IN THE COURT OF APPEAL OF NEW ZEALAND CA 85/96

THE QUEEN

V

DAVID JOHN ELLERM

Coram: Eichelbaum CJ
Gault J
Heron J

Hearing: 22 May 1996 (at Christchurch)

Counsel: G M Brodie for Appellant
D J Boldt for Crown

Judgment: 13 August 1966

JUDGMENT OF THE COURT DELIVERED BY HERON J

The appellant was found guilty by a jury in the District Court at Christchurch on the 7th March 1996 of stealing logs valued at in excess of $300 between 1 January 1994 and 20 January 1995, the property of the Crown. The appellant had throughout 1994, on the shores of Lake Brunner in Westland, commenced a significant commercial tourist development at or on the site of the former timber mill at Cashmere Bay.

The Crown case was that during that time, and taking advantage of the opportunity presented, the appellant took logs from the lake bed which were the property of the Crown, thereby committing theft. It was common ground that in the course of the earthworks which were carried out as part of the development referred to earlier, the

appellant was entitled and indeed required, to go to the lake edge and possibly beyond in order to remove willows which had grown there and which were to be removed as part of the authorised development. It also seems to be agreed that it was likely that in the course of those earthworks, logs would be discovered which were either part of the stock of the former mill, or had played some part in the approaches to the mill and were not the property of the Crown. No charge could involve any of those logs.

On the 18th January 1995, the appellant was interviewed by the police and questioned with regard to the origin of wood on the back of a Bedford truck parked outside the appellant's house at 228 Major Hornbrook Road, Christchurch. However of more significance was the visit by the police to 181 Maces Road to commercial premises known as Cressey Furniture two days later where 54 rimu logs were found on vacant ground with polythene covers and with their ends painted. The Crown case was that these had been removed from Lake Brunner and taken to Christchurch so as to escape attention from people observing the appellant's activities generally and done so knowing that they were of value and inferentially that the appellant had no right to take them. Before leaving this topic, it should be said that the logs found in Maces Road, at the appellant's father's premises were said to be sections of logs so the 54 logs could have represented only something in the order of 15 or 20 felled logs as they were said to have existed on the lake bed.

Two questions emerged on appeal. The first was whether the Crown had proved the ownership of the logs on the lake bed on the assumption the jury must have found that they came from the lake bed and not from the lake shore or on property over which the appellant had an entitlement to take whatever he found there.

The second point arises out of the first and it is whether the evidence was so unsatisfactory as to the demarcation line between the lake bed, the lake shore and areas adjoining the lake that the Crown had not proved that any of the 54 logs come from the lake bed.

The case proceeded on the basis that the jury had to be satisfied that the logs came from the lake floor and that they had to be satisfied that there was no doubt that they came not from any area which could be affected by the rise and fall of the lake or be so close to the shore as to make it unclear as to whether it was on the bed of the lake, the Judge put the matter to them in this way.

> "It is only those logs, if any, which you find came from the lake which you are concerned with. It is not disputed that the Crown through the Department of Conservation controls the bed of the lake. Mr Brodie raised an issue about abandonment which I will deal with later. It follows then, that any logs in respect of which it is reasonably possible that they did not come from the bed of the lake you should disregard. That is, if you find that any of these 54 logs came from the shore or those parts of the skidway for example which were above the water line or the old mill site or the sawdust waste pile, you disregard those logs because they are not owned by the Crown. It is conceded they are owned either by the defendant himself if they are on his land, or alternatively by the Grey District Council which owns the road reserve between the lake edge and the boundary of the defendant's land.
>
> So the first hurdle the Crown faces in this case is that you might think the boundary of the lake is not accurately defined by the evidence. You have heard Mr Hansen's evidence and a map has been produced showing the boundaries of the lake, but there is no map showing the site of the old skidway and so on against the actual boundary line of the lake; the lake reserve; council land; and the defendant's land. It is a matter for you but you might think that the best evidence that there is available to you about the issue of the boundary comes from Mr Hansen's evidence. First of all at page 23, line 30 when he was looking at the Lands and Survey map which had been produced you will remember which will be available to you, and he notes,
>
> > "That it is certified by the chief surveyor for the purposes of the Conservation Act. The bed of Lake Brunner is marked with a black line and shown shaded grey on that map and as far as DOC, and my jurisdiction over the bed of that lake, it is conservation land and allocated to us to manage."
>
> And again you will remember his acceptance of the proposition put to him about the variability of the level of the water in the lake and that is contained in Mr Brodie's cross-examination at page 28, line 29.
>
> "Q To your knowledge does that lake rise and fall in different weather conditions.
> A It can rise substantially above normal level but it doesn't fall below normal level.
> Q Do you know whereabouts the legal boundary line between road reserve and lake bed is in relation to the water at any one time.
> A I couldn't tell you precisely but I have an idea where it is."
>
> And in that case Mr Brodie is referring I think to the area of the old skidway and the beach frontage cleared by the accused:
>
> "Q In relation to our particular part of the beach do you have precise detailed knowledge of where the boundary is.

A Within a couple of metres within my knowledge, the bach that is on photo 3 I had cause to check tenure of land that bach is built on and I did that by asking the drafting section at my office to produce a transparency of a tenure map that I overlaid on to the aerial photograph and that showed the boundary appeared to be a few metres in front of that bach, the bach being just on the road reserve.

Q You relied on someone else to tell you that.

A It is not a precise method of assigning a boundary but we use that and it has proved to be reliable enough for field circumstances.

Q You see in this case it could be quite significant to know where a boundary is a log might be on one side or the other.

A I would agree in any case it is good to establish where the boundaries are."

That really you might think Mr Foreman, ladies and gentlemen, is the only evidence of any significance as to where the boundaries might be and it is a matter for you, but you might think it is somewhat ambivalent.

Well, you will have regard in that connection to counsel's respective submissions. Mr McVeigh puts it to you on behalf of the Crown that the evidence is from the accused himself and from Mr Smith that these logs came from in the water, therefore they are in the lake; whereas I infer from Mr Brodie's submissions that it is arguable that these logs were all part and parcel of the shore line works and were therefore not in the lake, or at least it is reasonably possible that some of them were not.

So it is for you to resolve this evidence Mr Foreman, ladies and gentleman. You decide which, if any, of these 54 logs came from the bed of the lake. In respect of any of which you did not, put them to one side. If you are not satisfied beyond reasonable doubt that any of the 54 came from the lake then that would be the end of the case for the Crown and you would find the accused not guilty."

It is to be noted that the Judge returned, as he promised, to the question of abandonment. He said:

"As a matter of law I direct you that the logs in Cashmere Bay, or in Lake Brunner, have not been intentionally abandoned. Likely they fall into the category of being lost but you need not trouble yourselves about that issue. What you are entitled to have regard to however, is Mr Brodie's submission that the accused might have thought they were abandoned and might have treated them as abandoned and if he honestly believed that, then of course he would not be guilty of theft."

Theft is defined in S.220 of the Crimes Act 1961:

"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, permanently of such thing or of such property or interest;

(b) ...

(c) ...

(d) ... "

In this case the indictment alleged that the logs were the property of the Crown. The case was clearly put on the basis that it was only those logs, unequivocally on the lake floor and therefore within the confines of the lake boundary (with no room for error in that regard) which were the property of the Crown. The historical picture was given as to how the logs came to be on the lake floor. In general terms it was surmised that the logs would have been brought from the adjoining forests to the mill in some cases towed across the lake. Witnesses spoke of the storms which arose on the lake at times and the frequency with which those logs had been lost and fallen to the bottom of the lake. That evidence was supported by the evidence of a diver who had observed the sunken logs. It is clear that in one way or another the logs which were at the bottom of the lake bed, had at one time belonged to those persons engaged in the milling process. It may not necessarily have been the mill owner, it may have been the person or company engaged in the actual felling of the logs. There was no evidence as to the business practices undertaken by the company and so no certainty that at the time they were lost they necessarily belonged to the milling company. It would seem an acceptable inference however that they belonged to somebody at that point. There was insufficient evidence to finally conclude whether they had been lost or abandoned. In so far as the milling company was concerned, if at any time they had a proprietary interest in the logs, it would seem that on their going out of business in 1966 it is likely they abandoned any interest they may have had in the logs.

Some logs had recently been recovered by use of an inflation raft process which may not have been available at that time and probably underpins an assumption that they were abandoned. The same inference of abandonment is available as against those persons who may have owned the logs in transit. By virtue of their having fallen to the bottom of the lake it would likewise be a relatively safe inference that they had at that point been abandoned.

The Crown case however depended entirely on the legal and factual consequences of the Department of Conservation exercising control over the lake bed where the logs were left. It is plain in their dealings with one contractor in particular that they purported to have the right to deal with the logs.

Mr Raymond Thomas, a logging contractor of Greymouth, lived near the mill at Cashmere Bay as a child and worked there as a young man. Since 1990 he and his wife had been investigating the possibility of recovering logs of rimu and other timber from the bed of the lake. He recalls the towing of logs across the lake behind a big boat. He described some of the logs as breaking away and sinking and some if they were "floaters" would float into the shore and were later recovered. At the loading points sometimes the logs would slide down on the skids. He said there was little effort made to recover the ones that sank because timber was so readily available no one worried about it. He described his efforts to float logs after having obtained permission from the Department of Conservation. These logs recovered were about two chains out into the lake and were all covered by water. The logs that he managed to recover in this experiment were in excellent condition.

Evidence was further given that on the 13th April 1994 Mr John Scriven on behalf of the Regional Conservator of the West Coast Conservancy Office in Hokitika wrote to the appellant in the following terms:

> 13 April 1994
>
> Mr David Ellerm
> Ellerm Norton Ltd
> 228 Major Hornbrook Road
> CHRISTCHURCH 8
>
> Dear Sir
>
> I am advised by our Conservation Officer from Greymouth that you have exercised the consents received from Council to remove willows etc at Iveagh Bay at Lake Brunner.
>
> He advises that a good result has been achieved and at this stage you have no further work planned which will involve operations on the bed of the lake.
>
> One point I should have made to you related to the activities on the lake bed was if any old saw logs were brought off the lake bed these would need to have been put aside for the Department of Conservation to dispose of in accordance with permissions given to other people.

> You will need to get in contact with this Department, either through this office or through the Greymouth Office before commencing further operations on the lake bed.
>
> Yours faithfully
>
> John Scriven
> for Regional Conservator

It should be said that the resource consents referred to in the letter authorised the appellant for three months to remove willows and exotic vegetation from the lake edge and to place sand to form beaches at Iveagh Bay, Lake Brunner. No reference was made in that consent to the removal of logs. The Department of Conservation as manager of the lake through its field centre manager, Barry Hanson, gave evidence producing a land and survey map showing Lake Brunner. He said it was conservation land and allocated to the Department of Conservation to manage.

One of the maps shows the lake as DOC estate stewardship DOC allocation K32 No. 18. Stewardship areas are provided for in part V of the Conservation Act 1987 and are required to be managed so that natural and historic resources are protected. Stewardship areas are defined as any area which is not a marginal strip or a watercourse area or an interest in land held for the purposes of a conservation park ecological area, sanctuary area or wilderness area.

Obviously this means that the Department of Conservation were entitled to manage this area and were in possession of it. The functions of the Department of Conservation are inter alia to manage all land and other natural and historic resources which would include this lake. It would be an intrinsic part of management to control what was taken from the lake bed. All this however falls short of any ownership in the logs in the lake, but arguably gives a right to their possession.

The learned authors in Adams on Criminal Law CA 217.11 note:

> "Cases may arise where property is taken from a person who has less than full rights of ownership over the property. Is this a taking from the "owner"? The term "owner" is not defined in S.217; and the meaning to be given is not made clearer by

> the use, in S.220(1)(a), of the words "the owner, or any person having any special property or interest." There appears to be a number of possibilities. One is that the sections are to be read in light of the common law which would allow the prosecution to aver ownership in the possession of a bailee as well as a bailor compare *R v Harding* (1929) 21 Cr App R 166. Another is to apply a presumption of ownership arising from the fact of possession. However, it may be thought that the most satisfactory is to treat a person in possession of goods as having a "special property" in them, regardless of the true ownership of the goods, sufficient to fulfil the requirements of S.220. This solution, it is submitted, is the most satisfactory in logic. It also has the advantage of resolving the difficulties that might otherwise arise in the cases of the taking of a chattel from a finder or a thief. In either case true ownership may be difficult to establish. It should, it is submitted, be sufficient for the prosecution to show that there was an unlawful taking from the person then in possession. It may be added that the fact that that person's possession had been unlawfully obtained will not absolve any subsequent taker from liability."

A case somewhat similar to this is *R v Woodman* [1974] 1 QB 755. There the owner of a factory site which was disused had sold miscellaneous scrap metal on the site to a group of companies who had the right and title to enter onto the site and remove the scrap metal. Not all of the scrap metal was removed and some of it was left because it was inaccessible. It remained like that until the defendant came onto the site and took it away. He was later charged with theft. The conviction was upheld because, although the site owners did not know any of the scrap remained, their conduct in erecting fences and notices showed a sufficient control of articles on the site to meet the terms of the Theft Act 1968 which provides:

> Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest.

In *Hibbert v McKiernan* [1948] 2 KB 142 a trespasser on the private links of a golf club took eight golf balls abandoned by their former owners. In affirming the conviction of the man for theft Goddard CJ said:

> "Every householder or occupier of land means or intends to exclude thieves and wrong doers 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 of the goods taken therefrom, not under a claim of right but with a felonious intent." (emphasis added).

The Chief Justice considered *R v Rowe* (1859) 8 Cox's Criminal Law Cases 139 was binding on the Court and said:.

> "Clearly there is no licence from the club to all and sundry to go on to the course and take what they can find, and the facts show that the club did mean to exclude these pilferers, though the officials of the club did not know at any given moment the position or number of balls that might be lying on their property."

In *Rowe* the appellant was convicted of stealing iron from the bed of a canal belonging to a canal company. Iron had apparently fallen or been thrown overboard from barges and had been taken when the canal was drained. The company manager said that if the property could be identified it was returned to the owner otherwise it was kept by the company.. Pollock CB said:

> "The judges who have considered this case are of opinion that the conviction should be affirmed. The prisoner was not in the employ of the Canal Company, but a stranger, and the property of the Company in the iron when it was in the canal, was of the same nature as that which a landlord has in goods left behind by a guest. Property so left is in the landlord's possession for the purpose of delivering it up to the true owner, and he has sufficient possession to maintain larceny against a stranger."

To the same effect is *Elwes v Brigg Gas Company* (1886) 33 Ch.D 562.

The authorities as to the rights and liabilities of an occupier in respect of chattels were reviewed by Donaldson LJ in ***Parker v British Airways Board*** [1992] 1 All ER 834 which was applied in ***Tamworth Industries v A-G*** [1991] 3 NZLR 616. The ***Parker*** case involved competing claims to a gold bracelet found by Mr Parker in a British Airways Executive Club departure lounge. The true owner not having claimed it, the competing claims were by Mr Parker as finder and British Airways as occupier of the building in which it was found. Donaldson LJ, with whom the others members of the Court were in substantial agreement, listed the rights and liabilities of an occupier including the following rights (843).

1. An occupier of land has rights superior to those of a finder over chattels in or attached to that land and an occupier of a building has similar rights in respect of chattels attached to that building, whether in either case the occupier is aware of the presence of the chattel.

2. An occupier of a building has rights superior to those of a finder over chattels on or in, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be on or in it.

These passages do not expressly deal with the situation of an occupier of land in relation to chattels on the land (as distinct from in or attached to the land), but since he cited *Hibbert v McKiernan* (golf balls on the land) without criticism the omission may be taken as reflecting no more than that it was not the situation there to be dealt with. There is no difference in principle between a chattel in a building and one on land.

Mr Brodie relied on *R v Redfearn* CA 125/92, 25 March 1993. The jury in that case were told that a person from whom property had been taken by the lawful owner had a sufficient interest in the property to give rise to theft if she had bought and paid for such property. However both that case and *Larkin v Brown* (1906) 8 GLR 654 were cases which involved theft or allegations of theft as against the true owner. It has always been possible for persons to be convicted of theft of their own property provided they were taking or converting property with intent to deprive any person "having any special property or interest therein permanently of such thing": S.225(a) Crimes Act 1961. In *Redfearn* the case turned on the authority of the accused's girlfriend's father to sell the property to the third party. If he acted without authority, an issue which was not left to the jury, then the purchaser could not have had any property or interest in the vehicle to set against the claim of the rightful owner. The case proceeded on the premise that the appellant was the rightful owner unless he had authorised the sale of the vehicle for the purposes of repaying a loan.

In *Larkin v Brown* an action was brought for false imprisonment. The defendant was an employee of an auctioneer who had a lien upon a horse belonging to the plaintiffs. The plaintiffs retook the horse into their possession with intent to deprive the auctioneers of their lien. If they were guilty of theft and were arrested then the action against the defendant for false imprisonment for assault could not succeed. As Cooper J said:

> "Although a lienee is not the owner of the chattel over which he has a lien, he has an interest in it, and S.218 defines theft or stealing as including the fraudulent taking, without colour of right, of anything capable of being stolen with intent to deprive any person having any special "interest" therein permanently of such interest."

The Judge referred to *R v Wilkinson* R&R 470, saying the principle in that case had been incorporated into S.218 (the present S.220). The Judges in that case said it was larceny if the chattel was taken out of the possession of a person who has no property in it but merely a right to hold it against the owner, with intent to deprive such person wrongfully of his possession and against such person's will, together with the necessary felonious intent. Again however that was a case where the question before the court was whether the owner (Wilkinson) could be guilty of theft. The present case does not involve such considerations. It was common ground that the original owners, whether they had lost the property or abandoned it, were unknown.

In the circumstances of this case it cannot avail the appellant to contend, as he does, that the Crown was not the owner of the logs on the lake bed.

On the authorities, and particularly ***Parker v British Airways Board***, it is clear that the owner or occupier of land who has manifested a sufficient intention to exercise control over the land and the things which might be on the land has rights over chattels on that land (even if they are not attached to or imbedded in the land). Those rights may be categorised as a "special property" in the chattels, as by the majority in ***Hibbert v McKiernan,*** or as possession - see Pritchard J in the same case and Lord Russell CJ in ***Bridges v Hawkesworth*** [1896] 2 QB 44,46. Possession gives rise to the presumption of ownership: ***The Winkfield*** [1902] P 42,60. As stated in ***Pollock and Wrights Possession in the Common Law*** (91) the wrongdoer cannot defend himself by showing that some third person, through or under whom he does not himself claim, has a better title. Indeed as Wright points out (118) the proper conception of theft is that it is a violation of a person's possession of the thing accompanied with an intention to misappropriate the thing.

In s 220 the words "the owner, or any person having any special property or interest" encompass persons having a wide range of proprietary and other interests in things capable of being stolen. They are not confined just to owners having general property (see the definition of "property" in s 2 of the Sale of Goods Act 1908) and persons such as pledgees who are conventionally referred as having a special property: 4 Halsbury Vol 35 para 1215; ***Chabbra Corporation Pte Ltd v Jag Shakti*** (Owners) "*The Jag Shakti*" [1986] 1 AC 337,345. The words must be taken to extend to lawful possession as, for example, in a bailee. They must also extend to the interest of an owner or occupier of land exercising actual control over what is on it as in the cases referred to. Even if that interest is something less than legal ownership no miscarriage of justice can flow from that in this case.

Mr Brodie criticises the summing up for allowing the jury to assume that control of the bed of the lake and therefore possession of the logs meant that ownership and possession coincided. We do not think that the jury would have been at all confused by this proposition and in other passages the Judge has pointed out the existence of persons who probably owned the logs at some time earlier. What is fundamental to the correctness of the summing up is that there was something capable of being stolen from a person being the owner so defined or a person having any special property or interest in the logs. The definition of stewardship area in the Conservation Act and the evidence of ongoing management creates the necessary concept of being in possession as occupier. As to the manifestation of an intention to exercise control over the lake bed and anything on it, the evidence was that Mr Thomas who was licensed to salvage some of the logs from the bed of the lake, approached the Department of Conservation and was required to obtain a permit. He was granted a permit to lift three logs as a trial following an application publicly advertised. The appellant himself professed knowledge of Mr Thomas' application when he spoke to Mr Hansen in January 1995.

Nor did the accused make any issue of the Department of Conservation's entitlement to exercise control over the logs. The appellant put aside logs at the direction of the Department for the benefit of Mr Thomas because they had arguably come from the lake floor immediately in front of the mill as part of the slipway. Furthermore, it was never suggested by the appellant that anyone was entitled to take logs from the lake floor. His case was that no logs were taken by him from the lake except in that marginal area where he was possibly required to work for the purposes of removing willows and the like.

The appellant when giving evidence admitted taking some logs "out of the lake" but then added:

> "I don't dispute there have been logs found in willow fringe. I have not removed logs from anywhere else than willows fringe. I have not gone further out into the lake. I don't have diving equipment. I don't dive or I don't have access to diving equipment. I have chains that are associated with our work which in total might be 10 metres in length. The logs varied in condition."

This evidence was given following the evidence of the whereabouts of the boundary and raises the question as to whether the Crown have satisfactorily established the position of these logs taken from the water as the appellant admits. It is clear from the Judge's summing up in the passage referred to earlier that the Crown regarded such taking as proof from the accused's mouth of some taking of logs belonging to the Crown from the bed of the lake.

That would however depend on whether they were within the boundaries of the lake as described or arguably "all part and parcel of the shore line works and were therefore not in the lake, or at least it is reasonably possible that some of them were not" as the Judge said.

In the end we consider the jury would have understood the onus on the Crown to establish the right it had to claim possession of logs on the lake bed having regard to the boundary of the lake.

In that regard, we think the Judge's direction to "put to one side" from consideration logs not recovered from the bed of the lake properly directed the jury's attention to the requirement that there had to be a taking of logs from the lake bed and from nowhere else. The Judge after referring to the Lands and Survey map, which indicated the extent of the jurisdiction over the bed of the lake, went on and reviewed the evidence about the variability of the level of the water in the lake, the discussion about where the boundary was, and then made it plain that the jury had to be satisfied beyond reasonable doubt that some of the 54 logs came from the lake and sufficient to amount to $300 worth.

In summary therefore there was evidence of the Crown's entitlement to the logs in terms of S.220 sufficient to support a charge of stealing them.

The second point made for the appellant was that numerous and separate offences are included in the indictment. The appellant had unsuccessfully applied prior to trial for better particulars of the location of the logs allegedly stolen but that request had been disallowed. The indictment referred to stealing logs from Lake Brunner valued at $14,000 between 1 January 1994 and 20 January 1995. The evidence focused on the 54 logs found at his father's factory.

The appellant says that the evidence suggested logs had disappeared from various points in the bay and it was impossible to know which and how many were the subject of the verdict.

By taking each of the locations in turn and having regard to the circumstantial evidence surrounding them, Mr Brodie submits that the verdict in respect of particular logs shown to have disappeared must be impeached on the grounds that the verdict was against the weight of evidence - there being no sufficient evidence to link those logs with the sections in the appellant's possession.

This reflects a misconception of the Crown case. It was not contended that the 54 logs held by the appellant were the same logs which were the subject of specific evidence

that they had been removed from various locations in the lake. The Crown case was more general. It was that there was evidence that logs were being taken from the lake bed as was exemplified by the disappearance of particular logs that were known to be no longer there. There was evidence that the appellant had access to the lake and was in possession of sections of logs said to have been under water for significant periods. It was a case resting entirely on circumstantial evidence casting the inference that the appellant had taken logs (not any particular log known to have disappeared) from the lake bed and that the sections in his possession were parts of such logs.

The Crown case was that logs were taken from the lake bottom and that scientific evidence revealed that some of the 54 logs were of a condition to suggest that they came from a deep part of the lake. There was some contrary evidence but in an area where the jury would have properly made its preference in arriving at a conclusion.

S.329(4) and (6) Crimes Act 1961 are relevant and provide:

> "(4) Every count shall contain so much detail of the circumstances of the alleged crime as is sufficient to give the accused reasonable information concerning the act or omission to be proved against him, and to identify the transaction referred to; but the absence or insufficiency shall not vitiate a count.
>
> (6) Every count shall in generally apply to the one transaction."

The Crown case was that numerous logs, which had earlier been observed on the floor of the Lake Brunner, had disappeared. We think that in the end Mr Boldt is correct when he says:

> "It was not possible to identify specific dates on which the thefts had occurred, and the contest was whether the appellant had removed any logs from the bed of the lake or whether, as he claimed, the logs had come from the foreshore and the bank."

When the Crown case is properly understood there was no failure to observe the requirements of S.329. In the end the jury were left with a clearly ascertainable issue whether more than $300 worth of logs had been taken from the lake floor by the appellant.

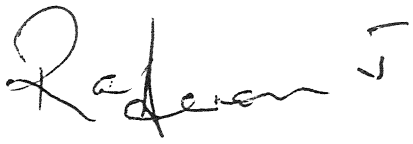
Coupled with the Judge's warning that they were to have regard to the possibility that the appellant honestly believed he was entitled to the logs and this particularly so if there was uncertainty as to where they were found and the uncertain location of the lake boundaries (see the earlier passage of the summing up referred to) we conclude the jury must have been satisfied that logs were taken from the lake bed. The Judge's observations on sentencing as to the origins of some of the 54 logs was a matter to be taken into account on penalty. The indictment however alleged the taking of logs and we do not consider the defence has been prejudiced in having to deal with the overall allegations in this way, being as they were, part of an overall transaction.

Mr Brodie objected to the way in which the boundary evidence was given.

Undoubtedly the evidence of the location of the exact boundary was unsatisfactory and made further so because the certified Department of Lands and Survey Information map which went to the jury was not available to us as an exhibit. Mr Hansen's location of the boundary by reference to work he did in his office may not have met the best evidence rule because he did not produce the aerial photograph from which he worked but his findings were given to the jury by virtue of his reference to the Land and Survey plan and the photographs. He described use of a transparency prepared at his direction from a survey plan over laid on the aerial photograph. That was admissible. We think that had the material giving rise to his finding been available to the jury they would still have been left with an uncertain boundary. The need to be satisfied beyond reasonable doubt that the logs unequivocally came from the lake bed remained.

The jury were adequately directed not to convict if there was a reasonable doubt as to the origins of the logs and the uncertainty of the boundary must have been an obvious weakness in the Crown case in that respect. There was however a significant body of circumstantial evidence including scientific evidence to show that logs had disappeared from much deeper areas in the lake and logs found in the appellant's possession were of that description.

The appeal against conviction is therefore dismissed.



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