

[PRIVY COUNCIL.]

BANK OF NEW SOUTH WALES . . DEFENDANTS ; J. C.*
 AND 1897
 PIPER PLAINTIFF. *March 16, 17 ;*
May 21.
 ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—11 Vict. No. 4, s. 7—Construction—Statutory Offence—Malicious Prosecution—Mens rea.

By s. 7 of Act 11 Vict. No. 4, a sale of wool under a lien “with a view to defraud,” without the written consent of the lienee is made a punishable offence; a like sale of stock is made so independently of a like intent.

In an action for malicious prosecution thereunder, it appeared that the plaintiff had sold stock of which the defendant bank was lienee, without intent to defraud, and with the bank’s oral consent :—

Held, that on the true construction of the above section, an intent to defraud was not an element of the statutory offence charged, that this was matter for decision by the judge, and that a verdict must be entered for the defendant.

An intention to offend against the penal provisions of an Act constitutes mens rea; and was proved by the plaintiff’s knowledge that there was no written consent.

APPEAL from an order of the Supreme Court (May 11, 1896) whereby a rule nisi, obtained by the appellants for a new trial, or nonsuit, or verdict for the appellants, was discharged with costs. The verdict of the jury was for 1000*l*.

The facts are stated in the judgment of their Lordships.

The case in the Court below is reported in 17 N. S. W. R. Cases at Law, 54.

At the trial, at the close of the respondent’s case the appellants’ counsel applied for a nonsuit, on the grounds that on the respondent’s evidence he was in fact guilty of the offence for which he had been prosecuted; that even if the appellants had given an oral consent to the sale, it was no answer to the charge; that upon the admitted facts there was reasonable and probable cause for the prosecution; and that there was no evidence to go to the jury in support of the respondent’s

* *Present*: LORD WATSON, LORD DAVEY, and SIR RICHARD COUCH.

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case. The judge, however, declined to nonsuit or direct a verdict for the appellants, but reserved leave to the appellants, if necessary, to move to enter a nonsuit or a verdict for them.

Upon the argument of the rule nisi Darley C.J. and Owen J. held that the preamble to the 7th section of the Act 11 Vict. No. 4, indicates that the crime to be punished is fraud; that the presence of mens rea is necessary to constitute an offence under the section; 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 the jury had abundance of evidence to shew that the plaintiff, in selling the sheep, had acted with the full knowledge of the bank, and without any intent to defraud. Stephen J. was of opinion that a nonsuit should be entered on the ground that the presence of mens rea was not necessary to constitute an offence under the section.

Joseph Walton, Q.C., Pitcher, Q.C. (New South Wales), and *Clark*, for the appellants, contended that it is an indictable offence under 11 Vict. No. 4, s. 7, for a mortgagor of stock to sell the stock comprised in the mortgage without the written consent of the mortgagee. The oral consent did not save the terms of the Act. Consequently there was as matter of law, depending on the construction of the section, reasonable and probable cause for prosecuting the respondent. The judge ought not to have left that question to the jury. Reference was made to *Sherras v. De Rutzen* (1) and *Reg. v. Jobson*. (2) Mens rea is proved by shewing an intention to do that which the Act has forbidden. If the bank were wrong in their construction of the Act to the effect that sale of stock by the mortgagor without their written consent was penal, notwithstanding the absence of fraud; still the absence of reasonable cause is not proved where there is an honest mistake as to the meaning of an Act: see *Phillips v. Naylor* (3); *Johnson v. Emerson*. (4) The following cases were cited on the point whether an action for malicious prosecution would under any

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

(3) (1859) 4 H. & N. 564.

(2) (1889) 23 Q. B. D. 168.

(4) (1871) L. R. 6 Ex. 329.

circumstances lie against a corporation such as the appellants, on the ground that a corporation is only liable through its agents, and a principal is not liable for the tort of his agent when it involves mens rea, i.e., malice or fraud or both: *Wilde v. Gibson* (1); *Denton v. Great Northern Ry. Co.* (2); *Abrath v. North Eastern Ry. Co.* (3); *Udell v. Atherton* (4); *Barwick v. English Joint Stock Bank.* (5) [Their Lordships pointed out that this point was not taken in the grounds of application for a new trial, and therefore was not now open.]

Montague Shearman, and *W. E. Hume Williams*, for the respondent, contended that the findings of the jury upon all the questions submitted to them were right and based upon a right view of the evidence. According to the true construction of the section in question, it has not enacted that the commission of the forbidden act without a mens rea is sufficient to prove the offence charged. At the best the meaning was doubtful, and, accordingly, the Court should look to the nature of the offence, the scope and object of the statute, and the consequences involved. The preamble to s. 7 shews clearly that the crime to be punished is fraud. Even if in the present case it was not necessary for the prosecutor to prove a fraudulent intent, it was at least open to the respondent to disprove that intent, and he did so, and he further shewed that the manager of the bank knew that he had no fraudulent intent. Reference was made to *Reg. v. Jobson* (6); *Reg. v. Prince* (7); *Sherras v. De Rutzen* (8); *Ravenga v. Mackintosh.* (9)

Pitcher, Q.C., replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The suit in this appeal was brought by the respondent against the appellants for falsely and maliciously and without reasonable or probable cause making a charge against him before a justice of the peace, upon which

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| (1) (1848) 1 H. L. 605. | (5) (1867) L. R. 2 Ex. 259. |
| (2) (1856) 5 E. & B. 860. | (6) 23 Q. B. D. 168. |
| (3) (1886) 11 App. Cas. 247. | (7) (1875) L. R. 2 C. C. 154. |
| (4) (1861) 7 H. & N. 172. | (8) [1895] 1 Q. B. 922. |
| (9) (1824) 2 B. & C. 693. | |

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he was summoned to appear at the police court at Cowra in New South Wales, and was committed for trial at the court of quarter sessions at Cowra. Afterwards the Attorney-General refused to prosecute. The defendants pleaded not guilty. The trial took place in March, 1895, before Simpson J., when the jury found a verdict for the plaintiff for 1000*l.* damages. On May 7, 1895, a rule nisi for a new trial or for a nonsuit or verdict for the defendants, pursuant to leave reserved at the trial, was granted by the Supreme Court. On May 11, 1896, the rule was discharged by the Chief Justice and Owen J., Stephen J., the third judge, dissenting.

The appellants are a banking company incorporated in the Colony of New South Wales by Act of Parliament and Deed of Settlement. The respondent is a farmer and grazier residing near Cowra. By a deed of mortgage dated February 29, 1892, the respondent assigned to the appellants by way of mortgage 2050 sheep, ninety-five head of cattle, and twelve horses, as a collateral security for credit advances and accommodation to the extent of 250*l.* in account current which the bank had agreed to grant to him. The mortgage was duly executed and registered in accordance with the provisions of the Act 11 Vict. No. 4. Sect. 7 of that Act is as follows :—

“And 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 Be it enacted that any grantor of any such preferable lien on wool or of any mortgage of sheep cattle or horses and of their increase and progeny under this Act whether such grantor shall be principal or agent who shall afterwards by the sale or delivery of the wool under any such lien without the written consent of the lienee to any purchaser pawnee or other person or by selling steaming or boiling down or causing to be sold steamed or boiled down without such written consent as aforesaid the sheep whereon the same shall be growing with a view to defraud such lienee of such wool or of the value thereof or who shall after the due execution and registry of any such mortgage without the written consent of the mortgagee thereof

sell or dispose of or steam or boil down or cause to be sold and disposed of or to be steamed or boiled down any sheep cattle or horses or their increase or progeny or who shall in any way or by any means whatsoever or howsoever directly or indirectly destroy defeat invalidate or impair or any other person or persons who shall wilfully and knowingly incite aid or abet any such grantor directly or indirectly to defeat destroy invalidate or impair the right of property of any lienec in the wool of any sheep mentioned and described in any such registered agreement as aforesaid or the right of property of any such mortgagee as aforesaid in any sheep cattle or horses or their increase and progeny mentioned in any mortgage duly executed and registered as aforesaid under the provisions of this Act shall be severally held and deemed guilty of an indictable fraud and misdemeanour and being thereof duly convicted shall be severally liable in the discretion of the judge or Court before whom any such offender shall be so convicted to fine or imprisonment or to both fine and imprisonment for any period not exceeding three years with or without hard labour at the discretion of such Court or judge."

In May, 1893, whilst the mortgage was subsisting, and the respondent was indebted thereon to the appellants in about 240*l.*, the respondent, without their written consent, sold and delivered to one Robert Philip King 645 sheep and a number of cattle, part of the sheep and cattle included in the mortgage. On November 3, 1893, James Thomas Evans, the manager of the bank at Cowra, swore an information under s. 7 before a justice of the peace that the respondent on or about May 19, 1893, without the written consent of the bank, sold and disposed of the sheep and cattle to King. Upon this information the respondent was brought before the justice of the peace and committed for trial, but the Attorney-General, as already stated, refused to file a bill against him. The action was then brought.

At the trial the respondent admitted the execution and registration of the mortgage and the sale to King, and did not suggest or set up that at the time of the sale he had or believed himself to have the written consent of the appellants or their

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manager to the sale ; but he swore that before the sale he obtained the verbal consent of Evans to it. At the close of the respondent's case the appellants' counsel applied for a nonsuit on the ground that on the respondent's evidence he was in fact guilty of the offence with which he had been charged, and that even if it were proved that the appellants had given a verbal consent to the sale, it would afford no answer to the charge ; and that, therefore, upon the admitted facts there was reasonable and probable cause for the information and charge. The learned judge declined to nonsuit, but reserved leave to the appellants to move to enter a nonsuit or a verdict for them. Evans was then examined as a witness for the appellants. He denied that he gave the respondent any authority orally or in writing to make the sale to King ; but the jury, in answer to the first question put to them by the learned judge, found that Evans did verbally authorize the sale. That must therefore be taken as the fact. Two other questions were submitted to the jury, one being : " 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 ? " and the other : " 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 Vict. 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 ? " To both these questions the jury answered " No."

The decision of the question whether there was reasonable or probable cause for the charge depends upon the construction of s. 7. It was for the judge to decide that question, as a matter of law, upon the facts admitted or found by the jury. It is to be observed that in the first part of s. 7, which relates to the sale or delivery of wool that is under a lien, the words " with a

view to defraud" are introduced as an essential quality of the offence; but in the part of the section which relates to the sale and disposition of sheep or cattle that have been mortgaged these words are omitted. This cannot be considered to be an unintentional omission unless it is shewn to be so by the context of the section. Their Lordships do not see any ground for construing the section as if the words "with a view to defraud" had been inserted in this part of it. They cannot alter the offence created by the statute by the introduction of words which the Legislature has omitted.

It was certainly competent to the Legislature of New South Wales to define a crime in such a way as to make the existence of any state of mind of the perpetrator immaterial, and the question is whether in the case of the sale by the mortgagor it has not done so. The enactment in this part of s. 7, according to the ordinary meaning of the words, appears to their Lordships to provide that the selling without a written consent shall be punished, as if it were a fraud. In their Lordships' opinion neither the preamble to the 7th section nor the enactment that the persons offending shall be held and deemed guilty of an indictable fraud justifies the opinion that an intent to defraud must be implied, or that it is open to the person charged to give evidence to rebut the presumption of fraud. It is the intention of the Legislature to make a sale by the mortgagor without the written consent of the mortgagee a criminal offence. It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be mens rea on the part of the accused, and that he may avoid conviction by shewing that such mens rea did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and

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reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. The case of *Sherras v. De Rutzen* (1), where the conviction of a publican for the offence of selling drink to a constable on duty was set aside by the court because the accused believed and had reasonable grounds for the belief that the constable was not on duty at the time is an illustration of its absence. The circumstances of the present case are far from indicating that there was no mens rea on the part of the respondent. He must be presumed to have known the provisions of s. 7, whether he was actually acquainted with its terms or not. Then he knew that he had not the written consent of the mortgagee; and that knowledge was sufficient to make him aware that he was offending against the provisions of the Act, or, in other words, was sufficient to constitute what is known in law as mens rea. If the offence of which the offender is convicted is a venial one, the Act puts it within the discretion of the judge who tries the case to award a nominal punishment. At the end of the defendants' case the learned judge ought to have ruled that, there being no written consent, there was reasonable and probable cause for making the charge in the information, and he should have directed the jury to find a verdict for the defendants. The questions which were submitted to the jury were unnecessary, and ought not to have been submitted. Their Lordships will therefore humbly advise Her Majesty to discharge the order of the Supreme Court, and to order the rule to enter a verdict for the defendants to be made absolute with costs. The respondent will pay the costs of this appeal.

Solicitors for appellants: *Waltons, Johnson, Bubb & Whatton.*
 Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

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

ERRATA.

<i>Page</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
284	7 from the end	s. 7	s. 20.
377	2	<i>Henderson v. Shanklin</i>	<i>Henderson v. Shankland.</i>
384	note (3)	4 H. & N. 564	4 H. & N. 565.
384	10 from the bottom	} <i>Reg. v. Jobson</i>	<i>Reg. v. Tolson.</i>
385	8 „ „		
629	foot-note (4)	[1894] A. C. 136	[1895] A. C. 136.
711	„ (2)	3 D. M. & G. 204	3 D. M. & G. 904.