1901

*Mar. 25.

*May 21.

A. T. KING (DEFENDANT).....APPELLANT;

AND

CHARLES BAILEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute of limitations—Criminal conversation—Damages.

The statute of limitations is not a bar to an action for criminal conversation where the adulterous intercourse between defendant and plaintiff's wife has continued to a period within six years from the time the action is brought.

Quaere.—Does the statute only begin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within the six years preceding the action?

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiff.

The respondent was married in England on the 8th August, 1861, and lived there with his wife until the 24th March, 1886.

On or about the last mentioned date, the appellant, who was employed by the respondent, and the respondent's wife eloped and took steamer from Liverpool to Halifax, thence to Montreal, and subsequently took up their residence in Toronto, and from that time up to the issue of the writ of summons herein, lived together as husband and wife.

The respondent came out from England to the City of Toronto shortly before the issue of the writ herein, and commenced the proceedings herein.

On these facts the courts below held that the Statute of Limitations did not bar the respondent's action and

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick and Girouard JJ.

(Mr. Justice King was present at the argument but died before judgment was delivered.)

(1) 27 Ont. App. R. 703.

that he was entitled to damages for injury caused by the conduct of the parties during the six years immediately preceding the issue of the writ.

Lobb for the appellant. The cause of action arises on commission of the first act of adultery, and the statute begins to run then. *Evans* v. *Evans* (1); *Patterson* v. *McGregor* (2).

Hyde K.C. for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—The cause of action first set out in the statement of claim in this case is the old action on the case for criminal conversation expressed in the language of the modern formula of pleading, and, as so stated, is in substance simply that in the year 1885 (it should have been 1886), upon the request of the defendant, the plaintiff's wife left the home of the plaintiff with the defendant, and that they went together to the City of Toronto, in the province of Ontario, where ever since their arrival they have lived, and still, at the time of the commencement of this action, do live together in adulterous intercourse, whereby the plaintiff has been deprived of the comfort and enjoyment of the society of his wife, and her affections have been alienated from the plaintiff, and he has been deprived of the assistance which he formerly derived from her and to which he was entitled.

To this is added a paragraph asserting a cause of action for wrongfully enticing the plaintiff's wife from the plaintiff and procuring her to absent herself from him for some time from the year 1885 (should be 1886), to the time of the commencement of this action.

As this cause of action was only inserted to meet the case of the plaintiff being unable to prove the

(1) [1899] P. D. 195. (2) 28 U. C. Q. B. 280.

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adulterous intercourse charged in the previous paragraph, and as that intercoure has been established by most abundant evidence, the cause of action stated for wrongfully procuring the plaintiff's wife to absent herself from her husband has become merged in the charge for adulterous intercourse, and is, apart from that cause of action, quite immaterial, and it was so properly treated at the trial It is only necessary, therefore, for us to deal with the cause of action for adulterous intercourse as set out in the statement of claim.

No plea in denial of that cause of action has been put upon the record, unless the plea of the Statute of Limitations, namely,

> that the cause of action which the plaintiff's statement of claim purports to set forth did not accrue within six years next before the writ of summons herein was issued

may be construed as being a plea of "not guilty" within six years.

The averment in the statement of claim that in the year 1886, the defendant took the plaintiff's wife from the plaintiff's house in Doncaster, England, where they resided, and removed to the City of Toronto, and has ever since lived with her there in adulterous intercourse, and is still living with her in such intercourse, is precisely equivalent to an averment that the defendant is now at the time of the bringing of this action living with the plaintiff's wife in adulterous intercourse in the City of Toronto, and has lived with her in such adulterous intercouse ever since some time in the year 1886, when he induced her to elope with him from the plaintiff's house in Doncaster, England, and *quàcunque viâ* it is viewed, a plea that a cause of action so alleged did not accrue within six years next before the commencement of the action can admit of no other construction than that no part of the adulterous intercourse, which is the cause of action stated, to which

the plea is pleaded, took place within six years before the commencement of the action.

In an action on the case for criminal conversation according to the old form of pleading, the wrong might have been stated to have been committed "*diversis vicibus et diebus*," and in such a case it was competent for a plaintiff to recover upon proof of adulterous intercourse having taken place within six years before the commencement of the action.

How then when, as here, it has been abundantly proved by witnesses who have known the defendant ever since his arrival in Toronto, in September, 1886, and it is sworn absolutely by the defendant himself, that he and the plaintiff's wife have been and still are living together in adulterous intercourse, can it be argued that the plaintiff is deprived by a plea of the Statute of Limitations of his right to recover in this action because of its being alleged in the statement of claim that the adulterous intercouse commenced in England in 1886, and has ever since continued?

When, to an action of the nature of the present, the Statute of Limitations is pleaded and an isolated case appears, or several distinct isolated cases appear, to have taken place more than six years before the commencement of the action and a case or cases is or are shown to have occurred within six years, evidence of those cases which occurred at periods beyond the six years must be excluded from the consideration of the jury, and the damages recoverable are limited to the cases proved to have occurred within six years before action. This was the case of the *Duke of Norfolk* v. *Germaine* (1). Whether or not that rule is applicable to a case like the present where the adultery charged is one continuous cohabitation alleged to have been commenced in England in 1886, and to have been

(1) 12 How. St. Tr. 927.

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continued to the present time, it is not necessary to decide in the present case, for the learned Chief Justice Meredith, at the trial, in very clear terms directed the jury to exclude from their consideration everything which, by the evidence, appeared to have occurred within the six years next ensuing the elopement in 1886, and to confine themselves to the subsequent conduct of the parties. For the contention that the Statute of Limitations is a complete bar to the plaintiff's remedy, notwithstanding the proof of the relationship which existed between the parties during the six years next preceding the commencement of the action, there is no foundation in law

Then it was argued that strict evidence of the actual marriage of the plaintiff was necessary, and that such evidence was not given. Evidence of an actual marriage, *i.e.* a marriage *de jure*, was undoubtedly necessary although there was no plea on the record denying the marriage and expressly putting it in issue. Rule 403 made under the authority of the Ontario Judicature Act is as follows:

> Save as aforesaid the silence of a pleading as to any allegations contained in the previous pleadings of the opposite party is not to be construed into an applied admission of the truth of such allegation.

The editors of the last edition of the Judicature Act, Messrs. Holmsted & Langton, say in a note to this rule:

> When a material fact is alleged in pleading, and the pleading of the opposite party is silent in respect thereto the fact must be considered in issue

citing *Waterloo Mutual* v. *Robinson* (1); and *Seabrook* v. *Young* (2).

This rule is in terms the exact reverse of the English Order 19, rule 13 which provides that:

> Every allegation of fact in any pleading if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposite party shall be taken to be admitted.

(1) 4 O. R. 295. (2) 7 C. L. T. 152.

It was therefore incumbent on the plaintiff to give strict proof of the marriage.

This it appears to us he has done sufficiently by the supplementary proof which the learned Chief Justice permitted to be given after the trial of the issues which were left to the jury. That the Chief Justice had the power to adjourn the trial for the reception of such evidence and for further consideration and to permit proof by affidavit there can be no doubt, in view of of the rules 564, 567 and 682.

The only point remaining is upon the question whether we should grant a new trial.

The claim for a new trial is rested upon what appears, I think, to be a misconception of the charge of the learned Chief Justice to the jury, which appears to have very fairly and fully drawn the attention of the jury to all the matters urged by the defendant's counsel in his client's behalf. The defendant's ground of complaint, if any there be, seems to be that the jury have not given that consideration to the points so submitted to them by the learned Chief Justice which the defendant thinks was due to them rather than to any just ground of complaint against the charge given to the jury.

The appeal must be dismissed with costs.

Appeal dismissed with costs

Solicitors for the appellant: *Lobb & Baird.*

Solicitor for the respondent: *Louis F. Heyd.*