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*May 18.

*Nov. 21.

CHARLES GEORGE MAJOR (PLAINTIFF) ..... APPELLANT;

AND

HIRAM PERRY McCRANEY AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Construction of statute--20 & 21 V. c. 54, s. 12 (Imp.)—Application—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.

The Imperial Act, 20 & 21 Vict., ch. 54, sec. 12, provides that "nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed; * * * and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated."

Held, affirming the judgment of the Supreme Court of British Columbia, that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts.

Semble, that the section only covered agreements or securities given by the defaulting trustee himself.

Quære. Is the said Imperial Act in force in British Columbia?

If in force it would not apply to a prosecution for an offence under R. S. C. ch. 164 (The Larceny Act) sec. 58.

An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. ch. 164, sec. 58, which was not re-enacted by the Criminal Code, 1892.

Held, that the alleged Criminal Act, having been committed before the Code came into force, was not affected by its provisions and the covenant could not be enforced. Further, the partnership property not having been held on an express trust the civil remedy was not preserved by the Imperial Act.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Supreme Court of British Columbia (1) reversing the judgment at the trial in favour of the plaintiff.

The action was brought on a covenant contained in an agreement under seal, dated the 25th day of October, 1894, by which the defendants covenanted to pay to the plaintiff $7,000.00 at the end of three years from its date, with interest at 8 per cent.

The defence set up is that the agreement was executed in consideration that a criminal prosecution would be stifled.

The plaintiff claims that on the evidence no offence under the Criminal Code was disclosed and there could, therefore, be no abandonment of the prosecution. He also contended that under the Imperial Act 20 & 21 Vict. ch. 54, sec. 12, such defence could not be set up as against misappropriation of trust funds.

The trial judge concurred in the latter contention and gave judgment for the plaintiff which was reversed by the full court.

The questions at issue upon this appeal are stated in the judgment reported.

Robinson Q.C. for the appellant.

Chrysler Q.C. for the respondents.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed.

It was found by both the courts below that the covenant of the 25th October, 1894, upon which this action is brought, was given for the express purpose of stifling a prosecution against H. P. McCraney for certain statutory offences with which he was charged in respect of the embezzlement or misappropriation of

(1) 5 B. C. Rep. 571.

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the assets of a partnership firm of which he had formerly been a member, and which was comprised of the present appellant, H. P. McCraney and Thomas Robson Pearson. The evidence is so strong as to leave no doubt that the abandonment by the appellant of the prosecution which had been instituted and under which H. P. McCraney was then in prison, having been on a preliminary examination committed for trial by a police magistrate, was the express object which the respondents had in view in executing the covenant in question.

The principal question which has been raised is as to the application of an Imperial enactment (the 12th section of 20 & 21 Vict. ch. 54) to the case. It is said that this provision was in force in British Columbia at the time the covenant in question was given, and that it validates a transaction which but for it would be confessedly illegal and void.

The Act in question which made a breach of trust a criminal act provides that ;—

> Nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act shall prevent, lessen or impeach any remedy at law or in equity which any party aggrieved by any offence against this Act might have had if this Act had not been passed, but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him, and nothing in this Act contained shall affect or prejudice any agreement entered into or security given by any trustee having for its object the restoration or repayment of any trust property misappropriated (1).

It has been contended in argument here that the Imperial Act referred to and consequently the 12th section just set forth, was not in force in British Columbia when the acts for which H. P. McCraney had been prosecuted or threatened with prosecution were committed and when the covenant was given.

(1) 20 & 21 Vict. ch. 54, s. 12.

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It is in my view not material to the decision of the present appeal to inquire whether the Act in question was in force or not.

The statute in question would not, in my opinion, have applied to authorize such a prosecution as that which had been instituted against McCraney. The class of trustees referred to in the Act were trustees who had been guilty of misappropriation of property held upon express trusts.

From the evidence it appears that there was *primâ facie* a case warranting a prosecution against McCraney under the 58th section of the Revised Statutes of Canada, ch. 164, which enacts that:

> Every one who, being a member of any co-partnership owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles or unlawfully converts the same or any part thereof to his own use or that of any person other than the owner, is liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership or one of such beneficial owners.

This section was not re-enacted in the Dominion Act known as "The Criminal Code (1892)" and the Act in which it was contained was by that legislation repealed.

The acts however charged against H. P. McCraney and for which he was threatened with criminal prosecution, and for one of which he had actually been imprisoned, and was in prison at the time the covenant in question was executed, had been committed in 1892, the co-partnership having been dissolved in 1891. Then the second sub-section of section 981 of the Criminal Code expressly reserves the liability to criminal prosecutions and punishment for acts committed under the repealed statutes, a list of which is contained in a schedule to the Act which includes chapter 164.

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The Criminal Code itself did not by the express provision in its second section come into force until the 1st of July, 1893, so that whilst it was in force at the date of the prosecution and the execution of the impeached agreement, it was not in force when the alleged criminal acts were committed and is therefore entirely without relevance in the present case.

Of course it is out of the question to say that section 12 of the Imperial statute, if in force in British Columbia, could apply to a prosecution for an offence under section 58 of the Larceny Act (ch. 264 Revised Statutes of Canada.)

That the offences with which McCraney was charged, embezzling the money raised by a mortgage of partnership lands and other moneys obtained by drawing on the partnership bank account were criminal acts within section 58 of chapter 164 Revised Statutes of Canada, is too plain to require demonstration. Therefore an agreement to stifle a prosecution for these alleged acts must, in the absence of any statutory provision to the contrary, have been illegal as in contravention of the rule of the common law which declares illegal all agreements to suppress criminal prosecutions.

Returning to section 12 of the Imperial Act I must say that even if that section were in force and applied to a case like the present, it appears to me that the judgment of the late learned Chief Justice of British Columbia was wrong in the construction which he placed upon the 12th section, for it appears very plainly to me that the enactment whilst it did provide that the civil remedies of a *cestui que trust* who had been defrauded should not be interfered with by the statute, and that he should be at liberty to accept reparation and restoration of the trust fund and securities therefor, did not authorize an express agreement

to forbear criminal prosecution. Further, this section 12 would seem to be restricted to agreements or securities given by the defaulting trustee himself, and not to those given by third persons under no civil liability to the *cestui que trust* for the avowed purpose of rescuing him from criminal responsibility.

For the general law as to the illegality of agreements to stifle prosecutions I refer to *Jones* v. *Merionethshire Permanent Benefit Building Society* (1) and to *Flower* v. *Sadler* (2). In the first case there are important observations upon the difference between securities given by the wrong doer himself by way of reparation and those given by third parties under no civil obligation to the party wronged merely for the purpose of stifling the prosecution. I do not think that by section 12 it was intended to legalize securities of the last class.

The appeal must be dismissed and I see no reason why it should not be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Gordon E. Corbould.*

Solicitors for the respondents: *Davis, Marshall, McNeil & Abbott.*

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(1) [1892] 1 Ch. 173. (2) 10 Q. B. D. 572.