[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;
APPELLANT,

AND

KENT-NEWBOLD . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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SYDNEY, *Nov.* 20, 21. *Dec.* 7.

Latham C.J. Starke and Dixon JJ.

Criminal Law—Autrefois acquit—Acquittal on "stealing" charge—Non-agreement by jury on "receiving" charge—Retrial on "receiving" charge—Criminal Code (Tas.) (14 *Geo. V. No.* 69, 1*st Sch.*), *secs.* 234, 258, 311, 332*, 338*, 355*.

The respondent was tried upon an indictment containing (*a*) a count for stealing a motor car between 19th December 1938 and 6th February 1939, and (*b*) a count for receiving the same motor car on 6th February 1939. He was acquitted on count *a*, and the jury were unable to agree on count *b*. Upon his second trial upon count *b* the respondent pleaded a plea of *autrefois acquit* based upon his acquittal on count *a* and the provisions of secs. 355 (1), 338 (1) and 332 of the *Criminal Code* (Tas.).

Held that the plea was a bad plea; by *Latham* C.J., on the ground that sec. 332 precludes an acquittal upon one count from supporting a plea of *autrefois acquit* in respect of an "alternative" crime charged in another count

* The *Criminal Code* (Tas.) provides:—Sec. 332: "Where in any section it is provided that upon an indictment for any particular crime the accused person may be convicted of any other specified crimes it shall be intended thereby that if the jury find such person not guilty of the crime with which he is charged he may be convicted of such other of the crimes specified in such section as is established by the evidence to have been committed by him, or of an attempt to commit such other crime if such attempt is established as aforesaid, but not, upon that indictment, of any other crime." Sec. 338 (1): "Upon an indictment for—I. Stealing: II. Obtaining property by a false pretence: III. Cheating: or IV. Receiving stolen property—the accused person may be convicted of any of such crimes respectively." Sec. 355 (1): "An accused person may plead to an indictment— . . . II. That he has already been acquitted or convicted—(*a*) of the issue charged in the indictment; (*b*) upon an indictment upon which he might have been convicted of that crime."

in the same indictment; by *Starke* J., on the ground that upon the true construction of the indictment the respondent was never in jeopardy under count *a* of the crime charged in count *b*; and by *Dixon* J., on the ground that where in one indictment a count for a crime falling under any of the secs. 333 to 338 is joined with a count making a specific charge of another crime falling under that section sec. 332 does not authorize a conviction for that specific charge on any part of the indictment except the count making it.

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Decision of the Supreme Court of Tasmania (Full Court) reversed.

APPEAL from the Supreme Court of Tasmania.

The Attorney-General of Tasmania, on behalf of His Majesty the King, appealed to the High Court by special leave from a decision of the Full Court of the Supreme Court of Tasmania dismissing an appeal from a judgment of acquittal of Ernest Joseph Kent-Newbold upon a charge of receiving stolen property contrary to sec. 258 of the *Criminal Code* of Tasmania.

For the purposes of the appeal to the Full Court, counsel for the appellant and counsel for the respondent agreed upon, and put in, a formal statement of the facts which was substantially as follows :—

1. The Crown alleged that on or about 20th December 1938 a dark blue Ford 10 h.p. sedan car the property of James Burnet Forbes Young was stolen from the second-hand car department of City Motors Ltd. On 6th February 1939 the accused traded in such car with City Motors Ltd. in part payment of another car.

2. On 28th April 1939 an indictment, of which the following is a copy, was filed against the accused :—Statement of Crime.—First count.—Stealing contrary to sec. 234 of the *Criminal Code*.—Particulars.—Ernest Joseph Kent-Newbold at Hobart in Tasmania between about 19th December 1938 and 6th February 1939 stole one Ford 10 horse power sedan motor car the property of James Burnet Forbes Young.—Statement of Crime.—Second count.—Receiving stolen property, contrary to sec. 258 of the *Criminal Code*.—Particulars : Ernest Joseph Kent-Newbold at Hobart in Tasmania on or about 10th January 1939 without lawful excuse had in his possession one Ford 10 horse power sedan motor car the property of James Burnet Forbes Young which had been stolen, knowing the same to be stolen property.—Statement of crime.—Third count.—Receiving stolen property, contrary to sec. 258 of the *Criminal Code*.—Particulars : Ernest Joseph Kent-Newbold at Hobart in Tasmania on 6th

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February 1939 without lawful excuse had in his possession one Ford 10 horse power sedan motor car the property of James Burnet Forbes Young which had been stolen, knowing the same to be stolen property.

3. On the trial of the accused at Hobart on 2nd May 1939 the accused pleaded " not guilty " to each count of the indictment.

4. The trial judge on 5th May 1939 gave the appropriate direction to the jury in relation to a charge of stealing in dealing with count 1 of the indictment and the appropriate direction in relation to a charge of receiving stolen property in dealing with counts 2 and 3 of the indictment.

5. The jury on 5th May 1939 returned the following verdicts :— count 1—Not guilty ; count 2—Not guilty ; count 3—No ten of the jury able to agree. Thereupon the accused was remanded to take his trial on count 3 to the next criminal sittings of the Supreme Court of Tasmania at Hobart.

6. On the second trial of the accused at Hobart on 15th June 1939, the accused when asked whether he adhered to his plea of " not guilty " by his counsel submitted the following special plea which was in writing and duly filed as required by sec. 355 (4) of the *Criminal Code* :—" The King ought not further to prosecute the third count in the said indictment against him because he had been lawfully acquitted :—(*a*) upon an indictment upon which he might have been convicted of the crime alleged in the said third count ; (*b*) of a crime arising out of the same facts and substantially the same crime as that charged in the third count of that indictment." No formal application to withdraw his plea of " not guilty " pleaded on 2nd May 1939 was made by the accused. No objection was made by counsel for the Crown to the filing of such special plea on the ground that leave had not been given to the withdrawal of the plea of " not guilty."

7. A jury was thereupon empanelled to try the issues raised by the said special plea as required by sec. 361 of the *Criminal Code*, and after hearing counsel for the Crown and the accused respectively the trial judge stated that he proposed to direct the jury to acquit the accused man and to leave the matter to be debated if the Attorney-General thought fit before the Court of Criminal Appeal.

Thereupon he directed the jury accordingly and the jury without leaving the jury box acquitted the accused.

8. Counsel for the Crown thereupon orally notified the intention of the Attorney-General to appeal to the Court of Criminal Appeal as required by sec. 407 (3) of the *Criminal Code* and applied orally for the certificate of the learned trial judge that the case was a fit one for appeal as provided in sec. 401 (2) II. of the *Criminal Code*, which said application was granted.

9. On 21st June 1939 the Attorney-General gave formal notice of appeal in manner prescribed against the acquittal of the accused in manner aforesaid on the following questions of law :—" (*a*) That the plea of *autrefois acquit* pleaded at the said trial by the accused to the third count of the indictment herein should not have been accepted by the trial judge inasmuch as the accused had already pleaded the plea of ' not guilty ' to the said count at his trial . . . on 3rd May 1939, which said last-mentioned plea had at no subsequent time been withdrawn in manner provided by the *Criminal Code* and was at all relevant times and still is a subsisting plea. (*b*) That the trial judge was wrong in law in directing the jury at the trial of the accused on 15th June 1939 to uphold the plea of *autrefois acquit* of the accused and to return a verdict accordingly. (*c*) That the trial judge was wrong in law in adjudging that the accused should be discharged from the premises set forth in the third count and in discharging the accused accordingly."

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

Beedham K.C. (with him *McMinn*), for the appellant. Under sec. 351 (6) of the *Criminal Code* the trial of an accused person is deemed to commence when he is called upon to plead. Therefore the respondent's trial began at the first trial when he pleaded not guilty. That plea remained a subsisting plea because it was not at any time withdrawn either in the manner provided by sec. 356 of the *Code*, or at all. There is not any distinction under sec. 356 between the law there expressed and the common law as dealt with in *R.* v. *Banks* (1), where the matter of the two pleas was considered.

(1) (1911) 2 K.B. 1095.

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The decision in *R.* v. *Banks* (1) is not met by the provisions of sec. 355 (2) of the *Code*. As the plea of not guilty was not withdrawn it was impossible for the respondent in law to plead *autrefois acquit*. The plea of *autrefois acquit*, even if properly pleaded, was not an answer to the second trial on the third count, the count of receiving. The decision appealed from, especially if extended, renders difficult, and perhaps impossible, the joining of alternative counts in the one indictment. The indictment did for the jury what otherwise would have been done for them by secs. 332 and 338 of the *Code* : See also *Packett* v. *The King* (2). For a multiplicity of counts in the one indictment, see *R.* v. *King* (3). An alternative way of regarding the matter is to apply secs. 332 and 338 to the indictment as a whole, and, keeping in mind the verdict as it came, treat the verdict on the first count as being (*a*) not guilty of stealing, and (*b*) unable to agree on receiving, incorporating in the first count the actual verdict given by the jury in relation to the third count. Sec. 338 only applies to a count of stealing *simpliciter*, but not to a count of stealing plus a count for another charge. The respondent could not have been convicted of receiving upon the indictment for stealing. Under sec. 332 the alternative crime must be established by the evidence. Stealing and receiving are completely different offences. Under the common law the material date for a charge of receiving is the date upon which the goods were received ; under the *Code* a charge of unlawful possession may be made in respect of any date between the date of the stealing and the date of the indictment. The facts before the jury on the second count were not the same as the facts before the jury on the third count ; therefore sec. 355 (1) II. (*c*) does not apply.

Wright, for the respondent. The meaning of sec. 355 should be first ascertained without reference to the law previously existing. It should be given its full meaning without attempting to confine it to what were the common-law rules with regard to *autrefois acquit*. The important principle which underlies sec. 355 is shown in sec. 11. The jury at the first trial not having come to a conclusion upon the

(1) (1911) 2 K.B. 1095.
(2) (1937) 58 C.L.R. 190, at p. 195.
(3) (1897) 1 Q.B. 214.

issue, it follows that for the purposes of the trial of the third count as a separate indictment the respondent's position, at the second trial, was the same as if he had never pleaded, because under sec. 351 (1) he had a right to plead again. The issue was not continuously before the court; upon the discharge of the jury the charges were in the same position as if the count had never been tried: See sec. 326 (5) II. There was not any plea of not guilty subsisting to the second trial, therefore the respondent was entitled to plead *autrefois acquit* without being impeded by the decision in *R.* v. *Banks* (1).

[LATHAM C.J. referred to *Newell* v. *The King* (2).]

Some assistance may be obtained from *Munday* v. *Gill* (3). The absence or presence of a plea of *autrefois acquit* does not go to jurisdiction (*R.* v. *Tonks* (4)). Upon the assumption only that it was necessary to withdraw the plea of not guilty it should be inferred from the judge's acceptance of the plea of *autrefois acquit* that he gave leave to withdraw the first-mentioned plea. Sec. 332 was intended as a general provision to the five sections which follow it; it should not be read as an overriding section qualifying sec. 355. On the question whether the jury's verdict at the first trial was a perfect or an imperfect verdict and the effect thereof, see *Latham* v. *The Queen* (5). The jury's verdict on the receiving charge was a good verdict, and, in the circumstances, amounted to a verdict of not guilty. The position created by a verdict on one count and the jury's inability to agree as to other alternative counts was dealt with in *R.* v. *Grimwood* (6), and *Archbold's Criminal Pleading, Evidence and Practice*, 25th ed. (1918), pp. 157, 212: See also *Selvester* v. *United States* (7). The appellant's contention that the express inclusion in the indictment of the second and third counts negatives the effect of secs. 332 et seq. would produce the effect that it would still leave all dates between 19th December and 6th February to be dealt with under secs. 332 et seq., except on or about 10th January, and, also, 6th February. That is a circumstance which

(1) (1911) 2 K.B. 1095.
(2) (1936) 55 C.L.R. 707.
(3) (1930) 44 C.L.R. 38, at pp. 86, 87.
(4) (1916) 1 K.B. 443.
(5) (1864) 5 B. & S. 635 [122 E.R. 968].
(6) (1896) 13 T.L.R. 70.
(7) (1898) 170 U.S. 262, at pp. 263, 266, 270, 271 [42 Law. Ed. 1029, at pp. 1030, 1031, 1032].

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shows that the presence of the other two counts specifically referring to two specific charges cannot be given any effect which would diminish the operation of secs. 332 et seq. The completeness or otherwise of a judge's direction to a jury was dealt with in *R.* v. *Lester* (1). The principle upon which the plea of *autrefois acquit* depends is shown in *R.* v. *Barron* (2). The offences charged in the second and third counts respectively are offences arising substantially out of the same set of facts. The expression "on or about the 10th January" used in the second count is wide enough to include the "6th February" mentioned in the third count. The date is not the material part of the indictment (*Archbold's Criminal Pleading, Evidence and Practice*, 25th ed. (1918), pp. 51, 492; *Stephen's Commentaries on the Laws of England*, 8th ed. (1880), p. 400).

[LATHAM C.J. referred to *R.* v. *Severo Dossi* (3).]

There is not any distinction between the second and third counts except the question of date, which is immaterial.

Beedham K.C., in reply. The word "indictment" in sec. 355 is used in the sense of a written document; therefore the respondent has not been acquitted upon any indictment but only upon portion. In view of the express provisions of the *Code*, *Latham* v. *The Queen* (4) and *Selvester* v. *United States* (5) do not afford any assistance in this matter. The second trial was really only a second hearing. The words, "Do you still adhere to your plea?" addressed to the respondent at the second trial, imply that the plea given at the first trial was a subsisting plea. The provisions of sec. 356 were completely ignored at either trial. The facts in *R.* v. *Grimwood* (6) are entirely different from the facts of this case. In that case it was the one set of facts throughout, differently described. *R.* v. *Lester* (1) is distinguishable because in this case a good direction was given by the judge at the first trial, both as to stealing and as to receiving.

Cur. adv. vult.

(1) (1938) 27 Cr. App. R. 8.
(2) (1914) 2 K.B. 570, at p. 574.
(3) (1918) 13 Cr. App. R. 158.
(4) (1864) 5 B. & S. 635 [122 E.R. 968].
(5) (1898) 170 U.S. 262 [42 Law. Ed. 1029].
(6) (1896) 13 T.L.R. 70.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from a decision of the Court of Criminal Appeal of Tasmania dismissing an appeal from a judgment of acquittal of Ernest Joseph Kent-Newbold upon a charge of receiving stolen property contrary to sec. 258 of the *Criminal Code* of Tasmania. Sec. 258 provides that " any person who, without lawful excuse, receives or has in his possession any stolen property, knowing it to be stolen property, is guilty of a crime."

On 2nd May 1939 Kent-Newbold was presented for trial upon an indictment containing three counts—(*a*) stealing contrary to sec. 234 of the *Criminal Code*, (*b*) receiving stolen property contrary to sec. 258, (*c*) receiving stolen property contrary to sec. 258. The particulars of the charges show that they related respectively to stealing a Ford motor car between 19th December 1938 and 6th February 1939, and to being in possession without lawful excuse of the motor car on or about 10th January 1939 and on 6th February 1939. The accused pleaded not guilty to each count. The jury returned verdicts as follows :—count 1—not guilty ; count 2—not guilty ; count 3—no ten of the jury able to agree. (Under sec. 48 (2) of the *Jury Act* 1899, except in capital cases, ten jurors may, after two hours deliberation, give a verdict which is taken as the verdict of the jury.) The accused was remanded for trial to the next criminal sittings. On the second trial the accused, when asked whether he adhered to his plea of not guilty, submitted a special plea alleging that " he had been lawfully acquitted, (*a*) upon an indictment upon which he might have been convicted of the crime alleged in the third count, and (*b*) of a crime arising out of the same facts and substantially the same crime as that charged in the third count in that indictment." No application to withdraw the plea of not guilty was made, and that plea was not withdrawn. A jury was empanelled to try the issue raised by the special plea and the learned trial judge directed the jury to acquit—which the jury did. Counsel for the Crown obtained a certificate of the learned trial judge which made an appeal possible : See *Criminal Code*, sec. 401 (2) II. The Court of Criminal Appeal dismissed the appeal, the decision being in accordance with the opinion of *Morris* A.C.J., the

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other member of the court, *Clark* J., dissenting. The Attorney-General obtained special leave to appeal to this court.

The first question which arises is whether it was proper for the learned trial judge, upon the occasion of the second trial, to accept the plea of *autrefois acquit* when the plea of not guilty had not been withdrawn. In my opinion there is no doubt that the plea of not guilty was a plea which still stood. The prisoner had on the first trial pleaded not guilty to the third count and issue was joined between the King and the accused upon that plea. The first jury failed to agree upon the count, and the second jury was then called upon to try the accused upon that issue so raised. Sec. 355 of the *Criminal Code* sets out the pleas which an accused prisoner may plead to an indictment, and it specifically provides in sub-sec. 2 for the pleas that may be pleaded together. Par. II. of sub-sec. 1 contains the plea that the prisoner has already been acquitted. Sub-sec. 2 does not permit such a plea to be pleaded together with a plea of not guilty. Except under express statutory provisions it is not permissible to join any other plea with a plea of not guilty (*R.* v. *Strahan, Paul and Bates* (1); *R.* v. *Banks* (2)). Thus, the plea of not guilty not having been withdrawn, the learned trial judge should not have accepted the plea upon which the accused succeeded.

The learned Acting Chief Justice, while not questioning the effect as stated of sec. 355, thought that the appeal could not be properly decided upon this particular objection, because he was of opinion that, if the appeal were upheld and the accused were put upon his trial again, he would make application under sec. 356 of the *Criminal Code* for leave to withdraw the plea of not guilty, and that such an application would almost certainly be granted. Upon this view his Honour considered that it would be idle to allow the appeal upon the ground that there could not be at the same time a plea of not guilty and a plea of *autrefois acquit*, and that, so far as that ground was concerned, the court should exercise the power conferred upon it by sec. 402 (2) of the *Criminal Code* and dismiss the appeal.

I am not prepared to deal with the case upon this basis. In my opinion it is by no means certain that in the circumstances of this case a judge would as a matter of course accede to an application

(1) (1855) 7 Cox C.C. 85. (2) (1911) 2 K.B. 1095.

by an accused person to withdraw a plea of not guilty. The only object of allowing withdrawal of the plea would be to enable the accused to plead *autrefois acquit*. The latter plea would be supported by the contention that he had been charged in one indictment under two counts of stealing and receiving, that he had been acquitted of stealing and therefore had necessarily been acquitted of receiving. The *Criminal Code* expressly provides in sec. 338 that upon an indictment for stealing an accused person may be convicted of receiving, and sec. 332 provides that, where there is such a provision as that contained in sec. 338, if the jury finds the prisoner not guilty of the crime with which he is charged, he may be convicted of such other crime as is specified in that section. The argument of the accused would be that if he had been charged with stealing only and there was no count for receiving, he could, by virtue of sec. 332 and sec. 338, have been acquitted of stealing and convicted of receiving, but that, because there was a count for receiving as well as a count for stealing, the acquittal of stealing necessarily involved an acquittal of receiving. I see no reason why a judge should be concerned to allow a prisoner to withdraw a plea for the purpose of relying upon such a point. The argument is entirely technical. It has no merits whatever. As was said in *R.* v. *Banks* (1), "the point being an extremely technical one may properly be met by a technical answer." It is for this reason that I am not prepared to apply sec. 402 in favour of the accused in the present case. I am therefore of opinion that, upon this ground of the appeal, the Crown should succeed.

It is desirable, however, to deal also with the substantial question raised by the appeal, independently of any technicality based upon rules of pleading.

Sec. 355 (1) of the *Criminal Code* provides that "an accused person may plead to an indictment—II. that he has already been acquitted or convicted . . . (*b*) upon an indictment upon which he might have been convicted of that crime" (that is, the crime charged in the indictment to which he is actually pleading).

Sec. 338, which relates to "Stealing, false pretences, receiving, cheating," is as follows:—"(1) Upon an indictment for—I. Stealing: II. Obtaining property by a false pretence: III. Cheating: or

(1) (1911) 2 K.B., at p. 1101.

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IV. Receiving stolen property—the accused person may be convicted of any of such crimes respectively." When crimes are grouped together by the *Code* in this manner, so that an indictment for one of them may be the basis of a conviction for another of them, I propose to refer to them as " alternative " crimes.

The accused was (as already stated) charged on the occasion of his first trial upon an indictment containing a count for stealing a motor car and also two counts for receiving the motor car. He was acquitted of stealing the car and of one count for receiving. The jury failed to agree upon the other count for receiving. The argument for the accused is that upon the count for stealing he might have been convicted of the receiving alleged in the last-mentioned count, and that, therefore, he had been acquitted upon an indictment upon which he might have been convicted of the crime of receiving with which he was charged in the third count.

The result of accepting this argument would be that whenever an indictment contained a count for stealing a chattel, and another count for receiving the chattel, any verdict upon the first count would exclude any verdict of guilty upon the second count and vice versa, if a defence of *autrefois acquit* under sec. 355 were duly raised. It could be effectively raised only after a verdict on one count had been given, and, therefore, only by leave of the judge (sec. 356).

The reply of the Crown to this argument depends upon sec. 332, which deals with " alternative " crimes—of which sec. 338 provides an illustration. Sec. 332, the marginal note to which section reads " Alternative convictions," is as follows : " Where in any section it is provided that upon an indictment for any particular crime the accused person may be convicted of any other specified crimes it shall be intended thereby that if the jury find such person not guilty of the crime with which he is charged he may be convicted of such other of the crimes specified in such section as is established by the evidence to have been committed by him, or of an attempt to commit such other crime if such attempt is established as aforesaid, but not, upon that indictment, of any other crime."

The Crown urges that the section means, for example, that it is permissible for a jury in any case to convict of receiving after

acquitting of stealing, or vice versa. The accused contends that the section is applicable where only one crime, for example, stealing, is charged in the indictment, but that where an indictment contains more than one count (as for stealing and for receiving) the operation of the section is excluded. The argument depends not upon any particular construction of sec. 332, but upon what is said to be the impossibility of giving effect to the section in all cases if full effect is to be given to sec. 355 (1) II. (*b*). All the provisions of the Act can be reconciled (it is said) only by limiting sec. 332 in some way, and the limitation proposed is that it should be confined to cases where only one count appears in the indictment, so that, in order to secure a conviction for an " alternative " crime, the Crown must rely, not upon the alternative crime being charged in the indictment, but upon a section (such as sec. 338) permitting a conviction for one crime upon an indictment for another crime.

Before considering this argument in detail, it is necessary to refer to sec. 311 of the *Criminal Code*. Sub-sec. 1 provides, *inter alia*, that an indictment shall be sufficient if it contains a statement of the specific crime " or crimes " with which the accused person is charged, with particulars. Sub-sec. 2 provides expressly that " charges of more than one crime may be joined in the same indictment, if those charges are founded on the same facts, or are, or form part of, a series of crimes of the same or a similar character." Sub-sec. 6 provides that " where there are more counts than one in an indictment each count shall be regarded as a separate indictment." Accordingly it is clear that an indictment may contain more than one count.

Sec. 338 and other sections of the same chapter of the *Criminal Code* provide typical cases of charges which may be founded on the same facts, and of crimes which are of the same or a similar character. Thus such charges as those mentioned in sec. 338 may be joined together in the same indictment. But it is contended for the accused that, if this is done, any verdict upon any one of the charges excludes a verdict upon any other of the charges. It is, I think, clear that a conviction upon any one of such charges so joined would exclude a conviction upon any other of such charges. If a plea of not guilty is allowed to be withdrawn and a plea of *autrefois convict* (sec. 355

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(1) II. (*b*)) is pleaded, the latter plea would be good in such a case. In such circumstances, there is every reason for allowing a withdrawal of the plea of not guilty. Thus a plea of *autrefois convict* is admissible and would be successful in such a case. But is the position the same when there is not a conviction, but an acquittal, in relation to one of the " alternative " crimes ?

The Crown contends, and in my opinion rightly, that sec. 332 excludes a plea of *autrefois acquit* where the plea is based upon an acquittal for an " alternative " crime which is expressly charged in the same indictment. I read sec. 332 as meaning, not only that where a person is charged upon an indictment containing a single count of stealing he may be convicted of (for example) receiving, but also as meaning that, if he is charged under two counts, one of stealing and one of receiving, if the jury finds him not guilty of stealing, they may, nevertheless, convict him of receiving (which is another crime specified in sec. 338) if that crime is in their opinion established by the evidence. The words of the section, taken by themselves, are capable of this construction, and I can see no reason why it should not be adopted.

It is contended, however, for the accused, that this construction of the section is excluded by the provisions of sec. 355, which I state so far as necessary : " An accused person may plead to an indictment— I. that he is guilty of the crime charged in the indictment . . . II. that he has already been acquitted or convicted—(*a*) of the crime charged in the indictment ; (*b*) upon an indictment upon which he might have been convicted of that crime." It may be urged that " an indictment " means and means only some indictment other than that to which the accused is pleading, that is, some prior indictment. There is much to be said for this view, but the result of adopting it would be that a plea of *autrefois convict* could not be raised where there had been a conviction on, for example, a count of stealing and there was a second count of receiving the same goods at or about the same time. Such an interpretation could not be justified unless no other interpretation was possible. Subject to what I have already said as to the impossibility of combining a plea of not guilty with a plea of *autrefois acquit*, I agree that the latter plea to one count in an indictment can be supported, if sec. 355 alone is regarded,

by an acquittal for another count in the same indictment. But sec. 332, in my opinion, operates to prevent this result in the case of counts in the same indictment for " alternative " crimes. That section, as already stated, prevents such an acquittal having that effect in relation to a specified crime where the acquittal is upon a charge of another crime upon which, according to any section of the *Criminal Code*, an accused person may be convicted of the specified crime. The section is expressly designed to impose a limitation upon the effect of any acquittal of one of a number of " alternative " crimes, whether only one, or more than one, of such crimes is charged in the same indictment.

It was further contended for the accused that the crime of receiving on or about 10th January (second count) was a crime arising out of the same facts and was substantially the same crime as that charged in the third count, namely, receiving on or about 6th February. But it is clear that the accused might have been innocent of one of the crimes and guilty of the other. They are separate crimes in every sense, though they are of the same character. Further, the evidence (the " facts ") relied upon for proof of one charge was quite different from that relied upon to support the other charge. The only common feature was the alleged presence of the same motor car in the possession of the accused.

In my opinion the appeal should be allowed, the order of the Court of Criminal Appeal should be discharged, the verdict and judgment of acquittal should be set aside, and the accused should be remanded for trial on the third count at the next sittings of the Supreme Court in its criminal jurisdiction at Hobart. In accordance with the condition imposed by the court in granting special leave to appeal, the appellant must pay the respondent's costs of the appeal.

STARKE J. Appeal, by special leave, on the part of the Crown from a judgment of the Supreme Court of Tasmania. The respondent was charged upon an indictment containing three counts as follows: —(1) Stealing contrary to sec. 234 of the *Criminal Code*. The particulars of the charge stated that the respondent stole a motor car between 19th December 1938 and 6th February 1939. (2)

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Receiving stolen property contrary to sec. 258 of the *Criminal Code*. The particulars of this charge stated that on or about 10th January 1939 the respondent had in his possession without lawful excuse the motor car which had been stolen knowing the same to be stolen property. (3) Receiving stolen property contrary to sec. 258 of the *Criminal Code*. The particulars of this charge stated that on 6th February 1939 the respondent had in his possession without lawful excuse the motor car which had been stolen knowing the same to be stolen property.

Upon this indictment, the accused was arraigned and pleaded " not guilty " to each count.

The jury found a verdict of not guilty upon the first and second counts but in default of agreement as to a verdict by ten or more jurors upon the third count the accused was remanded for trial upon that count to the next sittings of the Supreme Court (*Jury Act* 1899, secs. 48, 49). Upon his trial coming on, the accused was asked whether he adhered to his plea of not guilty upon the third count, but his counsel submitted a special plea of *autrefois acquit*, alleging that he had been lawfully acquitted (*a*) upon an indictment upon which he might have been convicted of the crime alleged in the third count, (*b*) of a crime arising out of the same facts and substantially the same crime as that charged in the third count in that indictment. The matter relied upon was the acquittal of the respondent upon the charge of stealing laid in the first count of the indictment.

The accused had no right to plead this plea together with his plea of not guilty (*Code*, sec. 355 (1), (2); *R.* v. *Banks* (1)). The leave of the trial judge to withdraw the plea of not guilty and to substitute the plea of *autrefois acquit* might have been obtained, but no application was made for that purpose and no such leave was obtained. However, the learned trial judge considered the plea, upheld it, and directed the jury to acquit the accused.

The *Criminal Code* gives a right of appeal to the Attorney-General upon the certificate of the trial judge that it was a fit case for appeal against an acquittal on a question of law alone, and this certificate was obtained. The Attorney-General appealed and the grounds of

(1) (1911) 2 K.B. 1095.

this appeal were that the accused had no right to plead the plea of *autrefois acquit* together with his plea of not guilty and also that the trial judge was wrong in law in his direction to the jury that they should uphold the respondent's plea of *autrefois acquit* and acquit the accused. The learned judges who heard the appeal differed in opinion, but it was dismissed in accordance with the opinion of the Acting Chief Justice. Special leave was given to appeal from this decision to this court upon the suggestion of the Crown that the matter was of some importance in the administration of justice in Tasmania.

The Solicitor-General for the State of Tasmania, who argued the appeal on the part of the Crown, did not abandon his objection that the pleas of *autrefois acquit* and not guilty could not be pleaded together, but he desired the judgment of this court upon the larger question whether the accused's plea of *autrefois acquit* was or was not a good plea. The *Code* allows charges of more than one crime to be joined in the same indictment if those charges are founded on the same facts or are or form part of a series of crimes of the same or a similar character (*Code*, sec. 311). This section justifies the form of the indictment in this case. I rather think that the Crown would have been better advised had the accused been indicted upon one count and reliance placed upon secs. 338 and 332 of the *Criminal Code*. Those sections provide that upon an indictment for (*a*) stealing, (*b*) obtaining property by a false pretence, (*c*) cheating, or (*d*) receiving stolen property, the accused person may be convicted of any such crimes respectively. These provisions give "a wide choice of verdicts" and tend to diminish technicalities. The verdict, however, should be in respect of the offence established by the evidence to have been committed: a true and not a false verdict is contemplated (*R.* v. *Tonks* (1)). The indictment in the present case, however, contains several counts, and a verdict of not guilty has been given upon the count for stealing. Accordingly it is contended that the plea of *autrefois acquit* falls within the express provisions of sec. 355 of the *Code*.

So far as material that section provides:—"(1) An accused person may plead to an indictment . . . II. That he has

(1) (1916) 1 K.B., at p. 449.

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already been acquitted . . . (*a*) of the crime charged in the indictment: (*b*) upon an indictment upon which he might have been convicted of that crime: (*c*) of a crime arising out of the same facts and substantially the same crime as that charged in that indictment." It is clear enough that the accused has not been acquitted of the crime charged in the third count. Stealing and receiving are distinct crimes; the essential elements of these crimes are different; and they are not substantially the same crime for the purposes of sub-sec. *c*. But it is said that the accused was acquitted upon the count for stealing "upon which he might have been convicted" of receiving by reason of the provisions of secs. 332 and 338. In my judgment the argument cannot be sustained.

The *Jury Act* 1899 provides in sec. 49 that where the jury on the trial of any criminal issue shall be discharged by the court without giving any verdict, the prisoner may lawfully be tried upon the same indictment by another jury either at the same or a subsequent sittings. The jury was discharged without giving a verdict upon the criminal issue raised by the third count. Prima facie, therefore, the issue so undetermined should be tried. But despite sec. 338 the accused could not now be convicted of the crime of stealing charged in the first count: of that crime he has been acquitted. Nor, in my opinion, could he now be convicted of receiving stolen property contrary to sec. 258 upon the first count. He would not, I apprehend, be liable to be tried for any offence for which though not indicted he might have been convicted pursuant to the provisions of sec. 338: Cf. *Roscoe, Criminal Evidence*, 14th ed. (1921), p. 260. Nor could he be tried again for the crime charged in the second count, for on that he was acquitted. So the question comes to this: Might the accused have been tried under the first count for a crime in respect of which he was indicted under the third count, namely, receiving stolen property on 6th February 1939? It was necessary for the accused to establish that there could have been a conviction on the first count of the offence charged in the third count. In some cases this conclusion will appear on the face of the record: in others proof of facts may be necessary (*R.* v. *Bird* (1)), whilst in the present case the question depends not so much, I think, upon the

(1) (1851) 5 Cox C.C. 20, at p. 89.

interpretation of the *Code* as upon the proper construction of the indictment itself. An indictment must be construed "like any ordinary document: . . . it must be construed 'in that sense in which the party framing the indictment must have used it if he intended the charge to be consistent with itself'": See *Roscoe, Criminal Evidence*, 14th ed. (1921), p. 97. The indictment under consideration is framed as for separate crimes. Time is not the essence of the crime charged in counts 1 or 3, but it may be noted that the time assigned in the particulars to count 1 is *between* 19th December 1938 and 6th February 1939, whilst in the particulars to count 3 it is "on the sixth day of February 1939." The natural construction of the document is that the crime charged in count 3 is not a crime upon which the accused might be convicted under count 1, but a crime separated and apart from any crime charged in that count or for which the accused might be convicted under that count. If this is so, the accused was never in jeopardy under count 1 of the crime charged in count 3. This view was acted upon, I should suppose, at the original trial, but whether this be so or not it is, I think, the better view and the one upon which this appeal should rest. In other words, a verdict of not guilty upon the first count but guilty upon the third count would have been a permissible and lawful verdict. Otherwise a verdict of not guilty upon the first count would necessitate a verdict of acquittal upon the third count also.

Grimwood's Case (1) was referred to, but all it appears to decide is that the crimes there charged differed only in degree and that a verdict upon one charge was a bar as to all the other charges.

The result is that the plea of *autrefois acquit* was a bad plea and that this appeal should be allowed.

DIXON J. This is an appeal by the Attorney-General of Tasmania against an order of the Supreme Court confirming an acquittal on a point of law. Under Tasmanian law the Attorney-General may by leave appeal to the Supreme Court against such an acquittal. The prisoner was arraigned upon an indictment containing three counts, all relating to the same transaction. One count was for

(1) (1896) 60 J.P. 809; 13 T.L.R. 70.

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stealing and two for receiving. The counts for receiving alleged different dates for the offence, but related to the same chattel. The counts were intended as alternative charges and upon the evidence the prisoner could be properly convicted upon not more than one of them. They were joined in the same indictment in purported pursuance of sec. 311 (2) of the *Criminal Code* of Tasmania, which authorizes the joinder of charges of more than one crime in the same indictment, if those charges are founded on the same facts, or are, or form part of, a series of crimes of the same or similar character. Where there are more counts than one in an indictment each count is to be regarded as a separate indictment (sec. 311 (6)).

The prisoner pleaded not guilty to each count in the indictment. No ten of the jury were able to agree upon a verdict as to the third count but on the first and second counts the jury found the prisoner not guilty. Acting as under sec. 49 of the *Jury Act* 1899 (Tas.) the court thereupon remanded the prisoner for trial at a subsequent sittings of the court. When at that sittings the prisoner was again placed at the bar, he adhered to his plea of not guilty which he had pleaded to the third count of his arraignment; but his counsel raised the contention that he was no longer liable to conviction on that count, because the verdict of not guilty on the first and second counts operated to conclude the charge of receiving contained in the third count. The ground of the contention is that, as a result of secs. 332 and 338 of the *Criminal Code*, upon an indictment for stealing, if the jury find the prisoner not guilty of stealing, he may be convicted of receiving, if his commission of the latter offence is established by the evidence.

The first count, regarded, as it must be, as a separate indictment, exposed the prisoner, it is said, to liability to conviction for receiving and, therefore, after the verdict of not guilty on that count, it is no longer possible to convict him of the receiving expressly charged in the third count. Sec. 355 (1) II. (*b*) provides that an accused person may plead to an indictment that he has already been acquitted or convicted upon an indictment upon which he might have been convicted of that crime. According to the prisoner's contention his case fell exactly within this provision, so that he was entitled to succeed on the issue raised by a plea to the third count, regarded

as a separate indictment, that he had been acquitted upon an indictment, viz., for stealing, on which he might have been convicted of the receiving charged by the third count, and therefore, under sec. 362, he was entitled to be discharged from the premises set forth in that count. The learned judge who presided at the trial took this view. He allowed the prisoner to file a plea in writing that he had been so acquitted, and, upon the Crown taking issue thereon, he directed the jury empanelled to try the issue to return a verdict for the prisoner. Unfortunately the necessity of the prisoner's first withdrawing his earlier plea to the third count of not guilty was overlooked (secs. 355 (2) and 356). As, under sec. 355 (3), a prisoner against whom the issue raised by a special plea is determined is thereupon entitled to plead over, the withdrawal of his plea of not guilty could not have prejudiced the prisoner and there can be no doubt that, if, at the time, the Crown had raised the objection that the prisoner was making two pleas, an application to withdraw his former plea would have been at once made and granted. In these circumstances I do not think that it was open to the Crown on appeal to rely upon the irregularity either in the Supreme Court or before this court. But in any case it appears to me that, if the contention made for the prisoner is sound in substance, it was unnecessary to file a plea under sec. 355 (1) II. (*b*), because the contention involves the consequence that an acquittal on the first count amounted in point of law to an acquittal not only of the charge expressly made thereby but also of the charge of receiving tacitly contained therein, and if so such an acquittal entitled the prisoner to be discharged by the court from the whole indictment, notwithstanding the failure of the jury to agree upon a verdict on the third count. For, upon the hypothesis that the prisoner's contention is well founded, the general verdict of acquittal on the first count included an acquittal of the very charge expressed in the third count, however little the jury may have intended to absolve him from that charge.

But in my opinion the contention for the prisoner is not well founded. It depends, I think, on a too literal application of the words of a part only of the *Code*, made at the expense of the substantial intention disclosed when its relevant provisions are read

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together and at the expense of the meaning of the indictment and of the jury's verdict considered as a whole.

In the first place, I think that when sec. 311 (2) and (6) on the one hand and secs. 332 to 338 on the other hand are brought into comparison and are considered together it sufficiently appears that they cannot be given what I may call a cumulative operation. That is to say, they cannot be given an operation which will result in the one indictment containing precisely the same charge against the prisoner in two or more counts. They cannot, by their use in combination, operate to include in one count tacit or implied charges which are expressly made in other counts of the same indictment. Secs. 332 to 338 are intended to allow of the conviction of a prisoner, who is acquitted of the charge expressed in an indictment, of certain alternative crimes notwithstanding the absence from the indictment of counts specifically charging him with any of those crimes. The very purpose of secs. 332 to 338 is to authorize verdicts against a prisoner which otherwise could be returned only where additional counts had been included in the indictment. It is impossible to suppose that, where more counts than one are joined in the same indictment, so that the indictment itself authorizes the alternative verdicts or some of them for which secs. 332 to 338 provide, those sections operate cumulatively so as again to authorize the same alternative verdicts in respect of each count as if it stood alone. A consideration of the consequences which would flow from a construction of sec. 311 and of secs. 332 to 338 making the respective provisions cumulative in their operation will show that it could not be intended.

If upon the trial of an indictment for stealing the jury are satisfied beyond reasonable doubt that the prisoner is guilty of receiving the stolen goods, the jury are not only entitled but they are bound to find him guilty of receiving. The verdict of guilty of receiving must, in the absence of a count for that offence, be returned in respect of the count for stealing. But if secs. 332 and 338 apply notwithstanding the presence of a count for receiving in the indictment containing the count for stealing, then it would necessarily follow that the jury who are satisfied of the prisoner's guilt of the crime of receiving stand in the same position with respect to the count for stealing.

The count must be regarded as a separate indictment, and upon the hypothesis stated the jury would be entitled and, indeed, bound to return on the count for stealing a verdict of guilty of receiving. But the jury would also be entitled and bound to find the prisoner guilty on the count for receiving actually contained in the indictment. The prisoner would thus be exposed to liability, in respect of the same crime, to a plurality of convictions upon the same indictment, each conviction justifying and, perhaps, even requiring a separate sentence or judgment. It is true that the *Code* contains an express provision against double punishment for the same act or omission (sec. 11). But an examination of that section will show that it does not advert to or contemplate the possibility of such a legal solecism as two convictions at the same time for the same offence under the same provision or enactment; but provides against the possible case of two enactments or provisions making punishable, either under the same or different descriptions, the same act or omission.

If secs. 332 to 338 are understood as providing for the case only of indictments which do not contain counts warranting the very thing those sections authorize, then the consequence I have described cannot ensue. Such an interpretation does, no doubt, amount to making an implication; but it is a natural meaning to place upon the provision, and it avoids an impossible result. It also avoids other anomalies which would exist if secs. 332 to 338 were treated as operating cumulatively upon sec. 311. For instance, if they were so treated, then upon an indictment containing more than one count for crimes to which sec. 332 applied, no verdict involving a conviction could be taken which was not open to one or other of three objections, viz., (*a*) that it was inconsistent, (*b*) that it did not dispose of all the crimes to be inquired into under the indictment, and (*c*) that it convicted the prisoner of the same offence twice. That this is so will be seen by an example. Suppose an indictment relating to one transaction contains a count for stealing and another for receiving. If the jury find that the prisoner committed the offence of stealing and convict him under the count for that offence, they must take some course with reference to the count for receiving. They may return a verdict under it of guilty

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of stealing, a course open in Tasmania on a simple indictment for receiving. But if they do so there will be two convictions for one offence. They may return a general verdict under the receiving count of not guilty. But if they do so, then, on the hypothesis that secs. 332 and 338 apply, they will have impliedly acquitted him of stealing, an acquittal incompatible with their express verdict of guilty of stealing. Thirdly, the jury may give, on the count for receiving, no verdict or a verdict of not guilty limited to the crime of receiving. But if they do that they will have left undisposed of part of the matters which, on the hypothesis assumed, are covered by the count. No fourth course is possible.

In my opinion the true answer to these difficulties is that where in one indictment a count for a crime falling under any of the secs. 333 to 338 is joined with a count making a specific charge of another crime falling under that section, then in such a case sec. 332 does not authorize a conviction for that specific charge on any part of the indictment except the count making it.

I am aware that the consequences and anomalies to which I have referred might be avoided, not by treating secs. 332 to 338 as inapplicable to the extent to which express counts under sec. 311 cover the same ground, but by treating sec. 311 as inapplicable to crimes falling under secs. 332 to 338. But having regard to the position, the nature and the purpose of the respective provisions to which I deny a cumulative operation, the more reasonable reconciliation and that most likely to accord with the intention of the legislation appears to me to be that which I have adopted. It means that the indictment should not be understood as tacitly or impliedly charging in one count the commission of specific crimes which it expressly charges in other counts. No doubt the indictment against the prisoner does not mean to do so, and the interpretation of the indictment itself might be enough to answer the prisoner's contention. For if the indictment means that the alternative crime of receiving is excluded from the first count and that meaning is operative, then the prisoner was never in peril upon that count of a conviction of receiving. But it might well be a question whether the indictment could receive its intended operation unless some such interpretation as I have given to the relevant provisions is placed upon them.

Again, the meaning of the verdict or answer returned by the jury to the court accords with the interpretation I have placed on the indictment and upon the legislation. Considered as a whole, the jury's answer to the counts of the indictment means that the jury were unable to say whether or no the prisoner was guilty of the receiving made the subject of the third count, but that he was not guilty of stealing or of the receiving the subject of the second count. Thus, properly construed, the verdict did not assume to acquit the prisoner of the receiving which, according to his contention, should or might have been inquired into under the first count. If, contrary to the view I have expressed, he was on that count in peril of conviction for the receiving in question, he was not delivered. But the truth is that, in meaning, the verdict, the indictment and the legislation all accord.

I think that the appeal should be allowed, the order of the Supreme Court discharged, the verdict of acquittal on the issue joined upon the special plea in writing should be set aside and in lieu thereof a verdict entered on such issue for the Crown.

Appeal allowed. Order of the Court of Criminal Appeal discharged. In lieu order that the appeal of the Attorney-General to the Court of Criminal Appeal from the verdict and judgment of acquittal on the third count be allowed and such verdict and judgment set aside. Order that verdict be entered for the appellant on the issues joined upon the special pleas in writing filed by the respondent to the third count. Respondent remanded for trial on the third count to the sittings of the Supreme Court at Hobart in its criminal jurisdiction. Appellant to pay respondent's costs of appeal.

Solicitor for the appellant, *H. M. Brettingham-Moore*, Crown Solicitor for Tasmania, by *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Crisp, Wright & Hodgman*, by *J. W. Maund & Kelynack.*

J. B.