[HIGH COURT OF AUSTRALIA.

THE KING . . . . . APPELLANT;

AND

HENRY GRILLS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 17, 30.

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

Criminal Law—Statement made in presence of prisoner—Denial by Prisoner—Admissibility—Misdirection.

A prisoner was convicted of an unnatural offence upon a boy. Evidence was given on behalf of the Crown by the arresting constable of a conversation between the constable, the boy, and the prisoner, before his arrest, in which the boy, in answer to questions put to him, charged the prisoner with the commission of the offence, and the prisoner asserted his innocence. This evidence was not objected to. The boy subsequently gave independent evidence of the commission of the offence by the prisoner, and there was independent evidence that an assault of the kind alleged had been committed upon the boy. In his summing-up the Judge directed the jury that the evidence of the boy if true proved that an assault had been committed upon him by the prisoner; that the prisoner in his statement to the jury, and also in his statement to the constable denied the charge; and that unless they were satisfied of the truth of the boy's evidence they should acquit. No exception was taken to this direction when it was given, but after verdict the objection was taken that the jury should have been directed that statements made in the prisoner's presence and denied by him were not evidence of his guilt.

Held, that evidence of the statements made in the prisoner's presence was properly admitted.

Held, also, by *Griffith* C.J., *Barton* J., and *O'Connor* J. (*Isaacs* J. dissenting), that under the circumstances of the case the direction given to the jury was sufficient, and that the conviction should be sustained.

Per Griffith C.J.—When evidence has been given of an unsworn statement made in the presence of the accused, whether in the course of conversation or not, if the circumstances of the case suggest a danger that the jury may regard the statement as independent evidence of the facts alleged in it, the jury should be cautioned against giving it any such effect. Otherwise such a caution is unnecessary, and need not be given.

Per O'Connor J.—In criminal cases objection may be taken by the prisoner at any time before sentence to a misdirection or non-direction of the Judge at the trial, although no exception was taken to the direction during the course of the trial.

R. v. *Gibson*, 18 Q.B.D., 537, and *R.* v. *Norton*, (1910) 2 K.B., 496, considered.

Decision of the Supreme Court: *R.* v. *Grills*, 10 S.R. (N.S.W.), 309; 27 W.N. (N.S.W.), 95, reversed.

APPEAL, by special leave, from the decision of the Full Court quashing a conviction upon a special case stated by Judge *Docker*, Chairman of Quarter Sessions at Kempsey.

The case stated was as follows:—

"This prisoner was tried before me at the Kempsey Quarter Session, 5th April 1910, on a charge of having committed an unnatural offence upon a boy. He was convicted and sentenced to seven years' penal servitude.

"It is fortunately not necessary to set out the whole of the disgusting evidence which was given in the case. The points reserved refer solely to the evidence of the arresting constable, George Grove. His evidence, so far as it is relevant to the points taken, was as follows:—

"On 4th March (two days after the alleged offence) I had a conversation with the accused where he was camped with his cart 300 yards from Mrs Wood's residence. Horace Wood was present. After some preliminary questions I said to the accused, 'Do you know this boy?' Accused replied, 'Yes, he has been here before.' I said to Horace Wood, 'Do you know this man?' He replied, 'Yes.' 'Is this the man that pulled you into the cart, pulled your trousers down, and assaulted you?' 'Yes.' Accused said, 'Assaulted him? It is the first I have heard of it.' I said, 'A complaint has been made that you pulled the boy into the cart, pulled his trousers down, and committed an unnatural offence upon him.' Accused said, 'When was this supposed to

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happen?' I said, 'On Wednesday afternoon last between four and six.' Accused said, 'I was washing when the boy came to the cart. I got up to go to the cart for my pipe and tobacco. The boy climbed on the nave of the wheel. I tickled him a bit—that was all.'

"I said, 'I am going to ask the boy in front of you what he told me, and you can hear for yourself what he says.' 'Did this man pull you into the cart, and pull your trousers down?' The boy said, 'Yes.' Accused said, 'That's not a fair way of asking him; you are rehearsing his statement. Let me ask him.' I said, 'Go on.' Accused looked at him and said, 'Do you say that I pulled your trousers down?' The boy did not answer. Accused again said, 'Do you say that I pulled your trousers down?' The boy replied, 'No; a button came off and they fell down.' I said, 'The boy is frightened. Horace, is it true what you told your mother and what you told me last night?' The boy replied, 'Yes.' I said, 'Do not be frightened—tell the truth. Did this man pull your trousers down, or did a button come off, and they fell down?' The boy replied, 'He pulled them down.' Accused said, 'Oh, they made up a tale between them.'

"I said, 'Did you give the boy a bunch of grapes?' Accused said, 'Yes; I gave him two bunches.' 'Did you give him sixpence—two three-penny pieces?' 'Yes.' 'What did you give him the sixpence for?' 'To buy a melon; he told me his mother sold melons'.

"I then charged the accused with having committed an unnatural offence upon the boy. Accused replied, 'I deny everything.' I said, 'Were you wearing on Wednesday last the shirt and trousers you have on now?' Accused replied, 'I think so. Why? Anything wrong with description or dress?' I said, 'That is all right.' Accused said, 'Why did not the boy sing out? There was a man passed by in a sulky, and a man working in a paddock over here. I want them as witnesses.' I said the boy cried. Accused said, 'He did not cry here.'

"Next morning I said to accused in the lock-up, 'You spoke about some witnesses; tell me who they are, and what you want, and I will do what I can.' Accused said, 'I do not think they

would be any good to me. I do not think I need them. I want to see a solicitor.'

"In cross-examination the witness said that the accused may have used the words, 'I deny doing anything to the boy.'

"The boy, Horace Wood, 9 years old, gave evidence as to the conduct of the accused, and medical evidence of the result of an examination on the night of 4th March was also given.

"In directing the jury, I told them that the only persons who could speak directly as to the occurrences of the afternoon of 2nd March were the boy Horace Wood and the accused himself; that the evidence of the boy, if true, proved that a criminal assault had been committed upon him by the accused; that the accused in the statement which he made to the jury, and also in his statement to the constable when charged, denied that he had committed any such assault; and that, therefore, their verdict depended upon the question whether they believed the boy or not, and I told them that unless they were satisfied as to the truth of the boy's evidence they ought to acquit the accused.

"I pointed out that the medical evidence was corroborative of the boy's evidence as to his having been assaulted by some person, and that the statements of the accused to the constable as to Horace Wood having climbed on the cart and as to tickling him were corroborative of the boy's evidence that it was the accused who had assaulted him. I made no further reference to the constable's evidence as I had placed before the jury the case as detailed by the boy himself.

"The attorney for the accused, Mr. *Hardiman*, took no exception to my summing up, nor did he ask me to give any direction to the jury; but the next day when the prisoner was called up for sentence he asked me to reserve the following points for the consideration of the Judges of the Supreme Court:

"1. That his Honor should have directed the jury that the statements made by Constable Grove in the presence of the accused tending to implicate him in the crime, and denied by him, were not evidence against him of his guilt.

"2. That his Honor allowed statements made in the presence of (1) accused, and denied by him as false, to go to the jury as evidence against the accused.

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"I am compelled by law to reserve points at the request of prisoner's counsel, and to state a case accordingly; but I have to point out that an assumption of facts is involved in the statement of points which is not correct. The second point assumes that I gave some direction to the jury equivalent to telling them that the statements referred to were evidence against the accused. That is not the fact.

"It is the fact that I did not give the direction mentioned in the first point. I was not asked to do so, nor was any objection raised when the constable gave his evidence; but I had impliedly given the jury a direction to the same effect by telling them that the question of the prisoner's guilt depended upon the evidence of the boy himself.

"The question for the consideration of the Judges of the Supreme Court is whether the jury were properly and sufficiently directed by me."

The Supreme Court held that the evidence of the conversation between the constable, the prisoner, and the boy was admissible, but that the jury should have been directed that any portion of a statement made in the prisoner's presence which in their opinion was not admitted by the accused to be true, should be discarded from their consideration when deciding whether the prisoner was guilty of the offence with which he was charged. They therefore upheld the objection and quashed the conviction (1).

Blacket, for the appellant. The whole of the conversation between the prisoner and the boy and the constable was admissible for all purposes as evidence in the case against the prisoner. The prisoner took an active part in this conversation, and adopted some of the statements previously made by the boy to the constable. It would have been improper for any part of the conversation to have been excluded from the jury's consideration. *R.* v. *Gibson* (2), which was relied upon in the Court below, is distinguishable, as in that case inadmissible evidence was pressed against the prisoner after objection. In *R.* v. *Thompson* (3), following *R.* v. *Bromhead* (4), it was held that a statement they

(1) 10 S.R. (N.S.W.), 309.
(2) 18 Q.B.D., 537.
(3) (1910) 1 K.B., 640.
(4) 71 J.P., 103.

made by one person, and read over to the prisoner, cannot be held to be inadmissible merely because the prisoner when it is read over to him denies it, though it is a matter for the jury to determine what weight should be attached to it. The point actually decided in *R.* v. *Norton* (1) is not in conflict with these decisions, and the dicta in that case, in so far as they are at variance with *R.* v. *Thompson* (2), should not be followed. Assuming the evidence was admissible, as the Judges of the Supreme Court have held it to be, the Chairman, in directing the jury, has gone further than he need have done in the prisoner's favour. He clearly pointed out to the jury that there was a direct conflict between the boy's statement and the prisoner's denial of it, and that it was for them to decide which they believed. Counsel for a prisoner cannot allow a question to be put without objection, and then ask the Court to set aside the conviction on the ground of the inadmissibility of the evidence: *R.* v. *Bridgwater* (3); *Prudential Assurance Co.* v. *Edmonds* (4); *Seaton* v. *Burnand* (5); *Mutual Life Insurance Co. of New York* v. *Moss* (6). In considering whether in any particular case the jury have been properly directed, regard must be had to the way in which the case was conducted at the trial. The Judge is entitled to assume that the jury are reasonably intelligent, and in this case there was nothing unfair or misleading in the direction given. There was no reasonable probability that the jury would regard the statements made in the prisoner's presence as independent evidence of his guilt.

Young, for the respondent. Statements not on oath made in the presence of a prisoner are only admissible as evidence of the facts stated so far as the jury find that the prisoner, by his words or conduct, has admitted them to be true. The evidence is admitted provisionally in the first instance, and it is then for the jury, upon a proper direction, to determine whether the prisoner has acknowledged the truth of any portion of the statements. It is necessary that they should be expressly directed that, unless they find he has done so, they should discard the

(1) (1910) 2 K.B., 496.
(2) (1910) 1 K.B., 640.
(3) (1905) 1 K.B., 131.
(4) 2 App. Cas., 487, at p. 507.
(5) (1900) A.C., 135, at p. 145.
(6) 4 C.L.R., 311.

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evidence. If evidence of statements made in the presence of the prisoner is allowed to go before the jury, it must be accompanied with its proper antidote. The dicta in *R.* v. *Norton* (1) are directly applicable to the facts of this case, and are consistent with the previous cases. Evidence of the triangular dialogue between the prisoner, the constable, and the boy was left to the jury at large, and uncoupled with any express direction that the jury could only regard it as evidence of the facts stated, to the extent that they found that the prisoner had admitted them to be true. Until, upon proper direction, they have so found, the statements did not become evidence in the case generally. Evidence of complaints made by the girl assaulted in cases of rape, which are not evidence of the prisoner's guilt, are analogous. So also in cases of divorce, where evidence is given of admissions of adultery by the wife, it is the duty of the Judge to tell the jury that they are not evidence against the co-respondent. The statements put into the mouth of the boy by the constable in this case, as to which the boy himself could not have given evidence, illustrate the necessity of such a direction being given. Here the jury were not expressly warned that what the boy said to the constable in the presence of the prisoner was not necessarily evidence of his guilt, and the facts were such that in order to guide the jury properly such a direction should have been given. The fact that the direction was not asked for at the trial does not affect the prisoner's right to take the objection.

Blacket, in reply.

Cur. adv. vult.

The following judgments were read:—

November 30.

GRIFFITH C.J. This is an appeal by special leave from a decision of the Supreme Court of New South Wales quashing a conviction upon indictment for an aggravated assault on a boy on the ground of non-direction. There was independent evidence that an assault of the kind alleged had been committed upon the boy by some one. The substantial question to be tried was one

(1) (1910) 2 K.B., 496, at p. 500.

of identity. The arresting constable was called as a witness for the prosecution, and deposed to a conversation between himself, the accused, and the boy at the time of the arrest, in the course of which the accused admitted that he was in the boy's company at the relevant time, and had "tickled" him and had afterwards given him money, but denied the circumstances of aggravation. During the conversation the constable said to the boy "Is it true what you told your mother and what you told me last night?" to which the boy replied, "Yes." What he had told his mother and told the constable does not appear in the case, but may be readily conjectured. Nor is it stated whether the mother and the constable gave any, or if any, what evidence of a complaint having been made to them by the boy. No point is raised to which these facts would be relevant, but, if the prosecution was conducted in the ordinary way, the fact, at least, of a complaint would have been proved. The learned Chairman of Quarter Sessions directed the jury "that the only persons who could speak directly as to the occurrences of the afternoon of 2nd March were the boy . . . and the accused himself; that the evidence of the boy, if true, proved that a criminal assault had been committed upon him by the accused; that the accused in the statement which he had made to the jury, and also in his statement to the constable when charged, denied that he had committed any such assault; and that, therefore, their verdict depended upon the question whether they believed the boy or not, and I told them that unless they were satisfied as to the truth of the boy's evidence they ought to acquit the accused."

He also told them that "the statements of the accused to the constable as to Horace Wood (the boy) having climbed on the cart and as to tickling him were corroborative of the boy's evidence that it was the accused who had assaulted him."

No objection was made to the admission of the evidence of the conversation or to the direction, but after verdict the accused's advocate asked that the following points might be reserved for the consideration of the Supreme Court:—

1. "That his Honor should have directed the jury that the statements made by Constable Grove in the presence of the accused

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tending to implicate him in the crime, and denied by him, were not evidence against him of his guilt.

2. "That his Honor allowed statements made in the presence of the accused, and denied by him as false, to go to the jury as evidence against the accused."

The Supreme Court were of opinion that the evidence was properly admitted, and there can be no doubt as to the correctness of that opinion. But they thought that the direction was defective in that it did not warn the jury against giving any independent weight to the statements made by the constable and by the boy in the presence of the accused as corroborative of the boy's sworn testimony.

The respondent's counsel referred to the observations of Lord *Blackburn* in his speech in *Prudential Assurance Co.* v. *Edmonds* (1):—"So far as a statement of law is necessary to give a proper guide to the jury upon the case, the Judge should state it; and, although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject for a bill of exceptions and would be a ground for a *venire de novo*." The learned Lord had said just before: "It is a mistake in practice, and an inconvenient one, which very learned Judges have fallen into, of thinking it necessary to lay down the law generally, and to embarrass the case by stating to the jury exceptions and matters of law which do not arise upon the case. That is not the duty of the Judge at all, and I think it is better not to do it." I accept this statement of the Judge's duty. Whether, therefore, a particular direction should be given must depend upon the nature and circumstances of the case. If a particular direction is necessary under the circumstances of the case it should be given, otherwise it should not be given.

The learned Judges of the Supreme Court applied the analogy of a statement, not on oath, made by a person not called as a witness and read to the accused. The fact that such a statement has been read is often admissible in evidence, and the reason for

(1) 2 App. Cas., 487, at p. 507.

its admissibility is well known. The statement itself is not evidence of the facts alleged in it. The evidentiary fact consists in the conduct of the accused when it is read to him, whether by way of spoken words, which may amount to an admission or denial in whole or part, or by silence. The circumstances of the case may show that such conduct is evidentiary of some fact relevant to the question of his guilt, *e.g.*, his untrue denial of some relevant fact proved *aliunde*. If it is not evidentiary of any such fact the evidence is irrelevant, and inadmissible on that ground. If the presiding Judge were to allow the statement to go to the jury as independent evidence there would be a mis-trial. The same general principle applies to any oral statement made to or in the presence of the accused, and to conversations with him. It is common knowledge to all who are conversant with the administration of criminal law—and I may claim some familiarity with it—that in a very large proportion of cases evidence of conversations with the accused is given, and necessarily given. It is equally common knowledge that it has never been the practice of Judges to caution the jury not to attach independent weight to a statement made by one party to such a conversation and denied by the accused, unless the circumstances of the case are such as to call for such a caution.

In my opinion the true rule, which is a rule of common sense as well as of law, is this:—

When evidence has been given of an unsworn statement made in the presence of the accused, whether in the course of conversation or not, then, if the circumstances of the case are such as to suggest a danger that the jury may think that the statement should be treated as independent evidence of the facts alleged in it, the Judge should caution the jury against giving it any such effect. If, on the other hand; the circumstances of the case do not suggest any such danger, he need not do so.

The test in each case is the necessity, which can only be ascertained by considering the circumstances of the particular case. There is no authority to be found inconsistent with this rule. All the learned Judges in the Supreme Court referred to the case of *R.* v. *Gibson* (1), a case which has been much misunderstood

(1) 18 Q.B.D., 537.

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owing to the erroneous, or at least ambiguous, wording of the head-note. In that case evidence had been given without objection of an oral statement not made in the hearing of the prisoner. In summing up the Chairman of Quarter Sessions specially directed the attention of the jury to the statement. Before verdict the prisoner's counsel objected that it should not have been left to the jury, but the Chairman refused to withdraw it from their consideration. Under these circumstances the verdict manifestly could not stand. But the case has been cited as an authority for the position that if any inadmissible evidence is "left" to—in the sense of not expressly withdrawn from—the jury, the conviction is bad. What was really decided was that if the jury are expressly invited to take inadmissible evidence into consideration the conviction is bad. It happens, I suppose, in innumerable cases that, by inadvertence, irrelevant evidence (which, strictly speaking, is not admissible) is admitted, and passes without notice and without mischief. But there is no case which decides that a conviction is necessarily bad on the ground that the jury had not been expressly directed to disregard such evidence.

Reg. v. *Gibson* (1), however, has no application to the present case, in which the evidence was properly admitted.

The learned Judges also referred to the cases of *R.* v. *Smith* (2); *R.* v. *Bromhead* (3); and *R.* v. *Thompson* (4). Those were all cases upon the admissibility of evidence, and not upon misdirection or non-direction. *R.* v. *Smith* (2) was overruled by *R.* v. *Thompson* (4), in so far as it was a decision that a statement denied by the accused is necessarily inadmissible. Before us reference was also made to the case of *R.* v. *Norton* (5), reported since leave to appeal was given. The only point actually decided in that case was that statements made in the presence of the accused and denied by him could not be treated as substantive evidence of the facts so denied. The learned Commissioner (now *Scrutton* J.) had invited the jury to give weight to such statements as substantive evidence, and an appeal from the conviction was of course allowed. But the learned Judges proceeded to

(1) 18 Q.B.D., 537.
(2) 18 Cox C.C., 470.
(3) 71 J.P., 103.
(4) (1910) 1 K.B., 640.
(5) (1910) 2 K.B., 496.

express their opinion *obiter* upon several other points. First, they referred to the principle which I have already stated on which evidence is admissible of statements made in the presence of an accused person. They then expressed an opinion as to the procedure which should be adopted with regard to such statements before admitting them in evidence, applying in effect the principle which is followed with regard to dying declarations. As to this there would seem to be some difficulty in reconciling the suggested rule with the cases of *R.* v. *Bromhead* (1) and *R.* v. *Thompson* (2); and it is obvious that, if applied to evidence of conversations as distinct from unsworn statements read to the accused, it would impose conditions impossible of observance in the practical administration of the law. Finally, they expressed an opinion as to what would be the proper direction to be given to the jury with respect to such unsworn statements.

I have no comment to make upon the suggested direction as one to be given when the circumstances of the case render it necessary. But the rule laid down has no application to a case where the circumstances are not such as to suggest that the jury are likely to treat the statement as independent evidence of the facts stated. Moreover the learned Judges were dealing with the case before them, and not with the every-day case of conversations with accused persons on the occasion of their arrest.

I do not think that anyone would be more surprised—perhaps not without amusement—than the learned Judges who were parties to the decision in *R.* v. *Norton* (3) to hear that they had laid down a general rule applicable to all cases in which any evidence is given of a conversation with an accused person in which an assertion is made in his presence and denied by him; so that if, for instance, at the trial of a man charged with stealing from the person, evidence were given that the accuser gave the accused into custody, saying to a constable, "This man has picked my pocket," and that the accused then denied the charge, the presiding Judge would be bound expressly to direct the jury that they must not attribute any independent weight to the statement so made, and that in the absence of such a direction there would be a mistrial and the conviction should be quashed. Ever

(1) 71 J.P., 103. (2) (1910) 1 K.B., 640. (3) (1910) 2 K.B., 496.

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since I have had the honour to occupy this seat I have tried—I do not know with what success—to dispel the notion that the law —I am not speaking of the Statute law—is a mysterious esoteric science which can only be understood by initiates, and to show that it is a system founded on broad principles of common sense applicable to the everyday conditions of civilized life. Applying such principles to the present case there can, in my judgment, be no doubt as to the result.

The boy, to whose unsworn statements in the presence of the accused it is sought to apply the rule, was sworn as a witness. In my opinion the suggestion that any jury might have thought that those unsworn statements, denied by the accused when made, could be regarded as adding anything to the weight of his sworn evidence is quite unreasonable. A caution may reasonably be given against a probable danger, but there is no need to caution against one which is wholly visionary and illusory. Moreover, the learned Chairman, so far from inviting the jury to give any such weight to the statements, expressly directed them that they had to decide between the boy's sworn evidence and the defendant's denial made both in the dock and when he was accused by the constable and the boy. If, therefore, the occasion was one which called for any explicit direction on the subject—and I think it was not—I think that such a direction was given in terms sufficient to prevent an error being committed by any reasonable men.

For these reasons I am of opinion that the appeal should be allowed and the conviction restored.

I have confined my judgment to the questions raised by the case reserved.

BARTON J. In *R.* v. *Norton* (1) the Commissioner who tried the case (one of carnally knowing a girl under the age of 13 years) had, in effect, directed the jury to take into consideration the girl's statement as evidence of the facts contained in it (though she was not called as a witness), and to consider whether, looking at all the circumstances, they accepted it or the prisoner's denial. The matter was therefore put to them in such a way as would not

(1) (1910) 2 K.B. 496, at p. 499.

have been proper unless she had given her testimony under the usual sanction. This was an express misdirection, and the Court of Criminal Appeal so held, "upon a point very material to the issue." They made reference to the general rule that "statements as to the facts of a case under investigation are not evidence unless made by witnesses in the ordinary way." One accepts without hesitation the proposition of the Court that "statements made in the presence of a prisoner upon an occasion on which he might reasonably be expected to make some observation, explanation, or denial . . . are . . . never evidence of the facts stated in them," but are admitted "only as introductory to, or explanatory of, the answer given to them by the person in whose presence they are made," whether such answer be given by words, or by conduct, such as remaining silent on an occasion which demands an answer. It is clear also that "if the answer given amount to an admission of the statements or some part of them, they or that part become relevant as showing what facts are admitted; if the answer be not such an admission, the statements are irrelevant to the matter under consideration and should be disregarded," or in the words used in *Taylor on Evidence*, sec. 814, "the statements only become evidence when by such acceptance he makes them his own statements."

I have shortly stated the parts of the judgment material to the question which was immediately before their Lordships for decision. The question in the present case is one, not of misdirection, but of non-direction. The points for the respondent are —first, that the learned District Court Judge erroneously omitted to direct the jury that the statements made in the presence of the accused by the constable, tending to implicate him in the crime, and denied by him, were not evidence against him of his guilt; and secondly, that his Honor allowed statements made in the presence of the accused, and denied by him as false, to go to the jury as evidence against the accused. The learned Judge admittedly gave no direction in the terms of the latter point, but the contention is that the omission to direct the jury that the statements denied were not evidence was equivalent to allowing them to go to the jury as evidence against the accused. That is, in my view, an unfounded contention, unless it is assumed that the jury

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will probably treat statements denied by the accused as evidence against him unless they are expressly warned against doing so; and there is certainly no ground for such an assumption unless some principle or authority can be found to justify a primary assumption that juries in criminal cases are not endowed with as much intelligence as the generality of their fellow-citizens outside the box. I confess that I see no reason in this case why the Judge should have added a direction in the terms suggested to that which he tells us he actually gave. He, in effect, told the jury that as the accused, in his statement to the constable in the presence of the boy, denied that he had committed the offence, their verdict depended on the question whether they believed the evidence of the boy, given in the witness box, and that they ought to acquit the accused unless they were satisfied as to the truth of the boy's evidence. He also pointed out that the medical evidence was corroborative of the boy's evidence that someone had assaulted him, and mentioned to them the parts of the conversation with the constable in which the boy's evidence was to some extent corroborated by the accused. This direction clearly amounted to telling the jury to confine themselves to a consideration of the sworn testimony of the boy with such corroboration as they found it to have received from medical evidence and any admission of the accused, and therefore to exclude from their minds other parts of the case, among which was the conversation with the boy and the constable. I do not think it possible for any ordinary jury to misunderstand such a direction. The objection therefore resolves itself into this, that, though they were directed in terms which not only drew their attention only to the evidence of the boy, but impressed on them that they should confine their attention to it, there had been a fatal non-direction because the Judge did not add to the unmistakeable terms which he had used an express caution that the parts of the conversation in which the accused had denied what the constable said must be disregarded. On this argument it is not enough to say: "Here are A., B. and C.; look at A., and A. alone;" it is vitally necessary to add, "of course, if you look at A. alone, as I have told you to do, you will not look at B. and C." To my mind, the argument is an attempt to set up a ridiculous position, which

would add unnecessarily to the difficulties which already, and perhaps necessarily, surround the proof of crime. I do not find that any express direction, which the circumstances and the terms already used by the Judge render quite superfluous, has been forced upon Judges as the result of any one of the cases cited or even of any dictum they contain. Nothing so contrary to common sense has been laid down in those authorities. I think the appeal ought to be allowed.

O'CONNOR J. In this case the Supreme Court reversed the conviction on the ground that the learned Judge at the trial had failed to properly direct the jury.

The principles upon which a Court of Appeal will revise a summing up on the ground of non-direction are well established, and have been expounded in several cases. I shall quote from two of them.

In the *Prudential Assurance Co.* v. *Edmonds* (1) a Judge's direction in a civil case was under consideration, but the foundation of the legal right to have the jury properly directed is the same in criminal as in civil cases. Lord *Blackburn* in delivering judgment says:—"I take it that when there is a case tried before a Judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the Judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Farther than that, it is not necessary for him to go. It is a mistake in practice, and an inconvenient one, which very learned Judges have fallen into, of thinking it necessary to lay down the law generally, and to embarrass the case by stating to the jury exceptions and matters of law which do not arise upon the case. That is not the duty of the Judge at all, and I think it is better not to do it. So far as a statement of the law is necessary to give a proper guide to the jury upon the case, the Judge should state it; and, although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject

(1) 2 App. Cas., 487, at p. 507.

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for a bill of exceptions and would be a ground for a *venire de novo*."

In criminal cases it is immaterial whether the Judge at the trial was or was not asked to direct the jury as it is claimed they ought to have been directed, or whether exception was taken to the direction before verdict. If the Judge has failed to direct the jury in accordance with the right of the accused, the point may be raised at any time before sentence, and when raised must be noted by the trial Judge and considered by the Court of Appeal. In *Rex* v. *Stoddart* (1) Lord *Alverstone* C.J. delivered a reserved judgment of the Court of Criminal Appeal. In dealing with a point raised as to non-direction, he makes some observations which are well worthy of consideration. He begins by quoting Lord *Esher's* words in *Abrath* v. *The North Eastern Railway Co.* (2), as follows:—

"It is no misdirection not to tell the jury everything which might have been told them: there is no misdirection, unless the Judge has told them something wrong, or unless what he has told them would make wrong that which he has left them to understand. Non-direction *merely* is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood."

Lord *Alverstone* then goes on to say:—"Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never

(1) 25 T.L.R., 612, at p. 617. (2) 11 Q.B.D., 440, at p. 453.

suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument."

In applying these principles, two things are of vital importance, the real nature and effect of the evidence with respect to which it is alleged the jury were not properly directed, and the way in which the issues were presented to the jury for determination. My learned brother, the Chief Justice, having stated fully the facts material to be considered in this case, I shall not refer to them in detail. It will be noted that the statements of the boy and the constable, as to which it is said the jury should have been warned, were referred to in the course of a conversation between the constable, the accused, and the boy. The main subject of conversation was the boy's visit to the cart of the accused and the occurrences on that occasion. The fact of the boy's complaint to his mother and to the constable was mentioned by the latter, and was open to inquiry or comment by the accused during the conversation, just as other subjects of the conversation were open. Neither the constable nor the boy said in the prisoner's presence what it was the boy stated to his mother and to the constable. It may, however, be conceded that the jury might have reasonably inferred from the whole conversation that the statements amounted in substance to an accusation against the prisoner of having done that for which he was being tried. The constable's account of the conversation makes it plain that the accused admitted the presence of the boy at the cart on the occasion referred to, but it is equally plain that he stoutly denied any wrong-doing. The learned Judge put the case to the jury as involving only one issue—the credibility of the boy. He told them that unless they believed his story they must acquit the accused. His only reference to the conversation with the constable was to direct the jury's attention to the corroboration of the boy's story furnished by the admission of the accused that the boy had climbed on the cart and the accused had tickled him. The learned Judges of the Supreme Court held that the direction was insufficient in not warning the jury as to the way in which they should regard the conversation. Mr. Justice *Gordon* puts the view of the Court definitely and

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clearly in these few words (1):—"In the case before us, I think the learned Judge was right in allowing to be given in evidence the conversation detailed by the constable between himself, the boy (Horace Wood), and the accused, but he was bound, clearly and distinctly, to tell the jury that in deciding on the guilt of the accused they were to pay no regard to any portion of the statements made, or referred to, in the above conversation, save as far as the truth of the same was in their opinion admitted by the accused, either directly or impliedly by his conduct."

In taking that view of the presiding Judge's duty in the circumstances stated in the special case, the learned Judges, in my opinion, fell into an error, an error which—and I say it with all respect to them—seems to have arisen from their failing to recognize the dissimilarity between the kind of statements dealt with in the cases on which they have relied and the statements with which the special case was concerned.

It is sometimes necessary in criminal cases to put before the jury evidence of a statement made in the presence of the accused in which there is an averment direct or indirect of the guilt of the accused, or of some fact or circumstance material to prove his guilt. A statement of that kind is tendered, not as having been made by the accused or authorized or assented to by him; it is admissible in evidence only as having been made or read in his presence. It is put forward, not as affording in itself any evidence that the facts stated are true, but to show what was the conduct of the accused on hearing it. On hearing the statement made or read he may admit, he may deny, he may correct, he may qualify its effect, he may remain silent—whatever course he takes his conduct on hearing the statement is the only fact which the evidence can establish. The facts proved in *R.* v. *Thompson* (2) illustrate that class of evidence.

Two persons were accused jointly of burglary. A statement incriminating both was made to the police by one and afterwards read by the police to the other, who emphatically denied its truth. The statement was received in evidence, the presiding Judge warning the jury, both on its reception and in his summing up, that it must not be taken as affording any evidence against

(1) 10 S.R. (N.S.W.), 309, at p. 323. (2) (1910) 1 K.B., 640.

the prisoner who denied its truth. The warning was obviously necessary to prevent the jury from being misled into taking the issue to be between the truth of the statement and the credibility of the accused in denying it. To decide guilt or innocence on that issue would be to put the statement itself on the footing of evidence against the accused, which it could not be, for he had not only not admitted it to be true, but had explicitly declared it to be untrue. Now there is another and very different class of case in which statements made in the presence of the accused are admissible—those in which a witness deposes to a conversation between the accused and himself on the subject of the crime or some fact relevant thereto. In such cases there is really an interchange of statements, and the accused may speak in admission, denial, or qualification of the other party's statements as question and answer pass between them. Apart from the statutory protection from disclosure which the law throws round confessions of guilt made under certain circumstances, the details of such conversation are always admitted in evidence, and are as to parts of them admitted in reality on the same ground as the statements described in my first illustration. The only parts of the conversation which can be given effect to as evidence against the accused are his own statements, and those of the other party to which he has by voice or conduct assented. It is necessary, however, in order to understand what the accused has said, and to ascertain to what extent he has admitted or acquiesced in the statements of the other party, to put the whole conversation before the jury. It is possible that even in a case of that kind it may be necessary to specially warn the jury against allowing some particular statement detailed or mentioned in the conversation to weigh against the accused. But in the great bulk of cases the whole conversation is left to the consideration of the jury, without special direction as to the applicability of different portions of it to the issue of innocence or guilt. Generally speaking no other course is practicable. To ask the Judge in each case to separate those portions of the conversation which may be allowed to have effect against the accused from those which may not, is to impose on him a task often exceedingly difficult to perform adequately, and which if

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adequately performed would tend in most cases to confuse rather than help the jury to an understanding of their duty.

There are passages in Mr. Justice *Pickford's* judgment in *R.* v. *Norton* (1) which would appear at first sight to favour the view that the law imposes some such obligation on the Judge presiding at a criminal trial. But when the real question to be determined in that case is looked at, it will be found that the judgment as a whole cannot be used as an authority in support of that view. In the two illustrations I have given I have placed side by side the instance in which a special warning to the jury is obviously one of the rights of the accused, and the instance in which it is equally obvious that he is entitled to no such right. In the actual work of the Criminal Courts the cases generally vary between these extremes. The duty of the Judge in each case can only be determined when the evidence is closed, and the issues upon which the verdict must really turn have taken definite shape. The principle on which the Judge ought, in my opinion, to deal with evidence of this kind in his direction to the jury may be stated in a few words. If a statement admitted because it was made in the presence of the accused, and not being in itself evidence against him, is of such a nature, and has been brought to his attention under such circumstances, that there may be danger of a juryman of ordinary intelligence mistaking the effect of the evidence, and giving weight to the statement as being in itself evidence against the accused, the Judge will be bound to specifically instruct the jury as claimed in this case. Where there is no danger of jurymen being so misled no specific warning need be given. Tried by that test the direction of the learned Judge in this case was, in my opinion, substantially correct. It was clear on the prisoner's admission that the boy had been in the cart on the occasion in question, and that the prisoner had played with him, though, as the prisoner alleged, quite innocently. The vital issue as put to the jury by the learned Judge was whether they believed the boy's account of what the accused had done, and he further told them that unless they believed the boy's account the accused must be acquitted. Having regard to the emphatic and detailed denial given by the accused to the several portions of the

(1) (1910) 2 K.B., 496.

boy's story discussed in the conversation with the constable, it is difficult to see how the jury could have been misled into giving any effect as against the accused to the statements alleged to have been made by the boy to his mother and to the constable, which at the most could amount to no more than what he said in the witness-box. If the differences between the story of the accused and that of the boy were merely differences in detail, it is possible that the jury might, if not warned against such a course, have been misled into improperly giving to the boy's statements to his mother and to the constable a corroborative effect in aid of his evidence at the trial. But the issues did not turn on the details but on the substance of the boy's account of the occurrences at the dray as given in Court. If that account was untrue the same story told to his mother and to the constable must have been untrue also. The importance of keeping in mind the way in which the real issues at the trial were shaped by the evidence is specially adverted to by Lord *Alverstone* in the passage I quoted at the beginning of this judgment. Looking at what the real issues were, and the learned Judge's direction in regard to them, I can see no reason, therefore, for coming to the conclusion that the jury were likely to be misled into treating the boy's statements as furnishing in themselves corroboration of his evidence in Court.

For these reasons I am of opinion that the accused was not entitled to have the special direction to the jury which he claimed, and that the omission to give it did not entitle him to have the conviction reversed. I therefore agree that the judgment of the Supreme Court must be set aside, this appeal allowed, and the conviction restored.

ISAACS J. I think this appeal should be dismissed. The learned Judges of the Supreme Court have, in my opinion, correctly stated and applied the law of the case. If I were not differing from the views entertained by my learned brethren I should be content to simply state my agreement with the reasons given in the judgments appealed from, with the additional observation that since they were delivered there has been the

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confirmatory decision of the Court of Criminal Appeal in *R.* v. *Norton* (1).

In the circumstances, however, it is proper for me to state in my own words why I have arrived at the same conclusion.

It is an elementary rule of law, going to the very foundation of justice, that no man shall be adjudged to be guilty of a crime upon evidence of another person's previous assertion. It matters not whether the assertion was made in the absence or the presence of the accused, as a mere assertion it cannot be regarded as any proof of the culpability of the accused or any confirmation of his accusers. But it is evident that upon such an assertion being made, and equally whether in the accused's absence or presence, he may admit its truth, and if he does, then it becomes evidence against him of his guilt, not because another has said it, but because of the admission. It is then equivalent to his own statement, and is receivable in that character. And it is further manifest that the acknowledgment of its correctness may be made in an infinite variety of ways. There may be an express and unqualified admission, or there may be a guarded admission, or there may be no direct but merely an implied acknowledgment, or there may be conduct, active or passive, positive or negative, from which, having regard to the ordinary workings of human nature, a total denial may be considered by reasonable men to be precluded, because, if innocence existed, an unequivocal or a qualified denial would in such a situation be expected. Even an express denial may be accompanied by circumstances such as "evasive responsion": *Best on Evidence*, par. 575, or hesitation or subsequent challenge without reply as in *R.* v. *Thompson* (2), which leave it open to a jury to say whether an admission of any kind ought or ought not to be inferred. *Thompson's Case* (2) it is said overrules *Smith's Case* (3). In *Thompson's Case* (2) the objection was to the statement being admitted at the preliminary stage for the purpose of drawing an inference of admission of its truth. Prisoner's counsel urged, on the strength of *Smith's Case* (3), that unless there was active admission—which was impossible, he contended, where there was active denial—the statement

(1) (1910) 2 K.B., 496.
(2) (1910) 1 K.B., 640.
(3) 18 Cox C.C., 470.

should be entirely kept out of evidence for any purpose. Lord *Alverstone* C.J. disagreed with that, and said if *Smith's Case* (1) is supposed to have enunciated such a doctrine it went too far. He refused to lay down any general rule as to admissibility, that is for the purpose of the preliminary question. He approved of the Judge when admitting the statement expressly warning—that is directing—the jury against accepting the statement as true in any way, and the repetition of that warning in summing up. He considered that the statement was in the circumstances admissible, and that its weight—which obviously means its weight as evidence of the suggested admission of its truth—was for the jury. "The point taken on behalf of the prisoner fails, said the Lord Chief Justice, and that point was entirely confined to what I have called the preliminary stage. I must say that after a careful perusal of *Smith's Case* (1), particularly at p. 472, I would hesitate to believe that *Hawkins* J. intended to lay down any rule on this point other than that enunciated in *Thompson's Case* (2). But whether as to that *Thompson's Case* (2) does or does not correct *Smith's Case* (1) is immaterial to our present inquiry; because the admissibility of the statement in the case before us is not contested, so far as it relates to the preliminary stage, and the difficulty here begins just where that in *Thompson's Case* (2) ended. But that case is most valuable for the approval given by the Court to the express direction of the presiding Judge, cautioning the jury not to regard the statement as evidence on the main issue. As to that it accords with *Smith's Case* (1) on the same point.

Conceding then the statement here to have been originally properly received in evidence for the purpose mentioned, what is the effect of it? As long ago as 1829 *Parke* J. in *Melen* v. *Andrews* (3), a civil case—for the rule is universal—said of a conversation in a person's presence, "it is *only* for the sake of these *inferences* that the conversation can ever be admitted." So in 1832 in *R.* v. *Smithies* (4), a criminal case, the same learned Judge and *Gaselee* J. held observations stated to have been made to the prisoner by his wife to be receivable as evidence of an

(1) 18 Cox C.C., 470.
(2) (1910) 1 K.B., 640.
(3) M. & M., 336, at p. 337.
(4) 5 C. & P., 332.

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implied admission on his part. When the Judge has permitted a statement to be given in evidence in what I call the preliminary stage, or what may be considered a collateral inquiry of "acceptance or non-acceptance" of the accuracy of the statement, then the function of the jury is to find upon that preliminary or collateral issue. And according as they find upon it, so must be the future fate of the statement as to its being regarded as evidence or no evidence on the main issue. If the jury find acceptance, whether express or inferred, a statement to the extent of the acceptance, but no further, is then *for the first time* properly considered as introduced among the evidence of the truth of the facts stated in it—that is, of guilt. Even an admission—other than a formal plea—is not conclusive; it is evidence only and may be outweighed by other evidence: *Heane* v. *Rogers* (1).

If, however, the jury either find there was no acceptance, or only a limited acceptance, then the statement must be either wholly, or so far as it is in excess of the acceptance, disregarded from consideration, and practically erased from the testimony, as matter which has proved on examination to be a mere intrusion into the case.

The next question, and really the only material one for the decision of this case, is, what is the proper course for the Judge to pursue? I entirely agree that no Judge is called upon to state to the jury any law not required for their instruction having regard to the circumstances of the case.

But Lord *Blackburn* was careful to say in the case relied on by the appellant (*Prudential Assurance Co.* v. *Edmonds* (2)):— "When once it is established that a direction was not proper, either wrong in giving a wrong guide, *or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the Judge to give a guide,* we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo.*"

To some extent that is qualified by the Statute—*Crimes Act* 1900, sec. 470—which provides against the reversal of a convic-

(1) 9 B. & C., 577, at p. 586. (2) 2 App. Cas., 487, at p. 507.

tion unless for some substantial wrong or other miscarriage of justice. But *Norton's Case* (1), following *R.* v. *Stoddart* (2), establishes that a substantial miscarriage has occurred if a wrong direction has been given, unless the Court is satisfied that the jury would—not might—have found the prisoner guilty. See also *Makin* v. *Attorney-General for New South Wales* (3) hereinafter referred to. No such position is possible in the present case. If the necessary warning was absent the statement is too serious to be ignored.

The first question then is whether the facts were such as to make it the duty of the Judge to give the jury the distinct warning that they were to disregard the statement except so far as they found it to be admitted. With the greatest deference to the opposite view taken by my learned brethren, I cannot help feeling that the facts distinctly called for such a warning. I apprehend that, whenever there is a possible excess of a statement containing assertions of a damaging nature and made in the presence of an accused person over the part accepted by him as true, the whole statement being admitted originally because separation is impossible, it is always a necessary instruction to the jury, untrained as they are in the practice of the law, how they should regard the part unaccepted in case they find it to exist. There the circumstances of the case are such as to require the guiding direction. The damaging nature of the statement may be in the nature of an accusation direct or indirect, or it may be by reason of assertions of extraneous facts, such as conversations with some persons calculated to influence the mind of the jury, by lending apparent corroboration or credibility to the story told for the prosecution. In every such case there is obviously a possibility of unlawful prejudice to the accused, should the jury take into their consideration the unaccepted part of the statement. When I say "unaccepted part" I include in the case of a statement, extraneous statements which a prisoner cannot accept or deny, such as an alleged conversation between third persons, and which could not under any circumstances be in itself legal evidence against him on the main issue, but which

(1) (1910) 2 K.B., 496. (2) 25 T.L.R., 612, at p. 617.
(3) (1894) A.C., 57.

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must be admitted in the first instance as part of the statement so as to make the whole intelligible. Though no part of a direct accusation, it is almost equally dangerous, and more insidious, because it might go far in the minds of the jury and induce them to give credit to the accusing witness, and thus really determine the case in favour of the prosecution.

The jury should be made clearly to understand that they are not to consider this part at all, that they are not to weigh it, but to blot it out of their mental vision. Even such an intimation leaves a prisoner heavily handicapped by a prejudicial statement being brought at all to the notice of the jury, and the recorded authorities seem to me without variation to declare that a prisoner is in all such cases entitled to an explicit instruction on the point. Any other rule leaves it entirely to the discretion of the presiding Judge whether the prisoner shall be prejudiced or not, and makes him the tribunal to determine the weight of the unaccepted part, instead of the jury. There is nothing impracticable in following the rule. Where the statement is clearly separable, there the Judge can point out the line of demarcation. Where it is not, the Judge can at least indicate to the jury the mental process necessary to effect the same result. The jury are supposed to do it, and there is no difficulty that I can see in explaining to them their duty. Certainly the difficulty of attempting it is no reason for permitting a man to be convicted upon improper testimony.

In *Smith's Case* (1), decided in 1897, *Hawkins* J. is express as to this. After that had stood unchallenged for nine years, the tenth edition of *Taylor on Evidence* appeared (February 1906). Paragraphs 816 and 907 are material. Paragraph 816 contains this passage:—"In *all* these cases it must be distinctly remembered that the statement made in the party's presence or hearing is *not evidence against him*, but *his own conduct* in consequence of such statement is the *sole evidence*." Paragraph 907 states (*inter alia*) that whether there is any evidence that the prisoner admitted the truth of the statement is for the Judge, and the paragraph proceeds:—"If he thinks so he should allow the evidence to go to the jury, *and if they come to*

(1) 18 Cox C.C., 470, at p. 471.

the conclusion that the prisoner admitted the truth of the whole or any part of it, they may take the statement into consideration, or so much of it as they think admitted, *as evidence*, not because the statement standing alone is any evidence, but solely because of the prisoner's admission of the truth. *Unless the jury find as a fact that there was such admission, the statement is not evidence.*"

I have quoted this passage because it is professedly founded on *Smith's Case* (1), and because it is expressly approved by the Court of Criminal Appeal in *Bromhead's Case* (2) in December 1906. Lord *Alverstone* C.J. there pointed out that the statement made by another person in the prisoner's presence was *not admissible to prove the facts contained in it* but only as dealing with the conduct and demeanour of the prisoner, that is the preliminary or collateral inquiry. Then he went on to say that the Judge had *directed* the jury in accordance with paragraphs 816 and 907 of *Taylor on Evidence*, and added: "It cannot be said that these statements were used for a *wrong purpose*." In other words it is clear the opinion of the learned Lord Chief Justice was that, if the statement as a statement had been treated as evidence upon which to determine guilt, it would have been used for a wrong purpose, and further that the explicit direction in accordance with paragraph 907 of *Taylor* was the proper course to prevent the wrong use of the statement. *Bromhead's Case* (2) is the decision not only of the Lord Chief Justice, but also of Lord *Mersey* (then *Bigham* J.), and *Grantham*, *Lawrence* and *Bucknill* JJ.

Lastly, in *R.* v. *Norton* (3), the Court of Criminal Appeal, consisting of Lord *Alverstone* C.J., and *Pickford* and Lord *Coleridge* JJ. in a written judgment read by *Pickford* J., in terms which show it is the joint considered opinion of all three Judges, laid down the rule most distinctly and in accordance with the previously declared practice. After detailing the various steps which under the present practice in England led up to the admission of such statements for the purpose of ascertaining whether or not there was any acknowledgment of their truth, the judgment proceeds thus:—"Where they are admitted we

(1) 18 Cox C.C., 470.
(2) 71 J.P., 103.
(3) (1910) 2 K.B., 496, at p. 500.

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think the following is *the proper direction* to be given to the jury," and then follows a verbatim extract from the judgment of *Hawkins* J. in *Smith's Case* (1). That passage, as I have said, is condensed in *Taylor* from *Smith's Case* (1), approved in *Bromhead's Case* (2), unnoticed in, because irrelevant to *Thompson's Case* (3), and expressly adopted by the Court of Criminal Appeal in *Norton's Case* (4). *Norton's Case* (4), in my opinion, goes no further than I have stated.

I find, therefore, what appears to me a clear, definite and authoritative pronouncement of the law, which I feel bound to follow.

The learned Chairman states in the special case that he impliedly gave the requisite instruction. But whether he did so or not must be determined by looking at the direction itself, which he states he gave.

The view taken by the learned Judges of the Supreme Court as to this appeals to me as perfectly sound. It seems to me impossible to say the jury were told in substance to discard the surplus statements, as not being any evidence whatever against the prisoner on the issue of innocence or of guilt. They were reminded in effect that two persons only—the prisoner and the boy—could speak directly as to the occurrences on 2nd March, and that both these persons had given their respective accounts. Reference was made to the boy's evidence in Court, and to the prisoner's statement in Court, and his statement to the constable, denying the assault, and therefore, said the learned Chairman, their verdict depended on "whether they believed the boy or not," and he adds, "I told them that unless they were *satisfied* as to the truth of the boy's evidence they ought to acquit the accused" (5). Is that enough? I have looked in vain for any indication that would convey to the lay minds of the jury that the surplus statement was not evidence on the issue of guilt. The last sentence quoted is nothing more than the common exhortation to give the accused the benefit of any doubt. They were advised to be "satisfied" that the boy's evidence was true before they found the man guilty. But nowhere were they told

(1) 18 Cox C.C., 470.
(2) 71 J.P., 103.
(3) (1910) 1 K.B., 640.
(4) (1910) 2 K.B., 496.
(5) 10 S.R.(N.S.W.), 309, at p. 311.

that that satisfaction must be obtained independently of the statements of the constable and the boy on 4th March, that the boy had at an early period told the same story as he gave in the witness-box.

The statement of the prisoner in Court is put by the learned Chairman on the same footing as his denial out of Court, that is, they were treated equally as elements to be weighed in determining guilt or innocence. And if the denial was a factor, so was the statement denied. Altogether there is an absence of the affirmative specific guidance which the authorities cited require. The jury probably considered they had to judge between the veracity of the boy and that of the man from all the matters deposed to. And when it came to a contest of veracity between the unsworn statement of the accused and the sworn testimony of the boy, it is impossible, I think, to escape feeling the enormous weight that in the absence of the most careful warning might, and probably would be attached by the jurymen to the circumstance, involved in the constable's statement and the boy's assent, that soon after the event the boy had recounted the story in all its main details, first to his mother and then to the constable. This, in my opinion, should have been distinctly withdrawn, and the jury warned against considering it.

If they were hesitating whether they should believe the story of the boy as given in the witness-box, the circumstance of a consistent story being told by him a month before would in all human probability have great importance and seriously affect their verdict. This is the real point of the judgments of the learned Judges of the Supreme Court (see fols. 44 and 77), and is the real point of the case. Lord *Blackburn's* words therefore apply with cogent force, and so does the case of *R.* v. *Gibson* (1). In that case everything turned on the identification of the prisoner with the person who threw the stone. There was ample evidence of his identification other than the statement contested. That statement was made by the prosecutor in the course of his evidence, and was unobjected to until after the jury had retired. Lord *Coleridge* C.J. said the verdict of guilty could not stand "by reason of the illegal evidence having been left to

(1) 18 Q.B.D., 537.

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the jury." The Chairman in that case expressly drew the attention of the jury to the objectionable evidence, but that was immaterial in principle. The point was that the evidence was allowed to be given, and not affirmatively withdrawn. The learned Lord Chief Justice said (1):—"I am of opinion that the true principle which governs the present case is that it is *a duty of the Judge in criminal trials to take care* that the verdict of the jury is not founded upon any evidence except that which the law allows. Here evidence which was at law inadmissible was allowed to go to the jury." *Stephen* J. agreed. *Mathew* J. said it was the duty of the Judge to *warn* the jury not to act upon evidence which is not legal evidence against the prisoner. *Wills* J. also said there was an affirmative duty on the Judge to take care that the prisoner is not convicted upon any but legal evidence.

As the evidence complained of in this case was inadmissible on the question of guilt or innocence, and in itself inadmissible at any stage and for any purpose because *res inter alios acta*, the observations in *Gibson's Case* (2) exactly apply, and with even greater force than in that case. Though *Gibson's Case* (2) in 1887 appears to be the first reported case directly on the point, the doctrine it enunciates has been long recognized in English law. For instance, in *Milne* v. *Leisler* (3), twenty-five years earlier, *Channell* B. says:—"I do not mean to say that if a document is admissible for a certain purpose, so that the Judge could not exclude it, it becomes evidence of all the facts alleged in it. Where the document cannot be altogether excluded, it seems to me a safer and better rule for the Judge *to caution* the jury against acting upon *that part of it which is not evidence.*"

And still earlier, 1832, in *Willis* v. *Bernard* (4), *Park* J. said:—"So in the case of prisoners; where confessions are given in evidence which unavoidably involve the mention of others besides the party confessing. But the jury are *always* cautioned to *exclude* the statement as against any but the party confessing. They also received a proper caution in this case, and, subject to that, the letter was properly admitted."

Evidently those learned Judges made no exception, and thought

(1) 18 Q.B.D., 537, at p. 542.
(2) 18 Q.B.D., 537.
(3) 7 H. & N., 786, at p. 800.
(4) 8 Bing., 376, at p. 384.

it insufficient merely to ask the jury if they believed the opposite testimony.

The same affirmative duty of the Judge to take care was insisted on in *R.* v. *Bridgwater* (1), and again by the Court of Criminal Appeal by three Judges as recently as *R.* v. *Fisher* (2), There the rule is made plain that, where evidence is allowed to go to the jury against the prisoner which ought to have been excluded, if the jury may have been influenced by it the conviction cannot stand, although there is sufficient evidence otherwise to convict the prisoner. And *Fisher's Case* (2) was still more recently followed by the same Court consisting of five Judges: *R.* v. *Ellis* (3). And the last, but the most authoritative case I shall mention, is *Makin* v. *Attorney-General for New South Wales* (4). There the Privy Council, considering sec. 423 of the *Crimes Act*, said that where inadmissible evidence is introduced, then notwithstanding there is sufficient evidence to sustain the verdict and show the accused was guilty, there is a substantial wrong or miscarriage of justice except where it is impossible to suppose the evidence improperly admitted could have any influence on the verdict, as, for example, where it related to some merely formal matter not bearing directly on the guilt or innocence of the accused. To sustain a verdict under these circumstances would, as their Lordships say, amount to trial by Judges and not by jury.

And in *R.* v. *Bertrand* (5) the Privy Council observed:— "The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party."

And that is why the consent of a prisoner to an illegal course counts for nothing.

In my opinion, the object so indicated was not attained by the trial at which the prisoner was convicted. On the contrary, I feel little doubt that the statements referred to were very likely to influence the verdict; and therefore, in my opinion, the

(1) (1905) 1 K.B., 131, at p. 158.
(2) (1910) 1 K.B., 149.
(3) 26 T.L.R., 535.
(4) (1894) A.C., 57.
(5) L.R. 1 P.C., 520, at p. 534.

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decision arrived at by the Supreme Court was correct and should be upheld.

Appeal allowed.

Solicitor, for appellant, *J. V. Tillett*, Crown Solicitor.

Solicitor, for respondent, *L. J. Hardiman*, Kempsey, by *J. W. Maund.*

[HIGH COURT OF AUSTRALIA.]

ROBERT LOUDEN BEGLEY . . . . APPELLANT; DEFENDANT,

AND

THE ATTORNEY-GENERAL OF NEW SOUTH WALES . . . RESPONDENT. PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

SYDNEY, *Nov.* 18, 21, 22. *Dec.* 7.

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

Administration—Administration bond—Action against surety—Evidence of breach of conditions of bond by administratrix—Decree against administratrix in administration suit—Admissibility against surety—"Res inter alios acta"—Construction of administration bond—Rest and residue clause—Proof of damage—Assignments of their interests by next of kin to administratrix—Charter of Justice (N.S. W.) secs. XV., XVI.—*Wills, Probate and Administration Act* 1898 (*N.S. W.*) (*No.* 13), *sec.* 155—*Practice—Nominal plaintiff—Relator—Title of proceedings.*

An action was brought against the appellant as surety to an administration bond, which was in the form prescribed by sec. 15 of the Charter of Justice. The breaches alleged were : (1) that the administratrix did not well and truly administer ; (2) that she did not make a true and just account of her administration ; and (3) that she did not dispose of the rest and residue found remaining upon the administration account, after allowance of accounts in due course of administration, or as directed by the Court.