1954
*Jun. 9,10
*Oct. 5

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ANDREW SHYMKOWICH .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Theft—Mens Rea—Beachcomber collecting logs from booming ground without consent of owner—Whether theft—Whether mens rea—Criminal Code, ss. 22, 396.

The respondent was charged under the *Criminal Code* with the theft of two saw logs belonging to a lumber company and stamped with a registered brand, which had been floating within a recognized booming ground but not contained in any boom. He admitted taking and selling them to another beachcomber who, according to the existing practice, had them scaled by the Forest Branch of the provincial government. But he contended that he did not intend to do anything wrong and thought that he had the right to do what he did; that they were drifting and that he thought that the tide or the wind had carried them into the enclosure.

His acquittal by the trial judge, on the ground that there had been no mens rea, was affirmed by the Court of Appeal.

Held (Locke J. dissenting), that the appeal should be allowed and a conviction directed.

Per Taschereau and Rand JJ.: The respondent's belief that by the general law he had the right to collect the logs as he did, to dispose of them, and in effect to require the owners to pay him or the person to whom he transferred them a remuneration for his salvage work, being a mistake of law, was not admissible as a defence by virtue of s. 22 of the *Criminal Code*.

Per Estey and Fauteux JJ.: In the circumstances of this case, it cannot be said that the respondent could justify his collecting the logs by stating that they were drifting. The were not drifting in an area that would permit a beachcomber to take them into his possession. He did not collect them in such a place or under such circumstances that he could reasonably presume that they had been abandoned or that he might take them out of possession of the party in control of the booming ground. Knowing that they were in a booming ground under the control and direction of the company, he could not be said to have had an honest and reasonable belief in the existence of facts which, if true, would have constituted a defence and, therefore, he possessed mens rea.

By trespassing upon the booming ground and taking the logs fraudulently and without colour of right, with intent of disposing of them in a manner that deprived the company temporarily of its property, he was guilty of theft.

Per Locke J. (dissenting): There was evidence upon which the trial judge could find that the respondent took possession of the logs believing that he was entitled to do so with the intention not of stealing them

*PRESENT: Taschereau, Rand, Estey, Locke and Fauteux JJ.

but of profiting by obtaining salvage from the owners if they were found, or which could leave the trial judge in such doubt as to require him to acquit. To constitute the crime of theft, the act must be done fraudulently and without colour of right.

Section 22 of the *Criminal Code* did not affect the matter since the question to be determined was whether or not the respondent committed any offence.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the acquittal by the trial judge of the respondent on a charge of stealing saw logs from a booming ground.

S. J. Remnant, Q.C. for the appellant.

Glen McDonald for the respondent.

The judgment of Taschereau and Rand JJ. was delivered by:—

RAND J.:—The external facts in this appeal are few and simple. The accused removed from a booming ground, within which a lumber company, the prosecutor, had exclusive privileges for the putting down of mooring dolphins, the anchorage of booms, a line of piles and a log haul-up, two logs belonging to the company which at the time of removal had become lodged against the easterly end of a line of booms. He did that by entering the water area over a boundary line of single logs a distance of approximately 40 feet and towing the two logs out and down the Fraser river where on the following day he sold them, along with 23 others, for eighty dollars or so.

He was believed in saying that he did not intend to do anything wrong and that he thought he had the right to do what he did. This both the County Court judge who tried him and the Court of Appeal (1) have found to be an answer to the charge laid.

The accused can be said, as he was in the courts below, to have acted upon a mistake, but in what did the mistake lie? He acknowledged that the logs were not drifting, that is, not at large in the river; he claims they were floating, that is, within the leased area, and for a distance of about 40 feet, they might move as the tide came in or went out. With admittedly no claim whatever to any property

(1) [1954] 12 W.W.R. (N.S.) 49; 108 C.C.C. 194.

1954

THE QUEEN v. SHYMKOWICH

Rand J.

interest in them but as a means of earning what may be called salvage money, he proceeded to gather them up as if they were adrift and, if not interfered with, might be carried out to sea some miles distant. He knew or abstained from ascertaining that the logs were stamped with the mark of the logger and that they were owned by some person who could establish his title to them. They were not lost and he was not in the position of a finder, though if that circumstance had been present it would not yield much benefit to him. He admits that, for all he knew, they might have belonged to the company, but with that he was not concerned. He does not suggest that from the company he had any right or privilege in any manner or degree to appropriate them and in fact he was aware of a memorandum of advice published by the provincial land department which told him that even when logs gathered up were drifting, he was, if called upon, bound to surrender them to the owner, and whether or not he would be entitled to receive compensation for his trouble depended on some form of understanding between himself and the owner. No such distinction between a drifting and a floating log is made in that memorandum.

What, then, he believed was that by the general law he had a right to collect them as he did, to dispose of them, and in effect to require the owners to pay him or the person to whom he transferred them remuneration for his salvage work. Is that admissible as a defence? I have no doubt that it is not. As Kenny in his outlines of criminal law, 1952 Ed. at p. 48 says:—

> The final condition is, that the mistake, however reasonable, must not relate to matters of law but to matters of fact. For a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime. Ignorantia juris neminem excusat. The utmost effect it can ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of mens rea which some particular kind of crime may require.

This principle is embodied in sec. 22 of the *Criminal Code*:—

> The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.

A claim to ownership of a chattel, although it may depend on matter of law, is, in most cases, a question of fact, or its legal basis may, in the ordinary sense of the

word, be subsumed in "fact". This enhances the difficulty of separating legal from factual elements in any relation to property and in any case it may resolve itself into a refined conceptual distinction. But a distinction between justifying an act as authorized by law and as a bona fide belief in a property interest does seem to correspond with an instinctive discrimination between the two concepts.

This idea is given its best expression by Lord Westbury in *Cooper* v. *Phibbs* (1) in the following language:—

> It is said "ignorantia iuris haud excusat"; but in that maxim the word "ius" is used in the sense of denoting general law, the ordinary law of the country. But when the word "ius" is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.

This language was used in a civil proceeding but it furnishes a most helpful distinction for the application of the maxim in criminal law of which it has always been taken to be a basic principle.

The taking into possession and the conversion of the logs obviously was intended to deprive the owner temporarily at least of its property and this comes within the express language of the definition of theft given by the *Criminal Code.*

I would therefore allow the appeal and direct a judgment of conviction upon the second count, with a fine of $25 imposed upon the accused.

The judgment of Estey and Fauteux JJ. was delivered by:—

ESTEY J.:—The respondent was found not guilty in the County Court Judge's Criminal Court of Westminster, British Columbia, on a charge containing two counts: (1) that he did, on February 15, 1953, without the consent of the owner, fraudulently collect two saw logs stamped with a registered brand and thereby committed an offence contrary to s. 394(*a*)(i) of the *Criminal Code;* (2) that he did steal the said logs and thereby committed an offence contrary to s. 396 of the *Criminal Code.* His acquittal was

(1) L.R. 2 H.L. 149 at 170.

1954

THE QUEEN v. SHYMKOWICH

Estey J.

affirmed in the Court of Appeal (1). Leave to appeal to this Court was granted, but restricted to the acquittal under the second count.

These logs were each stamped with a registered brand—8 over 697 within a triangle. They had been sold by the owner of that brand and at all times material hereto were the property of McKay and Flanagan Brothers Lumber Mill Limited (hereinafter referred to as the company). This company operates a sawmill on the Fraser River near New Westminster and leases an area of that river in front of its mill site, about 1,300 feet in length and in width varying from 240 to 265 feet, as a booming ground. For some distance from the shore this booming ground is well marked on the surface thereof and the respondent admits that these logs were within that marked area and that he knew the logs were in this booming ground, both when he first saw them and when he collected them.

The respondent describes himself as a fisherman who does "a bit of beachcombing". About ten o'clock Sunday morning, February 15, 1953, accompanied by a boy fifteen years of age named Hamilton, he went out in his fishing boat upon the Fraser River to "look for some logs". He deposed that in "going up river and passing Flanagan's booming ground I noticed two logs drifting down and I circled the boat and came up against the tide, it was just about slack tide by that time. By the time I got the boat turned around the logs landed on top of the boom, at the head end of their boom". He directed his boat into the booming ground and collected the two logs which he estimated had floated approximately forty to fifty feet since the time he first saw them. The next day he disposed of the logs to another beachcomber, Patterson, along with some twenty-six other logs he had obtained in beachcombing, all for a sum which he recollected to be $78.

Patterson, called on behalf of the Crown, described the respondent as a "fisherman, and he picks up a few logs for me". Patterson states that on the Monday the respondent brought some twenty-eight or thirty logs for which he paid him $80. That Patterson intended to communicate with the authorities and have these logs disposed of in the

(1) [1954] 12 W.W.R. (N.S.) 49; 108 C.C.C. 194.

usual way there can be no doubt, but before the scalers had arrived a representative of the company called and Patterson delivered to him the two logs in question, as well as three more of the company's logs which he had in his possession.

The Fraser River at this point flows approximately westward and these logs were at the upper or east end of the booming ground, well inside of the marked area thereof. At this end a barrier exists between that of the Farris Lumber Company Limited and the booming ground of the company, for the purpose of separating these grounds.

Respondent justifies his collecting these logs upon the basis that they were drifting and, therefore, he "was entitled to go and pick them up". When it was suggested he incurred some risk, he replied: "I didn't figure it was a risk picking up logs at all, because they were loose and floating and drifting".

Respondent based his belief in his right to take a floating log upon his reading of the pamphlet issued by the British Columbia Forestry Service entitled "General Information on Beachcombing" and which was filed as an exhibit at the trial. He did not specify any particular portion thereof, but contented himself with stating: "According to this, as long as you don't steal them" it is all right to collect floating logs, but that "if you take a log out of a boom that is stealing". In fact the pamphlet makes no reference to a booming ground or a boom. It refers to the civil rights of one engaged in the business of beachcombing and indicates his position to be that of "a finder of lost things". Section 394 of the *Criminal Code* is specifically referred to, and in part set out. It further reminds the beachcomber that he must comply with the provisions of the *Forest Act*. Indeed, when one reads the pamphlet as a whole it supports the view that the purpose and intent of beachcombing is to restore to the owner logs which have passed out of his control. In *Watts and Grant* v. *The Queen* (1), the logs were collected at points not under the control or direction of the owner and the issues concerned the collection by the accused parties of logs belonging to a particular owner and what, if any, were the rights of the accused

(1) [1953] 1 S.C.R. 505.

1954

THE QUEEN v. SHYMKOWICH

Estey J.

with respect to these logs, while in the present case the issue turns on the right of one, while engaged in the business of beachcombing, to knowingly enter and collect logs floating outside of a boom but within a private booming ground.

Counsel for the Crown, upon these facts, submitted that, as respondent took the logs from an area which he well knew was a booming ground and, therefore, an area under the control and direction (except with respect to certain matters not material hereto) of the company as lessee, he could not do so with other than a dishonest or fraudulent intent. The logs within such an area are subject to the control of the company and, apart from the rights of an owner (with which we are not here concerned), the lessee has a right to the possession thereof against a person in the position of the respondent. *South Staffordshire Water Company* v. *Sharman* (1). The conduct of the respondent, in the submission of the Crown, in going into and trespassing upon the booming ground with the intent and purpose of collecting floating logs therein, though not inside a boom, was itself, in the circumstances, such evidence of dishonest or wrongful intent that the mere assertion on his part that he thought he had a right to collect floating logs would not establish an honest intent. The conduct of the respondent, at the time of collecting the logs, as well as later when the police officer called at his home, appears to support the contention of the Crown. When the police officer called, and before he had intimated the reason therefor, the respondent stated: "I guess it is about the logs". He had lived for about twenty-five years in the vicinity and, while the evidence does not disclose how long he had been beachcombing, Patterson says he had purchased logs from him during the "last year and a half anyway I believe". Apart altogether from the pamphlet, which does not support the respondent, a person in his position would know that as a beachcomber he would not be entitled to take these logs out of a private booming ground. In the ordinary circumstance the logs there would be the property of the lessee, as, in fact, they were in this case. A beachcomber, therefore, in collecting them would do so for the purpose of having the lessee pay him for

(1) [1896] 2 Q.B. 44.

finding and collecting the logs in his own (the lessee's) booming ground. There is really, in such circumstances, no "finding" and no "collecting" in the sense that these words would be understood in the business of beachcombing.

In these circumstances it cannot be said that one in the position of the respondent, who collected logs in the booming ground, could justify his doing so by stating that they were drifting. They were drifting in one sense, but they were not drifting in an area that would permit of one engaged in the business of beachcombing taking them into his possession.

In *Brend* v. *Wood* (1), the accused had been absent from the country on service with the Navy. He was given a forged motor vehicle fuel coupon and later was charged with having that coupon in his possession with intent to deceive. It was established that he did not know it was forged and he satisfied the court that he had acted in good faith. In the present case the accused had lived in the vicinity for a period of twenty-five years and was himself, at least to some extent, engaged in the business of beachcombing and, therefore, is not in a position at all analagous to that of the accused in *Brend* v. *Wood*.

The beachcomber collects logs which are lost to the owner in the sense that they are out of his control and, in so far as his position is similar to that of one who finds lost articles, the observations of Baron Parke in *Regina* v. *Wm. Thurburn* (2), are pertinent. There the accused found a note which had been accidentally dropped on the highway with no name or mark thereon to indicate the owner, nor were there any circumstances which would enable the finder to discover to whom the note belonged when he picked it up, nor had he any reason to believe that the owner knew where to find it again. At p. 393 Baron Parke states:

> To prevent, however, the taking of goods from being larceny, it is essential that they should be presumably lost, that is that they should be taken in such a place and under such circumstances, as that the owner would be reasonably presumed by the taker, to have abandoned them, or at least not to know where to find them. Therefore if a horse is found feeding on an open common or on the side of a public road, or a watch found apparently hidden in a hay stack, the taking of these

(1) (1946) 62 T.L.R. 462.

(2) (1849) 1 Den. Cr. C. 387.

1954

THE QUEEN v. SHYMKOWICH

Estey J.

would be larceny, because the taker had no right to presume that the owner did not know where to find them; and consequently had no right to treat them as lost goods.

The respondent did not collect these logs "in such a place or under such circumstances" that he could reasonably presume that they had been abandoned, or that he might take them out of the possession of the party in control of the booming ground.

Bank of New South Wales v. *Piper* (1) was an action for malicious prosecution arising out of a charge laid by a bank manager against a mortgagor who had mortgaged his sheep to the bank as security. Under s. 7 of the relevant statute (11 Vict. No. 4) the mortgagor could not sell any of his sheep without the written consent of the mortgagee. The mortgagor, with the oral consent of the mortgagee, sold the sheep and when a charge was laid by the bank the Attorney General refused to proceed with it. In the action for malicious prosecution the jury found that, while the mortgagor did not have the written consent, he had the oral consent of the manager of the bank and judgment was directed for the plaintiff. In the Privy Council this was reversed. It was there held that the legislature intended to make a sale by the mortgagor without the written consent of the mortgagee a criminal offence and with respect to mens rea it was stated: ". . . the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent". A written consent would have made the accused innocent of the charge. He did not claim such and, therefore, never had "an honest and reasonable belief . . . of the existence of" a written consent "which, if true, would make the act charged against him innocent". Therefore, in the opinion of the Judicial Committee, he possessed mens rea.

In the present case the respondent knew he was taking logs out of a booming ground under the control and direction of the company. The fact that the logs were floating outside of a boom does not alter or qualify the fact that while they were within the limits of the booming ground they were in the possession of the company. Had these logs been outside the booming ground and floating in a

(1) [1897] A.C. 383.

position and manner that one might reasonably conclude they were out of the control of, or, in effect, lost to the party entitled to their possession, then the beachcomber might collect them and cause the party entitled to them to pay for his work. The respondent did not have present to his mind any such facts. His belief was analagous to that of Piper in the *New South Wales* case who thought the verbal permission sufficient. The respondent, in taking these logs out of the possession of the company, could not be said to have an honest and reasonable belief in the existence of facts which, if true, would have constituted a defence and, therefore, within the foregoing authority, he possessed mens rea.

The respondent made no effort to see if the logs were marked. Even if he had found a mark, it is doubtful if he would have known they were the property of the company. That, however, is not a material circumstance. What he did know, and which is material, is that these logs were in the company's booming ground. In this connection the language of Lord Goddard C.J. in *Hibbert* v. *McKiernan* (1) is pertinent. There the accused went upon a golf course and picked up certain golf balls which had been abandoned by their owners. It was held that the golf club had sufficient property and interest in these balls to support an indictment for larceny. Lord Goddard C.J., in the course of his judgment, stated:

> Every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property occupied by him, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, not under a claim of right, but with a felonious intent.

These cases illustrate what is stated in Halsbury's Laws of England, 2nd Ed., Vol. 11, p. 497:

> To prevent the taking from being felonious the claim of right must be an honest one, though it may be unfounded in law or in fact.

See also Kenny's Outlines of Criminal Law, 1952 Ed., p. 241; Stephen's History of the Criminal Law of England, Vol. 3, p. 124.

A reading of this record in the light of the authorities, and I say this with the greatest possible respect to the learned judges who hold a contrary view, leads to the conclusion,

(1) [1948] 2 K.B. 142.

1954

THE QUEEN v. SHYMKOWICH

Estey J.

when regard is had to the area in which the logs were floating, the knowledge of the respondent in respect to that area and the rights of the company therein, that the respondent trespassed upon the booming ground, took the logs fraudulently and without colour of right, with the intent of disposing of them in a manner that deprived the company temporarily of its property or interest therein. I am, therefore, of the opinion that the respondent committed the offence of theft as charged and would impose a fine of $25.

I am, therefore, of the opinion that the appeal should be allowed.

LOCKE, J. (dissenting):—This is an appeal by the Crown taken pursuant to leave granted by Rand J. from a judgment of the Court of Appeal for British Columbia (1) which dismissed the appeal of the Crown from the acquittal of Shymkowich by His Honour Judge Grimmett after a trial held in the County Court Judge's Criminal Court of the County of Westminster.

Two charges were laid against the respondent but the leave granted restricts the matter to be considered to the acquittal upon the second of these, which was in the following words:—

> For that the said Andrew Shymkowich on or about the 15th day of February A.D. 1953 at South Westminster in the County of Westminster and Province of British Columbia, unlawfully did steal two saw logs bearing timber mark 8 over 697 within a triangle and valued at over $25.00 and being the property of McKay and Flanagan Brothers Lumber Mill Limited, contrary to the form of the Statute made and provided and against the Peace of our Lady the Queen, her Crown and Dignity.

The facts disclosed by the evidence, in so far as it is necessary to consider them, are as follows:—On the south bank of the Fraser River, a short distance east of the City of New Westminster, the lumber company referred to operates a lumber mill. For the purpose of carrying on its operations, the company obtained in the year 1938 the right, granted under the provisions of the *Navigable Waters Protection Act* (c. 140, R.S.C. 1927), to place a line of six dolphins at equal distance between the easterly and westerly boundary of a 7·41 acre portion of the Fraser River immediately adjacent their mill property to the north, a log haul-up, a line of piles fifty feet in length on the southerly

(1) [1954] 12 W.W.R. (N.S.) 49; 108 C.C.C. 194.

boundary of the log haul-up produced north westwardly and any other dolphins, piling or construction which might be necessary for the more efficient operation of a saw mill. For these privileges the lumber company paid an annual sum to the New Westminster Harbour Commissioners. In pursuance of the rights thus granted to them by Order-in-Council, the dolphins were installed along the northerly boundary of the booming ground and piling was driven along the easterly or up river end of the area to which boom sticks were attached, forming what was referred to as a standing boom extending from the shore line approximately 135 ft. to the north, designed apparently to prevent logs being carried out of the booming ground to the east by the tide, and similarly to prevent logs being carried into the booming ground by the current from the east. The booming ground was not enclosed in any way along its northerly boundary other than by the dolphins placed there and, while the evidence is not clear on the point, it apparently was not enclosed in any way at its westerly extremity.

On the day in question, a boom of logs which the lumber company had bought from the Scheller Logging Company was tied up to the piling which had been driven in a line parallel to the southern shore of the river and some 50 feet north of the water line between the log haul-up and the easterly limits of the booming ground.

The respondent is a fisherman and apparently supplements his income by beachcombing logs on the Fraser River and, on the day in question which was a Sunday, proceeded in company with a fifteen year old boy, Albert Hamilton, in his fishing boat up the river, apparently in search of logs drifting on the river which he might salvage. According to the respondent, on Saturday, February 14, 1953, there had been a very heavy wind on the Fraser and there were quite a few logs drifting around but the waves were so high they could not be salvaged. He described his actions on the following day as follows:—

> I decide I would go up river and have a look for some logs. Going up river and passing Flanagan's booming ground I noticed two logs drifting down and I circled the boat and came up against the tide, it was just about slack tide by that time. By the time I got the boat turned around the logs landed on top of the boom, at the head end of their boom.

1954

THE QUEEN v. SHYMKOWICH

Locke J.

Circling around, coming in against the tide, I reversed into the top of the boom and I got Ab Hamilton to drive a couple of dogs in the logs and after I got the logs dogged up, I came out past the boom and went down the river and tied up alongside of my float there.

Nothing was said by the respondent in giving his evidence in chief as justification for his actions in going in the booming ground and taking away logs which presumably were the property of the lumber company but, when cross-examined, he said that when he saw the logs they were "floating down river". He then said that they were floating down from the standing boom and that, at that time, the tide was just starting to change and as he circled the boat around the tide carried them up against the top of the boom, referring to the purchased boom above mentioned. After saying that he knew that the logs were in a booming ground, when asked why he went in and took possession of them, he said:—

Well, it has been the practice, any log floating, any fisherman picks up any log that has been floating.

He then said that:—

I couldn't tell that they were McKay and Flanagan's logs.

In answer to further questions, he gave the following evidence:—

Q. Did you realize that you were taking quite a risk in picking up logs indiscriminately?

A. Not to my knowledge, I didn't figure it was a risk picking up logs at all, because they were loose and floating and drifting.

Q. Do you know the difference between a floating log and a drifting log?

A. Yes.

Q. What is it?

A. Well, a floating log is in a boom and a drift log is drifting down the river, floating loose say out of the boomsticks.

Q. Referring to your own statement, you saw two logs floating within a booming ground of McKay & Flanagan Mill, didn't you?

A. Yes.

Q. You think those are drift logs, do you?

A. Well, in a boom I regard it—but actually this wasn't in a boom.

Q. We are talking about logs within this booming ground.

A. Well, they could have drifted down there.

Q. They weren't drifting, were they?

A. Yes, they were drifting.

Q. Where were they drifting?

A. They were drifting down the river.

Q. Did you see those logs being blown in there?
A. No, I didn't.
Q. So you don't know how they got there?
A. No, I don't.

When asked by the learned trial Judge as to whether he thought he was entitled to go in to the booming ground and take the two logs, he said he thought that he was. Asked by counsel for the Crown where he got this information, he said it was contained in a pamphlet issued by the Forest Branch of the B.C. Government. Whether he had seen this before the date in question does not appear. However, the document referred to, which had been received in evidence though objected to by counsel for the Crown, was apparently issued for the information of beachcombers and expressed certain views as to their civil rights and informed them that any log found by them which did not bear a registered timber-mark was deemed to be the property of the Crown: if the log bore a registered mark it was prima facie evidence that it was the property of the registered owner of the mark. Certain parts of section 394 of the *Criminal Code* were referred to and information as to the necessity of paying stumpage or royalty on such logs was given.

At the request of the respondent's counsel, the following passage was read into the evidence:—

> The Forest Service grants no authority to any person either by licence or permit to engage in the beachcombing of logs but does not attempt to prohibit or restrict such ventures providing that logs are not stolen or obtained by other unlawful methods.

Following this, the respondent was asked if he understood what stealing was and he said that he understood that if you take a log out of a boom that is stealing and said finally:—

> I was acting on the knowledge that probably the tide or wind blew them logs in there.

Hamilton, who was called as a witness by the Crown, said that, as the respondent's fishing boat was passing the booming ground, they saw the two logs starting to drift down from the standing boom and, by the time they got in to the booming ground, they had been carried, apparently by the current, to the most easterly end of the purchased boom which, he said, was tied up some 30 or 40 feet from

1954

THE QUEEN v. SHYMKOWICH

Locke J.

the shore and indicated the place at which the logs came to rest against it as a point some 50 feet from the shore. This, as shown upon a sketch showing the dimensions of the booming grounds, would be some 90 to 100 feet to the south of the line of dolphins along the northerly limit of the booming grounds.

Persons logging on Crown lands in the Province of British Columbia are required by the provisions of the Part IX of the *Forest Act* (c. 128, R.S.B.C. 1948) to mark each log with a timber-mark issued by the Forest Service in such a manner that it is readily discernible when the log is floated. The logs in the purchased boom and the two logs in question had been cut on a timber sale in the Chilliwack River Valley by the Collins Macken Lumber Company of Chilliwack who had registered a timbermark 8/697 within a triangle for that timber sale. It was shown that the two logs in question were stamped with this mark but the respondent does not appear to have examined them to ascertain whether they bore a timber-mark.

The respondent had apparently previously accumulated a number of logs presumably found adrift in the river and on February 16, 1953, he purported to sell these or his interest in them, with the two taken from the lumber company's booming ground, to Richard Patterson, a fisherman who also dealt in beachcombed logs. Patterson was familiar with the instructions given in the circular issued by the Forest Branch above referred to. On the 17th of February he had the logs scaled by an official scaler of the Forest Branch and paid to the Department timber royalties upon such of the logs as bore a timber-mark and stumpage upon those where no such mark was visible. The Scale and Royalty Account for this sum does not show any logs bearing the mark 8/697, the scaler apparently not observing the mark upon these logs. According to Patterson, the practice established by the Forest Branch is that, when logs bearing a registered mark are found adrift and beachcombed, the person finding or having possession of the logs reports the fact to the local office of the B.C. Forest Service and the registered owner of the mark is notified of the fact. As between dealers such as Patterson and loggers or lumber mill operators who are either registered as owners of a timber-mark or have purchased logs so marked, the usual

practice is to pay the dealers fifty per cent of the market value of the logs as salvage. As to logs upon which there is no visible timber-mark, the dealer, after paying stumpage to the Forest Branch, proceeds to sell them on the footing, apparently, that they have been purchased from the Crown. I think it is sufficiently clear from the evidence of this witness that a person such as Shymkowich finding a log adrift in the river bearing a timber-mark might expect, after paying the timber royalty, that the owner would deal with him in the same manner as with Patterson.

It was on February 19 that the two logs in question and three other logs similarly marked were found by the Royal Canadian Mounted Police in Patterson's boom. While there was no evidence that the three logs so marked were taken from the booming grounds of the McKay and Flanagan Lumber Company or that they had purchased all of the logs so marked by the Collins and Macken Lumber Company, it was apparently assumed that they were their property and they were returned to them, Patterson delivering the logs and making no claim for salvage.

In delivering judgment, the learned County Court Judge, after referring to certain of the evidence which had been given before him, said in part:—

> The accused says he did not know he was doing anything wrong in picking up the floating logs which were not contained in a boom. It is interesting to note that in the Regina vs Watts and Gaunt case beachcombed logs are described there as 'any logs which are separated from the booms and floating or resting on the shore.' The only complication in this particular case is that the accused actually entered a recognized booming ground to retrieve the floating logs which he thought were drift logs.
>
> I think that mens rea, that is an intent to do wrong, is an integral part of this offence and must be proved, and in this connection, I feel that the story and the actions of the accused have created more than a reasonable doubt in my mind as to there being any intent on his part to do anything wrong, and it is of course well established practice that the accused shall be entitled to any reasonable doubt. In view of this, I feel I must dismiss the charge.

The reasons for the judgment of the Court of Appeal were delivered by the Chief Justice of British Columbia. They refer only to the first of the two charges which had been laid under section 394(*a*) (1) of the *Code*. It is, however, quite clear that the remarks of the learned Chief Justice were intended equally to apply to the second charge, with which alone we are concerned. Agreeing with the learned trial

1954

THE QUEEN v. SHYMKOWICH

Locke J.

Judge that *mens rea* was an essential element of the offence and finding that there was evidence to support his conclusion that there was no *mens rea* on the part of the respondent, the learned Chief Justice found that there was no error in law. He further expressed the opinion that the evidence disclosed that the respondent was under the honest impression that he had the right to take possession of the logs in order to recover some portion of their value from the owners.

The relevant part of the definition of theft contained in section 347 of the *Criminal Code* reads:—

> Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent,
>
> (*a*) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest.

This portion of the definition appeared in the same terms when the *Criminal Code* was first enacted in 1892 as section 305. The definition does not appear to have been taken from the English Statutes enacted up to that time dealing with the offence of larceny under that name (c. 96, 24-25 Vict. and c. 116, 31-32 Vict.), but rather to embody the accepted definition of the offence of larceny at common law. To constitute the offence, the act must be done fraudulently and without colour of right. In Stephen's History of the Criminal Law, Vol. 3, p. 124, the learned author says:—

> The expression 'fraudulent misappropriation of property' obviously involves three elements: fraud, property capable of being misappropriated, and misappropriation in its various forms. Fraud, as I have observed elsewhere, involves, speaking generally, the idea of injury wilfully effected or intended to be effected by deceit or secretly, though it is not inconsistent with open force. It is, however, essential to fraud that the fraudulent person's conduct should not merely be wrongful, but should be intentionally and knowingly wrongful. Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence.

In East's Pleas of the Crown, Vol. 2, p. 659, in dealing with the offence of larceny, it is said:—

> And here it may be proper to remark, that in any case if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal.

In *Reg.* v. *Reed* (1), where the accused person had found a five-pound note and appropriated it, the Court directed the jury to consider the state of the finder's mind and ruled that if the jury thought the person really believed the note to be her own by right of finding they should not bring in a verdict of guilty on the indictment for larceny. Coleridge, J. said in part (p. 308):—

> Ignorance of the law cannot excuse any person; but, at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind; as, if a person take what he believes to be his own, it is impossible to say that he is guilty of felony.

In *Reg.* v. *Farnborough* (2), Lord Russell of Killowen, delivering the judgment of a Court consisting of himself, Pollock B., Grantham, Lawrence and Wright, JJ. said that to shown an animus furandi on the part of the prisoner was an essential ingredient of the crime of larceny and was a matter to be decided by the jury, a statement referred to and adopted by the Court of Appeal in *Rex* v. *Bernhard* (3).

These statements of the law are supported by the statement of Blackburn, J. to the jury in *Reg.* v. *Wade* (4), referred to by the learned Chief Justice of British Columbia, and the result of the authorities is, in my opinion, correctly stated in the passage from Kenny's Outlines of Criminal Law, at p. 241, quoted by him.

The evidence as to the extent of the rights of the lumber company to the booming ground in question is not entirely clear. The Order-in-Council relied upon as evidence as to such rights simply permitted the installation of the dolphins and other works to which I have above referred, but did not purport to give to the company the exclusive right of possession and expressly stipulated that the works should be constructed so as not to interfere with navigation in any way. It is, however, unnecessary, in my opinion, to decide whether in entering the booming ground the respondent was committing a trespass. The accused had sworn that he thought that probably the tide or wind carried the two logs into the enclosure, a statement which apparently the learned County Court Judge understood as meaning that they had theretofore been adrift in the main stream, where the

(1) (1842) C. & M. 306.
(2) [1895] 2 Q. B. 484.
(3) [1938] 2 K.B. 272.
(4) (1869) 11 Cox. C.C. 550.

1954

THE QUEEN v. SHYMKOWICH

Locke J.

respondent thought he would have been entitled to take them into possession for the purpose of obtaining salvage, and had simply floated into the booming ground and were not the property of the lumber company. I do not think the question to be determined is affected by section 22 of the *Criminal Code* stating that ignorance of the law is not an excuse for any offence committed, since the question to be determined is whether or not the respondent committed any offence. Other than to construe the language of the *Code* defining theft, I see no question of law in this matter other than as to whether there was any evidence upon which the learned County Court Judge could find that the respondent took possession of the logs believing that he was entitled to do so with the intention not of stealing them but of profiting by obtaining salvage from the owners if they were found, or which left him in such doubt as to require him to acquit him. I respectfully agree with the Chief Justice of British Columbia that there was evidence upon which the trial Judge could so find.

I would dismiss this appeal.

Appeal allowed; conviction directed.

Solicitor for the appellant: *S. J. Remnant.*

Solicitors for the respondent: *Collins, Green, Eades, Collins & McDonald.*