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*Nov. 19, 20
*Dec. 20

DONALD MacDONALD ..... APPELLANT

AND

HIS MAJESTY THE KING ..... RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law—Evidence—Charge to jury—General principles—Misdirection—Accomplice—Corroboration—Reading of extract of opinion given by a member of appellate court in a previous appeal—Substantive wrong or miscarriage of justice.*

The presence of the accused in his apartment with the perpetrators of a crime shortly after its commission, and the improbability of his evidence as to what occurred at that meeting, is capable of affording corroboration of the evidence of accomplices implicating him when considered in the light of all the evidence.

While the reading of an extract from the reasons of one of the Judges of the Court of Appeal on an appeal by the accused from his conviction at a previous trial is to be deprecated, this did not, under the circumstances, result in a miscarriage of justice.

APPEAL from the judgment of the Court of Appeal for Ontario dismissing (Laidlaw J. dissenting) the appellant's appeal from his conviction, on a trial before the General Sessions of the Peace at Toronto, Shea J., on a charge of armed robbery and kidnapping.

*Vera Parsons (Miss) K.C.* for the appellant.

*W. B. Common, K.C.* and *W. C. Bowman* for the respondent.

*Present:—Kerwin, Hudson, Taschereau, Rand and Kellock JJ.

The judgment of Kerwin, Hudson and Taschereau J.J. was delivered by

TASCHEREAU, J.:—On the 31st of October, 1944, the appellant was convicted for armed robbery, robbery, forcible restraining and imprisonment of one George Butcher, and, on the 7th of May, 1945, the Court of Appeal for Ontario (1) quashed this conviction and ordered a new trial.

The new trial took place before His Honour Judge Shea and a jury on the 19th of October, 1945, and on the 25th of October of the same year, after having been found guilty, he was sentenced to a term of fifteen years imprisonment in the Penitentiary at Kingston.

At the first trial, the appellant had been charged with and tried together with Benedetto Zanelli, Samuel Mancuso, Edwin MacDonald and William M. Baskett. Zanelli was also charged with the offence of receiving stolen goods. The appellant, Mancuso, Edwin MacDonald and Baskett were found guilty of armed robbery and imprisoning Butcher, but Zanelli was found guilty only of receiving stolen goods. The appellant and Mancuso appealed their convictions and sentences, and, while Mancuso's appeal was dismissed, the appellant's conviction was quashed and a new trial ordered. Having been convicted again at the second trial, MacDonald appealed, but the conviction was confirmed, the Honourable Mr. Justice Laidlaw dissenting on questions of law.

The facts are that on the 13th of December, 1943, a truck, containing liquor valued at many thousands of dollars, was seized in the city of Toronto by several men, one of whom was armed with an automatic pistol. The driver of the truck, named Butcher, was forcibly confined in an automobile, and the truck and its contents were taken to a barn on the premises of one Shorting, who operated a riding school known as The Lazy L. Ranch.

The evidence reveals that, on the 10th day of December, 1943, Mancuso (subsequently convicted of the armed robbery and unlawfully imprisoning the said Butcher), in company with one Zanelli (subsequently convicted of receiving the liquor), appeared at the riding school and

(1) (1945) 84 C.C.C. 177; [1945] 3 D.L.R. 764; [1945] O.W.N. 430.

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arranged with Shorting to rent his barn for storage of "a few cases of Christmas liquor". Wilkinson, who was an employee of Shorting and working at the school with him, was given $5.00 by Mancuso for "shaking some hay" over the liquor. Shorting himself received $20.00 for the use of his barn.

In the evening of the 12th of December, Zanelli telephoned Shorting to be at the barn at five o'clock the next morning. Following these instructions, Shorting and Wilkinson went to the barn and were met there by Zanelli. Shortly thereafter, an automobile containing four or five men arrived and also the truck containing six hundred cases of liquor which were unloaded. Later the same day, Shorting, through one Moberly, notified the Toronto police that the truck and liquor were at his barn. After having taken possession of the truck and liquor, the police visited the appellant's apartment in Toronto at one p.m. the same day, and there found Mancuso, Edwin MacDonald, Baskett (all subsequently convicted of the armed robbery and unlawful imprisoning). The appellant, Kay Donavan, a man by the name of Applebaum, a whiskey salesman, and another man by the name of Taylor, who is a known bootlegger, were also present. At the appellant's trial, Shorting and Wilkinson identified the appellant as being one of the men assisting in the unloading. Shorting also stated that one other man, while doing the unloading, referred to the appellant as "Mickey", which was his nickname.

The appellant's defence was an alibi, and in giving evidence in his own defence, he swore that the stolen liquor was never mentioned in his apartment, where all the men who had committed the crime a few hours before gathered at one p.m. on the 13th of December.

In his dissenting judgment in the Court of Appeal, Mr. Justice Laidlaw adopted the view that the learned trial judge erred in law in instructing the jury, that, if they found Shorting or Wilkinson to be accomplices, they might find corroboration of their testimony, as to appellant's presence at the barn, in the fact and circumstances of the meeting at the appellant's apartment, and from the fact also that the appellant's denial that the stolen liquor was

discussed was implausible. The second ground of dissent of Mr. Justice Laidlaw, is that counsel for the Crown improperly read to the jury, observations made by the Honourable Mr. Justice McRuer (now C. J. H. C.) in his judgment on the previous appeal, on the credibility of the witness Shorting.

The crimes for which the appellant was charged are not crimes for which, under section 1002 of the Criminal Code, corroboration is essential. However, if Shorting and Wilkinson were found to be accomplices in the perpetration of the crimes with which the appellant is charged, it was imperative to give the jury the usual warning that it was possible to convict without the evidence of Shorting and Wilkinson being corroborated but that it was dangerous to do so.

In his address to the jury, His Honour Judge Shea who presided at the trial said:

> It is important for you to decide that, because I have to instruct you as a matter of law that it is always dangerous to convict on the uncorroborated evidence of an accomplice, though it is your legal province to do so. Please note the word "uncorroborated"; it means unstrengthened or unconfirmed. If you have the evidence of an accomplice, and in addition you have something independent of that evidence, which strengthens or confirms it, you have corroboration. But I must tell you here, also, that the evidence of one accomplice cannot be taken in corroboration of the evidence of another. It has to be additional evidence to that given by either one of them. It need not be direct evidence that the accused committed the crime. The evidence in corroboration must be independent evidence which affects the accused, and connecting or tending to connect him in some material circumstances.

The learned trial judge also explained to the jury what was an accomplice, its legal meaning, and gave various definitions. He said:

> I will read you one or two of these definitions: "An accomplice is one who knowingly * * * and in a common intent with the principal offender, unites in the completion of a crime." Or, to determine if a witness is an accomplice, ask this question: "Could the witness have been indicted under the wide provisions of the Code for the offence for which the person has been convicted or is being tried?" And other definition: "An accomplice is a party to the crime himself, who assists in or is a partner of the crime." One more: "Every person who knowingly, deliberately co-operates with or assists or even encourages another in the completion of a crime is an accomplice."

The questions were, therefore: Could it be said that Shorting and Wilkinson were accomplices in the robbery

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of the liquor and of the imprisoning of Butcher? And if so was the proper direction given to the jury, by the trial judge, as to corroboration?

The definition of an accomplice is a question of law, and the determination of all the elements that are necessary to constitute corroboration is similarly a question for the trial judge. The trial judge must direct the jury as to what are the essential requirements to make a person an accomplice, and as to what is necessary to give a probative value to corroborative evidence, and it is also his duty to instruct them as to the legal evidence that must be adduced to establish complicity and corroboration. But the weighing of the facts revealed by the evidence, as to whether a person is an accomplice or not, and the question as to whether "corroborative inferences should be drawn from the evidence", are both within the exclusive province of the jury. *The King* v. *Christie,* (1); *Hubin* v. *The King,* (2); *Vigeant* v. *The King,* (3).

Corroboration must be found in some other legal evidence which tends to implicate the accused. This other evidence may of course be direct or circumstantial, oral or by writing or otherwise, as long as it leads to the reasonable belief that the statement of the accomplice is true, and does not let it stand alone. This additional evidence must be independent, that is to say, it must be free from any acts or words attributable to the witness for whom corroboration is sought, otherwise this witness would be a party to his own corroboration. (*The King* v. *Christie,* (4); *Hubin* v. *The King,* (2)). Likewise, an accomplice cannot be corroborated by another accomplice, and it is further an essential ingredient of corroboration that it should tend to show not only that a crime has been committed, but that it has been committed by the accused.

Of course, corroboration must not be so meagre that it should create a mere possibility that the accused has committed the crime for which he is charged; it should be strong enough to sufficiently impress the mind of the jury not with the probability of a conjecture, but with the probability of the truth of a fact put in evidence. It need not be conclusive, but it will be sufficient if it is pre-

(1) [1914] A.C. 545, at 568.
(2) [1927] S.C.R. 442, at 444.
(3) [1930] S.C.R. 396, at 399.
(4) [1914] A.C. 545, at 557.

sumptive, provided that the facts independently proven, and from which inferences are drawn, are consistent in tending to show the guilt of the accused, and are inconsistent with any other rational conclusion that the accused is the guilty person.

With deference, I am of opinion that the trial judge has properly instructed the jury as to the law and as to their duties, and that his charge is not impeachable.

The Court of Appeal for Ontario, in hearing the first appeal in Rex. v. MacDonald and Rex. v. Mancuso, came to the conclusion that a new trial in the case of MacDonald should be granted, because the learned trial judge had warned the jury that Shorting might be considered as an accomplice, but did not give the same warning as to Wilkinson. The Court properly said that the warning should have been given as to both witnesses, because the question as to whether they were accomplices or not was a question to be decided by the jury after the proper instructions had been given to them.

But in the present case, the situation is entirely different. The learned trial judge, after having given the proper legal definition of an accomplice, left it to the jury to determine if in fact Shorting and Wilkinson were accomplices. He then went on to explain that, if they were found to be accomplices, it was dangerous to convict the appellant on the uncorroborated evidence of Shorting and Wilkinson. He explained the legal meaning of corroboration; told all that was essential to give a legal probative value to corroborative evidence which must be of independent nature; he pointed out that something outside the evidence of the witness must be found which strengthens or confirms it; he said that the evidence of one accomplice cannot be accepted as corroboration of the evidence of another, that it need not be direct evidence, but that it may be circumstantial, as long as it connects or tends to connect the accused with the charge against him in some material circumstance. He also explained that if the jury found that they might decide that Shorting was an accomplice and Wilkinson was not, in that event, the evidence of the witness whom the jury found not to be an accomplice, could be taken as corroboration of the evidence of the other.

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These directions given by the trial judge are in harmony, I think, with what has been said in numerous well known cases, which have definitely established the rules that are to be followed in this country.

As early as in 1855 and even before, it was decided in *Regina* v. *Stubbs* (1), that the rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, and not a rule of law, and that a judge should advise the jury to acquit unless the testimony of the accomplice be corroborated, not only as to the circumstances of the offence, but also as to the participation in it by the accused, and that where there are several prisoners, and the accomplice is not confirmed as to all, the jury should be directed to acquit the prisoners as to whom he is not confirmed; but it was held that this rule being a rule of practice only, if a jury choose to act on the unconfirmed testimony of the accomplice, the conviction cannot be quashed as bad in law.

Later, *in re Baskerville,* (2) the Court of Criminal Appeal in England decided at page 87:

> There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. See *Rex* v. *Atwood* (3). But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence: *Reg.* v. *Stubbs* (1); *In re Meunier,* (4).

At page 91 in the same case, it is said:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute, "implicating the accused," compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corrobora-

(1) (1852-1856) 1 Dears. C.C. 555.
(2) (1916) 12 Cr. App. R. 81, at 87; [1916] 2 K.B. 658, at 663.
(3) (1787) 1 Leach 464.
(4) [1894] 2 Q.B. 415.

tion, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg.* v. *Birkett* (1).

Reference may also be made to the *Beebe* case (2); *Gouin* v. *The King* (3); *Hubin* v. *The King* (4); *Vigeant* v. *The King* (5).

The jury had, therefore, several alternatives. They could reach the conclusion that Shorting and Wilkinson were not accomplices, and convict on their uncorroborated evidence. It was open to them to believe that Wilkinson and Shorting were in no way connected with the robbery and with the imprisoning of Butcher, and that although they both might have violated the provincial liquor laws of Ontario, or might be a party to the receiving of the stolen goods, they were not implicated in the armed robbery and kidnapping. The offence of receiving stolen goods is a different offence from the one for which the appellant was charged. It has been said that under common law, the receipt of stolen goods did not constitute the receiver an accessory to the theft, but was a distinct misdemeanour punishable by fine and imprisonment. (Archibald's Criminal Pleadings Evidence and Practice, 28th edition, p. 1463).

In *Rex* v. *Dumont* (6), Mr. Justice Hodgins said:

I cannot regard the widow as an accomplice. The test is: could she have been indicted under the wide provisions of our Code for the offence for which the prisoner has been convicted? If she could, then any spectator of a crime might find himself described as an accomplice, for here she only saw the first blow struck and later witnessed the carrying out of her husband.

The Court of Appeal for Ontario in *Rex* v. *Zocanno and Burleigh* (7) said:

On a charge of breaking and entering, a witness who was found in possession of some of the stolen property, and who subsequently became an accomplice of the accused in other crimes in connection with the disposition of some of the stolen property, is not an accomplice in respect of the crime charged.

(1) (1837) 8 C. & P. 732.
(2) (1925) 19 Cr. App. R. 22, at 25.
(3) [1926] S.C.R. 539.
(4) [1927] S.C.R. 442.
(5) [1930] S.C.R. 396, at 399.
(6) (1921) 37 C.C.C. 166, at 176.
(7) (1944) 82 C.C.C. 71.

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It is quite unnecessary to examine the soundness of these decisions. But the only ground, upon which they could possibly be challenged, is that the possession of recently stolen goods is evidence upon which a jury may convict of theft, but this possession creates a mere presumption, and here, there is ample evidence to justify a jury to say that the presumption has been rebutted. (*Rex* v. *Watson* (1); *Baker* v. *The King* (2).

The jury could also take the view that Shorting or Wilkinson was an accomplice, and that the other was not. Then, they could properly find the corroboration of one witness in the testimony of the other.

Another course the jury could follow was that, even if both were accomplices, they could convict without corroboration, having been on that point properly instructed by the trial judge. They knew that this was a dangerous practice to follow, but it was within their province to do so and to believe Shorting and Wilkinson.

Lastly, if they did rely on corroboration in view of the warning given by the judge, because they believed Shorting and Wilkinson to be accomplices, they had independent circumstantial evidence which was of an incriminating nature. The presence of the appellant with the perpetrators of the crime in his own apartment, and his association with them, a few hours after the robbery, was a circumstance from which the jury could reasonably draw the inference, that Shorting and Wilkinson were speaking the truth when they swore that MacDonald was in the barn helping to unload the stolen liquor. It was also for them to believe that MacDonald would not have been present at that meeting if he was not linked in some material way with the others who have been found guilty.

Another most extraordinary circumstance is that, when heard as a witness in his own defence, MacDonald swore that all these people gathered in his apartment after the robbery, the unloading of the stolen liquor and the imprisonment of Butcher, did not mention among themselves the stolen liquor. This statement could be regarded as implausible by the jury, and as not being an expression of the truth. The jury saw and heard MacDonald, and

(1) [1943] 2 D.L.R. 44. (2) (1930) 54 C.C.C. 353.

from his demeanour, and from what they had the right to believe as being an absence of reasonableness, they could draw their own conclusions.

The behaviour of a witness as well as his contradictory or untrue statements are questions of fact from which a jury may properly infer corroboration.

In *The King* v. *Christie*, (1) Lord Moulton said:

> The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt.

In *Mash* v. *Darley*, (2) Kennedy L. J. said:

> I also agree that there may be cases in which language, whether used in a Court of justice or outside a Court of justice, may be considered as having the effect of corroboration, although there is nothing like an express admission. There may be such cases.

Under the circumstances of this case, I think that the jury could properly conclude that the meeting in MacDonald's apartment after the robbery, with the others who were since convicted, and his denial of any reference to the stolen liquor, were facts from which the jury, if they chose, could find elements of corroboration of Shorting's and Wilkinson's evidence. In view of the evidence adduced, these circumstances could be found consistent with appellant's guilt and inconsistent with any other rational conclusion.

The second ground raised by the appellant is that counsel for the Crown, in his address to the jury, read a part of the reasons for judgment of Mr. Justice McRuer, in the first appeal. Mr. Justice McRuer had said:

> The evidence of Shorting, it was argued, ought not to have been received while the charge of receiving was pending against him. I cannot agree with this contention. Nor do I think there was any impropriety in presenting the evidence of Shorting under the circumstances. Crown Counsel has a duty to offer to the Court such evidence as is available bearing on the charge in question. In many cases it is not only necessary but the duty of the Crown Counsel to call witnesses of low repute

(1) [1914] A.C. 545, at 560. (2) [1914] 3 K.B. 1226, at 1234.

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and against whom a charge may be pending. In the case of appeal it would have been quite impractical to have proceeded against Shorting on the charge of receiving until the accused had been tried on the principal charge.

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It is argued that the reading of this extract was improper and amounted to a mistrial, because it dealt with the credibility of Shorting as a witness, which was a vital issue of the trial. It is submitted that anything Mr. Justice McRuer said was not the opinion of the Court, and that if such extracts were read, the different opinions of other judges on the same point should also have been communicated to the jury.

The question would be different, if in fact Mr. Justice McRuer had said anything that would tend to create a favourable impression as to Shorting's credibility; but I find nothing of that kind in that part of the judgment that was read to the jury. Obviously, Miss Parsons, counsel for the appellant, had attacked the propriety of calling Shorting as a witness and it was owing only to the position in which the Crown had found itself at the time of the first trial that Mr. Justice McRuer referred. I am unable to find anything in these remarks that can be interpreted as praising Shorting's credibility. The indirect reference to Shorting, who was the Crown's main incriminating witness against the appellant, as a man of "low repute and against whom a charge may be pending" is surely not a vindication of his credibility as a witness. I am far from agreeing with the proposition that the Crown should call in all circumstances a person as a witness while a criminal charge is outstanding against him, or with the propriety of Crown counsel reading the judgment of a judge who had taken part in the hearing of the previous appeal, but the reading of what Mr. Justice McRuer had said involves no miscarriage of justice.

The appeal should be dismissed.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.—The first ground of challenge to the conviction was the direction of the trial judge that the meeting in the apartment of the accused within four or five hours of the unloading of the liquor in the barn could be taken

as corroboration of the evidence given by Shorting. There were present at that time Mancuso, Baskett and Edwin MacDonald, who were afterwards convicted of the robbery, two admitted bootleggers and the accused, himself a gambler and a bootlegger. Edwin MacDonald is a brother of the accused and Baskett is married to a step-sister of a woman who lives with the accused. The car in which the truck-driver was kidnapped was owned by the father-in-law of Baskett. It is not clear just how long they had been together before the detective arrived, shortly after one o'clock. When he entered, Baskett, Edwin MacDonald and a bootlegger, Taylor, were in the bedroom just off the living room, with MacDonald lying on the bed; in the living room were Mancuso, the bootlegger Applebaum, and the accused, talking to Applebaum. He was described as being under the influence of liquor, with an appearance of having been up all night. On the stand, he gave reasons for the presence of the different persons in his home and denied that the liquor had been mentioned. These explanations and this denial, in the setting in which they were offered, could have been accepted only by very credulous persons.

It is argued that the presence of these men, characterized by the circumstances indicated, was as consistent with innocence as with guilt; that either the gathering was mere coincidence or that the thieves might have made use of the apartment to arrange for disposing of the liquor without any previous knowledge on the part of the accused. Considering all of the evidence bearing upon it, including an adverse inference from disbelief in the improbable testimony of the accused, I am unable to treat the incident as being neutral in its probative effect; that the jury could find a balance of probability tending to connect him with the robbery seems to me to be perfectly clear; and no more is necessary, *Thomas* v. *Jones* (1). The direction was, therefore, well founded, and on this ground the appeal must fail.

Then in his address, the Crown Prosecutor introduced a quotation from the judgment of McRuer J. A. in the appeal from the first conviction, which dealt with the pro-

(1) [1921] 1 K.B. 22.

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priety of offering Shorting as a witness when there was a charge pending against him which had been the subject of twelve adjournments, in these words:

> Now, fortunately, in this very case one of the Justices of Appeal made some comments on the propriety of the crown acting as they did with regard to Shorting. The evidence of Shorting, it was argued, "ought not to have been received while the charge of receiving was pending against him. I cannot agree with this contention." This is what the Justice said: I was there. "nor do I think there was any impropriety in presenting the evidence of Shorting under the circumstances. Crown Counsel has a duty to offer to the Court such evidence as is available bearing on the charge in question. In many cases it is not only necessary but the duty of the Crown is to call witnesses of low repute and against whom a charge may be pending. In the case in appeal it would have been quite impractical to have proceeded against Shorting on the charge of receiving until the accused had been tried on the principal charge."

Evidence of these and subsequent adjournments was introduced at the second trial and we are told, and it is not questioned, that, in her address, Miss Parsons stressed rigorously the importance of Shorting's evidence and the possible effect upon him of those circumstances followed by the withdrawal of the preliminary proceeding against him in 1945, a few weeks before the second trial.

There is no doubt the quotation ought not to have been made; it was wholly irrelevant to the matters before the jury; and if I could bring myself to the view that it might have influenced them in making up their minds on the credibility of Shorting, I would not hesitate to hold with Laidlaw J. A. that it was an impropriety to be cured only by a new trial. But when the language is carefully examined in the background of the suggestions of counsel, its application to Shorting is really derogatory; it is simply a statement by a judge of what should be obvious to an ordinary juryman; and I do not think its effect can be taken to have been more than to bring forcibly to their minds the fact that in criminal prosecutions of the order in question the Crown more often than not is compelled by the necessities of the case to offer witnesses with character or reputation possessing little to commend them to belief. This ground fails then likewise.

The appeal should therefore be dismissed.

*Appeal dismissed.*

Solicitors for the appellant: *Horkins, Graham & Parsons.*

Solicitors for the respondent: *C. P. Hope.*