1916
*Oct. 10-13.
*Nov. 7.

THOMAS KELLY .... APPELLANT;

AND

HIS MAJESTY THE KING...... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Criminal law—Indictment—Separate counts—Verdict—Conspiracy—Extraditable offence—Inadmissible evidence—Conviction—Inconsistency—Irregularity of procedure—Charge to jury—Address of counsel—Substantial wrong or miscarriage—New trial—"Criminal Code," s. 1019—Penalty.

On an indictment containing several counts, including charges for theft, receiving stolen property and obtaining money under false pretences, in respect of which the person accused had been extradited from the United States of America, evidence was admitted on behalf of the Crown, for the purpose of shewing *mens rea*, which involved participation of the accused in an alleged conspiracy. The principal objections urged against a conviction upon the charges mentioned were (*a*) that by the manner in which the trial had been conducted the jury may have been given the impression that the accused was on trial for conspiracy, a non-extraditable offence; (*b*) that misstatements and inflammatory observations had been made by counsel for the Crown in addressing the jury; and (*c*) that, in his charge, the trial judge had failed to correct impressions which may have been thus made on the minds of the jury or to instruct them that portions of the evidence admitted in regard to other counts ought not to be considered by them in disposing of the charge of obtaining money under false pretences.

Held, that, as there was sufficient evidence to support the verdict of the jury on the charge of obtaining money under false pretences, quite apart from the irregularities alleged to have taken place at the trial, no substantial wrong or miscarriage had been occasioned and there could be no ground for setting aside the conviction or directing a new trial under the provisions of section 1019 of the Criminal Code.

Judgment appealed from (11 West. W.R. 46), affirmed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), upon a reserved case submitted by Mr. Justice Prendergast, the presiding judge at the trial of the appellant who was convicted upon four of the counts of the indictment preferred against him.

The accused was tried on five counts of an indictment, in substance as follows: (1) Theft of money, valuable securities and other property, belonging to the King, in the right of the Province of Manitoba; (2) unlawfully receiving money, valuable securities or other property belonging to the King which had been embezzled, stolen or fraudulently obtained by means of a conspiracy between the accused and others to defraud the King, the accused then knowing the same to have been so embezzled, etc., by means of said conspiracy; (3) a count similar to the second count, but naming two additional co-conspirators; (4) obtaining moneys by false pretences from His Majesty for the accused and others; (5) unlawfully receiving moneys of His Majesty which had to the knowledge of the accused been obtained by false pretences with intent to defraud.

The jury acquitted the accused on the third count, but brought in a verdict of guilty on all the others.

The issues raised on the present appeal are stated in the judgments now reported.

The questions reserved for consideration by the Court of Appeal for Manitoba, with the answers ordered to be returned thereto by that court were as follows:—

"1. Was I right in refusing to quash the whole indictment on the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

(1) 11 West. W.R. 46.

"2. Was I right in refusing to quash the first count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

"3. Was I right in refusing to quash the second count in the indictment upon the motion of counsel for accused upon the grounds urged by them in their argument before me? A. Yes.

"4. Was I right in refusing to quash the fourth count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

"5. Was I right in refusing to quash the fifth count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. No.

"6. If any of the said counts should have been quashed or otherwise dealt with by me, either before or during the trial, has there been a mis-trial of the accused on any other count or counts by reason of the admission of evidence upon such count or counts as should have been quashed or otherwise dealt with by me? A. No.

"7. Was I right in my charge to the jury on the first count of the indictment as to theft or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused? A. To the first part of question preceding the word 'or'—Yes; to remainder of question—No.

"8. Was I right in my charge to the jury on the fourth count of the indictment as to what constituted the offence of obtaining money by false pretences or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused? A. To first part of question preceding the word 'or'—Yes; to remainder of question—No.

"9. Was I right in admitting evidence as to acts, conduct, admissions, conversations and facts relating to some one or more of those named in the second count, namely: Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson and Victor W. Horwood, to which the accused was not a party, and, if I have erred, was the same prejudicial to a fair trial of the accused? A. To first part of question down to and including the word 'party'—Yes; to remainder of question—No.

"10. Was there evidence upon which a jury could properly convict the accused—(*a*) On count Number 1; (*b*) On count Number 2; (*c*) On count Number 4; (*d*) On count Number 5. A. Yes.

"11. The jury having found the accused Thomas Kelly not guilty on the third count in the indictment, and evidence having been admitted on said count upon the trial, was the admission of such evidence prejudicial to a fair trial of the accused on the remaining four counts in the indictment upon which he was found guilty? A. No.

"12. Was I right in permitting the affidavits on production of Thomas Kelly, Lawrence Kelly and Charles Kelly, Exhibits 62 and 63, in a civil action of he Attorney-General of Manitoba against Thomas Kelly & Sons to be put in evidence in the manner disclosed by the record against the accused Thomas Kelly, and, if not, was the same prejudicial to a fair trial of the accused? A. To first part of question down to words 'and, if not'—Yes; to remainder of question—No.

"13. Was I right in the admission of certain documents (as so called secondary evidence) at the instance of the Crown, and, if so, was the admission of such documents or of any other exhibits filed prejudicial

to a fair trial of the said Thomas Kelly as set out in Schedule 'D'? A. To first part of question down to and including the word 'Crown'—Yes; to remainder of question—No.

"14. Was any evidence admitted or allowed to be given which should not have been admitted or allowed to be given and which was prejudicial to a fair trial of the said Thomas Kelly, in regard to the matters set out in Schedule 'E'? A. No.

"15. Was I right in my comments upon the statement of the accused to the jury, with respect to it not being made under oath, and, if so, was this prejudicial to a fair trial of the accused or a violation of the "Canada Evidence Act?" A. To first part of question down to and including the word 'oath'—Yes; to remainder of question—No.

"16. Similarly were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused or to be a violation of the "Canada Evidence Act?" A. The first part of this question 'Were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused?' is not a question of law that may be reserved for the Court of Appeal under the Criminal Code. To the second part of the question—No.

"17. Was there in any respect, on my part, either a failure to direct the jury or an inaccurate direction to the jury with regard to the difference between a statement made by the accused to the jury and an address made on his behalf to a jury; or as to the weight that a jury is entitled to attach to the statements of the accused which are not made under oath or as to pointing out evidence favourable to the accused or in regard to correcting any mis-statements as to law or fact made

by the Crown counsel during the trial or any addresses to the jury? A. No."

The majority of the Court of Appeal for Manitoba, upon the rendering of the judgment appealed from, by which the above answers were returned, consisted of His Lordship Chief Justice Howell and their Lordships Justices Perdue and Cameron. Their Lordships Justices Richards and Haggart dissented and were of opinion that there should be a new trial and that such new trial should be upon the fourth count of the ndictment only.

Dewart K.C. and *Harding* for the appellant (*Sweatman* with them. The inflammatory and improper observations of counsel for the Crown to the jury afford ground for a new trial. In Pritchard's Practice of the Quarter Sessions, p. 22, it is laid down that prosecuting counsel addressing the jury ought to confine themselves to the simple statement of the facts expected to be proven; where prisoner has no counsel they should particularly refrain from stating any facts, proof of which may appear doubtful. Even where the prisoner has counsel, they should refrain from invective or appealing to the prejudices or passions of the jury, it being neither in good taste or right feeling to struggle for a conviction as is done in a civil court: *Reg.* v. *Thursfield*(1), *per* Gurney B. See also Archbold's Criminal Pleading, (24 ed.,) pp. 219-220; *Reg.* v. *Holchester*(2); *per* Blackburn, J.; *Reg.* v. *Berens*(3); *Reg.* v. *Webb*(4); *Rex* v. *Webb*(5); *Ibrahim* v. *The King*(6), at p. 616.

(1) 8 C. & P. 269.
(2) 10 Cox C.C. 226.
(3) 4 F. & F. 842, 843n.
(4) 4 F. & F. 862.
(5) 22 Can, Cr. Cas. 424.
(6) [1914] A.C. 599.

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We take objection to the comments and directions, or lack of directions, by the learned trial judge, particularly regarding theft and false pretences and the failure of the accused to testify. See *Rex* v. *Hill*(1) and *Reg.* v. *Coleman*(2), *per* McMahon J., at page 108. The trial judge failed to point out facts favourable to the accused: *Rex* v. *Dinnick*(3); *Rex* v. *Richards*(4); *Rex* v. *Totty*(5); *Reg.* v. *Parkins*(6); *Rex* v. *Beauchamp* (7); *Reg.* v. *Mills*(8).

The learned trial judge failed to clearly point out to the jury the difference between the offences of theft and receiving and conspiracy and obtaining by false pretences, and what evidence was admissible under each offence charged, what evidence affected each count, and that evidence involving conspiracy could not affect the counts for theft or false pretences. He should have pointed out the inconsistency of a verdict on all four counts: *Rex* v. *Wong On*(9); *Reg.* v. *Paul*(10), *per* Hawkins J., at p. 211.

There was wrongful admission of evidence in several respects, more especially relating to earlier events and to later conspiracies: *Reg.* v. *Blake*(11); *Reg.* v. *Barry* (12). The admission of evidence, under the second count, upon a general charge of conspiracy relating to persons other than the accused, and of evidence under count three, relating to a conspiracy in which the sons of the accused were joined as parties, altogether apart from the question as to the admissibility of evidence of subsequent conspiracies, were admis-

(1) 7 Can. Cr. Cas. 38.
(2) 30 O.R. 93.
(3) 3 Cohen Cr. App. R. 77.
(4) 4 Cohen Cr. App. R. 161.
(5) 111 L.T. 167.
(6) Ryan & M. 166.
(7) 25 Times L.R. 330.
(8) Dears. & Bell 205.
(9) 8 Can. Cr. Cas. 423.
(10) 25 Q.B.D. 202.
(11) 13 L.J. Mag. Cas. 131.
(12) 4 F. & F. 389.

sible only upon a charge of conspiracy to defraud. That charge should not have been preferred and evidence tending to prove it was clearly prejudicial to a fair trial on the remaining counts of the indictment. This evidence was not admissible under the other counts and the jury should have been so directed. The view that, by holding that there was ample evidence of some offence and, consequently, no substantial wrong or miscarriage occurred cannot prevail; the court cannot be the judge of what may have influenced the minds of the jury where evidence of an important character was improperly admitted: *Allen* v. *The King*(1); *Bray* v. *Ford*(2); *Makin* v. *Attorney-General of New South Wales*(3), at pages 69-70.

The first count, which charges theft, is bad for duplicity: sec. 853, sub-sec. 3, Criminal Code; Halsbury, Laws of England, vol. 9, p. 340; *Reg.* v. *Lamoureux*(4), at p. 103; Archbold (24 ed.), pp. 75, 76, 81, 84; *Rex* v. *Molleur*(5); *Rex* v. *Michaud*(6); The judge should have charged the jury as to what constitutes theft, explained the nature of colour of right, that taking must be against the will of the owner, and also that these elements were lacking in the case.

The second count is bad for duplicity or for triplicity; both conspiracy and receiving are charged, an earlier conspiracy "theretofore," and a later receiving. It confuses charges for receiving what had been embezzled, what had been stolen, and what had been obtained by a conspiracy to defraud. See Halsbury, vol. 9, p. 678.

(1) 44 Can. S.C.R. 331.
(2) [1896], A.C. 44.
(3) [1894], A.C. 57.
(4) 4 Can. Cr. Cas. 101.
(5) 12 Can. Cr. Cas. 8.
(6) 17 Can. Cr. Cas. 86.

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Nowhere in the Extradition Treaty, signed at Washington on 12th July, 1889, is conspiracy to defraud mentioned; by article 3, no person surrendered may be tried for any offence other than that upon which he was surrendered. See also the "Extradition Act," R.S.C., 1906, ch. 155, secs. 30 to 32; and R.S.C., 1906, ch. 142, secs. 22 and 23; *In re Gaynor and Greene* (1).

As to count four, the judge did not explain to the jury that the money in question was not parted with upon the strength of any false representation made by the accused knowing it to be false. No payment was made except by authority of contract or order-in-council. There can be no agency in crime: *Reg.* v. *Butcher*(2), at p. 19.

The practice adopted of including in one indictment many different offences is vicious, because the evidence admitted upon any count has a prejudicial effect against the prisoner on other counts, and particularly so where different kinds of crimes are charged with an alternative count of receiving: *Per* Hawkins J. in *Reg.* v. *King*(3), at p. 216.

The accused cannot be guilty of all four offences as found by the jury. The conviction could only be on one of these counts, but there is a specific verdict of guilty on each count: *Reg.* v. *Russett*(4); *Rex* v. *Fisher* (5). He cannot be guilty of any two offences. The penalties vary. The whole conviction is bad. One guilty of stealing goods as a principal cannot be convicted of receiving them: Halsbury, vol. 9, page 678 (footnote *n*). To be guilty of receiving stolen pro-

(1) 9 Can. Cr. Cas. 205.
(2) Bell C.C. 6.
(3) [1897], 1 Q.B. 214.
(4) 17 Cox C.C. 534.
(5) 103 L.T. 320.

perty it must have been taken by a person other than the person accused of receiving: *Reg.* v. *Lamoureux* (1); *Reg.* v. *Coggins*(2); *Reg.* v. *Perkins*(3).

The indictment is also bad for duplicity. Cyc., vol. 22, 376: "An indictment or information must not in the same count charge the prisoner with the commission of two or more distinct and separate offences and in case it does so it is bad for duplicity." The jury having found the prisoner guilty of theft, four kinds of receiving and false pretences, at the same time found him to be a conspirator. The Crown deliberately went to trial upon an indictment defective and bad for duplicity, triplicity and improper joinder, without considering the reservations made by Mr. Justice Holmes' judgment in the Supreme Court of the United States. The Crown should stand or fall by its own deliberate action. The conviction should be quashed.

The object of a motion to quash before trial is to preserve the rights of the accused at all stages, and particularly in the event of a verdict against the accused. The Crown has the right to amend, to sever, to elect which counts shall be proceeded upon—if necessary to prefer a new indictment or new indictments. But the Crown did not do so and the accused is entitled to the benefit of all the preliminary objections taken upon the motion to quash the indictment. The indictment was preferred and found when appellant was outside the Dominion of Canada, to the knowledge of the Attorney-General of Manitoba. The motion that was made under section 898 of the Criminal Code was absolutely necessary to preserve the rights of the accused as to any defects. The

(1) 4 Can. Cr. Cas. 101.
(2) 12 Cox. C.C. 517.
(3) 5 Cox. C.C. 554.

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objection then taken was that the indictment had been preferred by the Attorney-General without legal authority. The Attorney-General knowing that the accused was not in Canada, in his absence, and while extradition proceedings were in progress, caused the indictment to be laid. The Attorney-General had no right to avail himself of the power to prefer an indictment in the absence of the accused and while he had himself undertaken proceedings under the "Extradition Act." His consent to preferring the indictment is not a mere formality: *Reg.* v. *Bradlaugh*(1).

J. B. Coyne K.C. and *R. W. Craig K.C.* for the respondent. The appeal to the Supreme Court of Canada can only be based on the grounds as to which there was a dissent in the Court of Appeal for Manitoba: *McIntosh* v. *The Queen*(2); *Eberts* v. *The King*(3); *Mulvihill* v. *The King*(4); See also *Rice* v. *The King*(5); *Gilbert* v. *The King*(6). The second count is not in contravention of the "Extradition Act" and the treaty. It is in the exact terms of the Canadian warrant for Kelly's apprehension, of the American complaint or information, of the American warrant for his apprehension, and of the extradition commissioner's recommendation to the Secretary of State; the accused was surrendered for trial on this charge.

As to conspiracy, see Russell on Crimes (7 ed.), pp. 146 and 191; *Reg.* v. *Parnell*(7), at p. 515; Taylor on Evidence (10 ed.), sec. 591. The offence is complete when the agreement is made: *Reg.* v. *Connelly*(8);

(1) 15 Cox C.C. 156.
(2) 23 Can. S.C.R. 180
(3) 47 Can. S.C.R. 1.
(4) 49 Can. S.C.R. 587.
(5) 32 Can. S.C.R. 480.
(6) 38 Can. S.C.R. 285.
(7) 14 Cox C.C. 508.
(8) 25 O.R. 151.

Rex v. *Parsons*(1). If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of the act and the other another part so as to complete it with a view to the attainment of the common object they were pursuing, the jury are free to infer that they had been engaged in a conspiracy to effect that object: *Reg.* v. *Murphy*(2), *per* Coleridge J.; *Rex* v. *Cope*(3); *Rex* v. *Pollman*(4) at page 233.

A person concerned in any part of the transaction alleged as conspiracy may be found guilty, though there is no evidence that he joined in concerting a plan until some of the prior parts of the transaction were complete: *Rex* v. *Lord Grey*(5); *Rex* v. *Hammond*(6); Stephen's Digest of Evidence (4 ed.), pages 6 and 7.

See also *Rex* v. *Wilson*(7); *Reg.* v. *Shellard*(8); *Reg.* v. *Blake*(9).

The evidence is admitted on the ground that the act or declaration of one is the act or declaration of all when united in one common design. It is the principle of agency which, once established, combines the conspirators together and makes them mutually responsible for the acts and declarations of each: Wright, Criminal Conspiracy, p. 213, and pp. 212, 216; Russell on Crimes, p. 192; Roscoe, 355 at foot; *Rex* v. *Johnston*(10); *Rex* v. *Nerlich*(11); *Reg.* v. *Jessop* (12); *Reg.* v. *Charles*(13), at p. 502; *Reg.* v. *Desmond* (14). There is direct evidence of Kelly's part in

(1) 1 W. Bl. 392.
(2) 8 C. & P. 297.
(3) 1 Str. 144.
(4) 2 Camp. 229.
(5) 9 St. Tr. 127
(6) 2 Esp. 719.
(7) 19 West. L.R. 657; 21 Can. Cr. Cas. 105.
(8) 9 C. & P. 277.
(9) 6 Q.B. 126.
(10) 6 Can. Cr. Cas. 232.
(11) 24 Can. Cr. Cas. 256.
(12) 16 Cox C.C. 204.
(13) 17 Cox C.C. 499.
(14) 11 Cox C.C. 146.

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tampering with witnesses, fabricating and suppressing evidence, and upholding the fabricated evidence before the Public Accounts Committee.

When a criminal act has been proved and it is desired to connect the accused therewith it is relevant to shew that he had or had not a motive for the act or means and opportunity of doing it or that he had made preparations with that end in view or had threatened to do the act; the subsequent conduct of the accused often furnishes still further cogent evidence of guilt, *e.g.*, possession of recently stolen property, flight, or the fabrication or suppression of evidence: 13 Halsbury, pp. 447, 448; Wigmore on Evidence, sec. 278; *Moriarty* v. *London Chatham and Dover Rway. Co.*(1). The fabrication or suppression of evidence is none the less admissible because the accused called others to his assistance. If conspiracy were the charge it would not be necessary to set out the overt acts: *Reg.* v. *Blake*(2), at page 133; *Rex* v. *Hutchinson* (3); *Reg.* v. *O'Donnell*(4); *Rex* v. *Gill*(5). And if some overt acts were set out, the Crown would not be confined to them, but might prove others: *Reg.* v. *Stapylton*(6), *per* Wightman J., at p. 71.

Crown counsel's address was not an appeal to prejudice, but a plain and decided statement of the evidence. There can be no wrong done when statements are founded on evidence. The jury could not possibly have come to any other conclusion than that of the guilt of the accused on the evidence submitted irrespective altogether of the language of Crown counsel complained of. This is not a ques-

(1) L.R. 5 Q.B. 314.
(2) 6 Q.B. 126.
(3) 11 B.C.R. 24; 8 Can. Cr. Cas. 486.
(4) 7 St. Tr. N.S. 637.
(5) 2 B. & Ald. 204.
(6) 8 Cox C.C. 69.

tion which can be reserved for the opinion of the court of appeal: *Rex* v. *Nerlich*(1), *per* Hodgins J. at p. 317; *Rex* v. *Banks*(2).

As to clause 15 of the reserved case and the charge of trial judge regarding the statement of accused to the jury not being made under oath. The accused had no right to make a statement. He had the right to go into the witness-box and give his evidence on oath. There is a distinction between the English and Canadian Acts. The former has a saving section, negativing what would otherwise be the law, and providing that, notwithstanding the fact that he may give evidence on oath, the accused may still make an unsworn statement: *Rex* v. *Krafchenko*(3), at pp. 658, 659. As to what would be considered comments, see *Rex* v. *King*(4), at page 434; and *Rex* v. *McGuire*(5). The remarks complained of do not constitute a comment prohibited by the "Canada Evidence Act," section 4, sub-section 5: in *Rex* v. *Hill* (6) and in *Reg* v. *Coleman* (7) there was direct comment on failure to testify. See *Reg.* v. *Weir* (8), at pages 269-271; *Rex* v. *Aho* (9); *Rex* v. *Guerin* (10).

The powers of the appellate court are stated in the Criminal Code, secs. 1018, 1019 and 1020. Some substantial wrong or miscarriage must have been occasioned at the trial. The court may give separate directions as to each count and may pass sentence on any count unaffected by any wrong or miscarriage which stands good, or may remit the case to the court below

(1) 34 O.L.R. 298.
(2) (1916) W.N. 281.
(3) 24 Man. R. 652.
(4) 9 Can. Cr. Cas. 426.
(5) 9 Can. Cr. Cas. 554.
(6) 7 Can. Cr. Cas. 38.
(7) 30 O.R. 93.
(8) 3 Can. Cr. Cas. 262.
(9) 8 Can. Cr. Cas. 453; 11 B.C. Rep. 114.
(10) 14 Can. Cr. Cas. 424.

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with directions to pass such sentence as justice may require. A new trial is not justified here under sec. 1019.

There was no reserve case submitted on joinder of counts and argument on that point must be eliminated. *Rex* v. *Hughes*(1), at 454. There was no dissent in the Court of Appeal on this point. There was no objection to joinder before pleading, as required by the Code, sec. 898: *Reg.* v. *Flynn*(2). Counts may be joined as in this indictment: *Rex* v. *Lockett*(3); *Rex* v. *Seham Yousry*(4); *Reg.* v. *Poolman*(5); *Rex* v. *Beauchamp*(6); *Reg.* v. *Smith*(7). Under the Code, sec. 857, this is a matter in the discretion of the trial judge, and is not subject to review. There was a conviction on counts 1, 2, 4 and 5. No question was reserved for the Court of Appeal as to whether such verdict was inconsistent.

As to the charge on count 1 as to theft, and as to colour of right. The fraudulent contracts constituted no colour of right: *Reg.* v. *Kenrick*(8). As for "against the will of the owner," there was no question as to that in the evidence. The evidence was that the funds were wrongfully taken and converted.

As to count 4, obtaining money by false pretences, the statement of the law by the trial judge was sufficient to guide the jury in reaching a verdict so long as there was evidence to convict on such a charge.

The opinions of the CHIEF JUSTICE and DAVIES J. are delivered by Anglin J.

(1) 17 Can. Cr. Cas. 450.
(2) 18 N.B.Rep. 321.
(3) (1914), 2 K.B. 720.
(4) 31 Times L.R. 27.
(5) 3 Cohen Crim. App. 36
(6) 25 Times L.R. 330
(7) Dears. 494.
(8) 5 Q.B. 49.

IDINGTON J.—This appeal arises out of a reserved case in which the learned trial judge had submitted to the court below seventeen questions. On the hearing of that appeal two of the learned judges hearing it, dissented, on points hereinafter referred to, from the judgment of the Court of Appeal.

Under the authorities cited in argument, including *Reg.* v. *McIntosh*(1); *Rice* v. *The King*(2); *Gilbert* v. *The King*(3); *Curry* v. *The King*(4); *Eberts* v. *The King*(5), at p. 26; *Mulvihill* v. *The King*(6), and other cases cited in the reports of these decisions, I do not think there can longer be a doubt that our jurisdiction to hear an appeal from a court of appeal in a criminal case is bounded by the lines of clear dissent on any point raised therein relative to any of the questions of law properly involved in the submission of the reserved case.

A dissenting opinion relative to something outside that which can properly be made part of a reserved case or fails to bear upon the points of law properly involved in such case as reserved, can form no part of what we are concerned with.

I respectfully submit that the expressions of the dissents herein are, as I read them, not clearly confined within these lines. For example: as regards the grounds taken relative to the questions raised by the matter in the address of counsel for the Crown I doubt if such an address can be in itself the subject of a reserved case. I shall presently deal at length with that subject and the arguments founded on what for brevity's sake I may call the conspiracy aspect of the case, when what I refer to will more fully appear.

(1) 23 Can. S.C.R. 180.
(2) 32 Can. S.C.R. 480.
(3) 38 Can. S.C.R. 284.
(4) 48 Can. S.C.R. 532.
(5) 47 Can. S.C.R. 1.
(6) 49 Can. S.C.R. 587.

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I merely desire here to submit, respectfully, that for want of that definite application of each dissent to the reserved question it relates to, or what the exact grounds are intended to be covered thereby, and as the dissents may have implied more than I might find appears, in order to avoid mistakes, I shall proceed to deal consecutively with each question in the whole reserved case. I am not, therefore, to be assumed as departing from what I have just now said of the limits of our own jurisdiction to act.

There is another boundary to our jurisdiction expressed in the language of sec. 1019 of the Criminal Code, which is as follows:—

1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted: 55-56 Vict. ch. 29, sec. 746.

Applying this section enables me, for my part, to dispose of the case, without entering at length, and in minute detail, upon some of the nice questions which may be involved in the dissenting opinions.

There was a motion made by counsel for the appellant to quash the indictment, and refused by the learned trial judge.

The first six questions submitted concern the validity of this refusal and raise the further question of whether or not, if there be in any case an error therein, there was as a consequence thereof and the admission of objectionable evidence a mistrial.

There are six counts in the indictment. The sixth, which is for perjury, was, with the consent of the Crown, directed to stand over and not to be tried with the others.

The fifth has been disposed of by the Court of Appeal.

The first and fourth are ordinary counts for theft and false pretences, respectively, and I fail to see how any serious question can have been raised as to them.

The second and third counts may be open to the criticism that they are of doubtful import, but as the first and fourth counts enabled the whole of the evidence to be given, which was properly admissible on the trial, there cannot now, in face of the section quoted above, be any question of serious import raised as to the validity of the learned judge's refusal to quash.

The attempt to use the particulars delivered ten days later than this motion to quash, illustrates how absurd this part of the contention in the case is.

The complaint made that the learned trial judge did not, in his charge, enter upon a specific attempt to deal in detail with, and direct the jury as to, each of these counts, and what they mean and might be held to imply, seems unfounded, for his mode of treatment left the appellant without any ground of complaint in regard thereto. Had he done as suggested I imagine there might have been some ground for suggesting that the minds of the jury had been thereby confused.

The case was presented by him in his charge as one of stealing, or receiving that stolen, or of obtaining by false pretences. He wisely abstained from needlessly entering upon such a field of mystification as we have had presented to us to deal with and hence his charge misled nobody.

There was at the close of the trial a distinct question put by the foreman of the jury which led the learned judge to tell the jury they could not bring in a verdict of guilty on both these second and third counts,

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but must, if either included in a verdict of guilty, select one or other thereof.

Their verdict was guilty on the first, second, fourth and fifth counts.

There was, therefore, no substantial wrong or miscarriage in the refusal to quash or in consequence thereof.

As to question 7, which is as follows:—

7. Was I right in my charge to the jury on the first count of the indictment as to theft or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused?

There is raised thereby perhaps the most important and difficult question in the reserved case.

The learned judge relied upon section 347 of the Criminal Code and I think he was right in doing so. It is a most comprehensive definition of theft and is as follows:—

347. Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, any thing capable of being stolen, with intent,—

(*a*) to deprive the owner, or any person having any special property or interest therein, temporarily, or absolutely, of such thing, or of such property or interest; or,

(*b*) to pledge the same or deposit it as security; or

(*c*) to part with it under a condition as to its return which the person parting with it may be unable to perform; or,

(*d*) to deal with it in such a manner that it cannot be restored to the condition in which it was at the time of such taking and conversion.

2. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.

3. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

4. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting: 55-56 Vict., ch. 29, sec. 305.

"Anything capable of being stolen" might not cover money in the bank to the credit of any person, but

surely it does include a cheque to draw that money. I think a cheque being an order for money is a valuable security within the words of the indictment. Can it be said that the fraudulent means resorted to in order to induce the Lieutenant-Governor and others to do those acts which resulted in the preparation of the cheque and its due signature having preceded its existence, therefore the appellant guilty with others in bringing those acts about, can have acquired a colour of right to use it or convert it to his use?

I think not, and that if the appellant by reason of his fraudulent acts was not entitled to have received any of the cheques issued to him, he had no right to convert them to his use.

They each remained the property of the Crown recoverable by respondent, if so advised, from appellant at any instant until passed into the hands of the bank without notice. The language of sub-sec. 4 seems clearly to bear this out and to cover just such cases as this.

The later sections dealing with what used to be called embezzlement are in harmony with this view. The evident purpose of the section, as a whole, was to make clear that the fraudulent nature of the dealing was to be the test of whether or not the wrongful conversion was to be treated as theft or not.

Counsel for respondent in their factum suggest that the moneys had been stolen by the Minister and thereby there was a conversion of the money to which appellant was a party as accessory and hence he was liable as a principal.

My difficulty is in extending the section to a theft of money in the bank for it contemplates a taking which could not, I submit, be within the meaning of the section.

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The same counsel in argument also submitted the amendment to the English "Larceny Act" in 1861, section 70, aimed at officers of the government, and that such amendment was introduced by the Act introducing English law into Manitoba.

In my view it is not necessary to pass any opinion upon this contention.

If appellant could be guilty of stealing the cheques, then there is no need for prosecuting the inquiry.

The eighth question seems upon the evidence hardly arguable.

Clearly there was an obtaining of money by false pretences whatever may be said of the other charges as a matter of law.

The ninth question, which is as follows:

> 9. Was I right in admitting evidence as to acts, conduct, admissions, conversations and facts relating to some one or more of those named in the second count, namely: Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson and Victor W. Horwood, to which the accused was not a party, and if I have erred, was the same prejudicial to a fair trial of the accused?

raised at first, in argument, a doubt in my mind, when it was urged by counsel for appellant that the moneys obtained had all been obtained before the end of December, 1914, and the offences charged had then been completed and much of the evidence here in question related to later events.

It was alleged that what transpired later was in fact nothing but evidence of a new conspiracy and neither had nor could have had any direct relation to or be in any way a necessary result of the original conspiracy.

If the facts would justify this or some such way of looking at the admissibility of the later evidence I agree a grave question would have arisen.

It is, however, quite clear when one is enabled by a knowledge of the evidence to grasp the actual situation that this contention of appellant is hardly worthy of serious consideration.

The Crown alleges in fact the existence of a conspiracy on the part of those named, or some of them, including the accused, to use the opportunity of the erection of the public buildings—known as Parliament Buildings—for the improper purpose of diverting funds ostensibly voted by the legislature for that purpose, and the property of the Crown as charged, into the hands of some one for the purpose of forming part of a political campaign fund, or possibly dividing or distributing amongst them, or some of them, moneys so diverted.

It matters not what the purpose was so long as moneys were, from time to time during the progress of such works, to be diverted from their proper purpose as designated by the legislature.

There was evidence that justified such an inference and it was of such weight as to entitle the Crown to have the whole relative thereto fully developed.

Touching the mere questions of admissibility of such evidence the learned trial judge had to consider the nature of the charges either as alleged in the pleadings or presented by counsel for the Crown, and then the evidence already presented tending to support any such pretensions and determine whether in view of all that had preceded such later developments could reasonably be connected therewith.

In default of that being quite apparent from the case as developed, learned trial judges often, for convenience sake, have to rely upon the undertaking of the counsel presenting such like evidence that it will be connected with that preceding or to follow in such

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a way as to be relevant to the issues in question and maintain the contention put forward.

The mere technical questions of admissibility as presented in the question does not therefore go very far.

If, however, it should in such case turn out that the evidence could not be connected with other evidence in a way to form an arguable case, the consequences would have to be dealt with effectively to see that there was no miscarriage of justice. Here it is not merely the admissibility as that is put in the question that might have been involved.

Not only was it contended that the evidence of the later acts I have referred to were inadmissible, but also that the whole evidence of conspiracy, or to put it in another and less controversial form, of agreement to act together in pursuance of the common purpose of diverting a part of the money appropriated for said buildings, so attacked was quite inadmissible unless appellant was present.

I cannot assent thereto. Whatever our reason will maintain as fairly inferable from the circumstances presented must be the test. The accused, of course, must be so connected with those circumstances or part thereof as to justify, by that test, the maintenance of the inference argued for.

But, unfortunately for the appellant, his connection with the later developments has been shewn in fact to be so intimate and close that there is no need for straining the application of the principles I am relying upon to bring home to him the desire to destroy evidence and hinder its production and promote thereby the concealment of all that had transpired which might tend to shew him and others as having designed by their

co-operation to divert and to have succeeded in diverting moneys from their destined purpose.

And the desire to destroy, when existent in some bosoms, seems soon to produce destruction.

In each of the sections 69 and 70 of the Criminal Code there has been formulated a legislative guide expressive of the law which may be relied upon as an effective answer to all that has been put forward or that may be implied therein, in any way, bearing upon the many questions or many forms of the same question in contending against the use of anything done by others unless clearly and expressly directed by him.

The second sub-section of said section 69, is as follows:—

> 2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose: 55-56 Vict., ch. 29, sec. 61.

The general and comprehensive declaration of the law binds and goes a long way to define what may be admitted in evidence in cases of this kind.

It is but a deduction of that which in reason, must necessarily open the way to the introduction of evidence, in order to lay before the court those circumstances, from which it may be reasonable to infer concurrence of action on the part of the accused in regard to what is in question.

It is quite clear from the evidence that though the moneys got had been paid before the end of December, 1914, yet the scheme, as a whole, was far from complete, and had been only interrupted by steps in the way of inquiry before a committee of the legislature, which seemed likely to lead to an exposure that would prevent its full fruition. Hence it became necessary

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for those concerned, actively led by the accused as commander of the forces as it were, to destroy evidence and keep witnesses out of the way. He had been paid far in excess of the work done and was proceeding with further execution of the work. That payment, however, was a mere incident of all that had been planned.

I have no doubt that all that which was introduced as evidence at the trial in the way complained of, in order to prove concealment of a fraudulent purpose in relation to said payments, was properly admissible and evidence from which proper inferences might be drawn tending to establish that purpose and the character thereof.

I shall presently advert to another aspect of this question of conspiracy and its bearing on the case.

Question 10 seems, as put, hardly arguable.

Question 11 seems of the same nature and to call for the same reply, for, as put, it does not indicate that there was any evidence adduced which bore only upon the third count and could have an improper bearing upon other counts.

Question 12 was hardly pressed before us and I see no reason why such an affidavit should not be admitted under the circumstances. Moreover, the objection has no support in the dissenting opinions. On the contrary it is overruled in that of Mr. Justice Richards.

The same answer may be made as to questions 13 and 14 save that the learned judges dissenting made no observation anent same.

Question 15 is as follows:—

15. Was I right in my comments upon the statement of the accused to the jury, with respect to it not being made under oath, and if so, was this prejudicial to a fair trial of the accused or a violation of the "Canada Evidence Act?"

I desire to consider this and part of Question 17, together.

It seems difficult to understand how the proper remark of the learned trial judge can be construed as an infringement of the "Evidence Act."

It may be quite permissible for the accused, when undefended, to state his version of what has been given in evidence in order to bring home to the minds of the jurors the possibility that the evidence as it stands or, either by reason of the way in which it has been presented in the giving thereof or the summing up of Crown counsel may mislead, and by his statement induce a reconsideration of anything so tending. Any misleading construction put upon it to the detriment of the accused may thereby be cured.

When the accused in his address chooses to present his version and adds thereby something in way of statement of fact relevant to that which is properly before the jury, they are not only entitled but bound to consider what the accused has said including his statement of alleged fact.

But they, when considering same, can only properly consider it in the way of an explanation which may induce them to turn their minds towards the evidence which has been sworn to and see if as a whole it can properly bear the interpretation which the statement of fact made by the accused suggests as a possibility.

If on the evidence it cannot properly be so understood their duty is to discard the statement entirely for it is not evidence. That is in substance the effect of what the learned trial judge told them and therefore, his charge is in that regard unobjectionable.

The learned judge undoubtedly erred as he suggests, in allowing the accused to wander far beyond the issues

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and introduce topics and allege statements of pretended fact which had nothing to do with the simple issues of fact properly before the court. No one had the slightest right to do so, and above all things to make charges against or to insult opposing counsel by dragging in something as the accused did, which had nothing to do with the issues being tried.

If the accused dispensed with counsel, as quite possibly he did, in hopes of being allowed to drag in by way of his address something which was not permissible and what no counsel could or would venture upon doing, it is to be regretted he was permitted the measure of success he got.

As I gather from the learned judge's charge he felt he had erred and tried to rectify it by pointing out that statements of the accused in an address are not evidence and are not to be treated as such. He would have erred if he had failed under such circumstances in making plain as he did the law on the subject.

Question sixteen is as follows:—

16. Similarly were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused or to be a violation of the "Canada Evidence Act?"

The question as presented does not, I incline to think, put forward any question of law and hence is beyond that which we are entitled to act upon. It is put forward, however, at great length and, if I may be permitted to say so, given undue prominence.

We have presented in appellant's factum extracts culled from an address which occupies twenty-five printed pages of the appeal book. It is not difficult when such extracts are taken from their context to try and create an unpleasant impression. Some of these extracts are unfair presentations of what was intended.

The late Sir James Stephen, in his History of the

Criminal Law of England, vol. 1, p. 429, deals with the question of Crown counsel addresses, and there says:—

> It is very rare to hear arguments pressed against prisoners with any special warmth of feeling or of language; one reason for which no doubt is, that any counsel who did so would probably defeat his own object. Apart, however, from this, it is worthy of observation that eloquence either in prosecuting or defending prisoners is almost unknown and unattempted at the bar. The occasion seldom permits of it, and the whole atmosphere of English courts in these days is unfavourable to anything like an appeal to the feelings—though, of course, in particular cases, topics of prejudice are introduced.

Some few things said by counsel in summing up perhaps transgress these traditions of the English bar.

But wherein exists the question of law raised?

It certainly does not appear in the question sixteen or in these extracts as self evident.

I am not prepared to lay down as law that out of a Crown counsel's address there cannot arise ground for a reserved case.

I can imagine a case (such as does not exist here) of counsel misstating the law and the fact in such terms as to call for the prompt interference of the trial judge, and for his rectification of any wrong done thereby, by warning and directing the jury not to be misled thereby.

It is not the misstatements in the address which alone can furnish ground for a reserved case upon a point of law, but those coupled with failure on the part of the learned trial judge to see such errors rectified, that, in my opinion, can constitute grounds for a reserved case. In such event the least that should be required is a statement in the reserved case concisely setting forth exactly what is complained of. A general suggestion such as put in questions 16 and 17 does not satisfy what should be required.

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It does not seem to me that we have here any such definite statement of what is in question as the statute requires to be set forth in a stated case reserved for the appellate court.

In any event we are here confined to what appears in the dissenting opinions.

Mr. Justice Richards selects the criticism by the Crown counsel of the failure of the accused to be defended by counsel. The whole of the episode and real or affected resentment because a postponement of more than two weeks for preparation by counsel was refused deserved severe criticism. And I am not prepared to find any legal ground for interference merely because the language in which it was couched might have been better chosen, when the conduct in question deserved some observations from both Crown counsel and the learned trial judge to have been passed upon it. A firm, temperate rebuke was in order if respect for the bench is to be maintained.

Mr. Justice Richards further selects the misstatement of the law by the Crown counsel as to the crimes charged in the indictment, but, as I most respectfully submit, it may be my misfortune that my own view rather accords with that in substance which I take it was intended to be presented by the Crown counsel rather than what Mr. Justice Richards holds. I hardly think we can make much of that complaint.

Again he selects the expression as to accused thinking himself to be guilty. As I read the address it contains two pages of evidence quoted by counsel attempting to demonstrate in a fairly arguable manner that such is the inference to be drawn from the evidence quoted.

Counsel certainly on this occasion and others should not have stated, as he did, his own opinion,

instead of making a submission of his contention for consideration by those addressed.

I am not prepared to hold that there was any substantial wrong or miscarriage created either thereby or by the omission of the learned trial Judge to specifically call attention to the error and warn the jury against it.

The remaining passages, selected by Mr. Justice Richards as the subject of observation, seem to me of the character which (as Sir James Stephen remarks in the quotation above) would tend to defeat counsel's object.

I am quite sure the matters with which they deal could have been presented in a calm, lucid way that would have carried more weight with the jury and had a crushing effect, if the evidence is to be believed, beyond anything that is complained of.

And hence I fail to find that the omission of the learned trial judge to specifically deal therewith in each phase thereof, furnishes a reason to believe there has been any substantial wrong or miscarriage.

I repeat it is only by virtue of such omissions that a question of law can arise.

The learned trial judge's charge was fair and in general terms covered all that is gathered thus from the address of counsel.

Mr. Justice Haggart assigns nothing further on this question than that already referred to by Mr. Justice Richards.

In parting with this part of the case I think it is due to Mr. Coyne to say that whatever may be said or thought of the error in the mode of address used by his leader in summing up, he ought not to have been attacked, as he has been, for he was doing no more

than his duty in repudiating what accused improperly dragged into the case.

I cannot think that under the circumstances the granting of a new trial, by reason of anything that is thus complained of, would conduce to the due administration of justice.

There remains for consideration the objection taken by Mr. Justice Richards in one form, and by Mr. Justice Haggart in another, relative to the charge of conspiracy alleged to be made in the second and third counts of the indictment and all bearing thereupon or flowing therefrom. These counts cannot, I submit, be held to be in law an indictment for conspiracy.

They are, by the express language used, clearly intended to be charges against the accused, of unlawfully receiving money, valuable securities or other property, belonging to the respondent which had been stolen by means of a conspiracy.

How can that be pretended to be a count framed to charge a conspiracy? If nothing had been adduced in evidence but that tending to establish a conspiracy and on the trial all reference to its successful accomplishment had been omitted, would any court or judge listen long to a prosecuting counsel professing to desire the charge of conspiracy to be submitted on such a count to a jury and proposing to ask them to find the accused guilty of conspiracy? I venture to think no judge could be got to assent to such a proposition.

It seems to me this is the proper test to apply to what is suggested and elaborately argued relative to the infringement of the Extradition Treaty under which the accused was surrendered.

So tested, there is not a single ground upon which

in reason or authority the claim to exclude evidence because it would tend to prove a conspiracy, can be maintained.

Again, suppose the words

> by means of an unlawful conspiracy by fraudulent means of Thomas Kelly aforesaid, Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson, Victor H. Horwood and others unknown to defraud His Majesty

had been omitted from each of these second and third counts and each then stood as a count in the ordinary form of obtaining money or valuable securities, or property by false pretences, and it had been attempted to prove exactly what has been proven and no one ever used the word "conspiracy" but the facts were offered to conclusively establish the means whereby the wrongs complained of had been accomplished, would any trial judge rule out any of the evidence? On what ground could he?

The charge is, in this amended count I suggest, that the money, or securities, or property had been theretofore stolen. The means used is not stated in the amended form I suggest. How could the judge be asked to reject the evidence? Would he listen to, or give effect to, the argument that it had unexpectedly been disclosed that the accused was one of those who had counselled the original crime of theft and therefore he could not be convicted of unlawfully receiving that which he was an accessory to the stealing of?

The fact is notorious that in many criminal circles there exist men who act as fences. Could such a man secure his acquittal on a charge of receiving stolen goods, by proving that he had directed those usually doing the actual stealing and bringing him the goods, to take these goods in question from some one he had pointed out?

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Such proof would constitute him a principal liable to be found guilty of the theft.

Whoever supposed that because it had this or in some such way developed that the man accused of receiving stolen goods was in fact liable to be charged as a principal, he would be entitled to his acquittal?

Since when has it been law that a man indicted for a minor offence can claim acquittal on any such theory?

I have always supposed that the Crown was entitled to prosecute for that of which a man was clearly guilty even if he was suspected of being liable to be held for a higher or greater offence and a diligent inquiry might produce evidence thereof.

Whatever might be the duty of a Crown officer under such circumstances can have no bearing upon the legal result.

The Crown is entitled to lay the charge for whatever is deemed appropriate to the evidence at hand. And if tried for that for which the Crown has so chosen to indict him, the accused can never again be arraigned and tried for another offence upon the same facts.

Those apprehensive that the accused might suffer wrong by reason of such a proceeding will be relieved by a perusal of those parts of Archbold's Criminal Pleading, Evidence and Practice (22 ed.) pp. 150 *et seq.* where the work deals with the subjects of *autrefois acquit* and *autrefois convict,* and cites the numerous authorities on the subject.

So much for the possible wrong or miscarriage.

Moreover does it not seem idle to argue about the wrong done by a suggested possibility of these counts containing more than one charge, in face of the provisions for inserting in one indictment any number of offences and only one or two, but none of these, are excepted from being so dealt with.

Then again we have the further provisions contained in section 951, of which the first sub-section is as follows:—

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

This alone should be held to cover all the objections revolving around these two counts and dispose of all except the conspiracy question already dealt with and about to be referred to. Though the section just quoted and others give wide scope for acting under in order to relieve trials from the danger of being wrecked by some mere play upon words or trifling frivolities so dear to the hearts of ancient pleaders now dead, the duty remains to have it kept clear during the trial what the court is about to try and is trying an accused for.

Not only as I submit was there no doubt in this case in the minds of any one, but special pains were taken by counsel for the Crown and the learned trial judge to make clear that there was no charge of conspiracy made by the indictment, and the only reference made thereto was part of the inducement in the pleadings explaining the means whereby the crimes charged were accomplished. I imagine no juryman in Manitoba was ever stupid enough to fail to understand what he was thus told.

To meet some points pressed upon us though not open for action as I read the reserved case, I may add a few sentences and cite some precedents covering things so urged or pointed at. Even the question of a man being charged with receiving that which he might

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not only be charged with having stolen but was in fact guilty of, is covered by authority in the case of *Reg.* v. *Hughes*(1).

There might have been raised a more arguable case than some parts of this one on the ground of the verdict of guilty being entered for both the theft and the receiving of that stolen inasmuch as the punishments respectively assigned to such offences are not the same. Counsel for appellant seemed to think some such question was raised and put it forward in several ways. The case of *Rex* v. *Darley*(2) and other cases referred to in Chitty's Criminal Law (18 ed.), when dealing with the law as it stood one hundred years ago, suggest the contention would have been unavailing.

What could be dealt with in a practical common sense fashion under the state of law then cannot surely furnish obstacles to the execution of justice now in view of the effort made by the legislature to remove such like barriers from the successful administration of justice and reduce all that is involved to the simplicity so much to be desired.

The appeal should be dismissed.

DUFF J.—There was, I think, no evidence to support a conviction on the charge of theft. In each case the authorities having custody on behalf of the Crown of the moneys paid to Kelly intended to pass the property in these very moneys to Kelly. Except as to the contention advanced on behalf of the Crown to which I am about to refer, it is sufficient to say that touching this branch of the appeal I adopt the reasoning of Mr. Justice Richards.

The answer to the learned judge's reasoning put

(1) Bell C.C. 242; 8 Cox C.C. 278.
(2) 4 East 174.

forward by counsel for the Crown appears in the following extract from the factum:—

Mr. Justice Richards errs in holding that count 1 of the indictment is negatived by the evidence. He apparently looks at the count as charging Kelly with actually himself stealing or embezzling the moneys. He apparently overlooks Kelly's position as an accessory before the fact to misappropriation of the public funds by the ministers. If he does not overlook this, then his view must be based on a restricted view of the definition of theft in the Criminal Code, sec. 347, which would limit the operation of that section to the *taking* of anything capable of being stolen, all the cases cited by him being judgments dealing with the question of the offence of larceny at common law. This leaves out of consideration theft by conversion under this section, which is committed whenever a person already in possession of personal property, with the owner's consent, fraudulently and without colour of right converts it to his own use or to the use of any other person than the owner of it with intent to deprive the owner of such property, or so to deal with it that it cannot be restored. The contention of the Crown is, and the evidence shews, that the cheques upon the funds of His Majesty the King in the right of the Province of Manitoba, and the moneys subsequently paid on those cheques were received under circumstances that constituted a theft or embezzlement by Messrs. Roblin, Coldwell, Howden and Montague in combination with Messrs. Kelly, Simpson and Horwood. To this Kelly contributed by being an accessory before the fact, and is therefore in law a principal in the commission of the offence, under sec. 69 of the Criminal Code, by reason of which there is no longer any distinction between a principal and an accessory before the fact.

See Crankshaw, p. 72:—

"A principal may be the actual perpetrator of the act, that is, the one who, with his own hands or through an innocent agent, does the act itself; he may be one who, before the act is done, does or omits something for the purpose of aiding some one to commit it; he may be one who is present aiding and abetting another in the doing of it; or he may be one who counsels or procures the doing of it, or who does it through the medium of a guilty agent."

The assumption underlying this argument is that the Ministers Roblin, Coldwell, Howden and Montague being in possession of moneys of the Crown could be convicted of unlawful conversion of the moneys under section 347 of the Criminal Code. When pressed for evidence that these moneys were in the possession of these ministers in contemplation of law, that is to say, within the meaning of the enactment

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relied upon, counsel were unable to point to any evidence of such possession. The fallacy of the argument lies in taking it for granted that the political (as distinguished from legal) control of the machinery of administration which, subject in the last resort to the authority of the Lieutenant-Governor, rested in the hands of these persons was equivalent in law to such possession and that in putting such machinery in motion, which they were able to do by falsifying the facts and thereby enabling Kelly to procure the moneys in question, they were guilty of the criminal offence of conversion within the contemplation of section 347.

The point may be illustrated by reference to the moneys paid under authority of orders-in-council. It was argued that as these ministers, or some of them, constituted a majority of the executive on whose advice the orders were passed, their acts in procuring the passing of them, and indirectly, by means of the orders, the issue of cheques payable to Kelly amounted to "conversion" in point of law.

But in truth these moneys were the moneys of His Majesty lawfully disbursable only on the order of His Majesty's representative, the Lieutenant-Governor (acting it is true on the advice of his Executive Council) and by the instrumentality of cheques signed by certain permanent officials, one of them being the Auditor. The moneys were in the possession of the Crown subject to disposition only by following a procedure prescribed by law; and though the advice of the Executive was a necessary part of this procedure, it was by no means the whole of it. Nor were the other essential acts, such for example as the concurrence of the Lieutenant-Governor which in these cases was obtained by deceiving him as to the facts of a character so purely ministerial as to justify

the conclusion that these moneys were in law under the control of the ministers as depositaries. The truth is that, in law, the function of these persons was advisory only, the effective executive acts were the acts of others.

This is, of course, not to say that the conduct of Roblin and his associates, regard being had to their obligations as holders of high public office, was not (leaving out of view the law relating to conspiracy and obtaining money under false pretences) such conduct as the law notices and punishes as criminal under another head or other heads than theft.

The charge of receiving moneys knowing that such moneys had theretofore been embezzled, stolen or fraudulently obtained also, in my opinion, fails for the reason that up to the moment when the moneys in question were "received" by Kelly they remained in possession of the Crown and had not up to that moment been "obtained" by anybody not entitled to have them. The appellant is consequently entitled to have the conviction against him in respect of count No. 1 and count No. 2 quashed as being unsupported by evidence.

Mr. Coyne, as counsel representing the Crown, quite properly stated in the argument that the Crown submitted to the judgment of the Court of Appeal being treated as if it provided under section 1020 of the Criminal Code that the penalty should be limited to the lowest maximum penalty allowed by law to be imposed as the result of a conviction on the first, second and fourth counts.

I have nevertheless expressed my opinion upon the points above discussed because that, as I think, is due in strict justice to the appellant. In a court of morals no difference may be perceptible between the crime

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charged in the first count and that charged in the fourth count; yet the law does (as the difference in severity of the penalties attached to these crimes respectively demonstrates) regard the first mentioned offence as much the graver and it is right I think to state my opinion that of the graver offence he could not properly be convicted.

Before coming to the crucial questions relating specifically to the conviction on count number four it is convenient to deal with the objection (which might have been a formidable one if founded in fact) that the trial as actually conducted was in truth a trial for conspiracy—a non-extraditable offence. The objection has no sub-stratum of fact. The officers of the Crown were entitled, and indeed it was their duty, in the circumstances, to bring before the jury all facts legally admissible in evidence which might tend to establish the fraud charged to the satisfaction of the jury. The design and the concerted action in furtherance of it were rightly proved and emphazised—not for the purpose of obtaining a conviction for conspiracy as a substantive offence—but as establishing the responsibility of Kelly for certain acts and as exhibiting the character and operation of the dishonest scheme which, as the Crown alleged, disclosed the criminal intent that was an essential ingredient in the offence charged under any of counts one, two or four.

The appellant asks for a new trial in respect of the fourth count of the indictment on the ground that the law was departed from at the trial in (1) comments alleged to have been made on his failure to testify on his own behalf; (2) the reception of inadmissible evidence; (3) unfairness of the trial in respect of extreme

and inflammatory observations by counsel for the Crown.

As to the first of these grounds I can find nothing, which, when fairly construed, amounts to such comment within the meaning of the statutory prohibition.

As to the second ground (which was also put in the form of an objection that the learned judge failed to point out to the jury the evidence admissible under counts one and two that would not be admissible under count four) the only exception requiring comment is that relating to evidence of acts which were done after the last of the payments in question had been made (December, 1914), and to which Kelly was not proved to be an immediate party. Kelly it is said could not be held to be a party to these acts indirectly or constructively by reason of the conspiracy proved to obtain these moneys by fraud, as the object of that conspiracy was completely accomplished when the last payment was made. This objection is not, I think, well founded. These acts it was argued with a great deal of force (and I am inclined to think the argument is sound) which were concerned with measures for the prevention of discovery and disclosure were well within the original design. But be that as it may there is sufficient evidence of concert in preventing discovery and disclosure to establish a subsidiary conspiracy in which Kelly was involved with that as its object; and acts done in furtherance of such a conspiracy would be admissible in support of the charge of *mens rea*.

As to all these alleged grounds for granting a new trial it should be observed that the jurisdiction of the court of Crown cases reserved in Manitoba as well as the jurisdiction of this court in criminal appeals is

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derived from statute and that in exercising that jurisdiction both courts are strictly bound by the rule that no new trial can be granted unless there has been some error, by which "some substantial wrong or miscarriage" has been occasioned "on the trial" (Crim. Code, sec. 1019).

The guilt of the appellant as regards the offence charged by the fourth count (obtaining money by false pretences) is demonstrated by evidence indisputably admissible No jury directing its attention exclusively to that evidence could, unless bent upon not giving effect to the law, have failed to find a verdict of guilty on that count.

In these circumstances there was obviously no "miscarriage;" and assuming there was some technical "wrong" there can be in my judgment no "substantial wrong" from the admission of inadmissible evidence if it must be affirmed that relatively to the whole mass of admissible evidence that which is open to exception is merely negligible and that in the absence of it the verdict could not have been otherwise. This conclusion is in no way inconsistent with the acceptance of the criterion suggested in *Makin's Case*(1), at pages 70 and 71. In such a case the impeached evidence cannot in any practical sense be supposed "to have had any influence upon the verdict."

As to the ground numbered three upon which a new trial is prayed it may be added that although some of the observations of the learned Crown counsel were no doubt excessively heightened, it is impossible to think that in the circumstances of this case the accused could suffer in consequence of them. Such expressions could not deepen the effect of a bare recital of the

(1) [1894] A.C. 57.

facts in the story which the officers of the Crown had to put before the jury.

The opinion of the Chief Justice, Mr. Justice Davies and Mr. Justice Anglin was delivered by

ANGLIN J.—Although the conviction of the appellant on three distinct counts in an indictment—No. 1, for theft, No. 2 for receiving, and No. 4 for obtaining money by false pretences—was upheld by a majority of the learned judges of the Court of Appeal for Manitoba, the Chief Justice, as we understand with the concurrence of Mr. Justice Perdue and Mr. Justice Cameron, said (35 West. L.R. 57):—

It is difficult to see how the accused should for one crime be found guilty on the first, second and fourth counts. That he has committed a crime seems by the evidence to be clearly established, and it is perhaps best established under the fourth count.

I assume that the trial judge in pronouncing sentence will consider that the accused was found guilty of but one crime, and in considering the maximum sentence allowed by law I think he should be guided by the lowest maximum fixed by law for either of the three crimes set forth in the first, second and fourth counts.

This course being taken, I do not think such substantial wrong or miscarriage was occasioned at the trial as would justify a new trial under sec. 1019 of the Code.

There seems no necessity to interfere with the finding of guilty on the inconsistent counts. He was certainly guilty of one of them and as he will be punished on one only, I would follow the course taken in *Rex* v. *Lockett*(1).

The formal judgment of the court, however, does not direct that the penalty to be imposed shall be so limited; but Mr. Coyne, while vigorously insisting that the conviction on all three counts should be sustained, stated at bar in this Court that, as counsel representing the Crown, he submitted to the judgment of the Court of Appeal being dealt with as if it contained a provi-

(1) [1914] 2 K.B. 720, at p. 733; 83 L.J.K.B. 1193.

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sion under section 1020 of the Criminal Code limiting the penalty as indicated by the learned Chief Justice.

Having regard to all the circumstances of the case, and especially to the possible embarrassment which may have been caused by the trial together of five separate counts, and to the fact that the learned trial judge, while he carefully defined each of the offences charged, deemed it advisable to abstain from instructing the jury as to the facts in evidence bearing upon each branch of the indictment, we think the position taken by counsel for the Crown eminently proper and that "we ought to treat the verdict as a verdict on the lesser charge," namely, that of obtaining money by false pretences: *Rex* v. *Norman*(1), at page 343; *Rex* v. *Lockett*(2).

On this charge we find no dissent in the Court of Appeal on the two propositions; that the count itself was properly laid and that there was sufficient evidence to justify conviction upon it. The appellant urges as grounds for a new trial on this count, warranted by the opinions of the two dissenting judges, (*a*) that the conduct of the case may have given the jury the impression that the accused was on trial for conspiracy—a non-extraditable offence; (*b*) alleged comment on the failure of the accused to testify on his own behalf; (*c*) inflammatory and improper observations of Crown counsel; (*d*) failure of the learned trial judge to direct the attention of the jury to evidence favourable to the accused and to correct mis-statements of law by Crown counsel; and (*e*) the reception of inadmissible evidence and the failure of the learned judge to instruct the jury that certain evidence, though admissible on other

(1) [1915] 1 K.B. 341. (2) [1914] 2 K.B. 720, at pages 733-4.

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counts, should not be considered in disposing of the fourth count.

If ground (*a*) is covered by any question in the reserved case, in view of the explicit and reiterated warning given to the jury by the trial judge (emphasizing similar statements made to them by counsel for the Crown and by the defendant himself) that "the accused is not charged with conspiracy"—"what he is charged with is not conspiracy"—and again, "Remember that it is not the direct charge he is answering"—it is impossible to accede to the suggestion that the jury may have been misled as to the offences really charged; (*b*) There was no comment whatever on the failure of the accused to testify. His right to do so was not mentioned during the trial. The learned judge merely discharged his duty in warning the jury against treating the statement which he had allowed the accused to make as the equivalent of sworn testimony; (*c*) Whether there is any question of law reserved on this point is, to say the least, questionable.

But without dwelling further on the several grounds urged, and without determining that in regard to any of them there has been such error in law as would, if "some substantial wrong or miscarriage (had been) thereby occasioned on the trial" (Crim. Code, sec. 1019), have entitled the appellant to a new trial, we are of the opinion that his guilt on the fourth count has been established by uncontradicted evidence, of which the admissibility upon that count has not been and could not be successfully challenged, so complete and so convincing that in regard to that count a substantial miscarriage on the trial is out of the question and the matters complained of, whether taken singly or cumulatively, are "most unlikely to have affected the

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verdict:" *Ibrahim* v. *The King*(1), at page 616, if indeed it is not impossible that they could have had any influence upon it: *Makin* v. *Attorney-General of New South Wales*(2).

So overwhelming is the proof furnished by the evidence not excepted to, that no honest jury could have returned other than a verdict of guilty of obtaining money by false pretences had the conduct of the case been entirely free from all the alleged errors of omission and commission. No substantial wrong was occasioned on the trial of the fourth count, and the conviction upon it, is in our opinion, unassailable.

Since we also concur in the view of the learned Chief Justice of Manitoba that the punishment of the appellant should not exceed the maximum penalty which might be imposed had the conviction been upon the fourth count alone, the questions raised as to the first and second counts, to use the language of counsel for the Crown, have become academic. We therefore express no opinion upon them.

Appeal dismissed.

Solicitors for the appellant: *Richards, Sweatman, Kemp & Fillmore.*

Solicitor for the respondent: *The Attorney-General for Manitoba.*

(1) [1914] A.C. 599. (2) [1894] A.C. 57, at pages 70-1.