

MOSS v. HANCOCK.

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April 18;
May 6.

*Criminal Law—Restitution of Stolen Property—Current Coin of the Realm—
Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100.*

A coin which is current coin of the realm may be sold as a curiosity, and in such a case, if the seller is a thief who has stolen it from the owner and who has subsequently been prosecuted to conviction, an order for its restitution to the owner may be made under s. 100 of the Larceny Act, 1861 :—

Semble, that no such order could be made if the coin had been passed into circulation as current money, although it might be possible to identify it.

A thief stole from the respondent a five-pound gold piece (which by Royal proclamation had been made current coin of the realm) and changed it with the appellant, who was a dealer in curiosities, for five sovereigns :—

Held, that under the circumstances the coin had not been received by the appellant as current coin, and that an order might be made under s. 100 of the Larceny Act, 1861, ordering the appellant to restore it to the respondent.

CASE stated by justices under the Summary Jurisdiction Acts.

On December 5, 1898, one Thomas Neale was charged before the Hove justices for that he, while being a servant in the service of the respondent, feloniously did steal, take, and carry away one gold five-pound piece and other articles the property of the respondent, his master. Neale pleaded guilty, and was convicted and sentenced. The magistrates then made an order that the five-pound gold piece which was produced in evidence should be restored to the respondent.

It appeared that Neale was a butler in the service of the respondent at Hove, and that the five-pound gold piece was presented to the respondent by the committee of the Goldsmiths' Company in the year 1887, and bore the date of that year.

The gold piece was always kept by the respondent in a case in a cabinet in his drawing-room, and it had never been in circulation. Together with other property, it was stolen by Neale from the respondent's residence on November 20, 1898.

The appellant was a dealer in new and second-hand clothes,

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jewellery, and other articles, and Neale changed the five-pound gold piece with the appellant's son at the appellant's shop at Brighton for five sovereigns.

The appellant's son stated in evidence that he made no inquiries of Neale respecting the five-pound gold piece, but that he knew Neale was an indoor servant and had known him some little time as a customer, but he refused to say whether he had known him for a week or a year, or for any definite time. The appellant contended that the five-pound gold piece was current coin of the realm, and was received as such by his son, who gave five sovereigns for it without any knowledge that it had been stolen, and that the appellant was therefore entitled to retain it.

The justices were of opinion that under s. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and s. 27, sub-s. 3, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), they ought to order the restitution of the five-pound gold piece to the respondent, as they found as a fact that the same was his property, and had been stolen and parted with in manner hereinbefore mentioned, and they accordingly made an order for its restitution.

At the request of the appellant, they stated this case for the opinion of the Court, but submitted that the question was a question of fact, and doubted whether they had jurisdiction to state a case.

Firminger, for the appellant. The justices had no jurisdiction to order the restitution of this five-pound gold piece. By Royal proclamation in 1887, made under the provisions of the Coinage Act, 1870, five-pound gold pieces were declared to be current coin and legal tender. No doubt s. 100 of the Larceny Act, 1861, under which the justices purported to make the order (1), speaks of "money," but the "money" there referred

(1) By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, "If any person guilty of any such felony or misdemeanour as is mentioned in this Act in stealing, taking, obtaining, extorting, embezzling, converting, or dispos-

ing of or knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property or his executor or administrator and convicted

to is specific money set apart in a box or bag, and does not refer to money in actual circulation. The first statute on the subject was 21 Hen. 8, c. 11, and under that statute it was held that there could be restitution either of money actually found in the possession of the thief or of money which was in some way ear-marked, as by being in a box or bag: *Holiday v. Hicks*. (1) In a similar manner an order might be made for the restitution of the proceeds of stolen property: *Hale's P. C.* 541; but there is no power to make an order for the restitution of money which has once been put in circulation: *Miller v. Race* (2); the reason being (as is there pointed out) that such money cannot be identified. The 21 Hen. 8, c. 11, was repealed by 7 & 8 Geo. 4, c. 27, and re-enacted by 7 & 8 Geo. 4, c. 29, s. 57, by which it was extended to misdemeanours. The 7 & 8 Geo. 4, c. 29, was repealed by 24 & 25 Vict. c. 95. Looking at the present enactment, it is plain from the proviso that the Legislature did not contemplate an order being made for the restitution of current coin which had passed into circulation.

Boxall, for the respondent. The order for restitution was right. Admitting that the five-pound piece was current coin

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thereof, in such case the property shall be restore to the owner or his representative, and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof or being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration without any notice, or without any reasonable cause to suspect that the same had by any

felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security. . . ."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27, "Where an indictable offence is . . . authorized to be dealt with summarily. . . ."

"(3.) The conviction for any such offence shall be of the same effect as a conviction for the offence on indictment, and the Court may make the like order for the restitution of property as might have been made by the Court before whom the person convicted would have been tried if he had been tried on indictment."

(1) (1598) *Cro. Eliz.* 638, 661.

(2) (1791) 1 *Burr.* 452; 1 *Sm. L. C.* 10th ed. p. 447.

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and legal tender, it was not passed as current coin on this occasion, but was sold to the appellant as a curiosity. Money which is current may nevertheless have a special value and be sold as a curious or rare coin. But, even if it were passed as current coin, there is nothing to prevent an order from being made for its restitution if it can only be identified. The statute expressly speaks of the restitution of money, and the only difficulty that arises is as to the identification of the particular coins stolen. It is plain that money can be restored if it is found in the possession of the thief, and if the money stolen has been passed away by him and yet can be identified as the actual coin stolen by him, then an order for its restitution can be made. The doctrine that money has no ear-mark merely refers to the difficulty of identification. [He cited *Scattergood v. Silvester* (1); *Taylor v. Plumer* (2); *Rex v. Stanton*. (3)]

Firminger, replied.

Cur. adv. vult.

May 6. DARLING J. read the following judgment:—This was a special case stated by justices, and the following facts were stated as proved or agreed. The prisoner, a butler in the service of the respondent, was convicted of having stolen from his master a five-pound gold piece, presented by the Goldsmiths' Company to the respondent in the Jubilee year, 1887, the year of its date. The gold piece had been kept in a cabinet until November, 1898, when it was stolen by the prisoner, and had never been in circulation. The appellant is a dealer in new and second-hand clothes, jewellery, and other articles; and the prisoner changed the gold piece with the appellant's son in the appellant's shop for five sovereigns. Upon the prisoner's conviction the justices found that the five-pound gold piece stolen by the prisoner was the respondent's property, and they made an order for its restitution to the respondent, acting under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27, sub-s. 3. It was admitted during the argument that the gold

(1) (1850) 15 Q. B. 506.

(2) (1815) 3 M. & S. 562.

(3) (1836) 7 C. & P. 431.

pieces of the issue to which this one belonged are, by Royal proclamation, constituted current coin of the realm; and for the appellant it was contended that the order for restitution was therefore wrong. By s. 100 of the Larceny Act, 1861, it is provided that, on the prosecution to conviction of a thief, the Court may order the restitution of the things stolen to the prosecutor, and, among other stolen things, may order the restitution of money. It was contended before us in this case that although, even after they had been sold by the thief in market overt and so the property in them had passed, stolen goods might still, by virtue of an order under this statute, be re-vested in the owner from whom they had been stolen, yet no such restitution could be ordered of money, unless it were money in a bag or otherwise "ear-marked," as it was said. For this proposition decisions given in actions for trover and conversion of money were cited such as *Holiday v. Hicks*. (1) But s. 100 of the statute distinctly applies to "money"; and long before this it was stated in *Hale's Pleas of the Crown*, p. 542: "So if money be stolen, and the thief taken, and the money seized, he (that is, the true owner) shall have restitution of the money." Reliance was also placed on the case of *Miller v. Race* (2), which was an action of trover upon a bank-note, in which case it was held that the property in such a note passes like cash by delivery. And Lord Mansfield there said: "Now they (bank-notes) are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." Further on in his judgment Lord Mansfield said, referring to some expression attributed to Holt C.J., "'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said that 'the reason why money cannot be followed is because it has no ear-mark'; but

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(1) Cro. Eliz. 638, 661.

(2) 1 Burr. 452; 1 Sm. L. C. 10th ed. p. 447.

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v.	currency. So, in case of money stolen, the true owner cannot
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Darling J.	a valuable and bonâ fide consideration; but before money has
	passed in currency, an action may be brought for the money
	itself." Now, here it is plain that the mere fact that the
	stolen gold piece was money would not render it unfit for the
	application to it of an order for restitution. The true question
	seems to me to be whether by the manner of dealing with it
	which the thief adopted the gold piece passed in currency.
	The exchanging of a coin for other coins is not conclusive
	proof that the exchanging was that of dealing with current
	coin on both sides. Many coins, which yet have not been
	formally withdrawn from currency, have a price far beyond
	their denominated value, by reason of their antiquity or rarity,
	or for their beauty of design or execution (though this last is
	perhaps merely to say again by reason of the coins being struck
	in another age and mint than ours). Money as currency, and
	not as medals, seems to me to have been well defined by Mr.
	Walker in "Money, Trade, and Industry" (1) as "that which
	passes freely from hand to hand throughout the community
	in final discharge of debts and full payment for commodities,
	being accepted equally without reference to the character or
	credit of the person who offers it and without the intention of
	the person who receives it to consume it or apply it to any
	other use than in turn to tender it to others in discharge of
	debts or payment for commodities." Bearing in mind all the
	foregoing considerations, and applying them to the facts stated
	for us by the magistrates, I ask myself was this gold piece
	passed on in its character as coin of currency, or was it rather
	the subject of a sale as an article of virtù. We are permitted
	to draw inferences from the facts stated to us; and besides it
	was stated in the course of the argument that this piece was
	of somewhat greater value than that of its denomination, and
	so was worth more than the five pieces given in exchange for

(1) F. A. Walker, "Money, Trade, and Industry," p. 4, cited in Encyclopædia Britannica, sub tit. "Money."

it, though each of those was of a fifth of the nominal value of this gold piece. Upon the facts stated I come to the conclusion that this gold piece never passed in currency, though it was the subject of a sale (as a medal might have been) to a dealer in old or curious things; and that, therefore, the magistrates acted within their powers in making an order for its restitution.

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CHANNELL J. read the following judgment:—I entirely agree with the judgment that has just been delivered, but as I have prepared a judgment of my own, I think it well to deliver it.

In this case, stated by magistrates, an appellant appeals against an order made under s. 100 of the Larceny Act, ordering him to restore to the prosecutor a five-pound gold piece stolen from him by a thief who has been convicted. The magistrates suggest a doubt whether they have power to state a case, but I think that there is no foundation for this doubt. The magistrates next suggest that the whole question is one of fact. They leave us, however, in some doubt as to what they mean to find. In one view it is a question of fact, in another one of law. They state certain facts, but they do not state what inference they draw from them. That being so, we have power under the rules of Court to draw any inferences which the magistrates might have drawn. The facts have been already fully stated, and I think the proper inference to be drawn from those facts is that the thief did not pass the coin as current money, but sold it for 5*l*. It is true that, by Royal proclamation issued under the Acts of Parliament relating to the coinage, this piece is made current coin of the realm, and might have been used in payment of a debt or otherwise as money; but though it might be so used, it might also be dealt with as if it were a medal, or ancient coin, or other curiosity. I think it was offered to the appellant because he dealt in curiosities, and was taken by him as such.

It is also doubtful whether the magistrates meant to find the transaction *bonâ fide*. Without meaning to suggest that the appellant's son could be found guilty of receiving the coin knowing it to be stolen, I still think the circumstances were

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such that the magistrates might well find that it was not taken bonâ fide, so that, if it had been a bill of exchange or other negotiable instrument, no better title would have been taken than the thief had. If that was the view of the magistrates, they would be right in considering the question one of fact; and if it was not their view, much that they state in the case is wholly immaterial. Under these circumstances we ought to draw the inference ourselves, and upon that inference I think the order of the magistrates a good one.

If the coin had been dealt with and transferred as current coin of the realm, as, for instance, in payment for goods purchased or in satisfaction of a debt, or bonâ fide changed as money for money of a different denomination, I think a question of law of great difficulty would arise. If that were the case, no doubt the property would have passed to the appellant; but the operation of the statute is to revest in the prosecutor, on conviction of the thief, the property in the thing stolen, notwithstanding that the property in it has previously passed effectively to a transferee as by sale in market overt: *Horwood v. Smith* (1); *Scattergood v. Silvester*. (2) The history of the matter is to be found in 2 Hawkins's Pleas of the Crown, c. 23, ss. 49-57. The mere fact of the property in the coin having passed would not, therefore, prevent the statute operating, and it is curious that in all the statutes, beginning with that of 21 Hen. 8, c. 11, money stolen is placed on the same footing as chattels stolen. Unless, therefore, there is something exceptional in the way in which property in money passes, it would appear that, in all cases where by some accident the particular coin or coins stolen could be identified at the date of the conviction, the person then owning them would lose his property though the money had been taken bonâ fide. But we have to consider the proviso which was in the statute of George IV. as well as in the present statute, protecting persons who had bonâ fide taken a negotiable instrument. Now, all the considerations which could have induced the Legislature to protect holders of stolen negotiable instruments must equally apply to stolen money taken bonâ fide. In fact, it is because

(1) (1788) 2 T. R. 750.

(2) 15 Q. B. 506.

bills of exchange, &c., are like currency that they are negotiable : see *Miller v. Race*. (1) It may be that the Legislature did not think it necessary to protect, by including them in the proviso, persons who had *bonâ fide* taken stolen money, because in the great majority of cases it would be impossible, in fact, to identify the money, so that only in rare cases would protection be wanted ; but that hardly seems satisfactory. It seems to me that the Legislature must have assumed that persons having *bonâ fide* taken stolen money did not come within the statute. The matter is very doubtful ; but, on the whole, I think the explanation may be this : it may be that the true meaning of the saying that money has no ear-mark is that when current coins of the realm have passed *bonâ fide* from hand to hand as currency and as money they are considered, for all purposes of property in them, not to be identifiable. They become merely so much money in the possession of the person to whom they have passed. If it is a sovereign, then for all purposes of the property twenty shillings or eight half-crowns are the legal equivalent of the sovereign. If the payment to the man has been made in error the right against him is, as a rule, merely to recover so much money, and not the identical coins. A man cannot, as a rule, be convicted of larceny as a bailee of money : *Reg. v. Hassall*. (2) Of course, this view in no way prevents a servant or agent being liable to hand over identical coins received to his master. The point only arises upon the passing of the coins from one person to another as money. The doctrine that money has no ear-mark, whatever it means, is undoubtedly a doctrine of our law. Lord Mansfield, in *Miller v. Race* (1), criticized the expression, not as being incorrect, but as not being the true reason why the property in money passed on transfer independently of the title of the transferor. The doctrine is discussed and explained both in *Taylor v. Plumer* (3) and in the judgments of Sir George Jessel and Thesiger L.J. in *In re Hallett's Estate*. (4) I think the view which I have suggested as to money, on its being dealt with and passed as money

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(1) 1 Sm. L. C. 10th ed. p. 447.

(3) 3 M. & S. 562.

(2) (1861) L. & C. 58 ; 30 L. J.

(4) (1879) 13 Ch. D. 696.

(M.C.) 175.

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bonâ fide, being treated in law as having lost its identity, and being merely so much money in the hands of the person who took it, is really consistent with all the cases, if not with all the dicta. If it is correct, it makes the 100th section of the Larceny Act, 1861, work as one would expect. I cannot think that if a thief steals a sovereign and buys some article of small value with it in a shop and goes away with the article and the change, and then by reason of some accidental circumstance, such as the shopkeeper happening to have no other sovereign in his till at the time, the coin can be identified in fact, that, upon conviction of the thief, the shopkeeper loses his title to the sovereign. I incline to think that the effect of the 100th section of the Larceny Act, so far as money is concerned, is limited to cases where the money stolen or the proceeds of it are found on the thief, or in the possession of some one taking from him otherwise than by the money passing as currency. When the statute of Henry VIII. was passed its most important effect probably was the same as the effect of an appeal and writ of restitution in the older procedure: see 2 Hawkins's Pleas of the Crown, c. 23, ss. 49-57—namely, to prevent forfeiture to the Crown or to any lord having right to waifs or estrays or goods of felons; but all that is now obsolete.

I have thought it right to discuss the questions of law which were argued before us; but, as I have already said, the points do not arise upon the inference which I think it right to draw from the facts stated.

I think that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *H. Clifton, for Plumbridge, Brighton.*

Solicitors for respondent: *Venn & Woodcock, for T. A. Goodman, Brighton.*

A. P. P. K.