BELCHER, C.J. & THOMAS, ACTING J. 1927. June 27.

[BELCHER, C.J. AND THOMAS, ACTING J.]

REX

v.

CHRISTOS VASILI.

CRIMINAL LAW—FOREST TRESPASS—CLAIM OF RIGHT—"BONÂ FIDE"—MENS REA—FOREST DELIMITATION LAW NO. 8 OF 1881, SECTION 3.

Law 8 of 1881, Section 3, runs as follows:—

"All State forests shall be deemed to be lands declared to be under the protection, control and management of the Government under the provisions of the Forest Law, 1879.

Provided that nothing in that law or in this law contained shall hinder any person from doing any act or exercising any rights which he might have been lawfully entitled to do or exercise in or over any forest at any time prior to the passing of the Forest Law, 1879."

In 1927, a shepherd, a young man, was prosecuted for trespass in a State forest. He claimed that he was exercising a lawful right, and, if no such right in fact existed, that he acted *bonâ fide* believing it did, and so was without *mens rea*.

HELD: No personal right could exist in a man born since the passing of the Law of 1881.

No communal right was proved to exist before that year.

HELD FURTHER: This was one of a class of acts, not essentially criminal in themselves, but prohibited in the public interest under a penalty, where *mens rea* is not a necessary element.

Per THOMAS, *Ag. J.:* The *fiat* should not be refused in any case where the subject has a genuine or *primâ facie* claim against the Crown.

APPEAL of accused from conviction by a Criminal District Court.

Theodotou and *Triantafyllides* for appellant.

The Solicitor-General for the Crown.

The facts are sufficiently disclosed in the judgments.

Judgment. THE CHIEF JUSTICE: This is an appeal from a conviction by the District Court of Larnaca, for pasturing cattle in a Government forest, without an authority in writing from the proper officer.

The defences relied on are that the defendant was exercising a lawful right and that, whether the lawful right existed or not, defendant *bonâ fide* and on reasonable grounds believed that it did and is on that ground to be excused as being without the suggested necessary *mens rea*.

To these defences the Crown replies: (*a*) the defendant has not proved the right, (*b*) he had no *bonâ fide* belief in its existence, and (*c*) if he had, it makes no difference: *mens rea* is not a necessary ingredient in an offence of this kind.

On the first point, whether or not defendant had a legal right (which it is alleged he exercised as a member of the village community of Xylotymbo), we have listened to a great deal of argument which, as Mr. Theodotou has pointed out, would be more in place in a civil suit. But Section 3 of the Forest Delimitation Law of 1881 clearly contemplates that certain rights of the public (or it may be of individuals only) may have existed prior to the Forest Law, 1879—that is to say under the old Turkish law theretofore in force—and so clearly lays it down that nothing in either law, 1879 or 1881, shall hinder the exercise of any such right, that it would be a complete defence (apart from all questions of *bonâ fide* belief) if accused could show the existence of such a right in himself. The Laws would simply not apply to him. We, therefore, decided to hear whatever might be adduced in argument on this point. In our opinion, the defendant has not shown that such a right exists in himself communally or individually. The latter, of course, was at once excluded by his age—he is quite a young man and certainly born since 1879. As to the former, the evidence at the best amounted to this: that during the memory of one or two old men of the village, the villagers of Xylotymbo had in Turkish times, that is before 1878, grazed their sheep and goats wherever they liked in this area, without licence and without restriction. There may be no inherent improbability in this, but no Turkish law under which such acts would give rise to any right, presumptive or other, has been brought to our notice, and on the other hand there has been brought to our notice in detail the Turkish legislation scheduled to the Act of 1879 as thereby repealed; and from a perusal of the provisions of that legislation it seems at the least unlikely that any rights of the type suggested could have been acquired against the Turkish Government in a Turkish State forest. We do not say that such acquisition is impossible: we do not even know that this land was a Turkish State forest: and we limit ourselves to saying that the accused did not

prove in the Court below that he in fact had any right to do the act with which he was charged. In saying this we must not be taken as laying it down that in no circumstances could he prove such a right, so as to prejudice any civil action which he or other villages may be advised to bring. But he has not proved it in this case. The facts proved are equally interpretable as being a long series of profitable trespasses in a badly-guarded area.

We come now to the second line of defence, which is that even if the right did not exist, defendant *bonâ fide* believed, on reasonable grounds, that he had a right to exercise it. Now *bonâ fide* belief is a question of fact: you do not establish it merely by alleging it. There was evidence before the Court below that this forest was delimited in 1889 or 1890. What took place between delimitation and 1894 as to permits is not clear, but permits were, though freely granted, required as a condition of grazing for the thirty years from 1894 to 1924: and then they were stopped. During that period there were many prosecutions under the law now invoked, for grazing without permit: the villagers knew the area was a State forest and what its bounds were: and the accused persons do not appear ever to have raised such a claim of right as one would expect to see raised, if the community, as such, had any belief in its existence. Accused's own father regularly took out a permit for animals which were part of the flock accused was grazing when he was charged with this offence. As against this the accused, while claiming a right, gives little more foundation for his belief in it than that legal advice had been obtained by the village to the effect that it existed. If this consideration were allowed preponderating weight on the question, *bonâ fide* belief or not, there would never be any need to establish civil rights in circumstances of this kind: for there could in practice never be a conviction and all forest laws would be a nullity. We think there was evidence on which the Court below could find, as it did, that the alleged belief in the right was not held *bonâ fide:* this Court is in all cases slow to reverse the decision of a lower tribunal on matters of fact, and we see no reason for doing so in this case.

In the view we take of the foregoing matters it is not necessary to discuss the application of the legal principle underlying the maxim *Actio non facit reum, nisi mens sit rea* to the circumstances of the present case. But it is to be observed that the accused intended the very act prohibited by statute: he knew that he was grazing animals in a State forest and he knew that he had no permit to do

so: the prohibited act is one exactly of the class referred to in *Sherras* v. *de Rutzen*, (1895) 1 Q.B. 918, namely acts not essentially criminal in themselves but prohibited in the public interest under a penalty: in these cases the trend of judicial decisions goes to show that *mens rea* is not a necessary element. The case indeed seems on all fours with those of *Hudson* v. *Macrae*, 4 B. & S. 585, and *Hargreaves* v. *Diddams*, L.R. 10 Q.B. 582, in each of which the appellant openly fished contrary to statute in certain water under what he alleged were his rights as a member of the public. In each case the conviction was sustained, though it was admitted the claim was made *bonâ fide*.

It has been alleged before us that the attitude of Government to the people of this village in connection with their grazing has been unreasonable: with that we have nothing to do; we can only decide on legal matters brought before us.

THOMAS, *Ag. J.:* The appellant was convicted by the District Court of Larnaca for pasturing cattle in the forest without a permit contrary to section 6 (*h*) of the Forest Law, 1879. The only question for determination by this Court is whether or not such conviction were right.

In the Court below appellant admitted pasturing his animals without a permit, but claimed the right so to do. Alternatively he put forward the defence that he acted *bonâ fide* in the belief that he had the right to do the act complained of. Very slight evidence was offered to establish that appellant in common with his co-villagers had the right to graze animals in the area in question. Appellant's counsel contended that this was not the proper Court before which to establish his right, and rested his main defence upon the fact that he had acted under a *bonâ fide* claim of right. As to appellant's claim to the right iself I have had the advantage of seeing the Chief Justice's judgment, and I agree with all he says on this point, and with his finding that appellant has not proved that he possesses such right. The Court below found that appellant did not believe that he had a *bonâ fide* claim of right, and it cannot be said that there was no evidence to justify the Court in such a finding. But before considering this point it is necessary to enquire whether the offence is such that a *bonâ fide* claim of right affords a complete defence.

The appellant relied upon the maxim *Actus non facit reum nisi mens sit rea*. It is a general principle of criminal law that a person cannot be convicted of a criminal offence, unless he has a guilty mind, but the application of this

principle has in modern times been restricted. I cite the observations of Mr. Justice Stephen in *Cundy* v. *Le Cocq* (13 Q.B.D., 207):—

> " I do not think that the maxim as to *mens rea* has so wide an application as it is sometimes considered to have. In old times, and as applicable to the common law or to the earlier statutes, the maxim may have been of general application. . . . It is now impossible to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowledge is of the essence of the offence created."
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> There are certain offences in which proof of a particular intent or state of mind is unnecessary. " Under this head," says Halsbury (Vol. IX., note (*e*), p. 227) " fall many indictable nuisances. In a prosecution for trespass in pursuit of game a *bonâ fide* belief by the defendant that he was not a trespasser is no defence. (*Morden* v. *Porter*, 7 C.B. (N.S.), 641.) There are a number of cases analogous to public nuisances where an act is peremptorily forbidden and innocence of intention or mistaken belief is no defence." (*R.* v. *Bishop*, 5 Q.B.D., 259.) " A person who sells adulterated food may be convicted under the Sale of Food and Drugs Acts, 1875, although he does not know of the adulteration. In a prosecution under a statute which makes it an offence for a licensed person to sell intoxicating liquor to a child under fourteen, except in a vessel properly corked and sealed, *bonâ fide* belief on the part of the licensed person that the vessel in which the liquor was sold was properly corked and sealed is no defence. (*Brooks* v. *Mason*, (1902) 2 K.B., 743.)
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> Most of these cases where ignorance or innocence of intention is no defence are cases punishable by fines, and many of them are only punishable on summary conviction before Magistrates.

See also the cases collected in *Archbold's Criminal Pleading* (26*th Edition*), p. 25. In all of the cases cited the legislature has forbidden absolutely the commission of certain acts. In any statute creating an offence, but which is silent as to the intention of the offender, the whole scope of the Act must be examined to see if the intention of the legislature was to forbid absolutely the act, or only to forbid it if it were done with a wrongful intention.

The Forest Law, 1879, under which the appellant was convicted, was enacted among other things to preserve the forests from destruction. In my view this offence is analogous to those cited above, and the legislature has for-

bidden absolutely the grazing of animals upon forest lands without a permit. If it were otherwise it would be impossible ever to convict persons grazing animals without a permit, for in every case an accused person to escape conviction would have only to say that he had been advised that he had a right to do the act complained of. For these reasons I am of opinion that the offence for which appellant was convicted is one in which the intention of the offender is immaterial and affords no defence.

Applicant's counsel alleged that appellant in common with his fellow-villagers has been prevented from asserting rights which would be a complete defence to prosecution. The record shows that the villagers of Xylotymbo were making petitions in 1925 for free pasturage in the forest, and that in May, 1926, they, through their advocates, sent to the Colonial Secretary a writ of summons asking for a declaration of their right to graze, take fuel, etc., within an area therein defined.

At this date there were prosecutions pending for grazing in the area mentioned in the writ of summons, which the Magisterial Court adjourned in order to give the inhabitants of Xylotymbo time to prefer a claim to establish their rights. The Colonial Secretary replied that the request for permission to bring an action against the Government would not be considered until after the hearing of the criminal prosecutions then pending in the Magisterial Court. That is, the Crown refused its *fiat*. Now there is no doubt that the right of the Crown to grant or refuse its *fiat* is not subject to any restriction. The *fiat* is the modern form of the King's endorsement of petitions " Let right be done." The old authorities show that while originally it was a matter of pure grace on the part of the Crown to allow the subject to bring his petition, in course of time the subject has acquired something very much approximating to a right to have a genuine claim against the Crown heard before a competent Court. The authorities show no case of refusing the *fiat* where a reasonable claim against the Crown was put forward by the subject. It has become the practice to grant it when the subject makes a genuine claim. So firmly has this practice become established that Bowen, L.J., said in *In re Nathan* (12 Q.B.D., 461): " Everybody knows that a *fiat* is granted as a matter, I will not say of right, but as a matter of invariable grace by the Crown wherever there is a shadow of claim; nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the *fiat* unless the claim is frivolous." Robertson in his *Proceedings by and against the Crown*, p. 577, submits Bowen, L.J., went too

far in making these observations: but they are of value coming from such a great lawyer as Lord Bowen, and they have never been overruled although they must have been frequently considered. The Lord Justice's views were evidently shared by the Attorney-General himself in that case, Sir Henry James; at p. 464 of the report he says in his argument—

> . . . . . all his rights can be ascertained under a petition of right in which the burden of proof will lie upon him and not, as on a return to a mandamus, on the Crown, and the remedy is a substantial one, for all that is necessary to obtain a *fiat* is to show a *primâ facie* case.

It is quite clear that in the present case the Crown in refusing to grant a *fiat* has not followed the well-established constitutional practice. The refusal of the *fiat* has worked an injustice to the appellant. He has been required to establish his right as a means of defence to a criminal charge. This is not the way a person should be called upon to prove a civil right; the means of proof are different, and there can be no discovery.

This case is a test case, there being hundreds of similar cases pending. The subject makes a genuine claim to exercise certain rights; the Crown refuses permission to the subject to make that claim before a Civil Court, and it brings criminal proceedings against him. In these proceedings the accused defends himself by asserting that he had a *bonâ fide* belief that he had the right to do the act complained of. The Court finds that such belief is no defence. This is an impossible situation for a person who has a genuine claim to exercise certain rights over land. The refusal of the *fiat* was improper and oppressive in that it has prevented the subject from asserting his rights, and if it were refused in the hundreds of similar cases awaiting trial it would cause a substantial injustice to all those accused persons.

The numerous cases that come before the Courts clearly show that the attitude of the Forest Department towards the villagers is harsh and oppressive. This affords all the stronger reason in such cases as the present, where a person makes a claim to exercise certain rights over forest lands, why the Crown should do nothing to add to the opppression of the subject and deny him his undoubted right of establishing any genuine claim before a Civil Court.

In my opinion the appeal fails and the conviction should be affirmed.

Appeal dismissed.