

## BROWN v. CLARK.

*"The Stock Act, 1932" (23 Geo. V., No. 54), Sec. 46 (1) (iii)—Branding sheep—Absence of knowledge of ownership—Mens rea.*

The respondent was charged under Sec. 46 (1) (iii.) of "The Stock Act, 1932," that he "did unlawfully brand with a body brand eleven sheep of which he was not the owner, and without having the authority of the owner thereof or with the brand of such owner." Evidence was given to the effect that the respondent, a pastoralist, and his two servants gathered his sheep for shearing; that 67 sheep owned by a neighbour were culled out after examination of the flock and returned to their owner; that respondent or his servant had branded the flock; that in the course of so doing one or other of them had branded 11 sheep owned by the same neighbour, without knowing that the sheep were not the respondent's own sheep. The P.M. dismissed the complaint on the ground that the evidence failed to prove that the respondent personally had branded the 11 sheep in question or any of them. On return of an order to review, NICHOLLS, C.J., affirmed that decision.

On appeal,

*Held* (by NICHOLLS, C.J., CRISP and CLARK, JJ.)—That the appeal should be dismissed.

The respondent Rennie Meekisson Clark was charged before a *Court of Petty Sessions* at Launceston that he "did unlawfully brand with a body brand eleven sheep of which he was not the owner and without having the authority of the owner thereof or with the brand of such owner" contrary to Sec. 46 (1) (iii) of "The Stock Act, 1932."

Evidence was given for the prosecution; by Detective-Sergeant Brown: "I said we wished to examine his sheep and his run, to see if there were any of Denmen's sheep on his place. He said 'Denmen told me that he had reported to you his shortage, and finding 5 sheep bearing my brand on his place and to expect a visit from the Police.' He said 'If you had been here yesterday I had most of my sheep in.' I asked how many sheep he sheared last shearing, and who sheared them and who branded them. He told me. I said 'Who branded them?' He replied 'I branded them myself.' I said 'Did you hand off the shearing board?' He said 'Yes.' I said 'What have you to say about the 5 spoken of?' He said 'I'll not deny that I sheared and branded those 5, and will pay for the wool off them.' I said 'Have you any others of the same sheep on your place now?' He said 'No! not so far as I am aware, except one in a shed nearby.' I said 'That is one branded and shorn as I said about the others.' He said 'Yes! On Saturday last I threw over the fence into Denmen's 3,000 acre paddock 5 more of the sheep. They carried my body brand, and were also shorn.' I said 'How many do you think you sheared altogether?' He said '11 as far as I know.'

NICHOLLS,  
C.J.

1934.

October 30.

Full Court.

NICHOLLS,  
C.J.,  
CRISP &  
CLARK,  
JJ.

1935.

March 10, 15,  
22.

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"Defendant said to me before he left 'I have been thinking over "the branding, and find that Jack Laird who was working for me "branded a few of the sheep branded at shearing time.' I asked "defendant where he would be then and he said he would be in the "shed. He said 'I am prepared to take the responsibility of the "branding of the sheep and would pay Denmen for the wool off the "11 sheep.' He said he told Denmen that he would, provided he "branded each sheep with his (Denmen's) body brand, and he would "hand over cheque when that was done. I told defendant he would "most likely be charged with breach of Body Brands Act."

"Clark is a young man with a good reputation in that district. He "told me he thought he was a number of sheep short. Clark afforded "us every opportunity of inquiry into the circumstances."

Evidence was given for the defence, by the defendant, as follows:—  
 "I am a pastoralist at Piper's River and have about 8,000 acres there.  
 "A fence divides my property on one side for a quarter of a mile but  
 "sand from the sea blows on it and sheep can cross it easily. Began  
 "shearing about 2nd Dec., 1933. First gathered from run adjoining  
 "Denmen and gathered there 500 (about). They were yarded. Jack  
 "Laird and Michael Welsh spent about 2 hours examining sheep and  
 "picked out 67 as belonging to Denmen. They were put into one yard  
 "and 4 others picked out and put in another yard. I sent Welsh to  
 "Denmen and in the afternoon his son Frank Denmen came over and  
 "I told him I had a lot of his father's sheep here, referring to the 67,  
 "and asked him to look through the remainder of the 500 to see if  
 "there were any others of his father's amongst mine. He spent  
 "about half an hour examining them but found none. I helped him  
 "to put the 67 back into Denmen's paddock. The fences were only  
 "moderate, and some of those 67 could have got back into my pad-  
 "docks. Those 500 sheep were being shorn, and others were being  
 "brought in at the same time. I have lost about 70 sheep myself.  
 "After shearing, the sheep go out into pens, and at lunch time about  
 "30 are branded. I branded about 600 or 700 personally out of 980.  
 "The sheep could have been examined for earmarks before branding.  
 "It would take time. On 25/4/34 Denmen asked me how many of  
 "his sheep I had shorn. I said I did not know of any. He said he  
 "had found 4 shorn and branded with my brand on his run. I then  
 "searched my run and found six of his sheep there branded with my  
 "brand and shorn. I put 5 into Denmen's run and one into my shed.  
 "I said if he would come and brand the sheep with his brand I would  
 "pay for the wool. If they did not have his brand they might come  
 "back on to my place and be again taken for mine. Denmen is  
 "assisted by his son. He assisted him at shearing time. In previous  
 "years there have been sheep shorn by both Denmen and me belong-  
 "ing to the other of us. The male sheep have to be marked on one  
 "ear and females on the other. The examination for ownership is

"done by examining earmarks. I do not think there was anything indistinct in the earmarks of the 11 sheep in question. I think the sheep must have come back through the fence after they were taken away by Frank Denmen. That is the only explanation I can give. If they came back through the fence they might have been in any lot of the sheep shorn. Only Laird and I did the branding, and he was branding under my instructions."

This evidence was corroborated by defendant's two servants referred to.

At the conclusion of the evidence, counsel for the defendant raised two contentions—(1) that it was not proved that the defendant personally branded any of the sheep mentioned in the complaint, and (2) that the defendant had no knowledge at the time that any sheep not belonging to him were branded. The Police Magistrate dismissed the complaint.

In these proceedings, the Police Magistrate filed an affidavit in which he said "I gave my decision on the first point only. Being satisfied that it could not be said which of the two, defendant or his servant, branded those particular sheep, and considering that the defendant could not be held responsible for the act of his servant as he had made genuine efforts to cull out all sheep not belonging to him and did not know at the time that sheep not belonging to him remained amongst those submitted for branding, I thereupon dismissed the complaint."

An order to review was obtained, and after argument, was discharged by NICHOLLS, C.J. On appeal to the *Full Court*,

*R. N. K. Beedham*, for the appellant: Sec. 46 (1) (iii) prohibits the branding of stock in the circumstances mentioned therein without regard to the state of mind at the time of branding of the person who performs the branding. This is indicated by the object and scope of the Act. Its object is no longer merely to prevent cattle stealing; its dominant object is to enable the identity of the animals to be easily ascertainable in the public interest, e.g., for the detection of disease and destruction of pests, detection of stealing, and to identify straying stock. One of the ways in which this object is achieved is by requiring every owner to brand his sheep. (Sec. 29.) Only one of the penal provisions of "The Stock Act, 1932," expressly makes knowledge an essential ingredient of the offence. (Sec. 44 (2) I.) The only punishment is a pecuniary penalty. (Counsel referred to *The King v. Ewart* (1905), 25 N.Z.L.R. 709; *Reg. v. Prince* (1873), 2 C.C.R. 154; *Reg. v. Bishop* (1880), 5 Q.B.D. 259; *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207; *Reg. v. Tolson* (1889), 23 Q.B.D. 168; *Coppen v. Moore* (1898), 2 Q.B. 306; *Bear v. Lynch* (1909), 8 C.L.R. 592; *Duncan v. Ellis* (1916), 21 C.L.R. 379; *Ross v. Sickerdick* (1916), 22 C.L.R. 197.) The nature of the offence charged is such that to re-

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quire guilty knowledge as an essential would frustrate the object of the Act. If the statute imposes an absolute prohibition the defendant is responsible for the acts of his servants. (Counsel referred to *Coppen v. Moore* (1898), 2 Q.B. 306 and 312, 314-5; *Tearks, Gunston Tee Ltd. v. Ward* (1902), 2 K.B. 1 and p. 11; *Mousell Bros. v. L. & N.W. Ry. Co.* (1917), 2 K.B. 836; *Griffiths v. Studebakers Ltd.* (1924), 1 K.B. 102 and 105.) The only remaining point is the suggestion that the offence proved comes within para. (vi.) and not para. (iii.) of Sec. 46 (1). But in the case of crimes other than felonies there never has been any distinction between the principal offender and an aider and abettor. (Counsel referred to *Du Croi v. Lambourne* (1907), 1 K.B. 40; *Benford v. Sims* (1898), 2 Q.B. 641; "*Justices Procedure Act*, 1919," Sec. 22.)

*Tasman Shields*, for the respondent: The *onus* is on the appellant to show that *mens rea* is not required. (*The King v. Ewart* (1905), 25 N.Z.L.R. 709; *Miller v. Hood* (1921), 40 N.Z.L.R. 998.) The Court will apply the test of reasonableness as a chief consideration in deciding whether or not guilty knowledge is required. It is wholly unreasonable to construe the prohibition as absolute irrespective of the defendant's state of mind. A conviction in this case would carry practically the same stigma as a conviction for sheep stealing. (Counsel referred to *The King v. Marsh*, 2 B.C.C. 717; *R. v. Prince* (1873), 2 C.C.R. 154; *R. v. Ewart* (*supra*); *R. v. Hurst*, 51 N.Z.L.R. 300.)

CLARK, J., referred to *In re Mahmoud and Ispahani* (1921), 2 K.B. at pp. 731-2.)

C.A.V.

NICHOLLS, C.J.: The question arising in this case continually is being discussed, and the leading authorities are known to everyone.

The existing cases on the construction of penal statutes cannot all be reconciled; but I think it is safe to say that the test we have to apply lies between two propositions.

*Firstly*—"A Court is not at liberty to put a limitation on general words, which is not called for by the sense or the objects of the enactment."

*Secondly*—"Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language."

These statements are, if I may say so, pure commonsense with which every clear-thinking person will agree; and, moreover, are stated in the form in which a general rule should be stated, so that it may be understood without investigation of facts of the case which caused its enunciation.

The charge in this case is that the respondent "did unlawfully brand " with a body brand eleven sheep of which he was not the owner and " without having the authority of the owner thereof or with the brand " of such owner."

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This charge is based on Section 46 of "The Stock Act, 1932," and follows paragraph (iii.) of that Section.

The case was tried before *Mr. E. L. Hall, P.M.*, who found on the facts that it had not been proved that respondent branded the sheep. He also found as a fact that respondent, owing to the fact that sand was apt to obliterate the fences between his land and that of a neighbour, had taken great precautions to see that the only sheep branded were his own sheep, even going to the extent of calling in his neighbour's son to look over the sheep and pick out any belonging to his father.

In some way not exactly known, but probably owing to a fence having been covered by sand blown over it, some of the neighbour's sheep got back to respondent's run, and, either by respondent or his servant, accidentally were branded with respondent's brand.

Paragraph VI. of Section 46 makes it an offence for any person to cause, procure, permit, or assist in the doing of anything prohibited by the Section; but no charge was laid under that paragraph, nor did the prosecution claim that respondent was liable under it, nor was any amendment of the complaint asked for.

The Police Magistrate's decision was based on the finding that defendant had not been proved to have branded any of the eleven sheep, and had been proved to have taken the greatest care to brand only his own sheep.

*Mr. Beedham*, for the appellant, claims that the Act lays down an absolute rule that if a brand-owner, or his servant authorised to brand the master's sheep, puts the master's brand on another person's sheep, the master has committed the offence of unlawful branding and that no explanations or excuses will avail. This includes the proposition that if a man's servant maliciously, to injure his master, brands a neighbour's sheep with his master's brand, the master is guilty of the offence created by paragraph (iii.). Also, that put by *Mr. Shields*-- If a man buys some sheep at a public auction, and the auctioneer's assistants deliver the wrong sheep, and the buyer's servant brands them with the buyer's own brand (and they must be branded within ten days), and the mistake of the auctioneer is discovered later on, then the buyer is guilty of an offence.

The question when a man shall be liable under this Section for the act of another person has been considered by the Legislature, as can be seen by reading in paragraph VI. He is liable if he causes or procures or permits or assists in the unlawful branding. It is contended

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that he can become guilty under this section although he has no knowledge that his brand is to be, or is being, put upon some other person's sheep, and that we must extend the meaning of the words cause, procure, commit, and assist to cover an accidental act of a servant, of which the master knows nothing, before or when it is done.

Apart from any rule as to construing penal acts strictly, I think that we should be doing violence to the meaning of the words causing, procuring, permitting, and assisting, if we said that they did not include an implication of purpose and will. Even in the civil law of negligence, to "cause" an accident always means to have done something which should not have been done or to have left undone something which should have been done, which was the cause of the accident. In this argument, the accident is treated as its own cause, and as conclusively implying wrongdoing on the part of the person whose brand has been used.

As *Austin* says, the expression "intention" meets us at every step in every department of jurisprudence. The intention of the respondent and apparently of his servant was, after taking great care to separate all respondent's sheep from the neighbour's, to brand his own sheep with his own brand. There may have been some negligence of the servant or there may not. It is enough to say at present that we are not in a position to say that there was negligence.

This Act must be taken as having been enacted as a part of the whole *corpus juris*, and with a knowledge of the essentials of a crime. The Legislature could have made it a crime accidentally without negligence to brand another man's sheep, and could have attributed to a master criminal liability for such an accident happening to his servant without negligence. But we should need direct language or unavoidable implication, before we could decide that such a revolution in the doctrines of criminal liability had been brought about.

I think the learned Police Magistrate was right in dismissing the complaint.

CRISP, J.: The respondent was charged, for that he did unlawfully brand eleven sheep of which he was not the owner and without having the authority of the owner thereof or with the brand of such owner.

The Police Magistrate believed that the defendant had tried to avoid shearing stock other than his own, and, as there was no proof that defendant had branded those particular sheep, he dismissed the complaint.

Upon this appeal, it is contended that Section 46 (1) (iii.) of "The Stock Act, 1932," contains an absolute prohibition of the act of

branding the sheep of others without regard to the state of mind of the branding owner, and that whether the defendant or his servant did the branding the defendant is liable.

Now this section is a penal one, and, *prima facie*, a principal is not criminally responsible for the acts of his servant; though, the Legislature may prohibit an act or enforce a duty in such terms as to make the prohibition or the duty absolute: in which case the principal is liable, though the act is, in fact, done by his servant. To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to a number of considerations. I think these are well expressed by ATKIN, J., in *Mousell v. L. & N.W. Ry. Co.* (1917), 2 *K.B.*, at p. 845:—"Regard must be had to the object of the statute, "the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed"—a formidable task. Indeed, in *Mahmoud v. Ispahani* (1921), 2 *K.B.* at p. 731, the same learned Judge (now LORD ATKIN) expressed himself as viewing with some trepidation any tendency to diminish the importance of the rule as to *mens rea* which has prevailed in respect of criminal charges; and he went on to say, "There are cases no doubt where a statute makes it plain that an offence is created without a criminal intention on the part of the person who is charged, but those cases, where the Court is dealing with a question of crime, are to my mind in themselves anomalous."

There are, of course, very many cases upon the point. *Mr. Beedham* cited quite a number, and I am sure, exercised restraint in not citing more. Many of them are old friends, because the question for decision here has exercised the minds of Judges for years past, and opinions have differed so much upon the point. But I proceed to attempt to apply the tests suggested by ATKIN, J.:—(1) Regard must be had to the object of the statute. There seems to be no difficulty here. Its object, in this regard, is to provide for and regulate the branding of stock, and to make it an offence for any person to brand the stock of others except with the authority of that other and with his brand.

But then we meet trouble. (2) Regard must be had to the words used. If we could only interpret the words used, all would be well. Section 29 requires every "sheep owner" to brand all sheep belonging to him: when we come to Section 46 the word "owner" is not used: the offence is committed by "any person" who brands the stock of another. (3) Regard must be had to the person upon whom the duty is imposed: that is the very question we are attempting to answer.

When we consider the next test, the appellant, I think, meets with difficulties:—(4) Regard must be had to the person by whom this particular work would, in ordinary circumstances, be performed. Who

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would that person be? Obviously, in many cases at least, not the owner, but his servant.

Then I proceed to try and read Section 29 with Section 46. Under Section 29 the duty of branding all his sheep is cast on the owner: is he not then the "person" referred to in Section 46? Could Parliament have meant the brander to be liable when he may know nothing about the sheep, and, in shearing and branding may be merely obeying the direction of the owner or his manager? It seems a fair enough argument, and yet it may be put in quite another way; Section 26 imposes the duty of branding on the owner, but when the actual work of branding is to be done, Parliament, knowing that, in many cases, it will not be the owner doing it, enacts (Section 46) that the person actually branding shall not do certain things. Which of these two constructions is the proper one? Upon the whole I think the latter; considering that the owner may be an absentee, and considering too that all owners of large flocks almost certainly would not be branding personally, Parliament could hardly have been aiming at the owner. At all events, if Legislators think the owner should be liable they should say so in plain terms: and they have not done so here.

I am not prepared to say that the CHIEF JUSTICE's decision is wrong, and think that the appeal should be dismissed.

CLARK, J.: I also agree that the appeal should be dismissed.

Solicitor for the appellant: *A. Banks Smith*, Crown Solicitor.

Solicitors for the respondent: *Shields, Heritage, Stackhouse, & Martin*, by their agents, *Butler, McIntyre, & Butler*.

CRISP, J. DAVIES' WILL; PERPETUAL TRUSTEES, EXECUTORS, &  
AGENCY COMPANY OF TASMANIA LIMITED v. DAVIES.

1935.  
February 4, 11.  
High Court  
of  
Australia.

*Will—Construction—Income for "maintenance, education, and bene-  
"fit" of daughter until she attains twenty-one—Gift of income to  
daughter for life on attaining twenty-one—Balance of income unex-  
pended during daughter's infancy.*

NICH,  
STARKE,  
DIXON,  
EVATT,  
AND  
McTIERNAN,  
JJ.  
1935.  
May 2, 3.

Testator by his will directed his one half of the proceeds of conversion of his estate to be invested and the interest and income thereof to be paid and applied for the maintenance, education, and benefit of his daughter until she should attain the age of 21 years; from and after the date on which his daughter should attain the age of 21 years, testator directed his trustee to pay the income to his daughter for and during her life, and upon her death to divide the fund equally among her children, and if there should be none, then to others. The trustee applied the income for the maintenance, education, and benefit of the daughter during her infancy; the balance of income unexpended at the time when the daughter attained twenty-one years of age was considerable.

*Held (by CRISP, J.)—That the daughter was not entitled to the balance of unexpended income, which devolved as capital.*