[HIGH COURT OF AUSTRALIA.]

THE KING AND ANOTHER . . . APPELLANTS;
PLAINTIFFS,

AND

SEERY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Nov.* 18.

Griffith C.J., Isaacs and Powers JJ.

Estoppel—Res judicata—Action for money received to use of Crown—Previous acquittal on charge of fraudulent conversion—Mens rea.

In an action by the Crown to recover money received by the defendant to the use of the plaintiff a previous acquittal of the defendant on a charge of fraudulent conversion of the same money does not afford a defence of *res judicata*.

APPEAL from a District Court of New South Wales.

An action was brought in a District Court of New South Wales by His Majesty the King and the Commonwealth of Australia against Anna Maria Seery, a postmistress in the employment of the Commonwealth, to recover a sum of £137 15s. 8d. as being public moneys collected and received by her between certain dates and not paid to the plaintiffs or either of them.

It appeared that the defendant had been tried and acquitted at a Court of Quarter Sessions on an indictment charging under sec. 64 of the *Audit Act* 1901-1909 that she did fraudulently convert to her own use certain public moneys, to wit £144 10s. 2d., the property of His Majesty; and it was alleged and admitted that the sum of £137 15s. 8d. sued for in the action was part of

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the sum of £144 10s. 2d. the subject matter of the indictment. One of the defendant's pleas in the action was that as the defendant had been acquitted on the charge of misappropriating the moneys claimed the defence of *res judicata* applied. At the hearing of the action evidence was called on both sides, and a certificate of the trial and acquittal of the defendant was put in evidence on her behalf. The learned Judge then told the jury that, as it was virtually admitted that the evidence which had been given before them was the same as that which was given on the trial of the defendant for fraudulent conversion, the defence of *res judicata* had been made out, and he directed them to find a verdict for the defendant. The jury accordingly did so.

From that decision the plaintiffs now appealed to the High Court.

R. K. Manning, for the appellants.

Betts, for the respondent.

During argument reference was made to *Concha* v. *Concha* (1); *R.* v. *Hutchings* (2); *Duchess of Kingston's Case* (3); *Petrie* v. *Nuttall* (4); *North Eastern Railway Co.* v. *Dalton Overseers* (5); *Wakefield Corporation* v. *Cooke* (6); *Castrique* v. *Imrie* (7); *Midland Railway Co.* v. *Martin & Co.* (8); *In the Estate of Crippen* (9); *Hardgrave* v. *The King* (10); *Flitters* v. *Allfrey* (11); *R.* v. *Farnborough* (12); *In re Bank of Hindustan, China and Japan* (13); *Barclay* v. *Why Te Hong* (14); *Everest and Strode on Estoppel*, 2nd ed., pp. 8, 136.

GRIFFITH C.J. The direction of the learned Judge which is objected to was manifestly founded upon a misapprehension of the doctrine of *res judicata*. There are, in my opinion, serious difficulties as to the question whether a verdict in a criminal case

(1) 11 App. Cas., 541.
(2) 6 Q.B.D., 300.
(3) 2 Sm. L.C., 11th ed., 731, at p. 773.
(4) 25 L.J. Ex., 200.
(5) (1898) 2 Q.B., 66.
(6) (1904) A.C., 31,
(7) L.R. 4 H.L., 414.
(8) (1893) 2 Q.B., 172.
(9) (1911) P., 108.
(10) 4 C.L.R., 232.
(11) L.R. 10 C.P., 29.
(12) (1895) 2 Q.B., 484.
(13) L.R. 9 Ch., 1.
(14) 3 N.S.W.L.R., 119.

either of guilty or not guilty is admissible under any circumstances as evidence in a civil case, and, if so, for what purpose. According to the older authorities it was never admissible. It may be that for some purposes it is admissible. But, if it is, it can only be admitted as *res judicata*, and only where it appears that the point determined by the verdict is the same point which is in issue in the civil case.

This is an action for money received by the defendant to the use of the Crown. The verdict relied upon is a verdict on a charge of fraudulently misappropriating that money. In order to determine the latter question the jury had to apply their minds not only to the question whether the respondent received the money but also to the other question whether she fraudulently misappropriated it. It does not appear from the verdict whether they were satisfied that she had received the money. They may not have applied their minds to that question at all, but may only have come to the conclusion that, whether she had or not, they were not satisfied that she had misappropriated it with fraudulent intent.

The element of fraud was necessarily involved in the charge. That was decided by this Court in *Hardgrave* v. *The King* (1); and it would be very strange if it were not so. It may be that under the Statute an accounting party who has received money for the Crown and does not account for it labours under the disadvantage that there is a presumption of fraud against him. But the fraudulent intent is an essential element of the charge, and must be found by the jury. If authority is needed for that proposition it is to be found in *R.* v. *Farnborough* (2). There the Judge at the trial upon a charge of larceny asked the jury whether they believed the evidence for the prosecution, and, on their answering the question in the affirmative, directed a verdict of "guilty," and it was held that the direction was wrong because the fraudulent intent was a fact that must be found by the jury. In this case it does not appear whether the jury found anything more than that the respondent had no fraudulent intent, which had nothing to do with the question whether she had received the money.

(1) 4 C.L.R., 232.

(2) (1895) 2 Q.B., 484.

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For these reasons I am of opinion that the appeal should be allowed.

ISAACS J. I quite agree. The verdict of acquittal may, for all that appears, have proceeded on the finding of absence of *mens rea*. There are no materials before the Court now to enable it to say whether or not anything was found by the jury as to the receipt of the money or the ownership of the money. Under those circumstances the principle applies which I think is most concisely stated by *Mellish* L.J. in *In re Bank of Hindustan, China and Japan*; *Alison's Case* (1). One other case I should mention is *Stephenson* v. *Garnett* (2), where *Collins* L.J. lays down the same principle.

POWERS J. I agree.

Appeal allowed. Judgment appealed from discharged and new trial ordered. Respondent to pay costs of appeal and of first trial.

Solicitor, for the appellants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor, for the respondent, *E. F. Thomas*, Goulburn.

B. L.

(1) L.R. 9 Ch., 1, at p. 25.

(2) (1898) 1 Q.B., 677, at p. 682.