed only upon a failure to restore or replace the specific thing delivered. In the present case the appellant received money as agent for the guardian of the minors and not under any of the conditions referred to in the section. He was not a trustee within the meaning of 24 & 25 Vict. c. 96, s. 1, and could not properly have been convicted under that Act: *Rex v. Kane*. (1) There was no proof of a fraudulent intention, which is a necessary element of the corresponding offence under the French Code: Dalloz, Codes Annotés, Code Pénal, p. 756, § 445.

Sir R. Finlay, K.C., and *O'Hagan*, for the respondent. The interpretation of the section is of importance in all colonies in which the criminal law is based upon the French system. The offence is not limited to cases in which the accused fails to

(1) [1901] 1 K. B. 472.

return the specific thing delivered to him. This is indicated by the terms of the section, which covers the case of money entrusted to the accused. The French authorities shew that s. 408 of the French Penal Code is not so limited in its operation: Adolphe et Hélie, *Théorie du Code Pénal* (ed. 1862), vol. 5, pp. 418, 423, 441 to 445; Villargues, *Les Codes Criminels* (ed. 1877), p. 813, § 125, p. 814, § 153; Dalloz, *Codes Annotés, Code Pénal*, p. 748, § 169 et seq., § 177 et seq. If the section does not cover the offence of embezzlement or of larceny by a trustee or bailee, save in the limited manner contended for, those offences provided for by English law are, save to that extent, unprovided for in either the Seychelles or the Mauritius Penal Codes. [20 & 21 Vict. c. 54; 24 & 25 Vict. c. 96; Larceny Act, 1901 (1 Edw. 7, c. 10); and Archbold's *Criminal Pleading* (ed. 1910), p. 660 et seq., were referred to.] There was evidence upon which a fraudulent intent on the part of the appellant could be found.

E. M. Pollock, K.C., in reply.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a conviction and sentence of the Supreme Court of Seychelles. It was pronounced on July 5, 1911, by the Acting Chief Justice, who tried the case without a jury.

The appellant is a merchant in Mahé on one of the Seychelles islands. He was at the time of the proceedings a member of the Legislative Council of the Colony and Consul for the French Republic, and he held various important commercial agencies. He was managing director of the firm of Lanier & Co.

It is for obvious reasons undesirable to comment upon various peculiarities of the case, and it is expedient to confine even the statement of the circumstances to the barest narrative. Such a narrative is, however, necessary.

There was in the colony a family of two minor children named Lablache. At a family council duly held under the law of the colony (derived from the French Civil Code) Miss Lucie Lablache was appointed to the office of their guardian. On November 14, 1908, she executed in favour of the appellant a procuration or power of attorney, and on April 2, 1909, on the eve of her leaving

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with the children for Europe, she confirmed the procuration by what is called a deed of maintenance. Under these deeds the appellant had the amplest powers to act for the guardian in the ingathering and the investment, either with or without security, of the property of the minors. Acting under these powers, certain funds were received and remittances of money were from time to time made by Messrs. Lanier & Co., the appellant's firm.

From beginning to end of these proceedings no suggestion has ever been made that either the minors personally, or Miss Lablache, their guardian, ever complained of, or are now or ever were dissatisfied with, the conduct of the appellant or his firm. Miss Lablache's anxiety appears to have been solely that a high rate of interest should be obtained, and this was done.

A circumstance of importance is that these payments were made by the firm of Lanier & Co. This firm's interposition (presumably at the instance of the appellant) appears to have been highly in the interest of the minors in past years. A regular account was opened, and from the year 1906 the minors' funds were received and advances made from time to time by the company. The advances were sometimes far in excess of the receipts; and indeed in the end of 1908, whereas the receipts had been Rs.6119, the advances had been no less than Rs.9435.

In November, 1910, a sum of Rs.35,313 became payable to the minors by M. d'Emmerez de Charmoy. This gentleman proposed at first to pay by an order in favour of the appellant and drawn upon the appellant's bankers, Messrs. Said & Co., but the transaction took the shape of crediting the amount to Messrs. Lanier & Co. in their account with their bankers, which account was overdrawn. This was an undoubted irregularity. Their Lordships incline to think that it occurred simply because the firm had been acting in the minors' interest and had had direct account with them for many years. No concealment of any kind was practised. The minors' account with Messrs. Lanier & Co. was duly credited and all the entries throughout are openly and regularly made. After this date the firm continued to make advances as before out of this money which was lying with it at interest. The receipts for

the last three remittances are produced; they are dated in February, April, and May, 1911, and cover payments of 1500 francs. So far as M. d'Emmerez de Charmoy was concerned, he also saw no objection to his payment being thus dealt with. Instead of making it to Mr. Lanier and getting that gentleman's receipt, he was aware that the bankers had simply credited their customers Lanier & Co. with the amount. He was undoubtedly also aware of the history of the family, of the standing of the firm, and of its previous relations with the minors. That there was anything criminal being done does not at that time seem to have entered into any person's mind.

On June 20, 1911, however, a family council was held, which was presided over officially by Mr. Alexander Williamson, the Acting Chief Justice. A "Mr. Finlay Gemmel, friend" asked that Mr. Lanier "must shew what cash he has in hand belonging to the minors." Thereupon the appellant stated fully and with almost complete exactness how the matter stood. Mr. Gemmel suggested that the amount be invested or paid or that a guarantee be given by Mr. Lanier. This was perfectly reasonable, and an adjournment was made till June 27, to enable one of these courses to be taken. Mr. Lanier acquiesced; and on June 27 a guarantee for Rs.34,000, with a mortgage over the properties, was offered by Mr. Lemarchand, and this offer was, of course, unanimously accepted. One would have thought that everything was now satisfactorily arranged and ended. The minors' interests were completely protected. Sharply as the appellant had been pulled up, he had answered the call: the council were satisfied; and the guarantee and mortgage were put upon record. It seems incredible, but it is the fact, that it was after all this had been done that criminal proceedings were instituted against the appellant under the Seychelles Penal Code.

On the same day an information was filed charging Mr. Lanier with having wilfully, fraudulently, and feloniously embezzled the minors' money on the previous May 31. And on that day, namely, June 27, a warrant was issued for Mr. Lanier's arrest. On the next day, namely, June 28, the Chief Justice informed the family council that he had communicated with the Crown Prosecutor. The proceedings thus started were pursued

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with alacrity and vigour. The Prosecutor considered it desirable that a member of the Bar should conduct the case, and the family council, again presided over by the Chief Justice, appointed two, and arranged about their fees.

On November 1 the Prosecutor moved the Chief Justice to be allowed to make drastic amendments to the information, including one which altered the tempus delicti to June 20, 1911. These amendments were objected to ; the objections were repelled ; and the trial was fixed for four days afterwards, namely, July 5.

On July 5 an application was made for a week's adjournment to enable counsel to be employed for the defence, and a telegram from Tamatave, stating that counsel's passage was booked, was produced. The application was refused. The evidence led was substantially in accord with the narrative already given. The books were produced with all the entries in order. No further facts suggesting criminality were proved. In short, counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have convicted the appellant of crime. The Chief Justice, however, convicted Mr. Lanier and sentenced him to be imprisoned for eighteen months with hard labour and to pay the costs of the prosecution.

Application for leave to appeal to the Supreme Court of Mauritius was refused, on the ground that the case was not appealable. This was correct. Had the sentence been for two years an appeal would have lain. A request was made that the sentence be increased, so as to made the case appealable. This was refused. An attempt was then made to bring the proceedings before the Supreme Court of Mauritius by certiorari, with a view to their being quashed. The learned judges of that colony not obscurely intimated that the affidavits before them disclosed a grave question, but they were constrained to decide that they had no jurisdiction to entertain such an application. Application for leave to appeal to His Majesty in Council was then made and was granted by this Board.

Many grounds for a reversal of the judgment appealed from have been made, and in the affidavits which form part of the present record others also of a grave character are suggested.

It appears to their Lordships, however, that the matter may be disposed of by a consideration of the facts above mentioned, of the judgment itself, and of the reasons stated therefor, the whole being viewed in the light of the statute. The information, as amended, upon which the trial proceeded, was as follows: "That on or about the 20th day of June in the year of our Lord one thousand nine hundred and eleven, at Seychelles, at a place called Victoria, one Louis Edouard Lanier, merchant, residing at Victoria, did wilfully, fraudulently, and unlawfully embezzle to the prejudice of the minors Lablache the owners thereof, the sum of thirty-four thousand one hundred and ninety-one rupees and thirty-three cents, which sum had been delivered to the said Louis Edouard Lanier merely in pursuance of a deposit or trust whilst he was acting in his capacity as agent or proxy of the said minors' dative guardian, viz., Lucie Lablache, and as sub-guardian of the said minors, with the condition that the same be returned or produced against the form of the Statute in such case made and provided and against the peace of our Lord the King his Crown and Dignity."

The statutory ground of the information was not stated in its text. But on July 1, when the motion for amendment of its terms was made, the Crown Prosecutor announced that he proceeded upon s. 216 of the Seychelles Penal Code. That section is as follows:—

"Whoever embezzles, squanders away, or destroys, or attempts to embezzle, squander away, or destroy to the prejudice of the owner, possessor, or holder thereof any goods, money, valuable security, bill, acquittance, or other document containing or creating an obligation or discharge which has been delivered to such person merely in pursuance of any lease or hiring, deposit, agency, pledge, loan (*prêt à usage*) or for any work with or without a promise of remuneration with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment and a fine not exceeding three thousand rupees (Rs.3000)."

In the construction of this section placed before the Board by the learned counsel for the appellant, an argument was presented that the section refers alone to the failure to restore

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or replace goods, money, &c., in forma specifica, and that the section was accordingly inapplicable to a position like that of the ordinary breach of agency or trust, in which money, in the sense of the actual notes, sovereigns, or the like, does not fall to be returned, but only its equivalent. And the argument proceeded substantially to exclude all such ordinary cases as embezzlement from the ambit of the Seychelles Code, as it was also maintained that that crime was not dealt with by any other or more nearly applicable section. Against this argument Sir Robert Finlay, on behalf of the Crown, protested, and in their Lordships' opinion the protest was well founded. The statute does not appear to be limited in the sense contended for.

Upon the other hand, no countenance can be given to the view that the language of the statute can be used to rank within the category of crime conduct or actions which do not essentially partake of the nature of embezzlement in the sense in which that term is ordinarily and properly understood. Although the term "embezzle" is supplemented by the terms "squander away or destroy," the whole context and view of the section shew that the latter expressions are amplifications or exemplifications of the operations which are of the nature of embezzlement, in the sense that the conduct which is libelled has been a wilful appropriation by the accused of the property of another, or, after possession of the same has been acquired, a wilful squandering or destruction of it to his prejudice. The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility, which of course may be imposed by statute, a Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind. It is sufficient with regard to the judgment before the Board of the

Acting Chief Justice to remark that such distinctions, and, in particular, the distinction between criminal liability and civil liability to account, hardly seem to have been present to his mind. Two observations of his may be quoted which make this clear : "The act is wilful and fraudulent if he ought to foresee that a prejudice can result. It is not sufficient for him to state that he did not wish to cause prejudice, nor can he defend himself by saying that he did not foresee the result. He ought to have foreseen it. It was his duty not only to himself, but to those for whom he acted, to take such precautions and to have exercised such foresight as would not have involved him in the possibility of causing prejudice." In so far as this is a statement of law, it is a proposition of constructive crime, and does not appear to be warranted by any general principle of law or by any sound interpretation of the section. The second passage applies the erroneous doctrine thus :

"In this case the wilful and fraudulent intent resulted from the fact that the accused so used the moneys entrusted to him that he rendered himself unable to produce them when the demand was formally and legally made by the family council."

It is sufficient to say that, in the opinion of their Lordships, even though the legal doctrine proceeded upon were sound, the facts proved do not warrant, but negative, the conclusion drawn. The alleged date of the crime is June 20. That is the very date on which the position was explained by the appellant, and it was arranged that full security should be given, and it was given as stipulated. It would be straining the Act to apply it to anything done on that date, or indeed to the facts as a whole which were proved in this case.

Their Lordships are of opinion that the rules thus laid down by the judge are in no respect safe guides in a matter of criminal responsibility. If they were, all persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment, could be held criminally liable for errors in investment, or even for sanguine forecasts about investments, although their motives had been generous, and their conduct undeniably honest. These propositions are not made in order to mitigate the rigour of that civil responsibility which must

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attach to all the dealings with the property of others; but they are so elementary as grounds of distinction between the categories of liability in a civil as distinguished from a criminal suit, that their Lordships regret that they appear on this occasion to have been left out of judicial view.

This omission would in any case be serious, but in the present case the point is not merely formal, and the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere.

In criminal cases this Board does not lightly interfere. To use the language of Lord Watson in *In re Dillet* (1): "Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it be shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The appeal will be allowed, but not on any matter of form. Having carefully examined all the evidence, their Lordships are of opinion that the facts did not, on any just or legal view of them, warrant a conviction. It is unnecessary to consider arguments as to the rushing of the procedure or the harshness of the sentence, for, in their Lordships' view, even although the proceedings are taken to have been unobjectionable in form, justice has gravely and injuriously miscarried.

Their Lordships will humbly advise His Majesty that the appeal be allowed, that the judgment and sentence appealed from be quashed, and that the appellant be declared not guilty of the offence charged. Looking to the exceptional nature of the case the Crown will pay to the appellant the costs of the appeal. There will also be restored to him the amount of the costs of the prosecution paid under the judgment of the Court below.

Solicitors for appellant: *Loughborough, Gedge, Nisbet & Drew*.
Solicitors for respondent: *Sutton, Ommaney & Rendall*.

ERRATA.

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