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Dec. 14.  
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Feb. 1.

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED.]

# THE KING v. JAMES AND JOHNSON.

*Criminal Law—Indictment—Wife stealing Goods of Husband when about to leave or desert him—Indictment for Larceny—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12, 16.*

On the trial of a charge against a wife for stealing the goods of her husband when about to leave or desert him, which is made a criminal offence by ss. 12 and 16 of the Married Women's Property Act, 1882, it is not necessary that the indictment should contain averments that the prisoner was the wife of the prosecutor, and that she took the goods in question when leaving or deserting, or about to leave or desert, her husband.!

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the chairman of the Glamorganshire Quarter Sessions.

The prisoners Sarah Eliza James and Thomas Johnson were tried on an indictment in the following form:—

“County of Glamorgan to wit. The jurors for our Lord the King upon their oath present that Sarah Eliza James and Thomas Johnson, on the fifth day of October, in the year of Our Lord One thousand nine hundred and one, at the parish of Pontypridd, in the said county, certain moneys, to wit, three pounds, and a deal box, a sewing-machine, a quilt, two sheets, a waistcoat, a cruet, two pictures, two ornaments, a table-cloth, a tray, two plates, and three glasses, of the moneys, goods, and chattels of John Thomas James, feloniously did steal, take, and carry away 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.”

It appeared at the trial that Sarah Eliza James was the wife of John Thomas James, and that on the day in question she had, while her husband had been induced by Johnson to accompany him to Cardiff, removed the articles charged from her husband's house and deserted him, and subsequently joined Johnson, in whose possession the articles were found.

Counsel for the prisoners submitted that the indictment was insufficient against the wife for want of an averment that she was the wife of John Thomas James, and that she had taken the articles when leaving or deserting, or about to leave or desert, her husband.

The chairman held that these averments were not material to the indictment, and, the jury having convicted the prisoners, he stated this case on the question whether it is essential that an indictment against a married woman for stealing the goods of her husband should aver that she was his wife, and wrongfully took the goods when about to leave him. (1)

*Lloyd Morgan*, for the prisoner James. The indictment was bad. *Reg. v. Streeter* (2) is an authority for saying that the stealing by a wife of goods belonging to her husband is not a larceny at common law or under the Larceny Act. It is a statutory offence created by ss. 12 and 16 of the Married Women's Property Act, 1882, and an indictment charging, as this does, simple larceny is insufficient, since directly it was proved that the prisoner was the wife of the prosecutor the offence charged was disproved. The indictment ought to have stated that the prisoner was the wife of the prosecutor, and that she took the goods when leaving or deserting, or about to leave

(1) By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12, "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property as if such property belonged to her as a feme sole . . . . Provided always that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by

her, nor while they are living apart as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife."

By s. 16, "A wife doing any act with respect to any property of her husband which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband."

(2) [1900] 2 Q. B. 601.

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or desert, her husband. In Hale's Pleas of the Crown (1) it is laid down that an indictment grounded upon an offence made by Act of Parliament must by express words bring the offence within the substantial description made in the Act of Parliament, and "those circumstances mentioned in the statute to make up the offence shall not be supplied by the general conclusion *contra formam statuti*." [He referred to *Steel v. Smith*. (2)]

*Albert Parsons*, for the prosecution. The indictment is sufficient. *Reg. v. Streeter* (3) is not an authority on this case, as the point as to the sufficiency of the indictment was not there taken. The proviso in ss. 12 and 16 of the Married Women's Property Act, 1882, is not a definition of the offence; it merely gives an answer to the defence which might be set up that the prisoner was the wife of the prosecutor. The offence is that of larceny, and is created by the Larceny Act, 1861 (24 & 25 Vict. c. 96). Where an offence is created by one statute and an exception is created by a subsequent statute, it is unnecessary to negative the exception in the indictment: *Rex v. Hall* (4); *Thibault v. Gibson* (5); Hawkins' Pleas of the Crown, bk. 2, ch. 25, s. 113.

*Lloyd Morgan* replied.

*Cur. adv. vult.*

Feb. 1. The judgment of the Court (Lord Alverstone C.J., Lawrance, Wright, Bruce, and Darling JJ.) was read by

LORD ALVERSTONE C.J. At common law a wife could not steal her husband's goods, and now she can only be convicted of larceny by virtue of the provisions of the Married Women's Property Act, 1882, ss. 12 and 16: see *Reg. v. Kenny*. (6) [His Lordship read the sections, and continued:—]

Criminal proceedings can only be instituted by the husband against the wife if the wife and husband are not living together at the time the criminal proceedings are taken, and even then they can only be taken concerning an act done by the wife at the time when they were not living together concerning pro-

(1) 2 Hale, P. C. 170.

(2) (1817) 1 B. & Ald. 94.

(3) [1900] 2 Q. B. 601.

(4) (1786) 1 T. R. 320.

(5) (1843) 12 M. & W. 88.

(6) (1877) 2 Q. B. D. 307.

perty of her husband, or unless such property shall have been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband. We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established; and so, if the act relied upon as constituting larceny were proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband. But the question to be determined is whether the conditions imposed by the proviso contained in s. 12 and incorporated into s. 16 are conditions which must be proved by the prosecution to exist in order to establish the offence, or whether the offence may be established without regard to the conditions, in the absence of any evidence offered by defendant of facts which would establish a defence under the proviso. If compliance with the conditions is a necessary ingredient in the offence, then we think statements alleging compliance with the conditions are an essential part of the indictment.

In *Thibault v. Gibson* (1) Lord Abinger C.B. said: "I believe it is a well-established principle, that, in all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause which gives the penalty, exempting certain cases from its operation, the declaration or information must shew that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act, it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as a ground of defence."

In the same case Parke B., after quoting a passage from 1 Wms. Saund. (2) much to the same effect as the passage cited from Lord Abinger, proceeds as follows (3): "In all cases of

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(1) 12 M. &amp; W. 88, at p. 94.

(2) 1 Wms. Saund. 262 a.

(3) 12 M. &amp; W. 88, at p. 95.

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exception, where it comes by way of proviso in a subsequent section, the exception must be noticed by the party who relies on it; and I have some doubt whether the same rule does not also hold, even where the exception comes by way of proviso in the same section, although it will not be necessary to decide that point at present."

In the case of *Rex v. Jarvis* (1) Lord Mansfield C.J. says: "It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them."

In the same case Denison J. says (2): "There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth) and those in the purview of the Act." And in the same case Foster J. says (3): "Where negatives are descriptive of the offence, there they must be set forth."

In Chitty on Pleading, 4th ed. vol. i. p. 322, the law is thus stated: "It is material, however, in all cases that the offence or act charged to have been committed or omitted by the defendant appear to have been within the provision of the statute, and all circumstances necessary to support the action must be alleged. . . . Where a person is exempt from a penalty under certain circumstances by a proviso in a statute, and not in the body of it, the plaintiff need not state that the defendant is not within the exemptions, for that is merely matter of defence to be shewn by the defendant; but where the exception is contained in the enacting clause, it must be negatived in the declaration, and where an Act of Parliament in the enacting clause creates an offence and gives a penalty, and in the same section there follows a proviso containing an exception which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative the exception; and in this respect there seems a material difference between a proviso and an exception."

(1) (1754) 1 East, 643, n., at p. 646, n.

(2) 1 East, at p. 647, n.

(3) 1 East, at p. 647, n.

In *Steel v. Smith* (1) the marginal note is to the following effect :  
 “ Where an Act of Parliament, in the enacting clause, creates an offence and gives a penalty, and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration.” In that case Bayley J. said (2) : “ I cannot say that the proviso is part of the same sentence ; for if it had been omitted, the preceding sentence would have been entire.”

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In the same case Abbott J. said (2) : “ There is a technical distinction between a proviso and an exception, which is well understood. All the cases say that if there be an exception in the enacting clause, it must be negated : but if there be a separate proviso, it need not.”

It is true that the last two quotations refer to declarations in civil actions ; but the principles applicable are the same, although, no doubt, the principles will be applied with greater strictness in criminal than in civil proceedings.

In *Hawkins' Pleas of the Crown*, bk. 2, ch. 25, s. 113, there is this passage : “ It seems agreed that there is no need to allege in an indictment, that the defendant is not within the benefit of the provisoes of a statute whereon it is founded ; and this hath been adjudged, even as to those statutes which in their purview expressly take notice of the provisoes, as by saying, That none shall do the thing prohibited, otherwise than in such special cases, &c., as are expressed in the Act.”

We think the substance of the authorities is this : That it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception. Thus in an indictment on a statute which enacts that if any person shall put off any milled money whatsoever unlawfully diminished, and *not cut in pieces* for a lower rate

(1) 1 B. & Ald. 94.

(2) 1 B. & Ald. at p. 99.

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than its nominal value, he shall be guilty of felony, it is necessary to state in the indictment that the money was not cut in pieces: *Rex v. Palmer*. (1) In the present case, ss. 12 and 16 must be read together, and the enacting clause in s. 12, when read in connection with s. 16, makes the wife liable to criminal proceedings by her husband, subject to the proviso contained in the latter portion of s. 12. But the conditions imposed by that proviso do not affect the quality or character of the offence. They merely introduce matters which may be pleaded by way of defence, and we think they are not matters necessary to be negatived in the indictment.

We have not overlooked the case of *Lemon v. Simmons* (2), but it is not, in our opinion, inconsistent with the view which we have expressed.

For these reasons we think the indictment good, and that the conviction should be affirmed.

*Conviction affirmed.*

Solicitor for prisoner: *Colenso Jones, Pontypridd.*

Solicitor for prosecution: *W. T. Davies, Porth.*

(1) (1773) 1 Lea. 162.

(2) (1888) 57 L. J. (Q.B.) 290.

A. P. P. C.