was wrongfully set aside and should be now restored, and the appeal allowed.

Appeal allowed.

Solicitors, for the appellants, *Atthow & McGregor.*
Solicitors, for the respondents, *McCowan & Lightoller.*

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Foll/Appl *Zobory* v *Federal Commissioner of Taxation* (1995) 129 ALR 484

Foll *Norilya Minerals Pty Ltd* v *Comr of State Taxation (WA)* (1995) 31 ATR 179

Appl *Zobory* v *Federal Commissioner of Taxation* (1995) 64 FCR 86

Cons *K & S Corp* v *Sportingbet Aust* (2003) 86 SASR 312

Cons *Port of Brisbane Corporation* v *ANZ Securites (No2)* [2003] 2 QdR 661

[HIGH COURT OF AUSTRALIA.]

JOHN BLACK AND ISABELLE BLACK . APPELLANTS;
DEFENDANTS,

AND

S. FREEDMAN & COMPANY . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Stolen moneys—Husband and wife—Volunteer—Primâ facie evidence unrebutted.

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PERTH, *Oct.* 27, 28.

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

Stolen money can be followed into the hands of a person who takes as a volunteer.

Where a husband hands stolen money to his wife and there is *primâ facie* evidence that she received it as a volunteer and no evidence is offered to rebut the inference, it can be recovered.

Nature of evidence of identification considered.

Decision of *McMillan* J. affirmed.

APPEAL from the decision of *McMillan J.*

The facts are fully set out in the judgment of *Griffith* C.J.

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Drake-Brockman and *J. B. Mills*, for the appellants. The plaintiffs failed to prove their case in the trial before *McMillan* J. It was not proved that John Black had been convicted: nor, supposing that the money had been stolen, that it was the money in the possession of Isabella Black. No evidence was adduced to show that the wife took without consideration and that she was affected with knowledge that it had been stolen. Once the money had been through the bank it had passed into currency and could not be followed. [They referred to *Clarke* v. *Shee* (1); *Collins* v. *Stimson* (2); *Mansell* v. *Mansell* (3); *Chudleigh's Case* (4); *Dudley and West Bromwich Banking Co.* v. *Spittle* (5); *Wells* v. *Abrahams* (6)].

[*Griffith* C.J. referred to *Appleby* v. *Franklin* (7)].

Piklington K.C. and *J. Moss*, for the respondents. *McMillan* J. found *inter alia* that the plaintiffs were entitled to recover the money from the wife it being money of the plaintiffs which was stolen by her husband and placed to her account. Assuming that she took as a volunteer, then it is unnecessary to prove that she had notice that the money had been stolen. The onus is on her to show she took without notice and for valuable consideration; but no evidence in that direction was produced. [They referred to:—Notes to *Miller* v. *Race* (8); *Jones* v. *Gordon* (9); *Hall* v. *Featherstone* (10); *Best on Evidence*, 7th ed., par. 273.]

GRIFFITH C.J. This was an action by the respondents against the appellant Black and his wife to recover a sum of money alleged to have been stolen by him from them while in their employ. As against the wife they claimed to recover part of that money, which they say came into her possession and is identified as the stolen money, and which she received under such circumstances that she is bound to repay it to the plaintiffs. Now so far as the claim against the appellant Black is concerned, there was abundant evidence before the learned Judge to show that the appellant had stolen the money. It is not necessary to

(1) 1 Cowp., 197.
(2) 11 Q.B.D., 142.
(3) 2 Wms., 678, at p. 682.
(4) 1 Rep., 120 (*b*).
(5) 2 L.T. N.S., 47.
(6) L.R. 7 Q.B., 554.
(7) 17 Q.B.D., 93.
(8) 1 Burr, 452.
(9) 2 App. Cas., 616.
(10) 27 L.J., Ex., 308.

refer to it in detail. The only point that can be made is with respect to the wife. The stealing was shown affirmatively to have begun in May 1907, when Black stole a sum of £60 odd. In July 1907 he stole a further sum of £54 odd, and on the 9th January 1908 he stole another sum of £66 odd. He was a man receiving a salary of £4 a week, and from the evidence it is to be inferred that he had no other source of income. The particular thefts of which evidence was given, and which were thefts of the sums sought to be recovered in the action, began in October 1909, from which period until the following April he appears to have stolen money very frequently, taking altogether during that interval between £1,300 and £1,400. He had a banking account, and in December he paid into that account £465. As he had no other source of income, it is a fair inference that that £465 was part of the money which he had stolen from his employers before that date, and which was a sum largely in excess of £465. On 15th January 1910 he drew a cheque on his own account for £460. Apparently he cashed it, and on the same day paid it into his wife's account at the Government Savings Bank, purporting to pay it in as "J. Wrixon, Trustee for Wrixon's Estate." There is no doubt as to where he got the money from, and there is no doubt that the statement as to Wrixon's Estate was false. It is not an unreasonable inference that that was done for a fraudulent purpose. That sum, therefore, I think, can be identified as part of the stolen money. After that he did not pay any money into his own account, but he went on stealing. On 4th April he paid a sum of £200 into his wife's account, still having no other source of income except the stolen money. That also is described as being paid in by "J. Wrixon, Trustee of Wrixon's Estate." That sum can also be identified as being part of the stolen money. Then there is a third sum paid in earlier, on 25th November 1909, of £94 10s. That was paid in in his own name. Two or three months before that—in August—Mrs. Black had transferred a sum of £180 from the Savings Bank to his account, and it might be suggested that the £94 10s. was in part re-payment of that sum. But I think that the whole transaction may be taken together. If it had appeared that he had not stolen any money

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before November, or that he had not stolen so much as £94 10s., a great deal could be said in favour of the inference that it should be regarded as a re-payment of what she had lent or paid to him. But it appears that before that he had stolen at least £180 from his employers, and that transaction and the transfer from his wife may be regarded as one transaction, and it may be inferred that he was making use of her account at the Savings Bank as a depository for his stolen money. I think, therefore, that it is a reasonable inference—though it is not so strong as with respect to the other two sums—that the £94 10s. also can be identified as part of the stolen money. Then there is a further sum of £250 which was spent in the purchase of circular notes. It appears that Black intended to abscond, and that he did in fact abscond. £250 was drawn from his wife's account at the bank, and he bought £250 worth of circular notes in her name and paid for them in cash. I have no doubt, for the reasons already given, that those notes were bought out of the stolen money, and can be identified also. They were found in his possession when he was subsequently arrested on a charge of stealing from his employers and when he claimed them as his own. When his wife was told that he claimed them as his own she made no answer. I think that is sufficient evidence that that sum of £250 was his money, and that the notes were only taken in her name as a blind. Taking all these transactions together, I have no doubt the whole amount claimed by his wife, consisting of the four sums I have mentioned, can be identified as part of the stolen money.

Then the question is whether it can be claimed from her, It is suggested that in following trust property there is a distinction between real and personal property which gets into the hands of a volunteer. But the rule appears to be the same with respect to all kinds of property. It is so laid down in the old case referred to in *Lewin on Trusts*, and it is so stated in the last edition of *White and Tudor* in the notes to *Dyer* v. *Dyer*. Dealing with this particular point, *Sir George Jessel* M.R., in the case of *In re Hallett's Estate* (1), said this, amongst other things:—"The modern doctrine of equity as regards property

(1) 13 Ch. D., 696, at p. 708.

disposed of by persons in a fiduciary position is a very clear and well established doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them." He points out that you very often cannot identify the proceeds. In the present case I think they are sufficiently identified — I mean there is a sufficient *primâ facie* case of identification in the absence of any explanation. Of course it is not sufficient if the money is taken by the other party *bonâ fide* for valuable consideration. There the money cannot be recovered back. But it has been laid down in cases decided long ago that if the alienee is a volunteer the estate may be followed into his hands whether he had notice of the trust or not. In the present case, did the wife take the money as a volunteer? In my opinion the proper inference to be drawn from the evidence is that the husband—supposing there was no question of stealing—presented the money to his wife. He intended her, no doubt, to keep it, in one sense, and that it should go to her account at the Savings Bank, where it became under the local law her money for her separate use, but that is quite irrelevant to the question whether she took it as a volunteer or not. I think that where a man pays a large sum of money to his wife, and no more appears, the inference is that it is a present. Therefore the doctrine of equity is applicable. The money is identified; it came into her hands as a volunteer, and she is liable to repay it. It was pointed out by *Sir George Jessel*, in a well known case, that a man may at a certain stage be innocent, but that, if he knows that he has got the advantage of a fraud to which he was no party and says he will keep it, then he becomes himself a party to the fraud and is liable to the jurisdiction of the Court of Equity. In the present case the wife says she holds this money for her separate use and claims it for herself, knowing now, at any rate, the circumstances under which it came to be given to her. In those circumstances I am of opinion that there was a case made on the plaintiffs' evidence for the defendants to answer. They thought, not unnaturally on the whole, that it was better not to go into the witness box, and

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they must take the consequences. In my opinion the learned Judge was quite right, and the appeal should be dismissed.

BARTON J. I am of the same opinion entirely. I do not wish to waste words on this endeavour to retain the fruits of a crime.

O'CONNOR J. I agree. The only part of the case which really presented a question worthy of investigation is that which related to the right of the wife to retain these moneys. But there is no doubt about that on the facts. I think the law applicable is that which is laid down in the passage to which Mr. *Brockman* referred in *White and Tudor*, in the notes to *Dyer* v. *Dyer*. Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person's hands. If, of course, that other person shows that it has come to him *bonâ fide* for valuable consideration, and without notice, it then may lose its character as trust money and cannot be recovered. But if it is handed over merely as a gift, it does not matter whether there is notice or not. The only question therefore is: what were the plaintiffs obliged to prove in this case? Were they obliged to prove affirmatively that the wife had received this money as a volunteer? I think they were. I think they were bound to give *primâ facie* evidence of that. But the circumstances afford *primâ facie* evidence of it. There is no evidence to rebut the *primâ facie* case which is to be inferred from the facts, which is this: The husband was stealing money regularly; he wanted to have some place in which to put it away safely, and for that purpose he gave up the account which he had in the Savings Bank and put a small balance of about 17s. into an account which a month or so before his wife had opened; then apparently regularly the proceeds of his crime were paid into this account. It is absurd to put payments made under those circumstances on the same footing as payments made by the thief to a stranger. In this case they were paid into the wife's account; the wife dealt with them and allowed her account to be used for the purpose of this

money being paid in, and there is no doubt that, when the catastrophe came at the end and he was obliged to go, she went with him to the bank, got the money out on her requisition as she was bound to do, and the circular notes were paid for out of that. When the husband is afterwards charged with the ownership of those notes, he says they are his own money. The wife is asked afterwards about this claim of her husband's to the circular notes and she says nothing. Considering that these circular notes were bought out of money which purported to be her money, paid for by her and afterwards claimed by her, and that she was asked in reference to this claim, surely she was under a duty to say something. She says nothing, and that is evidence that is entitled to be considered. In all the circumstances, I am of opinion that there was a *prima facie* case, that she was a volunteer, and that this money retains its character as trust money and she cannot be allowed to keep it.

Solicitors, for the appellants, *Henning & Brockman.*

Solicitors, for the respondents, *M. L. Moss & Dwyer.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

QUEENSLAND TRUSTEES LIMITED . . APPELLANTS;
PLAINTIFFS,

AND

FOWLES . . . . . RESPONDENT,
NOMINAL DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Succession duty—Realization—Value of estate impossible of fair ascertainment—Agreement—Power of Commissioners to compound—General power of the Executive Government—Succession and Probate Duties Act 1892 (*Qd.*) (56 *Vict. No.* 13), *secs.* 20, 37, 39, 47.