BERNARD FREY (PLAINTIFF) ..... APPELLANT;

AND

STEPHEN FEDORUK AND RICHARD PERCY STONE (DEFENDANTS) ..... RESPONDENTS.

1950

*Feb. 7
*Apr. 25

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—"Peeping tom"—Whether criminal offence—Conduct likely to cause breach of peace—False imprisonment—Arrest without warrant—Burden of proof—Criminal Code, ss. 30, 646, 647, 648, 650—Supreme Court Act, R.S.B.C. 1936, c. 56, s. 77.

Appellant was chased, caught and detained by respondent, Fedoruk, after he had been seen on Fedoruk's property looking into a lighted side window of the house where a woman was preparing for bed. A policeman, the other respondent, was called and, after some investigation, arrested appellant without warrant.

On a charge that he "unlawfully did act in a manner likely to cause a breach of the peace by peeping . . ." appellant was convicted by a Police Magistrate but acquitted by the Court of Appeal.

His claim for damages for malicious prosecution and for false imprisonment was dismissed by the trial judge and this was affirmed by a majority in the Court of Appeal on the ground that appellant had been guilty of a criminal offence at common law and therefore that there had been justification for the arrest without warrant. The appeal to this Court is concerned only with the claim for false imprisonment.

Held: Appellant's conduct did not amount to any criminal offence known to the law. Therefore respondents have failed to satisfy the onus placed upon them to justify the imprisonment under ss. 30, 648 or 650 of the *Criminal Code*.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Locke and Cartwright JJ.

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Held also: Section 30 Cr. C. authorizes a peace officer to arrest without warrant only if he, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, but not if he erroneously concludes that the facts amount to an offence, when, as a matter of law, they do not.

Held further: Conduct, not otherwise criminal and not falling within any category of offences defined by the criminal law, does not become criminal because a natural and probable result thereof will be to provoke others to violent retributive action; acts likely to cause a breach of the peace are not in themselves criminal merely because they have this tendency. It is for Parliament and not for the Courts to decide if any course of conduct, which has not up to the present been regarded as criminal, is now to be so regarded.

Per Kerwin J.: The appellant, by "peeping", did not commit a breach of the peace. If he had, it is not an offence for which either a police constable or a private individual might arrest without warrant under ss. 646 or 647 of the *Criminal Code*. Sections 30, 648 and 650 afford no assistance to either respondents since no criminal offence was committed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming, Robertson JA. dissenting, the dismissal by the trial judge of an action for false imprisonment and malicious prosecution.

H. R. Bray, K.C. for the appellant.

Lee A. Kelley, K.C. and *W. R. Meredith* for the respondent Stone.

KERWIN J.: The plaintiff in this action, Frey, appeals against a judgment of the Court of Appeal for British Columbia (1) affirming by a majority, so far as the defendants Fedoruk and Stone are concerned, the dismissal of the action by the trial judge. The action as tried was for false imprisonment and malicious prosecution but the action stands dismissed as against all defendants on the latter issue and we are not concerned with it in this appeal.

The claim for false imprisonment arose from the following circumstances which, though some are denied by the appellant, must be taken to be established. While on his way home from work about 11.15 p.m. on March 4, 1947, the appellant stopped the truck which he was driving on the highway, turned out the lights on the truck and walked to the rear of a house occupied by the defendant Fedoruk, his wife, and mother. There he peeped through a window

(1) 95 Can. C.C. 206.

upon which there was no blind but the curtains of which had been drawn to within six to eight inches of each other, and was seen by Fedoruk's mother while she was standing in her nightgown in her lighted bedroom. The mother's cry, "Man at window", was heard by the wife of Fedoruk, who called him. Seizing a butcher knife, he ran out the door in time to see the appellant leaving the property. Upon Fedoruk's shouting, the appellant started to run but was caught by Fedoruk about 300 feet down the road while the appellant was attempting to insert the key in the ignition lock of the truck. Fedoruk brought the appellant back to the house and the police were notified. The defendant, Constable Stone, and another police officer came and, after investigating thoroughly by examining the footprints upon the dewy ground and in other ways, Stone arrested the appellant and took him to a police station. There he was charged that he "unlawfully did act in such a manner likely to cause a breach of the peace by peeping at night through the window of the house of S. Fedoruk". His conviction by a magistrate on that charge was set aside by the Court of Appeal and the present action followed.

There was agreement in the Court of Appeal that a bare trespass not amounting to a breach of the peace is not a criminal offence. The difference of opinion arose between the majority, who considered that an actual breach of the peace had occurred, and Mr. Justice Robertson who thought otherwise. As Mr. Justice O'Halloran, speaking for the majority, pointed out:—"Furthermore, it would seem plain at common law that if the intruder's conduct did not constitute a criminal offence, then he could not be charged with conduct likely to cause a breach of the peace by the Fedoruks." It may be difficult to define exhaustively what is a breach of the peace but, for present purposes, the statement in Clerk and Lindsell on Torts, (10th edition), page 298, may be accepted:—

> A breach of the peace takes place when either an actual assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult to an individual stopping short of actual personal violence is not a breach of the peace. Thus a householder—apart from special police legislation—cannot give a man into custody for violently and persistently ringing his door-bell.

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As authority for the last sentence, a case of false imprisonment, *Grant* v. *Moser* (1), is cited. It is true that it was decided on a pleading which ultimately the defendant was permitted to amend but the latter part of the report, containing the argument of Sergt. Talfourd for the defendant, including interpolations by Chief Justice Tindal and Cresswell J. is significant. It reads:

It is submitted that the plea sufficiently discloses a breach of the peace at the time of the arrest. After stating that the plaintiff "with force and arms" came to the house and violently rang the bell, and continued so doing after being requested to desist, it states that "thereupon (which must mean instanter) the defendant gave him in charge. In *Baynes* v. *Brewster* (2 Q.B. 375; 1 G. & D. 669) a plea justifying the plaintiff's arrest for creating a disturbance by rapping at the defendant's door was held bad because it appeared that the disturbance was over at the time of the arrest (Tindal C.J. And that, although the plea stated that the defendant gave the plaintiff in charge "in order to preserve the peace." Cresswell J. What allegation is there in this plea of anything having been done in breach of the peace?) It alleges that the disturbance took place "against the peace of our Lady the Queen." (Tindal C.J. Those are mere *verba sonantia*. One party cannot arrest another for a mere unlawful act. Cresswell J. Every trespass is laid as a breach of the peace. Suppose the plaintiff had blown a horn in the front of the defendant's house, that might have been a breach of the metropolitan police act (2 & 3 Vict. c. 47. See sect. 54, div. 14); but it would not have been a breach of the peace. Tindal C.J. To make this a good defence there should be a direct allegation either of a breach of the peace committing at the time of giving the plaintiff into custody, or that a breach had been committed, and that there was reasonable ground for apprehending its renewal.)

In the earlier case of *Green* v. *Bartram* (2), to quote the headnote:

(A. went to the house of B. to demand a debt, which B. said he could not pay. Angry words passed, and B. told A. to leave his house, this A. refused to do unless he was paid. Upon this B. sent for a police officer, and had A. locked up in the watch-house: Held, (by Lord Tenterden, C.J.) that if A. was making a disturbance B. would have been justified in turning him out of his house, but that he was not justified in imprisoning him.)

Notwithstanding the contemptible actions of the appellant, I find myself in agreement with the dissenting judge that the appellant did not, even in view of all the surrounding circumstances, commit a breach of the peace. If he had, it was not an offence for which either a police constable or a private individual might arrest without warrant under sections 646 or 647 of the *Criminal Code*. Section 30 authorizes a peace officer to arrest without warrant only

(1) (1843) 5 Man. & G. 123. (2) (1830) 4 Car. & P. 308.

if he, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed. Since no criminal offence was committed, subsection 1 of section 648:

> A peace officer may arrest, without warrant, any one whom he finds committing any criminal offence.

affords no assistance to the respondent Stone even if it could be said that he had found the appellant "committing". Similarly, section 650 affords no assistance to the respondent Fedoruk, assuming that he was the owner of the property. The majority in the Court of Appeal considered that the statute 34 Edw. III, c. 1, was not in force in British Columbia but, even if it were, it would not apply since no offence had been committed.

The appeal should be allowed and judgment should be entered for the appellant for the amounts fixed by Mr. Justice Robertson as to which no question was raised; that is, against Fedoruk for $10 and against Stone for $50. The appellant is entitled to his costs in the Court of Appeal and in this Court. There should be no costs of the action against the respondents so far as the issue of false arrest is concerned unless the appellant is able to secure an order under section 77 of the *Supreme Court Act of British Columbia.*

The judgment of the Chief Justice and of Taschereau, Rand, Kellock, Locke and Cartwright, JJ. was delivered by:

CARTWRIGHT J.: This appeal raises questions as to whether the conduct of the Plaintiff, which is popularly described as that of a "peeping tom", constitutes a criminal offence and if so, whether the Defendants Fedoruk and Stone were justified in arresting the Plaintiff without a warrant.

In this Court, the appeal was presented as depending upon undisputed facts which may be briefly stated as follows:

About 11.15 p.m. on the 4th of March 1947, the mother of the Defendant, Fedoruk, while standing in her night-gown in her lighted bedroom in her son's house saw the Plaintiff peeping into her window, the curtains of which were only partially drawn. She was frightened and called

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to her son who seized a butcher knife and ran outside. He shouted at the Plaintiff who was then just leaving Fedoruk's property. The Plaintiff started to run; Fedoruk chased him about one hundred yards to a point where the Plaintiff was trying to unlock and get into his truck. The lights of the truck were out. Fedoruk took the Plaintiff back to his house, threatening him with the knife. Fedoruk's mother identified the Plaintiff as the man whom she had seen at her window and the police were called. The Defendant Stone, a police constable, arrived accompanied by another police officer, and after some investigation, as a result of which he formed the opinion that the Plaintiff had been "peeping", he told the Plaintiff he was under arrest and took him to the Police Station where he was confined.

There are allegations in the pleadings and in the evidence that the Defendant Stone assaulted the Plaintiff on his way to the Police Station and at the Police Station, but as to this, there appear to be concurrent findings of fact against the Plaintiff, and counsel for the Plaintiff made it clear in his factum and in his argument that the Plaintiff's appeal was limited to his claim for damages for false imprisonment as against the Defendants Fedoruk and Stone.

The learned trial Judge dismissed the action against all three Defendants. The Court of Appeal (1) unanimously allowed the appeal as to the Defendant Watt and awarded the Plaintiff $100 damages against him, and from this award no appeal was taken. The majority of the Court of Appeal dismissed the Plaintiff's appeal as against Fedoruk and Stone. Robertson, J.A. dissenting would have allowed the appeal as to these Defendants also and would have awarded the Plaintiff damages of $10 against Fedoruk and $50 against Stone. Leave to appeal was granted to the Plaintiff by the Court of Appeal.

The majority of the Court of Appeal were of opinion that the Plaintiff was guilty of a criminal offence at Common Law, and that the Defendants were justified in the circumstances in arresting him without a warrant. Robertson, J.A. was of the view that on the facts as found, no criminal offence was committed by the Plaintiff.

(1) 95 Can. C.C. 206.

The claim being one for damages for false imprisonment, in my opinion, the following short passage from Halsbury's Laws of England, Second Edition, Volume 33, page 38 correctly states the law:

> The gist of the action of false imprisonment is the mere imprisonment; the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification.

There is no question on the facts but that the Plaintiff was imprisoned first by Fedoruk and afterwards by Stone, and in order to succeed it was therefore necessary for each of them to plead and prove that the imprisonment was legally justifiable. The justification pleaded by Fedoruk consists of a brief statement of the facts outlined above followed by the allegation that fearing that the Plaintiff was under the circumstances in question, doing an act which was likely to cause a breach of the peace, to wit, peeping without any lawful excuse into the windows of his mother's bedroom while hiding outside, he pursued the Plaintiff through his property and arrested the Plaintiff because of the violation of law committed by the said Plaintiff.

The justification pleaded by Stone is that he placed the Plaintiff under arrest by reason of the commission of an act by the said Plaintiff that was likely to cause a breach of the peace by reason of the said Plaintiff peeping at night through the window of the home of Stephen Fedoruk, and in particular through the window of the bedroom of the said Defendant's mother while she was undressing and preparing for bed and only after having investigated the explanation given by the Plaintiff and having found that the same could not be in accordance with the facts.

It will be observed that the Defendant Stone does not plead that he believed a breach of the peace had been committed or that such breach had in fact been committed. He limits his plea to the allegation that the Plaintiff had committed an act likely to cause a breach of the peace.

The only charge laid against the Plaintiff was that he:

> unlawfully did act in a manner likely to cause a breach of the peace by peeping at night through the window of the house of S. Fedoruk, there situated, against the peace of our Lord the King, his Crown and dignity; Contrary to the form of Statute in such case made and provided.

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On this charge the Plaintiff was convicted by a police magistrate sitting for the summary trial of an indictable offence. The formal conviction concludes with the words: and I adjudge the said Bernard Frey for his said offence to keep the Peace and be of good behaviour for the term of one year.

This conviction was quashed by the Court of Appeal on the ground that the evidence on the record did not support the conviction, without that court finding it necessary to decide whether or not the acts charged constituted a criminal offence. This is stated in the judgment of O'Halloran, J.A. who was a member of the Court which quashed the conviction.

It would appear that the acquittal of the Plaintiff on the criminal charge does not preclude the Defendants from showing as their justification for having imprisoned him that he had in fact committed the offence of which he had been acquitted. See *Cahill* v. *Fitzgibbon* (1) and *Cook* v. *Field* (2).

O'Halloran, J.A. with whom Sidney Smith, J.A. agrees, stated his conclusion that the Plaintiff had committed an offence at Common Law in the following words:

> He himself committed a breach of the "King's Peace" by acting in a way that produced fear in the inmates of the house; he disturbed their tranquillity and privacy in a manner that he would naturally expect to invite immediate violence against him. Among other things it is instinctive in man to take physical reprisal against invasion of the privacy of his womenfolk particularly at night. Accordingly his breach of the "King's peace" was more than likely to cause an immediate breach of the King's peace by the inmates of the house; and he contributed another sinister incident by running when Fedoruk shouted at him instead of stopping and talking to Fedoruk.
>
> No attempt is made to define completely the Common Law offence of "breach of the King's Peace", except to say, it is not used here in its common and more narrow sense.

O'Halloran, J.A. later continues:

> As previously intimated, breach of the peace has two significations; the narrow and common one applicable to riots, tumults and actual physical violence; and the other and wider one which goes so deeply into the roots of the Common law, viz., any disturbance of the tranquillity of people, which if not punished, will naturally lead to physical reprisals, with wider and more aggravated disturbances of the "King's Peace."

While O'Halloran, J.A. takes the view that the *Criminal Code* does not expressly make the Plaintiff's conduct criminal and that at Common Law merely looking through

(1) (1885) 16 L.R. Ir. 371. (2) (1788) 3 Esp. 133.

a window at night is not in itself a criminal offence, he goes on to hold that the circumstances in which the act is done may change its character, and continues:

> It is my judgment that the circumstances here surround the intruder's act of looking in the window with such sinister implications, that in the lack of a credible explanation, his conduct as a whole must be regarded as criminal at Common Law. It was late at night, the intruder was on private property some thirty to forty feet back from the street line; he was looking in a side window which did not face the street, the window was lighted and he could see a woman preparing for bed. Quite apart from the "peeping tom" aspect, the presence of a prowler in such circumstances, the dread of the hostile unknown at night, would naturally frighten the inmates of the house, and incite them to immediate violent defensive or offensive action against him.

Robertson, J.A. dissenting, was of opinion that the Plaintiff did not commit an actual breach of the peace. He points out that "an indictment will not lie for a bare trespass not amounting to an actual breach of the peace." This statement of the law is amply supported by the authorities cited by Robertson, J.A. all of which were decided long after the passing of C.8 of 5 Rich. II (1381), referred to in the judgment of O'Halloran, J.A. as making unlawful entry into any lands a criminal offence even if unaccompanied by violence. In my view that statute contemplates entry with the intention of taking possession and has no reference to an isolated and temporary act of trespass such as occurred in this case. I agree with the conclusion of Robertson, J.A. that the Plaintiff did not commit any criminal offence.

We have been referred to no reported case in which the conduct of a "peeping tom" was held to be a criminal offence. It is well settled that, while the rule may not be so strict as in criminal cases, in a civil case where a right or defence rests on an allegation of criminal conduct a heavy onus lies upon the party alleging it, and questions that are left in doubt by circumstantial evidence must be resolved in favour of innocence.

There is no suggestion in the evidence of any attempt on the part of the Plaintiff to offer violence to anyone. A reasonable inference to be drawn from the facts recited above is that the Plaintiff had no intention of himself doing any violent act and hoped that he would not be discovered.

When he was discovered he at once ran away. In my opinion, the mere fact that his presence at night in close

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proximity to the window would have the probable effect of frightening the inmate of the room does not make such conduct criminal at Common Law.

While I agree with the view expressed by O'Halloran, J.A. that such conduct, if discovered, would naturally frighten the inmates of the house and that it would tend to incite them to immediate violent action against the intruder, I am doubtful whether such action could be properly described as defensive. I would describe it rather as offensive and retributive. I do not think action is defensive when the person against whom it is taken has given no indication of any intention to attack and is already in flight. I do not think that it is safe to hold as a matter of law, that conduct, not otherwise criminal and not falling within any category of offences defined by the Criminal Law, becomes criminal because a natural and probable result thereof will be to provoke others to violent retributive action. If such a principle were admitted, it seems to me that many courses of conduct which it is well settled are not criminal could be made the subject of indictment by setting out the facts and concluding with the words that such conduct was likely to cause a breach of the peace. Two examples may be mentioned. The speaking of insulting words unaccompanied by any threat of violence undoubtedly may and sometimes does produce violent retributive action, but is not criminal. The commission of adultery has, in many recorded cases, when unexpectedly discovered, resulted in homicide; but, except where expressly made so by Statute, adultery is not a crime.

If it should be admitted as a principle that conduct may be treated as criminal because, although not otherwise criminal, it has a natural tendency to provoke violence by way of retribution, it seems to me that great uncertainty would result. I do not think it safe by the application of such a supposed principle to declare an act or acts criminal which have not, up to the present, been held to be criminal in any reported case.

This would be my view if the matter were not covered by authority, but it also appears to me to be supported by authority. In my view it has been rightly held that acts likely to cause a breach of the peace are not in themselves

criminal merely because they have this tendency, and that the only way in which such conduct can be dealt with and restrained, apart from civil proceedings for damages, is by taking the appropriate steps to have the persons committing such acts bound over to keep the peace and be of good behaviour.

This appears to be the view of Lord Goddard, with whom Humphreys, J. agrees, in *Rex* v. *County of London Quarter Sessions Appeals Committee* (1), particularly at page 475, where he says:

> In *Dalton's Country Justice,* a work of the highest authority, a catalogue is given, not intended, I think, to be exhaustive, of a large number of instances which would justify sureties for good behaviour being taken. It starts with rioters and barrators, and goes on to such cases as nightwalkers and eavesdroppers, suspected persons who live idly and yet fare well, or are well apparelled having nothing whereon to live, and common gamesters.
>
> None of these were ever indictable offences. Eavesdroppers are first defined in *Termes de la Ley* as "such as stand under walls or windows by night or by day to hear news and to carry them to others to make strife and debate amongst their neighbours".
>
> Though it is said in *Russell on Crimes* that eavesdropping was dealt with in the Sheriff's Tourn and Courts Leet as an offence, so far as I am aware no instance can be found in the books of any indictment being preferred for this offence at common law. It follows, therefore, that nobody can be convicted of eavesdropping or nightwalking, or of many of the other matters which are mentioned by Dalton, although, no doubt, in modern times, the necessity for good government in towns and cities has caused the Legislature to pass Acts which make things which in earlier days were regarded as no more than bad behaviour criminal offences; and it is necessary to bear in mind that in the present case which we are considering no charge of having committed any offence against a statute such as the Metropolitan Police Act was preferred.

In *Ex parte Davis* (2), Blackburn, J. points out that the binding over of a person to keep the peace is not an action or proceeding by way of punishment, but is only a precautionary proceeding to prevent a breach of the peace.

In *Rex* v. *Sandbach Ex parte Williams* (3), Humphreys, J. citing Blackstone, Volume (iv), page 256 points out that a man may be bound to his good behaviour for causes of scandal *contra bonos mores,* as well as *contra pacem.*

In my view, the Plaintiff's conduct in peeping through the window was *contra bonos mores,* but was not *contra pacem* in the sense of being a breach of the criminal law.

The case of *Davies* v. *Griffiths* (4), is a decision of the

(1) [1948] 117 L.J.R. 472.
(2) (1871) 24 L.T. 547 at 548.
(3) [1935] 2 K.B. 192.
(4) (1937) 53 T.L.R. 680.

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King's Bench Division. The judgment is given by Lord Hewart, C.J., and the other members of the Court, Macnaghten and Singleton, JJ. agree with him.

It is stated in the report that the relevant facts proved or admitted, showed that the appellant, Davies, had attempted to address a meeting near the entrance to a colliery and persisted in such conduct, despite the protest of a police inspector, that previously there had been breaches of the peace at the colliery and that the appellant's conduct was such as might lead to a breach of the peace.

Davies had been convicted by justices on two informations preferred against him by the respondent Griffiths. The first of these was "having on August 18, 1936 been guilty of conduct near the Taff Merthyr Colliery, Gelligaer, which might lead to breaches of the peace, contrary to the common law". The Lord Chief Justice, having stated that the major point in the appeal was as to this first charge said:

> With regard to the first information it is quite evident that there was a misconception. The only course open to the justices when the facts had been proved was, if they thought fit, to bind the appellant over to keep the peace and perhaps to find sureties. It is common ground at the Bar that the course which the justices took was a course not open to them. They fined the appellant on the basis that he had committed a substantive offence to which a penalty might apply. In so doing they erred in point of law.

In my view, the definition of a breach of the Peace in Wharton's Law Lexicon, 14th Edition, page 143, quoted by Robertson, J.A. "offences against the public which are either actual violations of the peace, or constructive violations, by tending to make others break it", is too wide if the concluding words "or constructive violations, by tending to make others break it" are intended to include conduct likely to produce violence only by way of retribution against the supposed offender.

O'Halloran, J.A. does not refer to any reported case in which the conduct of a "peeping tom" has been held to be a criminal offence. As mentioned above, we were referred to no such case by counsel, and I have not been able to find one.

I do not understand O'Halloran, J.A. to suggest in his elaborate reasons that there is precedent for the view that the Plaintiff's conduct in this case was criminal. Rather

he appears to support the finding of the trial Judge to that effect on the grounds stated in the following paragraph:

> Criminal responsibility at Common law is primarily not a matter of precedent, but of application of generic principle to the differing facts of each case. It is for the jury to apply to the facts of the case as they find them, the generic principle the Judge gives them. Thus by their general verdict the jury in practical effect decide both the law and the facts in the particular case, and have consistently done so over the centuries, and cf. *Coke on Littleton* (1832 Ed.) vol. 1, note 5, para. 155 (*b*). The fact finding Judge in this case, as the record shows, had not the slightest doubt on the evidence before him that what the appellant had been accused of was a criminal offence at Common Law.

In my opinion when it is read against the background of the rest of the Reasons of O'Halloran, J.A., it appears that, in relation to the facts of this case, the "generic principle" which the learned Judge has in mind is too wide to have any value as a definition. The genus appears to be "a breach of the King's Peace" in the wider signification which is attached to that expression elsewhere in the Reasons.

It appears to me that so understood, the genus is wide enough to include the whole field of the criminal law. As it is put in Pollock and Maitland, History of English Law (1895) Volume 1, page 22:

> all criminal offences have long been said to be committed against the King's peace.

and in Volume 2 of the same work at page 452, it is stated:

> to us a breach of the King's peace may seem to cover every possible crime.

Once the expression "a breach of the King's Peace" is interpreted, as O'Halloran, J.A. undoubtedly does interpret it, not to require as an essential ingredient anything in the nature of "riots, tumults, or actual physical violence" on the part of the offender, it would appear to become wide enough to include any conduct which in the view of the fact finding tribunal is so injurious to the public as to merit punishment. If, on the other hand, O'Halloran, J.A. intended to give to the expression a more limited meaning so that it would include only conduct of a nature likely to lead to a breach of the peace in the narrower sense of which he speaks, the authorities referred to elsewhere in this Judgment seem to me to show that this is not an offence known to the law.

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I am of opinion that the proposition implicit in the paragraph quoted above ought not to be accepted. I think that if adopted, it would introduce great uncertainty into the administration of the Criminal Law, leaving it to the judicial officer trying any particular charge to decide that the acts proved constituted a crime or otherwise, not by reference to any defined standard to be found in the code or in reported decisions, but according to his individual view as to whether such acts were a disturbance of the tranquillity of people tending to provoke physical reprisal.

To so hold would, it seems to me, be to assert the existence of what is referred to in Stephen's History of the Criminal Law of England, Volume 2, Page 190, as:

> the power which has in some instances been claimed for the Judges of declaring anything to be an offence which is injurious to the public, although it may not have been previously regarded as such.

The writer continues:

> this power, if it exists at all, exists at Common Law.

In my opinion, this power has not been held and should not be held to exist in Canada. I think it safer to hold that no one shall be convicted of a crime unless the offence with which he is charged is recognized as such in the provisions of the *Criminal Code,* or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts.

Having reached the conclusion that the Plaintiff's conduct did not amount to any criminal offence known to the law, the question whether the Defendants were justified in arresting Frey presents little difficulty. The justification put forward in argument was based on certain sections of the *Criminal Code* all of which, with the exception of Section 30, would require as a condition of their affording justification to the Defendants the fact that some criminal offence had been committed.

Section 30 would be of no avail to Fedoruk who was not a peace officer, but it must be examined in regard to Stone. The section reads as follows:

> Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has

been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

It may be that Stone's Statement of Defence is not aptly framed to raise this section as a defence but I do not think it necessary or desirable to decide this point upon the precise form of the pleadings. In my opinion, assuming, without deciding, that the form of the pleadings permits Stone to rely upon it, this section does not afford any justification for his arresting the Plaintiff.

I think that this section contemplates the situation where a Peace Officer, on reasonable and probable grounds, believes in the existence of a state of facts which, if it did exist would have the legal result that the person whom he was arresting had commited an offence for which such person could be arrested without a warrant. It cannot, I think, mean that a Peace Officer is justified in arresting a person when the true facts are known to the Officer and he erroneously concludes that they amount to an offence, when, as a matter of law, they do not amount to an offence at all. *"Ignorantia legis non excusat"*.

Having reached the conclusion that the Plaintiff committed no criminal offence, it is not necessary to examine the authorities collected and discussed by O'Halloran, J.A. as to the meaning of the terms "found committing" or "whom he finds committing".

For the reasons set out above, I am of the opinion that the Plaintiff's conduct did not amount to a criminal offence, and that the Defendants Fedoruk and Stone have failed to satisfy the onus which lay upon them of showing some justification in law for having imprisoned him. I agree with Robertson, J.A. that the Plaintiff was entitled to succeed as against both Defendants.

I would not vary the assessment of the damages proposed by Robertson, J.A. The Plaintiff's counsel does not ask that they be increased and I do not think that the amounts suggested are excessive. While I agree with Robertson, J.A. that in a sense "the whole matter was brought upon the Plaintiff by himself", the facts remain that his arrest was effected by Fedoruk by the threatening

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use of a deadly weapon, he was deprived of his liberty for several hours and subjected to some minor indignities at the police station, all without any justification in law.

In the result I would allow the appeal and direct that judgment be entered against Fedoruk for $10 and against Stone for $50 with costs of the appeal to the Court of Appeal and of the appeal to this Court. There should be no costs of the action against the Respondents unless the Appellant is able to secure an order under section 77 of *The Supreme Court Act of British Columbia,* allowing him costs of the action so far as the issue of false arrest is concerned.

Appeal allowed with costs.

Solicitors for the appellant: *Fleishman and Fleishman.*

Solicitor for the respondents: *Angelo E. Branca.*