

1914

July 7, 8.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* NOEL.

Criminal Law—Fraudulent Conversion of Property—First Disclosure of Acts by Accused as Voluntary Witness in Cross-examination in Civil Action—Protection from Prosecution—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 85.

When an act done by a person is first disclosed by him without making any objection during cross-examination in a civil action, it is not disclosed by him "in consequence of any compulsory process" of a Court of law, within the meaning of s. 85 of the Larceny Act, 1861, and he is liable to be convicted of an offence under the Larceny Act, 1901, in respect of the act so disclosed.

APPEAL from a conviction at the Central Criminal Court upon an indictment under s. 1 of the Larceny Act, 1901.

The appellant was charged, upon several counts, with fraudulently converting to his own use a cheque for 1000*l.* and the proceeds thereof received for or on account of another person or entrusted to him for a certain purpose or entrusted to him for safe custody.

The cheque for 1000*l.* had been handed to the appellant by his employer and paid by the appellant into a banking account upon which he alone could draw, and he drew upon that account for the full amount of the cheque.

An action was brought in the High Court against the appellant and his employer in respect of that sum of 1000*l.* In that action the appellant voluntarily gave evidence and in cross-examination he was asked to produce the pass-book relating to the said banking account. The book was not in Court, and the appellant was told by the Lord Chief Justice, before whom the action was being tried, to fetch the book; the appellant fetched the book and produced it without making any objection; the entries in that book were the first disclosure of the payment of the cheque for 1000*l.* into the said banking account and of the drawing against it by the appellant.

Subsequently this prosecution was instituted against the appellant, and at the trial the defence (among others) was set up that he was not liable to be convicted, by reason of the provisions

of s. 85 (1) of the Larceny Act, 1861, because the acts upon which the charge against him was founded were first disclosed by him as above stated. This defence was overruled; the appellant was convicted; and he appealed upon the above ground (among others). The other points argued upon the appeal do not call for a report.

1914

 REX
v.
NOEL.

A. Powell, K.C., and *Arthur Lawton*, for the appellant. It is admitted that the dealings of the appellant with the cheque in question were first disclosed by him in the evidence which he gave in the civil action. He was, therefore, protected from conviction by s. 85 of the Larceny Act, 1861. The Larceny Act, 1901, repeals ss. 75 and 76 of the Act of 1861, but provides (s. 2, sub-s. 1) that "this Act shall have effect as part of the Larceny Act, 1861, and section 1 of this Act shall be substituted for sections 75 and 76 of that Act, and references in any enactment to those sections shall be construed as references to section 1 of this Act." This prosecution was under s. 1 of the Act of 1901, and, therefore, s. 85 of the Act of 1861 applies. It is true that the appellant was a voluntary witness in the civil action, but he did not disclose any of the facts upon which this prosecution was founded until he was cross-examined and told to produce the pass-book. That was a disclosure by him in consequence of "a compulsory process" of the Court within the meaning of s. 85. The term "process" is a very wide one and will include the cross-examination of a witness in a civil action. Giving evidence in a civil suit upon cross-examination is being compelled to give evidence and to answer questions, for it is against the desire and the will of the witness. That is clearly a compulsory process. In such a case

(1) The Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 85 (so far as it is unrepealed): "Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any Court of Law or Equity, in any action, suit, or proceeding which shall have been bona fide instituted by any party aggrieved."

1914

REX

C.
NOEL.

as this the witness could not object to answer upon the ground that his answer might tend to criminate him, because of the provisions of s. 85, and therefore he must be entitled to the protection against subsequent conviction which is given by that section: *Garbett's Case* (1); *Skeen's Case* (2); *Reg. v. Gunnell* (3); *Rex v. Oliver*. (4) The case of *Rex v. Pike* (5) was decided upon the provisions of the Bankruptcy Act, 1890, and has no bearing upon the present case. If such a case as this does not come within the protection given by s. 85, then a person like the appellant is in a worse position than a person who, for instance, has committed a forgery; the latter, if giving evidence as a witness in a civil action, could refuse to answer any question which might shew that he had committed forgery, but the provisions of s. 85 would prevent the former from refusing to answer any question which might shew that he had fraudulently converted property. That would be a most unreasonable construction of the section.

Travers Humphreys, for the Crown. The obligation imposed by the first part of s. 85 to answer questions ought to be limited so as to coincide with the protection given by the latter part of the section, that is, it should be limited to persons giving evidence in consequence of "compulsory process" and should not be extended to a voluntary witness. The section applies only to a person who has been forced by the machinery of the law to give evidence against his will. Disclosure made by a witness who voluntarily gives evidence in an action is not made under any "compulsory process" of the Court, and it cannot make any difference that the disclosure is made during cross-examination. A witness who gives evidence in consequence of a subpoena may be doing so in consequence of "a compulsory process" of a Court, but not a voluntary witness. Even if a voluntary witness claims to be entitled to refuse to answer upon the ground that his answer may criminate him and is ordered by the Court to answer, that is not "a compulsory process" within s. 85. In this case, however, there was no suggestion of any refusal to answer questions or produce the pass-book and

(1) (1847) 1 Den. C. C. 236.

(3) (1886) 16 Cox, C. C. 154.

(2) (1859) Bell, C. C. 97.

(4) (1909) 3 Cr. App. Rep. 246.

(5) [1902] 1 K. B. 552.

the disclosure was purely voluntary. Not one of the cases cited has any bearing upon the present case.

1914

REX
v.
NOEL.

A. Powell, K.C., replied.

The judgment of the COURT (Ridley, Lord Coleridge, and Scrutton JJ.) was delivered by

RIDLEY J. A point has been raised that the appellant was not liable to conviction because the acts done by him upon which the charges against him were founded had, previously to his being charged, been first disclosed by him on oath, in consequence of a "compulsory process" of a Court of law, within the meaning of s. 85 of the Larceny Act, 1861. It has been contended that, if a witness is cross-examined, his answers are given in consequence of a compulsory process of the Court, and that, therefore, the acts disclosed by such answers cannot subsequently be made the foundation of criminal proceedings against him. It seems to us that the expression "compulsory process," in s. 85, signifies something more than the mere putting of a question to a witness which he may not wish to answer. If there were a compulsory examination, as in bankruptcy, or by interrogatories, or by a bill in equity, that would be a compulsory process of a Court of Law or Equity. Also, possibly, if a witness claims the privilege of refusing to answer a question because his answer may tend to criminate him, and the Court orders him to answer the question, that may be a "compulsory process" of the Court within the meaning of s. 85. We do not, however, desire to decide that point, as it is not necessary to do so in the present case. In this case no such privilege was claimed, and it is not necessary for us to go further than to say that, where evidence is given voluntarily by a witness in proceedings in a Court of Law or Equity, it is not given "in consequence of any compulsory process of a Court of Law or Equity," within the meaning of s. 85.

This appeal, therefore, fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant : *Adrian de Fleury & Co.*

Solicitor for the Crown : *Director of Public Prosecutions.*

J. H. W.