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SUPREME COURT OF VICTORIA

PENDLEBURY v KAKOURIS

McInerney J

14, 20 May, 30 July 1970 — [1971] VicRp 20; [1971] VR 177

SUMMARY OFFENCE – UNLAWFUL POSSESSION – QUANTITY OF GOODS FOUND IN A HOUSE AND IN A TRUNK – GOODS CLAIMED TO BE OWNED BY THE OCCUPIER OF THE HOUSE – 'NO CASE' SUBMISSION UPHELD BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *SUMMARY OFFENCES ACT* 1966, S26.

HELD: Orders nisi absolute. Remitted to the Magistrate to hear and determine according to law.
1. In the present case the magistrate expressed himself as not satisfied beyond reasonable doubt that the defendant was in possession of certain articles, the subject-matter of the information, which were discovered elsewhere than in the locked trunk. These were articles found in a house jointly occupied by the defendant and her husband, to which the defendant and her husband, as joint occupiers, had an equal right as well as power of access. In those circumstances the magistrate was not satisfied beyond reasonable doubt that the defendant had the complete present personal physical control of that property to the exclusion of others not acting in concert with her – which in this context, must be understood as referring to her husband. In arriving at that conclusion, the magistrate did not appear to have misdirected himself in any respect. It is not possible for the Supreme Court to say that as a matter of law the magistrate should have been satisfied beyond reasonable doubt that those goods were in the actual possession of the defendant. The onus was on the informant to adduce evidence sufficient to establish that proposition beyond reasonable doubt. The magistrate was not satisfied on that point and, consequently, in relation to those goods, no case of error had been made out or that the decision of the magistrate ought to be set aside.

2. With relation to the goods found in the locked trunk, however, the position was otherwise. The magistrate expressed himself as satisfied that those goods were in the possession of the defendant, so long as she had the key to the trunk. That key was in her pocket in her wardrobe, and although her husband might have had physical power to go to her wardrobe, take the key from her pocket and unlock it, it would not in ordinary circumstances have been likely that he would have done so. The magistrate evidently concluded that he was bound to hold that by virtue of her having handed over the key to the police, she had divested herself of possession and that she was, therefore, not in possession of the goods at the time when the police, having opened the trunk, saw the goods and suspected that they had been stolen or unlawfully obtained. The magistrate was not bound so to hold, and in those circumstances the proper order, since the magistrate invited and indeed upheld a submission of no case, was to order that the matter be remitted to the magistrate to hear and determine according to the law.

3. The order nisi was, therefore, made absolute and the order of the Court of Petty Sessions in so far as it related to the goods the subject of the information as so amended set aside. The information, amended as herein before directed, was remitted to the magistrate to hear and determine according to law.

McINERNEY J: This is an order nisi granted by Master Bergere on 7 October 1969 to review an order of the Court of Petty Sessions at Malvern on 6 August 1969, whereby an information laid by the informant, Ian Charles Pendlebury against the defendant, Wasiliki Kakouris, charging her with having on 24 June 1969 at Malvern in her actual possession a number of items of property enumerated in the information numbered 1 to 86 respectively reasonably suspected of having been stolen or unlawfully obtained, was dismissed.

The facts as deposed to in the affidavit of Lawrence Hamilton sworn in support of the application of the order nisi were that on 24 June 1969 at 7.10 p.m. the informant, Pendlebury, and other police went with a man named Andreas Kakouris, the husband of the defendant, to the defendant's address at 28 Horace Street, Malvern. The premises comprised three rooms, being half a house at 28 Horace Street, the occupants of the house or the half house being the defendant,

her husband and two small children, a girl aged 21 months and a boy aged five months. One of the police, Constable Warman, gave evidence that the defendant and her husband rented this half house. Almost certainly this statement was of a hearsay character but no objection was taken to it at the hearing. The police proceeded to search the premises, beginning with the bedroom. A quantity of articles were found in the defendant's wardrobe and also throughout the bedroom. Those articles are enumerated in the affidavit of the deponent Hamilton. The police then entered the lounge room where there was a trunk on top of which were two heavy cardboard cartons containing what appeared to be a dinner set addressed to another person. There were also other items of private property on what is described as "the tea chest". Warman testified that they removed everything from the tea chest, found that it was not locked and opened it and found many items of clothing for both male and female. There were also children's books some of which were duplicated. Warman then said to Kakouris: "Who has the key to that large trunk over there?", to which Kakouris replied: "My wife has it. I do not know what is in it - you ask my wife." It does not appear whether this was said in the hearing of the defendant, but since no objection to the question and answer was taken before the magistrate I assume that it was. Warman then said to the defendant: "Would you get the key for this trunk for me please?" She claimed that she did not know where it was, that she could not open it and repeated this assertion when a second request was made for the key. Finally, in response to a third request, she went straight to her wardrobe in her bedroom, reached into a pocket of a coat there and produced the key which she handed to the informant, Pendlebury, saying, as she did so: "The things in there are mine. I am taking them back to Greece with me. I buy everything in there."

Pendlebury opened the trunk and found inside a large *Oxford Dictionary*, some clothes, tea towels, linen bed sheets and pieces of material. Lying on the top of the dictionary was a small serviette branded "Melbourne Hospital Central Linen Service".

Another of the policemen, Senior Constable Hamilton, then said to Andreas Kakouris in the defendant's presence: "Whose property is all this in the trunks and on the bed?" Kakouris said: "I know nothing. Ask my wife. It is hers." Hamilton then asked Mrs Kakouris: "Where did all this property you have here come from?" She said: "I buy it. We have money, $90 a week we get in the house. I buy all of it. We have no money in the bank. I spend it all to buy things to take back to Greece with me." Later, when invited by Hamilton to indicate what was her own property and what had been stolen or unlawfully obtained, she reiterated that it was all her property and that she had bought it all. Thereupon Hamilton instructed the other police to put the property in the two trunks and arranged for another police car to attend to transport the property to the police station. As the other police arrived and the two trunks were being moved, the defendant said: "All right, I tell you the truth. I steal it all. That big trunk, that is stolen. I take the handle and drag it out of Myers. Take the chairs, take the table, take the beds if you want. I steal them all." Whether these statements were true or merely the products of pique was, of course, a matter for the magistrate.

Subsequently the defendant was brought to the Malvern Criminal Investigation Branch office where she was interviewed by Senior Constable Hamilton, First Constable Pendlebury and Constable Warman. That interview commenced at 10 p.m. on the Tuesday night and concluded at 10.15 a.m. on Wednesday 25 June 1969. There was a further interview with the defendant which commenced at 12.35 p.m. on that Wednesday and concluded at 1.30 p.m. The questions put and the answers given were typed in the form of what is now known as a "record of interview". At the end of each interview the defendant was asked if she wished to sign the interview or read it. After the first interview she said: "No, you think I am a thief, I will not read it." At the end of the second interview she simply said: "No". The record of interview is included as part of the affidavit of the deponent, Hamilton, and has presumably been so included as part of the material laid before the Court of Petty Sessions, although there is no indication in the affidavit that the document was admitted in evidence as an exhibit. The affidavit does not make it clear whether any objection was taken to the admissibility of the record of interview. In view of the answers given by the defendant when asked to read and sign it, and in view of the fact that on neither occasion did she sign or read the record of interview, the document containing the record of interview was not admissible in evidence against her: see *R v Kerr (No 1)* [1951] VicLawRp 27; [1951] VR 239; [1951] ALR 490; *R v Lapuse* [1964] VicRp 7; [1964] VR 43 at p45. The affidavit does not contain any suggestion that the police used the document merely to refresh their memory but if it was so used, then the document itself would not have been admissible in evidence before the magistrate. During the

course of the hearing of the order nisi I intimated to counsel for the informant that because these matters were not satisfactorily cleared up in the affidavit filed in support of the application for an order nisi, I did not think the record of interview should have been included in the informant's affidavit and that I did not propose to treat it as part of the evidentiary material before me. He did not seek to dissuade me on this point of view.

Mr Black of counsel, who appeared for the defendant at the hearing of the information, did not cross-examine the witness, Constable Warman. The Stipendiary Magistrate then asked Senior Constable Hamilton, who appeared for the prosecution, whether he had any other evidence to offer, to which he said: "Yes." Thereupon the magistrate asked: "Is it in respect of ownership?", to which the prosecutor replied: "No, only for corroborative evidence." The Stipendiary Magistrate then said: "Well, at this stage perhaps you, Mr Black, would like to make a submission?" Mr Black then said: "I would have made a submission at a later stage but if your Worship is inviting me I will make my submission now." Mr Black then submitted that there was no case to answer on the ground that at the time the property was suspected of being stolen it was not in defendant's actual possession to the exclusion of all others.

The magistrate then asked the prosecutor is he had anything to say. In reply, the prosecutor argued that from the facts that the defendant had maintained ownership of the property from the time the police first entered the house, and that she had personal property on top of the unlocked trunk and that she had had the key of the locked trunk, the court should infer that the property found in that trunk was in her actual possession even when the police opened the trunk. The magistrate said that in the absence of evidence to the contrary he must assume that Mr Kakouris rented the premises and was, therefore, the occupier and he was satisfied that the articles in the unlocked trunk were never, at any stage, in the actual possession of Mrs Kakouris and that there was no case to answer regarding those. The magistrate said that the case as to the property in the locked trunk was similar to the case *Olholm v Clink* [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421, in reverse.

He said further that he was satisfied that while Mrs Kakouris held the key to the locked trunk, the property in it was in her actual possession, but that the police could only suspect the property when they saw it and that when they opened the locked trunk themselves, and saw the property in the locked trunk, it was no longer in her actual possession. After the prosecutor had addressed further arguments, the magistrate said that he was satisfied that, at the time the police saw the property in the locked trunk, it was no longer in the defendant's actual possession and that he was dismissing the charge on a technicality only concerning the opening of the locked trunk by the police. He then dismissed the information.

The affidavit on which the order nisi was obtained makes no reference to any witness for the prosecution having given evidence of having suspected that the property had been stolen or unlawfully obtained. Following some discussions of this matter with counsel for the informant, I caused inquiries to be made of the Stipendiary Magistrate. In reply the Stipendiary Magistrate informed me as follows: "In his evidence-in-chief Constable Robert Warman did not give any evidence regarding suspicion of property the subject of the charge. In answer to specific questions directed to him by me, he said that he suspected the property found as being stolen or unlawfully obtained when he first saw it. He went on to say that as far as articles in the locked trunk were concerned, his suspicion attached to each article when he first sighted same, either as it was removed from the trunk, or as it came into view still in the trunk as other goods were lifted out."

In those circumstances, it is unnecessary for me to deal with the submission made by counsel for the informant – based on the authorities referred to in Bourke's *Police and Summary Offences* (2nd ed., by Messrs. Fogarty and Cummins (1970), p144) - that it is not necessary that any prosecution witness should swear to having actually entertained the requisite suspicion if the circumstances were such that a reasonable man would have had the necessary suspicion and the informant acted as such a person would have acted if he had that suspicion.

Section 26 of the *Summary Offences Act* 1966 (Act No. 7405) which the defendant was alleged to have contravened, was formerly s42 of the *Police Offences Act* 1958 which traced back through the consolidating Acts of 1928 and 1915 to the consolidating Act No. 2422, being the *Police Offences Act* 1912, and s10 of the *Police Offences Act* 1907 (Act No. 2093).

When in 1966 the provisions of s42 of the *Police Offences Act* 1958 were transferred (along with other provisions of that *Police Offences Act*) into the *Summary Offences Act* 1966 (Act No. 7405) opportunity was taken of effecting certain amendments. For instance, in subs(1) "reasonably" was inserted before the words "suspected of being stolen or unlawfully obtained" (in response to criticisms expressed over many years by members of the legal profession, and ultimately by the Statute Law Revision Committee, of the decision in *Donnelly v Devenish* [1926] VicLawRp 37; [1926] VLR 235; [1935] ALR 208, that it was not necessary that the informant's suspicion should be a "reasonable suspicion"). One other amendment was made, namely, in sub(3) where the words "whether in a building or otherwise" which had been part of the legislation since 1907 were repealed: and replaced by the words "or under his control" so that the present sub(3) reads:

> "Upon proof that any property was or had been in the actual possession of such person or under his control and whether or not such person still has possession or control thereof when brought before the court the property shall for the purposes of this section be deemed to be in his actual possession."

Having regard to the history of the legislation – reviewed in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265 at pp272, 273; 25 ALR 213 at p219, the omission from the 1966 Act of the words "whether in a building or otherwise" may give rise to problems hereafter, but I do not think, for reasons which I shall presently discuss, that it is necessary to consider, in the present case, the effect of that omission.

The offence created by s26 of the *Summary Offences Act* 1966 may be described as that of failing to give to the Court of Petty Sessions a satisfactory account as to how the accused came by personal property which he had in his actual possession or was conveying in any manner at the time when the informant reasonably suspected it of having been stolen or unlawfully obtained. In the present case the defendant was not at any material time conveying the property the subject-matter of the information: consequently the prosecution had to prove that the property the subject of the information was in her actual possession. Where, as here, the property is found in a building, the decisions on the question whether the property was or was not in the actual possession of the defendant are by no means easy to reconcile.

Moors v Burke [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213, a decision of the Full Court of the High Court on appeal from the Full Court of Victoria, has always been regarded as the leading case on the section.

The defendant was an officer of the Customs Department and, as such, had access, for the purposes of his employment, to a locker in the custom shed in Melbourne. Although the headnotes both in the *Commonwealth Law Reports* and in the *Argus Law Reports* of the decision in the High Court state that Moors had not the exclusive right or access to the locker and that another customs clerk had at least an equal and independent right and power of access, the report of the Full Court of the Supreme Court decision (25 ALR 61, at pp61, 62) goes no further than to suggest that Moors might not have been the only officer that had the keys of the lockers.

The judgment of the High Court, read by Isaacs J, was devoted in the first instance to an analysis of the phrase "actual possession" and of various passages in Pollock and Wright on *Possession in the Common Law*. Mr Justice Wright's statement that "possession" signifies "physical possession" – a state of facts rather than a legal notion – and his proposition that "when a person is in such relation to a thing that (1) so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure; and (2) so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him, or in some receptacle belonging to him, and under his control he is in physical possession of the 'thing'" were specifically approved. Approval was also expressed of the passage at p129 of Pollock and Wright: "No phrase is more usual for describing the ordinary test of possession than the question –'Had he the separate, undivided and exclusive control of the thing'?"

At CLR p274; ALR p217, the High Court summarized its views as to the meaning of the section here in question:

> "'Having actual possession' means, in this enactment, simply having at the time, in actual fact and without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has

> that control by having the property in his present manual custody, or by having it where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes."

The reasons for judgment proceed:

> "In its nature it corresponds to its companion expression 'conveying', which necessarily involves instant personal physical control to the exclusion of others. These two expressions are obviously intended to cover the whole ground of actual personal control - that is, whether the property is kept stationary or is in motion. But it does not include the case of a person who has put the property out of his present manual custody and deposited it in a place where any other person independently of him has an equal right and power of getting it, and so may prevent the first from ever getting manual custody in the future. In that event the property is not in his actual possession: it is where he may possibly reduce it again into actual possession, or, on the other hand, where the other person may himself reduce it to his own actual exclusive possession."

Applying that analysis to the facts of the case the High Court held (CLR at pp274, 275; ALR at p217):

> "The wool, placed in the locker by Moors, had ceased to be in his actual possession, because, though it was in the locker, the locker itself was not, in the words of Mr Justice Wright, 'a receptacle belonging to him' or 'under his control', nor had he the exclusive means or right of opening it and obtaining the contents. Another Customs clerk had equal right and power with Moors, and independently of him, to open the locker and take out its contents. The wool was, therefore, at the crucial moment, not in fact in the 'actual possession' of Moors, and the prosecution necessarily fails."

Reference was made by the magistrate in the present case to *Johnson v Kennedy* [1922] VicLawRp 41; [1922] VLR 481; 28 ALR 194. In that case separate informations for unlawful possession had been laid against Thomas Kennedy, a ganger, and his wife, Lavinia Kennedy. They were in occupation of railway premises where a quantity of wheat was found. Mrs Kennedy was the station mistress and as such had the use of the residence at the railway station: she received also a salary or fee of 1s 9d. per day. In consideration of the work he did at the railway station and greasing points etc., her husband also had the use of the residence. A shed in the premises was found to contains some 10 bags of wheat and in an iron tank on the residence there was a quantity of wheat and oats loose. Despite the objections of the defendants, the two informations were heard together. In each case the defendant was convicted of having been in possession of one bag of wheat suspected of having been stolen or unlawfully obtained. The convictions were set aside on the ground, *inter alia*, that against each of the accused persons the fact of actual possession of the bag of wheat the subject of the information was not proved. This, I take to mean, that the Full Court was not satisfied that as a matter of law the inference of exclusive possession could be drawn against either of the defendants.

In *Olholm v Clink* [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421, McArthur J, on a case stated from the court of general sessions held that on the evidence the chairman was justified in finding that the defendant, Clink, had on 5 July 1922, at Camperdown, actual possession of goods suspected of having been stolen. The property in question consisted of four tins of kerosene which had been found by the informant on the previous day in the kitchen of a house in which the defendant and his wife resided, to which the defendant in course of subsequent questioning by the police referred as "my house". The defendant had been questioned about the kerosene on 4 July when two police officers visited the house and found the kerosene there. On the next day, at the Camperdown Police Station, the same police officers further questioned the defendant and he made a written statement. On 4 July, when asked where he got the kerosene, the defendant said that he bought four cases of kerosene in a shop. In a statement which he made to the police at the police station on 5 July, he claimed that the kerosene had been purchased by him from a man whose name he did not wish to mention. McArthur, J, said that he had no doubt that the defendant was in actual possession of the kerosene on 4 July, because on that date he was not only in the house where the kerosene was but was actually in the room where it was, the kitchen (VLR at p561; ALR at p423). As to the question of possession, McArthur J, thought it might reasonably be inferred that prior to the defendant's going to the police station on that date he was at the house and thought he could not draw the inference that the defendant was in the house on 5 July after he signed the statement to the police, or, if he was, that the kerosene was still there. Nevertheless, McArthur, J, held that it was open to the chairman of general sessions to find that the kerosene was, at the time when the defendant made the statement at the police

station on 5 July, in the actual possession of the defendant. McArthur J held (VLR at p560) that on the evidence the proper inference to be drawn was that the house was the defendant's house and not his wife's house, "his house" in the sense that he (the defendant), and not his wife, was in law in possession of the house – whether as owner or otherwise was immaterial to the question under discussion. He rejected (VLR at p560; ALR at p423) the argument that "the mere fact that personal property, which from its nature may belong either to the husband or the wife, is found in the house, does not justify the inference that such personal property belongs to the husband any more than to the wife, and that therefore it cannot be said to be in the husband's possession any more than in the wife's."

He commented (VLR at pp560, 561):

> "Perhaps not. But here the defendant claimed the kerosene as his, stating that he had purchased it from a man whose name he refused to give, and that it had been delivered at his house in the afternoon of a date which he could not give. As against the defendant, therefore, and as between him and his wife, this kerosene must be taken to be the defendant's property."

He went on (VLR at p561; ALR at p423) to say:

> "In the present case, when the facts are investigated, it is found that the kerosene is in the defendant's house was claimed by him to be his own property, and therefore (apart from any special meaning which the words 'actual possession' may have in s40) it must be taken as against the defendant that he was in actual possession of that kerosene."

After a reference (VLR, at p564) to the remarks of Lord Halsbury in *Charlesworth v Mills* [1892] AC 231 at p237, he added (VLR at p564; ALR at pp424, 425):

> "Once it is conceded that a man may be in actual possession of a thing which is out of his hands, out of his reach, and out of his sight, and in a different room in the house to that in which he himself is, it must follow, I think, that he may still be in actual possession of it even though he is not in the house at all, or on any part of the premises. In the present case the defendant was living in his house in Scott Street, Camperdown, a country township. When he was away from his house - certainly when he was no further away from it than somewhere else in the township - he would still be, in my opinion, in actual possession of his personal property."

It is clear that such a view gives the legislation a scope far beyond that expressed in relation to the parent English Acts in *Hadley v Perks* (1866) LR 1 QB 444, and McArthur J seems to have been of the view (see at VLR p559) that the presence in the section of the words "whether in a building or otherwise" was an indication that the section was not to be limited – as Hood, J, had suggested in the case of *Tatchell v Lovett* [1908] VicLawRp 91; [1908] VLR 645; 14 ALR 540 – to cases where the accused was caught flagrante delicto.

As to the argument that the defendant, Clink, did not have control of the property "to the exclusion of others not acting in concert with him; that he had not exclusive right or power to place his hands on it", within the meaning of those words in the judgment in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213, having regard to the fact: "that the defendant's wife would naturally have the right of access to the kitchen, and being in the kitchen she would have the right – at all events she would have the power – to place her hands on the tins of kerosene, and so have manual custody of them", McArthur J said (VLR at p565; ALR at p425):

> "But it must be noticed that the words in the definition are 'right or power'. So that if the defendant had either the exclusive right or the exclusive power, he would come within the definition. This is amplified lower down in the judgment, where, as a corollary, it is said: – 'where any person independently of him has an equal right and power of getting it.' There is no evidence whatever, in my opinion, that the defendant's wife had, independently of the defendant, any right or power of getting the kerosene. The only evidence at all on the subject is that they were man and wife being together in the same house – the defendant's house - and that the tins of kerosene in the kitchen were claimed by the defendant to be his property. That may justify the inference that what ordinarily happens in such a case happened in this – viz., that the wife, with the husband's knowledge and consent, did in fact use the kitchen in the ordinary way, and that she did in fact take kerosene from the tins in the ordinary way when she required it for household purposes. But it certainly does not justify the inference that, independently of the defendant, she had the right and power to do so. In fact, I think the proper inference to draw is that she had not such independent right and power, but

> that the only right and power she had was derived from her husband, who could at any moment, at his own will and pleasure, have withdrawn from her his permission to use the kerosene – or even, for that matter, to go into the kitchen – and that therefore the defendant's control of the kerosene was exclusive."

McArthur J, therefore, concluded that the defendant was, on 5 July, immediately after he signed the statement at the police station, in actual possession of the kerosene which was in his house and which he claimed to be his own.

Olholm v Clink [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421, was distinguished by Macfarlan J, in *Sloan v McGowan* [1926] VicLawRp 35; [1926] VLR 227; [1926] ALR 192 – a case stated by a chairman of general sessions. In that case McGowan deposited for storage with Mayne Nickless' storeroom 16 trunks containing drapery which (when discovered) was suspected of having been stolen. The trunks were locked and roped and the defendant kept the keys. A certificate in respect of the trunks was issued by Mayne Nickless to the defendant in respect of each consignment of trunks, but ultimately those certificates were recalled and one certificate was issued in respect of the whole 16 trunks. The storeroom kept by Mayne Nickless and Co. was for the purpose of storage of goods, and persons other than the defendant stored goods there. To each person who stored goods there a certificate in respect of such goods was issued. No person had the right of access to the storeroom except on the production of his certificate, nor could anyone enter the storeroom without the permission of the employees of Mayne Nickless and Co. The only people who had access to the storeroom were the employees themselves, except those persons who produced certificates issued by Mayne Nickless and Co. No one had any right to open the trunks in question except the defendant and he kept control of the keys. On those facts Macfarlan J held that the goods were not in fact in the actual possession of the defendant within the meaning of the section at the time of the informant having suspected that they were stolen. The goods were in the warehouse to which the defendant was no more entitled to exclusive entry and which was no more under his control than was the locker in *Moors v Burke*, *supra*. That fact alone was sufficient, Macfarlan, J, said, to show that it was not a case of actual physical possession as distinct from mere legal possession. Dealing with a contention for the informant "that as the defendant is the only person, other than the employees of the warehouse, who was entitled to get possession of the goods, then that was conclusive that he was in actual possession of them", it being said that the case of *Olholm v Clink*, *supra*, was authority for the contention. Macfarlan J said ([1926] VLR at p229; [1926] ALR at p193): – "If *Olholm v Clink* decided that, I should have no hesitation in dissenting from it; but, notwithstanding certain expressions in the judgment, I do not think that it decided anything of the kind. Those expressions must be read in conjunction with the facts of that case, which were very different from those of the present case, and it was only in dealing with one aspect of that case that those expressions were used." (This appears to be a reference to the passage in the report (VLR at p565; 28 ALR at p425) that it was sufficient that the defendant had either the exclusive right or the exclusive power to deal with the goods.)

In *Donnelly v Devenish* [1926] VicLawRp 37; [1926] VLR 235; [1926] ALR 208, the property in question consisted of five tins of oil found in the rear of a car. At the time when the constable first saw the oil in the car and suspected that it had been stolen, there was a man other than the defendant sitting in the back seat of the car, but the defendant was not then in the car, he being on the beach with other persons. The defendant admitted that he was the driver of the car and that he owned the oil, which he said he had got from his employer at some stage before he left the garage at 11.30 p.m. on the previous night. He told the police that he had carried the oil about with him all night. On this material the Full Court held that there was abundant evidence that the defendant was in "actual possession" at the time when the constable first saw the tins, and rejected the argument for the defendant that the defendant's possession was not exclusive having regard to the fact that another man in the car had access to and control over the oil.

Olholm v Clink, *supra*, was again distinguished by Macfarlan J in *McKnight v Wooding* [1935] VicLawRp 6; [1935] VLR 30; [1935] ALR 66. In that case the defendant was taken by the police to a shed situated in the backyard of a house in which he did not live but which adjoined the house in which he Boarded. By permission of the owner of the premises adjoining those in which he Boarded, the defendant kept his motor cycle in that shed. It appeared that numerous other persons also used the shed in question. In that shed the police found certain goods which they suspected of having been stolen. (The motor cycle was not part of the goods in question.) One of

the police asked the defendant: "To whom do these articles belong?", to which he answered "They are mine." He refused to explain where had got them except to agree, when asked, that they were "crook". Macfarlan, J, set aside the conviction holding (applying *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213) that there was no evidence from which the justices could infer that the defendant was in actual possession of the goods at the material time. There was nothing to suggest that the shed was in the control, much less the exclusive control, of the defendant. The only other evidence as to his connexion with the goods was that he said they were his. "The statements by the defendant were not", said Macfarlan J "evidence of actual possession any more than it would be evidence of actual possession if the police had taken the goods in their hands, and taken them outside the shed and said 'Whose goods are these?' and the accused had then said 'they are mine'. The mere fact that when they are making their inquiries the goods are still in the shed, does not, in my opinion, make any difference. In both cases, the statement seems to me to be quite consistent with the position that the goods have never been in the actual possession of the accused." He added that the case was quite distinguishable from the cases of *Olholm v Clink*, *supra*, and *Donnelly v Devenish*, *supra*, but did not amplify this comment in any way.

Olholm v Clink was further distinguished (this time by Martin J) In *Wilby v Gilder* [1942] VicLawRp 8; [1942] VLR 28; [1942] ALR 13, a case in which the facts are remarkably similar to those in the present case. The facts are in some respects more fully reported in the *Argus Law Reports* than in the *Victorian Law Reports*. From that report and from the Court file it appears that the informant and other police had arrived at the premises with the defendant's husband, that the defendant thereupon asked her husband what had happened, to which her husband replied that he had just been arrested by the police for shop breaking and that he had been caught coming out of a shop. Subsequently, when asked who occupied the house, the defendant replied: "My husband and I." Asked who owned the furniture and other property therein, she said: "My husband owns most of it but some of the things are mine." She was then asked to specify which of the property was hers and which was her husband's, to which she replied that she could not say from memory. The informant then asked what was in a sideboard which was in the house and was told only a few clothes and odds and ends. The sideboard was then searched and two cases of cutlery and other cutlery wrapped in cloth were found to be therein. After a statement made by her husband in her presence and hearing to the effect that the cutlery belonged to her having been given to her as a present by her late husband, the defendant said that the cutlery was her property, which had been given to her as a wedding present by her late husband some four years before- about 12 months before she had married her present husband. At the hearing the informant called evidence from the manufacturer's agents, the sole agents for the cutlery in question, that none of these articles of cutlery had been received by them until about July 1939, and that none of those articles could have been purchased in Australia before November 1939, although it would have been possible for a person having purchased the articles overseas, to have brought them into Australia before that date. In cross-examination the informant stated that the sideboard wherein the cutlery was found was in a position where it was accessible to any occupant of the house, and that it was possible for the defendant's husband to have access to the sideboard, and that the sideboard was not locked.

The Court of Petty Sessions dismissed the information and on review Martin J discharged the order nisi. In moving the order absolute, counsel for the informant contended that since the defendant had claimed to be the owner of the cutlery the making of that claim warranted the conclusion that she was in possession of it notwithstanding the husband's equal right of access and notwithstanding the falsity of the claim. For the defendant, it was argued that the husband and wife had equal rights and opportunity of access of the goods, that the defendant's claim of ownership was irrelevant and that in any case it was shown to be false.

Martin J distinguished *Olholm v Clink* on the ground that in the case under review it was not shown and could not be inferred that the defendant had any right and power to exclude the husband from using either the house or the sideboard ([1942] ALR at p14). Martin J further relied on the views expressed by Macfarlan J in *McKnight v Wooding* that a claim of ownership of goods which were kept in a shed to which the claimant and others had lawful access was insufficient to show actual possession. He distinguished the case of *Field v Sullivan* [1923] VicLawRp 12; [1923] VLR 70; 29 ALR 38, as being concerned with the right to possess as distinct from actual possession.

The authority of *Olholm v Clink* was, however, somewhat restored by the decision of Gavan Duffy J, in *Olsen v Davies* [1957] VicRp 24; [1957] VR 183; [1957] ALR 446. In that case the goods in question had been found in a garage in a backyard of a house in which the accused, his wife and two children lived. The accused claimed to be the owner of the garage and house and he claimed to be the owner of the tools. The accused further said that his wife and children had nothing to do with the tools which were entirely his responsibility. The evidence showed that the garage door was secured with a piece of wire, and the police evidence was that the defendant had to use considerable force to break the wire. The tools in question would have been accessible to any person who entered the garage. Gavan Duffy J held that *Olholm v Clink* was a clear authority that the evidence in the case then before him was sufficient to prove actual possession and that *Wilby v Gilder*, *supra*, was no authority to the contrary. He said he took *Olholm v Clink* (VLR at p185; ALR at p447) "to be at any rate authority for this. Where the evidence is that the accused claimed articles suspected of having been stolen as his, and they were found on premises of which he had in law the rights of a person legally in possession, the fact that his wife was living with him on the premises where the articles in question were found did not prevent the articles from being in his actual possession. I need hardly say that such a conclusion may be negatived by other evidence which shows that he had neither the exclusive right nor power to place his hands on it". After discussing cases such as *Brennan v Thomas* [1953] VicLawRp 21; [1953] VLR 111; [1953] ALR 214, and *Public Trustee v Kirkham* [1956] VicLawRp 13; [1956] VLR 64; [1955] ALR 1079, Gavan Duffy J said (VLR at p186; ALR at p449):

> "As the reported cases stand at present, I am not prepared to hold that where a husband and wife are living together in a house which he owns he has lost any possessory right except perhaps a general right to insist on his wife ceasing to live in the house."

It is presumably that aspect which Gavan Duffy J had in mind when he said of *Wilby v Gilder*, *supra*, that "the defendant was the wife and not the husband and there was no evidence that she owned the house or was the occupant thereof" (VLR at p185; ALR at p448).

The most recent decision in this Court on the matter is *Hofstetter v Thomas* [1968] VicRp 20; [1968] VR 199, a case arising under the provisions of s42 of the *Police Offences Act* 1958. Hofstetter had been arrested while walking in a street in Melbourne and carrying a small brief case which contained £4200. He was taken to the Russell Street Police Station and interviewed by the two informants. On being requested by the informant, Gardner, to empty out all his pockets he emptied all but a small fob pocket. This pocket was then found to contain a set of keys for a box in the Melbourne Safe Deposit. The police then asked Hofstetter if he was willing to take them to the safe deposit box and show them what it contained. He told them that he could tell them that it contained 13,400 pounds in cash and he agreed to show the contents of the box to the informant, Gardner. Accordingly, they went to the Melbourne Safe Deposit where the manager of the establishment escorted the appellant to his safe deposit box. The manager, after operating the central control, opened the appellant's box and handed to the appellant the metal box contained therein. The appellant, Hofstetter, then carried the box to an inspection room where he opened the box which was then seen to contain a large number of bank notes. When asked whose money it was the appellant said: "I can't answer, and, when asked whether it was his money, he said: "No, I can't tell you." When asked how much was there he said 13,400 pounds. Asked in whose name the safe deposit box was leased he said "Caster Heights Pty Ltd", and further said that it was his company. It was shown by the evidence that the safe deposit box had been leased to Caster Heights Pty Ltd and that this was an investment company of which the appellant, Hofstetter, and his wife were directors and in which they had the controlling interest. Access to the safe deposit box could only be had by the appellant or his wife or any person to whom they or either of them gave authority. The appellant had been issued with a key to the box and a duplicate key.

On those facts Menhennitt J held that although Hofstetter's wife had equal rights to access to the safe deposit box and Hofstetter could not, therefore, on the authority of *Moors v Burke*, *supra*, be said to have actual possession of the box and its contents within the meaning of s42 of the *Police Offences Act* 1958 while the money was in the safe deposit, nevertheless when he, who alone had a right to possession of the contents of the box, took physical custody of the money, he thereby was in actual possession of the money within the meaning of s42.

The decision seems plainly correct, but in the course of his reasons for judgment,

Menhennitt J said (at p205):

> "The decisions in *Olholm v Clink* [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421, and *Olsen v Davies* [1957] VicRp 24; [1957] VR 183; [1957] ALR 446, established that where more than one person is in possession of premises, if one of them asserts that the personal property in issue belongs to him and that the premises are his, that is sufficient to give him actual possession of the personal property. This being so, it seems to me to be an *a fortiori* case if a person with the right to possession of property actually reduces it into his physical custody."

As to these remarks it is to be observed that neither in *Olholm v Clink*, *supra*, nor in *Olsen v Davies*, *supra*, was there in fact evidence that there was more than one person in possession of the premises. In each case there was evidence that the accused and his wife and family resided in the house. In each case the accused specifically said that the house was his and there was no evidence to show that the wife was the owner or entitled to possession of or that she was in possession of the premises. In each of those cases the accused was treated as being the person in possession of the premises and it was that circumstance rather than the claim by the accused that the personal property in issue belonged to him which justified the conclusion that he was in actual possession of the personal property. The significance attached by Menhennitt J to the assertion by the accused that the personal property in issue belonged to him is not easy to reconcile with the decisions of Macfarlan J in *Sloan v McGowan* [1926] VicLawRp 35; [1926] VLR 227; [1926] ALR 192, and *McKnight v Wooding* [1935] VicLawRp 6; [1935] VLR 30; [1935] ALR 66, nor with the decision of Martin J in *Wilby v Gilder* [1942] VicLawRp 8; [1942] VLR 28; [1942] ALR 18. So far as the report goes, it does not appear that the attention of Menhennitt, J, was directed to any of these decisions. For that matter, it does not appear from the report of *Olsen v Davies* that Gavan Duffy J adverted to the decisions in *Sloan v McGowan*, *supra*, and *McKnight v Wooding*, *supra*, though *McKnight v Wooding* is cited in *Wilby v Gilder* to which he was referred.

In *Beard v Brebner* [1962] SASR 223, Beard had been charged with having in his possession personal property which at the time of such possession was reasonably suspected of having been stolen or unlawfully obtained. It was found in a carton with other property in the shed at the back of a house. The shed was open on one side and all persons living at the house, which was divided into flats, had access to it. Beard was the occupant of one of the flats, and admitted that he had placed the speaker, together with other property belonging to him, in the carton and put it in the shed. There was evidence that when questioned by the police the appellant had claimed the property to be his and had stated that he had had it for years. Furthermore, the appellant, when giving evidence, said that he had brought this with him from his previous dwelling place, that he had carted it around with other electrical stuff and put it in a carton which contained old rags and other electrical gear.

Hogarth J (at p227), considered that the decision in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213, established that the "essential elements of 'actual possession'" or "possession" as used in legislation of this type are: –

> (1) that the possession is to be "actual", or "de facto" and not merely constructive;
>
> (2) this actual, as opposed to constructive, possession, in addition to requiring the mental element of intention to control, connotes both the present fact of or power to control the object and the exclusion of other persons (other than accomplices) from exercising such control.

Hogarth J further considered (at p227) that the evidence sufficiently disclosed an intention on the defendant's part at all material times to control the speaker. As to the factum of possession, consisting both of the positive element (the present fact of or power to control the object) and the negative (the exclusion of other persons (other than accomplices) from exercising such control), he inferred that the appellant had been on the premises during the earlier part of the day with respect to which he was charged with being in possession of the premises. Hogarth J considered (at p228) that the facts proved, sufficiently established that the appellant had a present power to control the speaker. "At the material time the speaker was on a part of the premises to which the appellant (in common with others) had access, and in the absence of any evidence to the contrary, I consider it proper to infer a licence on his part to use the shed for the purpose of storing his gear, including in that expression, the speaker."

That left for consideration the question whether the power of the control in the appellant was sufficiently "exclusive". The evidence indicated that other adult persons resident on the premises used the shed, in addition to the appellant and his wife, and that were also three children. As to this, Hogarth J said (at pp228, 229):

> "At first sight, the element of exclusion referred to in *Moors v Burke* appears to be very strict. It operates to deny possession where a person, having placed property out of his present manual custody, has 'deposited it in a place where any other person independently of him has an equal right and power of getting it.' As I read the cases, it is this element which has been the decisive factor in most of the instances in which the property has been found to be on premises. These cases may be explained by saying that in such circumstances, persons other than the owner or occupier in general have not an 'equal right and power' with the owner or occupier, of getting the property on his premises. *Wilby v Gilder* is probably an extreme example of this; but it is to be noted that in that case there was no evidence to connect the accused (rather than her husband) with the property, except her statement to the effect that it was hers. In particular there was no evidence of her ever having handled or been in possession of the suspected property, similar to the evidence in the present case.
>
> "*Williams v Douglas* [1949] HCA 40; (1949) 78 CLR 521; [1950] ALR 223, is an example of an accused person being held to have de facto (as opposed to constructive) possession of certain gold bars which he had hidden in a bathroom at a hotel where he was staying in Perth. The bathroom was available for use by other Boarders in the hotel and it was clear from the report that the accused person had a mere licence to use the bathroom along with those other persons. In the judgment of Latham CJ, Dixon J (as he then was) and McTiernan J at CLR p527, it was held that the word 'possession' in the sense of de facto possession was 'wide enough to include any case where the person alleged to be in possession has hidden the thing effectively so that he can take it into his physical custody when he wishes and where others are unlikely to discover it except by accident.' In the same case, Rich J at p527, pointed out that possession does not necessarily mean actual physical possession or manual detention. The phrase 'possession and control' denotes the right and power to deal with the article in question. In any given case it is necessary to take into consideration all the circumstances and the nature of the thing the subject of the inquiry."

After this citation Hogarth J observed:

> "In my view, the element of exclusiveness of control must be considered in the light of the probability or otherwise of interference by third party. Where such interference by a third party is likely, then it may in an appropriate case be inferred that there is an equal right and power in that third party to get the property in question. Where, however, the property is hidden in a part of the premises to which third parties have the right of access, the element of exclusion remains because it is unlikely, as a matter of fact, that such third parties will interfere with the property. In the same way the nature of control does not cease to be exclusive merely because adequate safeguards are not taken to prevent theft or disturbance by a trespasser. Interference by thieves or trespassers is sufficiently unlikely not to disturb the exclusiveness of control by the person having apparent possession.
>
> "Mr Wells, for the respondent, contended that it is sufficient if the person who is alleged to have possession exercises control of such a nature that it is respected by other members of the community. This concept to my mind imports the question to which I have been adverting; namely, whether or not there is a likelihood of interference by strangers."

In the result Hogarth J considered that it was established beyond reasonable doubt that the appellant had possession in the sense of actual immediate physical control when he brought the speaker from his previous residence to Marlborough Street and that there was no evidence of his having relinquished that possession. He added (at p229):

> "The fact of the appellant's former immediate possession, coupled with his placing the article in a carton, in a place of comparative safety, namely, at the back of the shed which itself is at the rear of the premises, to my mind would make it sufficiently obvious to other members of the household (the only persons who are at all likely to have access to the shed) that the appellant had no intention of abandoning his rights over the article. So long as that position prevails, I do not consider that it would be correct to say that the other persons living on the premises had an equal right and power of getting the article. While they no doubt had the physical power to do so, the evidence discloses no likelihood that they would seek to do so nor that they had an equal right to do so."

In *Palumbo v O'Sullivan* [1955] SASR 315, the evidence for the prosecution showed that the police officer had found a wristlet watch in the pocket of a coat belonging to Palumbo which was hanging in an unlocked wardrobe in a room occupied by Palumbo in a house where he was

lodging. Palumbo's married sister and her two young children also lived in the house and the children shared the room occupied by Palumbo. It appeared from the evidence that Palumbo had not been at the house for two nights prior to the finding of the watch. When the watch was produced, Palumbo disclaimed all knowledge of the watch, and said that it was not his and that he had never seen it before.

Palumbo was convicted. The conviction was set aside on grounds not here material, but in the course of his judgment, Ligertwood J said (at p321) that when the appellant took the detective to his "home" and showed the detective "his room", he became upon his entry into the room physically possessed of the coat which was hanging in the wardrobe. While there was a *prima facie* case that at the same moment he became physically possessed of the watch, because ordinarily a man knows what he has got in his coat pocket, it nevertheless lay on the prosecution to prove beyond reasonable doubt that Palumbo was aware that there was a watch in the coat pocket. This, in the opinion of Ligertwood, J, the prosecution had failed to establish beyond reasonable doubt.

The review of the cases shows that the difficulties adverted to by the late Mr William Paul in his article in 16 ALJ 24, have by no means disappeared over the years. One of the difficulties appears to be the unresolved conflict between the views expressed by McArthur J in *Olholm v Clink* [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421, accepted by Gavan Duffy J in *Olsen v Davies* [1957] VicRp 24; [1957] VR 183; [1957] ALR 446, and by Menhennitt J in *Hofstetter v Thomas* [1968] VicRp 20; [1968] VR 199, and, on the other hand, the views expressed by Macfarlan J in *Sloan v McGowan* [1926] VicLawRp 35; [1926] VLR 227; [1926] ALR 192, and *McKnight v Wooding* [1935] VicLawRp 6; [1935] VLR 30; [1935] ALR 66, followed by Martin J in *Wilby v Gilder* [1942] VicLawRp 8; [1942] VLR 28; [1942] ALR 13, McArthur J appears to have been of the view that a claim by the defendant to be the owner of the suspected articles may be relied on to support the conclusion that he is in actual possession of them. The late Mr William Paul (16 ALJ at p226) accepted this view subject to the question whether this proposition held good where the defendant's claim of ownership was shown to be entirely false: see *Wilby v Gilder*, *supra*. On the other hand, Macfarlan, J, distinguished very clearly – in *McKnight v Wooding*, *supra* – between ownership and actual possession. A claim to ownership was, in his view, not necessarily relevant to a decision whether the person making that claim was in actual possession and he recognized that in many cases an assertion of ownership would be no evidence that the goods were, at that time, in the actual possession of the person making the assertion. As appears from his reasons for judgment in *Sloan v McGowan* he regarded *Olholm v Clink* as supportable on the basis of the doctrine stated in Pollock and Wright that a person is in physical possession of a thing if he is in such a relation to that thing that so far as regards the thing he can assume, exercise or resume manual control of it at pleasure; and so far as regards other persons, the thing is under the protection of his personal presence or in or on a house or land occupied by him – as in *Olholm v Clink*, *supra* – or in some receptacle belonging to him or under his control.

In my view, much must depend upon the circumstances in which the claim of ownership is made. There are many cases in which from the claim of ownership an inference may be properly drawn that the defendant is intending thereby to assert that he was in possession. *Olholm v Clink* and perhaps also *Olsen v Davies* may be explained on this ground, although I think that they are to be justified on the basis of possession of chattels in the house being inferred from the proved fact of possession of the house. This certainly was the view taken by Macfarlan J in relation to *Olholm v Clink*. On the other hand, in *Wilby v Gilder* there was much to support the view that the claim of ownership was made solely in an attempt to divert suspicion from the defendant's husband, and when the evidence showed that the account of the origin of the ownership could not be regarded as true, there was the less reason for giving to that claim of ownership the weight which it had been given in *Olholm v Clink*. Even if *Wilby v Gilder* be justified or explained on the basis assigned by Gavan Duffy J in *Olsen v Davies*,such an explanation or justification cannot be advanced in relation to the decisions in *McKnight v Wooding*, *supra*, and *Sloan v McGowan*, supra. The observations of the late Mr William Paul in the article referred to may be applicable here (16 ALJ, at p225):

> "According to decided cases, it seems that 'actual possession' where it exists, admits of several degrees of what may be called 'completeness'. The most complete degree is exemplified in cases where the defendant, at the relative time, has the articles in his hand or otherwise about his person. Here, the defendant need do nothing for the purpose of reducing the articles into his complete actual possession.

In other cases, however, the defendant does need to do something further for that purpose.

"Thus, in order to acquire, at the relevant time, the complete actual possession of the articles, he may have need to do acts of the following kind: –

(i) Where the articles are locked up in a safe, he must get the key, go to the safe, unlock it and recover the articles (see *Moors v Burke*, *supra*. [I would add a reference to *Hofstetter v Thomas*, *supra*.]

(ii) Where the articles are lodged in his motor car which he has parked at some distance from the place where he is for the time being, he must at least go some distance to his parked motor car (see *Donnelly v Devenish* [1926] VicLawRp 37; [1926] VLR 235; [1926] ALR 208).

(iii) Where the articles are lodged in his office at some distance from where he then is, ...he must visit his office, enter it, and lay his hands on the articles (compare *Hofstetter v Thomas*, *supra*).

(iv) In all cases where the articles are lodged at a great distance from where the defendant is for the time being, he may have need to make journeys, incur expenses, and make various arrangements in order to reach the place where the goods are lodged (compare *Hofstetter v Thomas*).

(v) Moreover, many physical obstacles or hindrances may prevent the defendant for the time being from gaining the complete actual possession of the articles. Thus he may in this way be prevented by bush fires, floods, storms, etc., or by the lack of means of transport or travel." (To this may be added that he may be unable to gain access to a room, such as a bathroom, in which he has hidden the article, by the circumstance that other people are using the bathroom in question: (see *Williams v Douglas* [1949] HCA 40; (1949) 78 CLR 521; [1950] ALR 223)). "How far any of these enumerated things which a defendant so needs to do in order to gain complete actual possession amounts to a 'further step' is at least open to doubt."

In the present case the magistrate has expressed himself as not satisfied beyond reasonable doubt that the defendant was in possession of certain articles, the subject-matter of the information, which were discovered elsewhere than in the locked trunk. These were articles found in a house jointly occupied by the defendant and her husband, to which the defendant and her husband, as joint occupiers, had an equal right as well as power of access. In those circumstances the magistrate was not satisfied beyond reasonable doubt that the defendant had the complete present personal physical control of that property to the exclusion of others not acting in concert with her - which in this context, I think, must be understood as referring to her husband. In arriving at that conclusion, the magistrate does not appear to have misdirected himself in any respect. I do not see how, on review, it is possible for this Court to say that as a matter of law the magistrate should have been satisfied beyond reasonable doubt that those goods were in the actual possession of the defendant. The onus was on the informant to adduce evidence sufficient to establish that proposition beyond reasonable doubt. The magistrate was not satisfied on that point and, consequently, in relation to those goods, I do not think that a case of error has been made out or that the decision of the magistrate ought to be set aside.

With relation to the goods found in the locked trunk, however, the position is otherwise. The magistrate has expressed himself as satisfied that those goods were in the possession of the defendant, so long as she had the key to the trunk. That key was in her pocket in her wardrobe, and although her husband might have had physical power to go to her wardrobe, take the key from her pocket and unlock it, it would not in ordinary circumstances have been likely that he would have done so. (The views expressed by Hogarth J in *Beard v Brebner* [1962] SASR 223, at p229, appear to support that conclusion.) As *Beard v Brebner*, *supra*, shows, if the goods are shown to have been in the actual possession of the defendant up to the time when he deposited them in some receptacle or place, to which other people have access, the circumstance that those other people will ordinarily respect his right to possession of the goods may be called in aid to support the conclusion that he continues to be in actual possession of those goods, notwithstanding that these other people may have the physical power to disturb the defendant's possession. That conclusion will not ordinarily be drawn in the absence of evidence of prior possession by the defendant: cf. *Palumbo v O'Sullivan* [1955] SASR 223, and *McKnight v Wooding* [1935] VicLawRp 6; [1935] VLR 30; [1935] ALR 66. In the case under review the magistrate has taken the view that when the defendant handed the key to the police, who then unlocked the trunk and discovered the suspected property, that property had, by that time, ceased to be in the possession of the defendant. As I understand it, the magistrate has taken the view that the defendant, in giving the key of the trunk to the police, thereby surrendered possession of trunk and of its contents to the

police. I do not think that this conclusion necessarily follows, as a matter of law, from the act of handing over the key to the police. Whether or not it follows must depend, I would suppose, on the intention of the defendant in handing over the key. In many cases a person handing over a key in such circumstances would have no intention of surrendering possession of the contents of the trunk or other receptacle but would be reserving and asserting her right to possession of these contents. Indeed the defendant's statements, after the police had opened the trunk, are capable of being construed as an assertion of ownership and possession of the goods in question. Whether they should be so construed is, of course, a matter for the tribunal of fact, i.e. the magistrate. I am, therefore, of the opinion that it was open to the magistrate to find that the fact that the appellant had given the key to the police officers to open the trunk, she being physically at hand, did not necessarily operate to divest her of her possession. The magistrate evidently concluded that he was bound to hold that by virtue of her having handed over the key to the police, she had divested herself of possession and that she was, therefore, not in possession of the goods at the time when the police, having opened the trunk, saw the goods and suspected that they had been stolen or unlawfully obtained. The magistrate was not bound so to hold, and in those circumstances I think the proper order, since the magistrate invited and indeed upheld a submission of no case, is to order that the matter be remitted to the magistrate to hear and determine according to the law, but I do not think it would be proper to have the matter remitted on the footing of his rehearing of the original information. In consequence of views which I intimated on this point during the course of the hearing, there has been filed a further affidavit by Snr. Constable Hamilton, in which he sets out what are the goods the subject of the original information which were found in the locked trunk. In the circumstances the information should be amended by striking out the other goods and by remitting the information as so amended to the magistrate to hear and determine.

The order nisi will, therefore, be made absolute and the order of the Court of Petty Sessions in so far as it relates to the goods the subject of the information as so amended must be set aside. The information, amended as herein before directed, will be remitted to the magistrate to hear and determine according to law. The usual order as to cost must follow.

Solicitor for the informant: John Downey, Crown Solicitor.
