

assault took place is admissible, although such complaint might have been made on the day of the assault to some other person, if the presiding Judge thinks that the complaint was made at such a time and under such circumstances as to render it probable that the complaint honestly presented, to the person to whom it was made, the real attitude of the mind of the prosecutrix.

CASE RESERVED for the Full Court by HODGES, J.

The jury found the accused guilty of rape, with mitigating circumstances, and a strong recommendation to mercy. It appeared from the evidence of the prosecutrix that, at the time of the offence, she was in the service of a Mrs. Molloy. After the offence had been committed, the prosecutrix said to the accused that she would tell her sister about what had taken place. On the same evening, she saw Mrs. Molloy, and stayed at her house all night. Next day she went to her sister's. The question for the Court was, whether evidence of a complaint made by the prosecutrix to her sister on that day, but not immediately after her arrival at her sister's, was admissible. It was objected to by Counsel for the accused, on the ground that the complaint should have been made to Mrs. Molloy. His Honour overruled the objection, as, considering the apparent age of the girl, the extent of her intelligence, the length of time she had been in Mrs. Molloy's employ, and her bearing generally, it appeared to him that her sister was the first person she saw to whom it was reasonable to expect her to complain, and that she complained reasonably soon. His Honour, however, reserved the question.

WALSH, Q.C., for the Crown, referred to *Reg. v. Cooper*, 1 W.W. & A'B. (L.), 123.

EAGLESON for the prisoner.—A distinction must be made between rapes and assaults upon girls of tender years. In the latter class of cases, it might be contended that they should complain to some person to whom they were accustomed to complain. But in the case of an assault upon a girl over 16, the rule is that the complaint must be made so soon after the alleged assault as to show that it is the spontaneous act of an outraged person. [HODGES, J.—Do you say that if she did not make a complaint to the first man she met in the street, her evidence should not be received? Or even to the first woman?] She might at least complain to the first woman she knew in the street. The cases show that the question is, whether the complaint was made "soon after the assault." [HOOD, J.—I thought the test was, whether it was made at the first available opportunity.] The first person to whom she should have complained was her mistress—*Reg. v. Milliman* (1896), 2 Q.B. 167, at p. 171. The girl here would have time to manufacture a story.

The judgment of the Court was delivered by MADDEN, C.J.—We think the conviction should be affirmed. The principle of law involved is intelligible enough. Of course it is a flagrant exception to the ordinary rules of evidence, that statements made between others, in the absence of the prisoner, should be admitted as

evidence, but it is applied to the very peculiar and special case of alleged rape, which depends in a most essential degree on the question whether the woman was consenting. A Judge has, and must have, a discretion to say whether a complaint which has been made is one which, having due regard for the person alleged to be outraged, and the reasonable safety of the prisoner, should be admitted. The circumstances of the length of time which elapsed before the complaint was made; of omitting to complain to the first person whom the girl saw after the assault, and to whom complaint might have been easily made; and the conditions attaching to the person outraged, have to be taken into consideration. We have to get the natural picture of the girl's mind, in order to see whether or not it was a real outrage to her, or whether it was an act done with her consent. Of course, the longer she has to think over it, the more danger there is of her making a false or exaggerated charge. The Judge must consider in each case what class of woman she is, what opportunities for complaint there were, and so on. And on the whole, exercising his best discretion, he has to judge whether the complaint was probably made at such a time and under such circumstances as make it probable that the woman honestly presented the real attitude of her mind to the person to whom the complaint was made. It is argued here that the girl's mistress was available to receive a complaint, and that the girl saw her first that night after the assault, and did not complain to her. She may not have thought her mistress a sympathetic person, or may have felt ashamed to speak to her. The girl certainly told the prisoner at the time of the offence that she would complain to her sister, and she did complain to her sister within a very short time—the very next day. It is true that she did not speak to her sister immediately she saw her, but only when the sister was leaving to go home; but that can easily be understood in a very modest girl, even when speaking of such a thing to a sister. All these are questions for the Judge to consider for himself in order to assure himself that the evidence is of a kind which the law aims at admitting. We think that His Honour exercised his discretion entirely according to the principles by which he should be guided. We therefore think the admission of the evidence in question was correct. *Conviction affirmed.*

[Solicitors—For the prisoner, Lyons and Turner; for the Crown, Guinness.]

CRIMINAL JURISDICTION.—Be- } May 28, 31.  
fore Holroyd, J.

### R. v. ALEXANDER.

*Criminal Law—Bigamy—Enquiries as to whereabouts of husband—Bonâ fide belief in death—Evidence as to.*

A prisoner, charged with bigamy, giving evidence on his or her own behalf, in support of a defence that he or she had a *bonâ fide* reasonable

belief as to his or her wife's or husband's death, may state what enquiries he or she made as to the whereabouts of his or her wife or husband, and the replies he or she received, without the persons from whom the information was obtained being called. The prisoner may also, in support of the defence of the *bona fides* of such belief, give evidence that he or she told third parties about the projected second marriage.

PRESENTMENT for bigamy.

FINLAYSON for the Crown.

EAGLESON for the prisoner, Elizabeth Beatrice Alexander.

The prisoner gave evidence on her own behalf to the effect that she believed her husband was dead before she married again, and was asked the following question during her examination-in-chief:—"What enquiries did 'you make from your first husband's relatives as to his 'whereabouts, and what answers did you get?'"

FINLAYSON objected to the question.—The defence have to show that the prisoner had a *bona fide* belief as to the death of the first husband, which must be founded on reasonable grounds. The proper way to prove this is to call the person from whom the enquiries were made to show that such person had knowledge or had means of knowing the husband's whereabouts, or had reasonable grounds for such knowledge.

EAGLESON.—The question should be allowed in accordance with the decision in *R. v. Tolson*, 23 Q.B.D. 168.

HOLROYD, J.—As it is now a defence, according to *R. v. Tolson*, that the prisoner had a *bona fide* belief in the death of her first husband, if such belief is based on reasonable grounds, I am of opinion that evidence as to the enquiries which the prisoner made from the first husband's friends, and the replies which she obtained, may be given by her in her favour in support of such a defence, and I accordingly hold that the question is rightly put to the witness.

The prisoner was subsequently asked—"Did you tell 'any persons about your projected second marriage, 'and were your friends and your intended second 'husband's friends amongst such persons?'"

FINLAYSON objected to the question.

EAGLESON.—Such evidence would show that she had no criminal intention, and would also show that her belief in her first husband's death was *bona fide*.

HOLROYD, J., allowed the question to be put.

Verdict—Guilty.

[Attornies—Guinness, Crown Solicitor, for Crown; Hart, for prisoner.]

Before Hood, J.

March 30.

### BUCHANAN v. BUCHANAN.

*Rules of the Supreme Court 1884, Order XIX., r. 27—Action for breach of trust—Infant plaintiff by next friend—Concurrence in breach*

*by next friend—Pleading concurrence—Practice—Motion to dismiss action.*

Where, in an action by an infant by her next friend, the statement of claim alleges breaches of trust by the defendant as administrator, the defendant is not a liberty to plead that the next friend of the plaintiff concurred in the alleged breaches of trust, and that the infant is a mere dummy for him.

Under such circumstances, the proper remedy is by motion to have the action dismissed.

#### SUMMONS.

This action was brought by the plaintiff, an infant, by her next friend, Gustavus Robert Bruce, against the defendant, the administrator of the estate of the plaintiff's father. The statement of claim alleged breaches of trust by the defendant as administrator, and claimed *inter alia* the usual administration accounts and enquiries, payment of what might be found due from the defendant, and so far as necessary, administration of the estate by the Court.

Paragraph 6 (c) of the statement of claim alleged that the defendant had taken out of the trust estate, and employed for his own use, various moneys, part only of which had, under pressure, been restored by him to the trust estate, and had not paid or charged himself with any interest in respect thereof. In his defence (paragraph 6), the defendant, as to paragraph 6 (c) of the statement of claim, alleged "that with full knowledge and concurrence of G. R. Bruce, the next friend of the plaintiff herein," he borrowed from the estate a sum of money on ample securities, and had repaid the same with interest. Paragraphs 9 and 10 of the defence were as follows:—

9. He says that G. R. Bruce (the plaintiff's next friend), is a surety for the due administration by the defendant of the said intestate estate, and has been conversant with, and has fully concurred in the administration thereof by the defendant, and especially with regard to the alleged breaches of trust, and he will contend that he is not, nor is the plaintiff by him as her next friend, entitled to maintain this action, and that he and the plaintiff by him is estopped from relying on such breaches of trust.

10. He further says that the plaintiff is in this action only a dummy for the said G. R. Bruce, and is not therefore entitled to maintain the same.

This summons was taken out by the plaintiff to have the words quoted above from paragraph 6, and the whole of paragraphs 9 and 10 of the defence struck out "on the grounds that they disclose no reasonable 'answer, and are irrelevant and embarrassing, and 'prejudice the fair trial of the action."

WEIGALL in support.—As a matter of law, these paragraphs of the defence are irrelevant. They raise an issue not material. The next friend is not a party to the suit. If the defendant thinks the next friend is not a proper person, his remedy is by motion to set aside the suit.