J. J. van RENSBURG v. H. E. SPENCER-PAYNE.

HIGH COURT CIVIL CAUSE No. 12 OF 1939.

Conditions on which evidence given in one case is receivable in another case—interlocutory application for leave to read evidence.

A collision took place between two cars driven by the plaintiff and the defendant and as a result criminal proceedings were taken in Southern Rhodesia against the defendant. In these proceedings evidence was given on behalf of the Crown by Sydney Moule. When this civil case was being prepared it was found that Moule's whereabouts were unknown and consequently an interlocutory application was taken out applying for leave to read Moule's evidence in the criminal proceedings in the civil case. The Registrar dismissed the application and his reasons are stated fully in the order set out below.

O'Donovan, Registrar: This is an application by the plaintiff under Order 37, Rules 3 and 18 of the Supreme Court for an Order granting him leave to read in evidence at the trial of this action the evidence of one Sydney Moule taken at Wankie in Southern Rhodesia on the 29th November, 1938.

The grounds upon which the application is based are set out in an affidavit sworn by Mr. Barry Warner, the plaintiff's solicitor, and are briefly (*a*) that the evidence is material, (*b*) that the witness has left or is beyond the jurisdiction of the Court, (*c*) that the present plaintiff and defendant were concerned in the cause tried at Wankie and (*d*) that defendant had full opportunity at that trial to cross-examine and in fact did cross-examine the said Sydney Moule.

Mr. Mills has opposed the application on three grounds, namely—

(1) that the parties in this action are not the same as those in the former Wankie proceeding;

(2) that the issues in the two proceedings are not the same, and

(3) that the defendant did not have full opportunity to cross-examine the witness Moule.

I am satisfied that the witness Moule is beyond the jurisdiction of the Court within the meaning of Order 37 Rule 18. He has always been beyond that jurisdiction but I accept that he has now left Southern Rhodesia, that his whereabouts are unknown and that it is unpracticable and impossible to secure his attendance at the trial of this suit.

Before, however, an order granting the plaintiff leave to read the evidence of the witness at the trial can be made, the plaintiff must satisfy the Court that the three qualifications to Order 37 Rule 2 have been observed or complied with. It is on the grounds of non-compliance with these qualifications that Mr. Mills has objected.

The first condition is that the proceedings must be between the same parties or their privies. The former proceedings at Wankie, it is admitted were between the Crown and the defendant, as Mr. Mills has stated a proceeding under the Road Traffic Act wherein the plaintiff was a witness.

The affidavit of Mr. Warner alleges that the plaintiff and defendant were concerned in the Wankie cause, in what manner is not disclosed, but it is submitted that the proceedings are between the same parties and that the intervention of the Crown does not alter the case. I am unable to agree with this contention. It is clear, and, as stated above, admitted that the plaintiff was only concerned as a witness in the Wankie trial and as such he could not, in my interpretation of the law, be a party. The parties in that proceeding were on the one side the Crown and on the other the defendant. The rights or liabilities of the plaintiff were in no way affected.

It remains for me to consider whether the Crown was privy to the plaintiff. *The Law of Evidence*, Phipson, 6th edition, sets out at page 437 that " privies may also be affected by or take advantage of former testimony in the same way that they may a judgment in a former trial (*Morgan* v. *Nicholl* C.R. 2 Com. Pleas 117) provided that the title of privy accrued subsequently to the former trial ". The conditions essential are analogous to those relating to judgments and whenever a decree in one case would be evidence of the facts decided when tendered in another, there the testimony of a witness in the former trial, who was liable to cross-examination but is incapable of being called is receivable.

The rule is co-extensive with identity. Privity is a term which denotes successive or mutual relationship to the same rights of property and privies are defined as falling within three classes, viz. (*a*) privies in blood, as heir and ancestor, but not father and child where the latter sues under independent statutory authority or title as in *Morgan* v. *Nicholl*, (*b*) privies in law, e.g., executor and testator or a husband suing for wife, and (*c*) privies in estate or interest as in vendor or purchaser, lessor and lessee, joint tenants, etc., and within this class falls the case of *Peterborough* v. *Germaine* 1 E.R. 1485.

I hold that the present application does not come within the limits cited above or that any privity exists between the Crown in the Wankie proceeding and the plaintiff in this action.

It is furthermore good authority to state that if the point in issue though very similar was so far different in the two proceedings, that the witness, who was called to prove or disprove the issue in the former need not have been fully cross-examined to matters in controversy in the latter, his deposition if tendered on the second trial will be excluded. *Rex* v. *Ledbetter* (1850) 3 C. and K. 108.

The main defence in this suit is based on the contributory negligence of the plaintiff. As the contributory negligence of the present plaintiff would have been no answer in law in the Wankie Court proceedings I hold that cross-examination by the defendant in those proceedings would only partially cover the issues in the present case. (*Rex* v. *Beeston* 24 L.G. M.C. 5.)

Mr. Warner has contended that the evidence of Moule which he seeks to read is of a formal nature only and refers to measurements and the relative position of the vehicles after the collision; it is, however, conceivable that this evidence may be very material in assisting the Court in coming to a finding on the question of contributory negligence and cross-examination thereon may not only be desirable but essential for the defendant's case.

As contributory negligence would not be an essential element of the former proceedings it would appear to me that the issues in the two actions are also dissimilar, but as this application would fail if anyone of the necessary qualifications is absent it is unnecessary for me to deal with this point at length.

For the reasons set out in *Printing Telegraph Construction Co.* v. *Drucker* (1894) 2 K.B. 801 an order in the present application would not affect the admissibility at the trial of evidence which the plaintiff seeks to read. I nevertheless feel bound to hold that before I can grant such order the plaintiff must show that his application comes within the terms of Order 37 Rule 3. In the present case it does not and the application is accordingly dismissed with costs.