01/75

SUPREME COURT OF VICTORIA — FULL COURT

LAWSON v MITCHELL

Young CJ, Newton and Kaye JJ

24, 25 September, 20 December 1975 — [1975] VicRp 57; [1975] VR 579

COMPANIES – DIRECTOR OF COMPANY CHARGED WITH FAILING TO KEEP ACCOUNTING RECORDS – 'NO CASE' SUBMISSION REJECTED – SUBMISSION THEN MADE THAT DIRECTOR SHOULD BE RELIEVED FROM LIABILITY – SUBMISSION UPHELD – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR – WHETHER CONFINED TO CIVIL PROCEEDINGS: *COMPANIES ACT* 1961, SS161(1), (6), 365.

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrate for hearing and determination in accordance with the law.

1. Section 365 of the *Companies Act* 1961 ('Act') empowers a court to grant relief from civil liability only and has no application to criminal liability, whether upon a summary prosecution in a Magistrates' Court or upon indictment. This conclusion is supported by a consideration of s365 in its present form as a mere matter of statutory interpretation and is reinforced by a consideration of the history of the provision.

***Re Barry and Staines Linoleum Ltd* [1934] Ch 227; [1933] All ER Rep Ext 1013, and**
***Re Gilt Edge Safety Glass Ltd* [1940] Ch 495; [1940] 2 All ER 237, not followed.**

2. Accordingly, construing the words of s365 in accordance with their plain and ordinary meaning, it is clear that s365 has no application to proceedings upon an information alleging breach of a provision of the Act. The magistrate therefore was in error in purporting to relieve the respondent from his liability to pay a pecuniary penalty for non-compliance with the requirements of s161

YOUNG CJ and NEWTON J: This is the return of an order nisi to review the dismissal on 12 March 1974 by the Magistrates' Court at Melbourne of an information under s161(1) of the *Companies Act* 1961 (as in force at the material times). For reasons which we shall later explain, the order nisi was made returnable before the Full Court.

By the information the respondent, Peter Alexander Mitchell (whom we shall call "Peter Mitchell"), was charged that between 4 May 1967 and 15 August 1968 at Melbourne, he

> "being a director of Apex Freight Lines Pty Ltd did not cause to be kept in the English language such accounting and other records as would explain the transactions and financial position of the said company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time and in such manner as to enable such accounting and other records to be conveniently and properly audited."

The information is dated October 1973, but the Attorney-General specifically consented to its being brought more than three years after the commission of the alleged offence: see s381(2) of the *Companies Act* 1961. It is convenient to set out s161(1) and s161(6), as in force at the material times.

> "161(1) Every company and the directors and managers thereof shall cause to be kept in the English language such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited."

> "(6) If default is made in complying with any of the provisions of this section the company and every officer of the company who is in default shall be guilty of an offence against this Act. "Penalty: Imprisonment for three months or $200. Default penalty."

(The definition of "officer" in s5(1) includes a director; the expression "Default penalty" is defined by s380, so as to indicate that continuation of the offence after initial conviction shall constitute a further offence and expose the person convicted to additional penalties.)

Section 161 was repealed by s17 of the *Companies Act* 1971 (Act No. 8185), which came into force on 31 December 1971; s17 *inter alia* substituted other provisions to the same general effect as the repealed s161. But the repeal of s161 in its original form did not of course affect the liability to prosecution of persons who had contravened its provisions during any period while it was in force: see s7(2) of the *Acts Interpretation Act* 1958; and *Byrne v Garrisson* [1965] VicRp 70; [1965] VR 523. And counsel for Peter Mitchell did not contend to the contrary before this Court.

The information was heard on 18 and 26 February 1974 and 12 March 1974, and the Magistrates' Court was constituted by Mr Proposch SM. The information was heard together with a number of other informations against one Denys Alexander Mitchell, the father of Peter Mitchell. In the Magistrates' Court Denys Mitchell and Peter Mitchell were separately represented by counsel. The affidavit sworn by the informant in support of the application for the order nisi, which, with its exhibits, constitutes the only evidentiary material before this Court states all these facts. *[Their Honours then referred to this affidavit and continued:—]* ... At the conclusion of all the evidence called by the prosecution in the Magistrates' Court, counsel for Peter Mitchell submitted to the stipendiary magistrate that there was no case for Peter Mitchell to answer, so far as concerned the information against him. The stipendiary magistrate rejected this submission. But counsel for Peter Mitchell then submitted that pursuant to s365 of the *Companies Act* 1961 the stipendiary magistrate ought to relieve Peter Mitchell from liability. The stipendiary magistrate accepted this submission and dismissed the information.

The order nisi contains six grounds. But the only ground which we find it necessary to consider in detail is ground 3, which is in substance that s365 has no application to criminal proceedings in respect of offences against the *Companies Act* 1961. For reasons which we shall later state, we consider that this ground is valid.

But it is convenient first to deal with a submission which was put to this court by counsel for Peter Mitchell, which was to the effect that the stipendiary magistrate was wrong in holding that there was a case for Peter Mitchell to answer, so that the order nisi ought to be discharged even if s365 was inapplicable. We do not accept this submission. *[Their Honours then dealt with this submission in detail and continued:—]* ... We now turn to examine the conclusion of the stipendiary magistrate that it was open to him to dismiss the information against Peter Mitchell under s365 of the *Companies Act* 1961. As earlier indicated, we consider that s365 had no application to a prosecution under s161(1), so that the conclusion of the stipendiary magistrate on this point was wrong.

Section 365 of the Companies Act 1961 provides as follows:—

> "365. (1) If in any proceeding for negligence default breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence default or breach the Court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.
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> "(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence default breach of duty or breach of trust he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence default breach of duty or breach of trust had been brought.
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> "(3) Where any case to which subs(1) of this section applies is being tried by a judge with a jury the judge after hearing the evidence may, if he is satisfied that the defendant ought in pursuance of that sub-section to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge thinks proper.
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> "(4) The persons to whom this section applies are—
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> (a) officers of a corporation;
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> (b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;

(c) experts within the meaning of this Act; and

(d) any persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed."

The expression in s365(4)(a) "officers of a corporation" is defined by s5(1). We shall not set out the whole of that definition. It is sufficient to say that the definition includes any director, secretary or employee of a company; a receiver or manager of any part of the undertaking of a company, who is appointed under a power contained in any instrument; and a liquidator of a company appointed in a voluntary winding-up.

The expression in s365(4)(c) "experts within the meaning of this Act" refers to the definition of "expert" in s5(1) as including an "engineer valuer accountant and any other person whose profession or reputation gives authority to a statement made by him". "Experts" as defined are referred to in the provisions of the *Companies Act* 1961 dealing with prospectuses, and it would appear that an "expert" can become subject to civil liability for any untrue statement purporting to be made by him as an expert, which is included in a prospectus with his consent: see s46(2); compare s47, as to criminal liability.

"Court" is defined in s5(1) as meaning the Supreme Court or a judge thereof. But this definition, like all the other definitions in s5(1), is subject to any contrary intention appearing, and it may well be that in s365 the word "court" can include other courts besides the Supreme Court or a judge thereof. But we find it unnecessary to pursue this question.

Notwithstanding the decisions in *Re Barry and Staines Linoleum Ltd* [1934] Ch 227; [1933] All ER Rep Ext 1013, and *Re Gilt Edge Safety Glass Ltd* [1940] Ch 495; [1940] 2 All ER 237, to which we later refer, we consider that s365 empowers a court to grant relief from civil liability only. We consider that s365 has no application to criminal liability, whether upon a summary prosecution in a Magistrates' Court or upon indictment. These conclusions are, in our opinion, supported by a consideration of s365 in its present form as a mere matter of statutory interpretation, as we believe that the conclusions are reinforced by a consideration of the history of the provision. We shall first consider the question as simply one of statutory interpretation in relation to s365 in its present form.

There is of course no doubt that s365 confers power upon the Court to relieve from civil liability. The words of the provision are entirely apt to cover relief from civil liability, and there are a large number of reported cases in relation to s365, or substantially corresponding provisions, where relief from civil liability has been granted, or where, even though it has been refused, the Court has proceeded on the footing that the provision enabled relief to be granted from civil liability: see, for example, *Re Claridge's Patent Asphalte Co Ltd* [1921] 1 Ch 543; *Re J Franklin and Son Ltd* [1937] 4 All ER 43; *Selangor United Rubber Estates Ltd v Cradock (No. 3)* [1968] 2 All ER 1073; [1968] 1 WLR 1555, at pp1659-60; *Re Duomatic Ltd* [1969] 2 Ch 365; [1969] 1 All ER 161; [1969] 2 WLR 114; *Re International Vending Machines Pty Ltd* 80 WN (NSW) 465; [1962] NSWR 1408, at pp1424-5; and *Re Toowoomba Welding Works Pty Ltd (No. 2)* [1969] Qd R 337. Having regard to the wide class of persons defined by s365(4) as persons to whom s365 applies, and having regard to the numerous and different types of civil claims which could be made against members of that class, it may be that a problem could arise in relation to whether s365 was applicable to some civil claims against members of the class; we have in mind particularly claims brought not by the relevant company or its liquidator, but by somebody else such as a shareholder or debenture holder seeking personal relief for himself. But this is not a question which it is necessary to examine in the present case. It is sufficient to reiterate that s365 undoubtedly confers power upon the Court to relieve from civil liability.

But in our opinion a large number of considerations show that s365, even if viewed simply in its present form and context and without regard to its history, has no application to criminal liability, and is confined to relief from civil liability. It is, we think, sufficient to say that these considerations include the following, although we do not think that they are by any means exhaustive:—

(1) A person who commits a criminal offence is liable to conviction, and also to punishment, which ordinarily takes the form of imprisonment, fine, bond or probation order.

(2) But as to punishment after conviction, courts ordinarily have a very wide discretion, and if s365(1) were to apply so as to enable relief to be given from punishment following upon conviction, it would add little or nothing to the discretionary powers which courts already possess.

(3) Conceivably it would be possible to apply s365(1) so as to enable a court before which a person was prosecuted summarily to relieve him from conviction, notwithstanding that the offence was proved, and numerous offences under the *Companies Act* 1961 by persons falling within the classes specified in s365(4) may be prosecuted summarily in a Magistrates' Court: see s73 of the Justices Act 1958 and s379 of the *Companies Act* 1961. But in the case of offences which may be prosecuted summarily, provisions already exist which enable the Court in certain circumstances to avoid proceeding to conviction, notwithstanding that the offence is proved; see, for example, s75(a) and s92(6) of the *Justices Act* 1958. Furthermore, s365(1) could hardly have been intended to apply to summary prosecutions unless it also applied to prosecutions for indictable offences before a jury: as to relevant indictable offences, see, for example, s166, s167, s168, s169, s170, s171, s172, s173 and s182 of the *Crimes Act* 1958, and s64(10) and s375(2)(a) of the *Companies Act* 1961. But it is very difficult to see how s365 could apply to a trial for an indictable offence before a jury; for this would involve giving to the trial judge power in effect to direct an acquittal, notwithstanding that the jury had found the accused guilty or might be about to find him guilty, there being sufficient evidence to justify a conviction. As to this, s365(3) appears to be directed to trials before a jury, but the words "defendant" and "judgment", and the reference to costs, indicate that s365(3) refers to civil trials only, not to criminal trials at all. Furthermore, while a judge in a civil trial before a jury can himself "withdraw the case in whole or in part from the jury" (see, for example, *Humphrey v Collier* [1946] VicLawRp 60; [1946] VLR 391 esp. at pp406-8; [1946] ALR 448), it is well-established that in a criminal trial a judge must obtain the verdict of the jury, once the accused has been placed in charge (see *R v Paprounas* [1970] VicRp 107; [1970] VR 865).

(4) There are additional difficulties in the way of treating s365(2) as applicable to criminal offences. Section 365(2) omits to state who should be respondent to any application thereunder. This omission is readily understandable if the provision applies only to apprehended civil claims, for it is plain that the prospective claimant would be a necessary respondent. But if s365(2) were to apply to apprehended prosecutions for criminal offences, who would be the appropriate respondent to any application for relief in such a case? Would the Attorney-General be an appropriate respondent? Compare *Dyson v Attorney-General* [1911] 1 KB 410; [1912] 1 Ch 158. And would a decision relieving an applicant from criminal liability bind the Crown, or would it bind any prospective informant who had not been made a respondent to the application? Furthermore, the word "claim" in s365(2) does not appear to us to be apt to include a criminal prosecution.

(5) As earlier indicated, the *Companies Act* 1961 creates numerous offences which may be committed by persons falling within the classes specified in s365(4). Many of these offences are enumerated in the table set out in Appendix B in Wallace and Young, *Australian Company Law and Practice* pp1169-1184. We consider that there is no justification for the view that s365 was intended to operate, *inter alia*, as a proviso to all these statutory offences, so as to enable a person who had committed any of the offences to be relieved from liability, if it appeared to the Court that he had acted honestly and reasonably and ought fairly to be excused. In this regard attention may usefully be directed to certain specific instances. Thus, as earlier stated, s161 of the *Companies Act* 1961 was repealed by s17 of the *Companies Act* 1971 (Act No. 8185). But s17 of Act No. 8185 also, *inter alia*, enacted the present s161A of the *Companies Act* 1961, which, with some alterations, reproduced the provisions of the original s161. Section 161A(10) provides, so far as presently material, that if a company does not keep accounting records as required by s161A(1), then any director of the company who failed to take all reasonable steps to secure compliance by the company with s161A(1) shall be guilty of an offence. But s161A(11) provides that "in any proceedings against a person for failure to take all reasonable steps to secure compliance by a company with a provision of this section, it is a defence to prove that he had reasonable grounds to believe and did believe that a competent and reliable person was charged with the duty of seeing that that provision was complied with and was in a position to discharge that duty". Furthermore, s374B of the *Companies Act* 1961 (as originally enacted by the *Companies (Defaulting Officers) Act* 1966 (Act No. 7501), and as amended by s19 of the *Companies Act* 1971 (Act No. 8185)) provides as follows:—

"374B. Where the provisions of s161A have not been complied with in respect of a company to which this section applies throughout the period of two years immediately preceding the relevant day or the period between the incorporation of the company and the relevant day, whichever is the shorter, every officer who is in default shall, unless he acted honestly and shows that in the circumstances in which the business of the company was carried on the default was excusable, be guilty of an offence against this Act.
Penalty: Imprisonment for one year or $2,500."

(The expression "the relevant day" is defined in s374E(1)). It appears to us that the existence of the

> present s161A(10) and, even more so, the existence of the present s374B, are entirely inconsistent with the view that Parliament intended that s365 should enable the court to relieve from criminal liability under the present s161A; and if s365 is inapplicable to s161A, then there is no reason for thinking that it was intended to apply to the original s161. Other provisions of the *Companies Act* 1961, which appear to us to be inconsistent with the view that s365 was intended to apply in relation to liability for statutory offences created by the Act, include s39(5) and s39(6), s47(1), s51(9) and s234(5).

We now turn to the legislative history of s365. As earlier stated, we consider that this history supports our conclusion that s365 has no application to criminal offences. The first enactment in companies legislation of a provision comparable to s365 was s32 of the English *Companies Act* 1907, which provided as follows:—

> "32. If in any proceeding against a director of a company for negligence or breach of trust it appears to a court that the director is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, the court may relieve him, either wholly or partly, from his liability on such terms as the court may think proper."

This provision was substantially reproduced by s279 of the English *Companies (Consolidation) Act* 1908, which was in the following terms:

> "279. If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the court hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think proper."

Section 279 of the English *Companies (Consolidation) Act* 1908 remained in force until the repeal of that Act by the English *Companies Act* 1929, which substituted a provision in different terms, to which we shall later refer. In Victoria the first relevant provision was s288 of the *Companies Act* 1910, which was in the same terms as s279 of the English *Companies (Consolidation) Act* 1908. Section 288 was reproduced without amendment in s288 of the *Companies Act* 1915 and again in s288 of the *Companies Act* 1928.

It is in our opinion plain that the power to relieve directors from liability, which was given by s32 of the English *Companies Act* 1907, and by the corresponding provisions in the English *Companies (Consolidation) Act* 1908 and in the Victorian *Companies Acts* of 1910, 1915 and 1928, was confined to a power to relieve from civil liability only.

Section 32 was obviously taken from s3 of the English *Judicial Trustees Act* 1896; a provision corresponding to s3 of that Act was first enacted in Victoria by s3 of the *Trusts Act* 1901, and now appears as s67 of the *Trustee Act* 1958. But it has never, so far as we are aware, been suggested that provisions such as s67 of the *Trustee Act* 1958 extend to relief from criminal liability, and in our opinion it is plain from their language that they do not.

Furthermore, by 1907 the civil liability of a director to compensate his company for loss had become well defined by decisions of the courts, and those decisions had established that in general such liability existed only in cases where loss had been caused to the company by negligence on the part of the director, or else by some misconduct on his part in relation to property of the company; such misconduct was frequently referred to in the decisions as a "breach of trust", because it was established that a director owed a fiduciary duty to his company. As to a director's liability for negligence, reference may be made to Palmer's *Company Law* 6th ed. (1909) pp196-200, where the authorities up to that time are mentioned: see too the review of the authorities in *Re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407; [1924] All ER 485; and Sir Douglas Menzies' paper published in (1959) 33 ALJ 156 esp. at pp163-4. Section 124 of the Victorian *Companies Act* 1961 now declares the law upon this topic by imposing upon directors a statutory duty to use reasonable diligence, but this provision was first introduced in Victoria by s107 of the *Companies Act* 1958, and so far as we are aware such a provision has never existed in English legislation. As to a director's liability for breach of trust, reference may be made to Palmer, *supra*, pp201-3, where many of the authorities up to that time are referred to: see too *Re Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425, at p440; *Re Claridge's Patent Asphalte Co Ltd*

[1921] 1 Ch 543; *Re Etic Ltd* [1928] Ch 861, at pp872-5; and *Selangor United Rubber Estates Ltd v Cradock (No. 3)* [1968] 1 WLR 1555 at pp1574-7; [1968] 2 All ER 1073; compare *Re International Vending Machines Pty Ltd* 80 WN (NSW) 465; [1962] NSWR 1408 at pp1419-21.

The expression in s32 of the English *Companies Act* 1907 "any proceeding against a director of a company for negligence or breach of trust" thus naturally referred to civil proceedings only, namely the principal proceedings then available in which a director could be held civilly liable to his company for loss which he had caused to it. Prior to 1907 there had been several decisions in England where a director had been held civilly liable to compensate his company for loss caused by technical misconduct (i.e. "breach of trust") on his part, notwithstanding that the director had acted honestly, or even in reliance upon legal advice: see, for example, *Hirsche v Sims* [1894] AC 654; *Re Faure Electric Accumulator Co* [1889] 40 Ch D 141; [1886-90] All ER Rep 607; and *Young v Naval and Military Co-operative Society* [1905] 1 KB 687: see too the observations of Lindley LJ, in *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485, at p490. In our opinion the purpose of s32 of the English *Companies Act* 1907 was to provide some amelioration of the strict approach laid down by such decisions in relation to the civil liability of directors: see too Palmer, *supra*, pp204-5.

We may here add that under the Companies legislation as in force in England in 1907, and also under the Victorian *Companies Act* 1910, numerous offences were created in respect of contravention of provisions of the legislation. But we think it plain that s32 of the English *Companies Act* 1907, and also s288 of the Victorian *Companies Act* 1910, were not intended to apply in relation to any of those offences. This conclusion is supported by the observations which we have already made about s32, and also by reasons which are similar to some of our reasons for the conclusion that s365 of the *Companies Act* 1961 was not intended to apply to statutory offences. Furthermore, many of the offences, if committed by a director, would not necessarily have involved any "negligence or breach of trust" on his part. And, finally, many of the offences could be committed by officers of a company, who were not directors, and it would have been remarkable if the English or Victorian Parliaments had intended to afford to directors a protection against criminal liability, which was denied to officers of a company who were not directors.

The English *Companies Act* 1929 repealed the *Companies (Consolidation) Act* 1908, and a new provision replaced s279 of the latter Act. This provision was s372 of the *Companies Act* 1929. It was in the following terms:

> "372. (1) If in any proceeding of negligence, default, breach of duty, or breach of trust against a person to whom this section applies it appears to the court hearing the case that that a person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit.
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> "(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to court for relief, and the court on any such application shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.
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> "(3) Where any case to which subs(1) of this section applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant ought in pursuance of that subsection to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper.
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> "(4) The persons to whom this section applies are the following:—
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> (a) directors of a company;
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> (b) managers of a company;
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> (c) officers of a company;
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> (d) persons employed by a company as auditors, whether they are or are not officers of the company."

The word "director" was defined in s380(1) of the English 1929 Act so as to include "any person occupying the position of director by whatever name called". Neither the word "officer" nor the expression "officers of a company" were defined by the Act: as to their meaning, see Buckley on the *Companies Acts*, 11th ed., (1930) p572.

It will be seen that s372 of the English *Companies Act* 1929 had much similarity to s365 of the Victorian *Companies Act* 1961, with which we are now concerned. Indeed we think that, metaphorically speaking, s372 may be regarded as the parent of s365, and s32 of the English *Companies Act* 1907 as its grandparent. The quite considerable differences between s372 of the 1929 Act and s32 of the 1907 Act require some examination. But before we examine those differences, it will be convenient briefly to state the rest of the history of the legislation.

A provision substantially corresponding to s372 of the English *Companies Act* 1929 was first introduced in Victoria by the *Companies Act* 1938, which repealed the *Companies Act* 1928. This provision was s390 of the *Companies Act* 1938. Section 390 was in very similar terms to s372 of the English 1929 Act, save that subs(4) included in the class of persons to whom the section applied "experts" within the meaning of s37(4) of the *Companies Act* 1938, as well as directors, managers, officers or employees of a company, and auditors. The next relevant step in the history of the legislation is that the English *Companies Act* 1948 repealed the English 1929 Act, and s372 of the 1929 Act was replaced by s448 of the 1948 Act. Section 448 (which is still in force) is in similar terms to s372, save that subs(4) is omitted altogether, and instead subs(1) and subs(2) are expressed to apply to any "officer of a company or a person employed by a company as auditor (whether he is or is not an officer of the company)", and the word "officer" is defined by s455(1) so as to include a director, manager or secretary.

In Victoria the *Companies Act* 1938 was repealed by the *Companies Act* 1958, and s254 of the latter Act replaced s390 of the former. Section 254 of the 1958 Act was very similar to s390 of the 1938 Act, save that subs(4) made no reference to directors or managers of a company; but subs(4) specifically included in the class of persons to whom s254 applied "officers or employees of a company", and by s3(1) "officer" was defined so as to include "a director and any other officer whatsoever of a company". The Victorian *Companies Act* 1958 was repealed by the *Companies Act* 1961, s365 of which replaced s254 of the 1958 Act. The 1961 Act for the first time brought liquidators, receivers and managers within the class of persons to whom the provision applied.

As we have earlier remarked, s372 of the English *Companies Act* 1929 ought, in our opinion, to be regarded as the parent of s365 of the Victorian *Companies Act* 1961. We have already explained why we consider that s32 of the English *Companies Act* 1907, and later corresponding provisions in England and Victoria, did not empower the Court to grant relief from criminal liability. Section 372 of the English *Companies Act* 1929 was of course in much wider terms than s32, but nevertheless in our opinion it too was confined to civil liability, and did not empower the Court to relieve from criminal liability.

Most of the general considerations upon which we have earlier relied in support of the conclusion that s365 of the Victorian *Companies Act* 1961 does not apply to criminal liability, even if considered apart from its history, are equally applicable to s372 of the English 1929 Act. Furthermore, s372 replaced s279 of the English *Companies (Consolidation) Act* 1908 (which itself had replaced s32 of the 1907 Act), and in our view, for reasons already stated, s279 had not applied to criminal liability. The explanation for the much wider terms in which s372 of the 1929 Act was expressed is, in our opinion, to be found in the enactment of s152 of the 1929 Act. S152 was a new provision, which invalidated any provision in the articles of association of a company or otherwise, under which any director, manager, officer or auditor of a company was exempted from liability. Section 152 was in the following terms:—

> "152. Subject as hereinafter provided, any provision, whether contained in the articles of a company or in any contract with a company otherwise, for exempting any director, manager or officer of the company, or any person (whether an officer of the company or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void: Provided that—
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> (a) in relation to any such provision which is in force at the date of the commencement of this Act, this section shall have effect only on the expiration of a period of six months from that date; and

(b) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force; and

(c) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under section three hundred and seventy-two of this Act in which relief is granted to him by the court."

Section 205 of the English *Companies Act* 1948 substantially reproduced s152 of the 1929 Act. A provision substantially corresponding to s152 was first enacted in Victoria by s152 of the *Companies Act* 1938; s152 of the Victorian 1938 Act was in its turn substantially reproduced first by s111 of the *Companies Act* 1958, and then by s133 of the *Companies Act* 1961. The Victorian *Companies Act* 1938 was, as we have earlier pointed out, the first Victorian companies legislation to contain a provision (s390) which corresponded to s372 of the English *Companies Act* 1929.

We think it clear that s152 of the English *Companies Act* 1929 was enacted so as to overcome the effect of decisions such as *Re City Equitable Fire Insurance Co Ltd*, *supra*, and *Re Brazilian Rubber Plantations and Estates Ltd*, *supra*, in which articles of association in terms exempting directors, other officers of a company, and auditors, from liability for anything except wilful neglect or default, or even for anything except dishonesty, had been held to be valid. We consider that the reason why s372 of the English 1929 Act used much wider language than s279 of the 1908 Act was to ensure that the Court should have a wide power in appropriate cases to relieve a director, other officer or auditor of a company from civil liability; thus some amelioration was provided for the loss of protection under articles of association or otherwise, which was brought about by s152. The wide words in s372(1) "negligence, default, breach of duty, or breach of trust" in fact simply reproduced the same set of words in s152. This view is supported by the note to s372 in *Buckley on the Companies Acts*, 11th ed. (1930), which stated, *inter alia*: "Section 279 of the Act of 1908, corresponding to subs(1) of this section, applied only to directors and to cases of negligence or breach of trust. That Act did not, however, contain any provision corresponding to s152 of the present Act."

Prior to the enactment of the *Companies Act* 1929, it was of course impossible for a company's articles of association to exempt its directors or other officers or auditors from criminal liability, and we consider that neither s152 nor s372 were concerned with criminal liability in any way, save for the limited reference to criminal proceedings in proviso (c) to s152. The words in s372 "any proceeding for negligence, default, breach of duty or breach of trust" (which also of course appear in s365 of the Victorian *Companies Act* 1961) were no doubt capable, standing alone, of including a criminal proceeding as well as a civil proceeding. But in our view they were restricted upon their proper interpretation to civil proceedings. We should add that we do not consider that the words in proviso (c) to s152 of the English 1929 Act "any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under s372 of this Act in which relief is granted to him by the court" show that it was contemplated that s372 applied to criminal proceedings. The language used in proviso (c) is, in our view, somewhat compendious, and we consider that the reference to relief under s372 should be interpreted as a reference to civil proceedings only, just as the words "in which judgment is given in his favour" must refer to civil proceedings only.

Our conclusion that the enactment of s152 by the English *Companies Act* 1929 was the reason for the wider language used in s372 as compared with the language used in s279 of the *Companies (Consolidation) Act* 1908 is, we believe, further supported by an aspect of the legislative history, to which we have not so far referred. Section 152 in fact substantially reproduced s78(1) and s86(5) of the English *Companies Act* 1928, and s78(2), s78(3) and s78(4) and s86(5) of that Act in terms amended s279 of the *Companies (Consolidation) Act* 1908 so as to turn s279 into a provision closely corresponding to s372 of the *Companies Act* 1929. But, as things turned out, s78 and s86 of the 1928 Act never came into effective operation, and were in the end repealed by the *Companies Act* 1929. The position was that s118(4) of the *Companies Act* 1928 provided that the provisions of that Act, with one presently immaterial exception, should come into operation on the day or respective days appointed by order in council, and in fact none of the provisions of the Act were ever proclaimed (save for another presently immaterial exception) until 1 November

1929, which was the day when the *Companies Act* 1929 came into operation; the *Companies Act* 1929 repealed the whole of the *Companies Act* 1928, so that s78 and s86 never had any effective operation: see s118(4) of the *Companies Act* 1928; s385(2) and s381(1) of the *Companies Act* 1929; Buckley, 11th ed., *supra*, pp v vi 1xxxvii; and Palmer's *Company Law*, 13th ed., (1929) p11. We have therefore not to referred to s78 or s86(5) of the English 1928 Act in our earlier review of the relevant legislative history. Those sections provided as follows:—

> "78.(1) Subject as hereinafter provided, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or other officer of the company from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void:
>
> "Provided that—
>
> (a) in relation to any such provision which is in force at the date of the commencement of this Act, this subsection shall have effect only on the expiration of a period of six months from that date; and
>
> (b) nothing in this subsection shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force; and
>
> (c) notwithstanding anything in this subsection, a company may, in pursuance of any such provision as aforesaid, indemnify any director, manager or other officer of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under section two hundred and seventy-nine of the principal Act or under this section in which relief is granted to him by the court.
>
> "(2) Section two hundred and seventy-nine (s279) of the principal Act shall apply to the managers and officers of a company as it applies to the directors of a company, and shall have effect as though for the words "negligence or breach of trust wherever they occur" (sic) there were substituted the words "negligence, default, breach of duty or breach of trust", and the court in determining in pursuance of that section whether any person ought fairly to be excused for any negligence, default, breach of duty, or breach of trust shall take into consideration all the circumstances of the case, including those connected with his appointment.
>
> "(3) Where any case to which the said section two hundred and seventy-nine applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant ought in pursuance of the said section to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper.
>
> "(4) Where any person being a director, manager or officer of a company has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the court for relief, and the court on any such application shall have the same power to relieve him as under section two hundred and seventy-nine of the principal Act it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought."
>
> "86...(5) So much of this Act as makes void any provisions contained in the articles of a company or in any contract or otherwise for exempting a director of a company from or indemnifying him against any liability in respect of negligence, default, breach of duty or breach of trust in relation to the company, and as provides that where any person being a director, manager, or officer of a company has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty, or breach of trust, he may apply to the court for relief and the provisions of section two hundred and seventy-nine of the principal Act (which empowers the court to grant relief to directors in certain cases), shall apply to, and in the case of, persons employed by a company as auditors, whether those persons are or are not officers of the company, as they apply to, and in the case of, directors." (The "principal Act" was the *Companies (Consolidation) Act* 1908: see s118(2) of the *Companies Act* 1928.)"

It will thus be seen that the changes in s372 of the *Companies Act* 1929 as compared with s279 of the *Companies (Consolidation) Act* 1908 originated in the very same sections of the *Companies Act* 1928 as enacted for the first time the provisions which later became s152 of the

Companies Act 1929. It appears to us that this circumstance is a very strong indication that the clue to the changes in the language of s372 is to be found entirely in the enactment of the new s152, and that those changes were not intended to give to the Court a power to relieve from criminal liability.

The reason why this order nisi was referred to this Court was, as counsel informed us, because of the decisions in *Re Barry and Staines Linoleum Ltd*, *supra*, and *Re Gilt Edge Safety Glass Ltd*, *supra*.

In *Re Barry and Staines Linoleum Ltd* it was held by Maugham J, so far as presently material, that where a person had acted as a director of a company without holding a share qualification as specified by the articles, so as to become liable to a fine under s141 of the English *Companies Act* 1929, the Court had power under s372 to relieve him from liability for the fine; and in that case Maugham J made such an order. Section 141 substantially corresponded to s116 of the Victorian *Companies Act* 1961. Maugham J said in the course of *ex tempore* reasons for judgment [1934] Ch at p232):— "It is beyond doubt that it" (i.e. s372) "applies...where proceedings are being taken in a court of summary jurisdiction to recover one of the penalties imposed on directors and others under the Act and accordingly, it includes power to relieve against the penalty imposed under s141 of the Act....".

But Maugham J gave no reasons for this conclusion, and it appears from the report that no argument in support of the contrary view was put to him, the only parties having been the petitioner director and the company itself. For the reasons which we have already stated at considerable length, we respectfully consider that the conclusion expressed by Maugham J was wrong. In *Re Gilt Edge Safety Glass Ltd*, *supra*, the conclusion of Maugham J in relation to the application of s372 of the *Companies Act* 1929 to s141 was accepted as correct by Crossman J, although in the particular circumstances of the case he refused to grant relief from liability. In the course of an *ex tempore* judgment Crossman J said [1940] Ch at p501):— "I think that it follows from the decision of Maugham J in *Re Barry and Staines Linoleum Ltd* that the phrase 'any claim...in respect of any negligence, default, breach of duty or breach of trust' in s372, subs(2), of the Act of 1929, includes proceedings...under s141...". But once again it appears from the report that the contrary view was not argued.

We may here state that we have found nothing in text books published after the enactment of the English *Companies Act* 1929 and prior to the decision in *Re Barry and Staines Linoleum Ltd*, *supra*, which suggests that it was then though that s372 of the 1929 Act could apply to criminal proceedings: compare Buckley, 11th ed., *supra*, p656; and Halsbury, 2nd ed., vol. 5 (1932) pp331-2 (par.545), 346 (par.570), 386 (par.634) and 434-4 (pars.716-25).

We respectfully consider that *Re Barry and Staines Linoleum Ltd*, *supra*, and *Re Gilt Edge Safety Glass Ltd*, *supra*, ought not to be followed upon the point which we now have to decide. So far as we have been able to discover, the question whether the conclusion expressed by Maugham J, and followed by Crossman J, upon that point was correct, has never hitherto been considered by any appellate court. Nor has that conclusion been carefully examined by any of the recognized text books on company law, although the text books do appear to have accepted the conclusion without critical comment. No rights of property or the like have been acquired or regulated in reliance upon the two decisions.

For ourselves we see nothing harmful to the public interest in depriving company officers, who are charged with criminal offences, of a supposed defence under s365 of the *Companies Act* 1961, if the true view be, as we are convinced it is, that s365 on its proper interpretation can afford no defence: see *R v Button* [1966] AC 591, at pp627-8. We do not believe that it would be right to conclude that in enacting s390 of the *Companies Act* 1938, s254 of the *Companies Act* 1958 or s365 of the *Companies Act* 1961, the Victorian Parliament intended that those provisions should bear the interpretation placed on s372 of the English 1929 Act by Maugham J in *Re Barry and Staines Linoleum Ltd*, *supra*, so far as concerned criminal proceedings: see *R v Reynhoudt* [1962] HCA 23; (1962) 107 CLR 381 at p388; [1962] ALR 483 at p487 per Dixon CJ; and *Ashenheim v Income Tax Commissioner* [1973] AC 1 at p12 per Sir Victor Windeyer.

Counsel for the informant submitted to this Court that even if the stipendiary magistrate

was right in his conclusion that under s365 he had power to relieve Peter Mitchell from liability and to dismiss the information, nevertheless there was no evidence upon which the stipendiary magistrate could properly have exercised that power. As to this, it is sufficient to say that, as at present advised, we would agree with the submission. But it is unnecessary to pursue the question. Counsel for Peter Mitchell submitted before this Court that the submission was not open on the grounds stated in the order nisi, but if necessary we would be prepared to amend ground 6, as we were in fact asked to do by counsel for the informant, so as plainly to cover the point: see *Mortimore v Stecher* [1971] VicRp 106; [1971] VR 866, at pp869-70.

For the foregoing reasons we consider that the order nisi should be made absolute, the order dismissing the information set aside, and the matter remitted to the Magistrates' Court at Melbourne to be dealt with in accordance with law. We consider that the costs of the applicant/informant of this order nisi, including reserved costs, should be taxed and paid by the respondent (subject to the limit imposed by s161 of the *Justices Act* 1958).

Counsel for the respondent asked that an indemnity certificate should be granted to the respondent pursuant to s13 of the *Appeal Costs Fund Act* 1964 in the event of the order nisi being made absolute with costs, and we think it appropriate to grant such a certificate.

KAYE J: This is the return of an order nisi to review an order made in the Magistrates' Court at Melbourne on 12 March 1974 dismissing an information laid under the provisions of s161 of the *Companies Act* 1961.

The complaint made in the information was that between 4 May 1967 and 15 August 1968, the respondent (defendant), while a director of Apex Freight Lines Pty Ltd, did not cause to be kept in the English Language such accounting and other records as would explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time and in such manner as to enable such accounting and other records to be conveniently and properly audited.

At the conclusion of the applicant's (informant's) case, a submission made by the respondent's counsel that the information had not been proved was over-ruled. Upon a further submission, the Magistrate, in the purported exercise of powers under s365 of the Act, wholly relieved the respondent from liability for breach of duty under s161 and dismissed the information.

The order nisi was granted on six grounds but Mr Ormiston, who appeared to move the order absolute, based his principal submission on ground No. 3 which reads,

> "The Magistrate should have held that the proceedings for negligence default breach of duty or breach of trust against a person referred to in the said sub-section did not include criminal proceedings in respect of offences against the Act."

The substance of this ground is that s365 of the *Companies Act* 1961 has no application to the hearing of an information alleging the commission of an offence against the provisions of the Act. In dismissing the information, the Magistrate purported to act under s365(1) which reads as follows:

> "If in any proceedings for negligence default breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for negligence default or breach the Court may relieve him either wholly or partly from his liability on such terms as the Court thinks fit."

The matter raised by this ground, therefore, requires resolution by statutory interpretation. For this purpose it is necessary to consider the whole of the section which contains four sub-sections.

Subs(4) defines the persons to whom the section applies. The first three sub-sections confer jurisdiction to relieve a person from liability in three sets of circumstances. Subs(1) and subs(3)

apply to the exercise of power during the hearing of proceedings, while subs(2) enables the Court to grant relief where proceedings are anticipated. The nature of the proceedings and claims to which these provisions apply should be spelt out from the four causal circumstances enumerated, namely, negligence, default, breach of duty, and breach of trust. The words "default" and "breach of duty" refer to the performance or omission to perform some act required or forbidden by the statute. On the other hand, negligence and breach of trust are constituted by factual situations which do not necessarily fall within the circumstances of contravention of or failure to comply with, a statutory provision. Furthermore, the sub-section relates to liability for negligence, default, breach of duty and breach of trust. But the liability to which a person who contravenes or fails to observe a requirement of the Act is to a conviction of and punishment for an offence. Negligence and breach of trust, arising out of the commission or omission of an act forbidden or required to be done, do not involve risk of conviction.

Subs(3) empowers a judge in the course of proceedings before a jury for negligence, default, breach of duty, or breach of trust, if he is satisfied that the defendant ought in the pursuance of subs(1) to be relieved from liability, to withdraw the case in whole or in part from the jury and direct judgment to be entered for the defendant on such terms as to costs and otherwise as he thinks proper. The power given to the Court and the procedure prescribed are consistent with circumstances existing in the course of a civil trial where the judge rules that there is no case proper to go to the jury. In those circumstances the course followed by the judge is to enter judgment for the defendant after having either directed the jury to find a verdict for the defendant and received such verdict from it or discharged the jury without taking a verdict; *Phillips v Ellinson Bros Pty Ltd* [1941] HCA 35; (1941) 65 CLR 221 at pp227-9 and 252-3; [1941] ALR 340; *Thompson v Amos* (1949) 23 ALJ 98, per Dixon J (as he then was) at pp103-4; and *Humphrey v Collier* [1946] VicLawRp 60; [1946] VLR 391 at pp407-8; [1946] ALR 448. On the other hand, it is incompetent for a judge in the course of a criminal trial to withdraw a case in whole or in part from the jury without receiving its verdict on the presentment; *R v Nicholas* [1921] VicLawRp 106; [1921] VLR 602; 27 ALR 369; 43 ALT 91; *R v Hancock* (1931) 23 Ch App R 16; *R v Heyes* [1951] 1 KB 29; [1950] 2 All ER 587; and *R v Paprounas* [1970] VicRp 107; [1970] VR 865. Thus the procedure described is both foreign and quite inappropriate to criminal proceedings.

The jurisdiction to grant relief where a person apprehends that a claim will or might be made against him in respect of any negligence, default, breach of duty, or breach of trust is conferred by subs(2). The expression "claim . . . in respect of any negligence default breach of duty or breach of trust" is again inappropriate to a prosecution or information on indictment. In my view the word "claim", used in conjunction with the words "negligence default breach of duty and breach of trust", has the connotation of the assertion of a cause of action based upon conduct giving rise to civil liability.

The use of the expression in subs(1) "relieve him either wholly or partly from his liability" is difficult to apply to criminal proceedings. A person charged with an offence against a provision of the *Companies Act* may be exposed to twofold liability, namely, to a conviction and to a penalty, either by way of fine or imprisonment or both. To relieve a person so charged wholly of liability would necessitate a dismissal of the information. But it is not clear how a court could relieve a defendant partly from his liability for conviction and punishment. Furthermore the exercise of power to relieve a person wholly or partly in respect of prospective liability for conviction and punishment would create great problems. It might require a Court to make findings of fact upon an information for an offence—perhaps in advance of its formulation—and an adjudication that the person at risk should not be convicted, or if convicted not punished. But apart from procedural problems of this type, relief from liability is not an expression used in connection with a criminal offence. The procedure followed to absolve a person from risk of conviction is to grant him either a pardon or an indemnity or immunity from prosecution. In addition the Crown might enter a *nolle prosequi* for this purpose.

These considerations have led me to the conclusion that the provisions contained in s365 have no application to an information alleging an offence under the Act.

This conclusion, however, is in conflict with the basis of decisions in *Re Barry and Staines Linoleum Ltd* [1934] 1 Ch 227; [1933] All ER Rep 1013, and in *Re Gilt Edge Safety Glass Ltd* [1940] 1 Ch 495; [1940] 2 All ER 237. In both these cases the Court had been petitioned for orders relieving

petitioners from liability consequent upon having acted as a director without being possessed of the requisite share qualification. The petitioners sought to invoke the power to grant relief invested in the Court by s372 of the English *Companies Act* 1929. This section, save for the definitions contained in subs(4) of the persons to whom it applies, is expressed in the same language as the Victorian section now under consideration. In *Barry and Staines Linoleum Ltd*, *supra*, Maugham J, as he then was, stated that it was beyond doubt that s372(1) applied where proceedings were being taken in a Court of summary jurisdiction to recover a penalty imposed on a director and others under the Act of 1929. His Lordship concluded that s372(2) empowered the Court to grant relief on the application of a director who apprehended that a claim would be made against him for payment of fines because he had acted as a director without being qualified.

The petitioners in *Re Gilt Edge Safety Glass* sought relief after having been served with summonses to appear before a Court of summary jurisdiction to answer informations that they had unlawfully acted as directors after ceasing to hold the requisite share qualification. The hearing of the summonses was adjourned to enable the directors to apply for relief. In their respective petitions, they sought relief under subs(1) and subs(3) in respect of both proceedings already commenced as well as any future proceedings. Crossman J at [1940] 1 Ch p501 observed that it followed from Maugham J's decision *Re Barry and Staines Linoleum* that s372(2) applied to prospective liability to pay fines and penalties under the Act. His Lordship, however, declined to make orders in respect of the adjourned proceedings on the ground that by subs(1) the Court hearing the extant informations possessed jurisdiction to give relief.

Having regard to the length of time since these decisions were made, and to references made to them by learned commentators and authors, (see *Buckley on the Companies Act* 13th ed., p772, Palmer's *Company Law*, 21st ed., p590; O'Dowd and Menzies *Victorian Company Law and Practice*, p586, and Halsbury 4th ed., vol. 7, p306 par. 524) this Court ought not depart from them unless there is some demonstrable error in the principle adopted by the Chancery Division.

For this purpose, it has been necessary to consider what were the civil and criminal liabilities of a director immediately before power to relieve a director was first given to the Court. This required examination of the state of the law as it was in 1907 at the time when the *Companies Act* 1907 (7 Edw. VII C.50) was enacted.

A director's civil liability then included the obligation to pay compensation to a person who had suffered loss and damage in consequence of an untrue statement contained in a prospectus or to whom shares had been irregularly allotted; *Directors Liability Act* 1890 s3 and *Companies Act* 1900 s5(2). He was also liable to repay money and restore property lost by a company as a result of his misfeasance or breach of trust; *Companies (Winding up) Act* 1890 s10(1). Such statutory liabilities were in addition to his common law liabilities to pay damages for fraudulent misrepresentation as well as liabilities in equity for breach of trust.

In addition to criminal responsibility for fraudulent conduct in connection with property, accounts, and records of a company, (*Larceny Act* s81, s82, s83, s84), a director was liable to pay pecuniary penalties for failing to comply with particular statutory requirements. Those penalties were recoverable by prosecution under the *Summary Jurisdiction Act*: (*Companies Act* 1907 s49.) By some sections an offender was required to have contravened the requirements "knowingly", or "wilfully", or "knowingly and wilfully"; by other sections the commission of an offence was complete without such state of mind or intent. Thus penalties were recoverable from a director who "knowingly" was a party to a default or who "knowingly" permitted a contravention; Companies Act 1862 s32 and *Companies Act* 1907 s3, s5, s10, s18 and s19. A director who "wilfully" made in any document required by the Act a statement false in any material particular, knowing it to be false, was punishable by imprisonment or fine or both; *Companies Act* 1907 s28. Pecuniary penalties were recoverable from a director who had "knowingly and wilfully authorised or permitted" non- compliance or default; *Companies Act* 1862 s25, s27, s32, s42, s44, s46, s53, s54. The circumstances in which a director was liable to punishment for non-compliance or contravention of a section, without knowledge, wilfulness or both, were those contained in the *Companies Act* 1862 s58 and s60, *Companies Act* 1867 s6, *Companies Act* 1900 s6 and s18 and *Companies Act* 1907 s11, s35 and s48.

It was by s32 of the Act of 1907 that power to relieve a director from liability was first

introduced. The section, which appeared under the heading "Directors", reads:—

> "If in any proceedings against a director of a company for negligence or breach of trust it appears to a court that the director is or may be liable in respect of negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, the courts may relieve him, either wholly or partly, from his liability on such terms as the court may think proper."

The first and obvious observation which the section provokes is that, because the jurisdiction was conferred on the courts to grant relief to a director in proceedings for negligence or breach of trust and from his liability for negligence and breach of trust, the section was restricted in its operation to civil proceedings. The expressions "negligence and breach of trust" do not describe non-compliance with or contravention of a statutory requirement, sanctioned by a fine or term of imprisonment. But the following further considerations have led me to the conclusion that the section was not applicable to punitive proceedings against a director for an offence against any section of the Acts.

First, before the introduction of s32, there were sections in the then existing legislation which contained provisions for exculpating a director from non-compliance with statutory requirements. One such provision was contained in s10(7) of the Act 1900, by which a director could avoid liability for non-compliance with the provision in the same section requiring a prospectus to contain specific particulars, if he had been unaware of any matter not disclosed or if non-compliance had arisen from an honest mistake on his part. Similarly, by s6(4) of the Act of 1907, on application for relief by a company or any person liable for default in filing particulars concerning specified contracts, the court could extend the time for filing the necessary document provided that the omission had been accidental or due to inadvertence or that it was just and equitable to grant release.

Secondly, the persons liable to punishment for offences against the Act included managers, officers and agents of a company, and "every person" responsible for contravention as well as directors. There is nothing to be found in the acts discriminating between the responsibility of a director on the one hand and a manager or officer of a company on the other hand for breach of any statutory requirement, or suggesting any reason why a director's responsibility for the same offence should have been less than that of others.

Thirdly, with the exception of a small number, all offences were complete unless they were committed knowingly, or wilfully, or knowingly and wilfully. It followed that the state of mind of a person who authorised or permitted a default or contravention was required to be either one aware that his acts or omissions constituted an offence, or one intending to commit the offence or one aware that his conduct constituted an offence which he deliberately intended to commit; *Burton v Bevan* [1908] 2 Ch 240, at pp246-7, and *R v Senior* [1899] 1 QB 283; [1895-9] All ER Rep 511, at pp288-91. A person possessed of such intent could scarcely be said to have acted honestly and reasonably; indeed it would be difficult to envisage circumstances where fairness would demand that a person with such state of mind should be excused.

Fourthly, s32 was expressed in similar terms to the *Judicial Trustees Act* 1896 s3 by which power was given to the Court to relieve a trustee from liability for the consequences of breach of the ordinary rules of equity; *Re Lord de Clifford's Estate* [1900] 2 Ch 707 per Farwell, J at pp712-3. But relief from criminal liability was not available to a trustee under the *Judicial Trustees Act*.

Fifthly, s32 of the Act of 1907 was re-enacted, with amendments, in s279 of the *Companies (Consolidation) Act* 1908 by which it was extended to apply to any "person occupying the position of a director". The power to grant relief was then given to "the Court hearing the case". Both of these additions fortify the conclusion that the relieving power was intended to apply only to civil proceedings. The phrase "person occupying the position of a director" embraced all persons, other than promoters and those who authorize the issue of a prospectus, who by s84 of the Act of 1908 (which re-enacted s3 of the *Directors Liability Act* 1890) were liable to pay compensation for a false statement contained in a prospectus. The words "the Court hearing the case" are scarcely appropriate to describe the hearing of a prosecution on an information or complaint alleging default or non-compliance with a statutory requirement. Yet the words do describe a court before which an action for damages or other civil remedy is in progress.

Moreover, it is noteworthy that whereas in Halsbury 1st ed., (1910), Vol. 5 in the sections headed "Misfeasance Proceedings" and "Liabilities" the power to relieve a director or person occupying the position of a director is referred to under the heading "Crimes and Offences", in the same edition no reference is made to either the power or s279 of the Act of 1908; see p. 483 par. 520; p. 232 par. 372 and pp311-8 pars. 514-8.

The *Companies Act* 1929 s372 re-enacted s279 of the Act 1908 with amendments so that the power to grant relief extended to proceedings for "default" and "breach of duty". It also conferred power to grant relief in anticipation of such proceedings and in the course of a hearing before a judge and jury. But, for the reasons already stated, I do not consider that the introduction of the words "default" and "breach of duty" extended the operation of the section to the hearing of an information to punish for breach of a provision of the Act. On the other hand the introduction of these words made the section applicable to those provisions in the Acts imposing liability on persons to pay compensation to persons who had suffered loss, in consequence of an irregular allotment of shares or a false prospectus.

Similar references and omissions in connection with the power to relieve and s372 of the Act of 1929, to those relating to s279 of the Act of 1908, are to be found in Halsbury 2nd ed. (1932), Vol. 5, p331, par. 545; p346, par. 570; and pp434-44, pars. 716-725.

Section 372 of the Act of 1929 was re-enacted in s448 of the *Companies Act* 1949 without amendment except as to persons to whom it applied. This was subsequent to the decisions in *Re Barry and Staines Linoleum*, *supra*, and *Re Gilt Edge Safety Glass*, *supra*. But the re-enactment of substantially the same provisions in a consolidating Act did not signify legislative approval of the judicial interpretation of the former section; see *Galloway v Galloway* [1956] AC 299; [1955] 3 All ER 429, per Lord Radcliffe at (AC) p320, and *R v Reynhoudt* [1962] HCA 23; (1962) 107 CLR 381, per Dixon CJ at p388; [1962] ALR 483; (1962) 36 ALJR 26.

In the result while the basis for Maugham J's assertion that the power to grant relief to a director applied to summary proceedings to recover a penalty for an offence against the Acts is not apparent, there are sound reasons for concluding that the power under the English Act had no application to a prosecution for breach of provisions of the Acts punishable by fine or imprisonment.

The first Victorian Statute which conferred on a court similar power to relieve a director was the *Companies Act* 1910 s288, which was expressed in the same language as s279 of the English *Companies (Consolidation) Act* 1908. Thus the power extended to a person occupying the position of a director as well as a director. This section was analogous to the Victorian *Trusts Act* 1901 s3, which in turn was the counterpart of the English *Judicial Trust Act* 1896 s3. The Victorian s298 was reproduced without amendment in s288 of the *Companies Act* 1915 and s288 of the *Companies Act* 1928. The section was re-enacted with amendments in s390 of the *Companies Act* 1938. This section contains substantially the same provisions as s372 of the English Act of 1929 except that by subs(4) the persons to whom it applied included in addition to directors, managers, officers and auditors as set out in the English Act, employees of a company and experts as defined in s37(4) which dealt with liability to pay compensation for statements in and omissions from a prospectus. It was the counterpart of this section with which their Lordships were concerned in both *Re Barry and Staines Linoleum*, *supra*, and *Re Gilt Edge Safety Glass*, *supra*.

When re-enacted in s254 of the *Companies Act* 1958, both directors and managers were not referred to in the definition clauses of subs(4). Nevertheless, the differences in definitions are of little, if any, significance.

By the length of time which has expired since the decisions in *Re Barry and Staines Linoleum* and *Re Gilt Edge Safety Glass*, they may now be regarded as "received interpretations" of the section. Nevertheless circumstances which might warrant following the previous decisions, notwithstanding that they are based upon an incorrect construction of the section, are absent in this instance. The section, being designed to relieve persons from liability, is not one of the class under which in the past rights have been acquired or duties incurred, and by not following the decisions neither injustice nor inconvenience is likely to be suffered; *Brownsea Haven Properties Ltd v Poole Corporation* [1958] Ch 574; [1957] 3 All ER 211; per Evershed, MR (Ch) at pp603-4.

For these reasons, construing the words of the section in accordance with their plain and ordinary meaning, it is clear that s365 has no application to proceedings upon an information alleging breach of a provision of the Act. The magistrate therefore was in error in purporting to relieve the respondent from his liability to pay a pecuniary penalty for non-compliance with the requirements of s161. *[His Honour then considered other submissions made on behalf of the respondent in support of the magistrate's order and rejected them and concluded that the order nisi should be made absolute.]*

Order absolute, order dismissing information set aside, matter remitted to Magistrates' Court to be dealt with in accordance with law. The respondent to pay applicant's taxed costs limited to $200. Certificate pursuant to s13 of the *Appeal Costs Fund Act* 1964 granted.

Solicitor for the applicant: John Downey, Crown Solicitor.
Solicitor for the respondent: K. J Williams.
