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informed by the counsel for the third party that they were delivered only pro formâ, and I think that we must treat the case as if these pleadings had never passed between the parties. But at all events, as can be seen from the dates, at the time when the statements of claim and defence respectively were delivered, it had not been determined that there should not be one trial for all the matters in dispute, and therefore the ground did not then exist upon which we now give judgment.

Appeal dismissed.

Solicitors for defendants: *William A. Crump & Son.*

Solicitors for third party: *Hill, Son, & Rickards.*

J. E. H.

March 11.

[CROWN CASE RESERVED.]

THE QUEEN v. NEWMAN.

Larceny—Misappropriation of Property intrusted for safe Custody—Larceny Act (24 & 25 Vict. c. 96), ss. 75, 76.

N., a solicitor, was intrusted by a client with money to invest on mortgage on the client's behalf, he, instead of so doing, fraudulently appropriated the money to his own use:—

Held, by Lord Coleridge, C.J., Denman, Stephen, Mathew, and Cave, JJ., that N. was not intrusted with such money for "safe custody" within s. 76 of 24 & 25 Vict. c. 96 (the Larceny Act).

THE prisoner in this case was a solicitor of Southampton, and was found guilty before Bowen, J., at the Winchester Assizes, of an alleged offence against s. 76 of 24 & 25 Vict. c. 96. The indictment charged that he being an attorney and being intrusted with the property of another person "for safe custody" did, with intent to defraud, convert and appropriate the same to his own use. It appeared that at various times during the lifetime of one Thomas Dawkins, since deceased, the prisoner had been intrusted with divers sums of money from Dawkins as his solicitor, in order that the prisoner might lay out and invest the same on mortgages on behalf of Dawkins. The prisoner always subsequently represented that he had acted according to his instructions, and that

the proper mortgages had been duly effected from time to time, and that the moneys intrusted to him were outstanding upon such mortgages, and from time to time the prisoner paid over to Dawkins divers sums as and for interest supposed to be received by the prisoner from the various supposed mortgagors. It was discovered, however, after the death of Dawkins, by the trustees and executors under his will, and it was established in evidence at the trial that the mortgages were wholly fictitious, and non-existent, and that the prisoner instead of investing the money intrusted to him upon any such mortgages, had fraudulently and improperly appropriated the money to his own use.

The learned counsel for the prisoner at the close of the case for the prosecution, submitted that there was no evidence of any offence having been committed as laid in the indictment, and that money intrusted to the prisoner to lay out on mortgages was not properly intrusted to him for "safe custody" under s. 76 of 24 & 25 Vict. c. 96. The learned counsel cited *Reg. v. Cooper* (1); *Reg. v. Fullagar*. (2) Bowen, J., said he would express no opinion on the point, but would reserve it for this Court, but for the purposes of the day he should direct, and accordingly did direct the jury, that if they were satisfied that money was intrusted to the prisoner to be invested on mortgage, and to be kept safely in his own hands till such mortgage was effected by him, and if, instead of investing the money so intrusted to him, he converted it fraudulently to his own use they should find the prisoner guilty. The jury accordingly found the prisoner guilty, and the learned judge reserved for the opinion of this Court, whether his direction was correct in law, stating that if it was, the prisoner was rightly convicted, whilst if it was not the conviction ought to be quashed.

B. Coleridge for the prisoner. The charge is made under s. 76 of 24 & 25 Vict. c. 96, which treats only of property, including, as appears by the definition given in the statute, money intrusted for "safe custody." The earlier section, s. 75, deals with misappropriation of money intrusted for investment or for any particular purpose, and requires a written direction to be proved, and in a subsequent portion deals with certain frauds as to

(1) Law Rep. 2 C. C. R. 123;
43 L. J. (M.C.) 89.

(2) 41 L. T. (N.S.) 448; 14 Cox,
C. C. 370.

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chattels and valuable securities, but as to them requiring no written direction. Sect. 76 requires no written direction to be proved, but deals with, inter alia, money intrusted for safe custody, as distinguished from investment. So that if the money is intrusted for investment a written direction is required, if for safe custody it is not required. The legislature thus clearly distinguishes the case of money intrusted for investment from that intrusted for safe custody, and cannot have intended money intrusted for investment to be regarded as money intrusted for safe custody until investment in all cases, whether there was or was not any express or additional contract as to the custody until investment.

[CAVE, J. Sect. 76 requires an intent to defraud to appear, whilst s. 75 deals with violations of good faith and acts contrary to the intrusting, there is that distinction in the wording of the sections also.]

Yes. It tends to shew that the misapplication of money intrusted for investment, including the necessary keeping of it till investment, is distinguished from money intrusted merely for safe custody, as in a box. These sections were considered in *Reg. v. Cooper*. (1) In that case the solicitor charged received money which he ought to have invested, but which he instead in part misappropriated, and there, as much as here, it might have been, and indeed seems to have been, contended that the accused had the money for safe custody till investment, yet the Court held the 76th section was clearly out of question, that the money was really intrusted for investment and not safe custody. It is intrusted for safe custody only when it is contrary to the recipient's duty to part with the money intrusted. The terms are exclusive, when money is for investment it is not for safe custody.

[DENMAN, J. May not a person have to hold the money for a week and then invest, and would he not for the week have it for safe custody?]

Such an arrangement is not shewn by any evidence to have been made in the present case.

In *Reg. v. Fullagar* (2) the indictment was under both sections, and as it is put by Hawkins, J., if the solicitor charged there was intrusted with the money for investment it was by letters, and

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(2) 41 L. T. (N.S.) 448.

therefore there was a direction in writing, whilst if the letters did not amount to a direction to invest, then he had the money for safe custody.

E. U. Bullen (*Tickell*, with him). The prisoner had the money for safe custody until investment, the jury have so found, and there is really nothing reserved, their finding disposes of the matter. The direction was as matter of law clearly right, and there is nothing reserved as to how far the evidence supported the finding.

[LORD COLERIDGE, C.J. The direction is expressed to be for the purposes of the day only. The point is, was it on the facts the proper direction.

CAVE, J. The difficulty is, there is no evidence to shew that the money was not to be invested at once.]

In *Reg. v. Cooper* (1) there was no particular sum that the prosecutor could call his own, whilst here there is a direct handing to him of the property. In all cases of solicitor and client the solicitor holds for safe custody until investment. *Reg. v. Fullagar* (2) is a similar case to the present. That the money was paid to the prisoner by a mortgagor who was paying off a mortgage, and not by his client, is hardly a substantial difference; the receipt is as agent of the client, the contract, whether for custody, or investment, or both, is with the client. It is the client who intrusts the money.

Coleridge replied.

Cur. adv. vult.

March 11. LORD COLERIDGE, C.J. In this case we are called upon to determine the true construction of s. 76 of 24 & 25 Vict. c. 96, a section which, preceded by one other section, is to be found in that statute under the heading of "As to Frauds by Agents, Bankers, or Factors." The question which is left to us is substantially whether the facts in this case are such as to bring the prisoner within the provisions of s. 76. I think the facts do not so bring the prisoner within that section. He had been intrusted with divers sums of money from Dawkins as the solicitor of Dawkins, to lay out and invest such money on mortgages on behalf of Dawkins. It was not the specific coins that he had

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received which he was to invest, it was not the specific cheques or notes that he was to invest, he had not to keep the specific money or the specific cheques or notes, but what he had to do was to invest the money, not to keep it, but to lay it out. If there had been any direction in writing the prisoner would have been within s. 75, a section which is in two parts, and in which a distinction appears between money to be invested or applied and money intrusted for safe custody. In s. 76 the intrusting for safe custody is dealt with, that section does not deal in any sense with money to be laid out or invested. This would be my opinion if the matter were devoid of authority. That, however, is not the case; *Reg. v. Cooper* (1) is an authority for this view. The facts were that Whittaker had obtained a loan of 50*l.* from another person on a deposit of some title deeds, and employed the defendant to raise a further loan. Accordingly the defendant obtained 140*l.* from a Miss Taylor, which he ought to have employed in paying off the previous loan, and handing the balance to Whittaker. He did not pay off the previous loan, and he only paid 60*l.* to Whittaker, keeping him in ignorance that so much as 140*l.* had been obtained, and paying interest on the 140*l.* without Whittaker's knowledge—in fact, misappropriating a portion of the 140*l.* Under these circumstances the defendant was indicted under s. 76, but this Court held that s. 76 was out of the question, because there had been clearly no improper dealing with any money intrusted for safe custody. But if the view now urged by counsel for the prosecution were correct, the money ought to have been held to have been intrusted for safe custody. The Court held that money intrusted for investment was clearly not intrusted for safe custody, and the case bears strongly in favour of the prisoner in this case.

In *Reg. v. Fullagar* (2) the Court came to a conclusion which does not appear to conflict with *Reg. v. Cooper*. (1) Money was received by an attorney, and he was requested by the owner of the money to keep it until a letter should be received from one Goldsmith, pending which to hold it safely. It was held that the facts brought the defendant within s. 76, and it may well be that the actual intention was that the coin, or the symbols of coin, were to be intrusted for safe custody. The judgment of the Court

(1) Law Rep. 2 C. C. R. 123.

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proceeded on that footing, and if it were not so the decision would be in conflict with the case of *Reg. v. Cooper*. (1)

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The facts stated before us do not supply the materials which must necessarily be supplied in order to bring this case within s. 76, and, inasmuch as we can only deal with the facts stated, I am of opinion that this conviction ought to be quashed.

DENMAN, J. I feel very great difficulty in saying that the direction of the learned judge was wrong in point of law. If there had been evidence that a specific sum of money was intrusted to the prisoner with specific directions to keep it safely till a certain day, and then to invest it, I think the case would be within s. 76, and, indeed, as I read *Reg. v. Fullagar* (2) that case is an authority in support of this view. But the difficulty here is that there was no evidence of anything of this sort; the money may have been in cheques, or other like form, and it may have been intrusted with instructions to get a mortgage as soon as possible in each case. Money so intrusted would be intrusted for a specific purpose, and would fall within s. 75 if there was a direction as to it in writing which was violated contrary to good faith, it would not fall within s. 76. In *Reg. v. Cooper* (1) an attorney was employed to raise a loan on mortgage and hand over the balance, after making certain deductions, to the mortgagor. It was held there that no property had been intrusted for safe custody within s. 76. This may mean that the attorney had no permission to hold the money, even for an instant, but it appears to me at present not an unreasonable thing to hold, and that it might in some future case possibly be held, that if specific money be intrusted for investment, it may be treated as intrusted for safe custody for a reasonable time until opportunity for investment should arise. But in the case now before us there is no evidence to support any such view, and I therefore agree that the conviction should be quashed.

STEPHEN, J. I find no fault whatever with the direction of the learned judge as it stands. It is, I believe, in accordance with the cases which have been decided, but, taken together with the facts stated in the case itself, I think it is erroneous. I think the judge should have said that there was no evidence upon which the jury

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could say that the money was ever intrusted for safe custody within s. 76. If money is intrusted to an agent on the terms that he is to keep it by him and then to lay it out on mortgage, I should say that is an intrusting for safe custody within s. 76; for this *Reg. v. Fullagar* (1) appears to me a direct authority. In the present case we are not informed whether money in any specific form was intrusted, nor whether there were any specific directions as to the keeping of it, or whether it was simply paid by cheque with possibly a current debtor and creditor account, if the latter were the true state of things, there could clearly be no offence within s. 76. Again, there is no evidence of what was to be done with the money in the interval between the intrusting and the investing; therefore it is impossible to conclude that it was intrusted for safe custody during that interval. On this ground alone I think the direction wrong. This view appears to me to be independent of the authority of *Reg. v. Cooper*. (2) I do not wish it to be understood that anything I have said implies any disagreement with that case, but I cannot help thinking that there may have been other facts upon which the judgment proceeded. The attention of the Court was apparently directed chiefly to s. 75, whilst s. 76 is very briefly referred to. It is, of course, undesirable to express any opinion as to what may have been the reasons why they considered s. 76 to be out of the question, but it is to be observed that the money was in that case not intrusted by the person defrauded, but by the mortgagee, and it is by no means clear that that fact alone would not have prevented the application of s. 76.

MATHEW and CAVE, JJ., concurred.

Conviction quashed.

Solicitor for prosecution: *G. Feltham, Portsea.*

Solicitors for prisoner: *Emanuel & Co., Agents for Bell & Tayler, Southampton.*

(1) 41 L. T. (N.S.) 448.

(2) Law Rep. 2 C. C. R. 123.

C. D.