[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL OF THE STATE OF NEW SOUTH WALES . . . APPELLANT;

AND

MARGARET JACKSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1906.

SYDNEY, *April* 10, 11, 12.

Griffith C.J., Barton and O'Connor JJ.

Evidence—Deposition of witness in preliminary investigation—Admissibility at trial after death of witness—Portion of statement omitted—Crimes Act (*N.S.W.*), (*No.* 40 *of* 1900), *secs.* 406, 409—*Justices Act* (*N.S.W.*), (*No.* 27 *of* 1902), *sec.* 36, *Sched.* 2 (*Fi*).

Practice—Appeal by Crown in criminal cases—Special leave—Conviction quashed by Supreme Court—Grounds open on case stated—Prisoner no longer in custody—Motion to rescind special leave.

Sec. 409, sub-sec. (1), of the *Crimes Act* 1900 provides that a deposition purporting to be signed by the justice by or before whom it purports to have been taken may be read in evidence in the prosecution at the trial of an accused person upon proof on oath that the witness is dead, and that the deposition was taken in the presence of the accused, and that the accused or his attorney or counsel had a full opportunity of cross-examining the witness, unless it is proved that the deposition was not in fact signed by the justice purporting to sign it. Sub-sec. (3) provides that depositions taken on the preliminary or other investigation of any charge of felony or misdemeanour shall be admissible in evidence on the trial of the accused for any other offence, although of a higher or different nature, if they would be admissible on his trial for the offence in respect of which they were taken.

Held, that a deposition taken in the form prescribed by the *Justices Act*, and as to which the requirements of sec. 409 were complied with, was not rendered inadmissible by reason of the omission from the deposition of certain statements made by the witness during the examination. Such an omission may, if the words omitted subsequently turn out to be material, afford ground for comment on the value of the deposition as evidence, but it in no way touches its admissibility.

Reg. v. *Hendy*, 4 Cox C.C., 243, followed.

An accused person was charged with a certain offence at a Police Court, and was then brought to a room where a witness was lying dangerously ill and was again charged and informed that the witness was about to give evidence. The deposition of the witness was then taken in the form prescribed by the *Justices Act*. Subsequently the accused was committed for trial on the offence charged before the same justice.

Held, that the deposition was taken on a preliminary or other investigation within the meaning of sub-sec. (3) of sec. 409, and was admissible in evidence on the trial of the accused for an offence of a more serious nature.

Reg. v. *De Vidil*, 9 Cox C.C., 4, followed.

Sec. 406 of the *Crimes Act* 1900 provides for the taking of the depositions of a person dangerously ill in certain cases, and prescribes certain conditions which must be fulfilled before such a deposition can be given in evidence on the trial of an accused person for the offence to which the deposition relates.

Held, that a deposition taken under the circumstances contemplated by that section, but which was not admissible under it by reason of non-compliance with the prescribed conditions, might nevertheless be admissible in evidence as a deposition under sec. 409 if it satisfied the requirements of the latter section.

Rex v. *Holloway*, 65 J.P., 712, followed.

When the admissibility of a deposition is in question at a criminal trial, all relevant questions of fact are to be determined by the presiding Judge, and his decision is conclusive unless it is manifestly not warranted by the evidence.

It is no objection to the entertaining of an appeal by the Crown from an order quashing a conviction that the prisoner has been released from custody under the sentence, and is at liberty.

Semble, that the High Court will not grant special leave to appeal from a decision of the Supreme Court quashing a conviction on a Crown case reserved, on the ground that the point upon which the decision went was not one of those specifically reserved at the trial, if that point appears clearly on the face of the case stated.

Motion to rescind special leave to appeal from the judgment of the Supreme Court; *Rex* v. *Margaret Jackson*, (1905) 5 S.R. (N.S.W.) 581, refused, and judgment reversed.

APPEAL from a decision of the Supreme Court of New South Wales on a Crown Case Reserved by Mr. Acting Justice *Fitzhardinge*.

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

The respondent was tried at the Central Criminal Court, Darlinghurst, on an indictment in which she was charged with the murder of a woman, who according to the evidence died at the Coast Hospital from septic peritonitis, part of the septicæmia following upon a miscarriage. As part of the Crown case, a deposition made by the deceased was tendered and admitted after objection. The circumstances under which the deposition was made, which are set out in the judgments, were proved in evidence at the trial by the magistrate before whom it was taken, who stated, amongst other things, that he went to the hospital, where the witness was lying dangerously ill, to take her dying depositions under sec. 406 of the *Crimes Act* 1900, but that as the respondent, who had already been charged with an offence, was present, he took the deposition as one under the provisions of the *Justices Act* and contemplated by sec. 409 of the *Crimes Act* 1900, and that afterwards at the Police Court he proceeded with the hearing of the charge against the respondent and committed her for trial. She was convicted of manslaughter and sentenced to a term of imprisonment.

At the trial counsel for the respondent requested the presiding Judge to reserve for the consideration of the Supreme Court certain points, which are fully stated in the judgments. His Honor did so, and in concluding the case stated the question for the Court in these words :—" Was I right in admitting the deposition of the witness under the circumstances stated ?"

The Supreme Court did not consider the specific objections taken by counsel at the trial to the admissibility of the deposition, but held that, as it appeared from the evidence as stated in the case that certain statements of the witness which were in their opinion material were omitted from the deposition, the deposition was inadmissible, and quashed the conviction : *Rex* v. *Margaret Jackson* (1). Following upon that order the respondent was discharged from custody.

On 27th November,

Hamilton, for the Crown, moved for special leave to appeal from the decision of the Supreme Court.

(1) (1905) 5 S.R. (N.S.W.), 581.

[GRIFFITH C.J.—This Court, following the practice of the Privy Council, is very reluctant to grant leave to appeal in criminal cases, especially to the Crown.]

It will be granted where the decision in question, if incorrect, would seriously affect the administration of justice.

[He referred to secs. 406 and 409 of the *Crimes Act* 1900; sec. 36 and schedule 2 (FI) of the *Justices Act*, 1902; *Reg.* v. *Hendy* (1); *Reg.* v. *Bates* (2).]

[GRIFFITH C.J. referred to *Reg.* v. *Coote* (3).]

Special leave was granted.

On 10th April, 1906,

Blacket, for the respondent, moved to rescind the special leave. There is no case in which the Crown has been allowed to appeal in a criminal case, after the prisoner has been discharged by a competent Court. It was decided in *Reg.* v. *O'Keefe* (4), that when a conviction had been quashed under sec. 470 of the *Crimes Act*, on the ground of misreception of evidence, there could be no further trial of the accused.

[GRIFFITH C.J.—That was on the principle that once a person has been in peril on a charge he must not again be placed in peril on the same charge.]

Reg. v *Coote* (3) is distinguishable. In that case the prisoner was still before the Court and the proceedings were pending, his sentence being postponed until the appeal should be finally disposed of. But if the appeal is allowed there is no power in the Court to order the re-arrest of the prisoner. The Supreme Court could not make such an order.

[GRIFFITH C.J.—We have power to make such order as the Supreme Court should have made in the first instance.]

Yes, but it could not be carried into effect, now that the prisoner has been set free. The question is therefore purely academic. The proceedings have been absolutely set aside: see sec. 470 of the *Crimes Act*. If the Supreme Court had made an order which was not merely wrong but without jurisdiction, the

(1) 4 Cox C.C., 243.
(2) 2 F. & F., 317.
(3) L.R. 4 P.C., 599.
(4) 15 N.S.W.L.R., 1.

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

position might have been different, for then the prisoner would never have been lawfully at large. [He referred to *Reg.* v. *Furnell* (1), and *Reg.* v. *Bertrand* (2).]

[O'CONNOR J.—But if this Court allows the appeal, the order of the Supreme Court is set aside, and the position is as if there never had been such an order, although when made it was valid.]

The prisoner is in the same position as if she had been pardoned.

[GRIFFITH C.J. referred to *United States of America* v. *Gaynor* (3), and *Judiciary Act* 1903, secs. 35, 39.]

Pollock, for the appellant. There is no authority for the contention that the fact of the prisoner having been set free is any obstacle to her being re-arrested when the order discharging her from custody is set aside. The only possible objection is the novelty of the proceeding. If this Court by its order discharges the order of the Supreme Court, it in effect orders the sentence to be carried out, and affords an answer to any *habeas corpus* application that may be made in favour of the prisoner if she is re-arrested. Moreover, the order of the Supreme Court was made without jurisdiction. The ground on which the conviction was quashed was not one of the points reserved. The power of the Supreme Court depends on Statute and is confined to the points reserved.

[GRIFFITH C.J.—The order may have been erroneous, but it was clearly one of a kind that the Court had power to make. I do not see that the question of jurisdiction arises.]

The Privy Council granted special leave to appeal in a case similar to the present: *Re Mount and Morris* (4). A conviction had been quashed by the Supreme Court of Victoria and the prisoner discharged after having been sentenced. The Crown has at least the same right of appeal to the Privy Council in criminal cases as the subject, but the contention of the respondent would practically be a bar to its obtaining leave to appeal in such cases at all.

Another result would be that once a prisoner is discharged from gaol, even if it is by a mistake on the part of the authorities, he could not be re-arrested. The Privy Council evidently thought

(1) 1 S.C.R. (N.S.W.), 27.
(2) L.R. 1 P.C., 520.
(3) (1905) A.C., 128.
(4) 5 A.J.R., 58.

that there was no difficulty in ordering that the sentence should be carried out after the Supreme Court had held the sentence to be bad. [He referred also to *Reg.* v. *Bertrand* (1).]

Blacket in reply.

GRIFFITH C.J. This is an appeal by special leave from an order of the Supreme Court of New South Wales quashing a conviction, the result being that the prisoner has been discharged from custody under the sentence which she was serving. It is contended that under these circumstances an appeal does not lie, because, the prisoner being at present lawfully at large, there can be no means of again subjecting her to custody. As to that it is sufficient to say that the question may be determined when it arises. The question now is whether we are precluded by that difficulty from hearing the appeal. I for my part should not like to give my support to such a contention. In *Reg.* v. *Bertrand* (2) the Supreme Court of New South Wales had granted a *venire de novo*, on the application of the prisoner who had been convicted, and it was objected that an appeal from that decision ought not to be entertained by the Privy Council. On that point their Lordships of the Privy Council said:—"Upon principle, and reference to the decisions of this Committee, it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a Charter or Statute, the authority has not been parted with, it is the inherent prerogative right, and, on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, as far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally. The interest of the Crown, duly considered, is at least as great in these respects in criminal as in civil cases; but the exercise of this prerogative is to be regulated by a consideration of circumstances and consequences; and interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its officers on

(1) L.R. 1 P.C., 520.

(2) L.R. 1 P.C., 520, at p. 529.

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

Griffith C.J.

behalf of itself or by individuals. The instances of such appeals being entertained are therefore very rare." Now, that lays down the principle acted upon by the Privy Council. The appellate jurisdiction of this Court is given by the Constitution, and this case clearly falls within the words of sec. 73. That section gives the Court jurisdiction to entertain appeals from all judgments, decrees, orders, and sentences of the Supreme Courts of any States, with such exceptions and subject to such regulations as Parliament may prescribe. Parliament has imposed no limitation upon the right of appeal in criminal cases, and the only condition imposed is that special leave to appeal must first be obtained. As to the objection that the prisoner has been discharged from custody, that is a circumstance which must of necessity exist in the majority of cases of this kind. I know of only one case in which the objection is reported to have been taken before the Privy Council, *United States of America* v. *Gaynor* (1), an appeal from an order of a Judge in Canada, discharging from custody certain persons who had been brought up on a writ of *habeas corpus* under an extradition treaty with the United States. The first point taken by Mr. Asquith for the respondents was that the appeal was only of academic interest, since, the respondents having been in full possession of their liberty, no practical effect could be given to a judgment reversing that appealed from. I may remark that *habeas corpus* in criminal cases is regarded as a matter of criminal law. The Privy Council paid no attention to the argument, but entertained the appeal and reversed the decision appealed from. It appears also in the case of *Reg.* v. *Mount and Morris* (2), that the Privy Council entertained an appeal from an order of the Supreme Court of Victoria discharging the prisoners who were under sentence for manslaughter, and allowed the appeal. In that case, as appears in the report, special leave to appeal was granted, though the prisoners were at large. There is, therefore, nothing in that objection.

No objection was taken by Mr. Blacket on general grounds that this was not a case involving questions which affect the due course of procedure in criminal cases generally.

(1) (1905) A.C., 128.

(2) L.R. 6 P.C., 283.

I am therefore of opinion that the motion to rescind special leave fails, and should be dismissed.

BARTON and O'CONNOR JJ. concurred.

Argument on the appeal was then proceeded with.

Pollock, for the appellant. Sec. 406 of the *Crimes Act* applies only to depositions of a dying witness, and prescribes certain conditions to be observed in such cases. The deposition in this case was not taken under that section. It was taken in the ordinary form prescribed by the *Justices Act* 1902, and was, tendered at the trial under sec. 409 of the *Crimes Act*, which provides for the using of depositions so taken on the trial of an accused person, provided it is proved that certain formalities have been complied with. It was proved at the trial that everything that was required by that section had been done, and the deposition was in the proper form. The fact that the circumstances under which it was taken were such as would have justified the magistrate in taking a deposition under sec. 406 is immaterial. The deposition was therefore properly admitted. The only objection raised at the trial was that owing to the illness of the witness the prisoner had really not had a proper opportunity for cross-examination; the only points reserved by the Judge, and the only points which he intended to submit to the Supreme Court, were whether the deposition was not admissible under sec. 406 owing to its not being in the prescribed form and whether it was not admissible under sec. 409 because there had not been a full opportunity for cross-examination by the accused. The Court had no power to consider the point upon which they ultimately decided.

[GRIFFITH C.J.—We granted leave to appeal on the question whether the deposition was or was not rendered inadmissible by reason of its having been shown by extrinsic evidence that it did not contain the whole of the evidence given by the witness at the examination. We think we ought not to hear you on the point that the Court had no power to consider the ground upon which they decided, because we would not have granted special leave to appeal if it had been asked for on that ground.]

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

As regards the main point, evidence was given at the trial as to the circumstances under which the deposition was taken, and the question whether on that evidence the statutory conditions had been fulfilled to render the deposition admissible was an issue for the Judge alone, and his decision is conclusive of the matter unless it is wholly unsupported by the evidence. The evidence in this case amply justified him in admitting the deposition. The accused was present and could have cross-examined the witness if she pleased. The illness of the witness is a usual feature in such examinations. The omission of the words "I cannot recollect" was no objection to the admissibility of the depositions. It would be quite impracticable to put down every word that was said; it must therefore be left to the discretion of the justice who takes the deposition to decide what should be recorded and what omitted. If matters which subsequently turn out to be material are omitted, that can be shown at the trial, and the jury may take it into consideration in estimating the value of the deposition as evidence. In the present case the jury had the whole matter in evidence before them. The omission of words does not affect the admissibility of the deposition if it is taken in accordance with the provisions of sec. 409. [He referred to *Reg.* v. *Hendy* (1); *Reg.* v. *Bates* (2); *Reg.* v. *Muldoon* (3); *Reg.* v. *Mitchell* (4); *Ex parte Monson* (5).]

Blacket, for the respondent. The deposition was not admissible under sec. 409. It was not taken at a preliminary or other investigation within the meaning of that section, and was not taken as a deposition under the *Justices Act*. The justice was not a stipendiary magistrate, and the examination was not conducted in a Court in any sense of the word. He went to the hospital to take dying depositions under sec. 406, and should have complied with the requirements of that section. The legislature has thought fit to make strict provision for the observance of certain formalities in such cases, and as the circumstances were such as the legislature contemplated in that section, the appropriate course should have been adopted. Having failed in that,

(1) 4 Cox C.C., 243.
(2) 2 F. & F., 317.
(3) 1 Legge (N.S.W.), 657.
(4) 17 Cox C.C., 503.
(5) 5 S.C.R. (N.S.W.), 256.

the justice was not entitled to treat the case as one within sec. 409. There was no remand of the accused after the examination, and the subsequent hearing at which the accused was committed was an afterthought to make the proceedings appear regular, but that cannot validate them if they were in themselves invalid. In a proceeding in Court in the ordinary manner as contemplated by the *Justices Act* there would be a full opportunity of cross-examining a witness in ordinary health. Sec. 409 was never intended to apply to cases like the present, which are specially provided for in sec. 406. It cannot be said that in the circumstances of this case the accused had a proper opportunity for cross-examination within the meaning of sec. 409. The witness was not fit to be pressed with questions. [He referred to *Reg.* v. *Peacock* (1).

As to the ground relied upon by the Supreme Court. There is no necessity for counsel to ask the Judge at the trial to reserve a point. He may reserve it of his own motion. In this case the question submitted was whether the deposition was rightly admitted under the circumstances. The Court was entitled to consider any ground that appeared upon the case stated affecting the admissibility of the deposition. The omission of these words from the deposition was a radical defect. There is a great difference between hearing the words in their proper place in the witness's statement and hearing them from the mouth of another witness without reference to the order in which they were used. They might have come in at the most important point, and have weakened the whole effect of the statement. It should be assumed in favour of the accused that the words omitted were important in their relation to the rest of the statement. When there is such a substantial difference between the words actually used and those recorded, the deposition is in effect not that of the witness at all, and is not a compliance with the directions in sec. 36 of the *Justices Act*, that the evidence shall be taken down in writing. [He referred to *Reg.* v. *Muldoon* (2).]

[O'CONNOR J. referred to *Phipson on Evidence*, p. 430, and *Rex* v. *Katz* (3).]

(1) 12 Cox C.C., 21.

(2) 1 Legge (N.S.W.), 657.

(3) 64 J.P., 825.

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

Pollock, in reply. Though the deposition could have been taken under sec. 406, and may have been intended to have been so taken, the failure to comply with the requirements of that section does not affect its admissibility under sec. 409: *Rex* v. *Holloway* (1). A deposition may satisfy all the requirements of the *Justices Act* and sec. 409 of the *Crimes Act*, though it is not taken in a formal proceeding in a Court, or even before the justice who ultimately commits the accused: *Reg.* v. *De Vidil* (2). A justice may hold an inquiry in any place he pleases.

Cur. adv. vult.

April 12th.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court of New South Wales quashing a conviction for manslaughter, upon a case reserved by the Judge before whom the conviction was had. The ground for quashing the conviction was that the deposition taken from a deceased person was wrongly admitted in evidence. The case states that after the prisoner's arrest she was formally charged at the Randwick Police Station with an offence which at that time had not resulted in the death of the person for whose manslaughter she was subsequently convicted; that she was afterwards taken to the Coast Hospital, where her alleged victim was lying; that she was then again formally charged by Mr. Murphy, the Chamber Magistrate from the Water Police Court, who was also a Justice of the Peace; and that in the prisoner's presence the witness, whose depositions are in question, was sworn and examined by Mr. Murphy, her evidence was taken down, read over to her, signed by her, and countersigned by Mr. Murphy, and that the prisoner had a full opportunity of cross-examining the witness, and exercised that right by asking her some questions. In the evidence given before the learned Judge at the trial in order to show that the deposition was admissible under the Statute, the medical practitioner who was present at the time, after saying that the witness was perfectly sane and sensible when she gave her evidence, added that he had suggested some questions to the Magistrate, and that the prisoner complained, and said it was not justice to her or words to that effect, and also stated that

(1) 65 J.P., 712. (2) 9 Cox C.C., 4.

the witness said on one or two occasions, in answer to questions, that she could not recollect. The advocate for the prisoner at the trial asked the Judge to reserve two points of law for the consideration of the Supreme Court. The first was that the sworn statement of Sidney Gertrude Hanlon, the witness, was wrongly admitted, as sec. 409 of the *Crimes Act* 1900, under which the deposition was tendered, did not apply where a sworn statement was taken from a person dangerously ill; that the proper procedure in such a case is provided by sec. 406 of the *Crimes Act* 1900; and that the statement was not admissible under sec. 406 inasmuch as it was not in the prescribed form, and the conditions precedent required by that section had not been complied with. The second ground was that the statement was wrongly admitted as a deposition under sec. 409 of the *Crimes Act* 1900, as it was not a deposition taken at a preliminary or other investigation into any charge against the accused, and the accused had not by herself or her counsel or attorney a full opportunity to cross-examine the witness. The learned Judge, after setting out the evidence, including the passage to which I have referred, said, at the the end of the case: "Although I have set out verbatim the points submitted to me, the question reserved for the consideration of the Court is: Was I right in admitting the deposition of Sidney Gertrude Hanlon under the circumstances stated?"

Before the Supreme Court it was objected for the Crown that the only points reserved for the consideration of the Court were those expressly taken by the advocate for the prisoner, but the Court were of opinion that it was open to them to consider whether, under all the circumstances appearing in the depositions and the case, the Judge was right in admitting the deposition in question. They were of opinion that the deposition was wrongly admitted on the ground that the medical gentleman had said that the witness had stated on one or two occasions that she could not recollect something. They were of opinion that, if she said anything to that effect, it ought to have been recorded, and that the deposition was therefore inadmissible. That involves a very important question in the administration of criminal justice, and on that ground we granted special leave to appeal.

The learned Judges did not deal with any of the other points

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

Griffith C.J.

raised by the prisoner's advocate, but before us Mr. Blacket raised one or two others which, he contended, appeared on the face of the proceedings, as to which it is not necessary for me to say very much. I will read the language of sec. 409 of the *Crimes Act* 1900, under which the question arises. That section provides: [His Honor read the section and continued:] In the present case the offence with which the prisoner was charged was an act which afterwards resulted in the death of the witness. Now, the first objection to which I will refer, and which is stated by the learned Judge in the special case as one of the points taken at the trial, is that the prisoner had not had a full opportunity of cross-examining the witness. It is a settled rule that, when the admissibility of a deposition is in question, all relevant questions of fact must be determined by the presiding Judge, and, although probably his decision on the point is subject to appeal, and would be set aside if it were manifestly not warranted by the evidence, yet, unless it appears that that is the case, his decision is final. In the special case he has stated that the prisoner had a full opportunity of cross-examination and exercised it. The fact that the witness was dangerously ill, and that the prisoner, whether from a kindly disposition or some other motive, did not ask her some material questions, cannot affect that finding of fact. There is nothing in the case to show that the Judge was manifestly wrong in so deciding. Then it was said that this was not in substance a preliminary investigation. I confess I do not quite know upon what ground that objection is sought to be put. The accused was charged at the Police Court, and then she was brought up to the room in which the witness was lying ill—an ordinary incident in the administration of criminal justice—and before the deposition was taken, the magistrate, according to the evidence which he gave on the question of the admissibility of the deposition, said "the prisoner was present and was charged by me and I read over the charge to her. I read it from the caption of the deposition." The proceedings were perfectly regular. The prisoner was present. The charge was read over to her, and she was informed that the witness was about to give evidence. There is nothing therefore in that point.

I will now deal with the objection which appeared to the Supreme Court to be fatal, namely, that the deposition was inadmissible because the witness said something which was not recorded in the deposition. It is manifest that this raises a very important question, because, if the admissibility of a deposition in a preliminary investigation of a charge for an offence depends upon the exact accuracy of the person engaged in recording the deposition, in every case someone who was present at the time might be called to swear that something which was said by the witness which he considers material had been left out. The statement might be true or false, but it would have to be investigated on each occasion. I suppose the Judge would have to determine whether anything was left out, what was left out, and how far it was material. That would be a new kind of investigation for the purpose of determining the admissibility of a deposition. In my opinion, all such questions are excluded by the plain words of the Statute. The legislature has thought fit to lay down certain rules for determining the admissibility of depositions, and in doing so it must be taken to have had regard to the fact that depositions are not always, probably never are, absolutely verbally correct. The Judge is charged with the duty of seeing that these rules have been regarded, and the legislature has prescribed conditions for ensuring substantial accuracy. Now, the conditions laid down are contained in sec. 36 of the *Justices Act*, which requires that the deposition shall be read over to the witness, and also that it shall be attested by a Justice of the Peace. The *Justices Act* also requires (sec. 36) depositions to be signed by the witness, but, in the opinion of a very learned Judge, Mr. Justice *Wills*, expressed in the case of *Rex* v. *Holloway* (1), it is not necessary for the purpose of subsequent admissibility that it should be actually signed by the deponent.

The words of sec. 409 of the *Crimes Act* 1900 were interpreted by *Erle* J., then a Judge of the Queen's Bench, afterwards for many years Chief Justice of the Court of Common Pleas, in 1850, shortly after the corresponding section had been passed: *Reg.* v. *Hendy* (2). In that case the deponent was examined and cross-examined, and the magistrate in whose presence the

(1) 65 J.P., 712.

(2) 4 Cox C.C., 243.

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

Griffith C.J.

deposition was taken down considered the cross-examination immaterial. The clerk who took down the evidence said he took down everything that he considered to be material. He did not take down anything of the cross-examination. *Erle* J. said (1), "he was of opinion that the requisites of the Statute had been complied with—he had no discretion but to see that those preliminary requisites had been established, and that the witness was examined before the justices in the presence of the accused party; that it had been taken down in writing; that the accused party had an opportunity of cross-examination, and that after the examination had been taken down the matter was read over in the presence of the accused, and signed by the justice. All those requisites had been established upon the present occasion. The witness was examined in the presence of the accused and the legal adviser of the accused, and they had full opportunity to cross-examine. The examination had been taken down and signed by the justice, and it had been proved that the witness was too ill to attend. He did not think it the duty of the justice to take down every word, for then it would be necessary to conduct the case by question and answer. The law, by way of caution, had directed that the examination should be read over to the accused, and the magistrate was to certify that it had been done." In my opinion, that, if I may say so with respect, is a correct statement of the law, and lays down the only conditions to be required by the Judge in considering the question of admissibility. In the present case all the conditions were complied with. The section itself refers to the only case in which such a deposition shall not be admissible, that is, when it is proved that it was not in fact signed by the justice purporting to sign it.

In my opinion, the intention of the legislature was that the certificate of the justice that the evidence was taken in accordance with the Statute should be conclusive evidence that the deposition was properly taken. Whether it is permissible in any case to give evidence that the witness also said something else it is not necessary to decide. That was done in the present case, so that no injustice was done. The contention for the respondent amounts to this, that the depositions must be taken down by a shorthand

(1) 4 Cox C.C., 243, at p. 244.

writer so expert as not to omit anything at all of what is said, either in question or answer. I do not suppose that there exists any such shorthand writer anywhere. There is no half-way house between that and the proposition which *Erle* J. laid down in 1850; which was substantially followed by *Blackburn* J. in *Reg.* v. *De Vidil* (1), and by *Wills* J. in *R.* v. *Holloway* (2).

In my opinion, therefore, the deposition was properly admitted by the learned Judge and the conviction should have been affirmed.

BARTON J. I am of the same opinion, and it is almost unnecessary to add anything.

The objections, on examination, resolve themselves into one resting upon sec. 409 of the *Crimes Act* 1900. It seems to me that the position taken up on behalf of the accused cannot be maintained unless it is shown that the document in question is not a deposition within the meaning of sec. 409. If it is such a deposition, then, as it purports to be signed by the justice, as it was proved that the witness died, that the evidence was taken in the presence of the accused, and that she had a full opportunity of cross-examination, it follows that, having regard to the first three paragraphs of sec. 409, and the third sub-section, it may be read. Then was it a deposition? The contention that this document, purporting to be a deposition taken under the circumstances sworn to, is not a deposition, rests on the fact that the witness, with reference to one or two matters, we are not told what, said she did not recollect, and it is urged that, because the document does not record that she failed to remember them, it is not a deposition. That contention presents insuperable difficulties to any person who endeavours to maintain it. The real objection is to the value of the evidence, not to its admissibility. On its appearing in evidence that the witness did not recollect one or two circumstances, it might be argued by the counsel for the accused that the deposition was not worth the paper it was written on. It might become necessary for the party defending to go to that length, and it would then be for the jury to say whether the position was tenable. The document was clearly the woman's deposition, and it was for the jury to weigh the value

(1) 9 Cox C.C., 4.

(2) 65 J.P., 712.

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

Barton J.

of this criticism upon it. An objection, founded upon this alleged failure to record every word that was said, could only be an argument with respect to the value, and could in no sense touch the admissibility of Mrs. Hanlon's evidence. Otherwise, if a single word uttered by a witness were omitted from the deposition, it could not be used in evidence at all.

For these reasons, and on the high authority of *Erle* J. who in a case in which the whole cross-examination had been omitted, nevertheless decided that he was bound to hold that the requirements of the Statute had been substantially complied with, and to allow the deposition to be read, I am of opinion that this deposition was properly before the jury, and that the conviction should be affirmed.

O'CONNOR J. I am of the same opinion.

Although the only point decided by the learned Judges of the Supreme Court was that the document in question was inadmissible on proof that certain statements made by the witness were not taken down in the deposition, Mr. Blacket relied upon two other grounds in support of his objection. It is not necessary for me to go fully into those two grounds as they have been already dealt with. I shall only add this. The first ground was that the fact of the illness of the witness made it necessary to take proceedings under sec. 406 of the *Crimes Act* 1900, and that, as the proceedings were not properly taken under that section, the deposition was not admissible. The answer to that is that, if the depositions were duly taken in accordance with the provisions of sec. 409 of that Act, the fact that circumstances existed which would have justified their being taken under sec. 406 has no bearing on their admissibility as depositions under sec. 409. The case of *Rex* v. *Holloway* (1) is a distinct authority for that position. In that case the witness was ill. It had been intended to take the examination, which was taken in the hospital, under sec. 6 of 30 & 31 Vict. c. 35, which corresponds to sec. 406 of the *Crimes Act* 1900, but the formalities of that section were not complied with, as the circumstances under which it would have been applicable did not exist. But, never-

(1) 65 J.P., 712.

theless the deposition complied with the requirements of sec. 17 of 11 & 12 Vict. c. 42. It was held that they were admissible. That is a direct authority of *Wills* J., that the objection of Mr. Blacket cannot be sustained. The other objection is that, in order to make the deposition admissible under sec. 409, it is necessary that there should be a formal charge in a proceeding resulting in a committal of the prisoner. Now, that point is substantially dealt with in the case of *Reg.* v. *De Vidil* (1). There the depositions were taken before a magistrate who had no jurisdiction to commit, and in fact did not commit. They were taken by a county magistrate at Twickenham. Afterwards the prisoner was brought before a magistrate at Bow Street and there a committal took place. It was contended that, as the depositions were not taken before the magistrate before whom the committal took place, they could not be admitted under a section similar to this. *Blackburn* J. said (2): "I am of opinion that it was not intended, by the two sections referred to, to confine the admissibility of a deposition to the case of a person examined before the magistrate before whom the charge is made, and who commits the prisoner for trial. The meaning of the provision in the Act is this, that when a witness may be in a distant part, and too ill to travel, the magistrate or magistrates acting for that locality may take the examination, of course in the presence of the accused, and with the formalities enjoined, and return it to the proper quarter."

So here, even if it is to be assumed that the proceedings of the magistrate in committing afterwards were, as Mr. Blacket contends, unnecessary and irregular, the proceedings as to the taking of the depositions were regular under sec. 409, and the depositions are admissible.

The main point upon which the Judges of the Supreme Court decided turns upon the construction of sec. 409. That is the section upon which the whole question of admissibility depends. There is no definition of a deposition in the *Crimes Act* or in the *Justices Act*, but it appears to me that one would be helped very much in the construction of sec. 409 by bearing in mind what a deposition is, and the distinction between a deposi-

(1) 9 Cox C.C., 4.

(2) 9 Cox C.C., 4, at p. 5.

H. C. OF A. 1906.

ATTORNEY-GENERAL OF NEW SOUTH WALES v. JACKSON.

O'Connor J.

tion under sec. 409 and a statement on oath under sec. 406. A deposition under sec. 409 is a deposition taken by a magistrate in the ordinary discharge of his duty under the *Justices Act*. A magistrate's duty in a committal case is to inquire whether or not a *primâ facie* case has been made out, and he is charged with the duty of inquiring into all material facts necessary to enable him to come to a conclusion. It is not necessary for the magistrate to place upon the depositions matters irrelevant to that inquiry simply because a witness chooses to state them. It must be conceded that the taking of depositions is part of the daily routine of administering justice, and, if it were admissible for an accused person or his counsel to ask any questions he chose and obtain an answer, no matter how immaterial, and it were necessary to write them all down, proceedings of this kind would never end. Schedule (*f*) (*i*), to which my learned brother Mr. Justice *Barton* referred, as laying down a rule upon which depositions must be taken, must be read in view of the considerations I have mentioned. The form in (*f*) (*i*) contains this direction, that the deposition is to be taken down as nearly as possible in the words the witness uses. The obvious meaning of that is that the words he uses in answer to inquiries by the magistrate are to be put down, together with statements made of his own volition, if they have some reference to the matter before the magistrate. That is, where there is evidence to admit of a committal of the accused. Sec. 406 has a different purpose altogether. It refers to a statement which may be made by a witness before any charge has been made against any person, and without any opportunity on the part of the prisoner or his advocate of testing the witness by cross-examination. The whole proceeding is founded upon the necessity of obtaining a record of what the person in a dying condition may say in the event of a charge being afterwards made. It may be that no charge will afterwards be made, but if it is made, at the time of the inquiry no question can be raised as to whether the evidence taken is material or not, and therefore it is that under these circumstances there must be great particularity in taking down the actual words used. The question to be decided therefore depends entirely upon the construction of sec. 409. Reading

deposition in that section as meaning deposition taken in the ordinary course of the magistrate's conduct of business in holding preliminary inquiries, the fact that it might afterwards be required to be used in the absence of the witness would be held in view when the deposition was being taken. In this case, as it did become necessary to use the deposition, the learned Judge who presided at the trial, Mr. Acting Justice *Fitzhardinge*, had placed upon him the duty of ascertaining whether the preliminaries required under sec. 409 had been complied with. Evidence was taken of the facts necessary to enable him to come to a conclusion. I think he came to a right conclusion, and could not have come to any other. Mr. Blacket admitted that the Court should not interfere with the discretion exercised by the Judge in coming to a conclusion, unless that conclusion was such as he could not have reasonably come to on the evidence, or was so totally contrary to the evidence as to be really a misuse of his discretion. I do not think there can be any complaint of His Honor's decision here. It was open to him to decide on the facts before him, and he decided it properly.

The objection really amounts to this, that the Judge had no power to enter upon the inquiry whether the preliminaries had been complied with, that, as soon as the words were proved to have been omitted, it was not open to the Judge to admit the deposition. That involves the very broad proposition that, unless every word said is taken down, the deposition is not admissible. Mr. Blacket of course allows that the proposition in that general form is not maintainable. He sought to limit it to the omission of material words. But who is the judge of their materiality? The proceeding is one to decide whether or not the accused person ought to be committed. The proper person to decide on the materiality of the evidence is the magistrate. Who else is to decide it? Are the jury afterwards to decide it, or is the Judge? If upon such evidence being given the deposition becomes inadmissible, it seems to me that it would be at the option of any person, who happened to be in Court when a deposition of this kind was taken, to neutralize the operation of sec. 409 by giving evidence that some answer or question, not