picious in receiving goods on 13th April, not examining them till 27th May, and then, after, as he says, finding them bad, trading in them till 1st June, he considered that the presumption was against the defendant, and, as that presumption was not rebutted, he did not feel compelled to go into the facts. That is not an unreasonable attitude, and there is no reason to think that the magistrate's conduct is substantially inconsistent. He did not wish to undertake the responsibility of going into th facts. But it was his duty to do so, sitting as a court of first instance, and was not the duty of the court of appeal. Now that he has found on the facts, we see no reason to disturb that finding. The appeal will be dismissed with costs.

SHEIL and GRAHAM, JJ., concurred.

The appeal was accordingly dismissed with costs.

Appellant's Attorneys: *Bell & Hutton;* Respondent's Attorney: *C. E. Espin.*

SCOTT v. REX.

1911 *February* 14. KOTZÉ, J.P., and SHEIL and GRAHAM, JJ.

Criminal procedure.—Theft of stock.—Animus furandi.—Taking under colour of right.—Appeal.—Legal presumption of innocence.

Conviction for theft of stock quashed on appeal where the appellant had taken a strayed sheep to replace one of his, which four or five years previously had strayed into the complainant's flock, and the court of appeal considered that the magistrate, in judging of the intention of the appellant, had given weight to every circumstance against the accused, but none to those in his favour.

Appeal from a conviction and sentence by the assistant resident magistrate for the district of Queenstown.

The accused, Alexander Scott, a farmer, was charged under the provisions of Act 35 of 1893, as amended by Acts 7 of 1905 and 3 of 1907, with the theft of a sheep, the property of Walter Filmer. He pleaded not guilty. The evidence showed that the sheep in question had been missed from Filmer's flock about five months before the date of the opening of the trial (28th January, 1911). On 3rd January the accused had reported to the police that he had lost some twenty sheep. In consequence of the description given by him the sheep now in question was traced by the police to Filmer's flock. When shown to the accused, he claimed it as his own. It bore the accused's brand, but Filmer's earmark. It further appeared that the sheep had originally strayed from Filmer's flock into the flock of a farmer named Hartley, and that the accused had obtained it from Hartley's herd by telling him that he had informed Mr. Filmer's son of the sheep being there, and had told him to give him the sheep in payment for a sheep which he had owed him for a long time. Both Filmer and Scott were large sheep farmers, the latter owning 2800 sheep. It was common for the sheep of the one to stray into the flock of the other through a river which divided the farms. The accused, giving evidence on his own behalf, stated that some four years ago one of his sheep got mixed with those of the brothers Filmer. He had both written and spoken to George Filmer, who was in partnership with Walter, about the sheep, but it had not been returned, and he had taken the sheep found in Hartley's flock in return for the one so lost by him. He said he had told George Filmer that he had taken the sheep. He also stated, "I thought I was quite right in taking the sheep now in question. I had no intention of stealing it at all. I took it quite openly. . . . I thought Filmer would never give me back my sheep, so I took this one. I cannot explain why I took the one they had lost, and which they knew nothing of. . . . I admit I misled the boy (Hartley's herd). . . . I cannot explain at all why I never kept one of the straying sheep, but went and took the one Filmers did not know about. The sheep I took was only a young two-tooth one, value about 10s. . . . I thought it did not matter so much about a young sheep. I thought if they

found out they would not make so much fuss. . . . I had no intention at all of stealing the sheep, but only of repaying myself." George Filmer, recalled after the accused had given his evidence, stated that about two years ago the accused had debited him in a letter with 16s. 3d. on account of a sheep which he said had got mixed with the Filmers' sheep three years previously: but, on settling up other matters referred to in the letter, he made no mention of this sheep. In examination-in-chief this witness had stated: "Some years ago accused joked with me, and said one of his sheep was with ours, and he would take one of ours in place of it. I looked upon the matter as a joke. It is quite three or four years ago." It was admitted that the accused had at times returned sheep of the Filmers which were running among his. The magistrate convicted him and sentenced him to three months' hard labour. In his reasons, after analysing the evidence at great length, he stated, "I am satisfied he distinctly contemplated non-delivery, intended to benefit himself and deprive the Filmers of ownership, and relied upon the neighbourliness of the Filmers, if perchance the taking of this sheep did come to light, to smooth the matter over. I fully believe Scott took this sheep with *animus furandi*, and certainly with *animus lucrandi*, and without the consent of the true owners either express or implied." Scott now appealed.

D. Grant Hodge, for the appellant: The main facts are not disputed. What was done was done under a claim of right. Where a thing is taken as an equivalent for something due, it is taken under a claim of right: see Russell on *Crimes* (6th ed. vol. 2. p. 217); *Queen* v. *Vorster* (8 E.D.C. 187): and *The King* v. *Sumango* (18 E.D.C. 173). It is not enough to prove a taking with intent to keep: a fraudulent taking (*contrectatio fraudulosa*) must be established. The test is not, Had the accused a right? but, Did he believe he had a right? *Regina* v. *Boden* (1 Car. & K. 395) was a case in which it was held that there was too much semblance of right for a charge of theft to stand. *Rex* v. *Winnicott* ([1909] E.D.C. 198) is a case the principles of which should be applied here.

H. Lardner Burke, K.C., S.-G., for the Crown: I do not dispute the law as quoted, but I deny its applicability to this case. The simple question is, Was the claim a *bonâ fide* one? The magistrate gave an extremely careful consideration to the case, and came to the conclusion that it was not. The evidence as to the claim of right must be conclusive: see *Queen* v. *Tanca* (12 E.D.C. 155). If the alleged claim of right was not the real motive of the accused's action, but merely a shadowy claim to be relied on in case of discovery, then the conviction should stand. The accused admitted he obtained possession of the sheep by a false statement to the herd. Had he come by it honestly, he would have written to the owner. The magistrate is the best judge of the accused's intentions.

KOTZÉ, J.P.: The appellant was charged before the assistant resident magistrate of Queenstown, with the theft of a sheep belonging to his neighbour, Mr. Walter Filmer, and by him convicted of that offence. The case has been well argued on appeal for both sides, and the simple question for us is whether the Crown has proved the charge beyond a reasonable doubt. It appears that Scott and the Filmers are neighbours, and that some four or five years ago one of Scott's sheep got mixed with Filmer's, and was not returned. About two years ago, Scott, in a letter to George Filmer, who is in partnership with Walter, debited him with 16s. 3d. on account of this sheep. Both Scott and the brothers Filmer are large owners of sheep; Scott is also the owner of a farm, and of a considerable number of cattle. A few months ago Scott saw a sheep of Filmer's in the possession of a Mr. Hartley's herd. He told the herd he was going to take the sheep, which bore the brand and earmark of Filmer. He had the sheep taken to his farm, and there had it shorn by a native herd, and in this way Filmer's brand was removed. Scott then put his own brand on. It is, however, important to notice that Filmer's earmark was not removed. This sheep remained in Scott's possession for some time, and then got back to Filmer's. Scott, when shown the sheep by the police, claimed it as his property, and as a consequence these proceedings were instituted. It has been rightly said by the *Solicitor-General* that the Court

should be careful in allowing the defence of taking under colour of right to be set up. I quite agree with that remark, but each case must depend on its own circumstances. This is not a case of a man taking a sheep which he found unattended in the dark and telling no one of the fact. Here Scott told Filmer that he would take a sheep, and Filmer laughed at the remark as a joke. He only took one, though he had ample opportunities to take more. Then Hartley's herd knew that he had taken the sheep; he was one witness; and Scott ordered another man to shear the sheep, thus providing a second witness against himself. There is also the fact that he did not obliterate the owner's earmark. Then he tells the police about the sheep, knowing that it bears Filmer's earmark. Scott is also a landed proprietor and a man of substance. The magistrate makes a point of the fact that the accused said in his evidence that he only took a sheep worth 10s. because he thought that then the Filmers would not make so much fuss. The magistrate seems to have taken note of every fact against the accused, and not to have considered those in his favour, as he ought to have done in judging of the facts. He should have remembered the golden rule that in cases of doubt the conclusion should be *pro reo*. I think that there was a reasonable doubt in this case, and that the accused should have had the benefit of it. The appeal will be allowed, and the conviction and sentence set aside.

SHEIL and GRAHAM, JJ., concurred.

Applicant's Attorneys: *Roberts & Whiteside.*