sons injured by their torts, committed often in reckless disregard of life or property.

The difficulty with such cases in the past has been one of procedure only, for it is fundamental that the members are liable individually for their torts. This new rule gives a more convenient method of redressing a wrong by holding the association suable as a body. The Court justifies this as follows: [16]

> "As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether when they have voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick unit action and elasticity, created a self-acting body with great funds to accomplish their purpose, they may not be sued as this body, and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose."

It is well known that trade unions are very distinct entities. They have as much actual existence as any corporation. Why, then, should they be allowed to hide behind a rule of procedure and so escape liability for their torts, which are often very grievous and sometimes irreparable? The Supreme Court is to be commended for holding that unincorporated associations may be sued, and it is to be hoped that this dictum will be followed.

W. C. H.

THE POSSESSION OF RECENTLY STOLEN PROPERTY AS EVIDENCE OF LARCENY.—The law on this subject is in a very much confused state. There are almost as many views as there are jurisdictions. Through loose or mistaken use of terms, the same court frequently lays down opposing rules. When the *corpus delicti* has been proved, it is universally agreed that evidence as to the possession of recently stolen goods is admissible in larceny cases. The dispute centers around the probative force of such evidence and the provinces of court and jury respectively.

Following the English custom of instructing the jury as to the weight of the evidence, some of our American courts go very far in defining certain presumptions that are necessarily raised from certain proved facts. The rule of these courts is that proof of the possession by the accused of recently stolen property raises a legal presumption of his guilt and places on him the burden of showing that he acquired the property in a lawful manner.[1] Failure to prove innocent acquisition to the satisfaction of the jury makes the presumption conclusive against him and necessitates a verdict of

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[16] (U. S. 1922), 42 Sup. Ct. 570, 576.

[1] State *v.* Weston (1833), 9 Conn. 527, 529; Thomas *v.* State (1916), 15 Ala. App. 163, 72 So. 688; Burrill, CIRCUMSTANTIAL EVIDENCE 446.

guilty.[2] The reasoning of this line of cases is that the connection between the fact proved and the fact presumed is so universal that the court itself, without the aid of a jury is able to infer the one fact from the proof of the other.[3] Honest acquisition should be easy to explain. This rule practically takes the case from the jury —a very harsh rule for any criminal case.

The weight of authority on the other hand, seems to allow the jury to decide what weight is to be given to evidence of this kind. However, there is considerable difference of opinion as to how far the court can go in instructing the jury. The differences are too minute and numerous for a clear classification. One court will rule that the possession of recently stolen property raises a presumption of fact from which the jury may find the accused guilty,[4] another that it is a fact from which the jury may infer guilt,[5] another that it is sufficient evidence on which to base a verdict,[6] and another that it is a mere circumstance from which the jury may infer the unlawful acquisition of the property.[7] All of this seems a mere confusion of terms, all meaning practically the same thing. However, when we consider the effect an instruction containing one of these propositions will have on the minds of a jury of ordinary people, we can see why one court prefers the term, "evidentiary circumstance," to the stronger term, "presumption of fact". The problem is to find a fair way of laying the evidence before the jury in order not to prejudice the accused or to place an undue burden on the prosecution by excluding circumstantial evidence. Without any attempt to discuss each separate view of this question, we shall outline what we consider to be the better and just view.[8]

To have any weight at all as evidence of guilt, the accused's possession must be recently after the theft.[9] But how recent? The possession of a famous painting several years after theft might, if unexplained, point very strongly to the guilt of the one in whose possession it is found. Yet the possession of Liberty Bonds of a certain denomination and number the day after theft does not necessarily imply guilt, especially in a large banking center where such securities are regularly bought and sold. A poor laborer accustomed to wear second-hand clothes might be seen wearing a stolen suit within a few days after theft without being presumed to be guilty of larceny; but if the same man were found possessed of

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[2] State *v.* Kelly (1881), 73 Mo. 608; State *v.* Garvin (1897), 48 S. C. 258, 26 S. E. 570; State *v.* Carr (1904), 4 Penn. (Del.) 523, 57 Atl. 370; State *v.* Lee (Mo. 1920), 225 S. W. 928; State *v.* Capodilupo (Me. 1921), 112 Atl. 387.

[3] State *v.* Kelly, *supra.*

[4] State *v.* Raymond (1878), 46 Conn. 345.

[5] Temples *v.* State (1916), 18 Ga. App. 510, 89 S. E. 600.

[6] Gravitt *v.* State (1902), 114 Ga. 841, 40 S. E. 1003, 88 Am. St. Rep. 63.

[7] Moore *v.* State (Tex. Cr. App. 1922), 237 S. W. 258.

[8] An exhaustive note on this subject will be found in 101 Am. St. Rep. 481.

[9] State *v.* Wolff (1851), 15 Mo. 168; Shepherd *v.* State (1884), 44 Ark. 39; Boyd *v.* State (1888), 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908.

very valuable stolen jewelry some time after theft, explanation would be in order. From consideration of these extreme cases it is clearly apparent that the definition of the word "recent" in this connection depends not only upon mere lapse of time but also upon the nature of the articles stolen and a consideration of whether or not they are of a description likely to pass rapidly from hand to hand, and the defendant's situation and vocation in life. Between these extremes one can readily see that there is an infinite number of special cases, each of which depends upon its own facts and requires, it may be, a different rule. Is it reasonable to allow the court to bind the jury by an instruction as to how recent possession must be after theft in order to raise a presumption of guilt? It is believed that the just doctrine is to leave the decision of the point to the jury, unhampered by any legal rules.

To warrant any inference as to guilt, the possession must be exclusively in the accused. This is so generally accepted that the courts seem to take it for granted.[10] Whether or not the possession is exclusive depends on many surrounding circumstances, and the prosecution must show that there was conscious possession of the goods by the defendant, not merely that they were found on his premises.[11] This does not mean that property must be found on the accused's person but that it must be found in some place under his control.[12]

A third requirement to be fulfilled before the prosecution has made out its case is to show that the possession is unexplained. The burden of proof is not shifted to the accused when the state has proved that he had in his possession recently stolen property.[13] If the accused gives a reasonable explanation, the prosecution must show it to be false *beyond a reasonable doubt*.[14] The explanation need not show that the property was honestly acquired. Evidence of good character may be considered by the jury in connection with the other facts as an explanation of possession.[15] Whether the explanation is reasonable and credible is a question for the jury to determine from a consideration of all the facts.[16]

It is well settled that the evidence in this type of cases must prove three distinct things regarding the defendant's possession of

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[10] Jackson *v.* State (1890), 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. Rep. 839; State *v.* Warford (1891), 106 Mo. 137, 16 S. W. 886, 27 Am. St. Rep. 322; State *v.* Belcher (1896), 136 Mo. 137, 37 S. W. 800.

[11] State *v.* Drew (1903), 179 Mo. 315, 78 S. W. 594, 101 Am. St. Rep. 474.

[12] State *v.* Johnson (1864), 60 N. C. 235, 86 Am. Dec. 434.

[13] State *v.* Powell (1899), 61 Kan. 81, 58 Pac. 968; State *v.* Jennings (1890), 79 Iowa 513, 44 N. W. 799; State *v.* Harrington (1918), 176 N. C. 716, 96 S. E. 892.

[14] State *v.* Emerson (1878), 48 Iowa 172; State *v.* Carr, note 2, *supra;* Zediker *v.* State (Neb. 1921), 184 N. W. 80.

[15] State *v.* Merrick (1841), 19 Me. 398; Watts *v.* People (1903), 204 Ill. 233, 68 N. E. 563.

[16] Cosby *v.* Commonwealth (1891), 12 Ky. L. R. 982, 16 S. W. 88; Leslie *v.* State (1895), 35 Fla. 171, 17 So. 555; State *v.* Mandich (1898), 24 Nev. 336, 54 Pac. 516; May *v.* State (1918), 135 Ark. 466, 205 S. W. 806.

stolen property, viz.: that it was recent, exclusive and unexplained. If any one of these is not shown by the evidence, the jury cannot convict. The court, then, should instruct the jury that unless all three elements have been shown, they cannot convict. When this has been done, it is submitted that the province of the court should cease and that the jury should begin. It should be for the jury to determine from all the evidence adduced at the trial whether each of these facts is true. The jury alone should judge as to the credibility and weight to be given each portion of the evidence, and the court has no right to instruct it that any set of facts necessarily raises a presumption of guilt. This seems the view most nearly in accord with reason and it is sustained by ample authority.[17] The Supreme Court of Missouri, which, for years, had held that unexplained possession of recently stolen property raised a legal presumption of guilt, has recently overruled all previous decisions and adopted substantially the above rule.[18]

R. D. G., JR.

EFFECT OF DIVORCE UPON THE INCHOATE RIGHT OF DOWER.—In a recent case [1] in which a husband attempted to force his divorced wife to cancel her inchoate right of dower in his real estate in accordance with an agreement by which she had released him of all claims she had against him, it was held that the husband's bill must be dismissed since the inchoate right of dower is not a claim against the husband or his estate; and it was furthermore held by way of dictum that a wife who secures a divorce for her husband's fault does not thereby lose her right of dower.

With regard to this latter ruling it has generally been held in this country that in the absence of statute to the contrary, a divorce *a vinculo matrimonii* cuts off the right of dower, while this right is retained where the divorce is one *a mensa et thoro*.[2] This holding is eminently logical, for the theory underlying a divorce *a vinculo* is that the parties are no longer man and wife; consequently upon the death of the man the woman is not his widow, and, since the inchoate right of dower is not a vested right but a mere expectancy,[3] the woman cannot claim the rights belonging to a widow. On the other hand the divorce *a mensa* is no more than a mere separation. But when we see what the result of an application of the same reasoning was in England, we are at a loss to understand how our courts have come to apply it as they have.

Under the old English common law the right of dower ceased

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[17] Cooper *v.* State (1890), 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. Rep. 712; State *v.* Williams (Ore. 1921), 202 Pac. 428; Pospisil *v.* State (Neb. 1921), 182 N. W. 506; State *v.* Lippard (N. C. 1922), 111 S. E. 722; 2 Bishop, NEW CRIM. PROC. § 740 ff; 2 Wharton, CRIM. EV. (10th Ed.) § 758; 4 Wigmore, EVIDENCE, § 2513.

[18] State *v.* Swarens (Mo. 1922), 241 S. W. 934.

[1] Knapp *v.* Knapp (Ill. 1922), 135 N. E. 732.

[2] 9 R. C. L. 570; 19 C. J. 504.

[3] See dictum in Randall *v.* Kreiger (1874), 23 Wall. 137, 148.