The Northern Life Assurance Company of Canada *(Defendant) Appellant*;

and

Florence Reierson *(Plaintiff) Respondent.*

1976: March 10, 11; 1976: April 1.

Present: Martland, Judson, Spence, Dickson and Beetz JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Insurance—Life insurance—Group policy—Termination of policy for non-payment of premium—Cheque given for monthly premium dishonoured—No response to demand for replacement until after death of one of insured and after advice coverage no longer in force—No waiver by insurer of right to rely on s. 238(1) of The Alberta Insurance Act, R.S.A. 1970, c. 187.

The appellant company issued a group policy of insurance to cover employees of L. J. Scobie Co. Ltd. with effect from January 1, 1972. One of the employees covered by the policy was L. J. Scobie and he designated the respondent as beneficiary. The monthly premium amounted to $84.60 and was due on the first day of each month during the continuance of the policy. Provision was made for a grace period of 31 days for the payment of each premium falling due after the first premium, during which the policy would remain in force.

In response to a premium billing notice of January 26, 1972, which indicated a credit of $15.40 from the January billing, a cheque, dated February 15, 1972, for $69.20 (the balance of the February premium) was delivered to the appellant. This cheque was later returned N.S.F. The appellant asked for a replacement cheque but such was not received until about a week after the death of Scobie, which occurred on March 11, 1973. The replacement cheque was held by the appellant pending a decision on possible reinstatement of coverage and was later returned to the Scobie Company.

An action on the policy was dismissed at trial. An appeal was allowed by the Alberta Appellate Division which was of the view that the acts of the appellant in retaining the N.S.F. cheque and demanding a replacement cheque were unequivocal and could relate only to an election to continue holding the N.S.F. cheque for the purpose for which it had been received, that is, payment of the February premium. The Appellate Divi-

sion concluded that the February premium was paid and that as Scobie had died during the period of grace which commenced on March 1st, the respondent was entitled to succeed. From this decision the insurance company appealed to this Court.

Held: The appeal should be allowed.

The respondent's submission that the demand for a replacement cheque was equivalent to payment of the February premium was not tenable. Section 238(1) of *The Alberta Insurance Act*, which provides that where a cheque is given for the whole or part of a premium, and payment is not made according to its tenor, the premium or part thereof shall be deemed not to have been made, negated any argument that delivery of the February 15 cheque, later dishonoured, amounted to payment of the February 1 premium. Payment of the premium could be made within the days of grace but failing that the policy, by its terms, terminated. Nothing whatever was done in response to the demand for a replacement cheque until after the death of Scobie and after advice that the insurance coverage was no longer in force. There could be no doubt that the coverage under the contract came to an end on March 2 with the expiry of the days of grace, subject to the possibility of reinstatement upon compliance with certain conditions which were never satisfied. Before waiver can be found there must be express and unequivocal language or conduct, which could not be found in the present case.

McGeachie v. North American Life Insurance Company (1893), 23 S.C.R. 148, followed.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Primrose J. Appeal allowed.

T. Mayson, Q.C., for the defendant, appellant.

Angus G. Macdonald, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

DICKSON J.—The narrow issue in this appeal is whether the appellant, The Northern Life Assurance Company of Canada, waived its right to rely upon s. 238(1) of *The Alberta Insurance Act* R.S.A. 1970, c.187, which provides that where a cheque is given for the whole or part of a premium, and payment is not made according to its

[1] [1974] 5 W.W.R. 332, 48 D.L.R. (3d) 276.

tenor, the premium or part thereof shall be deemed not to have been made.

During argument, my brother Spence expressed concern that the appeal was on a question of fact alone and that the Court was without jurisdiction under s.36 of the *Supreme Court Act* (since repealed) to entertain the appeal. That section permitted an appeal on a question that was not a question of fact alone from a final judgment pronounced in a judicial proceeding where the amount in controversy in the appeal exceeded $10,000. Counsel for the respondent did not take the jurisdictional point, being of the view that the question raised on the appeal was one of law. At an earlier date, a motion was brought on behalf of the respondent to quash the appeal for lack of jurisdiction but on the ground that the amount of the matter in controversy did not exceed $10,000. The amount of insurance claimed by the respondent, Florence Reierson, in these proceedings is exactly $10,000. Rule 520 of the Alberta Rules of Court provides, however, that interest runs from the date of judgment at trial if, as occurred here, the trial Court is reversed. When interest runs from the date of judgment of the Court of first instance to the date of the judgment of the Court of Appeal that interest must be included in computing the amount in controversy in the appeal to this Court, because the judgment appealed from is necessarily the judgment of the Court of Appeal: *Dominion Cartage v. Cloutier*[2], at p.397. For these reasons the motion to quash was dismissed. It is the opinion of the Court that in all the circumstances any doubt as to the Court's jurisdiction should be dispelled by granting leave to appeal and leave is hereby granted.

The essential facts are not in dispute. In late December 1971, a group policy of insurance was issued by Northern Life to cover employees of L. J. Scobie Co. Ltd. with effect from January 1, 1972. The Scobie Company was a small plumbing and heating concern carrying on business in the City of Edmonton. The monthly premium amounted to $84.60. The sum of $100 was paid to cover the January premium leaving a credit of $15.40 to

[2] [1928] S.C.R. 396.

be applied on the February premium. One of the employees covered by the policy was L. J. Scobie and he designated the respondent as beneficiary. The policy contained several provisions of importance in the present appeal. The first premium was stated to be due and payable on the effective date of the policy, *i.e.* January 1, 1972, and monthly premiums were due and payable on the first day of each insurance month thereafter during the continuance of the policy. Provision was made for a grace period of 31 days for the payment of each premium falling due after the first premium, during which period the policy would remain in force. The provision also stated that: "If any premium be not paid within the days of grace this policy shall automatically terminate."

On January 26, 1972, a premium billing notice was sent to the Scobie Company for the February premium indicating a credit of $15.40 from the January billing and a net amount payable of $69.20. In the lower right-hand corner of the notice these words appear: "This premium must be paid not later than March 1, 1972 in order to continue this contract in effect."

In response to the premium billing notice the respondent, who was secretary-treasurer of the Scobie Company, prepared a cheque for $69.20 which was signed by Scobie and forwarded to the head office of Northern Life in London, Ontario. The cheque was received on February 17, 1972, and deposited. Eleven days later, on February 28, 1972, a Monday, the Canadian Imperial Bank of Commerce in Edmonton marked the cheque to be returned for insufficient funds to the bankers for the Northern Life at London, Ontario. On the same day a notice was forwarded to the Scobie Company by the Canadian Imperial Bank of Commerce advising that the cheque for $69.20 and two other cheques had been dishonoured for insufficient funds. Several days later, the N.S.F. cheque was received by Northern Life in London. On March 3, an officer of that company forwarded an inter-office memorandum to W. B. McAthey, group manager for Northern Life at Edmonton, reading: "The cheque of $69.20 to pay the balance of the February premium has been returned by the

Bank N.S.F. Please obtain a new cheque for this amount." McAthey asked Paul Shelemey, the insurance broker who had represented the Scobie Company in obtaining the insurance coverage, to obtain a replacement cheque. Shelemey telephoned that company and spoke to the respondent, who was already aware that the cheque had been returned, and asked her to make arrangements to replace the dishonoured cheque. He followed this up by telephone and by one or two personal calls. On March 10, Shelemey attended at the office of the Scobie Company; Scobie was not there and he spoke to the respondent, advising her that the insurance was out of force because the days of grace had expired and that the N.S.F. cheque should be replaced immediately. He was particularly concerned about the 10 or 11 employees who would think they were covered but were not. The respondent told Shelemey that the employees' contributions had been deducted from their pay cheques but the company was without funds with which to pay the premium. Scobie died the following day.

About a week later, on March 17, Shelemey received a telephone call asking him to pick up a cheque for $69.20 drawn on the personal bank account of Carlo Schwartz, a foreman with the Scobie Company, and payable to Northern Life.

Shelemey forwarded the cheque to the Edmonton office of the company with a covering letter reading: "Please find enclosed the replacement cheque for the February statement. This plan is to remain in force and the March premium will be paid as the statement is presented." Upon receipt of the letter McAthey telephoned Shelemey and told him that the policy was out of force as the days of grace had expired. He added that if the surviving employees wished to continue the plan, evidence of insurability would be required before the plan could be reinstated. McAthey wrote to the group department at London on March 20. The letter reads:

> Please find enclosed cheque in the amount of $69.20 paying the balance of the February premium and replacing the cheque that was N.S.F.

You will recall that I mentioned that Lloyd Scobie had died sometime during the weekend of March 11 and 12. I have never seen an announcement in the paper and we haven't heard from relatives or the company as to our liability. Paul Schelemey, the agent, tells me that the rest of the group want to carry on with their coverages, but I told him we would have to have the policy re-instated as they had gone over the 30 days allotted for payment of premium.

If you wish to have the group carried on, would you please prepare a Re-instatement form that we can have signed?

On March 21, the respondent wrote to the head office of Northern Life advising tht she was the beneficiary of Scobie's insurance and requesting claim forms. The company replied that the policy had terminated on February 1 due to non-payment of the premium due that date and as a result coverage under the policy had ceased. On March 28, the head office group department of the insurance company wrote the Scobie Company stating that the March 17 cheque for $69.20 was being held, that the policy had terminated on February 1 due to non-payment of the February premium and that the company would consider reinstatement of coverage upon completion of forms enclosed in the letter. The forms were never completed. The remaining employees decided not to seek reinstatement. Northern Life returned to the Scobie Company (i) the March 17 cheque for $69.20 which had been held pending a decision on reinstatement, (ii) a cheque in the amount of $15.40 representing the credit from the January billing and (iii) a cheque for $84.60 which had been forwarded to cover the March 1 premium. And so the matter rested.

Northern Life has taken the position that the policy lapsed on February 1 in accordance with its terms and was not reinstated, and that the death of Scobie occurred after the days of grace, at a time when the policy was out of force. The company relies upon s. 238(1) of *The Alberta Insurance Act* to which I have earlier referred according it the right to treat non-payment of the February 15 cheque as non-payment of the February 1 premium.

The position of the respondent is that by retaining the N.S.F. cheque, the $15.40 paid on account, and in making a demand for a replacement cheque, Northern Life elected to accept the obligation set out in the N.S.F. cheque in payment of the February premium and thereby waived its rights under s. 238(1) of the Act. The trial judge, Primrose J., dismissed the action, declaring himself "unable to find any area where the defendant appears to have elected to treat the policy as valid and binding, although it had requested a replacement cheque for the N.S.F. cheque, still reserving its right to consider reinstatement evidence of insurability, that decision to be made by Head Office." The Appellate Division reached a different conclusion. Mr. Justice Prowse, speaking for the Court, was of the opinion that the acts of Northern Life in retaining the N.S.F. cheque and demanding a replacement cheque were unequivocal and could relate only to an election to continue holding the N.S.F. cheque for the purpose for which it had been received, that is, payment of the February premium. The learned judge of appeal concluded that the February premium was paid and that as Scobie had died during the period of grace which commenced on March 1st, the respondent was entitled to succeed. I have very great difficulty in accepting this view.

It seems to me that this appeal is practically concluded by the decision of this Court in *McGeachie v. North American Life Insurance Company*[3] dismissing, without calling upon counsel for the respondents, an appeal from a decision of the Court of Appeal for Ontario reported in 20 O.A.R. 187. In that case, a condition in a policy of insurance provided that if any premium or note given therefor was not paid when due the policy would be void. A note given for the premium under the policy was partly paid when due and renewed. The renewal note was three weeks overdue and unpaid at the death of the insured. The Court held that the policy was void at date of death. It was also held that a demand for payment after the maturity of the renewal note, a demand which reached the

[3] (1893), 23 S.C.R. 148.

city in which the assured resided on the day on which the assured died, and was delivered to his brother on the same day was not a waiver of the breach of the condition so as to keep the policy in force. On this point Mr. Justice Osler said, p. 195:

> I do not wish to be understood as saying that a demand, even if actually communicated to the insured, unless followed by actual payment and acceptance of the premium in his lifetime, would be evidence of a waiver of the forfeiture or sufficient to reinstate the policy.

In the present case the meeting between Shelemey and the respondent on March 10, the day preceding the death of Scobie, is of critical importance. The respondent was advised at that time that the insurance was out of force. Shelemey did not have authority to keep the insurance in force. He was not an agent of Northern Life. He was an insurance broker, holding an agency contract with The Manufacturers Life Insurance Company. He was entitled to place through another company coverage which Manufacturers Life did not provide. The trial judge accepted his evidence that he could in no way bind Northern Life. The policy stated that except by written authority signed by the president or vice-president and by the secretary or actuary of Northern Life no person had power on behalf of the company to accept premiums in arrears or to extend the time for payment of any premiums or to waive the company's rights or requirements.

The Scobie Company was also alerted by the premium billing notice that the premium must be paid not later than March 1 if the contract were to continue in force. The submission urged by counsel for the respondent that the demand for a replacement cheque was equivalent to payment of the February premium is simply not tenable. Section 238(1) of *The Insurance Act* negates any argument that delivery of the February 15 cheque, later dishonoured, amounted to payment of the February 1 premium. Payment of the premium could be made within the days of grace but failing that the policy, by its terms, terminated. If the Scobie Company had given Shelemey the sum of

$69.20 immediately after March 3 following expiry of the days of grace, other questions might arise as to waiver but the difficulty which remains, so far as the respondent is concerned, is that nothing whatever was done in response to the demand until after the death of Scobie and after advice that the insurance coverage was no longer in force. I do not think there can be any doubt that the coverage under the contract came to an end on March 2 with the expiry of the days of grace, subject to the possibility of reinstatement upon compliance with certain conditions which were never satisfied. Before one can find waiver there must be express and unequivocal language or conduct, which one does not find in the present case.

I would accordingly allow the appeal, set aside the judgment of the Appellate Division and dismiss the action with costs in this Court and in the Courts below.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Milner & Steer, Edmonton.

Solicitors for the plaintiff, respondent: Macdonald, Spitz, Edmonton.

Her Majesty The Queen *Appellant*;

and

Herbert Bruce Newton *Respondent.*

1976: February 5, 6; 1976: April 1.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Possession of goods recently stolen—No explanation advanced—Charge to jury—Evidentiary effect of proof of recent possession—Proper instruction to jury does not constitute comment on failure of accused to testify—Canada Evidence Act, R.S.C. 1970, c. E-10, s. 4(5).

The respondent was charged with breaking, entering and theft. Goods which had been recently stolen were found in his possession. At the trial counsel for the Crown urged the trial judge to instruct the jury as to the inference to be drawn from the accused being found in possession of recently stolen goods, but, after argument, the judge made an express ruling that he "would decline to charge the jury as requested by the Crown with respect to the doctrine of recent possession." He was of the view that it was incumbent upon the Crown to adduce evidence as to whether or not the accused had offered any explanation for his possession of the stolen goods. An appeal from the accused's acquittal was dismissed by a majority of the Court of Appeal on the ground that an instruction to the jury in accordance with the rule as to recent possession would constitute a comment on the failure of the accused to testify contrary to the provisions of s. 4(5) of the *Canada Evidence Act*. The Crown appealed further to this Court.

Held: The appeal should be allowed and a new trial ordered.

Per Laskin C.J. and Dickson J.: The trial judge erred. There is no duty upon the Crown to lead negative evidence. It would be better to continue the existing practice in this matter. If the accused has offered an explanation to the police, it is open to his counsel, if the accused does not wish to testify, to cross-examine the police witnesses for the purpose of bringing forth evidence of the explanation.

The argument respecting s. 4(5) of the *Canada Evidence Act* was not persuasive. Explanations can be given inside or outside the court-room. When the trial judge speaks to the jury about absence of explanation, the reasonable inference for the jury to draw is that the accused did, or did not, as the case may be, offer an explanation at the time one would expect an explanation, that is, when the accused was found in possession of the goods alleged to have been stolen.

R. v. Graham, [1974] S.C.R. 206, referred to.

Per Martland, Judson, Ritchie, Spence, Pigeon, Beetz and de Grandpré JJ.: The instruction which should be given to a jury in a case involving possession by the accused of recently stolen goods is described by Lord Reading in *R. v. Schama; R. v. Abramovitch* (1941), 11 Cr. App. R. 45, at p. 49. The essence of the matter is that in a case such as the present one where it has been established that the accused was in possession of recently stolen goods and where no explanation whatever has been advanced, the jury shoud be instructed that the evidence of such possession standing alone raises a *prima facie* case upon which they are entitled to bring in a verdict of guilty.

The trial judge was wrong in thinking that some evidence relating as to whether or not there was an explanation must be adduced by the Crown if it seeks to rely on the above rule. Under the circumstances of this case, there was no onus upon the Crown to produce evidence of an explanation which might have been made by the respondent out of Court. Any other conclusion would have fixed the Crown with an untenable burden and made the rule as to the evidentiary effect of proof of recent possession almost completely unworkable.

The contention that an instruction to the jury in accordance with this rule would constitute a comment on the failure of the accused to testify contrary to the provisions of s. 4(5) of the *Canada Evidence Act* was rejected. There was no evidence of any explanation of the stolen goods being found in the respondent's possession and the provisions of s. 4(5) of the *Canada Evidence Act* do not alter the instructions which a judge should give to the jury in such a case.

R. v. Schama; R. v. Abramovitch, supra; *Richler v. The King*, [1939] S.C.R. 101; *Ungaro v. The King*, [1950] S.C.R. 430; *Graham v. The Queen*, [1959] S.C.R. 652; *Tremblay v. The Queen*, [1969] S.C.R. 431; *R. v. Graham*, [1974] S.C.R. 206; *R. v. Hill* (1973), 10 C.C.C. (2d) 541, referred to.

Per Martland, Judson, Spence, Pigeon and Beetz JJ.: *R. v. Graham, supra*, is conclusive against the view that, in order to rely on the doctrine of recent possession, the Crown must give some evidence as to whether or not there was an explanation given.

Assuming for the purposes of this case that, under the circumstances, a direction to the jury in the exact words of Lord Reading in *Schama*, 11 Cr. App. R. 45, at p. 49, would, in view of what was decided in *Bigaouette v. The King*, [1927] S.C.R. 112, be apt to be understood by a jury as a comment on the failure of the accused to testify (contrary to the provisions of s. 4(5) of the *Canada Evidence Act*), all the trial judge had to do was to give the direction omitting the words: "in the absence of any reasonable explanation". There was no necessity for stating the rule with the qualification when, on the evidence, it was to be applied without qualification.

When the Crown has put in evidence facts from which guilt may be inferred, the accused may be convicted unless there is an explanation that may reasonably be true. When such an explanation appears, whether in the evidence tendered by the Crown or brought by the defence, it must be considered and will justify an acquittal if it raises a reasonable doubt. This is what distinguishes facts from which guilt may be inferred from facts giving rise to a legal presumption where the defence has the onus of proving any admissible excuse on a balance of probabilities.

R. v. Spurge, [1961] 2 Q.B. 205, referred to.

APPEAL by the Crown from a judgment of the Court of Appeal for British Columbia[1], dismissing the Crown's appeal from the acquittal of the accused on charges of breaking, entering and theft. Appeal allowed.

G. L. Murray, Q.C., for the appellant.

P. R. Lawrence, for the respondent.

The judgment of Laskin C.J. and Dickson J. was delivered by

DICKSON J.—The short question in this appeal is whether the Crown is obliged to adduce evidence of any explanation given by the accused, or

[1] [1975] 2 W.W.R. 404, 21 C.C.C. (2d) 550.

absence of explanation, before relying on what has come to be called the "doctrine of recent possession". It has generally been understood that all the Crown need establish in the first instance is that the goods were recently stolen and that they were found in the possession of the accused. Then the jury must be told that they may, not that they must, in the absence of any reasonable explanation, find the accused guilty. In the instant case, the trial judge refused so to instruct the jury being of the view that it was incumbent upon the Crown to adduce evidence as to whether or not the accused had offered any explanation for his possession of the stolen goods. With respect, the judge erred.

There is no duty upon the Crown to lead negative evidence in these circumstances. The issue now before the Court was decided in *R. v. Graham*[2]. Consider the implications of what has been suggested. Let us assume that no explanation was given by the accused. To establish this, it would presumably be necessary for the Crown to call all police officers with whom the accused had spoken during investigation of the offence or after arrest. Each officer would be questioned as to whether the accused had made any explanation to him. Apart from the obvious practical difficulties this would present, a more serious concern is that the jury could obtain, indeed could hardly escape, the impression that a duty to explain rested upon the accused. Let us assume, on the other hand, that the accused had given several explanations. Nothing could be more damaging than evidence adduced by the Crown of a series of inconsistent explanations by the person charged. For these reasons, I should think it would be better to continue what I have understood to be the practice in this matter. If the accused has offered an explanation to the police, it is open to his counsel, if the accused does not wish to testify, to cross-examine the police witnesses for the purpose of bringing forth evidence of the explanation.

[2] [1974] S.C.R. 206.

The argument respecting s. 4(5) of the *Canada Evidence Act*, I do not find persuasive. Explanations can be given inside or outside the court-room. When the trial judge speaks to the jury about absence of explanation, the reasonable inference for the jury to draw is that the accused did, or did not, as the case may be, offer an explanation at the time one would expect an explanation, that is, when the accused was found in possession of the goods alleged to have been stolen.

I would allow the appeal, set aside the judgment of the Court of Appeal and the verdict of acquittal, and order a new trial on the second and third counts of the indictment.

Martland and de Grandpré JJ. agreed with the reasons of Ritchie J.

RITCHIE J.—This is an appeal brought pursuant to the provisions of s. 621(1)(*a*) of the *Criminal Code* from a judgment of the majority of the Court of Appeal of British Columbia dismissing an appeal by the Attorney General from a verdict of acquittal rendered at trial. The respondent was charged and acquitted on an indictment containing four counts of breaking, entering and theft but, in the Court of Appeal the Attorney General abandoned the appeal on the first and fourth counts and the judgment from which this appeal is taken is thus concerned only with counts two and three.

The dissenting opinions of Mr. Justice Taggart and Mr. Justice McIntyre are recorded in the formal order of the Court of Appeal in the following terms:

AND BE IT RECORDED that the Honourable Mr. Justice Taggart and the Honourable Mr. Justice McIntyre dissent from the judgment of the Court on the ground that in law the learned trial judge was in error in refusing to charge the jury on the inferences they might draw from the possession by the Respondent of recently stolen goods.

The issue before this Court is accordingly limited to the question of law so recorded.

One of the counts which was the subject of appeal related to breaking into a hardware store from which two walkie-talkie radios and a 22-calibre rifle were stolen, and the other count

arose out of the breaking and entering of a garage where tires were stolen.

It is not seriously contested at this stage that the goods which had been recently stolen were found in the possession of the respondent and it seems unnecessary to recount the details of the circumstances under which they were found, having regard to the following admission contained in the respondent's factum:

> It is conceded by the Respondent that the "fact of possession of goods recently stolen" was before the Jury. That "fact" will hereinafter be referred to as "THE FACT".

At the trial counsel for the Crown urged the learned trial judge to instruct the jury as to the inference to be drawn from the accused being found in possession of recently stolen goods, but after lengthy argument and on consideration of the authorities, the learned trial judge made an express ruling that he "would decline to charge the jury as requested by the Crown with respect to the doctrine of recent possession." The instruction which should be given to a jury in such a case is described by Lord Reading in *R. v. Schama; R. v. Abramovitch*[3], at p. 49, in a passage which has been approved by this Court on many occasions and particularly in *Richler v. The King*[4]; *Ungaro v. The King*[5], *per* Estey J. at p. 436; *Graham v. The Queen*[6]; *Tremblay v. The Queen*[7], at p. 437; and more recently in *R. v. Graham*[8]. The passage in question reads as follows:

> Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced

[3] (1914), 11 Cr. App. R. 45.
[4] [1939] S.C.R. 101.
[5] [1950] S.C.R. 430.
[6] [1959] S.C.R. 652.
[7] [1969] S.C.R. 431.
[8] [1974] S.C.R. 206.

that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes, it always rests on the prosecution. That is the law; the Court is not pronouncing new law, but is merely restating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases.

This statement has come to be referred to by text writers and by many judges as the statement of a "principle" or a "doctrine", but I prefer to think of it in terms of a rule of evidence as to which all judges should charge a jury. The rule has been variously stated in different cases, but in my view the essence of the matter is that in a case such as the present one where it has been established that the accused was in possession of recently stolen goods and where no explanation whatever has been advanced, the jury should be instructed that the evidence of such possession standing alone raises a *prima facie* case upon which they are entitled to bring in a verdict of guilty.

In refusing to instruct the jury in the present case as to the evidentiary effect of proof that the appellant was found in possession of recently stolen goods, the learned trial judge had occasion to say:

It seems to me to be incumbent upon the Crown if it seeks to rely on the presumption to give some evidence relating as to whether or not there was an explanation . . .

With the greatest respect for those who may hold a different view, I am of opinion that the learned trial judge erred in thinking that it was incumbent upon the Crown to call such evidence before it could invoke the rule to which I have referred. To make proof as to whether or not there was an explanation, a prerequisite to the application of the rule might entail requiring the Crown to prove a negative before the rule could be invoked and might indeed involve questioning all the persons with whom the accused might have been in contact between the time of the theft and his apprehension.

It was, however, argued before us on behalf of the respondent that the learned trial judge was right in thinking that some evidence relating as to whether or not there was an explanation must be adduced by the Crown if it seeks to rely on the rule. In this regard it should be noted that the majority of the Court of Appeal rejected this proposition. Branca J.A., while he dismissed the appeal on another ground, concluded that under the circumstances of the present case there was no onus upon the Crown to produce evidence of an explanation which might have been made by the respondent out of Court and this opinion was obviously shared by the two dissenting judges. In my view any other conclusion would have fixed the Crown with an untenable burden and made the rule as to the evidentiary effect of proof of recent possession almost completely unworkable.

In the case of *R. v. Graham*[9], the following passage occurs in the reasons for judgment of the majority of this Court at p. 213:

> There is nothing in any of these authorities to suggest that in relying upon the presumption of guilt flowing from possession of recently stolen goods, the Crown has the burden of proving that no explanation has been given by the accused at any time prior to his trial, or that if such an explanation has been given, it could not reasonably be true.

The majority of the Court of Appeal, however, dismissed this appeal on the ground that an instruction to the jury in accordance with the rule which I have stated would constitute a comment on the failure of the accused to testify contrary to the provisions of s. 4(5) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10, which provides that:

> The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution.

This contention is based on the use of the words "in the absence of any reasonable explanation" as they were employed by Lord Reading in the *Schama* case, *supra*, and it is said that to tell a jury that recent possession of stolen goods which is

[9] [1974] S.C.R. 206.

unexplained raises a *prima facie* case upon which "the jury may, not that they must . . . .find the prisoner guilty" is tantamount to commenting on the failure of the accused to testify.

This argument assumes that in using the words "in the absence of any reasonable explanation" as he did, Lord Reading must be deemed to have been referring to the failure of the accused to give evidence as to a reasonable excuse for his possession. Mr. Justice Seaton, with whom the majority of the Court of Appeal agreed in this regard, appears to have adopted the view that this Court and the Court of Appeal of Ontario have both accepted this approach when he says:

> *R. v. Graham*, [1974] S.C.R. 206, and *R. v. Hill*, (1973) 10 C.C.C. (2d) 541, have shown that the explanation properly in question is the explanation given in the witness box by the accused.

In subscribing to this view, Branca J.A. abstracts the following paragraph from a judgment of the majority of this Court in the *Graham* case, *supra*.

> "In cases such as that of *Schama* where the accused has given an unsworn explanation before the trial and a later explanation from the witness box in the presence of the jury, I think, with all respect for those who take a different view, that when the Court of Appeal refers to the result 'if the jury think that the explanation may reasonably be true' they are to be taken to be referring to the sworn explanation which the jury has heard and seen delivered in the Court rather than any unsworn statement made before the trial."

In the present case no evidence was adduced as to any explanation given by the respondent before trial and he gave no evidence himself, so that the circumstances which existed in the *Schama* case are not present here. The fact that in a case where there is an explanation under oath and one which is unsworn, the explanation under oath is the one to which the judge is to be taken as referring when he states the rule, has no relevance in a case where there is no explanation whatever.

In the case of *R. v. Hill, supra*, to which Mr. Justice Seaton referred, Gale C.J.O. said, at p. 542:

> In our view, there is no obligation on the Crown to show that no explanation was given prior to trial. If the accused is found in the position where the doctrine of recent possession is applicable, then it is encumbent upon him to give any explanation available to him and then let the Court decide whether it reasonably could be true. In this respect I will make reference to just one decision, that of the Court of Appeal of Quebec in *Messina v. The King* (1926), 42 Que. K.B. 170, where this was said:
>
> > "Where the doctrine of recent possession is applicable, all that the Crown need establish in the first instance is that the goods were stolen and that they were in the accused's possession . . ."

I do not think that the above passage is to be construed as meaning that where recent possession has been established, the accused is required to testify or that a verdict of guilty must necessarily ensue from his failure to do so.

With the greatest respect for the contrary opinions advanced in the Court of Appeal, I do not think that there is anything in that case or in the *Graham* case, *supra*, to suggest that a judge is commenting on the failure of an accused to testify when he instructs a jury that evidence of recent possession, standing alone, raises a *prima facie* case upon which they may but not must bring in a verdict of guilty of theft.

It has been suggested that the effect of instructing the jury in accordance with the rule is to place the burden of proof on the accused, but as Lord Reading said in the *Schama* case "That onus never changes, it always rests on the prosecution", and it is not inconsistent with this fundamental principle of our criminal law to say that when the prosecution has proved facts beyond a reasonable doubt which constitute a *prima facie* case against the accused, the jury is entitled to bring in a verdict of guilty.

Here as I have said, there was no evidence of any explanation of the stolen goods being found in the respondent's possession and in my view the

provisions of s. 4(5) of the *Canada Evidence Act* do not alter the instructions which a judge should give to a jury in such a case. As Mr. Justice Taggart said in the present case, that provision

> is not a reason for the judge to not make reference to the possession by the respondent of recently stolen goods as a circumstance from which the jury might infer guilt because the inference of guilt arises from possession alone.

As I stated at the outset, this appeal is brought pursuant to the provisions of s. 621 (1) (*a*) which read as follows:

> **621.** (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 603 or 604 or dismisses an appeal taken pursuant to paragraph 605 (1) (*a*) or subsection 605 (3), the Attorney General may appeal to the Supreme Court of Canada
>
> (*a*) on any question of law on which a judge of the court of appeal dissents, or . . .

The question of law which was the subject of dissent in this case is whether "the learned trial judge was in error in refusing to charge the jury on the inferences they might draw from the possession by the respondent of recently stolen goods."

As I have indicated, I am of opinion that the learned trial judge was in error in this regard and I would accordingly allow this appeal and direct that there be a new trial on counts two and three of the indictment.

Martland, Judson, Spence and Beetz JJ. agreed with the reasons of Pigeon J.

PIGEON J.—I have had the advantage of reading the reasons written by Ritchie J. with whom I agree. I wish however to make the following observations.

In my opinion, our judgment in *R. v. Graham* [10] is conclusive against the view that, in order to rely on the doctrine of recent possession, the Crown must give some evidence as to whether or not there was an explanation given.

[10] [1974] S.C.R. 206.

The neat point requiring consideration for the first time in this Court, as far as I know, is as to what the instructions to the jury should be when there is no evidence of an explanation and the accused has not testified. How is this to be done so as to avoid saying anything that might constitute a comment on the failure of the accused to testify contrary to the provisions of s. 4(5) of the *Canada Evidence Act*? In all the previous cases mentioned by Ritchie J., the accused had testified or there was evidence of an explanation. Thus, the problem did not arise as it does here.

For the purposes of the present case, I will assume that, under the circumstances, a direction to the jury in the exact words of Lord Reading in *Schama* [11], at p. 49, would, in view of what was decided in *Bigaouette v. The King*[12], be apt to be understood by a jury as a comment on the failure of the accused to testify.

In the Court of Appeal[13], Branca J.A. thought that, on such view of the matter, the trial judge's refusal to give the direction to the jury was justified. With respect, this is where I think he was in error. All the trial judge had to do was to give the direction omitting the words: "in the absence of any reasonable explanation". In the circumstances of this case, those words were unnecessary, there was no evidence of an explanation. If the trial judge had given a direction to the jury in those terms, it would have been unobjectionable and adequate in the circumstances.

As Seaton J.A. pointed out at p. 569: "It must be kept in mind that an English Judge may comment upon the failure of an accused to testify." Therefore, in *Schama*, Lord Reading did not have to worry about possible implications in a case where no explanation had been given. Anyway, it was a case where explanations had been given. In the present case, however, there was no evidence of

[11] (1914), 11 Cr. App. R. 45.
[12] [1927] S.C.R. 112.
[13] 21 C.C.C. (2d) 550.

any explanation. Therefore, the jury did not have to be bothered with how they should be dealing with it if an explanation had been offered. Only such instructions need be given as the case being tried actually requires. There was absolutely no necessity for stating the rule with the qualification "in the absence of any reasonable explanation", when, on the evidence, it was to be applied without qualification. In this connection, I would direct attention to the manner in which the onus of proof was approached by the English Court of Criminal Appeal in *R. v. Spurge* [14], at p. 212, a dangerous driving case:

> It has been argued by counsel for the Crown that even if a mechanical defect can operate as defence, yet the onus of establishing this defence is upon the accused. It is of course conceded by the Crown that this onus is discharged if the defence is made out on a balance of probabilities. In the opinion of this court, the contention made on behalf of the Crown is unsound, for in cases of dangerous driving the onus never shifts to the defence. This does not mean that if the Crown proves that a motor-car driven by the accused has endangered the public, the accused could successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of mechanical defect. The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of the jury, then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict.

In short, when the Crown has put in evidence facts from which guilt may be inferred, whether it be possession of recently stolen goods or driving objectively dangerous, the accused may be convicted unless there is an explanation that may reasonably be true. When such an explanation appears, whether in the evidence tendered by the Crown or brought by the defence, it must be considered and will justify an acquittal if it raises a reasonable doubt. This is what distinguishes facts from which guilt may be inferred from facts giving rise to a

[14] [1961] 2 Q.B. 205.

legal presumption where the defence has the onus of proving any admissible excuse on a balance of probabilities.

I would accordingly allow the appeal, set aside the judgment of the Court of Appeal and the verdict of acquittal, and order a new trial on counts 2 and 3 of the indictment.

Appeal allowed; new trial ordered.

Solicitor for the appellant: George L. Murray, Vancouver.

Solicitors for the respondent: Lawrence & Co., Vancouver.