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*May 31
*June 1
*Oct. 4

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ALFRED PATRICK HEMINGWAY otherwise known as Barry Hamilton and Richard Balfour ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Code—False Pretences—Conditional Sale—Obtaining goods through medium of written contract—Whether a buyer "obtains anything capable of being stolen" on acquiring a property interest in goods under a conditional sales agreement—The Criminal Code, s. 405 (1)—Conditional Sales Act, R.S.B.C. 1948, c. 64.

An accused was convicted by a jury under s. 405 (1) of the *Criminal Code*, R.S.C. 1927, c. 36, of having obtained certain goods by false pretences through the medium of a contract in writing. The conviction was quashed by the British Columbia Court of Appeal on the ground that as title to the goods was expressly reserved to the vendor by the terms of the contract, a conditional sales agreement, until the purchase moneys were fully paid, the conviction could not be supported.

Held: That the judgment should be set aside and the conviction at trial restored. The accused by false pretences induced the vendor not only to part with possession of the goods but also to pass to the accused a property interest recognized by the *Conditional Sales Act*, R.S.B.C. 1948, c. 64, and such an interest fell within the words "obtains anything capable of being stolen" as used in s. 405 of the *Criminal Code*.

Held: Further, by Kerwin C.J. and Estey and Abbott JJ., that the word "obtained" in s. 405 of the *Criminal Code* must be given a more extended meaning than that attributed to it in the British Larceny Act.

Rex v. *Scheer* 39 Can. C.C. 82 at 83, *Rex* v. *Craingly* 55 Can. C.C. 292 and *Rex* v. *Kennedy* 91 Can. C.C. 347, approved.

*PRESENT: Kerwin C.J. and Kellock, Estey, Locke and Abbott JJ.

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APPEAL by the Crown from a judgment of the Court of Appeal for British Columbia (1) allowing the respondent's appeal from his conviction in the Supreme Court of British Columbia before Wilson J. and a jury on a charge of having obtained goods by false pretences through the medium of a contract in writing.

H. R. Bray, Q.C. for the appellant.

E. L. Whiffin for the respondent.

The judgment of Kerwin C.J. and of Estey and Abbott JJ. was delivered by:—

ESTEY J.:—The respondent's conviction of obtaining household goods by false pretences was quashed in the Court of Appeal for British Columbia and the Crown, in this further appeal, asks that the conviction at trial be restored.

On October 26, 1953, the respondent made certain representations which, upon the evidence, were false and thereby induced the Belmont Furniture Stores to deliver the goods to him under a conditional sales agreement of that date. Under this agreement he agreed to pay $2,050.38 on terms of $355 in cash, which he paid, and the balance in monthly instalments of $70.75. In addition to the cash payment, he paid two instalments. When the third was demanded he produced a receipt purporting to acknowledge the balance having been paid in full. The Belmont Furniture Stores had not given such a receipt and in these proceedings its validity has not been suggested.

The learned judges in the Court of Appeal were of the opinion that, because, under the agreement, title remained in the Belmont Furniture Stores until the purchase price was fully paid, the respondent had obtained no more than possession and a statutory right to the title and ownership of the goods upon completion of his payments and, therefore, it could not be said that in law the crime of false pretences had been committed.

The delivery of the goods having been made under a conditional sales agreement, the relationship between the respondent and the Belmont Furniture Stores is determined

(1) (1955) 14 W.W.R. 668.

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by the terms of that agreement read with the provisions of the *Conditional Sales Act* of British Columbia (R.S.B.C. 1948, c. 64). This latter Act contains the following relevant provisions:

11(2) The buyer shall not, prior to complete performance of the contract, sell, mortgage, or otherwise dispose of his interest in the goods, unless he, or the person to whom he is about to sell, mortgage, charge, or otherwise dispose of same, has notified the seller in writing, personally or by registered mail, of the name and address of such person, not less than ten days before such sale, mortgage, charge, or other disposal.

(3) In case the buyer removes the goods or disposes of his interest in them contrary to the foregoing provisions of this section, the seller may retake possession of the goods and deal with them as in case of default in payment of all or part of the purchase price.

12(1) Where the seller retakes possession of the goods pursuant to any condition in the contract, he shall retain them for twenty days, and the buyer may redeem the same within that period by paying or tendering to the seller the balance of the contract price, together with the actual costs and expenses of taking and keeping possession, or by performance or tender of performance of the condition upon which the property in the goods is to vest in the buyer and payment of such costs and expenses; and thereupon the seller shall deliver up to the buyer possession of the goods so redeemed.

(2) When the goods are not redeemed within the period of twenty days, and subject to the giving of the notice of sale prescribed by this section, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period.

(7) This section shall apply notwithstanding any agreement to the contrary.

That the Legislature intended a buyer would, from the outset, have an interest in the goods is clearly evidenced in the foregoing s. 11(2), under which he may, upon giving the specified notice, "dispose of his interest in the goods." Again, in s. 11(3), if a buyer "disposes of his interest" in the goods without giving the notice "the seller may retake possession." Moreover, if the seller retakes possession, under s. 12(1) the buyer has certain rights of redemption. Also, and quite apart from the statute, the buyer would have an insurable interest. In these circumstances the respondent, as a buyer, acquired both possession and an interest in the goods, or what may be properly described as a property interest in the goods. It may be that the Belmont Furniture Stores had a right to repudiate the contract, in which event the respondent, by virtue of his payments, may have had some rights. These, however, are civil rights with which we are here not concerned.

The respondent was convicted under s. 405 of the *Criminal Code,* the material part of which reads as follows:

405. Every one is guilty of an indictable offence . . . who, . . . by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, . . .

The main contention on behalf of the respondent is that, as the property did not wholly or entirely pass to the respondent, he cannot be found guilty of false pretences within the meaning of the foregoing section because the word "obtains," as there used, means the acquisition by the respondent of the whole or the entire property interest of the Belmont Furniture Stores.

In support of this contention counsel for the respondent referred to *The Queen* v. *Kilham* (1), in which Bovill C.J., in the course of his reasons and speaking for the Court, stated:

But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us.

The Chief Justice expressed the basis of the decision in the following words:

. . . the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time.

He also stated:

The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel etc.

Their Lordships were there considering a case in which no property whatever was intended to pass. However, the general observation which includes the phrase "deprive the owner wholly of his property", though unnecessary to the decision, appears to have been accepted as a statement of the law by the learned authors of recognized texts. *Russell on Crime,* 10th Ed., p. 1377, states:

. . . there must, as in larceny, be an intention to deprive the owner wholly of his property.

See also *Kenny, Outlines of Criminal Law,* 1952, 16th Ed., s. 342; *Archbold's Cr. Pl. Ev. & Pr.,* 33rd Ed., pp. 546 and 554.

(1) (1870) L.R. 1 C.C.R. 261.

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In 1951 Lord Goddard stated:

> There is no doubt that "obtains" means obtains the property and not merely possession, and the obtaining must not for this purpose be under such circumstances as to amount to larceny. *Rex* v. *Ball* (1).

In all of the foregoing it is the distinction between larceny by trick and false pretences, or between mere possession and property, that is under discussion. In fact, the precise point here under consideration does not appear to have been raised in any of the courts in Great Britain. This may be due to the fact that there chattels are disposed of, not under conditional sales agreements such as that here in question, but rather under hire-purchase agreements. The nature of the hire-purchase contract is described by the learned authors of *Dunstan's Law of Hire-Purchase,* 4th Ed., at p. 9:

> The contract of hire-purchase, as already defined, is a contract of hire with an option of purchase, in which the owner of goods lets them out on hire to the hirer for a fixed term, at an agreed rental to be paid at intervals mutually agreed upon, as instalments, and the owner, in addition to letting the goods out, further agrees that if the hirer keeps them for the agreed period and regularly pays the rent they shall become the hirer's property.

See also *1 Hals.,* 2nd Ed., p. 761, para. 1249.

Hire-purchase contracts, since 1938, are subject to the *Hire-Purchase Act* (1 & 2 Geo. VI, c. 53). There are other agreements, which apparently are referred to as hire-purchase agreements, which come within the provisions of the *Factors Act,* 1889, and the *Sale of Goods Act,* 1893. These enactments are referred to here only for the purpose of indicating that the exchange of chattels is effected in Great Britain under agreements subject to statutory provisions which are substantially different from the conditional sales agreement and the statutory provisions in respect thereto adopted generally throughout Canada.

It also appears that our relevant criminal law is quite different from that in Great Britain. Prior to 1892 the statutory law with respect to larceny and false pretences was contained in *The Larceny Act* (R.S.C. 1886, c. 164). Larceny is not, in that statute, defined and the relevant portion of s. 77, corresponding to the present s. 405, reads:

> 77. Every one who, by any false pretence, obtains from any other person any chattel, money or valuable security, with intent to defraud, is guilty of a misdemeanor, and liable to three years' imprisonment.

(1) [1951] 2 K.B. 109 at 111.

This s. 77 is in part founded upon s. 88 of the *Larceny Act*, 1861 of Great Britain (24 & 25 Vict., c. 96), being "An Act to Consolidate and Amend the Statute Law of England and Ireland Relating to Larceny and Similar Acts." In that statute s. 88 read in part:

> Whosoever shall, by any false pretence, obtain from any other person any chattel, money or valuable security with intent to defraud shall be guilty of . . .

In 1880 a British Royal Commission reported by submitting a draft criminal code which, in their own language, was "a reduction of the existing law to an orderly written system freed from needless technicalities, obscurities and other defects which the experience of its administration has disclosed. It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure both as to indictable offences and as to summary convictions" (Report Part I, Codification in General).

Apparently impressed by the advantages of a codification, the Government of Canada asked Mr. Justice Burbidge of the Exchequer Court, who had for some time been Deputy Minister of Justice, and Mr. Sedgewick, then Deputy Minister of Justice, later a Justice of this Court, to draft a code of the criminal law for Canada. The code which they drafted and submitted was, in a large part, taken from the British draft code submitted in 1880; in fact, so much so that Mr. Justice Taschereau, later Chief Justice of this Court, in his 1893 edition of the Criminal Code of Canada, referred, under each section taken in whole or in part therefrom, to the British draft code from which, as he stated, "the present code has been in a large measure textually taken." *Taschereau's Criminal Code,* 1893 Ed., p. iii.

Section 305 of the 1892 code, now s. 347, setting forth what constitutes the offence of theft, is taken verbatim from the British draft code, except that in subpara. (*a*) the word "permanently" in the British draft code is deleted and the phrase "temporarily or absolutely" inserted in lieu thereof. It will, therefore, be observed that in our code an important addition to the definition of theft as contained in the draft British code is made, which in itself was quite different and much wider in its scope than that which had been developed under the common law and for the first time authoritatively

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set forth in s. 1 of the 1916 *Larceny Act,* or, indeed, as interpreted under the British *Larceny Act* of 1861, or the Canadian *Larceny Act* above referred to.

This definition of theft is important in this discussion because s. 405 contains the words "obtains anything capable of being stolen . . .," which replace the words "any chattel, money or valuable security," as they appear in s. 88 of the 1861 British *Larceny Act.* Moreover, these words "any chattel, money or valuable security," as they appeared in s. 88, were construed to include only that which could be the subject of larceny at common law. *Stephen's History of the Criminal Law of England,* p. 162; *Kenny's Outlines of the Criminal Law,* 16th Ed., p. 278.

The words in s. 405 "anything capable of being stolen" are of wider import and this is emphasized by the language of ss. 344 and 347 of the *Criminal Code,* where, as already intimated, theft is defined in terms more comprehensive than at common law or under any of the statutory provisions in Great Britain. In s. 344 it is provided:

> Every inanimate thing whatever which is the property of any person . . . is capable of being stolen . . .

and the provisions of s. 347 read, in part, 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, anything 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;

Section 405, with which we are mainly concerned, is not in the language of either the Canadian statutes or the British statutes with respect to larceny and false pretences in force prior to 1892. In fact, both s. 347 (with the change already noted) and s. 405 are taken from the draft British code which never did become law in Great Britain and which was itself quite different from the statutory provisions then in force in that country. It is but a section in a statute largely codifying the criminal law of Canada. Its provisions effected many changes which principle and experience dictated and by restatement was intended to remove technicalities and clarify the criminal law. As such, s. 405, as well as the entire statute, is, in the language of their Lordships of the Privy Council, "an original enactment with no trace of its origin or history to be found either

in its terms or in any other" legislation of the Parliament of Canada. *Attorney-General for Ontario* v. *Perry* (1). It was there held that a section of the Ontario *Succession Duty Act,* "obviously borrowed," but not identical, should be construed as an "original" section. It should, therefore, be construed in a manner that gives effect to the intention of Parliament as expressed in the language there adopted. Of course, regard must be had to its language in relation to the statute as a whole, but its history ought not to be examined except in the case of ambiguity, and then, as stated by their Lordships of the Privy Council, that "is always a process of construction which is accompanied with much danger." *Ouellette* v. *C.P.R.* (2).

The construction of the word "obtains" as expressed by Chief Justice Bovill was pronounced in a day when the enforcement of the criminal law was subject to refinements and technicalities which our code was intended to eliminate. A reference to the standard dictionaries discloses that, as ordinarily used and understood, the word "obtains" does not suggest or import that the entire property must be acquired. In the *Oxford Dictionary* the word is defined:

> To procure or gain, as the result of purpose and effort; hence, generally, to acquire, get.

As so defined, the word would include the acquisition of possession from a party together with whatever interest that party might have.

Neither do I find anything in the language of s. 405 to suggest that the word should be so construed. Then, as a matter of principle, there would appear to be no difference between one who, by false pretences, obtains the whole or entire property and one who obtains possession and a property interest in the goods.

Our attention was directed to the fact that the word "obtain" appears in other sections of the *Code,* particularly s. 399. A comparison of this section with s. 82 of the Canadian *Larceny Act* in the 1886 Statutes and s. 88 of the *Larceny Act* of Great Britain in 1861 leads to precisely the same conclusion that s. 399 is a new and an original section in which the word "obtain" is used in a wide and comprehensive sense and should be construed to the same effect as in s. 405.

(1) [1934] A.C. 477 at 483. (2) [1925] A.C. 569 at 575.

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In Canada there is authority in support of the view that if, by false pretences and with intent to defraud, the possession together with a property interest is acquired in anything capable of being stolen, that is sufficient to support a conviction for false pretences.

Counsel for the respondent discussed a number of Canadian authorities to which reference may now be made. In *The King* v. *Nowe* (1), *Rex* v. *Scheer* (2), and *Rex* v. *McManus* (3), there was no intention to pass any property whatsoever and, therefore, it was held the crime of false pretences was not committed. In *Rex* v. *Scheer* a conviction for false pretences was quashed. Chief Justice Perdue, in the course of his reasons, at p. 83, stated:

> To constitute the offence of obtaining by false pretences it must appear that the prosecutor had been induced to part with some property right and not merely the possession of the goods.

Both Chief Justice Perdue and Mr. Justice Cameron referred to *Tremeear,* 1919 Ed., at p. 498, where the learned author states:

> It must appear that the prosecutor had been induced to part with some property right and not merely possession of the goods.

In the 5th Ed., 1944, this statement, at p. 459, is altered to read:

> If he intends to part only with the possession there can be no conviction for obtaining by false pretences.

In *Rex* v. *Craingly* (4), Craingly supplied material to Goodman, who manufactured trousers therefrom. This arrangement continued for some time. In the course of their dealings Goodman gave to Fisher, a cartage agent, a parcel containing eight pairs of trousers with instructions to deliver them to Craingly only upon payment of $63.50. When Craingly refused to pay the $63.50 Fisher refused to deliver to him the trousers. Later, however, during the same day, Fisher received a telephone message purporting to be from Goodman and instructing him to deliver the parcel on receipt of $20. This Fisher did. The learned trial judge found, and this was accepted in the Court of Appeal, that Craingly had made the telephone call to Fisher. The accused was found guilty of obtaining the trousers by false pretences and his conviction was affirmed

(1) (1904) 8 Can. C.C. 441.
(2) (1922) 39 Can. C.C. 82.
(3) (1923) 42 Can. C.C. 248.
(4) (1931) 55 Can. C.C. 292.

upon appeal. Grant J.A., with whom Mulock C.J.O. and Hodgins J.A. agreed, found that Fisher was a bailee of the parcel and, therefore, had a special property or interest therein.

The above was followed in *Rex* v. *Kinsey* (1), where the accused purchased from Edmonton Automart a truck for $1,000, plus repairs thereto in the sum of $50, payable $500 in cash and the balance on terms. The accused signed a contract under which title remained in the vendor until payment had been made in full. The cash payment was made in cheques which proved to be worthless. The accused was charged and found guilty of obtaining goods by false pretences.

Rex v. *Craingly, supra,* and *Rex* v. *Kinsey, supra,* appear to have been decided in accord with the intention of Parliament expressed in s. 405.

The accused, by false pretences, acquired possession of the goods and a special property or interest therein in a manner that brings him within the words "obtains anything capable of being stolen," as used in s. 405 of the *Criminal Code.*

The appeal should be allowed and the conviction restored.

The judgment of Kellock and Locke JJ. was delivered by:—

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia allowing an appeal by the respondent from his conviction in the Supreme Court of British Columbia before Wilson J., and a jury, on a charge of having obtained goods by false pretences through the medium of a contract in writing.

On October 26, 1953, the respondent, under the name of "Barry Hamilton", entered into a conditional sales contract for the purchase of certain furniture. The premises at the address he gave were owned by a Mrs. Hamilton and her son, whose name was Barry Hamilton. He was not the respondent, whose real name is unknown. He goes under various aliases.

At the time of the transaction the respondent gave to the vendor for that part of the purchase moneys payable in cash, a cheque drawn by a third person in favour of "Barry

(1) (1948) 91 Can. C.C. 347.

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Hamilton" for $355, which he endorsed in the name of the payee. This left a balance of purchase moneys of $1,695.38, payable at the rate of $70.75 per month. Two of these instalments were subsequently paid in November and January following.

Early in February, the respondent, on being applied to for payment of the third instalment, then overdue, took the position that the full balance of the purchase moneys had been paid and he produced an alleged receipt to that effect. This, however, proved to be a forgery.

The indictment contained two counts in addition to that of false pretences, one of which was withdrawn. The other was of obtaining credit by false pretences. This was, however, not dealt with by the jury as the learned trial judge instructed them they need not consider it if they found the accused guilty of obtaining goods.

Ss. 404(1) and 405(1) of the *Code* are as follows:

404(1) A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

405(1) Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.

In the Court of Appeal the conviction was quashed on the ground that, as title to the goods was expressly reserved to the vendor by the terms of the contract until the purchase moneys were fully paid, the conviction could not be supported. In the language of O'Halloran J.A., with whom Robertson and Bird JJ.A., agreed,

It has long been accepted that a conviction under Code Sec. 405(1) for "obtaining" goods by false pretences (as distinguished from theft by a trick see *The Queen* v. *Russett* (1), cannot be supported unless ownership of the goods as distinct from their authorized possession has passed to the convicted person;

The learned judge referred to a number of other authorities, including *Rex* v. *Scheer* (2). This is the sole point with which we are concerned on this appeal.

(1) [1892] 2 Q.B. 312.

(2) (1922) 39 Can. C.C. 82.

In *Russett's* case, the prisoner had agreed at a fair to sell a horse to the prosecutor for £23, of which £8 was paid down, the remainder to be paid on delivery. The horse was never delivered, the prisoner causing it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it. It was contended in appeal from his conviction of larceny by a trick that the only offence disclosed by the evidence was that of obtaining money by false pretences and that there was no evidence of larceny. In the course of his judgment affirming the conviction, Lord Coleridge C.J., said, at p. 314:

> . . . if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud—that is larceny.

It was held that the £8 was paid by the prosecutor merely by way of deposit, the prosecutor never intending to part with the property in the money until he obtained delivery of the horse.

While the principle was sufficiently stated for the purposes of that case by Lord Coleridge, as above, it is important to understand the underlying distinction between the two offences of larceny by a trick and obtaining goods by false pretences. In *Queen* v. *Kilham* (1), Bovill C.J., at p. 263, quoted the language of s. 88 of 24-25 Victoria, c. 96, as follows:

> whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour . . .

and continued:

> The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel, etc. This is . . . made more clear by referring to the earlier statute from which the language of s. 88 is adopted. 7 & 8 Geo. 4, c. 29, s. 53, recites that "a failure of justice frequently arises from the subtle distinction between 'larceny and fraud'", and, for remedy thereof, enacts that "if any person shall, by any false pretence, obtain," etc. The subtle distinction which the statute was intended to remedy was this: that if a person, by fraud, induced another to part with the possession *only* of goods and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny.

(1) (1870) L.R. 1 Cr. Cas. Res. 261.

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When emphasis is placed on the word "only", which I have italicized, the point of distinction between the two offences is clear. The subsequent language of the learned Chief Justice, namely,

> But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property . . .

is fully satisfied where the fraud is perpetrated "through the medium of a contract", whether part payment or no payment at all be made. The offence is nonetheless committed where the intention is to deprive the owner of what is his. In the case at bar the jury were satisfied of that. As the later authorities make plain, the contract need not provide for the immediate passing of the property in the goods.

In the circumstances of such a case as the present, the respondent could not have been convicted of theft as the vendor of the goods was consenting not only to the transfer of possession but to the transfer of the property in the goods upon the terms of the written contract. Under that contract the respondent obtained an interest in the goods which is recognized by the *Conditional Sales Act*. While it is provided by the contract that "title to, property in and ownership of said goods shall remain in Vendor at Purchaser's risk until all amount due hereunder, . . . are paid in cash" the statute provides by s. 11(2) that

> The buyer shall not, prior to complete performance of the contract, sell, mortgage, charge or otherwise dispose of *his interest* in the goods, unless . . .

and s-s. (3) enables the vendor to retake possession

> in case the buyer . . . disposes of *his interest* in them . . .

If the transaction under which the defrauder obtains possession of the goods does not provide for the passing of the property either immediately or in the future, "part of the transaction is incomplete", to use the language of Lord Coleridge above. A wrongful conversion in such circumstances means only one thing, namely, theft. If, however, the transaction is "complete" in the sense that the owner consents to the passing of the property in compliance with a term of the contract to that effect, there can be no theft. In so far, therefore, as the question in issue in the case at bar

depends upon a choice as between theft and obtaining the goods by false pretences, the only possible offence of which the respondent could have been convicted was the latter.

As pointed out in the 10th Edition of *Russell on Crime* p. 1413, the "main distinction" between larceny and obtaining by false pretences is that in the former the goods are taken "without the owner's consent, whereas in the latter the owner has been induced by the pretences to give his consent." In commenting upon the decision in *Russett's* case, the same author says, at p. 1110:

the essential point is in the presence or absence of the owner's consent:

That this is the essential principle is, in my opinion, borne out by the authorities.

In *Whitehorn Brothers* v. *Davison* (1), the facts were that one Bruford, whom the plaintiffs, a firm of manufacturing jewellers, knew as a jeweller and dealer in pearls, obtained from the plaintiffs a pearl necklace on the representation that he would like to send it to one of his customers on approval. The plaintiffs assented and, on obtaining the necklace, Bruford pledged it with the defendant as security for moneys owing by him. Subsequently, Bruford represented to the plaintiffs that his customer had decided to take the necklace but that he was in the habit of receiving six months' credit. Ultimately, the plaintiffs invoiced the necklace to Bruford, taking from him two bills, one at five, the other at six months. These were subsequently dishonoured, Bruford having absconded. The plaintiffs then sought recovery of the necklace from the defendant. In the course of his judgment at p. 473, Vaughan Williams L.J., said:

. . . I should have great difficulty in arriving at the conclusion that what Bruford did amounted to larceny by a trick. There was, no doubt, evidence to shew that he did by fraudulent statements persuade the plaintiffs to enter into a contract with him, which, taking the view of it most favourable to them, appears to me to have been a contract under which possession of the necklace was given to him together with an option, within a reasonable time, I suppose, to accept as sold to him the necklace so delivered on sale or return for a price to be paid in cash, or to return the same. That being so, the case is one in which he, undoubtedly, got possession of the necklace by fraud, but it appears to me that he got it under a contract between himself and the plaintiffs. He not only got it under this contract, but, admittedly, the object of that contract was that he should have an opportunity of seeing whether he could sell the necklace

(1) [1911] 1 K.B. 463.

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to a customer before he made up his mind whether he would accept it on the terms of the approbation note. Under these circumstances . . . I think that would constitute obtaining goods by fraud, and not larceny.

Buckley L.J., at p. 479, said:

> On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property. The question which is material under the circumstances of the present case is this. Suppose the facts are that the owner of the goods, being induced thereto by a trick, intends, not to pass the property in them, but to confer on the person to whom he gives possession a power to pass the property; under which head does that case fall? Prima facie it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences.

Kennedy L.J., at p. 485, expressed a similar view.

The principle of these judgments was subsequently adopted and applied by the Court of Appeal in *Folkes* v. *King* (1). In my opinion, the principle so stated is right and fully covers the circumstances of the case at bar.

It may be observed that in *Rex* v. *Scheer* (*supra*) to which the Court of Appeal referred, the Manitoba Court of Appeal adopted the statement in the 1919 edition of Tremeear to the effect that in the case of the offence here under consideration, it must appear that the prosecutor has been induced to part with "some" property right and not merely possession of the goods.

It was further contended for the respondent that there never had in fact been any contract entered into between him and the owners of the furniture for the reason that the latter considered they were dealing not with the respondent but with another person, namely, the real Barry Hamilton. In my opinion, the evidence does not support this contention. It is true that the respondent used that name and that there was another person of that name, but that other person was not known to the vendors. They dealt with the respondent himself, although they accepted his statement that his name was Barry Hamilton, from which they were able to ascertain that a person of that name did reside at the address given.

This is not a case, therefore, of a contract with one person in the belief that it was with another. The vendors dealt and intended to deal with the respondent. The fact that

(1) [1923] 1 K.B. 282.

he gave a false name is immaterial in these circumstances; *King's Norton Metal Co.* v. *Eldridge, Herrett & Co.* (1). The distinction between such a case and the circumstances in *Cundy* v. *Lindsay* (2), where the person defrauded was, by reason of the fraud of the person with whom they dealt, induced to believe they were dealing with another person, is obvious.

The appeal should be allowed and the conviction restored.

Appeal allowed and conviction restored.

Solicitor for the appellant: *H. R. Bray.*

Solicitor for the respondent: *E. L. Whiffin.*