to the words in capitals, and a meaning which is precise and unambiguous can be given to the headings set out in this form, *viz.* that item 172 is concerned with a solicitor acting as advocate and employing counsel.

The fact that there is a *casus omissus* and that no provision is made for a solicitor not acting as advocate briefing counsel must not deflect me from this conclusion: it is not for me to supply it here for that would be to make law, but I think a new rule should be made.

The application must therefore be dismissed with costs.

Application dismissed.

REX v. EDWIN

Supreme Court (McDonnell, Ag. C.J.): October 8th, 1923

[1] **Criminal Law — false pretences — defence that alleged pretence true — burden of proof — prosecution must initially prove prima facie case even if defence based upon fact peculiarly within knowledge of accused:** Despite the rule that an accused person bears the burden of proving a fact peculiarly within his own knowledge, the prosecution retains the initial burden of proving a *prima facie* case even if the accused's defence is based upon such a fact; a person charged with obtaining money by false pretences therefore need only bear the onus of proving the truth of the statement he made to obtain the money in question, if the prosecution has established a *prima facie* case against him (page 92, lines 3—14; page 93, lines 29—35).

[2] **Evidence — burden of proof — facts peculiarly within knowledge of accused — prosecution must prove prima facie case even if defence based upon such a fact:** See [1] above.

The defendant was charged with obtaining money by false pretences.

The defendant obtained goods worth £486 from the complainant after making various statements implying the creditworthiness of his company in its business dealings. Although he paid £330 of the purchase price he failed to pay the balance and was charged with obtaining money by false pretences. His defence was based on the contention that the statements made by him at the time of the sale were true.

The prosecution adduced evidence of the state of the defendant's business, including the fact that his company had no

bank account and that there was no documentary evidence of a subsidiary contract to which the company was allegedly a party. Having drawn attention to various other dubious aspects of the defendant's activities, the prosecution contended that since the defence was based upon a fact peculiarly with the knowledge of the defendant, the prosecution evidence was sufficient to establish a *prima facie* case, since the onus shifted to the defendant to prove the truth of his own statements at the time of the sale.

The defendant contended that the prosecution had not proved a *prima facie* case against him and that until it did there was no onus upon him to prove innocence.

The suit was dismissed.

Cases referred to:

(1) *Elkin v. Janson* (1845), 13 M. & W. 655; 153 E.R. 274.

(2) *R. v. Burdett* (1820), 4 B. & Ald. 95; 106 E.R. 873, *dicta* of Holroyd, J. applied.

(3) *R. v. Howarth* (1870), 23 L.T. 503; 11 Cox, C.C. 588.

McDONNELL, Ag. C.J.:

At the close of the case for the Crown, after certain submissions for the defence with which I need not concern myself, I asked the Solicitor-General what he had to say on the proof of the falsity of the pretence alleged to have been put forward as a means of obtaining money in this case.

The Solicitor-General by the length and elaboration of his argument showed clearly his appreciation of the vital nature of the point thus raised by the court. His argument in fact was that where the subject-matter of an allegation lies peculiarly within the knowledge of one of the parties, it affects the quantity of evidence which the other side must bring to make out a *prima facie* case.

Here, the subject-matter of the prosecution is that it was by one or both of two allegations that £137 worth of kernels and £18 worth of sacks were obtained. Whether these allegations — the first as to a contract with Lipton, and the second as to Edwin & Co. — are true or false lies peculiarly within the knowledge of the accused; and therefore, says the Solicitor-General, the quantity of evidence which *he* must bring to make out a *prima facie* case is thereby affected. To pass the onus of proof from the prosecution to the defence some *prima facie* evidence must be brought forward by the Crown.

As was said by Holroyd, J. in *R.* v. *Burdett* (2) (4 B. & Ald. at 140; 106 E.R. at 890):

> "[T]he onus probandi lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

The rule is put shortly by Alderson, B. in *Elkin* v. *Janson* (1) where he says that it refers only to the weight of evidence but that there should be some evidence to start the presumption and cast the onus on the other side.

The Solicitor-General lays great stress on *R.* v. *Howarth* (3). This was a case where a man obtained a quantity of wine from a wine merchant at Tunbridge Wells by falsely pretending that he had taken a house in that town, that he had a carriage and pair which he was expecting down from London next day and that he had a large property abroad. The evidence for the prosecution was that five days earlier the accused stayed under a false name at a hotel in Eastbourne, failed to pay a deposit as is usual when a visitor arrives without luggage but said he would cash a cheque at a bank next morning. In consequence of the visit to the bank next day a telegram was sent at his request and on his being asked for 1s. to pay for it he said he had not even that on him and eventually he told the hotel manager and two other tradesmen in Eastbourne that he had no money to pay their bills and was generally in a destitute condition. They took the law into their hands and pelted the accused Howarth, *alias* De Courcy, out of Eastbourne but five days later he turned up at Tunbridge Wells.

What is the evidence upon which Crown relies here?

1. Absence of documents relating to a contract with Lever.
2. Absence of documents re Edwin & Co.

3. The fact that S.C.O.A. was approached through Davies and Davies approached through Betts.

4. The absence of a bank account in the name of the company.

5. The smallness of the credit balance in the private bank account of accused.

6. The failure of the accused to produce an original or office copy of his cables.

7. The fact that Ratcliffes were approached through Nelson Williams and that he could not pay for a bale of sacks but had to get Nelson Williams' guarantee which is still in force.

In answer to this the defence says the total liability of accused over these kernels was £486; out of that he paid first £200 then £130 making in all £330, so that all that was unpaid was £137-odd for kernels and £18-odd for bags, or £156-odd in all out of a total of £486.

Must it not be said that this is very different from the penniless man under a false name in *R.* v. *Howarth* (3)? The absence of credentials either of the company or from Levers; what the Solicitor-General has called the "huggermugger" means of approaching big firms like the S.C.O.A. and Ratcliffes; and the quantities larger than the annual output of kernels of this Colony and Protectorate of which the accused spoke, must all arouse grave suspicions. The shortage of funds is explained by the accused by the delay in the arrival of his bank guarantee which was to enable him, I presume, to get an overdraft to pay his current expenses.

The whole thing is suspicious, I admit. One wonders at the credulity which in business matters accepts without confirmation the *ipse dixit* of a man such as the accused.

Suspicion, however, is not enough: what I have to ask myself is this: Is there any proof by direct or presumptive evidence of any fact which will displace the burden of proving falsity from the prosecution, place the burden of proving the truth of the allegations upon the prisoner and sumultaneously displace the great presumption in criminal matters that the accused is assumed to be innocent till he is proved to be guilty? I have had the opportunity of very carefully weighing the evidence and in spite of the ingenuity of the Solicitor-General the conclusion to which I have come is that the Crown have not brought forward the measure of evidence which the law requires: they have, as they must admit, not proved the falsity of the pretences laid, and I have to hold that

they have not shifted to the accused the onus of proving their truth, that therefore there is no evidence to go to the jury and the accused must be discharged.

Case dismissed.

S.C.O.A. LIMITED v. KELLER

Supreme Court (Purcell, C.J.): July 7th, 1924

[1] **Contract — illegal contracts — agreements contrary to public policy — agreements in restraint of trade — unreasonable restraints illegal and void — covenant preventing use of employee's personal skill in competition with employer unreasonable, unless designed reasonably to protect employer's trade secrets or other interests:** A covenant in restraint of competition is enforceable only if it is reasonable in the circumstances, and although it may be reasonable for an employer to impose such a covenant upon his employee in order to protect trade secrets or to prevent him from exercising his influence to attract customers away from his employer, a covenant which does not protect any such interest but is designed only to prevent the employee from using his personal skill in competition with his employer, is unreasonable and therefore illegal and void (page 96, line 27—page 99, line 12).

[2] **Employment — restraint of competition — unreasonable restraints illegal and void — covenant preventing use of employee's personal skill in competition against employer unreasonable, unless designed reasonably to protect employer's trade secrets or other interests:** See [1] above.

[3] **Trade and Industry — restraint of trade — reasonable restraints enforceable — covenant preventing use of employee's personal skill in competition with employer unreasonable and void unless designed reasonably to protect employer's trade secrets or other interests:** See [1] above.

The plaintiffs brought an action against the defendant in the Circuit Court claiming damages for breach of contract and an injunction to restrain the defendant from further breaches.

The plaintiffs employed the defendant under an agreement which provided *inter alia* that during the two years following the termination of the employment the defendant should not take part in any business in the Colony or Protectorate which was similar to the plaintiffs'; and that he would be liable to pay liquidated damages should he do so.

About six months after leaving the plaintiffs' employment the