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do not see anything in the memorandum or articles of this company determining that the shares shall be paid for otherwise than in cash; and I do not find any evidence that there was a contract duly filed at or before the issue of such shares. Even if there was such a contract registered, I do not at all wish to be taken at present as accepting the position that that would have been sufficient to enable those who took those shares to treat them as paid up to 6/- if they were not in fact so paid up in cash or in kind—"in meal or in malt." The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor, for the appellants, *L. W. Marsland.*
Solicitor, for the respondents, *H. C. Keall.*

N. G. P.

[HIGH COURT OF AUSTRALIA.]

WILLIAM HARDGRAVE . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

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SYDNEY, *Aug.* 8.

Griffith C.J. and O'Connor J.

Criminal law—Offence against laws of Commonwealth—Misappropriation of public moneys by public accountant—Evidence of deficiency in State moneys—Admissibility to negative plea of accident—Audit Act (*No.* 4 *of* 1901), *sec.* 64, *sub-sec.* (1) (*a*).*

The prisoner, a clerk in the post office, having failed to account for moneys received by him in the course of his duty as a servant of the Commonwealth, was charged under sec. 64, sub-sec. (1) (*a*), of the *Audit Act* 1901 with misappropriation of public moneys. At the trial evidence was admitted that a few months before the discovery of the deficiency the prisoner had received moneys on behalf of the State Savings Bank, for which he failed to account. It was his

* Sec. 64, sub-sec. (1) (*a*) of the *Commonwealth Audit Act* 1901 is as follows:—"Any public accountant or person subject to the provisions of this Act who—(*a*) misapplies or improperly disposes of or makes use of otherwise than is provided by this Act or the regulations any public moneys or stores which come into his possession or control; . . . shall be deemed to have fraudulently converted such moneys or stores to his own private use and shall be guilty of an indictable offence, and shall be liable to imprisonment with or without hard labour for any period not exceeding five years."

duty to render an account of his dealings in connection with those latter moneys to the State.

Held, that the evidence was properly admitted, the earlier transactions being sufficiently similar to and connected with the defalcations in respect of which the prisoner was charged, to render evidence of them relevant to the defence of mistake or accident that might have been set up.

Per Griffith C.J.—There is nothing in the words of sec. 64 of the *Audit Act* 1901 to exclude the general rule that an accused person is not criminally responsible for default arising through accident or honest mistake.

Per O'Connor J.—Whether, in order to establish an offence under that section, a *mens rea* need be shown or not, it is at any rate necessary to prove an intentional act, and the evidence was admissible for that purpose, as it tended to show system on the part of the prisoner, and that the misappropriation charged, whether fraudulent or not, was intentional.

Conviction affirmed.

CROWN case reserved.

The prisoner was tried before *Gibson* D.C.J., at the Bourke Quarter Sessions on an indictment under sec. 64, sub-sec. (1) (*a*) of the Commonwealth *Audit Act* 1901 for that he being a public accountant within the meaning of that sub-section did misapply and improperly make use of certain money, to wit £28 15s. 5d., the property of His Majesty, and did then fraudulently convert the said money. It appeared from the evidence given at the trial that the prisoner was a counter clerk in the post office at Bourke, his duties being to attend to the wants of the public at the counter, to issue postal notes, stamps, and money orders, to deliver letters and duty stamps, to receive State Savings Bank deposits and to pay out all demands. He received cash from the office to enable him to make payments when necessary.

The Crown Prosecutor tendered evidence that not very long before the discovery of the alleged deficiency in the Post Office moneys, the prisoner made an entry in the pass book of a Savings Bank depositor, showing a payment in of £39 received by him, but there was no entry of the item in the Post Office books, and the amount had never been paid by the prisoner into the Savings Bank.

The prisoner's advocate objected to the admission of the evidence on the ground that the Savings Bank was a State

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department, and that the fact of a deficiency in Savings Bank moneys was not admissible to show that the deficiency in Commonwealth moneys in respect of which he was indicted was the result of a mistake. The evidence was admitted. Evidence was given by the postmaster that the inspector and he, on examination of the prisoner's cash and reserve of stamps, discovered a deficiency in stamps to the amount alleged in the indictment, and that the prisoner, when asked for an explanation of this deficiency, said that he was unable to account for it.

The prisoner was convicted, and on the application of the prisoner's advocate the Judge stated a case for the High Court, the question of law reserved for their consideration being whether the evidence as to the £39 received by the prisoner on behalf of the State Savings Bank, and not accounted for, should have been rejected.

Sheridan (*Mitchell* with him), for the prisoner. Evidence of the class in question is only admissible if it tends to show system: *Reg.* v. *Oddy* (1). It must therefore be confined to transactions of the same kind as those in respect of which the alleged offence was committed. The deficiency charged in the indictment was shown to have arisen, not in respect of the receipt of money from customers, but in respect of specific items of stamps, notes, &c. received from the post office. The moneys received for the State Savings Bank were not public moneys within the meaning of sec. 64 of the *Audit Act* 1901; they belonged to the State: *Government Savings Bank Act* 1902.

[GRIFFITH C.J.—The real principle is laid down in *Makin* v. *Attorney-General for New South Wales* (2). Such evidence is admissible if it tends to show that the Act alleged was not accidental, or to rebut a defence otherwise open. He referred also to *Reg.* v. *Richardson* (3); *Reg.* v. *Dodwell* (4).]

But it is not necessary to show a *mens rea* in order to prove an offence under sec. 64, and therefore it is immaterial to negative accident or mistake. [He referred to Queensland Act, 38 Vict. No. 12, sec. 49; and *Reg.* v. *Highfield* (5).]

(1) 2 Den., 264; 20 L.J.M.C., 198.
(2) (1894) A.C., 57.
(3) 2 F. & F., 343.
(4) 5 Q.S.C.R., 171.
(5) (1880) Queensland Digest, col. 65.

[GRIFFITH C.J.—The improper admission of evidence is not a ground for setting aside the conviction if the evidence is not material: *Judiciary Act* 1903, sec. 75.]

Misapplying in sec. 64 means merely a failure to account. The offence is complete if the applying of the moneys in any other than the proper way is an intentional or conscious act, irrespective of criminality. [He referred to *Piper* v. *Bank of New South Wales* (1); *Reg.* v. *Bishop* (2); *Reg.* v. *Prince* (3); *Reg.* v. *Tolson* (4).]

If an act is made unlawful by Statute, a man who does the act intentionally knows that he is doing what is unlawful.

[GRIFFITH C.J. referred to *Sherras* v. *De Rutzen* (5); and the definition of criminal intention in the Queensland Criminal Code 1899, secs. 23, 24.]

Bevan, for the Crown. The purpose of sec. 64 was merely to facilitate proof of fraudulent conversion. It throws the burden of proof on the accused, but it does not do away with the necessity of a *mens rea*. [He referred to *Reg.* v. *Tolson* (4).] If the legislature had intended to declare that accident or mistake should be no defence they would have done so by clear words. There is nothing in the scope and purpose of the Act or in the nature of the evils to be prevented by it which would suggest that these defences should not be open, or that the ordinary common law rule should be excluded, when a man is charged with an offence of this kind. At common law collateral evidence is always admissible if it tends to show knowledge, intention, good or bad faith on the part of the accused, even though the matters to which the evidence refers are not apparently connected with the transaction in question: *Taylor on Evidence*, 9th ed., sec. 338, p. 241; or if it tends to rebut some defence that has been suggested: *Reg.* v. *Hiddilston* (6); *Reg.* v. *Bond* (7); *Makin* v. *Attorney-General for New South Wales* (8). It is not necessary that the collateral transactions should be substantially part of the main transaction, or even connected with it, provided

(1) 17 N.S.W.L.R., 54; 18 N.S.W. L.R., 224.
(2) 5 Q.B.D., 259.
(3) L.R. 2 C.C.R., 154.
(4) 23 Q.B.D., 168.
(5) (1895) 1 Q.B., 918.
(6) 10 N.S.W. L.R., 280.
(7) 28 T.L.R., 633.
(8) (1894) A.C., 57.

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they are similar to it, and throw light on the state of mind of the accused: *Reg.* v. *Gray* (1); *Reg.* v. *Francis* (2); *Reg.* v. *Oddy* (3); *Reg.* v. *Richardson* (4). In this case the supposed mistakes are similar. The prisoner received moneys from customers and failed to account in each case. The employment was the same; at least there is no evidence the prisoner was engaged to perform his various duties by any other person than the Postmaster-General. The Savings Bank moneys were received on account of the Commonwealth, and the Commonwealth had to account for them to the State. The prisoner might have been prosecuted for having misappropriated the £39 Savings Bank moneys as public moneys of the Commonwealth. It was for the Judge to decide whether the Savings Bank transaction was sufficiently recent to be capable of throwing any light on the prisoner's mind at the time of the alleged offence, and as it was not unreasonably distant in point of time, the evidence was rightly allowed to go to the jury for them to give to it what weight they thought fit.

Sheridan, in reply, referred to *Rex* v. *Siffer* (5).

GRIFFITH C.J. (His Honor referred briefly to the evidence and read sec. 64 of the *Audit Act* 1901, and continued): It does not appear very distinctly whether the prisoner, in receiving the Savings Bank deposits, was acting in the capacity of an officer of the State or of an officer of the Commonwealth, the Commonwealth having undertaken to perform the routine duties with respect to the Savings Bank for the State. But in the view I take of the case, I do not think it is very material. Two objections were taken by counsel for the prisoner to the admissibility of evidence that the prisoner was not only deficient in the Post Office funds, but also in the State Savings Bank money. One objection was that, as the misappropriation of moneys belonging to the State was an entirely different offence, evidence of it could not be received on this particular charge. In answer to that the Crown contended that the evidence was admissible to negative

(1) 4 F. & F., 1102.
(2) L.R. 2 C.C.R., 128.
(3) 2 Den., 264; 20 L.J.M.C., 198.
(4) 2 F. & F., 343.
(5) (1904) 4 S.R. (N.S.W.), 320.

the defence, which might have been set up, of accident or negligence, that is, that the misapplication of the money, which was sufficiently proved, was an accident. The second ground of objection taken by counsel for the prisoner was that the defence of accident or negligence was not admissible in prosecutions under this section, and that therefore any evidence to negative such a defence must be irrelevant. Respecting the contention that it is not necessary to show anything more than the mere fact that there is a deficiency, I do not think that that is supported by the language of the section. The general rule is that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident. It is also a general rule that a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist. I do not think the first rule has ever been excluded by any Statute. I can see no foundation for the suggestion that a man who by accident places a sum of money belonging to the Commonwealth in a wrong drawer, honestly believing that it belongs to himself or to the State, is criminally liable. I think it would be a good defence to show that, although there was a deficiency in the Commonwealth accounts, the money lacking was placed to the credit of another account quite by accident, or with a *bonâ fide* intention, and I think that evidence bearing upon that point would have been admissible. I will now refer to the authorities on the question whether evidence to negative such a defence is admissible. In delivering the opinion of the Judicial Committee of the Privy Council, in *Makin* v. *Attorney-General for New South Wales* (1) Lord *Herschell* L.C., said :—" It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the

(1) (1894) A.C. 57, at p. 65.

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jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." In *Reg.* v. *Francis* (1), the rule was stated by Lord *Coleridge* C.J. in substantially the same words:—"It seems clear upon principle," he said, "that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the gravity of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority."

In the present case the prisoner has collected money for the State and the Commonwealth. It is immaterial whether he is to be regarded as a Commonwealth officer, or a State officer, or both. In either view he received money for different accounts, and obviously his answer to a charge of misappropriating the £28 15s. 5d. might be: "Oh! yes. I paid that by mistake into the State account." It was therefore relevant to inquire whether that was so, and to show by other evidence that there was a deficiency in his State account as well. The evidence was tendered for that purpose, and was in my judgment admissible for the purpose of rebutting this defence which might have been set up.

I am of opinion, therefore, that the evidence was properly admitted, and the conviction should be affirmed.

O'CONNOR J. I agree with my learned brother, the Chief Justice, and do not think it necessary to add anything except in regard to Mr. Sheridan's contention that it is immaterial, in order

(1) L.R. 2 C.C.R., 128, at p. 131.

to constitute an offence under sec. 64, whether there is or is not any fraudulent intent. (His Honor then read sec. 64 and continued): It is not necessary to decide whether or not the Crown was bound to prove fraudulent intent; or whether, as Mr. Bevan has contended, the effect of the section in its present form is merely to throw the onus of disproving fraud on the accused, not to relieve the Crown of the necessity of proving fraud. However that may be, it is clear that the offence charged involves the proof of something actively done by the accused. He must have either misapplied or improperly disposed of or made use of the moneys mentioned. All these acts imply an intention. Before there can be an offence there must be the intention to do something which amounts to a misappropriation or an improper disposal. A good defence to that charge would be that the misapplication was not intentional, that the mind of the accused person did not go with the acts charged. In order to meet that defence it is clear to my mind that, on the principle laid down in *Makin* v. *Attorney-General for New South Wales* (1) evidence may be given to show that there were other instances in which a deficiency has occurred in the moneys of the accused, not through mistake, but by misapplication—in other words, by embezzlement.

It is said, however, that on the evidence this transaction as to the £39 is, first of all, too remote; and in the second place, is not connected with the transaction in respect of which the accused is charged sufficiently to enable the jury to draw any inference from it. It appears to me that that criticism is not borne out by the evidence. The greatest period that elapsed between the embezzlement, if there was one, and the discovery of the deficiency in the moneys which is the subject of the present charge was less than three months. I think that under the circumstances it would not be unreasonable for the jury to draw a conclusion from the occurrence of this embezzlement within that period that the deficiency charged in this case was not a mere mistake. Between the two instances I think it is clear that there is a connection. The duty of the accused was to collect certain moneys on behalf of the Commonwealth.

(1) (1894) A.C., 57.

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Some of these moneys, respecting which he has been charged with misappropriation, clearly belonged to the Commonwealth, and were used and applied in the Commonwealth service. The other moneys, which he collected on behalf of the Commonwealth, were apparently to be paid into the State account, and it was part of his duty to send a statement of those moneys into the Government Savings Bank. But in both cases he collected the money under the service of the Commonwealth. It was public money under the *Audit Act* 1901. The Crown sought to meet the defence of accident in dealing with one of these sets of public moneys by giving evidence that there was misappropriation of public moneys in the other set both sets being in charge of the accused. It appears to me that the connection between these instances is such that it would be reasonable for the jury to draw the inference that the failure to account for the deficiency in the case of the moneys he is charged with misappropriating was not an accident, but that it was caused in the same way as that which occurred three months before in respect of the other moneys.

I think, therefore, that the evidence was admissible, and that the conviction should be affirmed.

Question answered in the negative. Conviction affirmed.

Solicitors, for the prisoner, *Biddulph & Salenger.*

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

C. A. W.