

Province of British Columbia.

COURT OF APPEAL.

Macdonald, C.J.A., Irving, Martin, Galliher,
and McPhillips, J.J.A.]

[16 D.L.R. 126.

REX *v.* ANGELO.

1. *Evidence—Criminal trial—Former testimony—Absent witness for prosecution—Deposition at preliminary enquiry.*

A court of criminal appeal will not interfere with a preliminary finding by the trial judge under Cr. Code, sec. 999 (amendment of 1913), on admitting in evidence the prior deposition of an absent witness for the Crown taken on the preliminary enquiry, that such witness was absent from Canada, where such finding was based on proof that the absent witness was a police officer who had obtained a short leave of absence and having thereafter failed to report for duty had been heard from in the United States under circumstances tending to shew that he had gone there to avoid giving evidence at the trial in question; it is not a prerequisite to the admission of the prior deposition that there should be absolute proof of absence from Canada, but only that such facts should be proved from which such absence "can be reasonably inferred" (Cr. Code 999, as amended 1913).

2. *Appeal—Leave to appeal—Criminal case—Stated case not to be dispensed with.*

On giving leave to appeal under Cr. Code (1906), sec. 1015, following the refusal of the trial judge to reserve a case, the court of criminal appeal should not, even by consent, hear and deal with the matter as though a case had been stated on the question on which the leave is given; sec. 1016 of the Criminal Code is mandatory in directing that a case "shall be stated."

R. v. Armstrong, 12 Can. Cr. Cas. 544, 15 O.L.R. 47, dissented from.

3. *Appeal—Contradictions in record on appeal case—Judge's certificate of evidence not shewn on stenographer's notes.*

In a conflict between what the trial judge certifies in a case stated under Cr. Code 1906 sec. 1016, to have been specifically sworn to by a witness in answer to his own question, and what is shewn on the stenographer's notes of evidence sent up with the