BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

LLOYD S. LARKIN .....DEFENDANT.

1960
Sept. 12
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Crown—Financial Administration Act, R.S.C. 1952, c. 116, s. 89—Action for money received as agent of Crown and not accounted for—Plea of res judicata based on acquittal on criminal charges involving same money rejected.

The Crown seeks to recover from the defendant a sum of money received by the defendant when one of the Crown's postmasters as agent for the Crown and which he has failed to pay to Her Majesty though duly requested to do so, in accordance with the provisions of the *Financial Administration Act,* R.S.C. 1952, c. 116, s. 89.

The defendant pleads that the monies now claimed by the Crown were the same monies as were involved in two offences with which the defendant was charged and upon which he was acquitted by an Assize Court of the province where he resided, and pleads the defence of *res judicata.*

Held: That the plea of acquittal in the Criminal Courts cannot be invoked by the defendant in this case.

ACTION by the Crown to recover money received as agent of the Crown and not accounted for.

The action was tried before the Honourable Mr. Justice Cameron at Winnipeg.

Max Isaacs for plaintiff.

G. O. Jewers for defendant.

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The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (September 12, 1960) delivered the following judgment:

By this Information, the Crown seeks to recover from the defendant the sum of $3,948.66 and interest. At the trial this morning, no oral evidence was adduced, the parties, however, having agreed upon a Statement of Facts filed as Exhibit 1. From these facts it appears that at all material times the defendant was the Postmaster at Teulon, Manitoba; that between March 1, 1956, and March 31, 1957, the defendant as such Postmaster in the employment of and as agent for Her Majesty, received the sum of $3,948.66 on behalf of and for the use of Her Majesty, which sums he has failed to pay to Her Majesty although duly requested to do so. It is that amount, with interest, which the Crown now seeks to recover.

Pursuant to s-s. (1) of s. 89 of the *Financial Administration Act*, R.S.C. 1952, c. 116, the Minister of Finance on February 23, 1959, caused a notice (Exhibit 2) to be served on the defendant requiring him to account for the said sum to the Deputy Postmaster General within thirty days from the day on which he was so served. That section reads as follows:

> 89. (1) Whenever the Minister has reason to believe that any person
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> (*a*) has received money for Her Majesty and has not duly paid it over,
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> (*b*) has received money for which he is accountable to Her Majesty and has not duly accounted for it, or
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> (*c*) has in his hands any public money applicable to any purpose and has not duly applied it,
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> the Minister may cause a notice to be served on such person, or on his representative in case of his death, requiring him within such time from the service of the notice as may be named therein, duly to pay over, account for, or apply such money, as the case may be, and to transmit to the Minister proper vouchers that he has done so.
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> (2) Where a person has failed to comply with a notice served on him under subsection (1) within the time stated therein, the Minister shall state an account between such person and Her Majesty, showing the amount of the money not duly paid over, accounted for or applied, as the case may be, and, in the discretion of the Minister, charging interest on the whole or any part thereof at the rate of five per cent per annum from such date as the Minister may determine, and in any proceedings for the recovery of such money a copy of the account stated by the Minister, certified by him, shall be *prima facie* evidence that the amount stated therein, together with interest, is due and payable to Her Majesty, without proof of the signature

of the Minister or his official character, and without further proof thereof, and such amount and interest may be recovered as a debt due to Her Majesty.

Under s-s. (2) thereof, the Minister of Finance on April 20, 1960, stated an account between the defendant and Her Majesty (Exhibit 3) showing the amount of $3,948.66 said not to be duly accounted for and charging interest thereon at the rate of 5 per cent. per annum from that date.

By s-s. (2) of s. 89 of the *Financial Administration Act* (*supra*), it is provided that

> In any proceedings for the recovery of such money a copy of the account stated by the Minister, certified by him, shall be *prima facie* evidence that the amount stated therein, together with interest, is due and payable to her Majesty, without proof of the signature of the Minister, or his official character, and without further proof thereof, and such amount and interest may be recovered as a debt due to Her Majesty.

In his Statement of Defence, it is alleged that the defendant, following service on him of the Notice (Exhibit 2), did account for the said sum. It is admitted that on February 25, 1959, the defendant by his solicitor wrote the letter referred to in para. 4 of the Statement of Defence, which reads as follows:

> Mr. Larkin has sent us the "notice to account" under Section 89(1) of the Financial Administration Act, chapter 116 of the Revised Statutes of Canada, 1952, which you caused to be served on him on February 23rd, 1959. Our client has instructed us to advise you that the sum of $3,948.66 mentioned in the "notice to account" was apparently stolen from the safe in the post office at Teulon, Manitoba on or about April 1st, 1957. The missing monies formed the subject matter of criminal charges against Mr. Larkin namely, public mischief and conversion. Mr. Larkin was acquitted by an Assize Court Jury of both of these offences, although he was convicted of certain offences regarding falsification of his accounts. The law officers of the Crown are quite familiar with the circumstances of this loss for which Mr. Larkin accounted, apparently satisfactorily, to a criminal Assize Court Jury.

No evidence was given as to the alleged theft of the monies on or about April 1, 1957, and accordingly I need say nothing further about that matter.

The remaining defence is that disclosed in the same letter, namely, that by reason of the acquittal of the defendant by an Assize Court of the province of Manitoba on October 20, 1958, the matter is now *res judicata* and the Crown is

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thereby estopped from taking these proceedings. The two charges on which he was acquitted are stated in para. 6 of the Defence as follows:

(*a*) That being a person employed in the business of the Canada Post Office as a Postmaster at Teulon Post Office in the said Province and an employee of the Government of Canada did between the 1st day of March, 1956 and the 31st day of March, 1957 at Teulon aforesaid, unlawfully convert to his own use monies in the amount of $4,315.56, entrusted to him in his capacity of Postmaster as aforesaid and did thereby commit an indictable offence, contrary to Section 62(1) of the Post Office Act.

(*b*) On the 31st day of March, A.D. 1957, at the Village of Teulon in the Province of Manitoba, did unlawfully, with attempt to mislead, cause V. H. Marchbank, a peace officer, to enter upon an investigation by reporting that an offence had been committed when it had not been committed, contrary to the provisions of Section 120(*a*)(*c*) of the Criminal Code.

By the agreed facts it is admitted that the monies involved in those offences are those now claimed by the Crown and that the defendant was acquitted on those two charges.

In order that a defence of *res judicata* may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff had an opportunity of recovering, and, but for his own fault might have recovered in the first action that which he seeks to recover in the second (see *Halsbury's Laws of England,* Third Edition, Vol. 15, Art. 358, p. 185). That is not the situation here as the Assize Court in which the defendant was tried had no power to direct payment to the Crown of the amounts now claimed.

The matter is concluded, I think, by the judgment of the Supreme Court of Canada in *The King v. Bureau*[1]. There the suppliant sought to set aside an Order forfeiting to the Crown certain cigarettes illegally imported into Canada and the automobile used in connection therewith. It was shown that the claimant had been acquitted in the Criminal Courts of having in his possession without lawful excuse goods illegally carried into Canada—namely, the cigarettes. In the Supreme Court, Rinfret J. (as he then was), speaking for the majority of the Court, said at p. 374:

It was correctly decided in the Exchequer Court [1948] Ex. C.R. 257, that the acquittal of the respondent in the Criminal Court could not be invoked by him in the present case. That is in accordance with the judgment of this Court in *La Fonciere Compagnie d'Assurance de France v. Perras et al. and Daoust* [1943] S.C.R. 165.

[1] [1949] S.C.R. 367.

It was, therefore, necessary for the case to be tried *de novo* absolutely as if no criminal charge had been brought against the respondent.

A case very similar to the present one was before the Australian Courts in *The King v. Seery*[1] a decision of the High Court of Australia. That was an action against a postmistress to recover £137 as being public monies collected and received by her and not paid to the plaintiff. It appeared that she had been tried and acquitted at a Court of Quarter Sessions on a charge that she fraudulently converted to her own use certain monies which included the sum claimed in the civil proceedings. A plea of *res judicata* failed. Griffith C.J. stated at p. 17:

This is an action for money received by the defendant to the use of the Crown. The verdict relied upon is a verdict on a charge of fraudulently misappropriating that money. In order to determine the latter question the jury had to apply their minds not only to the question whether the respondent received the money but also to the other question whether she fraudulently misappropriated it. It does not appear from the verdict whether they were satisfied that she had received the money. They may not have applied their minds to that question at all, but may only have come to the conclusion that, whether she had or not, they were not satisfied that she had misappropriated it with fraudulent intent.

The element of fraud was necessarily involved in the charge. That was decided by this Court in *Hardgrave v. The King*, 4 C.L.R. 232; and it would be very strange if it were not so. It may be that under the Statute an accounting party who has received money for the Crown and does not account for it labours under the disadvantage that there is a presumption of fraud against him. But the fraudulent intent is an essential element of the charge, and must be found by the jury. If authority is needed for that proposition it is to be found in *R. v. Farnborough* (1895) 2 Q.B., 484. There the Judge at the trial upon a charge of larceny asked the jury whether they believed the evidence for the prosecution, and, on their answering the question in the affirmative, directed a verdict of "guilty", and it was held that the direction was wrong because the fraudulent intent was a fact that must be found by the jury. In this case it does not appear whether the jury found anything more than that the respondent had no fraudulent intent, which had nothing to do with the question whether she had received the money.

For these reasons I am of opinion that the appeal should be allowed.

Isaacs J. agreed, stating at p. 18:

I quite agree. The verdict of acquittal may, for all that appears, have proceeded on the finding of absence of *mens rea*. There are no materials before the Court now to enable it to say whether or not anything was found by the jury as to the receipt of the money or the ownership of the money. Under those circumstances the principle applies which I think is most concisely stated by Mellish L.J. *In re Bank of Hindustan, China*

[1] 19 Commonwealth Law Reports, 15.

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and Japan: Alison's Case, L.R. 9 Ch., 1, at p. 25. One other case I should mention is *Stephenson v. Garnett* (1898) 1 Q.B., 677, at p. 682, where Collins L.J. lays down the same principle.

In my opinion, the plea of acquittal in the Criminal Courts cannot be invoked by the defendant in this case. There being no dispute that the defendant received the amount claimed as agent for the Crown and has not paid it, there will be judgment for the Crown for $3,948.66, with interest at 5 per cent. thereon from April 20, 1960. The plaintiff is also entitled to costs after taxation.

In the agreed Statement of Facts it is admitted that "there is payable to the defendant approximately the sum of $1,900 superannuation credits which sum has been withheld from him pending the outcome of this action". In his defence, the defendant claimed that these credits amounted to $3,000, but the amount is now agreed upon as approximately $1,900. By agreement of the parties, I was not asked to deal specifically with this matter. I have no doubt whatever that the Crown in view of the agreement of its counsel that this amount is owing to the defendant, will in due course give credit for the full amount on hand.

Judgment accordingly.