[McRUER C.J.H.C.]

Rex v. Mazerall.

Evidence—Admissibility of Evidence Given by Accused on Oath before Royal Commission—Inapplicability of Rules respecting Confessions to Police or Persons in Authority—Criminating Answers—Effect of Accused's Failure to Object—The Canada Evidence Act, R.S.C. 1927, *c.* 59, *s.* 5.

The effect of s. 5 of The Canada Evidence Act in its present form is that a witness, being examined before a tribunal authorized to take evidence under oath, is bound to answer questions even though his answers may tend to criminate him, and if he does not object to answer the questions when they are put to him, the provisions of subs. 2 do not apply, and the answers are receivable against him in any criminal trial or other proceeding thereafter. *Rex v. Clark* (1901), 3 O.L.R. 176, followed.

The fact that the witness is compelled by statute to answer the questions does not render his answers inadmissible against him in subsequent proceedings. *Walker v. The King,* [1939] S.C.R. 214; *Reg. v. Coote* (1873), L.R. 4 P.C. 599; *Reg. v. Scott* (1856), 1 Dears. & B. 47, and other authorities, applied. There is no onus on the Crown to prove that the answers were "voluntary", in the sense that they were not induced by any promise or threat, and the special rules applicable to the admissibility of statements made to police officers or other persons in authority have no bearing in connection with such answers.

TRIAL of an issue, during the trial of an indictment for conspiracy, as to the admissibility of evidence given by the accused before a Royal Commission appointed by Order in Council under The Inquiries Act, R.S.C. 1927, c. 99.

16th and 17th May 1946. The issue was tried by McRUER C.J.H.C., in the absence of the jury, at Ottawa.

J. R. Cartwright, K.C., Lee A. Kelley, K.C., and *B. W. Howard, K.C.,* for the Crown.

Roydon A. Hughes, K.C., L. Lafleur, K.C., and *R. K. Laishley,* for the accused.

18th May 1946. McRUER C.J.H.C. (orally):—I have had the benefit of having the matters involved in this issue fully developed in the able arguments presented to me by counsel on behalf of the Crown and of the defence. The only duty I have to perform is to decide whether the evidence tendered is legally admissible. If it is, I am bound to admit it; if it is not, I am bound to reject it. I have to find the facts and interpret the law as I see it, and there my duty ends.

The evidence that is tendered by the Crown is evidence given by the accused under oath before a Royal Commission consisting of the Honourable Mr. Justice Taschereau and the

Honourable Mr. Justice Kellock, set up by Order in Council under the provisions of The Inquiries Act, R.S.C. 1927, c. 99. There is no doubt in my mind that the accused was properly sworn as a witness before the Commission; on the evidence I do not see that any other conclusion can be arrived at. Nor do I doubt that the Royal Commission was properly constituted under the provisions of The Inquiries Act with all the authority conferred on it under that Act to require such witnesses to give evidence under oath as the commissioners might deem requisite to the full investigation of the matters concerning which they were appointed to examine.

It is not suggested that the accused refused to give evidence before the Commission on the ground that it might tend to criminate him, or in fact on any other ground. Those being the circumstances under which the evidence tendered was given, what is the law governing its admissibility at this trial? Mr. Hughes in his very forceful and exhaustive argument puts the case for its rejection on three grounds:

(1) The onus is on the Crown to show that the proceedings before the Royal Commission were legal in every respect, and that the Order in Council appointing the Commission was strictly complied with.

(2) If there was something that affected the voluntary nature of the statements previously made to police officers, the onus is on the Crown to show that that impediment had been removed before the accused testified before the Commission.

(3) The Commission had by its conduct lost jurisdiction to examine the accused under oath.

This, I think, fairly summarizes my conception of the grounds on which Mr. Hughes' argument is founded.

As to the first point, that the onus is on the Crown to show that the proceedings before the Royal Commission were legal in every respect and that the Order in Council appointing the Commission was strictly complied with, I think both on the law and on the facts I am bound to hold that the Crown has discharged the onus.

Mr. Hughes' second point involves consideration of the matter on a broader basis. Argument was presented, and the case on the *voir dire* was developed, on the basis that the principles

of law applicable to statements made by accused persons to police officers or other persons in authority are applicable to the circumstances of this case. After careful perusal of all the authorities I have been able to obtain, I have come to the conclusion that those principles are clearly inapplicable to the matter that I have before me for decision. In those cases where an accused person has made a statement to a police officer or other person in authority, there is an onus on the Crown to show that the statement is voluntary, in the sense that it has not been obtained by threats or inducements held out, as the law presumes that under threat or inducement an accused person may tell that which is not true, either to escape the threatened punishment or to reap the benefits held out in the inducement. It is, however, quite different where evidence is given under oath; in such case the presumption is that the accused did not commit the crime of perjury and that his statements are true. In this case there is what I consider clear authority that I should follow, in fact authority which I am bound to follow, covering this branch of the argument.

The point under discussion is not a new one; it is one that has been discussed in our courts and in England in many cases. The common law of England in respect to the matter is expressed in the maxim *nemo tenetur seipsum accusare*—"No one is bound to accuse himself". That, however, may be altered by statute, and it has been altered in Canada by The Canada Evidence Act, R.S.C. 1927, c. 59. There are also many other statutes which make provision for the examination of those who may be suspected of crime, for example the Fire Marshal's Acts, the various provincial Acts respecting coroners' inquests, and particularly The Bankruptcy Act, R.S.C. 1927, c. 11, which not only provides that the debtor may be examined, but expressly provides that the evidence given on the examination may be used in evidence against him on charges laid under the Act.

For the purpose of this case it is, therefore, necessary only to consider the effect of the provisions of s. 5 of The Canada Evidence Act, which reads as follows:

"No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

"2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

As I interpret the authorities, the section applies to any witness lawfully giving evidence under oath before any properly constituted legal tribunal which has the power to take evidence under oath. This section has been discussed, both in its present form and in its form prior to its amendment by 1898, c. 53, s. 1, in many cases before the courts. In its original form, as 1893 (Dom.), c. 31, s. 5, it read as follows:

"No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him . . . Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

The earlier cases dealing with the section in its previous form clarify the purposes of the amendment and the construction to be put on the section as it now is. In *Reg. v. Hendershott and Welter* (1895), 26 O.R. 278, the question that arose for decision was whether the protection provided in the section extended to a witness notwithstanding the fact that he failed to object to answering the question put to him. In that case, dealing with evidence given at a coroner's inquest, it was held that without objection by the witness the protection of the statute extended to him, and that the evidence given on the previous inquiry was not admissible at his trial.

In *Reg. v. Williams* (1897), 28 O.R. 583, the same question came before a Divisional Court two years later, and it was held that unless the accused objected to giving evidence on

the ground that it would tend to criminate him the evidence was admissible at a subsequent criminal trial.

The matter again came before a Divisional Court in *Reg. v. Hammond* (1898), 29 O.R. 211, 1 C.C.C. 373, in which the Court did not follow *Reg. v. Williams, supra,* and held that the accused was entitled to the benefit of the protection given by the statute, even though no objection was taken at the earlier proceedings. Then followed the amendment to the statute so that it should read as it now does.

Mr. Justice Osler, in *Rex v. Clark* (1901), 3 O.L.R. 176 at 181, 5 C.C.C. 235, reviews the previous authorities and deals with the statute as amended:

"A point was made, that the latter evidence had been improperly admitted [—that was evidence given at previous proceedings—], but, notwithstanding Mr. Teetzel's ingenius suggestion, I am of opinion that the 5th section of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D) as amended by 61 Vict. ch. 53 (D), removes, as I read it, the ground for the differences of opinion, which prevailed as to the proper construction of the section as it originally stood: See *Regina v. Hendershott and Welter,* [*supra*]; *Regina v. Williams,* [*supra*]; *The Queen v. Hammond,* [*supra*].

"If when called upon to testify, that witness does not object to do so on the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case the section provides for) in any criminal trial or other criminal proceeding against him thereafter."

The law of Ontario therefore is that a witness being examined before a tribunal authorized by law to take evidence under oath is bound to answer questions even though they may tend to criminate him, and if he has not objected to answer such questions at the time they are put to him the provisions of subs. 2 of s. 5 of the Canada Evidence Act do not inure to his benefit.

I shall now deal with the question whether the answers so given under oath before a lawfully constituted tribunal with power to take evidence ought to be considered in the light of the body of law dealing with statements made not under oath to persons in authority, and whether there was any onus on the Crown to show that if there had been any threat or induce-

ment held out to the witness by anyone in authority that had been removed before the accused gave evidence.

The first proposition involved in this question has been dealt with in several cases, to some of which I shall make reference.

Reg. v. Scott, Dears. & B. 47, 169 E.R. 909, which has been consistently followed, was decided as long ago as 1856. At p. 59 Lord Campbell states as follows:

"Finally, the defendant's counsel relies upon the great maxim of English law *'nemo tenetur se ipsum accusare'*. So undoubtedly says the common law of England. But Parliament may take away this privilege, and enact that a party may be bound to accuse himself; that is, that he must answer questions by answering which he may be criminated. This Act of Parliament, 12 & 13 Vict. c. 106, creates felonies and misdemeanors, and compels the bankrupt to answer questions which may shew that he has been guilty of some of those felonies or misdemeanors. The maxim of the common law therefore has been overruled by the Legislature, and the defendant has been actually compelled to give and has given answers, shewing that he is guilty of the misdemeanor with which he is charged. The accusation of himself was an accomplished fact, and at the trial he was not called upon to accuse himself. The maxim relied upon applies to the time when the question is put, not to the use which the prosecutor seeks to make of the answer when the answer has been given. If the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded where the question was lawful and the party examined was bound by law to answer it. At the trial the defendant's written examination, signed by himself, was in Court, and the reading of it as evidence against him could be no violation of the maxim relied upon."

In *Reg. v. Erdheim,* [1896] 2 Q.B. 260, Lord Russell of Killowen, Lord Chief Justice of England, referring to *Reg. v. Scott,* says, at p. 268:

"Lastly, as to the arguments based upon the principle 'Nemo tenetur se ipsum accusare', the Court held that the statute of 1849 had in the case in question taken away this privilege by

enacting that he must answer touching all matters relating to his trade or estate without any qualification. It is to be observed that in this case there was no express provision that the answers of the bankrupt should be admissible in evidence against him. In my judgment, the principles enunciated in this case (with the decision in which I entirely agree) practically determine the present case."

This same question was dealt with by the Judicial Committee of the Privy Council in *Reg. v. Coote* (1873), L.R. 4 P.C. 599, C.R. [6] A.C. 282. The matter under consideration by the Judicial Committee in that case was whether evidence given, without objection being taken, at a fire marshal's inquiry held under The Fire Marshal's Act of the Province of Quebec could be read in evidence against the accused on his trial on a charge of arson arising out of the fire that had been under investigation. I am convinced that the decision of the Judicial Committee is in point in this case, and I have no right to refuse to follow it. At p. 605, Sir Robert Collier says:

"Their Lordships are unable to concur in what appears to be the view of one of the Judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a Prisoner of statements made by him upon Oath is so unsettled, that every Judge is at liberty in every case to act upon his own individual opinion."

And at p. 607, after referring to several cases, including *Reg. v. Scott, supra,* he says:

"From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on Oath of a Witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle *'nemo tenetur seipsum accusare'*, but does not apply to answers given without objection, *which are to be deemed voluntary."* (The italics are mine.)

The Judicial Committee also considered the question whether the accused might have been ignorant of the law enabling him to decline to answer criminating questions, and whether if he had been acquainted with it he might have withheld some

of the answers which he gave. The matter is disposed of at p. 607 in the following language:

" . . . it is obvious, that to institute an inquiry in each case as to the extent of the Prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule, recognized as essential to the administration of the Criminal Law, *'Ignorantia juris non excusat.'* "

There is one other case in the English Courts to which I wish to make reference. In *In re Atherton,* [1912] 2 K.B. 251, it was sought to examine, under the provisions of The Bankruptcy Act, an accused who was in custody awaiting extradition on a criminal charge. Objection was taken on the ground that the examination might have the effect of causing him to make statements that would criminate him in respect of the criminal charge pending, and in reference to which extradition proceedings were pending. Mr. Justice Phillimore points out that, while there is a practice in England not to examine a bankrupt after charges have been laid against him, that is only a rule of convenience, and that it is perfectly lawful to do so; and the legal effect, as I read his judgment, of the evidence given, is not affected by the charges that are pending against him.

Walker v. The King, [1939] S.C.R. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353, is the final authority on the subject in Canada. While the circumstances of this case are entirely different, it seems to me that the principles of law enunciated by the former Chief Justice of Canada, Sir Lyman Duff, at p. 217, clearly warrant the conclusions that I have deduced from the authorities already dealt with. There he says:

"In order to clear the ground, it seems to be necessary to observe at the outset that statements made under compulsion of statute by a person whom they tend to incriminate are not for that reason alone inadmissible in criminal proceedings. The term 'voluntary,' as employed in the summary description of the class of statements by accused persons which are admissible in criminal proceedings, is well understood by lawyers as importing an absence of fear of prejudice or hope of advantage held out by persons in authority and is inter-

preted and applied judicially according to lines traced by well-known decisions and by a well settled practice. But there is no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them."

Reg. v. Scott, supra, and *Reg. v. Coote, supra,* are relied upon as authority for this statement.

I am not called upon to decide whether statements made by the accused to police officers before he was sworn as a witness were voluntary. No such statements are tendered in evidence by the Crown. I am referred to no authority, and I know of no authority, that justifies me in holding that, even if previous statements had been made which were of an involuntary character, the evidence given under oath by the accused on the subsequent hearing would be inadmissible unless the Crown proved that the accused's mind was free at the time of giving the evidence from those influences that tended to make the previous statements involuntary within the authorities governing statements made to police officers and others. When the accused was lawfully sworn to tell the truth under the sanctity of an oath, everything he said then took on a different character.

I now deal with Mr. Hughes' third ground of objection, *i.e.,* that the Commission, even if properly constituted, had by its conduct lost jurisdiction to examine the accused under oath.

I am not at all clear that this Court has, in these proceedings, any jurisdiction to review the conduct of the Commission or to decide that a Commission acting with apparent lawful jurisdiction has at any time by its conduct deprived itself of jurisdiction. I am, however, in a position to dispose of the arguments put forward without deciding this point.

It is argued that, as no summons was issued to the witness, this had some bearing on the legality of the evidence given under oath by him. I am of opinion that, the accused being before the Commission and having been sworn, the commissioners were then lawfully entitled to take his evidence, and in fact that the accused, being before the Commission,

could not have refused to be sworn and to give evidence, under the provisions of The Inquiries Act.

It is also argued that the Commission lost jurisdiction to take evidence under oath on the ground that the accused did not have the benefit of counsel when giving evidence. Section 12 of The Inquiries Act provides:

"The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel."

There is no evidence before me, and it was not suggested in argument, that before or during the taking of his evidence the accused at any time applied to the Commission to be represented by counsel, or that the Commission denied him the right to be represented before it by counsel. In the lengthy examination on the *voir dire* no evidence was given of anything that took place before the Commission which affected the accused in giving truthful answers to the questions put to him.

Following *Rex v. Hammond* (1941), 28 Cr. App. R. 84, I permitted Crown Counsel to put the following question to the accused on the *voir dire*:

"Q. Mr. Mazerall, would this be a fair and correct statement, that throughout the giving of your evidence before the Royal Commissioners you endeavoured to the best of your ability to tell the truth throughout? A. Yes."

Even were I permitted to consider it in my present judicial capacity, I cannot find the slightest ground for finding that the commissioners at any stage of the inquiry dealt with in the evidence before me acted without jurisdiction.

A great deal of the evidence given on the *voir dire* goes more to the question of the weight of the evidence tendered than to its legal admissibility.

Therefore, there being no specific enactment or rule of law excluding the statements that are tendered in evidence, I have come to the conclusion that I am bound to permit them to be received, and I direct that they be so received. I do not, however, direct that the transcript as tendered be received in its entirety. I shall have to follow it carefully as it is read, and I ask the co-operation of all counsel that any questions and

answers which may be objectionable be not read until I have had an opportunity of considering them and dealing with their admissibility. I have particular reference to any quotation or reference to statements that may have been made at an earlier time to police officers, and to questions and answers that may deal with matters that are not relevant to the charge against the accused. Only such evidence may be put in in this way as may be led by the Crown as evidence in chief relevant to prove the charge before the Court.

Evidence admitted.

[COURT OF APPEAL.]

Re Plant.

Wills—Construction—Gift, apparently Absolute, Followed by Gift Over.

A testatrix directed that her bonds, money in bank, etc., were to be put in her mother's name, "but taken care of on condition described herein". She proceeded to direct that the bonds should not be sold unless all other "principal" was exhausted and more was required, and that her executor, if he could obtain more interest, might invest the money in the bank "according to his own good judgment". She further provided that her mother was to have "a drawing account up to $30.00 per month", and that on the mother's death "all money & Bonds left" should go to R.

Held, upon a true construction of the will the mother took only a life interest in the assets, but with power, in addition to receiving the income from them, to encroach upon capital to the extent of $30 per month. *Re Walker* (1924), 56 O.L.R. 517, distinguished: *Re Scott* (1925), 58 O.L.R. 138; *Re Johnson* (1912), 27 O.L.R. 472; *Re Cutter* (1916), 37 O.L.R. 42; *Re Richer* (1919), 46 O.L.R. 367, discussed; other authorities referred to.

AN APPEAL by Andrew E. Ross in his personal capacity from an order of Treleaven J. made in Weekly Court at Toronto. The facts are stated in the reasons for judgment.

7th June 1946. The appeal was heard by HENDERSON, ROACH and HOGG JJ.A.

A. S. Pattillo, for the appellant: Where a gift over is imposed upon a prior gift, it is not repugnant and void unless the prior gift is absolute in its terms. If there is no repugnancy, the gift over prevails, and the prior gift is limited to a life estate: *Constable v. Bull* (1849), 3 DeG. & Sm. 411, 64 E.R. 539; *Re Cutter* (1916), 37 O.L.R. 42, 31 D.L.R. 382; *Re Richer* (1919), 46 O.L.R. 367, 50 D.L.R. 614; *Stadder v. Canadian Bank of Commerce,* 64 O.L.R. 69, [1929] 3 D.L.R. 651. Here there is no direct gift to the mother; the words "but taken care of on condition described herein" indicate that there was to be a trust, and are inconsistent