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May 28.

## THE QUEEN v. RUSSETT.

*Criminal Law—Larceny—Money paid or deposited under Contract induced by Fraud—Property remaining in Depositor—Possession obtained by Fraud—Larceny by a Trick.*

Where the owner of money or goods parts with the possession of them under a contract induced by fraud, but does not intend to part with the property in them until the other party to the contract has fulfilled his part of the bargain, the person so fraudulently obtaining possession of the money or goods may be convicted of larceny.

The prisoner agreed at a fair to sell a horse to the prosecutor for 23*l.*, of which 8*l.* was to be paid to the prisoner at once, and the remainder upon delivery of the horse. The prosecutor handed 8*l.* to the prisoner, who signed a receipt for the money; by the receipt it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it:—

*Held*, that the prisoner was rightly convicted of larceny by a trick.

CASE stated by the deputy-chairman of the Gloucestershire Quarter Sessions.

The prisoner was tried and convicted upon an indictment, charging him with having feloniously stolen on March 26, 1892, the sum of 8*l.* in money of the moneys of James Brotherton. It appeared from the facts proved in evidence that on the day in question the prosecutor attended Winchcomb fair, where he met the prisoner, who offered to sell him a horse for 24*l.*; he subsequently agreed to purchase the horse for 23*l.*, 8*l.* of which was to be paid down, and the remaining 15*l.* was to be handed over to the prisoner either as soon as the prosecutor was able to obtain the loan of it from some friend in the fair (which he expected to be able to do) or at the prosecutor's house at Little Hampton, where the prisoner was told to take the horse if the balance of 15*l.* could not be obtained in the fair. The prosecutor, his son, the prisoner, and one or two of his companions, then went into a public-house where an agreement in the following words was written out by one of the prisoner's companions, and signed by prisoner and prosecutor: "26th March, G. Russett sell to Mr. James and Brother (sic) brown horse for the sum of 23*l.* 0*s.* 0*d.*

Mr. James and Brother pay the sum of 8*l.*, leaving balance due 15*l.* 0*s.* 0*d.* to be paid on delivery." The signatures were written over an ordinary penny stamp. The prosecutor thereupon paid the prisoner 8*l.* The prosecutor said in the course of his evidence: "I never expected to see the 8*l.* back, but to have the horse." The prisoner never gave the prosecutor an opportunity of attempting to borrow the 15*l.*, nor did he ever take or send the horse to the prosecutor's house; but he caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it.

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It was objected on behalf of the prisoner that there was no evidence to go to the jury, on the ground that the prosecutor parted absolutely with the 8*l.*, not only with the possession but with the property in it; and, consequently, that the taking by the prisoner was not larceny, but obtaining money by false pretences, if it was a crime at all; the objection was overruled. In summing up the deputy-chairman directed the jury that if they were satisfied from the facts that the prisoner had never intended to deliver the horse, but had gone through the form of a bargain as a device by which to obtain the prosecutor's money, and that the prosecutor never would have parted with his 8*l.* had he known what was in the prisoner's mind, they should find the prisoner guilty of larceny.

The question for the Court was whether the deputy-chairman was right in leaving the case to the jury.

*Gwynne James*, for the prisoner. The conviction was wrong. The only offence disclosed was that of obtaining money by false pretences. There was no evidence to go to the jury upon a charge of larceny. The property in the money passed to the prisoner at the time when it was handed to him by the prosecutor, who admittedly never expected to see it again; the receipt given for the money is strong evidence of the change of property. The case is distinguishable from *Reg. v. Buckmaster* (1); for in that case the question was whether the prosecutor expected to have his money back. There is in the present case a breach of contract, for which the prosecutor has a civil remedy, and it is

(1) 20 Q. B. D. 182.

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immaterial that the prisoner in making the contract had a fraudulent intent: *Rex v. Harvey*. (1) For the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing: *Clough v. London and North Western Ry. Co.* (2) The principle of law is stated in Roscoe's Criminal Evidence, 11th ed. at p. 620, where it is said: "The doctrine is clearly established that, if the owner intends to part with the property in the goods, and in pursuance of such intention delivers the goods to the prisoner, who takes them away, and the property becomes his, this is not larceny, even though the prisoner has from the first a fraudulent intention."

*Stroud*, for the prosecution, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this conviction must be supported. The principle which underlies the distinction between larceny and false pretences has been laid down over and over again, and it is useless for us to cite cases where the facts are not precisely similar when the principle is always the same. When the question is approached it will be found that all the cases, with the possible exception of *Rex v. Harvey* (1), as to which there may be some slight doubt, are not only consistent with, but are illustrations of, the principle, which is shortly this: if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud—that is larceny. This seems to me not only good law, but good sense, and this principle underlies all the cases. If, however, authority be wanted, it is to be found in two cases which we could not overrule without the very strongest reason for so doing: the first is *Reg. v. McKale* (3), where Kelly, L.C.B., said, "The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the

(1) 1 Leach, 467.

(2) Law Rep. 7 Ex. at p. 34.

(3) Law Rep. 1 C. C. 125.

thing, and the accused has taken it with a fraudulent intent, that amounts to larceny." The distinction, in which I entirely concur, is there expressed in felicitous language by a very high authority. The other case is that of *Reg. v. Buckmaster* (1), which seems to me directly in point; that decision was grounded on *Rex v. Oliver* (2) and *Rex v. Robson* (3), where the same principle was applied, and the same conclusion arrived at.

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 Lord Coleridge,  
 C.J.

POLLOCK, B. I agree in the conclusion at which the Court has arrived, and would add nothing to the judgment of my lord but that I wish it to be understood that this case is decided on a ground which does not interfere with the rule of law which has been so long acted on; that where the prosecutor has intentionally parted with the property in his money or goods as well as with their possession there can be no larceny. My mind has therefore been directed to the facts of the case, in order to see whether the prosecutor parted with his money in the sense that he intended to part with the property in it. In my opinion, he certainly did not. This was not a case of a payment made on an honest contract for the sale of goods, which eventually may, from some cause, not be delivered, or a contract for sale of a chattel such as in *Rex v. Harvey* (4); from the first the prisoner had the studied intention of defrauding the prosecutor; he put forward the horse and the contract, and the prosecutor, believing in his bona fides, paid him 8*l.*, intending to complete the purchase and settle up that night. The prisoner never intended to part with the horse, and there was no contract between the parties. The money paid by the prosecutor was no more than a payment on account.

HAWKINS, J. I am entirely of the same opinion. In my judgment the money was merely handed to the prisoner by way of deposit, to remain in his hands until completion of the transaction by delivery of the horse. He never intended, or could have intended, that the prisoner should take the money and hold it, whether he delivered the horse or not. The idea is absurd;

(1) 20 Q. B. D. 182.

(2) 2 Russell on Crimes, 170.

(3) Russ. & Ry. 413.

(4) 1 Leach, 467.

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Hawkins, J.

his intention was that it should be held temporarily by the prisoner until the contract was completed, while the prisoner knew well that the contract never would be completed by delivery : the latter therefore intended to keep and steal the money. Altogether, apart from the cases and from the principle which has been so frequently enunciated, I should not have a shadow of doubt that the conviction was right.

A. L. SMITH, J. The question is whether the prisoner has been guilty of the offence of larceny by a trick or that of obtaining money by false pretences ; it has been contended on his behalf that he could only have been convicted on an indictment charging the latter offence ; but I cannot agree with that contention. The difference between the two offences is this : if possession only of money or goods is given, and the property is not intended to pass, that may be larceny by a trick ; the reason being that there is a taking of the chattel by the thief against the will of the owner ; but if possession is given and it is intended by the owner that the property shall also pass, that is not larceny by a trick, but may be false pretences, because in that case there is no taking, but a handing over of the chattel by the owner. This case, therefore, comes to be one of fact, and we have to see whether there is evidence that, at the time the 8*l.* was handed over, the prosecutor intended to pass to the prisoner the property in that sum, as well as to give possession. I need only refer to the contract, which provides for payment of the balance on delivery of the horse, to shew how impossible it is to read into it an agreement to pay the 8*l.* to the prisoner whether he gave delivery of the horse or not ; it was clearly only a deposit by way of part payment of the price of the horse, and there was ample evidence that the prosecutor never intended to part with the property in the money when he gave it into the prisoner's possession.

WILLS, J. I am of the same opinion. As far as the prisoner is concerned it is out of the question that he intended to enter into a binding contract ; the transaction was a mere sham on his part. The case is not one to which the doctrine of false

pretences will apply, and I agree with the other members of the Court that the conviction must be affirmed.

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*Conviction affirmed.*

Solicitors for prosecution: *Indermaur & Brown, for Smith, Winchcomb.*

Solicitor for prisoner: *H. Lewis, Cheltenham.*

W. J. B.

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[IN THE COURT OF APPEAL.]

C. A.

WOOLLEY v. BROAD.

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June 20.

*Practice—Copyright in Design—Defendant's Particulars of Objection—Amendment—Discretion of Judge—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).*

The discretion of a judge to allow the amendment of particulars in an action for infringement of a patent or design cannot be affected by any practice as to the terms on which such amendment will be allowed.

*Morris Wilson & Co. v. Coventry Machinists Co.* ([1891] 3 Ch. 418) commented on.

APPEAL from a judgment of the Divisional Court.

In an action brought against the defendant for an alleged infringement of copyright in a registered design, the defendant, pursuant to order, delivered particulars of his objections to the originality of the plaintiff's design. The defendant subsequently applied for and obtained at chambers unconditional leave to amend his particulars. The Divisional Court affirmed this order.

The plaintiff appealed.

*Dugdale, Q.C.*, and *E. M. Daniel*, in support of the appeal. A well-settled practice has grown up in patent actions, that if the defendant desires to amend his particulars he can only do so on terms, and this practice has been held to be applicable to actions for infringement of copyright in registered designs: *Morris Wilson & Co. v. Coventry Machinists Co.* (1)

(1) [1891] 3 Ch. 418.