H. C. OF A. 1905.

LILLIECRAP v. THE KING.

Griffith C.J.

Addison's Digest of Criminal and Magistrate's Cases, p. 303, which was decided in 1874 by *Sir James Martin* C.J., *Faucett* and *Hargrave* JJ. In that case the accused was charged with stealing and receiving, and the jury returned a verdict of guilty of receiving, omitting the words "feloniously" and "well knowing the same to have been stolen." The Supreme Court held that that verdict was a valid one, and sustained the conviction.

I cannot help thinking that in this case the point is not seriously arguable. It is, at best, a point of a purely technical character, not in any way touching the merits. I think that the case which was followed by the Supreme Court was rightly decided. Being of opinion, therefore, that the decision sought to be appealed from is obviously right, I think that special leave to appeal from it should be refused.

BARTON J., and O'CONNOR J., concurred.

Leave refused.

Solicitor, for applicants, *J. F. Thomas*, by *Wilkinson & Osborne.*

C. A. W.

Cons *Pyke v Duncan* [1989] VR 149

Cons *Ward, Re; Official Trustee v Dabnas Pty Ltd* 3 FCR 112

Foll *Burns Philp Trustee Co Ltd v Ironside Investments Pty Ltd* [1984] 2 QdR 16

Cons *Kastropil, Re; Ex parte Official Trustee v Kastropil* (1989) 33 FCR 135

Cons *Ward, Re; Ex parte Official Trustee v Dabnas Pty Ltd* (1984) 55 ALR 395

Cons *Griffiths v R* (1994) 76 ACrimR 164

Appl *Richard Walter Pty Ltd v Comr of Taxation* (1996) 33 ATR 97

Foll *Official Trustee in Bankruptcy v Alvaro* (1996) 138 ALR 341

Foll *Kastropil, Re; Ex parte Official Trustee in Bankruptcy* (1989) 109 ALR 568

Foll *Edwards v R* (1993) 68 ACrimR 349

Appl *R v Cassell* (1998) 45 NSWLR 325

[HIGH COURT OF AUSTRALIA.]

JACK . . . . . APPELLANT;

AND

SMAIL AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1905.

MELBOURNE, *August* 8, 9, 10, 11, 14, 15, 16.

Griffith C.J., Barton and O'Connor JJ.

Insolvency Act 1890 (*Victoria*) (*No.* 1102), *secs.* 70 (v.), 72—*Insolvency Act* 1897 (*Victoria*), (*No.* 1513), *sec.* 5—*Married Women's Property Act* 1890 (*Victoria*), (*No.* 1116), *secs.* 10, 13—*Court of Insolvency—Jurisdiction—Application to declare trustee entitled to property adversely claimed—Burden of proof—Savings of wife out of housekeeping allowance by husband—Deposit in Savings Bank—Settlement—Grocer's licence—"Goods and chattels"—Reputed ownership.*

The Court of Insolvency has jurisdiction under the *Insolvency Act* 1897 to entertain an application by the trustee of an insolvent estate for a declaration that property claimed by a third person to which the trustee sets up a title paramount is part of the insolvent estate.

Decision of Supreme Court on this point (*In re Jack*, [1905] V.L.R., 275; 26 A.L.T., 172) affirmed.

Moneys saved by a wife out of an allowance made to her by her husband for housekeeping purposes, and deposited by her from time to time in a Savings Bank in her own name, are within sec. 10 of the *Married Women's Property Act* 1890 (Victoria), and are therefore to be deemed to be her separate property until the contrary is proved. Moneys so saved by a wife, and with the husband's consent invested by the wife as her own, are not a "settlement of property" within sec. 72 of the *Insolvency Act* 1890 (Victoria).

To constitute a "settlement" within that section it is necessary to show that the gift was intended by the donor to be kept in its original form, or in the form of an investment, for the benefit of the donee.

In re Plummer, (1900) 2 Q.B., 790, followed.

Held, on the evidence, that the respondents, the trustees of the husband's insolvent estate, had not proved that money standing to his wife's credit in a Savings Bank was not her separate property, and that no case of fraud on creditors had been established.

Decision of Supreme Court reversed.

A grocer's licence issued under the *Licensing Act* 1890 is not "goods and chattels" so as to be subject to reputed ownership within the meaning of sec. 70 (v.) of the *Insolvency Act* 1890.

Anthoness v. *Anderson*, 14 V.L.R., 127; 9 A.L.T., 175, followed.

APPEAL from the Supreme Court of Victoria.

In the Court of Insolvency at Melbourne, a motion was heard by which Edward William Smail and Frederick Wooton Danby, trustees of the insolvent estate of John Jack, asked for an order or declaration "that the trustees of the insolvent estate of the above insolvent are entitled to receive, as part of the insolvent estate, the interest claimed by Elizabeth Jane Jack (the wife of the above-named insolvent) under the contract of sale of land at High Street, Malvern, dated 28th May, 1903, between the said Elizabeth Jane Jack and the Fourth Victoria Permanent Building and Investment Society, and for an order that the said Elizabeth Jane Jack do execute all such transfers, conveyances, assignments, releases and other deeds or documents of title as shall vest the legal or equitable right therein in the said trustees, on the ground that the sum of £200 which has been paid in respect of the purchase money thereof formed portion of the moneys of the above-named insolvent, and now forms part of the insolvent estate. And also for an order or declaration that the grocer's licence now in

H. C. OF A. 1905.

JACK v. SMAIL.

the name of the above-named insolvent (purchased from one Mrs. Mason on or about the 16th August, 1900), and which is now claimed by the said Elizabeth Jane Jack, forms part of the said insolvent estate, on the ground:—That the sum of £320 which has been paid therefor formed portion of the moneys of the above-named insolvent," &c.

On the hearing of the motion before His Honor Judge *Molesworth*, the only evidence as to the facts of the case was the deposition of Mrs. Jack, which had been taken on her examination before the Court of Insolvency in John Jack's insolvency, and also before His Honor Judge *Molesworth*. This deposition, with the several documents which were exhibits thereto, were put in evidence on behalf of the trustees, and their effect is sufficiently stated in the judgment of *Griffith* C.J. hereunder.

The motion having been dismissed, the trustees appealed to the Supreme Court, which allowed the appeal [*In re Jack* (1)], and declared that the trustees were entitled to the interest claimed by Mrs. Jack in the land, and that the grocer's licence referred to in the notice of motion formed part of the insolvent estate.

Mrs. Jack now appealed to the High Court on the grounds (*inter alia*):—

1. That the Judge of the Court of Insolvency had no jurisdiction to make the order or declaration which he was asked to make, and therefore the Full Court had no jurisdiction to make, or ought not to have made, the order and declaration the subject-matter of this appeal.

3. That the decision of the Judge of the Court of Insolvency was not against evidence or the weight of evidence.

4. That in reversing the findings of fact of the Judge of the Court of Insolvency, the Judges of the Full Court disregarded the rule of law that they should not interfere with findings of fact unless such findings are unreasonable.

5. That upon none of the grounds relied on in the appeal to the Full Court should the said appeal have been allowed.

6. That even if the grocer's licence was paid for by the insolvent, or with the insolvent's money, the said licence did not pass to the trustees in insolvency.

(1) (1905) V.L.R., 275; 26 A.L.T., 172.

McArthur and *Starke*, for the appellant. The examination of the witness, whose deposition was put in on this motion, having taken place before the Judge who heard the motion, he was entitled to take into consideration the demeanour of the witness when giving that evidence. The Full Court should not have interfered with his decision unless it was clearly wrong.

[GRIFFITH C.J.—The appeal is a re-hearing, and the Appeal Court can do what the Judge below could do. But if it is a mere question of credibility of witnesses, the Appeal Court will not in general set up their view against that of the Judge who saw the witnesses: *Coghlan* v. *Cumberland* (1).]

As to how a judgment on a question of fact will be treated by a Court of Appeal, see *Healey* v. *Bank of New South Wales* (2); *Allen* v. *Quebec Warehouse Co.* (3); *Simms* v. *Registrar of Probates* (4); *Payne* v. *Rex* (5). A grocer's licence cannot be within the reputed ownership of the insolvent within the meaning of sec. 70 (v.) of the *Insolvency Act* 1890: *The Colonial Bank* v. *Whinney* (6).

The onus of proving that this property was the insolvent's rested upon the trustees. The onus of proof depends upon the Insolvency Acts, and the only section which could throw it upon the appellant is sec. 72 of the *Insolvency Act* 1890. Under that section the onus is upon the trustee to prove a settlement within five years of insolvency, and the onus is upon the other party to prove that the settlor could at the time of the settlement pay his debts without the aid of the settled property. If the money with which this property was bought was given by the insolvent to his wife, it is not a settlement within sec. 72. A settlement within that section means a gift of money or property with the intention that it should be preserved in the form in which it is given, or in the form of an investment for the benefit of the donee: *In re Tankard* (7); *In re Plummer* (8); *In re Player* (9). The surplus of housekeeping money allowed by a husband to be kept by his wife is a gift, and there is no resulting trust for the husband.

(1) (1898) 1 Ch., 704.
(2) 24 V.L.R., 694; 20 A.L.T., 200.
(3) 12 App. Cas., 101.
(4) (1900) A.C., 323.
(5) (1902) A.C., 552.
(6) 11 App. Cas., 426.
(7) (1899) 2 Q.B., 57.
(8) (1900) 2 Q.B., 790.
(9) 15 Q.B.D., 682.

H. C. OF A. 1905.

JACK v. SMAIL.

Whether there is a resulting trust is entirely a question of fact. In *Bernicko* v. *Walker* (1), *Hood* J. held that savings out of housekeeping money belonged to the wife. The question of fact is, what was the intention of the husband? See also *Lush on Law of Husband and Wife*, 2nd ed., p. 199; *Barrack* v. *McCulloch* (2); *Lady Tyrrell's Case* (3); *Brooke* v. *Brooke* (4). The word "goodwill" may be used in two senses, it may be attached to property, or it may be merely personal reputation. Goodwill in the latter sense would not pass to the trustee on insolvency: *Cooper* v. *Metropolitan Board of Works* (5). A grocer's licence, so far as it is anything, is an incident attaching to the premises in respect of which it is granted, although it is not a part of the realty in the strict sense of that word. See *Ashburner on Mortgages*, p. 175. Here the lease and the licence go together, and the rent agreed to be paid for both is not severable. The licence may be severed from the premises, and may be assigned separately. The assignee cannot take the licence unless he also takes the lease of the land; he cannot take the licence except as an incident of the business carried on on the land. Here the lease was determined for non-payment of rent. See *Ex parte Royle* (7); *Kelly* v. *Montague* (8); *Chissum* v. *Dewes* (9); *Pile* v. *Pile* (10); *Whitley* v. *Challis* (11); *Cadogan* v. *Lyric Theatre Ltd.* (12); *West London Syndicate Ltd.* v. *Commissioners of Inland Revenue* (13); *Anthoness* v. *Anderson* (14), and secs. 5, 10, 17, 38, 46, 101, 102, 115 of the *Licensing Act* 1890. The *Licensed Premises Act* 1894 (No. 1364) seems to suggest that in the opinion of the legislature a licence is an incident of the licensed premises. A grocer's licence is not "goods" or "chattels" within the meaning of sec. 70 (v.) of the *Insolvency Act* 1890, and therefore cannot be in the reputed ownership of an insolvent. The reputed ownership section is intended to apply in Victoria to tangible articles only. Things savouring of realty or incident to realty are not goods or chattels, nor is a right to enter premises or to carry on business on certain

(1) 23 V.L.R., 332; 19 A.L.T., 88.
(2) 26 L.J. Ch., 105; 3 Kay & J., 110.
(3) Freeman Ch. R., 304.
(4) 25 Beav., 242.
(5) 25 Ch. D., 472, at p. 479.
(7) 46 L.J. Bky., 85.
(8) 29 L.R. Ir., 429.
(9) 5 Russ., 29.
(10) 3 Ch. D., 36.
(11) (1892) 1 Ch., 64.
(12) (1894) 3 Ch. 338.
(13) (1898) 2 Q.B., 507.
(14) 14 V.L.R., 127; 9 A.L.T., 175.

premises. As to choses in action, see *Law Quarterly Review*, vol. IX., p. 311; vol. X., p. 393; vol. XI., p. 64. If Mrs. Jack has mixed her husband's money with her own, and out of the mixed fund has bought property, the trustees are not entitled to the property so bought, but are at most entitled to a charge to the extent of her husband's money that can be traced. If it cannot be traced the only remedy is to sue Mrs. Jack: *Underhill on Trusts*, 6th ed., p. 381; *In re Hallett & Co., ex parte Blane* (1). The trustees are not entitled to a declaration that the property belongs to them unless they are also entitled to some consequential relief: *Brooking* v. *Maudslay Son and Field* (2); *Barraclough* v. *Brown* (3); *Rooke* v. *Lord Kensington* (4). The words "whether any consequential relief is or could be claimed or not," which are in the English *Judicature Rules*, Or. XXV., r. 5, are omitted from the corresponding Victorian rule. The principle of law which applies to the Supreme Court as to making declarations of right applies to every Court unless the contrary is provided by Statute.

Isaacs A.G. and *Duffy* K.C. (with them *Woolf*), for the respondents. Sec. 3 (D) of the *Insolvency Act* 1897, gives jurisdiction to the Court of Insolvency "to declare for or against the title of trustees to any property adversely claimed." There is no limitation to the effect that the trustee must be entitled to some other relief. The objection that the Court had no power to make a declaratory order is not now open to the appellant, as it was not taken at the proper time. The moneys with which these properties were purchased never were in reality the wife's. Savings made by a wife out of a housekeeping allowance are the husband's property: *In re Aherne, ex parte Mathias* (5); *Lewin on Trusts*, 11th ed., p. 970; *MacQueen on Husband and Wife*, 3rd ed., p. 108; *Barrack* v. *McCulloch* (6). In *Bernicko* v. *Walker* (7), it was admitted that the money was a gift to the wife.

[*McArthur.*—Under sec. 5 of the *Married Women's Property Act* 1890 a married woman is entitled to hold as her separate property any savings made by her.]

(1) (1894) 2 Q.B., 237.
(2) 38 Ch. D., 636.
(3) (1897) A.C., 615.
(4) 2 Kay & J. 753.
(5) 10 Q.L.J., 17 Notes of Cases.
(6) 26 L.J. Ch., 105; 3 Kay & J., 110.
(7) 23 V.L.R., 332; 19 A.L.T., 88.

H. C. OF A. 1905.

JACK v. SMAIL.

That section does not apply to savings out of a housekeeping allowance: *Smith* v. *Smith* (1). In order to make it property of the wife, there must be evidence that the husband consented to her keeping it, though the evidence required may be very slight. The presumption is that it is the husband's: *Smith* v. *Hope* (2).

[GRIFFITH C.J. referred to *Slanning* v. *Style* (3).]

In that case there was strong evidence of the husband's consent to the wife keeping the savings made by her. This Court is here asked to set aside findings of fact made by the Full Court.

[GRIFFITH C.J.—This Court is in as good a position to decide these facts as the Full Court was, and we are as much bound to draw the proper inferences from the facts as the Full Court was.]

If, looking at the whole of this decision, the view taken by the Full Court is open, this appeal should be dismissed. A grocer's licence is property, and is "goods and chattels" within the meaning of sec. 70 (v.) of the *Insolvency Act* 1890: *Whyte* v. *Williams* (4); *Re Coak* (5); *In re Keith* (6): *Williams on Bankruptcy*, 8th ed., p. 218; *Ex parte Foss* (7); *Longman* v. *Tripp* (8). A grocer's licence is an authority to do something which, without the licence, would be unlawful. It is a chose in possession. It differs from a patent, which is a right to prevent others from doing something, and is therefore a chose in action. A licence is capable of enjoyment in possession in its ordinary sense: *Colonial Bank* v. *Whinney* (9). As to what is a chose in action, see *Ex parte Agra Bank, In re Worcester* (10); *In re Bainbridge* (11); *Warren on Choses in Action*, pp. 3, 18; *Ex parte Barry* (12); *Ex parte Ibbetson* (13); *Hanfstaengl* v. *Newnes* (14); *Steers* v. *Rogers* (15); *Re Elliott* (16). The licence is part of the goodwill of the business, and the business cannot exist without the licence. No personal agreement can alter the nature of the licence. Where a trustee has mixed trust money with his own, and has made an investment out of the mixed fund in his own name, and subsequently mis-

(1) 3 V.L.R. (E.), 2.
(2) 9 V.L.R. (L.), 217.
(3) 3 P. Wms., 335.
(4) 29 V.L.R., 69; 24 A.L.T., 222.
(5) (1902) 2 S.R. (N.S.W.) (Bky.), 49.
(6) 17 N.S.W. L.R. (B. & P.), 1.
(7) 2 DeG. & J., 230.
(8) 2 Bos. & P., N.R., 67.
(9) 30 Ch. D., 261; 11 App. Cas., 426, at p. 446.
(10) L.R. 3 Ch., 555.
(11) 8 Ch. D., 218.
(12) L.R. 17 Eq., 113.
(13) 8 Ch. D., 519.
(14) (1894) 3 Ch., 109, at p. 128.
(15) (1893) A.C., 232.
(16) 84 L.T., 325.

applies the balance, the trustee cannot afterwards say that the investment was made out of the trustee's own money: *In re Oatway* (1). So here, the savings belonging to the husband, and the wife having mixed them with her moneys, she cannot now say that investments made by her out of the mixed fund are hers. See also *Brown* v. *Adams* (2). The Court, on looking at all the facts, will say that the true transaction between the husband and wife was that the wife in fact gave or lent her property to her husband for the purpose of his business. If there were savings they were the husband's own moneys. At common law there could not be a gift from husband to wife, but in equity there could be, and one of the ways of making the gift was for the husband to make an allowance for housekeeping to the wife telling her that what was over she could keep for herself. If nothing was said as to what was over it became a question of inference. If husband and wife were living apart, the inference was that the savings belonged to the wife, but if they lived together the inference was that they belonged to the husband. But the husband's consent to the wife having the savings would be easily implied. See *Messenger* v. *Clarke* (3); *Lady Tyrrell's Case* (4); *Barrack* v. *McCulloch* (5); *Brooke* v. *Brooke* (6); *Eversley on Domestic Relations*, 2nd ed., p. 294; *Grant* v. *Grant* (7); *Ashworth* v. *Outram* (8). The whole question is, has the husband by words or conduct made what would be a gift between persons who are not husband and wife?

[GRIFFITH C.J.—Does not sec. 10 of the *Married Women's Property Act* 1890 throw the onus on a husband, and on anyone claiming through him, of proving that deposits in the name of the wife are not hers? And under sec. 13 must it not be proved that the money was the husband's, and that the investment was made without his consent?]

Those sections do not touch this case, or, if they do, it is conceded that the money was once the husband's, so that the question still remains what, apart from those sections, was the law as to savings of a wife? The onus of proof is shifted on to the wife

(1) (1903) 2 Ch., 356.
(2) L.R. 4 Ch., 764.
(3) 5 Ex., 388.
(4) Freeman Ch. R., 304.
(5) 3 Kay & J., 110, at p. 114.
(6) 25 Beav., 342.
(7) 13 W.R., 1057.
(8) 5 Ch. D., 923.

H. C. OF A. 1905.

JACK v. SMAIL.

once it is proved that the money came from the husband: See *Thicknesse's Digest of Law of Husband and Wife*, pp. 258, 269. There was not in substance or in fact a *bonâ fide* gift by the husband to the wife, and, if there was a gift, it was a settlement. Under the proviso at the end of sec. 13 of the *Married Women's Property Act* 1890, the creditors of the husband may show that the deposit was in fraud of them, and the Court may order the money specifically to be handed to them. If the savings were the property of the husband, the respondents are entitled to a charge on the property bought out of the savings to the extent of the portion of the mixed fund which belonged to the husband: See *Brett's Leading Cases in Equity*, p. 2. If this was an honest transaction, and the money was the wife's, and she invested portion of it in the licence which she lent to her husband for reward for the purpose of his business, then under sec. 6 of the *Married Women's Property Act* 1890 the licence must be treated as assets of the husband's estate. A licence ordinarily is a permission to do an act which, as against the person who gives the licence, would otherwise be unlawful: *Encyclopædia of the Laws of England*, vol. VII., p. 301. Here the grocer's licence is the document itself. If it is anything more, it is an independent piece of property which passed to the trustees: *R.* v. *Licensing Justices of North Brisbane* (1). If the licence was merely a personal licence and could not be transferred, there would have been an immediate answer in *Whyte* v. *Williams* (2). If the licence was attached to the lease of the land, the trustees got both lease and licence, and, as they have not disclaimed the lease properly, they still have the right to the licence. As to reputed ownership see *In re Brick* (3). Whatever a licence is, it should not be regarded as a chose in action, the main idea of which is the right to bring an action, and the meaning of which has never been extended to include anything else than the right to bring an action for something which the person having the chose in action has not got. A man with a licence has everything he wants, and he needs no action in order to enjoy that which he has in his possession.

(1) 6 Q.L.J., 95.

(2) 29 V.L.R., 69; 24 A.L.T., 222.

(3) 18 N.Z.L.R., 496.

Starke in reply. An incident attaching to premises has more the quality of property than a licence which may be shifted from place to place. So that if a licence which is attached to premises is not property, *â fortiori* a grocer's licence, which may be shifted from place to place, is not property. If the licence be property, then, as to the savings, the onus of tracing the money of the husband into the property of the wife is on the trustees. The wife being found in possession of property, the trustees must prove every ingredient of ownership in the husband. One necessary ingredient is that the husband gave no assent to the wife keeping the savings. If they prove that any of the savings belong to the husband, then they have to trace those savings into the property. All that the trustees could possibly be entitled to is an inquiry as to how much of the savings went into the land and how much went into the licence, and a charge over the land and licence respectively for the sums so found. Following trust funds assumes a relation of trustee and *cestui que trust.* If the relation between the husband and his wife is only that of debtor and creditor there is no right to follow the funds. The trustees are not entitled to now rely on a right to a charge. They should have made a claim of that sort distinctly by their motion As to sec. 70 (v.) of the *Insolvency Act* 1890, the trustees cannot take a part without taking the whole. They must take both the lease and the licence, or neither: *Ex parte Allen*; *In re Fussell* (1). Although there was no disclaimer of the lease, it was possible to surrender it without disclaimer, and that the trustees did. The provision as to "things in action" in sec. 70 (v.) of the *Insolvency Act* 1890, shows that "goods and chattels" in that section are to be limited to chattels which can be in the visible occupation of a person. The words "goods and chattels" mean corporeal personal property, and not incorporeal personal property. If the lease and licence can be separated, the licence was not lent or entrusted to the husband within the meaning of sec. 6 of the *Married Women's Property Act* 1890. It was demised to the husband on condition that he would pay rent. "Entrusted" means allowed to pass into the possession of the

(1) 20 Ch. D., 341.

H. C. OF A. 1905.

JACK v. SMAIL.

husband and to be used by him as he likes, the wife maintaining all the time that it is hers: *In re Cronmire* (1).

Cur. adv. vult.

16th August.

GRIFFITH C.J. This is an appeal from the Full Court of Victoria allowing an appeal from the Judge of the Court of Insolvency upon a motion by the trustees of the estate of John Jack, an insolvent, asking for a declaration that the trustees were entitled to receive as part of the estate of the insolvent an interest claimed by the appellant, the insolvent's wife, under a contract for the purchase of certain land, on the ground that the sum of £200, which had been paid in respect of the purchase money, formed portion of the insolvent's moneys, and now forms part of the insolvent estate. The trustees further asked for a declaration that a grocer's licence in the name of the insolvent, and claimed by the insolvent's wife, formed part of the insolvent estate, on the ground that the sum of £320, which had been paid therefor, formed portion of the moneys of the insolvent.

The notice of motion was given in accordance with the Rules under the Insolvency Acts which require that the relief sought, and the grounds of the relief, shall be set out in the notice of motion. An objection to the jurisdiction of the Court of Insolvency to decide the matter was taken by the appellant, but the Supreme Court decided against that objection. The question appears to be free from doubt. It was decided in 1870, the year after the passing of the English *Bankruptcy Act* 1869, that a section in similar terms to sec. 5 of the *Insolvency Act* 1897, conferred upon the Court of Bankruptcy jurisdiction in matters in which the trustee claims by a higher and better title than the bankrupt. *Ex parte Anderson* (2). Later, in *Ex parte Dickin* (3), the Court held that it was quite clear that, wherever the trustee claimed by a higher and better title than the bankrupt, it was intended that the Court of Bankruptcy should deal with the claim, but said that in other cases the Court ought not, in the exercise of its discretion, to do so.

(1) (1901) 1 K.B., 480.

(2) L.R., 5 Ch., 473.

(3) 8 Ch. D., 377.

In dealing with this case it is necessary to bear in mind some elementary principles, which are as much principles of common-sense and natural justice as principles of law, but which—I say so with all respect—appear to have been sometimes inadvertently lost sight of by the learned Judges in both Courts. The principles I refer to are, first, that an assignee has no better title than his assignor unless some Statute gives it to him, secondly, that a party in the position of plaintiff must allege and prove his case, and, thirdly, that fraud must be alleged and proved, and cannot be inferred from mere suspicion. The application of these principles will go a long way towards disposing of the questions raised in this case. The trustees came into Court undertaking to establish that the moneys, by which these purchases were assumed to have been made, were the moneys of the insolvent. When the case came before the Judge of the Court of Insolvency, the trustees contented themselves with putting in evidence the deposition of the appellant taken on her examination in the Court of Insolvency in the course of her husband's insolvency. It must be remembered that sworn depositions are no more than a written admission made by the party by whom the evidence was given. This deposition was so treated in the Court of Insolvency without objection, and clearly no objection could be taken to it. But, being used by the trustees as an admission, the trustees must take the deposition as they find it. They cannot select a fragment and say it bears out their case, and reject all the rest that makes against their case. They must take the deposition as a whole. That is the rule in criminal proceedings, and it was the rule in the Court of Chancery. A fragmentary portion of depositions could not be taken alone if it was qualified by another portion. That is simply a rule of fair play. The trustees therefore are bound by the statements of fact in the deposition, which is the only version of the facts that we have, so far as it is not contradicted by other evidence. If there is any statement which seems to be doubtful or improbable, the party who uses it as an admission is at liberty to prove that that passage is untrue. But, in the absence of such proof, it must either be taken as true, or it must be taken that there is no evidence on the subject. In either view the

H. C. OF A. 1905.

JACK v. SMAIL.

Griffith C.J.

plaintiff must prove his case—he must succeed on the strength of his own case, and not on the weakness of his opponent's case.

The facts, as they appear from the only evidence before the Court, are these :—It appears that in the year 1893 the appellant, whose husband was then carrying on business as a grocer, opened an account in the Savings Bank, and kept it there down to the date of the insolvency of her husband, 13th August, 1904, a period of eleven years. During that period she paid into the account various sums of money. The sources from which these moneys came are shown from an examination of the books, from which it appears that about £550 was her own. She also paid into the account other sums amounting to about an equal sum, as to which she says that her husband agreed to give her an allowance of £2 10s. per week for housekeeping expenses, that she was economical and saved various sums from this allowance, and deposited these savings to her credit in the Savings Bank. In the course of her examination the appellant produced a little memorandum book containing entries beginning in 1903 and ending at the date of her husband's insolvency. From this book it appears that she used to debit her husband with £2 10s. a week, and to credit her husband with any payments he made to her. I mention this memorandum book because one of the Judges of the Supreme Court expresses the view that it was apparently concocted for the purposes of the trial. It appears to me, on the contrary, to bear on its face all the marks of genuineness. It also appeared that three sums of money were paid out of this account, viz., £320, which was spent in the purchase of a grocer's licence in 1900, and two payments of £100 each, making up the £200 claimed by the trustees to be the money of the insolvent, and which were made in May, 1903, and May, 1904, as instalments of the purchase money for the land claimed by the trustees. Documents were produced which were said to be contemporary with the transactions, and as to which no suggestion is made or evidence given to show that they were not contemporary, or that they were in any way impeachable. After hearing the evidence, the learned Judge of the Court of Insolvency, treating the matter as one in which the appellant had to defend herself, and as if it were sufficient for the trustees to make their

claim against the appellant in order for them to succeed, while she had to establish her defence, rested his decision practically upon the ground that he did not think he ought to disbelieve the appellant. He says "the only ground I am asked to disbelieve her upon is her own evidence," and he declined to disbelieve her, and dismissed the motion. When the matter went to the Full Court the learned Judges seem to have treated it in the same way, as if the onus were upon the appellant to prove that she was lawfully in possession of the property. *a'Beckett* J. says:—"All depends upon the wife showing that, with regard to the property which was bought in the husband's name, it was bought with her money." With the greatest respect, that is throwing the onus upon the wrong party. It was for the trustees to show that the money was the money of the husband, unless some Statute changed that onus. *a'Beckett* J. further says:—"In addition to the general improbability of such an amount having been saved, there are certain figures which the other members of the Court attended to more closely, following with closer scrutiny than I was able to give, which seem to demonstrate that her story cannot be true." But if it be not true, then we know nothing of the facts except that the money came out of the appellant's banking account. *Hodges* J., after pointing out that the question between the parties in the Court of Insolvency was whether the money was really the insolvent's or whether it was his wife's, goes on to say:—"She was therefore cross-examined with the view of showing that it was not her money really." But the learned Judge seems to have thought that the appellant was giving evidence to support her case, that the onus of proof was upon her, and that the Judge of the Court of Insolvency was justified, if he thought her evidence did not prove her case, in giving judgment against her. But, as I have pointed out, that was not the position at all. *Hodges* J. further says:—"I come to the conclusion that the husband was as fast as he could drawing money from the business, handing it to the wife, who paid it to her account, and that, as time went on and as business became worse and he became more nearly insolvent, the withdrawals from the business and the payments to the credit of the wife increased, and that accounts

H. C. OF A. 1905.

JACK v. SMAIL.

Griffith C.J.

for the increased amount that went to this account from savings, and how this amount increased in the late years during which he carried on business. It really was a scheme between husband and wife, and to my mind they were withdrawing money from the business and placing it to the credit of the wife as something to which they could look when the creditors came to ask for their money and insolvency supervened." With the greatest respect to the learned Judge, that is a mere surmise. There is no evidence to support it. If the onus were upon the wife to establish that the money was hers, the result might have been different. But the onus being upon the trustees to establish their case, we cannot, from the fact that the wife's story is improbable, infer that the money was not hers, but her husband's. Her story may, indeed, be disbelieved, in which case there is no evidence on the subject. Supposing that the wife did not make the savings from the housekeeping allowance, then she must have got the money from some other source. What was that other source? We do not know; there is no evidence on the matter.

The alleged savings were of varying amounts, being, according to the figures given us by the learned Attorney-General, in 1893 about £18, in 1894 £27, in 1895 £26, in 1896 £25, in 1897, and 1898, £59, in 1899 £44, in 1900 £61, in 1901 £96, in 1902 £100, in 1903 £82, and in 1904, up to August, £23. What are the facts we know upon independent testimony? We know that in August, 1900, the appellant had £366 to her credit in the Savings Bank. At that time her husband purchased a grocer's business from a Mrs. Mason, and paid for it out of moneys he got from somewhere. In order to carry on that business it was desirable to get a grocer's licence, which apparently stood in the name of Mrs. Mason. The appellant bought it from her and paid her £350 for it, and that sum was drawn from the Savings Bank deposit. Contemporaneously with that purchase an agreement between the appellant and her husband was drawn up by which she agreed to "let" to him and he agreed to "rent" from her the licence from year to year at a monthly rental of £2 3s. 4d. The appellant was to keep the certificates, which were the documents of title to the licence, subject to her producing them when required for the purposes of the law. That reduced the amount

to the appellant's credit in the bank to £16. So matters went on until, in May 1903, she entered into an agreement with a building society to buy a piece of land, and to make certain payments for it. £100 was paid in cash, which was drawn out of the appellant's account on 25th May, 1903, and the next payment in May 1904 of £100 was also drawn out of that account. Those are all the facts proved that I can discover. What was the position on those facts? The trustees thought it was sufficient to prove that this money or some part of it had once been the husband's, and that thereupon they were entitled to succeed. So far as regards the two payments of £100 each, I have very great doubt whether this would have been so before the *Married Women's Property Act*, but since that Act the matter is made absolutely clear. Sec. 10 of the *Married Women's Property Act* 1890 provides that:—"All such deposits" (that is deposits in a Savings Bank &c.) ". . . . which, after the commencement of this Act shall be . . . . placed . . . . or transferred in or into or made to stand in the sole name of any married woman, shall be deemed unless and until the contrary be shown to be her separate property." So that the trustees, having undertaken to prove that this money was the money of the insolvent, tendered evidence which showed that the money was the property, not of the husband, but of the wife until the contrary was shown, and they offered no evidence to show the contrary. Bearing in mind that the trustees have no better title than their assignor unless a Statute gives it, the position is the same as if the husband had made the claim. Sec. 13 of the *Married Women's Property Act* 1890 provides that:—"If any investment in any such deposit . . . . shall have been made by a married woman by means of money of her husband without his consent, the Court may upon an application under section twenty of this Act order such investment and the dividends thereof or any part thereof to be transferred and paid respectively to the husband." What position then would the husband have been in if he had made this application? He would have had to prove that the money claimed as his was deposited without his consent. The foundation of the judgment of the Supreme Court, and the greater part of the argument for the trustees here, is that the money was deposited with the

H. C. OF A. 1905.

JACK v. SMAIL.

Griffith C.J.

husband's consent, and there is not a scintilla of evidence that it was not with his consent. So far the application would fail. But sec. 13 goes on :—"Nothing in this Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife of any property which after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors, but any such moneys so deposited or invested may be followed" &c. But, as I remarked at the outset, if fraud is alleged it must be proved, and in this case no evidence on that subject was offered.

The only other better title that the trustees set up with respect to these moneys, and it was not pressed very much, was under sec. 72 of the *Insolvency Act* 1890, which provides that:—"Any settlement of property . . . shall, if the settlor becomes insolvent within two years after the date of such settlement, be void as against the assignee or trustee of the insolvent estate under this Act, and shall, if the settlor becomes insolvent at any subsequent time within five years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such assignee or trustee." The term "settlement" is defined by that section as including "any conveyance or transfer of property," and property undoubtedly includes money. Therefore it is suggested that these savings from the allowance given by the husband to the wife might be treated as a "settlement," that is to say, that they were transfers of property to her made from time to time, and might be impeached on that ground. But that argument is disposed of by the judicial interpretation put upon that section. The last case on the subject, and the only one to which I need refer, is *In re Plummer* (1), before the Court of Appeal. The section had come before Courts of first instance on several occasions, first in *In re Player, ex parte Harvey* (2); again in *In re Vansittart* (3); and in *In re Tankard* (4). In *In re Plummer* (5), *Rigby*

(1) (1900) 2 Q.B., 790.
(2) 15 Q.B.D., 682.
(3) (1893) 1 Q.B., 181.
(4) (1899) 2 Q.B., 57.
(5) (1900) 2 Q.B., 790, at p. 808.

L.J. puts the matter in a few words. He says:—"I do not think *In re Player, ex parte Harvey* (1), has been at all successfully impeached. It appears to me that in that case the Court went on the very intelligible principle that a gift of money which is not hedged about with conditions that it shall be invested and kept in a certain way cannot be called a 'settlement' within the meaning of sec. 47." As I have said, all we know about these moneys is that they were savings by the wife out of the housekeeping allowance, and, in that sense, gifts by the husband to his wife. If that statement is correct those gifts were not a "settlement" within the words of sec. 72 of the *Insolvency Act* 1890, and there is no evidence that they were deposits or investments made "in fraud of the husband's creditors," to use the words of sec. 13 of the *Married Women's Property Act* 1890. So that *quâcunque viâ* we find these moneys were the wife's property. They were moneys standing to her credit, and were therefore to be deemed to be her separate property, unless and until the contrary was shown, and no evidence was offered to the contrary: and as to the gifts to her being a settlement, and therefore void as regards his creditors, the trustees established no case whatever.

Turning now to the purchase of the licence in 1900. With respect to that the trustees set up a title paramount. They contend that the licence was a chattel which at the date of the insolvency was in the order and disposition of the insolvent, that it was a chose in possession and not a chose in action. In dealing with this point it is necessary to consider what is the nature of a grocer's licence under the *Licensing Act* 1890. It seems to be often treated in one sense as property, or at least as a proprietary right. Mrs. Mason sold the licence in question to the appellant, and the appellant executed a document which treated it as the subject of a demise. Moreover, a licence is said to have a considerable monetary value by reason of the limit placed upon the number of licences, a quasi-monopoly value thus being created. But that does not conclude the question as to the nature of a licence. It is necessary then to refer to the provisions of the *Licensing Act* 1890. Sec. 5 provides for the granting of several descriptions of

(1) 15 Q.B.D., 682.

H. C. OF A. 1905.

JACK v. SMAIL.

Griffith C.J.

licences, amongst them victuallers' licences and grocers' licences. Sec. 10 provides that a grocer's licence shall authorize the licensee, being also a licensed spirit merchant, to sell and dispose of liquor in bottles provided that such liquor be not drunk on the premises, and the section goes on "it shall be lawful for the holder of a grocer's licence to carry on the business of a grocer and licensed spirit merchant in any premises situate within the district in which such licence has been granted, and from time to time to remove such licence to new premises within such district on giving notice and making application therefor in the manner provided by this Act for the transfer of licences." The form of a grocer's licence is given in the Second Schedule to the Act, and recites that the Licensing Court has by its certificate authorized the issue of a grocer's licence to a certain person for certain premises, and declares that that person "is licensed to sell and dispose between certain hours of liquor in bottles on such premises so that such liquor shall not be drunk in or near to such premises," and that the licence shall continue in force for a year. A licence is renewable under sec. 101 provided it has not been allowed to expire, and has not been forfeited or revoked or become void from any cause whatever. Sec. 102 provides for the transfer of licences by the Licensing Court upon the application of the person holding the licence and the proposed transferee jointly, and, as I have pointed out, grocer's licences may, subject to the same conditions, be removed to other premises. Sec. 104 provides for notice being given of the intention to apply for the transfer of a licence. The same conditions apply to an application for the removal of a grocer's licence to other premises. By sec. 107 it is provided that:—"Every transfer of a licence shall operate as a like licence to the transferee for the residue of the term for which the licence was granted." Sec. 109 imposes penalties for procuring the transfer of a licence by fraud or misrepresentation, and provides that under certain circumstances the licence may be forfeited, and that the person procuring the transfer may be disqualified from holding a licence for a period of three years. Sec. 111 provides for the transfer of a licence from a wife to her husband subject to the approval of the Licensing Court. It has been decided that the Licensing Court has a discretion in approving of a proposed

transferee. Sec. 119 provides that if licensed premises are by fire tempest or other calamity rendered unfit for the carrying on of the business of the licensee he may be authorized to carry on his business temporarily in some neighbouring premises. All the provisions I have referred to are equally applicable to grocers' licences and victuallers' licences. There is, however, a distinction between them as to removeability, for under the present law a licensed victualler's licence cannot be removed from one house to another. Whether there can be such a thing as a licence in the abstract--a thing in the air—it is not necessary to determine. The effect or quality of a licence has been determined by authority which, in my opinion, this Court is bound to follow. I refer first to some observations of *Sir John Cross* in *Ex parte Thomas* (1). That was a case of a bankrupt licensed victualler. Speaking of goodwill *Sir John Cross* (2) says:—"I am not aware of any case in bankruptcy, on which a question has arisen respecting the commodity called goodwill; and yet, according to the present argument, there must exist such a commodity in every bankruptcy. It is easy to conceive there to be such a thing as local goodwill, arising from the habit which customers have been in of frequenting the same place. There is another kind of goodwill which may be called personal, and this has been said to be incapable of sale. But there may be a goodwill, like that in the present case, which is partly personal and partly local. This, so far as it was personal, remained with the bankrupts, notwithstanding their bankruptcy, and did not pass to the assignees; for it is nothing else than the power to recommend the customers of the old concern to the new one, a power which cannot be exercised by assignees. So far therefore as this goodwill is personal, it does not appear to me to belong to either of the parties now before me. It is a matter of ordinary occurrence, that where a publican has premises for the residue of a term, he can sell the goodwill; for he can decline to give up the possession, unless upon receiving a premium. But I am of opinion, that under the peculiar circumstance of this case, no such thing as goodwill can be considered as having been sold by the assignees, there being in fact no such commodity to sell."

(1) 2 Mont. D. & DeG., 294. (2) 2 Mont. D. & DeG., 294, at p. 296.

H. C. OF A. 1905.

JACK v. SMAIL.

Griffith C.J.

That seems to be a very sensible view of the matter. A man who has a licence may decline to give it up unless he is paid for it. The case of *Rutter* v. *Daniel* (1) before *Fry* J. and afterwards (2) before the Court of Appeal, is to the same effect. In the case of *Ex parte Punnett, in re Kitchin* (3), it is true the matter was not argued, but it was held that the goodwill of a public house is not a personal goodwill, but on a sale of the house passes with it, that is, it is something attaching to the house. In *Rutter* v. *Daniel* (1) *Fry* J. held that a licensed victualler's licence was an incident of the goodwill so as to pass with an assignment of it. The case of *Kelly* v. *Montague* (4) is an express decision that a victualler's licence is not property at all. *Barry* L.J., quoting from a former judgment of his own, says (5): "I don't think there is any property at all in a licence." But even if these authorities do not dispose of the matter, there is a decision of the Supreme Court of Victoria by which, I think, we are bound. That is the case of *Anthoness* v. *Anderson* (6), decided by the Full Court consisting of *Higinbotham* C.J., *Holroyd* J., and *Kerferd* J., in 1887. The licence there in question was a publican's licence. I have pointed out that a grocer's licence is analogous to a victualler's licence in that both are in respect of premises, and have a qualified transferability from one person to another, after giving full notice. At the time when the case of *Anthoness* v. *Anderson* (6) arose, the analogy between the two classes of licences as to their removability to other premises was complete, although there is now a difference between them in that respect.

In that case *Higinbotham* C.J. says (7):—"No doubt the licence constitutes one of the most valuable parts of the plaintiff's security. A licence of this kind—a publican's licence—is, in our opinion a personal licence, the exercise of which is limited to particular specified premises. Being a personal licence, it is not at common law capable of assignment or transfer. It is a licence to an individual for particular premises till it is taken out of him by legal authority. The Act provides several ways in which the

(1) 30 W.R., 724.
(2) 30 W.R., 724, at p. 801.
(3) 16 Ch. D., 226.
(4) 29 L.R. Ir., 429.
(5) 29 L.R. Ir., 429, at p. 447.
(6) 14 V.L.R., 127.
(7) 14 V.L.R., 127, at p. 142.

licence may be transferred from the licensee to another person, and also for means by which the exercise of the authority given by the licence can be transferred from one house or premises to another house or premises. But, unless in the way provided by the Act, the right of property cannot be affected, nor can the licensee transfer his licence to another person, except subject to the provisions of the Act. The transfer depends upon the authority given by the Licensing Court." The learned Chief Justice then goes on to point out that the assignee in insolvency has the same right as the owner of the premises to obtain a transfer of a victualler's licence to himself. No such right is expressly given by the Act of 1890 in the case of a grocer's licence, but I understand that it has been given by a later Statute. The learned Chief Justice then goes on (1):—" But that will not apply to a case where, by the lawful determination of the lease by the landlord, the licensee is prevented from carrying on business in the premises for which the licence authorizes the business to be carried on; and when the landlord lawfully takes possession, the licensee has no right to carry on the business in these premises, and the assignee cannot take the place of an evicted tenant. In that case the landlord is the only person entitled to ask the sanction of the Licensing Court to substitute one tenant for the other, and transfer to him the licence that has not expired. The plaintiff's right to relief, therefore, in respect to the licence stands in the same position as his right to possession of the lease and of the premises. It ceases to exist in any form once the landlord has lawfully determined the lease." Every word of that, except so far as it refers to the express power of the landlord of a licensed victualler's premises to obtain a transfer of the licence to himself, is equally applicable to grocers' licences. That being the quality of a grocer's licence, what right can the trustees assert to it? It is not property; it is a personal right of the insolvent to carry on business in a particular place under conditions prescribed by law. I proceed to apply this law to the present facts. From the time the licence was purchased until the insolvency it was held in the husband's name. Shortly after the wife bought the property from the building society a lease was

(1) 14 V.L.R., 127, at p. 143.

H. C. OF A. 1905.

JACK v. SMAIL.

Griffith C.J.

drawn up by which the wife demised the land and the licence to her husband for a term of ten years at a yearly rental of £26, payable in monthly sums of £2 3s. 4d. The husband covenanted to pay the rent, not to transfer the lease or transfer the licence, to use the premises as a grocer's shop in accordance with the licence, not to do anything by reason of which the licence might be forfeited, and at the expiration of the lease to give the necessary notice for transfer or removal of the licence, and to do everything to enable the wife to obtain a transfer of the licence. It is suggested that that was only a juggle, and that the licence was the husband's notwithstanding. But this is a mere suggestion, and is unsupported by evidence. There can be no doubt that the money with which the licence was bought, or a large part of it, was the wife's. Such a suggestion is one to which no Court of Justice should pay attention.

These were the conditions at the time of the insolvency. If the authorities which I have quoted were not sufficient to establish the true nature of the licence, we have the *Licensed Premises Act* 1894, which expressly confers upon the landlord of licensed premises a right in respect of the licence. Sec. 2 (2) of that Act, which applies to grocers' licences, provides that "If such licensed person fails or neglects to apply for such renewal before the day to which such annual sitting is so adjourned an application by or on behalf of the owner of the licensed premises or if the owner does not apply then an application by or on behalf of the mortgagee of such licensed premises for a renewal of such licence may be heard and determined at such adjourned sitting; and . . . . such renewal may without the production of such licence be granted to such owner . . . . or to such mortgagee." So that, assuming the lease to be genuine, the appellant had a statutory right herself to apply to have the licence renewed without production of the licence. Under these circumstances, and this being the law, the conclusion I come to is, as *Sir John Cross* said in *Ex parte Thomas* (1), that so far as this licence is personal, it does not belong to either of the parties; so far as it is local, it belongs to the premises, and it is proved that they belong to the appellant.

(1) 2 Mont. D. & DeG., 294.

H. C. OF A. 1905.

JACK v. SMAIL.

Griffith C.J.

To turn now to the other question whether this licence can be said to be a chattel in the possession, order or disposition of the insolvent. If the licence is not property it is not a chattel. But apart from that, another answer is afforded by the *Licensed Premises Act* 1894, giving the landlord of licensed premises a right to apply for a renewal to himself. It is impossible to say that the public can think that a licence to which such an incident is attached is property of the lessor which he allows the lessee to have in his order and disposition, when that Statute has given this express right to the lessor to be exercised without the consent of the lessee.

In my opinion the trustees have absolutely failed to make any case against the appellant. I think, therefore, that the appeal should be allowed, and the order of the Judge of the Court of Insolvency restored.

BARTON J. I had intended to deliver judgment at some length dealing with the various authorities, but as his His Honor the Chief Justice has dealt with them so fully, I shall content myself with a few words. It seems to me that this case rests upon the depositions of the witness taken in the Court of Insolvency, and put in as an admission in the proceedings which the trustees took for the declarations mentioned in their notice of motion. There is no doubt that the deposition of a witness taken in the Court of Insolvency and filed, can be used in any other proceeding in the same insolvency. That is clearly shown in *Ex parte Hall, in re Cooper* (1). But it must be used as it is found, and it must be used as an admission. It is also clearly decided in *Davey* v. *Bailey* (2) that "depositions already made in the Court of Insolvency by a defendant in equity are admissible in evidence in a suit to set aside a voluntary settlement on the defendant by the insolvent, and may be sufficient to establish the plaintiff's case. The whole of such depositions will be regarded as in evidence, and the Court will attach such weight to the different parts as it considers them entitled to." That is the head-note to the case, and although it may not set out in express terms the decision of *Molesworth* J., it is evident that it sets out that which is to be

(1) 19 Ch. D., 580.

(2) 10 V.L.R. (E.), 240.

H. C. OF A. 1905.

JACK v. SMAIL.

Barton J.

extracted from it. So that, not only in other proceedings in the Court of Insolvency, but also in a suit in equity arising out of the same matter, these depositions are admissible as evidence against the party whose claim is impeached. While in *Davey* v. *Bailey* (1) it was held that the Court would attach such weight to the different parts of the depositions as they considered them entitled to, it must not be forgotten that, in weighing the evidence, the Court will act upon the principles of the law of evidence, which are the same in all jurisdictions except so far as modified by Statute. One essential principle is that, where an admission is put in evidence either in the civil or the criminal jurisdiction, the party relying on it is bound to take it as a whole, and cannot take those parts which are in his favour and reject the rest. It is clear this statement of the appellant is evidence as an admission, and upon that principle the whole is evidence as an admission, that is to say, the effect of any portion of it cannot be taken without the qualifications upon it contained in the remainder. If the person examined, against whom the story is put in when she is made a defendant party, gives a reasonable account of how she came by property claimed against her, it is incumbent upon the party putting in her story to show that it is false. If, however, her account of the matter is unreasonable or improbable on the face of it, the onus of proving its truth lies upon her. If it is reasonable or probable, she need go no further than her statement. If, however, it is not so, she has the onus of proving it and must give such evidence as she can. That is clearly laid down in *R.* v. *Crowhurst* (2). Applying the principle so stated, we find this state of things. This deposition is put in as a sworn statement of the appellant. It is clearly receivable in evidence. The whole of it must be taken together. It was uncontradicted, and the trustees did not avail themselves of the means open to them to contradict it. The documents put in evidence at the taking of the deposition are consistent with her testimony. Was there not in the present case, this deposition being the only oral evidence tendered on the main facts—for the evidence of the trustees only touches the question of reputed ownership—fair justification for the belief that it was true until it was contradicted? I think

(1) 10 V.L.R. (Eq.), 240.

(2) 1 Car. & K., 370.

there was. If the documents put in by the trustees did contradict the deposition, so as to show its untruth, then the case would be different. I have gone carefully through those documents and compared them with the statements in the deposition, and the documents, instead of contradicting the deposition, are absolutely consistent with it. Where there is a conflict of testimony between two witnesses the jury are frequently and rightly told that they should turn to the documentary evidence, and let the consistency of the documents with one case or the other prove the determining factor in their minds in coming to a conclusion. This is a principle which could undoubtedly be applied in the present case but for the fact that the story is all one way and is not impeached by facts *aliunde*. As the documents are positively consistent with the deposition, it seems to me that this one test by which the evidence of the appellant may be examined, when applied, redounds in her favour. I need say no more on the question of the admission.

I fully concur with the Chief Justice as to the way in which, in the light of previous decisions and the state of the law at the time, which was the same with regard to victuallers' licences and to grocers' licences, a grocer's licence should be considered. The question is decided in *Anthoness* v. *Anderson* (1), and I think that case is an authority we may well follow, and that the decision ought now to be taken as law in Victoria. As to whether the savings made by the appellant should be regarded as a "settlement," reference may be made to the case of *In re Player, ex parte Harvey* (2). There a gift of money, made by a father to his son for the purpose of enabling him to set up business on his own account, was held not to be a settlement within the meaning of sec. 47 of the *Bankruptcy Act* 1883, which, in respect of avoiding settlements, is the same as sec. 72 of the *Insolvency Act* 1890. In that case *Mathew* J., the senior Judge of the Court, said (3):—"I am of opinion that this appeal must fail. It is said that the gift from the bankrupt to his son was a settlement of property within sec. 47 of the Act of 1883, and therefore void. It is contended that the trustee is entitled, upon the true

(1) 14 V.L.R., 127.
(2) 15 Q.B.D., 682.
(3) 15 Q.B.D., 682 at p. 684.

H. C. of A. 1905.

JACK v. SMAIL.

Barton J.

interpretation of the Act, to follow the sum given by the father; to show that it was used by the son as capital in the business which he carried on, and to call upon the son, if any capital remained in the business, to pay it over to the trustee. . . . . But I am of opinion that the Act of Parliament never intended to give such a right as the trustee claims, because if transactions of this kind, which certainly are not morally wrong, are included in the operation of sec. 47, all gifts from a father to a son for his advancement in life could be recovered from the unfortunate son at any time within ten years if the father became bankrupt, unless the son could show that his father was able to pay all his debts without the aid of the gift at the time it was made. It was contended that this was a 'transfer of property' within sub-sec. 3 of sec. 47, and by the interpretation clause in the Act 'property' includes money. I think the meaning of sub-sec. 3 is that where money is settled as property it may be recovered by the trustee in the same way that property which is ordinarily the subject of settlement might be. It would be impossible to put on sub-sec. 3 the construction contended for on the trustee's behalf without rendering void many transactions which, as matter of moral obligation, are perfectly proper and right." Of course the applicability of an authority of that kind necessarily depends upon the credit given to the story of the respondent, and I have dealt with that subject. The next case in point of date is *In re Vansittart, ex parte Brown* (1). There there was a gift of jewellery and shares by a bankrupt to his wife within two years of his bankruptcy. That gift was held to be within the clause on the ground that it was plainly the transferror's object that the very subject-matter should permanently remain the property of the transferee, and that the husband contemplated the retention by his wife of the presents. The same principle was applied in *In re Tankard, ex parte Official Receiver* (2). *Wright* J. said (3):—"The retention of the property in some sense must according to these cases be contemplated, and not its immediate alienation or consumption." It seems to me impossible to regard the moneys which passed from the husband to the

(1) (1893) 1 Q.B., 181.
(2) (1899) 2 Q.B., 57.
(3) (1899) 2 Q.B., 57, at p. 59.

wife in this case as the subject of a settlement, in which case alone they could be regarded as within the section. On the other points I have nothing to add.

GRIFFITH C.J. I desire to say that I did not mention the fact that the lease from the wife to the husband of the house and premises had been determined before the notice of motion had been given. I wish to add also that I do not think the fact that grocers' licences had, by reason of their limited number acquired a monopoly value and could be sold for large sums, makes any difference in the character of the proprietary rights in respect of them. I mention the last matter in order that it may not be supposed that the argument based on it has not been present to my mind.

O'CONNOR J. The main fact determined by the Judge of the Court of Insolvency was that a fund in the name of the appellant belonged to her and not to her husband, the insolvent. Out of that fund payments had been made by the wife by which she acquired the house and premises in which the business of the insolvent was carried on, and which is the subject of the first part of the motion. Out of that fund also she made a payment by which the grocer's licence was originally acquired from the prior owner. Into that fund had been paid by the wife, between 1893 when the account was first opened, and the date of her husband's insolvency, about £1100. Half that amount, about £550, came from sources which were undoubtedly her private property. The other half consisted of savings which the wife said she had made out of money paid to her by her husband for housekeeping purposes. The trustees allege that, as far as those savings are concerned they belonged to the husband, and belonging to him, that the property acquired by means of payments from the fund, into which they had been paid, was property of the trustees. The inquiry was not by any means a full one, and I should hesitate to say what the real facts were as to the ownership of these moneys; but all we have to do with here are the facts as they appear upon the evidence. There can be no question, I think, that the onus of proving that those moneys were the moneys

H. C. OF A. 1905.

JACK v. SMAIL.

O'Connor J.

of the husband, rested upon the trustees. They were bound to establish that those moneys, which originally belonged to the husband, and were paid into the wife's account out of her housekeeping savings, were paid into that account under such circumstances that they did not become the wife's private property. I think Mr. Duffy quite correctly stated the rule of law which obtained before the *Married Women's Property Acts*. Before those Acts a wife could not hold separate property in money, and therefore it was always presumed that money in her possession was her husband's. She could only acquire personal property of her own by a declaration in equity that it was her separate property. The onus was always upon the wife to prove that. But since the Act which enables a married woman to acquire property equally with her husband, the onus of proof altogether depends upon the fact to be established. In a case, for instance, in which a husband alleges that certain property held by his wife is not her property but his, the husband has to prove it. There is one instance, however, in which the Statute arbitrarily puts the onus of proof upon the husband, and that is where moneys are deposited in the name of his wife in a Savings Bank. When moneys are found deposited in the name of the wife, under sec. 10 of the *Married Women's Property Act* 1890 they are deemed to be the property of the wife unless and until the contrary is shown. If, however, the husband or his trustees prove that the moneys were deposited in fraud of the husband's creditors, then under sec. 13 those moneys may be recovered by the trustees. In that case the trustees will have to prove that the moneys were deposited in the name of the wife in fraud of the husband's creditors. So that the onus rests in the one case upon the husband or his trustees to prove that the moneys were deposited without the consent of the husband, and in the other case that the moneys were deposited by the husband in the name of the wife in fraud of the husband's creditors. In the present case the onus of proof becomes of importance. It was contended by Mr. Duffy that, it having been proved that the moneys were originally the husband's, and were handed to the wife for housekeeping purposes, the onus of proving that the husband consented to the wife keeping any savings she made for herself and paying them

into her account was cast upon the wife. I do not think that is so. The fact that the moneys were at one time the husband's before they got into the wife's possession, is a neutral fact. The important fact is whether the husband consented to the moneys being paid into the wife's account. It appears to me the onus of proof imposed by the Act could not be discharged by the trustees without proving that the moneys were paid into the wife's account without the consent of the husband. Looking through the evidence called, I see absolutely no evidence of want of consent on the part of the husband to these moneys being paid into the wife's separate account. As the evidence stands, I should think it would be very difficult to infer that the husband was not well aware of her payments into the account. As to the other way in which the *primâ facie* presumption raised by section 10 that the moneys standing in the wife's name in a Savings Bank was her property, that is by proving that the moneys were deposited in fraud of the husband's creditors, there is an entire absence of evidence. Comments may be made on the nature of the transaction—suspicions may be raised.. But it is impossible to get rid of the *primâ facie* case made by the provisions of sec. 10 of the *Married Women's Property Act* 1890, by mere suspicion. The trustees, no doubt acting under advice, chose to rest their case practically upon the wife's account of the transaction. The husband was not called, and no other evidence was given; and the wife's account being the only evidence, it has to be taken. No doubt if the evidence of the wife taken as a whole proved the case set up by the trustees, that would be quite as good as any other evidence. But her evidence must be taken as a whole, and on it I see no ground for coming to the conclusion that these moneys were paid into the wife's account from her savings without the consent of the husband, or were paid in in fraud of the husband's creditors. That being so, the trustees have failed to establish the allegation that the moneys out of which the land and premises were bought were the husband's property and therefore part of the husband's estate, it follows that they failed also to establish their position in regard to the sum of £320 paid for the licence, which would appear, on the evidence before us, to be the wife's property.

H. C. OF A. 1905.

JACK v. SMAIL.

O'Connor J.

Coming to the question of the licence, what was the position at the time of the insolvency? This licence had originally been purchased with the wife's money. It was, together with the land and premises, leased to the husband by deed under which he undertook, among other things, to keep it attached to the premises in which the business was carried on. When the licence was first bought it was apparently held in the husband's name, and was attached to the premises on which he then carried on business. When he went into the new premises built on the land which was bought by the wife, the licence was apparently removed so as to enable him to carry on business under the licence in the new premises, because we find that, in the lease which the wife makes of the premises, both the premises and the licence are mentioned as the wife's property. So that the position of the parties was this:—The licence being a personal licence was in the name of the husband and authorized him to carry on the business of a grocer selling wine and spirits on these particular premises which were his wife's. He undertook by agreement with her to carry on the business on these premises, and to hold the licence solely for the purpose of carrying on business there. When the insolvency of the husband took place the trustees only stepped into his shoes. No paramount right is given to the trustees in respect of this licence. No right is given by the *Licensing Act* 1890 in respect of a grocer's licence such as that given in respect of a victualler's licence. Any rights the trustees can exercise in respect of this grocer's licence are bounded entirely by the respective rights of the husband and the wife. The first question is whether the licence was property which passed to the trustees. I have no doubt whatever that it was not. The licence may be described as having two attributes each being absolutely distinct from the other. First, it is a personal licence to the husband to carry on this business, and secondly, it is a licence to carry on business in these premises. Therefore, carrying on business in accordance with the licence must necessarily imply a continuance in the premises in respect of which the licence is granted. If the husband loses possession of the premises, then the licence is absolutely of no value to him. Before he can remove the licence to other premises he has to get the consent of

the Licensing Court to the removal. Apart from that, he has covenanted with his wife not to use the licence otherwise than in carrying on the business in her premises, and the trustees are in no better position than he is in this respect. On his losing possession of the premises the licence became, as it were, something in the air. Being a licence to carry on business in certain premises, of which he is no longer in possession, it lost all its value. But even if it had any value, the trustees could only have in it the same rights as the husband. Under the agreement with his wife he has no longer any property in it, and the trustees cannot be in a better position. I agree with the learned Chief Justice that there is no difference in principle between the attributes of a grocer's licence and those of a publican's licence. I think the case in the Irish Courts of *Kelly* v. *Montague* (1) is unanswerable in its reasoning, that there can be no property in a licence attached to premises in which the business is to be carried on, as is the case here. If that were not sufficient, I think the case of *Anthoness* v. *Anderson* (2) is, if possible, more conclusive. Under these circumstances, this licence, attached as it was to the premises, is, in my opinion, not property which passes to the trustees. That being so, it becomes unnecessary to consider the very difficult question which was raised in argument as to whether a licence is a chose in action or a chose in possession. Nor is it necessary to consider the question as to following trust funds, which was also argued. As regards the licence, therefore, I agree with the other members of the Court that it is not property which passed to the trustees, and that in regard to it also the trustees have failed to establish the case they undertook to prove. I think the decision of the Judge of the Court of Insolvency was right, and that the order varying it was not properly made.

Appeal allowed. Order appealed from discharged. Order of Judge of Court of Insolvency restored. Respondent to pay the costs of this appeal and of the appeal to the Supreme Court.

(1) 29 L.R. Ir., 429.

(2) 14 V.L.R., 127.