1948

*Mar. 23, 24
*June 25

HIS MAJESTY THE KING.....APPELLANT;

AND

PETER QUON .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law—Possession of a firearm capable of being concealed upon the person while committing any criminal offence—Whether the words "any criminal offence", The Criminal Code, s. 122, includes any criminal offence the essential element of which is the possession of a firearm—The Criminal Code, R.S.C., 1927, c. 36, s. 122 as re-enacted by S. of C., 1938, c. 44, s. 7.

Held: (Kerwin J. dissenting)—To avoid the absurdities, inconsistencies or repugnancies which a perusal of other sections of the *Code* would otherwise give rise to, the words "any criminal offence" as used in s. 122 are restricted to an offence of which the possession of a firearm capable of being concealed upon the person, is not an essential element. In the result *Rex.* v. *Maskiew* (1945) 53 Man. R., 281, overruled.

Per Kerwin J. (dissenting)—By themselves the words "any criminal offence" do not admit of two interpretations and therefore the applicable rule is that set out in *Grey* v. *Pearson* 6 H.L. Cas. 61 at 106; *Victoria City* v. *Bishop of Vancouver Island,* [1921] A.C. 384 at 387.

Another principle in the construction of statutes applicable to s. 122 is: "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity"—*Reg.* v. *Judge of City of London Court,* (1892) 1 Q.B. 273, 290; *Cook* v. *Charles A. Vogaler Co.,* [1901] A.C., 102, 107. The remedy lies with Parliament and not with the Courts—*Canadian Performing Right Society* v. *Famous Players Canadian Corp.* [1929] A.C. 456 at 460.

APPEAL by leave granted under section 1025 of the *Criminal Code,* from a judgment of the Court of Appeal for Ontario (1) quashing a conviction of the respondent. The respondent was charged on two counts. The first laid under section 446 (*c*) of the *Code,* alleged robbery while armed; the second, laid under section 122 of the *Code,* alleged possession of a firearm capable of being concealed upon the person while committing a criminal offence. The accused pleaded guilty to the first charge and not guilty to the second. He was convicted on both and sentenced to two years imprisonment on the first, and to an additional two years on the second. He appealed his conviction on the second charge.

W. P. Common, K.C. for the appellant.

Arthur E. Maloney for the respondent.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

(1) [1947] O.L.R. 856.

1948

THE KING
v.
QUON

The judgment of the Chief Justice and Estey, J. was delivered by:

ESTEY J.:—The accused, Peter Quon, on the early morning of the 30th of March, 1947, entered a restaurant in the City of Toronto and there, armed with a revolver, intimidated and robbed the proprietor, Sam Lun, of $75. In the proceedings that followed he pleaded guilty to an offence contrary to section 446(*c*) of the *Criminal Code,* and was found guilty of an offence of having on his person a revolver, contrary to section 122 of the *Criminal Code.* He was sentenced under sec. 446(*c*) to a term of two years in the penitentiary and to a further term of two years under sec. 122.

The Crown appeals from a judgment of the Appellate Court for Ontario quashing the conviction under the second count on the basis that the words "any criminal offence" in sec. 122 "do not include any criminal offence an essential element of which is the possession upon the person of a pistol, revolver or any firearm capable of being concealed upon the person."

The learned Judges of the Appellate Court while of the opinion that the words "any criminal offence" standing by themselves were exhaustive and would include every offence created by the *Code,* were of the opinion that Parliament did not intend these words as used in sec. 122 should be given that exhaustive meaning but rather the restricted meaning above indicated. In this regard the learned Judges disagreed with the decision of *Rex* v. *Maskiew* (1) a decision of the Appellate Court in Manitoba.

Sec. 122 reads as follows:

122. Everyone who has upon his person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence.

Sections 118 to 129 of the *Criminal Code* were repealed in 1933 and as re-enacted embody several material changes.

(1) (1945) 85 C.C.C. 138; (1945) 53 Man. R. 281.

1948

THE KING v. QUON

Estey J.

Sec. 122, prior thereto sec. 120, was one of these sections. As amended it applied only to a pistol, revolver or other firearm capable of being concealed upon the person (the rifle and shotgun were added in 1938). At the same session Parliament enacted sec. 118 and provided that "every one * * * who not having a permit in Form 76, has upon his person, elsewhere than in his own dwelling house, shop * * * a pistol, revolver, or other firearm, capable of being concealed upon the person" is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years. The identical weapons are dealt with in 1933 in both secs. 118 and 122. The learned Judges of the Appellate Court point out that a literal construction of the language used in 1922 would result in that one found guilty under 118 is also guilty of an offence under sec. 122 and liable to a further minimum term of two years imprisonment. The learned Judges also referred to secs. 115, 116, 117, 123 and 124, and pointed out that with respect to these a similar absurdity or repugnancy would result.

Then with respect to the offence of burglary under sec. 457, paragraph (2) thereof provides:

> 457. (2) Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped.

This subsection covers with respect to burglary all that sec. 122 provides for if the latter be given the meaning contended for by the Crown. It cannot be that Parliament intended sec. 122 should apply to burglary in view of the provisions of sec. 457(2).

The foregoing absurdities, inconsistencies or repugnancies are such as to justify a Court adopting that construction of the language in sec. 122 as may avoid them. In *Grey* v. *Pearson* (1) at p. 104, Lord Wensleydale stated:

> I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

This passage has been repeatedly approved.

(1) (1857) 6 H.L. Cas. 61.

The construction given to this section by the learned Judges of the Appellate Court avoids these absurdities and repugnancies. Moreover, that construction seems to be supported by a perusal of many sections of the *Code*. The group of sections such as 115 to 129 deal in the main with custody and possession of the specified weapons under certain circumstances; then the offences such as sec. 264 (attempts murder); sec. 273 (wounding with intent); sec. 446 (robbery) cover those cases in which the weapons are used in the manner as therein described. In all of these latter offences the maximum punishment provided is life imprisonment. In those sections where possession or custody is the basis of the offence, Parliament has in mind the mischief or risk to the public occasioned by the possession of one of these firearms. Apart from 122 there is no section that deals with the having, with or without a permit, the firearms specified in 122 upon the person of one while committing a criminal offence. A firearm upon the person of a criminal while committing an offence is fraught with the greatest possible danger to the public, when detected, he resorts to his firearm with usually serious and sometimes fatal consequences to one or more of the public. It is in sec. 122, as in the other sections with which it is associated under the heading "Offensive Weapons", that Parliament seeks to punish and to that extent to protect the public against the possession or custody of these firearms and thereby avoid the consequences already suggested.

The construction adopted by the Court of Appeal removes the absurdities, inconsistencies and repugnancies, and in my opinion is consistent with the position of sec. 122 in the *Code* in relation to the other offences.

The appeal should be dismissed.

KERWIN J. (dissenting):—By leave granted under section 1025 of the *Criminal Code*, the Attorney-General of Ontario appeals to this Court from a judgment of the Court of Appeal for that province (1) quashing a conviction of the respondent Quon. The basis of the reasons for that decision, delivered by Mr. Justice Roach on behalf of the Court, is that the words "any criminal offence" in section 122 of the *Code* do not include a criminal offence an essential element

(1) [1947] O.L.R. 856.

1948

THE KING v. QUON

Kerwin J.

of which is the possession upon the person of a pistol, revolver or any firearm capable of being concealed upon the person. Section 122 at the relevant time was as follows:—

122. (1) Every one who has upon his person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence.

Quon was convicted of an offence under this section and it was that conviction that was set aside. He had already pleaded guilty to a charge that at the City of Toronto on or about the 30th day of March, 1947, being armed with an offensive weapon, to wit, a pistol, he robbed Sam Lun of the sum of $75 in money, which charge was laid under section 446(*c*) of the *Code*:—

446. Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who

* * *

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person.

It is common ground that the pistol mentioned in this charge is the same pistol referred to in the charge under section 122.

The reasoning of the Court of Appeal applies even though an accused has never been convicted or even charged under section 446 and, as pointed out by Roach J.A., the decision is in conflict with the judgment of the Court of Appeal for Manitoba in *Rex* v. *Maskiew* (1). Chief Justice Macpherson in that case gives the history of the two sections of the *Code* set out above and in my view that history emphasizes the all inclusiveness of the words "any criminal offence" in section 122. Even though some of the results set out by Mr. Justice Roach may in certain circumstances ensue, I am unable, with respect, for that reason, to cut down the meaning of those plain unambiguous words.

By themselves the words do not admit of two interpretations and therefore the applicable rule is set out by Lord

(1) (1945) 85 C.C.C. 138; (1945) 53 Man. R. 281.

Atkinson, speaking for the Judicial Committee, in *Victoria City* v. *Bishop of Vancouver Island* (1) in the second paragraph of the following extract at 387-388:—

In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. In *Grey* v. *Pearson* (2) Lord Wensleydale said: "I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Lord Blackburn quoted this passage with approval in *Caledonian Ry. Co.* v. *North British Ry. Co.* (3), as did also Jessel M. R. in *Ex parte Walton* (4).

There is another principle in the construction of statutes specially applicable to this section. It is thus stated by Lord Esher in *Reg.* v. *Judge of the City of London Court* (5):

"If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this:—If the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation." And Lord Halsbury in *Cooke* v. *Charles A. Vogeler Co.* (6) said: "But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the legislature has said." Which necessarily means that for this latter purpose it is legitimate to take into consideration the reasonableness or unreasonableness of any provision of a statute.

Again a section of a statute should, if possible, be construed so that there may be no repugnancy or inconsistency between its different portions or members.

I have quoted these three paragraphs because Lord Wensleydale's statement in *Gray* v. *Pearson,* referred to in the first paragraph, has been relied upon by the Court of Appeal in coming to its conclusion but since there is no ambiguity in the words themselves, "any criminal offence", the relevant rule in my opinion, as I have stated, is that set forth in the second paragraph. It is true that there are cases in the books where the meaning of a word of general import

(1) [1921] 2 A.C. 384.
(2) 1857 6 H.L. 61 at 106.
(3) (1881) 6 App. Cas. 114 at 131.
(4) (1881) 17 Ch. D. 746, 751.
(5) [1892] 1 Q.B. 273, 290.
(6) [1901] A.C. 102, 107.

1948

THE KING v. QUON

Kerwin J.

has been restricted. Examples of such cases are *River Wear Commissioners* v. *Adamson* (1) and *Cox* v. *Hakes* (2), but no decision of authority can be found to say that where, as here, two offences are created by the same Act, a general expression found in one section is to be cut down because a Court may think such construction would lead to some inconvenience or absurdity. The remarks of Lord Chief Justice Reading, speaking for the Court of Criminal Appeal in *Frederick Miles* (3), at 15, are appropriate: "But it is perfectly plain that in such a case as this, if a jury have given a verdict for one offence, a jury can give a verdict for another offence." Here, there is a separate and distinct offence created by section 122 and what I consider, with deference, to be the plain intent of Parliament must be given effect to. The remedy lies with Parliament and not with the Courts, as pointed out in the judgment of the Judicial Committee in *Canadian Performing Right Society* v. *Famous Players Canadian Corp.* (4) at 460:—

> Strenuous efforts, however, have been made by counsel for the appellants to induce their Lordships to accept a construction other than the literal one, and it is necessary therefore to consider whether such a construction is the correct one. Great stress is laid by the appellants on the extreme inconvenience of a literal construction. It may, it is said, be practically impossible, when occasion arises to register an assignment, to obtain a duplicate without which, as it would appear, registration is impossible.
>
> One answer to this argument is that it ought to be addressed to the legislature and not to the tribunal of construction, whose duty it is to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship.

Counsel for the accused argued that he was entitled to uphold the order setting aside the conviction upon the ground of *res judicata*. The members of the Court of Appeal were unanimous and, if they really decided the point against the accused, the latter has not the right to ask us to determine it as that would in effect permit him to appeal to this Court in a case not provided for by the *Code*. In an early part of his judgment, Mr. Justice Roach states: "In my opinion it is clear that the appellant has a complete defence to the second charge but it is not the defence of *res judicata*" but, towards the end, after referring to a number of cases cited on behalf of the accused, he continues: "On my interpretation of section 122, neither

(1) (1876-7) 2 App. Cas. 743.
(2) (1890) 15 App. Cas. 506.
(3) (1909) 3 Cr. App. R. 13.
(4) [1929] A.C. 456.

the defence of *autrefois convict* or *res judicata* has any application." I take it from these two extracts that the Court of Appeal did not consider the defence of *res judicata* and, if that be so, the proper order is that the case be remitted to that Court in order that it may pass upon that defence: *The King* v. *Boak* (1). On the other hand, if the Court of Appeal decided the point against the accused, the result will be that his conviction will be affirmed.

TASCHEREAU J.—The Attorney General for Ontario appeals from a judgment of the Court of Appeal, unanimously quashing the conviction of the respondent Quon. Special leave to appeal was granted by the Honourable Mr. Justice Estey, on the ground that this judgment conflicts on a question of law with a judgment of the Court of Appeal of the Province of Manitoba, *Rex* v. *Maskiew* (2).

The respondent was charged on two counts:

1. That at the City of Toronto on or about the 30th day of March, 1947, being armed with an offensive weapon, to wit: a pistol, he robbed Sam Lun of the sum of $75 in money, the property of Melody Lunch and Sam Lun, contrary to the Criminal Code.

2. And further, at the City of Toronto on or about the 30th day of March, 1947, he had upon his person a pistol or revolver or firearm, capable of being concealed upon the person while committing a criminal offence, contrary to the Criminal Code.

The respondent pleaded guilty to the first count and not guilty to the second. He was sentenced on the first charge to two years in the Penitentiary, and having been found guilty on the second charge, he was sentenced to a further term of two years consecutive.

The charge under the first count was laid pursuant to the provisions of section 446(*c*) of the Criminal Code which reads as follows:

446 (*c*). *Robbery while armed.*—Being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person.

The charge under the second count was made pursuant to section 122, which is as follows:

122. *Armed while committing offence.*—Everyone who has upon his person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be

(1) [1925] S.C.R. 525.

(2) (1945) 85 C.C.C. 138; (1945) 53 Man. 281.

1948

THE KING
v.
QUON

Taschereau J.

sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence.

It is common ground that on the 30th day of March, 1947, the respondent entered a restaurant of which the proprietor was Sam Lun, at the south-west corner of Carleton and Jarvis Streets in the City of Toronto. The respondent had a revolver in his hand and intimidated the proprietor and robbed him of about $75. It is to be noted that the charge on the first count relates to the 30th day of March, 1947, and that the charge on the second count also relates to the same date. It is admitted that the revolver which Quon had in his hand and the possession of which is an essential element of the crime committed under the first count, is the same offensive weapon which can be concealed, and which is mentioned in the second count.

This section 122 which is an amendment to the *Criminal Code* (1938), was enacted in order to increase the punishment when certain crimes are committed while the authors are bearers of arms which may be concealed, and which give to the offences a more dangerous character. It has however very far reaching consequences which the draftsman obviously did not all foresee. It applies to anyone who while committing *any* criminal offence has on his person a weapon which may be concealed. It would therefore apply to a man who, while writing a defamatory libel, has a revolver in his pocket, or to a person for example who, while violating the provisions of sections 221 and 222 of the *Criminal Code* relating to common nuisances, is in possession of an arm which may be concealed. But, fortunately, we have not to decide these cases, and they are matters to be dealt with by the proper legislative authorities, and not by the judiciary.

The question put before this Court is:

Does section 122 of the *Criminal Code* find its application, when it is an essential element of the "criminal offence", that the guilty person be the bearer of an offensive weapon? (a revolver in the present case).

It is submitted that the plain grammatical interpretation of section 122, is that the section applies to any person who, while committing *any* criminal offence, has upon his

person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person. It is argued that the language of this section is plain and unambiguous and that the judgment of the Court of Appeal is wrong in that the principles applied by that Court in its reasons for judgment are to be applied, only when the language of the statute to be interpreted, is ambiguous and capable of more than one meaning.

I do not think that this reasoning applies here. If the Crown's contention is adopted, it will mean that the respondent is to be punished for a robbery of $75 when armed with a revolver, and that he will receive an additional punishment because he had on his person that very same revolver, which was an element of the first criminal offence.

I have had the occasion of reading the reasons for judgment of my brother Kellock, and I agree with him that Parliament never contemplated such an unreasonable and shocking result. Words are primarily to be construed in their popular sense unless such a construction would lead to a manifest absurdity. If they lead to an absurdity, the words may be modified so as to avoid it. (Halsbury's Laws of England, 2nd Ed. Vol. 31, at pages 480, 482 and 483).

I believe that this rule must be applied here, and that it should be held that the words "any criminal offence", found in section 122 mean an offence, where the possession of a firearm susceptible of being concealed, is not an element.

I think that the Court of Appeal of Ontario was right in its conclusion, and I would therefore dismiss this appeal.

KELLOCK J.:—The respondent was charged in the County Court Judge's Criminal Court on two counts as follows:

1. That at the City of Toronto on or about the 30th day of March, 1947, being armed with an offensive weapon, to wit a pistol, he robbed Sam Lun of the sum of $75 in money, the property of Melody Lunch and Sam Lun, contrary to the Criminal Code.

2. And further that at the City of Toronto on or about the 30th day of March, 1947, he had upon his person a pistol or revolver or fire-arm capable of being concealed upon the person while committing a criminal offence contrary to the Criminal Code.

He pleaded guilty to the first count and not guilty to the second count. Evidence was submitted on the second count and he was found guilty. The sentence on the first count was two years in the penitentiary and on the second

1948

THE KING v. QUON

Kellock J.

count a further term of two years. The charge under the first count was laid under the provisions of section 446(*c*) of the Criminal Code and that under the second under section 122.

The facts are not in dispute. In the early morning of the 30th of March, 1947, the respondent entered a restaurant in the City of Toronto, the proprietor of which was one Sam Lun. Respondent had a revolver in his hand and with it intimidated Lun, and effected the robbery. It is common ground that both charges arise out of these circumstances and that the pistol referred to in the second charge is the same pistol as is referred to in the first charge.

On appeal to the Court of Appeal for Ontario the appeal was allowed and it was held that the words "any criminal offence" in section 122 do not include an offence an essential element of which is the possession of a firearm capable of being concealed upon the person. The Crown now appeals pursuant to leave granted, on the ground of conflict between the judgment here in question and the decision of the Court of Appeal of Manitoba in *Rex.* v. *Maskiew* (1).

The relevant sections of the *Code* are as follows:

445. Robbery is theft accompanied with violence or threats of violence to any person or property used to extort the property stolen, or to prevent or overcome resistance to its being stolen.

446. Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person;

447. Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment and to be whipped.

Section 122, as enacted by 2 Geo. VI, *cap.* 44, section 7, reads as follows:

122. (1) Every one who has upon his person a rifle, shot-gun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence.

(1) (1945) 53 Man. R. 281; [1946] 1 D.L.R. 378.

On the view of the appellant as to the effect of these two sections, the possession of the revolver by the respondent in the commission of the robbery took the respondent out of section 445 and raised the offence to one within section 446(*c*), while at the same time, the *same fact,* i.e., the possession of the revolver constituted an additional and separate offence within section 122.

In approaching the question as to the proper view to be taken of the meaning of the statute, I think there are well settled principles to be kept in mind. The first is illustrated by *Wemys* v. *Hopkins* (1). In that case a complaint was preferred against the appellant under 5 and 6 Wm. IV, c. 50 (1), s. 78, for that being the driver of a carriage on a highway, by negligence or wilful misbehaviour, viz., by striking a certain horse ridden by the respondent, caused her hurt and damage. The appellant was convicted on this charge and fined. Subsequently a complaint was preferred against him under 24 and 25 Vict., c. 100, s. 42, for that he did on the same date as that in question on the first complaint and by reason of the same conduct, unlawfully assault, strike, and otherwise abuse the respondent. On this charge he was also convicted and fined. The question for the court was whether, the appellant having been convicted on the first, could also be convicted on the second complaint. It was held he could not. Blackburn, J., at p. 381 said:

> The defence does not arise on a plea of autrefois convict, but on the well established rule at common law, that when a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam,* that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence * * * It is necessary in the present case to have it proved * * * that on a former occasion the appellant was charged with the same assault, although not in the same words, yet in terms the same, and that he was then convicted and punished.

The above principle is embodied in section 14 of the *Code.* The common law principle is as applicable, in my opinion, in the case of two sections of the same statute as in the case of separate statutes.

There is also to be borne in mind the second principle, as stated by Cockburn, C.J., in *Queen* v. *Elrington* (2) at 696, viz.: "the well established principle of our criminal

(1) (1875) L.R. 10 Q.B. 378. (2) (1861) 1 B. & S. 688.

1948

THE KING
v.
QUON

Kellock J.

law that a series of charges shall not be preferred and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form". Section 907 embodies this latter principle.

It is obvious of course that Parliament may, if it sees fit, constitute two separate offences out of the same act or omission or make part of an act or omission or one or more of a series of acts or omissions a separate offence additional to that constituted by the complete act or omission or the whole series.

In the light of the principles referred to, which are fundamental principles of the criminal law, one asks one's self whether Parliament has in fact as to the statutory provisions here in question, departed from these principles and shown the intention that the possession of a firearm in the commission of the offence of robbery, which thereby raises the offence to that of armed robbery, shall also constitute a separate and distinct offence under section 122. In other words, does the statute, taken as a whole, indicate that the words "any criminal offence" in section 122 are used in other than their literal all inclusive sense?

The argument for the appellant is based squarely upon the literal interpretation of this phrase. Where statutory language admits of only one meaning, then, of course no other meaning may be applied but it is the intention of the legislature upon the whole statute that is the determining factor. The matter is put thus in Maxwell, *On the Interpretation of Statutes,* 7th Ed. p. 2.

> The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar. From these presumptions it is not allowable to depart where the language admits of no other meaning. Nor should there be any departure from them where the language under consideration is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the Legislature. If there is nothing to modify, nothing to alter, nothing to qualify, the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The great fundamental principal is:—
>
> "In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to,

unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther."

However, the mere use of a general word, even the "any" does not end the matter. In *Cox* v. *Hakes* (1) Lord Halsbury, L.C., at p. 517 said:

* * * it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy.

While it was in that case admitted that the case with which the House was dealing fell within the literal meaning of the statute this meaning was rejected. In the words of Lord Bramwell at p. 526:

* * * if the result would be futile, or lead to an absurdity, the right way of dealing with those words is to put a limit on them;

In *River Wear Commissioners* v. *Adamson* (2) where the House had to deal with a similar question, Lord Blackburn said at page 763:

In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

And at page 764 he said:

* * * and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear.

In *Astor* v. *Perry* (3) the principle of the above authorities was applied again to the word "any" and additional words were implied by the House to give a limiting meaning to the general language used in the statute.

What is meant by "absurdity" is well explained by Lord Blackburn in *Rhodes* v. *Rhodes* (4) at 205, where he said, quoting Lord Cranworth in *Thelluson* v. *Rendlesham* (5):

(1) (1890) 15 App. Cas. 506.
(2) (1876-7) 2 App. Cas. 743.
(3) [1935] A.C. 398.
(4) (1882) 7 App. Cas. 192.
(5) (1858) 7 H.L. Cas. 428.

1948

THE KING
v.
QUON

Kellock J.

The rule on which the appellant relies is that universally recognized and acted on, namely, that words are to be construed according to their plain ordinary meaning unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is, perhaps, involved in the former, for, supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to shew that the words could not have been used in their ordinary sense.

Lord Blackburn continued:

Lord Wensleydale once more repeated the rule as laid down in *Warburton* v. *Loveland* (1) but it is worth observing that by "an absurdity" can hardly be meant a result which the Court who construe the will thought ought not to have been the intention of the testator. If that had been so, the Thelluson will itself would have been upset. Lord St. Leonards says, p. 509, that much thought and learning had been bestowed for the purpose of endeavouring "to counteract, and properly too, if it could be done, the ambitious views of the testator," but the intention was too clearly expressed. Lord Cranworth, therefore, seems quite correct when he says that the latter branch of the rule is but a means by the context of shewing that the words were not used in their ordinary sense, as it is not to be presumed that the testator meant an absurdity; but that if it is shewn that it was intended to use them so as to work this absurdity, that intention, if it be not illegal, must be carried out.

It is necessary to see therefore whether there is anything to indicate the sense in which the words here in question were used.

The ancestor of section 122, so far as I have been able to trace it back, is section 2 of 40 Victoria, (1877), *cap.* 30: "An Act to make provision against the improper use of Firearms." Sections 2 and 3 of that statute read as follows:

2. Whosoever, when arrested either on a warrant issued against him for an offence or whilst committing an offence, has upon his person a pistol or air gun, shall be liable on conviction thereof to a fine of not less than twenty dollars or more than fifty dollars, or to imprisonment in any gaol or place of confinement for a term *not exceeding* three months.

3. Whosoever has upon his person a pistol or air gun, with intent therewith unlawfully and maliciously to do injury to any other person, shall be liable on conviction thereof, to a fine of not less than fifty or more than two hundred dollars, or to imprisonment in any gaol or place of confinement for a term *not exceeding* six months:

(2) The intent aforesaid may be *prima facie* inferred from the fact of the pistol or air gun being on the person.

It is evident that the question which is involved in the present appeal arose in 1877 on the enactment of the original legislation. If the argument for the Crown is sound, the proper construction of these two sections is that you take the conduct described by section 3 as constituting the

(1) Hud. & Br. (Ir.) 648.

offence therein provided for, and automatically you also take a part of that same conduct and, by adding it to its whole, make out the additional offence under section 2. In my opinion statutory language which produces such a result should be very clear and free from all indication of a contrary intent. I think the language here under consideration does indicate such a contrary intent.

Parliament has, in my opinion, provided in section 3 that the *totality* of the conduct there described shall constitute one offence punishable by a fine of *not more* than two hundred dollars or by imprisonment for a term *not exceeding* six months. How can effect be given to this clear and unambiguous expression of intention in section 3 except by construing section 2, as Roach, J.A., has construed the present section 122, as applying only to offences which do not include as an element thereof any of the conduct described in section 3, or more specifically, the possession upon the person of a pistol or air gun?

Again, to read the two sections together in accordance with the contention of the appellant they would read somewhat as follows:

> Whosoever when arrested whilst having upon his person a pistol or air gun with intent etc., which intent may be inferred from the fact of possession, has upon his person a pistol or air gun shall be liable to conviction * * *

To so read the sections is to reduce them to the merest tautology and to render them absurd. I think therefore that the statute provides the necessary internal evidence that these sections are to be read in accordance with the principle applied by Roach, J. A.

Coming to the *Code* as it now stands, one finds that section 122 is embodied in a group of sections commencing with section 115. When these are examined the same consideration appears as in the case of sections 2 and 3 of the Act of 1877. For instance, section 118, as enacted by 23-24 Geo. V., *cap.* 25, section 1, is as follows:

> 118. Every one is guilty of an indictable offence and liable to imprisonment for a term *not exceeding* five years, who, not having a permit in form 76,—
>
> (*a*) has upon his person, elsewhere than in his own dwelling house, shop, warehouse, counting house, or premises, a pistol, revolver, or other firearm, capable of being concealed upon the person;

1948

THE KING v. QUON

Kellock J.

If a person is without the statutory permit he is guilty of the offence described by this section if he has upon his person in the circumstances mentioned, a firearm capable of being concealed. For the *totality* of this conduct the penalty prescribed by Parliament is a term *not exceeding* five years. If the appellant's argument be sound, the existence of one element of this very conduct would subject the defendant to an additional penalty of two years merely by the process of a separate charge being laid against him under the provisions of section 122. It seems to me that Parliament, in the use of the phrase "not exceeding" in section 118, has clearly indicated that that section is exhaustive as far as the conduct to which it relates is concerned, and that therefore section 122 is to be confined in its operation, notwithstanding the use of the words "any offence", to offences of which the possession of a firearm capable of being concealed upon the person is not an element.

The same situation arises under many of the sections in the group and I think they are to be construed in the same manner. Section 129, however, as enacted by 23-24 Geo. V., *cap.* 25, section 1, does not include in the offence thereby created the possession or use of offensive weapons and the above reasoning would therefore not apply to it.

The force of the considerations above set out is enhanced when section 457 is referred to. The section reads as follows:

> 457. Every one is guilty of an indictable offence and liable to imprisonment for life who
>
> (*a*) breaks and enters a dwelling-house by night with intent to commit any indictable offence therein; or
>
> (*b*) breaks out of any dwelling-house by night, either after committing an indictable offence therein, or after having entered such dwelling-house, either by day or by night, with intent to commit an indictable offence therein.
>
> 2. Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped.

In my opinion it would be absurd to say that a person liable to conviction under the provisions of subsection 2 is also liable to be convicted under the provisions of section 122, if the offensive weapon is a firearm. The absurdity

of such a construction is heightened by the fact that the penalty provided by section 457, subsection 1, is imprisonment for life.

Coming to section 446(*c*), Parliament has by this provision, declared that for that offence, involving as one of its main elements, the presence on the offender of an offensive weapon, the penalty may be imprisonment for life and whipping. That is expressly the penalty for the totality of that conduct. I do not think therefore, that there is to be attributed to Parliament the intention that one part of that conduct (where the weapon in question is a firearm) may be made the subject of a separate charge under section 122, a procedure which would be ineffective and absurd where the maximum penalty had been imposed. In any case where the maximum is not imposed, it is to be taken that it is because the trial tribunal did not consider that the conduct involved merited such a penalty. Surely it cannot be said that in such a case Parliament has expressed the intention, nonetheless, that the same tribunal may be called upon to impose an additional penalty for the same conduct under the guise of a separate charge. While it is the fact that in the case of the offences provided for by clauses (*a*) and (*b*) of section 446, the penalty is the same as in the case of an offence under clause (*c*), an offensive weapon is not there in either case involved. The same considerations therefore do not apply as in a case under clause (*c*).

It is quite true that under the provisions of section 122, subsection 1, a conviction for the offence thereby provided does not depend upon a conviction for the other offence to which the subsection refers but it does depend upon such offence being proved to have been in fact committed. I do not think, therefore, that this situation has any bearing upon the construction of the section from the standpoint above set forth.

In my opinion, therefore, Roach, J. A., was right in the conclusion to which he came.

In *Rex* v. *Maskiew* (1), the following, which is the ratio decidendi of the judgment of the Chief Justice, occurs at p. 143:

> Section 122 is for the purpose of governing the carrying of firearms. In its original form, in 1886, the section was comparatively simple and

(1) (1945) 85 C.C.C. 138; [1943] 53 Man. 281.

1948

THE KING
v.
QUON

Kellock J.

the punishment not severe; but conditions and the increase of crime having made it necessary to amend same for the protection of the public, the amendments of 1932 and subsequent years indicate the importance of prohibiting the carrying of concealed weapons and that there should be a certainty of additional punishment imposed upon a convicted criminal found in such possession. If it had been the intention of the Legislature to have made a special exemption of a conviction under s. 446(*c*), it would have been quite easy to have done so; but the section does not make any exception.

This appears to say that because a general word has been used without any express exception, the literal interpretation must be applied. With respect, the authorities to which I have referred establish that that is not the law.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitor for the Appellant: *C. P. Hope.*

Solicitor for the Respondent: *A. W. Maloney.*