

stitute the charter, and form the contract of the members with relation to the carrying on of whatever business they select, and whatever personal obligations they select as incidental to the welfare and maintenance of the business, are at least as valid as if they were set out in the Memorandum of Association, under the Trading Companies Act. And possibly the nature of the Act itself, and the subject-matter in relation to it, give a larger scope for mutual obligation. The words of Lord Macnaghten, in *Auld v. Glasgow Working Men's Building Society*, 12 A.C. 197 at p. 205, regarding a building society, that "in societies of this sort the rules form the contract between the members and the society," is equally true of a society like McEllistrim's, but not true of the articles alone of a Company like the present. See, also, *Smith v. Galloway*, (1898) 1 Q.B. 71 at p. 77.

Here, as already shown, the Company is merely an agency company, and though the only shareholders are to be orchardists and fruitgrowers (memorandum and the 13th and 44th articles), yet the business of the Company is selling the fruit of individuals, and when shareholders and "others" employ the Company to sell their fruit, they stand in the capacity of principals, of clients, of independent contractors, and, as such clients, on the same footing. The right to charge for the service is not a charge against him *quâ* member, but *quâ* employer. The fruitgrower cannot stand on both sides of the line at once, and be individually both agent and principal. The positions are in a sense antagonistic. And, going one step further back, and remembering that buying fruit is no part of the Company's business, it is difficult to see why Article 7 is not mere coercion on a person who is a shareholder to compel him as an individual to bring his produce, as and when, and in such form as the directors dictate, to the Company, as a compulsive agent.

As I have said, it is not necessary to give any final decision on this branch of the case, and I am open to reconsider the point; but I have given, with some elaboration, my reasons why I am not prepared, as at present advised, to accede to the argument of the respondent on the point.

*Order*—(1) *Appeal allowed.* (2) *Judgment and order of the Supreme Court of Tasmania set aside.* (3) *Judgment for the defendant, H. G. Heron, with costs of action when taxed. Respondent, the Port Huon Fruitgrowers' Co-operative Association Limited, to pay the taxed costs of the defendant, Heron, of his appeal to the Supreme Court of Tasmania in Full Court and to this Court.*

[Solicitors—For the appellant, Finlay, Watchorn and Clark; for the respondent, Page, Hodgman and Seager.]

FULL COURT — (Knox, C.J., }  
Gavan Duffy and Starke, JJ.) } Nov. 9, 1921.  
(Sydney.)

### WILLIS, Defendant Appellant v. BURNES Informant Respondent.

*Police offences—Goods suspected of being stolen—Possession of—Information for — Satisfactory explanation—Onus of establishing—"Police Offences Act 1901" (N.S.W.), sec. 27\* — "Police Offences (Amendment) Act 1908" (N.S.W.), sec. 11.*

In a prosecution under section 27 of the "Police Offences Act 1901" (N.S.W.), charging the defendant with knowingly having goods in his possession, which goods may be reasonably suspected of being stolen, if it is established to the satisfaction of the Justice that the goods may reasonably be suspected of having been stolen, and that the defendant is knowingly in possession of them, the onus lies on the defendant of satisfying the Justice that he came by them honestly. If the defendant's account of how he came by the goods leaves the Justice in doubt whether they were honestly come by, the defendant is not entitled to be acquitted.

Decision of Wade, J., in *Burnes v. Willis*, 38 N.S.W. W.N. 42, affirmed.

### APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

The appellant, Elias Willis, was proceeded against by the respondent, John Hugh Burnes, on an information for an offence under sec. 27 of the "Police Offences Act 1901" of New South Wales, for knowingly having in a building certain rabbit-skins reasonably suspected of being stolen. The hearing was before a Police Magistrate, who dismissed the information, but stated a case for the opinion of the Supreme Court. The case stated, after setting out the facts as above, proceeded—"It was proved to my satisfaction that the defendant on the day and at the place charged did knowingly have a quantity of rabbit-skins in a certain building, situate at Henry Street, Werris Creek, in the State of New South Wales, which said rabbit-skins were reasonably suspected of being stolen. And thereupon I called upon the defendant to give an account to my satisfaction how he came by the same. The defendant then gave an explanation which, I thought, might reasonably be true, although I was not convinced that it was true.

\* Section 27 of the "Police Offences Act 1901," as enacted by section 11 of the "Police Offences (Amendment) Act 1908," is as follows:—

"27. Whosoever being charged before a Justice with—(a) Having anything in his custody; or (b) knowingly having anything in the custody of another person; or (c) knowingly having anything in a house building lodging apartment field or other place whether belonging to or occupied by himself or not or whether such thing is there had or placed for his own use or the use of another which thing may be reasonably suspected of being stolen or unlawfully obtained does not give an account to the satisfaction of such Justice how he came by the same shall be liable to a penalty not exceeding ten pounds or to imprisonment for a term not exceeding three months."

Cf. "Police Offences Act 1915" (No. 2708) (Victoria), sec. 40.

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"A doubt was thus left in my mind as to whether or not the defendant honestly came by the same. I held that the defendant was entitled to the benefit of that doubt, and dismissed the information. The question for the opinion of the Court is whether my said determination was erroneous in point of law."

Wade, J., who heard the case stated, held that the decision of the Magistrate was erroneous in point of law, and that the defendant should have been convicted, for he had left a doubt in the Magistrate's mind, and had failed to satisfy him.

The defendant obtained special leave to appeal from that decision, on the grounds—

1. That the learned Judge was in error in holding that the question should be answered in the affirmative.

2. That the Magistrate, having a reasonable doubt, the defendant was entitled to an acquittal.

3. That on the finding of the Magistrate the defendant had given an account, to the satisfaction of the Magistrate, how he came by the goods in question.

*Mack, K.C.*, and *McGhie*, for the appellant, referred to—*Trainer v. The King*, 13 A.L.R. 53; *McDonald v. Webster*, 19 A.L.R. 563; *Peacock v. The King*, 17 A.L.R. 566; *R. v. Tolson*, 23 Q.B.D. 168; *Abrath v. North-Eastern Railway Co.*, 11 Q.B.D. 440; *R. v. Plummer*, (1902) 2 K.B. 339.

*E. M. Mitchell*, for the respondent, was stopped.

KNOX, C.J.—In this case Wade, J., decided that, in a prosecution under sec. 27 of the "Police Offences Act 1901," when it has been established to the satisfaction of the Magistrate that the property may reasonably be suspected of having been stolen and that the defendant is knowingly in possession of that property, then the onus lies on the defendant of giving an account of how he came by it—that is, of satisfying the Magistrate that he came by it honestly. That decision appears to me to be quite correct. I desire to adopt, with slight alteration, what Gordon, J., said in *Ex parte Potts*, 31 N.S.W. W.N. 1, at p. 2—"In my opinion, the section throws on the Crown 'the onus in the first instance of showing that the person charged was in possession of goods, and that those goods were' (this should read 'might be') 'reasonably suspected of being stolen or unlawfully obtained. It seems to me that it is not necessary to show that the goods were in fact stolen. The offence is that the person charged is 'in possession of goods which are' (this should read 'may be') 'reasonably suspected' of having been stolen, and then fails to give a satisfactory account of how they came into his possession. It has been said in one case the offence is not being 'in possession of the goods, but failing to give a 'satisfactory account of their possession, when found 'in possession of goods which are reasonably suspected of having been stolen. In my opinion the

"onus lies on the Crown first of all to show the goods 'were' (this should read 'might be') 'reasonably suspected of having been stolen; when that 'has been shown the onus is shifted, and it becomes 'necessary that the person found in possession of 'these goods should give an account to the satisfaction of the justice how he came by the same." I think that that statement is literally in accordance with the provisions of the section. A new offence was created by the section, and the words of the section are conclusive as to what the offence is, as to the manner of proving it and as to the onus of proof. I do not think that the cases cited by Mr. Mack are really in point in this case. In those cases it lay upon the Crown to establish a fact, and if the Crown failed to establish it beyond reasonable doubt, the jury would acquit the accused. But in the present case the Statute deliberately provides that if certain facts are established the defendant shall be convicted unless he satisfies the Magistrate of certain other matters. In this case the Magistrate says that the defendant did not satisfy him of those matters, and Wade, J., held that in that event the Magistrate should have convicted the defendant, and I agree with him.

GAVAN DUFFY and STARKE, JJ., concurred.

*Appeal dismissed, with costs.*

[Solicitors—For the appellant, H. Levien for R. J. O'Halloran, Tamworth; for the respondent, J. V. Tillett, Crown Solicitor.]

## Supreme Court.

FULL COURT — (Irvine, C.J., March 3, 6;  
Schutt and Mann, JJ.) } May 10.

In re HARPER, Deceased.

TRUSTEES, EXECUTORS AND AGENCY CO. LTD.

v. HARPER and Others.

*Administration and probate—Estate duty—Property the subject of gift—Duty thereon—Right of Crown against the property — Charge—Executor's obligation to pay duty — Right of indemnification— "Estate Duty Assessment Act" (No. 22 of 1914), secs. 8 (4a), 34.*

Section 8 of the "Estate Duty Assessment Act 1914" (Federal) provides—sub-section (1)—that estate duty shall be levied and paid upon the value, as assessed under the Act, of the estates of persons dying after the commencement of the Act. Sub-sec. (4) provides that property which passed from the deceased person by any gift *inter vivos* made within one year before his decease, "shall for the purposes of this Act be deemed to be part of the estate of the person so deceased." By section 34 of the Act it is provided that the duty assessed under the Act shall be a first charge upon the estate in priority over all other incumbrances whatever.