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BAUME v. THE COMMONWEALTH.

GRIFFITH C.J. In that case the appellant's motion will be dismissed with costs.

Motion dismissed with costs.

Solicitor, for the plaintiff, *Mark Mitchell.*

Solicitors, for the Commonwealth, *Macnamara & Smith* for the *Crown Solicitor for the Commonwealth.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

PRISCILLA TRAINER . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 20, 21.

Griffith C.J., Barton and O'Connor JJ.

Criminal Law—Receiving stolen property—Goods the property of person unknown—Evidence—Recent possession—False statement by person in possession.

The prisoner was found by the police in possession of certain sheep, and, on being questioned, gave an untrue account of the way in which they came into her possession. She was charged with stealing and with receiving sheep the property of some person or persons unknown. Except her own statement there was no evidence as to the ownership of the sheep, or as to their having been stolen. She was convicted of receiving.

Held, that there was not sufficient evidence to support the conviction.

On an indictment for larceny or receiving no presumption adverse to the accused may be drawn from the fact that the goods alleged to have been stolen or feloniously received were found in his possession unless there is evidence of

ownership in some person other than the accused, and also evidence from which the jury may reasonably infer that the goods were taken by some person *invito domino*.

Decision of the Supreme Court: *Rex.* v. *Trainer*, (1906) 6 S.R. (N.S.W.), 407, reversed.

APPEAL from a decision of the Supreme Court of New South Wales, upon a special case stated by *Fitzhardinge* D.C.J., Chairman of Quarter Sessions.

The prisoner was charged at Quarter Sessions with stealing and also with receiving three lambs the property of a person unknown. Some young lambs had been missed from one of several sheep runs within a few miles of the prisoner's house, and though a careful search was made they were not found. Very shortly afterwards three lambs similar in age and breed to the missing ones, but not identified with them, were found in the prisoner's possession. The lambs missed and the lambs found were of the same breed as nearly all the other sheep in the surrounding district. She was questioned as to how they came into her possession, and at different times she gave different inconsistent accounts. At the trial she endeavoured to support one of her statements by producing receipts which were alleged by the Crown to be fraudulent. The Judge directed the jury that, if they were satisfied on the evidence adduced by the Crown that the prisoner was in possession of the three lambs and that they were not honestly come by, they could convict her on either count of the indictment, unless she, in her defence, proved to their satisfaction that the lambs were honestly acquired. The jury convicted her of receiving, His Honor having refused to withdraw the case from the jury on the ground "that there was no evidence that there was ownership in anyone else but the prisoner."

The following points were reserved by His Honor for the consideration of the Supreme Court:—that there was no evidence that there was ownership in anyone else but the accused; that, as the accused had accounted for the possession of the lambs, and that account had not been disproved, she should have been acquitted; and that His Honor should not have directed the jury that the onus lay on the accused to account for the possession.

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The Supreme Court, consisting of *Darley* C.J., *Owen* and *Cohen* JJ., held that the conviction was good: *Rex* v. *Trainer* (1), and it was from that decision that the present appeal was brought by special leave.

Mack, for the appellant. The Crown case was based wholly on the prisoner being found in possession of the lambs and giving false statements as to how they came into her possession. There was no other evidence as to the ownership of the lambs. They were not identified with those which had recently been missed. There must be some evidence of ownership in a person other than the accused. It is not necessary to prove the ownership in some named person, but it must be shown that the goods were stolen by somebody from somebody. It cannot be inferred that the goods were stolen from some person unknown simply because the person in possession of them gave an untrue account of the manner in which she acquired them. She was not called upon to account for the possession until a larceny had been proved. The giving of a false statement was consistent with innocence. *Reg.* v. *Fitzsimmons* (2), on which the Supreme Court relied, is distinguishable. There was in that case evidence of ownership in a person other than the prisoner. Here there is no evidence of an asportation at all. Laying the property in a person unknown does not relieve the Crown from the necessity of proving a larceny by some person other than the receiver. "Person unknown" means only that the identity of the person from whom the goods were stolen is unknown to the Crown. The old form was "person whose name is unknown."

[He referred to *Harris' Principles of the Criminal Law*, 5th ed., p. 399; *Reg.* v. *Campbell* (3); *Reg.* v. *Stroud* (4).] The property must be *cujusdam*: *Reg.* v. *Brown & Duncan* (5) cannot be good law, because it, in effect, held that it is not necessary on a charge of larceny to prove ownership in anyone at all, known or unknown. Ownership is always material in such cases: *Reg.* v. *Isaacs* (6). *Russell on Crimes*, 4th ed., p. 296; 6th ed., p. 269,

(1) (1906) 6 S.R. (N.S.W.), 407.
(2) 20 N.S.W. L.R., 424.
(3) 1 C. & K., 82.
(4) 1 C. & K., 187.
(5) 9 N.S.W. L.R., 58.
(6) 5 N.S.W. L.R., 369, at p. 372.

lays down the principle that there must always be some evidence that the taking of the goods was *invito domino*.

[GRIFFITH C.J.—Possession is not of itself evidence of larceny by the possessor, unless the larceny is established by other evidence. He referred to I. *Hale* P.C., 510.]

It must be recent possession of *stolen property*. If this were not so, sec. 502 of the *Crimes Act* 1900 would be unnecessary. This was really a case within the meaning of sec. 27 of the Act No. 5 of 1901, which deals with property reasonably suspected to have been stolen: *Ex parte Davis* (1).

[O'CONNOR J.—There are three ingredients necessary to establish a charge of receiving, viz., ownership, larceny, and receiving. He referred to *Reg.* v. *Isaacs* (2).]

Armstrong K.C., for the Crown. The form of the indictment is admittedly good. It has been used since very early days: *Russell on Crimes*, 6th ed., p. 269. It applies not only to the case where the owner is some person whose name is not known, but also where nothing at all is known as to the owner. That appears from *Anon. case* (3); and also from II. *Hale* P.C., p. 180, and I. *Hale* P.C., p. 111, where it is said that though the owner be not known a felony has been committed and the felon must be punished. That being so, the only way in which an indictment could be supported where the owner is unknown in the latter sense, is by evidence such as that in the present case. From the nature of the case there cannot be direct evidence of the ownership or of asportation. All the circumstances of the case may be taken into consideration in order to establish that a felony has been committed. So here, from the falsity of the prisoner's statement the jury may infer that the lambs were dishonestly acquired, *i.e.*, either stolen by her or received by her knowing them to have been stolen. *Reg.* v. *Isaacs* (4) does not apply.

[GRIFFITH C.J.—Surely it is a new doctrine that giving a false account of the way in which a person obtained goods is of itself evidence of stealing or receiving.]

Reg. v. *Brown & Duncan* (5) is authority for that proposition.

(1) 18 N.S.W. L.R., 39.
(2) 5 N.S.W. L.R., 369, at p. 373, *per Faucett* J.
(3) Dyer, p. 99.
(4) 5 N.S.W. L.R., 369.
(5) 9 N.S.W. L.R., 58.

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The question of guilt in the circumstances of this case does not turn on the ownership of the goods. It is not necessary to show that a particular person has been wronged; the crime is against the King. In *Reg.* v. *Mockford* (1) the prosecutor could not identify the goods, yet it was held that the jury might convict, because there was reasonable ground for the inference that the prisoner had stolen or feloniously received the goods in his possession. The only restriction is that if the owner is known the property must not be laid in a person unknown.

[BARTON J.—But in this case what does the falsity of the prisoner's story prove? If the goods in her possession were proved by other evidence to have been recently stolen, her false statement might be sufficient to support the inference that she was the thief or the receiver. But what effect has her false statement if the goods are not proved to be stolen goods?]

The verdict of the jury cures that difficulty; they were of opinion that the property was stolen. [He referred to *Reg.* v. *Ritson* (2); *Reg.* v. *McDarra* (3); II. *East* P.C., p. 651.] If a conviction cannot be supported under these circumstances an enormous amount of crime would go unpunished. *Reg.* v. *Fitzsimmons* (4) shows that the practice under such indictments has been long established. It would be dangerous to change it at this stage by judicial decision.

[GRIFFITH C.J.—That would be a good argument for the legislature.]

The conviction is in accordance with the law and practice as now established. The jury are entitled to draw inferences as to all the ingredients of the offence, ownership, asportation, and receiving. [He referred to *Taylor on Evidence*, vol. I., p. 119, sec. 127A; *Reg.* v. *Langmead* (5); *Reg.* v. *McMahon* (6).]

Mack in reply. In all the cases in which the prisoner has been held to be rightly convicted on a false statement there was evidence of a felony *aliunde*. In this case there is a mere blank on that point. The jury cannot draw an inference one way or the other, because they have no materials before them.

Cur. adv. vult.

(1) 11 Cox. C.C., 16.
(2) 15 Cox. C.C., 478.
(3) 9 N.S.W. W.N., 67.
(4) 20 N.S.W. L.R., 424.
(5) L. & C. C.C., 427.
(6) 13 Cox. C.C., 275.

GRIFFITH C.J. This is an appeal by special leave from a judgment of the Supreme Court of New South Wales, affirming a conviction of the appellant for receiving three lambs, the property of a person unknown, knowing them to have been stolen. The evidence, as far as is material, may be stated very briefly. Seven young lambs were found on the prisoner's premises. She was asked where she got them, and said that she bought four of them from a person named; and that was true. As to the other three, which were similar, she said first that "Paddy" had bought them, and afterwards that she bought them herself from some person. It also appeared that lambs of the same kind had been missed about that time from a sheep-run some two miles away. On that evidence she was charged with stealing three lambs the property of some person or persons unknown, and also with receiving them, knowing that they had been stolen. There was no evidence of ownership direct, unless it was afforded by the prisoner herself. It was not suggested that the lambs could be identified as those from the run. It could only be stated that they were like them. The district was a pastoral district.

The story told by the prisoner as to how she became possessed of the lambs was untrue. At a later period she produced a document purporting to be a receipt for the price of the lambs. She did not, however, produce it until after she was committed for trial; and there was evidence upon which the jury might come to the conclusion that the receipt was not genuine. The learned Judge told the jury that if they were satisfied on the Crown evidence that the prisoner was in possession of the three lambs, and that they were not honestly come by, they could convict her on either count of the indictment. In effect the Judge told them that the onus was upon the accused of showing that she acquired the lambs honestly. Counsel for the prisoner asked that the case might be withdrawn from the jury, on the ground that there was no evidence of ownership in any person except the prisoner. The Judge refused, and was then asked to reserve the following points: (1) That there was no evidence that there was ownership in anyone else but the accused; (2) that, as the accused had accounted for the possession of the lambs, and that account had not been disproved, a verdict of acquittal should have been directed;

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and (3) that His Honor should not have directed that "if the lambs were lost and were found soon after in the possession of the prisoner, she must give a proper account of them, otherwise the jury should convict."

The Supreme Court was of opinion that there was sufficient evidence of a larceny. The way in which the question was stated by the learned Chief Justice was this (1):—"All these facts being before the jury, they disbelieved the story told by the prisoner as to how the lambs came into her possession, and they thereupon came to the conclusion that the lambs were not the property of the prisoner; that they must therefore, have been the property of someone else; that they were the property of someone other than the prisoner, from whom they had been stolen, and that the prisoner knew when they came into her possession that they had been stolen."

The learned Chief Justice and his brother Judges agreed in thinking that upon that evidence the jury could convict the prisoner. They thought the case was governed by *Reg.* v. *Fitzsimmons* (2) in which the evidence went to show that property was found in possession of the accused, which he had dealt with in a way that was unusual for a person dealing with his own property, as if he wanted to conceal the ownership and the manner in which he became possessed of the property.

As the point raised is one of very great importance, we gave special leave to appeal. The question is really one of circumstantial evidence.

In any indictment for larceny you must prove first of all that the property has been stolen, and you must then prove that the person who stole it was the prisoner, or that it was stolen by some other person, and received by the prisoner knowing it to have been stolen. It is a well known rule that recent possession of stolen property is evidence, either that the person in possession of it stole the property, or received it knowing it to have been stolen, according to the circumstances of the case. *Primâ facie*, the presumption is that he stole it himself, but if the circumstances are such as to show it to be impossible that he stole it, it may be inferred that he received it, knowing that someone else had stolen

(1) (1906) 6 S.R. (N.S.W.), 407. (2) 20 N.S.W. L.R., 424.

it. This is only an illustration of the rule as to circumstantial evidence. I will read a passage from the 22nd edition of *Archbold's Criminal Pleading, Evidence, and Practice*, at page 312. "Presumptive or (as it is usually termed) circumstantial evidence is receivable in criminal as well as in civil cases: and, indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for in criminal cases the possibility of proving the matter charged in the pleading by the direct and positive testimony of eyewitnesses or by conclusive documents, is much more rare than in civil cases." But this is qualified by the statement: "Although presumptive evidence must, from necessity, be admitted, yet it should be admitted cautiously. And *Sir Matthew Hale*, in particular, lays down two rules most prudent and necessary to be observed in this respect: *first*, Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and *secondly*, Never to convict any person of murder or manslaughter, till at least the body be found —on account of two instances he mentions, where persons were executed for the murder of others who were then alive, although missing, 2 *Hale*, 290."

This is the earliest reference that I know of in our law books to stealing the goods of a person unknown. The rule suggested by *Sir Matthew Hale*, if I may say so with respect to so great a man, is most necessary. The foundation of the charge of stealing is that the property in question is stolen property. That is, if the property of someone has been taken by someone else, a person found in possession immediately afterwards, may be found guilty of stealing or receiving. But in the absence of the proof of a stealing by some one else, where is the foundation of the inference? The foundation is not that it is not the property of the accused, but that it is the property of someone from whom it has been feloniously taken. A person is not called upon to give an account of how he became possessed of his own property. If it does not appear whether the property belongs to the prisoner or not, then you cannot draw any inference from his refusal to give an account of it. If the man found in possession of the property gives a false account of it, and the account is proved to be false, how does the

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case stand then? You know nothing. The only account given is untrue, and you know nothing more about it. That reasoning cannot be evaded merely by alleging that the property is that of some person unknown. As was pointed out by *Sir Matthew Hale*, the stealing must first be proved. The point is referred to in II. *East* P.C., p. 651. There it is said :—" With respect to things which are the regular subjects of property, felony may be committed in stealing them, though the owner be not known ; for the guilt of the thief is the same. And he may be charged in the indictment with having stolen the goods of a person to the jurors unknown ; or with having received goods stolen by a person unknown. And in such case the King shall have the goods. But if the owner be really known an indictment alleging the goods to be the property of a person unknown, would be improper : in that case the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. And in prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious or *invito domino*; for it is not enough that the prisoner is unable to give a good account how he came by the goods."

I will give an illustration of what is meant by property owned by a person unknown. In *Roscoe's Criminal Evidence*, 12th ed., p. 589, citing II. *East* P.C., 652, it is said :—" There can be no property in a dead body, and though a high misdemeanour, the stealing of it is no felony. A shroud stolen from the corpse must be laid to be the property of the executors, or of whoever else buried the deceased. So, the coffin may be laid to be the goods of the executor. But if it do not appear who is the personal representative of the deceased, laying the goods to be the goods of a person unknown is sufficient." An illustration is then given : " A knife was stolen from the pocket of A. as he lay dead on a road in the diocese of W. A.'s last place of abode was at T. in the diocese of G., but *Patteson* J. held, that there was sufficient proof to support a count for larceny, laying the property in the Bishop of W. : *R.* v. *Tippin* (1)." It was clear there that the corpse belonged to the ordinary of the parish to

(1) Car. & M., 545.

which the dead man belonged. The law of England, and it is the same here, requires the ownership of the property to be laid in the indictment and proved. There is ample power of amendment, but in the absence of amendment it must be proved as laid. If the name of the person is not known, and he is dead or gone, and the stealing is proved, then the charge may be laid as stealing from a person unknown. But, if it is not known whether the goods were stolen or not, you cannot get over the difficulty by saying the goods were stolen from a person unknown. In the case of *R.* v. *Isaacs* (1), *Sir James Martin* laid down the law, and, in my opinion, laid it down correctly, in a passage cited by *Darley* C.J. in *R.* v. *Brown and Duncan* (2). He said (3):—"Now comes the question whether, under the proviso of the 423rd section of the *Criminal Law Amendment Act*, that proof did not become unnecessary where it appears that a crime has been committed. I am unable clearly to interpret the meaning of the words in the proviso. A mere defective proof may not be a substantial wrong or injustice in a civil action, but I am not disposed in a case like this, where the liberty of the subject is concerned, to say that this was not a substantial wrong, and that proof of the property of stolen goods is immaterial. I think that the conviction ought not to be sustained."

So far as *R.* v. *Brown and Duncan* (4) purports to overrule *R.* v. *Isaacs* (1), I think it was wrongly decided. In my opinion *Sir James Martin's* decision is good law; and it has always been taken to be the law by the legislature of New South Wales and the legislature of England, as appears by the course of legislation. In 1850 there was passed an Act for the Better Protection of Cattle in New South Wales, 14 Vict. No. 14, the first section of which provided that:—"If any credible witness shall prove on oath before a Justice of the Peace that there is reasonable cause to suspect that the carcass or carcasses of any cattle stolen from any person is or are concealed in any dwelling-house or other place it shall be lawful for such Justice to issue a warrant directing any constable to search such dwelling-house or other

(1) 5 N.S.W. L.R., 369.
(2) 9 N.S.W. L.R., 58, at p. 61.
(3) 5 N.S.W. L.R., 369, at p. 372.
(4) 9 N.S.W. L.R., 58.

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place and if the carcass or carcasses of any cattle or any part of any such carcass or carcasses so suspected to have been stolen shall by virtue of such search warrant be found in the possession of any person in or at such dwelling-house or other place specified in such warrant with his knowledge it shall be lawful for any Justice . . . to commit such person to the nearest gaol or lock-up in which he can be conveniently confined in order that he may be brought forward for trial at the next Court of Petty Sessions . . . and if such person so apprehended after proof upon oath of such finding of such carcass or carcasses or any part thereof as aforesaid shall not satisfy the Justices sitting at Petty Sessions in open Court that he came lawfully thereby he shall be held guilty of a misdemeanour and shall forfeit and pay any sum not exceeding twenty-five pounds together with the charges previous to and attending his conviction."

That Act was repealed by the *Cattle Stealing Prevention Act* of three years later, 17 Vict. No. 3, which in sec. 5, re-enacts the same provisions with some slight modifications. It has since been continued on the Statute books, and stands in sec. 502 of the *Crimes Act* 1900. Respecting the finding of the carcass of an animal supposed to be stolen from a person unknown, another Act, 19 Vict. No. 24, was passed two years later containing a provision, sec. 1, which is now sec. 27 of the *Police Offences Act* 1901: "Whosoever being charged before a Justice with having in his possession or conveying in any manner anything which 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." If the view contended for by the Crown in this case was good law, this would be quite an unnecessary provision. There is an English Act, 31 & 32 Vict. c. 5, which provides (sec. 55):— "When two or more oyster or mussel beds or fisheries belonging to different proprietors are contiguous to each other, and any proceeding by indictment or otherwise is taken against any person for stealing oysters or mussels from any bed formed under an order made in pursuance of this Part of this Act, or for stealing oysters

from any bed formed independently of this Act, it shall be sufficient, in alleging and proving the property and lawful possession of the oysters or mussels stolen, and the place from which they were stolen, to allege and prove that they were the property of and in the lawful possession of one or other of such proprietors, and were stolen from one or other of such contiguous beds or fisheries." There are similar provisions in the Statutes of Queensland and South Australia.

It is admitted that you cannot avoid the necessity of proving property in the thing stolen, or of proving that there has been a crime committed, by alleging that the property taken was that of some person unknown, but it is suggested that you can draw both conclusions from the mere fact that the person in possession of property does not satisfactorily account, or gives a false account of his possession, of it. To infer from a man's giving a false account of property which, *primâ facie*, is his own, that he has stolen it, is an obvious fallacy. If the law is defective in that respect, it is a matter for the legislature, and not for the Courts to remedy.

For the reasons I have given I am of opinion that the appeal should be allowed. I would add, referring to the very analogous case cited by counsel for the Crown in the present case, that in that case the man was charged with being a common thief. The present charge is, in effect, that the defendant stole sheep. I think such a charge is not good according to the law of New South Wales or England.

BARTON J. concurred.

O'CONNOR J. It appears from the evidence in this case that three lambs were found in the possession of the accused. An attempt was made to prove that they had been lost some little time previously from the station of one of the surrounding land-holders. But there was no evidence to go to the jury that the three lambs in question were amongst those which had been lost. Nor was there any evidence to go to the jury of ownership in any person. Under these circumstances the accused, having been asked to account for her possession of the lambs, made a number

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of statements which may be summarized as a false account of her possession. Under the circumstances, the Chairman of the Court of Quarter Sessions directed the jury that, if they were satisfied on the evidence that the prisoner was in possession of the property, they could convict her on either count of the indictment. In the special case His Honor said :—"I directed the jury that if they were satisfied on the evidence adduced by the Crown that the prisoner was in possession of the three lambs, and that they were not honestly come by, they could convict her on either count of the indictment, unless she, in her defence, proved to their satisfaction that the lambs were honestly acquired." The Chairman's direction amounted to this :—That the accused being found in possession of property not shown to be stolen, nor to belong to anyone else, might be convicted if she gave a false account of her possession of it. That direction is not in accordance with law. The larceny charged, although statutory in respect to its punishment, is larceny at common law. Larceny at common law is defined in II. *East* P.C., c. 16, sec. 2, p. 553, as "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." Before the accused can be convicted of larceny all those ingredients of the offence must be proved. Sometimes, but very seldom, the offence is made out by the evidence of witnesses who saw the taking. More generally it is by circumstantial evidence, applying the rule of presumption as to a false account of stolen goods given by the person found in recent possession of them. The rule has been laid down by many authorities, in many cases, and always in the same way. For instance, in 2 *Russell on Crimes*, 6th ed., pp. 287, 288, it is stated in this way :—"With regard to the evidence in cases of larceny it generally consists (unless the prisoner is detected in the fact) of proof of the felony having been committed, and of the goods stolen having been found shortly afterwards in the possession of the prisoner; and upon such proof the general rule will attach, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by

it, otherwise the presumption is, that he obtained it feloniously." That presumption may be either that the accused himself stole the property, or that he received it knowing it to have been stolen according to the form of the indictment. *Blackburn* J. in *R.* v. *Langmead* (1), laid down the rule in the same way. He said:—"When it has been shown that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances."

It is therefore essential in applying the rule of presumption arising from a false account of goods in recent possession that there must be evidence that the goods have been stolen. That is emphasized in the judgment of *Faucett* J. in the case of *Reg.* v. *Isaacs* (2) which has already been referred to. He said:—"The Crown has to prove, first, that some goods have been stolen; second, that such goods are the property of some person; third, that the prisoner received them, knowing that they were stolen." If the position taken up by the Crown here is to be established, it can only be upon the ground that, whenever a person is found in the possession of property of which he gives a false or inconsistent account, he may be convicted of stealing it; in other words, wherever a person is found in the possession of property not shown to have been stolen, and either speaks or acts as a person would who had stolen it, he may be convicted of larceny. There is no warrant for any such statement of the law. All the authorities lay down the law in the same way, namely, that the first necessity in applying the law of presumption from recent possession is that there must be evidence to go to the jury that the goods were stolen. Frequently the evidence is that the owner has missed the goods under circumstances leading fairly to the inference that they had been stolen. Sometimes the evidence is more direct. There is always some evidence of that kind given. There are cases undoubtedly in which it is impossible to name in the indictment the owner of the goods, although it is perfectly clear that they have been stolen from some person; but that does not alter the law with

(1) Le. & Ca., 427, at p. 441. (2) 5 N.S.W. L.R., 369, at p. 373.

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regard to the necessity of the proof of *corpus delicti*, (that the goods have been stolen), in applying the law of recent possession. *Sir James Martin* C.J. in the case of *Reg.* v. *Isaacs* (1) lays down the law in accordance with all the authorities before and since. He said:—"It has always been the law, and is one of the things essential in cases of larceny, that the ownership of the property stolen should be proved. If, at the trial, it were shown that the goods stolen were the goods of A., instead of being the goods of B., as charged, an amendment of the information could be made. But here no such amendment was applied for . . . It is an essential thing to show that they were either the property of a person unknown, or of some person named. The ownership, however, was not proved here." So where it would be impossible to lay the ownership of the goods in any particular person it is permissible to lay it in some person unknown; that does not relieve the Crown of the necessity of proving that there has been a theft from some person unknown, and in the passage already cited Lord Chief Justice *Hale* goes on to say (2):—"I would never convict any person for stealing the goods *cujusdam ignoti* merely because he would not give an account of how he came by them, unless there were due proof made, that a felony was committed of these goods."

The necessity of proving the existence of a felony applies equally whether goods are alleged to be the property of persons known or of persons unknown. As there was no evidence in this case of any felonious taking from a person unknown, it appears to me that the jury could not legally draw the inference which they were asked to draw. It was said that the decision of the Supreme Court followed the decision of *Reg.* v. *Fitzsimmons* (3). If that case is to be taken as laying down the law that, in a case of this kind, it is not necessary to prove a *corpus delicti*, it is not law. I do not think that it does go to that extent. It was a case in which the sheep skins when found in the possession of the accused had been disguised and altered in such a way as to destroy all identity. He was called upon to give an account, and gave a false account, and it was held that he might be con-

(1) 5 N.S.W. L.R., 369, at p. 372. (2) II. Hale's P.C., 290.
(3) 20 N.S.W. L.R., 424.

victed; but it was assumed by the Chief Justice, and no doubt properly, that the condition of the skins was in itself evidence that they had been stolen. He says (1):—"In such a case the man could be indicted and convicted of attempting to steal the property of a person unknown. The prisoner in this case was in possession of property which appeared to have been stolen. All the marks of identification had been obliterated, and it was impossible to say to whom the skins belonged."

It seems to me therefore that that case, if examined, cannot be taken as an authority supporting the decision of the Supreme Court in this. In my opinion, therefore, the conviction must be set aside.

Appeal allowed. Conviction quashed.

Solicitors, for the appellant, *Sly & Russell* for *F. F. Mitchell.*

Solicitor, for the respondent, *The Crown Solicitor for New South Wales.*

C. A. W.

H. C. OF A. 1906.

TRAINER v. THE KING.

O'Connor J.

[HIGH COURT OF AUSTRALIA.]

CHARLES MARKELL AND ALEXANDER MARKELL (TRADING AS MARKELL AND CO.) PLAINTIFFS;

AND

H. N. P. WOLLASTON AND THE COMMONWEALTH DEFENDANTS.

Refd to *Stretton* v *Malika Holdings Pty Ltd* [1999] 2 VR 38

H. C. OF A. 1906.

SYDNEY, *July* 31. *Aug.* 1, 2, 7.

Griffith C.J. and O'Connor J.

Customs Tariff 1902 (*No.* 14 of 1902), *Schedule, item* 104—*Insecticide—Paper coated with chemicals — Classification — Construction — Customs Act* 1901 (*No.* 6 *of* 1901), *sec.* 138.

By item 104, under the heading "Drugs and Chemicals," in Division IX. of the Schedule to the *Customs Tariff* 1902, "insecticides" are declared to be free of duty.

(1) 20 N.S.W. L.R., 424, at p. 427.