CASE AND COMMENT.

CONTRACT—CHOSE IN ACTION — ASSIGNMENT — PART OF DEBT—JUDICATURE ACT.—May a *Judicature Act* assignment of part of a debt or legal chose in action be made? This question, which has been in several instances before single judges in England who have given diverse answers,[1] has been authoritatively answered in the negative by Greer and Slesser, L.JJ., in *Williams* v. *Atlantic Assurance Co. Ltd.*[2] The Court of Appeal were considering in this respect sub-section 1 of section 136 of the *Law of Property Act, 1925,* a re-enactment, in slightly different language of sub-section 1 of section 25 of the *Judicature Act, 1873,* which has been adopted in the *Judicature Acts* of the common law provinces of Canada,

The *Williams* case disposes of the troublesome and unsatisfactory case of *Brice* v. *Bannister*[3] in which Coleridge, L.J., held that an assignee of part of a chose in action might in his own name recover from the debtor. Greer, L.J., makes it clear that the assignee of part of a debt is at best an equitable assignee.

The views of Canadian judges on the possibility of an assignment under the *Judicature Act* of part of a debt have also been conflicting. In *Seaman* v. *Canadian Stewart Co.*[4] Moss, C.J.O., expressed his doubt on the question, but he added that "the better opinion seems opposed" to entitling an assignee to recover part of a chose in action from the debtor. Riddell, J., in *Olson* v. *Machin,*[5] after remarking that no difficulty arises from the assignment of part of a claim where it is equitable and not made pursuant to the statute, said that he would not "enter into the many curious and difficult questions arising out of the precise wording of the statute . . . the cases range from *Brice* v. *Bannister*[6] to *Forster* v. *Baker*:[7]" The view that there cannot be a *Judicature Act* assignment of part of a debt was vividly expressed by Idington, J., in *Beatty* v. *Best and Ash*[8] in the following words: "The statute enabling an assignee of a chose to sue, in

[1] See *Durham Bros.* v. *Robertson,* [1898] 1 Q.B. 765 at p. 774; *Skipper and Tucker* v. *Holloway,* [1910] 2 K.B. 630; *Forster* v. *Baker,* [1910] 2 K.B. 636; *In re Steel Wing Co.,* [1921] 1 Ch. 349; *Bank of Liverpool and Martins, Ltd.* v. *Holland* (1926), 43 T.L.R. 29.

[2] [1933] 1 K.B. 81.

[3] (1878), 3 Q.B.D. 569.

[4] (1911), 2 O.W.N. 576.

[5] (1912), 4 O.W.N. 287.

[6] *Supra.*

[7] *Supra.*

[8] (1921), 61 Can. S.C.R. 576 at p. 581.

my opinion, never was intended to enable the possessor of a valuable chose in action to issue a kind of currency, as it were, by dividing up his right into little bits and distributing them amongst his friends, and giving each of them a chance to worry and annoy the debtor." In *Stephens & Co.* v. *Perdue*[9] Ewing, J., while addressing himself particularly to an equitable assignment, used wide language with respect to an assignment of part of a debt. He said: "The right to assign part of the moneys due or to become due was asserted in *Brice* v. *Bannister,* and has so far as I can see been followed ever since. The practice of assigning part of a fund has become very general and has been recognized by Courts here and in England, provided the fund out of which the order is payable is indicated."[10]

In deciding that the assignee of part of a debt is merely an equitable assignee, Greer, L.J., had in mind that, as a general rule, the assignee to succeed against the debtor must sue in the name of the assignor. It would not be possible for the assignor to bring at the behest of two or more assignees of parts of the same chose in action as many actions against the debtor. In *Forster* v. *Baker*[11] Bray, J., stated in this connection: "The position formerly (prior to the *Judicature Act*) of a debtor as regards a legal debt which had been assigned was that an action could be brought against him, but the assignor, except in certain exceptional cases, was a necessary party to the action either as plaintiff or defendant, in order that he might be bound, as well as the debtor and the assignee, by the decision of the case. I should certainly assume, although I do not know of any authority to that effect, that if a part of a debt had been assigned to A and another part to B, and A had brought an action to recover his part, he would have been obliged not only to make his assignor a party, but B also, so that there would be one action which would decide the relationship of the debtor to each of the persons who owned a part of the debt, and the question would be decided once for all between all the parties." The most important of the exceptional cases contemplated by Bray, J., is founded in the decision of the House of Lords in *William Brandts Sons & Co.* v. *Dunlop Rubber Co.*[12] where equitable assignees recovered in their own name against the debtors. The assignors in that case were not parties to the

[9] [1931] 4 D.L.R. 46 at p. 51.

[10] See also *Stirling Collieries, Ltd.* v. *Jones,* [1924] 4 D.L.R. 1305.

[11] [1910] 2 K.B. 636 at p. 639. In Ontario under Rule 88 of the Consolidated Rules of Practice, 1928 (formerly one of the General Orders of Chancery) an equitable assignee of a chose in action may sue in his own name the debtor. See *Graham* v. *Crouchman* (1917), 41 O.L.R. 22.

[12] [1905] A.C. 454.

action. Greer, L.J., paraphrased the warning against the general applicability of the principle of the *Brandt* case, issued by the House of Lords in *Performing Right Society* v. *London Theatre*.[13] He was of the opinion that an equitable assignee of a debt cannot sue the debtor in his own name unless the assignment was accompanied by a power for the assignee to give the debtor a perfectly good receipt.[14] Canadian Courts have regarded the caveat expressed in *Performing Right Society* v. *London Theatre* as relating to the technicalities of procedural law rather than to substantive law as regards the legal ownership of the chose in action.[15]

S. E. S.

* * *

CRIMINAL LAW—MENS REA—STATUTORY OFFENCES.—In *Rex* v. *Piggly Wiggly Canadian Ltd.*[1] the Manitoba Court of Appeal applied the doctrine of absolute statutory prohibition which exists in our criminal law as an exception to the general rule that in order to create criminal liability there must be unlawful conduct coupled with *mens rea,* or guilty knowledge. It was held that an employer is liable to conviction for the inadvertent act of a servant in selling to a customer goods short of the quantity purchased contrary to section 63 of the *Weights and Measures Act*[2] for *mens rea* is not an essential ingredient of the offence thereby created.

A clerk in the employ of Piggly Wiggly Canadian Ltd., in the course of his duty, having to fill a great number of bags all stencilled in advance for ten pounds, mistakenly weighed and put into one of them a quantity of sugar that was short by about one pound. This bag was sold to a customer. Graham, P.M., in dismissing the charge of selling by short weight, stated the case for the decision of the Court of Appeal. It was held, Trueman, J.A., dissenting, first, that

[13] [1924] A.C. 1, partic. at pp. 14 and 31.

[14] *Brice* v. *Bannister, supra,* may be explained on this ground.

[15] See *Laidlaw* v. *Hartford Ins. Co.* (1916), 29 D.L.R. 229; *Kidd* v. *Harden,* [1924] 4 D.L.R. 516; *General Motors Acceptance Corp. & Williamson* v. *Johnson,* [1930] 4 D.L.R. 291; *Stephens & Co.* v. *Perdue, supra; Dealers Finance Corp.* v. *Sedgwick,* [1932] 1 D.L.R. 71.

[1] (1933), 41 Man. R. 249; 60 Can. C.C. 104.

[2] R.S.C. 1927, c. 212.

"63. Notwithstanding any of the provisions of the Criminal Code, any person who sells, delivers or causes to be sold or delivered, anything by weight, measure or number, short of the quantity ordered or purchased, shall be guilty of an offence and liable to a fine not exceeding twenty-five dollars for the first offence, and to a fine not exceeding one hundred dollars for every subsequent offence.

2. No proceedings shall be taken under the provisions of this section except with the consent of the Minister. 1919, c. 75, s. 7."

guilty knowledge was not an essential element of the offence created by section 63, and, secondly, that an employer was liable under that section for the acts or omissions of his servant. Accordingly the dismissal was set aside, and the matter remitted to the magistrate.

In this note, it is proposed to discuss the general rule of criminal liability for statutory offences, the nature of the particular exception applied in the above case, the matters to be considered by a court in determining whether it should apply the general rule or the exception, the burden of proof on this issue, and upon the further issue as to the presence or absence of *mens rea* in fact. These questions are of significance not only because of the difficulty involved in applying the exception to particular statutes, but also because of the great activity of modern legislatures, and the variety of subjects upon which they legislate.

In the case of common law offences, the general rule of criminal liability is that mere conduct will not be punishable if the mind of the person doing the act in question is innocent. This is expressed in the ancient maxim that *"actus non facit reum nisi mens sit rea."*[3] The forbidden conduct must be accompanied by some form of *mens rea*. *Mens rea*, generally speaking, means an intention to disobey the law or to do something wrong.[4]

When, however, a person commits an act which the law forbids, there arises a presumption of *mens rea* being in fact present, for everyone is taken to intend the natural consequences of his acts.[5] This presumption, however, is only a *prima facie* one, and the accused is permitted to show that there was an absence of *mens rea* in his particular case. He may rebut this presumption in a number of

[3] See Lord Kenyon, C.J., in *Fowler* v. *Padget* (1798), 7 T.R. 509 at p. 514; 101 E.R. 1103 at p. 1106. An exception seems to exist at common law in the case of public nuisances. See *Regina* v. *Stephens* (1866), L.R. 1 Q.B. 702, where an employer was held liable on an indictment for a nuisance caused by workmen without his knowledge and contrary to his orders.

[4] In *Chisholm* v. *Doulton* (1889), 22 Q.B.D. 736 at p. 741, Cave, J. said: "It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge, but as a general rule there must be something of that kind which is designated by the expression *mens rea*—and this principle of the common law applies also to statutory offences with this difference, that it is in the power of the legislature, if it so pleases to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence although there was no blameworthy condition of mind about him; but, inasmuch as to do so is contrary to the general principle of the law, it lies upon those who assert that the legislature has so enacted to make it out convincingly by the language of the statute." See also *Regina* v. *Prince* (1875), L.R. 2 C.C.R. 154.

[5] See *Rex* v. *Mead*, [1909] 1 K.B. 895 at p. 899; *Rex* v. *Sheppard* (1810), Russell & Ryan 169; 168 E.R. 742.

ways, *e.g.* by showing mistake or ignorance of fact,[6] insanity,[7] or compulsion.[8]

In the case of common law offences, therefore, the only issue as to *mens rea,* is whether or not it is in fact present. Hence the burden of proof is as follows: If a person is charged with a common law offence the prosecution must prove (1) the commission of the forbidden act, and (2) that accused committed the act. Thereupon the prosecution can rest its case, and if nothing more appears, the accused will be convicted, for *mens rea* is presumed against him. It is open to the accused, however, to show an absence of *mens rea* in his case. The burden of proof on this issue, when raised, is on the defence.

In the case of statutory offences, there is still the general common law presumption that *mens rea* is required in order to convict the accused for doing an act forbidden by the statute.[9] The presumption of a person intending the natural consequences of his acts applies, however, also to statutory offences. Hence the burden is upon the accused to show absence of *mens rea* in fact. In such a case, therefore, the burden of proof is the same as in common law offences.

In regard to statutory offences, however, our courts have recognized an exception to the general rule, stated above, to the effect that in some statutes it may be apparent that the intention of the legislature is to make punishable the mere doing of the forbidden act, regardless of the state of mind of the accused. In other words the terms of the statute itself rebut the presumption that *mens rea* is an essential ingredient of the offence created.[10] If this is the intent to be gathered from the statute, the question of actual presence or absence of *mens rea* in the particular case becomes wholly immaterial, so far as determination of guilt is concerned.[11] There is a *prima facie* presumption against a statute making such an absolute prohibition. Hence the burden is upon the prosecution to show that the

[6] *Rex* v. *Levett* (1638), Cro. Car. 538; Anonymous (Assizes 1745-63), Foster's Crown Law 265; *Regina* v. *Tolson* (1889), 23 Q.B.D. 168.

[7] *Regina* v. *M'Naughten* (1843), 10 Cl. and F. 200. Cf. Can. Criminal Code, s. 19.

[8] *Rex* v. *McGrowther* (1746), Foster's Crown Law 13. Cf. Can. Criminal Code, s. 20.

[9] See footnote no. 4, *supra;* Cave, J., in *Regina* v. *Tolson, supra,* and *Sherras* v. *DeRutzen,* [1895] 1 Q.B. 918.

[10] See footnote no. 4, *supra; Cundy* v. *Le Cocq* (1884), 13 Q.B.D. 207; *R.* v. *Newcombe* (1918), 52 N.S.R. 85; *Rex* v. *Burke* (annotated), [1925] 3 D.L.R. 625; 44 Can. C.C. 234.

[11] It will, of course, be relevant to the question of the amount of punishment to be imposed, where the court has a discretion in the matter. See the remarks of Manisty, J., in *R.* v. *Tolson, supra.*

statute rebuts the presumption that the general rule requiring *mens rea* is applicable.[12]

The matters which the courts have deemed to be relevant to the above issue are: (1) the object and purpose of the statute, to be gathered from a consideration of the statute as a whole, (2) the wording of particular sections, and (3) the severity of the punishment provided.[13] It is pointed out in *R.* v. *Tolson*[14] that it is reasonable to assume that the legislature would not intend to impose serious punishment upon persons who have not transgressed morally but have only unintentionally done something prohibited by law.

In *Rex* v. *Piggly Wiggly Canadian Ltd.* the majority opinion was that the purpose of the statute in question was the protection of the public, not so much from acts in their nature criminal, as from acts prejudicial to the individual interests of individual persons, and that absolute prohibitions are essential for the adequate effecting of such a purpose. In regard to the wording of the statute, it is pointed out that the word "wilfully" is used in section 65 which accentuates its omission from section 63. It is also said that putting the proceedings under the control of the Minister, which is not done in the other sections, shows that the section is a drastic provision which dispenses with *mens rea.* The matter of the prescribed punishment is not discussed, but in fact the penalty prescribed in section 63 is quite small for a first offence and, furthermore, that penalty is a maximum one, and no minimum is set.

In the present case, as indeed in many cases[15] where courts have been called upon to decide the difficult question of the intention to be imputed to the legislature in such cases, there is a dissenting opinion. Trueman, J.A., expresses the opinion that an absolute prohibition is not necessary to achieve the object of the enactment and that there is nothing in the statute to indicate the exclusion of the defence of mistake or unintentional wrong. The prevalence of dissenting opinions in such cases points to the inherent difficulty in deciding the issue as to absolute prohibition or otherwise in statutory offences.

[12] See footnote no. 4, *supra.*

[13] See Wills, J., in *Regina* v. *Tolson, supra;* Wright, J., in *Sherras* v. *De Rutzen, supra,* and Prendergast, C.J.M., in *Rex* v. *Piggly Wiggly Canadian Ltd. supra.*

[14] By Wills, J., (1889), 23 Q.B.D. 168 at p. 177. See also *Rex* v. *Hyde,* [1925] 2 D.L.R. 958; 44 Can. C.C. 1.

[15] See e.g. *Queen* v. *Tolson, supra; Roberts* v. *Egerton* (1874), L.R. 9 Q.B. 494; *Rex* v. *Newcombe, supra; Rex* v. *Nat. Bell Liquors Ltd.* (1920), 16 Alta. L.R. 73; 54 D.L.R. 704; *Rex* v. *Ping Yuen* (1921), 14 Sask. L.R. 475; 36 Can. C.C. 269; *Rex* v. *Silver Spray Brewing Co.* (1925), 21 Alta. L.R. 387; 44 Can. C.C. 35. Cf. *Rex* v. *McDonald* (1927), 38 B.C.R. 298; 48 Can. C.C. 208 with *Rex* v. *Kidd* (1929), 52 Can. C.C. 191.

Where the section forbidding the act uses terms such as "wilfully," "maliciously" or "knowingly" it is clear that the statute does not impose an absolute prohibition.[16] Furthermore, not only do such words prevent any issue from arising as to whether or not *mens rea* is essential, but they also effect a shifting of the burden of proof on the issue whether *mens rea* was in fact present in the accused's case.[17] To make out the case for the Crown under such a provision, the prosecution must show, (1) the commission of the forbidden act, (2) that accused committed it, and (3) that accused had the *mens rea* required by the statute.

It will be noted that Prendergast, C.J.M., intimated that the appearance of "wilfully" in section 65 accentuated its omission in section 63. The argument is sometimes made[18] that if the legislature uses "knowingly," "wilfully," etc., in one section and omits such words in another it must be deemed to have omitted them from the latter section deliberately in order to make the prohibition absolute. This sort of argument was not accepted in *Sherras* v. *De Rutzen,* where Day, J.[19] pointed out that the only effect of the use of such words is to shift the burden of proof, as explained above. In other words, the legislature does not deliberately omit such words in order to impose an absolute prohibition, but deliberately inserts them in certain sections in order to remove the presumption of *mens rea* which ordinarily follows from the acts of the accused, and to place the burden of proving actual *mens rea* upon the prosecution. The omission of such words merely continues the presumption against the accused, but does not preclude him from rebutting it.

Therefore, when a court is called upon to determine the validity of a conviction for a statutory offence it has to decide, first, the question whether the enactment is to be construed as falling within the general rule requiring *mens rea,* or as within the exception of absolute prohibition. If such expressions as "knowingly," etc. are used it is clear that the general rule applies, and *mens rea* is an essential element of the offence. If no such words are present, there is still a presumption that the general rule applies, and the burden is upon the prosecution to show that the prohibition is absolute. Matters relevant to this issue are, the object and purposes of the

[16] *Brooks* v. *Mason,* [1902] 2 K.B. 743; *Emary* v. *Nolloth,* [1903] 2 K.B. 264; *Rex* v. *General News Bureau Inc.* (1933), 46 B.C.R. 459; 60 Can. C.C. 66.

[17] See Day, J., in *Sherras* v. *DeRutzen, supra; Rex* v. *General News Bureau Inc., supra.*

[18] E.g. in *Sherras* v. *DeRutzen, supra.*

[19] [1895] 1 Q.B. 918 at p. 921. But see *Stephen, J.,* in *Cundy* v. *Le Cocq, supra.*

enactment, the wording of the statute, and the severity of the prescribed punishment.

If the prosecution can establish that the prohibition is absolute, then the question of the presence of *mens rea* in fact is irrelevant. If, however, the prosecution fails to show that the general rule is not to be applied, then the presence or absence in fact of *mens rea* becomes an issue. If the statute uses "knowingly," etc., the burden is upon the prosecution to prove the presence of *mens rea*. If no such words are used, the defence has the burden of proving absence of *mens rea* in the particular case.

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COPYRIGHT—BROADCAST MUSICAL WORKS—REPRODUCTION BY LOUD SPEAKER—"A PERFORMANCE"—The decision of Maugham, J., in *Performing Right Society, Limited* v. *Hammond's Bradford Brewery Company, Limited*[1] was the subject of a note by the present writer.[2] It will be remembered that in that case it was held for the first time in England that the reproduction by a loud speaker, in a tavern, of copyrighted musical works broadcast by the British Broadcasting Corporation, was a separate "performance" within the meaning of the *Copyright Act, 1911,* which was not allowed by the license granted by the plaintiff to the British Broadcasting Corporation to broadcast the work. Accordingly, judgment was given for the plaintiff.

From that judgment an appeal was taken and decided by the Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ) on 4th October, 1933. The decision which affirmed the judgment under appeal has been reported.[3]

The Master of the Rolls in giving judgment said:

> The copyright in musical works conferred by section 1(2) of the Act was the sole right to produce or reproduce the works in public, and included the sole right to authorize a performance in public; and by section 2(1) copyright in a work was to be "deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." Section 35 defined the word "performance," as meaning "any acoustic representation of a work . . . including such representation made by means of any mechanical instrument."
>
> What, then, did the defendants do? By means of an installation they made audible the performance in Hammersmith to a larger number of persons than the domestic circle at the George Hotel. In his (his Lordship's)

[1] (1933), 49 T.L.R. 410.
[2] (1933), 11 C.B. Rev. pp. 573-576.
[3] (1933), 50 T.L.R. 16.

view that constituted an infringement of the plaintiff's rights by performing or authorizing the performance of those works in public.

It had been argued by the appellants that the rights of the copyright owners were exhausted when they authorized the original performance at Hammersmith, and that all that had been done was to enlarge the audience, just as if someone had come near to listen to a performance at a watering-place. But the appellants had taken steps to render the songs audible to another audience by a mechanical device, and that amounted to a performance or to the authorizing of a performance. That that was the right view was indicated by the judgment in the United States of America in *Buck* v. *Jewell-LaSalle Realty Company*[4] and by what was said by Mr. Justice McCardie in *Messager* v. *British Broadcasting Company Limited*.[5]

The appeal would be dismissed, with costs.

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[4] 283 U.S. Rep. 191 at p. 201.
[5] 43 T.L.R. 818; [1927] 1 K.B. 543.