29. Sec. 29 gives power to combine two authorities under Part I. and Part II., and if that were not so there would be unrestricted power of granting leases of Crown lands and unrestricted power of granting leases of private land, and that cannot possibly be imagined. I have just observed sec. 26 which deserves notice. It provides that "Pursuant to the provisions of Part I. of the Principal Act" a mineral lease may be granted giving the holder thereof the right to enter and mine upon "any land being a pastoral allotment or grazing area demised either before or after 1st March 1892 . . . without making compensation to the lessee thereof for surface or other damage." That is exactly similar to what occurred in the present case.

*Appeal dismissed with costs.*

Solicitor, for the appellant, *A. Phillips.*
Solicitors for the respondent, *McCay & Thwaites.*

B. L.

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[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

FINLAYSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.



*Criminal law—Stealing—Evidence of fraudulent intent—Evidence of similar acts—Criminal Code* 1902 (*W.A.*) (1 & 2 *Ed. VII. No.* 14), *sec.* 369.

Fraudulent intent is an essential element of the offence of stealing under the *Criminal Code* 1902 (W.A.), sec. 369. On a prosecution for such offence evidence may be given tending to prove the commission by the prisoner of

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other acts similar to those which form the basis of the offence charged for the purpose of proving that that offence is part of a fraudulent scheme or system and to rebut an anticipated defence that the acts constituting the offence charged, if done by the prisoner, were done innocently, accidentally, or inadvertently, and not intentionally. Such evidence, having been rightly admitted, does not afterwards become irrelevant, merely because the only defence actually presented to the jury is a denial of the acts constituting the offence charged.

Decision of the Supreme Court of Western Australia reversed.

APPEAL from the Supreme Court of Western Australia.

Walter James Finlayson was tried in the Court of Quarter Sessions at Bunbury on an indictment charging him on three counts with having stolen three several sums of money the property of His Majesty the King. He was found guilty and sentenced to three years imprisonment with hard labour.

From this conviction Finlayson appealed by leave to the Supreme Court, by whom the appeal was allowed, the conviction was quashed and a new trial was ordered.

From this decision the Crown by special leave appealed to the High Court.

The facts are sufficiently stated in the judgments hereunder.

*Mitchell* K.C. (with him *Ham*), for the appellant. Under sec. 69 of the West Australian *Criminal Code* 1902 a fraudulent intent is a material ingredient of a charge of stealing. Evidence that on previous occasions the accused obtained money in the same way was admissible not only to rebut a possible defence of mistake or accident, but as showing a fraudulent intent, and that what he did was part of a fraudulent system : *Makin* v. *Attorney-General for New South Wales* (1) ; *Director of Public Prosecutions* v. *Ball* (2). The different acts were so connected as to show that they were parts of one transaction : *R.* v. *Bond* (3).

*Duffy* K.C. (with him *C. Gavan Duffy*), for the respondent. The evidence as to the offence actually charged, if true, shows that the respondent stole the cheques. The money he received for them from the bank was the money of the bank which the

(1) (1894) A.C., 57, at p. 65. (2) (1911) A.C., 47, at pp. 56, 71.
(3) (1906) 2 K.B., 389.

bank could have recovered back: *R.* v. *Prince* (1), and larceny of that money was not larceny of the money of the Crown. He stole the cheque when he converted it to his own use, and as the offence was then completed evidence as to what he intended to do with the money which he obtained by means of the cheques is immaterial to the charge of stealing the cheques. The only relevant intent of the respondent was his intent when he exercised dominion over the cheque, and evidence that on other occasions he had stolen other articles and had afterwards kept the proceeds of them is not relevant to that intent.

He also referred to *R.* v. *Fisher* (2).

*Mitchell* K.C. was not heard in reply.

GRIFFITH C.J. The respondent was charged with stealing three small sums of money the property of the Crown in right of the Government of Western Australia. He was an officer in the service of the Government, called a supervisor of roads, having under him a gang of men. The practice as to paying the men was for the respondent to send in periodically to the Public Works Department a document called a wages sheet, showing the names of the men, the number of days on which they were respectively said to have worked, and the amount payable to each. That wages sheet would then be sent back to him with cheques drawn to the order of the several men for the amounts due to them respectively. The respondent would then hand the cheques to the men and take their signatures as receipts on the face of the wages sheet.

He is charged with having appropriated three cheques drawn to the order of one Kinsella who was sometimes working under him. It was alleged—and there is now no doubt about the truth of the allegation—that the respondent did not give the cheques to Kinsella, but that he wrote Kinsella's name on the pay sheets, endorsed the cheques with Kinsella's name, imitating his signature in both cases, wrote his own name under Kinsella's, took the cheques to the bank, received the money and kept it. The prosecution, anticipating the defence that these irregular trans-

(1) L.R. 1 C.C.R., 154. (2) (1910) 1 K.B., 149.

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actions were of an ambiguous character, and were consistent with either innocence or guilt—that is, that it might have been for Kinsella's convenience to get the money for him without putting him to the trouble of going personally to the bank, or might be a deliberate attempt to appropriate the money to himself—tendered evidence to show that these three transactions were part of a system of stealing money sent to him for payment of wages.

The definition of stealing under the law of Western Australia is "fraudulently taking anything capable of being stolen or fraudulently converting it to his own use or to the use of any other person." An essential element in the case is the fraud of the accused. Fraud may be established in as many ways as it may be committed. We all know that when a man is charged with one offence you cannot prove that he has been guilty of another offence for the purpose of showing that he is a man of bad character, and so likely to have committed the offence with which he is charged. But there are exceptions to that rule which are dictated by common sense. The rule has been laid down in several cases, amongst others in the leading case of *Makin* v. *Attorney-General of New South Wales* (1), where it was applied to a trial for murder. In *R.* v. *Bond* (2), the rule was concisely laid down by *Bray* J. in words which I should like to adopt as my own. He said (3):—"A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads: 1. Where the prosecution seeks to prove a system or course of conduct. 2. Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake." I need not read the third. A little further on he said (4):—"The ground on which in cases of this class evidence is admitted of acts not charged in the indictment is, in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan (say) for obtaining money by fraud, that the act with which the prisoner is charged is part of a planned fraud, and that the other acts of which evidence is sought to be given when proved will

(1) (1894) A.C., 57.
(2) (1906) 2 K.B., 389.
(3) (1906) 2 K.B., 389, at p. 414.
(4) (1906) 2 K.B., at p. 415.

show the existence of the plan, and, therefore, the guilty mind of the prisoner." I adopt that as the rule applicable to the present case. It was, therefore, permissible in order to show that the acts with which the accused was charged in the indictments were parts of a scheme or system, to show that he had done the same thing with regard to other employés. It was accordingly proved that he had forged the signatures of two other men to the wages sheet and cheques, endorsed the cheques with his own name, obtained the money and kept it.

The learned Chief Justice of the Supreme Court seems to have thought that the evidence was admissible, in the first instance, when it was given. I think that of that there can be no doubt. But he seems to have thought that it was only admissible to rebut a suggested defence of accident or mistake. Afterwards the prisoner himself gave evidence, and set up the defence that, although he had obtained the money he had paid it to the men. They all swore that he had not done so, and the jury did not believe him. The learned Chief Justice thought that, although the evidence was properly admitted in the first instance, it then became irrelevant, and ought to have been withdrawn from the notice of the jury. *McMillan* J. agreed in the result, but gave no reasons. *Burnside* J. seems to have thought that the evidence was not admissible at all, and at any rate that the Judge ought to have withdrawn it from the jury. I confess I cannot follow the argument. It was essential for the jury to find that what the accused did was done with a fraudulent intention. And, surely, the evidence was as relevant for that purpose at the end of the trial as at the beginning. The respondent did not say that he had failed to pay over the money by accident or mistake, but that he had paid it. He flatly contradicted the witnesses who said that they had not received the money from him. In weighing his testimony against theirs and considering whether they should accept his statement that he had paid the money to them, it was just as important for the jury to weigh the evidence of the other persons defrauded as the evidence of the person to whom the sums mentioned in the indictment were payable. The facts therefore remained relevant for the purpose of determining whether the taking charged was fraudulent or not. Even

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if it had become irrelevant there is no reason why it should have been formally withdrawn from the jury. The Crown is entitled to anticipate several possible loopholes of escape, and naturally endeavours to close them all up. If finally the accused determines to rely on only one loophole, the evidence as to the rest need not be formally withdrawn from the jury.

I have dealt with the ground upon which the conviction was quashed. Mr. *Duffy* suggested that there might be other grounds for quashing it. I think I have answered all his arguments by what I have already said. An essential element of stealing is the fraudulent intention, and any evidence to show the existence of that fraudulent intention is admissible. It must not, of course, be too remote. Evidence to show a system is clearly relevant. I think therefore that the appeal must be allowed.

BARTON J. I am of the same opinion.

ISAACS J. The matter seems to be very concisely stated in *Lord Halsbury's Laws of England*, vol. IX., p. 380:—"Evidence cannot be given for the prosecution to prove that the defendant is a bad character or has a propensity to commit criminal acts of the same nature as the offence charged. But in cases where a guilty knowledge or intention or design is of the essence of the offence, proof may be given that the defendant did other acts similar to those which form the basis of the charge. Such acts may be proved, whether they were done before or after the acts which form the basis of the charge, and even if they form or have formed the basis of other charges. Such evidence is admissible to show not that the defendant did the acts which form the basis of the charge, but that, if he did such acts, he did them intentionally and not accidentally, or inadvertently, or innocently, or that they formed a part of a system."

Many cases are cited in the note supporting that paragraph, and I will only refer to one specially; that is, *R.* v. *Stephens* (1). I refer to it by name because the principle on which the matter rests is very succinctly and clearly stated and exemplified in the case. That principle is that the fraudulent character of the act

(1) 16 Cox C.C., 387.

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is an essential ingredient of the charge, and the onus of showing this is on the prosecution. As an isolated instance the act might be innocent—even though done neither by accident or mistake. But if shown to be part of a system in itself fraudulent its character may be found not to be innocent. I will only add, that, if the evidence tendered does not tend to show that the offence is part of one system, it is not admissible, but if the Judge thinks the evidence is sufficient to connect the act charged with the other acts as parts of one system, then it is admissible.

*Appeal allowed. Order appealed from discharged. Conviction restored. Case remitted to the Supreme Court to do what is just and consistent with this judgment.*

Solicitors, for the appellant, *Lawson & Jardine* for *F. L. Stow*, Crown Solicitor for Western Australia.

Solicitors, for the respondent, *L. Waxman* for *Penny, Hill & Nairn*, Perth.

B. L.

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[HIGH COURT OF AUSTRALIA.]

PARKER . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, *May* 23.

Griffith C.J., Barton and Isaacs JJ.

*Criminal Law—Evidence—Identification of person charged—Finger prints.*

Where it is proved that a crime has been committed resemblance of finger prints may of itself in connection with other circumstances be sufficient evidence of the identity of an accused person with the person who committed the crime charged.