[HIGH COURT OF AUSTRALIA.]

MENGES . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE MAGISTRATE'S COURT OF NORFOLK ISLAND.

H. C. OF A. 1919.

SYDNEY, *July* 30.

Barton, Isaacs and Rich JJ.

Criminal Law—Law of Norfolk Island—Prosecution—Information, form of—Necessity of oath—Indictment—Verdict of jury—Cattle stealing—Fraudulently branding—Appeal to High Court—Norfolk Island Act 1913 (*No.* 15 *of* 1913), *secs.* 4, 11 (1)—*Administration Law* 1913 (*Norf. I.*) (*No.* 2 *of* 1913), *secs.* 6, 10, 15 (1), 16—*Appeal Ordinance* 1919 (*Norf. I.*) (*No.* 1 *of* 1919), *clause* 2 (1)—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *secs.* 4, 126, 130, 131.

Sec. 16 of the *Administration Law* (Norf. I.) provides that "All crimes and offences shall be prosecuted by information in the name of the senior officer of police."

Held, that a document signed by the senior officer of police and stating that he, being the officer duly appointed to prosecute for His Majesty, charged a named person with a specified offence, was an "information" within the meaning of sec. 16, although it was called an "indictment"; and that it need not be upon oath.

By *Barton* J.: Clause 2 (1) of the *Appeal Ordinance*, made under the authority of the *Norfolk Island Act* 1913, which in the case of any person being "indicted for an indictable offence" authorizes the Magistrate's Court to reserve questions of law for the consideration of the High Court, applies to a prosecution instituted by an information pursuant to sec. 16 of the *Administration Law*.

By secs. 130 and 131 of the *Crimes Act* 1900 (N.S.W.), which are in force in Norfolk Island, it is provided that where on the trial of a person for stealing cattle the jury are not satisfied that he is guilty thereof, but are satisfied that he is guilty of the offence of (*inter alia*) fraudulently branding any cattle the property of another person, they may acquit him of the offence charged and find him guilty of the offence of which they are satisfied he is guilty.

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On a prosecution before the Chief Magistrate of Norfolk Island sitting as the Magistrate's Court, for stealing a heifer the property of a named person, the jury found the accused "not guilty of cattle stealing, but guilty of fraudulently branding."

On appeal to the High Court pursuant to sec. 11 (1) of the *Norfolk Island Act* 1913, which permits appeals to the High Court from all "judgments, decrees, orders, and sentences" of the Chief Magistrate acting judicially,

Held, that the jury must be taken to have found the accused guilty of fraudulently branding cattle the property of the named person.

Decision of the Magistrate's Court of Norfolk Island affirmed.

APPEAL from the Magistrate's Court of Norfolk Island.

A prosecution of Henry Walter Harvey Menges in the Magistrate's Court was instituted by a document in the following terms:— "Sidney Charles Werner Esquire Acting Chief Police Officer being the officer duly appointed to prosecute for His Majesty in this behalf, by virtue of the Act in such case made, being present in the Magistrate's Court at Kingston in the Territory of Norfolk Island on the sixth day of February in the year one thousand nine hundred and nineteen, charges that Henry Walter Harvey Menges at Norfolk Island did steal one heifer, the property of one Henry Seymour Buffett. (Signed) S. C. Werner, Prosecutor." That document was called throughout the proceedings in that Court an "indictment." The prosecution was before the Chief Magistrate and a jury of seven elders.

During the hearing counsel for the accused objected that the document above referred to was not an information within the meaning of the *Administration Law* 1913. The Chief Magistrate overruled the objection, holding, as he stated in a statement of the case made by him for the purpose of an appeal to the High Court, that the objection was met by the provision in sec. 4 of the *Crimes Act* 1900 (N.S.W.) that "'indictment' includes any information presented or filed as provided by law for the prosecution of offences." In the statement the Chief Magistrate also stated as follows:— "When considering the evidence it was pointed out to the jury that if they were not satisfied that the accused was guilty of cattle stealing, but were satisfied that he was guilty of fraudulently branding the animal in question, they might acquit him of the offence

charged and find him guilty of fraudulently branding . . . *Vide* secs. 130 and 131 of the *Crimes Act*. The jury then retired to consider their verdict. . . . On being asked if they had agreed upon their verdict, the foreman answered 'Yes.' On being asked if the accused was guilty, he answered : 'Not guilty of cattle stealing, but guilty of illegally branding.' On being asked by the Chief Magistrate if he meant 'fraudulently branding,' he answered 'Yes.' The jury were then addressed as follows : 'Then gentlemen you say the accused is not guilty of cattle stealing but guilty of fraudulently branding, and so say you all' ; and they all answered in the affirmative. The verdict was then recorded upon the fold of the indictment with the date of trial." The accused was then sentenced to imprisonment for six months with hard labour.

From that sentence the accused now appealed to the High Court, the grounds taken in the notice of appeal being (1) that the verdict was against the evidence and the weight of the evidence ; (2) that evidence was wrongly admitted, and (3) that no sworn information was laid or warrant issued for the arrest of the accused.

McMahon, for the appellant.

Broomfield, for the respondent.

[During argument reference was made to *Musgrove* v. *McDonald* (1) ; *R.* v. *Snow* (2) ; *The Commonwealth* v. *Brisbane Milling Co.* (3) ; *R.* v. *Bernasconi* (4) ; *R.* v. *Slator* (5) ; *R.* v. *Baxter* (6) ; *Norfolk Island Act* 1913, secs. 4 (1), 11 (1) ; *Administration Law* 1913 (Norf. I.), secs. 6, 10, 15 (1), 16 ; *Brands and Marks Law* 1913 (Norf. I.), sec. 6 ; *Appeal Ordinance* 1919 (Norf. I.), clause 2 (1) ; *Crimes Act* 1900 (N.S.W.), secs. 4, 126, 130, 131, 360, 362.]

BARTON J. The accused was brought before the Chief Magistrate and a jury, constituting the tribunal appointed for the trial of crimes and offences in Norfolk Island, upon a document which was as follows : "Sidney Charles Werner Esquire Acting Chief Police Officer being the officer duly appointed to prosecute for

(1) 3 C.L.R., 132.
(2) 20 C.L.R., 315.
(3) 21 C.L.R., 559.
(4) 19 C.L.R., 629.
(5) 8 Q.B.D., 267.
(6) 5 S.R. (N.S.W.), 134.

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His Majesty in this behalf, by virtue of the Act in such case made, being present in the Magistrate's Court at Kingston in the Territory of Norfolk Island on the sixth day of February in the year one thousand nine hundred and nineteen, charges that Henry Walter Harvey Menges at Norfolk Island did steal one heifer, the property of one Henry Seymour Buffett." The question arises whether this is an information or an indictment. The *Crimes Act* 1900 of New South Wales by sec. 4 enacts that the term "indictment" shall include "any information presented or filed as provided by law for the prosecution of offences." But the *Administration Law* of Norfolk Island, which continued to be law after the Commonwealth accepted that island as a Territory, and assumed control, provides by sec. 16 that all crimes and offences shall be prosecuted by information in the name of the senior officer of police. If this document is not an information, the question arises whether the prosecution was properly instituted. Having in view the provision of sec. 16 of the *Administration Law* and the further fact that by sec. 15 of that Law the provisions of the *Crimes Act* of New South Wales are only to apply subject to the *Administration Law*, it appears to me that the last-named Act does necessitate the prosecution of all crimes and offences by information.

There was a time before the *Crimes Act* 1900 when, in New South Wales, all charges before the Supreme Court and Courts of Quarter Sessions were prosecuted by information of the Attorney-General or a Crown Prosecutor. It was, of course, unsworn. The document in use under the present law is called an indictment. Its purpose is the same as was that of information, namely, to institute the proceeding. Having regard to the previous requirements of the New South Wales law, I do not think that, when the *Administration Law* directs that prosecutions shall be by information, it requires an information to be sworn. The document is an official proceeding taken by the person who, for want of an Attorney-General or Crown Prosecutor, is the chief prosecutor of the Island, and in that capacity deputed to lay it. He is an officer clothed with authority for the purpose, and I do not think that such an officer should have to take an oath to the document. No law requiring such an oath has been indicated.

At this stage it is well to mention the *Appeal Ordinance*, No. 1 of 1919, which was made by the Governor-General in Council under the authority of the *Norfolk Island Act* on 26th June 1919. By clause 2 (1) of that Ordinance it is provided that "When any person is indicted for an indictable offence, the Magistrate's Court shall, on application by or on behalf of the accused person made before verdict, and may in its discretion, either before or after judgment without such application, reserve any question of law which arises on the trial for the consideration of the High Court of Australia." Then follow a number of other provisions as to the procedure to be adopted and as to the judgment which it is competent for the High Court to pronounce. But I wish to draw attention to the first words "when any person is indicted." The whole Ordinance depends on that, and the remedies and privileges given to accused persons under that Ordinance will not be available to any person convicted before the Ordinance was passed unless it is held that the document under which he was convicted was an indictment. It seems to me, having regard to the subsidiary legislation, that the Governor-General used the term "indicted" to indicate the document by which the proceedings are initiated whether it is called an indictment or an information. To hold otherwise would be to deprive a number of persons of the remedy of appeal. However, I think it is enough to say that, this document having been put before the Court in pursuance of the *Administration Law* which was in operation at the time irrespective of the Ordinance, it fulfils the requirement of an information in the name of the senior officer of police; and I think that disposes of the really available ground of appeal.

The two grounds taken in the notice of appeal that the verdict was against the evidence and the weight of the evidence, and that evidence was wrongly admitted, as they apply wholly to the verdict, are not available, having regard to the authorities in this Court of *Musgrove* v. *McDonald* (1) and *R.* v. *Snow* (2).

There remains another point, namely, that the verdict was not of any effect. It is said that, the accused having been found not guilty of stealing, the jury should have said that he was guilty of

(1) 3 C.L.R., 132. (2) 20 C.L.R., 315.

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fraudulently branding a beast "the property of another person" or of one Buffett. The point involved is this: that if the accused had simply been found "guilty of stealing," that would have been a bad verdict on the ground that it did not go on to say "the property of another person" or "the property of Buffett." I do not think that that consequence at all follows. In a charge to a jury under circumstances of this kind and in every criminal Court with which I have been acquainted, the Judge, in charging the jury, points out to them that a verdict may be given of stealing, and also points out any alternative verdict which the law allows. In the case of stealing, an alternative verdict of "receiving" is allowed, but, of course, that connotes receiving the property of some other person from whom it was theretofore stolen. Here secs. 130 and 131 of the *Crimes Act* 1900 provide that where, on the trial of a person for stealing cattle, the jury are not satisfied that he is guilty thereof, but are satisfied that he is guilty of the offence of (*inter alia*) fraudulently branding any cattle the property of another person, they may acquit him of the offence charged and find him guilty of the offence of which they are satisfied he is guilty.

The Magistrate pointed out that the primary charge related to the animal before the Court, and at no stage of the proceedings, or at least not on this appeal, has there been any pretence that that animal was the property of the accused or was not the property of "another person." The jury then said: "Not guilty of stealing, but guilty of fraudulently branding." Can we have any doubt that they meant the same thing as a jury in this State would mean if on a charge of horse stealing they found the accused "guilty of illegally using"? To my mind the connotation of such a verdict is that the beast branded or the horse illegally used is the beast or animal the subject of the primary charge. Mr. *Broomfield* has pointed out to us that in New South Wales such a verdict has such a connotation, and my experience at the Bar is to the same effect. I never heard it disputed in Court that such a verdict had such a connotation, nor have I ever heard of anyone being so courageous as to take the point that a verdict of stealing or of illegally using

was bad because it did not go on to say "a horse the property of John Smith." I think that point also fails.

I think, therefore, that the appeal fails and should be dismissed.

ISAACS J. I agree in the result, and wish to add a few words for myself. The appeal is from a conviction or sentence before the Chief Magistrate and a jury of seven elders according to the law of Norfolk Island. Three grounds are taken: (1) that the verdict was against the evidence and the weight of the evidence; (2) that evidence was wrongly admitted, and (3) that no sworn information was laid or warrant issued for the arrest of the accused.

The jurisdiction of this Court depends on the terms of the *Norfolk Island Act* 1913, and by sec. 11 it is to hear and determine appeals from all "judgments, decrees, orders, and sentences." The section adds "with such exceptions, and subject to such conditions as are prescribed by Ordinance made by the Governor-General," but as far as this case is concerned there is no existing Ordinance which has any application. The terms in which the jurisdiction is conferred by the Parliament of the Commonwealth do not extend to an examination of the verdict or of the admission of the evidence which leads to the verdict, and the first two grounds are therefore not matters upon which we can enter.

The third ground is one which attacks the basis of the whole proceeding. So far as the latter part of the ground is concerned, nothing was said, and there appears to be nothing to justify it. With regard to the first part, that there was no sworn information, it consists of two parts, first, that there was no information, and, secondly, if there was, it was not sworn. Assuming that there was an information, the answer to the objection that it was not sworn is that there is no law which requires it to be sworn. As to whether the document in question is an information, I think it is. It is a charge or accusation by an officer, and in this case by the proper officer, whose position is proved *primâ facie* by his acting in the office and by his position being accepted by the Magistrate's Court. Being an accusation by him against the accused, it is in law an information. This ground of objection therefore fails.

Another point was taken, which is not included in the grounds of

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appeal, but, as was rightly said by my brother *Barton*, this Court in the interest of an accused person will not be stringent to exclude him from an objection the taking of which cannot act unfairly to the other side. The point is that the sentence, which was six months' imprisonment, was an incompetent sentence. It is said that it was incompetent because the jury did not find that the heifer which they found the accused fraudulently branded was the property of Buffett as charged in the information. Examining the objection with all the care which the Court gives in the interest of an accused person, I think the objection fails for this reason:—The Court must presume, from the fact that the verdict is not challengeable here and the fact that no attempt has been made to show that an improper charge to the jury was delivered by the presiding officer, that the charge was a proper one, and that the jury were warned to come to a conclusion in their minds as to whether the heifer was the property of another person, in this case Buffett, and were told that, in accordance with the law as laid down in secs. 130 and 131 of the *Crimes Act* 1900 of New South Wales, they might then, if they thought right, find the accused guilty of fraudulently branding the property of another person. On the assumption that they were properly warned, they would have to find that the heifer was the property of Buffett. They found him "not guilty of stealing"—the word "stealing" would include in itself the implication that what was stolen was the property of someone else. The verdict of "fraudulently branding" is not quite in the same position; but in my opinion the presumptions I have referred to carry the matter to this extent, that the jury must have found, and must have intended by their statement of "guilty of fraudulently branding" to have conveyed to the Court that they found, that the heifer was the property of another person. That being so, the appeal fails, and should be dismissed.

RICH J. I agree, but I desire to confine myself, so far as the written grounds of appeal are concerned, to the third ground, namely, that there was no sworn information laid. I have no doubt that the document in question is an information. We have not

been referred to any provision of law that it need be sworn. The latter part of the ground was not pressed.

I am also of opinion that the ground taken *ore tenus*, that the jury did not find that the heifer was the property of Buffett, also fails, as I consider that the jury, by the verdict of guilty of fraudulently branding, found that the heifer was the property of another person.

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Appeal dismissed.

Solicitor for the appellant, *W. D. McMahon.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE CO-OPERATIVE ESTATES LIMITED . APPELLANT; DEFENDANT,

AND

WILKINSON . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

Nuisance—Injury caused by quarry—Acquiescence—Injunction—Damages.

In an action by the plaintiff, the owner of a house and land, against the defendant, from whom he had bought the land, claiming an injunction in respect of a nuisance caused by the working by the defendant of a quarry on adjoining land belonging to the defendant,

Held, on the evidence, that the plaintiff had not acquiesced in the nuisance so as to disentitle him to an injunction, and that an injunction was properly granted.

Decision of the Supreme Court of Tasmania (*Crisp* J.) affirmed.

H. C. OF A. 1919. SYDNEY, *August* 5. Isaacs, Gavan Duffy and Rich JJ.