HIS MAJESTY THE KING.....APPELLANT;

AND

CHARLES T. ORFORD.....RESPONDENT.

1942
*Oct. 8
1943
*Feb. 2

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Perjury—Declaration made by vendor pursuant to Bulk Sales Act—Statement proved to be false—Whether offence is perjury under section 172 Cr. C.—Substitution of lesser offences under sections 175 and 176 Cr. C.—Criminal Code, sections 170, 171, 172, 173, 174, 175, 176, 951 (1), 1016 (2)—Bulks Sales Act, R.S.B.C. 1936, c. 29—British Columbia Evidence Act, R.S.B.C., 1936, c. 90.

The *Bulk Sales Act* of British Columbia provides that the vendor of any stock in bulk shall give to the purchaser a list of his creditors with the amount of all accounts owing by him in connection with his business. Such statement had to be verified by the solemn statutory declaration of the vendor. The respondent sold his café business and gave the required statement to the purchaser, declaring that he did not owe any debts. The declaration proved to be false and he was convicted on a charge of perjury. The conviction was quashed by a majority of the appellate court.

Held, affirming the judgment appealed from (58 B.C.R. 51), Kerwin and Hudson JJ. dissenting, that the respondent did not give a false statement under oath while called as a witness in a judicial proceeding (s. 170 Cr. C.) nor did he give a false oath in a judicial proceeding in the manner contemplated by section 172 Cr. C., and therefore, cannot be charged of having committed the crime of perjury under these sections.

Per Rinfret and Taschereau JJ.:—Section 170 Cr. C., defining perjury, enacts that it may be committed only "by a *witness* in a judicial proceeding"; and section 172 Cr. C. provides that "every one is guilty of perjury who * * *". So, any violation of this last section amounts to *perjury:* it must necessarily be perjury as defined in section 170 Cr. C. and, therefore, in a judicial proceeding.

Per Davis J.:—The concluding words of section 176 Cr. C.: "makes a statement which would amount to perjury if made on oath in a judicial proceeding" show that section 172 Cr. C. is limited to false statements made on oath in a judicial proceeding.

Per Kerwin J. dissenting:—Section 172 Cr. C. contains no reference to section 170 Cr. C. nor does it state that the enumerated acts must be done by a witness or in a judicial proceeding. By section 172 Cr. C., Parliament has enacted that every one who does the things specified is guilty of a crime (perjury). In view of the plain language of that section, a person falling within its terms is just as guilty of what Parliament has chosen to call perjury as one who falls within the ambit of section 170 Cr. C.—The respondent's solemn statutory declaration contains the statement that such declaration was of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act.* The declaration having been proven to be false, the respondent was guilty of perjury under section 172 Cr. C.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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Per Hudson J. dissenting:—The taking of the statutory declaration falsely by the respondent, is perjury within the meaning of section 172 Cr. C.

As to the question whether or not a conviction could or should have been made for a lesser offence under sections 175 and 176 Cr. C., pursuant to sections 951 (1) and 1016 (2) Cr. C.,

Held that the respondent could not have been found guilty under 176 Cr. C.

Per Rinfret and Taschereau JJ.:—There is no evidence that the commissioner, before whom the respondent gave the statutory declaration, was an officer authorized by law to receive a statement or a declaration of the particular character mentioned in section 176 Cr. C.—No opinion expressed as to whether that section contains the elements of a lesser offence.

Per Davis J.:—Perjury, as defined in the Criminal Code (s. 170) does not "include" the commission of the offence defined in section 176 Cr. C.; and perjury was the only offence charged in this case.

Per Kerwin J.:—The offence dealt with in section 176 Cr. C. is not a lesser offence but a different one, as the declaration mentioned therein simpliciter is not the same as the statutory declaration referred to in section 172 Cr. C.

Held, also, that it is not open to this Court to decide the question whether the respondent may have been found guilty of a lesser offence under section 175 Cr. C., as there was no dissenting opinion on that point in the appellate court.

APPEAL by the Attorney-General for British Columbia from the judgment of the Court of Appeal for British Columbia (1), which (McDonald C.J.B.C. and O'Halloran J.A. dissenting in part, but on different grounds) quashed the conviction of the respondent for perjury.

R. L. Maitland K.C. for the appellant.

John A. Sutherland for the respondent.

The judgment of Rinfret and Taschereau JJ. was delivered by

TASCHEREAU J.—The *Bulk Sales Act* of British Columbia provides that the vendor of any stock in bulk shall give to the purchaser a list of his creditors, with the amount of the indebtedness or liability due, owing, or accruing due or to become due. This statement which has to be verified by the statutory declaration of the vendor, may be in the form set forth in schedule A of the Act, or to the like effect.

(1) (1942) 58 B.C. Rep. 51; [1942] 3 W.W.R. 83; [1942] 3 D.L.R. 582.

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The respondent Charles T. Orford who was the owner of a café in British Columbia sold his business in August, 1941, and in compliance with the law, gave the required statement to the purchaser Mrs. Myra E. Ticehurst. He stated that all the accounts owing by him in connection with his business were paid, whereas in fact, he owed over $2,500. A charge was laid against him for perjury and he was convicted and sentenced to the time spent in gaol and to pay a fine of $500.

The Court of Appeal quashed the conviction on the ground that the accused could not be convicted of perjury, the Chief Justice of British Columbia and O'Halloran J.A. dissenting on questions of law. The Chief Justice thought that the taking of a statutory declaration falsely is perjury within the meaning of section 172 of the Criminal Code, and that in any event, perjury contrary to section 172 of the Criminal Code and making a false oath contrary to section 176 of the Criminal Code, are cognate offences, and that a conviction ought to be entered against Orford for taking a false oath.

Mr. Justice O'Halloran reached the conclusion that the accused should have been found guilty of the lesser offence of making a false declaration under section 176 Cr. C.

The Attorney General for British Columbia now appeals to this Court.

The respondent at the outset of the argument raised the question of jurisdiction of this Court, and cited the case of *The King* v. *Wilmot* (1). The authority of this Court to hear criminal appeals coming from the Crown is founded on section 1023, paragraph 2, of the Criminal Code. Such an appeal lies, when any court of appeal sets aside a conviction, or dismisses an appeal against a judgment or verdict of acquittal, on any question of law on which there has been dissent in the court of appeal.

In the present case, the Court of Appeal has set aside the conviction of the respondent, and there have undoubtedly been dissents on questions of law in the court below. I have no hesitation in coming to the conclusion that this court has jurisdiction to hear this appeal, and that the *Wilmot* case (1) has no application. In that case, the accused was charged with manslaughter but found

(1) [1941] S.C.R. 53.

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guilty of driving in a manner dangerous to the public under section 285(6) of the Criminal Code. The court came to the conclusion that he had not been acquitted, and that therefore it was not open to the Attorney General to appeal under section 1023(2) Cr. C. We are confronted with an entirely different matter, because the accused has been acquitted by the Court of Appeal.

The first submission of the Crown is that the Court of Appeal erred in holding that the offence in question did not constitute perjury under section 172 of the Criminal Code. With deference, I do not agree with this contention and I am of opinion that the majority of the Court of Appeal was right.

At common law, in order to amount to perjury, the offence had to be committed in a judicial proceeding. False swearing was a different offence. In Canada, after Confederation, an Act respecting perjury was introduced in Parliament in 1869 (ch. 23, 32-33 Victoria) and it is found in a modified form in the Revised Statutes of 1886, ch. 154. The reading of this Act will show that it was the clear intention of Parliament to do away with the existing law, for the word "perjury" in the new Act did not apply only to a witness giving evidence under oath in a judicial proceeding, but to any one, who having taken any oath, affirmation, declaration or affidavit, in any case in which by any Act or law in force in Canada, or in any province in Canada, it is required or authorized that facts, matters or things be verified or otherwise assured or ascertained. The wide extension given to the word perjury was a complete departure from the law of England, where the Star Chamber, in 1613, declared that perjury by a *witness* only was punishable at common law.

Kenny in his "Outlines of Criminal Law", 4th ed., says at page 295:—

> The common law offence of perjury, thus created, consists in the fact that a witness, to whom an oath has been duly administered in a judicial proceeding, gives, upon some point material to that proceeding, testimony which he does not believe to be true. It will thus be seen that false oaths do not always involve a perjury.

The Act of 1869 remained the law of the land until 1893, when our Criminal Code based on the English Draft

Code was enacted. We now find section 170 Cr. C. which defines perjury as follows:—

> Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.

It is for all practical purposes a copy of the English Draft Code, except that, in Canada, it is not necessary that the evidence given be material. But the main feature of this section is that perjury may be committed, only by a witness in a judicial proceeding, whether the witness gives his evidence orally, or by affidavit or otherwise. This is obviously a return to the former notions of perjury and a limitation of its definition to a much narrower field.

Our section 171 Cr. C., which is also found in the Draft Code, defines what is a judicial proceeding and it states that every proceeding is judicial which is held not only under the authority of a Court of Justice, but also before a grand jury, or before the Senate or House of Commons or a committee of either House, or similar bodies.

The Criminal Code deals also with false oaths which would amount to perjury if made in judicial proceedings. Section 175 Cr. C., different from 122 of the Draft Code only in its phraseology, reads as follows:—

> Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

This section covers the case of a false oath given in a non-judicial proceeding. It is not called perjury, but is merely described as being an indictable offence.

Then comes section 176 Cr. C. drafted as follows:—

> Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

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It is significant that as in the Draft Code the legislator uses the words "any statement or declaration". We do not find as in section 175 Cr. C. "statement on oath or solemn declaration". It was not sure if the giving of a false statement or declaration not on oath to a person authorized by law to permit it to be made before him, was a common law misdemeanour, but in their report the English Commissioners said:—

> False statements not on oath to which faith is given are not perjury, etc.

But they felt that it should be made indictable and proposed the enactment of section 123 which we have adopted and embodied in our Code. It is now section 176 Cr. C. It cannot be said that any untrue statement or false declaration is an offence under this section. But when the false statement is given to a person authorized by law to require it, it is an offence as it would be for instance in the case of an authorized custom or excise officer to whom a false statement is given.

It can now be seen that the law deals with three different offences: The crime of perjury, always committed by a witness in a judicial proceeding; the indictable offence of giving a false oath in a non-judicial matter; and the last, the indictable offence of giving a false statement, not under oath, to a person authorized by law to receive it. For those three offences the punishment is different. The gravest of all is obviously perjury, because made in a judicial proceeding, and which renders the offender liable to 14 years' imprisonment. The second, less serious because extra-judicial, provides for a penalty of seven years; and the third one of a minor character, where the penalty is only two years.

But the Criminal Code contains another section, which is section 172 and which is not in the English Draft Code. It is as follows:—

> Every one is guilty of perjury who,
>
> Having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath,

affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or

Knowingly, wilfully and corruptly, upon oath, affirmation or solemn declaration, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit as to any such fact, matter or thing, if such statement, affidavit, affirmation or declaration is untrue in whole or in part.

The appellant contends that the offence committed by the accused is covered by paragraph 2 of this section, a false oath being in a non-judicial matter. I do not think that section 172 Cr. C. can be interpreted in the manner suggested by the appellant.

Any violation of this section amounts to perjury. "Every one is guilty of perjury who" etc. says section 172 Cr. C. It must necessarily be perjury as defined in section 170 Cr. C. and therefore in a judicial proceeding, otherwise, we would have to reach the illogical conclusion that 172 and 175 Cr. C. both cover extra-judicial oaths, although the punishment for violating 172 Cr. C. is 14 years, and 7 years for 175 Cr. C.

The crimes described in sections 175 and 176 Cr. C. are not qualified as "perjury" but it is said in both sections, that they would amount to perjury "if made in a judicial proceeding", and these last words are omitted from 172 Cr. C., obviously because they are unnecessary. The intention of the legislator in enacting section 172 Cr. C. was not to repeat what was already enacted in section 175 Cr. C. concerning extra-judicial oaths, but to declare that it would be a crime amounting to perjury, for any person other than a witness (whose case is covered by section 170 Cr. C.), to give a false statement under oath, in a judicial proceeding. And it is very frequent that affidavits have to be given in judicial proceedings by persons who are not witnesses, as for instance affidavits by plaintiffs in civil actions, before the writ of summons may be issued.

This is, to my mind, the case which the legislator had in mind when he enacted section 172 Cr. C., and which otherwise would not amount to a crime under the Criminal Code. Indeed, it would not be an offence under 170 Cr. C. because the false oath would not have been given

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by a witness, and it cannot be said that it would be a violation of section 175 Cr. C. because the oath would be given in a judicial proceeding.

In the present case, the respondent did not give a false statement under oath while called as a witness in a judicial proceeding, nor did he give a false oath in a judicial proceeding in the manner contemplated by section 172 Cr. C., and therefore, he cannot be charged of having committed the crime of perjury.

Did the respondent commit a lesser offence, and should he have been found guilty under sections 175 or 176 Cr. C.? It seems useless to examine the question as to whether section 175 Cr. C. could apply, because there is no dissenting judgment on this point in the Court of Appeal, and our jurisdiction being limited to questions of law on which there has been a dissent, it is not open to us to deal with the matter. The contention that section 176 Cr. C. applies is found in both dissenting opinions, and it is based on section 951 of the Criminal Code which says:—

> Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

It is most important to note in this section the words "may be convicted of any offence so included, which is proved".

It has been proved that on the 11th of August, 1941, the respondent gave a statutory declaration under oath before John P. Berry, a commissioner for taking affidavits within British Columbia. But in order to find the respondent guilty under section 176 Cr. C., it would be necessary that there should be some evidence to show that John P. Berry is an officer authorized by law to receive a statement or declaration under 176 Cr. C. John P. Berry may be a person authorized to receive a statement under oath, but there is nothing to show that he is an officer authorized by a statute to receive a statement or a declaration of the particular character mentioned in section 176 Cr. C. The falsity of the contents of such

a declaration or statement amounts to a crime only when the statement or declaration is made before such officers which are empowered, in view of the functions they occupy, to receive them. It has not been established that Berry was clothed with such authority.

This reason is, I think, sufficient to dispose of this last point raised by the appellant, and in view of my conclusion, it is unnecessary to express any opinion as to whether section 176 Cr. C. contains the elements of a lesser offence.

The appeal should be dismissed.

DAVIS J.—The respondent was charged and convicted of perjury. On appeal the Court of Appeal for British Columbia set aside the conviction, the Chief Justice and O'Halloran J., dissenting. The Attorney General of British Columbia appealed to this court.

The charge was perjury but it was not stated to have been laid under any particular section of the Criminal Code. The majority of the judges of the Court of Appeal agreed that the facts did not bring the case within the definition of perjury in the Criminal Code; the statutory declaration made by the respondent under sec. 5 of the *Bulk Sales Act* of British Columbia not being made in a judicial proceeding. See secs. 170, 171 and 172 of the Criminal Code. By sec. 174 Cr. C. everyone is guilty of an indictable offence and liable to 14 years' imprisonment who commits perjury or subornation of perjury; if the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life.

The two dissenting judges in the Court of Appeal thought that a conviction could have been made under sec. 176 Cr. C.:

> 176. Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

The concluding words,

> makes a statement which would amount to perjury if made on oath in a judicial proceeding,

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show, I think, that sec. 172 Cr. C. is limited to false statements made on oath in a judicial proceeding. I think as a matter of proper construction one is not justified in reading two different sections of the Criminal Code (secs. 172 and 176) as if they covered the same thing, but that the construction should be approached in an endeavour to give to each of the sections its own independent meaning. Here we have secs. 170, 171, 172 and 173 Cr. C. defining perjury, followed in 174 Cr. C. with a very heavy penalty. Subsequently sec. 176 Cr. C. deals with certain false statements or declarations "which would amount to perjury if made on oath in a judicial proceeding," and the penalty is two years' imprisonment. Mr. Justice Taschereau has set out in his judgment all the relevant sections of the Code and has very carefully considered their origin and scope.

In considering the question whether or not a conviction could and should have been made under sec. 176 Cr. C. (sec. 175 Cr. C. may have had some application but is not relied on in the dissents), much confusion of thought is likely to be avoided if we keep to the exact words of the statute instead of adopting other words such as "lesser offences" and "cognate offences" which have not infrequently been used in many of the decisions. Under sec. 951 Cr. C. the offence charged must "include" the commission of the "other offence." It is contended that by virtue of sec. 951 Cr. C. the Court of Appeal could and should have substituted a conviction under sec. 176 Cr. C. for making a false declaration under the *Bulk Sales Act* of British Columbia. But in my opinion perjury as defined in the statute does not "include" the commission of the offence defined in sec. 176 Cr. C. Nor could sec. 1016 (2) Cr. C. empower the Court of Appeal on the facts of this case to substitute a conviction under sec. 176 Cr. C. Sec. 1016 (2) Cr. C. applies only where an appellant has been convicted of an offence and the jury or, as the case may be, the judge or magistrate, could "on the indictment" have found him guilty of some other offence. Perjury was here the only offence charged. See *Rex* v. *Leroux* (1).

I should dismiss the appeal.

(1) (1928) 62 Ont. L.R. 336.

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Kerwin J.

KERWIN J. (dissenting).—This is an appeal by the Attorney General for British Columbia from an order of the Court of Appeal for that province quashing the conviction for perjury of the respondent Charles T. Orford. The appeal is based upon the dissents on questions of law of the Chief Justice of British Columbia and Mr. Justice O'Halloran.

The conviction was made after the trial of the respondent on a charge:—

> 1. For that he, the said Charles T. Orford, at the said City of Vancouver, on the 11th day of August, A.D. 1941, being permitted by the *Canada Evidence Act* to verify certain facts relating to his financial obligations by solemn declaration, unlawfully did commit perjury by knowingly, wilfully and corruptly by solemn declaration, declaring that he did not owe any debts, in respect of Good Eats Café and Station View Apartments such declaration being false, contrary to the form of the Statute in such case made and provided.

Orford had carried on businesses under the name of "Good Eats Café" and "Station View Apartments" and on August 11th, 1941, contracted to sell his stock of goods and chattels in bulk. The *Bulk Sales Act* of British Columbia, R.S.B.C. 1936, chapter 29, provides that in such circumstances it shall be the duty of the vendor to furnish to the purchaser a written statement verified by statutory declaration, which statement shall contain the names and addresses of all his creditors, together with the amount of the indebtedness, and that such statement and declaration may be in the form set forth in schedule A. This form concludes

> and I make this solemn declaration conscientiously believing the same to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act*.

Orford made a statement and statutory declaration substantially in the form prescribed but the declaration was false in that Orford did not disclose all his creditors and the charge for perjury followed. The majority of the Court of Appeal decided that Orford was not guilty of perjury or of any lesser offence within the meaning of section 951 of the Criminal Code or of "any other offence" within the meaning of subsection 2 of section 1016 Cr. C., and that the conviction should be quashed.

The determination of this appeal depends upon a consideration of several sections of the Criminal Code. Section 170 Cr. C. defines "perjury" and section 171 Cr. C.

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defines "witness" and "judicial proceeding" as those expressions are used in section 170 Cr. C. Then comes the section principally relied on by the appellant, section 172 Cr. C., which reads as follows:—

172. Every one is guilty of perjury who,

(*a*) having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or

(*b*) knowingly, wilfully and corruptly, upon oath, affirmation or solemn declaration, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully, and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit as to any such fact, matter or thing, if such statement, affidavit, affirmation or declaration is untrue in whole or in part.

Section 174 Cr. C. enacts that every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury, with provision for an increased penalty in certain circumstances. Sections 175 and 176 Cr. C. are as follows:—

175. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

176. Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

I find it impossible to say that Orford's conviction for perjury on the charge as laid against him is bad because what he did was not done in a judicial proceeding. I agree with Chief Justice Graham of Nova Scotia when he stated in *Rex* v. *Morrison* (1) that sections 172 and 175 Cr. C. overlap and probably mean the same thing. As he points out, section 172 Cr. C. is taken from R.S.C. 1886, chapter 154, while section 175 Cr. C. is taken from the English Draft Code. In *Rex* v. *Rutherford* (2) Mr. Justice McKay of the Saskatchewan Court of Appeal,

(1) (1916) 26 C.C.C. 26, at 27. (2) (1923) 41 C.C.C. 240, at 243.

quotes the first of these statements with approval and his judgment was concurred in by the present Chief Justice of Saskatchewan.

While sections 172 and 175 Cr. C. overlap, Parliament has seen fit to insert each in the Criminal Code and I cannot overlook the words of section 172 Cr. C.: "Every one is guilty of perjury who, etc.", and treat them as if they were not there. Section 172 Cr. C. contains no reference to section 170 Cr. C. nor does it state that the enumerated acts must be done by a witness or in a judicial proceeding. By section 172 Cr. C., Parliament has enacted that every one who does the things specified is just as guilty of a crime (perjury) as one who comes within the provisions of section 170 Cr. C. Upon conviction, each becomes liable to a penalty in accordance with section 174 Cr. C. whether or not his actions be those of a witness or in a judicial proceeding. In view of what, with respect, is to me the plain language of section 172 Cr. C., a person falling within its terms is just as guilty of what Parliament has chosen to call perjury as one who falls within the ambit of section 170 Cr. C. No doubt, in view of the overlapping of sections 172 and 175 Cr. C., the presiding judge would consider the gravity of a particular offence in imposing sentence.

The solemn declaration taken by the respondent was required by the British Columbia *Bulk Sales Act*. Section 63 of the British Columbia *Evidence Act*, R.S.B.C. 1936, chapter 90, provides that any declaration made in the form in the schedule to that Act shall be as valid and effectual as if expressed to be made by virtue of that Act, notwithstanding that the same is expressed to be made by virtue of the *Canada Evidence Act*. The conclusion in the form in the schedule is practically the same as the conclusion in the form attached as schedule A to the *Bulk Sales Act*. In the present case Orford's statutory declaration was taken before one who testified that he was a commissioner for taking affidavits in the province and it states that the declaration was of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act*. In one sense, therefore, it might be said that Orford was

"permitted by the *Canada Evidence Act* to verify certain facts relating to his financial obligations"

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by solemn declaration, but, even if that be not so, the words in quotation marks may be treated as surplusage, and the charge as drawn is sufficient.

If the conviction were not sustainable under section 172 Cr. C., Orford could not legally have been convicted under section 951 of the Criminal Code as for an offence under section 176 Cr. C., nor could the Court of Appeal proceed under subsection 2 of section 1016 Cr. C. The offence dealt with in section 176 Cr. C. is not a lesser offence but a different one, as the declaration mentioned therein simpliciter is not the same as the statutory declaration referred to in section 172 Cr. C. Counsel for the appellant referred to section 175 Cr. C. but we have no jurisdiction to consider the applicability of that section as no dissent in the Court of Appeal was based upon the point.

The appeal should be allowed and the conviction restored.

HUDSON J. (dissenting).—The only ground of dissent from the judgment of the court below to which I wish to refer is the second, namely, that the taking of a statutory declaration falsely is perjury within the meaning of section 172 of the Criminal Code. There are differences of opinion in this court and in the court below on this point and, with respect, I am of the opinion that the dissent on this point is right. As has been pointed out by other members of the court, this section of the Criminal Code is of purely Canadian origin and was in force in Canada long before the Criminal Code was passed.

Looking at the statute, chapter 154, R.S.C. 1886, section 2 is as follows:

> 2. Every one who,—
>
> (*a*) Having taken any oath, affirmation, declaration or affidavit in any case in which by any Act or law in force in Canada, or in any province of Canada, it is required or authorized that facts, matters or things be verified, or otherwise assured or ascertained, by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing—
>
> (*b*) Knowingly, wilfully and corruptly, upon oath or affirmation, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes,

signs or subscribes any such affirmation, declaration or affidavit, as to any such fact, matter or thing,—such statement, affidavit, affirmation or declaration being untrue, in the whole or any part thereof, or—

(c) Knowingly, wilfully and corruptly omits from any such affidavit, affirmation, or declaration, sworn or made under the provisions of any law, any matter which, by the provisions of such law, is required to be stated in such affidavit, affirmation or declaration,—

Is guilty of wilful and corrupt perjury, and liable to be punished accordingly:

It also contains a proviso as follows:

(2) Provided, that nothing herein contained shall affect any case amounting to perjury at common law, or the case of any offence in respect of which other or special provision is made by any Act.

The language is quite plain and it seems to me that there is no justification for reading any qualification in the section as it thus stands.

When the Criminal Code was compiled this section was included in almost precisely the same language. The existence of other sections of the Criminal Code providing for punishment of other offences of the same character does not seem to be a sufficient justification for reading into section 172 Cr. C. an intention by Parliament to attach a new meaning to the language of the old provision.

The section has been so construed by the Court in Banc in Nova Scotia in *Rex* v. *Morrison* (1), and again by the same court in 1924 in *The United States* v. *Snyder* (2), and by the Court of Appeal in Saskatchewan in 1923, consisting of Justices Lamont, Mackay and Martin, in the case of *Rex* v. *Rutherford* (3). The matter had been decided in the same way by the Supreme Court of the Northwest Territories in *Regina* v. *Skelton* (4).

On the other points I agree with the other members of the court.

Appeal dismissed.

Solicitor for the appellant: *Eric Pepler.*

Solicitor for the respondent: *John A. Sutherland.*

(1) (1916) 26 C.C.C. 26, at 27.
(2) (1924) 43 C.C.C. 92.
(3) (1923) 41 C.C.C. 240, at 243.
(4) (1898) 3 Terr. L.R. 58; 4 C.C.C. 467.