

## [COURT OF CRIMINAL APPEAL.]

THE KING *v.* DAVIES.

1913

*Feb.* 17.

*Criminal Law—Fraudulent Trustee—Treasurer of Friendly Society—Misappropriation of Funds—Prosecution—Necessity of Sanction of Attorney-General—Larceny Act, 1901 (1 Edw. 7, c. 10), s. 1.*

The sanction of the Attorney-General is not a necessary preliminary to the prosecution of an offender under s. 1, sub-s. 1, of the Larceny Act, 1901.

## APPEAL to the Court of Criminal Appeal.

The appellant was tried at the Worcester Assizes on an indictment under s. 1, sub-s. 1, of the Larceny Act, 1901 (1), charging that he having been entrusted by sundry persons with money to the amount of 64*l.* 5*s.* 7*d.* did fraudulently convert the same to his own use. The appellant was the treasurer of a friendly society at Worcester known as the Old Greyhound Slate Club, and the money in question was the property of the club and had been entrusted to him in his capacity as treasurer. He had been appointed to that office under the rules of the club, and his duty in respect of the application of the money received by him as treasurer was also defined by the rules. That duty was to pay out money to members becoming entitled to sick pay, and once a year at Christmas time to divide the surplus among the members. At the close of the case for the prosecution it was objected on behalf of the appellant that the offence with which he was charged was an offence "included in" s. 80 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), that the sanction of the Attorney-General to the prosecution was consequently necessary, and that in the absence of proof of that sanction the prosecution must fail. The judge, Channell J., overruled the objection and the appellant was convicted.

(1) By the Larceny Act, 1901, s. 1, sub-s. 1, "Whosoever—

"(a) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay, or deliver, for

any purpose or to any person, the property or any part thereof or any proceeds thereof . . .

fraudulently converts to his own use or benefit . . . the property or any part thereof or any proceeds thereof shall be guilty of a misdemeanour."

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*H. G. Farrant*, for the appellant. The sanction of the Attorney-General was necessary to the prosecution. By s. 80 of the Larceny Act, 1861, "Whosoever being a trustee of any property for the use or benefit either wholly or partially of some other person . . . . shall with intent to defraud convert or appropriate the same or any part thereof to or for his own use or benefit . . . . shall be guilty of a misdemeanour . . . . Provided that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of Her Majesty's Attorney-General"; and by s. 1 of that Act "the term 'trustee' shall mean a trustee on some express trust created by some deed, will, or instrument in writing." Every person who is entrusted with the money of others is in the widest sense of the term a trustee of that money, and if he is so entrusted on the express terms of an instrument in writing he is a trustee within s. 80. Here the appellant was entrusted with the money as treasurer on the terms of the club rules which expressly defined his duty in respect of it. Those rules were an "instrument in writing" within the meaning of s. 1 of the Act of 1861. In *Reg. v. Fletcher* (1) the prisoner was convicted, under the corresponding section of the Fraudulent Trustees Act, 1857 (20 & 21 Vict. c. 54), in which the language was precisely the same, of having misappropriated the money of a savings bank of which he was trustee, treasurer, and secretary. His duties in respect of the money received by him on account of the institution were, as here, defined by the rules of the institution. It was held that he was a trustee within the meaning of the Act, and that the rules were an instrument in writing creating an express trust. The appellant then might have been indicted under s. 80 of the Act of 1861, and his offence was consequently an "offence included in" that section. He could not indeed before 1901 have been charged under that section, for s. 75 of the Act of 1861, which corresponds to s. 1, sub-s. 1, of the Act of 1901, expressly provided that "nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever," including instruments other than a deed or will. That section, s. 75, is now repealed by the Act of 1901, but s. 1, sub-s. 2, which

(1) (1862) 9 Cox, C. C. 189.

corresponds to the excluding clause in s. 75, differs in its terms; it runs thus: "Nothing in this section shall apply to or affect any trustee on any express trust created by a deed or will," omitting all reference to instruments in writing other than deeds or wills. The result is that now, in such a case as the present, it is at the option of the prosecution whether they will proceed under s. 80 of the Act of 1861 or under the Act of 1901, and as the offence is an "offence included in" s. 80, the sanction of the Attorney-General is necessary none the less because the prosecution elect to proceed under the later Act.

*Hon. R. Coventry*, for the prosecution, was not called upon.

The judgment of the COURT (Darling, Phillimore, and Pickford JJ.) was delivered by

PHILLIMORE J. We are of opinion that this appeal must be dismissed. Under the Act of 1857 entitled "An Act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property" it was provided by s. 1 that "If any person being a trustee of any property for the benefit, either wholly or partially, of some other person . . . shall with intent to defraud convert or appropriate the same or any part thereof to or for his own use . . . he shall be guilty of a misdemeanour," and by s. 17 the word "trustee" was defined to mean "a trustee on some express trust created by some deed, will, or instrument in writing." It was under that statute that *Reg. v. Fletcher*(1) was decided. There the prisoner was trustee, treasurer, and secretary of the society. He was indicted as trustee. It was contended that he was not a trustee within the meaning of the Act, and, secondly, that his trust, if any, was not created by an instrument in writing. It was held that he was a trustee, because he was so in fact, and it was in respect of his breach of duty as trustee that he was charged. He was not the less a trustee because he was also the treasurer. And further it was held that as his duties as trustee were expressly defined by the rules of the society, his trusteeship was on an express trust created by an instrument in writing. That statute was repealed by the Larceny

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Act, 1861, by s. 75 of which it was enacted that "Whosoever having been entrusted . . . as a banker, merchant, broker, attorney, or other agent with any money . . . with any direction in writing to apply, pay, or deliver such money . . . for any purpose or to any person specified in such direction" should fraudulently convert it to his own use should be guilty of an offence. The section went on to say that "nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever." Then s. 76 said that similar classes of agents who were entrusted with any property "for safe custody" and fraudulently converted the same to their own use should also be guilty of an offence. Then s. 80 dealt with trustees who were excluded from the operation of s. 75, and provided that no prosecution for any offence included in that section should be commenced without the sanction of the Attorney-General. Sect. 75 was intended to deal with the class of persons who were entrusted with money as part of their business, and presumably for reward; s. 80 was intended to deal only with the class of trustees who were appointed under a formal instrument, and who in general discharged their duties gratuitously. The two sections were meant to be mutually exclusive. No one could come within both. There was consequently no difficulty under that Act in saying whether the particular offence charged was one which required the sanction of the Attorney-General as a preliminary to prosecution. So long as s. 75 remained unrepealed the words of s. 80 "any offence included in this section" could mean nothing else than "any offence under this section." Then came the Act of 1901, s. 1 of which follows to some extent the language of s. 75 of the earlier Act, but omits to qualify the word "whosoever" by reference to bankers and other classes of agents, and also omits the condition of a "direction in writing"; it runs: "Whosoever—(a) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof," fraudulently converts it to his own use shall be guilty of an offence. That takes the place of ss. 75 and 76, but

it leaves s. 80 untouched. It goes on to say, indeed, that nothing in the section shall apply to "any trustee on any express trust created by a deed or will." But to my mind that provision is wholly unnecessary, for, as I have said, the classes of offenders who are dealt with respectively by this section and s. 80 of the Act of 1861 are mutually exclusive. It cannot be that the fact of the repeal and re-enactment of s. 75 in slightly different language can enlarge the meaning of the words of s. 80 "any offence included in this section" and enable them to include an offence which they could not have included before 1901. We are therefore of opinion that the requirement of the Attorney-General's sanction is confined to the case of a prosecution under s. 80 of the Act of 1861 and has no application to a prosecution under the Act of 1901.

*Appeal dismissed.*

Solicitor for appellant: *Registrar of Court of Criminal Appeal*.

Solicitor for prosecution: *Director of Public Prosecutions*.

J. F. C.

[IN THE COURT OF APPEAL.]

SHIPP *v.* FRODINGHAM IRON AND STEEL COMPANY,  
LIMITED.

C. A.

1913  
*Jan.* 13, 20.

*Employer and Workman—Compensation—Basis of Calculation—"Average weekly earnings"—Deductions from Wages—Working in Gangs—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., s. 2 (a), (d).*

In a claim for compensation under the Workmen's Compensation Act, 1906, founded upon the average weekly earnings of the workman, it appeared that his work was that of a miner of ironstone, and he formed one of a gang of fifteen men similarly employed. In getting the ironstone it was necessary to remove sand and use gunpowder for blasting. The gang were paid at the rate of 6½*d.* per ton for ironstone plus a bonus of 3¼ per cent., and 2½*d.* per yard for sand with a bonus of 6¼ per cent. From the aggregate of these sums was deducted the value of the powder used by the gang, and the net sum was paid to the ganger, who distributed it amongst the men in proportion to the number of hours they had worked. The employers provided the powder at cost price. The workman claimed 14*s.* 7*d.* per week on the ground that his average weekly earnings had been 1*l.* 9*s.* 2*d.*, namely, his share of the full amount due to the gang without deducting anything