[HIGH COURT OF AUSTRALIA.]

PIDDINGTON . . . . . APPELLANT;
PLAINTIFF,

AND

BENNETT AND WOOD PROPRIETARY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1939, *Nov.* 21-24.

MELBOURNE, 1940, *Feb.* 23.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Evidence—Relevancy—Explanation of witness' presence at scene of accident—Cross-examination—Evidence in contradiction—New trial—Influence of inadmissible evidence on verdict.

In an action for negligence which arose out of an accident in a public street, a witness for the plaintiff stated that he was in the street and saw the accident, which he described. In the course of cross-examination he asserted that he had been doing a message for one J. at a bank which was distant a block or two from the scene of the accident. The bank manager, who was called by the defendant, said that there had not been any operation on J.'s account on the day of the accident, and he produced an authenticated copy of the account in support of his statement. The jury returned a verdict for the defendant.

Held, by *Dixon*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. and *Starke* J. dissenting), that the bank manager's evidence was inadmissible and the misreception of the evidence could not be treated as an immaterial error not reasonably capable of affecting the verdict of the jury; therefore a new trial should be granted.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

Albert Bathurst Piddington was on 11th April 1938 knocked down in Phillip Street, Sydney, by a motor cycle and side-car driven

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by a servant of Bennett & Wood Pty. Ltd. He was injured and brought an action in the Supreme Court of New South Wales in which he claimed from Bennett & Wood Pty. Ltd. the sum of £15,000 as damages, alleging negligence on the part of its servant in the management of the motor cycle.

One Donnellan, who was called on behalf of the plaintiff, said that he had witnessed the accident, and he proceeded to describe it. He was cross-examined as to how he came to be at the scene of the accident. He explained that he "was after doing a message for Major Jarvie." At first he said that on Jarvie's behalf he was going to the branch of the Bank of New South Wales in Hunter Street to deposit or withdraw money, he had forgotten which. Afterwards he amended this, in reply to a question asked by the trial judge, by saying that he had already been at the bank and was on his way back to 164 Phillip Street, where he resided and was employed as caretaker. A further question put to him in cross-examination was: "You were either cashing a cheque for Major Jarvie over the counter of the Bank of New South Wales in Hunter Street, or you were making a deposit?" to which he replied: "Yes, that might be." He stated that when he arrived at the intersection of Martin Place and Phillip Street he saw a man whom he knew and to whom he desired to speak, but as the man was engaged in conversation with another person he, Donnellan, stood there for about seven or eight minutes waiting for the conversation to stop. It was while he was waiting that, he said, he saw the accident.

The defendant called one Sheridan, the manager of the branch of the Bank of New South Wales at Hunter Street. He gave evidence that Jarvie was one of the customers of the branch. Jarvie used the branch for the purpose of remitting moneys to other branches, apart from operating on his own account. The bank manager recognized Donnellan as a man who sometimes did banking business for Jarvie. He stated that there had not been any operation on Jarvie's account on the day of the accident, and produced an authenticated copy of Jarvie's bank account in support of his statement. Although objected to, both the statement and the document were admitted. In reply to a question put to him by counsel for the plaintiff, the bank manager agreed that there were many things

which could be done by a person at a bank which would not result in any written record.

The jury returned a verdict for the defendant.

An application for a new trial was made by the plaintiff to the Full Court of the Supreme Court on numerous grounds, the only ground material to this report being that the trial judge was in error in admitting the evidence of the bank manager or any part of such evidence. It was contended that this evidence was inadmissible as being in rebuttal of answers given in cross-examination which went only to Donnellan's general credit.

The application was refused (*Jordan* C.J. and *Halse Rogers* J., *Bavin* J. dissenting). All the members of the Full Court agreed that there was evidence to support the verdict of the jury and that the jury was properly directed. *Bavin* J. dissented upon the ground that the bank manager's evidence was wrongly admitted, and that for this reason a new trial should be granted.

From that decision the plaintiff appealed to the High Court on several grounds, the only ground material to this report being that the Supreme Court was in error in holding that the trial judge was right in admitting the evidence given by the bank manager.

Windeyer K.C. and *McKillop* (with them *Evatt* K.C.), for the appellant.

Windeyer K.C. The proof of whether the witness Donnellan did or did not cash a cheque or pay in any money or go to the bank at all establishes nothing, in the circumstances of this case, as to whether he was at the scene of the accident at the time of the accident. It was not proved that he did not go to the bank, nor can such an inference be drawn from the evidence. A distinction should be drawn between the proof of facts in issue and the proof of facts relevant to the facts in issue.

[McTIERNAN J. referred to *Hollingham* v. *Head* (1).]

Evidence may always be given as to facts in issue, but this is not so as regards evidence as to facts relevant to the facts in issue ; such evidence should not be admitted unless it is reasonably conclusive (*Metropolitan Asylum District* v. *Hill* (2)). Here the evidence is

(1) (1858) 4 C.B.N.S. 388, at p. 391 [140 E.R. 1135, at p. 1136].
(2) (1882) 47 L.T. 29.

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not only not conclusive, but, also, it has no bearing on collateral facts in the case. The onus is upon the respondent to show that the inadmissible evidence could not reasonably have had any effect upon the jury (*Goodsell* v. *National Bank of Australasia* [*No.* 2] (1); *Crease* v. *Barrett* (2)). The inadmissible evidence of the bank manager was calculated to affect adversely the credibility of the witness Donnellan, the evidence of whom directly relating to the accident is very important and serves to corroborate the evidence of other witnesses. The question is not, Might the evidence have influenced the jury? but, Could it have influenced the jury?

[LATHAM C.J. referred to *Betts, Louat and Hammond's Supreme Court Practice* (*N.S.W.*), 3rd ed. (1939), p. 138.]

In the circumstances a new trial should be granted.

McKillop. Any evidence which is called in rebuttal of collateral evidence—by which is meant evidence which in some way relates to the evidence on the point in issue—must be evidence which is admissible as to evidence which is in issue (*Taylor* on *Evidence*, 12th ed. (1931), vol. 2, p. 937, par. 1470). Evidence tendered in rebuttal should be capable of affording a reasonable presumption or inference as to the matter in dispute (*Metropolitan Asylum District* v. *Hill* (3)). The fact that the witness was or was not at the bank on the particular day was not relevant to the fact in issue. For that reason the bank manager's evidence was inadmissible.

LATHAM C.J. We should like to hear the argument for the respondent on this point.

Dovey K.C. (with him *W. B. Simpson*), for the respondent. The bank manager's evidence was directed to the credibility of a witness, and was, therefore, both relevant and admissible. His evidence as a whole did not adversely affect the credibility of that witness or prejudice the appellant's case. The onus is upon the appellant, as being the party seeking a new trial, to prove the inadmissibility of the evidence and that it resulted in a miscarriage of justice (*Ryan* v. *Ross* (4); *Coroneo* v. *Kurri Kurri and South Maitland Amusement*

(1) (1890) 11 L.R. (N.S.W.) Eq. 156.
(2) (1835) 1 C.M. & R. 919 [149 E.R. 1353].
(3) (1882) 47 L.T., at pp. 30, 35.
(4) (1916) 22 C.L.R. 1, at p. 33.

Co. Ltd. (1)). A new trial should not be lightly granted (*Turnbull & Co.* v. *Duval* (2)).

[EVATT J. referred to *R.* v. *M'Leod* (3).]

The view there expressed is not the view now held by the court (*Brain* v. *Commonwealth Life Assurance Society Ltd.* (4) ; *Bonette* v. *Woolworths Ltd.* (5)).

[DIXON J. referred to *Commonwealth Life Assurance Society Ltd.* v. *Smith* (6), and to *Wigmore* on *Evidence*, 1st ed. (1905), vol. 2, pp. 1165, 1166, and cases there cited.]

A new trial will not be granted on the ground that evidence was wrongly admitted if that evidence was not material (*Cross* v. *Goode* (7)).

[STARKE J. referred to *Herald and Weekly Times Ltd.* v. *McGregor* (8).]

The onus is upon the party seeking relief to satisfy the court that evidence wrongly admitted did not certainly procure a miscarriage of justice, but probably did.

[DIXON J. referred to *Moore* v. *Tuckwell* (9) and *Brandford* v. *Freeman* (10).]

Apart from the facts relevant to the issue there are a number of matters upon which the testimony of witnesses can be impeached, if necessary, by extrinsic evidence. Amongst those matters is the right to call extrinsic evidence to re-establish the credibility of a witness whose credit, that is, general reputation, has been impeached (*Taylor* on *Evidence*, 12th ed. (1931), vol. 2, p. 939, par. 1473) ; and also to test the capacity of the witness to observe and the extent of his knowledge (*Wigmore* on *Evidence*, 1st ed. (1905), vol. 2, pp. 1150, 1165, 1166, and cases there cited).

[DIXON J. referred to *R.* v. *Lovegrove* (11).

[EVATT J. referred to *R.* v. *Cargill* (12).]

(1) (1934) 51 C.L.R. 328, at p. 345.
(2) (1902) A.C. 429, at p. 436.
(3) (1890) 11 L.R. (N.S.W.) 218, at p. 231.
(4) (1934) 35 S.R. (N.S.W.) 36, at p. 47.
(5) (1937) 37 S.R. (N.S.W.) 142, at p. 156.
(6) (1938) 59 C.L.R. 527.
(7) (1887) 8 L.R. (N.S.W.) 255, at pp. 263, 264.
(8) (1928) 41 C.L.R. 254, at pp. 269, 270.
(9) (1845) 1 C.B. 607, at p. 609 [135 E.R. 679, at p. 680].
(10) (1850) 5 Ex. 735, at p. 736 [155 E.R. 322, at p. 323].
(11) (1920) 3 K.B. 643.
(12) (1913) 2 K.B. 271.

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The question of remoteness as to the relevancy of evidence for the purpose of a trial should and must be in the final judgment of the trial judge. On such a matter an appeal court is not in so good a position as the trial judge. Questions as to the inadmissibility of evidence are always, in a sense, questions of degree. Subject to certain exceptions, e.g., bias, evidence can be given only to contradict evidence which already has been given.

Windeyer K.C., in reply. The evidence to be contradicted must be an element or factor in the principal evidence of the witness to be attacked. The evidence given by the manager was clearly inadmissible, and it cannot be shown that it did not affect the jury. The court should not take it upon itself to say that this was not a matter upon which the verdict of the jury depended (*Makin* v. *Attorney-General for New South Wales* (1)). In *Cross* v. *Goode* (2) the inadmissible evidence was given as to an issue which did not arise in that case.

Cur. adv. vult.

1940, Feb. 23. The following written judgments were delivered :—

LATHAM C.J. The plaintiff, Mr. A. B. Piddington, was on 11th April 1938 knocked down in Phillip Street, Sydney, by a motor cycle and side-car driven by a servant of the defendant company. He was injured and sued for damages, alleging negligence on the part of the defendant's servant in the management of the motor cycle. The jury found a verdict for the defendant. An application for a new trial by the plaintiff to the Full Court of the Supreme Court of New South Wales (*Jordan* C.J., *Halse Rogers* and *Bavin* JJ.) was refused, *Bavin* J. dissenting. All the learned judges agreed that there was evidence to support the verdict of the jury and that the jury was properly directed. *Bavin* J. dissented upon the ground that certain evidence was wrongly admitted and that there ought to be a new trial on this ground.

The plaintiff himself had no memory of the actual happening of the accident and gave no evidence with respect to it. He called two witnesses to the accident. It occurred in Phillip Street, near to the southern side of Martin Place. One Donnellan gave evidence

(1) (1894) A.C., at pp. 69, 70. (2) (1887) 8 L.R. (N.S.W.) 255.

that he saw the accident. He said that he saw the plaintiff crossing the street from east to west at a very fast pace, that he did not hear any horn sounded, that he saw skid marks on the road which extended for ten or twelve yards to the point of collision, and that the motor cycle went five or six feet beyond the plaintiff after knocking him down. In cross-examination he said that there were no cars parked on either side of the road at or about the place where he was standing (which was opposite to where the accident occurred). The other witness to the accident who was called for the plaintiff, Norman Davis, said that the plaintiff crossed the street at an ordinary pace, that the motor cycle " came along and made a terrific noise, skidding," turned and struck the plaintiff. He heard no horn sounded. He estimated the speed of the motor cycle at thirty to forty miles per hour. This witness said that there was a car parked on the east side of Phillip Street near to the locality of the accident, but that there was no car on the opposite side of the road.

The plaintiff also called a constable, who arrived on the scene of the accident a few minutes after it had happened and who measured marks left by the motor cycle on the road. The motor cycle was upright and still standing in its tracks. The evidence of the constable as to the length and direction of the skid marks was not challenged by the defendant. This evidence showed that a light mark, indicating that the brake had been applied to the motor cycle, extended for eighteen feet from a point beginning about four feet from the building line of Martin Place. Then a heavy skid mark continued for eighteen feet to the point of collision where the cycle had stopped. This heavy skid mark showed that the brake had been strongly applied so that the wheel of the motor cycle had locked and had dragged along the surface of the road. The plaintiff was lying about two feet in front of the end of the skid mark. Twelve feet before the point of impact the skid mark turned towards the right, that is, towards the middle of the road, and the distance between the divergent track and the continuation of the original straight track was two feet or two feet six inches. The constable gave evidence that there was a car parked on the eastern side of Phillip Street, and another car parked almost opposite to it on the other side of the street. He also gave evidence that the front of the motor

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cycle in the position which he found it was about level with the front of the back mudguard of the car parked on the opposite side of the street, and that the near wheel of the side car was about two feet from the off or outside wheel of that car. That car was, he said, about four yards from the building line of Martin Place.

For the defendant the driver of the motor cycle, Burling, gave evidence that when he began to cross Martin Place he had slowed down to eight or ten miles per hour, but that he accelerated in crossing to twenty or twenty-five miles per hour. He was going to the Traffic Office which, it is said, was about one hundred yards away, and he was looking for a parking space for his vehicle on the western side of Phillip Street. As he crossed Martin Place a car coming in the opposite direction along Phillip Street turned left into Martin Place. This car of course had to pass any car which was parked on the eastern side of Martin Place near the corner. The driver of the motor cycle had to drive sufficiently far from the western side of Phillip Street to pass the car which was parked on that side. The roadway being thirty-six feet wide and six feet being allowed for the parked car, he had about twelve feet for his normal course on the western side of the middle line of Phillip Street. He said that he directed his course so as to leave two to three feet between the near side of his side-car and the off-side of the parked car, and that his own vehicle was about five feet wide.

His further evidence was to the following effect:—He first saw the plaintiff when he (the driver) was level with the guttering on the northern side of Martin Place. He saw him behind the approaching car, which was on the driver's right and on the plaintiff's left. He immediately blew his horn and braked slightly, with the intention of allowing the plaintiff to pass in front of him and of himself going behind the plaintiff. He also pulled to the right slightly. At this time the plaintiff was about twelve feet out from the eastern footpath, that is, about six feet from the middle of the road. The plaintiff was walking and when Burling blew his horn the plaintiff ran forward in a trot. Burling said: "As he started to trot I pulled to the right. If he had kept going I would have gone round the back of him, but he changed his mind suddenly and stepped back right into my path again and turned around, faced me, and

put his hands up. . . . I put my brakes on hard when Mr. Piddington stepped back. The moment I saw him step back I braked heavily. When I hit him I was not going fast. I stopped dead on the spot the moment I hit him. His left hand touched the head lamp. . . . The braking stalled the engine on the spot." He said that the plaintiff " was taking his time across the street. When I blew the horn he seemed to hesitate for a moment, and then turned round and watched me. He saw me in fact, and he hurried forward then. Then he must have thought he could not do it, and he tried to step back out of the way to let me go through on the left-hand side of the road, but he could not come back the distance in time and I caught him half way." This witness said that there was a car parked on each side of the street at about the place where the accident happened.

One Reeves, who was a passenger in the side-car, also gave evidence for the defendant. His evidence was that when the driver blew the horn he noticed the plaintiff " running across the road from behind a car. When I first saw him he was actually running." The witness explained that this car was the stationary car on the eastern side of Phillip Street. This witness did not notice any moving vehicle. He said that when he first saw the plaintiff (when the horn blew) he was about nine feet out from the stationary car, that is, within two or three feet of the middle of the road. He said : " When we blew the horn Mr. Piddington seemed to stop and look towards us, and there was nothing else we could do but hit him, otherwise if he had kept going we might have missed him." He said that the driver put on the brakes and veered to the right a little and that the brakes went on at practically the same time as the horn was blown. He said that " if Mr. Piddington had kept going I think we would have missed him." He also said that the plaintiff " seemed to stop and looked to us and propped."

Mrs. Margaret Joseph Smith saw the accident from the point where Donellan described himself as standing. She saw the two parked cars—one on each side of Phillip Street—and she saw the plaintiff step off the footpath and commence to cross the road. She did not see whether he looked to his right or to his left. When she saw the bicycle it was not very far from the plaintiff—it was

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"almost pulling up, it was going very slowly and struck the man on the left hand." She said that a motor car had just passed the stationary car and that the plaintiff crossed behind the moving car when it had just passed. She also spoke of the swerve of the motor cycle to the right which was recorded by the skid mark.

In his charge to the jury the learned judge explained that they must first consider whether the defendant's servant was guilty of negligence. He said, without any objection being taken, that the negligence relied upon was excessive speed of the motor cycle and failure to sound the horn. He explained that if the plaintiff was guilty of contributory negligence the plaintiff could not recover notwithstanding the negligence of the defendant. He said that it was for the jury to decide whether the speed was excessive, whether the horn was blown, and whether the plaintiff was guilty of contributory negligence in crossing the road without looking out or in hurrying forward and then stopping and going back when he heard the sound of the horn. He explained that even if the jury thought that the plaintiff, in the emergency which occurred, did not do the right thing, it did not follow that he was therefore guilty of negligence.

The evidence discloses a street accident of an ordinary and all too common type—a pedestrian trying to avoid a motor vehicle, the driver of the vehicle trying to avoid the pedestrian, and failure of all efforts—the whole series of events occupying probably less than two seconds from the first possible appreciation of probable danger. On the evidence, which I have stated in its essential particulars, it was, in my opinion, open to the jury to find that the driver could and should have stopped the motor cycle in time to allow the plaintiff to pass in front of him. He did not do so. Alternatively, it was open to the jury to find that the driver could and should have swerved more decidedly and earlier to the right and that if he had done so he would have passed behind the plaintiff and would not have struck him.

In considering these possible conclusions the jury could properly take into account the small space available between the left-hand side of the side-car and the right-hand side of the motor car parked on the western side of Phillip Street which would allow the plaintiff very little room to cross in front of the motor cycle. Thus there

was evidence upon which the jury could properly find the defendant's driver guilty of negligence.

It was also open to the jury, however, to find that the driver was travelling upon a normal course at a normal speed, that he adopted the proper course in sounding his horn to warn the plaintiff, slowed down to allow the plaintiff either to stop or to go on, that an emergency was created when the plaintiff first hurried forward and then stopped and stepped back, that the driver was not responsible for the creation of the condition of emergency but that the plaintiff was not guilty of any negligence, so that there was no negligence on either side. But it was also open to the jury to find that the driver of the car was entitled to think that the plaintiff would continue his course and that if he had continued his course without stopping and turning and retreating, the motor cycle would have passed him without injury and that the change of mind and consequent hesitation on the part of the plaintiff was contributory negligence on his part.

Further, it was open to the jury to find that, if the plaintiff had looked to his left after he came from behind the stationary car and before he passed the middle of the road he would have seen the motor cycle within about forty feet and that he could and should then have stopped and waited for it to pass, which it would have done without endangering him. The jury was entitled to take the view that upon that basis the plaintiff was guilty of contributory negligence.

I have stated the evidence in some detail and have also stated the different findings which appear to me to have been open to the jury. I have done this for the purpose of showing that the case is, in my opinion, essentially what may be called a jury case. In my opinion there was evidence to support any one of the findings which I have set out. It is not for a court of appeal to substitute its own view of the evidence for any view which it was open for the jury to take. Accordingly, in my opinion, the appeal cannot succeed upon the basis that there was no evidence of negligence or of contributory negligence or that the verdict was against the weight of evidence.

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It is further contended for the plaintiff that the learned judge misdirected the jury. But no objection on the ground of misdirection or non-direction can be allowed as a ground for a new trial (except by leave of the court) unless objection to the misdirection or non-direction was taken at the trial (*Supreme Court Rules*, rule 151B). Thus the plaintiff cannot complain that a particular case was not submitted to the jury on his behalf if no request was made that it should be submitted. A number of requests were made to the learned judge on behalf of the plaintiff to direct the jury on particular matters and these requests were complied with except, it is said, in relation to the doctrine of the last chance. The learned judge had told the jury that they must consider what was the " real " cause of the accident. He was asked for a direction that the jury should consider what was the " proximate " cause of the accident. The learned judge said that he had already directed that they should consider what was the real cause, and the matter was left at that without further request or application or observation. Not a word was said about the " last chance." It would have been very easy, if it were desired to rely upon the doctrine, to ask in definite language that a direction upon that subject should be given. But no such request was made. Accordingly, a new trial cannot be granted upon the ground of failure to direct upon this point.

A further question arises as to the admissibility of certain evidence tendered by the defendant. The plaintiff contends that it was inadmissible and that he is entitled to a new trial on that account. The evidence in question is the evidence of a bank manager who was called to show that no money was paid into or drawn out of the account of one Jarvie at a branch of the Bank of New South Wales in Hunter Street on 11th April 1939, the day of the accident.

In cross-examination of the witness Donellan his presence in Phillip Street on the occasion of the accident was challenged by counsel for the defendant. He was asked what he was doing in Phillip Street at the time. His answer was " I was after doing a message for Major Jarvie." In answer to further questions he first said that he was going to the Bank of New South Wales in Hunter Street and that he did not remember whether it was to pay in or draw out money for Major Jarvie or indeed what it was.

But in answer to a question by his Honour he said definitely: "I had been at the bank and was on my way home." Later he said that "it might be" that he was either cashing a cheque for Major Jarvie or making a deposit for him. Having done the message, he saw an acquaintance and waited for an opportunity to speak to him. It was while he was waiting that, he said, he saw the accident.

The manager of the Hunter Street branch of the Bank of New South Wales gave evidence, which was objected to, that no money was paid into or drawn out of the account of Major Jarvie on the day in question.

It was open to the jury to regard Donellan's evidence as stating in the final result that he happened to be in Phillip Street on the occasion in question because he was on his way back from the bank after drawing out or paying in money for Major Jarvie.

Any witness may be cross-examined for the purpose of discrediting him. But if questions affect only the credit of a witness and are not relevant to the matters actually in issue in the case, the witness's answers cannot be contradicted by other evidence except in certain exceptional cases. Exceptions to the rule at common law are that after cross-examination of his opponent's witnesses a party may give evidence to show that they are notorious liars, or have given their testimony from a corrupt or other wrong motive, or that they have previously made statements inconsistent with their evidence. A statutory exemption allows proof of convictions where such convictions have been denied by a witness. It is argued that the evidence of the bank manager does not fall within any of these exceptions and that therefore it was inadmissible.

It is always permissible to give evidence as to the facts which are in issue between the parties and as to facts relevant to the facts which are in issue. When a witness describes himself as an eye-witness of events constituting the facts which are in issue, his presence and capacity to observe those events are facts relevant to the facts in issue. No witness would be permitted to go into the box and simply to depose that certain events happened at a certain time and place without saying that he was then and there present, and observed the events.

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It has not been denied that the party against whom a witness is called may call evidence to show that the witness was not present at the time and place alleged, or that, if he were present, he could not have seen, or very probably could not have seen, what he claimed to have seen. Such evidence may fail in a particular case, but it is not therefore inadmissible. It must be evidence of a fact which is capable of affording a reasonable presumption as to the matter which is in dispute between the parties: See *Taylor* on *Evidence*, 12th ed. (1931), vol. 1, p. 222, sec. 316. The question is whether the truth or falsehood of the fact of which evidence is sought to be given may fairly influence the belief of the jury as to a matter in dispute (*Melhuish* v. *Collier* (1)). As Lord *Watson* said in *Managers of the Metropolitan District Asylum* v. *Hill* (2) (referring to evidence of collateral facts, that is, facts not constituting the matters directly in dispute between the parties), "in order to entitle him to give such evidence, he must, in the first instance, satisfy the court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute."

His Lordship proceeded to say that he was "disposed" to hold that the party was also bound to satisfy the court that the evidence which he is prepared to adduce would be reasonably conclusive, but he in fact did not go so far as to state this proposition as an established principle of law. The question is discussed in *Wigmore* on *Evidence*, 2nd ed. (1923), sec. 1005, where the learned author states that a necessary qualification for a witness is personal knowledge, that is, an opportunity as to place, time, proximity and the like, to observe the event or act in question, and that extrinsic evidence may be adduced to show the deficiency of such opportunity. Accordingly, an alibi may be proved against a witness.

In the present case, as soon as the witness was asked how he came to be in Phillip Street he at once offered as an explanation of his presence the fact that he was doing a message at the bank for Major Jarvie. There might have been many other reasons for him being in Phillip Street, for example, simply the fact that he lived there and happened to have walked out on the footpath, but he did not

(1) (1850) 15 Q.B. 878 [117 E.R. 690]. (2) (1882) 47 L.T., at p. 35.

give any other reason. The circumstance whether he went to the bank or not for Major Jarvie was accordingly a fact which had a bearing upon the probability or improbability of the truth of his evidence as to his presence at the place of the accident. The proof or disproof of such a circumstance would not be conclusive. Its weight was seriously diminished by the further evidence given by the bank manager in cross-examination to the effect that Donellan was often at the bank, and that there might be many reasons for a person going to the bank other than paying in or drawing out money. In some cases the displacement of a reason alleged by a witness for his presence at a particular place might have very great weight indeed ; for example, the presence of a civilian in a military camp to which the admission of civilians was prohibited would itself be a circumstance which would require explanation, and the truth of any explanation given might be a most relevant fact for consideration in determining whether or not he was in fact present as alleged. In other cases the weight of evidence of this type would be much less. But evidence directed to displacing an explanation of presence at a particular place would be admissible if the evidence tended to make his presence there improbable. In the present case, in all the circumstances, the evidence was, in my opinion, of but little weight. It did not demonstrate that he was not at the bank on that day. At the best it excluded one set of reasons (drawing out or paying in money) as accounting for his alleged visit to the bank. But alibi evidence need not be conclusive in order to be admissible. I agree with *Jordan* C.J. and *Halse Rogers* J. in the opinion that the evidence was admissible as tending to disprove the explanation given by Donellan of his presence at the place in question, although it was weak and was practically deprived of weight by the answers given by the bank manager upon his cross-examination. The challenge of Donellan's presence at the scene of the accident was, at the trial, a very minor element. It was barely mentioned in the lengthy summing up. Reference is made to the cross-examination on the point, but no reference whatever was made to the evidence of the bank manager.

I am further of opinion that, in the circumstance of this case, where the fact that the plaintiff was run over by the defendant's

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driver was not disputed and where the evidence of all the witnesses was so similar in substantial respects, even the rejection of Donellan's evidence by the jury could hardly have prejudiced the plaintiff. But, in my opinion, it is not necessary to decide the question upon these considerations because, for the reasons stated, I think that the evidence was admissible.

I am therefore of opinion that the decision of the Full Court was right and that the appeal should be dismissed.

STARKE J. This action arose out of a street accident in circumstances which are not at all uncommon. The appellant, whose age is seventy-six, was crossing Phillip Street, Sydney, which from kerb to kerb is thirty-six feet wide. He did not cross at a recognized crossing place but a little north of the regular crossing at the intersection of Phillip Street and Martin Place. A motor car was parked between the intersection and the point at which the appellant started to cross the street. He stepped off the footpath on the eastern side of Phillip Street and was crossing to the western side where a motor car was also parked almost opposite the back of the car on the eastern side. A motor cycle with a side-car driven by an employee of the respondent was coming along Phillip Street in a northerly direction. The cycle was on its right side and was being driven at a moderate pace—the driver said about twenty-five miles per hour. The driver noticed the appellant some two or three paces from the centre of Phillip Street when he (the driver) got level with the building alignment at the intersection of Martin Place and Phillip Street, which would be about twenty to twenty-five feet from the line of the appellant's crossing. The driver sounded his horn, which the appellant heard, for he quickened his pace and ran or trotted across the front of the advancing motor cycle. The driver braked slightly and also pulled a little to the right so as to go behind the appellant. But the appellant suddenly stopped and stepped back in the path of the motor cycle. It may be that the position of the motor car parked on the western side of the street made him fear that the motor cycle could not pass the motor car without striking him, though there is evidence that with the pull to the right made by the driver of the motor cycle he, the appellant, would have had

between five and six feet. So soon however as the driver of the motor cycle noticed the appellant step back, he put his brakes on hard, but still struck the appellant, who was knocked down and seriously injured. The motor cycle stopped dead, according to the driver, so soon as it struck the appellant.

The facts as I have stated them are in dispute in some respects, but I have done no more than state as facts matters which were open to the jury on the evidence adduced at the trial of the action.

The action was tried before a jury, and the learned judge who presided directed the jury to consider whether there was carelessness or negligence on the part of the driver of the motor cycle in the speed at which he was driving or in the warning given to the appellant and if so whether there was any contributory negligence on the part of the appellant, "that is to say," as the learned judge explained, whether "the plaintiff himself by the exercise of reasonable care might not have avoided the results of the" (driver's) "negligence" by keeping a proper lookout and so on, but he pointed out to the jury that it was proper to bear in mind that, if a sudden emergency arose, the mere fact that a person does what subsequently turns out to be a wrong thing does not in itself establish negligence or carelessness. More than once he suggested in substance that the jury should consider whether the driver of the motor cycle or the appellant was responsible for the accident or, to use his own words, whether the carelessness of the driver or of the appellant was the real cause of the accident: See *Swadling* v. *Cooper* (1). Counsel for the appellant submitted that there was no evidence of any contributory negligence on the part of the appellant and that the jury should be so directed, but otherwise no objection was taken to the charge. And rule 151B of the rules of the Supreme Court provides: "No direction, omission to direct, or decision as to the admission or rejection of evidence given by the judge presiding at the trial shall without the leave of the court be allowed as a ground for such notice of motion" (for a new trial &c.) "unless objection was taken at the trial to the direction, omission, or decision by the party on whose behalf the notice of motion has been filed." The jury found a verdict for the respondent.

(1) (1931) A.C. 1.

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A motion was then made to the Supreme Court for a rule or order that the verdict be set aside and a new trial granted limited to the question of damage. The Supreme Court by a majority dismissed the motion. An appeal is now brought to this court.

One of the matters argued on this appeal was that raised at the trial, namely, that there was no evidence of contributory negligence on the part of the appellant fit to be submitted to the jury and that the trial judge should have so directed. All the learned judges of the Supreme Court rejected this contention, and I agree with them. There was evidence to this effect before the jury:—(1) That the driver of the motor cycle warned the appellant of his approach some twenty to twenty-five feet away. (2) That the appellant heard the warning and saw the motor cycle when he was two or three paces from the centre of the road. (3) That the appellant did not stop so that the driver of the motor cycle might pass him but ran or trotted across the street in front of the moving motor cycle. (4) That the appellant suddenly stopped and stepped back in the path of the motor cycle.

It is the duty of a pedestrian crossing a street to use due care, as it is also of persons driving motors along the street. And a jury, viewing the evidence reasonably, might well conclude on the facts stated that the acts of the appellant were thoughtless and careless and amounted to negligence which caused or contributed to the accident of which he was the victim. Friendship and sympathy for an old and distinguished member of the legal profession should not sway the judgment of the court. But if reason and common sense are to prevail, surely it was the province of the jury to determine whether, after warning given and heard, it was not a risky and negligent act to run or trot across the front of the moving motor cycle some twenty to twenty-five feet away and whether that act, coupled with the appellant suddenly stopping and stepping back in the path of the motor cycle, did not cause or contribute to the injury sustained by the appellant.

Another argument submitted on this appeal was that the learned judge omitted any reference to what is called the doctrine of the "last chance." But such a reference would have been inappropriate in the facts of this case, and in any case the learned trial judge was

not requested to direct the jury upon the matter and rule 151B precludes reliance upon the omission now.

Lastly, it was submitted that the trial judge was in error in admitting the evidence of a witness named Sheridan called upon behalf of the respondent. Both the Chief Justice of the Supreme Court and *Halse Rogers* J. held that the evidence was admissible, but *Bavin* J. was of opinion that it was inadmissible and that there was a possibility of it having influenced the jury to a substantial degree in arriving at a conclusion whether a witness (Donellan) for the appellant was or was not present at the accident and what credit should be given to his evidence. The evidence was, I think, admissible, but it had little, if any, weight. The witness Donellan stated that he was present when the accident took place. In cross-examination he gave a description of the side-car, which does not appear to have been correct, and when asked how he came to be at the scene of the accident, he stated that he was " doing a message for Major Jarvie," and had been at a bank and was on his way back. He named the bank, and when asked whether he was cashing a cheque for Major Jarvie over the counter or making a deposit he replied, " Yes, that might be " but he could not tell whether he " was going to either take out or put in." The respondent called the bank manager (Sheridan), who proved that there was no operation on the banking account of Major Jarvie on the day of the accident. This is the evidence the subject of the objection.

When a party cross-examines his opponent's witness as to facts relevant only to the witness' credit, he is not as a general rule entitled to call evidence to contradict him. But, as *Christian* J. said in *R.* v. *Burke* (1)," the truth is, that the rule of exclusion is a rule of convenience, and not of principle," but it is only in cases which bring " the witness into special connection with the party, or the subject, that the rule has been broken in upon." It was not denied that evidence would be admissible to prove as a fact relevant to the facts in issue that Donellan was not present when the accident happened to the appellant, for that would bring him into special connection with the subject matter of the issue being tried : Cf. *R.* v. *Lovegrove* (2). But it was submitted that Sheridan's evidence did

(1) (1858) 8 Cox C.C. 44, at pp. 53, 54.

(2) (1920) 3 K.B. 643 ; 15 Cr. App. R. 50.

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not show that Donellan was not present at the scene of the accident It does not do so directly, but it is not necessary that the fact should be so proved. It may be proved indirectly, that is, inferred from other facts. The evidence of Sheridan established a fact, slight in itself, but which with others might afford a solid basis for inferring that Donellan was not present at the accident. The trial judge had to deal with the question of admissibility whilst the respondent was building up its case, and could not then exclude proof that Donellan had not been to the bank for the purposes he himself suggested, for that tended to negative his presence at the accident. Later on, the trial judge might have excluded the evidence from the consideration of the jury or advised them that it was of little weight. But if the evidence is of such little weight or so irrelevant as is suggested, why should a court assume that the jury might have been influenced by it? After all, juries have some reasoning capacity, and a good deal of common sense. And it cannot be denied that the new trial of an action which took five days to try, five days on appeal to the Supreme Court, and another four days on appeal to this court, should be avoided unless it is clear that substantial justice has not been done. I agree with the Chief Justice of the Supreme Court and *Halse Rogers* J. that, if Sheridan's evidence were inadmissible, still it was relatively so unimportant and of such little weight and so unlikely prejudicially to affect the decision of this case that a new trial should not be granted.

In my opinion the appeal should be dismissed.

DIXON J. The order under appeal refused an application for a new trial by an unsuccessful plaintiff in an action for damages for personal injury.

The plaintiff, who is the appellant, was run down by the defendant's motor cycle and side-car as he was crossing a city street, and sustained injuries of some severity. As a result of shock presumably, he was unable to give an account of the accident himself, and in order to make out his case he depended upon the evidence of such bystanders as he was able to call as witnesses. His chief witness, a man called Donellan, gave evidence which, if believed, would establish that the accident arose from the excessive speed of the

motor cycle, which prevented it from pulling up or avoiding the plaintiff as he crossed the street in an ordinary manner.

The accident occurred in Phillip Street, Sydney, a little north of the intersection of that street with Martin Place. The motor cycle was travelling north and was on the left-hand or western side of Phillip Street. The plaintiff was crossing from the eastern to the western side. Donellan said that he was standing on the eastern side of Phillip Street close by with his back to a fence and facing west, so that he had a good view of the occurrence. He lived in a building, of which he was caretaker, situated on the same side of Phillip Street, but south of Martin Place. There was nothing surprising or unnatural in his standing there, and he said that " he stood there pretty often in order to get a bit of sun when it comes out." Doubt was cast, however, in the course of his cross-examination upon his account of the accident, and it was suggested that he had not in fact witnessed it. He was asked what he was doing, and he said that he was on a message for one Major Jarvie, who had business in the building of which the witness was caretaker ; he was going to or coming from a bank in Hunter Street where he cashed a cheque or paid one in for Major Jarvie. He said that he stood waiting to speak to an acquaintance whom he saw conversing with another man two yards away. In the course of the case for the defendant evidence was tendered that Major Jarvie's account at the bank disclosed neither a payment in nor a payment out nor any other transaction on the day of the accident. The evidence was objected to but admitted. The first question is whether the evidence was admissible.

The evidence was tendered as relevant to the question whether Donellan was or was not present at the scene of the accident. The evidence proved no more than that, on the day of the accident, he had not paid money in or withdrawn money from Major Jarvie's account. In itself this fact has no natural tendency to show that Donellan was absent from the scene of the accident. All it does is to discredit the account he gave under cross-examination of his movements before the time of the accident. The tendency to discredit him may make the question of the admissibility of the evidence important, but it does not make the evidence admissible.

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His movements before he stood in the street near his home are not part of one indivisible activity, journey or transaction so that to displace or disprove any part of it is to displace the whole. He might have been present, though his account of what he did beforehand was wrong, or absent even though that account had proved right. If the evidence that no payment in or withdrawal from Major Jarvie's account was made is admissible as tending to prove that Donellan was not a bystander when the accident took place, it must be admissible independently of Donellan's account of his antecedent movements. But if Donellan had never given that account, no one would dream that evidence of such a fact was relevant or bore in any way on Donellan's presence at or absence from the scene of the accident.

In my opinion the evidence was inadmissible. The reception of inadmissible evidence gives an unsuccessful party against whom it was tendered a prima-facie right to a new trial. But if it appears that the verdict cannot have been influenced by the inadmissible evidence or that independently of that evidence a verdict other than that found would have been unreasonable or unsustainable the prima-facie right to a new trial is displaced. It is said in the present case that the evidence erroneously admitted cannot reasonably be supposed to have affected the result. I think that, having regard to the manner in which the plaintiff's case was presented to the jury by the judge's charge, the credibility of Donellan as a witness may have been treated by the jury as an important matter and the inadmissible evidence was not at all unlikely to affect their opinion of his credibility. In that view it does not seem to me to be open to us to regard the misreception of the evidence as an immaterial error not reasonably capable of influencing the verdict or unlikely to do so.

For myself I should have thought that after the evidence of Burling and Reeves, who were respectively the driver and passenger of the cycle and side-car, the testimony of Donellan might be considered as of much less importance for the plaintiff. The picture of the accident which that evidence presents is by no means inconsistent with the plaintiff's success. When it is read with the undisputed evidence of the nature and position of the tyre and skid

marks on the road it appears to give an account of the accident which may be summarized as follows. In Phillip Street, a street thirty-six feet wide, a car was parked on either side of the road. As Burling drove the defendant's motor cycle and side-car across the intersection of Martin Place a car coming towards him in Phillip Street turned easterly into Martin Place, that is, away from him. He was travelling between twenty and twenty-five miles an hour. He then saw the plaintiff crossing behind the car coming towards him and turning. He was about nine feet out from the eastern kerb, and was crossing towards the rear of the car parked on the other side of the road. Burling sounded his horn and turned slightly to his right, with a view to go round the back of the plaintiff. The latter, on hearing the horn, hastened forward at a trot. He was an elderly but an active man. He trotted or ran thus for a few yards, about four. Had he continued the cycle and its side-car might have missed him and passed behind him. According to the tracks the course it took with its swerve, would have left him a space of two to two and a half feet between the moving vehicle and the parked car. According to Burling's evidence about five to five and a half feet. But the plaintiff in confusion stepped back or "propped," threw up his hands and was struck and thrown down. In the meantime the driver Burling had jammed on his brakes which, when he sounded his horn, he had applied to effect some reduction in his speed.

On this account of the accident it might have been found that the driver was negligent in not giving the plaintiff a wider berth and not reducing his speed, when he first saw him, to a much greater extent. Once negligence in the driver is found, in my opinion it would, on this narrative, be wrong to treat the plaintiff as guilty of contributory negligence defeating his cause of action. In going forward and quickening his pace he did exactly what was expected of him by the driver, who intended to pass behind him. In stepping back or propping when the cycle and side-car came down upon him leaving him so little room, he responded to an appearance of danger as many pedestrians do, but he was not guilty of negligence. No doubt the jury might have absolved the driver from all negligence and treated the plaintiff's action as an explanation of the accident.

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But, given a finding of initial negligence on the part of the driver Burling, it would not be reasonable to hold that the plaintiff's action in hastening forward and then stepping back in confusion as the car neared him was contributory negligence. In the course, however, of a summing up, otherwise lucid and correct, the account of Burling and Reeves was presented to the jury as lending no support to the plaintiff's cause of action, and the plaintiff's running forward and stepping back were put to the jury without qualification or explanation as affording a foundation for a finding of contributory negligence.

Those actions could not, I think, amount to contributory negligence, always assuming, of course, that the jury were satisfied that the driver was guilty of negligence forming a cause of the accident, an assumption without which contributory negligence has no meaning.

In these circumstances the jury were almost bound to regard the plaintiff's success as depending, to some extent at all events, upon Donellan's evidence, as opposed to the evidence of Burling and Reeves. Further, it is possible that the verdict was founded on an item of contributory negligence which in my opinion would not support that defence, namely, the plaintiff's hastening forward, and then, in the face of a danger caused by the plaintiff's negligence, stepping back.

These considerations appear to me to make it impossible for us as a matter of discretion to refuse an order for a new trial.

I think that the appeal should be allowed, the order of the Supreme Court discharged and a new trial ordered. The appellant should receive his costs of this appeal and of the new trial motion.

EVATT J. At the trial of the action, a witness named Donellan was called by the plaintiff. He gave evidence as an eye-witness of the accident, including evidence as to the speed of the motor bicycle which collided with the plaintiff. He described that speed as being "very fast." He also gave evidence as to the movements of the plaintiff and as to distances.

In cross-examination, the witness explained that he was caretaker of a building situated in close proximity to the place of the accident.

He stated that he had been on a message to a bank situated at some considerable distance from the scene of the accident, but that subsequently, having reached the spot from which he witnessed the accident, he happened to see, on the opposite side of the street, a person to whom he wished to speak. Accordingly, he waited for that purpose at the same spot, and a period of seven or eight minutes elapsed. While so waiting, he saw the accident. The witness not only repudiated the suggestion that he had not seen the accident at all, but, when his recollection was being tested in cross-examination, he was very disinclined to pin himself down to any definite assertion that, on the visit to the bank prior to the accident, he had cashed a cheque or was making a deposit for a Mr. Jarvie. This appeal has arisen largely because (*a*) during the defendant's case in chief, the learned trial judge, despite objection raised to that course, allowed the manager of the bank to give oral evidence that no transaction relating to Mr. Jarvie's account with the bank had been recorded by the bank on the day of the accident, and (*b*) despite further objection, the defendant was actually allowed to tender in evidence a written statement of the bank's account with Mr. Jarvie which recorded no transaction on the day in question.

No question arises as to the purpose for which this evidence was intended. It was to invite the jury to infer that Donellan was not present at the scene of the accident at all. I think that it is quite possible, even probable, that, as a result of the seriousness and importance which would be attached to the bank manager's evidence, the jury made this inference. The production of the written bank account was an important piece of what is called "real evidence." Such evidence, as Lord *Darling* has observed, "is of much value for securing attention . . . they look so solid and important that they give stability to the rest of the story" (*Scintillae Juris*, p. 85).

Was this evidence admissible? In my opinion it was quite inadmissible for the purpose of establishing the fact that Donellan was not a witness of an accident which occurred at a different part of the city and at a later time on the same day. The evidence had no other bearing on the case.

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There may be cases where, by reason of some closely related incident of a somewhat special character, a witness of an accident volunteers a positive explanation of his presence at the scene of the accident, and where direct contradiction of such alleged incident and such alleged explanation is permissible despite the inevitable delay caused by such an extension of the ordinary scope of the investigation. Such evidence may be admissible upon the ground that the fact of the presence of the witness at the scene of the accident is deemed to be a fact relevant to the issue, and that it cannot reasonably be dissociated from the incident, event or circumstance by which he has explained his being an eye-witness.

Under special conditions such as the above, it may possibly be said that the particular witness has " garnished his account of the relevant facts with associated details designed to give verisimilitude " —to quote from one of the judgments in the Supreme Court.

In my opinion, this present case belongs to no such special category. The witness Donellan did not explain his presence at the scene of the accident by reference to any special event, incident or circumstance. It was fully established that the place of Donellan's residence and occupation was close by the scene of the accident. It was almost fanciful to say that the witness attempted to garnish his story by attaching special significance to his message to the bank. On the contrary, his recollection as to the bank visit was obviously not very clear, and he never suggested that the visit formed any integral or even relevant portion of his narrative of the accident. We are then left with a chain of reasoning which seeks to infer the fact that A was *not* present at one place at a certain time by proving that A was *not* present at a different place at a somewhat earlier point of time. The reasoning is fallacious. It would be very different if it could be proved that A *was* at a different place at the very time of the accident. As it is, one may quote by way of analogy one of Lincoln's devastating answers to Stephen Douglas during one of their famous Illinois debates :—" I assert," said Lincoln, " that you are here to-day, and you undertake to prove me a liar by showing that you were in Mattoon yesterday. . . . That is the whole force of Douglas's argument " (*The Prairie Years : Abraham Lincoln*, by *Sandburg*, vol. II., p. 159).

A subordinate obstacle to the reception of the evidence of the bank manager was correctly emphasized by *Bavin* J., and counsel for the defendant now seems to agree with the suggestion. The point made by *Bavin* J. is that the bank manager's evidence does not even establish the fact that Donellan had not been on a visit to the bank on the day of the accident; for it is quite possible that the purpose of the message was to change one form of cash for another, in which case no record would have appeared in the bank's books relating to Jarvie. This subordinate point reinforces the objection to the evidence.

One of the judgments of the Full Court suggests a number of illustrations where a matter of fact deposed to by a witness is so closely associated with his presence at the scene of an accident—according to the testimony of the witness—that it is legitimate to contradict the witness as to the associated fact in order to establish the further fact that the witness was not present at the accident. But the illustrations suggested bear little analogy to the peculiar facts of the present case. Moreover, it is erroneous to suggest that as incidents, explanations and circumstances become less and less closely associated with the fact of the presence of a witness at an accident, the consequence is that direct evidence contradicting such incidents, explanations and circumstances merely loses its weight. On the contrary, such evidence in contradiction becomes irrelevant and inadmissible at the very point where the relation of such evidence to the one fact which is sought to be contradicted, viz., presence at the accident, becomes too remote and attenuated. Remoteness, like relevance, involves considerations of degree. But the trial judge must exclude the evidence in contradiction at the very point where the relationship has become too remote.

Here, at least, there is no logical relevance between the fact permitted to be proved, viz., the *absence* of Donellan from the scene of the accident, and the fact sought to be proved, viz., his *absence* from a different place at a different time of the day. Even the logical relevance of a particular circumstance to a matter relevant to a matter in issue is not necessarily a ground for the admissibility of such particular circumstance. But logical irrelevance is always a reason for exclusion.

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In the result, the evidence tendered through the bank manager went merely to prove that Donellan's general recollection or memory or credibility was not to be relied upon. Except under very special conditions, which did not exist in this case, evidence in direct contradiction is not admissible for such a purpose.

The evidence having been wrongly admitted, the next question is whether, upon such ground alone, the plaintiff is entitled to a new trial of the action. In my opinion, he is.

Where, notwithstanding a party's objection, evidence has been wrongly admitted, common-law practice does not require such party to prove, as a condition of an order for a trial, that he " was prejudiced by the wrongful admission of evidence." This view of *Jordan* C.J. is also expressed in the judgment of *Rogers* J. :—" I am certainly not able to come to the conclusion that if the evidence of the bank manager had been rejected, there is a likelihood that the result of the trial would have been different. To put it another way, I think the probability of a different result if the evidence had not been admitted is so slight that it would be quite wrong for this court to order a new trial because of the reception of this disputed evidence."

On this point, *Bavin* J. said : " I therefore find myself quite unable to say either that the evidence of Sheridan (the bank manager) could not have had any influence on the findings of the jury, *or that there was ample evidence apart from Donellan's to justify those findings.*" I think that this latter test is too favourable to the present defendant, because an application for a new trial is not answered merely by showing that, apart from the inadmissible evidence, there was evidence which, if the jury had acted on it, would have warranted the same verdict. To be sure, a similar test has frequently been applied in applications for statutory prohibitions under the New-South-Wales *Justices Act.* Whether such practice is correct may well be doubted (*Dawson* v. *Zammit*; *Ex parte Zammit* (1), overruling *McClintock* v. *Noffke*; *Ex parte Noffke* (2)). In any event, the test in cases of statutory prohibition is not, and never has been, the common-law test in New South Wales.

(1) (1936) Q.S.R. 322.

(2) (1936) Q.S.R. 73.

In the first part of the sentence I have quoted, *Bavin* J., in my opinion, has stated the correct common-law principle, viz., whether the inadmissible evidence *could* reasonably have affected the verdict of the jury. If it " could," then, except in the special circumstances illustrated by a number of New-South-Wales cases, the verdict should be set aside. In my opinion, the common-law practice is correctly stated in *Betts, Louat and Hammond's Supreme Court Practice* (*N.S.W.*), 3rd ed. (1939), p. 138, as follows : " If a judge at the trial admits improper evidence, or rejects evidence which ought to be admitted, by which means the result of the trial might have been different, the court will, as a rule, grant a new trial."

The rule is, of course, of great importance in practice. Upon new trial applications such as the present, it used to be the practice of great common-law judges, such as Mr. Justice *Pring* and Mr. Justice *Ferguson*, to refer to *Makin* v. *Attorney-General for New South Wales* (1) as illustrating the common-law practice in civil issues. Of course, *Makin's Case* (2) was a criminal appeal. Moreover the Privy Council had to interpret a statute which provided that no conviction should be set aside unless there had been a substantial wrong or miscarriage of justice. Despite the protection thus given to convictions, the Privy Council rejected the theory that if " without the inadmissible evidence there were evidence sufficient to sustain the verdict, and to show that the accused was guilty, there has been no substantial wrong or other miscarriage of justice " (3).

In the following passage the Privy Council stated this general principle :—

" It is obvious," they said, " that the construction contended for transfers from the jury to the court the determination of the question whether the evidence—that is to say, what the law regards as evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the court. The judges are in truth substituted for the jury, the verdict

(1) (1894) A.C., at pp. 68-71. (2) (1894) A.C. 57.
(3) (1894) A.C., at p. 69.

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becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords " (1).

Every word in the above passage is equally applicable to cases like the present. Their Lordships proceeded :—

" The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the court might under such circumstances be justified or even consider themselves bound to let the judgment and sentence stand. These are startling consequences, which strongly tend in their Lordships' opinion to show that the language used in the proviso was not intended to apply to circumstances such as those under consideration. Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them " (2).

Their Lordships had previously pointed out that, upon ordinary common-law principles, the verdict would certainly have been invalidated and, upon that foundation, they held further that the statute made no difference to the application of a fundamental principle.

As it turned out, this part of the Privy Council's judgment was not strictly necessary to the actual decision in *Makin's Case* (3). But the Privy Council chose deliberately to deal with the point of practice because an acute difference of opinion had arisen in the New South Wales Full Court in the earlier case of *R.* v. *M'Leod* (4), which also reached the Privy Council, but went off upon a point of jurisdiction, so that the question of evidence was not examined. In *R.* v. *M'Leod* (4) the question as to the vitiating effect upon a jury's verdict of

(1) (1894) A.C., at pp. 69, 70.
(2) (1894) A.C., at p. 70.
(3) (1894) A.C. 57.
(4) (1890) 11 L.R. (N.S.W.) 218.

evidence which had been wrongly admitted was examined by *Windeyer* J., who anticipated an important portion of the Privy Council's ruling in *Makin's Case* (1). *Windeyer* J.'s judgment is therefore of special importance. In the course of it he said :—

" It is said that the conviction may be upheld, because a new trial will not be granted in a civil case where evidence has been improperly admitted, if the court sees that a contrary verdict would have been so demonstrably wrong that a new trial would have been granted . I am of opinion that this rule, which is in the nature of a proviso to the general rule, that the court will grant a new trial in a civil case where evidence has been improperly admitted, cannot be applied on the criminal side of the court, where no power of granting new trials exist " (2).

From this citation, it is quite clear that, at the time, the accepted practice in New South Wales on the civil side at common law was that the court would as a rule grant a new trial where evidence had been improperly admitted : but that in its discretion the court might refrain from granting a new trial if it was affirmatively satisfied that the actual verdict returned could not have been affected by the inadmissible evidence.

Windeyer J. gave one illustration of an exception to the prima-facie rule. There are other exceptions—e.g., where the inadmissible evidence is so remote or insignificant that the court is able to say affirmatively that its wrongful admission could not possibly have affected the verdict.

In the present case, it is impossible, in my opinion, to take the case out of the general rule of common-law practice. I think that the jury may well have paid special regard to the inadmissible evidence and have drawn the conclusion therefrom that Donellan had never been at the scene of the accident. If so, the whole of the evidence of such witness must have been disregarded by the jury, and the weight of the plaintiff's evidence as to the speed of the defendant's motor vehicle was seriously lessened. The fact that another witness gave evidence to a similar effect to that of Donellan is nothing to the point. For the absence of the testimony of the

(1) (1894) A.C. 57.
(2) (1890) 11 L.R. (N.S.W.), at pp. 231, 232.

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rejected witness may have been sufficient to raise a doubt in the jury's mind as to the plaintiff's case on the question of speed, and so to induce, or even compel, the jury to find a verdict for the defendant.

It follows that the plaintiff is entitled to an order for a new trial of the action. In these circumstances it is not necessary to come to a final determination as to the three following questions :—(1) whether, on the testimony of the driver of the motor cycle, a finding by the jury that such driver was not negligent could be supported ; (2) whether there was any evidence of contributory negligence on the part of the plaintiff ; (3) whether the " real cause " direction was sufficient and whether the plaintiff was not entitled to a direction that if the driver of the cycle had put it out of his power to avoid an accident, either (*a*) by driving at an unreasonable speed, or (*b*) by failing to give the plaintiff a reasonable margin of manœuvre after the former had crossed the path of the motor cycle, the plaintiff would be entitled to a verdict despite a finding of negligence against him.

All these questions were elaborately discussed by learned counsel. I agree with Mr. *Windeyer's* comment that in the present case the evidence of contributory negligence was extremely shadowy and that the summing up did not emphasize the strong case of negligent driving which emerged from the evidence of the cycle driver himself and from the other undisputed or undisputable facts of the case. I also agree that before a case of contributory negligence should be allowed to go to the jury, the precise negligence alleged against the plaintiff should be not only particularized but considered in relation to the negligent acts or omissions charged against a defendant. In late years, we have had a great deal of repetition of the platitude that it is not sufficient to charge a defendant with negligence " in the air." The plaintiff is equally entitled to particularity of charge. In the present case, the charge of contributory negligence seems to have been based upon somewhat vague suggestion, and there was little or no attempt to relate it to the acts of negligence alleged against the driver of the motor cycle.

It follows that, quite independently of the wrongful admission of evidence, justice might require the granting of a new trial upon one

or more of the above grounds. But I do not think it is necessary to discuss them any further, particularly as the general principles involved have been fully examined in a series of judgments of this court, concluding with the recent case of *Wheare* v. *Clarke* (1). I base my decision upon the wrongful admission of evidence at the trial.

The appeal should be allowed with costs here and before the Full Court, and costs of the first trial should be made costs in the cause.

McTiernan J. In my opinion the appeal should be allowed.

There was evidence fit to be left to the jury that the driver of the motor cycle neglected the duty which the law casts upon the person who has the management of a vehicle upon a public street to take reasonable care and to use reasonable skill to prevent it from doing injury; but I do not think that there was any evidence fit to be left to the jury that the plaintiff was guilty of contributory negligence. The trial, in my opinion, was vitiated by the submission of the issue of contributory negligence to the jury. The contributory negligence alleged was, as the driver of the motor cycle said, that the appellant hesitated and stepped back a couple of paces or, as the passenger in the side-car said, that the appellant trotted or ran but "propped" when he came near the other side of the street. It need not be disputed that, if the appellant had not hesitated and stepped back a few paces or "propped," the accident would not have occurred, as the motor cycle would have passed behind him. The appellant's action, if he did either of these things, contributed to the accident; but was it negligence? The duty which the law cast upon him when crossing the street was to take reasonable care to avoid the vehicles running on the street. In *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (2) Lord *Blackburn* said: "A man may not do the right thing, nay may even do the wrong thing, and yet may not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much."

(1) (1937) 56 C.L.R. 715.

(2) (1880) 5 App. Cas. 876, at p. 891.

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Lord *Blackburn* used these words with reference to a person having the management of a ship or a carriage. They are applicable to a pedestrian walking across a public street where motor traffic runs but across which human beings may lawfully pass. The law does not fail to recognize the possible infirmities of human nature. It would not, in my opinion, be making any undue allowance for the conduct of the appellant, who apparently lost his nerve and faltered before the motor cycle as it came on to him, to say that there was no evidence upon which a jury might reasonably and properly find that he was guilty of contributory negligence. It was not negligent for the appellant to assume that the driver of the motor cycle would slow down or swerve before he did in order to permit the appellant to go in front of the cycle without danger : Cf. *Toronto Railway* v. *King* (1). It is argued that there was evidence that the driver sounded his horn. But, even if he did, it was not negligent for the appellant, who was then crossing the street, to assume that the driver would slow down or swerve away from him. It was a reasonable and natural consequence of the conduct of the driver in continuing in his course at the rate of speed at which he approached the appellant for the appellant suddenly to become apprehensive of crossing in front of his vehicle and to perform the movements described in the evidence—especially as clearly the appellant could have seen that had he gone on he would have been forced into the narrow space between the course taken by the passing vehicle and a motor car parked alongside the footpath towards which he was going.

The jury might have found that the driver was negligent because he did not slow down or swerve sooner than he did. If it came to that conclusion, the appellant was, subject to the proof of damages, entitled to a verdict. The jury was, however, directed to consider whether the appellant was guilty of contributory negligence, if it came to the conclusion that the driver was guilty of negligence. Counsel for the appellant asked for a direction to the jury that there was no evidence of contributory negligence. In my opinion, this direction should have been given. It follows that the verdict should be set aside and a new trial ordered.

(1) (1908) A.C. 260, at p. 269.

Another question in the case is whether evidence was wrongly admitted, and, if it was, whether its admission vitiated the trial. The evidence tended to show that no money was put in or taken out of the account of the customer for whom the witness Donellan said he went on a message to the bank. The witness said that he saw the accident after he had gone on a message to the bank for that customer. This evidence could throw no light whatever on the question whether the witness had seen the accident or not. It could discredit the witness, but it was incapable of contradicting any fact upon which proof of the opportunity which the witness had of observing the accident depended. The admission of the evidence and the use which was made of it were calculated to distract the minds of the jury from the material issues to the immaterial issue whether there was any operation on the bank account on that morning. If the jury thought that there had been no such operation and it would be almost bound to think so upon the evidence of the state of that account, the jury could not but take an unfavourable view of the appellant's case.

In my opinion, the evidence was wrongly admitted, and it was of sufficient importance in the case to make it necessary to set aside the verdict because of its wrongful admission.

Appeal allowed with costs. Order of Full Court of Supreme Court set aside. Defendant to pay plaintiff's costs of motion to Full Court of Supreme Court for new trial. Verdict of jury and judgment of Supreme Court set aside. New trial ordered. Costs of first trial to be costs in the cause.

Solicitors for the appellant, *Faul, Ferguson & Hudson Smith.*

Solicitors for the respondent, *Frank A. Davenport & Mant.*

J. B.