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*Oct. 11, 12.
*Oct. 20.

ALONZO AARON BROWNELL (DEFENDANT) ..... APPELLANT;

AND

MILDRED VERNON BROWNELL (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—Adduction of evidence—Cross-examination at trial—Vexatious and irrelevant questions—Discretionary order—Propriety of review.

The judge presiding at the trial of a cause has a necessary discretion for the protection of witnesses under cross-examination and, where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence, an appellate court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a question being disallowed which did not, at the time it was put to the witness, have relevancy to the issues.

Idington J. dissented on the ground that, under the circumstances of the case, counsel was entitled to have the question answered.

APPEAL from the judgment of the Supreme Court of British Columbia, *in banco,* reversing the judgment of Martin J., at the trial, with costs, and ordering a new trial.

A statement of the case appears in the judgment of Mr. Justice Anglin now reported.

Newcombe K.C., for the appellant.

J. Travers Lewis K.C., for the respondent.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Anglin JJ.

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THE CHIEF JUSTICE and GIROUARD and DAVIES JJ. agreed in the reasons stated by Anglin J.

Idington J.

IDINGTON J. (dissenting).—This appeal arises in an action by a wife against a husband long and widely separated in which he amongst other things pleaded laches in bringing the action, as well as the Statute of Limitations, and in the trial of which much might turn on their respective credibility.

She was in America and he in South Africa when the events took place as to his manner of life into which inquiry was being made at the trial.

Much necessarily depended on getting from himself that part of his life history or discrediting him entirely in regard thereto.

He had been examined for discovery. He is alleged to have admitted one bigamous marriage in South Africa, and in fact to have had improper relations there with another woman, but whether under cover of marriage or not had not been developed in his examination, when the unfortunate difference took place between the learned trial judge and counsel conducting this cross-examination.

The fact of one bigamous marriage having been contracted in Cape Town in South Africa was admitted, but exactly where defendant either would not or could not tell. There might be others, as the counsel in fact tells the court, and presumably wishing to identify the marriage he asked if that one then being spoken of by witness was his marriage with Magdalena Mary Snyder. Thereupon the court interrupted and ruled he could not go into that.

Counsel asserted amongst other things that he desired to be in a position to put the examination for

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discovery in evidence and be in a position thereby to prove the fact and also effectively contradict the defendant. He was afraid to disclose to the witness just what his purpose was, and offered that discovery examination to the learned judge for perusal. That seems to have been declined. I do not see why this, which is not an unheard of method of assuring the judge of counsel's good faith and real purpose without forcing him to tell the witness and put him on his guard, was declined.

Counsel also used illustrations indicating his purpose. He also, properly as I think, for quite evident reasons protested he should not be forced in face of such a witness to disclose his full purpose.

I think he was entitled to have this question answered. It was probably the only means the respondent or her counsel had of identifying and distinguishing this marriage from another he was able by means of the discovery examination or otherwise to prove.

I do not think counsel ought to be driven in such a case and with such a witness as the record discloses this was to ask the direct question, whether or not this was the only bigamous marriage he had contracted in South Africa. Nor do I think in such a case the court should insist on the literal adoption of any precise way of putting, or words in which it might think best to put a question, and refuse to allow another which counsel might prefer.

If, as prior rulings indicate, the fact of a marriage was the proper subject for inquiry at all, I submit with respect every latitude should have been given to counsel in relation to it. Either the ground should not have been entered on at all, or the work done thoroughly.

The ruling at this point of the cross-examination I have referred to led to counsel withdrawing. A judgment was then entered for appellant and upon appeal to the Supreme Court of British Columbia a new trial was ordered and hence this appeal.

I prefer not to deal with what appears in the course of the cross-examination leading up to this breaking off point beyond saying it indicates the witness to have been one with whom counsel needed a pretty free hand, indeed more so than he was given.

The appellate court having merely granted a new trial which bound no one's future rights in the premises, I submit with respect such an appeal to this court is to be regretted.

If, as seems quite possible, the appellant had contracted more than one bigamous marriage preceded by all which that implies, he may by untrustworthy evidence have won a judgment he is not entitled to.

I submit it would be better to dismiss the appeal with costs and let the case be fully tried out.

ANGLIN J.—The parties to this case are a wife and husband whose unfortunate matrimonial difficulties have culminated in proceedings by the wife for divorce.

In the present action the wife, as plaintiff, seeks to establish a partnership with her husband and claims from him an accounting. Denying the alleged partnership, the defendant also pleads in answer to the action laches and the Statute of Limitations.

After a refusal of a motion for nonsuit the defendant entered the witness box. In the course of cross-examination he admitted having contracted a bigamous marriage in South Africa, ten months' co-habita-

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tion and the birth of a child. He also stated that he did not know in what precise place in the City of Cape Town the bigamous ceremony was performed. He was asked the name of the woman with whom the marriage had been contracted. This question the learned trial judge declined to compel him to answer, and, because this ruling was adhered to, the plaintiff's counsel withdrew from the case.

On the evidence before him the learned judge held that the plaintiff had failed to establish a partnership with the defendant and dismissed the action. Upon appeal, the Supreme Court of British Columbia set aside this judgment and ordered a new trial, on the ground that the trial judge had unduly hampered the plaintiff's counsel in his cross-examination of the defendant; and the defendant was ordered to pay the costs of the former trial and of the appeal.

The only question formulated by counsel for the plaintiff to which the trial judge refused to compel an answer by the defendant was that above stated as to the name of the bigamous wife. His refusal was based upon the irrelevancy, immateriality and vexatious character of the question.

Though counsel for the appellant at first suggested that practically the only restriction upon the right of cross-examination is the sense of professional duty of cross-examining counsel, he ultimately conceded that a trial judge has some discretion to protect a witness against questions which are purely vexatious. It is obvious that were this power denied to a judge presiding in a trial court he would have no control over the conduct of the case, and would be powerless to prevent the grossest abuse of the right of cross-examination. Trials would become interminable and irrele-

vant matter might be introduced for most improper purposes. That it is necessary that a trial judge should have this discretion is therefore manifest; that he has it in fact is well established. Taylor on Evidence (18 ed.), par. 1460; Best on Evidence (10 ed.), p. 121.

The character of this discretion, however, is such that its precise limits are not easily defined and in practice its exercise, though undoubtedly reviewable, must be left largely to the sound judgment and wisdom of the presiding judge who, from his observation of the demeanour of the witness and also of the manner of and the conduct of the case by counsel, has means and opportunities of forming a correct opinion as to the importance and real purpose of questions propounded which are not open to an appellate court.

Counsel for the appellant sought to uphold his client's right to an answer to the rejected question on the grounds that it was relevant either to the plea of laches or to that of the Statute of Limitations and also to the issue as to the defendant's credibility. The facts of the bigamous marriage, the ten months' duration of the intercourse, the birth of the child—all these were facts tending to shew a prolonged absence of the defendant in South Africa, and therefore relevant upon the pleas of laches and of the statute. But I find it difficult to conceive how the plaintiff's case on this issue could be advanced or the defence weakened by the disclosure of the name of the defendant's unfortunate victim.

Counsel ingeniously urged that the purpose of the question put was to identify the particular bigamous marriage then being dealt with, it being the intention of the cross-examiner thereafter to shew that a second

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bigamous marriage had been contracted by the defendant and thus to establish the probability, if not the certainty, of a still more prolonged absence from British Columbia, excusing the plaintiff's delay in bringing suit. It is obvious that with this object the witness might well have been asked whether in fact he had a second time committed bigamy and, if he admitted that fact, might further have been asked as to the duration of his co-habitation with the second victim. If he denied the fact of the second bigamous marriage and if counsel, desiring to lay a foundation to contradict him upon this point, then sought for that purpose to introduce the names of the persons with whom the alleged bigamous marriages had been contracted in order to fully identify the marriage as to which he sought to put himself in a position to adduce evidence in rebuttal, it may be that the relevancy and propriety of the question under consideration would be established. But as the evidence stood when the question was put it is, I think, not possible to say that the trial judge erred in treating it as irrelevant and immaterial.

No doubt the limits of relevancy must be less tightly drawn upon cross-examination than upon direct examination. The introduction upon cross-examination of the issue of the witness's credibility necessarily enlarges the field. But it does not follow that all barriers are therefore thrown down. That which is clearly irrelevant to this issue or to the issues raised in the pleadings is no more admissible in cross-examination than in examination in chief.

Counsel sought to maintain the relevancy of the question to the issue of credibility on the ground that it related to matter the proof of which would tend to

degrade the witness's character and would therefore affect the judgment upon his credibility. The fact of the bigamous marriage, the duration of the intercourse, and the abandonment of the victim were all facts which might well be deemed relevant for this purpose; but again I find it impossible to conceive how the statement of her name would help in the determination of this issue.

In view of the facts that divorce proceedings were pending between the parties, that the admission sought, while apparently of no value for the purposes of this partnership action might be of service in these divorce proceedings, that from all that appeared upon the proceedings and evidence before the trial judge the identity of the woman in question was entirely irrelevant to any issue which he might have to determine, and that from what he had seen of both plaintiff and defendant in the witness box, of the conduct of the case generally by counsel and of the manner in which and the circumstances under which the particular question was put and pressed the learned trial judge had the very best opportunity of judging of its importance and real purpose, it is, I think, quite impossible for an appellate tribunal to say that his discretion was not in this case reasonably and properly exercised in excluding the question.

There was nothing in the trial judge's refusal to permit this particular question to be answered at the time when it was put which prevented counsel proceeding with the fullest cross-examination of the witness, and it might well be that that which was quite irrelevant upon the issues as developed by the evidence then before the court might at a later stage of the proceedings have become admissible. At all

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events nothing occurred which precluded counsel from proceeding with cross-examination as to any other bigamous marriage of the defendant or facts connected therewith and certainly nothing to prevent the fullest cross-examination upon matters directly relevant to the issue of partnership or no partnership. It was not argued that upon the evidence before the learned trial judge his conclusion that the plaintiff had failed to establish a partnership can be successfully attacked.

For these reasons I am respectfully of the opinion that the provincial appellate court erred in interfering with the discretion exercised by the learned trial judge, and that its order for a new trial based upon this ground cannot be upheld.

I would allow the appeal of the defendant with costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Fell & Gregory.*
Solicitor for the respondent: *J. A. Aikman.*