Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John Lemm v. Thomas Alexander Mitchell, from the Supreme Court of Hong Kong; delivered the 28th February 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD SHAW.
LORD MERSEY.
LORD ROBSON.

[DELIVERED BY LORD ROBSON.]

The Appellant in this case was the Defendant in an action to recover damages for criminal conversation brought by the Respondent in the Supreme Court of Hong Kong (original jurisdiction) on the 19th December 1908. To that action he pleaded *res judicata*. The learned Chief Justice held the plea to be bad and on appeal to the Full Court his decision was affirmed.

In the year 1906 the Respondent was a master mariner living with his wife at Hong Kong, where the Appellant also resided. The Respondent in that year commenced a suit in the First Division of the Court of Session, Edinburgh, for the dissolution of his marriage with his wife on the ground of misconduct with the Appellant, who was not a party to the action, and in November 1906 the marriage was dissolved. Afterwards, on the 29th July 1907, the Respondent commenced an action of criminal conversation in the High Court of Hong Kong

against the Defendant-Appellant to recover damages for the misconduct above-mentioned. In that action the Defendant pleaded that the Court had no jurisdiction in respect of the alleged cause of action. The point of law thus raised was set down for hearing, and was heard by the learned Chief Justice, who, on the 5th May 1908, delivered Judgment in favour of the Defendant-Appellant and dismissed the Action with costs.

It is unnecessary for the purposes of the present case to go in detail through the various Ordinances of the Colony on which the learned Chief Justice based his Judgment in the Action just mentioned. It is sufficient to say that, in his view, the introduction of the English Divorce Act, 1857, into the Colony by Ordinance 5 of 1858 had abolished the Common Law action for criminal conversation in Hong Kong; that on the repeal of Ordinance No. 5 of 1858 by Ordinance No. 5 of 1860 the action for criminal conversation was revived, but that by the retro-active effect of certain subsequent enactments, more particularly Ordinance No. 3 of 1895, the right to bring that action in the colony was again abolished. The learned Judge went on to intimate that if the Attorney-General of the Colony read his Judgment he had no doubt that he would immediately take steps to procure the alteration of the law as it then stood so as to bring the action for criminal conversation again into existence in Hong Kong.

Accordingly a new Ordinance, No. 20 of 1908, was passed on the 11th December 1908. It was entitled "An Ordinance to amend the Interpre-" tation Ordinance, 1897 (Ordinance No. 8 of " 1897), and to remove an ambiguity in the " construction of the same." Section 2 was as follows :—

" Notwithstanding the repeal of Ordinance No. 3 of ' 1895 by Ordinance No. 8 of 1897, Section 4 of Ordinance

" No. 3 of 1895 is hereby further repealed, and its effect on " existing legislation is hereby declared to have been and to " be inoperative and of none effect, and the Ordinances " thereby affected are hereby declared not to have been " affected, but to have remained and to remain of the same " force and effect as if the said Section 4 of the last-named " Ordinance had not been enacted."

The effect of this Ordinance was undoubtedly to revive the right of action for criminal conversation in Hong Kong, if it had ever been in fact suspended. It is also clear that the Ordinance had a retro-active effect to the extent of enabling actions to be brought in respect of criminal conversation during the period when the right of action had ceased to exist in the Colony, but the question now to be determined is whether it went further, and operated to annul a valid and subsisting judgment as between parties whose rights had been duly determined under and according to the law which existed before the new Ordinance was passed. The Respondent assumed that it did, and on the 19th December 1908 he instituted the present suit against the Appellant in respect of precisely the same acts of misconduct as he had alleged in his former action.

The Defendant-Appellant then raised the plea of *res judicata*, and that point of law was argued before the Chief Justice apart from the other questions arising in the action. The learned Judge overruled the plea on the ground that there had been no judgment on the merits of the case. In his view all that had been decided was that at the time of the former Judgment the Court had no jurisdiction to hear the action. That technical difficulty in the Plaintiff's way was he said removed by the new Ordinance No. 20 of 1908, and therefore the merits of the case could, for the first time, be considered by the Court.

The action accordingly came on for trial before a Judge and Jury, and the Jury found in

favour of the present Respondent and awarded him $7,500 by way of general damages.

There were other issues between the parties as to certain special damage claimed by the Respondent which were separately tried, and as to which Judgments passed on the 17th September 1909 and 8th December 1909 substantially in the Respondent's favour. Those Judgments are also included in the present Appeal, but in the view taken by their Lordships' of the issue as to *res judicata* it is unnecessary to discuss them.

The Appellant appealed to the Full Court, consisting of the Chief Justice and the Acting Puisne Judge, Mr. Hazeland, and on the 11th July 1910 Judgment was delivered dismissing the Appeal with costs.

Their Lordships are unable to agree with the decision of the Supreme Court.

The contention that the Judgment of the 5th May 1908 only decided a preliminary point as to the jurisdiction of the Court is far from being an exact account of the proceedings. The substance of the question then tried was whether or not the law of the Colony gave the Plaintiff a remedy on the facts alleged. It was decided that it did not and the Defendant thereupon became entitled, on those allegations, to a judgment dismissing the whole claim. This result was not due to any defect in the jurisdiction of the Supreme Court, which was ample, but to a shortcoming in the general law. In the absence of appeal the Judgment was a final determination of the rights of the parties, and the ordinary principle that a man is not to be vexed twice for the same alleged cause of action applies, unless it be excluded by the Legislature in explicit and unmistakeable terms. That is not the case here.

The law applicable to the case is shortly and sufficiently stated by Chief Justice Tindal in

Kay v. *Goodwin* (6 Bingham, p. 576) where he says :—

"I take the effect of repealing a statute to be to "obliterate it as completely from the records of the "Parliament as if it had never been passed and it must "be considered as a law that never existed, except for the "purpose of those actions which were commenced, prosecu-"ted, and concluded whilst it was an existing law."

The exception there stated covers the present case.

The Ordinance No. 20 of 1908 under which this action has been brought is certainly phrased in rather remarkable terms. It deals with an Ordinance (No. 3 of 1895), which it describes as already repealed, and declares that, so far as a particular section is concerned, it is thereby further repealed, so that Ordinances affected by it are declared not to have been affected, but to have remained as if it had not been enacted at all. This language is only an expansion, in rather emphatic terms, of the statement of principle affirmed by Chief Justice Tindal, and is subject to the same qualification or exception as he expressed, viz., that it must not be taken to deprive persons of vested rights acquired by them in actions duly determined under the repealed law.

It would require language much more explicit than that which is to be found in the Ordinance of 1908 to justify a court of law in holding that a legislative body intended, not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting.

Their Lordships will, therefore, humbly advise His Majesty that this Appeal be allowed, and that the Judgments of the 9th June 1909, the 17th September 1909, the 8th December 1909, and the 11th July 1910, in favour of the Respondent, be set aside and Judgment entered for the Defendant with costs.

In the Privy Council.

JOHN LEMM

v.

THOMAS ALEXANDER MITCHELL.

DELIVERED BY LORD ROBSON.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1912.