[HIGH COURT OF AUSTRALIA.]

MORGAN . . . . . APPELLANT;
INFORMANT,

AND

BABCOCK AND WILCOX LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 31; *Aug.* 5, 6.

MELBOURNE, *Oct.* 16.

Knox C.J., Isaacs, Starke and Dixon JJ.

Evidence—Proof of offence—Confidential communication from representative of company to managing director—Admissibility of secondary evidence—Notice to company—Notice to managing director—Ostensible authority—Offence committed within the jurisdiction — Proceedings — Commencement — Statutory limitations of time—Onus of proof—Secret Commissions Prohibition Act 1919 (*N.S.W.*) (*No.* 26 *of* 1919), *secs.* 3, 14 (2), (3), (4)*—*Justices Act* 1902-1918 (*N.S.W.*) (*No.* 27 *of* 1902—*No.* 32 *of* 1918), *secs.* 20, 145A.

A., the attorney and general manager in Australia of an English company carrying on business in New South Wales, was, early in 1926, told by M., an employee of the Sydney Municipal Council, that the sum of £10,000 would have to be paid by the company if it wanted a favourable report on and the acceptance of a certain tender. A. replied that he would have to recommend to his managing director or directors to pay the blackmail. The company's tender was accepted, and after the contract was signed A. informed M. that the

* The *Secret Commissions Prohibition Act* 1919 (N.S.W.) provides, by sec. 14, as follows:—"(2) If in any prosecution under this Act it is proved that any valuable consideration has been received or solicited by an agent from or given or offered to an agent by any person having business relations with the principal, without the assent of the principal, the burden of proving that such valuable consideration was not received, solicited, given, or offered in contravention of any of the provisions of this Act shall be on the accused. (3) No prosecution under this Act shall be commenced after the expiration of two years from the commission of the offence charged, or six months from the first discovery thereof by the principal or the person advised, as the case may be, whichever expiration first happens. (4) No prosecution under this Act shall be commenced without the consent of the Attorney-General."

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latter would have to nominate somebody to receive the payment, and that he (A.) would have to pass the name on to the managing director of the company, who, no doubt, would pay it. M. arranged that the money should be paid into the account of B. at a specified bank in Sydney. M. informed A. of this arrangement, and also told him that he would want £600 more for expenses. At the end of July or the beginning of August 1926 A. wrote to the managing director of the company at its head office, in London, a confidential letter giving reasons for the payment of the money, and furnishing him with the name of B. and B.'s bank. A. also stated that payment to B. would be a sufficient discharge. This letter, which was in manuscript, was not recorded on the company's files n Sydney. On 7th September 1926 B.'s account with the bank in Sydney was credited with the sum of £10,600 on the authority of some document purporting to come from the bank's head office in London, and the money was paid to M. A prosecution of the company was instituted for an offence punishable summarily under the *Secret Commissions Prohibition Act* 1919 (N.S.W.) in paying the money to M. The managing director of the company died before the hearing. A notice to produce the letter sent by A. to the managing director was served on the company, and, on the company's failing to comply with the notice, secondary evidence of its contents was admitted. The company was convicted.

Held, by *Knox* C.J., *Isaacs* and *Dixon* JJ. (*Starke* J. dissenting), that the conviction should be upheld because secondary evidence of the contents of the letter was rightly admitted and the circumstances afforded prima facie evidence that the money had been paid by the company to M.

Per Starke J.: As the whole case depended on the credibility of M. it would be prudent to require corroboration of his story and wiser and safer to confirm the judgment of the Supreme Court reversing the conviction.

Held, further, by *Knox* C.J., *Isaacs* and *Dixon* JJ., that as the offence was completed by the crediting of the money to B.'s account with the bank in Sydney it was committed within the jurisdiction.

The information against the company was laid on 11th July 1928, but no evidence was given as to when the offence was discovered by the principal.

Held, by *Knox* C.J., *Isaacs* and *Dixon* JJ., that, upon the proper interpretation of sec. 14 (3) of the *Secret Commissions Prohibition Act* 1919, the burden was upon the defendant of proving that the prosecution had not been commenced within six months from the first discovery by the Council of the offence charged.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Babcock & Wilcox Ltd.*, (1929) 29 S.R. (N.S.W.) 256, reversed.

MOTION to rescind special leave to appeal; and Appeal from the Supreme Court of New South Wales.

Babcock & Wilcox Ltd., an English company registered under Part III. of the *Companies (Amendment) Act* 1906 (N.S.W.) and

carrying on business in New South Wales, was charged on the information of William Morgan, a detective sergeant of police, under the provisions of the *Secret Commissions Prohibition Act* 1919 (N.S.W.) for that it did at Sydney in the State of New South Wales corruptly give to Silas Young Maling (see *R.* v. *Gates*; *Ex parte Maling* (1)), then being an agent, within the meaning of the *Secret Commissions Prohibition Act* 1919, of the Municipal Council of Sydney, a valuable consideration, to wit, the sum of £10,600, as a reward for the said agent, Silas Young Maling, having done an act in relation to the affairs of his said principal, the Municipal Council of Sydney, to wit, for having recommended his said principal to accept a certain offer made by Babcock & Wilcox Ltd. to his said principal for and in connection with certain plant for the Bunnerong Power Station. The prosecution was commenced on 11th July 1928. At the hearing before the magistrate in December 1928, Arthur James Arnot, the attorney and general manager for Babcock & Wilcox Ltd. in Australia and Australasia, gave evidence. He stated that after various interviews with Maling early in 1926, the latter told him that "we would have to pay £10,000 if we wanted to secure the order," and indicated that the money was to go to certain aldermen. Arnot protested but ultimately said to Maling: "I will have to recommend to my managing director or directors to pay the blackmail." Matters were in this position when the tenders for the plant were dealt with and that of Babcock & Wilcox Ltd. accepted. After the contract was signed Arnot told Maling that he would have nothing to do with the payment, that Maling would have to nominate someone to receive it, and that he would pass the name submitted on to his managing director, Sir James Kemnal. Maling said he would think the matter over and let Arnot know later. It was eventually arranged by Maling that the money should be paid into the account of Francis Buckle at the head office, Sydney, of the English, Scottish & Australian Bank. This arrangement was communicated by Maling to Arnot, the former at the same time telling Arnot that he (Maling) would want £600 more for expenses. Arnot agreed to the extra payment—thus bringing the amount to be paid to the credit of Buckle's account to £10,600. A letter was then written by Arnot

(1) (1928) 41 C.L.R. 519.

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to Sir James Kemnal (who died prior to the date of the commencement of the prosecution) in which he set out the nature of the transaction, his reasons for practically agreeing to pay the amount demanded, the name of the nominee and of the nominee's bank. The letter was in manuscript, probably marked " confidential," and was despatched towards the end of July or the beginning of August 1926, but there was no record of it on the Company's files here. Arnot stated in evidence that matters affecting the Company which he did not wish to become public property, he communicated to Sir James Kemnal marked " Private " or " Confidential." The office of Sir James Kemnal was at the head office of Babcock & Wilcox Ltd., London ; he occupied the managing director's office, and Arnot directed his communications there. Early in September 1926 the account of Buckle in the bank named was credited with the sum of £10,600, and the whole of that amount was subsequently transferred to Maling. A notice to produce the letter referred to by Arnot was served on Babcock & Wilcox Ltd., but, the notice not having been complied with, secondary evidence of the contents of the letter was admitted. The magistrate convicted Babcock & Wilcox Ltd., fined it £1,000, and ordered it to pay to the Municipal Council of Sydney the sum of £10,600.

The Company moved in the Supreme Court for a rule nisi for a writ of prohibition on (*inter alia*) the following grounds : (1) that there was no evidence of any act in contravention of the *Secret Commissions Prohibition Act* 1919 and constituting the offence charged committed by Babcock & Wilcox Ltd. within the jurisdiction of the State of New South Wales ; (2) that there was no evidence that Babcock & Wilcox Ltd. authorized the payment of the £10,600, or knew of it at the time it was made ; (3) that, on the facts given in evidence, there was no evidence of the commission of any act constituting the offence charged by any person for whose act Babcock & Wilcox Ltd. was criminally responsible ; (4) that there was no evidence that the prosecution was commenced within the time limited by law in that behalf ; (5) that the magistrate was in error in admitting in evidence confidential communications between Arnot and Sir James Kemnal, two officers of Babcock & Wilcox Ltd. ; (6) that the magistrate was in error in admitting evidence by the

accountant of the English, Scottish & Australian Bank that he credited Buckle's account with an item of £10,600 on the authority of a certain document not proved to be authoritative and not connected with Babcock & Wilcox Ltd.; (7) that the evidence against Babcock & Wilcox Ltd. was circumstantial only, and did not exclude a reasonable hypothesis consistent with the Company's innocence; (8) that there was not sufficient evidence to support the conviction. *James* J. granted the rule nisi, which was subsequently made absolute by a majority of the Full Court of the Supreme Court: *Ex parte Babcock & Wilcox Ltd.* (1).

From this decision the informant now, by special leave, appealed to the High Court; and the respondent, by motion on notice, applied for the rescission of the special leave to appeal.

Other material facts appear in the judgments hereunder.

E. M. Mitchell K.C. (with him *Turner*), for the applicant, on the motion. This is a criminal case in the ordinary sense. The decision appealed from is one based purely on fact; it cannot form a precedent and lays down no rule for future guidance. When the evidence is merely circumstantial the case is outside the rule laid down by the Court for the granting of special leave to appeal (*Schiffmann* v. *The King* (2)). Leave to appeal is granted only when special circumstances are present (see *Corbet* v. *Lovekin* (3); *Ross* v. *The King* (4); *Houston* v. *Wittner's Pty. Ltd.* (5)), but no such special circumstances have been established in this matter to justify the granting of leave to appeal. No important principle of law is involved in this case. Satisfactory evidence is not before the Court on many points which must be established before the prosecution can be successful. It is quite competent for the Court to rescind an order granting leave to appeal, and such power has been exercised on several occasions (see *R.* v. *Ellis* (6)).

Flannery K.C. and *Shortland*, for the respondent, on the motion, were not called upon in respect to the motion.

(1) (1929) 29 S.R. (N.S.W.) 256.
(2) (1910) 11 C.L.R. 255.
(3) (1915) 19 C.L.R. 562.
(4) (1922) 30 C.L.R. 246.
(5) (1928) 41 C.L.R. 107.
(6) (1925) 37 C.L.R. 147.

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KNOX C.J. A majority of the Court is of the opinion that the application should be refused.

E. M. Mitchell K.C. (with him *Turner*), for the respondent, on the appeal. There is no evidence that the offence charged was committed within the jurisdiction. The Bank acted as the agent of Buckle, and not as the agent of the Company. Evidence as to the contents of the letter forwarded by Arnot to Kemnal was improperly admitted. There is no proof of the delegation by the Company of any powers to Kemnal. Notice of a proposal to Kemnal to commit an offence is not notice to the Company. He was not authorized to receive any such notice on behalf of the Company. Arnot never intended that the letter should go before the board of directors of the Company as he knew the directors would reject the proposal: it was sent to Kemnal for his private action (*Re Fitzroy Bessemer &c. Steel Co.* (1)).

[ISAACS J. referred to *J. C. Houghton & Co.* v. *Nothard, Lowe & Wills* (2).]

The case of *De Jaegers Sanitary Woollen System Co.* v. *Walker & Sons* (3) is distinguishable, because here the business had been concluded. It does not follow that because money was paid into Buckle's account the payment was made by the Company. There was not a prima face case on the circumstantial evidence sufficient to warrant a conviction (*Peacock* v. *The King* (4); *Houston* v. *Wittner's Pty. Ltd.* (5)). There are three reasonable hypotheses other than the hypothesis of guilt: (1) that the money did not come from the Company at all; (2) that the money came from Kemnal's private funds; (3) that Kemnal paid the money from the Company's funds without the Company's authority. The observance of conditions precedent is of the utmost importance (*R.* v. *Harris* (6)). Proof is not before the Court that the prosecution was initiated within the time limited by sec. 14 (3) of the *Secret Commissions Prohibition Act* 1919. It is a matter which cannot be in the knowledge of the accused, and therefore should be proved by the prosecutor (*Taylor on Evidence*, 11th ed , par. 376, p. 284; see also *R.* v. *Turner* (7)). On the

(1) (1884) 50 L.T. 144.
(2) (1928) A.C. 1.
(3) (1897) 77 L.T. 180.
(4) (1911) 13 C.L.R. 619.
(5) (1928) 41 C.L.R., at p. 114.
(6) (1922) 2 K.B. 543, at p. 545.
(7) (1816) 5 M. & S. 206; 105 E.R. 1026.

proper construction of the statute it is a condition precedent to the right to commence a prosecution that it should be brought within the specified time, and there is no jurisdiction to try the offence unless that proof be given, the onus to do so being on the prosecutor (*R.* v. *Phillips* (1); *Adam* v. *Inhabitants of Bristol* (2); *R.* v. *Parker* (3); *R.* v. *Casbolt* (4); *Dixon* v. *Wells* (5)). Also, if objection be taken that the formality of proving the consent of the Attorney-General as required by sec. 14 (4) of the Act has not been complied with, it is a condition precedent that such proof must be given by the prosecutor (*R.* v. *Waller* (6); *R.* v. *Bates* (7); *R.* v. *Metz* (8); *Berwin* v. *Donohoe* (9)). The effect of the decision in *R.* v. *Inwood* (10) must be modified in the light of *R.* v. *Bates*. This view conforms to the general view of the law (see notes to *Hodsden* v. *Harridge* (11)). The difference between a statute which indicates the time within which proceedings for the recovery of a penalty under it must be commenced and a Statute of Limitations is that under the former the right is extinguished at the end of the period whilst under the latter it is merely avoided. Time is of the essence of the offence (*Halsbury's Laws of England*, vol. IX., pp. 336, 337; *American Encyclopædia of Law and Procedure*, vol. XII., p. 382). Sec. 56 of the *Justices Act* 1902 (N.S.W.), as amended, is a "jurisdiction" section.

[STARKE J. referred to *R.* v. *Chandra Dharma* (12).]

This question was dealt with in *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch)* v. *Alexander* (13). Sec. 145A of the *Justices Act* has no application whatever to a matter which is a condition precedent (*R.* v. *Phillips* (1)). The requirements of sec. 14, sub-secs. 2, 3 and 4, of the *Secret Commissions Prohibition Act* 1919 are conditions precedent and not provisoes (*R.* v. *James* (14)). The case of *Chepstow Electric Light & Power Co.* v. *Chepstow Gas & Coke Consumers'*

(1) (1818) Russ. & R. 369; 168 E.R. 849.
(2) (1834) 2 A. & E. 389; 111 E.R. 151.
(3) (1864) Le. & Ca. 459.
(4) (1869) 11 Cox C.C. 385.
(5) (1890) 25 Q.B.D. 249, at pp. 256, 257.
(6) (1910) 1 K.B. 364, at p. 366.
(7) (1911) 1 K.B. 964.
(8) (1915) 31 T.L.R. 401.
(9) (1915) 21 C.L.R. 1, at p. 25.
(10) (1896) 17 N.S.W.L.R. 100.
(11) (1669) 2 Wms. Saund. 61; 85 E.R. 672.
(12) (1905) 2 K.B. 335.
(13) (1912) 15 C.L.R. 308.
(14) (1902) 1 K.B. 540.

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Co. (1) is distinguishable, as there the exceptional case was dealt with.

Flannery K.C. (with him *Shortland*), for the appellant. The provisions of sec. 14 (3) of the *Secret Commissions Prohibition Act* 1919 are either an exemption from liability or a qualification to the operation of the Act. The knowledge of one or two members of the Council as to the nature of the transaction between Maling and the Company is not the knowledge of the principal, the Council as a whole (*J. C. Houghton & Co.* v. *Nothard, Lowe and Wills* (2)). Assuming that the onus of proof is on the prosecutor, if there is any evidence before the Court from which the magistrate could draw the conclusion which he did the Court will not, in the circumstances, take the view that it cannot exercise jurisdiction (*R. v. Bass* (3)). If it is the duty of the prosecutor to produce evidence showing that the prosecution was not commenced within six months of the discovery of the offence, and that it was commenced after, then it is sufficient for the magistrate to infer from the evidence that the matter was not publicly before the Council until March 1928, which would be enough. In the circumstances secs. 20 and 145A (2) of the *Justices Act* 1902-1918 are applicable (*Ex parte Martin* (4) ; see also *Archbold's Criminal Pleading, Evidence and Practice*, 25th ed., p. 94, rule 4). It is not necessary in New South Wales for the prosecutor to prove that the Attorney-General has given his consent to the commencement of proceedings : it is for the defendant to show that such consent has not in fact been given (*R.* v. *Inwood* (5)). The question is one of practice and not of jurisdiction. As to the general law with regard to provisoes and exemptions, the Court is referred to *Paley* on *Summary Convictions*, 8th ed., pp. 56 *et seqq.*, where all the cases cited by Mr. *Mitchell* on this point are dealt with. The whole onus of proof is on the accused to show that he is not punishable.

Cur. adv. vult.

(1) (1905) 1 K.B. 198.
(2) (1928) A.C. 1.
(3) (1793) 5 T.R. 251 ; 101 E.R. 141.
(4) (1904) 21 N.S.W.W.N. 123.
(5) (1896) 17 N.S.W.L.R. 100.

The following written judgments were delivered :—

KNOX C.J. AND DIXON J. The charge upon which the respondent was convicted was that between 5th September 1926 and 5th February 1927 it did, at Sydney, corruptly give to one Maling, then being an agent within the meaning of the *Secret Commissions Prohibition Act* 1919 of the Municipal Council of Sydney, a valuable consideration, to wit, £10,600, as a reward for the said agent, Maling, having done an act in relation to the affairs of his principal, the Municipal Council of Sydney, to wit, for having recommended to his said principal to accept an offer made by the defendant Company.

The informant proved (1) that Maling had demanded a bribe before he would report favourably upon the defendant's tender; (2) that the defendant's attorney under power had promised he would recommend his managing director or directors to pay the bribe; (3) that Maling had reported in favour of the defendant's tender; (4) that the amount of the bribe was fixed at £10,600; (5) that Maling proposed that payment of the bribe should be made by placing the money to the credit of the account of his nominee, one Frank Buckle, at a specified bank in Sydney; (6) that some time afterwards the sum of £10,600 was in fact credited to that account; and (7) that Buckle accounted for it to Maling.

Evidence was then adduced that the defendant's managing director was Sir James Kemnal (since dead), that his office was the managing director's office at the defendant Company's headquarters in London, that the attorney under power wrote to him at that address when he communicated matters "which he did not want to become public property," and that after promising to recommend his managing director or directors to pay the bribe, he did send a letter in manuscript addressed "Sir James Kemnal, Managing Director of Babcock & Wilcox," and that he probably marked it "Private." It was admitted that, a sufficient time before the hearing, the defendant had received a notice to produce; but the defendant did not produce the letter when called for. Thereupon the informant tendered secondary evidence of the contents of the letter, which was admitted.

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The first question to be decided is whether secondary evidence, or any evidence, of the contents of this letter was admissible. The contents of the letter were clearly relevant because not only was Kemnal's knowledge of the facts which the letter stated material upon the issue of corruption, but the request and instruction which the letter contained were part of the circumstances tending to show payment by Kemnal. Whether secondary evidence was a proper medium of proof depends upon the effect of the defendant's failure to produce the letter after due notice. If the letter had come into the defendant Company's possession or into the possession of Kemnal for and on behalf of the Company, or in such circumstances that the Company had a right to call for and obtain it from him, non-production, after due notice, would let in secondary evidence. "In order to let in secondary evidence the instrument need not be in the actual possession of the party: it is enough if it is in his power, which it would be, if in the hands of a party in whom it would be wrongful not to give up possession to him. But he must have such a right to it, as would entitle him not merely to inspect but to retain" it (per *Littledale* J. in *Parry* v. *May and Morrit* (1)). Possibly the writer of the letter meant, and the recipient understood, that he was to withhold the letter from the custody of the ordinary officers of the Company because of its compromising character. But the fact that it was intended for his secret information does not make his receipt of the letter any less a receipt for and on behalf of the Company. It was because of the fact that he was head officer of the defendant Company that the letter was written to him, and it was only in that capacity that he was concerned with the information which the letter contained. If, therefore, his possession of the document was not actually that of the defendant Company, at least he was compellable in point of law to surrender the document to the defendant Company if called upon to do so. His death makes no difference, because it could not affect the legal right of the defendant Company to call for and obtain the document from any person who took over the custody of it. For these reasons secondary evidence was admissible.

(1) (1833) 1 Mood. & R. 279, at p. 280.

The writer of the letter swore that it informed Sir James Kemnal of the facts which have been shortly stated above. It then urged the wisdom of paying the bribe, and described the method in which it was to be paid, i.e., by placing £10,600 to the credit of Frank Buckle's account at the specified bank in Sydney. The circumstances proved are enough, in our opinion, to support a finding that Sir James Kemnal caused £10,600 to be placed to the credit of Buckle's account in payment of the bribe demanded by Maling. The fact that this exact sum, one of large amount, is placed to the precise account in proper time after the request to pay it had reached Kemnal, appears to us to afford presumptive evidence that it was sent in answer to the letter from the Company's attorney and business representative urging that it should be so paid. The question involved largely depends upon the degree to which coincidence of events and circumstances warrants a belief in their causal connection. An examination of hypotheses logically consistent with proved facts is the received method of testing their sufficiency to establish the conclusion. In the end, however, the reasonableness or the probability of the occurrence of such hypotheses determines their admissibility, and when coincidence of fact and concurrence of time are relied upon, the sufficiency of the circumstances must inevitably be judged by considering whether general human experience would be contradicted, if the proved facts were unaccompanied by the fact sought to be proved. In our opinion it would be so astonishing if the crediting of £10,600 to Buckle's account were not the result of Sir James Kemnal receiving the letter which counselled him to pay that sum to that account, that, in the absence of further evidence, it may be inferred that Kemnal caused the credit to be made. It is, however, equally consistent with all the known facts that he did this without consulting his fellow-directors, and the question remains whether it is enough for the purpose of the charge against the Company to prove that its managing director did, in relation to its affairs, cause the bribe to be paid.

No difficulty arises under the *Secret Commissions Prohibition Act* 1919 in relation to the criminal responsibility of corporations, because corporations are expressly included. An offence involving corrupt intention can be committed by a corporation only through

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a servant or agent, who, with the necessary *mens rea*, does or causes to be done, the forbidden act for and on behalf of the corporation acting within the course of his employment or authority. This statute, in our opinion, means that the corporate body is punishable for acts so done. Sir James Kemnal, in paying the bribe, acted for and on behalf of the Company, and it remains only to consider whether it was within the course of his employment or authority. He was managing director addressed by a subordinate as the appropriate person to deal with the situation. It is consistent with the articles that he had very wide powers indeed, and it is implicit in the description of his office that he administered the business concerns of the Company. This is enough to prove a prima facie case that he was acting in the course of his authority.

The next question is whether the evidence shows that the material facts constituting the offence took place within the jurisdiction. The offence was not charged under sec. 8 (*b*), and the special provisions of that section, therefore, do not apply. It was said the facts proved were compatible with the bribe having been paid abroad. This means that before the money was transmitted, it became the money of Buckle or Maling or those associated with them. But, according to the evidence, the arrangement was that payment should be accomplished by crediting the money at the bank in Sydney. It was this act which completed the offence. When Sir James Kemnal, in London, caused this to be done here, he thereby completed the offence here. It follows, therefore, that the offence was committed within the jurisdiction.

Sec. 14 (3) of the *Secret Commissions Prohibition Act* 1919 provides: "No prosecution under this Act shall be commenced after the expiration of two years from the commission of the offence charged, or six months from the first discovery thereof by the principal or the person advised, as the case may be, whichever expiration first happens." The prosecution was commenced within two years of the commission of the offence, but it was objected that it did not appear that the offence had not been discovered by the principal more than six months before the information was laid. The information alleged that the Sydney City Council was the principal, and on this footing it apparently was conceded before the Supreme

Court that there was no evidence to show when the offence was discovered by the principal. It may be doubted on the facts of this case whether the corporation was not the true principal, but the informant cannot now depart from the allegations made in his information. It may well be that the burden of proving that the offence was committed not more than two years before the prosecution lies upon the informant. The Act may be considered to impose upon an offender a liability to punishment during a period of two years, and upon this view it would be necessary for the prosecutor to prove that the offence was within the period of liability as a condition upon which criminal responsibility rested. But the immunity from punishment arising from the fact that six months expire from the discovery of the offence is of a different order. It is not a fixed period of liability. The offence may or may not be discovered by the principal. Unless and until it is discovered the six months does not commence to run. In other words a new and additional fact must occur which after the effluxion of six months defeats the liability which otherwise would continue for two years. As the bar depends upon a new event, which may or may not happen, and its subsequent occurrence operates in defeasance of a liability which has been incurred, we think that the burden of proof is on the defendant.

For these reasons we think that the appeal should be allowed with costs and the conviction restored.

The rule nisi should be discharged with costs.

ISAACS J. The ground upon which the majority of the Supreme Court set aside the conviction was that—assuming all other objections unsustainable—there was not sufficient evidence to warrant the finding that the bribe was given by the respondent Company. For that reason, and also because that is the point which practically most affects the efficacy of the Act, I consider that ground first.

The dominating circumstance that connects Maling's demand with the Company is that it was made to Arnot, who was the attorney under power and the general manager for the Company in Australia and Australasia, and the person who tendered for the Company for the municipal contract; it was transmitted by him to the London

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managing director of the Company, Sir James Kemnal, confidentially, that being the established and accustomed routine channel adopted by Arnot as the Company's agent when communicating confidential matters to his principal. Arnot, in his evidence, in answer to the question "How did you communicate the business of Babcock & Wilcox Ltd.?" replied:—"Matters that I did not want to become public property I communicated to Sir James Kemnal. His office was at the head office of Babcock & Wilcox Ltd., London. He occupied the managing director's office, and I addressed my communications there." There is nothing to qualify the effect of this evidence as indicating the recognized channel of Arnot's confidential communications to his principal, the Company. It is an obvious implication that on previous occasions, over a period of about four years—for the Company was established here in 1923—Arnot had found that the method so adopted had always resulted in the Company's knowledge and action. That of itself is evidence, and very cogent evidence, that the contents of the letter reached the Company itself, that is, the governing body of the Company. If so, all else follows, and almost as a matter of course. For not only does it afford affirmative evidence that the Company knew of Maling's demand, but, the letter being "confidential," it is almost perfect evidence that no one else did. The suggestion that Kemnal might have suppressed the information and then have paid the bribe out of his own pocket is wild conjecture, and too strongly opposed to the ordinary experience of life to be accepted without the weightiest proof of such unexampled unselfishness. Why should Kemnal have concealed the demand from his fellow-directors? Neither duty, interest nor modesty can be invoked to lead one to such an inference. As managing director receiving from the Australian agent of the Company information so deeply concerning the present business and future purposes of the Company, it was his plain duty to communicate it and allow the matter to be dealt with by the board, and there was no element of antagonistic interest which would naturally impel him to suppress his knowledge. (See *J. C. Houghton & Co.* v. *Nothard, Lowe and Wills* (1), per Lord *Dunedin* (2) and per Lord *Sumner* (3).) In the interest both of the

(1) (1928) A.C. 1.
(2) (1928) A.C., at pp. 14, 15.
(3) (1928) A.C., at p. 19.

Company and himself, it was a prudent as well as a natural thing that Kemnal should lay the matter before the board. No modesty or any other virtue can furnish adequate reason why Kemnal should personally silently bribe the servant of the Sydney Corporation rather than allow even the suggestion of the corrupt demand to assail the sensibilities of his fellow-directors. And if not Kemnal, who else in the wide world can rationally be supposed to have done it ? Must each living individual be eliminated as the possible source of the bribe to Maling ? Kemnal's may or may not have been the hand that actually transmitted the instructions to the English, Scottish & Australian Bank in London to cable the sum of £10,600 to Sydney. But if he, rather than any other functionary of the Company, did so, then, in view of the proved circumstances of the case, it was in all human probability, to the exclusion of any rational hypothesis to the contrary, an authorized act of the Company. The letter sent by Arnot shows not only that he had agreed that the Company would pay the blackmail, but that he himself personally would not be the channel of payment. In other words, some other channel for the Company's money to pass into Maling's hands must be found. If Arnot had himself paid the money, there could have been no earthly doubt as to the Company's complicity. The English, Scottish & Australian Bank, as the innocent instrument, was substituted to pay the money into the hands of Buckle, as the guilty secret representative of Maling ; but, though the channel was altered, the source remained the same. Estimating, therefore, the evidence according to its own intrinsic force, there is, in my opinion, not only sufficient, but, in the absence of any explanation or exculpatory testimony on the part of the Company, most convincing proof of the Company's guilt.

There is, however, an additional consideration. The information was laid on 6th July 1928, the hearing took place on 10th December 1928, over five months afterwards. Every reason existed why the Company, if innocent of complicity, should have made that innocence manifest. The majority judgment appealed from recognizes the difficulty for anyone reading the evidence to escape a very strong suspicion of the Company's guilt. Not the slightest effort to afford any evidence, oral or written, to repel that suspicion was made on

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the part of the Company. The pecuniary amount at stake as well as the business reputation of the Company formed sufficient inducement to despatch some officer familiar with the books or affairs to say that the payment was not with the Company's funds or by its authority.

In *Moreau* v. *Federal Commissioner of Taxation* (1) I quoted the observation of Lord *Mansfield* in *Blatch* v. *Archer* (2) that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." Here the prosecution could not possibly have produced stronger evidence, but it was in the power of the defence to have repelled the inference that arises from the evidence as it stands. The principle is exemplified in *General Accident, Fire and Life Assurance Corporation* v. *Robertson* (3), and notably in *Mammoth Oil Co.* v. *United States* (4). It was applied by the Supreme Court of South Australia in *Wilson* v. *Buttery* (5) in the judgment of *Napier* J., who cited other cases, notably that of *Dolling* v. *Bird* (6). Consequently, since the affirmative evidence in the case raises, to say the least, a strong probability that it was the Company that paid, or caused to be paid, the bribe demanded by Maling, the silence of the Company, and its failure to explain, materially weakens any attempt to suggest in its favour possible hypotheses of innocence. In order to succeed, therefore, the respondent must maintain some one or the other objections it has raised.

It has been assumed throughout that the facts of the case fall within the scope of sec. 3 of the Act, and I therefore say nothing and decide nothing with respect to that question.

One of the objections relied on was that, assuming a payment by the Company, it took place in London, the bank then transmitting the money to Sydney as Buckle's agent. This is not supported by facts. The arrangement between Maling and Arnot was that Buckle's Sydney account should be placed in funds. The bank was the payer's agent to transmit to Sydney, and the direction might

(1) (1926) 39 C.L.R. 65, at p. 71.
(2) (1774) 1 Cowp. 63, at p. 65; 98 E.R. 969.
(3) (1909) A.C. 404, at p. 413.
(4) (1927) 275 U.S. 13, at pp. 51, 52.
(5) (1926) S.A.S.R. 150, at pp. 153, 154.
(6) (1923) G.L.R (N.Z.) 607, at p. 608.

have been countermanded at any time before payment to Buckle in Sydney.

Another point was that Arnot's letter, if present, was inadmissible, and therefore secondary evidence of its contents was inadmissible. The answer is that if, as already shown, the letter was a communication sent to the Company in the manner authorized by the Company, and is presumed or inferred to have reached the Company, notice to produce, not complied with, enables secondary evidence to be given.

The most substantial objection was as to the burden of proving that the proceedings were not commenced too late. Sec. 14 (3) prescribes that "No prosecution under this Act shall be commenced after the expiration of two years from the commission of the offence charged, or six months from the first discovery thereof by the principal or the person advised, as the case may be, whichever expiration first happens." Mr. *Mitchell*, in a forcible argument, relied on a number of cases of which *Phillips's Case* (1) may be taken as the type. I do not think that this case is governed by *Phillips's Case* or those that follow it. They undoubtedly establish that where a statute requires a prosecution to be commenced *within* a certain time from the commission of the offence—events that, unless admitted, must be proved and so be apparent—the onus of properly proving the commencement of the proceedings is on the prosecution. That, so to speak, is a statutory condition that, if questioned, must be shown to be satisfied. But there is no authority showing that a possible event which may never happen, and therefore may never be capable of proof, gives rise to the same obligation. A principal or person advised may never discover the offence. He may die or be absent from Australia or become insane. Now, while no difficulty can arise as to whether the commencement of the prosecution is *after* two years from the commission of the offence—for that is an event certain and must appear—yet as the prosecutor is not necessarily the principal or the person advised, he may not be able to prove when the first discovery by the principal or person advised took place. The principal may be permanently out of Australia. No doubt of the necessary facts appears. This portion of the section operates to make the proceedings incompetent. But

(1) (1818) Russ. & R. 369; 168 E.R. 849.

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the two portions of the sub-section stand on different footings. That of the first has been stated. Its object is to protect an accused person from a serious charge after evidence may have disappeared or faded. The object of the second, however, is to make silence of the principal equivalent to condonation or acquiescence, and to remove the sting of the secret fraud. That, however, is dependent on an event which may never occur, which is no necessary ingredient in the offence or the proceedings, which if it does occur is a relieving fact, which can be at any time created by the offender making disclosure.

On the whole, both from its nature and its effect, the burden of establishing the fact—unless it incidentally appears—rests, in my opinion, on the accused. The principal may have died or left Australia, and the prosecutor may be utterly without the means of proving a negative, and this, in my opinion, strengthens the view I have expressed.

The civil cases on the Statute of Limitations turn, as the judgments point out, on the principle that the plaintiff by the established pleading and practice assumes the affirmative of the issue, and so must prove it.

STARKE J. Babcock & Wilcox Ltd. was charged under the *Secret Commissions Prohibition Act* 1919 (N.S.W.), sec. 3 (*a*), that it did at Sydney corruptly give to one Maling, the deputy general manager of the electrical department of the Sydney Municipal Council, the sum of £10,600 as a reward for Maling recommending the Council to accept a tender of Babcock & Wilcox Ltd. for and in connection with the steam-raising plant at the Bunnerong Power Station, which was being erected or established by the Council. The defendant was convicted and ordered to pay the maximum penalty of £1,000, and to pay the sum of £10,600 to the Council within a period of six months (see sec. 10). In the Supreme Court this conviction was, by a majority, reversed. An appeal has been brought to this Court by special leave. The case does not appear to raise any important or general question of law. The argument made it clear that the sufficiency of the evidence is the real question

involved in the appeal. A motion, however, to rescind the leave was refused; and we have now to deal with the appeal.

The case is suspicious, but suspicion cannot take the place of proof, any more in cases involving pecuniary penalties and reparations than in cases involving imprisonment of the subject. It was established that in September 1926 a sum of £10,600 was placed to the credit of the account of one Buckle at the English, Scottish & Australian Bank in Sydney. The ledger of the Bank shows it to have been so credited by "t.t."—which, I suppose, means telegraphic transfer. But the evidence of the Bank officer did not show where the money came from, or who paid it. This money, or a large part of it, found its way, by devious paths, into the hands of Maling. Arnot, the attorney and general manager of the defendant Company in Australasia, deposed that it had tendered for the erection of plant at the Bunnerong Power Station about February 1926, and that before the tender was accepted Maling informed him that it would be recommended if the defendant paid £7,500 (subsequently the demand was increased to £10,000), the money to be divided between Maling and members of the Municipal Council of Sydney. Arnot further deposed that he protested, but that he told Maling he would recommend his general manager "to pay the blackmail." On 15th April 1926 Maling recommended the tender to the Council, and on the 27th the Council resolved that the tender be accepted, and a contract was signed on 5th May 1926. But Arnot deposed that after the contract was signed he told Maling that he would have nothing to do with the payment, and that he (Maling) would have to nominate someone to receive it. Maling, according to Arnot, nominated Buckle, and demanded a further sum of £600 for expenses. Arnot agreed to this further demand, making the total sum £10,600. A few weeks later—about the latter half of July or the first day of August—Arnot declares that he wrote to Sir James Kemnal, the managing director of the defendant Company, who was in England, telling him the "history of the job"; "what he" (Arnot) "was up against"; that he "had made every effort to get the business without blackmail"; that "Maling had given him the name of Buckle and the English, Scottish & Australian Bank" as the account to which the money should be paid, as he (Arnot) had "refused to

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have anything to do with the transaction"; and that he (Arnot) "gave the name Buckle, the English, Scottish & Australian Bank, and £10,600," and said "that would be a sufficient discharge for payment of the money." Arnot further deposed that matters that he did not wish to become public property he communicated to Sir James Kemnal in London, that he wrote to him in the present case and addressed the envelope to Sir James Kemnal, Managing Director, Babcock & Wilcox Ltd., London, and that he probably marked it "Private and Confidential," but would not swear as to this last; also that the letter was in manuscript, and did not go on the files of the Company in Sydney. Notice to produce this letter was given to the defendant, but it was not produced. Sir James Kemnal was dead at the time of the hearing of the charge, but when he died does not appear. Six or seven weeks after the despatch of this letter, Arnot heard from Maling that the money had arrived, but he had no advice, so far as the evidence goes, from the defendant or Kemnal, of the despatch of the money. About nine weeks "after the transaction," Arnot went to England, and declares that he spoke to one person about the money, the assistant secretary, but he did not speak of it to the directors, nor they to him. He discussed the contract, and also other jobs, but nothing was said concerning the matter of the £10,600.

Now it is insisted that the magistrate might reasonably infer from this evidence that Sir James Kemnal provided and forwarded the sum of £10,600 credited to the account of Buckle in the English, Scottish & Australian Bank at Sydney, that it was within the scope of his authority as managing director of the defendant to provide and forward it, and that consequently the defendant was responsible in law for his acts. In the circumstances of the case, I do not suppose that any of the directors of the Company ever saw the letter or authorized the payment of the sum of £10,600, or knew anything about it; anyhow, there is no evidence incriminating them; though I, of course, accept the proposition that a corporation is liable in law for the wrongful acts of its directors, officers and servants, committed without authority but in the course of the service of the corporation and in apparent furtherance of its purposes. (See *Pollock*

on *Torts*, 11th ed., p. 96; *Lloyd* v. *Grace, Smith & Co.* (1).) But the present case really turns upon the credibility of Arnot, who apparently advised, recommended, and encouraged the transaction, if he did not actually participate in it. It would be prudent, I should think, in view of all the circumstances of the case, to require some corroboration of Arnot's story before accepting it. It is a grave accusation of bribery and corruption against Sir James Kemnal, who is dead, and should not be accepted without confirmation that places it beyond reasonable doubt. I am not unmindful of the fact that the magistrate saw and heard Arnot as a witness, but he makes nothing of this in his reasons, and merely states his conclusion. The credibility of the story is open to criticism. Thus, in May 1926 the contract with Babcock & Wilcox Ltd. was signed, and yet the supposed letter was not written until the latter half of July or 1st August, and the money which Kemnal is alleged to have provided to obtain a contract which had been signed in May was not paid into Buckle's account until September, and was by way of blackmail or a bribe which Arnot had not promised but only said he would recommend. Again, it is strange that nothing was said to the directors about the blackmail when Arnot was discussing the contract with them in London. The amount is startling, and must have seriously affected the profits of the Company. Arnot is deeply interested, and his motives cannot be fathomed: it may be that he is shifting responsibility in the transaction on to the shoulders of a dead man. Unless Arnot's evidence be true, the whole case fails. But, it is said, the fact that a large sum of money from a source and place unproved was placed to the credit of Buckle's account confirms Arnot's story, and, taken together with it, connects the defendant with the payment. All I can say is that the impression left on my mind by the evidence is one of doubt and uncertainty, and that it would be unsafe to convict anyone of gross dishonesty and corruption upon it. The payment is the only evidence in support of Arnot's story, and it completely fails to identify the party paying the money: Arnot cannot corroborate himself, and yet his evidence is all that can be suggested as an identification of the party paying that money. If one is asked: who then paid the money?

(1) (1912) A.C. 716.

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the proper answer is that the prosecution must prove beyond reasonable doubt and by credible evidence that the defendant paid the money. In our abhorence of dishonesty, let us not first assume that Kemnal must have been one of the guilty parties, and then rely upon suspicion, conjecture and guesses at the truth "to confirm not our judgment but our prejudices."

In my opinion, it would be wiser and safer, on the evidence in this case, to confirm the judgment of the Supreme Court and dismiss the appeal.

Such a result would not prevent the Municipality of Sydney from bringing an action against Babcock & Wilcox Ltd. for the sum of £10,600, if so advised, and then the facts could be placed beyond doubt, perhaps by means of discovery, and certainly by evidence taken on commission. I frankly distrust the summary method that was adopted in the present case for the recovery of the sum of £10,600, and the meagre evidence that was given in support of the order made.

Appeal allowed. Rule nisi discharged.

Solicitor for the appellant, and the respondent in the motion, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, and the applicant in the motion, *Creagh & Creagh.*

J. B.