REGINA V. BABY

(1854), 12 U.C.Q.B. 346

Upper Canada Queen's Bench, Robinson C.J., Draper and Burns JJ., 1854

Indictment--No new trial under 14 & 15 Vic. ch. 13--Indictment under 13 &14 Vic. ch. 74, for purchasing land from Indians without the consent of govern- ment--To what lands the Act extends--Scienter--Variance between indict- ment and proof, as to lands purchased--Meaning and object of the statute.

The court has no power to order a new trial in a criminal case reserved under 14 & 15 Vic. ch. 13; but only to decide upon any legal exceptions raised, and whether there was legal evidence to sustain the indictment, taking it in as strong a sense against the defendant as it will bear, and supposing the jury to have given credit to it to its full extent.

The 13 & 14 Vic. ch. 74, prohibits the buying or contracting to buy from Indians, not merely any lands of which they are in actual possession, but any lands held by the government for their use or benefit;--but *Quoere*, whether the clauses of the act relating to trespasses on Indian lands extend to any lands not actually possessed by them.

Held, that the indictment in this case, after verdict, sufficiently averred the lands purchased by the defendant to be Indian lands--*i.e.*, lands held by the crown for them ; and *Quoere*, whether the act extends only to lands so held, or as well to lands purchased by Indians from individuals.

A guilty knowledge on defendant's part sufficiently averred in the indictment.

Held, also, that no variance was shewn between the lands described in the indictment and that which the defendant was proved to have contracted for.

Held, also, no objection that the purchase was alleged to have been from certain Indians named, whereas it was in fact the tribe through their council.

Held, also, that the evidence in this case was sufficient to sustain the conviction.

Semble, that the meaning of the statute is, that no one shall attempt to bargain with the Indians for the purchase of their lands, until he has first obtained the consent of government; and that it is therefore contrary to the act to make even a conditional agreement, subject to their approval.

The proposal should be made to government in the first instance.

SPECIAL CASE, reserved under 14 & 15 Vic. ch. 13.

The defendant was indicted under the statute 13 & 14 Vic., ch. 74, for making a contract with certain Indians, concerning the sale and purchase of certain lands, and of the interest of the said Indians therein.

The indictment charged that Joseph White and two other persons, who were named in the indictment, were and are Indians of and residing in Upper Canada--to wit, in the township of Anderdon, in the county of Essex--and as such Indians were, on the twenty-first day of June, in the sixteenth year of the reign of her present Majesty, entitled to and claimed certain lands situate in the town of Sandwich, in the said county of Essex (which were particularly described in the indictment): and that the defendant, who was described as an attorney-at-law, well knowing the promises, and that the three persons named were such Indians in Upper Canada as aforesaid, on, &c. at, &c., without the authority or consent of her majesty the now Queen, unlawfully did make a contract with the said three persons, so being such Indians of Upper Canada as aforesaid, for and concerning the sale and purchase of the said lands, and concerning the sale and purchase of the said lands, and of the interest of the said three persons, as such Indians, therein--against the form of the statute and against the peace, &c.

At the trial at Sandwich, before *Draper, J.*, the following evidence was adduced on the part of the Crown:--

George Jessup sworn.--I married a daughter of the late Mr. Mears. I know a piece of land at the east and northerly end of the town (Sandwich), described by the boundaries in the indictment. I knew the late Mr. Mears twenty years ago. He was then in possession of this land. The Indians near Amherstburg claim this land. I knew Alexander Clark and Joseph White, both Indians, part of those Indians who claim this land.

Cross-examined.--I only speak of the land between the road and the river as being claimed by the Indians.

Alexander Clark sworn.--I claim to be an Indian by usage. I am recognized as such. I know the land spoken of. The Indians claim this land where Mrs. Hand's house is and the steam-mill. I am fifty-four years old. Mears had one part of this land and Mr. Hands one, as long as I can recollect. It was decided by the Indians in our council here, the Indians named in the indictment being parties to the decision, that we did not want this land, and we resolved to take possession first and then to sell. We were prevented taking possession of the vacant lot. We then consulted Mr. Baby, the defendant. We could get no satisfaction from our agent to whom we applied to sell it. We negotiated with defendant for the vacant lot, which we valued at £250, and he agreed to take it from us at £250, and to run all risks and bear all ex- penses, I joined with other Indians in making this contract.

Cross examined.--We tried to take possession before we consulted defendant, but Col. Prince opposed us. We were then only contending for the piece near the river, not for the whole block. We heard of an old lease called the Walker lease. The contract was written down by defendant. It was early in June. We all signed the paper, and afterwards signed another paper (looks at a paper). This is one of the papers, dated 28th of June,1852; it is executed by me and the other chiefs, at the school house in council, (read).

It is a power of attorney only, from the Indians to defendant. The defendant said it would not be lawful to purchase, except through the government. He drew petitions to the government, which we signed. The result was that, because the defendant was not the recognized agent for the Indians, Colonel Bruce, the chief superintendent, would not recognize him or the petition, (a certified copy of the petition put in by consent of *Prince, Q.C.*). The defendant prepared this

petition for us and sent it in. Our first desire was to have the whole sold in a lump, and get the money to be used at our village for improvements. Afterwards we were willing to sell to the several parties in possession. The defendant told us this was the wish of the government and we refer to this in the petition just read. The defendant was requested by us to attend our councils on the matter. He was acting for our interests, as we employed him.

Re-examined.--Before signing the power of attorney, we sold to defendant for £250 this land, provided the govern- ment consented to it--*i.e.*, the upper piece. I don't think this first agreement was in writing. We sold to defendant on condition the government would sanction it. Then we found our right extended to much more land that this piece, and therefore we rescinded the agreement to sell to defendant.

Dominique Langlois, sworn--I am 57 or 58 years old. This property was in a great part occupied by old Williams for forty years, and Hands occupied another part. I was present when a negotiation took place to sell his land, or an interest in it or part of it to defendant. He was to give $1000 or $1100. This was two years ago last June. I had a paper given to me by Mr. Baby, the defendant, but on search, I could not find it.

Cross-examined.-- I went with the Indians to defendant, and know that they employed defendant. Previously employed him for myself. He told me, in presence of the Indians, that there could be no purchase or lease from the Indians without the consent of the government. The last witness was there and some other chiefs. Joseph White was there. This was at the same time as the bargain about the sale to defendant. At first the Indians only thought they had a right to a part, but on seeing the old lease defendant said to the Indians they had a right to more. Defendant said "I will give you $1000,"--*i.e.*, to the Indians--"if the government will sanction the sale to me." Except the government did he would not pay them anything at all.

Thomas King, sworn.-- At one of the Indian councils, where defendant was, I was present. There was a dispute among the Indians as to the value of these lands. At first they thought they had only two acres, then they found they had more, and they said they should get more. The defendant produced a paper which he said they had signed, and they admitted it. He said it was an agreement made for some land in the town of Sandwich for $1000, but that was to be kept secret. It was said, however, amongst them that it had become null and void, in consequence of something but what I cannot tell. It might have happened at a council held in February, 1853. The conversation referred to an agreement made in June, 1852.

Louis J. Fluette, sworn.-- I have heard of this dispute. I have been for ten years in possession of a part of the land. I saw the Indians coming to put up fences, and felt apprehensive of difficulty in consequence of something I heard. I went to defendant and asked if we were to be ousted of our property. He said it was too true; we had no title, and the Indians would oust us. I asked him what would become of my improvements. He said, you will have to purchase again to get a title. I said I would give anything to make good my title, and he asked me what I had paid. I said $150. He said, "if you and the rest will put your heads together, I will make, or I can make, your title good." He asked $150 to do this. From what defendant said. I understood he had the management of the whole concern in his hands. He said he had been to Toronto to see about it, to the government, and the business was in a fair way.

William Clark, sworn.--I am an Indian. I know this land Our people claim it as part of their

property.

The defendant's counsel admitted service of a notice to produce the contract spoken of.

DEFENCE.

Pierre H. Morin, sworn.--The power of attorney put in was witnessed by me--I wrote it, read it to the Indians, and saw them execute it. The defendant was present. A petition to the government was signed at the same time. Nothing was said at that time about any contract between the parties.

Thomas Woodbridge, sworn.--I am in possession of part of this land. I have no fear of what government will do.

The jury were out all night, and on the following morning returned a general verdict of guilty.

Mr. Cooper made the following objections in arrest of judgment.

1. The evidence is not sufficient in law to establish the offence created by the statute.

2. If evidence of a contract it was only for a small piece of ground, parcel of that described in the indictment, where- fore the indictment, describing it as one piece by metes and bounds, is not sustained.

3. The evidence not only did not establish anything contrary to the statute, but it did prove an understanding consistent with the statute.

4. The indictment does not charge an attempt to purchase such lands--*i. e.*, lands *de facto* in possession of the Indians-- as the statute refers to.

5. The allegation in the indictment is of a purchase from certain of the Indians (named), whereas the purchase proved was from the body or tribe of Indians represented in their council.

6. There is no proof that these particular Indians named in the indictment had any interest to sell.

Prince, Q. C., for the crown, had previously agreed that any objection that might be raised to the legality of the con- viction should be reserved for the opinion of the court; and as the learned judge entertained some doubt as to the suffi- ciency, in point of form, of the indictment, though no other objections than those above noted were taken, he reserved the case; without passing sentence, the defence giving security to appear at the next assizes, for the opinion of the Court of Queen's Bench.

[The statute 13 & 14 Vic. ch. 74, is intituled "An act for the protection of the Indians in Upper Canada from imposition, and the property occupied and enjoyed by them from trespass and injury."

It recites that "It is expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians *in the unmolested possession and enjoyment* of the lands and *other property in their use or occupation*."

And it enacts "That no purchase or contract for the sale of lands in Upper Canada which may be made of or with the Indians, or any of them, shall be valid, unless made under the authority and with the consent of her Majesty, her heirs or successors, attested by an instrument under the great seal of the province, or under the privy seal of the governor thereof for the time being."

And (sec. 2) "That if any person, without such authority and consent, shall in *any manner or form*, or upon any terms whatsoever, purchase or lease any lands within Upper Canada of or from the said Indians, or any of them, or *make any contract* with such Indians, or *any of them*, for or concerning the sale of any lands therein, or shall in any manner give, sell, demise, convey or otherwise dispose of any such lands, or any interest therein, or offer so to do, or shall enter on, or take possession of, or settle on any such lands, by pretext or color of any right or interest in the same, in consequence of any purchase or contract made or to be made with such Indians, or any of them, unless with such authority and con- sent as aforesaid, every such person shall in every such case be deemed guilty of a misdemeanor, and shall on conviction thereof before any court of competent jurisdiction, forfeit and pay to her Majesty, her heirs or her successors, the sum of £200, and be further punished by fine and imprisonment, at the discretion of the court.]

Before the trial a notice was served upon the defendant that he would be required to produce a certain bond, agreement, and paper in writing, made or purporting to be made between him and others, and certain Indians of the township of Anderdon, in the county of Essex, and a certain person or certain persons on behalf of such Indians, for the purchase, sale, or transfer of the whole or part of the interest claimed by the said Indians in certain lands and premises in the town of Sandwich aforesaid, occupied by, &c. (naming the occupants), and which said bond, agreement, or writing was entered into by him, the defendant and others, the parties thereto, within the last twelve months or thereabouts.

And also a certain power of attorney from the said Indians, or some of them, or their agent, to the defendant, relating to the said lands or to their interest therein; and also all other deeds, bonds, agreements, contracts, and writings made and entered into by the defendant with the said Indians, or any of them, or any agent of theirs, relating to the same lands.

Richards for the Crown.

Cooper, contra, cited--Beasley v. Cahill, 2 U.B.R. 320 ; Rex v. Robinson, Holt N.P.C. 595 ; Rex v. Deeley, 4 C. &P. 579 ; Regina v. Jones, 1 Cox 105 ; Regina v. Taunton, 1 Moo. C. Ca. 118 ; Rex v. Great Canfield, 6 Esp. 136 ; Rex v. Upton-on-Severn, 6 C. & P. 133 ; Tay. Ev. I. 190 ; Ross. C. L. 111-112 ; Cex v. Philpotts, 1 C. & K. 112.

ROBINSON, C. J., delivered the judgment of the court.

It is scarcely necessary to say that the statute 14 & 15 Vic. ch. 13, under which cases are submitted to us from the criminal courts gives us no authority to order a new trial, or to prevent a verdict of guilty from going into effect because we may think that the jury would have exercised a sounder judgment if they had acquitted. We may consider the evidence for the prosecution to be weak ; we may find it to be conflicting, and may have a strong impression that if we ourselves had formed part of the jury we might not have been satisfied with it. But it is not in that point of view that we are at liberty to look at any case referred us under statute; we have only to

pronounce judgment upon any particular legal exceptions which may have been or may be raised upon the pleadings or the *evidence*, or upon the general question, which is strictly one of law, whether there was legal evidence given at the trial sufficient to sustain the prosecution, taking it in as strong a sense against the defendant as it will bear, and supposing the jury to have given credit to it to its full extent.

Now, as to the particular legal objections raised by *Mr. Cooper* in this case, the statute does we think, prohibit the buying from Indians, or contracting to buy from them, without the consent of the Crown, not merely any lands of which they are actually in possession, but any lands held by the government for their use and benefit, whether actually used and possessed by them or not. The consideration of policy which led to enactment would apply in the latter case as well as in the former, and there is nothing in the language of the clauses relating to this prohibition which would warrant us in giving to it so limited a construction as that contended for. In those parts of the act which relate to the punishment of trespassers on Indian lands, there is some evidence of an intention to confine such provisions to lands actually possessed and enjoyed by Indians, though it is unnecessary now to determine whether they can or cannot be extended further.

Another objection taken to the indictment is, that it does not shew that the land contracted for by the defendant was what is called Indian land--that is, public lands yet vested in the Crown, and held by the Queen for the use and benefit of the Indians.

It is contended that the prohibition against purchasing without the consent of the government relates to such lands only, and not to any lands which an Indian or Indians may have acquired by purchase from individuals, or may hold like any other person by grant from the Crown; and the objection is that for all that appears in the indictment, the land now in question may have been held under a title of the latter description.

We think the answer which must be given to this objection is, the first and second clauses of the statute are as general in their language as the indictment is; and that, by the 47th clause of our statute 4 & 5 Vic. ch. 24, it is provided that where an offence is created by any statute the indictment or information shall, after verdict, be held sufficient if it describes the offence in the words of the statute creating the offence.

Whether if it had appeared upon the trial that the Indians named were only contracting to sell to the defendant some land which they held by an ordinary title in fee simple, it would have been proper to hold such contract to be within the act, is another question, and one which at present seems to us rather doubtful upon a view of the whole statute. But we cannot doubt from the evidence that the land in question was in fact what we ordinarily understand by Indian lands; and indeed the indictment does contain the averment that White and the others named where, "*as such Indians*, entitled to the land mentioned. We are of opinion, therefore, that we cannot give way to this objection.

It has been argued also that the indictment is deficient in not clearly enough averring a guilty knowledge on the part of the defendant. As to that it must be considered that the clauses of the statute on which it is framed contain nothing in express terms that calls for the introduction of a *scienter* ; and, in the next place, that the indictment does nevertheless contain the allegation that the defendant well knew that White and the others named were, as Indians, entitled to these lands. We cannot therefore see that there is any room for this objection.

Another fault found with the indictment, and intended, we think, to be strongly insisted upon, was that there was a fatal variance between the proof and the statement, in this, that the indictment charges that the defendant contracted to buy certain lands particularly described, being a certain message and lands in the town of Sandwich occupied by one George Jessup, and a certain other message and lands occupied by one Hannah Easter Mears, widow, which said messages and lands adjoin each other, and are bounded on the north by a certain run of water near the church line which there empties itself into the river Detriot, on the south by a message and premises belonging to Alexander Chewett, Esquire, on the east by the Queen's public highway leading from the town of Sandwich aforesaid to the village of Windsor, and on the west by the river Detroit aforesaid; whereas it is contended that all that can be said to have been proved was, that the defendant contracted to buy the small pieces of land between the public highway and the river, and not the land described in the indictment. We understood this to be the nature of Mr. Cooper's objection relating to the variance, but it appears to be founded on a misconception of the description in the indictment, for that comprises in reality only the small tract of land between the road and river, and the defendant is not charged with having contracted to buy more than that. There is some ground offered in the evidence for supposing that the written agreement spoken of by the witness King did in fact embrace more land than this, or, at least that the defendant, after he had taken it, claimed that it included more.

If the defendant had produced the writing upon the notice given to him, we should have been able to see exactly what it did include. If it were found only to include the pieces of land between the road and the river--in other words, west of the road--then there would be no ground for the objection of variance, for the indictment and the writing would correspond. It it were found to contain that land as described in the indictment and other lands besides, that would be no variance, for the charge in the indictment would in that case be strictly proved, and it would only appear that the charge might have been carried further. But in the absence of the deed, which for all that appears, it was in the power of the defendant to have produced, we could not hold that any variance was shewn. The exact purport of the deed is left in some degree in doubt upon the evidence, and we cannot tell what conclusion the jury came to in regard to the precise land which it contained. All that can be said is, that they could scarcely have doubted that it did include the land in front of the road, if nothing more, which was all that was necessary to support the indictment in that respect.

We do not think that there is anything in the objections taken at the trial, that the indictment alleges that the defendant made a purchase from certain Indians named, whereas the purchase, so far as it was proved, was from the body or tribe of Indians through their council; and also that it was not proved that the particular Indians named in the indict- ment had any interest to dispose of.

The statute is very general in its terms. It provides that no contract made with the *Indians, or any of them,* for the sale of land in Upper Canada shall be valid; and that if a person shall make *any contract* with the Indians in Upper Canada, *or any of them,* for or concerning the sale *of any lands therein,* without the authority and consent of her Majesty, he shall be deemed guilty of a misdemeanor.

The evidence given upon the trial tended to prove that the defendant did make a contract with certain Indians in Upper Canada for and concerning the sale of lands therein. The persons named were proved to be three of the Indians inter- ested in the land in question, or claiming to be so;

and it was proved that they contracted to sell to the defendant for £250 the land named. He knew they had not the legal title, which was vested in the Crown, and not in a tribe of Indians; but what they contracted to sell was the interest of the Indians in it, including their own interest, which is what the indictment charges, and is within the letter and the spirit of the act.

If there appeared to us to be a clear objection to the conviction on any ground, however technical, we should have no disinclination to give effect to it; for we have received the impression from the evidence that the defendant very probably either made his contract or commenced his treaty with the Indians in ignorance of the prohibition contained in the act of parliament and of the heavy penalty which it imposes; or that, if he was aware of these, it is doubtful whether he ever anticipated making a bargain otherwise than the subject to the condition understood between him and the Indians that it should receive the sanction of the government. And, whatever effect this could be allowed to have in saving him from the penalties of the statute, it would go very far to relieve the defendant from the charge of criminal intention, if we could see clearly and certainly that such had been his conduct.

Being of the opinion however that none of the legal exceptions taken are fatal to the conviction, we have to consider the case as it stands upon the evidence, and to determine whether, upon the broad ground on which it was mainly argued, the defendant has been lawfully convicted of an offence within the statute. In determining this point, the impression which we have just intimated, that the defendant was perhaps ignorant of the terms of this statute on which he has been prosecuted, can have no influence upon our decision. He was bound, as others are, to know the law and to observe it, and we cannot be satisfied that he did not know it.

Upon what point it was that the jury had difficulty in coming to a conclusion does not appear, but it seems they were out a whole night; and I confess that, as a juror, I should have had some difficulty, merely upon consideration of what was safe and reasonable in convicting the defendant upon the account that was given of his conduct. The statute gives no power to mitigate the penalty according to the apparent degrees of criminality, and every scuple would therefore be felt to apply with greater force.

But, upon an anxious consideration of the evidence, we cannot pronounce that in our opinion it does not in point of law sustain the conviction, and that, the jury have given an illegal verdict.

It was desirable certainly that it should have been made plainer and more certain what was the precise nature of the contract into which the defendant entered. There was evidence on his own admission, and some evidence otherwise, of a contract in writing for the sale to him of this Indian land. That writing must be assumed to be in his possession, and he had notice to produce it. He did not attempt to contradict the evidence that there was a written contract in fact, nor give any reason for his not producing it. It is just therefore, under such circumstances, to take the account that was given of the purport of that contract most strongly against the defendant since, for all that appears, he had it in his power to shew the jury the real particulars of his contract by producing the writing which he had taken and, it is reasonable to suppose he would have done so if that would have disproved or weakened the charge against him.

It stands uncertain upon the evidence whether the defendant in the first instance fairly told the Indians that he could not and would not make any bargain with them except subject to the consent of the government, or whether, after he had made his bargain and had offended against

the statute, whether in ignorance of it or not, and perhaps after his own conduct had been complained of by some of the par- ties interested, he made the Indians aware that he could no insist upon his bargain unless the government would sanction it.

It does not appear either, whether in the writing any reference is made to the consent of the government as a necessary condition of the contract.

That the defendant had not in fact the consent or authority of the government seems clear upon the correspondence produced.

We can easily believe it possible that this defendant or any other person wishing to buy lands from the Indians, might be under the impression that if he entered into the contract only conditionally and openly and avowedly made his agree- ment subject to the consent and approbation of the govern- ment, he would not be offending against the act; and we can believe that if the jury in this case had been satisfied upon the evidence that the defendant had acted openly in that spirit and upon that understanding and no other from the first, they would probably not have found the defendant guilty. The learned judge who tried the cause is under the impression that, from the observations with which he gave the case to the jury, they would have acquitted the defendant if they had taken that view of his conduct on the evidence. It may be that the difficulty which the jury had in coming to a conclusion arose from the necessity of their considering very carefully the bearing of the evidence in that respect. But upon that point two considerations arise--first, if the jury had acquitted the defendant expressly upon the ground that he had only made his agreement subject to the approval of the government, would that have been taking a correct view of the intention and spirit of the statute? At present we will only say that we look upon that as very doubtful ; for there is much force and reason in Mr. Richards's argument, that the considerations of policy which gave rise to the statute, and, as we must suppose the intention of the legislature, are at variance with that construction.

The meaning probably is, that no one shall attempt to traffic with the Indians for the purchase of their lands, till he has first obtained the authority and consent of the govern- ment for entering into a contract with them. The Indians would not seem to be adequately protected against the evils recited in the statute if persons were allowed first to enter into a treaty with them, and after the Indians had compromised themselves as to price and terms of payment, to apply then for the confirmation of the crown. It would appear to be a more effectual protection if no one were allowed to enter into a conditional bargain with them for their land without obtaining previously the authority of the government to make such bargain; for if the government were appealed to before any specific proposal were made to the Indians, the course which we may suppose would be taken would be such as would leave not merely the Indians but the government in a position to act much more freely then by the other course, where, by declining to confirm, the government would in fact be annulling a bargain already made. The government, if applied to before any treaty as to price or terms had been entered into, would first have to consider whether it would be proper to allow the Indians to sell, and if so, they could take care that before any of the Indians had committed themselves to a bargain from which they might think it dishonorable to retract, the proposal to purchase should be opened and discussed at a council fairly representing the tribe and in the presence of some public officer, who might see that everything was duly considered and understood, and fully agreed to. If we look at the letter of the statute we think it can hardly be denied that a person who without authority of the government makes a bargain with the Indians to buy certain lands from them for a certain sum of money *provided the*

government will give its consent, does without authority of the government make a contract with the Indians concerning the sale of their lands; and we would recommend all persons who are inclined to bargain with the Indians for their lands, to go in the first place to the govern- ment and make the proposal to them, for we think that is what the legislature intended.

But it is really not necessary that we should pronounce upon this question, because we are not warranted in assuming that the jury were satisfied that the defendant openly and avowedly, and from the first, dealt with the Indians named upon the express understanding that the bargain was to go for nothing unless the government approved of it.

The evidence tends a great deal the other way, though it was sworn that the defendant did state that everything must depend upon the consent and approval of the government, and that may have been at the time that the contract of pur- chase was made; but there was no proof that anything to that effect was inserted in the writing. The defendant seems to have taken a writing which the Indians understood and intended was only to relate to the small piece of land in front of the highway, though he afterwards, according to some or the testimony, asserted under it an interest in the large, tract on the east side of the road; and although he was long afterwards in communication with the Indian department of the government, endeavoring to procure permission to the Indians to make sale of their land, he does not seem in any of his letters, or in the documents, sent to the government, to have conveyed the intelligence that he had himself concluded on his own account any purchase, conditional, or otherwise; but held himself out as interceding for the Indians as their agent merely, and without any intimation, so far as appears, that he had a personal interest in soliciting the consent for which he applied. This, coupled with the defendant neither producing the writing, nor giving any reason for not producing it, left his conduct subject to any construction which the evidence would warrant; and we cannot on any clear ground hold that he was illegally found to have offended against the statute in any manner charged ill the indictment. If by referring to any points that were proved, and others that were omitted to be proved upon the trial, the defendant can shew his conduct to be entitled to be viewed in a different light from that in which we must suppose the jury to have viewed it, he must submit himself to the consideration of the executive government. We consider the conviction legal upon the indictment and evidence.

Conviction affirmed.