[HIGH COURT OF AUSTRALIA.]

SLATTERY . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *June* 26, 27, 28.

Griffith C.J., Barton and O'Connor JJ.

Larceny by bailee—Bailment—Receipt of money as agent—Failure to account for balance—Fraudulent appropriation by agent—Crimes Act (*N.S. W.*), (*No.* 40 *of* 1900), sec. 125.*

An agent having general authority under power of attorney to act for his principal, and, amongst other things, to collect rents from time to time, as they became due, with instructions to make certain payments on behalf of his principal, out of the moneys received, and account for the balance every three months, continued for a period of several years to receive the rents and to make payments from time to time on his principal's behalf, but neglected altogether to comply with the instructions as to accounting, and fraudulently appropriated to his own use the balances which should have been paid over to his principal.

Held, that he was not liable under sec. 125 of the *Crimes Act* 1900, to be convicted of larceny as a bailee of the sum of money representing the balance due from him to his principal.

R. v. *Brodie*, 15 N.S.W. L.R., 436; *R.* v. *Amora*, 18 N.S.W. L.R., 114; and *R.* v. *Pritchard*, (1901) 1 S.R, (N.S.W.), 364, distinguished.

Decision of the Supreme Court, *R.* v. *Slattery*, (1905) 5 S.R. (N.S.W.), 294; 22 N.S.W. W.N., 92, reversed.

*Sec. 125 of the *Crimes Act* (No. 40 of 1900), is as follows :—

"125. Whosoever being a bailee of any property fraudulently takes or converts the same, or any part thereof or any property into or for which it has been converted or exchanged, to his own use, or the use of any person other than the owner thereof, although he does not break bulk, or otherwise determine the bailment, shall be deemed to be guilty of larceny, and may be convicted thereof upon an indictment for simple larceny.

"The accused shall be taken to be a bailee within the meaning of this section, although he may not have contracted to restore, or deliver, the specific property received by him, or may only have contracted to restore, or deliver, the property specifically."

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APPEAL from a decision of the Supreme Court of New South Wales, on a special case stated by *Pring* J.

The following statement of the facts is taken from the special case, and the learned Judge's notes of the evidence, which were annexed to the special case.

The appellant was convicted before *Pring* J., at the Central Criminal Court, Sydney, on a charge of stealing £6,958 18s. 10d., the property of Mrs. Scanlon.

The appellant had been employed by her as her agent to collect the rents of certain house property belonging to her. Accounts between them appear to have been satisfactorily settled up to October, 1901. In April or May, 1902, Mrs. Scanlon left Sydney for Europe, and did not return until January, 1905. Before leaving she executed a power of attorney in favour of the appellant, by which she conferred on him very full authority to act for her, and amongst other things to collect her rents. In her evidence she stated that it was arranged between her and the appellant that he was to collect the rents, pay them into his own bank, and, after payment thereout of rates, taxes, and expenses of repair, pay the balance every three months to the credit of her account with the Commercial Bank. The appellant denied that any such arrangement was made. It was proved that during Mrs. Scanlon's absence the prisoner, at her request, paid some debts of hers, and also distributed money for her by way of charity.

After October, 1901, the appellant collected large sums of money on behalf of Mrs. Scanlon, which amounted in all to over £11,000, his books showing that, after all deductions for payments made on her behalf, there was due from him to her the sum of £6,958 18s. 10d. The amount alleged to have been stolen was this balance of the £11,000. No part of this sum was ever paid to Mrs. Scanlon, and there was ample evidence that the appellant had fraudulently appropriated it to his own use. The appellant kept two banking accounts, one at the head office of the Bank of New South Wales, his "business" account, the other at a branch of the same bank, his "private" account. He paid the rents received on behalf of his principal into his "business" account, and from time to time drew out moneys from this account and paid them into his "private" account. All these moneys he used for his own private

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purposes. Mrs. Scanlon said in her evidence that she had never authorized the appellant to use her money for his own purposes, or to retain money beyond three months, and that the arrangement, as she understood it, was that he should pay the moneys received on her behalf into a separate account, and account to her for the balance. Proceedings were taken in Equity by Mrs. Scanlon's solicitors, in her absence, against the appellant, who finally consented to a decree for the amount of the deficiency. A writ was issued against him for this amount and judgment signed. Afterwards the criminal proceedings were instituted. The learned Judge at the trial directed the jury that the appellant had in the first instance received the money rightfully, but that if he subsequently fraudulently appropriated it to his own use he was guilty of larceny. His Honor was asked to direct the jury that, even if the appellant had fraudulently appropriated the money to his own use, he was not guilty of larceny, inasmuch as he had in the first instance received it rightfully, but refused to so direct them. There were also other directions asked for but refused, which are not now material. The Full Court held that the learned Judge's direction was right, and that the appellant had been rightly convicted of larceny as a bailee under sec. 125 of the *Crimes Act* (N.S.W.) (No. 40 of 1900): *R.* v. *Slattery* (1).

Want K.C., and *Lamb*, (with them *Kelynack*), for the appellant. Before there can be a conviction under this section there must be a bailment in the first instance. The first words, "whosoever being a bailee" &c., must control the whole of the rest of the section. The last part must be read, not as an independent enactment, but as a proviso to the first. The Court below must have read it as if it wholly removed the necessity, which existed under the first part of the section, for a bailment to have been made originally. The proviso was inserted to meet the difficulty that had arisen in *R.* v. *Hassall* (2), in which it was held that a person was not guilty of larceny as a bailee of the article misappropriated, unless he was under an obligation to restore or deliver the specific thing entrusted to him. It merely declares the law as it was declared in

(1) (1905) 5 S.R. (N.S.W.), 294; 22 N.S.W. W.N., 92.
(2) 8 Cox Cr. Ca., 491; 30 L.J. M.C., 175.

that case by *Cockburn* C.J. In *R.* v. *Bunkall* (1); *R.* v. *De Banks* (2), and *R.* v. *Holloway (Governor), Ex parte George* (3), the property bailed had been converted, and the Court held that there was evidence that the thing into which it had been converted was the subject of a bailment.

If the latter part of the section is ambiguous it should be construed consistently with the earlier part, not in such a way as to contradict it. If the legislature intended to make such a change in the definition of bailment as is necessary to support a conviction in this case, it would have done so by clear words. Bailment is defined in *Pollock and Wright on Possession in the Common Law*, p. 163, as the delivery of a specific thing to some person under a promise by him to restore or deliver that thing, or the thing into which it has been converted, to the bailor or to someone for him. That definition is in accordance with that of *Sir William Jones*, as stated in *Wyatt Paine on Bailments*, p. 2, and in *R.* v. *McDonald* (4), and adopted by the Privy Council, in *South Australian Insurance Co.* v. *Randell* (5). There are three essentials in a bailment, (I.) the delivery of a specific thing by the bailor to the bailee; (II.) that the property in the thing does not pass from the bailor to the bailee; (III.) a promise on the part of the bailee to return or deliver a specific thing. The absence of any one essential makes a bailment impossible in law. In this case the subject-matter of the alleged larceny was money. Before a man can be found guilty of larceny of money as a bailee it is necessary to prove the identity of the money which is the subject of the charge with that which was the subject of the bailment: *R.* v. *Hennelly* (6). Again, a bailment must be distinguished from a sale. The delivery of wheat to a miller, in order to be ground into flour, under a promise to deliver to the customer flour the equivalent of the wheat, is not a bailment: *South Australian Insurance Co.* v. *Randell* (5). In this case there was no delivery of a specific article by the bailor or his agent to the bailee. Moreover, what was delivered by the tenants to the appellant, assuming it was a specific article or articles, became the

(1) 1 Le. & Ca., 371.
(2) 13 Q.B.D., 29.
(3) 66 L.J.Q.B., 830.
(4) 15 Q.B.D. 323, at p. 328.
(5) L.R. 3 P.C., 101.
(6) 14 V.L.R., 59.

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property of the appellant. His contract was to account to the prosecutrix every three months for the balance, after making certain payments. That would have been satisfied by the payment of any money, equal in value to the actual coins taken out of the appellant's own bank. The whole of the three essentials of bailment were therefore absent. Where a person, who is entrusted with moneys under instructions to act generally for his principal, fails to account, he is not liable to conviction for larceny. If he were treated as a bailee, he would be liable for not returning the actual coins received, even though he were prepared to pay the principal immediately with other moneys equivalent in value to the moneys delivered to him. Under the power of attorney in this case the appellant had the widest powers of an agent; the relationship, as regards the power of dealing with the moneys, was rather that of banker and customer. *R.* v. *Pritchard* (1), which was followed by *Pring* J., is distinguishable. In that case there was evidence of a bailment of the moneys appropriated. The same is true of *R.* v. *Brodie* (2) and *R.* v. *Amora* (3), both of which were cases of agents, who were held liable to be convicted of larceny as bailees under sec. 125. Those cases must all have proceeded upon that ground. They are not authorities for the contention that there can be a conviction for larceny under this section in the absence of bailment in the first instance.

Sly K.C. and *Hamilton*, for the respondent. Sec. 125 enlarges the definition of bailment at common law, and this case comes within its meaning. If there had only been the first limb of the section, then it would have been necessary to prove a bailment at common law. The words "or any property into or for which it has been converted" are not in the English Acts, but were inserted to get rid of any difficulty as to the conversion of the thing bailed, whether with or without the authority of the bailor. The second part of the sentence is useless if it leaves "bailee" with its common law meaning. The words "shall be taken to be a bailee" themselves point to an intention to extend the common law meaning. Otherwise the first part covers everything

(1) (1901) 1 S.R. (N.S.W.), 364. (2) 15 N.S.W. L.R., 436.
(3) 18 N.S.W. L.R., 114.

and requires no assistance from the proviso. The law was altered because of the decisions in *R.* v. *Hassall* (1) and *R.* v. *Rigbey* (2), in which the Court had held that there must be a contract to restore or deliver the specific coins. [See also *R.* v. *Garrett* (3) and *R.* v. *Horne* (4).]

[GRIFFITH C.J.—Is the result then that every debt becomes a bailment?]

It may be so. The debtor would not be liable under this section unless he fraudulently misappropriated the property. "Debt" is defined as included in "property" by this Act (sec. 4). These words of the proviso, if added to the definition of bailment by Sir William Jones, in the authorities referred to, supply a new definition for the purposes of this Act. That is the only reasonable construction of the proviso. The words are "bailee within the meaning of this section," not "at common law."

[GRIFFITH C.J.—But it is contended that this particular money was not Mrs. Scanlon's property.]

The rents are her property. The agent was to collect them, and pay them to her credit. Even if, under sec. 125, the identity of the property subject to the bailment must be preserved, there was evidence that he had no authority to mix those moneys with his own, and the jury must be taken to have found on that point against him. When he drew the money out of the Commercial Bank it became impressed with her instructions and was her property, and he misappropriated it. The specific coins were not to be returned to her, but their equivalent, the thing into which he converted them, at some stage or other became her property. This was not a general collection, but a collection of definite sums as rents. That is sufficient identification. The payment of the money into the bank, being in accordance with the instructions, did not affect the ultimate mandate, to pay the balance to the prosecutrix. The number of conversions or exchanges did not make any difference. He was not entitled to say that, because he withheld the money and did not carry out her instructions, it ceased to be his principal's property.

(1) 8 Cox Cr. Ca., 491; 30 L.J. M.C., 175.
(2) 2 N.S.W. S.C.R., 176.
(3) 2 F. & F., 14.
(4) 2 N.S.W. L.R., 187.

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[GRIFFITH C.J.—Larceny is of a particular thing. There are two meanings of "property," one beneficial ownership, and the other the technical one lying at the root of the law as to larceny. It is the latter to which we must look now.]

The possession was in the appellant, but the property, in the strict sense, modified by the new definition in the section, was in Mrs. Scanlon. If not, the case *R.* v. *De Banks* (1), was wrongly decided. The facts in the present case are similar.

[GRIFFITH C.J.—If the money had been sovereigns, could a thief, who took them from the agent, have been charged with stealing the property of the principal ?]

Not at common law, unless there was a contract to restore or deliver the specific coins, but under this section that is no longer necessary. Assuming, but not admitting, that there was only an obligation to account for the balance, that means that a sum equivalent to the balance was to be paid. The last part of the section must be construed as if it read : "The accused shall be deemed a bailee of the substituted article when he has contracted only to restore or deliver any equivalent of the property received, equally as in the case where he has contracted to restore or deliver the specific property received." The property is thus always in the bailor. The offence is just as complete if only a part of the property bailed is fraudulently converted. The fact that the contract would be performed by the rendering of equivalent moneys does not take the case out of the section, though it would have excluded the case from the head of larceny as a bailee under the law before 1883, the date of the *Criminal Law Amendment Act*, 46 Vict. No. 17. The effect of the section, though the provision is not scientifically drawn, is to take away the third requirement of bailment, that the specific thing the subject-matter of the transaction is to be restored or delivered. By logical deduction from that provision it is no longer necessary that the article into which the original article has been converted, nor the original article itself, should remain the property of the bailor, in the common law acceptation of the term in relation to larceny. A thing which may be returned either itself or in the form of an equivalent cannot any longer be the specific property of the bailor in the

(1) 13 Q.B.D., 29.

common law sense. The common law incidents depending upon that formerly distinctive feature of bailment, viz., that the property to be restored or delivered must be a specific thing, no longer attach to the term bailment. In this case the specific things bailed were coins, cheques and other things received from the tenants. The contract as to their disposal by Slattery satisfies in every requirement the definition of bailment under the section.

The receipt of rents may be a form of bailment at common law: *Coggs* v. *Bernard* (1).

In 1871 a Royal Commission sat to consider the state of the law in New South Wales, and their finding states that the evil to be remedied by legislation was that under the existing law there was no offence in cases where the thing bailed was not to be returned. That is a matter which this Court may consider as an indication of the intention of the legislature in the enactments dealing with that particular subject: *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks* (2).

Knowing that there was this evil, and that the legislature proposed to remedy it, and that there are no other sections in the Act which would give a remedy in the particular circumstances of this case, the section should, if capable of it, receive that construction which will provide a remedy. This is a general section imposing a lighter punishment designed to cover cases that are not specially provided for in the following sections relating to frauds by agents, which impose severe punishments for certain specified offences of a more serious nature. The mere fact of possible overlapping is no argument against a particular construction. It is a common thing in our law for special enactments and general provisions to overlap. The history of the legislation on the subject supports the argument for the respondent. All the Statutes up to 1881 left this class of case unprovided for. [They referred to the Acts 14 Vict. No. 6, and 22 Vict. No. 9.] There was a series of cases ending in *R.* v. *Horne* (3), which so decided. Then in 1883 the Act 46 Vict. No. 17, by sec. 71 dealt with this matter, adding to the former sections, which were

(1) 2 Ld. Raym., 909, at p. 918. (2) (1898) A.C., 571.
(3) 2 N.S.W. L.R., 187.

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in effect the same as in the English Acts, the words already referred to. Since that date the Supreme Court in *R.* v. *Brodie* (1), and in *R.* v. *Amora* (2), has decided that persons convicted under circumstances similar to those of the present case were rightly convicted, being bailees within the meaning of sec. 71 of 46 Vict. No. 17. In 1900 the legislature consolidated the criminal Statutes, and re-enacted sec. 71 of 46 Vict. No. 17 in identical terms in sec. 125 of the *Crimes Act* 1900. Since that the Supreme Court in *R.* v. *Pritchard* (3) has followed its previous decisions, and in this case has interpreted those decisions as being founded upon the extended definition of bailment now contended for. This Court should therefore follow those cases.

They referred also to *Pollock and Wright on Possession in the Common Law*, pp. 161, 163; and *Stephens* v. *Badcock* (4).

Want K.C., in reply, referred to *Orton* v. *Butler* (5).

The judgment of the Court was delivered by:—

GRIFFITH C.J. [His Honor having shortly referred to the facts as already set out, continued:]

The question is not whether the appellant was guilty of fraudulent misappropriation, but whether he was properly convicted of larceny. That is a dry technical question, and in order to answer it we must deal with the Statutes as we find them.

It is clear that at common law the prisoner could not have been charged with larceny. Larceny under the English law was subject to many peculiar rules. It was necessary first of all that the charge should have reference to some specific thing. It must also be alleged and proved that the thing said to have been stolen, whether it was a sum of money, coin, or something representing money, or anything else, was the property of the person prosecuting. It was necessary also to prove what was called a taking and carrying away, and the taking must be from the prosecutor or from someone whose possession was the possession of the prosecutor. Any defect in this proof was fatal to the charge. One result of these rules was that a person entrusted with property to hold for

(1) 15 N.S.W. L.R., 436.
(2) 18 N.S.W. L.R., 114.
(3) (1901) 1 S.R. (N.S.W.), 364.
(4) 3 B. & Ad., 354.
(5) 5 B. & Ald., 652.

another, who converted that property to his own use, could not be charged with larceny, because he did not wrongfully take it away, having had it lawfully in his possession. It was held by the Star Chamber in the 15th century that if a bailee broke bulk, as it was said, and took away part of the goods fraudulently, he might be convicted, because by doing so he took that part of the goods out of the possession of the owner, and so had been guilty of a felonious taking and carrying away. Up to 1857 the law remained that, as a general rule, a bailee of goods could not be convicted of larceny of the thing bailed. Shortly before that, in New South Wales, a law dealing with what was called larceny by carriers had been passed. But in England the general rule was, as stated by *Sir James Stephen* in his *General View of the Criminal Law of England*, pp. 51, 52, 53, that fraudulent misappropriation of property was not a criminal offence if the possession of it was originally honestly obtained. That is still the law in England and New South Wales, except so far as it has been altered by Statute. The exceptions made in England, which were made here at a later period, were as follows: First, servants embezzling their masters' money were excepted in 1799 from the protection of this rule; secondly, in 1812, bankers, partners, merchants, attorneys and other agents misappropriating money entrusted to them were excepted; thirdly, in 1827, factors and others fraudulently pledging goods; and in 1857, trustees under express trusts fraudulently disposing of trust funds; and in the same year bailees fraudulently misappropriating goods bailed to them were made liable for larceny.

Now, the Statute of 1857 (20 & 21 Vict. c. 54), which was referred to by *Owen* J. in his judgment, was entitled "An Act for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property."

The fourth section provided that any person who, being a bailee of property, should fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he should not break bulk or otherwise determine the bailment, should be guilty of larceny. The same Act contained provisions relating to trustees, bankers and other fiduciary agents. The term "property" in that Act did not include money or valuable

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securities. The Act 22 Vict. No. 9, which was passed in New South Wales about the same time, contained practically the same provisions. Then in one of the Criminal Law Consolidation Acts in England, 24 & 25 Vict. c. 96, called the *Larceny Act*, that section was re-enacted in these words: "Whosoever being a bailee of any chattels money or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted upon an indictment for larceny." That is the history of the legislation in England. Under those Statutes, applying the old law as far as it had not been altered, it was necessary to prove that the property fraudulently converted was the property of the bailor. That was an essential condition. If that proof was wanting there could be no conviction. It was held in *R.* v. *Hassall* (1) that there could not be a conviction of a man who had misappropriated part of the funds entrusted to him. Although he had received them for a specific purpose, he could not be convicted of larceny as a bailee of any specific sum of the money received, because he was not a bailee of that specific sum. It becomes necessary, therefore, in order to construe the section now before us, to consider what a bailee is.

A definition was read during the argument from *Pollock and Wright* on *Possession in the Common Law*, which we are prepared to accept as a correct definition. It occurs at page 163, and is as follows: "Upon the whole, it is conceived that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person."

Mr. Hamilton in his very able argument admitted that bailment implies three things: first the delivery of some specific article by one person to another; second, that the thing delivered should remain the general property of the bailor; and third, that it,

(1) 8 Cox Cr. Ca., 491; 30 L.J. M.C., 175.

or some specific thing into which it is converted under the terms of the bailment, is to be returned to the bailor or delivered to some person for him. That is substantially correct. There are then three elements—a specific thing is delivered, the thing delivered remains the property of the bailor, or at least does not become the property of the bailee, and the thing itself or something for which it has been exchanged under the contract of bailment is to be restored or delivered. If the thing is applied under the instructions given by the bailor, as for instance, if an animal is entrusted to another to be sold and the proceeds applied in a particular way, the question whether the proceeds are or are not at common law the subject of a bailment, is a question of evidence, as appears from the case of *R.* v. *De Banks* (1). The evidence might show that under the terms of the contract, the thing into which the original article was to be converted was to become the property of the bailor or the contrary. If the contract showed that the specific thing was to become the property of the bailor then there was a bailment of that thing, otherwise not. That being the common law, the decision in the last case cited to us, *R.* v. *Holloway* (*Governor*), *Ex parte George* (2), was to the same effect. There securities had been delivered by the bailor to another for the purpose of raising a loan upon them. The question was whether, under the terms of the original delivery, the specific money which the bailee was to receive by way of loan, was to remain the property of the bailor or become the property of the bailee. That was under the common law. It was conceded here that under the common law this prosecution could not be maintained for the deficiency resulting from two or three years' transactions by the prisoner as agent for Mrs. Scanlon, because in such a case there was not at common law a bailment. It was not consistent with the terms of his employment as agent, as stated in her evidence, that he was to treat all the sovereigns, cheques, and bank notes which he received as her specific property. If, for instance, this property had been picked out of his pocket while he was carrying it about, the thief could not have been charged with stealing Mrs. Scanlon's money. It is clear from her instructions and the course of dealing between the parties that the property was to be dealt

(1) 13 Q.B.D., 29.

(2) 66 L.J.Q.B., 830.

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with as a mixed fund, out of which he was to make payments on her behalf, and account to her for the balance. At common law that was not a bailment, because the money was received under such circumstances that the specific money received was not to be handed over to her.

But it is said that the case is different under the Statute law of New South Wales. The amendment of the law relied upon was first introduced in New South Wales in the *Criminal Law Amendment Act* of 1883. Sec. 71 of that Act provides that "Whosoever being a bailee of any property fraudulently takes or converts the same or any part thereof—or any property into or for which it has been converted or exchanged—to his own use or the use of any person other than the owner thereof—although he shall not break bulk or otherwise determine the bailment—shall be guilty of larceny and may be convicted thereof upon an indictment for larceny." Now, stopping there, a change was introduced into the law by the use of the words "or any property into or for which it has been converted or exchanged." That is to say that, if a bailee, according to the definition I have read, having received property, whether it was to be returned in specie or to be disposed of under the instructions of the bailor, converted it into something else, and then fraudulently converted that substituted property to his own use, or the use of any other person than the owner, he should be guilty of larceny. That clearly made this change in the law, that, whether the conversion of the article bailed was authorized by the bailor or not, the bailee was equally guilty of larceny if he made away with the substituted property. But these words, as to which the difficulty arises, were added to the section: "And the accused shall be taken to be a bailee within this section although he may not have contracted to restore or deliver the specific property received by him or may only have contracted to restore or deliver the property specifically." What we have to do is to construe these words. It is said that they have entirely altered the law of bailment so far as regards larceny. The first observation that suggests itself is that there is nothing to show an intention to alter the law of bailment in general. The legislature merely provides that certain cases shall fall within the section which

would not otherwise have done so. They altered the law in some respects. But in what? It must be borne in mind that from 1857, when the first English Statute was passed, and thenceforward, the books had spoken of a new offence, that of larceny as a bailee. In truth it was only a particular form of larceny, but that was the term commonly used. The old rule was that a bailee could not be guilty of larceny. This Statute said that he might be, and so altered the law. We must consider the legislature to have had that in their mind. And in construing these words we should, if possible, give them some sensible meaning as altering the law, and not as being futile. The first point arises on the words: "The accused shall be taken to be a bailee within this section." Of what is he to be taken to be a bailee? It must be of something. You cannot have a bailee in the abstract, any more than you can have, for instance, a husband in the abstract. There must be some property of which he is a bailee. It must mean therefore one of two things, either a bailee of the specific property received by him from the bailor, or of the property which was substituted for it. Let us see which of these constructions will give a sensible meaning to the words. Take the first. There the provision is that the accused shall be taken to be a bailee of the property received by him, although he may not have contracted to restore or deliver it, or may only have contracted to restore or deliver it. But both these conditions may be absolutely irrelevant to the question whether he was a bailee or not. A man is not necessarily any the less a bailee because he has not contracted to restore or deliver the specific property received by him. If the terms of the bailment were that he should sell the articles he is no less a bailee, and if he contracted to give it back to the bailor, and converted it, he would be none the less a bailee. So that on that construction the legislature have declared that he is a bailee notwithstanding the existence of circumstances which have nothing whatever to do with the case. On that construction therefore the words have no sensible meaning. Such a construction should not be resorted to unless we can find no other one which will give a sensible meaning to the words. Let us turn now to the second possible construction; the accused shall be taken to be a bailee

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of the substituted property within the meaning of this section, (and bear in mind that the legislature had in its mind that they were dealing with bailees of goods, and larceny by such persons of those goods), although he may not have contracted to restore or deliver the specific property, that is, the original property received by him.

Now that would make a material change in the law, because under the common law, if the bailee had not contracted to restore or deliver the specific thing received by him, it might be that he would not be a bailee of the goods substituted for them, for the reasons already pointed out. The property in those goods could not then have been laid in the bailor, and under these circumstances the words in the first part of the section would be inapplicable, because the offence is converting property "to the use of any person other than the owner thereof;" and, as there would in that case be no bailment of the particular goods in question, and consequently no bailee, the person who converted them would be the only owner known to the law. If the bailment was on the terms that he was to give the property back to the bailor, and he did not do so, but wrongfully converted it to or exchanged it for something else, he might not at common law be a bailee of the property put in its place. Hence arose a difficulty in laying the property in the thing substituted. That difficulty is removed by the second construction of the words of the section, and a full meaning is thereby given to them. In that sense it relates only to the ownership of the substituted article, and in that respect alters the third condition or element referred to by Mr. Lamb and Mr. Hamilton, that the thing, or some specific thing into which the thing bailed has been converted or exchanged under the terms of the bailment, is to be returned to or applied under the directions of the bailor. It becomes no longer material to consider whether the thing into or for which the original article was converted or exchanged was so converted or exchanged under the terms of the contract or not. But in all other respects the Statute leaves the law unaltered. An essential condition in all cases is that the thing first delivered remained the general property of the bailor. So that really the section has no application to such a case as the present.

The question still remains to be considered, whether, where the property is received under the circumstances disclosed in this case, it remains the property of the bailor or becomes the property of the agent. I will deal with that presently.

Reliance was placed by the respondent upon several cases decided by the Supreme Court of New South Wales, some before the *Crimes Act* 1900, under sec. 125 of which this charge is laid, which takes the place of sec. 71 of the Act 46 Vict. No. 17. The first was *R.* v. *Brodie* (1), and the second *R.* v. *Amora* (2). The conclusions arrived at by the learned Judges in those cases are entirely consistent with all that I have stated. They treated the terms of this part of the section as relating to the substituted property only. They pointed out that under the old law the property in the substituted article would not be in the bailor, and that the effect of this section was that the substituted thing became the property of the bailor, and that therefore the bailee could be guilty of larceny of that thing. A careful consideration of the judgments shows that that was the reason of the decisions. And, if I may say so, I think that they were right. The foundation of both decisions was that there was an original bailment. Whether there was an original bailment in those cases may be open to question, but we are not now called upon to inquire into or criticise the reasons for which in those cases the Court thought that there had been a bailment in the first instance. But, if they were right in thinking so, then the consequence that the prisoners were properly convicted necessarily followed upon their construction of these words of the section. As regards that question each case must stand upon its own merits.

Now, can it be said in this case that there was an original bailment? Mr. Want referred us to a case in which it was held that you cannot bring an action for trover for money, because there is in the case of money no obligation to restore or deliver the specific coins. There must be a bailment of some specific money, cheques, or sovereigns in a bag, or indeed out of a bag. But under ordinary circumstances when money is given by one person to another with instructions to deal with it in a specific way, that is not a case of bailment, but of debt. That dis-

(1) 15 N.S.W. L.R., 436. (2) 18 N.S.W. L.R., 114.

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tinction was clearly pointed out by the Privy Council in the case of *South Australian Insurance Co.* v. *Randell* (1). "A bailment on trust implies that there is reserved to the bailor the right to claim a re-delivery of the property deposited in bailment," but, "whenever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for the return of the identical subject-matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment." So, if there is a receipt of money under a contract, not to hand over the money received, but to account for it by paying a balance that may remain after carrying out the instructions of the principal with regard to the money, that creates a debt and not a bailment. That principle appears to be perfectly clear. It follows that in this case the relationship between Mrs. Scanlon and the prisoner was that of principal and agent, or creditor and debtor, not bailor and bailee. That is at common law. The Statute does not, in our opinion, affect the case in any way. The case of *R.* v. *Pritchard* (2), decided in 1901, was also founded upon the assumption made by the Court that there was an original bailment. It is not necessary for us to say whether we think that there was such a bailment or not. The learned Judges who decided it thought that there was, and that the case was covered by the case of *R.* v. *Amora* (3). It was, if there was an original bailment, but in the absence of a bailment the whole foundation of the structure is gone.

In the present case the learned Judges thought that the rule laid down in the earlier cases to which I have referred, applied. We cannot see that it has any application, because the question here is whether there was an original bailment or not. If there was not, the whole basis is gone.

There is another consideration with respect to the construction of sec. 125, which would be very weighty, if the reasons already given, viz., that the construction which we adopt is the only one which gives an intelligible meaning to the words, or makes any sensible alteration in the law, were not conclusive. Bearing in mind that at common law a person fraudulently appropriating

(1) L.R. 3 P.C., 101, at p. 108. (2) (1901) 1 S.R. (N.S.W.), 364.
(3) 18 N.S.W. L.R., 114.

money entrusted to him was not guilty of a criminal offence, and that he is only guilty of an offence when his acts are made punishable by some Statute, we start with the proposition that fraudulent appropriation of property is not an offence. We find that in this Statute the legislature has adopted from the *Criminal Law Amendment Act*, which had itself adopted them from the English Act of 1861, the *Larceny Act*, which re-enacted the Act of 1857, a series of careful provisions dealing with fraudulent appropriation of moneys by persons holding fiduciary positions. These provisions begin at sec. 165, which deals with the case of an agent misappropriating money, who is made liable only when there are instructions in writing. Sec. 166 deals with the case of an agent entrusted with any chattel or valuable security for safe custody, who misappropriates it in any manner. Sec. 168 deals with the case of an agent entrusted with property for safe custody who fraudulently sells or in any other way misappropriates it. Sec. 169 makes it an offence for a person entrusted with a power of attorney for sale or transfer of property, to fraudulently sell or misappropriate the same. Sec. 170 deals with the case of an agent fraudulently pledging or obtaining advances on property entrusted to him. Sec. 172 deals with trustees of property fraudulently misappropriating it to their own use, and sec. 173 with directors who fraudulently apply to their own use the property of the company. Sec. 177 contains a safeguard as to all these sections, that no person shall be convicted of any offence under the last preceding twelve sections in respect of any act or omission by him, if before being charged with the offence, he first disclosed the act or omission on oath, under compulsory process or compulsory examination in bankruptcy. So that, when a prosecution is instituted under any of these sections, it is a complete defence to show that the accused had disclosed the fact on oath. Whether that section would apply in this case is immaterial.

We find then that the legislature carefully considered the whole question of fraudulent misappropriation by agents and trustees, and made specific provision with regard to it in different cases. If sec. 125 is construed so as to make every agent who misappropriates money guilty of larceny, all these elaborate provisions would have been futile. According then to the ordinary rule,

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that if possible a Statute is to be construed so as to give the same effect to all its provisions, sec. 125 should be construed as relating to a different subject-matter.

Nobody can have any sympathy with fraudulent misappropriation. The law in New South Wales may be defective in this respect. It may be that the law in other places is more advanced, and that there are *lacunæ* or gaps in the law of New South Wales. But if there are, it is for the legislature, not for the Courts, to fill them up. The contention of the Crown amounts to this, that any fiduciary agent who misappropriates trust funds is liable to be charged with larceny as a bailee. There is no such law in the Statute book as we interpret it.

For these reasons, while not in any way differing from the construction placed upon this Statute by the Supreme Court in *R.* v. *Amora* (1), and *R.* v. *Pritchard* (2), as we understand those cases, we think that the case does not fall within the principle of those decisions, nor within sec. 125, and that the conviction must be quashed.

Want K.C. asked to be allowed costs, and referred to *Macleod* v. *Attorney-General for N.S.W.* (3).

GRIFFITH, C.J. In criminal cases costs are not usually given to either side. There is also a very good rule that the Crown does not pay costs in such cases. Indeed, unless there is some Statute giving us the power, we do not think that we can grant them against the Crown. Apart from that, we do not think that you ought to ask for costs.

Appeal allowed. Order of Supreme Court affirming conviction discharged. Conviction quashed.

Solicitors for the appellant, *Westgarth, Nathan & Co.*

Solicitor for the respondent, *The Crown Solicitor of New South Wales.*

C. A. W.

(1) 18 N.S.W. L.R., 114. (2) (1901) 1 S.R. (N.S.W.), 364.
(3) (1891) A.C., 455, at p. 489.