NICHOLAS POWER.....APPELLANT ; 1881

AND *Feb'y.18,19.
*March 3.

THOMAS ELLIS.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Witness—Refusal to answer questions on cross-examination—Privileged communications—Improper ruling—Misdirection.

Plaintiff (respondent), a teller in a bank in *New York*, absconded with funds of the bank, and came to *St. John, N. B.*, where he was arrested by the defendant (appellant), a detective residing in *Halifax, N. S.*, and imprisoned in the police station for several hours. No charge having been made against him he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his wife, read to her a telegram and demanded and obtained from her money she had in her possession, telling her that it belonged to the bank and that her husband was in custody.

In an action for assault and false imprisonment and for money had and received, the defendant pleaded, *inter alia*, that the money had been fraudulently stolen by the plaintiff at the city of *New York*, from the bank, and was not the money of the plaintiff; that defendant as agent of the bank, received the money to and for the use of the bank, and paid it over to them. Several witnesses were examined, and the plaintiff being examined as a witness on his own behalf did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his doing so would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the question proposed. The learned judge then told the jury that there was no identification of the money, and directed them that, if they

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*PRESENT—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

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should be of opinion that the money was obtained by force or duress from plaintiff's wife, they should find for the plaintiff.

Held (*Henry*, J., dissenting), that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1), sustaining a verdict given in favor of the respondent, who was plaintiff below.

The following was the case settled for appeal to the Supreme Court:—

DECLARATION.—*Thomas Ellis*, by *Charles W. Weldon*, his attorney, sues *Nicholas Power* for money payable by the defendant to the plaintiff, for money received by the defendant for the use of the plaintiff, and for money payable by the defendant to the plaintiff; for interest upon money due from the defendant to the plaintiff and forborne at interest by the plaintiff to the defendant, and at his request.

And the said plaintiff, by leave of a judge for this purpose first had and obtained, also sues the said defendant for that the said defendant assaulted the said plaintiff and compelled him to go to a police station, and there imprisoned and kept him in prison for a long time, whereby the plaintiff suffered great pain of body and mind, and incurred expense in obtaining his liberation from the said imprisonment; and the said plaintiff claims ten thousand dollars.

PLEAS.—"The defendant, by *S. R. Thomson*, his attorney, as to the first and second counts of the declaration, says that he never was indebted as in these counts alleged.

"And for a second plea, as to the first count of the declaration, the defendant says that he received the money in that count mentioned as the agent of the *National Park Bank* of *New York*, and for the said *National Park Bank* of *New York*, and not otherwise,

(1) 20 New Brunswick Reports 40.

whereof the plaintiff then and there had notice; and that after having so received the said money, and before the commencement of this action, he, the said defendant, paid the same over to the said *National Park Bank* of *New York*, and that ever since such payment, the defendant has had and now has no possession or control of the said money in the said first count of the said declaration mentioned, or of any part thereof.

"And for a third plea, as to the said first count of the declaration, the defendant says that the money in that count mentioned had been feloniously stolen by the plaintiff at the city of *New York* from the *National Park Bank* of *New York*, and in fact was the money of the said bank and not the money of the plaintiff, and thereupon the defendant, as the agent of and acting for the said bank, received the said money to and for the use of the said bank and not otherwise, and afterwards and before the commencement of this action, he, the said defendant, paid the said money over to the said *National Park Bank* of *New York*, and that since such payment the said defendant has never had any possession, use or control of the said money in the said first count mentioned, or of any part thereof.

"And the defendant, as to the third count of the said declaration, says that he is not guilty.

"And for a second plea, to the said third count of the declaration, the defendant says that the plaintiff, before the alleged trespass and imprisonment in that count mentioned, at the city of *New York*, *United States of America*, had feloniously stolen and carried away a certain large sum of money, to-wit, the sum of $30,000 from a certain banking corporation, doing business in the city of *New York* aforesaid, and called the *National Park Bank* of *New York*; and that the plaintiff, after having so feloniously stolen the said money, immediately thereafter fled from the *United States*, and

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came with the said identical money so by him feloniously stolen as aforesaid still being in his possession, into the city of *St. John*, in the Dominion of *Canada*, and then actually had in his possession at the city of *St. John* aforesaid, the said money so stolen, or a large part thereof, contrary to the provisions of the Act of the parliament of *Canada* in such case made and provided. Whereupon the defendant, then knowing the premises, and by reason thereof having reasonable and probable cause for suspecting and suspecting that the plaintiff was the person who had so feloniously stolen the said money at the city of *New York* as aforesaid, and that he the said plaintiff, feloniously and contrary to the provisions of the said Act, had then, in the city of *St. John* or elsewhere in *Canada*, the said money so feloniously stolen as aforesaid, or a part thereof, took the plaintiff into custody and brought him to the police station in the said city of *St. John*, and there delivered him into the custody of the police magistrate (who had jurisdiction over the said offence) and of the policemen there, to be dealt with according to law in respect of the premises; and that after having so caused the said plaintiff to be imprisoned in the said station house, he, the said defendant, had nothing more to do with him the said plaintiff; which are the alleged trespasses and imprisonments in the said third count mentioned, and not otherwise."

JOINDER.—"The plaintiff joins issue on the defendant's first, second, third, fourth and fifth pleas."

The verdict was for the plaintiff, and damages assessed on the first count $5572, and on the second count $200.

A rule *nisi* for a new trial having been granted was subsequently discharged and the *postea* delivered to the plaintiff. The present appeal was from this decision.

The facts of the case sufficiently appear in the head note, and the judgments hereinafter given.

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RITCHIE, C. J. :—

One of the grounds urged for a new trial was that the judge on the trial allowed the plaintiff to refuse to answer certain questions on cross-examination, on the ground that the plaintiff was privileged and not bound to answer the questions put. This is what took place :—

"*Thomas Ellis*—I am the plaintiff. In November, 1876, I gave to my wife $4,500—$100 greenback notes, $300 in Canadian money, in the boarding house at Mrs. *Thompson's*; she had other Canadian money; I got the $4,500 from *James W. Fisher* two or three days before I left *New York*; I got $900; six or seven in forty-nine, $100; the $4,500 I gave to my wife, being part of the $4,900; I requested *Fisher* to purchase $200 in *Canada* money; I gave $300 American money; it was part of what my brother-in-law gave.

"Cross-examined by Mr. *Thomson*—I left *New York* on the evening of 21st October, 1876; all questions outside of this I will answer at the proper time.

"Were you the paying teller of the *National Park Bank* on that day? Obj.

"(Mr. *Palmer* contends that the witness is not bound to answer this question.)

"Witness says—I rely upon my counsel to advise me.

"Were you the paying teller of *National Park Bank*? Obj. On what ground do you decline to answer that question?

"(Judge—I have to allow the witness to exercise his own discretion; if he is of opinion these questions will affect him criminally, or in any way as to the charge set up in these pleas, he is not bound to answer the questions regarding the *National Park Bank*, or any stealing therefrom, as charged in the plea).

"Will you answer? Do you believe that by answering my question that in so doing it would tend to criminate you?

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"(Judge—The witness need not answer, but if you are of that opinion, it will by answering tend to criminate on the charge, you need not answer, but may decline doing so.)

"(The witness remains silent.)

"I shall follow you step by step until you do answer my questions. Do you apprehend serious consequences if you answer my question? Witness—I respectfully decline answering that question.

"(Judge—I decide the witness if he believes the question if answered by him will tend to criminate him in stealing from the *National Park Bank*, he is not bound to answer.)"

It is not necessary to discuss or decide whether the rule broadly laid down by Lord *Cranworth*, in the case of *The King of the Two Sicilies* v. *Wilcox* (1), that the privilege does not extend to crimes committed in a foreign country for which the witnesses may be liable to be there prosecuted, or the more limited rule as laid down by Lord *Chelmsford* in *U. S.* v. *McRae* (2) should prevail, because in this case the defendant was, without reference to where the crime was committed, entitled to the oath of the party that he objected to answer, because he believed his answering would tend to criminate him, more particularly as the plaintiff, having in his direct examination sworn positively that he got the money from *James W. Fisher* two or three days before he left *New York*, and *Fisher* swearing that the money was the proceeds of a draft drawn by the *First National Bank*, and which money he got from the *First National Bank* in *New York*, and this being the money handed by plaintiff to his wife, if his evidence and contention is true, this could not have been the money stolen from the *National Bank* of *New York*, and there could have been no offence in reference to this money in *New*

(1) 1 Sim. N. S. 301. (2) L. R. 3 Ch. 79.

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Brunswick, nor indeed, so far as the evidence goes, in *New York*; and therefore it was all important that the court should have the witness's oath, as it would be impossible for the judge, assuming the witness and *Fisher's* statement to be true, to conclude that any pertinent question relating to this money in controversy could criminate the witness.

I think, therefore, in this case the defendant was entitled to have the oath of the witness that he believed his answer would tend to criminate him. The privilege of protection belongs to the witness, he may in the discretion of the judge be cautioned, but it is for the witness to claim the protection of the court on the ground that the answer would tend to criminate himself, and if there appears reasonable ground to believe that it would do so, or rather if there are no other circumstances in the case to induce the judge to believe that the answer would not have that tendency, he is not compellable to answer.

In *Webb* v. *East* (1) it was held that a party to an action who objects to the production of a document for inspection, on the ground that it may tend to criminate him, must make the objection on oath.

Stephen, J., referred to *Boyle* v. *Wiseman* (2).

Counsel:—"Admitting that the defendant may be called as a witness by the plaintiff, and obliged to state on oath his objection to produce these documents, this is an interlocutory proceeding to which no such rule applies."

Kelly, C. B.:—"I am clearly of opinion that there is no distinction between preliminary proceedings and those before a judge and jury, as to the position of a party to an action who objects either to the production of a document or to any other mode of obtaining evidence, directly or indirectly, on the ground that the

(1) 5 Ex. D. 23. (2) 10 Ex. 647.

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evidence may tend to criminate him. In every such case the objection must be taken by the party himself, and supported by his oath."

Stephen, J., concurred.

Mr. *Taylor* sums up the law thus (1): "On the whole, as Lord *Hardwicke* once observed, these objections to answering should be held to very strict rules, and in some way or other the court should have the sanction of an oath for the facts on which the objection is founded."

STRONG, FOURNIER and TASCHEREAU, J.J., concurred.

HENRY, J.:—

I am sorry to differ from my colleagues on this question. The pleas to this action set up; [the learned judge read the pleas] (2).

In this case the judge had the evidence before him, he saw whether the notes belonged to the *National Bank* of *New York*, or the plaintiff, and was in a position to know whether the answer to the question might incriminate him. Where the pleas and the opening of counsel make it clear that the question put to the witness is for the purpose of obtaining such an answer as would subject the witness to be incriminated, I do not think he is obliged to answer. I go further, and I maintain that the authorities go this far—that if the answer to the question will incriminate the witness, the judge has a right to interpose and tell him, as the judge did in this case, that if he thinks the answer will incriminate him he need not answer, and the witness was right in not answering. As to the question whether the answer might incriminate him in the *United States* or *New Brunswick*, this cannot alter the position. The defence here was that the plaintiff brought the notes taken from his wife from the *United States*, and that

(1) Sec. 1458. (2) Ser. p.

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they were the identical notes stolen. This, if proved, was an offence indictable in *New Brunswick* under the Dominion Criminal Statutes, and, if on that issue, plaintiff had been found guilty, it would be sufficient for the taking of such steps as would lead to his incarceration. I think, under all these circumstances, it was not necessary for him to answer the questions put to him. It is true, he may be guilty of larceny, but this fact alone is not sufficient to destroy all the rules of evidence in criminal matters, and, in my opinion, it is more important that they should be preserved and let a guilty person escape the punishment he might have otherwise have been subjected to.

GWYNNE, J.:—

I agree that there has been a miscarriage in this case, arising in some measure, as I think, from the fact of two very different causes of action, involving different considerations, having been tried at the same time, without the attention of the jury having been sufficiently drawn to the points involved in each. I agree also that the cross-examination of the plaintiff was prematurely interrupted, and he should have been required to pledge his oath expressly that his reason for declining to answer questions put to him on cross-examination was that he believed that his answers, if given, would tend to convict him of the felony charged. That appears to me to be the rule as established by the recent decisions (1). I am of opinion, however, that independently of this point there has been a miscarriage, by reason of misdirection in the manner in which the case was left to the jury. The learned judge told the jury that there was no evidence whatever of identification of the money, and he directed them that if they should be of opinion that the money was obtained from Mrs.

(1) 10 Ex. 652, 701; L. Rep. 3 Ex. 281; 5 Ex. D. 23; 3 Q. B. D. 658.

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Ellis by force or duress they should find for the plaintiff. No distinction is drawn in this charge between the two different species of action. Now, as to the action of assault and false imprisonment, the manner in which the money was gotten from Mrs. *Ellis* had nothing whatever to do, and as to the action for money had and received, as well as to the action for false imprisonment, there was undoubtedly much evidence given on the part of the defence as to identification of the money with money feloniously taken, which should have been left to the jury to express their opinion upon. The circumstances of the case were indeed of such a nature as peculiarly to have called for a submission of the case to the jury in such a manner as to leave them at full liberty to draw their own inferences and to form their own opinion as to the degree of credibility to be attached to the evidence of all the witnesses.

Appeal allowed with costs.

Attorney for appellant: *S. R. Thomson.*
Attorney for respondent: *C. W. Weldon.*