Supreme Court of Canada
Brunet v. The King, (1918) 57 S.C.R. 83
Date: 1918-06-25

Michel Brunet Appellant;

and

His Majesty The King Respondent.

1918: May 31; 1918: June 25.

Present: Davies, Idington, Anglin, Brodeur JJ. and Lemieux C.J., *ad hoc.*

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Criminal Law—Abortion—Defence of innocent conduct—Evidence of previous offences—Rebuttal — Statutory law—Jurisdiction—"Absence." Articles 1014, 1017, 1019 Cr. C.—Art. 3262 (a) R.S.Q.

Under article 3262 (*a*) R.S.Q., the police magistrate who presided at the trial was empowered to hold the Court of Sessions of the Peace only "in case of the absence or inability to act of" the regular Judge of the Sessions of the Peace.

Held, that "absence" means absence from the bench or, at most, absence from the court-room in which the trial takes place when it begins.

When a person, accused of having unlawfully used means to procure a miscarriage, puts forward a defence of innocent and lawful purpose, the evidence of other women that he has previously practised abortion on them by a similar method is admissible in rebuttal.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Court of Sessions of the Peace, at Quebec.

The accused, appellant, was found guilty of abortion by the trial judge, but he prayed for a case to be reserved for the Court of King's Bench.

The questions submitted in the reserved case stated by the trial judge are as follows:—

1. That the trial and conviction are null, because the judge who tried the case had power to act only in the absence or incapacity of the Judge of Sessions, whereas the latter was, in fact, neither absent nor incapacitated.

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2. That the trial judge erred in admitting evidence of other criminal acts of the appellant.

3. That, in any event, there was error in admitting such evidence of other criminal acts in rebuttal.

The circumstances of the case are fully stated in the judgments now reported.

Ferdinand Roy K.C., Alleyn Taschereau K.C. and Paul Drouin for the appellant.

Arthur Lachance K.C. and Arthur Fitzpatrick for the respondent.

DAVIES J.—I concur in the reasons for judgment stated by my brother Anglin and would dismiss this appeal.

IDINGTON J.—The appellant was convicted of abortion on his trial had therefor, pursuant to his election for a trial without a jury, and on the 15th May, 1917, sentenced to a term in the penitentiary.

The learned trial judge on motion of counsel for appellant decided same day or next to reserve questions of law for the Court of Appeal.

Of these we are appealed to in regard to the following:—

> "A." Cette cour devait-elle admettre les témoignages de Laetitia Clouthier et de Bernadette Clouthier pour établir que l'accusé a déjà commis le crime dont on l'accuse?
>
> "B." En supposant cette preuve légale, pouvait-elle être permise pendant l'enquête de la Couronne "in rebuttal?"

I have as result of reference to numerous decisions on which I rely specially upon *Rex* v. *Bond*[1], and *Rex* v. *Crippen*[2], come to the conclusion that the answers of the majority of the Court of Appeal to these questions are unquestionably right,

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In the former case the law applicable to such a case, and the limitations thereof, is so fully and ably dealt with that I need not repeat what therein is applicable. Whether such proof should in all cases be tendered in support of the case for the prosecution or only be given by way of rebuttal must depend upon the particular circumstances of each case.

If for example the appellant had refrained from tendering his own evidence, and relied upon others to establish an alibi, such evidence in rebuttal could not have been properly received merely in way of rebuttal.

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[1] [1906] 2 K.B. 389.
[2] 27 Times L.R. 69.

But by his going into the witness box, to prove his innocence and try to shew a case wherein accident or mistake was all that was or could be involved, he raised a question which had to be met and could be effectually so by proving his previous criminal acts which could not rest upon mere mistake or accident.

One of these took place in 1914 and the other a year or two earlier—quite enough to illuminate the whole story.

As to the collateral effects on the minds of those having to pass upon such a case, that is something counsel defending an accused have to reckon with, and be prepared for if rendering same necessary by pursuing a hazardous course.

Often they have to take chances and do the best they can; but all that furnishes no reason for rejecting evidence when clearly admissible either in opening or in rebuttal according to the circumstances of each case.

And one guiding rule in regard thereto should ever be section 1019 of the Criminal Code which reads as follows:—

> 1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal

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> some substantial wrong or miscarriage was thereby occasioned on the trial; provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed a new trial shall be granted. (55-56 Vict., ch. 29, sec. 746.)

I think this curative section applicable here.

The appellant, after obtaining the foregoing reservation for the Court of Appeal on the 27th of August, 1917, nearly three months and a half later, bethought himself of something else and that was to question the jurisdiction of the court that tried and convicted him.

He applied to the judge who had tried him, and, I incline to think, had with his granting his former reservation become (under the peculiar conditional jurisdiction he had for acting) *functus officio,* unless in response to the possible requirements and directions of the Court of Appeal, he had to submit questions relative to his jurisdiction.

He graciously acceded, though I most respectfully submit he might have been well advised under all the circumstances and the material submitted to him, to have refused to state any further question, unless and until the Court of Appeal under its power in section 1015 of the Criminal Code so directed.

The result would probably have been from what now appears that on this branch of the case there could have been no further appeal herein.

When or how otherwise can the convicted be limited in regard to his appellant rights?

Suppose he had a dozen objections to make and chose to submit one at a time only and revert to the trial judge when that decided to state the next, and try the experiment with each, as it is agreed there is no time limit, could he go on through his list thus?

Out of respect to the Court of Appeal I will assume in this case that they have in substance acted under sec. 1015 and of the questions thus secondarily presented there would remain the third as follows:—

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> 3. Aviez-vous juridiction pour instruire et présider le procès expéditif de l'accusé dans les circonstances ci-dessus exposées et ce procès n'est-il pas nul pour avoir été instruit devant un juge qui n'avait pas juridiction?

It was suggested by Mr. Fitzpatrick in argument that as the trial must be presumed to have begun with the election of the accused and his pleading to the charge and fixing a date for the continuance of it the learned trial judge whose jurisdiction is attacked and his jurisdiction that far being maintained unanimously we could not entertain this part of the appeal.

I agree there would be much force in the argument, especially when we bear in mind the possibility of an accused so acting being led by the appearance of things to assume that it was the judge who interrogated him as to his wish that would be his judge, but I fear the decision of this court in *Giroux* v. *The King*[3], puts an end to the import formerly attached to that test of arraignment and pleading and fixing a date for trial.

It seems the remaining question must therefore be answered.

[3] 56 Can. S.C.R. 63; 39 D.L.R 190.

I admit the possible serious consequences of such a view for unless the fact that a judge once seized of the conduct of a case is to be allowed to continue it even if his senior, whose absence is the basis of his jurisdiction, should return there may be confusion arise some day.

It is not this case that embarrasses me, but what may flow from our recognition of a dissent that only cuts a proceeding in two.

I agree with the view taken by the majority in the Court of Appeal that the learned senior judge's actual absence from the trial is enough to rest the jurisdiction of his substitute upon.

This statute enabling that to be done is not like some others which expressly or impliedly intended

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absence to mean an absence beyond the place of residence or jurisdiction. Upon that many decisions rest.

I may also observe that the inability of the senior judge to undertake the duty is an alternative ground for naming a substitute.

The statement of Judge Langelier that for personal reasons he did not wish to sit ought to be presumed as meaning for good reasons which in law were a valid excuse and would in the alternative suffice, although not expressed on the record.

As at present advised I should so presume, if I thought the statement in the record could be displaced by any such proof as offered.

I do not however think the record can be so displaced for our purpose by such alleged proof.

I therefore think the learned trial judge must be held to have had jurisdiction and therefore the appeal be dismissed with costs.

ANGLIN J.—Convicted by the Court of Sessions of the Peace of having unlawfully used means to procure a miscarriage upon one Alice Vachon in July, 1916, and thereupon sentenced to imprisonment for a term of five years, the appellant applied for and obtained

the reservation of several questions of law under section 1014 of the Criminal Code. The questions so reserved were determined adversely to him by the Court of King's Bench—unanimously, with the exception of three, in respect of which Mr. Justice Lavergne dissented. The defendant now appeals to this court. I find his three grounds of appeal succinctly stated in the judgment of Mr. Justice Cross in these terms:—

> (1) That the trial and conviction are null, because the judge who tried the case had power to act only in the absence or incapacity of the Judge of Sessions, whereas the latter was, in fact, neither absent nor incapacitated.
>
> (2) That the learned trial judge erred in admitting evidence of other criminal acts of the appellant.

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> (3) That, in any event, there was error in admitting such evidence of other criminal acts in rebuttal.

(1) The appellant urges that it appears by an affidavit intituled and filed in the Court of Sessions of the Peace, apparently made gratuitously by one Chouinard, the clerk of the court, that, although there are formal entries in the record of the trial that Judge Choquette presided in the absence of Judge Langelier, made by the direction of the former, the latter was in fact in his chambers in the court house at the time of the commencement of the trial. Affidavits filed on behalf of the Crown in the Court of King's Bench not only do not contradict the fact so deposed to, but rather support the inference that it is true. In stating the reserved case Judge Choquette has informed the court that although Judge Langelier had certainly been absent from the city of Quebec when the preliminary inquiry was held, neither he nor Judge Langelier can state whether the latter was or was not in his chambers, as alleged in the affidavits, when the trial of the accused began. He adds:—

> L'eut-il été, vu sa déclaration qu'il ne pouvait siéger, j'avais d'apres ma commission júridiction pour entendre la cause.

The reserved case contains no further statement as to the presence or absence of Judge Langelier.

I am unable to accede to the contention of counsel for the Crown that the admitted absence of Judge Langelier at the time of the preliminary investigation would give Judge Choquette jurisdiction to sit upon the trial of the defendant. His trial was a new proceeding which began only after arraignment and plea at a later date then fixed for the hearing.

Giroux v. *The King*[4]; *Re Walsh*[5], at p. 17. The absence of Judge Langelier having been recorded as the ground

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upon which Judge Choquette acted in his stead, the right of the Crown to invoke Judge Langelier's inability to act, if that be the import of Judge Choquette's reference to "*sa déclaration qu'll ne pouvait siéger,"* would seem at least questionable. I think the case must be dealt with on the footing that Judge Choquette's jurisdiction was dependent upon the "absence" of Judge Langelier.

Counsel for the Crown maintained that entries in the trial book conclusively established his absence and strenuously resisted their being controverted upon extraneous evidence. I question whether upon a proceeding such as this—a recourse afforded by the statute for the very purpose of determining whether the trial is open to exception upon any substantial ground that can properly be stated as a question of law—the verity of a statement in the record in regard to a mixed matter of law and fact essential to his jurisdiction made by or under the direction of a judge of a court of inferior jurisdiction, although it be a court of record, should be conclusively presumed *(Mayor of London* v. *Cox*[6]; *Falkingham* v. *Victorian Railways Commissioner*[7], at pages 463-4).

But we are dealing with a stated case (sub.-sec. 6 of sec. 1014) and, except as provided for by sub.-sec. 2 of sec. 1017 and subject to the power conferred by sub-sec. 3 of the same section, I incline strongly to the view that in disposing of the questions reserved the appellate court is confined to the facts set forth in the stated case. Unless the affidavit of Chouinard, intituled and filed in the Court of Sessions should be taken to be part of the stated case, it does not disclose the presence of Judge Langelier in the court house or even in the city of Quebec at the time when the defendant's trial began.

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In the view I take, however, it is unnecessary to determine these points.

For the purpose of disposing of the question now under consideration I shall assume (without so deciding) that it has been established by material proper for our consideration that Judge Langelier, though not present in court, was in fact in his chambers at the court

[4] 56 Can. S.C.R. 63; 39 D.L.R. 190.
[5] 23 Can. Crim. Cas. 7; 16 D.L.R. 500.
[6] L.R. 2 H.L. 239, at p. 262.
[7] [1900] A.C. 452.

house when the trial began. The defendant and his counsel appear not to have been aware of that fact, however, until after the trial had concluded and may therefore be excused for not having taken exception before or during it to the jurisdiction of the presiding judge.

Acting under Art. 3262(a) of the R.S.Q. (enacted by 5 Geo. V., ch. 52, sec. 3) Judge Choquette was empowered to hold the Court of Sessions of the Peace only

> in case of the absence or inability to act of one or more of the (Judges of the Court of Sessions of the Peace).

By the Order-in-Council by which he was appointed and in his commission the judge whom he is to replace is designated as

> the Judge of the Court of Sessions of the Peace whose residence is established in the City of Quebec.

This was Judge Langelier.

The expression "absence or inability to act" should of course be given a construction at once reasonable and in harmony with the purpose of the statute. "Inability to act" may or may not involve "absence." It is usually accompanied by physical absence; and absence may be due to physical inability to be present. But, as used in the statute, "absence" clearly means something different from "inability to act." It connotes physical non-presence from whatever cause. The question is non-presence in what place or within what area? We are not concerned with the cause of absence.

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It must be presumed to be for some good and sufficient reason (*Engeman* v. *The State*[8]), and not to be due solely to a mere arbitrary refusal to act, since such dereliction of duty *(Klaise* v. *The State*[9]) will not be assumed. For an instance of a statute authorising a deputy magistrate to sit upon the mere request of the magistrate appointed to hold the court see R.S.O. 1914, ch. 88, sec. 10.

It cannot have been the intention of the legislature that the jurisdiction of the replacing judge and the validity of any trial had before him should be open to question merely because it can be shewn that when it began the Judge of the Court of Sessions of the

[8] 54 N.J. Law 247, at p. 251.
[9] 27 Wis. 462.

Peace was elsewhere in the city of Quebec or even in the court house itself. Many grave inconveniences and uncertainties in the administration of justice would result from such a construction of the statute. It would impose upon the replacing judge the obligation of instituting a judicial inquiry as to the whereabouts of the Judge of the Court of Sessions of the Peace before the commencement of every trial.

"Absence," as used in this statute, must, I think, be taken to mean absence from the bench, or, at the utmost, absence from the court-room in which the trial takes place. That is a fact of which the replacing judge can be personally cognisant when the trial is beginning. Beyond that his actual knowledge ordinarily cannot extend. Reason and authority would seem to concur in indicating this to be the proper construction of what must be conceded to be an ambiguous term *(Watkins* v. *Mooney*[10], at pages 652-4)

> seldom used without explanatory words.

Phillips v. Phillips[11], at p. 172. Thus it may

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necessarily import prior presence. *Buchanan* v. *Rucker*[12], at p. 194; or it may mean merely

> not being in a particular place at the time referred to,

without importing prior presence. *Ashbury* v. *Ellis*[13], at p. 345. It may imply constructive as well as actual absence. *In re Brown*[14], at p. 385. In its technical meaning and standing alone it signifies "want of appearance." *Phillips* v. *Phillips*[15]. *In common usage (it) simply means a state*

> of being away from or at a distance from, not in company with,

Paine v. *Drew*[16]*,* at p. 317; and *the words of a statute are to be taken in their ordinary familiar signification and import.* Potter's Dwarris on Statutes, p. 193.

The reference in the order-in-council and commission to the "residence in the city of Quebec" of Judge Langelier are invoked by the appellant in support of his contention that "absence" here means absence from that city. But these words are not in the statute, and

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[10] 114 Ky. 646.
[11] 1 P. & D. 169.
[12] 9 East 192.
[13] [1893] A.C. 339.
[14] 80 Cal. 381.
[15] 1 P. & D. 169.
[16] 44 N.H. 306.

it is the statute that prescribes the conditions of the jurisdiction which it confers. The language of the commission and order-in-council cannot aid in its construction.

In *Bingham* v. *Cabbot*[17], the Supreme Court of the United States was called upon to determine the meaning of the word "absent" in a statute affecting the constitution of Federal Circuit Courts. By sec. 4 of ch. 20 of the statute of the 1st session of the First Congress the Federal Circuit Courts were constituted each to consist of two Justices of the Supreme Court of the United States and the District Judge. Sec. 1 of ch. 22 of the statute of the 2nd session of the Second Congress enacted that the attendance of only one of

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the Justices of the Supreme Court should be sufficient and that

> when only one Judge of the Supreme Court shall attend any Circuit Court and the District Judge shall be absent * * * such Circuit Court may consist of the said Judge of the Supreme Court alone.

It appeared that the District Judge was present on the Bench but a memorandum in the margin of the record stated that he "did not sit in the cause." The court said, at p. 36:—

> We are perfectly clear in the opinion that, although the District Judge was on the Bench, yet, if he did not sit in the cause, he was absent in contemplation of law.

In *Engeman* v. *The State*[18], a similar question arose under a New Jersey statute of 1888 enabling the Chief Justice, or any associate Justice of the Supreme Court of the State

> in case of absence, sickness or other inability, or vacancy in the office of the law or president judge of any county in this State to sit or perform the duties of his office.

Van Syckle J., delivering the judgment of the court, said, at p. 251:—

> It is not necessary that the Supreme Court Justice, before he may proceed with the business in these courts shall institute a judicial inquiry to ascertain why the law judge is not in attendance. "Absence" in this Act means non-presence in the courts; when the law judge is temporarily away he must be presumed to be away by reason of some inability to attend and he is absent in the statutory sense.

In *Byrne* v. *Arnold*[19], the Supreme Court of New Brunswick passed upon the construction of the 105th section of the Canada Temperance Act, providing that

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[17] 3 Dal. 19.
[18] 54 N.J. Law 247.
[19] 24 N.B. Rep. 161.

> if (a) prosecution is brought before two * * * justices no other justice shall sit or take part therein unless by reason of their absence or the absence of one of them, etc.

The court was of the opinion that if the justices before whom the prosecution was begun were lawfully subpoenaed as witness, they would, although physically present in the court-room, be "absent" in contemplation

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of the statute so that two other justices might lawfully carry on the proceeding. Allen C.J., with whom Weldon and Fraser JJ. concurred, said at 164:

> I think the word "absence" in this section does not necessarily mean actual absence from the place or room where the trial is held; but would apply to a case where the justices had, for some cause, become incapable of sitting and taking part in the proceedings. If such was the case I think they would be absent within the meaning of the Act, though not absent in fact.

Palmer J. adds at 167:

> When the Canada Temperance Act enacts that when a justice is absent another can act, it does not mean that such justice is not in any particular house or place but simply that he is not taking part in the hearing of the case, *i.e.,* does not form a member of the court * * * If this construction of the Act is not correct it would be in the power of a defendant to defeat any trial, and a construction that would lead to such a result, I do not think is even reasonable.

In *Ex parte Cormier*[20], the Supreme Court of New Brunswick, again called upon to construe a statute empowering another magistrate to act in the absence of the police magistrate, held that

> The absence intended is * * * not actual absence from the jurisdiction or even from the place of trial, but it includes inability to attend to the business of the court such as was proved in this case.

The attendance of the police magistrate had been required before another tribunal apparently sitting in the same building at the time of the trial.

Of course the history of the legislation or the context of the statute may indicate an intention that the word "absence" should receive a stricter construction. *Opie* v. *Clancy*[21], at pages 46-7-. Compare *Manners* v. *Ripsam*[22] with *Lucas* v. *Ensign*[23], at p. 144.

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[20] 17 Can. Cr. Cas. 179.
[21] 27 R.I. 42.
[22] 61 N.J. Law 207, at p. 208.
[23] 4 N.Y. Leg. Obs. 142.

While I think that the mention of inability to act of the Judge of Sessions as a distinct ground upon which the replacing judge may sit in his stead makes it clear that "absence" in the statute means actual absence

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and not merely constructive absence such as was held is sufficient in *Bingham* v. *Cabbot*[24], and *Byrne* v. *Arnold*[25], I am of the opinion that the "absence" of Judge Langelier is sufficiently established by the admitted fact that when the trial of the appellant began he was neither on the Bench nor in the court-room where such trial was held. His subsequent presence would be immaterial. *Reg.* v. *Perkin*[26]; *Ex parte Cormier*[27].

(2) The evidence in chief on behalf of the Crown furnished cogent proof of a miscarriage having followed the use by the defendant upon the person of Alice Vachon of instruments adapted to procure it. That it was so caused was an inference clearly open. The defendant's criminal intent was also *primâ facie* established since every man is presumed to intend the natural and probable consequences of his acts. Giving evidence on his own behalf the accused admitted having used instruments as deposed to by the chief witness for the Crown (a matter theretofore in issue on his plea of not guilty), but he denied his intent to procure a miscarriage, averring that miscarriage had in fact already begun before his intervention and that his purpose was merely to obviate septic poisoning. The defence of innocent intent was thus set up. To rebut this defence —to aid the court in determining the true intent of the accused, thus made the vital issue—the Crown maintains that evidence of the use by him of similar instruments in two other cases for the purpose of procuring miscarriage was admissible.

The objections taken by the defence to the admissibility of this evidence are that it is irrelevant to the issue, that it is unfair to the accused as tending to prove

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the commission by him of other crimes and that he is a person of bad character, and that it contradicts him on a collateral issue.

Answers of the accused upon purely collateral matters are no doubt conclusive. But matter that is relevant is not purely collateral. Moreover, that the evidence in question had the

[24] 3 Dal. 19.
[25] 24 N.B. Rep. 161.
[26] 7 Q.B. 165.
[27] 17 Can. Cr. Cas., 179.

effect of contradicting him on such a matter would not be a good reason for excluding it if otherwise admissible.

It no doubt tended to impeach the defendant's character. But that again does not form a ground for its exclusion if admissible for other purposes. *Rex* v. *Kurasch*[28], cited by Mr. Roy himself, makes this very clear. See too *Rex* v. *Thompson*[29].

The other objections are more serious and, in view of the decision of the Ontario Court of Appeal in *Rex* v. *Pollard*[30], call for careful consideration. Counsel for the Crown maintains that the evidence in question is relevant and admissible because in itself it tends to make it more probable that the intent of the accused in using instruments on Alice Vachon was criminal and not innocent and also because it established two of a number of cases in which, according to the evidence of Alice Vachon, the accused had stated to her that he had administered like treatment under similar circumstances, and is corroborative of her testimony. The passage in Alice Vachon's evidence is as follows:—

> Q.—Est-ce que le médecin a essayé de vous rassurer? R.—Oui monsieur.
>
> Q.—Qu'est-ce qu'il vous a dit? R.—Il m'a dit qu'il en traitait d'autres pour la même chose que moi et qu'il y en avait que ça prenait du temps, plus de temps que moi.
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> Q.—Vous en a-t-il nommé des cas? R.—Il m'a pas nommé des cas. Il m'a pas nommé les noms, mais qu'il y en avait une à Québec ici qui restait chez eux à elle et puis qu'elle était malade la même chose que moi, mais qu'elle était pas découragée.

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> Q.—Vous a-t-il parlé de d'autres aussi, mademoiselle? R.—Oui, il m'a dit qu'il y en avait deux ou trois qu'il soignait comme ça.

This testimony counsel for the Crown maintains affords some evidence that procuring abortion was systematic with the accused.

In *Pollard's Case*[31], basing its decision on *Rex* v. *Bond*[32], the Ontario Court of Appeal held that testimony similar to that given in the case at bar by Bernadette Cleremont née Cloutier and Laetitia Cloutier had been improperly admitted in the absence of other evidence of a system of the existence of which a single prior criminal act of the same kind would not afford any proof.

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[28] 25 Cox C.C. 55.
[29] [1917] 2 K.B. 630, at p. 632.
[30] 19 Ont. L.R. 96.
[31] 19 Ont. L.R. 96.
[32] [1906] 2 K.B. 389.

In *Makin* v. *Attorney-General for New South Wales*[33], at p. 65, Lord Herschell formulated the rule in these terms, which have been accepted as authoritative in all subsequent cases:—

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or *to rebut a defence which would otherwise be open to the accused.*

This language is expressly approved of by the House of Lords in *Rex* v. *Ball*[34]. In *Rex* v. *Wyatt*[35], Lord Alverstone, after citing it, quoted from the judgment of Lord Russell of Killowen C.J. in *Reg.* v. *Rhodes*[36], at p. 81, the following passage:—

> It seems to me quite clear that if the transactions with Elston and Chambers had taken place before that with Bays at a period not too remote, the evidence of Elston and Chambers would have been admissible against the prisoner.

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The transactions with them were similar to that charged in the indictment. At p. 193 Lord Alverstone concludes:—

> The evidence objected to was clearly admissible as tending to establish a systematic course of conduct on the part of the accused and as negativing any accident or mistake or the existence of any reasonable or honest motive.

"These last words," says Jelf J., in *Rex* v. *Bond*[37], at p. 412, "are equivalent to and confirm Lord Herschell's expression

> to rebut a defence which would be otherwise open to the accused.

As Darling J. points out in the same case, at p. 409, Lord Herschell did not mean

> that such evidence might be called to rebut any defence possibly open but of an intention to rely on which there was no probability whatever. Here, however, the

[33] [1894] A.C. 57.
[34] [1911] A.C. 47.
[35] [1904] 1 K.B. 188.
[36] [1899] 1 Q.B. 77.
[37] [1906] 2 K.B. 389.

> evidence was called to overthrow a defence already set up and admitted to be the defendant's answer to the charge.

In the latest reported case that I have found, *Rex* v. *Thompson*[38], Lord Reading C.J. said, at p. 632:—

> There is no doubt as to the principles of law applicable to this case; they are well settled and in recent years have been frequently discussed and approved, and notably by the Judicial Committee of the Privy Council, in *Makin* v. *Attorney-General for New South Wales*[39], and by the House of Lords in *R.* v. *Ball*[40]. The general rule is *that the evidence tendered must be relevant to the charge* for which the accused is being tried. If the evidence merely proves, or tends to prove, that the accused is of such evil character or disposition that he is likely to have committed the offence charged against him, it is irrelevant and is inadmissible. If *it tend? to prove that the accused committed the crime charged against him it is relevant and admissible,* notwithstanding that incidentally it may also prove, or tend to prove, that the accused is a person of criminal or immoral character or disposition. *Reg.* v. *Ollis (per* Channell J.)[41]; *Perkins* v. *Jeffery*[42]. The difficulty lies in the application of this general rule to particular cases.

This judgment was affirmed in the House of Lords, 13 Crim. App. R. 61[43].

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In *Rex* v. *Boyle and Merchant*[44], at p. 347, the same learned Chief Justice, discussing the admissibility against a defendant charged with demanding money with menaces of evidence of other recent transactions similar in all respects to that charged, said

> We think that the ground upon which such evidence is admissible is that it is relevant to the question *of the real intent of the accused in doing the acts.* Its object is to negative such a defence as mistake or accident *or absence of criminal intent* and to prove the guilty mind which is the necessary ingredient of the offence charged. * * * In the recent case of *Mason* v. *Rex*[45], this court followed the decision in *Reg. v. Rhodes*[46], and came to the conclusion that the evidence of similar transactions subsequent to the charge was admissible *in order to rebut the defence set up.*

Avory J., quoting the foregoing language with approval in delivering the judgment of the Court of Criminal Appeal in *Perkins* v. *Jeffrey*[47], at p. 708, preceded it with this statement:—

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[38] [1917] 2 K.B. 630.
[39] [1894] A.C. 57.
[40] [1911] A.C. 47.
[41] [1900] 2 K.B. 758, at pages 781, 782.
[42] [1915] 2 K.B. 702, at page 707.
[43] [1918] A.C. 221.
[44] [1914] 3 K.B. 339.
[45] 10 Cr. App. Rep. 169.
[46] [1899] 1 Q.B. 77.
[47] [1915] 2 K.B. 702.

> But it is, we think, open to doubt whether evidence is admissible to prove a "system or course of conduct" unless it is relevant to negative accident or mistake *or to prove a particular intention.*

In *Rex.* v. *Shellaker*[48]*,* on a prosecution for unlawfully and carnally knowing a girl under 16, evidence of previous acts and conduct of the accused tending to shew that he had previously had connection with the girl was held admissible, as Isaacs C.J. said, citing *Reg.* v. *Ollis*[49], for the purpose of shewing intent. See too *Rex* v. *Smith,*[50]; *Reg.* v. *Francis*[51]; Archbold's Criminal Pleading Evidence and Practice, 25th ed. (1918), 345 *et seq.* Roscoe's Criminal Evidence, 12th ed., p. 80.

In *Rex* v. *Fisher*[52], Channell J., speaking for the Court of Criminal Appeal, said at p. 152:—

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> The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that the prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he committed the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence.

And at p. 153:

> If all the cases had been frauds of a similar character shewing a systematic course of swindling by the same method, then the evidence would have been admissible.

The passage first quoted from the *Fisher Case*[53] is approved in *Rex* v. *Rodley*[54], at p. 472. In *Rex* v. *Ball*[55], a case of incest, the House of Lords upheld the admission of evidence of previous incestuous relations between the defendants to establish, as Lord Loreburn C. says, at p. 71, that

> the proper inference from their occupying the same bedroom and the same bed was an inference of guilt or—which is the same thing, in another way—that the defence of innocent being together as brother and sister ought to fail.

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[48] [1914] 1 K.B. 414.
[49] [1900] 2 K.B. 758.
[50] 84 L.J. K.B. 2153.
[51] 30 L.T. 503.
[52] [1910] 1 K.B. 149.
[53] [1910] 1 K.B. 149.
[54] [1913] 3 K.B. 468.
[55] [1911] A.C. 47.

This, says Avory J. in *Rex* v. *Rodley*[54], at p. 473,

> comes within the rule previously indicated that (such) evidence is admissible to rebut a defence really in issue.

In *Reg.* v. *Ollis*[56], the defendant was charged with obtaining money on three worthless cheques. To prove guilty knowledge the prosecutor on a former charge against the accused (of which he had been acquitted), based on a like use of a single worthless cheque, was called and gave evidence that he had been induced to give the accused his cheque by a false representation that another cheque taken in exchange was

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good. A strong court held the evidence admissible, Lord Russell of Killowen C.J. saying, at p. 76:—

> It is impossible to say that all these facts were not relevant *as shewing an intention to defraud.* The fact of the dishonour of the first cheque might, and perhaps ought to, have been capable of explanation, but it is impossible to say that it was not relevant.

Channell J., at p. 782, gives a very apt illustration of the principle as applied to a case of passing counterfeit coin.

> In part the syllabus in *The People* v. *Hodge*[57], reads as follows:—
>
> Where defendant on trial for manslaughter in procuring an abortion, admitted the abortion, but claimed that he believed that the operation was necessary, and that he performed it without criminal intent, evidence that he had performed a similar operation on another woman for the purpose of producing an abortion was admissible on the issue of intent.
>
> See too The People v. Seaman[58], at p. 357 et seq.

I do not cite *Reg.* v. *Dale*[59], referred to by Mr. Justice Cross, because, although very much in point, and an opinion of Charles J., whom Lord Alverstone in *Rex* v. *Thomson*[60], at p. 22, speaks of as "a great authority," it has been adversely commented upon by that learned Chief Justice at p. 396 and by Lawrence J., at p. 424, in *Rex* v. *Bond*[61], the case which probably calls for the most careful consideration.

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[54] [1913] 3 K.B. 468.
[56] [1900] 2 K.B. 758.
[57] 141 Mich. 312.
[58] 107 Mich. 318.
[59] 16 Cox C.C. 703.
[60] [1912] 3 K.B. 19.
[61] [1906] 2 K.B. 389, at p. 398.

That case involved a charge similar to that now before us. The accused had admitted to Crown witnesses that he had used instruments on the complainant but "suggested" that it was for a lawful purpose and with no criminal intent.

That was substantially his defence. The evidence of one Taylor, that he had performed a like operation upon her to procure a miscarriage, was admitted to shew criminal intent. She added, however, that the

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accused had told her "he had put dozens of girls right." The judgments are very carefully and, if I may be permitted to say so, as was usual with that learned judge, very accurately analysed by Osier J.A. in *Rex* v. *Pollard*[62], with the probable exception of that of A. T. Lawrence J. As Mr. Justice Osier says, at p. 99:—

> The point (in *Pollard's Case*[62]) was not actually decided in the recent case of *The King* v. *Bond*[63], but it would seem from the opinions of the majority of the judges who took part in the decision that the evidence was not in the circumstances admissible. * * * In the case before us the evidence of system which carried the day against the accused in *The King* v. *Bond (supra),* or anything approaching it, which would let in proof of a single prior criminal act as part of a system is wanting; and therefore, in my opinion, the conviction of the prisoners cannot stand (p. 102).

The evidence of system referred to was the statement of the prisoner in the *Bond Case*[63] made to the Crown witness Taylor that, "he had put dozens of girls right." *Pollard's Case*[62], therefore, is authority for the admissibility on the issue of intent of proof of a single prior criminal act of like nature provided some proof is first given of a system of which it may form part.

Of the seven judges who heard the appeal in the *Bond Case*[63], two, Alverstone C.J. and Ridley J., thought the evidence of the prior act inadmissible apparently because the defence was not accident or mistake and the evidence of system was in their opinion insufficient.

Jelf J. and. Darling J. thought the evidence admissible without reference to the statement of the accused as to his treatment of dozens of other girls, and that the fact that it was a

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[62] 19 Ont. L.R. 96.
[62] 19 Ont. L.R. 96.
[63] [1906] 2 K.B. 389, at p. 398.
[63] [1906] 2 K.B. 389, at p. 398.
[62] 19 Ont. L.R. 96.
[63] [1906] 2 K.B. 389, at p. 398.

single instance affected only its weight and not its admissibility. The reasoning of Darling J., at pp. 409-10, is very cogent. He concludes:—

> Taylor's evidence went to prove that, contrary to the defendant's allegation in defence as to his being engaged in doing a lawful act, he

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> was doing a thing which, in his view, was apt to procure abortion, and that because it was so he had already done it with that unlawful avowed knowledge and purpose. This evidence, therefore, tends to prove that the defendant had, in repeating his former conduct, an intention different from that alleged by him in his defence, so it is not foreign to the point of it nor less relevant because it goes to prove the charge in the indictment.

Jelf J., at p. 413, says:—

> Upon the question whether there was or was not a design on the prisoner's part to procure the miscarriage of Ethel Jones evidence that on another occasion he had done the same thing with similar instruments under similar circumstances with that design upon another girl seems to me to have a definite bearing. The fact that only one other case was brought forward and that case nine months old, goes in my mind, only to the weight, and not to the admissibility of the evidence. The subject of inquiry is the state of mind of the prisoner when he used the instruments upon Ethel Jones and the improbability that on one occasion under precisely similar circumstances he should have the design to procure a miscarriage, and on the other occasion should have another and an innocent object would tend to shew (and that is all that is necessary) that he had the bad design in regard to Ethel Jones. Of course, if instances are multiplied, the weight of the evidence is greatly increased, and if a system is shewn it may be irresistible. But to my mind it is quite unnecessary to shew a system which is only a question of degree.

Kennedy J., if there had not been anything more, would have excluded the evidence of a single prior act done nine months before as affording no just ground of an inference of guilty intent in the case on trial. Citing *Reg.* v. *Cooper*[64], at pp. 549-50, however, he thought the statement made by the prisoner to the witness Taylor could not be excluded and amounted to proof of a course of conduct sufficient to render proof of the prior operation admissible as evidence of an act that formed part of such course of conduct and warranting an inference of a systematic pursuit of the same criminal object. A single instance of a former similar offence is in his opinion relevant without proof of system only to rebut a defence of accident or mistake.

I confess my inability to understand how evidence

[64] 3 Cox C.C. 547.

of a single prior similar act can be relevant to an issue of design versus accident or mistake, if it be wholly irrelevant to an issue of criminal versus innocent intent.

A. T. Lawrence J., as I read his judgment, distinctly held evidence of the former offence admissible as relevant on the issue of intent. He says, at p. 420:—

> The relevance depends upon the issues actually in contest; whenever it is in issue whether the prisoner, though he did the act alleged, did it without any intention, *i.e.,* accidentally, or without any criminal intention, *i.e.,* innocently, such evidence may be given.
>
> * * * * * * * * *
>
> If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence is admissible to rebut this defence by shewing knowledge of some fact essential to guilty knowledge or by shewing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances. The number of cases and the peculiarity of the circumstances tend to shew the improbability of the innocent intention (p. 421).
>
> The mind of the prisoner can only be revealed by his words or by his acts. It is in many cases impossible to form a sound conclusion upon the state of his mind at a given moment, unless his words and acts under similar circumstances are subjected to investigation. It is for this reason that I think the words of Lord Herschell—"to rebut a defence which would otherwise be open to the accused"—are an essential part of the proposition of law. This idea is also expressed by Lord Alverstone C.J. in *Rex* v. *Wyatt*[65], when he says that such evidence is admissible as negativing any accident or mistake or the existence of any reasonable or honest motive.
>
> Any statement of the law which omits this latter part of the proposition would seriously cramp the administration of justice and cannot be supported upon principle.
>
> * * * * * * * * *
>
> In all cases in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstances there must be a nexus between the two sets of facts otherwise no inference can be safely deduced therefrom (p. 424).

The learned judge concluded:—

> It is impossible without reversing a long series of cases to say that the evidence of Taylor was not admissible. It shewed that the illness of the prosecutrix was the result of design, and not of accident; it shewed that the prisoner's scheme or system when the indulgence of

[65] [1904] 1 K.B. 188 at p. 193.

> his passions had got girls into trouble was to use these instruments upon them to relieve himself from the burden of paternity; *it tended to rebut the defence he set up of an innocent operation, and to negative any reasonable or honest motive for its performance.*

It seems to me with respect, to be reasonably clear that Mr. Justice Lawrence agreed with Darling and Jelf JJ. rather than with Kennedy and Bray JJ., as Mr. Justice Osier appears to have thought.

No doubt, however, as put by Osier J.A., it was

> the evidence of system which carried the day against the accused in *The King* v. *Bond*[66].

It led Kennedy and Bray JJ. to hold the evidence in question admissible thus supporting the conclusion of Darling, Jelf, and Lawrence JJ. in favour of dismissing the appeal. While the *Bond Case*[66], therefore, certainly cannot be cited as an authoritative decision for the admission of evidence of the commission by the accused of another similar offence, if unaccompanied by some other similar evidence of system, to prove criminal intent where that is in issue, or to rebut a defence of innocent or lawful purpose, the reasoning of Darling, Jelf, and Lawrence JJ. seems to me unanswerable. With Jelf J. I am of the opinion that whatever objection there may be to evidence of a single other similar offence goes to its weight only and not to its admissibility. It

> tends to rebut the defence (of innocent purpose) which would be otherwise open to the accused

(Makin v. Attorney-General for New South Wales[67])—

> to rebut the defence set up,

(Mason v. Rex[68])—

> to rebut a defence really in issue,

(Rex v. Rodley[69])—

[66] [1906] 2 K.B. 389.
[66] [1906] 2 K.B. 389.
[67] [1894] A.C 57.
[68] 10 Cr. App. R. 169.
[69] [1913] 3 K.B. 468.

> to overthrow a defence already set up and admitted to be the defendant's answer to the charge

Rex v. Bond[70], per Darling J.—

Its object is to negative the defence of absence of criminal intent *(Rex* v. *Boyle and Merchant*[71]), to establish that the defence of innocent conduct should fail *(Rex* v. *Ball*[72]), to prove a particular intention *(Perkins v. Jeffrey*[73]). With Lord Russell C.J. I find it impossible to say that such evidence is not relevant *(Reg.* v. *Ollis*[74]), inasmuch as it tends to make more probable the criminal intent regarding which, in view of the defence set up, it was essential that the Crown should not leave room for reasonable doubt. How far it does so is a question of degree which affects its weight not its admissibility; see the speech of Lord Atkinson in *Rex* v. *Thompson*[75], at p. 72.

But while I think the evidence of the Cleremont and Cloutier women was admissible without and apart from any evidence of system, we have in the passage quoted from, the testimony of Alice Vachon, an admission by the accused of his practice or system of procuring abortions quite as clear and strong as was that deposed to by the witness Taylor in the *Bond Case*[70] and deemed sufficient by Kennedy and Bray JJ. to render admissible evidence of another like offence committed by the accused. The evidence here is of two like offences in the commission of which the method pursued was so similar to that adopted in the accused's treatment of Alice Vachon that the necessary nexus is clear notwithstanding that they took place, one, two years, and the other, four or five years before.

The admissibility of the evidence could probably be

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upheld also on the ground that it is corroborative of the testimony of Alice Vachon that the accused had told of having treated other girls in the same manner. *Rex v. Chitson*[76].

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[70] [1906] 2 K.B. 389.
[71] [1914] 3 K.B. 339.
[72] [1911] A.C. 47.
[73] [1915] 2 K.B. 702.
[74] [1900] 2 K.B. 758.
[75] 13 Cr. App. R. 61; [1918] A.C. 221, 229, 231.
[70] [1906] 2 K.B. 389.
[76] [1909] 2 K.B. 945.

The weight of the testimony was, of course, for the consideration of the trial judge in this case, as it would have been for that of a jury had the trial been by jury, I entertain no doubt whatever that the evidence objected to was admissible.

Nor have I any doubt that the evidence was properly received in rebuttal. It was offered to meet the defence of innocent purpose put forward by the accused. While such a defence was always open, there was no probability of its being set up until the prisoner gave his testimony. It was then actually in issue. *Rex* v. *Bond*[77], at pp. 409, 420. The evidence was offered to rebut the respondent's denial of criminal intent and, according to the view stated in a very recent criminal case, could not properly have been admitted for that purpose until that defence was definitely put forward. Avory J. in delivering the judgment of the Court of Criminal Appeal in *Perkins* v. *Jeffery*[78], said, at p. 708:

> Having regard to what was said in the House of Lords in the case of *Rex* v. *Christie*[79], as to the practice in a criminal case of guarding against the accused being prejudiced by evidence which though admissible would probably have a prejudicial influence on the minds of the jury out of proportion of its true evidential value, we think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake, or *absence of intention* to insult, is definitely put forward.

But as Osier J.A. said in *Rex* v. *Pollard*[80], at p. 103, in answer to the contention of the appellants that the evidence objected to, if admissible, should have formed part of the Crown's case in the first instance and that it was erroneous to admit it in reply:—

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> In my view, however, the point is of no importance. If admissible at all, the evidence might, by leave of and in the discretion of the trial judge, be given at either stage of the case for the purpose of disproving honesty of motive, if that were the defence relied upon, or of rebutting a defence of accident or mistake, or to contradict the defendant on a point material to the charge, as in *The King* v. *Biggins*[81].

In *Rex* v. *Crippen*[82], the Court of Criminal Appeal held that:

> Where evidence which is relevant to the issue is tendered by the prosecution to rebut the case set up by the defence it is for the judge at the trial to determine in his discretion whether such evidence should be allowed to be given or not. Even if the judge exercised his discretion in a way different from that in which the Court of Criminal Appeal would have exercised it, that affords no ground for quashing the conviction of the prisoner. If, however, it is shewn in any case that the prosecution

[77] [1906] 2 K.B. 389.
[78] [1915] 2 K.B. 702.
[79] [1914] A.C. 545.
[80] 19 Ont. L.R. 96.
[81] 7 Can. Cr. Cas. 68.
[82] 27 Times L.R. 69.

has done something unfair which has resulted in injustice to the prisoner the Court of Appeal may interfere.

Here the learned judge when admitting the testimony of Cleremont and Clouthier definitely informed the defendant that he would have the fullest opportunity of meeting it by calling any further evidence he might wish in sur-rebuttal and offered him an adjournment for that purpose; and the defendant actually gave evidence in contradiction of that given by those witnesses.

Not only was the evidence in my opinion properly admitted but every care was taken that the accused should suffer no possible injustice by its reception in rebuttal.

The appeal fails and should be dismissed.

BRODEUR J.—I am of opinion that this appeal should be dismissed with costs. The reasons for judgment of Mr. Justice Anglin and of Mr. Justice Lemieux having been communicated to me, I concur in those reasons.

LEMIEUX C.J. *(ad hoc).—On* the 15th May, 1917, Brunet, a physician, was convicted, before Judge

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Choquette, at Quebec, of practising abortion on the person of one Alice Vachon, and sentenced for such crime to five years in the penitentiary (303 Crim. Code).

Before passing sentence, the judge at Brunet's request reserved for the decision of the Court of King's Bench, the two following questions:—

1. Whether the presiding judge had jurisdiction to hear and determine the case;

2. Whether certain evidence adduced in rebuttal by the Crown was legal or not.

Appellant Brunet has contended, as well before the Court of King's Bench as before the present court, that Judge Choquette had no jurisdiction to hear and determine the case and that the evidence in reply put in by the Crown was illegal and prejudicial to the accused inasmuch as the trial judge had relied on such evidence to convict the appellant.

First Question.

Validity of the evidence in rebuttal or in reply adduced by the Crowm

As stated in the record of the reserved case, it was proved by the prosecution that the accused had, on the 13th, 14th, 15th and 16th days of July, 1916, used certain surgical instruments on the person of one Alice Vachon, an unmarried female, who was pregnant at the time, for the purpose of procuring her miscarriage.

The Crown, in making its proof in chief, adduced the evidence of the girl upon whom the illegal operation had been performed as well as medical evidence of the symptoms of Alice Vachon and of the mutilated condition of the fœtus and then rested its case.

Brunet, the accused, thought proper to be examined in his own behalf and stated, as a witness, that the instruments used by him on the person of Alice Vachon

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were so used for a lawful purpose and without any criminal intent.

In order to repel such criminal intent which the girl's evidence would fasten on him, the following question is put to Brunet by his attorney:—

> Q.—At all the visits which Alice Vachon made to you, she has sworn that you had worked in her body with certain instruments to bring about abortion, at almost every one of her visits, except in the afternoon; I ask you, is that true or not?
>
> A.—I did not use instruments to bring about abortion, but I used instruments to produce disinfection.

In cross-examination, he was asked by the Crown if it was not true that, in 1914, he had procured the miscarriage of two females living on Bridge St., Quebec city.

Following are the questions asked him in that connection as well as his answers thereto:—

> Q.—Now, did you not either procure the abortion of two young girls residing on Bridge St. in the fall of 1914? Question objected to. Question allowed. A.—It was not done, that is sure.
>
> Q.—I put you the question whether, in the fall of 1914, you did not procure the abortion particularly of a girl residing on Bridge St.? Question objected to. Objection reserved. A.—I do not recollect that.
>
> Q.—Will you swear that that did not happen? A.—I would have to see the person to be able to tell.
>
> Q.—You cannot remember? A.—Why no; in 1914, I do not remember.

The Crown, in reply or in rebuttal, heard, as witnesses, two women, Laetitia Cloutier and Bernadette Clouthier, who testified that the appellant had procured the miscarriage of each of them, some few years before, by methods which resembled those described by Alice Vachon as having been applied to her.

Brunet, heard as a witness in his own behalf, expressly admits having used instruments on the person of Alice Vachon; he denies however that it was with the criminal intent of procuring abortion, but states, on the contrary, that it was for disinfection purposes.

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Brunet's assertion was obviously intended to exculpate himself and to repel or disprove all evidence tending to shew that he had employed such instruments for abortive purposes.

Under such circumstances, was the Crown entitled to contradict Brunet, to rebut his affirmation and to examine, in reply, witnesses to shew that Brunet, with a criminal intent, that of causing abortion, had performed, on those very witnesses, similar practices, using instruments like those used in the case of Alice Vachon? In this matter of evidence in reply, the rule adopted by all the English authors is that such evidence must not be confirmatory. Evidence in reply must, as a general rule, be strictly confined to rebutting the defendant's case and must not merely confirm that of the plaintiff or prosecutor.

Brunet's contention, as embodied in his testimony, that he had used certain instruments on the person of Alice Vachon not with a view to determining abortion but in order to produce disinfection, purported on his behalf the allegation of a certain fact intended to establish his good faith and dismiss any criminal intent.

Such his claim amounted to a special plea based on a special fact which the Crown, in the examination in chief, could not anticipate. That theory of the disinfection constituted a new fact which the Crown had the right to disprove or rebut by evidence in reply of other facts excluding good faith, that is to say, of similar practices previously performed by the accused, on other persons, for a like criminal purpose.

Such evidence was not confirmatory of the prosecutor's case, but was evidence the nature and intent of which was to rebut the defendant's case and pretensions.

Jurisprudence or at least a list of judgments are to the effect that the evidence to prove in reply or in rebuttal

against the accused similar acts committed by him on other occasions is legal, when the defence of absence of intent to commit a crime is definitely put forward. It has been decided that such evidence was admissible upon three grounds: to establish design, to rebut the defence of accident, mistake or lack of criminal intent, and as shewing a systematic course of conduct.

As said in Perkins v. Jeffery[83]:

> There is an essential difference between evidence tending to shew generally that the accused had a fraudulent or dishonest mind, * * and evidence tending to shew that he had a fraudulent or dishonest mind in the particular transaction, the subject matter of the charge, then being investigated.

In the most recent criminal law treatise entitled Outlines of Criminal Law, published by Kenny, Professor of the Laws of England, 8th ed., p. 354, we find the following doctrine expounded:—

> Nor is there, even in English law, any intrinsic objection to giving evidence of the prisoner having committed other crimes, if there be any special circumstance in the case to render those crimes legally relevant,
>
> * * * * * * * * * *
>
> Whilst the fact of a prisoner having committed other similar offences is not relevant to the question whether he committed the *actus reus* of which he is accused now, yet, so soon as this *actus reus* has been fully established, evidence of those previous offences may well be relevant to the question of his state of mind in committing this act *(his mens rea)* if the defendant do actually raise that question *(Rex* v. *Rodley)*[84]. Such evidence was originally admitted only in exceptional offences where a denial of *mens rea* was peculiarly easy, like embezzlement or false pretences. But now the admissibility is recognised as a general rule in no way limited to peculiar classes of crime.

And the author quotes a number of cases where decisions were rendered supporting that principle.

On that ground, we find: that the evidence in reply adduced by the Crown through the two girls Leatitia and Bernadette Clouthier was legal inasmuch as such evidence was not confirmatory of the prosecution's case, but was meant to disprove or deny the assertion

[83] [1915] 2 K.B. 702 at p. 708.
[84] 9 Cr. App. R. 69 at p. 75.

made under oath by Brunet, of a new fact intended to establish his good faith; that such evidence was further legal inasmuch as it exposed or purported to expose Brunet's perverse or criminal mind in his practices or in his use of instruments on the person of the Vachon girl, to procure her abortion, by reason of the fact that, for a like criminal purpose, he had previously performed in a similar way on the Clouthier girls.

Second Question.

Had Magistrate Choquette proper jurisdiction to hear and determine the case?

Magistrate Choquette, who tried and convicted Brunet, is a Judge of the Sessions of the Peace, but his jurisdiction as such is subject to a particular condition, that is to say, he may sit only in the case of absence or inability to act of Judge Langelier, who is the regular Judge of the Sessions of the Peace, in and for the District of Quebec.

Brunet's contention is that Magistrate Choquette has heard and determined the information with which he was charged without due power or jurisdiction so to do, owing to the fact that, at the time of the trial, Judge Langelier was not absent, but that, on the contrary, he was then present in his chambers, at the court house, Quebec city, and furthermore that the condition to which Magistrate Choquette's jurisdiction is subject, *i.e.,* the absence of Judge Langelier, does not appear in the record.

All the proceedings had in the Brunet case before Magistrate Choquette bear, as a head-line, the statement that Magistrate Choquette is sitting in the absence and owing to the absence of Judge Langelier.

Such declaration in the record is supposed to be true or implies a presumption *pro tantum* of truth, to wit: that Judge Langelier was juridically absent for

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reasons deemed valid which it is not our province to question or appreciate. Such presumption *pro tantum* could of course be nullified and superseded by a stronger presumption or by legal evidence, offered in the usual way of legal debate, in support of a plea declining the jurisdiction of the court.

No such declinatory plea was ever urged in this matter.

We read, in Broom's Legal Maxims, p. 722, that

> where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is *omnia præsumuntur rite et solleniter esse acta donec probetur in contrarium,* everything is presumed to be rightly and duly performed until the contrary is shewn. The following may be mentioned as general presumptions of law illustrating this maxim— that a man, in fact acting in a public capacity, was properly appointed and is duly authorised so to act; that the records of a court of justice have been correctly made, according to the rule, *res judicata pro veritate accipitur;* that judges and jurors do nothing causelessly and maliciously; that the decisions of a court of competent jurisdiction are well founded, and their judgments regular, etc.

The statute, when referring to the *absence* of Judge Langelier, making conditional upon such absence the jurisdiction with which Magistrate Choquette is vested, uses a word which must be construed in a broad and liberal acceptation. The word "absent" does not mean "physically away from the district or the court house." The juridical construction of that word "absence" rather implies non-presence of the judge on the bench or in the court-room. The reasons for the judge's absence from the hench or the court-room may be numerous and may consist in relationship to either of the parties in the case, in having expressed his opinion on the matter at issue, in his feeling temporarily indisposed and in so many other reasons *ejusdem generis* as may induce the judge to abstain from attendance on the bench or in the court-room.

It is Judge Langelier himself who, in such instances,

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appreciates the validity of the reasons of his absence. He is not bound nor called upon to make a statement in writing as to his absence and his reasons therefor or to fyle same in the record, in order to vest Magistrate Choquette with the necessary jurisdiction.

Such absence was sufficiently established by the statement heading the proceedings in the case: "present, Hon. Judge Choquette, in the absence of Judge Langelier."

The following decision seems to conform to the spirit of the statutory enactment under discussion as well as to common sense: "Absent" as used in Acts, 1888, p. 64, authorising the Chief Justice to hold court in the absence of a law judge means non-presence in the courts. When the law judge is temporarily away, he must be presumed to be away by reason of some inability to attend, and he is absent in the statutory sense. *The State* v. *Engeman*[85], from Words and Phrases Judicially Defined, vol, 1, p. 35.

[85] 23 Atl. Rep. 676; 54 N.J. Law 247.

At the time when the reserved case was argued before the Court of King's Bench, the Crown fyled a sworn declaration wherein Judge Langelier stated that it was to his knowledge and with his consent that Magistrate Choquette had tried the Brunet case.

Such statement, supposing it were valid or necessary, would go to shew that Judge Langelier had agreed that the case be heard by Magistrate Choquette, because, obviously, for one reason or another deemed legitimate, he himself did not want to act. The above declaration would also preclude any supposition that Magistrate Choquette might have interfered in the case or arrogated to himself powers and jurisdiction with which he was not legally vested.

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In this affair, after Brunet had been sentenced, there took place certain formalities which, unless sternly discountenanced and reproved by our courts of justice, might lead to serious mishaps of a nature to interfere with the administration of justice in criminal matters.

Two months after the sentence, a clerk in the office of the Court of Sessions of the Peace gave his affidavit wherein he stated that Judge Langelier was present in court while Brunet was being tried. That clerk had no authority to make such declaration which had and could have no legal weight or value whatever. It could not avail as against the oft-repeated statement contained in the record that Magistrate Choquette had acted in the absence of Judge Langelier.

Other affidavits were also produced either to deny or corroborate the entry made in the record anent the absence of Judge Langelier. Such affidavits were not and could not be of any consequence in the decision of the reserved case. If really Magistrate Choquette had no jurisdiction, if he usurped the functions which he then exercised, there was but one way, during the trial, to dispute his jurisdiction and that was by special plea or exception. And if such want of jurisdiction only came to appellant's knowledge after his conviction, he could yet complain by urging the usual grounds, which he utterly failed to do.

We consequently find that Magistrate Choquette had due jurisdiction to hear and determine the case.

I am for dismissing the appeal.

Appeal dismissed.