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thus converting towage into salvage; it further applies only between the contracting parties; and, as Lord Kingsdown observed (p. 154)—"The rule has long been settled; parties enter into towage contracts "on the faith of it;" and it also assumes a given *res*, which the learned Lord calls "the ship in her charge," in respect of which the obligation of ordinary towage in the first place attaches, and to which the implied reciprocal obligations of the parties to the contract also attach when the circumstances call them into operation. This last assumption of a specific *res* is in line with the expression of Dr. Lushington in *The Galatea*, Swab. at p. 350—"The ship she has engaged "to tow."

Assuming the bargain between the tug and the Government to be one of contractual service, and one of ordinary towage only, the reasons why I hold "additional" towage remuneration cannot be granted here on the authority of *The Minnehaha Case* are—

(1) The *res* is different; (2) the parties are different; (3) the matter claimed for is assumed to be towage and not salvage; and (4) the Court of Admiralty has no jurisdiction to increase a sum fixed in a towage contract, the contract not being impeached—*The Hjemmet*, 5 P.D. 227; *Halshbury*, vol. I. p. 68. The history of salvage, which is entirely within the Common Law control of the Court of Admiralty, and does not depend on contract, but "is a mixed question "of private right and public policy"—*The Albion*, Lush, 282 at p. 284; and *The Atlas*, *ib.* 518 at p. 529—makes it essentially different from the recent statutory jurisdiction in towage which is always contractual, and a matter of private right only, and subject to the ordinary rules of contract. But assuming the £25 bargain not to be a contract of service by the owners of the *Cartela*, but to make that ship a Government ship *pro hac vice*, whereby the Government had practically the ownership for the adventure and the full control, then it seems to me altogether impossible to apply the new rule. The assumption in that case is that the Government itself voluntarily undertook to tow the vessel in, and simply hired the *Cartela* for the purpose; this brought the *Cartela* owners into no privity whatever with the *Inverness-shire*, and as the Government made no contract with that vessel, it might have abandoned its quest at any moment. How is it possible to apply the rule? Who was bound to salve? Who was bound to tow? Who could sue if neither was done?

For the primary reasons I have given, I think the appeal should be allowed, and compensation allowed on a salvage basis.

I ought to state that Mr. Lodge, when questioned by me as to the attitude he adopted before the Supreme Court on the question of towage, stated that he had refused to accept the suggestion of the Supreme Court to consent to the remuneration being based on a *quantum meruit*, unless the Court did so on a salvage basis. If that basis were taken, he stated that he was willing to assent to the Court fixing the re-

muneration free from the stipulation as to £500; but if not he gave no consent, but would argue his right to the £500 agreed to, without, of course, rejecting any lesser sum which the Court fixed on him, but preserving his right to object to the reduction and to claim the full amount. This I regard in strict accordance with the law.

Appeal allowed.

[Solicitors—For the appellants, Perkins and Dear; for the respondents, Hodgman and Seager.]

Supreme Court.

FULL COURT—(Madden, C.J.
a'Beckett and Hodges, JJ.)

Feb. 1.

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Factories and shops—Statutory offence—Rate of wages fixed by a board—Employment at lower rate—Mens rea—How far an essential element—"Factories and Shops Act 1915" (No. 2650), secs. 194, 221, 226, 228.

Where the owner of a factory is charged, under section 226 of the "Factories and Shops Act 1915," with employing a person at a lower rate of wages than the rate fixed by a wages board, it is a good defence that the wages were paid under an honest belief in a state of facts which, if they had been true, would have made the payment lawful.

Moffatt v. Hassett, 13 A.L.R. 266; and *Billingham v. Oaten*, 17 A.L.R. 36, approved.

ORDER TO REVIEW.

William Ellis was charged at the Court of Petty Sessions, South Melbourne, that being the owner of a factory within the meaning of the "Factories and Shops Act 1915," he unlawfully employed one Tozer at a lower rate of wages than the rate fixed by the Painters' Wages Board.

At the hearing before the Justices the defendant admitted that he had paid Tozer the wages of an improver, and stated that he had done so under the belief that Tozer was an improver.

The evidence before the Justices sufficiently appears in the judgment of Madden, C.J.

The Justices found that the defendant had believed Tozer's statements, and they therefore dismissed the case.

The prosecution obtained an order *nsii* (returnable before the Full Court) to review that decision, on the grounds—

1. That on the facts proved, the defendant should have been convicted.

2. That even if the defendant at the time of the employment of Tozer believed him to be an improver, and paid him as such, that belief afforded no defence.

3. That to constitute the offence charged, it was not necessary that the defendant should have acted with *mens rea* or with intent to contravene the provisions of the "Factories and Shops Act 1915."

Pigott to move the order absolute.

Starke for the defendant to show cause.

The following cases were cited during argument:—*Moffatt v. Hassett*, 13 A.L.R. 266; *Billingham v. Oaten*, 17 A.L.R. 36; *Reg. v. Tolson*, 23 Q.B.D. 168; *Bryse v. Bartlett*, 5 A.L.R. 281; *Rex v. Erson*, 20 A.L.R. 46; *Sherras v. De Rutzen*, (1895) 1 Q.B. 918.

MADDEN, C.J.—In this case the defendant was prosecuted for that, being the owner of a factory, he employed one Tozer, who in fact was, within the meaning of the Act, a painter, as an improver, and paid him wages appropriate to an improver, and not appropriate under the determination of the wages board to a painter. In the Court below the employer, the defendant Ellis, gave evidence that he had a vacancy for an improver, and advertised in so many words for an improver; that the man Tozer came to him a few days afterwards, and referring to the advertisement, said—"Have you got an improver yet?" that Ellis replied that he had not, and that Tozer said—"Then will you take me?" Ellis then asked where he had been working and what he had been getting, and Tozer replied "Nine shillings a day." Ellis then said he would engage him. The man's own representations, the wages he had been getting, and the wages he expected, all suggested that he came there as an improver seeking an improver's place. The defendant said he believed that Tozer was an improver, and was only nineteen years of age. He believed consequently he was under the age when he would cease to be an improver, and ineligible to be employed as an improver without a licence. He also says that he spoke to Tozer on another occasion when he saw him speaking to a girl, and asked him when he was going to marry, and that Tozer said he was too young to marry, that he was only nineteen. So that after he entered the employment he still represented that he was only nineteen. The defendant told the Magistrates these facts. They saw Tozer, and could judge for themselves whether the story told by Ellis was likely to be true, or whether he was likely to have believed he was only nineteen, when as a fact he was twenty-four.

The Magistrates' finding expressly was that the defendant believed what Tozer had told him, and they therefore dismissed the charge. They held, in fact, that he had acted in the reasonable belief of a state of facts, which if true would have been an answer to the charge.

It is said that the Magistrates did not find in so many words that there were reasonable grounds for the defendant's belief. But as the whole of the facts which appeared in evidence are presented here, it is clear that they held that the defendant did believe these alleged facts, and that the alleged facts were reasonable for him to believe, and they therefore dismissed the charge against him.

The question then is whether such a defence is admissible under sec. 226 of the "Factories and Shops Act" on which the prosecution was based. It provides—[His Honour read the section.] As one looks at these words, they appear to me on the face of them to contemplate a condition of mind which, knowing that something proposed to be done is a violation of the law, resolves to do that something, although it involves a disobedience of the board's award, or else it shows that, in order to procure disobedience, a pretence or device is resorted to. If he resorts to a device, he plans a scheme. If he "attempts to employ," the very attempt involves an actual knowledge of what he is attempting to do, and ought not to do. If he employs a given person, that also seems to carry an intention. If he "authorises or permits to be employed," that, too, would seem to carry *ex vi termini* an operation of the mind which is deliberate. Of course, as a matter of legal possibility, a man may employ a person though he never saw him, for his manager might employ the man without consulting him, and in that sense he might "authorise or permit." But the language is quite consistent with an actual intention. It is not what has been described here as prohibitive. Therefore it would appear to me that, according to the common interpretation of legislation which creates criminal or *quasi* criminal offences, the language here is such as to carry with it the ordinary rule which runs through the criminal law that a person to be guilty of a criminal offence must intend to do the thing; must have a guilty mind; must know of the existence of the facts which make it wrong, and intend to do it.

But apart from that, the language in *R. v. Tolson* (*supra*) of the majority of the Court is to the effect that, with very rare exceptions, the law is, even where the language creating the offence is very definite, that there is always connoted in it the necessity of a *mens rea*; and it is held there, too, that where the accused can show that he believed in a state of facts which if true would have afforded an answer to the charge, he is entitled to an acquittal, even though the language of the Statute is direct and specific. In *Sherras v. De Rutzen* (*supra*), two of the learned Judges came to the conclusion that the conviction of a publican who had served drink to a constable, but under the supposition that he was off duty, was wrong when it was shown by the publican that he did not know, and had no reason to know, that the constable was on duty. Day, J., says, at page 920—"I am clearly of opinion that this conviction ought to be quashed. This police constable comes into the appellant's house without his armlet, and with every appearance of being off duty . . . the appellant believed, and he had very natural grounds for believing, that the constable was off duty." Later he says that the only effect of the word "knowingly" is in his opinion to shift the onus of proof. Wright, J., says there is a certain series of cases in which a defence of that kind, that

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the defendant reasonably believed in a state of facts which, if they had existed, would have been an answer to the charge, does not apply, and he enumerates them. And then he goes on (p. 922)—“But except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence. It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under [the Act], since it would be as easy for the constable to deny that he was on duty when asked or to produce a forged permission from his superior officer, as to remove his armlet before entering the public house.”

Therefore, except in that line of cases indicated by Wright, J., the general principle of law is that a *bona fide* reasonable belief in facts which if true would have made the man not guilty, is open as a defence unless you have it definitely excluded in the Act by language imperative and distinct. I therefore think that the meaning of the language itself and the authority of these cases, make it incumbent on us to interpret this section as one in respect of which if a charge is preferred, the defendant is at liberty to show a reasonable belief in facts, which, if true, would have absolved him.

At one time I was pressed by sec. 194, which imposes certain obligations upon the Minister, the employer, and the improver; but the case from which I have just read seems to be an answer to the difficulty it raises. It points out that the constable had taken off his armlet, and it was said that when he came into the hotel the publican ought to have got evidence of the authority of his superior officer allowing him to have the drink. But the Court says that if guilty knowledge is not necessary no care could have saved the defendant from a conviction, “since it would be as easy for the constable to deny that he was on duty when asked or to produce a forged permission from his superior officer, as to remove his armlet.” It would have been just as easy for Tozer to have produced a false certificate from his last employer as to tell the lies he did tell, for if Ellis's story is true, and the Magistrates believed it, everything he told Ellis was false, and Ellis accepted it. On that authority, and the interpretation of the Act, the position of Ellis was one in which the Magistrates might well find that he honestly believed what Tozer said, and that there were reasonable grounds for believing it, and that if he honestly believed it, he was not guilty of any such breach of this Act as is involved here.

Then it is said we ought not to read sec. 226 (a) as involving an intention to break the Statute, because in sub-sec. (2) there occur the words “knowingly and wilfully.” If there was no other section in the Act but that which had relevance to the matter suggested by Mr. Pigott's argument, I would say that the meaning of that sub-section would be that the element of

knowledge and wilfulness might sometimes be present in the commission of the offence above described, and sometimes not. But sec. 228 seems to have been enacted in order to meet that very position, for it provides that if an offence is committed by an agent, servant or workman, he is liable to the same penalty as if he were the occupier. The result is, therefore, that an occupier may be liable for his own acts or for the acts of his agent, servant or workman, and those persons may be also personally liable, and what sub-sec. (2) of sec. 226 is aiming at is that the factory licence may be forfeited where the occupier himself commits the offence, and not where the offence is committed by the agent, servant or workman, although the occupier will be liable to a penalty. So I do not think that sub-sec. (2) of sec. 226 derogates from the view we take. I think the decisions given on former cases are on right lines. Hodges, J., in *Billingham v. Oaten* (*supra*), considered the section very carefully, and laid down the true test. In the case of *Hall v. Bartlett* (*supra*), I myself took a similar view, though not expressing it in the distinct language of my brother Hodges. Cases of high authority in England support that view. That is the test the Justices used here, and if they did not express it, it is clear that they acted on Ellis's evidence, and rightly acted on it. We think the order *nisi* should be discharged, with costs.

A'BECKETT, J.—I agree that the order *nisi* should be discharged. If the argument for the informant prevailed, it would amount to this, that however gross an imposition was practised upon an employer, by which he was led to pay wages which the wages board said should not be paid, he would be precluded from showing that an imposition had been practised. It is not an order *nisi* taken out because the Magistrates have on insufficient evidence accepted the view that the defendant was imposed upon; it is taken out on the ground that the finding of the Magistrates that he had been imposed upon, and had paid what he believed to be a correct wages board rate, was a fact quite immaterial. The evidence showed that the defendant had not paid the rate of wages which was payable under the wages board determination, but that the man concerned had represented himself to be a person who might properly be paid the rate that was paid to him. It was an imposition practised upon the defendant by a person, after which the defendant paid what under the wages board award would have been lawful, if what the person who practised the imposition said had been true, but what on the actual facts was an amount less than the award required. I think in these circumstances, and having regard to the absence of any intention to commit or knowledge of commission of the offence, a defendant should not be precluded from showing that he did the acts complained of, not from ignorance arising from his own want of attention or

knowledge, but as a result of the imposition. The defence was—"I did what I did through being imposed upon, and through believing in a state of facts, which if they had been true would have made my act lawful." It is a specific defence of imposition, and I think it is a good defence, and that the order *nisi* should be discharged.

HODGES, J.—I concur, and have nothing to add.

Order nisi discharged.

[Solicitors—For the complainant, Guinness, Crown Solicitor; for the defendant, Gillott and Moir.] T.C.B.

[On 28th February special leave to appeal from this decision was given by the High Court of Australia.]

FULL COURT—(Madden, C.J., } April 7, 11.
Hood and Cussen, JJ.) }

REX v. JOSEPH STORER.

Criminal appeal—Practice—Opinion of Judge on the case—Disclosure to parties — Proceedings at trial—Statement of Judge as to—Other evidence as to—Weight to be attached — "Crimes Act 1915" (No. 2637), sec. 599.

The report of the Judge furnished in pursuance of section 599 of the "Crimes Act 1915," will, except in so far as it relates to matters which cannot affect the mind of the Court, be disclosed to the parties to an appeal.

On the hearing of a criminal appeal, the Court will have regard only to the report of the Judge who tried the case, unless it is clear that he has made a mistake.

CRIMINAL APPEAL.

At the Court of General Sessions, Portland, Joseph Storer was presented on counts of stealing sheep and of receiving stolen sheep the property of one Learmonth. On the charge of sheep-stealing the prisoner was convicted, and was sentenced to imprisonment for a year and nine months, with hard labour.

The time limited by the "Crimes Act 1915" for giving notice of appeal and of application for leave to appeal had expired. This was an application by the prisoner for an extension of time to give the notice, and for leave to appeal, on the ground, *inter alia*, that the trial Judge had misdirected the jury, and that the verdict was against evidence and the weight of evidence.

Bryant (Jacobs with him) for the prisoner.—We claim the right to see the report made by the Judge under sec. 599 of the "Crimes Act 1915." Unless we are allowed to see that report we shall not know what case we have to meet.

Leon, K.C., for the Crown.—The prisoner has no right to see the Judge's report. All materials necessary for this Court to deal with the appeal are in the hands of the prisoner's Counsel, and the Judge's report is not material.

MADDEN, C.J.—We are of opinion that in such a report there might be something so remote from the issues that it would not affect our minds, and we would disregard it. But as to anything else—anything that might influence us in the case—all of that should be disclosed to Counsel arguing the matter. The report of the Judge is very much in the nature of the reports which are sometimes made by justices of the peace in respect to proceedings in which an order *nisi* to review has been granted, and we have decided with regard to these that except in very special circumstances they should be before Counsel.

His Honour then read the report. From this it appeared that the learned Judge had explained to the jury the difference between a case of stealing, and the case of a man who by mistake and in the honest belief that they are his own, takes the sheep of his neighbour which have strayed into his paddock.

Bryant.—The affidavit of the solicitor for the prisoner filed in support of this application shows what took place at the trial. From that it appears that the learned Judge told the jury that the sole question was one of identification, and that if they were satisfied beyond reasonable doubt that the sheep belonged to Learmonth it was their duty to convict. [MADDEN, C.J.—Where the Judge makes a report in pursuance of the Statute it should be accepted by the Court. The Act of Parliament adopts the Judge as an authority. CUSSEN, J.—I should not like to lay down a general rule that in no case can we look at anything but the Judge's report.] The learned Judge never put to the jury the defence that, even though the sheep were Learmonth's, the prisoner honestly believed them to be his own. The affidavit of the solicitor shows what in fact took place at the hearing. His Honour is in error when he states that he explained to the jury the difference between stealing and taking under an honest mistake.

MADDEN, C.J., in delivering the judgment of the Court, said:—In this case we think the application should be refused. The first ground upon which it was said that the appeal should be allowed was that the learned Judge misdirected the jury. We have before us the report of His Honour as provided by Statute giving his opinion upon the case for the information of the Court. As to that it has been said we ought to disregard it or attach no importance to it because there is other evidence, which conflicts with it, and which suggests that the statement made by the Judge is not correct. Since the Statute itself authorises such a report, I think the Court should always be very cautious in declining to act upon the opinion of the Judge. It has been pointed out by my brother Cussen that, although as a general proposition this might be right, still there might be a mass of evidence as to what took place at the trial, the truth of which was in the highest degree probable, in conflict with the opinion of the Judge, and that if such a case arose the Court should not tie itself down to the rule