

1895.

November 13.

The C.J.
Windeyer J.
and
Owen J.

PIPER v. THE BANK OF NEW SOUTH WALES.

Lien on Wool Act (11 Vic. No. 4), s. 7—Sale of mortgaged stock—Written consent of mortgagee—Verbal consent—Criminal law—Mens rea—Onus of proof—Malicious prosecution—Reasonable and probable cause.

On a prosecution under 11 Vic. No. 4, s. 7, for selling mortgaged stock without the written consent of the mortgagee, proof of the sale without a written consent is *prima facie* evidence of the commission of the offence, and throws on the accused the onus of proving, if he can, that he acted without any fraudulent intent. This he may shew, *e.g.*, by proving a verbal consent by the mortgagee, and that the effect of the sale was in reality to preserve the security to the mortgagee. So held by the C.J. and OWEN, J. *Per* STEPHEN, J., s. 7 absolutely forbids the selling without a written consent, and the only defence to the charge is to produce a written consent.

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NEW TRIAL MOTION.

Declaration for that one Evans was at the time of committing the grievances hereinafter complained of manager of the defendant bank at Cowra, and as such manager and with the authority of the defendant bank falsely and maliciously and without reasonable and probable cause appeared before a Justice of the Peace, and charged the plaintiff that he did grant unto the Bank of New South Wales a mortgage of certain sheep and cattle, which mortgage was duly executed and registered in accordance with the provisions of the Act 11 Vic. No. 4, and that the plaintiff did afterwards at Cowra, without the written consent of the bank as such mortgagee thereof, sell and dispose of certain of the said sheep and cattle to one King, contrary to the Act, and upon such charge procured the said Justice to issue a summons against the plaintiff, bringing him before a Justice of the Peace at Cowra, who committed the plaintiff for trial at the Cowra Quarter Sessions, and afterwards the Attorney-General refused to file a bill against the plaintiff, and the said prosecution was so ended, whereby, etc. Plea, not guilty.

At the trial before *Simpson, J.*, in March, 1895, it was admitted that the mortgage was duly registered, and that the mortgaged

sheep were sold. The plaintiff's evidence was directed to shew that he sold them with the knowledge and verbal consent of Evans, that the sale was a bona fide one, and made in reality for the benefit of the bank's security, since the plaintiff had not sufficient grass to keep the stock, and some of them were dying; and that Evans, after he heard of it, approved of the sale. At the close of the plaintiff's case the defendant moved for a nonsuit, on the ground that as the plaintiff had not shewn a written consent to the sale, he was guilty of a criminal offence under s. 7 of 11 Vic. No. 4. The Judge declined to nonsuit, but reserved leave to move the Court. The defendant's evidence was an absolute denial by Evans that he ever gave the plaintiff permission to sell, either verbally or otherwise, or that he approved of the sale afterwards, but that he refused to accept King's promissory note, which the plaintiff had agreed to take in payment.

The jury found a verdict for the plaintiff for 1000*l.*, finding specially that Evans had verbally authorised the sale. The special findings of the jury are set out in full at the commencement of the judgment of *Owen, J.*

The defendants now sought to make absolute a rule *nisi* for a new trial, or to enter a nonsuit or verdict for defendants on the grounds—1. That the verdict was against evidence. 2. That his Honour ought to have nonsuited the plaintiff. 3. That the plaintiff sold and disposed of the mortgaged stock without a consent in writing, thereby committing the statutory offence with which he was charged.

The case was first argued on the 13th November, 1895, before the *C.J., Windeyer* and *Owen, JJ.*

C. B. Stephen (*Edgar* with him), in support of the rule. The case turns on the question whether Evans had reasonable and probable cause for laying the information, in respect of which the action is brought, against the plaintiff, and my contention is that inasmuch as the plaintiff, by selling the mortgaged stock without the written consent of the mortgagee, committed an offence against s. 7 of the 11 Vic. No. 4, for which he was liable and ought to have been convicted, it cannot be held that there was no reasonable and probable cause. It was never contended that the

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written consent required by that section was obtained, and the jury found that a verbal consent merely was given by Evans. The other findings of the jury do not affect the case if my view is right that the plaintiff did actually commit an offence within s. 7, for which he would, if a bill had been filed, have been convicted. The section is a most complicated one, but so much of it as applies to this case is the following: "Any grantor of any mortgage of sheep, cattle or horses who shall, after the due execution and registry of any such mortgage, without the written consent of the mortgagee thereof, sell and dispose of any sheep, cattle, or horses shall be held and deemed guilty of an indictable fraud and misdemeanour, and being thereof duly convicted shall be liable to fine or imprisonment, etc. That absolutely prohibits any sale without the written consent, and it is unnecessary to prove any *mens rea* or fraudulent intent. The section does not say "fraudulently" or "wilfully"; the fact of selling without a written consent is constituted an offence, and the accused cannot excuse himself by shewing a verbal consent.

[WINDEYER, J. I have ruled in a criminal case that the prisoner cannot attempt to prove a verbal consent, except in mitigation of penalty. If evidence of a verbal consent is tendered, should not the Judge reject it on the ground that the only excuse permissible is to shew a written consent?]

Clearly so. It is noticeable that the section, while carefully omitting the words "wilfully and knowingly" when creating a sale by the mortgagor an offence, puts in those words when providing that third persons shall not aid or abet the mortgagor in impairing the security.

[OWEN, J. Does not the preamble to the section shew that the offence aimed at is fraud, and you cannot commit a fraud without a guilty mind. May not, therefore, the prisoner rebut the presumption of fraud by shewing circumstances which negative that presumption?]

The preamble says that it is expedient to increase the public confidence in the validity of mortgages of live stock, and to surround them with the penal provisions necessary for the punishment of frauds, *i.e.*, to punish them *as if* they were frauds

in the ordinary sense. The section then in the clearest language constitutes the fact of selling without a written consent an offence, and at the end says that a person who does so *shall be held and deemed guilty of an indictable fraud and misdemeanour*, all of which shews, as I submit, that the Act, with the object of safeguarding these securities, intended to absolutely prevent any dealings except with the mortgagee's consent in writing, to render the proof of a fraudulent intent unnecessary, and to punish a sale made without the statutory consent as if it were an indictable fraud. To adopt Mr. Justice *Owen's* suggested reading of the section would be to read the word "fraudulently" into the Act.

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[THE CHIEF JUSTICE. Suppose that the manager of the bank had actually consented, though not in writing, to the sale, and had received all the proceeds?]

In such a case the offence under the Act is complete in every respect. Such facts as those can only be taken into consideration in mitigation of sentence. In creating new offences the Court must assume that the language used has been carefully chosen to effect the desired object. In the case of ordinary crimes, to which the general rule applies that a man cannot commit a crime without a guilty mind, it is usually enacted by the statute creating them that whoever shall "feloniously," or "maliciously," or "wilfully," or "knowingly" do certain things shall be liable to punishment. If those words are left out they cannot be read into the Act: see *R. v. Prince* (1).

[THE CHIEF JUSTICE. The omission of such words may relieve the Crown from the necessity of proving the fraudulent intent, but is it not still open to the accused to shew that there was no *mens rea*? Does not the omission of the words merely shift the onus of proof?]

No. The intention of the Legislature is to absolutely prohibit a certain thing being done. The doing of the thing prohibited supplies the *mens rea*. There are many cases of acts which make the mere doing of a thing an offence, without respect to

(1) L.R. 2 C.C.R. 154.

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I therefore submit that whether or not the accused had an intention to defraud has nothing to do with this case, except to this extent, that I admit that if he honestly believed, or had been, by the action of the defendant, led to believe, that he had obtained a written consent to the sale, he could not then be convicted. But to hold that he may excuse himself by shewing a verbal consent would be to render the operation of the Act entirely nugatory, as it would in most cases be easy for an accused to induce a jury to believe that he had, or thought he had, a verbal consent to sell.

Wise and *Rolin* shewed cause. The preamble to s. 7 shews that fraud is an essential element in the offence, and the preamble controls the enacting part of the section: *R. v. Percy* (11); *Winn v. Mossman* (12). The whole object of the section is to preserve the security, and the impairment of the security is therefore the gist of the offence. In the present case the object of the sale was to preserve the security because the sheep were dying for want of grass. Suppose, therefore, that under such circumstances the mortgagee asks the mortgagor to sell, and omits to give him a written consent, can he afterwards turn informant? We are not contending for a moment that if an accused can shew a verbal consent he must necessarily be acquitted. The question is whether the act was done without a *mens rea*, and the existence of a verbal consent is one of the circumstances, from which, taken with all the other facts of the case, the jury are entitled to judge whether the accused really acted with an innocent mind. The Act forbids the commission of a fraud, and though the fact of selling without a written consent raises a *prima facie* presumption of guilt, yet

(1) L.R. 3 P.C. 345.

(2) 5 Q.B.D. 259.

(3) [1892] 1 Q.B. 220.

(4) 13 Q.B.D. 207.

(5) 23 Q.B.D. 193.

(6) [1894] 2 Q.B. 176.

(7) L.R. 2 C.C.R. 154.

(8) L.R. 9 Q.B. 292.

(9) [1895] 1 Q.B. 918.

(10) 1 Q.B.D. 84.

(11) L.R. 9 Q.B. 64.

(12) L.R. 4 Ex. at 300.

that presumption may be rebutted by the prisoner. The omission of the words "knowingly" or "fraudulently" merely has the effect of shifting the onus of proof on to the prisoner when once the Crown has proved the sale and the absence of written consent. The general rule is that a person cannot be guilty of a crime unless he acts with a *mens rea* or blameworthy state of mind. In cases of offences which are *mala in se* the existence of a *mens rea* is absolutely necessary. In another class of cases in which the offences are *mala prohibita*, and where the thing forbidden is forbidden in the interests of the general public, the existence of the *mens rea* is not always required, or rather the doing of the act is taken as conclusive evidence of its existence. Under this heading come the cases which my learned friend has cited, such as *Graham v. Pocock*, *Dyke v. Gower* and *Cundy v. Le Cocq*. Such cases as these depend on the particular wording of the Act creating the offence. There is a third class of *mala prohibita*, where something is forbidden in the interest of individuals or of a class. In these cases the mere commission of the prohibited act is *prima facie* evidence of the commission of the offence, but the accused is free to rebut the presumption so raised by shewing that he acted innocently. That is this case. *Rex v. Banks* (1); *R. v. Sleep* (2); *Chisholm v. Doulton* (3); *Sherras v. De Rutzen* (4); *R. v. Tolson* (5); *Hearne v. Garton* (6); *Somerset v. Wade* (7).

Even if the case comes technically within the words of the Act, as contended by the defendants, still the plaintiff is entitled to maintain his action for malicious prosecution, because the jury specially found that Evans did not honestly believe that the plaintiff had committed any offence: *Hinton v. Heather* (8); *Ravenga v. Mackintosh* (9); *Turner v. Ambler* (10); *Broad v. Ham* (11); *Hicks v. Faulkner* (12); *Johnson v. Emerson* (13); *Barry v. Tully* (14).

C. B. Stephen replied.

Cur. adv. vult.

(1) 1 Esp. 144.

(2) L. & C. 44.

(3) 22 Q.B.D. 736.

(4) [1895] 1 Q.B. 918.

(5) 23 Q.B.D. 193.

(6) 2 El. & El. 66.

(7) [1894] 1 Q.B. 574.

(8) 14 M. & W. 131.

(9) 2 B. & C. 693.

(10) 10 Q.B. 252.

(11) 5 Bing. N.C. 722.

(12) 8 Q.B.D. 167.

(13) L.R. 6 Ex. 329.

(14) 9 N.S.W. L.R. 476; 5 W.N. 40.

1896. On the 26th and 27th February, 1896, Mr. Justice *Windeyer* being absent from the colony, the case was again argued before a bench consisting of *The Chief Justice*, Mr. Justice *Stephen* and Mr. Justice *Owen*, when similar arguments were advanced, and judgment was again reserved.

May 11. On May 11th the following judgments were delivered:—

OWEN, J. In this case the plaintiff brought an action against the bank for malicious prosecution, and obtained a verdict with 1000*l.* damages.

Three questions were submitted to the jury and answered by them—1. Did Evans before the sale verbally authorise the sale to King? Answer:—Yes. 2. Did Evans entertain an honest belief that the plaintiff was guilty of the offence charged in the information, and if so, was his belief founded on such reasonable grounds as would lead an ordinarily prudent and cautious man, placed in the position of Mr. Evans, to the conclusion that the plaintiff was probably guilty of the offence? Answer:—No. 3. Did Evans honestly believe that the plaintiff, having sold and disposed of certain sheep and cattle covered by the mortgage to the bank without written authority, although he may have had verbal authority, was guilty of an indictable offence under 11 Vic. No. 4, s. 7, and, if so, was his belief founded on such reasonable grounds as would lead a fairly cautious and prudent man in the position of Mr. Evans to entertain such belief? Answer:—No.

It was contended for the defendant bank, that the presence of a guilty mind or *mens rea* was not necessary in order to establish the guilt of a person charged under s. 7 of the Act 11 Vic. No. 4, and that on proof of a sale without written authority the person charged could not give any evidence to shew the absence of *mens rea*. For the plaintiff, it was contended that although the evidence of verbal authority, standing alone, would not be allowed to shew the absence of *mens rea*, such evidence coupled with the other circumstances would be admissible, and that in this case the jury had abundance of evidence to shew that the plaintiff in selling the sheep acted with the full knowledge of the bank, and without any intent to defraud, and for the best interests of his mortgagee.

The question turns on the construction of s. 7, but before considering that, it will be necessary first to ascertain the principles to be applied in determining such construction. Upon this point a great number of cases were cited before us, which at first sight seem hard to reconcile; but a careful consideration of those cases establish in my opinion the following propositions, which are perfectly consistent with each other, and explain the apparent discrepancies in those decisions:—1. The principle that there can be no crime without a guilty mind is the general rule of law, but there are some exceptions in offences created by statute. 2. To bring a case within the exception, the onus lies on the party alleging the exception to shew clearly that the statute so provides. 3. Where it is doubtful what the statute intends, the Court must look to the nature of the offence, the scope and the object of the statute, and the consequences that flow from the one interpretation or the other in order to see whether the proposed interpretation is reasonable. 4. The statute may be so worded as to shift the onus of proof, and to make the commission of the forbidden act *prima facie* evidence of a guilty mind, but permitting such presumption to be rebutted, in which case the jury would have to determine on the whole of the evidence whether there was a guilty mind.

These propositions are, I think, established by the following cases:—In *Chisholm v. Doulton* (1), *Field, J.*, says in his judgment—"Now the general rule of law is that a person cannot be convicted and punished in a proceeding of a criminal nature, unless it can be shewn that he had a guilty mind, and though the Legislature undoubtedly may enact, as in the case of certain of the offences under this very Act it has enacted, that persons shall be criminally responsible for the doing of particular acts, even though they have no guilty mind in doing them, yet it is for the prosecution in each case to make out clearly that the Legislature has in fact so enacted." And *Cave, J.*, says—"It is a general principle of our criminal law that there must be, as an essential ingredient in a criminal offence, some blameworthy con-

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(1) 22 Q.B.D. 736.

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 PIPER applies also to statutory offences, with this difference, that it is
 v. in the power of the Legislature if it so pleases to enact, and in
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 to the general principle of the law, it lies on those who assert
 that the Legislature has so enacted, to make it out convincingly
 by the language of the statute."

In *R. v. Tolson* (1), *Wills, J.*, says—"Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter, and may be so framed, as to make an act criminal, whether there has been intention to break the law, or otherwise to do wrong or not. Whether an enactment is to be construed in this sense, or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable." His Lordship then refers to several cases in which statutes in substantially identical language have been construed differently upon this point, and continues:—"If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there is, and sometimes that there is not, an offence when the guilty mind is absent, it is obvious that assistance must be sought '*aliunde*,' and that all circumstances must be taken into consideration which tend to shew that the one construction or the other is reasonable, and among such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight if the words be incapable of more than one construction . . if the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account." Then referring to a ruling of *Foster, J.*, he continues:—"This ruling was adopted by Lord *Kenyon* in *Rex v. Banks*,

(1) 23 Q.B.D. 168.

who considered it beyond question that the defendant might excuse himself by shewing that he came innocently into such possession, and treated the unqualified words of the statute as merely shifting the burden of proof, and making it necessary for the defendant to shew matter of excuse, and to negative the guilty mind instead of its being necessary for the Crown to shew the existence of the guilty mind. *Prima facie* the statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned." *Hawkins, J.*, after referring to the general principle that there must be a guilty mind, says, "In support of this view a whole list of authorities might be quoted; I shall, however, content myself by citing the most recent of them, *videlicet, Reg. v. Prince* (1), in which most of the cases bearing on the subject are very carefully reviewed by the present Master of the Rolls, then *Brett, J.*, whose language I cheerfully adopt as expressive of my own views touching the principles of law which govern such cases as that now before us. He says, 'It would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind or *mens rea* in every offence really charged as a crime. In some cases the proof of the committal of the acts may *prima facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea*; but even in those cases it is open to the prisoner to rebut the *prima facie* evidence, so that if in the end the jury are satisfied that there was no criminal mind or *mens rea*, there cannot be a conviction in England for that which is by the law considered to be a crime.'" In this view of the law so stated by *Brett, J.*, all the other Judges, fifteen in number, before whom the matter was heard, practically acquiesced.

In *Cundy v. Le Cocq* (2), *Stephen, J.*, in his judgment, says:—"Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind, but I do not think that maxim has so wide an application as it is sometimes considered to have. In old times and as applicable to the common

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(1) L.R. 2 C.C.R. 154.

(2) 13 Q.B.D. p. 207.

1896. law or to earlier statutes the maxim may have been of general application, but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *R. v. Prince* and *R. v. Bishop*, to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each act that is under consideration, to see whether and how far knowledge is of the essence of the offence created."

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I have cited these cases, not for the facts, but as laying down in broad and general terms the principles to be applied in dealing with all cases of crimes, whether under common law or under statutes.

The exceptions to the general rule that a guilty mind must be established, are grouped into three classes by *Wright, J.*, in the case of *Sherras v. De Rutzen* (1). (1) Acts which are not criminal in any real sense but are acts which, in the public interest, are prohibited under penalty; (2) some, perhaps all public nuisances; (3) cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right. Under the first class I should place such cases as *Graham v. Pocock* (2), which was an action to recover penalties for a breach of the Cape of Good Hope Customs Ordinance. In that case the Privy Council held that it was not an element in the ordinance that there should be a fraudulent intent to deprive the Government of the duty. *R. v. Prince* (3), which was a case of abduction of a girl under the age of 16. *Cundy v. Le Cocq* (4), which was a case of supplying liquor to a drunken person. *R. v. Bishop* (5), which was the case of receiving lunatics into an unlicensed house. *R. v. Dyson* (6), which was a case of an undischarged bankrupt obtaining credit. In all those cases it was contrary to public policy to allow the prohibited acts to be committed, no matter how morally innocent the person might be who committed them. Under the 3rd class I should place such cases as *Morden v. Porter* (7), which was a case of trespass in pursuit of game, and *Lee v. Simpson* (8), which was a case of dramatic piracy.

(1) [1895] 1 Q.B. p. 922.

(2) L.R. 3 P.C. 345.

(3) 2 C.C.R. 154.

(4) 13 Q.B.D. 207.

(5) 5 Q.B.D. 259.

(6) [1894] 2 Q.B. 176.

(7) 7 C.B. N.S. 641.

(8) 3 C.B. 871.

These cases are only illustrations of exceptions under statutes, and throw little or no light on the question we have to determine. Each case must be decided on the wording of the particular statute under consideration, and in determining the meaning of the statute the Court must bear in mind the 2nd and 3rd propositions I have mentioned, viz., that it lies on the defendant to shew clearly that the statute has enacted that the commission of the forbidden act, without a guilty mind, is sufficient to prove the crime; and that where the meaning is doubtful the Court must look to the nature of the offence, the scope and object of the statute, and the consequences that flow from one interpretation or the other.

Sect. 7 of the Act (11 Vic. No. 4) is prefaced with a preamble :—
“Whereas it is expedient with a view to increase the public confidence in the validity of such preferable liens on wool and mortgages of live stock to surround them with the penal provisions necessary for the punishment of frauds.” Now the preamble is the key to the statute, and it is clear from this that the crime to be punished is fraud. This view is confirmed by the enacting part, which provides that the person offending shall be held and deemed “guilty of an indictable fraud.” Fraud necessarily implies an intent to defraud; without such intent proved or presumed from the act done, there can be no fraud. The statute expressly provides that, in respect of one of the acts prohibited, *i.e.*, the sale of sheep where there is only a lien on the wool (but no mortgage of the sheep), the fraudulent intent must be proved. The words are “with a view to defraud such lienee of such wool.” In that case clearly the onus would lie on the person alleging the breach of the statute to prove fraudulent intent. Much stress was laid on the omission of the words “fraudulently,” or “with intent to defraud,” from the other part of the same section. In my opinion the effect of such omission is only to shift the burden of proof. It makes the proof of the commission of the forbidden act *prima facie* evidence of the fraudulent intent.

The question then remains, is it open to the person charged with the offence to rebut that presumption? In answering that question the Court must consider whether the interpretation which is sought to be put on the words is or is not reasonable,

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and for this purpose it must consider the consequences that would flow from the one interpretation or the other. As *Wills*, J., says, in *R. v. Tolson*, in considering the reasonableness of an interpretation, "it is impossible to discard the consequences." This country is subject to severe and disastrous droughts and floods, and diseases affecting live stock, rendering prompt action necessary to save the flocks and herds from destruction. Now the stations are often situated at great distances from the towns, where the mortgagees, who for the most part are banks or station agents, reside, and there may be no time to get a written authority for a particular sale, which may be necessary to avoid losing the sheep owing to the want of grass or water, or from floods or disease. In such a case, if the mortgagor got a general verbal authority to sell, if necessary, and he sold the sheep and paid the proceeds into the mortgagee's hands, would he be held guilty of "an indictable fraud and misdemeanour?" Or take another case, suppose the mortgagee gave verbal authority, and said he would send a written authority, but forgot or neglected to do so before the sale, would the mortgagor, in those circumstances, be guilty? If he did not sell the sheep would die, and the mortgagee would lose his security; if he did sell he would be guilty of a misdemeanour and liable to imprisonment for three years with hard labour.

Again, as the mortgagor is only at most a tenant at will, he would be liable to be turned out of his home, and deprived of the management of his station if he did not carry out the mortgagee's verbal authority to sell, but if he did carry it out he would be liable to imprisonment. If these consequences flow, and it appears to me they must flow, from the interpretation sought to be placed on this section, such interpretation cannot, in my opinion, be held to be reasonable.

The question was asked in argument, could the Court allow evidence to be given of a verbal authority to override the express provision that the authority must be in writing? I think evidence of verbal authority alone would not be enough, but such evidence coupled with other circumstances negating a fraudulent intent ought to be admitted, in order to rebut the presumption of fraud which arises on proof of the forbidden act. It

would then be for the jury to determine, on consideration of the whole case, whether the accused had rebutted the presumption.

For these reasons I am of opinion that the verdict ought to stand.

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THE CHIEF JUSTICE concurred in the judgment of *Owen, J.*

STEPHEN, J. A verdict was returned for the defendant bank in an action brought by the plaintiff to recover damages for that the defendant bank falsely and maliciously, and without reasonable and probable cause, charged the plaintiff with having sold and disposed of sheep and cattle mortgaged by the plaintiff to the defendant under the Act 11 Vic. No. 4 without their written consent. The plaintiff had a verbal consent at least, so the jury found, of the manager of a branch bank of the defendants, but sold the cattle and sheep so mortgaged without any written consent. The question is whether the bank laid the charge without reasonable or probable cause.

It is contended for the plaintiff that, as it must now be taken that he had a verbal consent from the manager, and did not sell with any intent to defraud, which was within the knowledge of the bank, the latter had no reasonable or probable cause for the prosecution. The defendant contended that the plaintiff was guilty of an offence by having sold without a written consent, and that the intent to defraud was not a necessary ingredient. Whether this is so or not depends upon the construction of s. 7 of the statute. The section deals with two classes of instruments, viz., liens on the annual produce of sheep, *i.e.*, wool, and secondly, with mortgages of sheep, cattle and horses. The first is dealt with in the earlier part of the section. The words "or of any mortgage, &c.," seem here to be awkwardly introduced, but are referred to later on by the words "such mortgage." Clearly all the other words of that part of the section down to "with a view to defraud such lienee of such wool or the value thereof," apply solely to liens on wool, and the disposal of the lienor's own sheep in certain ways not prohibited; but, if so disposed of with a view to defraud the lienee of the wool, the grantor is, by the concluding words of the section (common to all the offences created) to be held and deemed guilty of an indictable fraud. The section,

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after thus dealing with the lienors of wool, proceeds to the case of a grantor disposing of sheep, cattle or horses themselves, mortgaged by him and remaining in his possession. In this case the words "with a view to defraud" are omitted, and it is enacted that any grantor who shall sell without a written consent of the mortgagee shall be held and deemed guilty of an indictable fraud and misdemeanour. My opinion is that I am bound to hold that the words are purposely omitted and cannot be imported as an ingredient of the offence. I find that in a subsequent part of the section a lienor or mortgagor directly or indirectly impairing the right of property of the lienor or mortgagee is held guilty of the like offence, and the word "impairing" (coupled with others of a like import) indicates to me that the prevention of the impairing of the mortgagee's right was the main object of this statute, irrespective of any intent to defraud. Some reference was made in the argument to the policy of the Act, as solely in protection of a private right and in aid of the contention that the intent to defraud the lienor was material to the offence. I will only remark upon this that the preamble to the section shews that it was expedient to increase the public confidence in the validity of such documents, affecting as they did, and do now, that product of the colony in which its welfare is mainly bound up, and dealing with very large interests, the strict conduct of which may well be considered a matter of public concern. It certainly is not inconsistent with this view that the sale of stock, the property of the mortgagee, should be deemed an offence unless by his written consent. Some stress was laid upon the words "held and deemed to be guilty," and it was argued that "*prima facie* guilty of fraud" should be understood, and that though the offence might, in the first instance, be proved by shewing a sale without the written consent, the suspicion might be rebutted by proving that no intent to defraud existed. I see no ground for practically interpolating these words into the statute.

I now pass on to the argument that, assuming that the intent to defraud is not material, there was an absence of *mens rea* in the plaintiff by reason of his having a verbal consent, that this was known to the manager and that his knowledge was the bank's knowledge, and that therefore they acted without reasonable or

probable cause. It was, I think, hardly contested by the plaintiff but that a *prima facie* case might be made out by proving a sale without written consent, but it is said that the person charged could answer it by shewing that the *mens rea* was absent, and that therefore he could not be convicted of a crime. In general, I may remark in passing, it would be a strong thing to say that a person charging another with acts which *prima facie* constituted a crime, should be supposed to know of this absence of the *mens rea*. But here, in consequence of the finding of the jury, it seems to be taken for granted that, by reason of the manager's having given a verbal consent, he was aware that the *mens rea* did not exist, and therefore he acted without reasonable or probable cause. Granting this, it becomes necessary to examine whether the *mens rea* has anything to do with the case. I think not, and that it comes within that class of cases where it has been held that a conviction can be upheld in its absence.

In the latest case on the subject, *Sherras v. De Rutzen* (1), Mr. Justice *Wright* says, "there are many cases on the subject and it is not easy to reconcile them. There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered." He then cites a number of cases where it is held to be immaterial to consider the question of *mens rea*; to these I may add *Mullins v. Collins* (2), a sale by a servant to a police officer, where the principal was held liable though he had no knowledge of the act, and *Cundy v. Le Cocq* (3), sale to a drunkard who had given no sign of intoxication. In this case *Stephen, J.*, says, "I do not think that maxim has so wide an application as it is sometimes considered to have. It is impossible to apply the maxim generally to all statutes." I may also add *R. v. Dyson* (4). I refer to the quotation of Mr. Justice *Hawkins* both on this point and where he shews that the defendant came within the very words of s. 31, and where he refers to the absence of such words as fraudulently or intent to defraud (note that this is

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(1) [1895] 1 Q.B. 918.

(2) L.R. 9 Q.B. 295.

(3) 13 Q.B.D. 207.

(4) [1894] 2 Q.B. 176.

1896. material on the first branch of my judgment). See also *Betts v. Armstead* (1), *Dyke v. Gower* (2). Of course the authority of these cases could not be disputed.

But it was said that the present case did not come within any of the classes referred to by Mr. Justice *Wright*. I have already pointed out that, in the public interest, these sales without written consent might be prohibited, but whether so or not I maintain that the offence is clearly indicated by the words of the statute as being complete by the mere sale without written consent. The absence that I have referred to of the words "with a view to defraud," or any such words, supports my argument, because if I am right in holding that intent to defraud is not material, it is difficult to conceive what other state of mind could be material to absolve this plaintiff from the consequences of his breach of the provision of the statute now in question. Let me refer to the cases cited where it was held that in the absence of *mens rea* no offence had been committed. It will be found, I venture to say, that in every case the defendant was unconscious of his having committed a breach of the terms of the statute in question. Take *Hearne v. Garton* (3). The defendant there was utterly unconscious of the dangerous character of the goods; in fact, had been misinformed as to them. In *R. v. Cohen* (4), the Court held that the word "possession" implied "knowingly in possession." In *R. v. Sleep* (5), *Cockburn, C.J.*, said that it must be taken that the defendant was ignorant that the goods were marked with the broad arrow. So in *Sherras v. De Rutzen* (previously referred to) the defendant believed that the constable to whom he gave the drink was off duty, he being without his armlet and having every appearance of being off duty. Lord *Esher* (then *Brett, J.*), the sole dissentient in *R. v. Prince*, cites some of the above cases and others in support of his view that the prisoner should not be convicted; some I have already mentioned, others were cases of acquittal on the ground of a claim of right. He sums up in these words:—"Upon all the cases I think it is proved that there can be no conviction for crime in England in absence of a criminal

(1) 20 Q.B.D. 771.

(3) 2 E. & E. 66.

(2) [1892] 1 Q.B. 220.

(4) 8 Cox C.C. 41.

(5) 8 Cox. C.C. 472.

mind or *mens rea*." But in that case he was the one dissentient among 16 Judges. I ask, can this broad statement of the law be supported?

Now let me consider what is the absence of the *mens rea* contended for here. In contrast with the cases to which I have referred, his excuse is, "I am not morally guilty because I thought that, having a verbal consent, there was no harm in knowingly contravening the provisions of the Act." His plea is with reference to a matter entirely collateral to the Act. Suppose a publican in England was charged with supplying liquor to a constable on duty, and made this defence, that a superintendent of police authorised him to give it to him, he would be as morally innocent as the plaintiff in this case, but I maintain that that would be no bar to a conviction. In this supposed case, and the one under consideration, what the defence amounts to is nothing more than, "I thought I had committed no offence under the circumstances." In *R. v. Tolson* (1), *Stephen, J.*, referring to Lord *Esher's* judgment, says that he established this principle—"A mistake of facts on reasonable grounds to the extent that if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse." How can this be applied here, where no mistake as to any fact was made or relied on by the plaintiff? I point out that he was not in ignorance that he was committing a breach of the statute. He cannot make the defence that, *e.g.*, the defendant made in *Hearne v. Gaston* and *Sherras v. De Rutzen*. What does he say? "I did sell without a written authority, but I had a verbal one."

If the plaintiff can say that effectually, he virtually abrogates the Act, as no prosecution could take place where there was a verbal consent. Again, *Stephen, J.*, refers to that part of Lord *Bramwell's* judgment where he, referring to some examples of the *mens rea* preventing criminality, adds, "In those cases he would not know that he was doing acts forbidden by the statute." Plaintiff here knew, or must be taken to have known, that he was infringing the statute. I may here remark that *R. v. Tolson* shews how extremely difficult is a case of this kind. Notwithstanding the aid afforded by the judgments in the case of *R. v.*

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Prince, in *R. v. Tolson* nine Judges thought one way and five another. Lord *Coleridge*, at the conclusion of the argument, would have been among those upholding the conviction, but joined in quashing it by reason of the proviso to the section in question, which was the groundwork of the judgment delivered by Mr. Justice *Cave*.

The considerations that have pressed me most in favour of the plaintiff were the extreme cases that might occur if the statute has the construction that I put upon it. It is asked, "What if the mortgagee himself gave a verbal consent, received the proceeds of the stock sold, and then prosecuted the mortgagor?" In this connection I may observe that though the mortgagee is the informant the Attorney-General for the Crown is really the prosecutor. What if the mortgagor believed that he had a written authority? As to this last, this case might come within Lord *Esher's* principle, where a mistake of fact on reasonable grounds has been made. But I am not called upon to decide this point, and I answer that it is not always a safe method to construe statutes by extreme cases. In several of the authorities to which I have referred it is pointed out that extreme cases might occur, and that the difficulty might be met by nominal punishments. The degrees of criminality are so infinite that I may observe, by way of illustration, that our criminal code allows a Judge in a case of manslaughter to discharge the jury from giving a verdict, even though, if returned, it would necessarily be "guilty."

I conclude by saying that, in my opinion, this case exemplifies the propriety of the provision that I have been discussing. The defendants are a corporation whose headquarters are in Sydney, at a distance from the place where the stock are depastured. Their manager acts for them, and they were, I may fairly presume, informed by him that he had not given any authority to sell. This information, presumably, the defendants honestly believed. Possibly they considered that he had no implied authority to that effect. (To my mind it is questionable whether he had.) Nevertheless the bank is held liable (I do not mean that any question was made as to this) by the imputation to it of the wrongful and malicious act of its agent, found to be so under conflicting oral testimony. Such a state of things is some ground for assuming

that the Legislature intended to make it an offence to put mortgagees to the risk of the kind of contention that has arisen here, irrespective of any consideration of intent to defraud, or other state of mind which might be designated by the expression of *mens rea* or otherwise.

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I can hardly refrain from remarking that it is possible that the legislators, in those early days, may not have contemplated liens or mortgages of sheep to banks or other corporations, and intended that the consent should be given by the mortgagee himself. In s. 3 of the continuing Act, 31 Vic. No. 24, where the Legislature intended to allow the interposition of an agent, it expressly so provides. In the continuing Act, 31 Vic. No. 24, the importance of the consent in writing of the mortgagee, where the mortgagor wishes to give a lien upon the wool of the mortgagor's sheep, is emphasised by the addition of the words "but not without such consent."

I am, therefore, on the whole of opinion that a nonsuit should be entered.

Rule discharged with costs.

Attorneys for the plaintiff: *Curtiss & Barry.*

Attorneys for the defendants: *Allen, Allen & Hemsley.*