1894

*April 2.

*May 1.

ALEXANDER McINTOSH.....APPELLANT ;

VS.

THE QUEEN.....RESPONDENT ;

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Criminal appeal—Criminal Code 1892, *sec.* 742—*Undivided property of co-heirs—Fraudulent misappropriation—Unlawfully receiving—R.S.C. ch.* 164, *secs.* 85, 83, 65.

Where on a criminal trial, a motion for a reserved case made on two grounds is refused and on appeal to the Court of Queen's Bench (appeal side) that court is unanimous in affirming the decision of the trial judge as to one of such grounds, but not as to the other, an appeal to the Supreme Court can only be based on the one as to which there was a dissent.

A conviction under sec. 85 of the Larceny Act, R. S. C. ch. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under sec. 65.

A fraudulent appropriation by the principal, and a fraudulent receiving by the accessory may take place at the same time and by the same act.

Two bills of indictment were presented against A. and B. under secs. 85 and 83 of the Larceny Act.

By the first count each was charged with having unlawfully and with intent to defraud, taken and appropriated to his own use $7,000 belonging to the heirs of C., so as to deprive them of their beneficiary interest in the same.

The second count charged B. (the appellant) with having unlawfully received the $7,000, the property of the heirs which had before then been unlawfully obtained and taken and appropriated by said A., the taking and receiving being a misdemeanour under sec. 85, ch. 164 R. S. C. at the time when he so received the money. A. who was the executor of C.'s estate, and was the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving.

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* PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

1894

MCINTOSH v. THE QUEEN.

On the question submitted, in a reserved case, whether B. could be found guilty of unlawfully receiving money from A., who was custodian of the money as executor, the Court of Queen's Bench for Lower Canada (on appeal), Sir A. Lacoste C.J., dissenting, held the conviction good.

At the trial it was proved that A. and B. agreed to appropriate the money and that when A. drew the money he purchased his railway ticket for the United States, made a parcel of the money, took it to B.'s store, and handed it to him saying : "Here is the boodle ; take good care of it." On the same evening, he absconded to New York.

On appeal to the Supreme Court of Canada :

Held, affirming the judgment of the court below, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B. or previously, B. was properly convicted under sec. 85 ch. 164, R. S. C. of receiving it, knowing it to have been unlawfully obtained. Gwynne J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) on an appeal from the decision of the trial judge refusing a motion for a "reserved case" after verdict (1).

The "Reserved case" submitted to the Court of Queen's Bench by Mr. Justice Wurtele, the trial judge, was as follows :

"The prisoner Alexander McIntosh was tried before me on two counts ; by the first, for having unlawfully and with intent to defraud, taken and appropriated to his own use $7,000 belonging to the heirs Dalrymple, so as to deprive them of their beneficiary interest in such sum ; and, by the second, for having received such sum from one James Dalrymple, who had so unlawfully and with intent to defraud the heirs Dalrymple, taken and appropriated the same to his own use, so as to deprive them of their beneficiary interest therein, knowing the same to have been so unlawfully taken ; and on the 14th September last (1893) he was acquitted on the first count and was found guilty on the second.

(1) Q. R. 2 Q. B. 357.

1894

McINTOSH v. THE QUEEN.

After the rendering of the verdict, on the 20th September, 1893, Mr. St. Pierre Q. C., of counsel for the prisoner, moved:

"That inasmuch as, according to the evidence adduced on behalf of the crown, the money referred to was appropriated by one James Dalrymple, who was the proper keeper of that money, in his capacity of testamentary executor of the late James Dalrymple, and inasmuch as the act of appropriation by the said James Dalrymple only took place at the time when the money was handed over to the accused McIntosh, which act, to wit, that of handing over by Dalrymple and that of receiving by McIntosh formed but one single undivided act:"

"the following point be therefore reserved for the decision of the Court of Queen's Bench, appeal side;"

"whether McIntosh could be rightfully convicted of the crime of feloniously receiving a certain sum of money, knowing it to have been stolen."

"And that inasmuch as according to the same evidence the money referred to is alleged to be the undivided property of several heirs, who have never apportioned their respective shares;"

"the following point be reserved for the said Court of Queen's Bench, appeal side;"

"whether the accused could be found guilty of feloniously receiving money, of which he was part owner, for an undivided and indefinite share."

"In my opinion, the evidence showed that one Arthur Brennan owed $5,375.00 to the heirs Dalrymple; that James Dalrymple, and the prisoner as the legatee of his wife, had each a certain share of this money; that all the interested parties gave Mr. Brennan an acquittance, and agreed that James Dalrymple should receive the money from Mr. Brennan and divide it among them; that he did receive the amount on the

the 19th November, 1887, but that instead of dividing it, he handed it over to the prisoner on the evening of the day on which he had received it, together with other moneys coming fron payments of interest belonging to the heirs, which he had previously received as executor, and which formed together a total sum of $7,000.00; that after receiving the $5,375.00 from Mr. Brennan the prisoner went to the Windsor Hotel and bought a railway ticket for New York, taking for that purpose some of the money which he had received from Mr. Brennan and thereby breaking its bulk; that the prisoner had previously, on the 10th November, 1887, drawn from the Savings Bank, where he had deposited the moneys coming from interest, the sum which he added to the money received from Mr. Brennan and which formed with it the sum of $7,000.00; that it had been previously agreed between James Dalrymple and the prisoner that the former would fraudulently appropriate the money due by Mr. Brennan when it should be paid to him, and that he would abscond immediately afterwards, and that he drew the money from the Savings Bank with the intention of appropriating it and of absconding; that when he handed the money over to the prisoner he told him that it was the "boodle" and that, on the evening of the 19th November, 1887, James Dalrymple fled to the United States, and the prisoner went to the railway station to see him off."

"I was of opinion, as James Dalrymple, when he received the money from Mr. Brennan, as a bailee, intended to misappropriate it and to defraud his co-heirs of their shares and had carried out that intent with the previous knowledge and connivance of the prisoner, that he had appropriated it to his own use, so as to deprive them of their beneficiary interest in it, before he had handed it to the prisoner; that the

1894

McINTOSH v. THE QUEEN.

fact of breaking the bulk and taking some of the money to buy the railway ticket constituted a fraudulent appropriation of the money and ended his relation to his co-heirs of bailee; that moreover the fact of drawing the money of the heirs which he had deposited in the Savings Bank, with the intention of appropriating it to himself and fleeing to the United States, also ended his relation to his co-heirs of bailee of that money and rendered him guilty of fraudulent appropriation; and that the prisoner knew, when the $7,000.00 were received by him, that they had been previously fraudulently taken and misappropriated; and I therefore declared that the first point was not well taken."

"I was also of opinion that under section 85 of the Larceny Act (ch. 164 of the Revised Statutes of Canada) James Dalrymple was rightfully indicted and convicted of having unlawfully taken the $7,000.00 as under that section any one, being one of several beneficiary owners of any money, who steals or unlawfully converts the same to his own use or to that of any other person, is liable to be dealt with as if he had not been one of such beneficiary owners, and that as a consequence the prisoner was rightfully indicted and found guilty under section 83 of the same act for having received this money knowing it to have been unlawfully taken and misappropriated; and I therefore also declared that the second point was wrongly taken."

"I had no doubts on the two points, and on the 23rd September last, (1893), I consequently refused to reserve the two questions which the prisoner's counsel asked me to submit for the opinion of the Court of Appeal. The prisoner thereupon applied for leave to appeal from my ruling or decision, and on the 25th November last, (1893,) leave to appeal was granted."

1894

McINTOSH v. THE QUEEN.

"In conformity with paragraph 3 of section 744 of the Criminal Code, 1892, the present case is now stated by me; and I now submit for the opinion of the Court of Appeal, the two following questions, viz.:"

"1st. Whether, under the circumstances, the prisoner has been rightfully convicted of the crime of unlawfully receiving the sum of $7,000.00 from James Dalrymple, knowing it to have been previously unlawfully taken and misappropriated, inasmuch as James Dalrymple was the bailee of such money and only parted with it when he handed to him."

"2nd. Whether the prisoner could be found guilty of unlawfully receiving money of which he was part owner for an undivided share, inasmuch as the money was the undivided property of the heirs Dalrymple, of whom he represented one."

H. Saint Pierre Q. C. for appellant relied on and cited: *The Queen* v. *Warner* (1); *The Queen* v. *Perkins* (2); *The Queen* v. *Smith* (3); Russell on Crimes, by Greaves (4); Roscoe's Criminal Evidence (5); *The Queen* v. *Berthiaume* (6); *The Queen* v. *St. Louis* (7); *Mooney* v. *The Queen* (8).

M. J. F. Quinn Q. C., for the respondent: *Queen* v. *Ashwell* (9); *Queen* v. *Craddock* (10); *The People* v. *Smith* (11). Crankshaw on The Criminal Code, art. 742.

The judgment of the majority of the court was delivered by

TASCHEREAU J.—Two questions were submitted to the Court of Appeal in Montreal in this case.

1st. "Whether the accused could be found guilty of feloniously receiving money from a person who had a

(1) 7 Rev. Leg. 116.
(2) 2 Den. C. C. 459.
(3) 11 Cox C. C. 511.
(4) 4 ed. 2 vol. p. 236.
(5) 4 ed. 1874, p. 638.
(6) M. L. R. 3 Q. B. 143.
(7) 10 L. C. R. 34.
(8) Stephen's Dig. vol 3 p. 423.
(9) 16 Q. B. D. 190.
(10) 20 L. J. M. C. 31.
(11) 23 Cal. Rep. 280; R. S. C. ch. 164, secs. 85, 65.

1894
McINTOSH
v.
THE
QUEEN.
Taschereau
J.

legal right to the custody of that money but who had a felonious intent to the knowledge of the accused in intrusting the latter with said money;"

2nd "Whether the accused could be found guilty of feloniously receiving money of which he was part owner for an undivided and indefinite share."

Upon the second question, the learned judges were unanimous in the opinion that under sec. 85 of the Larceny Act, applicable to this case, there was no doubt that the objection taken by the accused on the point therein mentioned was unfounded, and consequently, there being no dissent on that question, no appeal thereon lies to this court, and it has been abandoned at the hearing. Sec. 742 Criminal Code of 1892; *Reg.* v. *Cunningham* (1) The first question, therefore, one of the learned judges having dissented from the judgment against the accused, is the only one before us. It is loosely drawn; the terms "feloniously and felonious intent" are not felicitous expressions in relation to a misdemeanour. However, we understand what the question means.

The facts of the case are as follows:

During the November term of the year 1892, two bills of indictment were presented by the Grand Jury one against James Dalrymple and the other against McIntosh, both under sections 85 and 83 of the Larceny Act, then in force. Both bills were drafted in exactly the same terms. By the first count each was charged with having unlawfully and with intent to defraud taken and appropriated to his own use, seven thousand dollars belonging to the heirs Dalrymple, *so as to deprive them of their beneficiary interest in the same.*

The second count was worded as follows: "And the Jurors aforesaid, upon their oath aforesaid, do further present: that the said Alexander McIntosh, [illegible] e

(1) Cassels's Dig. 2 ed 107.

nineteenth day of November, in the year of Our Lord, one thousand eight hundred and eighty-seven, at the City of Montreal in the District of Montreal, *unlawfully did receive a certain sum of money, to wit, the sum of seven thousand dollars, the property of Mary Dalrymple, Ellen Dalrymple, Caroline Dalrymple and George Dalrymple* which said sum of money, *to wit, said sum of seven thousand dollars had before then been unlawfully obtained and taken and appropriated by one James Dalrymple*, the obtaining and the taking of which sum of money, to wit, of said sum of seven thousand dollars, by the said James Dalrymple, as aforesaid, is made a misdemeanour in and by a virtue of section eighty-five, chapter one hundred and sixty-four of the Revised Statute of Canada, *he (said Alexander McIntosh) at the time when he so received the said sum of money to wit, the said sum of seven thousand dollars, as aforesaid, well knowing the same to have been so unlawfully appropriated, obtained and taken by the said James Dalrymple as aforesaid.*"

James Dalrymple pleaded guilty to the charge on the first count, and McIntosh was acquitted of the charge contained in the first count of the indictment, but was found guilty on the second, to wit, on the charge of receiving.

The prisoner's counsel thereupon moved for a er- ved case, which subsequently was heard before the Court of Appeal on the two question above mentioned.

Mr. Justice Wurtele who presided at the trial, stated the case as follows: (His Lordship then read from the reserved case as already published and proceeded as follows) :—

The fact that Dalrymple bought his railway ticket out of that money, were it material, cannot be denied by the appellant here as he has attempted to do. The facts must be taken as stated by the learned judge

1894

McINTOSH v. THE QUEEN.

Taschereau J.

who presided at the trial and cannot in any way be contradicted.

The majority of the judges of the Court of Appeal held that Dalrymple was not a bailee but a trustee; that as a trustee he was properly indicted under sec. 85; that Dalrymple's appropriation took place before he handed the money to appellant; that appellant was properly convicted of receiving; and that there was a fraudulent appropriation.

The learned Chief Justice, in a dissenting opinion, agrees that Dalrymple was guilty of fraudulent appropriation as a trustee, but that he ought to have been indicted under section 65; that he was not liable under section 85; that because he was not liable under section 85 the appellant could not be found guilty of the offence described in the indictment i. e. receiving money previously unlawfully obtained, taken and appropriated by the said James Dalrymple under circumstances which made such taking a misdemeanour under section 85; that consequently the offence has not been proved as charged.

Section 85 of ch. 164 R. S. C. is in the following terms:

Every one who unlawfully and with intent to defraud *by taking*, by embezzling, by obtaining by false pretenses, *or in any other manner whatsoever, appropriates to his own use, or to the use of any other person*, any property whatsoever, *so as to deprive any other person temporarily or absolutely, of the advantage, use or enjoyment of any beneficial interest in such property in law or in equity, which such other person has therein*, is guilty of a misdemeanour and liable to be punished as in the case of simple larceny, and if the value of such property exceeds two hundred dollars, the offender shall be liable to fourteen years imprisonment.

Section 83 of the same act provides that:

Any one who receives any money, valuable security, or other property whatsoever, the stealing, *taking*, obtaining, converting, *or disposing whereof*, is made a misdemeanour, by this act, if he knows the same to have been unlawfully stolen, *taken*, obtained, *converted* and disposed of, is guilty of a misdemeanour, and liable to seven years imprisonment.

1894

McINTOSH v. THE QUEEN.

Taschereau J.

Were it not for the dissent of the learned Chief Justice of the Court of Queen's Bench, and of my brother Gwynne in this court, I would say that the appellant's contestations are altogether unfounded. He would argue, I understand, that because Dalrymple might have been indicted under sec. 65 of the statute he could not be indicted under sec. 85. But why not, if the facts proved constitute an offence under the latter section?

We have an express statutory enactment that if any one is punishable under two or more statutes, or two or more sections of the same statute, he may be indicted under any of them. Sec. 933 Code (a re-enactment). The question arises then, whether under the facts proved in the case, Dalrymple was guilty of the misdemeanour created by sec 85.

There is no doubt but that McIntosh was not precluded by Dalrymple's conviction from proving that Dalrymple was not guilty under sec. 85.

When the principal has been previously convicted then the conviction is presumptive evidence that everything in the former proceeding was rightly and properly transacted, yet it is competent to the receiver to controvert the guilt of the principal. (1) But the fraudulent appropriation by Dalrymple is clearly established, and the facts proved fully support the finding of the jury against McIntosh. Whether Dalrymple was a bailee, or a trustee, or neither one nor the other is immaterial. Every one, says this clause, never mind who he is, whether he has a right to the possession or not, or to legally hold or not, who unlawfully and with intent to defraud, etc. Now, here, the intent to defraud cannot be questioned; therefore, the possession of this money by McIntosh, however lawful it might have been, became unlawful by this preconceived plan of

(1) 2 Russell on Crimes 4 ed. 571.

1894

McINTOSH v. THE QUEEN.

Taschereau J.

criminally appropriating it. And whether he might be said to have taken it, or embezzled it, or stolen it, or obtained it by false pretenses, is immaterial. All of these fraudulent conversions are covered by this sec. 85 with the addition of "in any other manner whatsoever." The fraudulent appropriation of the money so as to deprive the heirs Dalrymple of their beneficiary interest in it, cannot be, and is not denied by the appellant, but he bases on the facts proved a second objection to the conviction. He argues that even if Dalrymple were guilty of fraudulent appropriation, it was only when he handed the $7,000 to the appellant that he was guilty of any crime; that consequently the appellant, if guilty at all, was also guilty of fraudulent appropriation and cannot be indicted as a receiver; that he ought to have been found guilty of the fraudulent appropriation, or acquitted, and that the jury had no right to bring a verdict of guilty on the second count of the indictment for receiving. On that point the judges in the court below were unanimous in holding the appellant's contention unfounded.

The facts that bear on this point, though appearing in the reserved case, may perhaps be recapitulated here.

Dalrymple was appointed trustee or executor of two estates; one his father's the other his mother's.

As such trustee he had in his possession a sum of $1,812.82 which up to the month of November, 1887, was deposited in one of the banks in his own name. On 10th November, 1887, he drew this money out of the bank. On 15th November, 1887, having collected a certain sum due the estate by one Magnan, the heirs were called together and each received his portion of this sum. Dalrymple did not divide the $1,812.82 which he had drawn from the bank. There was a sum of $5,375.00 falling due, by one Brennan to

the heirs, a few days after the division of the Magnan money, and the heirs granted a notarial discharge to Brennan and Dalrymple for this sum and gave a verbal authorization to Brennan to pay the money to Dalrymple, and to Dalrymple to receive the money from Brennan. At the time of the division of the Magnan money, some of the heirs objected to the appellant receiving as large a share as he did. A disagreement arose and the appellant and Dalrymple walked home from the notary's office together. They then agreed to a scheme by which Dalrymple should appropriate the money to be paid by Brennan and defraud the other heirs. Several interviews took place, between the date of the division of the Magnan money and the receipt of the Brennan money by Dalrymple, and it was agreed between them, that when Dalrymple should receive this money he would hand it to appellant for safe keeping and abscond to the United States, This arrangement was fully carried out. Brennan paid Dalrymple $5,465.00 by check on 19th November, 1887. Dalrymple cashed the check; handed the difference between the amount due by Brennan, $5,375.00, and the amount of the check back to Brennan; went to the Windsor Hotel; purchased a ticket for New York; went home, took the $1,812.82 and made up a parcel of $7,000.00 out of this and the balance of $5,375.00; took this parcel to appellant's store, as previously arranged, and handed it to him saying: "Here is the boodle, take good care of it." On the same evening he absconded to New York.

Upon this evidence, I am of opinion, with the court below, that there was a fraudulent appropriation by Dalrymple previous to his handing over the money to McIntosh.

Whether the appropriation took place only at the very last second before he handed the boodle, as he

1894

McINTOSH v. THE QUEEN.

Taschereau J.

termed it, to McIntosh, or by any of his previous acts, it is immaterial. If it was then and there boodle the fraudulent appropriation had preceded. But, even if it could be said that the appropriation took place only by the handing over the money, that would be sufficient. The same act then constituted a fraudulent appropriation by Dalrymple, and a fraudulent receiving by McIntosh. The case of *Reg.* v. *Roberts* (1) would appear to be an authority for the proposition that there was no fraudulent conversion by Dalrymple on the facts proved till he handed over the money to McIntosh so as to constitute larceny, if the relation between them had been that of master and servant. But that case is based on the peculiar requisites of the conversion necessary at common law to constitute larceny, the doctrine whereof cannot be extended to the statutory offence provided for by sec. 85 of the Larceny Act.

I think the conviction was right.

After verdict the court is bound to resort to any possible construction which would uphold an indictment against a purely technical objection as was held in *Reg.* v. *Craddock* (2) on a verdict for receiving when the accused had, as here, been found not guilty on two first counts for stealing. It is legal by an express statutory enactment to charge a stealing and a receiving in the same indictment. There is consequently no such repugnancy in the present case as was contended for by the appellant. *Reg.* v. *Huntley* (3.) Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing. *Reg.* v. *Hilton* (4).

(1) 3 Cox 74.
(2) 2 Den. 31.
(3) Bell C. C. 238.
(4) Bell C. C. 20.

1894

McINTOSH v. THE QUEEN.

Taschereau J.

An indictment may charge the prisoner, in two counts, with being an accessory before the fact and accessory after the fact. *Rex.* v. *Blackson* (1).

A person having a joint possession with the thief may be convicted as a receiver. *Reg.* v. *Smith* (2); *Reg.* v. *Wiley* (3.) And in the same case, a conviction for a receiving is good, although a conviction for stealing would have been supported by the same evidence if the jury had so found.

Dalrymple might have been acquitted and yet McIntosh found guilty. And an accessory before the fact may also be a receiver. *Reg.* v. *Hughes* (4); *Reg.* v. *Pulham* (5); *Reg.* v. *Burton* (6); though a principal cannot be. *Reg.* v. *Coggins* (7); except under the circumstances mentioned in Greave's note to *Reg.* v. *Perkins* (8) in 1st Russ. 53. And here, McIntosh, though not a principal in the ordinary sense of the word, was an accessory before the fact, for it is settled law that, although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence was committed, are not principals but accessories before the fact. *Reg.* v. *Soares* (9); *Reg.* v. *Davis* (10); *Reg.* v. *Else* (11); *Reg.* v. *Tuckwell* (12). But as accessory before the fact he was liable to be indicted and punished as a principal. *Reg.* v. *James* (13).

In a note to *Reg.* v. *Langmead* (14), where the prisoner was found guilty of receiving only, though also charged with the larceny, Greaves says:

(1) 8 C. & P. 43.
(2) Dears. 494.
(3) 2 Den. 37; sec. 317, Crim. Code.
(4) Bell C. C. 242.
(5) 9 C. & P. 280.
(6) 13 Cox. 71.
(7) 12 Cox. 517.
(8) 2 Den. 459.
(9) R. & R. 25.
(10) R. & R. 113.
(11) R. & R. 142.
(12) Car. & M. 215.
(13) 17 Cox. 24; sec. 61 Code.
(14) L. & C. 427.

1894

McINTOSH v. THE QUEEN.

Taschereau J.

A clearer case of this there never was ; the sheep were proved to have been in possession of the son, and the prisoner received them ; and there was abundant evidence of guilty knowledge, and it was perfectly immaterial whether the prisoner had previously stolen them, for a man may be a thief and a receiver as well. There was also evidence that he either stole, or was an accessory before the fact to the stealing.

Now, here also, there is evidence that McIntosh was an accessory before the fact to the fraudulent appropriation, and therefore a principal, as in misdemeanours all are principals, and he was rightly charged as such in the first count of the indictment. But why was a verdict of guilty on the count for receiving not legal because the jury found him not guilty on the first count, as it was in Langmead's case, or Hughes' case, or the other cases above cited ?

He cannot argue that he became a principal only when he received the money ; he was, in law, a principal before that.

I would dismiss the appeal.

GWYNNE J.—In the month of September, 1893, the appellant was convicted in the District of Montreal upon a count in an indictment which charged him as follows :

" And the Jurors aforesaid, upon their oath aforesaid do further present : that the said Alexander McIntosh on the nineteenth day of November in the year of our Lord one thousand eight hundred and eighty seven at the City of Montreal in the District of Montreal, unlawfully did receive a certain sum of money, to wit, the sum of seven thousand dollars, the property of Mary Dalrymple, Ellen Dalrymple, Caroline Dalrymple and George Dalrymple, which said sum of money, to wit, said sum of seven thousand dollars had before then been unlawfully obtained and taken and appropriated by one James Dalrymple, the obtaining and the taking

1894

McINTOSH v. THE QUEEN.

Gwynne J.

of which sum of money, to wit, of said sum of seven thousand dollars by the said James Dalrymple, as aforesaid, is made a misdemeanour in and by virtue of section eighty five chapter one hundred and sixty four, of the Revised Statutes of Canada, he (said Alexander McIntosh) at the time when he so received the said sum of money, to wit, the said sum of seven thousand dollars, as aforesaid, well knowing the same to have been so unlawfully appropriated, obtained and taken by the said James Dalrymple as aforesaid."

Upon the verdict of guilty upon the charge contained in this count being rendered, counsel for appellant applied for a reserved case upon certain points stated by him. His application was refused by the learned judge who tried the case, and thereupon application was made to the Attorney General, under sec. 744 of 55 & 56 Vic. ch. 29, for leave to appeal, which having been granted, a case was stated to the Court of Queen's Bench, appeal side, Montreal, under the provisions of the third subsection of said sec. 744. The case so stated had appended thereto as part thereof the evidence upon which the verdict was rendered, and submitted for the opinion of the Court of Appeal the two following questions:

"1st. Whether, under the circumstances, the prisoner has been rightfully convicted of the crime of unlawfully receiving the sum of $7,000 from James Dalrymple, knowing it to have been previously unlawfully taken and misappropriated, inasmuch as James Dalrymple was the bailee of such money and only parted with it when he handed it to him.

2. Whether the prisoner could be found guilty of unlawfully receiving money of which he was part owner for an undivided share, inasmuch as the money was the undivided property of the heirs Dalrymple of whom he represented one."

1894

McINTOSH v. THE QUEEN.

Gwynne J.

The majority of the Court of Queen's Bench in appeal, the Chief Justice dissenting, were of opinion that the conviction was good, and therefore affirmed it and dismissed the appeal. From that judgment the present appeal is taken.

The count upon which the appellant has been found guilty is plainly framed under sec. 83 of the Dominion act 49 Vic. ch. 164, namely, that he had received from James Dalrymple the sum of, to wit, $7,000 which at the time of receiving it the appellant well knew that the said James Dalrymple had, previously to the appellant receiving the money from him, unlawfully appropriated, taken and obtained. Now the moneys handed by Dalrymple to the appellant were received by James Dalrymple in his character of testamentary executor of an estate in which the said James Dalrymple and the appellant and others were jointly interested as part owners. The money was therefore lawfully obtained by James Dalrymple and so long as it remained in his possession was there lawfully, whatever intention he may have entertained in virtue of a conspiracy with the appellant or otherwise to misappropriate it, for what the law makes criminal is the act done in pursuance of the criminal intention, not the mere intention not followed by an act to carry such intention into effect.

Until, therefore, James Dalrymple parted in some manner with the money of which he was lawfully in possession the appellant could not be guilty of the offence with which he is charged of having received from Dalrymple money which at the time of his receiving it he well knew that Dalrymple had previously unlawfully obtained or appropriated. If the handing of the money to the appellant constituted the appropriation which made Dalrymple guilty of the offence which he is alleged in the count against the

appellant to have committed, then the count against the appellant cannot be maintained for the offence committed by Dalrymple, with the knowledge of the previous committal of which the appellant is charged in the count, must be one which had been committed before ever Dalrymple handed the money to the appellant. However guilty the appellant may be under the evidence of some offence against the criminal law in the matter, it is plainly not that charged in the count upon which he has been found guilty for there is no evidence of any misappropriation of the money handed by Dalrymple to the appellant until the money was so handed. Neither the pre-arranged agreement between Dalrymple and the appellant as to the appropriation of the money to which Dalrymple has testified, nor his misappropriation, if any there was, of other money belonging to the estate of which he was such testamentary executor, can be of any consequence upon a count which charges that the appellant received the money which he did receive from Dalrymple well knowing that Dalrymple had previously unlawfully appropriated, obtained or taken it.

I am of opinion, that the evidence fails wholly to establish such charge, and therefore that this appeal must be allowed and that the conviction must be quashed.

Appeal dismissed with costs.

Solicitor for appellant: *H. C. St. Pierre.*

Solicitor for respondent: *The Attorney General of Quebec.*