

36, 1940

In the Privy Council.

30551

No. 44 of 1938.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

UNIVERSITY OF LONDON  
W.C.1.  
-7 JUL 1953  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

THE HONOURABLE JOHN E. BROWNLEE (*Defendant*) *Appellant*  
AND  
VIVIAN MacMILLAN (*Plaintiff*) - - - - *Respondent*

CASE FOR THE APPELLANT.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 1st March 1937, which by a majority of four judges to one, allowed the Respondent's appeal from the Supreme Court of Alberta, (Appellate Division) which had dismissed appeals by the Respondent and her father from the judgment of Ives J. dated the 2nd July 1934 in an action wherein the Respondent and her father severally claimed damages from the Appellant for the seduction of the Respondent. RECORD:  
p. 317.  
p. 284.  
p. 278.

2. The action was based on the Seduction Act, being Chapter 102 of the Revised Statutes of Alberta, 1922, which was first enacted as Chapter 8 of the Ordinances of the North West Territories, 1903. The Act is in these terms:—

“ CHAPTER 102.

“ AN ACT RESPECTING ACTIONS FOR SEDUCTION.

“ HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:—

“ SHORT TITLE.

“ 1. This Act may be cited as 'The Seduction Act.'”

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INSTITUTE OF ADVANCED  
LEGAL STUDIES,  
25, RUSSELL SQUARE,  
LONDON,  
W.C.1.

CASE FOR THE APPELLANT.

RECORD.

## " 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). 10

" 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). 20

" 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 un-  
 " married 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 30  
 " seduction may be maintained by any unmarried female who has  
 " 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)

p. 296, ll.  
27-37.

Sections 2, 3 and 4 were similar to legislation in Upper Canada dating from 1837. In 1903 immigrants, including many unprotected foreign women whose parents and relatives remained in Europe, were streaming into the North West Territories. The Upper Canada Statute was then adopted with the addition of Section 5.

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pp. 1-4.  
p. 1, l. 24-  
p. 2, l. 28.

3. The Statement of Claim dated the 22nd September 1933 alleged that in July 1930 the Appellant formed and thereafter pursued the intention of enticing the Respondent from her father's home and of seducing her;

- that in October 1930 the Appellant seduced the Respondent; that from October 1930 to June 1933 the Appellant on very many occasions had sexual connection with the Respondent; that in consequence the Respondent in the summer of 1932 suffered from a nervous breakdown and was forced to leave her position and return to her father's home, and in January 1933 lost a chance of marriage and a home of her own, and suffered notoriety and other ill-effects. The Respondent's father alleged the loss of the Respondent's services, and both the Respondent and her father claimed damages.
- 10 4. The Statement of Defence denied each specific allegation and alleged that the claim was frivolous and vexatious, that the Seduction Act had no application to the facts pleaded, and that the Statement of Claim disclosed no cause of action. The Appellant counterclaimed against the Respondent and a young medical student, one John Caldwell, alleging a conspiracy between them and with other persons unknown to blackmail the Appellant and to bring his character into disrepute (*inter alia*) by making the allegations in the Statement of Claim well knowing them to be untrue, by bringing the action and by procuring the publication of the Statement of Claim in newspapers. These allegations were denied in the Defence to the
- 20 Counterclaim.
5. The action came on for trial before Ives J. with a jury at Edmonton on the 25th June 1934 and continued until the 30th June 1934. As provided by Section 28 of the Jury Act, being Chapter 74 of the Revised Statutes of Alberta, 1922, the Jury consisted of six persons any five of whom might return a verdict.
6. The trial took place in circumstances so calculated to prejudice a fair trial that the Chief Justice of Alberta had "no doubt that it is proper to hold that there was not a fair trial and that no judgment founded on the verdict could be allowed or, if given, could be permitted to stand."
- 30 The Appellant was at all material times Prime Minister of Alberta. The Statement of Claim was published in the local newspapers and the action was the subject of a great many newspaper comments. On the third day of the trial the publisher and reporter of a newspaper were fined for what Ives J. described as "a very flagrant contempt of Court."
7. The case was fought on the one issue of fact, whether or not the Appellant had seduced the Respondent, and the Counterclaim was abandoned. The Appellant denied that he has ever had carnal knowledge of the Respondent, and the Respondent asserted that for a period of almost three years he had had carnal knowledge of her, even during her
- 40 monthly periods, on an average of two or three times a week. The jury found for the Respondent but the Appellant respectfully submits that an examination of the evidence justifies the emphatic opinion of Ives J. and

RECORD.

p. 2, II. 29-37.

p. 2, I. 38-

p. 3, I. 9.

p. 3, II. 10-14.

p. 3, II. 19-24.

p. 3, II. 25-42.

p. 3, I. 43-p. 4, I. 7.

pp. 5-6.

p. 5, I. 31.

p. 5, I. 35.

p. 6, II. 1-6.

pp. 6-8.

pp. 8-9.

p. 278, I. 3.

p. 273, II. 8-11.

p. 292, II.

32-36.

p. 1, I. 18;

p. 170, II. 32-34.

p. 101, II. 38-40.

p. 10, I. 25.

p. 132, II. 11-43;

p. 160, I. 26-

p. 162, I. 34.

p. 260, II.

10-22.

p. 200, I. 41.

p. 43, II. 14-24;

p. 91, I. 33.

p. 95, I. 13.

## RECORD.

p. 275, l. 21; Harvey CJA. that the verdict was quite wrong. The Respondent's story  
 p. 291, l. 39- contained many inherent improbabilities; although it had been very care-  
 p. 292, l. 4. fully prepared it was marked by inconsistencies, and its falsity was  
 p. 76, l. 24- admittedly demonstrated in a number of particulars. It may be significant  
 p. 77, l. 3. that as a clerk in the Attorney-General's office the Respondent had access,  
 of which she availed herself, to the files relating to sexual offences and  
 allegations of such offences although her work was in no way concerned  
 with such cases.

8. Of the inherent improbabilities the following are amongst the most important :—

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p. 103, ll. 14-24;  
 p. 228, l. 15;  
 p. 229, l. 26.

p. 3, ll. 3-6.

(i) The Respondent was a guest in the Appellant's house from the

p. 48, l. 43-  
 p. 49, l. 3.

p. 95, ll. 25-  
 29; p. 105,  
 l. 21.

p. 49, ll. 18-45;  
 p. 104, l. 42- p.  
 110, l. 3.

p. 108, ll.  
 11-32; p.  
 142, ll. 2-  
 16; p. 143,  
 ll. 2-18.

6th April to the 10th May, 1932. This visit was pleaded as of seven weeks during which on every night when the Appellant was home the Respondent alleged she committed adultery with him. The Appellant occupied the same room as and had his bed within two feet of that of his son Jack, aged 16, who to the Respondent's knowledge was a highly nervous boy who occasionally awoke screaming. The Respondent alleged that nearly every night during this period except for a week or ten days when the Appellant was away she came into the room and in the presence of the sleeping boy committed adultery and then returned to the room which she was occupying without disturbing the boy except on one occasion when he moved. The Appellant is alleged thereupon to have switched on the electric light and found the boy, although disturbed, to be still asleep.

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p. 89, l. 25- p. 90,  
 l. 7.  
 p. 47, l. 45- p. 48,  
 l. 2.  
 p. 49, ll. 25-42;  
 p. 107, ll. 16-43.

p. 106, l. 21;  
 l. 32.

p. 228, ll.  
 20-36.

(ii) The Appellant's wife, (who also was a light sleeper and frequently arose if she thought her son was restless) occupied a room next to the bathroom. The Respondent alleged that during this period of five weeks in order to conceal the noise of the Respondent's going to and from his room the Appellant went to the bathroom each night, generally after midnight, and again half an hour later, turned on the tap and flushed the toilet before and again after committing adultery. The Appellant's wife heard nothing.

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p. 120, l. 27.

p. 119, ll. 23-31;  
 p. 120, ll. 21-27.

p. 119, l. 32-  
 p. 121, l. 18.

(iii) The staff of the Parliament Buildings ceased work at 1 p.m. on Saturdays and the janitors of the buildings then came on duty. The Respondent was employed in the Attorney-General's offices. She alleged that habitually after the staff left she visited the Appellant's room in another wing and committed adultery. In her examination for discovery she gave a circumstantial account of how she avoided the notice of other members of the staff, how she communicated about 1.15 p.m. with the Appellant by telephone and how she then went straight from the Attorney-General's offices to the Appellant's room. In cross-examination she confirmed every detail of her account. She had, however, forgotten that each Saturday within a few minutes of 1 p.m. she "clocked out" on the basement floor and that she could not then return to the third floor where the Attorney-

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p. 121, l. 19-  
 p. 122, l. 20.

General's offices were without meeting many other civil servants. Faced with this fact, she changed her story by saying that she went to the ladies' cloak room. But that room had no telephone, and she again changed her story about the making of appointments. The janitors including the one who cleaned the Appellant's room on Saturday afternoon, were called but had never seen the Respondent in the building on any Saturday afternoon.

(iv) During a period of over two and a half years the Respondent alleged that in the Parliament Buildings, in motor cars and in his house she had habitually committed adultery with the Appellant and in her Statement of Claim she alleged that her conduct had become notorious, but no witness was produced who had observed any suspicious conduct on the part of either the Appellant or the Respondent. That diligent but fruitless search had been made for such evidence may, in the Appellant's respectful submission, be inferred from the fact that the Respondent called a witness to say that on one occasion in the latter part of October 1930 she saw the Respondent, late at night, get into a motor car driven by the Appellant, and from the fact that this was relied on as corroboration of the Respondent's story. It was common ground that from the late Autumn of 1930 the Respondent, with the knowledge and approval of her parents, was frequently in the Appellant's house and was on terms of close and affectionate friendship with the Appellant's wife and children, and that the Respondent had from time to time taken her for drives. In the Appellant's respectful submission the Respondent's allegations could not be true without suspicious incidents having been observed by other persons. Not only was no evidence given of any suspicious incident but the Appellant by calling his wife, his maidservant, his secretary and the janitors employed at the Parliament Buildings during the material time proved the non-existence of such circumstances.

(v) The Respondent in her affectionate friendship with the Appellant's wife, to whom at one time she telephoned every day, never showed the slightest embarrassment until nearly the end of April 1933. Her story was that her adultery was always physically painful and distasteful but

that one of the principal reasons why she began and persisted in it was to save the Appellant's wife from sexual intercourse with the Appellant.

The Appellant is alleged constantly to have represented that such intercourse might involve pregnancy which would endanger his wife's life. During the trial however, the Respondent alleged that the Appellant supplied her with pills which, as she said, would and did effectively prevent pregnancy.

(vi) In January 1933 the Respondent states that she received a proposal of marriage from John Caldwell, and then told him of her relations with

## RECORD.

p. 122, l. 29-  
p. 123, l. 3;  
p. 123, ll. 1-36.

pp. 250-252,  
253-255.

p. 91, ll. 23-  
34.

p. 3, ll. 36-  
42.

pp. 143-145.

p. 273, l. 41-  
p. 274, l. 12.

p. 97, ll. 23-39;  
p. 136, ll. 7-35;  
p. 41, l. 10.

p. 231, ll. 23-35;

p. 232, ll. 4-32.

p. 46, ll. 25-30;

p. 64, l. 29;

p. 86, ll. 36-40;

p. 91, ll. 31-36.

p. 38, l. 11;

p. 39, l. 40;

p. 41, l. 45-

p. 42, l. 11;

p. 51, ll. 30-44;

p. 53, ll. 14-19;

p. 56, ll. 33-36;

p. 79, l. 31-

p. 80, l. 25;

p. 82, ll. 19-42;

p. 88, l. 40;

p. 129, ll. 38-40.

p. 42, ll. 27-

31; p. 111,

l. 18; p.

113, l. 27.

p. 56, ll. 5-

24.

## RECORD.

p. 58, l. 45-  
p. 59, l. 5; p. 127,  
l. 40-p. 128, l. 33;  
p. 128, ll. 34-40;  
p. 60, l. 32-p. 61,  
l. 46.

the Appellant. In May 1933 he took her to a solicitor. Nevertheless she alleges that her adulterous association with the Appellant continued until the 3rd July. The action was started without any complaint being made to the Appellant and without the Appellant being challenged concerning the allegations. The first intimation to him that action was contemplated was a letter from the Respondent's solicitors dated the 3rd August 1933.

p. 365.

p. 101, l. 20-  
p. 104, l. 5.

9. The great care taken by the Respondent in preparing her story is shown by her admission that when, after the publication of the Statement of Claim in the newspapers and again after her examination for discovery, her attention was called to allegations that could not be true, she twice changed her account of the period during which she alleged she committed adultery with the Appellant in his house in 1932; by the detailed facts which she professed to remember including the numbers of the motor cars used by the Appellant, and by the certainty with which she gave the dates of many of the incidents she alleged. None the less the Respondent was forced to admit that on many points her story was wrong. A motor car number which she gave was the number of a Government car; but at the material date it had not been bought. The idea of her going from her parents' home to Edmonton was alleged to have been first put into her head by the Appellant, but she admitted documents which showed her to have taken steps in the matter before she met the Appellant; and her conduct and her mother's when she first came to Edmonton were inconsistent with the enticement alleged. On her examination for discovery the Respondent was asked about the use of contraceptives and denied their use, and it was not until trial that any allegation that the Appellant had supplied her with pills was put forward. Her explanation was that the questions on discovery were about the Appellant's use of contraceptives; but it is submitted that her answers were disingenuous if in fact he had supplied such pills for her to take. The matter is important because this evidence in the absence of any other evidence of special damage has since been strongly relied on as proving special damage, it being said that illness was caused by the taking of these pills. Farther the Respondent's allegations in respect of specific dates were in many cases disproved. On the 5th October 1930 the Appellant was travelling overnight from Winnipeg. On the 28th October 1930 the Appellant was in Stettler. On the 2nd January 1933 at the time when the Respondent alleged she was with the Appellant he was interviewing the Secretary Treasurer of a provincial town on government business. The Respondent gave evidence of being with the Appellant on each of these occasions. The period during which she alleged that she committed adultery in the Respondent's house while his wife was there was pleaded as being seven weeks but was reduced to four weeks in the Appellant's evidence. The Appellant's absence in Ottawa from the 6th to the 24th April 1932 proved the inaccuracy of the revised allegations. The adultery in motor cars was pleaded as taking place "in good weather" and the Respondent's evidence concerning the weather on the 13th October 1930

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p. 39, l. 18;  
p. 40, l. 17.  
p. 84, ll. 11-  
27.

p. 31, l. 38-  
p. 35, l. 24;  
p. 67, l. 46-  
p. 68, l. 16.  
p. 71, ll. 3-17;  
p. 332.

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p. 68, l. 17-  
p. 70, l. 42.  
p. 112, ll. 11-14;  
p. 113, ll. 7-27.

p. 173, ll. 32-39;  
p. 177, ll. 3-11;  
p. 178, l. 21-  
p. 119, l. 12;  
p. 243.

p. 78, ll. 12-18;  
p. 82, l. 34-  
p. 83, l. 16; p. 84  
ll. 24-34; p. 118,  
l. 20-p. 119, l. 12.

p. 3, ll. 3-6.  
p. 48, l. 31;  
p. 101, l. 23-  
p. 104, l. 5.  
p. 2, l. 43.  
p. 83, ll. 31-  
38.

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- (the occasion on which the Jury found that the Appellant seduced the Respondent) was that "it was not stormy at all" and that "as far as I can remember it was a clear night." When asked about newspaper reports of a blizzard that night, she was prepared to say she was out with the Appellant in a blizzard, and often drove out with him in blizzards. When she alleged adultery during a stay of three nights in the Appellant's house in 1931 during his wife's absence she described the sleeping arrangements in detail but, faced with a letter from the younger son written to his mother at the time, she admitted she was wrong. In fact when she was faced with
- 10 documentary evidence or entirely disinterested evidence contradicting her own she generally admitted that she was wrong. However in one instance she persisted in her original account, namely when told that it would be proved that the Appellant had never occupied the bed to which she alleged the Appellant had brought her almost nightly while she was staying in his house in 1932. The Respondent's evidence was also in conflict on many points with the evidence of other witnesses whose evidence there is no reason to distrust. It is clear that the learned judge thought that the Respondent's evidence had been entirely discredited.
- 20 10. In his charge to the jury Ives J. defined seduction as inducing a woman to part with her virtue for the first time or after rehabilitating her character after a former lapse. He distinguished seduction from rape. He warned the jury to decide on the evidence and advised them to test conflicting evidence by the reasonableness of it and the probabilities. He helped the jury to apply this test, however, only to the question of adultery alleged to have taken place in motor cars. The learned judge then pointed out that the Respondent's story was uncorroborated while the Appellant's
- 30 evidence was supported in many instances by that of other witnesses; and commented on the fact that no one had been found who in any way had reason to suspect any improper relationship. There was no evidence of any medical examination of the Respondent's sexual organs or any evidence other than her own that her ill-health was caused by sexual intercourse. The learned judge then stated the questions he proposed to ask the jury and directed them that without damage the action was not maintainable. He then told the jury that if they believed the Respondent's evidence about the 13th October, seduction took place at that time. After saying that Counsel had dealt with the facts and dates, the learned judge pointed out that some of the Respondent's dates were wrong and told the jury that any five of them could return a verdict.
11. The questions put to the Jury and the answers returned were :—
- 40 *Question* : "Did this Defendant seduce the Plaintiff Vivian MacMillan?"
- Answer* : Yes."

RECORD.

p. 83, l. 39-  
p. 84, l. 3.p. 47, l. 22-  
p. 48, l. 22;  
p. 93, ll. 7-25.p. 94, ll. 18-  
36.p. 109, ll. 7-  
11.

p. 275, l. 21.

pp. 269-273.

p. 270, ll. 7-  
13.p. 270, ll. 13-27;  
p. 270, ll. 32-44.p. 270, l. 44-  
p. 271, l. 20.p. 271, ll.  
21-30.p. 271, l. 38;  
p. 272, l. 5.p. 272, ll. 7-  
11.p. 272, ll.  
12-20.

p. 272, l. 21.

p. 272, ll. 36-39.

p. 272, l. 40;  
p. 273, l. 7.p. 272, ll. 9-  
11.

p. 275.

RECORD.

*Question* : " If so when ? "*Answer* : " At the time when Mr. Brownlee gained only partial entrance, as stated by Vivian MacMillan."*Question* : " If so did she suffer damage and in what amount ? "*Answer* : " Yes, \$10,000."*Question* : " If there was seduction did the male Plaintiff suffer damage and in what amount ? "*Answer* : " Yes, \$5,000."

p. 80, ll. 30-34.

The time referred to in the second answer is given in the Respondent's evidence as the 13th October 1930.

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12. The Appellant respectfully submits that the learned judge's charge constituted serious misdirection. No attempt was made to review the evidence, although the length of the trial and the nature of the evidence made it important that the jury should have the help of a full summing up. No adequate direction was given about the damage necessary to support the action, and no distinction was drawn between the special damage necessary to found the action and the general and exemplary damages which might be awarded. The question whether the Respondent suffered damage was combined with the only question which asked the amount of the damages to be awarded. The Appellant respectfully submits that there was no evidence of damage, and that the learned judge was quite wrong in telling the jury that, if they believed the Respondent, seduction took place on the 13th October, 1930. 20

p. 110, l. 44.

13. Admittedly the Respondent was not delivered of a child, and she was never pregnant. There was abundant evidence that except for her illness in 1932 she was happy and healthy. On the Respondent's own story the pills to which she attributed her illness were taken by her voluntarily. The medical evidence shows no connection between the Respondent's illness and sexual intercourse. On its most favourable interpretation from the Respondent's standpoint the evidence came to no more than this: that if the pills which she alleged she had taken contained ergot (of which there was no evidence) and if she had been using them for some time, the ergot, as a bowel irritant, might be a factor in producing her nervous, constipated condition. This condition was continuing at trial, practically a year after the last adultery alleged. The learned judge did not deal with the evidence of damage, and, in the Appellant's respectful submission, he misled the jury in respect of the 13th October, 1930. The Respondent's evidence of that occasion negated seduction as defined by the learned judge.

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p. 165, ll. 11-18.

p. 64, ll. 33-37.

p. 39, l. 14;  
p. 40, l. 10;  
p. 80, l. 30;  
p. 83, l. 24.

14. On the jury returning their verdict, and Ives J. expressing his disagreement therewith, the Appellant's Counsel applied for judgment on the ground that there was no evidence of damage to support the action. 40

p. 275, l. 26;  
p. 276, l. 37.



The learned judge reserved judgment until the 2nd July 1934, when he gave judgment in the Appellant's favour against both the Respondent and her father.

RECORD.  
p. 277, l. 5.  
p. 278.

15. In his considered judgment Ives J. held that, in law, damage was the gist of the action and 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. He saw nothing in the Alberta Seduction Act to convey a contrary intendment. He held that there was no evidence of illness resulting from the Respondent's seduction or of interference in any way with her ability to render services. He therefore dismissed the actions of both the Respondent and her father with costs.

p. 279.  
p. 279, ll.  
19-24.

p. 279, ll.  
14-18.

p. 279, l. 25.

16. Both the Respondent and her father appealed to the Supreme Court of Alberta (Appellate Division) which unanimously dismissed the appeal of the Respondent's father and which, by a majority of three judges to two, upheld the judgment of Ives J. dismissing the Respondent's claim. Harvey C.J. was of the opinion that the learned trial Judge had misdirected the jury so as to vitiate the verdict and he was also of the opinion that the verdict of the jury was wrong and that there was not a fair trial because newspaper reports of the comments on the proceedings of an unfair and prejudicial nature had come to the notice of the Jury during the course of the trial. The learned Chief Justice, however, did not find it necessary to decide whether the consequence should be a new trial or a dismissal of the action. His view of the law was that, in enacting section 5 of the Seduction Act, the Legislature had intended no change in the nature of the action for seduction but only specified another class of person who could maintain it. He held there was no evidence proper to submit to the Jury of any such damage as the law requires to support this action. Clark, J.A., who dissented, held that the Jury's verdict could not be disturbed but also held that there was no evidence of inability to serve resulting from the

p. 280.

p. 284.

pp. 285-303.

p. 286, l. 22-

p. 287, l. 26.

p. 287, l. 27-

p. 292, l. 34.

p. 292, ll.

34-42.

p. 292, l. 43-

p. 302, l. 44.

p. 303.

pp. 304-308.

p. 304, l. 25-

p. 305, l. 41.

p. 306, l. 1-

p. 307, l. 2.

p. 307, l. 3-

p. 308, l. 18.

pp. 311-314.

pp. 308-310.

p. 310.

p. 309, l. 39-

p. 310, l. 10,  
ll. 18-21.

Respondent's seduction but also held that, in law, the mere fact of seduction gave the Respondent a right of action per se. Lunney, J.A., who also dissented, agreed with this view of the law. Mitchell, J.A. and Ford, J. concurred in the views of the Chief Justice regarding the law applicable to actions of this kind, and concurred in the result of his judgment, but without being willing to disturb the Jury's findings of fact.

17. The Respondent's father did not appeal from the unanimous judgment of the Supreme Court of Alberta (Appellate Division), dismissing his action. The Respondent appealed to the Supreme Court of Canada, and the appeal was heard on the 16th and 19th October 1936. On the 1st March 1937 the Court gave judgment allowing the appeal. The Court was

p. 318, l. 6.

p. 317.

RECORD.  
pp. 318-324.  
p. 324, l. 17.  
p. 327, l. 30.  
p. 327, l. 34-  
p. 328, l. 26.  
p. 328, l. 27.  
p. 324, l. 18.

composed of Sir Lyman Poore Duff, C.J., and Rinfret, Davis, Kerwin and Hudson JJ. The learned Chief Justice stated reasons for allowing the Respondent's appeal, with which Rinfret J. agreed. Kerwin J. also agreed and stated additional reasons for allowing the Respondent's appeal. Hudson J. concurred in the result and Davis J. dissented.

p. 319, ll. 1-  
22.

18. The learned Chief Justice stated that there was undeniably force in the argument that the "action for seduction," which an unmarried female, by section 5, is 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 Section 2 and 3 of the Act. It may fairly be argued, he says, that each part of the statute ought 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 the 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 and that given such cause of action vindicable by the parents a cause of action having the same constitutive elements is, by section 5, bestowed upon the seduced woman. It follows, he says, from this reasoning, that damage of the kind which is the gist of the action under sections 2 and 3, i.e. disability for service resulting from child-birth, pregnancy or physical illness directly due to the sexual intercourse, is also of the essence of the cause of action under section 5.

p. 319, l. 23-  
p. 320, l. 42.

19. The Chief Justice then proceeded to summarize the other view of the section, which is that 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. He goes on to say that, according to this contention, 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, deal with a subject matter that is widely different. 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. Under section 5, he goes on to say, the action 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 considerations different in their nature from anything that can arise in considering a claim under sections 2 and 3. Under sections 2 and 3, on the question of whether or not the cause of action has been constituted, the conduct of the seduced woman is irrelevant, while leave and license by the parents, which might be established by proving consent either by words or conduct, would be an answer to the action. In an action under section 5, on the other hand, the conduct of the  
 10 woman, as well as her character, both enter into the determination of the existence of the cause of action. According to this contention the relief given by section 5 presupposes that the woman seduced was at the time she was corrupted by the appellant, a woman of virtuous life and habits and 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 Appellant or some unfair advantage taken through which he has induced the woman to have intercourse with him. All this, according to this contention, 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  
 20 woman seeking the gratification of her own desires were the preponderating factor in bringing about the common act. Again no consent, no enticement or manoeuvring on the part of the parents could be relevant in determining the existence of a cause of action under section 5. In this view, therefore, since the action under section 5 has nothing to do with the parental relation, with the relation of master and servant or with the loss of service, there is no *a priori* probability that section 5 contemplates relief conditioned upon the seduction being followed by child-birth, pregnancy or illness directly traceable to the physical act of copulation and giving rise to some disability for service; and undoubtedly the language of the section, when read alone, and  
 30 without colour derived from the preceding sections, neither expresses nor implies such a condition.

20. The learned Chief Justice then goes on to say that in deciding between these rival views, assistance may be derived 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 Chapter 102 of the Revised Statutes of Alberta 1922, which came into force on January 19th, 1923, by virtue of a statute (The Revised Statutes of Alberta Act 1923, being Chapter 6 of the Alberta Statutes, 1923) which was assented to on the 9th March 1923. Before that date, he says,  
 40 two decisions were pronounced by the Appeal Court of Alberta in 1916 and in 1921, both in the same sense, concerned with the construction of section 4 of the North West Territories Ordinance, (which is in the same terms as section 5 of the Seduction Act.) The learned Chief Justice states that, insofar as they involve a construction of that section, they can be taken to have received legislature sanction since section 5 was reproduced without

p. 320, l. 43-  
 p. 321, l. 12.

RECORD, material alteration in the Revised Statutes of Alberta which came into operation in 1923. In support of this proposition, he cites the rule in *Barras v. Aberdeen Steam Trawling and Fishing Co.* [1933] Appeal Cases 402.

21. The Appellant respectfully calls attention to the fact that in applying the principle of that case, the learned Chief Justice erred, since its application was negatived expressly by section 10 of the Revised Statutes of Alberta Act, 1922, being Chapter 49 of the Alberta Statutes 1922 which provides :—

“ 10. The legislature is not to be deemed, by reason of the  
 “ Revised Statutes of Alberta, 1922, being so substituted, to have 10  
 “ adopted the construction, which, by judicial decision, or otherwise,  
 “ has been placed upon the language of any of the Acts or  
 “ Ordinances, or parts thereof, included amongst the Revised  
 “ Statutes.”

The application of the rule in the *Barras* case to the revision of the statutes in 1922, was not argued in the Supreme Court of Canada nor in the lower Courts, and section 10 of the Revised Statutes of Alberta Act, 1922, was not, therefore, drawn to the attention of the Supreme Court.

p. 321, ll.  
13-22.

22. The learned Chief Justice then considers the first of the two cases, namely *Gibson v. Rabey* (1916) 9 Alberta Law Reports, 409. He first cites 20 from the judgment of Scott J. as follows :—

“ 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.”

The learned Chief Justice states that it appears conclusively from this sentence that 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.

23. The Appellant respectfully submits that Scott J. did not intend to give to the word “ seduction ” any different meaning in section 5 (at that time section 4 of the Ordinance) from the meaning which it bears in the other sections, for he says at page 412 :— 30

“ I cannot see that any other meaning can be attached to the  
 “ word ‘ seduction ’ in the fourth section of the Ordinance (now  
 “ section 5 of the Act) other than that attached to it in the other  
 “ sections thereof or other than both its ordinary and legal  
 “ significance before the Ordinance was passed.”

p. 321, l. 22-  
p. 322, l. 14.  
p. 322, l. 15.  
p. 322, ll.  
25-38.

24. The learned Chief Justice then cites passages from the judgment of Beck J., in which Stuart J. the other member of the Court concurred, and points out that in that case pregnancy apparently supervened. He then 40 proceeds to quote from *Tetz v. Tetz* (1921) 18 Alberta Law Reports 364 an explanation of *Gibson v. Rabey* by Beck J.A. who delivered judgment of the

Appellate Division of the Supreme Court of Alberta. The learned Chief Justice then goes on to say that these decisions recognise 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, he says, of no importance that the 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. The learned Chief Justice adds that 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 such a cause of action, but, under section 5, according to the decisions, such matters are determining factors. He then goes on to say that, 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.

RECORD.  
p. 323, ll.  
7-25.

25. The Appellant again respectfully calls attention to the fact that, in view of section 10 of the Revised Statutes of Alberta Act, 1922, previously cited, this conclusion of the learned Chief Justice is erroneous. It is also respectfully submitted that the judgment of Beck J.A. in *Gibson vs. Rabey*, does not seek to draw a distinction between the action for seduction given by section 5 (then section 4 of the Ordinance) and the action given in the other sections. According to his judgment, in both these actions, a plaintiff who has consented to the seduction is debarred from recovering. He said at page 415:—

30 “Wherever this action is permitted at common law, it is assumed  
“that the Plaintiff is not at fault. If he was assenting to the  
“seduction or connived at it or, without objection, permitted such an  
“improper action on the part of the Defendant as might naturally  
“and, in fact, did lead to it, these facts may be pleaded in bar of a  
“recovery.”

40 He then went on in the passage cited in the judgment of the learned Chief Justice to state that an action by the woman seduced is subject to a like defence and that she cannot recover if she is a consenting party, unless it can be shown that her consent was obtained through the enticement of the defendant i.e. was not a genuine consent. The defence is in both actions of the same character. The Appellant also respectfully calls attention to the fact that, in both *Gibson vs. Rabey* and in *Tetz vs. Tetz*, the Plaintiff was in fact pregnant as a result of the seduction and it would appear that it was damage of this kind which Beck J.A. had in mind when he referred to

RECORD:

damage as being the gist of the action on the case, and the gist of an action by the woman seduced. There is no suggestion in his judgment of there being a difference in the nature of the damage necessary to be proved, in an action under section 4 of the Ordinance (the present section 5) and an action under the other sections.

p. 323, ll.  
30-36.

26. The learned Chief Justice then concludes that section 5 should be construed according to the ordinary meaning of the words and that damage of the special character mentioned, i.e. 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. He adds that he has not any doubt 10 that there was sufficient evidence of damage to support the action.

p. 91, ll. 23-  
28. l. 30.

27. The Appellant respectfully submits that the learned Chief Justice here indicates that evidence of damage, even though not of the special kind required to support an action by the parents or master, is necessary to found an action by the woman seduced when suing in her own right. He does not mention what is the evidence which he considers sufficient to support the Respondent's action in this case. The Appellant respectfully calls attention to the fact that there was no evidence of damage of any kind having been suffered by the Respondent as a consequence of her being seduced on October 13th 1930, the only date on which the Jury found 20 that seduction had occurred. Any damage alleged to have been suffered by the Respondent did not occur until nearly two years later at a time when, according to the Respondent's own evidence, there had not for more than a year before been any question of seduction and the intercourse had become a habit.

p. 323, l. 37-  
p. 324, l. 13.

28. The learned Chief Justice then said that the verdict of the jury must stand unless the Court is clearly of opinion that it is one which no jury, acting judicially, could give. In his opinion this had not been established by the argument.

pp. 327-328.

29. Kerwin J. stated that he agreed with the judgment proposed by the Chief Justice and with his reasons, and added that a consideration of the language of section 5 lead him to the same conclusion. 30

p. 324, l. 18-  
p. 325, l. 11;  
p. 325, ll. 12-27.

30. Davis J. dissented. After reviewing briefly the facts of the case, he says that the Respondent cannot succeed upon the broadest possible interpretation most favourable to her 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 is the same as in the other sections of the statute, the birth of a child, 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. If, on the other hand, the cause of action in section 5 is to be regarded 40 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 at least

p. 325, l. 27.

something in the nature of negation of choice. He adds that taking either interpretation of section 5, the actions fails upon the evidence. He goes on to say that the proper method of interpretation of section 5 is to read the statute as a whole, that section 5 is part and parcel of the entire statute and that the statute remained in effect from its enactment as an Ordinance of the North West Territories in 1903 until the revision of 1922. 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. The other sections import as an essential  
 10 ingredient of the cause of action an illegitimate child born or conceived, and that is the common understanding of the cause of action. Davis J. then goes on to say that it is not without its own significance that Counsel had not been able to find any case in Canada where an action for seduction had succeeded without proof of at least pregnancy and no reported case in England since *Manvell v. Thompson* (1828) 2, Carrington and Payne's Reports, 303. In that case, he says, the question was not raised and further the case was prior to the legislation enacted in Upper Canada in 1837, being 7 William IV. Chapter 8, "An Act to Make the Remedy in Cases of Seduction More Effectual and to Render the Fathers of Illegitimate Children  
 20 Liable for Their Support," which statute, without substantial change, become 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 of the Alberta Seduction Act. He holds, therefore, that the substance of the statutory cause of action is the same in section 5 as in the other sections, i.e. the birth of a child or at least the condition of pregnancy. He did not in these circumstances consider it necessary to determine whether the jury was justified in arriving at  
 30 its verdict of guilt against the Appellant.

p. 325, l. 29-  
p. 326, l. 20.

p. 326, l. 20-33.

p. 326, l. 34-  
p. 327, l. 22.

p. 327, l. 23.

31. The Appellant respectfully calls attention to the fact that the Court of Appeal of Saskatchewan, in *Bilinski vs. Kowbell* (1931) 2 Western Weekly Reporter 245, considered the meaning of the same section of the Saskatchewan Seduction Act and that it interpreted the section in the same way as did Davis J. in the Supreme Court of Canada and the majority of the Supreme Court of Alberta (Appellate Division) in the present action.

32. The Appellant respectfully submits that the verdict of the Jury was perverse and against the weight of evidence and should have been set aside and that on the points of law raised the judgment of the Supreme  
 40 Court of Canada is wrong and should be reversed for the following amongst other :—

#### REASONS.

1. Because the finding that the Appellant seduced the Respondent was against the weight of evidence and perverse.

2. Because there is no evidence that the Appellant seduced the Respondent on the 13th October, 1930, and no finding of seduction on any other date.
3. Because the verdict of the jury is vitiated by the failure of the learned trial judge adequately to direct the jury and by misdirection on material points.
4. Because special damage is necessary to support an action for seduction and no special damage has been proved or found.
5. Because although the Respondent alleges that the Appellant had carnal knowledge of her, the Respondent admits that she was not delivered of a child and was never pregnant and the Respondent has not proved any incapacity from service or other damage caused by the carnal knowledge which she alleges. 10
6. Because the Supreme Court of Canada misconstrued the Seduction Act. 10
7. Because the reasoning of Mr. Justice Ives, of the majority of the Appellate Division of the Supreme Court of Alberta, and of Mr. Justice Davis is to be preferred to that of majority of the Supreme Court of Canada. 20

FRANK GAHAN.



In the Privy Council.

No. 44 of 1938

ON APPEAL FROM THE SUPREME COURT  
OF CANADA.

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BETWEEN

THE HON. JOHN E. BROWNLEE (*Defendant*)  
*Appellant*

AND

VIVIAN MACMILLAN (*Plaintiff*) - *Respondent*.

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CASE FOR THE APPELLANT.

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CHARLES RUSSELL & CO.,  
37, Norfolk Street,  
Strand, W.C.2.  
*Solicitors for the Appellant.*

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EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET E.C.4.