MICHEL LALIBERTÉ,.....APPELLANT.

AND

THE QUEEN,.....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Rape—Cross Examination of Prosecutrix—Previous connection with other men—New Trial—Discharge of Prisoner.

The Prosecutrix, in an indictment for rape, was asked in cross-examination, after she had declared she had not previously had connection with a man, other than the prisoner, whether she remembered having been in the milk-house of G——— with two persons named M———, one after the other.

Held,—That the witness may object, or the Judge may, in his discretion, tell the witness she is or she is not bound to answer the question; but the Court ought not to have refused to allow the question to be put because the Counsel for the prosecution objected to the question.

Held also,—That, since the passing of 32 and 33 Vict., ch. 29, sect. 80, repealing so much of ch. 77 of Cons. Stat. L. C. as would authorize any Court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32 and 33 Vict. ch. 36, repealing sect. 63 of ch. 77 Cons. Stat. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and that the Supreme Court of Canada, exercising the ordinary appellate powers of the Court, under sects. 38 and 49 of 38 Vict., ch. 11, should give the judgment which the Court whose judgment is appealed from ought to have given, viz.: to reverse the judgment which has been given, and order prisoner's discharge.

The prisoner was convicted of rape at the sittings of the Court of Queen's Bench for the Province of Quebec, held in the month of October last, before the Honorable Mr. Justice *Plamondon*, one of the Judges of the

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PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J. J.

Superior Court for the Province of Quebec, at the Village of Arthabaskaville, in the District of Arthabaska.

At the trial, the Prosecutrix, Philomène Michaud, on her cross-examination, after having described the details of the violence committed on her person by the prisoner, declared that it was the first time she had had carnal connection with a man.

This statement was made by her, without objection on her part or on the part of the Crown prosecutor.

In reply to another question she answered, that she was acquainted with D'Assise Malhoit and Baptiste Malhoit. She was then asked the question, "Do you remember your being in the milk-house of Clovis Guilmette with the two Malhoits, one after the other?"

The Crown prosecutor objected to this question as illegal, and the Court sustained the objection.

Joseph Provencher was a witness called for the defence. The prisoner's Counsel proposed to ask him the following question, "Did you ever see Philomène Michaud with D'Assise Malhoit and Baptiste Malhoit? If you have, please state on what occasion, and what they were doing?" The Court refused to allow the question as illegal.

The Court, in the conflict of decisions on the matter in the English Courts, reserved for the consideration of the Court of Queen's Bench, for the Province of Quebec, in appeal, the question of the legality of the two questions, and requested the opinion of the Court in regard thereto.

The Court deferred pronouncing judgment on the verdict rendered against the Defendant, and ordered him to be imprisoned in the common gaol of the district until the first day of the next term for the sitting of the Court to receive judgment, or until otherwise discharged according to law.

The matter Came before the Court of Queen's Bench, for the Province of Quebec, on the appeal side,* sitting in the City of Quebec, on the 15th December, 1876 ; and they rendered judgment, affirming the ruling of the Judge at the trial; Ramsay, J., dissenting as to the ruling on the first question.

The Defendant appealed from that decision under the 49th section of the Supreme and Exchequer Court Act.

26th of January, 1877.

Mr. *W. Laurier*, of the Quebec Bar, for the prisoner, and Mr. *W. H. Felton*, of the Quebec Bar, on behalf of the Crown.

The authorities cited in argument were: *Rex* v. *Hodgson*, (1); *Reg.* v. *Robins*, (2) ; *Rex* v. *Barker*, (3) ; *Rex* v. *Martin*, (4) ; *Rex* v. *Clarke*, (5) ; *Reg.* v. *Dean*, (6) ; *Verry* v. *Watkins*, (7); *Andrews* v. *Askey*, (8) ; *Reg.*v. *Cockcroft*, (9) ; *Reg.* v.*Holmes*, ; (10) 2 Starkie, Ev. (11) ; Philipps on Ev. (12) ; Taylor on Ev., (13) ; Best on Ev., (14) ; Russ. on Crimes, (15); Roscoe, (16); Taschereau Criminal Acts, (17) ; 3 Greenleaf on Ev., (18).

3rd February, 1877.

THE CHIEF JUSTICE: The case of *Rex* v. *Hodgson*, (19) ; is the leading case on the subject. The prisoner was convicted before Baron Wood at the Yorkshire Summer Assizes, in the year 1811, for committing a rape on Harriet Halliday.

* *Present*:—Monk, Ramsay, Sanborn, and Tessier, J.J.

(1) 1 R. & R. 211; (2) 2 Moo. & Rob. 612; (3) 3 C. & P. 589; (4) 6 C. &. P. 562; (5) 2 Starkie N. P. C. 241; (6) 6 Cox C. C. 23; (7) 7 C. & P. 308; (8) 8 C. & P. p. 7; (9) 11 Cox C. C. 410; (10 L. R. 1 C.C. 334; (11) p. 700; (12) 8 Lond. Edt. 489 & 914; (13) 2 Edt. 1122, 1137, 1314, 1319; (14) 244, 287; (15) 1 p. 925; (16) p. 880; (17) 1 p. 311; (18) 3 p. 214; (19) 1 R. & Ryan, 211.

After the prosecutrix had given her evidence in support of the prosecution, she was cross-examined by the prisoner's counsel, who put these questions to her.

Whether she had not before had connection with other persons, and whether she had not before had connection with a particular person named. The counsel for the prosecution objected that she was not obliged to answer these questions, but it was contended by the prisoner's counsel that in a case of rape she was. The learned Judge allowed the objection on the ground that the witness was not bound to answer these questions as they tended to criminate and disgrace herself, and said that he thought there was not any exception to the rule in a case of rape.

The prisoner's counsel called witnesses, and amongst others offered a witness to prove that the girl had been caught in bed about a year before this charge with a young man, and offered the young man to prove he had had connection with her.

The counsel for the prosecution objected to the admissibility of this sort of evidence of particular facts not connected with the present charge, as they could not come prepared to answer them. The case was first considered on the 2nd December, 1811, by all the Judges (except Mansfield, C.J., Macdonald, C.B., Grose, J., and Lawrence, J., who were absent), and was postponed for consideration to Hilary term, 30th January, 1812, when, all the judges being present, they determined that both the objections were properly allowed.

If we look closely at the statement of the case, we will see that the objection taken on the questions being asked her was *that she was not obliged to answer those questions*, not that she could not be asked them; and the learned judge allowed the objection on the ground

that the witness *was not bound to answer* these questions as they tended to criminate and disgrace herself. All that the Judges decided in that case was, that both objections were properly allowed.

In *Reg.* v. *Robins*, (1); before Coleridge, J., in 1843, the prosecutrix having denied on cross-examination that she had had connection with several men who were named, and who were brought into Court and shewn to her at the time she was questioned, the counsel for the defence called these persons to prove they had had connection with her.

Greenwood, for the prosecution, objected that such evidence was inadmissible, and cited *Rex* v. *Hodgson*, and referred to *Rex* v. *Barker*, (2); and *Rex* v. *Martin*, (3). Coleridge, J., after consulting Erskine, J., said neither he nor that learned Judge had any doubt on the question. It is not immaterial to the question whether the prosecutrix has had this connection against her consent, to show that she has permitted other men to have connection with her, which, on her cross-examination, she has denied.

This case does not seem to be sustained by the subsequent decisions.

The case of *Rex* v. *Barker*, (4); went to show that the prosecutrix was a common prostitute, and such evidence had long been held to be material.

The case of *Rex* v. *Martin*, (5); was tried before Mr. Justice Williams in 1834. The prisoner's counsel proposed to ask the prosecutrix whether on the Whit Sunday before the alleged offence, the prisoner, Aaron Martin, had not had intercourse with her by her own consent.

(1) 2 Moody & Rob. 512; (2) 3 C. & P. 589; (3) 6 C. & P. 562; (4) 3 C. & P. 589; (5) 6 C. & P. 562.

The counsel for the prosecution objected to the question, and relied on *Rex* v. *Hodgson*, and *Rex* v. *Clarke*, (1). Williams J., said he was one of the counsel in R. v. Hodgson. The question in the present case was as to previous intercourse with the prisoner, and the question there was as to intercourse with other men. He received the evidence and added : "I must say that I never could understand the case of *Rex* v. *Hodgson*. The doctrine that you may go into general evidence of bad character of the prosecutrix, and yet not cross-examine as to specific facts, I confess, does appear to me to be not quite in strict accordance with the general rules of evidence."

In *Rex* v. *Clarke*, (2) ; in 1817, Holroyd J., said : "It is clear that no evidence can be received of particular facts, and such evidence could not have been received, although the prosecutrix had been cross-examined as to those facts, because her answers upon those facts must have been taken as conclusive. With respect to such facts the case is clear. Then with respect to general evidence ; such evidence has been held admissible in all cases where character is in issue, and, therefore, the only question is whether the character of the prosecutrix is involved in the present issue. In the case of an indictment for a rape, evidence that the woman had a bad character previous to the supposed commission of the offence is admissible, but the Defendant cannot go into evidence of particular facts.

Rex v. *Clay*, (3). Evidence of the general character of the prosecutrix was admitted, such as that she had been reputed a prostitute, by Patterson J. At first he

(1) 2 Starkie N. P. C. 241 ; (2) 2 Starkie's Reports 244 ; (3) 5 Cox C. C 146.

was disinclined to allow the evidence, but on referring to the case of *Rex* v. *Barker*, he admitted it.

In *Rex* v. *Dean*, (1) ; prosecutrix had been examined about stealing from a former mistress. Her mistress had lost 15s. Burrowes, a constable, searched her box, she snatched a parcel containing 15s. from the box. When asked to account for the possession, in her examination, she said she had told Burrowes a gentleman had given her the 15s for insulting her ; she said : " I did not say it was for having connection with me." It was proposed to call Burrowes to contradict her. Platt, B., after consulting Wightman, J., said that Wightman, J., said he could not call the constable to contradict the statement of the prosecutrix ; as to her general character he might call him or other witnesses.

Verry v. *Watkins*, (2). In an action for seduction, the Plaintiff's daughter was cross-examined to shew her general bad character in respect of chastity and moral conduct. Alderson held the Defendant might call evidence as to particular acts of unchastity The question of damages, in such a case, would be affected by the want of chastity.

Andrews v. *Askey*, (3) In an action for seduction it was held that the Defendant could not contradict the witness as to statements about the paternity of the child until she had been asked in the witness box if she had made such statements.

Regina v. *Cockroft*, (4). The prosecutrix was asked whether she had ever had connection before with other men. She declined to answer the question Willes, J. said the prosecutrix need not answer the question unless she likes : " You may cross-examine

(1) 6 Cox C. C. 23 ; (2) 7 C. & P. p. 308 ; (3) 8 C. & P. p. 71 ; (4) 11 Cox. C. C. 410.

the prosecutrix with respect to particular acts with other men, but if she denies them then you are bound by her answer. You may not call those men to contradict her. You may, however, examine her with respect to particular acts of connection with the prisoner, aud if she denies them, you may call witnesses to contradict her."

On a former trial of the same prisoner, when the jury did not agree, Martin Baron was referred to *Reg.* v. *Robins.* His Lordship said he considered the decision, in the case cited, wrong, and so would not allow a witness to be called to prove particular acts of connection between the prosecutrix and other men.

These were the principal cases decided in the English Courts when the case of the *Queen* v. *Holmes* was considered, (1).

In that case, the prosecutrix, in her cross-examination, was asked by the prisoner's counsel if she had had connection with Robert Sharp, and she denied it. The prisoner's counsel called Robert Sharp, and asked him if the prosecutrix had ever had connection with him, but the counsel for the prosecution objected to the question on the authority of *Reg.* v. *Cockroft,* and the Court refused to allow the question to be answered, and reserved the question for the decision of the Court of Crown cases reserved.

The prisoner's counsel contended the evidence tendered was strictly relevant to the issue, as having material bearing upon the probability of the prosecutrix's consent. For the prosecution, it was contended that the question put to the prisoner was not relevant to the issue, it only went to credit. Upon principle, therefore, her answer is binding. Kelly, C.B., in his

(1) L. R. 1 Crown cases 334 (1871).

judgment, considers the question as on a collateral point, and the answer given must be taken for better or for worse, and that evidence to contradict the witness on the collateral point was not admissible. "If such evidence were admitted, the whole history of the prosecutrix's life might be gone into; if a charge might be made as to one man, it might be made as to fifty, and that without notice to the prosecutrix. It would not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice. Upon principle we must hold that the answer is binding.

On referring to *Rex* v. *Hodgson*, he said it was an actual decision that the prosecutrix, on a charge of rape, was not bound to answer such a question as that here put. He then refers to the second objection taken as raising the very point before them, and the decision being in accordance with the view that the Court took. He referred to the authorities, and shewed the only one against *Rex* v. *Hodgson* was *Reg.* v. *Robins*, which they declined to follow, and cited *Reg.* v *Cockroft* as an authority supporting his view.

Pigott, B., said he thought the evidence proposed to be given, not relevant to the issue and its admission, might lead to great injustice. Hannen, J., said *Rex* v. *Hodgson* was a decision that such evidence could not be given as substantial evidence in the cause and be regarded as relevant to the issue, but only as going to the *credit* of the witness. The witness's answer is therefore binding, and the reason is that the prosecutrix cannot come prepared to try all the issues which would be thus raised.

In Starkie on Evidence, (1); the question is consid-

(1) 4 Edt. Vol. 2, p. 237.

ered; and it is stated, as the result of the authorities, that it is perfectly well settled that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts not relevant to the issue, for this would cause the enquiry which ought to be simple and confined to matters in issue, to branch out into an indefinite number of issues.

Questions put to witness himself upon cross-examination are not, it may be observed, open to this objection since his answer is conclusive as to all collateral matters.

In Phillips on Evidence, (1); the question is referred to as follows:—"In criminal matters, evidence of character frequently affords a material presumption in regard to the perpetration of offences. Thus, when the charge is that of rape the general bad character of the prosecutrix may, under the circumstances of particular cases, afford a just inference as to the probability of her having consented to the commission of the act for which the prisoner is indicted. Accordingly, upon the trial of indictments for such offences, evidence is admissible on the part of the prisoner, that the woman bore a notoriously bad character for want of chastity and common decency. It appears also that, at least in trials for rape, evidence is admissible that the woman had been before criminally connected with the prisoner. But it seems that the evidence of particular facts cannot, in general, be received to impeach the chastity of the woman, as that, previously to the commission of the offence, she had a criminal connection with other persons. It has been held that the woman, in a prosecution for rape, is *not bound* to answer questions tending to criminate and disgrace herself, as, whether

(1) Lon. Edt. p. 489

she had not before connection with other persons or with a particular person."

In a note, the learned author refers to the ruling of Mr. Justice Holroyd in *Reg.* v. *Clarke*, that the woman's answers as to particular facts would be conclusive, and adds, but it is to be observed that this is treating the question as merely discrediting the witness and not as relevant to the issue, and in *Rex.* v. *Hodgson*, on the alleged ground that the prosecutrix could not be prepared to answer evidence of particular facts. Perhaps it may be considered that the question of the woman's chastity is not directly in issue upon such charges as it is in actions for *crim. con.* and seduction. The determination of this question may, however, afford a material inference as to the truth of the charge, and referring to the questions in *Rex* v. *Hodgson*, he adds: "It may be observed that the questions do not merely tend to discredit the witness, but are also relevant to the issue." In the same work at p. 914, reference is again made to the subject, on an indictment for rape, the woman *is not bound to answer* whether, on some former occasion, she had not a criminal connection with other men or with particular individuals, and Hodgson's case was again referred to.

Whether questions of such a description may not be legally asked is a very different question from that before considered, whether the witness is compellable to answer. It may be just to allow a witness the privilege of not answering in certain cases; but that the party against whom the witness appears shall not be allowed to ask the question, and force him to his privilege, is a proposition which, if carried into practice, might often be attended with unsatisfactory consequences.

Mr. Taylor, in his work on Evidence, (1); says: "It is said the prosecutrix in a rape case might be cross-examined with a view of showing that she had been guilty of incontinence with the Defendant, or even with other men, or with some particular person, and when she had denied the facts imputed, witnesses have been called for the purpose of contradiction."

In a note, it is said the cases cited seem to overrule *Rex* v. *Hodgson*, and at page 318, of the same edition, in a note referring to *Rex* v. *Hodgson*, it is said this case seems to be overruled.

In Best, on Evidence, (2); the matter is referred to as follows: "When the female prefers a charge of rape, or of assault with intent to commit rape, she brings the question of her own chastity so far in issue that it is competent for the accused to give general evidence of her bad character in this respect, or even to show that she has been criminally connected with himself; but the authorities are conflicting, whether he will be allowed to prove particular acts of unchastity with other men.

In Taylor, on Evidence, (3); it is laid down when the witness is not compellable to answer, the privilege is his, and counsel in the case will not be permitted to make the objection. Nor is the Judge, it would seem, bound to warn the witness of his right to demur to the question, though in the exercise of his discretion he may occasionally deem it right to do so.

At p. 1137, sec. 1314, the propriety of allowing witness the privilege to decline answering questions not directly material to the issue, but which affect his character is discussed, and the propriety of the rule is doubted. The section concludes: "No doubt cases may

(1) 2 Edt. p. 1122; (2) p. 287 Sec. 244; (3) Sec. 1319.

arise when the Judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date, might in general be rightly suppressed, for the interest of justice seldom require that the errors of a man's life long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant; so questions respecting alleged improprieties of conduct which furnish no real ground for assuming that a witness who would be guilty of them would not be a man of veracity, might very fairly be checked." And by sec. 1315: "But the rule of protection should not be further extended, for if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compell a witness either to commit perjury or destroy his own reputation, but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause."

I have made these references, perhaps at greater length than necessary, to shew the views that prevailed on the subject before the decision of *Regina* v. *Holmes*. One of the learned Judges in the Court of Queen's Bench inclined to the opinion that the allowing the question to be put was a matter in the discretion of

the Judge. I understand the discretion referred to is as to compelling the witness to answer the questions. It seems to me the party has a right to put the question, and the Judge will, in his discretion, decide whether he will compel the witness to answer.

When the object is to discredit the testimony of the witness, to show him to be of a disreputable character, there are conflicting authorities as to the right of the witness to refuse to answer. Generally, the question may be asked; but when it is not material to the issue, and the object is merely to degrade the character of the witness, he is not compellable to answer. Of course the Judge decides, when the witness claims the privilege, whether he may exercise it or not.

When the prisoner admits the improper connection, but contends that it was with the consent of the prosecutrix, the fact that she had had connection with other men at no distant time would, to the unprofessional mind, seem a fact proper to go to the jury, and relevant to the question, whether the connection complained of was against her will or not.

Were it nor for the last decision on the subject, so recent as 1871, in the *Queen* v. *Holmes*, I should have thought the question more relevant to the issue than as merely affecting the credit of the witness, but that case is expressly on the point that such is the nature of the question, and I think we ought not to depart from that decision. But, as already intimated, the right to put the question is an important one, of which the prisoner ought not to be deprived, and though, if answered by the prosecutrix, and the answer were false, he could not call witnesses to contradict her, yet she might answer truly, and, if she so answered, it might be of service to him. The question, as reported

in this case by the learned Judge, is not, in terms, asking her if she had had improper connection with the other men named, but that was the object of it and seems to be its effect; and it was argued in the Court of Queen's Bench, and in this Court, properly, I think, in that view.

On the whole, then, I come to the conclusion that the weight of authority and the course of practice by the Judges in England, is to permit questions of the kind objected to by the prosecuting officer, to be asked of a witness on cross-examination in cases of rape; that the prosecuting officer is not permitted to raise the objection; the witness not being bound to answer the question. The witness may object, or the Judge may tell the witness she is not obliged to answer, if he thinks proper, though not bound to do so, and the Judge will decide whether the witness is obliged to answer or not, when the point is raised.

In this case, the Judge, having ruled on the objection taken by the prosecuting officer, that the question was illegal and could not be put, the prisoner was deprived of a legal right which he wished to exercise, and we cannot say that the refusal to allow the question to be put has not prejudiced his case.

If the witness had answered the question which the prisoner's counsel wished to put in the negative, the case of *Regina* v. *Holmes* referred to is an express authority that she could not have been contradicted. Therefore, the ruling of the learned Judge rejecting that evidence tendered for the prisoner was correct when it was tendered as relevant to the issue in the cause.

As we are all of opinion that the conviction cannot be sustained, the next question is whether we have power to grant a new trial.

Just before the passing of the Statute 32-33 Vic., ch. 29, the provisions of ch. 113, Con. S., U. C., intituled: "An Act respecting new trials and appeals and writs of error in criminal cases in Upper Canada" were in full force.

The Act provided that when any person had been convicted of any treason, felony, &c., such person might apply for a new trial, upon any point of law or question of fact, in as ample a manner as any person might apply to the Superior Courts of Common Law for a new trial in a Civil action.

If the conviction was affirmed by the Superior Court, the person convicted might appeal to the Court of Error and Appeal, provided the appeal was allowed by the Superior Court, or any two Judges thereof, and any rule or order of the Court of Appeal was to be final.

The Court to which the application for a new trial was made, either in the first instance or by way of appeal, were to have power to determine the questions of law and fact involved in the application, and were to "affirm the conviction or order a new trial or otherwise, as justice requires."

In case of a new trial being granted, the same proceedings as to any future trial, or the commitment or bailing of the person convicted, as if no conviction had taken place. In case of a new trial being refused, the Court were to make such order for carrying out the sentence already passed, or for passing sentence if none had been passed, or for the discharge of the person so convicted, on bail or otherwise, as justice requires.

Ch. 112 of the same statutes provided that when any person convicted of treason, felony, &c., before any Court of Oyer and Terminer * * * * the Judge before whom the case was tried, might in his discretion

reserve any question of law, which arose on the trial, for the consideration of the Justices of either of the Superior Courts of Common Law. The Judge, thereupon, was to state in the case the question or questions of law reserved with the special circumstances upon which the same arose, which was to be transmitted to one of the Superior Courts.

The Justices of the Court to which the case was transmitted were to hear and finally determine the said questions and reverse, affirm or amend any judgment given on the indictment or inquisition on the trial whereof the question arose, or to avoid such judgment or order an entry to be made on the record that in the judgment of the said Justices the party convicted ought not to have been convicted, or arrest judgment, or if no judgment had been given, should order judgment to be given thereon at some future session of Oyer and Terminer or Gaol Delivery * * * or make such other order as justice might require. The judgment was to be certified to the Clerk of Assize, who was to enter the same on the record in the proper form. If the judgment was reversed, avoided or arrested, the person convicted was to be discharged from further imprisonment.

Under Cons. Statutes L. C., Ch. 77, Sects. 57, 58 and 59, similar provisions were made for reserving questions of law on a conviction for treason, felony, &c., for the consideration of the Court of Queen's Bench, which arose on the trial. The case is to be transmitted to the Clerk of Appeals. The Court of Queen's Bench, on the appeal side, to have full power to hear and finally determine every question therein; and thereupon to reverse, amend or affirm any judgment which has been given on the indictment or inquisition on the trial,

whereof such question arose, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the Court of Queen's Bench the party convicted ought not to have been convicted or to arrest the judgment * * * * or to make such other rule as justice requires. The judgment to be certified to the Clerk of the Court from which it came, who is to enter the same on the record in the proper form. If the judgment has been reversed, avoided or arrested, the sheriff or gaoler shall forthwith discharge the prisoner.

By sec. 63, if in any criminal case, either reserved as aforesaid or brought before it by writ of error, the Court of Queen's Bench is of opinion that the conviction was bad from some cause not depending upon the merits of the case, it may by its judgment declare the same and direct that the party convicted be tried again as if no trial had been had in such case.

The Statute 32 and 33 Vic., ch. 29, sec. 80, repealed so much of ch. 113 of the Cons. Stat. for U. C. as allowed an appeal to the Court of Error and Appeal in any criminal case where the conviction had been affirmed by either of the Superior Courts of Common Law on any question of law reserved for the opinion of such Court, as regarded any conviction after that Act came in force, and the judgment of the Superior Court on any question reserved should be final and conclusive, and so much of ch. 113 of the said Cons. Stat. U. C. or of ch. 77 of Cons. Stats. L. C., or of any other Act as would authorise any Court in the Province of Ontario or of Quebec to order or grant a new trial in any criminal case were repealed as regards any conviction after that Act came into force; and no writ of error was to be allowed in any criminal case unless

founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases. But nothing in the Act was to prevent the subsequent trial of the offender for the same offence in any case where the conviction is declared bad for any cause which made the former trial a nullity, so that there was no lawful trial in the cause.

Under ch. 36 of 32 and 33 Vict., ch. 113 of Cons. St. U. C. was repealed, except sects. 5, 16 and 17, which do not relate to the granting of new trials, and sec. 63 of ch. 77, Cons. Stats. L. C. was also repealed.

The effect of these repealing statutes is to take away the power of granting new trials in criminal cases and leaves the law applicable to Ontario and Quebec depending upon the provisions of the Con. Stat. U.C., ch. 112, and Con. Stat. L. C., ch. 77, sects 57, 58, 59 as to reserving questions at the trial for the consideration of the Court as the same may be affected by 80 sect. of 32-33 Vict., and by the 49 sect. of the Supreme and Exchequer Court Act, which, so far as applicable to the matter under consideration, is to the following effect :— "Any person convicted of treason, felony or misdemeanor before any Court of Oyer and Terminer or Gaol Delivery, or before the Court of Queen's Bench, in the Province of Quebec, on its Crown side, or before any other Superior Court of criminal jurisdiction, whose conviction has been affirmed by any Court of last resort, or in the Province of Quebec by the Court of Queen's Bench on its Appeal side * * * * may appeal to the Supreme Court against the affirmation of such conviction * * * * and the said Court shall make such rule or order therein, either

in affirmance of the conviction, or for granting a new trial or otherwise * * * * as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect, anything in the 80th section of the Act passed in the session held in the thirty-second and thirty-third years of Her Majesty's reign, ch. 29, to the contrary notwithstanding. Provided that no such appeal shall be allowed where the Court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney-General for the proper province within fifteen days after such affirmance or refusal."

The object of the Statute 32 and 33 Vict., chap. 29, sec. 80, taken in connection with the Statute chap. 36 of the same Session, repealing the provisions of the Statutes allowing new trials in criminal cases in Ontario and Quebec, seems clearly to have been to prevent in these Provinces new trials in criminal cases, and to leave questions of law to be decided on reserved cases as was and is the practice in England. Looking at the numerous Acts affecting the criminal law passed in that Session, it was, no doubt, after deliberation, determined to make this important change in the law then existing in the two Provinces on the subject.

In that view there would be no doubt, I apprehend, that, under a reserved case, on a question like this, stated under the direction of the Court, when we are of opinion that the ruling of the learned Judge at the trial was wrong, our duty would be to declare that the prisoner ought not to have been convicted, and on that being certified to the proper officer, the prisoner would be discharged from custody.

The question now to be considered is whether the

Dominion Parliament, when allowing an appeal to the Supreme Court from the decision of the Provincial Courts on a case reserved, intended to change the law so as to authorize new trials to be granted by this Court when such right did not exist in the Provincial Court if they entertained the same view of the law which this Court does. I do not think such was the intention of the Dominion Parliament.

If it were not for the words "and the said Court shall make such rule or order either in affirmance of the conviction or for granting a *new trial* or *otherwise* as the justice of the case requires," I should say this Court had no power to grant a new trial on an appeal in a criminal case brought here when the judgment of the Court below is reversed on the ground of the Judge who tried the case having, contrary to law, refused to admit evidence offered on behalf of the prisoner.

If the Court of Queen's Bench for the Province of Quebec had decided in this matter that the prisoner ought not to have been convicted, and had ordered an entry to be made to that effect on the record, it seems to me the person having the prisoner in custody should forthwith discharge him from imprisonment. Then, is it not absurd that, on an appeal alleging that the decision of the Court of Queen's Bench was incorrect on one of the questions reserved, if we are of opinion that the Court decided wrong, that the effect should be different from what it would have been if they had decided correctly.

In exercising the ordinary appellate powers of the Court, this Court under sec. 38 of the Supreme and Exchequer Court Act are to give the judgment which the Court whose judgment is appealed from ought to have given. Here, we think, the judgment

which should have been given by the Court appealed from was to have reversed not affirmed the conviction, and not to grant a new trial, for under the law, as it now stands, they had no power to do so

This man has been put in jeopardy by this trial, for an offence which is still a capital felony, and he has been convicted, perhaps, because the learned Judge refused to allow him to ask a certain question of the prosecutrix. Therefore, the conviction, being bad, cannot be sustained, and he ought not again to be put in jeopardy by us, unless there is express authority given us to place him in that position. In the present state of legislation upon the subject, and the uniform practice, as far as I am advised, not to have a *venire de novo* awarded in treason or felony, when on a case reserved the Court decides in favor of a criminal, I think we should not make an order for the affirmance of the conviction or for granting a new trial, but "*otherwise*" that our order should be to reverse the judgment which has been given on the indictment and order the prisoner's discharge.

As I have already stated, I do not think that by the clause in the Supreme and Exchequer Court Act referred to, the Dominion Parliament intended this Court to grant new trials in cases of treason or felony when questions were reserved by a Judge at the trial for the consideration of a Superior Court, unless such right existed independent of such section; and as it does not now exist in Quebec by virtue of any other law, as far as I am advised, this Court ought not to order a new trial.

In any event there must be grave doubts if such a power exists, and we are authorised to make an order "*otherwise*" than affirming the conviction or granting a new trial. We obey the Statute, and do what "the justice of the case requires" by reversing the judgment

which has been given in the matter by the Court of Queen's Bench.

I may here observe that the provisions as to cases reserved for the consideration of the Court for Crown cases reserved in England under Imp. Stat. 11 & 12 Vict. ch. 78, are the same in effect as those contained in the Cons. Stat. U. C. ch. 112 & Cons. Stat. L. C. ch. 77, the 36 sect. of the latter Statute being repealed as to reserving cases for the consideration of the Superior Courts of Law in Ontario, and of the Court of Queen's Bench in Quebec.

RITCHIE, J. :—

I think the conclusion to be arrived at from a consideration of all the authorities is that the prisoner's counsel had a legal right to put the first question objected to, and rejected by the learned Judge, and that the counsel for the prosecution had no right to object to the question; that if the witness herself objected to answer, I think it was in the discretion of the Judge to compel an answer; and that on the question being put, it was discretionary with the Judge to intimate to the witness that she might or might not answer it.

I think the answer of the witness when given must be accepted, and is not open to be contradicted by evidence on the part of the prisoner.

Under the peculiar circumstances of this case, viz: of prisoner's contention, as admitted on the argument, that the connection was with consent, and in view of the witness having, without objection, answered generally that the connection complained of was the first time any person had had carnal connection with her, it became, in my opinion, practically very important

that the prisoner should have been allowed to sift the witness as to the accuracy of such previous connection by putting the question proposed.

It is right, I think, to say that the witness does not appear to have objected to the question, or to have been at all unwilling to answer it, and it is obvious, had the prosecuting counsel not objected, and the Judge had not ruled the question out, she might have been only too glad to avail herself of the opportunity of denying the imputation and of vindicating her character, thus, by the question proposed, inferentially assailed. Be this as it may, I think on a trial jeopardizing the life of the prisoner, as this did, he was deprived of a right the law gave him, and was thereby prevented from making full defence, and, therefore, without attempting an inquiry into the extent of the injury he sustained, or speculating on the benefits he might or might not have received by the answering or refusing to answer the question when propounded, I think it sufficient to say the law gave the prisoner the right to put the question, and the learned Judge having deprived him of that right his trial was not according to law, and his conviction on such a trial cannot be sustained.

STRONG, J.:—

I am of opinion that the learned Judge who tried the case ought to have permitted the prisoner's counsel, on the cross-examination of the prosecutrix, to put the question which was objected to by the Crown Counsel, and that the Counsel for the prosecution had no right to interpose the objection which he made to it. The result of the English authorities is, that the question was one which might be put to test the credit of the witness, but that the prosecutrix

might, if she objected to answer it, in the discretion of the Judge, be excused from doing so, on the ground that it tended to degrade and harass her.

It is said by a text writer of high authority on the law of evidence, (1) that "cases may arise where the Judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance." Another author of repute, Best on Evidence, (2) lays it down that though in strictness the Courts can compel a witness to answer such a question ; yet, in their discretion, they will not do so, as the end of the cross-examination is obtained by putting the question and the refusal of the witness to answer. These writers state, I think, correctly the conclusion from reported cases. Here, however, the learned Judge did not permit the question to be put, and, therefore, deprived the prisoner not only of the chance of obtaining an affirmative answer, but also of the obvious practical advantage which might have resulted to him from a refusal to answer. Had the question been put, and the witness, on claiming protection herself been excused from answering, the exercise of discretion of the Judge could not be reviewed on a case reserved under the Statute, but must have been considered as conclusive.

Formerly there existed in England a reason for according to a witness an absolute privilege from answering such a question as that propounded to the prosecutrix, inasmuch, as a party guilty of an act of incontinence could have been made liable to penal consequences by a prosecution in the Ecclesiastical Court. This reason it seems, never had any force in the Province of Quebec, and it has long ceased to exist in England ; though in

(1) Taylor, 4. Edt. Sec. 1314, 1315. (2) 6th Lond. Edt. Sec. 130.

1812, when *Rex* v. *Hodgson*, (1) was decided it was applicable, and appears to have been one of the grounds of the decision, for Baron Wood there held the witness not bound to answer, as it tended to *criminate* her.

As to the question which was put to the witness Provencher, that was, without doubt, properly overruled on the authority of *Reg.* v. *Cockroft* (2), and *Reg.* v. *Holmes*, (3) and upon the very well settled principle that a witness cannot be contradicted in matters foreign to the issue, which on the trial of this indictment was, as Mr. Justice Ramsay points out, not whether the prosecutrix was unchaste, but whether the prisoner had had connection with her by violence.

The proper order to be made on the present appeal will, I think, be to reverse the judgment of the Court below, to direct the conviction to be quashed and the prisoner to be discharged. A new trial is out of the question, for Section 38 of the Supreme and Exchequer Court Act directs that this Court shall,in the alternative of a reversal, give the judgment which the Court below ought to have given, and since the repeal of Section 63, ch. 77 of the Consolidated Statutes of Lower Canada, the Court of Queen's Bench could not have granted a new trial. Section 49 of the Supreme Court Act which authorizes this Court to grant a new trial must be read in such a way as to make it consistent with section 38 already referred to, and this requires us to hold that the power to grant new trials is confined to cases in which the Court appealed from could have made such an order.

(1) R. & R. C. C. p. 211; (2) 11 Cox. C. C. C. 410; (3) L. R. 1 C. C. 334.

TASCHEREAU, J. :—

The prisoner was convicted of rape, and he now seeks to be discharged on the ground that he had not a fair trial, inasmuch as the presiding Judge excluded material evidence on cross-examination of the private prosecutrix. The question was "as to her having been in the dairy of one Clovis Guilmette with two men named Malhiot, the one after the other."

I agree with my brother Judges in declaring that the Judge was wrong in rejecting the question, which was manifestly calculated to affect the character, and, as a consequence, the credibility of the prosecutrix in a case of rape where her chastity was in question. For it is an undoubted principle in criminal cases as in civil cases, and now settled by the best and latest decisions, that any question tending to affect the character, and consequently, the credibility of a witness, should be allowed. As to her refusal to answer the question, if it had been allowed by the Judge, I have nothing to say at the present moment; as to the practical result of such a refusal, and as to the line of conduct of the Presiding Judge under the circumstances, I think we are not called upon to express any opinion on this subject.

It must also be noted that the prosecutrix had freely declared that she had had no carnal connection with any man previous to the occasion in question in this case. I think that by such answer she had, to a certain extent, challenged a very severe cross-examination, and renounced any privilege if she had been entitled to claim any. I am, therefore, of opinion that the ruling of the presiding Judge rejecting the question was wrong, and that the prisoner should have the benefit of it, and obtain nothing less than his discharge, in the actual state of the law.

FOURNIER, J. :—Concurred.

HENRY, J. :—

Agreeing as I do with the conclusions of the judgment already given in this case, on the two points raised and argued, it is unnecessary for me to make any extended remarks, and I will content myself by saying that, after the best consideration I have been able to give to the question submitted, and a consultation of the governing authorities, as well as the principles and the consequences involved, I have no hesitation in approving the reasons given by Mr. Justice Ramsay, in the Court of Queen's Bench.

The authorities, without doubt, in my mind, establish the right of the accused to have the question put, and having been prevented by the presiding Judge from having that done, I consider that his defence was thereby affected, and legal evidence virtually, though perhaps not technically, rejected.

Upon the second point, as to the rejection of the evidence of Joseph Provencher, there ought not, I think, be any doubt that the ruling of the presiding Judge was correct.

Having declined to permit the question to be put to the prosecutrix, it would, independently of previous testimony, be irrelevant to the issue, and therefore, not admissible ; and the prosecutrix, not having made any statement on the point, it could not be received as contradictory.

For the reasons given in the other judgments delivered, I concur in the view that the prisoner should be discharged. Under the Act constituting this Court, power is given it to order a new trial in criminal appeal cases ; but, independently of the other reasons given, I at present entertain doubts as to the

propriety of our doing so, except in cases where a mistrial has taken place.

I have advisedly confined my judgment to the two points raised.

Appeal allowed.