

## FISHER v. STATE.

Opinion delivered February 12, 1912.

LARCENY—SUFFICIENCY OF EVIDENCE.—A conviction of larceny of some sheep will not be sustained where the defendant did not exercise any control over the sheep, and did not have any connection with the theft except to ride in the wagon for a while with the boys who stole the sheep and were carrying them away.

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Appeal from Garland Circuit Court; *Calvin T. Cotham*, Judge; reversed.

*M. S. Cobb*, for appellant.

*Hal L. Norwood*, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

HART, J. The indictment against the appellant, George Fisher, contained two counts: the first count charged him with the larceny of four sheep, and the second with receiving the sheep knowing them to have been stolen. The jury returned a verdict of not guilty on the first count, and convicted him on the second count. From the judgment of conviction the defendant has appealed.

The defendant and his brother, John Fisher, lived with their mother about twenty miles from Hot Springs. On the night of September 3, 1911, the brother, Gus Jones, Earl Lee, and Walter Careley, who were all at Mrs. Fisher's residence, concluded to go to Hot Springs. George Fisher went ahead of the other boys, intending to stop at a Mr. Gilliam's to borrow some money. The other boys at a later hour left Mrs. Fisher's in a wagon. When they arrived at Mrs. Nancy J. Garrett's place, they stole four of her sheep and put them in the wagon. When they arrived at Mr. Gilliam's, the defendant came out, and got in the wagon with them. One of the witnesses says that he laughed when he saw the sheep in the wagon, and made no objection to the boys carrying them. The other boys say that

he strongly objected to them carrying the sheep, and advised them to turn them loose. One of the boys says that the defendant drove the wagon a part of the time while he was in it. Later on he again got out of the wagon, and, not having succeeded in borrowing money from Gilliam, went to see another person. He borrowed \$37.50 from him, and gave a mortgage to secure it, and then went on to the city of Hot Springs. He was not with the other boys after he left the wagon until after they had disposed of the sheep and divided the proceeds of sale. The other three boys proceeded on their journey, sold the sheep for \$8, and each of them received \$2 of the proceeds of the sale. The defendant did not have anything to do with the sale of the sheep, and the only reason he did not inform on the boys was because he did not want to tell on his brother. Under this state of the record, the sufficiency of the evidence to sustain the verdict is questioned.

It will be seen that the defendant did not have nor exercise any control whatever over the sheep, and did not in any wise aid in the disposal of them; he did not receive any portion of the proceeds of the sale, and did not have any connection whatever with the transaction except to ride in the wagon with the boys for a while. Under these circumstances, we do not think the evidence was sufficient to warrant the verdict.

The judgment will therefore be reversed, and the cause remanded for a new trial.

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