1936
* Oct. 16, 19.
1937
* Mar. 1.

VIVIAN MacMILLAN (PLAINTIFF).....APPELLANT;

AND

J. E. BROWNLEE (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Seduction—Action by the woman alleged to have been seduced—The Seduction Act, R.S.A., 1922, c. 102, s. 5—Construction—Cause of action—Nature of damage—Basis of damages—Sufficiency of evidence of damage to support action—Verdict of jury.

Sec. 5 of *The Seduction Act*, R.S.A., 1922, c. 102, enacts that "notwithstanding anything in this Act an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort and in any such action she shall be entitled to such damages as may be awarded."

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

(1) (1898) 29 Can. S.C.R. 239.

1937

MACMILLAN v. BROWNLEE.

At the trial the jury found that the present appellant, an unmarried female, and a plaintiff in the action, was seduced by defendant, and that she suffered damage in an amount of $10,000. The trial judge (Ives J.) dismissed her action, on the ground that damage is the gist of the action, that the damage necessary to found a right of action in the woman must be of the same character as gave the master his right of action, i.e., loss of service, or at least an interference with the woman's ability to serve, and that there was no evidence of such damage ([1934] 2 W.W.R. 511). The dismissal of the action was (by a majority) affirmed by the Appellate Division, Alta. ([1935] 1 W.W.R. 199). On appeal to this Court:

Held (Davis J. dissenting), that the appeal be allowed, and appellant have judgment for the amount of the jury's verdict.

Per Duff C.J., Rinfret and Kerwin JJ.: In view of the decisions of the Appellate Division, Alta., in *Gibson* v. *Rabey*, (1916) 9 Alta. L.R. 409, and *Tetz* v. *Tetz*, (1922) 18 Alta. L.R. 364, concerning the construction of said s. 5 as it stood prior to its reproduction without material alteration in R.S.A. 1922, c. 102, that reproduction must be taken to have given legislative sanction to the construction put upon the section by those decisions (*Barras* v. *Aberdeen Steam Trawling & Fishing Co.*, [1933] A.C. 402), and, having regard to the effect of those decisions (discussed), any construction is precluded by force of which the determining factors in the trial of an action of seduction under s. 5 are to be deemed essentially or substantially the same as those in the trial of an action of seduction under the other (preceding) sections of the Act or at common law. Starting from this point, it follows that s. 5 should be construed according to the ordinary meaning of the words and that damage of the special character which is the gist of the action under the other sections of the Act—damage actually or presumptively entailing some loss of service or some disability for service—is not of the gist of the action under s. 5. (*Per* Kerwin J.: A consideration of the language of s. 5 leads to the same conclusion. The language analyzed and discussed).

There was sufficient evidence of damage to support the action. Further, the jury's verdict must stand unless, examining the evidence as a whole, the Court was clearly of opinion that it was one which no jury, acting judicially, could give; and this had not been established by argument. So also as regards damages. It was for the jury to determine whether appellant's evidence, or how much thereof, should be accepted as correct; and on her evidence it could not be said that, if it was accepted, the sum awarded was such as no tribunal of fact acting reasonably could have awarded.

Per Davis J. (dissenting): Even accepting the appellant's story, she could not, on the facts of the case and upon the broadest possible interpretation most favourable to her of s. 5, succeed unless s. 5 be reduced to giving a cause of action for fornication *per se*. If the cause of action in s. 5 (excluding necessarily the relation of master and servant) is the same as in the other sections of the Act, the birth of a child or pregnancy or at least some physical disability as a direct result of the conduct complained of is an essential element of that cause of action, and the illness that was proved in this case was too remote and insufficient to sustain the action. If, on the other hand, the cause of action in s. 5 is to be regarded as a new and independent tort, separate and distinct from the action for seduction referred to in the other sections, then, whatever be the essential elements of this new

1937

MACMILLAN v. BROWNLEE.

cause of action, there must be at least something in the nature of negation of choice. Taking either interpretation of s. 5, the action failed upon the evidence.

In interpreting s. 5, the statute should be read as a whole and s. 5 interpreted, not as an isolated piece of legislation to be given a new meaning and significance, but as part of an entire statute dealing with the same subject-matter. The other (preceding) sections (discussed) necessarily import as an essential ingredient of the cause of action an illegitimate child born or conceived as a result of the relations complained of; and that has always been the common understanding in Canada of the cause of action for seduction. The language of s. 5 analyzed and discussed, and with reference to the language in the other sections. Sec. 5 should not be interpreted so as to import into the words used therein a different quality or meaning from that which the same words have in the other sections. In the cause of action under s. 5 there is necessarily excluded the relation of master and servant as an essential, and with it the necessity for proof of loss of service; but the substance of the cause of action, the birth of a child or at least the condition of pregnancy, remains. The re-enactment of the statute in the revision of 1922 does not touch the point as to the substance of the cause of action, because the fact of birth of a child or pregnancy in the Alberta cases prior to the revision was admitted or accepted by counsel and those cases did not turn upon that question. The evidence in the present case disclosed no cause of action.

APPEAL by the female plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) dismissing her appeal from the judgment of Ives J. (2).

The action was brought by the present appellant and her father for damages for alleged seduction of her by the defendant. At the trial before Ives J. and a jury, the jury found that the defendant seduced the present appellant and found damages for $10,000 in her favour and for $5,000 in favour of the other plaintiff. Upon announcement of the verdict by the jury, plaintiffs' counsel moved that judgment be entered in accordance therewith and defendant's counsel moved for dismissal of the action, submitting that there was no cause of action shewn. Ives J. reserved judgment and later delivered judgment dismissing the action (2). His grounds were stated as follows:

Upon the verdict being announced by the jury, counsel for the defendant moved for dismissal of the action on the ground that there was no evidence of any interference with the daughter's services to the parent to which he was entitled and no evidence that the seduction in any way interfered with the daughter's ability to serve.

It is quite clear that the daughter left her home in Edson with the consent and approval of her parents and was accompanied to Edmonton by her mother. It is equally undoubted that no illness resulted from the

(1) [1935] 1 W.W.R. 199; [1935] 1 D.L.R. 481.
(2) [1934] 2 W.W.R. 511.

seduction and no evidence that the ability of the daughter to render services was in any way interfered with.

In my opinion the law is well settled that damage is the gist of the action and I am also of the opinion that the damage necessary to found a right of action in the woman must be of the same character as gave the master his right of action, that is, loss of service, or at least an interference with the woman's ability to serve. I see nothing in our statute to convey a contrary intendment of the Legislature.

In my view of the law the action must be dismissed with costs, * * *

An appeal by the plaintiffs to the Appellate Division was dismissed (Clarke and Lunney, J.J.A., dissenting as to the appeal of the present appellant) (1). The present appellant then appealed to this Court.

The operative sections of *The Seduction Act*, R.S.A. 1922, c. 102, read as follows:

PERSONS ENTITLED TO MAINTAIN ACTION

2. The father or, in case of his death, the mother (whether she remains a widow or remarries) of any unmarried female who has been seduced and for whose seduction the father or mother could maintain an action in case such unmarried female was at the time dwelling under his or her protection may maintain an action for the seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with another person upon hire or otherwise.

[1903 (2), c. 8, s. 1.]

3. Upon the trial of an action for seduction brought by the father or mother it shall not be necessary to prove any act of service performed by the party seduced but the same shall in all cases be presumed and no evidence shall be received to the contrary; but in case the father or mother of the female seduced had before the seduction abandoned her and refused to provide for and retain her as an inmate then any other person who might at common law have maintained an action for the seduction may maintain such action.

[1903 (2), c. 8, s. 2.]

4. Any person other than the father or mother who by reason of the relation of master or otherwise would have been entitled at common law to maintain an action for the seduction of an unmarried female may still maintain such action if the father or mother is not resident in Alberta at the time of the birth of the child which is born in consequence of the seduction or being resident therein does not bring an action for the seduction within six months from the birth of the child.

[1903 (2), c. 8, s. 3.]

5. Notwithstanding anything in this Act an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort and in any such action she shall be entitled to such damages as may be awarded.

[1903 (2), c. 8, s. 4.]

(1) [1935] 1 W.W.R. 199; [1935] 1 D.L.R. 481.

1937

MACMILLAN v. BROWNLEE.

N. D. Maclean K.C. for the appellant.

A. L. Smith K.C. for the respondent.

The judgment of Duff C.J. and Rinfret J. was delivered by

DUFF C.J.—This appeal raises an important question as to the construction of section 5 of *The Seduction Act* of Alberta (Cap. 102, R.S.A. 1922) which was first enacted as Cap. 8 of the Ordinances of the North West Territories, 1903.

There is undeniably force in the argument that the "action for seduction," which an unmarried female is by that section given the right to institute, rests "in its essentials" upon the same cause of action as the "action for seduction" which the parents are entitled to bring under sections 2 and 3 of the statute. This is the view which prevailed with the majority of the Appellate Division and is supported by the Chief Justice of Alberta in a powerful judgment.

Each part of the statute ought, it may fairly be argued, to be read with each of the other parts; and, reading sections 2 and 3 with section 5, and section 5 with sections 2 and 3, and construing each of these parts of the enactment by the light of the other, and having regard to similarity of language in sections 2 and 5, the contention is by no means without substance that, *prima facie,* section 5 presupposes a cause of action capable of being asserted by the parents, if (at all events) living in Alberta, and that, given such a cause of action vindicable by the parents, a cause of action having the same constitutive elements (the parental relations being, of course, in this case irrelevant) is, by section 5, bestowed upon the seduced woman.

It follows from this, it is said, that damage of the kind which is the gist of the action under sections 2 and 3 (disability for service resulting from childbirth, pregnancy or physical illness directly due to the sexual intercourse) is also of the essence of the cause of action under section 5.

The other view of the section, which was, I think, in effect accepted by Mr. Justice Clarke and Mr. Justice Lunney, may be summarily stated thus:

Sections 2 and 3 are concerned exclusively with conduct that constitutes a wrong to the parents, and, in point of

law, the essence of this actionable wrong consists in the fact that it results in some loss of the services of the daughter, or illness entailing (presumptively or actually) some disability for service; while section 5, on the contrary, is concerned exclusively with the wrong which the law, by the parent enactment passed by the Legislature of the North West Territories in 1903, first recognized as effecting a prejudice to the interests of the seduced female herself, in respect of which she is entitled to legal protection, and that the sole purpose of the enactment in section 5 is to provide redress for this wrong.

Then, it is said, in construing the enactment in which this novel rule and principle of liability are embodied, one would not appear to be justified in imputing to the words employed by the Legislature for that purpose alone, a rather artificial signification derived from the earlier sections which, notwithstanding the similarity of language, do deal with a subject-matter that is widely different; and, it is added, there is less likelihood of frustrating the legislative intention if one gives effect to this enactment according to the commonly understood meaning of the words, having regard, of course, to its manifest purpose. The cause of action under section 5 arises, no doubt, out of an occurrence or occurrences which, assuming the conditions to subsist as to resulting damage, might form the foundation of an action by the parents of the woman. But the action under section 5 is bestowed upon a person who, *ex hypothesi,* is a voluntary participant in the acts which are the essential basis of her right to redress; and, in consequence, in passing upon a claim for damages under section 5, the tribunal of fact is faced with issues and with considerations of an order totally different in their nature from anything that can arise in considering or adjudicating upon a claim under sections 2 and 3. That circumstance alone, it is said, sharply differentiates, in substance, the cause of action under the later section from that under the earlier.

First of all, it is said that in an action under sections 2 and 3, on the question whether or not the cause of action has been constituted (as distinguished from the assessment of damage), the conduct of the seduced woman is irrelevant; while leave and licence by the parents, which might be established by proving consent either by words or con-

1937

MACMILLAN v. BROWNLEE.

Duff C.J.

duct, would be an answer to the action. In an action under section 5, on the other hand, the conduct of the woman as well as her character both enter into the determination of the existence of the cause of action. The relief given by section 5 presupposes, it is said, that the woman seduced was, at the time she was corrupted by the defendant, a woman of virtuous life and habits; and, moreover, that the words of the section, read according to the meaning they bear in the common language of men, imply that some enticement has been employed by the defendant, or some unfair advantage taken, through which he has induced the woman to have intercourse with him. All this, as has been said, would be irrelevant in an action under the earlier sections, which would lie even in a case in which it appeared that the advances of the woman seeking the gratification of her own desires were the preponderating factor in bringing about the common act. Again, no consent, no enticement or manœuvring on the part of the parents could be relevant in determining the existence of a cause of action under section 5.

In this view, since the action under section 5 has nothing to do with the parental relation, nothing to do with the relation of master and servant, nothing to do with loss of service or service, there is, it is contended, no *a priori* probability that section 5 contemplates relief conditioned upon the seduction being followed by childbirth or pregnancy or illness directly traceable to physical act of copulation and giving rise to some disability for service; and it is not susceptible of dispute that the language of the section (assuming damages to be of the essence of the cause of action) when read alone, and without colour derived from the preceding sections, neither expresses nor implies such a condition.

In passing upon these rival views we are not without assistance from judicial decisions. The ordinance of the North West Territories of 1903 was reproduced in its entirety (with the addition of the heading "Persons entitled to maintain action") by Cap. 102 of the R.S.A. 1922, which came into force on the 19th January, 1923, by virtue of a statute which was assented to on the 9th day of March, 1923.

Before that date, two decisions were pronounced by the full court of Alberta, one in 1916 and one in 1922, both in

1937

MACMILLAN v. BROWNLEE.

Duff C.J.

the same sense. The decisions are concerned with the construction of section 5 of the North West Territories Ordinance; and, in so far as they involve a construction of that section, they must, we think, be taken to have received legislative sanction when section 5 was reproduced without material alteration in R.S.A. which came into operation in 1923. (*Barras* v. *Aberdeen Steam Trawling & Fishing Co.*) (1).

I turn now to the decisions. The first in *Gibson* v. *Rabey* (2). Two judgments were delivered, one by Scott J., another by Beck J., in which Stuart J. concurred. Scott J. proceeded upon the ground that seduction in section 5 has its ordinary meaning and implies some enticement on the part of the seducer by which a virtuous woman is induced to give herself to him. That appears conclusively from the sentence:

> In my view the evidence was sufficient to support the conclusion the trial judge must have reached that she was enticed and persuaded by

the defendant to commit the act. Beck J., in the course of his judgment, observes at p. 414 that,

> The section of the ordinance already quoted, though awkwardly drafted, inasmuch as in giving the woman herself a right of action it does away with the whole idea of service and loss to a master, by the clearest necessary intendment constitutes the seduction, not mere seduction but seduction followed by damages consequent upon the seduction, the cause of the action. For I think that damage was the "gist" of the action in the case, and at all events the ordinance itself, I think, makes it the gist of an action by the woman seduced. It was contended that, in an action by a woman for her own seduction, the word should be interpreted as it appears to be very generally by the American authorities to involve an enticing by the defendant. The history of the action shews that so long as the action was based on loss of service, seduction was ultimately taken to mean no more than having carnal intercourse with. The reason, however, was that damage by way of loss of service was the gist of the action and consent by the servant was no answer to an action by the master.

He proceeds, at p. 415:

> Now that the woman herself is enabled to be the plaintiff, I think her action is subject to a like defence, that is, if she be the tempter or even if she deliberately consents from lasciviousness or even from the strength of mere natural passion, provided her consent has not been brought about by enticement of the defendant, she cannot recover.
>
> In this way, I come in effect to the same conclusion as my brother Scott.
>
> I think, however, that in the absence of evidence of loose behaviour on the part of the woman, the presumption is that there was enticement on the part of the defendant in cases of this sort and that the burden

(1) [1933] A.C. 402. (2) (1916) 9 Alta. L.R. 409.

1937

MACMILLAN v. BROWNLEE.

Duff C.J.

of shewing that the plaintiff cannot succeed on the ground that she was at least equally morally guilty is on the defendant.

Although it does not appear from the report, it seems that in this case pregnancy supervened, and, consequently, although it is stated by Beck J. that damage is of the gist of the action, no question arose as to the character of the damage necessary to sustain the action.

The second decision was pronounced in *Tetz* v. *Tetz* (1) by the Appellate Division of the Supreme Court of Alberta (Scott C.J, Stuart, Beck, Hyndman and Clarke JJA.) The judgment of the Court was delivered by Beck J.A., and in the course of his judgment he summarizes the judgment of Stuart J. and himself in *Rabey's* case (2) at pp. 365 and 366, thus:

> In that case I said that, in my opinion, it would be a *defence* to an action for seduction if it were shown, (1) that the woman was the tempter, or (2) even if she deliberately *consented* from lasciviousness or even from the strength of mere natural passion, *provided* her *consent* had not been brought about by the enticement of the defendant. To this I added that, in my opinion, in the absence of evidence of loose behaviour on the part of the woman, the presumption is that there was enticement on the part of the man and that the burden of showing that the plaintiff could not succeed on the ground that she was at least equally morally guilty is on the defendant. Stuart J. concurred with me and Scott C.J. (the Court being composed of three members) was evidently of the same opinion.

Now, it is clear that some points were decided in these two cases touching the construction and effect of section 5. In each it is declared that the plaintiff's right to recover under that section is conditioned in certain specified respects. When the facts are ascertained, it is held, the plaintiff cannot succeed if certain propositions of fact are established concerning the conduct of the plaintiff and defendant towards one another; and the investigation, when the plaintiff's right to recover is disputed, will involve the assignment to one or other of the parties the preponderating role in bringing about the result, the investigation of the part played by the woman's natural passion, and, it may be, the determination of the relative moral guilt of the pair.

These decisions, in other words, recognize that, in examining a disputed claim for relief under section 5, the court must deal with issues and considerations which could not arise and would not be relevant in the trial of an action under sections 2 and 3. It is of no importance that the

(1) (1922) 18 Alta. L.R. 364. (2) (1916) 9 Alta. L.R. 409.

matters mentioned in the judgment of Beck J.A. are said to be matters of defence; the investigation of these matters necessarily results, the judgments recognize, from the fact that the right to relief under section 5 is given to the seduced woman herself.

Seduction, as Beck J.A. says, at common law and in the earlier sections of the Act signifies nothing more than carnal intercourse. Enticement on one side or the other, relative moral responsibility, and so on, are matters which, as already observed, have no bearing upon the issue as to the existence of the cause of action. Under section 5, according to the decisions, such matters are the determining factors; and, in view of these decisions, since the re-enactment of the statute in 1922, any construction is precluded by force of which the determining factors in the trial of an action of seduction under section 5 are to be deemed essentially or substantially the same as those in the trial of an action of seduction under the earlier sections or at common law.

These decisions have nothing to say as to the nature of the damages which must be proved by the plaintiff under section 5, although in the first of them it was definitely stated that under that section damage is the gist of the action.

Starting from this point, it follows, we think, that section 5 should be construed according to the ordinary meaning of the words and that damage of the special character mentioned—damage actually or presumptively entailing some loss of service or some disability for service—is not of the gist of the action under that section.

Neither have we any doubt that there was sufficient evidence of damage to support the action.

There remains the question raised by the able argument of Mr. Smith in support of his contention that the judgment of the Appellate Division should not be disturbed on the ground that, on the evidence, the only reasonably admissible finding would be one against the plaintiff, or, in the alternative, that there should be a new trial on the ground that the verdict is against the weight of the evidence and particularly that the damages awarded are unreasonably excessive. This argument presents a question of a type with which the courts are very familiar.

1937

MacMillan v. Brownlee.

Duff C.J.

It is no part of our duty to ask ourselves what verdict we should find upon the evidence as presented to us in the record without the advantage of hearing and seeing the witnesses. The settled rule is that the verdict of the jury must stand unless, examining the evidence as a whole, the court is clearly of opinion that it is one which no jury, acting judicially, could give. This, in our opinion, has not been established by argument. So also as regards damages. It was for the jury to determine whether the evidence, or how much of the evidence, of the appellant should be accepted as correct; and we find ourselves unable to say that if her evidence was accepted the sum awarded was such as no tribunal of fact acting reasonably could have awarded.

The judgment of the Appellate Division should be vacated and in lieu thereof it will be ordered that judgment be entered for the amount of the verdict. The appellant will have her costs throughout.

Kerwin J.—I agree with the judgment proposed by my Lord the Chief Justice and with the reasons therefor given by him, but I think I should add that a consideration of the language of section 5 of the Act leads me to the same conclusion.

The section does not provide that "*the*" action of "*seduction*" may be maintained, but the expression used is "*an* action *for* seduction." In the old action of seduction at common law, the master was required to prove an act of service. A parent as master or mistress would not be able to prove that act where the daughter was serving or residing with another person, and, it being deemed that the parent should have a right of action under those circumstances, the first change in the common law, made by statute, was to provide that the parent might maintain an action for seduction notwithstanding the daughter was serving or residing with another person, and it was also provided that the parent need not prove any act of service performed by his daughter for the parent. Then in 1903 when the Ordinance was passed, the intention was to give to the woman, by section 5, a right of action of some sort even though a parent could by statute maintain the ordinary action for seduction notwithstanding the absence of the daughter from home, etc. Hence the expression "notwithstanding anything in this Act."

The decisions as to the effect of the first alteration by statute in the common law are clear that, when the new right of action was given to the parent, while the statute provided that evidence of service need not be given, the Act did not dispense with the necessity of proving loss of service. There is no provision in section 5 that in the action thereby given "it shall not be necessary to prove any act of service performed by the party seduced." If the contention that section 5 is speaking of the old form of action be correct, there would appear to be as much reason for the plaintiff to prove actual service (to someone) as the loss of that service.

The learned Chief Justice of Alberta was of opinion that the words "in the same manner as an action for any other tort" dealt with a mere matter of procedure, but, with respect, it seems to me rather that they are part of the substantive provisions dealing with the right of action thereby given and lend weight to the argument that the unmarried female may maintain a new action and not the old action of seduction.

The section concludes that "she shall be entitled to such damages as may be awarded." It does not say that she is entitled to "*the*" damages, thus indicating that the damages in an action brought by her may be on a different basis from the damages that could have been given in an action by a parent.

HUDSON J. concurred in the result.

DAVIS J. (dissenting)—The appellant, an unmarried female, brought an action for seduction in the Supreme Court of Alberta against the respondent, a married man. The appellant's own story may be shortly but I think fully stated. From October, 1930, until July, 1933, she says she had frequent sexual intercourse with the respondent who she knew from the beginning was a married man with a wife and family. When the relations first commenced she was a girl of about 18 years and 4 months of age. During the summer of 1932 she consulted a physician, as she had lost weight during the two prior years. She says she had "stomach trouble brought on by nerves" and she felt "very tired all the time," and that the pills she had been taking to avoid pregnancy had upset her. The physician,

1937

MACMILLAN v. BROWNLEE.

Davis J.

who was called by her counsel as a witness at the trial, described her then condition as "irritable colon," an irregular function which "might be produced by any systemic condition which causes fatigue or running down of the patient by the use of cathartics to correct constipation which had existed"—and which condition, he said, is frequently associated with a nervous condition. He said that there was no doubt that she was suffering from constipation. At that time she went home to the country to her parents for 5 or 6 weeks' rest. Upon her return to Edmonton, she admits she continued her relations with the respondent. In January, 1933, she says she told with a good deal of remorse a young man of her own age who, she says, was proposing marriage to her, of her relations with the respondent. But she admits she continued thereafter the same relations. In May, 1933, she says that at the instance of the young man she consulted a solicitor. Obviously this was with a view to taking some action against the respondent. But she admits again that she continued thereafter the same frequent relations with the respondent down to July 3rd, 1933. On the evening of July 5th, 1933, she says the young man and the solicitor pursued in a motor car the car in which she and the respondent were driving about the city, and that the respondent became aware that his car was being followed. The respondent was a man prominent in the public life of the province and the episode of that evening appears to have put an end to the relations between the parties, if there ever were any such relations as the appellant describes. Shortly thereafter the writ in this action was issued. It is admitted that there was not a child, or even pregnancy, resulting from the alleged relations. Nor is the action founded upon any misrepresentation, coercion or deceit. It is a suit upon section 5 of the Alberta *Seduction Act,* being chap. 102 of the Revised Statutes of 1922.

In my opinion, one has only to state the facts of this case to see, and I say it with the greatest deference to those from whom I differ, that the appellant cannot succeed upon the broadest possible interpretation, most favourable to the appellant, that can be put upon section 5 unless it be reduced to giving a cause of action for fornication *per se.*

If the cause of action in section 5 (excluding necessarily the relation of master and servant) is the same as in the other sections of the statute, the birth of a child or pregnancy or at least some physical disability as a direct result of the conduct complained of is an essential element of that cause of action, and the illness that was proved in this case was too remote and insufficient to sustain the action. If, on the other hand, the cause of action in section 5 is to be regarded as a new and independent tort, separate and distinct from the action for seduction referred to in the other sections of the statute, then, whatever be the essential elements of this new cause of action, there must be, it seems to me, at least something in the nature of negation of choice. Taking either interpretation of section 5, the action, in my opinion, fails upon the evidence.

The proper method of interpretation of section 5, in my view, is to read the statute as a whole. Section 5 is part and parcel of the entire statute. The statute is a very short one, there being only four operative sections. It was enacted in its entirety as an ordinance of the North West Territories in 1903 and became part of the statute law of the province of Alberta when that province was formed out of a part of the Territories. The statute has remained unchanged except that in the revision of 1922 a heading in large type "Persons Entitled to Maintain Action" was inserted at the commencement of the operative provisions of the statute. Section 5 therefore ought to be interpreted, not as an isolated piece of legislation to be given a new meaning and significance, but as part of an entire statute dealing with the same subject-matter.

In examining the statute, it is to be observed that the right of action is given firstly to the father or, in case of his death, to the mother, notwithstanding that the unmarried daughter was at the time of her seduction serving or residing with another person upon hire or otherwise; and proof of acts of service in such case is dispensed with and no evidence shall be received to the contrary. Secondly it is provided that in case the father or mother had before the seduction abandoned the daughter and refused to provide for and retain her as an inmate, then any other person who might at common law have maintained an action for the seduction may maintain such action. Thirdly it is pro-

1937

MACMILLAN v. BROWNLEE.

Davis J.

vided that any person other than the father or mother "who by reason of the relation of master or otherwise" would have been entitled at common law to maintain an action for the seduction of an unmarried female may still maintain such action (and the following words are very significant),

if the father or mother is not resident in Alberta at the time of the birth of the child which is born in consequence of the seduction or being resident therein does not bring an action for the seduction within six months from the birth of the child.

Those are all the provisions of the statute save and except the last section, section 5. Now those provisions necessarily import as an essential ingredient of the cause of action an illegitimate child born or conceived as a result of the relations complained of. And that, I believe, has always been the common understanding in Canada of the cause of action for seduction. It is not without its own significance that counsel have not been able to find any case in Canada where an action for seduction has succeeded without proof of at least pregnancy, and no reported case in England since *Manvell* v. *Thomson* (1). Not only was the question not raised in that case, but the case was prior to the legislation enacted in Upper Canada in 1837, being 7 William IV, chap. 8, "An Act to make the remedy in cases of seduction more effectual, and to render the fathers of illegitimate children liable for their support," which statute without substantial change became the law of the province of Ontario at Confederation and (except that the provisions for the maintenance of illegitimate children were carried forward in a separate statute) remained substantially unchanged until 1903, when the North West Territories enacted the Ontario statute verbatim and added thereto the section which is now section 5 in the Alberta revised statute.

Section 5 uses the same words as used throughout the other sections of the statute. "Any unmarried female who has been seduced" are the same words as used in section 2. The words "an action for seduction" in section 5 are substantially the same as "an action for the seduction" that are used throughout the statute. Then there is the general heading: "Persons entitled to maintain action." The words in section 5, "Notwithstanding anything in this

(1) (1826) 2 C. & P. 303.

Act," mean, I think, that notwithstanding that the action for seduction may be maintained by the several classes of persons referred to in the preceding sections, the unmarried female may herself maintain the action, and the words "in the same manner as an action for any other tort" refer to the procedure for maintaining in her own name the right of action and are not words creating the substance of a new cause of action.

It is a safe rule of statutory interpretation to assume, in the absence of an expressed intention to the contrary, that a Legislature when it uses the same words in different sections of the same statute, particularly a very short statute, uses the words in the same sense throughout the statute. Are we to interpret section 5 so as to import into the words used in that section a different quality or meaning from that which the same words have in the other sections of the statute? If the Legislature had intended that the words in section 5 should mean something different from what they mean in the other sections, the Legislature could have said so. Of course, where the right of action is given to the unmarried female herself there is necessarily excluded the relation of master and servant as an essential in the cause of action and with it the necessity for proof of loss of service; but the substance of the statutory cause of action, the birth of a child or at least the condition of pregnancy, remains. Again, with the greatest deference to those from whom I differ, I cannot see that the re-enactment of the statute in the revision of 1922 touches the point as to the substance of the cause of action, because the fact of the birth of a child, or pregnancy, in the Alberta cases prior to the revision has been admitted or accepted by counsel and those cases did not turn upon that question.

In the view I take of this appeal, it becomes unnecessary to examine minutely the evidence at the trial, as we were invited by counsel for the respondent to do, to ascertain whether or not the jury was justified in arriving at its verdict of guilt against the respondent. In my opinion, the evidence discloses no cause of action and therefore the action was properly dismissed.

1937
*Feb. 22.

The appeal, in my opinion, should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *N. D. Maclean.*

Solicitor for the respondent: *M. M. Porter.*

WILLIAM OSGOODE LANGDON (DEFENDANT) ..... } APPELLANT;

AND

HOLTYREX GOLD MINES LIMITED (PLAINTIFF) ..... } RESPONDENT;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF TISDALE, AND THE TREASURER OF THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF TISDALE (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and Taxation—Sale of land for taxes—Action to set it aside—Assessment Act, R.S.O. 1927, c. 238—Failure of treasurer of municipality to give proper notice under s. 174, as amended in 1933, c. 2, s. 14—Applicability of s. 181 to bar right of action.

Land of the plaintiff in a township municipality in Ontario was, on February 28, 1934, sold for taxes which at the time of sale had been in arrear for more than three years. The sale was (as found) openly and fairly conducted. The treasurer of the municipality did not send the notice (as to fact and date of sale and right to redeem) required by s. 174 of the *Assessment Act,* R.S.O. 1927, c. 238, as amended by 23 Geo. V (1933), c. 2, s. 14, but gave notice as required before said amendment. The land was not redeemed within one year after the sale, and the official deed of the land was delivered to the purchaser. Plaintiff sued to have the tax sale set aside.

Sec. 181 of said Act provides: "If any part of the taxes for which any land has been sold * * * had at the time of the sale been in arrear for three years * * * and the land is not redeemed in one year after the sale, such sale, and the official deed to the purchaser (provided the sale was openly and fairly conducted) shall notwithstanding any neglect, omission or error of the municipality or of any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto be final and binding * * *, it being intended by this Act that the owner of land shall be

---

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.