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LAND TAX.

Griffith C.J.

testator who died before that day, the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the settlor or testator by blood, marriage, or adoption, in such a way that they are taxable as joint owners under this Act, then, for the purpose of their joint assessment as such joint owners, there may be deducted from the unimproved value of the land, instead of the sum of £5,000 as provided by paragraph (b) of sub-sec. 2 of sec. 11 of this Act, the aggregate of the following sums, namely:— In respect of each original share in the land under the settlement or will—(a) the sum of £5,000, or (b) the sum which bears the same proportion to the unimproved value of the land as the share bears to the whole, whichever is the less.” The term “original share in the land” is defined to mean “the share” (the word “the” appears to be redundant) “of one of the persons specified in the settlement or will as entitled to the first life or greater interest thereunder in the land or the income therefrom, or to the first such interest in remainder after a life interest of the wife or husband of the settlor or testator.”

In the present case the appellants are trustees for nine persons who are joint owners of the estate. The question is whether those nine persons are joint owners of original shares in the land within the meaning of the definition. The testator gave the land in question for the benefit of his daughter for life with remainder to those nine persons, who are her children, in equal shares. Can they say that they are holders of original shares in the land? Are they “persons specified in the settlement or will as entitled to the first life or greater interest”? Of course they are not. Are they persons entitled “to the first such interest in remainder after a life interest of the wife or husband of the testator”? The answer to that is, No. They are, therefore, not within the exemption, but within the general rule as to joint owners; and there is no more to be said about it.

BARTON J. I am of the same opinion.

ISAACS J. I agree, and will only add one or two words. Sub-sec. 8 of sec. 38 defines “original share in the land” as being,

first, "the share of one of the persons specified in the . . . will as entitled to the first life or greater interest thereunder in the land or the income therefrom." That might be an estate in fee held by several persons jointly. The next is the share of one of the persons specified in the will as entitled "to the first such interest in remainder after a life interest of the wife or husband of the . . . testator." Now the words "such interest" mean a "life or greater interest," and that is to be an interest in remainder after possibly only a life interest of the wife or husband of the testator. It is quite evident that if the estate in remainder is one in fee it cannot be identical with the life interest given to the wife or husband, and therefore the contention that the share of these appellants is the same share as that of their mother cannot be upheld.

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Isaacs J.

GAVAN DUFFY J. I agree.

RICH J. I agree.

*Questions answered—(1) No. (2) Yes, on
the unimproved value of the land less
£5,000.*

Solicitors, for the appellants, *Madden, Drake & Candy.*

Solicitor, for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

Appl
R v Wilkinson
20 ACrimR
230

Discd/Appl
R v Pahuja
49 SASR 191

Cons
R v Downs
(1985) 3
NSWLR 312

Disc
Hicks v R
(1920) 28
CLR 36

Refd to
Goncalves v R
(1997) 99
ACrimR 193

Foll
R v Anderson
(2001) 127
ACrimR 116

[HIGH COURT OF AUSTRALIA.

BROWN APPELLANT;

AND

THE KING RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Criminal law—Practice—Statement made by accused—Cross-examination of*
1913. *accused subsequently giving evidence—Trial for murder—Verdict of man-*
slaughter, direction as to—Evidence—Res gestæ—Reasonable doubt, direction as
to—Crimes Act 1900 (N.S.W.) (No. 40 of 1900), secs. 18, 23, 405, 407.

—
SYDNEY,
Dec. 5, 8, 9,
19.

—
Barton A.C.J.,
Isaacs,
Gavan Duffy,
Powers and
Rich JJ.

Sec. 405 of the *Crimes Act 1900* (N.S.W.) provides that every accused person on his trial may make any statement “without being liable to examination thereupon by counsel for the Crown, or by the Court.”

Sec. 407 of the same Act provides that “every accused person in a criminal proceeding . . . shall be competent, but not compellable, to give evidence in such proceeding in every Court—Provided that (1) no such person charged with an indictable offence shall be liable . . . (b) to be questioned on cross-examination as to his previous character or antecedents, without the leave of the Judge.”

If an accused person, pursuant to sec. 405, makes a statement, and afterwards testifies on oath as a witness pursuant to sec. 407, the only limit to his liability to be cross-examined is that contained in sec. 407 (1) (b).

By sec 23 (2) of the *Crimes Act 1900* (N.S.W.) it is provided that “where, on any such trial” (*i.e.* the trial of a person for murder), “it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly,” &c.

On a trial for murder the jury are entitled under sec. 23 (2) to bring in a verdict of manslaughter, even though on the evidence the case is one of murder or nothing; and, therefore, where in answer to a question by the jury whether they were at liberty to find any other verdict than guilty or not guilty, the Judge told them that they were not,

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Held, that there was a misdirection.

By *Barton A.C.J.* and *Isaacs* and *Powers JJ.* : On a trial for murder what was said to the murdered man and his reply by word or gesture shortly after the infliction of the mortal wound and in the absence of the accused, may not be given in evidence unless what was said and the reply followed so soon after the infliction of the wound as to be substantially contemporaneous with it.

By *Barton A.C.J.* and *Isaacs* and *Powers JJ.* : A direction that a reasonable doubt which should lead a jury to acquit an accused person is a doubt such as would influence them in the ordinary affairs of life, is a misdirection.

Decision of the Supreme Court of New South Wales : *R. v. Brown*, 13 S.R. (N.S.W.), 433, reversed.

APPEAL from the Supreme Court of New South Wales.

Thomas Edwin Brown was on 30th July 1913, at the Central Criminal Court, Darlinghurst, before *Sly J.* convicted of the murder of Edwin Stuart Hickey, and was sentenced to death. He appealed to the Court of Criminal Appeal from the conviction and the sentence, and that Court dismissed the appeal and confirmed the conviction : *R. v. Brown* (1).

From that decision Brown now, by special leave, appealed to the High Court.

The material facts are stated in the judgment of *Barton A.C.J.*, hereunder.

Ralston K.C. (with him *Armstrong*), for the appellant. What was said by the appellant's son, Edwin Brown, to the deceased immediately after the infliction of the injury which caused his death and the gesture he made in reply were admissible in evidence as being part of the *res gestæ*. It was substantially concurrent with the happening of the event under consideration and was an incident of that event. [He referred to *Stephen's Digest of the Law of Evidence* (New South Wales Edition), p. 12, Arts. 8, 9; p. 206, note v. to Art. 8; *R. v. Foster* (2); *Phipson on Evidence*, 5th ed., p. 67; *R. v. Lunny* (3).]

(1) 13 S.R. (N.S.W.), 433.

(2) 6 C. & P., 325.

(3) 6 Cox. C.C., 477.

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[BARTON A.C.J. referred to *Beatty v. Cullingworth* (1).

RICH J. referred to *R. v. Bedingfield* (2).]

When a statement is made by an accused under sec. 405 of the *Crimes Act* 1900 and he is afterwards sworn and gives evidence under sec. 407, he cannot be cross-examined as to what he said in his statement, but cross-examination is limited to the evidence he has given in the witness-box. [He referred to *Criminal Law Amendment Act* of 1883, secs. 351, 354, 470; *Criminal Law and Evidence Amendment Act* of 1891, sec. 6.]

The definition of "reasonable doubt" given by *Sly J.* was wrong. It is not a doubt which would influence men in the ordinary affairs of life, but one which would influence them in the more important affairs of life. The measure of the doubt is the responsibility. The amount of certitude required is proportionate to the magnitude of the crime. [He referred to *R. v. Roberts* (3); *R. v. White* (4); *Best on Evidence*, 9th ed., p. 79; *Wills on Circumstantial Evidence*, 6th ed., p. 318.]

The question of the jury, "Are the jury at liberty to bring this case in in any other way than guilty or not guilty?" has been assumed both by the Judge at the trial and by the Court of Criminal Appeal to mean could they find the prisoner guilty of manslaughter. That being so, the Judge was wrong in answering it as he did. Under sec. 23 of the *Crimes Act* 1900 the jury may find the accused guilty of manslaughter even though on the facts the case is one of murder or nothing: *R. v. Grimes* (5); *R. v. Mitchell* (6); *R. v. Self* (7); *Prudential Assurance Co. v. Edmonds* (8); *R. v. Tate* (9). [Counsel also referred to *Crimes Act* 1900, sec. 18; *Stephen & Oliver's Criminal Law Manual* (N.S.W.), App., p. 199.]

[ISAACS J. referred to *R. v. Peacock* (10).]

Here, however, there was ample evidence to justify a verdict of manslaughter.

Garland K.C. (with him *Hodgson*), for the Crown. The

(1) 60 J.P., 740.

(2) 14 Cox. C.C., 341.

(3) 10 S.R. (N.S.W.), 612.

(4) 4 F. & F., 383.

(5) 15 N.S.W.L.R., 209, at p. 219.

(6) 9 S.C.R. (N.S.W.), 282.

(7) 1 Leach C.C., 137.

(8) 2 App. Cas., 487, at p. 507.

(9) (1908) 2 K.B., 680.

(10) 13 C.L.R., 619, at p. 642.

statement said to have been made by Edwin Brown and the reply were not part of the *res gestæ* and were inadmissible in evidence. In order that events may be part of the *res gestæ* there must be a substantial contemporaneousness: *R. v. Bedingfield* (1); *R. v. Goddard* (2); *Best on Evidence*, 10th ed., p. 410; *Halsbury's Laws of England*, vol. XIII., p. 437; *Roscoe's Criminal Evidence*, 11th ed., p. 25. Here the transaction during which Hickey received his mortal wound was entirely at an end when the event in question took place.

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As to the liability of the prisoner to cross-examination upon his statement, see sec. 470 of the *Crimes Act* 1883, the original of sec. 405 of the *Crimes Act* 1900, which only meant that if an accused person confined himself to making a statement he was not liable to be cross-examined upon it. At that time he could not give evidence; and when by sec. 6 of the *Criminal Law and Evidence Amendment Act* of 1891 he was first enabled to give evidence, if he chose to do so he became a witness in the same way as any other person, with the one limitation, that he could not be cross-examined as to his character or antecedents without leave of the Judge. He could, therefore, be cross-examined as to what he had said in his statement, if he had made one. [He referred to *R. v. Brotherton* (3).]

As to the direction with regard to what is a reasonable doubt, a fair meaning of it is that if the doubt was such as might in the ordinary affairs of life cause a man to pause and consider, and if on consideration he would come to the conclusion that the doubt was a reasonable one, then the jury should acquit. In that view the direction was right: *R. v. Brotherton* (3); *R. v. Stoddart* (4). It was unnecessary to give any explanation of what constituted a reasonable doubt, and what the learned Judge said did not put before the jury any false principle. It is, at most, as if he had said that a reasonable doubt is a reasonable doubt. If the result was that the jury would not be misled, this Court should not interfere: *R. v. Grills* (5). There are no gradations in the measure of reasonable doubt in criminal cases: *Wills on Circumstantial Evidence*, 6th ed., pp. 314, 319.

(1) 14 Cox C.C., 341.

(2) 15 Cox C.C., 7.

(3) 10 W.N. (N.S.W.), 56.

(4) 2 Cr. App. R., 217, at p. 245.

(5) 11 C.L.R., 400, at p. 415.

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The learned Judge was right in telling the jury that they could not find the accused guilty of manslaughter. Where there is no evidence to justify a particular conclusion, the judge is justified in telling them that they cannot find that conclusion: *R. v. Meany* (1). Here the defence was only compatible with the innocence of the accused, and in such a case the jury should, if they ask the question, be told that they cannot find manslaughter. On a trial for murder there is no necessity to direct the jury that they can find for manslaughter: *R. v. Fletcher* (2). [He also referred to *R. v. Norton* (3); *R. v. Lukins* (4); *Varawa v. Howard Smith Co. Ltd.* (5).]

Ralston K.C., in reply, referred to *Phipson on Evidence*, 4th ed., p. 65; *Bain v. Whitehaven and Furness Junction Railway Co.* (6); *Sutherland v. Thomson* (7); *Wallace v. Patton* (8); *Holmes v. Jones* (9); *Measures v. McFadyen* (10); *Jenkins v. Price* (11).

[*RICH J.* referred to *Connecticut Fire Insurance Co. v. Kavanagh* (12).]

Cur. adv. vult.

The following judgments were read:—

Dec. 19.

BARTON A.C.J. On the 30th July last the prisoner was convicted at the Central Criminal Court, held at Darlinghurst, of the murder of Edwin Stuart Hickey, a senior sergeant of police, at St. Ives in this State on 1st May 1913. He appealed to the Supreme Court under sec. 5 of the *Criminal Appeal Act of 1912* (No. 16). In his notice of appeal he stated the following grounds:— (1) The wrongful admission of evidence; (2) the wrongful rejection of evidence; (3) misdirection of the jury; (4) that the verdict was against evidence and the weight of evidence; (5) that the verdict was bad and contrary to law; (6) irregularity of process.

The Full Court dismissed the appeal, and the prisoner now appeals to this Court by special leave.

(1) *Le. & Ca. C.C.*, 213, at p. 216.

(2) 9 *Cr. App. R.*, 53.

(3) (1910) 2 *K.B.*, 496, at p. 500.

(4) 19 *W.N. (N.S.W.)*, 90.

(5) 13 *C.L.R.*, 35.

(6) 3 *H.L.C.*, 1.

(7) (1906) *A.C.*, 51.

(8) 12 *Cl. & F.*, 491.

(9) 4 *C.L.R.*, 1692.

(10) 11 *C.L.R.*, 723, at p. 733.

(11) (1908) 1 *Ch.*, 10.

(12) (1892) *A.C.*, 473, at p. 480.

The grounds taken in the notice of appeal to this Court are that *Sly* J., who tried the case, was in error (1) in disallowing a question by the prisoner's advocate as to what was said by Edwin Brown to the said Edwin Stuart Hickey immediately after the infliction of the injury which caused the death of the latter; (2) in allowing the prisoner to be cross-examined upon what he said in his statement to the jury; (3) in his direction to the jury as to the nature of a reasonable doubt; (4) in directing the jury that they were not at liberty to find a verdict other than guilty or not guilty of the charge contained in the indictment.

All these grounds are clearly within par. (a) of the first subsection of sec. 5.

As the grounds in the prisoner's notice of appeal to the Supreme Court are stated with much generality, counsel for the Crown on that appeal requested further particulars on the opening of the argument; but the request was not pressed in view of a statement by the prisoner's counsel that they would confine their argument to two points, namely, those now numbered 2 and 4 in the notice of appeal to this Court. The other two appear to have been first intimated to the Crown in the prisoner's notice of appeal to this Court.

It is incumbent upon us, then, to decide the second and fourth points; but it is questionable whether the first and third are properly before us. In the view I take of the case it is not absolutely necessary to decide whether these are properly raised. I shall therefore, in the first instance, deal with the second and fourth points.

First, then, as to number 2. It is contended that the learned Judge wrongfully allowed the prisoner to be cross-examined by the prosecution upon his statement to the jury. He made such a statement at the close of the case for the Crown, and before calling any witness in his defence. But he immediately afterwards gave evidence as a witness in his own behalf, under the liberty secured to him by sec. 407 of the *Crimes Act*.

From the transcript of the shorthand notes furnished under sec. 11 of the *Criminal Appeal Act*, it is clear that counsel for the Crown, in his cross-examination of the prisoner as a witness, was allowed to put questions to him as to assertions

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made in his statement under sec. 405. Sec. 405 just mentioned provides that the accused may make his statement "without being liable to examination thereupon by counsel for the Crown, or by the Court." His Honor must, I think, be taken to have ruled that the prisoner could in this case be questioned, in his cross-examination as a witness, on what he had said in his statement. It was held by the Supreme Court of this State in *R. v. Smith* (1) that the rights of the accused to make a statement and afterwards to give evidence are not alternative but cumulative.

It is contended that the ruling of *Sly J.*, which was acted upon, vitiates the conviction. On the other hand, it is argued that when once the accused testifies on oath as a witness, there is only one limitation on his liability to the test of cross-examination, namely, the exclusion of questions on his previous character or antecedents, unless permitted by the Judge (sec. 407 (1) (b)). It was pointed out that if sec. 405 provided in effect a further exemption from the ordinary tests, it would be competent for an accused person, intending to swear to a concocted story, to protect himself entirely from the risk of exposure by first making a statement of the whole fabrication from the dock, and then going into the witness-box and repeating it on oath; and it was urged that Parliament could not have intended such a result.

If an accused person has exercised only the right of making a statement, it is obvious that neither the Crown nor the Court can lawfully examine upon it. But it does not follow that when he goes on to exercise the further right to give evidence, the protection of sec. 405 extends to shield his sworn testimony from the ordinary tests of truthfulness. If, then, he is liable to be questioned on matters not mentioned in his statement, but protected as to matters so mentioned in respect of questions intended to test his veracity upon oath, it becomes clear that in practice the sworn evidence may be given with as much impunity as the mere statement. Cross-examination, at the stage when the prisoner was subjected to it, cannot, I think, be accurately described as examination within the meaning of sec. 405 on the unsworn statement, with which the prisoner did not content himself. It

(1) 17 N.S.W.L.R., 104.

is cross-examination upon his sworn evidence, and not the less so if in testing that evidence reference is made to any previous statement of the prisoner. In adding the sworn evidence to the unsworn statement the prisoner has undertaken every risk of a witness from which proviso (1) (b) to sec. 407 has not exempted him.

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I therefore agree with the conclusion of the Supreme Court on this point.

I pass to the fourth point, which questions the accuracy of his Honor's direction to the jury at the trial that they were not at liberty to find a verdict other than guilty or not guilty of the charge contained in the indictment.

At page 167 of the transcript already referred to, I find this passage :—

"*The Jury.* Are the Jury at liberty to bring this case in in any other way than guilty or not guilty ?

"*His Honor.* I do not think so. If the accused did shoot the sergeant the law considers that murder, unless there is something to show that there was some excuse for it. But there is no excuse suggested here, for the accused says 'I did not do it.' It seems to me there are only the two issues ; there is no suggestion of a third issue."

This incident took place immediately before the retirement of the jury.

After defining murder in sec. 18 (1) (a), and enacting in the following paragraph (b) that every punishable homicide, other than as defined, shall be taken to be manslaughter, the *Crimes Act* in sec. 23 (2) prescribes that where, on a trial for murder, "it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly." The power of convicting of manslaughter while acquitting of murder, is therefore conferred on the jury by Statute whenever they think that the act charged does not amount to the greater crime, but does amount to the lesser one. When, therefore, his Honor answered the jury by telling them that he did not think they were at liberty to find any other verdict than guilty or not

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guilty of murder, he in effect told them that they did not possess this power. Indeed, he went on to say that unless some excuse were shown for his act, the accused, if he shot the sergeant, had in law murdered him. This appears to be too broad a statement, since it leaves out the alternative of manslaughter, which cannot be called an excusable homicide. I am of opinion that this ground is fatal to the conviction.

It is true that on a charge of murder, if a defence is raised under sec. 23, the Judge is entitled to direct the jury, if it is the true position, that there is no evidence which would justify them in finding a verdict of manslaughter under that section: *R. v. Lukins* (1). In *Scholey's Case* (2) the Court of Criminal Appeal in England held that where a person had been convicted of feloniously wounding with intent to do grievous bodily harm, the Judge, who had not left the alternative of unlawful wounding to the jury, did not thereby misdirect them; and I think it is clear that where the evidence manifestly points to the crime charged or nothing, in the sense that there is no evidence on which a verdict of a less crime could be founded, it is not misdirection on the part of the Judge to abstain from telling the jury that they have power to find a verdict of the less serious crime: *Naylor's Case* (3). As lately as June of the present year it was held by the same Court that on a trial for murder, where there was clear evidence of intention, threats and motive, the only defence being accident, it was no part of the Judge's duty to tell the jury that it was open to them to find a verdict of manslaughter, though the Court said it was not a matter on which they could lay down a general rule: *Fletcher's Case* (4). On the other hand, there can be no doubt that on a charge of murder the jury are entitled at law to return a verdict of manslaughter, though on the facts the case be one of murder or nothing. It has been so decided in this State in the case of *Reg. v. Grimes and Lee* (5). There the jury, after retiring, returned into Court and asked the trial Judge (*Darley C.J.*) whether it was competent for them to find the prisoner guilty of manslaughter. His Honor told them it was, but he also told them that the case was one of murder or nothing.

(1) 19 W.N. (N.S.W.), 90.

(2) 3 Cr. App. R., 183.

(3) 5 Cr. App. R., 19.

(4) 9 Cr. App. R., 53.

(5) 15 N.S.W.L.R., 209.

They found the accused guilty of manslaughter. The accused contested the validity of the conviction on the ground that there was no evidence of manslaughter. But the Supreme Court held that the learned Chief Justice had taken a right course, and that the conviction could not be disturbed on the ground assigned.

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The distinction between abstaining from telling the jury that they are entitled to return a verdict of manslaughter where the evidence gives no ground for such an alternative verdict, and telling them, in answer to a question from them, that they are not at liberty to find such a verdict, is a very strong distinction. In the latter case the Judge affirms to them that they have not the power which the law actually confers upon them.

It was suggested in the course of the argument that where there is no evidence on which a jury could properly find manslaughter, the Court might dismiss the appeal, notwithstanding a direction by the Judge negating the jury's power to find such a verdict, since in such a case "no substantial miscarriage of justice has actually occurred": *Criminal Appeal Act*, sec. 6 (1). I wish to guard myself against seeming to agree with that suggestion, though I think the point does not arise here. For while there was undeniably evidence on which the jury could, if they believed it, convict of murder, yet I think it was possible to collect from the evidence, as given, material on which they might find a verdict of manslaughter while acquitting of the capital offence. I by no means say that they ought to have done so. In the prospect of a new trial, I am anxious to avoid saying any word that may be used hereafter in dealing with evidence which may be given, and so I abstain from pointing out any specific evidence already given on which, if it were repeated before a fresh jury, a contention upon the question of manslaughter might possibly be raised. It is enough to say that I think the appeal must be upheld on the fourth ground.

Holding this view, I do not think it imperative to say whether the first and third grounds stated in the notice of appeal are properly before us. Even if they are, as the conviction appears to be bad on the fourth ground, it is not now necessary to give an absolute decision on the first or the third. Nevertheless, it is necessary to remember that this case has already been twice

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tried, and that the result of to-day's judgment will be a third trial. If by reason of any rigid reticence on our part the case goes down to that trial with two of the points that have been argued still in doubt, there will again be dangers in the path both for the prisoner and for the Crown. It is most desirable that after the new trial there should be no further resort on any of these points either to the Court of Criminal Appeal or to this Court. I am so strongly impressed with this feeling that I consider it my duty to make some observations on both of the other points.

I turn then to the first point in the notice of appeal to this Court, namely, that the learned Judge was in error "in disallowing a question by the prisoner's advocate as to what was said by Edwin Brown to Hickey immediately after the infliction of the injury which caused the death of the latter."

Edwin Brown, a son of the prisoner, gave evidence at the trial. After saying that he walked from the prisoner's orchard up to his house with Sergeant Hickey, Constable Barclay and the prisoner, that the latter walked through the kitchen into the dining room, and was rushed by Hickey into the bedroom, this witness gave an account of a struggle which, as he alleged, ensued between the prisoner and Hickey, and said that he (Edwin Brown) was shot in the left wrist, while he was looking in at the door of the bedroom, in the course of the alleged struggle between the two men, during which several shots were fired. He then proceeded as follows:—"I saw Sergeant Hickey go out; he did not at any time fall; I did not know he was shot when he went out; when he went out I followed him, and told him something.

"(To his Honor) I did not notice anybody present when this was said.

"(To Mr. Abigail) Sergeant Hickey went out of the dining-room door. I went out after him a short time afterwards; when I got out I saw him going through the front double gate, which is about 75 feet away. When I saw him going through the front gate I was level with the house so that I could see up the lane; I had just come round the back of the house.

"Q. Did you then show Sergeant Hickey something and tell him something? (Objected to). H. C. OF A. 1913.

"His Honor: What this young man said to Hickey I do not think can be evidence.

"(Objection upheld).

"Mr. Garland: I want it understood that I am not objecting to anything that Sergeant Hickey said.

"(To Mr. Abigail) Whatever it was I said to Sergeant Hickey, he did not speak, but he did something; when I spoke to him I held up my hand showing the wound."

It appears, then, that before the witness spoke to Hickey he had himself had time to leave the house and come round the back of it, while the mortally wounded man had had time to go a distance of about 75 feet. This evidence is to be found on pages 104 and 105 of the record. At pages 117 and 118 the prisoner's sister, who gave evidence, said that after the shot "the sergeant walked away as if nothing was wrong with him; . . . he walked right out. . . . Mr. Hickey walked out and went through the double gate. . . . I saw that Edwin was shot, and saw him put his hand up to the sergeant and say something to him."

Upon this evidence it is contended that what was said by Edwin Brown to Hickey when holding up his wounded hand, and Hickey's reply, by word or gesture, were admissible as part of the *res gesta*. The law on this subject is concisely stated in *Halsbury's Laws of England*, vol. XIII., at p. 437, in the following passage, which was cited:—"There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they closely accompany and explain that fact. . . . These constituent or accompanying incidents are in law said to be admissible as forming part of the *res gesta* or main fact; and, when they consist of declarations accompanying an act, are subject to three important qualifications: (1) They must not be made at such an interval as to allow of fabrication, or to reduce them to the mere narrative of a past event; (2) they must relate to, and can only be used to explain, the act they accompany, and not independent facts prior or subsequent thereto; and (3) though admissible to explain, or corroborate, they are not in general to be taken

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as any proof of the truth of the matters stated: they are consequently not, in any strict sense, to be classed as exceptions to the hearsay rule." This passage is supported by the citation of several well known cases. In a note as to *R. v. Bedingfield* (1) it is stated that *Cockburn C.J.* is generally considered to have applied the rule too strictly in rejecting the evidence in that case; but it is added that "the dictum of Lord *Denman C.J.* in *Rouch v. Great Western Railway Co.* (2) that 'concurrence of time, though material, is not essential,' seems to err in the opposite direction, the weight of authority favouring a substantial though not a literal contemporaneousness." In *R. v. Bedingfield* (1) the deceased, with her throat cut, had come suddenly out of a house which the prisoner had entered a minute or two before, and on meeting a woman outside she had said something, pointing backwards to the house. In a few minutes she was dead. *Cockburn C.J.* held that the statement made by the deceased was not admissible as part of the *res gestæ*, because it was uttered at a time when the transaction was over. If the rule was applied too strictly in that case, it does not follow that the evidence tendered in the present case was admissible. Was the statement which Edwin Brown says he made to Hickey on holding up his hand really a part of the transaction? If it was, it was relevant to the facts in issue. If it was not, it was not admissible on that ground, and no other ground is suggested. *Stephen*, in his *Digest of the Law of Evidence*, Part I., Chap. 2, Art. III., says:—"A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue."

On the whole, I am not satisfied that the evidence tendered was admissible. The transaction or group of facts seems to me to have been over for an appreciable period at the time when Edwin Brown held up his wounded hand and said something to Hickey. Hickey, though mortally wounded, had had time to leave the bedroom (whether he had fallen there or not, as Constable Barclay says he did) and walk a distance of 25 yards. The shooting, whoever was its author, was over, and there was nothing

(1) 14 Cox C.C., 341.

(2) 1 Q.B., 51.

to urge Hickey to hasten to the gate, while there was much indeed to retard him. When Edwin Brown called out to him the transaction, the subject of the charge, was a past event, however recent. Edwin Brown's wound was certainly a part of the transaction; but I do not think that his subsequent statement was. If, then, the matter rests solely upon this piece of evidence itself, its rejection does not impair the conviction. But there are other circumstances which create some difficulty. In the case for the Crown a witness named Gaukrodger was examined. He was driving past the prisoner's place when he was hailed by Constable Barclay. He saw Hickey staggering out of the gate. Hickey was lifted into the vehicle, which was driven away in search of medical aid. The prisoner's advocate in cross-examination elicited from this witness that after Hickey was lifted into the sulky, and while on the way to the Pymble Station, he several times said "Barclay went away and left me," Barclay being the constable who accompanied him into the prisoner's house and was the chief witness on the charge of murder. This part of the cross-examination was not objected to, but I am not sure it was admissible; it seems, however, to have led to something more serious; for counsel for the Crown in re-examination elicited that in the same conversation Hickey said "The first shot missed me, but he got me." Whether the cross-examination was admissible or not, this evidence in re-examination was not so. It did not arise upon the cross-examination, and there was no independent ground for it. But its dangerous import is manifest, seeing that the evidence for the Crown was that the prisoner shot Hickey, while the evidence for the defence was that there was a struggle between the two men for the possession of a revolver, belonging to the prisoner, which was in the bedroom; that Hickey got possession of it; and that he must have shot himself in the struggle.

The difficulty of the situation thus created is that such a piece of evidence as that last mentioned went to the jury, calculated as it was to support the version of the Crown as to the possession of the revolver by the prisoner during the shooting; while the declaration of Edwin Brown to Hickey, which was excluded,

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Thus a piece of evidence favourable to the prisoner, but inadmissible, was excluded ; while another piece of evidence seriously prejudicial to him, but more clearly inadmissible, went to the jury. It is true that as to the latter circumstance the trouble began with the questions put to Gaukrodger in cross-examination by the advocate for the prisoner ; but it remains a fact that the course of events as to the respective pieces of evidence was calculated unduly to injure the defence. If Edwin Brown's gesture and statement were inadmissible, much more so was the statement of Hickey elicited by the Crown from Gaukrodger.

Although it is not now necessary to decide it, I cannot avoid an impression that a position was created which amounted to a miscarriage of justice. As there is to be a new trial on another ground, one can only express a confident hope that such a difficulty will not recur.

The third of the grounds stated in the notice of appeal to this Court remains for observation. It is that the learned Judge was in error in his direction to the jury as to the nature of a reasonable doubt.

After summing up the evidence, and asking the jury whether they believed that the accused shot the sergeant or that the sergeant shot himself, his Honor went on to say :—" If you have a reasonable doubt in that matter and you do not know where the truth lies, then you will find a verdict for the accused. A reasonable doubt, as I have already remarked, means a doubt such as would influence you in the ordinary affairs of life." It is objected that his Honor's definition of reasonable doubt is misleading and unsafe. I fully recognize that one embarks on a dangerous sea if he attempts to define with precision a term which is in ordinary and common use with relation to this subject matter, and which is usually stated to a jury without embellishment as a well understood expression. Had his Honor so left it, neither the present objection nor any other could have been taken to his direction in this regard.

In *Best on Evidence*, § 95, it is admirably remarked that " there is a strong and marked difference as to the effect of evidence in

civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation, both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or, as an eminent Judge expressed it, 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.'" The words last quoted by the author are those of *Parke B.* in *R. v. Sterne* (1).

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I think the above passage affords a good and sufficient guide as to the nature of the reasonable doubt which should prevent a jury from convicting in a criminal case. It does not follow that in charging a jury its nature need be stated with so much elaboration. In the ordinary affairs of life we are frequently compelled to arrive at conclusions where moral certainty is out of the question. There, we have no more to guide us than a mere preponderance of probability; and where a juryman perceives such a preponderance in a civil case sustaining the burden of proof, he is justified in deciding according to that greater weight of evidence. But the danger of applying a similar rule of action to criminal cases is manifest, because of the much more serious consequences which, as the learned author points out, must result from a mistaken conclusion. The *discrimen* is similarly expressed by *Taylor* in his work on Evidence, § 112. It is not necessary to multiply authorities on this question, of which a number were cited to us, but I turn to the case of *R. v. White* (2), because the report contains the statement of a Judge who put the necessary proposition with equal pith and accuracy. In that case *Martin B.* told the jury (3) that "in order to enable them to return a verdict against the prisoner, they must be satisfied, beyond any reasonable doubt, of his guilt; and this as

(1) Surrey Sum. Ass. 1843, MS.

(2) 4 F. & F., 383.

(3) 4 F. & F., 383, at pp. 385 *et seqq.*

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a conviction created in their minds, not merely as a matter of probability; and if it was only an impression of probability, their duty was to acquit." This seems to me an adequate condensation of the principle of the matter as stated in *Best on Evidence*.

That author points out in a note to § 95 that the juror's oath seems framed with a view to the distinction drawn in the text. In civil cases he is sworn "well and truly to try the issue joined between the parties," &c.; while in treason or felony his oath is that he "shall well and truly try, *and true deliverance make*, between our Sovereign Lord the King and the prisoner at the bar."

I agree with the learned reporters of *R. v. White* (1), already cited, in deprecating as dangerous the doctrine that jurors may convict prisoners upon such an amount of proof as they would act upon in any of the affairs of life, in which, as the learned reporters point out, it is notorious that men daily act—and necessarily act—without any actual proof at all. A direction as to reasonable doubt should be such that an approach to certainty no nearer than is required for the decision of an ordinary civil matter may not be accepted as sufficient. There must be a mind convinced, or there is not that moral certainty which alone will justify a jury in condemning a person accused of crime.

I base my decision, for the purposes of the appeal, on the fourth ground of those which we heard argued; and I am of opinion on that ground that a miscarriage of justice has occurred and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court of Criminal Appeal is empowered to make: *Criminal Appeal Act*, sec. 8 (1).

In my view the appeal should be allowed and a new trial had.

The judgment of ISAACS and POWERS JJ. was read by

ISAACS J. The judgment of the Supreme Court of New South Wales has been challenged on four grounds, of which two only were raised explicitly before that Court, namely, (1) that the accused should not have been cross-examined upon his unsworn statement made under sec. 405, and (2) that the learned Judge at

(1) 4 F. & F., 383.

the trial misdirected the jury in telling them that they could only either convict or acquit the accused of murder.

1. *Cross-examination upon Statement*.—As to the first of these grounds, we start with the total incapacity of an accused person at common law, confirmed by Statute (8 Vict. No. 1; 16 Vict. No. 14, sec. 3; and 22 Vict. No. 7, sec. 3), to testify upon oath, and also with his very doubtful capacity in New South Wales to place before the jury any unsworn statement upon which they could act in arriving at their verdict. In 1883, by Act No. 17, this position was altered. Sec. 351 enabled the accused in cases where authority or excuse was necessary to make possession lawful, and in cases of bigamy, to prove by his own testimony certain specified facts, but nothing more. He was thus a competent witness in his own defence, but within a limited area. Sec. 470 in terms empowered any accused person to make a statement without being liable to examination thereupon by the Crown or the Court. This either created or solidified (see note to sec. 470 in *Stephen & Oliver's Criminal Law Manual* (1883); *R. v. Morrison* (1); and *R. v. Chantler* (2)) the right of the accused to place his unsworn statement before the jury without liability to what is in effect cross-examination.

Up to that point of time the legislature were not prepared to break down the common law solicitude for accused persons by which they were protected against compulsory self-incrimination, or to detract further from the principle that the magnitude of his interest made the sworn evidence of a prisoner untrustworthy. See *R. v. White* (3). The provision was a compromise. On the one hand it avoided compulsion, and on the other it allowed the accused to place his personal explanation or contradiction of the Crown case before the jury—but only as an unsworn and untested statement, and so to be appraised. So far the accused had not the option of strengthening his statement by his oath and the test of cross-examination.

In 1891, however, by Act No. 5, sec. 6, Parliament changed its policy. It gave to a person charged with an indictable offence the option of giving evidence if he chose. But it expressly pro-

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(1) 10 N.S.W.L.R., 197, at p. 206.

(2) 12 N.S.W.L.R., 116, at p. 118.

(3) 20 N.S.W.L.R., 12, at p. 13.

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tested him against two things: (a) compellability by the prosecution to testify, and (b) cross-examination without leave of the Judge as to character or antecedents. And as to persons charged with bigamy it also gave the option of acting under sec. 354 of the Act of 1883 within the restricted area, or of taking advantage of the wider provisions of the Act of 1891.

But the later alternative offered seems to us to imply that election deliberately made to forego the shelter of the common law or of secs. 351, 354 and 470, carried with it attendant advantages and disadvantages, independently of the expressed or implied conditions attached to those earlier situations.

The object of sec. 470, said *Windeyer J.* in *R. v. Chantler* (1), was not to enable a guilty man to escape from justice but to enable the Court to discover the true facts of the case. And so the Court held in that case that the prisoner's statements might be contradicted by ordinary testimony in reply. If not, said *Innes J.*, it would encourage fabrication.

One disadvantage was, as decided in *R. v. Hunt and Ollivier* (2), that the statement might be used against the prisoner on a second trial.

Another disadvantage to the accused after the Act of 1891 was that reference might be made to the fact that he had elected to refrain from standing the test of the witness-box: *Kops v. R.* (3). The Privy Council held that moral compulsion by liability to comment was not forbidden by the law as it stood. In 1898 by Act No. 30, sec. 1, this was altered by prohibiting comment in such a case. The Act was passed for this specific purpose only, the point having been apparently overlooked in the general Evidence Act of 1898, No. 11.

The important fact, we think, is this: that the legislature while engaged on the specific and solitary task of completing the protection of accused persons who elected to give evidence on oath under the later alternative, and knowing from the decision of the Full Court in 1896, in *R. v. Smith* (4), that both alternatives—statement and testimony—might be exercised in the same case, nevertheless refrained from prohibiting cross-examination on the

(1) 12 N.S.W.L.R., 116, at p. 119.

(2) 8 N.S.W.L.R., 38.

(3) (1894) A.C., 650.

(4) 17 N.S.W.L.R., 104.

statement if the accused also took advantage of the witness-box.

It will be observed that sec. 405 does not say in general and positive terms that an accused person making an unsworn statement shall not be liable to examination upon it. It says he "may make any statement . . . without being liable to examination thereupon." In other words, he shall not be liable to such examination by reason of his making the statement. But when he submits himself as a witness under sec. 407 he is liable to be cross-examined, not by reason of his having made a statement, but by reason of the ordinary consequences attaching to a competent witness who has been sworn and examined.

And two things are noticeable in sec. 407. It is not confined in the second paragraph of the first sub-section to indictable offences, but extends to all "criminal" proceedings. Next, the first paragraph relates to civil proceedings, and the inference is that apart from express qualifications the same consequences follow in the one case as in the other. *R v. Brotherton* (1), decided in 1893, is in this direction as far as it goes.

For these reasons we are of opinion that the accused was not improperly cross-examined on his statement, and this suggested ground of objection fails.

2. *Power of Jury to return Verdict of Manslaughter.*—The second ground dealt with by the Supreme Court raises questions of a highly important and, in some respects, novel character. The contention of learned counsel for the accused is twofold. He maintained that there was ample evidence to justify the jury in finding a verdict of manslaughter if they had been so minded; and even if there were not, he argued that the law entrusts the jury with the power in favour of a prisoner, and to deny them that power is to prejudice the accused.

For obvious reasons we do not enter into any detailed examination of the facts, but content ourselves with saying that there was a considerable body of evidence which, if believed, might have led the jury to the opinion that, even if Brown's hand physically discharged the revolver, his mind did not so go with the act as to bring that act within the statutory definition of murder. The learned Judge at the trial said:—"Which do you

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(1) 10 W.N. (N.S.W.), 56.

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believe—do you believe the evidence of the Crown that the accused shot the sergeant, or do you believe the evidence for the defence that the sergeant shot himself?” Shortly after, in reply to the jury’s question, his Honor said:—“If the accused did shoot the sergeant the law considers that murder, unless there is something to show that there is some excuse for it. But there is no excuse suggested here, for the accused says ‘I did not do it.’ It seems to me there are only the two issues; there is no suggestion of a third issue.” But there was a strong suggestion of a third issue, which appears to have been lost sight of in consequence of a misapprehension regarding the effect of the Statute law of New South Wales. During the prisoner’s unsworn statement he said to the jury:—“I am charged with murder, which is a very serious charge. I will read you the definition of murder from the *Crimes Act*” (he does so). He then referred to the conduct of the police, and added: “The answer to that question of murder which I have just read to you from the *Crimes Act* is, ‘No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.’” Now, it may be that the particular circumstances relied on by him were not precisely those which a skilled lawyer would consider the most pertinent, but undoubtedly the prisoner pointed to the statutory definition of murder, and also emphasized the statutory requirement of malice, as well as the absence of lawful cause or excuse. There can be no doubt that this appeal to the jury led to the question which they addressed to the Court. The reply of the learned Judge to the question amounted to saying “If you find the revolver was exploded by the physical pressure of Brown’s fingers, you will find him guilty of murder.” But even at common law that would be erroneous. In *R. v. Skeet* (1), where a poacher shot a keeper, *Pollock C.B.* said of *Skeet*:—“He had the gun in his hands when it went off. If he *fired* it, he was guilty of murder: and even if it went off accidentally with a struggle, it occurred by reason of his resistance of the lawful seizure of the gun, and was manslaughter.” Wilfulness or intention was obviously indicated as the difference between the gun going off in the struggle, and its being fired. In either case it

(1) 4 F. & F., 931, at p. 937.

would not be incorrect to say that Skeet shot the keeper. One man may shoot another, though he does not shoot at him. And see *R. v. Weston* (1).

What, then, is the lawful power of a jury on a charge of murder? Apart altogether from statutory provisions, it is well established law, that at common law the jury, though they may not convict of an offence of an entirely different character from that charged—as of a misdemeanour where felony is charged—may convict of a less aggravated felony or misdemeanour than the one charged, provided the words of the indictment cover it. See *Archbold's Criminal Pleading*, 23rd ed., pp. 215-216; *Halsbury's Laws of England*, vol. IX., p. 371, and the cases there cited. There are some cases in apparent discord as to the circumstances in which this may be done. In *R. v. Greenwood* (2) *Wightman J.* told the jury in a case of murder and rape that they might find the prisoner guilty of manslaughter by ignoring the doctrine of constructive malice if they thought fit. On the other hand, in *R. v. Maloney* (3), *Byles J.* in a murder case refused to receive a verdict of manslaughter, because, said the learned Judge, "The prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved, the law presumes the malice. And, although that may be rebutted by evidence, no such attempt has been made here." In *R. v. French* (4), which is very shortly reported, *Lopes J.* held it was murder or nothing, as the evidence disclosed nothing on which a verdict of manslaughter could be returned. It evidently rested on the principle stated by *Byles J.*

The two last mentioned cases may represent the common law more accurately than that before *Wightman J.*, or they may be only instances of vigorous judicial intervention to prevent a jury from wandering into what the Judge personally felt was an illogical track.

It may, when necessary, be considered that the true rule is found in the words of *Pollock C.B.* in *Meany's Case* (5). There the learned Chief Baron said:—"A Judge has a right, and in

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(1) 14 Cox C.C., 346.

(2) 7 Cox C.C., 404.

(3) 9 Cox C.C., 6, at p. 7.

(4) 14 Cox C.C., 328.

(5) L.e. & Ca., 213, at p. 216.

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BROWN bound to receive their verdict unless they insist upon his doing
v. so; and where they reconsider their verdict, and alter it, the
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But it is clear in any case what the law now is in New South Wales.

In the Act of 1883, by sec. 370, the law was enacted as in sec. 23 of the Act of 1900. On that section was decided *R. v. Grimes* (1), in which it was held that on a charge of murder the jury are entitled to return a verdict of manslaughter, though on the facts the case is one of murder or nothing: See *per Windeyer J.* (2) and *per Innes J.* (3). The re-enactment of the same provisions after that important judgment seems to us to set the legislative intention at rest, and to show that to tell the jury they have not the power which the legislature gives them, in the interests of accused persons, is fundamentally erroneous. The accused has clearly a right to demand the finding of the jury upon the specific elements contained in sec. 18 (1), and to ask them to negative such as are relevant. If the jury are not prepared to find the existence of any of those facts, they may say so, and simply find sufficient to establish punishable homicide. We do not see how it is permissible to refuse to accept such a verdict, or to deny to them the right or to the prisoner the benefit of their so finding. In none of the three cases, *Fairbrother's* (4), *Scholey's* (5) and *Naylor's* (6), if they were relevant to New South Wales law, did the Judge direct the jury as a matter of law that they were not at liberty to return a verdict of manslaughter. Mr. *Garland* relied on *Stoddart's Case* (7) at the end of p. 245 and at p. 246. But this is not a case of choice of phrases; the objection is one of substance, and the portion of the judgment in that case—where the conviction was quashed—most applicable to the present one is found at p. 244 and the first part of p. 245.

On this ground, subject to what we are presently about to say,

(1) 15 N.S.W.L.R., 209.

(2) 15 N.S.W.L.R., 209, at pp. 216, 221, and particularly at p. 222.

(3) 15 N.S.W.L.R., 209, at p. 225.

(4) 1 Cr. App. C., 233.

(5) 3 Cr. App. C., 183.

(6) 5 Cr. App. C., 19.

(7) 2 Cr. App. C., 217.

the appellant must, in our opinion, succeed. The jury have been prevented from considering, and the accused has been deprived of whatever advantage might have been derived by him from their considering, whether they should find him guilty of manslaughter only, by negating the essentials enumerated in subsec. 1 (a) of sec. 18, or whether by negating all culpability whatever, they should acquit him altogether. They were in effect told that, if culpable at all, he was guilty of murder. That is not the law: though there was no justification or excuse, it might still only be manslaughter. The conviction must therefore be set aside, and a new trial ordered, unless a further point taken by the Crown is well founded.

That further point is, that under sec. 6 of the *Criminal Appeal Act of 1912* the miscarriage—if any—is not substantial. We think the reasoning of the House of Lords in *Bray v. Ford* (1) determines that question in favour of the appellant.

We would refer particularly to the observations of Lord *Watson* at p. 50, and of Lord *Herschell* at pp. 52, 53. Here the difference to the accused may have been between liability to death, liability to imprisonment, and absolute freedom; according as the jury viewed the facts. It is impossible to say that a mistake of that character does not occasion a substantial miscarriage of justice. *R. v. Horn* (2) is also in point.

A new trial is, therefore, imperative.

Learned counsel for the appellant raised two further points, which were not raised or argued in the Supreme Court. It is unnecessary to decide what course this Court would feel compelled to take, if the appellant had failed on the misdirection point.

It is therefore not strictly necessary to decide, and we do not propose formally to decide, these further points. But they have been fully argued, and, in view of the third trial and of the extreme probability of these questions again arising, it is manifestly desirable, considering the interests of the accused and the public, and general administration of the law, that an opinion should be expressed which may assist the learned trial Judge in a very difficult duty, and prevent so far as possible the miscarriage of the proceedings.

(1) (1896) A.C., 44.

(2) 76 J.P., 270.

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3. *Reasonable Doubt*.—The first of these additional points arises in the following way :—The learned presiding Judge told the jury that the reasonable doubt which would entitle the prisoner to acquittal was doubt such as would influence them in the ordinary affairs of life.

The words “reasonable doubt” are in themselves so far self-explanatory that no further explanation is considered strictly necessary. Usually attempts to elucidate them do not add to their clearness.

Doubt is doubt, and reasonable is reasonable having regard to the circumstances. In *R. v. Sterne* (quoted in *Best on Evidence*, 9th ed., p. 79) Parke B. thought it sufficient to speak of “Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.”

The issues which depend upon a correct apprehension of the phrase are, however, sometimes so great that Judges have naturally, and on occasions most desirably, endeavoured to convey its true and real meaning in terms which leave no possibility of error. And it has now become necessary to consider whether the translation or paraphrase of the expression placed before the jury in this case was calculated to mislead them to the accused’s prejudice.

In our opinion it was. A “doubt which would influence a man in an ordinary affair of life” is in itself ambiguous. Apart from the vagueness of the term “influence,” the doubt itself might not be reasonable, it might be based on suspicion merely, it might be speculative, and great or small according to the affair in which it arose. A doubt as to whether the moment was propitious for a walk, a doubt as to whether a property was worth the sum asked or offered for it, and a doubt as to whether one should marry a certain person, are all doubts which would influence one to some extent in ordinary affairs of life; but as a criterion for classifying or gauging the doubt as to the prisoner’s guilt, they are worse than useless—they are confusing, insufficient, and misleading. In ordinary business affairs men do not wait, and frequently cannot afford to wait, to be morally certain of the results of the step they are taking; they may act notwithstanding a most serious and well founded doubt. They often in such

cases do not carefully weigh the facts at their command with a view even to ascertain the preponderance of probability. which they would have to do in a civil trial. Sometimes they do not trouble to collect or test all the available facts and information.

The root of the matter is found in the distinction as to the burden of proof which has long been established between civil and criminal cases. As *Willes J.* said (*Cooper v. Slade* (1)), it is an "elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict." The gravity of the consequences in criminal cases, however, and the noble view of public justice that it is better that many guilty men should escape than that one innocent man should suffer, reject that proposition in such cases. Lord *Ludlow* said to the grand jury (see 42 *Solicitors' Journal*, p. 835), "Criminal cases must not be decided on the preponderance of probabilities, but on the proof of guilt."

The law is that there must be moral certainty of guilt, which in itself involves the absence of reasonable doubt. The judgments in *R. v. Roberts* (2) of *Cohen J.* (3) and *Pring J.* (4) collect the most important relevant authorities, including the unquestionable charge of *Martin B.* in *R. v. White* (5). The test of *Pollock C.B.* in *Manners' Case* (6) requiring "that degree of certainty in the case that you would act upon in your own grave and important concerns," is much less likely to prejudice the accused. *Manners' Case* was in 1849, and the charge there fairly followed the view of *Mr. Starkie* in 1842 (vol. 1., p. 578), expressed thus:—"So convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to the own interest." The ruling of *Pollock C.B.* in *Muller's Case* (6), substantially as in *Manners' Case* (6), has been followed in *Hopt v. Utah* (7). That mode of expression, however, is very different from permitting a doubt which would merely "influence" a man—that is, either lead him to act or deter him from acting, which is very different, and then only in matters of mere ordinary importance.

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(1) 6 H.L.C., 746, at p. 772.

(2) 10 S.R. (N.S.W.), 612.

(3) 10 S.R. (N.S.W.), 612, at pp. 614-615.

(4) 10 S.R. (N.S.W.), 612, at p. 616.

(5) 4 F. & F., 383.

(6) 4 F. & F., 388 n.

(7) 120 U.S., 430, at p. 441.

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In the rule stated by Mr. *Starkie* and *Pollock* C.B., conjecture and mere possibility are eliminated, whereas in the direction to the jury here complained of they are not. We most respectfully think that even the reference to the most grave and important concerns, though in the vast majority of instances it is a sufficiently accurate working rule, may in some cases lead to misconception. It is simpler to ask for moral certainty—a term of clear conception—with reference to the circumstances of the particular case. And in referring to the necessary absence of reasonable doubt—which is a view of the same conception from the negative standpoint—reference should preferably be similarly confined to the circumstances of the case in hand, which include, of course, the common elements of human nature. We are fully conscious that the expression “reasonable doubt,” though it can be amplified, cannot be simplified. Still, there are cases where amplification is necessary. An attempted definition by counsel, or the nature of the evidence, circumstantial or otherwise, may call for it. The substance of the matter seems to us to stand thus:—Where a jury, with minds directed to the single object of performing their duty by arriving at a true verdict, and unswayed by any ulterior consideration which might divert them from the truth, investigate and weigh all the circumstances of the case fully and fairly, and, after doing so, find that notwithstanding any possible balance of their opinion against the accused there nevertheless exists in their minds a residuum of doubt as to his guilt—not a mere conjectural, visionary doubt, or a doubt arising from the bare possibility of his innocence, but a real doubt created by the operation of the circumstances before them upon their reason and common sense,—then their doubt is a reasonable doubt within the meaning of the rule. If such a doubt exists, they have not that moral certainty which is the correlative of the expression, and which the law requires to overcome the initial presumption of innocence; and in that case they should acquit.

4. *Res Gestæ*.—The second additional point is as to the exclusion from the evidence of Edwin Brown, son of the accused, of his testimony as to what he said to Hickey, and what Hickey did in reply. It is to be taken that the two communications—Brown’s

words to Hickey and Hickey's gesture to Brown—were so connected with each other as to make Hickey's gesture equivalent to a statement by him relevant to the issue of guilt or innocence of the accused. The ground upon which the rejection of this testimony was challenged is that the occurrence was said to be part of the *res gestæ*.

After most careful consideration of the matter we have come to the conclusion that on the facts deposed to in the case, even those deposed to after the rejection, the matter rejected was not part of the *res gestæ*. For obvious reasons, it would be not only useless now, but, in view of the new trial, injudicious on our part, to enter into the details of the evidence relevant to this point. A very short statement as to its effect will suffice. The shooting, whoever did it, and however it was done, was over—no attempt to continue it was made or apprehended. Hickey was walking away, not as escaping from threatened attack, but to repair the injury already inflicted. The witness left after him, the accused remaining in the house.

In these circumstances, it seems to us the *res gestæ*—that is, every incident connected with the shooting—had ceased. Not only the main transaction, but also every subsidiary incident, so far as related to the act complained of, was at end. The incident offered in evidence was unconnected in causality with the shooting: if it had been so connected—as by flight to escape its continuance—the slight lapse of time and the mere fact of 25 yards distance would not have been sufficient in themselves to have destroyed the natural nexus.

But when there is no natural connection by continuance—which may have liberal connotation—and there is a distinct and appreciable break of time and place, it would in our opinion be going beyond the limit of authority to admit evidence, which is in substance and reality a mere narration respecting a concluded event, a narration not naturally or spontaneously emanating from or growing out of the main transaction, but arising as an independent and additional transaction.

The case of *R. v. Bedingfield* (1) was relied on by the Crown, and challenged by the defence. As to that case, we are con-

(1) 14 Cox C.C., 341.

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cerned only with the principle, not with the application of the principle to the facts. The assumption there was that the "act" was already complete, and the woman was coming away after completion of the attack, and not escaping from an attack apparently still in progress. For all that appeared she was going away solely for the purpose of treatment.

In *Aveson v. Lord Kinaird* (1) Lord *Ellenborough* said:—"If she declared at the time that she fled from immediate terror of personal violence from the husband, I should admit the evidence; though not if it were a collateral declaration of some matter which happened at another time." This observation is sound law, though the actual decision of the case is not: See *Stobart v. Dryden* (2). Two Canadian cases may be cited. They are *R. v. McMahon* (3) in 1889, and *Gilbert v. The King* (4) in 1907. We make no further references to the judgments except for two purposes. The first is to state that, as *Armour C.J.* in the first case mentioned (5), the decision of *R. v. Bedingfield* (6) appears to have had the support of *Field* and *Manisty JJ.*, and probably of the Court of Appeal. The second is to quote from the same page an extract from the pamphlet of *Cockburn C.J.*, written during the controversy he had on the subject. That extract is as follows:—"Whatever act or series of acts constitute or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrongdoer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive, as, *e.g.*, in the case of flight or applications for assistance, form part of the principal transaction, and may be given in evidence as part of the *res gestæ* or par-

(1) 6 East, 188, at p. 193.

(2) 1 M. & W., 615, at p. 626.

(3) 18 Ont. R., 502.

(4) 38 Can. S.C.R., 284.

(5) 18 Ont. R., 502, at p. 516.

(6) 14 Cox C.C., 341.