1951

*June 4
**Oct. 2
*Oct. 12

JOHN CLAY .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal Law—Theft—Receiving—Retaining—Recent Possession—Whether where explanation rejected but accused acquitted of receiving conviction on retaining charge maintainable—Whether doctrine of recent possession applies to retaining—Cr. Code s. 399.

The accused was charged with (*a*) receiving and (*b*) retaining stolen goods knowing them to be stolen. The evidence established that the goods were found in the recent possession of the accused. He gave no evidence but his wife, called as a witness on his behalf, gave an explanation as to how the goods came into her husband's possession. The trial judge, sitting without a jury, found that the explanation was not a reasonable one but acquitted the accused on the receiving charge and convicted him on the charge of retaining. An appeal to the Ontario Court of Appeal was dismissed but leave to appeal to this Court was granted on the following questions of law: (*a*) The doctrine of recent possession does not apply to a charge of retaining stolen goods; (*b*) The learned trial judge having acquitted the accused

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

***Reporter's Note*—The appeal was argued on June 4, 1951 before Kerwin, Kellock, Estey, Locke and Fauteux JJ. By order of the Court it was re-argued before the full bench on Oct. 2.

on a charge of receiving could not in the circumstances of the case convict him on a charge of retaining; (c) An accused person cannot be convicted of both of the offences of receiving and retaining.

Held: Rinfret C.J., Rand, Kellock, Estey, Locke and Cartwright JJ., (Kerwin, Taschereau and Fauteux JJ. dissenting):

1. The appeal should be allowed.

2. An accused person cannot be convicted both of receiving and of retaining. *R.* v. *Yeaman* 42 Can. C.C. 78; *R.* v. *Searle* 51 Can. C.C. 128; *Frozocas* v. *The King* 60 Can. C.C. 324; *Ecrement* v. *The King* 84 Can. C.C. 349.

3. The accused having been acquitted on a charge of receiving, could not in the circumstances of the case be convicted of retaining.

Per Rand, Kellock, Locke and Cartwright JJ. The accused having been acquitted on the receiving charge it was for the Crown to establish subsequent guilty knowledge which it failed to do. There was accordingly no evidence or no sufficient evidence upon which a charge of retaining could be supported.

Per Kerwin J. *contra.* The rejection of the explanation permits the doctrine of recent possession to apply to the charge of retaining. Not only was there evidence to determine that the explanation was not reasonable but it appeared that was the only proper conclusion.

Per Taschereau and Fauteux JJ. *contra.* In acquitting the accused on the charge of receiving the trial judge said he did not accept the explanation and therefore the presumption was not rebutted and it was open to him to decide as he did.

Held: also, Rinfret C.J. Kerwin, Taschereau, Estey and Fauteux JJ., (Rand, Kellock, Locke and Cartwright JJ. dissenting). The doctrine of recent possession applies to a charge of retaining. *The King* v. *Lum Man Bo* 16 Can. C.C. 274; *Lopatinsky* v. *The King* [1948] S.C.R. 220.

Per Taschereau and Fauteux JJ. S. 399 provides for two distinct offences "receiving" or "retaining" *knowing* it to have been so obtained. It matters not then *since when* on a charge of retaining, or *how long after* on a charge of receiving, the guilty knowledge co-exists with possession, provided it does at any time during retention on the former, and at the time of reception on the latter. To import into the section any question as to the duration of the guilty knowledge is to add to the word "knowing", the most essential word in the entire section, a qualification expressly rejected from the provision by the very word itself.

Per Estey J. The language adopted by Parliament indicates it contemplated the application of the doctrine to the offence of retaining, and this view finds support in that Parliament has not since *Lum Man Bo supra* was decided in 1910, enacted any amendment to the section.

Per Rand, Kellock, Locke and Cartwright JJ. *contra.* The doctrine does not apply, the Crown must establish not only possession but knowledge subsequently acquired of the stolen character of the goods. *R.* v. *Cohen* 8 Cox C.C. 41 and *R.* v. *Sleep* 1 Le. & Ca. 44, applied. *The King* v. *Lum Man Bow supra, Richler* v. *The King* [1939] S.C.R. 101 and *Lopatinsky* v. *The King, supra,* distinguished.

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APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) affirming his conviction by Forsyth County Court Judge in the County Court Judges' Criminal Court for the County of York on a charge of retaining stolen goods in his possession. Reversed.

C. L. Dubin K.C. for the appellant. The doctrine of recent possession does not apply to a charge of retaining. The theory upon which the doctrine evolved was that a person who was in possession of goods recently stolen was likely to be the thief and he was called upon for an explanation as to the manner in which they came into his possession. It had been the law that the so-called presumptive inference from which a jury might convict related only to theft and not receiving. *R.* v. *Langmeand* (2) apparently for the first time extended that charge to receiving because receiving also contemplates a guilty knowledge at the time of receipt. Receiving recently stolen goods brings into question only the initial possession of the goods whereas on a charge of retaining the initial possession is presumed to be innocent and a person is guilty of retaining as distinguished from receiving when having come by the goods honestly he later acquires knowledge that they are stolen and keeps them. On such a charge an accused is not called on to explain his initial possession because it is presumed innocent and the entire doctrine of recent possession only calls upon the accused to explain his initial possession. *R.* v. *Searle* (3); *R.* v. *Jones* (4); *R.* v. *Carmichael* (5); *R.* v. *Powell* (6); *R.* v. *Lamoureux* (7); *R.* v. *Scott* (8); *R.* v. *Watson* (9).

The judgment in *R.* v. *Lum Man Bow* (10) to the contrary was wrongfully decided and it will be noted that the argument now submitted was not made in that case. The contrary view in *Richler* v. *The King* (11) is *obiter* and the Court was not dealing with the argument now submitted.

In the alternative, assuming that the doctrine of recent possession applies to a charge of retaining, the learned trial judge having acquitted the accused of receiving could not

(1) [1951] O.W.N. 104; 98 Can. C.C. 284.
(2) Le. & Ca. 427; 169 E.R. 1459; 9 Cox C.C. 464.
(3) 51 Can. C.C. 128; 24 A.L.R. 27.
(4) 47 Can. C.C. 380.
(5) 28 Can. C.C. 443 at 447.
(6) 3 Cr. App. R. 1.
(7) 4 Can. C.C. 101.
(8) 31 Can. C.C. 399.
(9) 79 Can. C.C. 77.
(10) 16 Can. C.C. 274; 15 B.C.R. 22.
(11) [1939] S.C.R. 101; 72 Can. C.C. 399.

properly in the circumstances have convicted him of retaining and the verdict is inconsistent. Assuming the doctrine did apply all that is thereby required was an explanation that might be reasonably true that the accused came by the goods honestly. Roach J.A. in the Court of Appeal held that the doctrine only required an explanation of how the accused came by the goods and that an explanation which rebuts the presumption on the receiving charge also rebuts it on the retaining charge and in the absence of other evidence establishing guilty knowledge at the time of receiving he is entitled to an acquittal. By an acquittal on the charge of receiving the accused has rebutted the presumption of guilty knowledge at the time he initially came into possession of the goods and any adverse inference from recent possession of stolen goods has been met. The Court of Appeal failed to give any effect whatever to the acquittal on the charge of receiving. Having been acquitted of receiving the accused is in the same position as if his explanation had been accepted and he could not properly be convicted unless there was evidence that after his initial possession of the goods he subsequently learned they were stolen. There is no such evidence. Neither the trial judge nor the Court of Appeal made any such finding and the conviction was made and affirmed solely on the doctrine of recent possession. The conviction on the charge of retaining was inconsistent with the acquittal on the receiving charge. *R.* v. *Cook* (1); *R.* v. *Mondt* (2); *R.* v. *Hayes and Pallante* (3); *R.* v. *Christ* (4).

The accused cannot be convicted of both the offences of receiving and retaining. The Court of Appeal held that the accused should have been convicted of receiving but having been acquitted on the receiving charge all the evidence could be considered on a retaining charge as if there had been no acquittal on the charge of receiving, and that the accused could be convicted of both offences, but the offences are alternative offences and an accused cannot be guilty of both. Where the accused has knowledge of the goods being stolen at the time of their reception, he is guilty of receiving and that offence is complete. If he continues to hold them he is still only guilty of receiving. It is only where he realizes some time after he initially received

(1) 15 Can. C.C. 40.
(2) 60 Can. C.C. 273.
(3) 77 Can. C.C. 195.
(4) 35 Cr. App. R. 76.

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them that the goods are stolen and then retains them that he is guilty of retaining. *R.* v. *Brown* (1); *R.* v. *Yeamen* (2); *R.* v. *McClennan* (3); *Ecrement* v. *The King* (4); *R.* v. *Ungaro* (5).

C. P. Hope K.C. for the respondent. "Receiving" and "retaining" in s. 399 relate to two different offences. *R.* v. *Searle* (6). This statement of the law applies here as the appellant was acquitted of "receiving" and convicted of "retaining". The appellant contends the doctrine of recent possession does not apply to a charge of retaining. It has long been held that it applies to the offence of receiving. *R.* v. *Langmead* (7). The Court of Appeal of British Columbia held that it applied to the offence of retaining. *R.* v. *Lum Man Bow* (8) and *R.* v. *Davis* (9). The latter case proceeded on the basis that the Crown must prove that the goods were in fact stolen. In *R.* v. *Parker* (10) McDonald J.A. at p. 12 says that in cases of receiving and retaining the question is not whether the explanation is believed but whether it is a reasonable one. O'Halloran J.A. in *R.* v. *Mandzuk* (11) at 290 "Lack of proof that the appellant knew the nature of the property and that it was stolen, fail to take into consideration that when a person is found in possession of recently stolen goods (in this case slightly under two months) that fact may be regarded as circumstantial evidence of his knowledge (and cf. *R.* v. *Wilson* (12) Martin J.A. at 67) that they were stolen, unless he gives a reasonable explanation of his possession of them." Bird J.A. at 295 "There being evidence of recent possession of stolen goods, a *prima facie* presumption arises that the accused is either the thief or the retainer of the stolen property . . ." In *R.* v. *Tuck* (13) the accused convicted of retaining appealed, one ground being misdirection as to recent possession. Roach J.A. who wrote the judgment of the Court says at p. 52 "The proper direction on the trial of an accused charged with receiving or retaining has been settled, if there was previously any doubt about it by the Supreme Court of Canada in *Richler* v. *The King* (14)."

(1) 65 Can. C.C. 244.
(2) 42 Can. C.C. 78.
(3) 80 Can. C.C. 370.
(4) 84 Can. C.C. 349.
(5) [1950] S.C.R. 430.
(6) 51 Can. C.C. 128.
(7) 9 Cox C.C. 464.
(8) 16 Can. C.C. 274.
(9) 75 Can. C.C. 224.
(10) 77 Can. C.C. 9.
(11) [1945] 3 W.W.R. 280.
(12) 35 B.C.R. 64.
(13) 86 Can. C.C. 49.
(14) [1939] S.C.R. 101.

At 103 the learned Chief Justice, with whom the other members of the Court agreed, said: "The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether the explanation might be reasonably true, or to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty", and at p. 54 "It is true that the learned trial judge in those parts of his charge which I have quoted refers to the doctrine of recent possession in cases where the charge is receiving. But since the doctrine of recent possession applies similarly to a charge of retaining there was no misdirection . . ." In *R.* v. *Lopatinsky* (1) Estey J., who wrote the judgment of the Court, applies the doctrine to the offence of retaining.

As to the appellant's second point that the trial judge having acquitted on the receiving charge could not convict on the retaining charge. He was entitled to convict on both or either of them according to the way in which he viewed the evidence. *R.* v. *Langmead supra* per Pollock C.B. at 467, Martin B. at 468. In the instant case it was just as logical to convict of the retaining on an acquittal of receiving as it was in the *Langmead* case to acquit of theft and convict of receiving. It is for the jury to decide what is the proper verdict having regard to the facts. *R.* v. *Lincoln* (2). The reasoning of Roach J.A. who wrote the judgment of the Court of Appeal (3) is the correct reasoning, that of Martin J.A. in *R.* v. *Brown* (4) appears to be based on fallacious reasoning.

As to the appellant's third point that an accused person can not be convicted of both the offences of receiving and retaining, the point is irrelevant as the appellant was convicted only of retaining.

THE CHIEF JUSTICE: Leave to appeal was granted on the following questions of law:

(*a*) The doctrine of recent possession does not apply to a charge of retaining stolen goods;

(1) [1948] S.C.R. 220.

(2) [1944] 1 All E.R. 604.

(3) [1951] O.W.N. 104; 98 Can. C.C. 284.

(4) 65 Can. C.C. 244.

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(*b*) The learned trial judge having acquitted the accused on a charge of receiving could not in the circumstances of the case convict him on a charge of retaining;

(*c*) An accused person cannot be convicted of both offences of receiving and retaining.

In my humble view, the answer to Question (*b*) is sufficient to dispose of the appeal.

There is no doubt that the weapons were stolen goods; that the accused received them and that he had acquired recent possession of them. The only other element necessary to be proved in order to justify conviction on the charge of receiving was that the accused, at the time he received them, knew they were so stolen.

To establish that necessary element "the Crown relied on the doctrine of recent possession by the application of which the burden rested on the accused to give an explanation that he came by these weapons innocently", which explanation might reasonably be true, and, because it might reasonable be true, would raise a doubt as to his guilt.

Such explanation was given by the wife of the accused. The trial judge analyzed that explanation, examined every fact or element of same and came to the conclusion that it was not reasonable; but, when he came to apply that conclusion to the charge of receiving, he nevertheless acquitted the accused of that charge. On the same explanation, which he did not believe, he found the accused guilty of retaining.

As the only ground upon which he could acquit the accused of receiving was the explanation given by the wife, one must come to the conclusion that he believed it and found it reasonable with regard to the charge of receiving; while he stated in his judgment that he did not believe it with regard to the charge of retaining.

In my opinion that is incompatible. He could not at the same time believe the explanation or find it reasonable and disbelieve it and find it unreasonable.

All the facts considered by him with regard to that explanation, which led him to state that he thought the latter unreasonable, were all facts having to do with the charge of receiving. None were fresh facts which happened

subsequent to the receiving and relating only to the charge of retaining. That is precisely the interpretation of Roach J.A., who delivered the reasons for the Court of Appeal: (1). "The trial judge held that the explanation was not reasonable but he nevertheless acquitted him". There was only one explanation given and it applied to the charge of receiving. There was no distinct explanation given as regard to the charge of retaining.

There were no new facts put in evidence whereby a distinction could be made between the receiving and the retaining.

Very respectfully I think that the trial judge having acquitted the accused on the charge of receiving could not, in the circumstances of the case, convict him on a charge of retaining.

In my view, there is an absolute contradiction between the two findings of the trial judge.

For that reason, I am of opinion that the appeal should be allowed and the conviction set aside.

However, I understand that the reason for submitting *de novo* the appeal to the full Court was mainly to have the Court pronounce upon the question whether the doctrine of recent possession does or does not apply to a charge of retaining stolen goods; and on that additional point I wish to state that I concur with the other members of the Court who express the opinion that the doctrine does apply equally to a charge of retaining as to a charge of receiving stolen goods.

KERWIN J. (dissenting)—This is an appeal, by leave granted under section 1025 of the *Criminal Code* as enacted by s. 42 of c. 39 of the Statutes of 1948. The appellant was convicted in the County Court Judge's Criminal Court of the County of York, on June 7, 1950, of retaining in his possession, in the months of January and February, 1950, a Remington repeating shot gun and a Remington repeating rifle, the property of Grayson D. Burruss and therefore stolen, knowing the same to have been so stolen. This charge was the fourth count in a charge sheet which charged the appellant, first, with breaking and entering by day in

(1) [1951] O.W.N. 104;
98 Can. C.C. 284.

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January, 1950, the dwelling house of Grayson D. Burruss and stealing three guns and other articles, second, with breaking and entering by night in January, 1950, the same dwelling house with intent to commit theft, third, with receiving in his possession in the months of January and February the shot gun and rifle theretofore stolen, knowing the same to have been so stolen.

It was proved that on January 16, 1950, the gun and rifle were stolen from Mr. Burruss' house. The gun was found in the possession of the accused in his house on February 25, 1950. The rifle had on some earlier date in February been handed by the accused to one Enge for sale by the latter on terms that it would be sold for at least twenty dollars and that anything over that could be kept by Enge. There is no question about the identity of the gun and rifle and of the fact of their having been stolen. The accused did not give evidence but an explanation as to how these two articles came into his possession was given by his wife, which to some extent was corroborated by the testimony of Enge who had been called on behalf of the Crown. The County Court Judge found the explanation not reasonable and he found the appellant guilty on the fourth count, that is, of retaining, but endorsed the charge sheet with a verdict of not guilty on counts 1, 2 and 3.

Under these circumstances the first point argued was that the doctrine of recent possession does not apply to a charge of retaining. The applicable provision of the *Criminal Code* is s. 399, which reads as follows:

> 399. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained.

The offence of retaining was unkown to the common or statute law of England but was introduced in Canada when the *Criminal Code* was first enacted in 1892. It is an entirely separate offence from receiving. The doctrine of recent possession, as to both theft and receiving, was clearly established in *Reg.* v. *Langmead* (1). There, Langmead had been indicted and tried for stealing sheep, and

(1) (1864) 9 Cox. C.C. 464.

on a second count, for receiving the sheep knowing them to have been stolen. The jury convicted him on the latter count. It was argued that upon an indictment for receiving stolen goods, there should be some evidence to show that the goods were in fact stolen by some other person, and that recent possession of the stolen property was not alone sufficient to support such an indictment as such possession was evidence of stealing and not of receiving. That argument was not accepted. Chief Baron Pollock pointed out that the distinction between the presumption as to felonious receiving and stealing is not a matter of law. Blackburn J. stated that as a proposition of law, there was no presumption that recent possession points more to stealing than receiving. He continued:

> If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as render it more likely that he did not steal the property, the presumption is that he received it.

Of course, he was concerned only with the charges of stealing and receiving as there was no such offence as retaining known to the law at that time.

Logically there is as much reason to apply the doctrine to a charge of retaining as to a charge of receiving. It was so held by the Court of Appeal for British Columbia in *The King* v. *Lum Man Bow* (1), and by this Court in *Lopatinsky* v. *The King* (2). The point may not have been raised in those cases in the same manner as it was presented on this appeal but it was distinctly mentioned in the factum for the Crown, filed in this Court in the Lopatinsky appeal. I agree with the view of Roach J.A. in the Court of Appeal (3) in the present case where he states:

> Where the charge is retaining the explanation relates to the period of retention in this way and to this extent, that if at the time the accused received the goods he had knowledge that they were stolen, he continued

(1) (1910) 16 Can. C.C. 274.
(2) [1948] S.C.R. 220.
(3) [1951] O.W.N. 104; 98 Can. C.C. 284.

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thereafter to have that knowledge, but if at the time he received them he had not that guilty knowledge, there is no presumption that he thereafter acquired it. There is no burden on the accused who is charged with the offence of retaining to do more than give an explanation which might reasonably be true that at the time of receiving the goods he had not the guilty knowledge that they were stolen. Indeed, it is not difficult to think of a case in which a party innocently obtained possession of stolen goods and, apart from giving an explanation of the circumstances in which those goods came into his possession, he could do no more.

From the foregoing it follows that if an accused stands charged with both receiving and retaining stolen goods an explanation which rebuts the presumption on the receiving charge also rebuts it on the retaining charge and in the absence of other evidence establishing guilty knowledge at the time of receiving, he is entitled to an acquittal on that charge and in the absence of evidence establishing that after having received them he acquired knowledge that they were stolen, he is entitled to an acquittal on the retaining charge.

The second point raised by the appellant is that the trial judge having acquitted the accused of the charge of receiving could not, in the circumstances, convict him of retaining. However, it is not as if the trial judge had stated that he had accepted the explanation offered on behalf of the accused and therefore dismissed the charge of receiving, in which case it might be argued that there was nothing upon which he could base the conviction for retaining. In the circumstances existing in the present case, the fact that for some unexplained reason the appellant was found not guilty of receiving does not prevent a verdict of guilty of retaining. The rejection of the explanation permits the doctrine of recent possession to apply to the charge of retaining. It should be added that not only is there evidence upon which the trial judge could determine that the explanation was not reasonable but it appears that was the only proper conclusion.

The third point raised, that an accused person cannot be convicted of both offences, receiving and retaining, does not arise since the appellant was found not guilty of receiving.

The appeal should be dismissed.

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The judgment of Taschereau and Fauteux, JJ. was delivered by:

FAUTEUX J.:—It appears necessary, in view of the arguments raised in this appeal, to deal, at first, with the true legal notion of the offence or offences, created by the Canadian Parliament, in s. 399 of the *Criminal Code,* and then, consider the evidence on record and the conviction of retaining which is questioned by this appeal.

As to the first point.

By—and ever since—the enactment of the Criminal Code of Canada, retaining, as well as receiving, goods obtained by theft, knowing them to have been so obtained, constitutes a criminal offence in Canada. In this respect and since 1892, the Canadian law is at variance with the English law, wherein only the act of receiving, and not the act of retaining, constitutes an offence.

One of the consequences of this change and this difference in the two laws is that the cases decided in England,—where the occasion to discuss and apply a provision similarly worded as s. 399 never arose,—do not and cannot offer a precise and exhaustive definition of receiving and of retaining, both standing in relation to one another, as they do in s. 399.

But an important feature of the change, with respect to the real import of the section, stems from the very process by which it was accomplished. For this change in the law was not achieved by amendment, but by a codification of what became the main body of the Canadian Criminal Law, a law flowing from sources different in nature and origin. This very fact brings to the fore the rule of interpretation related to codification, according to which resort must not be had to the law pre-existing the codified law, unless the provisions of the latter be obscure and ambiguous.

Thus, to gather the true legal notion of the provisions of s. 399, the "proper course"—in the very words of Lord Halsbury, L.C., in *Bank of England* v. *Vagliano Brothers* (1), at page 151:

* * * is in the first instance to examine the language of the statute and to ask *what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law,* and not to start with inquiring

(1) [1891] A.C. 107.

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how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

But whether or not this rule is applied—and I can think of no reasons why it should not in the case under consideration—I fail to see what the difficulty is with respect to the first point, i.e., what facts may constitute an offence under the provisions of the section.

In the very terms of the provision under our law, everyone commits an indictable offence who:

(*a*) "RECEIVES or RETAINS in his possession * * *"

(*b*) "* * * anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada, would have constituted an offence punishable upon indictment * * *"

(*c*) "* * * KNOWING such thing to have been so obtained."

The natural meaning of this language is clear and non-ambiguous.

In (*a*):—If the evidence indicates the reception, on a charge of receiving, or the retention, on a charge of retaining, the first element, respective to each case, is fully established. This conclusion is equally true if, on either charge, both the reception and the retention are shown in the evidence; for—as far as the evidence is concerned—the question in each case, is not related to superabundance but only to sufficiency of the proof. Indeed, and in fact, less frequent may be the cases—but there are—where the one who receives does not retain, at least for some measurable time. The case of *Milton* v. *The King* (1) is a case in point. Equally, accidental may be the cases where a person who retains dishonestly, has received honestly, even though he had throughout the knowledge that the goods were stolen. This is illustrated by the case of *Rex* v. *Matthews* (2). Again and by the mere operation of s. 69 or others, one may in law, if not in fact, retain without having first received.

(1) (1943) 81 Can. C.C. 60.

(2) [1950] 1 All E.R. 137.

The difficulty there may be in certain cases,—where, as an illustration, the reception and the retention amount to one single transaction—to determine when the reception ceases and when the retention begins, is one related to evidence and not to substantive law.

In my view, this element in (*a*), while being worded in all-embracing, but not obscure nor confusing terms, is clear evidence of the will of the Canadian Parliament to cover in the most complete and effective manner the case of possession, at both reception and retention time.

In (*b*):—No discussion arises in this case.

In (*c*):—The third element which, as the second, is common to receiving and retaining, is the guilty knowledge. The words in the enactment are "*knowing* such thing to have been so obtained". The guilty knowledge must then co-exist with possession,—and this statutory requirement is fully satisfied if it does—(1) at the time of reception, on a charge of receiving, or (2) at any time during the period of retention, on a charge of retaining. In this respect, receiving and retaining are distinguishable as criminal offences. And once an accused is proved to have received or retained anything, obtained in any of the manners indicated in (*b*), the question is:—Did he, (1) at the time of receiving or (2) at any time during the period of retaining, or (3) throughout the whole period of his possession, have the knowledge that the thing was so illegally obtained?

An affirmative answer to (1), or (2), or (3) undoubtedly establishes clear guilt and certainly makes the accused amenable to justice, for receiving in (1), for retaining in (2), or either of them in (3); for in each case, the elements of guilt, as enacted by Parliament, are present.

Indeed and in the third alternative, guilty knowledge co-exists with both the reception and the retention of the possession. The fact that the evidence on a charge of retaining would indicate that the guilty knowledge proven to exist during the retention, would have equally pre-existed to it, or the fact that the evidence on a charge of receiving would indicate that the guilty knowledge, proven to exist at the time of reception, would not have ceased to exist but continued thereafter, cannot alter but only strengthen, in each case, the proof of the co-existence of

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the guilty knowledge with possession. For the enactment merely says "*knowing* the same to have been so obtained". No matter then, *since when,* on a charge of retaining, or *how long after,* on a charge of receiving, does the guilty knowledge co-exist with possession, provided it does at any time during retention, on the former, or at the time of reception, on the latter. To import in the section any like questions as to the duration of the knowledge is, in my view, adding to the word "knowing"—the most essential word in the entire section—a qualification expressly rejected from the provision by the very word itself.

In brief, the section provides, as it was decided in several Canadian cases, for two distinct offences, the first being receiving and then the second being retaining anything illegally obtained, *knowing* it to have been so obtained.

With respect to punishment, the inescapable consequence of the distinction between the two offences is that the sentence stated in the section is the authorized punishment for the commission of either of the two offences therein created.

It is from the latter conclusion—which is not disputed—that stem the following argument and conclusion made on behalf of the appellant.

It is said that Parliament never intended that, in addition to a penalty for receiving, the accused should be liable to a further penalty if, after so acquiring stolen goods, he retains them. On the basis, and as a result of this assumption, another and a new concept of the offence of retaining is advanced and concluded to be the one meant by the language of the section. It is suggested that retaining stolen goods, knowing them to have been stolen, ceases to be the offence of retaining once the evidence, establishing a guilty knowledge during retention, also indicates that this guilty knowledge was gained at the time of reception of the stolen goods or, to put it with more precision, that the guilty knowledge in retaining must be—and, therefore, must be proved to be—not only subsequent to reception but exclusively so.

One would observe, at first, that this concept of retaining —in support of which no precedent has been found to exist —rests on the limited consideration of a case where receiving and retaining amount to a continuous or a single transaction.

It would nevertheless, if accepted, affect the infinite variety of cases where retaining or receiving may, in fact and in law, not amount to a continuous or single transaction. This, particularly in view of the clear language of the section, calls for the necessity of examining both the assumption and the conclusion advanced on behalf of the appellant.

As to the first.

Whether or not Parliament intended, in the particular case above stated, that an accused should be liable to two penalties, is a matter that we are not called upon to decide in this case. In all the reported cases where the occasion to decide the question could have arisen, one penalty only was given, or if two were stated, they were made concurrent. I fail nonetheless to appreciate how a negative answer to the question could afford a valid criterion for the interpretation of the section. For the fact that a man may not be *punished* twice for the same offence does not necessarily import that he may not twice be *prosecuted* on a different charge setting up another legal aspect of the same facts. S. 15 of the *Criminal Code* supports that proposition.

As to the conclusion of the new definition.

With deference, I am unable to agree with the view that while, admittedly, the offence of retaining must, as one of its elements, include the guilty knowledge at some time while the possession is being retained, it must also exclude it at the time when possession is gained. I can think of no case where Parliament states—except in express language—the elements of a crime in maximum or exclusive terms and where, as a consequence, evidence must be made to exclude certain facts in order to reach the degree of certainty required for a conviction in criminal matters. Receiving and retaining, in s. 399, are certainly not described in such a manner. Strange and most technical, I think, it would be (*a*) if a person accused of retaining, could, having admitted the existence of the guilty knowledge during the retention, plead successfully that this knowledge had been already gained by him at the very time the goods were received; or, conversely, (*b*) if a person, accused of receiving, could plead successfully on that charge, that the guilty knowledge existing, at the time he gained possession, continued thereafter with the retention of the possession.

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Under the authorities where possession is proved to be recent in relation to theft, a presumption arises that the possessor came by the goods dishonestly. If, consequently, the above definition of retaining is accepted, this presumption of fact could, by itself, defeat the case of the prosecution on a charge of retaining, where the evidence indicates recent possession.

That the evidence, in some cases, may, on either charge, indicate the elements of both crimes is certain, but, if it does, I can find no justification to say that one of either the charge of receiving or the charge of retaining should have been preferred, by preference to the other.

For these reasons, I am not only unable to conclude that the above contention, made on behalf of the appellant, casts any obscurity or ambiguity on the natural meaning of the provision, but I am convinced that, if accepted, it would directly defeat the only import of the word *knowing*.

Dealing now with the second point, i.e., the evidence on record with respect to the conviction of retaining in the present appeal.

In the present case, the evidence revealed particularly the following facts: On the 16th of January 1950, the residence of one Burruss was broken into and entered; certain chattels, including a Remington repeating shot-gun and a Remington repeating rifle were stolen therefrom; having gained possession of these weapons, the appellant gave the rifle—valued at sixty-eight dollars—to an immediate neighbour, one Enge, with instructions to sell it, at a price left at the latter's discretion, provided that out of the proceeds of the sale, twenty dollars would be remitted to the appellant; the other gun was still in the possession of the latter, on the 25th of February 1950, when it was seized in execution of a search warrant.

Thus the appellant—even on the theory of a defence—did, as a fact, receive and retain possession of stolen goods. Of this there is no dispute.

The only point in issue is related to the third element, i.e., the guilty knowledge of the appellant.

One cannot in fact—even if he may in law—retain possession of a thing without having first gained possession of the same. Thus, on a charge of retaining, in order to decide whether the retaining is honest or dishonest, it

becomes not only pertinent and material but essential to consider whether there is any admissible evidence in the case indicating that the accused had or had not the guilty knowledge when he gained possession.

For once the character of this original possession is, in a given case, ascertained by direct or circumstantial evidence, as being dishonest or not proved to be such, the character of this original possession cannot suddenly change without further evidence of some subsequent intervening fact altering it. Thus, and in the absence of any such subsequent fact, if the knowledge is shown by the evidence to be dishonest at the time when possession is gained, no presumption arises that it becomes honest during retention; and conversely, if the knowledge is proved to be honest—or not proved to be dishonest—at the time the accused gained possession, no presumption can either arise, without such subsequent fact, that this knowledge at the time possession was gained became dishonest during the period possession was retained.

Knowledge is a matter of fact and the proof of its character is not dependent on the nature of the charge laid but on the very nature of the facts disclosed in the evidence.

Amongst the methods of proving the guilty knowledge, the doctrine of recent possession must be considered. Thus, any person, found in possession of stolen goods, is presumed to have come by them dishonestly if such possession is recent in relation to the theft; or, as was said by the Lord Chief Justice in *Rex* v. *Powell* (1), at page 2:—

> The possession of recently stolen property throws on the possessor the onus of shewing that he got it honestly.

The presumption being applied in the case of an indictment with a count of theft and a count of receiving, the jurisprudence is that in the absence of any explanation which might reasonably be true, the accused may—but must not necessarily—be found guilty of either theft or receiving. But the presumption itself is one of fact and not one of law. Again, it is not dependent on the charge laid, but it rests solely on the fact that the possession of the stolen goods is recent in relation to the theft thereof. The guilty knowledge is then presumed.

(1) (1909) 3 Cr. App. R. 1.

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The fact that there are no authorities in England indicating that the presumption arising from recent possession would apply to what is a case of retaining under the Canadian law, is of no significance in the present discussion but is only consistent with the other fact that the offence of retaining as we have it under the *Code*, is not known in England.

That the complete doctrine of recent possession has been applied in Canada on a charge of retaining, is clearly evidenced by the following decisions: The Supreme Court of Canada in *Lopatinsky* (1); The Ontario Court of Appeal in *Rex* v. *Tuck* (2); The British Columbia Court of Appeal in *The King* v. *Lum Man Bow* (3). And in no reported cases, anywhere in Canada, was it said that the presumption is inapplicable on a charge of retaining.

In the present case, it is granted that the possession by the appellant of the stolen guns was recent in relation to the theft thereof. Thus, this sole fact, conditioning the play of the presumption, being established, the appellant is therefore presumed to have come by these guns dishonestly. This is a rule of evidence and not of substantive law.

Further, there is nothing in the evidence indicating that this original guilty knowledge was subsequently changed to become honest during the period of time covered by the count of retaining, in the charge sheet.

The accused was jointly tried on four counts, the third being for receiving and the fourth for retaining. At no time did he ask for a separate trial on each or any of these counts. And, in the evidence common to all counts and admissible in each, appears an explanation, not only as to how the appellant gained possession of the stolen guns but how he dealt with each of them thereafter. This explanation was not accepted by the trial judge, and was qualified as "preposterous" by all the members of the Court of Appeal. In the views of both Courts, the presumption that the accused came by these guns dishonestly had not been rebutted. It was open, therefore, to the trial judge to decide, as he did, that the guilty knowledge existing at the time the appellant gained possession of these guns continued while he retained them, for there was no evidence

(1) [1948] S.C.R. 220. (2) (1946) 86 Can. C.C. 49.
(3) (1910) 16 Can. C.C. 274.

of any subsequent fact affecting the dishonest character of the original possession. On the contrary, the facts subsequent to the time the accused gained possession of the guns, added to the presumption, resulting from the recent possession, that he came by them dishonestly, were only capable of strengthening this guilty knowledge during the time of retention. Thus, (*a*) the appellant sold one of the two guns which the alleged unknown hunters were supposed to claim back, (*b*) the sale was made at a ridiculous price left, besides, to the discretion of a neighbour to whom the gun was entrusted; (*c*) these alleged hunters unknown to the appellant were never heard of though two months had elapsed when the seizure of the last gun took place.

It is true that the learned trial judge acquitted the appellant on the charge of receiving—one is not bound to convict on the strength of the presumption alone, the rule is "may" but not "must" find guilt,—and found him guilty on the charge of retaining. This leads the appellant to argue that, there being no other evidence as to the guilty knowledge but the presumption arising from recent possession, the acquittal on receiving was evidence that the trial judge accepted the explanation of the defence as to recent possession.

No doubt that, having been acquitted of receiving, the appellant could, on a fresh indictment for the same offence, plead *autrefois acquit*. But to say that, on the basis of this acquittal on receiving, one must conclude that on the consideration of the charge of retaining, the trial judge accepted the explanation of the appellant when, in too concise oral reasons for judgment but yet in unmistakable terms, he effectively said he did not, does not follow. It may be that, had the verdict been given by a jury or had the trial judge given no reasons, the appellant could have invoked the decision rendered in the *Quinn* case (1), a decision resting on what is still a conflicting view of the law in Canada. See *Rex* v. *Bayn* (2); *L.* v. *The King* (3). But again, and in the present instance, the trial judge plainly said he did not accept the explanation. The presumption was not rebutted and it was open to the trial judge to decide as he did.

(1) (1905) 10 Can. C.C. 412; 11 O.L.R. 242.
(2) (1932) 59 Can. C.C. 89.
(3) (1934) 62 Can. C.C. 308.

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In support of the appellant's contention on this last point, the case of *Leonard Edward Ernest Christ* (1), was quoted. In my view, this case is not only distinguishable from the present one, but is rather conclusive against the theory advanced on behalf of the appellant. The *ratio decidendi* in that appeal is to be found behind the verdict. It rests on a consideration of the evidence made in the light of the summing up. It is expressed in these terms by Devlin J.: "It is impossible to believe that the jury could have accepted the evidence of the police, upon which alone they would be justified in convicting him of receiving, and that at the same time rejected it, or not accepted it, in the case of larceny." In that case, there was no alternative. The police could not, at the same time, be believed and disbelieved.

On the contrary, there is an alternative open to a judge or a jury when the presumption of guilt, arising from recent possession, is actually found to be unrebutted. Upon such unrebutted presumption, there may, or may not, be a verdict of guilty. Again, the doctrine is not that the judge "must" but that he "may" convict upon it. The essential point in the present appeal is that there is no place for speculation as to what the finding of fact of the trial judge was in this respect for he clearly stated he did not accept the explanation. This was a finding of fact and even if it may be stated that his conclusion or the verdict he rendered on the charge of receiving, did not follow from this finding of fact, this can hardly supply a valid reason to adopt, on the consideration of the charge of retaining, a conclusion which, again, would not follow from this particular finding of fact further supplemented with evidence of circumstances subsequent to the time of reception of the guns.

Furthermore, even on the basis of the proposition propounded on behalf of the appellant,—a proposition which, with deference, I do not accept—that in a case of retaining, the guilty knowledge must be exclusively subsequent to receiving, the oral judgment of the trial judge fully justifies the conclusion that on his view of the evidence, there was no doubt that the appellant had the guilty knowledge during the period of retention of the guns, even if he did not have it at the time he received them.

(1) (1951) 35 Cr. App. R. 76.

While each case must be determined according to its own factual and legal features, in the circumstances of the instant case I agree with the conclusion reached in the unanimous judgment of the Ontario Court of Appeal that the conviction on the count of retaining should stand.

The appeal, consequently, should be dismissed.

The judgment of Rand, Kellock, Locke and Cartwright, JJ. was delivered by:

KELLOCK J.:—The appellant was charged in the County Court Judge's Criminal Court with (*a*) breaking and entering by day the dwelling house of one Grayson D. Burruss and the theft therefrom of certain guns and other articles, (*b*) breaking and entering by night the said dwelling house with intent to commit theft therein, (*c*) receiving a shotgun and rifle, property of the said Burruss, knowing the same to have been stolen, and (*d*) retaining in his possession the said shotgun and rifle, knowing the same to have been stolen.

He was acquitted on the first three charges but was convicted on the charge of retaining, his appeal with respect to this charge being dismissed by the Court of Appeal for Ontario. The appellant now appeals to this court, by leave, upon the following questions of law:

(*a*) The doctrine of recent possession does not apply to a charge of retaining stolen goods.

(*b*) The learned trial judge, having acquitted the accused on a charge of receiving, could not, in the circumstances of the case, convict him on a charge of retaining.

(*c*) An accused person cannot be convicted on both the offences of receiving and retaining.

The charge of receiving of which he was acquitted was as follows:

That the said John Clay, at the Township of North York and elsewhere within the County of York, in the months of January and February in the year 1950, received in his possession a Remington repeating shotgun and a Remington repeating rifle, the property of Grayson D. Burruss, and therefore stolen, knowing the same to have been so stolen, contrary to the Criminal Code.

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The charge which is the subject matter of this appeal is

> And further, that the said John Clay, at the Township of North York and elsewhere within the County of York, in the months of January and February in the year 1950, retained in his possession a Remington repeating shotgun and a Remington repeating rifle, the property of Grayson D. Burruss, and theretofore stolen, knowing the same to have been stolen, contrary to the Criminal Code.

This last mentioned offence was for the first time made an offence in Canada under that name in 1892 when the *Criminal Code* was first enacted by 55-56 Vict. c. 29, s. 314 (now s. 399). The words, "or retains in his possession," were not in the bill as originally drafted, but were apparently added between second and third readings. The same words were also placed in s. 315 (now s. 400) and in the early part of s. 316 (now 401), but were omitted, perhaps by oversight, in the latter part of that section.

As to the offence of receiving stolen property with knowledge that it had been stolen, it was said by Avory J. in *Rex* v. *Norris* (1), that the offence of "receiving" is one of the most simple in the criminal law. "The essence of the charge is that the defendant should be proved to have known *at the time*" that the property had been stolen. The learned judge also said that, "Generally, it is enough to say that it is not a crime merely to be in possession of stolen property." So much is this so, even with knowledge of their stolen character, that in *R.* v. *Tennet* (2), the Court of Criminal Appeal quashed a conviction on the charge of receiving because the trial judge, in the course of his summing up to the jury, had said that the Crown had to prove that the accused knew the goods were stolen at the time he received them "or had them in his possession."

Knowledge, then, at the time the accused person comes into possession of the goods is the essence of the charge of receiving, and if the element of knowledge at that time be lacking, it will not do, in order to support a charge of receiving, to show that the goods were kept after guilty

(1) (1916) 12 Cr. App. R. 156 at 157. (2) [1939] 1 All E.R. 86.

knowledge subsequently acquired; *R.* v. *Johnson* (1). In fact, even though at the very time of receipt the accused person knows that the goods are stolen, but then intends to turn them over to the police, although he subsequently changes his mind, the offence of "receiving" is not made out; *R.* v. *Matthews* (2).

As s. 402 provides, the act of receiving is complete as soon as the offender has possession or control over the goods, or aids in concealing or disposing of them. Merely because, however, the goods may remain in the possession of the offender, does not render the offence any the less that of receiving, the essence of the offence being, as already pointed out, not length of possession but knowledge of the stolen character of the goods at the time possession is acquired. It is of interest to observe in this connection that the old form of indictment against a receiver, as set out in Taschereau's Criminal Acts (1888) p. 444, was

"that A.B., . . . did receive and *have* . . ."

When, therefore, Parliament added the words, "retains in his possession" anything obtained by any offence punishable on indictment "knowing such thing to have been so obtained," it could hardly have intended to have constituted a new and additional offence to be made out by mere continuance of possession for some "measurable interval of time" (to use the language of Roach J.A. in the court below) after receipt, as this ground was already covered by the offence of "receiving." Parliament must have intended to create an offence distinct from that of receiving, and as the latter includes all cases in which guilty knowledge was acquired at the time of the receipt of the goods, the offence of "retaining" can only arise where that element is lacking but where knowledge of their stolen character is subsequently acquired and the goods are kept thereafter. It has been so held in *R.* v. *Yeaman* (3), a decision of the

(1) (1911) 6 Cr. App. R. 218. (2) [1950] 1 All. E.R. 137.
(3) (1924) 42 Can. C.C. 78.

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British Columbia Court of Appeal; *R.* v. *Searle* (1), a decision of the Appellate Division of the Supreme Court of Alberta; *Frozocas* v. *The King* (2), and *Ecrement* v. *The King* (3), both decisions of the Court of King's Bench, Appeal Side, of the Province of Quebec. I think the offence of retaining is correctly described in *R.* v. *Searle* by Harvey C.J.A. at p. 128:

> Section 399 makes one "who receives or retains" guilty of an offence. One may receive stolen goods not knowing them to be stolen and subsequently learning that they were stolen may retain them and thereby become guilty of "retaining" though he could not be found guilty of "receiving".

These two different offences are very clearly described by Walsh J. in the *Frozocas* case at p. 331, as follows:

> It is true that an accused may be guilty of receiving goods stolen; he may also innocently receive the stolen goods, and become guilty of retaining them later, when he will have acquired knowledge of their unlawful source. Section 399, Cr. Code, was amended to cover the latter offence.

In the case with which the court was there concerned, it was contended that the conviction of the appellant was illegal because it condemned him for having committed two distinct offences; first, for having received the goods knowing them to have been stolen, and second, for having retained them with the same knowledge. Notwithstanding the form of the information and conviction, the evidence in the case was all directed to establishing guilty knowledge at the time of the actual receipt of the goods. With respect to the objection to the conviction, Walsh J. had this to say:

> Though s. 399 speaks of *receiving* and *retaining,* and though these may indicate at times separate offences, yet there are also times, and the present case is to the point, when retaining is a continuation of the act of receiving. In this instance, to have said that the accused retained the goods in question was only surplusage.

(1) (1929) 51 Can. C.C. 128. (2) (1933) 60 Can. C.C. 324.
(3) (1945) 84 Can. C.C. 349.

Howard J. put the point another way at p. 327, referring to the judgment of Harvey C.J.A. in *Searle's* case:

> I concur in the opinion expressed by the learned Chief Justice that s. 399 deals with two offences in a case such as he describes, but I have serious doubt that, where an accused has received goods which he knew at the time were stolen and retained them, an indictment to that effect can be said to contain two distinct counts. I am rather disposed to the opinion that in such circumstances, there is but one offence charged—that the acts of receiving and retaining constitute *"in substance one transaction, one continuous set of transactions:" Weinbaum* v. *The King* 53 Que. K.B. 270.

Letourneau J. at p. 329 dealt with the matter as follows:

> The appellant is right in alleging irregularity in the indictment for having received, concealed *and* kept stolen goods (*Rex* v. *Searle,* 51 Can. C.C. 128) in fine when s. 399 of the Cr. Code says, "who receives *or* retains in his possession . . ." but then again it must be said that if we come to the conclusion that a crime of having "received . . . knowing" etc., was committed, this plea in regard to a defect in the form of the complaint, is without any bearing.

Tellier C.J. and Dorion J. concurred.

It is plain, therefore, that the difference between these two offences is that, in the case of the offence of retaining, there is an interval of time, however short, between the actual receipt of the goods and receipt of knowledge of their stolen character, during which interval the possession is either an honest possession or the character of this interval is not in question. The answer to the third question of law raised on the appeal is, therefore, that an accused person cannot be convicted of both the offence of receiving and that of retaining the same goods. They are distinct offences and mutually exclusive. No one would suggest, I think, that the thief may be convicted of retaining merely because he keeps possession. I think a similar contention as to the receiver is equally unsound.

With respect to the presumption arising from possession of recently stolen goods, Pollock C.B., in his charge to the jury in *Regina* v. *Exall* (1), put the matter this way:

> Property recently stolen, found in the possession of a person, is always presumptive evidence against that person, unless the possession can be accounted for and explained consistently with innocence.

The question which arises is as to the offences with respect to the commission of which, such possession is evidence,

(1) 4 F. & F. 922.

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and that is answered by the learned Chief Baron in the passage immediately following that above quoted, namely,

> The principle is this, that if a person is found in possession of property recently stolen, and of *which he can give no reasonable account,* a jury are justified in coming to the conclusion that he committed the robbery.
>
> And so it is of any crime *to which the robbery was incident, or with which it was connected,* as burglary, arson or murder. For, if the possession be evidence that the person committed the robbery, *and the person who committed the robbery committed the other crime,* then it is evidence that the person in whose possession the property is found committed that other crime.

Examples of the application of the presumption in connection with the crimes mentioned are referred to in Taylor on Evidence, 12th Edition, p. 135, and Archbold, 32nd Edition, p. 404.

The offence of receiving is, of course, "incident to" or "connected with" robbery, burglary or theft, as may be also arson and murder, but that is not true of the offence of retaining stolen goods, as the latter is separated from knowledge of the character of the goods by reason of the interval of time already referred to. There is a complete break between the commission of these other offences and that of retaining, while in the case of receiving it is directly connected by reason of the guilty knowledge existing from the moment when the possession of the accused commences. In other words, recent possession implies association with the thief in the particular case. Any such connection in respect of a charge of retaining is, however, excluded by the elements of that offence.

The close connection between the offences of theft and receiving is indicated in East's Pleas of the Crown, Vol. 2, p. 744, in the author's discussion of earlier legislative attempts to deal with these offences, where he says that the receiver was generally the employer and patron of the thief. In fact, 29 Geo. II c. 30, s. 1, recites that "buyers or receivers are the principal cause of the commission of such theft." It may be that this fact entered into the reason for the rule under discussion.

In *Regina* v. *Langmead,* which is best reported in 1 Le. & Ca. 427, the defendant was indicted on two counts, one for theft and the other for receiving, knowing the goods to

have been stolen. Blackburn J. at 437 stated the presumption which arises from the fact of possession, as follows:

> I should have said that recent possession was evidence either of stealing or receiving, according to circumstances, and that, as soon as it was proved that the person in whose possession they were found did not steal them, his possession, if unaccounted for, was evidence that he had received them knowing them to be stolen.

While, as already stated, the offence of retaining stolen goods does not exist in England, the following from the same learned judge in the above case is pertinent with respect to the inapplicability of the presumption to an offence such as retaining. Blackburn J. said at p. 438:

> If you start with the *datum* that the prisoner was in possession of the sheep, then, his possession being dishonest, he must have been the receiver, if he was not the thief. As soon as it was shown that the prisoner could not have been the thief, it followed that he was the receiver.

This renders the point, in my opinion, very clear. In the case of theft and receiving, the possession of an accused *can only be a dishonest possession,* the only question to be answered so far as guilt is concerned being whether the accused actually stole the goods himself or received them from another person knowing them to be stolen. But if the character of the original receipt of the goods by the accused is not in question, but he is charged only with having subsequently acquired guilty knowledge, there is no room for the operation of the presumption with which the court in *Langmead's* case was concerned, and the Crown must establish affirmatively that such knowledge was in fact acquired. Just as the offence of retaining is itself the creation of statute, a statute would also be required to raise a presumption of guilty knowledge acquired after a receipt the character of which is not in question.

While, as already mentioned, there is no offence in England of retaining stolen goods generally, there has been for a great many years the offence of having possession of military or naval stores marked with His Majesty's mark. The statute 9-10 Wm. III c. 41 recites by s. 1 that it rarely happens that direct proof can be made that such goods have been stolen, but only that goods so marked were found in the possession of the accused. Section 2 goes on to provide that "such person or persons in whose custody, possession or keeping such goods or stores, marked as aforesaid" are found, should be liable to conviction.

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In *Regina* v. *Cohen* (1), the defendant was charged on indictment under s. 2 with unlawfully having in his possession certain naval stores marked with the broad arrow. It was held that it was necessary for the Crown to show, not only that the defendant was possessed of the articles, but also that he knew they were marked. Watson B. said at p. 42:

> I am of opinion that it is necessary, in order to convict a person under this statute of having naval stores marked with the broad arrow in his possession, to show not only that he had them in his possession, but that he also knew the nature of the articles, and that they were marked with the broad arrow. The statute is no doubt couched in very general terms; it does not state in so many words that he must have them in his possession "knowingly," but that must be the true meaning of the statute.

Hill J. said at p. 43 that

> no offence is committed under the second section unless it is shown that the individual in whose possession or custody the goods were knew that they were marked with the broad arrow.

A similar case under the same statute arose in *Regina* v. *Sleep* (2), in which the decision in *Cohen's* case was specifically approved. In *Sleep's* case, the Crown contended that upon the true construction of the statute a *prima facie* case was made out by showing that the stores were found in the prisoner's possession, and that the onus was then cast upon him of "showing that his possession is innocent." This contention was negatived, it being held that it was for the Crown to show that the defendant knew that the goods were marked goods. Notwithstanding that the statute said nothing about knowingly, the well settled principle of the criminal law that the defendant must have a guilty mind, rendered it necessary that the principle should be imported into the statute. The principle of this decision is embodied in s. 434 of the Code.

In a case such as the present, namely, retaining possession of goods recently stolen, the Crown must prove (*a*) that the goods were recently stolen, (*b*) that they were found in the possession of the accused, and (*c*) that after the accused acquired possession he learned of their stolen character. Just as, in a case arising under 9-10 Wm. III, there is no onus upon the accused to explain anything until the Crown has established not only possession of the marked goods but that the accused knew they were so marked,

(1) (1858) 8 Cox C.C. 41. (2) (1861) 1 Le. & Ca. 44.

equally in the case of an offence of retaining stolen goods, the Crown must establish not only possession in the accused but knowledge subsequently acquired of their stolen character. As Roach J.A. himself says in the court below, there is no presumption establishing such knowledge.

If it be said that the presumption here under discussion is applicable to a charge of retaining stolen property knowing it was stolen, and that the person accused of that offence must go into the witness box and explain how it was "come by," it seems to me that those who so say are also saying something else, namely, that in every charge of retaining there is included a count of receiving, with respect to which the accused must clear himself before the Crown will be called upon to do anything in the way of establishing that after the receipt of the goods the accused learned of their stolen character. From this it follows that if the explanation of the accused as to how he "came by" the goods is not accepted, he will be convicted, and, as the charge is that of retaining, the conviction will also be called retaining, although in reality, it will be for receiving. Such a procedure merely confuses the two charges which by definition are separate and distinct. If this view were permissible, it is difficult to see why the Crown would lay a charge of receiving in any case.

As the Quebec Court of Appeal pointed out in the case of Frozocas, a charge of receiving has nothing added to it by words alleging that the accused retained the goods. On the other hand, if a charge of retaining were drawn expressly so as to include a charge of receiving, it would be bad for multiplicity. I come back to the point that on a charge of retaining as distinct from receiving, the state of mind of an accused person when he received possession of the goods is not in issue. In *Rex* v. *Bond* (1), Kennedy J. said at p. 397:

> It may be laid down as a general rule in criminal as in civil cases that the evidence must be confined to the point in issue: Roscoe's Digest of the Law of Evidence in Criminal Cases, 12th Ed. (1898) pp. 78, 79. When a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected

(1) [1906] 2 K.B. 389.

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with such charge; therefore, it is not allowable to shew on the trial of an indictment that the prisoner has a generel disposition to commit the same kind of offence as that for which he stands indicted.

It is said that the decision of the Court of Appeal for British Columbia in *The King* v. *Lum Man Bow* (1), was decided in a contrary sense. It is true that the charge in that case was that the accused did "unlawfully retain stolen property in their possession" knowing the same to have been stolen, but when the report is examined, it is plain that the case was treated as one of receiving and that the distinction between the two offences was not in the mind of any of the members of the court. The goods there in question which were stolen on the night of December 3-4, were found, on the afternoon of the 4th, in the possession of the accused who failed, in the language of the stated case, "to give a satisfactory account of how they *came by* the property."

Macdonald C.J.A., with whom Galliher J. concurred, referred, in the course of his judgment, to the argument on behalf of the accused that the only presumption which arose on the facts stated was a presumption that the accused had stolen the property, which excluded the presumption that they had retained it knowing it to be stolen. The learned Chief Justice negatived the contention, stating that in his opinion, the question was fully covered by the decision in *Langmead's* case where, he said, "precisely the same question arose and where the judges were unanimously of the opinion that whenever circumstances are such as to render it likely that the accused did not steal the property, the presumption is that he *received* it." The learned Chief Justice went on to say that in the case he was discussing, the charge was for retaining, not receiving, and that he thought the principle, so far as the presumption was concerned, was the same. He said that he adopted the contention of the Crown that the extension of the Code to the offence of retaining "was, I think, intended, as Mr. Maclean argued, to remedy a defect in the law which failed to reach persons who were indicted for the offence of receiving, but who afterwards were proven to be the thieves. The same person could not be the thief and the receiver, but under the present section he may be convicted notwithstanding that it should turn out on the trial that he *had actually*

(1) 16 Can. C.C. 274.

stolen the goods." It is quite evident from this what the idea of the offence of retaining was in the mind of the learned Chief Justice, and that it was not the offence which, in my view was created by the provisions of s. 399. The learned Chief Justice was making two offences out of theft merely from the fact that the person taking the goods did not immediately pass them on. This is the same contention applied to "receiving" with which I have already dealt.

It is also quite plain from the judgments of both Irving and Martin JJ.A. that they treated the case with which they were dealing as one of receiving. The latter expressly says that he had no doubt that the conviction of the accused "as receivers" was justified.

This case cannot, therefore, be said to be authority for the proposition contended for by the Crown in the case at bar.

On behalf of the Crown, we were referred to the decision of this Court in *Richler* v. *The King* (1). A reference to that case shows that the conviction there was for "receiving or retaining," and there is no discussion in the judgment of retaining as a separate offence. The point here in question was not raised. The Crown also referred us to *Lopatinsky* v. *The King* (2), where the conviction was for retaining. Again, however, the distinction between the two offences was not raised, and the evidence in the case was directed entirely to establishing guilty knowledge at the time the goods were received. While the charge there under discussion was one of retaining, the offence actually proved was receiving, and no point was made in the case of any distinction between the two offences. The same is to be said of *Rex* v. *Pomeroy* (3). The appeal to this court was dismissed, but is unreported. I think, therefore, that this court is not hampered by anything said in any of the decisions cited, and that the answer to the first question of law with respect to which leave to appeal was granted should be that the doctrine does not apply. This brings me to the second question.

In *Regina* v. *Sleep, ubi cit.*, appeal was from a conviction under 9-10 Wm. III c. 41, s. 2, for having been found in possession of naval stores marked with the broad arrow. The jury, in answer to questions, found (*a*) that the goods

(1) [1939] S.C.R. 101. (2) [1948] S.C.R. 220.
(3) [1936] 4 D.L.R. 523.

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were so marked, (*b*) that the prisoner had reasonable means of knowing they were so marked, but (*c*) that there was not sufficient evidence he did know. The conviction was set aside, notwithstanding that in the opinion of the court on appeal, there was abundant evidence of guilty knowledge, and that the jury ought to have so found.

In the case at bar, the appellant has been acquitted on the charge of receiving. In my opinion, he ought to have been convicted on that charge, but there is no appeal as to it, and that being so, there is no longer any question as to the state of mind of the appellant when he obtained possession of the guns here in question. It was for the Crown, therefore, to establish that subsequently, guilty knowledge as to the character of the goods was acquired by the appellant. In my opinion, the respondent failed to do so. It was contended that the fact that the name of the owner was on the case in which one of the guns was contained, was sufficient. Even if this could be said to be sufficient evidence, which I doubt, it is not to be assumed that this fact came to the attention of the accused at all, or did not come to his attention at the time he obtained possession originally. While the learned trial judge was entitled to give consideration to all the evidence when dealing with the charge of retaining, there was, in my opinion, no evidence or no sufficient evidence upon which a conviction on that charge could be supported. I would therefore allow the appeal and set aside the conviction.

ESTEY J.:—The appellant was tried before a judge, sitting without a jury, upon an indictment containing four counts: first, breaking and entering by day and stealing; second, breaking and entering by night with intent to steal; third, that he did receive a shot gun and a rifle, knowing they were stolen; and fourth, that he did retain in his possession the shot gun and rifle, knowing the same to have been stolen. He was found not guilty under counts one, two and three, but guilty under count four of retaining the shot gun and rifle. This conviction was affirmed by the Appellate Court of Ontario.

The evidence established the theft of the shot gun and rifle and that they were found in the recent possession of the appellant. The appellant did not give evidence, but his wife was called as a witness on his behalf and gave an

explanation as to how the shot gun and rifle had come into the possession of her husband. At the conclusion of the trial the learned trial judge stated, in part:

> I do not think that the explanation offered by the defence, in this matter, is a reasonable explanation and am therefore finding the accused guilty on the evidence, guilty of retaining, and that is guilty on count four.

Counsel for the accused contends that the presumption arising out of recent possession does not apply to a charge of retaining. S. 399 of the *Criminal Code*, under which counts three and four were laid, reads as follows:

> Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained.

The offence of retaining was not known to the common law, nor is it included in any of the British statutory offences. In Canada it was first made an offence by the insertion of the words "or retains" in the section of our Code of 1892 (S. of C. 1892, c. 29, s. 214). The language "receives or retains" in s. 214 (now 399) would indicate an intention on the part of Parliament to treat these offences as separate and distinct. Such an intention is emphasized by the provision in s. 402 in which it is provided that the act of receiving is completed as soon as the person has possession or control over the property. This section has been so construed in Canada. *Rex* v. *Yeaman* (1); *Rex* v. *Searle* (2); *Frozocas* v. *The King* (3); *Ecrement* v. *The King* (4).

The issue here raised was decided adversely to the contention of counsel for the appellant by the Court of Appeal of British Columbia in *The King* v. *Lum Man Bow* (5). The Court of Appeal of Ontario, in affirming the conviction of the appellant, expressly concurred in the view expressed in *The King* v. *Lum Man Bow*. The British Columbia Court of Appeal based its conclusions largely upon the decision in *Reg.* v. *Langmead* (6). In the *Langmead* case the accused was charged with both stealing and

(1) [1924] 2 W.W.R. 452; 42 Can. C.C. 78.

(2) [1929] 1 W.W.R. 491; 51 Can. C.C. 128.

(3) (1933) 60 Can. C.C. 324.

(4) (1945) 84 Can. C.C. 349.

(5) 16 Can. C.C. 274.

(6) (1864) 1 Le. & Ca. 427; 169 E.R. 1459; 9 Cox C.C. 464.

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receiving and his counsel submitted that, as the evidence proved no more than recent possession by the prisoner, the jury should have been directed that they could not lawfully find the prisoner guilty of receiving. This contention was rejected. Pollock, C.B. stated:

> * * * the distinction taken by Mr. *Carter* between a charge of stealing and one of receiving, with reference to the effect of evidence of recent possession, is not the law of *England*. If no other person is involved in the transaction forming the subject of the inquiry, and the whole of the case against the prisoner is that he was found in the possession of the stolen property, the evidence would, no doubt, point to a case of stealing rather than a case of receiving; but in every case, except, indeed, where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from some one else. If, as I have said, there is no other evidence, the jury will probably consider with reason that the prisoner stole the property; but, if there is other evidence which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them to be the more probable solution.

Blackburn, J. stated:

> I do not agree with Mr. *Carter* in thinking that recent possession is not as vehement evidence of receiving as of stealing. When it has been shewn that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.

In Great Britain where, as already stated, there is no offence of retaining, the courts have held that recent possession of stolen property raises a *prima facie* case or a presumption to the effect that the accused knew the goods were stolen when he received them. The further question of whether recent possession should raise a presumption to the same effect when the offence charged is retaining has, in Great Britain, never been considered. It would appear, therefore, that in Canada, where the offence of retaining is contained in the *Criminal Code*, the answer to the question must be found in an examination of the nature and character of the presumption as well as the offence of retaining, and the purpose and object Parliament had in enacting the same, with a view to ascertaining whether the presumption should be applied to the offence of retaining as well as to that of receiving, just as in *Reg.* v. *Langmead* it was held that the presumption applied to receiving as well as to theft.

In *Reg.* v. *Exall* (1), the charge was burglary. Pollock, C.B. stated to the jury:

> The principle is this, that if a person is found in possession of property recently stolen, and of *which he can give no reasonable account,* a jury are justified in coming to the conclusion that he committed the robbery. And so it is of any crime to which the robbery was incident, or with which it was connected, as burglary, arson or murder. For, if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.
>
> The law is, that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called up to *account* for the possession, that is, to give an explanation of it, which is not unreasonable or improbable.

Wills on Circumstantial Evidence, 7th Ed., pp. 93 and 94:

> Since the desire of dishonest gain is the impelling motive to theft and robbery, it naturally follows that the possession of the fruits of crime recently after it has been committed, affords a strong and reasonable ground for the presumption that the party in whose possession they are found was the real offender unless he can account for such possession in some way consistent with his innocence * * * The force of this presumption has been recognized from the earliest times; and it is founded on the obvious consideration, that if such possession had been lawfully acquired, the party would be able, at least shortly after its acquisition, to give an account of the manner in which it was obtained; and his unwillingness or inability to afford such explanation is justly regarded as amounting to strong self-condemnatory evidence.

Roscoe's Criminal Evidence, 15th Ed., p. 22:

> It has already been stated that possession is presumptive evidence of property; but where it is proved, or may be reasonably presumed, from the proved circumstances, that the property in question is stolen, the *onus probandi* is shifted, and the possessor, to rebut an accusation, is bound to explain reasonably that he came by it honestly; and if he fail to do so, the presumption is that he is the thief *or* the receiver, according to the circumstances.

The foregoing quotations indicate that the presumption of recent possession has no statutory origin, but has developed in the common law on the basis that reason and experience may justify a conclusion of guilt where the recent possession of stolen property remains unexplained. The nature and purpose of such a presumption is emphasized by Thayer, Preliminary Treatise on Evidence, p. 314:

> Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience.

(1) (1866) 4 F. & F. 922; 176 E.R. 850.

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This presumption of recent possession is applied where a party has been found in possession of stolen property so recently in relation to the time of the theft thereof that reason and experience lead to the conclusion that he may either be a party to the theft or has possession of the property with knowledge of its theft. It is of the utmost importance to keep in mind that the Crown must first prove that the property has been stolen and then that it was found in possession of the accused. It is not, however, the mere possession, but rather the recent possession in relation to the time of the theft, that raises the presumption and which presumption is rebutted by a reasonable explanation of honest possession. If the possession of stolen property is not found to be recent, the presumption does not arise, no matter what the offence charged may be.

This presumption of fact has not been restricted in its application to theft and receiving. In *Regina* v. *Exall* (1), it was extended to burglary and, as Pollock, C.B. stated, it applies to "any crime to which the robbery was incident, or with which it was connected, as burglary, arson or murder." In Taylor on Evidence it is pointed out that "The presumption . . . applies to all crimes, even the most penal," and reference is there made to cases of arson, burglary and murder. Taylor on Evidence, 12th Ed., 135, para. 142. See also Archibald's Cr. Pl. Evid. & Pr., 32nd Ed., 404.

It would appear, having regard to the language of Pollock, C.B. in the *Exall* case *supra,* that the offence of retaining, in relation to this presumption, is as "incident" to, or as immediately "connected" with the theft as receiving. The issues at a trial of theft and receiving are quite different. *The Queen* v. *Lamoureux* (2); *R.* v. *Lincoln* (3). A thief cannot receive from himself. *R.* v. *Langmead supra; R.* v. *Exall supra. R.* v. *Carmichael,* (4); *R.* v. *Brown* (5). The offence of receiving contemplates a person receiving the property after the theft has been completed. Retaining is in exactly the same position except that the retention contemplates an innocent receiving, then subsequently, in any appreciable time, however short, the

(1) (1866) 4 F. & F. 922; 176 E.R. 850.
(2) (1900) 4 Can. C.C. 101.
(3) [1944] 1 All E.R. 604.
(4) (1915) 26 Can. C.C. 443; 22 B.C.R. 375.
(5) (1936) 65 Can. C.C. 244.

acquisition of knowledge that the property was stolen, and thereafter a retention of same. When the importance of recent possession in relation to the time of the theft is kept in mind, retaining is as "incident" to, or as "connected" with the theft as receiving.

It has been emphasized that at common law it was only the initial possession to which the presumption was applied, not, however, because of the nature and character of the presumption, but because in the offence of receiving it was only the knowledge at the moment of the initial receipt that was in issue. Upon a charge of receiving an accused might have any amount of subsequent knowledge that the goods were stolen, but, if he received them innocently, at common law he was not guilty of that or of any other offence. This was because of the definition of the offence of receiving and not the nature and character of the presumption, under which an accused found in recent possession of stolen property might be found guilty in the absence of any reasonable explanation on his part. In other words, the presumption was raised against an accused charged with receiving, whether he received the property with knowledge that it had been stolen, or whether he acquired that knowledge subsequently to receiving it and then continued to retain the goods, or, indeed, whether he received and at all times held the property innocently. He could at common law, however, be found guilty only if he acquired the possession with guilty knowledge.

The offence under s. 399, without the words "or retaining," is the common law offence of receiving stolen property. One who was charged with receiving at common law and whose evidence was accepted that he had received the stolen goods innocently, but that subsequently, in no matter how short a time, he acquired knowledge that the property was stolen and still retained it, was not guilty of receiving. *Re Richard Johnson* (1); *Rex* v. *Tennet* (2); *Rex* v. *Matthews* (3). The Parliament of Canada concluded that one who retained stolen property, knowing it to have been stolen, committed an offence against society as great as that of the receiver and in 1892, while the bill was passing through Parliament, inserted the words "or retaining" after the word "receiving" in s. 214 (now 399)

(1) (1911) 6 Cr. App. R. 218. (2) [1939])1 All E.R. 86.
(3) [1950] 1 All. E.R. 137.

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and placed that offence on the same basis and provided the same punishment therefor as that of one who received the goods knowing they were stolen. It would seem that Parliament, by such an enactment, would intend that the same rules of evidence and presumption should apply to both offences.

As already stated, the British Columbia Court of Appeal, in 1910, decided that the presumption of recent possession applied where the indictment charged that the accused retained stolen property knowing the property was stolen. The *King* v. *Lum Man Bow supra.* While apparently the question has never been raised in a subsequent case with the clarity here presented by Mr. Dubin, it appears that in all of the reported cases subsequent thereto it has been more or less assumed that the presumption did apply to both receiving and retaining. *Rex* v. *Mandzuk* (1); *Rex* v. *Davis* (2); *Rex* v. *Parker* (3); *Rex* v. *Sullivan and Godbolt* (4); *Rex* v. *Tuck* (5); *Rex* v. *Richler* (6); *Rex* v. *Lopatinsky* (7). It would appear that if Parliament had not intended that this well known presumption, so long established in our law, should apply to retaining as well as to receiving that it would, at some date since 1910, have amended the section by the addition of apt words to that effect.

Receiving and retaining, as already stated, just as theft and receiving, are separate and distinct offences and an accused, even when the evidence of guilty knowledge is found only in the presumption, can only be found guilty of either theft or receiving, but not both. Upon the same basis an accused cannot be found guilty of receiving and retaining. The *Criminal Code* contemplates that upon the same facts an accused shall be convicted and suffer but one punishment. If an accused party receives the guilty knowledge coincident with possession of the stolen property, he is guilty of the offence of receiving and not of retaining. If, however, he receives the property and subsequently acquires knowledge that the property was stolen, and thereafter continues to retain same, he is guilty of the offence of retaining. The presumption of recent possession

(1) [1945] 3 W.W.R. 280.
(2) [1940] 75 Can. C.C. 224.
(3) (1941) 77 Can. C.C. 9.
(4) (1946) 85 Can. C.C. 349.
(5) (1946) 86 Can. C.C. 49.
(6) [1939] S.C.R. 101.
(7) [1948] S.C.R. 220.

applies to all three of these offences and if counts covering each one are included in the indictment it is for the jury, at the conclusion of the hearing, to find the accused guilty of one or other, or not guilty of all of these offences. Pollock, C.B., in *Reg.* v. *Langmead supra,* expresses this view as to theft and receiving, and, following his analogy, if the evidence of guilty knowledge adduced by the prosecution is restricted to that arising out of the presumption of recent possession and no further evidence is adduced, a jury would probably conclude that the accused was guilty of receiving. If, however, there is other evidence, it will be for the jury to say whether the accused be guilty of either receiving or retaining, or not guilty of either.

While the offences of receiving and retaining are separate and distinct, the essential difference is the time of the acquisition of knowledge on the part of the accused. In all other essentials there is no great difference. The existence of the motive for dishonest gain referred to in Wills on Circumstantial Evidence *supra* as a basis for the presumption is of no greater significance in relation to receiving than to retaining.

It would appear, therefore, that the submission that the presumption applies to retaining as well as to receiving is justified in principle. The language adopted by Parliament would seem to have contemplated its application to the offence of retaining, and this view finds support in that Parliament has not, since *Lum Man Bow supra* was decided in 1910, enacted any amendment in respect of this section.

The explanation here given related to the initial reception of the stolen property and was disbelieved by the learned trial judge. With great respect, upon that finding the accused should have been found guilty of receiving. There was no evidence that justified the conclusion that he received the goods without knowledge of their having been stolen and subsequently acquired such knowledge and thereafter continued to retain same. Learned counsel for the Crown suggests that, because the accused sold the rifle for $20, when the evidence disclosed that its replacement cost would be $68, therefore there was an inference of subsequent knowledge, but this he may well have done because he knew it was stolen when he received it. Certainly there is no fact here established to suggest he received it at any other time.

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He next drew attention to the fact that the purchaser of the rifle found the owner's name thereon, which aroused his suspicion and caused him to communicate with the police. The evidence establishes that the name was not at all conspicuous and was only found by the purchaser when he was cleaning the rifle, nor is it suggested throughout the evidence that the accused knew of the presence of that name. Counsel then referred to the fact that the hunters never came back. The difficulty with regard to the hunters is that the only evidence of their existence forms a part of the explanation which the learned trial judge did not believe.

In my opinion, with great respect, the evidence here adduced on the part of the Crown justified a conviction for receiving, upon which the learned trial judge acquitted and from which no appeal has been taken and which is, therefore, not before this Court. The evidence does not support a conviction of retaining, as that offence is constituted under s. 399.

The appeal should be allowed and the conviction quashed.

Appeal allowed and conviction set aside.

Solicitors for the appellant: *Kimber & Dubin.*

Solicitor for the respondent: *C. P. Hope.*