LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

OFFENCES AGAINST THE PERSON ACT, 1828

SECTION 28

LRC 35

1977

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE GARDE B. GARDOM, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
OFFENCES AGAINST THE PERSON ACT, 1828, SECTION 28

The *Offences Against the Person Act, 1828* is an English Statute which was once part of the Criminal Law of British Columbia. Most of its provisions have been superseded by Federal criminal laws for over 100 years, but our courts have held that section 28 of that Act remains in force in this Province. The effect of section 28 is that where a person has faced criminal proceedings for a minor assault, he is, if certain conditions are met, freed of civil liability to the person he assaulted.

It is the Commission's conclusion that this archaic provision should no longer have the force of law in British Columbia and this Report contains a recommendation to that effect.

CHAPTER I INTRODUCTION

Criminal law and the law of torts often overlap in the sense that a specific wrongful act or omission by a person may subject him both to civil liability to a party who has suffered loss arising out of the act or omission and to a prosecution under the criminal law. In terms of legal analysis, however, these two possibilities exist quite independently of each other. Civil liability is normally irrelevant when criminal liability is in issue and vice versa.

Within each of these two streams of liability there are rules of law which prevent a multiplicity of proceedings based on the same facts. A prior criminal prosecution can normally be raised as a valid defence to a later prosecution and similarly a prior civil action makes an issue *res judicata* so as to bar a later civil action. But the independence of the two heads of liability is such that prior civil proceedings will not bar a later criminal prosecution based on the same facts nor will a prior criminal prosecution bar a later civil action.

A rare exception to the latter rule is to be found in section 28 of the *Offences Against the Person Act, 1828* an English statute which the courts have held to be in force in British Columbia. It provides:

> And be it enacted,. That if any Person against whom any such Complaint shall have been preferred for any Common Assault or Battery, shall have obtained such Certificate as aforesaid, or having been convicted shall have paid the whole Amount adjudged to be paid under such Conviction, or shall have suffered the Imprisonment awarded for Nonpayment thereof, in every such Case he shall be released from all further or other Proceedings, Civil or Criminal, for the same Cause.

The "certificate" referred to is one which may be delivered to an accused by the court if the assault he is alleged to have committed is not proved, justified or too trivial to merit punishment.

The essence of section 28 is that a person who has been prosecuted for a petty assault will, if the conditions set out are met, be immune from civil proceedings based on the assault.

The rationale which underlies this rule is somewhat obscure:

> Why assaults should have been singled out for this unmeritorious distinction is a matter for conjecture. The damage caused by a summary assault is usually small. It is one of the cases where compensation is less important than the soothing of ruffled feelings and the prevention of retaliation. To duplicate the remedies may have been thought out of proportion to so slight a matter. Therefore recourse to the civil and the criminal courts was made alternative ... But such an explanation is only guesswork.

There is little we can add to that speculation.

CHAPTER II LEGISLATIVE HISTORY OF THE RULE

The *Offences Against the Person Act*, *1828* was in force in England at the time the colony of British Columbia came into existence and section 28 was thus introduced into British Columbia law by Governor Douglas' Proclamation of 19 November, 1858:

> ... that the Civil and Criminal Laws of England, as the same existed at the date of the said Proclamation of the said Act, and so far as they are not, from local circumstances, inapplicable to the Colony of British Columbia, are and will remain in full force within the said Colony, till such times as they shall be altered by Her said majesty in Her Privy Council, or by me, the said Governor, or by such other Legislative Authority as may hereafter be legally constituted in the said Colony; and that such Laws shall be administered and enforced by all proper authorities against .all persons claiming protection of the same Laws.

Whatever force section 28 has in the Province today derives from the *English Law Act*, the modern counterpart of the Proclamation set out above.

Only three years after the introduction of the Act into British Columbia new legislation was enacted in England, the *Offences Against the Person Act*, *1861* and the effect of section 28 of the 1828 Act was carried forward into section 45 of the new Act. The Act of 1861 appears to remain in force in England today.

The 1828 Act remained in force in British Columbia until after its entry into Confederation in 1871. Criminal laws enacted by the Dominion Parliament became applicable only in 1874. Those laws consisted largely of a variety of English criminal statutes which had been reenacted in 1869. Among them was an *Offences Against the Person Act* almost identical to the *English Act* of 1861.

The 1869 reenactment had contained a provision comparable to section 28 of the 1828 Act and, when the federal statutes were revised in 1886 the provision became part of the *Summary Convictions Act*. In 1892 it became part of our first *Criminal Code* and was carried forward through a number of revisions. Its final appearance was as section 734 of the Code in the 1927 revision of the statutes.

In 1954 a wholly new and revised *Criminal Code* was enacted. It contained no provision comparable to section 28 of the *Offences Against the Person Act*, *1828*.

CHAPTER III THE REVIVAL OF THE RULE

Section 28 of the Act of 1828 having been superseded by federal legislation and that federal legislation having been repealed, one might have thought that its effect had been terminated. As a general principle of statutory construction, the repeal of an Act which itself repeals a second Act does not revive that second Act. This principle is given legislative force in Canada by section 35(a) of the *Interpretation Act* (Canada) which provides:

> Where an enactment is repealed in whole or in part, the repeal does not
>
> revive any enactment or anything not in force or existing at the time when the repeal takes effect; ...

A similar provision appears in the British Columbia *Interpretation Act*.

In 1969, however, in *Sharkey* v. *Robertson* 4. *Walske*, (1966) 75 W.W.R. 411 (Alta. S.C.). In this case it was held that section 45 of the English *Offences Against the Person Act, 1861* was not in force in Alberta. It had been argued it was part of the law of Alberta by virtue of legislation comparable to our *English Law Act* (the relevant reception date being 1870). The rejection of that argument was based on an explicit holding that the comparable section of the *Criminal Code* was *intra vires* and repealed the prior English law to the extent that it had been in force. section 28 was raised as a defence in a civil action for damages arising out of an assault. Ruttan J. of the British Columbia Supreme Court considered the history of section 28 and held that it was in force:

> I agree that repeal of secs. 732 to 734 of the Criminal Code did not repeal such legislation as may have existed in this province before Confederation relating to the same subject matter ...

That decision has been followed twice in this Province: in 1971 in *McIntyre* v. *Moon*, and most recently in 1977 in *Sindaco* v. *Stupka*.

In all three cases in which section 28 was held to be in force it was also held that the defendant had not brought himself within the circumstances which would allow him to rely that provision as a valid defence.

CHAPTER IV CONCLUSION

It is our view that the continued existence of section 28 of the *Offences Against the Person Act, 1828* cannot be justified. First, as a matter of principle, there is little to be said for the creation of an anomaly (albeit a trivial one) by singling out minor assaults as an area in which a criminal prosecution should bar civil proceedings. In England the legislation has been described as a "trap for those unlearned in the law" 2. Law Reform Commission of BritishColumbia, *Report on the Rule* in *Hollington* v. *Hewthorn* 43 (LRC 30, 1977).

3. *Supra* n. 1 at 38. and that assertion is even truer in British Columbia because the provision is not contained in our own statute book.

Quite apart from its anomalous character, the policy of section 28 is questionable. We can see no basis in logic or fairness for absolving a person who has committed an assault from liability to the individual aggrieved simply because his liability to the state has been the subject matter of an adjudication.

The unsoundness in principle is illustrated by what we perceive to be almost uniform judicial hostility to section 28. A defendant must strictly prove that he comes within the protection of the provision and judges have formulated a number of guidelines which tend to restrict its availability. We have not been able to find a single British Columbia case in which section 28 or its Code counterpart has successfully been raised as a defense. This also appears to reflect the experience of other Canadian jurisdictions.

Another objectionable feature of section 28 is that it also permits an acquittal on a charge of assault, through the production of a certificate to that effect, to be raised as a defence in civil proceedings. In a previous Report we considered whether evidence of an acquittal in respect of criminal charges should be admissible in civil proceedings based on the same facts, and it was our conclusion that it should not be admissible.

Under section 28 of the *Offences Person Act* not only may an acquittal (as evidenced by a certificate) be raised in subsequent civil proceedings but it has the effect of releasing the defendant from civil liability. Our previous views on the relevance of acquittals have not changed.

Moreover, even to the extent that the provision represents a defensible policy of avoiding a multiplicity of proceedings it is easily evaded. We find ourselves in agreement with the following observation:

> It is difficult to avoid the conclusion that [the] section ... serves no useful purpose in its present form. If it is desired to bring both civil and criminal proceedings, one need only take the precaution of bringing the former first. So far as the criminal law alone is concerned, the section seems to add nothing to the common law. The best course would probably be to repeal it altogether ...

We also note that the English Criminal Law Revision Committee have provisionally concluded that the comparable provision of the 1861 Act should be repealed.

The repeal, in isolation, of a provision which is not a British Columbia statute, raises a question as to legislative distribution. Our suggestion is that the *English Law Act* might provide an appropriate vehicle. Section 2 of that Act provides:

> The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, are in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof.

Section 2 might be supplemented by a further section which provides that scheduled enactments are an exception to section 2. In this way other English statutes which are held to be, or are arguably in force can be accommodated if repeal is thought desirable.

The Commission recommends that:

A new section be added to the English Law Act *in the following terms: Notwithstanding section 2 the enactments in the schedule are repealed.*

2. *The schedule specify section 28 of the* Offences Against the Person Act, 1828.

LEON GETZ, *Chairman*
PAUL D. K. FRASER
PETER FRASER
DOUGLAS LAMBERT

August 8, 1977.