

[CROWN CASES RESERVED.]

THE KING *v.* TIDESWELL.

1905

May 20.

Criminal Law—Larceny—Pretended Purchase—Passing of Property.

The prisoner was in the habit of buying from time to time from a manufacturing company portions of the accumulated ashes of the company's works. The only agreement made between the managing director of the company and the prisoner with respect to such purchases was as to the price per ton, the prisoner being at liberty to take from the accumulation as much as he required, upon the understanding that the amount of his purchase in each case should be determined by the weight as ascertained by the company's weigher. It was the duty of the company's weigher to enter in a book a record of the weights of the ashes purchased to enable the company to charge the purchasers with the proper amounts. The company's weigher fraudulently and in collusion with the prisoner weighed and delivered to the prisoner 32 tons 13 cwt. of the ashes and entered the weight in the book as being 31 tons 3 cwt. only:—

Held, that on these facts the prisoner was rightly indicted for larceny of 1 ton 10 cwt.

CASE stated by the chairman of the Staffordshire Quarter Sessions for the consideration of the Court for Crown Cases Reserved.

1. The prisoner was tried on an indictment charging him—

(a) With feloniously stealing 1 ton 10 cwt. of casters' ashes on January 23, 1904, the property of Allen Everitt & Sons, Limited.

(b) With receiving the said goods on the date aforesaid well knowing them to have been stolen.

(c) With feloniously stealing 1 ton 6 cwt. of casters' ashes on April 21, 1904, the property of the said Allen Everitt & Sons, Limited.

(d) With receiving the last-mentioned goods on the said date well knowing them to have been stolen.

2. It was proved that the prisoner had been a customer of Allen Everitt & Sons, Limited, for a number of years, purchasing waste and residual metal products from them. A man named Ephraim Kaye was employed by Allen Everitt & Sons, Limited, as general metal weigher, and it was his duty to weigh out

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waste and residuals, and to enter in a book, called the residual metal book, a record of such weights for the purpose of enabling the customers to be charged in the books of the company with the proper weights. It was also the duty of Ephraim Kaye to keep another book, called the receipt-book, in which he took from the customers signed receipts for the weights of waste and residuals taken by them.

3. On January 23, 1904, Ephraim Kaye weighed and delivered into trucks of the railway company a quantity of casters' ashes, a residual metal product the property of Allen Everitt & Sons, Limited, weighing in fact 32 tons 13 cwt. Ephraim Kaye made out a receipt for these casters' ashes by the prisoner in his receipt-book describing them as weighing 31 tons 3 cwt. only, and this receipt was on January 23 signed by the prisoner, who was charged with that amount only in the books of the company. On January 20 and 23 the prisoner made out two consignment notes to the railway company in his own handwriting for 19 tons 9 cwt. and 13 tons 4 cwt. respectively of casters' ashes, amounting together to 32 tons 13 cwt.

4. On April 21, 1904, Ephraim Kaye weighed and delivered into two trucks of the railway company a quantity of casters' ashes, the property of Allen Everitt & Sons, Limited, weighing in fact 12 tons 16 cwt. 2 qrs. The prisoner on April 20 signed a receipt made out by Ephraim Kaye in his receipt-book for 11 tons 10 cwt. 2 qrs. only, and was charged with that weight in the books of the company. The prisoner on April 21 made out a consignment note to the railway company in his own handwriting for 12 tons 16 cwt. 2 qrs. of casters' ashes.

5. Ephraim Kaye, who on being charged with the aforementioned felonies before magistrates at petty sessions pleaded guilty and was sentenced to three months' imprisonment, was called on behalf of the prosecution, and stated that he entered the lesser weights in the residual metal book and receipt-book intentionally, and that he kept a private book, to which he referred at the trial, in which he entered all the correct weights of goods weighed out to the prisoner, who obtained these correct weights from him or through being present at the

time they were entered. He said that he had no previous arrangement or understanding with the prisoner that he was to be charged for less casters' ashes than were to be sent, and that he could not say that he had ever told the prisoner that he was being charged for less than the actual weights on any occasion, and that there was no understanding as to any particular deduction from weights, though (he added) deductions were as a matter of fact made; but the prisoner had given him sums of money from time to time as a reward for these services generally, though not as a payment in respect of any particular transaction. All the casters' ashes that were put into the railway company's trucks were loaded in the ordinary course of business between Allen Everitt & Sons, Limited, and the prisoner.

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6. On this evidence it was objected by counsel for the prisoner that the indictment was not supported by the evidence on the ground that there was no proof of the larceny or receiving by the prisoner of any specific goods.

7. I overruled the objection, but consented to reserve the point for the consideration of the Court for Crown Cases Reserved. I told the jury that if they believed the evidence for the prosecution their duty was to find the prisoner guilty. The jury found the prisoner guilty.

March 18. *Vachell*, for the prisoner. The ashes put into the trucks were never divided, so that it was impossible to say which particular tons or hundredweight were stolen. "In larceny some particular article must be proved to have been stolen": per Alderson B., *Reg. v. Lloyd Jones*. (1) Secondly, the evidence shews that the property in the whole of the ashes weighed out by Kaye passed from the prosecutors: Sale of Goods Act, 1893, s. 18, rule 3.

R. W. Coventry, for the prosecution. It is enough to specify the amount stolen although it forms part of a larger bulk. Kaye had no authority from the prosecutors to transfer the property in any portion of the ashes except to the extent of the entry made by him in the residual metal book. And

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the prisoner, knowing that he had no such authority, got no property in the excess : *Reg. v. Hornby*. (1)

The Court ordered the case to be remitted to the quarter sessions with directions that the following questions should be answered :—

(a) Was there any previous or contemporary contract between the prisoner and Allen Everitt & Sons, Limited, or any authorized agent or servant of Allen Everitt & Sons, Limited, other than Kaye, either for the sale of these ashes or the sale of any quantities of ashes ? If so, the particulars of the terms of the contract should be set out.

(b) Was there any contract between the prisoner and Kaye for the sale of the ashes on either of the dates laid in the indictment ? If so, the particulars of the contract should be set out.

In accordance with that order the chairman stated as follows :—

The evidence at the trial did not disclose any such contract as referred to in paragraph (a) or in paragraph (b). The managing director of the prosecutors stated in evidence that the prisoner was a customer as buyer of residuals, and that he had sold as much as 3000*l.* in value to the prisoner, and that he had known the prisoner fifteen years in the way of business. The practice appears to have been that when Allen Everitt & Sons, Limited, had an accumulation of waste residuals or ashes they sent for the prisoner, who saw the managing director and arranged verbally with him to buy so much as he should require of the bulk at so much per ton. No specific quantities would be mentioned, the understanding being that the quantities purchased should be defined by the weighing. The ashes the subject of the indictment formed part of one of these accumulations.

May 20. *R. W. Coventry*, for the prosecution.

Vachell, for the prisoner. The property in the whole of the truck-loads passed to the prisoner as soon as they were separated from the bulk and weighed and put into the trucks for the prisoner. For nothing else remained to be done to pass

(1) (1844) 1 C. & K. 305.

the property. Whatever fraud was afterwards perpetrated could not alter the fact. The prosecutors intended the whole of the goods to go to the prisoner, for by the terms of the arrangement he was to take as much as he pleased. What the prosecutors were deprived of was not a certain quantity of goods, but a part of the price.

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LORD ALVERSTONE C.J. Upon the point reserved for our consideration upon the case as originally stated, namely, whether the indictment for larceny could be supported in the absence of proof of larceny of any specific portion of the goods, I entertained no doubt whatever. But in the course of the argument a question was raised as to whether the property in the goods had not already passed to the prisoner at the time of the fraudulent entry in the weight-book, and whether consequently, whatever other criminal offence he might have committed, he could be properly charged with larceny; and as we thought the case did not sufficiently state the facts with respect to that matter we sent it back to be restated. The question whether the prisoner's offence amounts to larceny must depend upon the circumstances under which he received the goods. Suppose the owner of a flock of sheep were to offer to sell, and a purchaser agreed to buy, the whole flock at so much a head, the owner leaving it to his bailiff to count the sheep and ascertain the exact number of the flock, and subsequently the purchaser were to fraudulently arrange with the bailiff that whereas there were in fact thirty sheep they should be counted as twenty-five, and the purchaser should be charged with twenty-five only, there would be no larceny, because the property would have passed to the purchaser before the fraudulent agreement was entered into. On the other hand, if the owner were to leave it to his bailiff to arrange the sale, authorizing him to sell as many sheep out of the flock as the purchaser should be willing to buy, then if the contract of sale arranged between the bailiff and the purchaser was expressed to be for twenty-five sheep and the whole thirty were fraudulently delivered to the purchaser, the obtaining possession of the five sheep as to which there was no contract of sale would amount to larceny. In the

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present case, as restated, it appears that there was no contract with the managing director that the prisoner should buy the whole of the ashes in the trucks, but only such a quantity as should be defined by the weighing; in other words, there was no contract of purchase except that made with Kaye. That being so, the case is governed by the principle of *Reg. v. Hornby* (1), where the prisoner received goods from the servant of the owner under colour of a pretended sale, and it was held that the fact of his having received the goods with the knowledge that the servant had no authority to sell, and was in fact defrauding his master, was sufficient to support an indictment for larceny. I am of opinion that the conviction in this case must be upheld.

LAWRANCE J. I am of the same opinion.

KENNEDY J. I agree in the statement of the law by my Lord, and I also think that upon the case as originally stated it was not clear that the facts shewed the prisoner to have been guilty of larceny within that statement. It was contended that what took place was an arrangement whereby the property passed to the prisoner. If there had been a completed contract with the managing director or some other official of the company covering all the goods in the trucks, then no doubt the property would have passed, and no subsequent fraud would make the receipt of the goods larceny. The offence in such a case would be only a conspiracy to defraud the sellers of part of the price. But here, on the facts as now stated, there was no intention by the prosecutors to pass the property except in such goods as should be ascertained by the weighing—that is to say, in the smaller quantity. Consequently there was a larceny of the balance.

CHANNELL J. I agree. It appears to me that the question whether the prisoner could properly be convicted of larceny depends upon whether there was a contract between Allen Everitt & Sons, Limited, and the prisoner for the sale of the

(1) 1 C. & K. 305.

casters' ashes other than a contract made through the agency of the fraudulent man Kaye. To take the illustration given during the argument of the sale of sheep. If a farmer sells all the sheep in a field to a purchaser at so much per head, but not knowing for certain how many sheep there are sends his servant with the purchaser to count them, and the servant and the purchaser fraudulently agree to say that there were only nineteen sheep when there really were twenty, there is no larceny because all the sheep have been sold by their owner to the purchaser, but the purchaser and the servant have conspired to defraud the owner of the price of one sheep. If however a farm bailiff, having authority to sell his master's sheep in the ordinary way, says to a purchaser, "There are twenty sheep in the field belonging to my master, but he does not know how many there are; you can take them all; I will tell my master you had nineteen only, and you can pay him for nineteen and give me a present for myself," there is clearly a larceny of one sheep, and that whether the bailiff professes to sell the twenty sheep or whether he professes to sell nineteen only, for the fraud of the servant is known to the purchaser, and no property passes in the twentieth sheep by the act so known to be fraudulent even if the bailiff professes to part with the property in it. *Reg. v. Hornby* (1) is a distinct authority for this. It is a decision of Coltman J. alone, but it appears to be good law. *Reg. v. Middleton* (2) also supports this view, and so do all the cases as to what is usually called larceny by a trick. In the case supposed it would be impossible to say which of the twenty sheep was the one which had been stolen, but it could not be said that that would prevent a conviction. The suggested difficulty in the present case of identifying the ton and a half of casters' ashes which was stolen is, in my opinion, no more fatal than the difficulty as to the sheep would be. In the present case the jury must be taken to have found that the prisoner was a party to the fraud, and though he may not have known what quantity was on any particular occasion to be given to him without paying for it, or even that on a particular parcel being handed to him some

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(1) 1 C. & K. 305.

(2) (1873) L. R. 2 C. C. 38.

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part would be so given to him (for Kaye doubtless would only commit the fraud when the circumstances presented a reasonable probability of its being done without detection), yet the prisoner must be taken to have known before the transactions the subjects of this indictment that Kaye would probably do on this occasion what he had clearly done on others, and in the cases when he did so there would be a larceny committed by both, though in the other cases, when the stuff was correctly weighed, there would be none. On these points I find no difficulty, but in the case as originally stated there was nothing to shew whether the whole transaction of the sale of the casters' ashes was carried through by Kaye, or whether the limited company by any other officer or agent made a contract for the sale.

PHILLIMORE J. I entirely agree.

Conviction affirmed.

Solicitors for the Crown : *Parish & Co., Birmingham.*

Solicitors for prisoner : *Ford & Ford, for A. J. O'Connor, Birmingham.*

J. F. C.