real estate agent any of the functions of a real estate agent as defined by the Real Estate Agents Acts whether his remuneration be by way of salary, wages, commission or otherwise". The term "real estate agent" is defined in s. 3 of the *Real Estate Agents Act* 1928 (Vict.) as amended by s. 3 of the *Real Estate Agents and Business Agents Act* 1933 (Vict.). The amendment is not material for present purposes. The definition includes any person who exercises or carries on "any of the following functions, namely—(i.) selling buying . . . or otherwise dealing with or disposing of; or (ii.) negotiating for the sale purchase . . . of or for any other dealing with or disposition of land of any tenure or buildings".

There is no doubt that Robinson was at the material time carrying on the functions mentioned in the definition of "real estate agent". And it seems equally clear that at the material time Liubinskas was, in respect of the property at North Fitzroy, acting for or by arrangement with Robinson and performing for him the function of negotiating for the sale of that property. Shortly after the making of the original arrangement with Robinson he had expressly asked Robinson if he had any properties in Fitzroy or Collingwood, and Robinson had told him of the property at North Fitzroy and given him the keys of that property. Robinson had already given him a number of his business cards, contemplating (as *Sholl* J. found) that Liubinskas would write his own name thereon after the word "Representative". It seems clearly established that Liubinskas was a sub-agent of Robinson within the meaning of the *Real Estate Agents Acts*, and the only remaining question is whether the receipt of the money by Liubinskas from the plaintiff falls within the terms of s. 34.

Section 34 must be read with s. 33 (1), the latter part of which uses language which is repeated in s. 34. It must also be read in the light of the general policy and scheme of the legislation. The policy was undoubtedly to protect persons dealing with agents in and about sales and purchases of real estate and negotiations conducted with a view to such sales and purchases. With that end in view the original Act of 1922, which was re-enacted in the consolidation of 1928, required every real estate agent to obtain a licence, and made it a condition of obtaining a licence that he should deposit with the Treasurer of Victoria a fidelity bond the amount of which was originally £250 but was later increased to £500. Section 20 of the Act required every real estate agent to pay into a trust account at a bank all moneys received by him in his capacity of real estate agent. Before 1930 no provision was

H. C. OF A. 1952.

BRUNDZA v. ROBBIE & Co.

Dixon C.J. McTiernan J. Fullagar J.

made for " sub-agents ". The Act of 1930 required sub-agents, as defined, to be licensed, and made it an offence either for a licensed real estate agent to employ an unlicensed sub-agent or for any person to act as sub-agent for a licensed real estate agent unless he had a sub-agent's licence. It did *not*, however, require a sub-agent to deposit a fidelity bond. It amended s. 20 so as to require " every real estate agent who as such (whether himself or by any employé or sub-agent) receives any moneys on behalf of any person in respect of any transaction or who holds any moneys so received as a stakeholder or in trust pending the completion of any transaction " to pay such moneys as soon as practicable into a trust account at a bank. Then s. 33 (1) provided that " It shall not be necessary for any licensed sub-agent to pay moneys received by him into a bank to a trust account . . . but it shall be the duty of every sub-agent to pay forthwith to the licensed real estate agent for whom he is acting as a sub-agent all moneys received from or on behalf of any person by the sub-agent in respect of any transaction in his capacity of sub-agent for the licensed real estate agent ". Severe penalties are provided for any failure to comply with this provision. Then follows s. 34, the terms of which have already been set out.

Both the language of s. 34 and the context in which it is found strongly suggest that it was intended to extend substantially the liability of a real estate agent at common law. The conclusion seems unavoidable that any question of authority from agent to sub-agent to receive money is intentionally excluded and made irrelevant. One would think that the whole purpose of the section was to give a new remedy to the person entitled to the money. It does not exonerate the sub-agent, but it enables the person entitled to the money to maintain against the agent an action which, by reason of want of privity, would fail at common law. It could hardly be suggested that the section is not capable of application to cases in which the agent has expressly forbidden the sub-agent to collect or handle any money whatever.

In the present case the plaintiff's money was received by a sub-agent of the defendant, Robinson, who was a licensed real estate agent. But the crucial words of s. 34 are " acting as a sub-agent for him, in respect of any transaction in the capacity of sub-agent for the licensed real estate agent ". Those words are, in our opinion, wide enough to cover the present case. Liubinskas was acting as a sub-agent within the meaning of the Act. He said to the plaintiff: " I have a house from Robbie & Co. at 41 St. George's Road, North Fitzroy ". He told the plaintiff that he had the

keys from Robbie & Co. Both of these statements were true. He was performing for Robinson a function of a real estate agent in that he was negotiating with the plaintiff for the sale of the property. The use of the word " transaction " in s. 20 and its context in s. 33 (1) and s. 34 suggest that that word should receive a very wide meaning. The plaintiff and Liubinskas were engaged in a business dealing, in the course of which and " in respect of " which the plaintiff paid over his money. The money was paid " in respect of a transaction ". The words " in the capacity of sub-agent for the licensed real estate agent " appear at first sight to add little to the words " acting as a sub-agent for him ". They seem, however, to be closely, if somewhat awkwardly, connected with the word " transaction ", and, as soon as this is realized, their purpose becomes apparent. The general idea is conveyed by the words " course of employment ", which is familiar in the law of master and servant and is sometimes used in cases of principal and agent. Not only must the sub-agent be " acting for " the agent, but the " transaction " must be in the course of his employment as sub-agent. Liubinskas was authorized to negotiate for the sale of the North Fitzroy property, and he received the sum of £540 in the course of doing that very thing. The cases of *Lloyd* v. *Grace, Smith & Co.* (1) and *Uxbridge Permanent Benefit Building Society* v. *Pickard* (2) show that the facts that Liubinskas was acting in fraud of Robinson and in fraud of the plaintiff are not sufficient to enable one to say that he was going outside the course of his employment. His dealing with the plaintiff in respect of the North Fitzroy property was a dealing in the capacity of sub-agent for Robinson.

The appeal should be allowed. The judgment of the Supreme Court should be set aside, and in lieu thereof there should be judgment for the plaintiff for £540.

Appeal allowed with costs. Judgment of the Supreme Court discharged. In lieu thereof enter judgment for the plaintiff for £540 *with costs including the costs of pleadings interrogatories and discovery.*

Solicitors for the appellant, *Gair & Brahe.*
Solicitor for the respondent, *Patrick H. Kearney.*

R. D. B.

(1) (1912) A.C. 716.

(2) (1939) 2 K.B. 248.

[HIGH COURT OF AUSTRALIA.]

STAPLETON . . . . . APPLICANT-APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

H. C. OF A. 1952.

ADELAIDE, *Sept.* 18, 19.

MELBOURNE, *Oct.* 29.

Dixon C.J., Webb and Kitto JJ.

Criminal Law—Insanity—Test of responsibility—M'Naghten rules—Knowledge that act "wrong."

In applying the second branch of the legal test of insanity in criminal cases as formulated in *M'Naghten's Case* (1843) 10 Cl. & Fin. 200 [8 E.R. 718], the question is whether the accused knew that his act was wrong according to the ordinary principles of reasonable men, not whether he knew it was wrong as being contrary to law.

R. v. *Windle* (1952) 2 Q.B. 826 not followed.

Given a disease disorder or defect of reason, it is enough if it so governed the faculties at the time of the commission of the act that the accused was incapable of reasoning with some moderate degree of calmness as to the wrongness of the act or of comprehending the nature or significance of the act of killing.

Direction as to defence of insanity discussed.

APPEAL from the Supreme Court of the Northern Territory.

Terence Charles Stapleton was charged, in the Supreme Court of the Northern Territory at Darwin, before *Kriewaldt* J. and a jury, that, on 9th June 1952, at Katherine, Northern Territory, he murdered William Bryan Condon, a constable of police. The accused pleaded insanity at the time of the commission of the offence, and after a trial the jury found him guilty of murder. The evidence and proceedings at the trial are set out in the judgment hereunder.

Stapleton applied to the High Court of Australia for leave to appeal against his conviction on the following grounds:—

1. That the verdict was against the evidence and the weight thereof.

2. That there was misdirection, or non-direction amounting to misdirection, by the trial judge in that he (a) failed to direct the jury adequately or at all on certain of the evidence of one Sheila Peckham, a witness at the trial. (b) Failed to direct the jury adequately or at all on certain of the evidence of one Dr. Brothers, a witness at the trial. (c) Wrongly directed the jury that Dr. Brothers had said that the type of insanity he had been discussing was sometimes hereditary, whereas the witness had said that the mental abnormality from which the accused was suffering was hereditary and there was a history of insanity on both sides of his family.

3. That evidence was wrongly admitted.

4. That the trial judge failed to direct the jury adequately or at all on the use proper to be made of the evidence referred to in par. 3 (*supra*).

5. That there was a miscarriage of justice in that the accused's legal advisers were given no proper opportunity by the prosecution to consider the eligibility of the persons constituting the jury panel summoned for the trial to serve as jurors thereon.

During the hearing of the appeal, counsel for the applicant announced that he had been informed by the Crown authorities that it appeared that two of the jurors were not qualified, by reason of the fact that they were not British subjects.

A. L. Pickering, for the applicant-appellant.

C. A. Sandery, for the respondent.

DIXON C.J. Leave to appeal is granted and it is ordered that the motion be treated as the appeal and heard *instanter*. The appeal is allowed, and there will be an order that the verdict and sentence be set aside and that there be a new trial. We shall give our reasons later.

Oct. 29.

THE COURT delivered the following written judgment:—

The applicant Terence Charles Stapleton was convicted of murder before the Supreme Court of the Northern Territory and sentenced to death. He applied under s. 21 of the *Supreme Court Ordinance* 1911-1936 (N.T.) to this Court for leave to appeal against

H. C. OF A. 1952.

STAPLETON v. THE QUEEN.

Dixon C.J. Webb J. Kitto J.

the conviction. We granted leave to appeal and ordered that the application be treated as an appeal which appeal should be heard *instanter*. We then set aside the verdict and sentence and ordered a new trial. We did not then give our reasons because we thought it better to reduce them to writing. We now proceed to state the reasons why we considered that the verdict ought not to stand and there should be a new trial.

The charge was that the appellant did murder one William Bryan Condon, a constable of police, at Katherine on 9th June 1952. The defence made for the appellant was that he was insane at the time of the commission of the offence.

The appellant is a young man of twenty-two years of age who appears to have come from Tasmania. He belongs to a family with a history of mental deficiency and abnormality. On his father's side his grandmother, three aunts and an uncle were mentally abnormal or deficient and, if not all, three of them at least appear to have been confined in institutions. His uncle is stated to have developed at the age of twenty-two years a condition of extreme abnormal excitement and to have been considered very dangerous. He was certified insane and admitted to a mental hospital. On his mother's side the appellant had an uncle who committed suicide and an aunt who was admitted into a mental hospital. Concerning the appellant's own personal history little appears. He lived in Katherine and his occupation is described as that of a plant operator.

A race meeting had been held at Katherine on the day upon which Constable Condon was killed. It was a Monday and according to himself the appellant had been " on the drink " on the Saturday before and had been drinking on Sunday. After drinking during Monday morning he went to the races in company with a friend named Roberts. There they continued to drink. They returned to Katherine just before dark, by a taxi driven by one Ronald Brown. It was a taxi belonging to Leslie March who had a service station at Katherine. On his return to the town the appellant met Sheila Peckham, at whose house apparently he lived. This was at about half past six. They all three went to a cafe for a meal. As Sheila Peckham was sitting down some one drew her chair from under her and she fell to the floor. She was annoyed and the appellant who had been at the counter grew very angry. She left the café and the appellant overtook her and walked past her to the house where they lived. When she reached it, according to her evidence, he was standing by his bedside taking cartridges from a bag. He owned a rifle and a revolver, and there is some

evidence that on two previous occasions when under the influence of drink he had resorted to them and used them in a way causing alarm. As he stood by the bed he had his revolver in his hand and a bandolier round his waist. Sheila Peckham said "Why don't you have a sleep for awhile". Her evidence proceeds "He said 'Where's my rifle?' I said 'I don't know'. He came round the side of the bed where I was standing and put the revolver into my back. He said, 'You'd better hurry up and find it'. He was in a rage. I found the rifle and handed it to him. Before I walked out he said 'Don't forget to write to my mother and explain it'. I called for Mrs. Kruger (who presumably lived in the same or an adjoining house). He said 'If you both come in here, I'll blast the two of you'. He then left."

According to the witness the appellant was considerably affected by drink and her object had been to get him to have a meal and straighten himself up. She went to get Mrs. Kruger because she wanted to quieten him. She herself had always been able to quieten him on other occasions, but his physical and mental condition was such that she did not feel she could, and neither of them was successful.

Leslie March, who had the service station and the taxis, then takes up the story. He says that at about ten minutes to seven the appellant called to him and asked him whether he had seen Ronald Brown. On his replying that he had not done so for a couple of hours, the appellant demanded that he should drive him round looking for Brown. March demurred on the ground that he had two other jobs to do first and said that if the appellant waited for a quarter of an hour he would pick him up. The latter said "No quarter of an hour. Now." He must have placed the muzzle of his rifle against March's body. For in his evidence March says, "I walked towards the car then. I had pushed the barrel of the rifle away from my stomach with my left hand. He was carrying a torch as well as a rifle. He brought the torch down very hard on the back of my left wrist. He brought the rifle again into my stomach. He said 'Go on over and get in.' I got in the car." March then describes his journey in search of Ronald Brown, during which the appellant from the back seat kept the rifle between March's shoulder blades just below the neck. On his asking him why he wanted Brown in a hurry the appellant replied that Brown was his friend and his driver when he was in a car and the appellant just wanted him to drive him around. Under the pretext of inquiring for Brown, March called at his garage and

H. C. OF A. 1952.

STAPLETON v. THE QUEEN.

Dixon C.J. Webb J. Kitto J.

contrived to alight from the car and speak to his brother's wife. But the appellant covered him with the rifle and ordered him to stop when he had moved about four paces. He got back into the car and finally, after a drive of some twenty minutes in all, the appellant stopped him. The appellant said there was somebody he knew and he would walk. He got out of the car, asked how much he owed and fumbled in his pocket for the fare, producing a handful of cartridges and money. He said "I can't sort this out. I will pay you tomorrow." At one point during the drive the appellant placed his left hand over the back of the seat and asked March to shake hands, saying "You might not be able to see me tomorrow." March said "Why? Are you going away?" The appellant replied "No, but tonight blood will flow and I will go down in history." March put his hand up and shook hands with the appellant. As to his condition, March said that he walked steadily and spoke clearly and he March did not think he was drunk but "it seemed as if he was a bit off his rocker, to put it in general words." As soon as the appellant left him March drove off to the police station. Apparently the Sergeant of Police, whose name is Mannion, had already received a telephone message concerning the appellant's doings. He obtained his revolver and the police truck, and went to Mrs. Kruger's residence. There March told his story to him and Constable Condon. March drove the latter off, while Mannion drove himself in the police truck. March and Condon drove up the main street and they saw the appellant walking along the footpath. It was in the vicinity of the cafe and two men were standing talking there. Condon, who seems to have been unarmed, got out of the car. As Condon came from behind the car the appellant, who was only a few yards away, fired at him. He fell on one knee and the appellant fired again. The bullet passed through his abdomen and he lay fatally wounded. The two men, who were only nine feet or so from him, went to his assistance. The appellant seems to have gone to the verandah of a house adjoining. There he fired another shot at Sergeant Mannion as he drove up in the truck. Sergeant Mannion went to Condon's assistance but saw the appellant aiming at him again. He fired his revolver at the appellant who disappeared round a corner, to reappear shortly afterwards going across the street at a jog trot towards the railway yard. Sergeant Mannion fired again and then followed him but could not find him. A general search was instituted and went on until the early hours of the morning but without success. At about 8 a.m. however the appellant was seen sitting near the road about a quarter of a mile from the town. A police

constable drove to the place where he had been seen and found him sitting with his rifle, which was loaded, and his bandolier lying beside him. The constable drove the truck, so to speak, at him and he jumped up and stepped back without making any attempt to pick up the weapon or to resist or to escape. The constable arrested him on a charge of murder and drove him to the police station. There it was found that his revolver was at the back of his trousers. Sergeant Mannion put some questions to him, although the customary warning had not been given. The evidence of what occurred was objected to but was admitted. To the question "What happened last night?", the appellant answered "Your guess is as good as mine." In answer to further questions he said that he did remember being up the street the previous night with a rifle; he did not remember shooting Condon; he did remember shooting someone; he did not know it was a policeman; he did not know who it was; he did not know what for. Sergeant Mannion then said "Well you were seen to shoot Bill Condon and kill him and I saw you take a deliberate shot at me as I came up in the police truck. You will be charged with the murder of Condon and the attempted murder of me." To this, according to Mannion, the appellant said, "If I had known that it was going to be like that I might have given you a bit of fun." This observation Sergeant Mannion considered to be just a smart remark and to refer to the fact that he was in possession of a loaded revolver. The appellant explained it in his statement from the dock as meaning that he would have gone bush and let them try to find him instead of just waiting about. The evidence shows that the appellant hardly knew Constable Condon. Sergeant Mannion said in his evidence that he did not know even now why the appellant shot Condon. The effect of the appellant's statement from the dock and of a signed statement he made to the police was that he had a great deal of drink, he remembered the chair being pulled from under Sheila Peckham at the cafe and his being angry, he could remember shooting off a rifle but not where or why, he could remember some of the incidents of the night he spent in the bush and coming to or waking up in daylight and feeling ill and worried, but otherwise he had no idea of where he went or what he did after he left the cafe.

Expert evidence of the appellant's mental condition was given by a medical witness of high qualifications and experience in mental disease. At the time of giving evidence he was Deputy Chairman of the Mental Hygiene Authority of the State of Victoria and had held that post for some ten months. Before that he had been Director of Mental Hygiene for the State of Tasmania and he was

H. C. OF A. 1952.

STAPLETON v. THE QUEEN.

Dixon C.J. Webb J. Kitto J.

able to speak of his own knowledge of the condition of mental deficiency of some of the appellant's relatives who were confined in institutions in that State. He had examined the appellant two or three times in gaol. Another medical expert had done the same at the instance of the Crown but he was not called. The witness described the appellant as a schizoid psychopath, an abnormality that was hereditary and ran in families. A relatively small quantity of liquor would incite him to abnormal excitement and aggression and in the witness's opinion he would not be aware of what he was doing. He might at the same time walk, hold a conversation and give apparently sensible responsive replies and do an act like shooting.

To the question whether at the time of the shooting it would be possible that the appellant knew what he was doing the witness answered that he personally did not think so : that he meant that the appellant would not understand the nature of his act. To another question he said that he did not think that the appellant would be in a position to realise right from wrong at that particular time.

In re-examination the witness was asked " What is your opinion as to his knowledge of what he was doing and general awareness at that time ? " He answered " In my opinion he was not aware fully of what he was doing at the time of the shooting."

In his charge to the jury the learned judge left it open to them to find any one of four possible verdicts ; guilty of murder, guilty of manslaughter, not guilty on the ground of insanity and not guilty. His Honour directed the jury that if they were satisfied beyond reasonable doubt that the appellant shot Condon with the intention of killing him or inflicting serious injury, then unless they thought him insane at the time, they should convict him of murder. That was the substantial effect, but the charge to the jury dealt with some degree of elaboration with the need for the jury being satisfied beyond reasonable doubt of the issues which were anterior to the defence of insanity. In particular his Honour devoted some attention to the element of intention and to the bearing of intoxication upon the presence of a specific intent. If on that ground they did not find an intention to kill or inflict serious injury they might return a verdict of manslaughter. As to the defence of insanity his Honour told the jury that the accused must satisfy them upon a balance of probabilities that he suffered from a disease disorder or disturbance of the mind of such a character as to prevent him from knowing the physical nature of the act he did or knowing what he did was wrong, that is against the law. The learned judge enumerated

the points made on the evidence by the respective counsel with reference to the standard or test of insanity but he did not embark upon an explanation of the test or standard or upon an examination of its application to the special facts of the case or of the bearing upon the defence, of the considerations upon which reliance had been placed or which arose independently of the arguments employed or of the value or weight of these considerations.

An adjournment took place late in the afternoon before the charge to the jury was completed and the trial was resumed in the evening two or three hours later. In the earlier part of the summing up the learned judge had stated the burden and the standard of proof with respect to the commission of the act charged, the presence of the intention and the defence of insanity in a way to which no objection could properly be made. But unfortunately not very far from the close of his direction his Honour expressed himself thus :— "The third view you might take is that the evidence regarding drink does not prove either one of the two things which I have just mentioned—neither incapacity to form an intent nor a decrease in the mental standard to make him irresponsible, but merely shows that his mind was so much affected by liquor that he more easily gave way to his passions. If that is the view you take, the ordinary presumption prevails that a man intends the natural consequences of his acts, and in that case, if you think the natural inference is that he intended to kill or inflict a serious injury the accused is guilty of murder." For the appellant this passage was relied upon as a misdirection. Had it stood alone it is a statement which might have misled the jury. The first of the two sentences not only appears to place the burden of disproving intent on the accused but makes the test incapacity to form, rather than absence of, the intent. Upon the defence of insanity it might tend to lessen the probability of the jury grasping the part which the medical evidence assigned to alcohol in the production of an insane excitement and aggression in a person of inherited mental instability or deficiency. The second sentence tends still more to put the burden of proof on the accused with respect to the intent. The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous. For it either does no more than state a self evident proposition of fact or it produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation. Cf. *R.* v. *Steane* (1).

(1) (1947) K.B. 997, at pp. 1003, 1004.

H. C. OF A. 1952.

STAPLETON v. THE QUEEN.

Dixon C.J. Webb J. Kitto J.

But in the present case it must be borne in mind that a full correct direction on the burden of proof had been given and in any event the only defence raised for the appellant, so far as appears, was that he was insane at the time of the commission of the act. We should have seen no reason for interfering with the verdict if there had been nothing more in the case than this. But in relation to the defence of insanity we were unable to feel that the course which the case took was satisfactory. In support of that defence a strong case appears to us to have been made out. From the time the appellant left the cafe his whole behaviour was irrational. His anger at the trick played on Sheila Peckham may have set him off and prompted him to obtain his weapons. But once he had armed himself his mind seems to have gone off in other directions. His threats to Sheila Peckham and Mrs. Kruger, his forcing March at the point of the rifle to drive round looking for Ronald Brown, his shaking hands with March and his statements about blood flowing and going down in history are the obvious product of irrationality. They are none the less so because they were dangerous and homicidal. His sudden desertion of March was just as unreasoning. When he shot at Condon and Mannion he had no motive that could actuate a rational man. True it is that they were policemen and it is conceivable that that may have been his reason. But it must not be supposed that their dress made it evident to him that they were police even if there was light enough to see it. In any event it would still leave his act without any rational basis.

The family history of mental disability and abnormality strongly suggests inherited mental weakness. Then to this there is to be added the medical evidence.

No doubt it may be said that the medical evidence does no more than provide an explanation of the course of conduct of the appellant based upon study and experience of mental cases and an expert opinion as to the probable condition of the appellant's mind and faculties when he committed the act. But the experience of the witness was wide and his opinion of no inconsiderable weight. When the facts of the case are gone over and examined one by one in the light of that evidence the case in support of the defence of insanity becomes very strong indeed.

The jury had not the assistance which such an examination in the course of the charge would have provided and there appeared to be a distinct possibility that the verdict against the plea of insanity in spite of the strength of the case made was due to a failure on the part of the jury fully to appreciate the application to the strict and

somewhat difficult legal test of insanity of which some of the factors in the appellant's case were capable. The direction to the jury in relation to insanity contains with one exception which we shall mention nothing which could be said to be erroneous nor, when it is read in cold print, is there any lack of clarity. In many cases it would suffice. But on the whole we think that it would be unsafe to treat the verdict as based on an adequate and correct understanding on the part of the jury of the actual application of the legal test of insanity to the considerations arising upon the evidence and the facts of the case. A case of this description must turn very largely upon the jury's appreciation of what amounts to knowledge of the nature and quality of the act and of its wrongness. For it is evident that a jury although satisfied that no capacity existed in a particular accused to reason at all may think that at the back of it all was an awareness of the nature of the act and of the fact that other people might regard it as wrong more especially if that means regarded by the law as wrong. That would not lead to a conviction if the jury understands that, given a disease disorder or defect of reason, then it is enough if it so governed the faculties at the time of the commission of the act that the accused was incapable of reasoning with some moderate degree of calmness as to the wrongness of the act or of comprehending the nature or significance of the act of killing. See *Reg.* v. *Davis* (1), *Stephen* J., *R.* v. *Kay* (2), *Stephen* J. In *R.* v. *Porter* (3), this was expressed by *Dixon* J. as follows:—"The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong."

No doubt there are cases in which it would be no advantage to explain what is meant by knowing that the act was wrong to a jury. But in the present case to do so might have given the jury a better opportunity of grasping the considerations upon which a conclusion in favour of the prisoner depended.

The one exception in which the direction appears to us to be erroneous in what was positively said is in stating the question on the second branch of the legal test of insanity to be whether the

(1) (1881) 14 Cox C.C. 563.
(2) (1904) 68 J.P. Jo. 376.
(3) (1933) 55 C.L.R. 182, at pp. 189, 190.

H. C. OF A. 1952. STAPLETON v. THE QUEEN. Dixon C.J. Webb J. Kitto J.

accused knew that firing a shot at another person was against the law. This direction is in conformity with the decision of the Court of Criminal Appeal in *R.* v. *Windle* (1) but that decision is one that we are not prepared to accept or act upon. In the course of the century that has passed since the judges formulated the legal test of insanity for the information of the House of Lords in consequence of the acquittal of *Daniel M'Naghten* (2), there have been instances in which the same interpretation has been given to the words used by the judges in their third answer viz.: "that he did not know that he was doing wrong".

But the words in question formed part of a statement of the existing law as the judges knew it. They are not to be construed as a legislative declaration and, their meaning, if any difficulty exists about it, is best ascertained by looking at the authorities upon which the statement of the judges was founded. How the law had been understood for a century past appears from the reports of a number of trials not excluding the report of the trial of M'Naghten himself (*Reg.* v. *M'Naghten* (3)). What appears is that an incapacity to know the difference between good and evil was, if it was the outcome of mental disease, a test of irresponsibility. It is true that among the different expressions used there sometimes appears a reference to knowledge that the act committed was against the "laws of God and man". But the context leaves no doubt that this expression is referring to the canons of right and wrong and not to the criminal law. It is sufficient to refer to the following passages. In *R.* v. *Arnold* (4) which was tried in 1724 *Tracy* J. in his charge to the jury, said "If he (the prisoner) was under the visitation of God, and could not distinguish between good and evil, and (*sic*, not "or") did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of the man". In Lord *Ferrers'* trial (5) before the House of Lords, *Charles Yorke* as Solicitor General stated the law thus "if there be thought and design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the fact of the offence proved, judgment of the law must take place". In the case of Hadfield who was tried before Lord *Kenyon* C.J. in 1800 for shooting at George III. and acquitted on the ground of insanity at his Lord-

(1) (1952) 2 Q.B. 826.
(2) (1843) 10 Cl. & Fin. 200 [8 E.R. 718]; 1 Car. & K. 130 [174 E.R. 744].
(3) (1843) 4 State Trials N.S. 847.
(4) (1724) 16 State Trials 695, at p. 764.
(5) (1760) 19 State Trials 885, at pp. 947, 948.

ship's direction the test was stated by Sir *John Mitford* the Attorney-General (afterwards Lord *Redesdale*) as being "that competent understanding which enabled them to discern good from evil" (1). "Because there is a natural impression upon the mind of man, of the distinction between good and evil, which never entirely loses hold of the mind whilst the mind has any capacity whatever to exert itself" (2).

In the case of Bellingham who in 1812 was convicted of the murder of Mr. Spencer Perceval four days after the commission of the crime, Sir *James Mansfield* sitting with *Grose* J. and *Graham* B., told the jury that the law with respect to the defence of insanity was extremely clear. "If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. In order to support this defence, however, it ought to be proved by the most distinct and unquestionable evidence, that the criminal was incapable of judging between right and wrong. It must, in fact, be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature. There was another species of madness, in which persons were subject to temporary paroxysms, in which they were guilty of acts of extravagance; this was called lunacy. So long as they could distinguish good from evil, so long would they be answerable for their conduct. The single question was whether, when he committed the offence charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the law of his Country" (3). This celebrated trial and that of Bowler in the same year were afterwards the subject of strong criticism (see *Reg.* v. *Oxford* (4) and *M'Naghten's Case* (5). In *Bowler's Case* (6), *Le Blanc* J. summed up that it was for the jury to determine whether the prisoner when he committed the offence with which he stood charged, was or was not capable of distinguishing right from wrong or under the influence of any illusion in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit.

(1) (1800) 27 State Trials 1281, at p. 1287.
(2) (1800) 27 State Trials, at p. 1290.
(3) (1812) 1 Collinson on Lunatics 636, at pp. 671-673.
(4) (1840) 4 State Trials N.S. 497, at pp. 508, 509.
(5) (1843) 4 State Trials N.S. 847, at pp. 883, 884.
(6) (1812) 1 Collinson on Lunatics, at p. 673, (n).

H. C. OF A. 1952. STAPLETON v. THE QUEEN. Dixon C.J. Webb J. Kitto J.

It will be seen from the phrase of Sir *James Mansfield* C.J. that a tendency existed to add the law of man to the law of God as something the violation of which there must be capacity to comprehend and thus make it a double condition. In *R.* v. *Offord* (1), Lord *Lyndhurst* in 1831 stated the question simply " did he know that he was committing an offence against the laws of God and nature ? "

In *Reg.* v. *Oxford* (2), Lord *Denman* L.C.J. put the question to the jury—Whether there is disease in the mind of the person to show him incapable of distinguishing between right and wrong. Then he said " The object of the evidence laid before you is to show, in point of fact, that at the time he committed this act he was quite unaware of the nature and character and consequences of it, and therefore unconscious that in doing that particular act he was committing a crime ; if that is so, if you think he was so unconscious at the time, then undoubtedly you will be bound to say that he was insane and not responsible." At the trial of M'Naghten (3), *Tindal* L.C.J. who sat with *Williams* and *Coleridge* JJ. stopped the case and addressing the jury said—" the point I shall have to submit to you is whether on the whole of the evidence you have heard, you are satisfied that at the time the act was committed, for the commission of which the prisoner now stands charged, he had that competent use of his understanding as that he knew that he was doing, by the very act itself, a wicked and a wrong thing. If he was not sensible at the time he committed that act, that it was a violation of the law of God or of man, undoubtedly he was not responsible for that act, or liable to any punishment whatever flowing from that act." And again, " . . . if on balancing the evidence in your minds you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent, and liable to all the penalties the law imposes ".

It will be seen that when, in consequence of the acquittal of M'Naghten, the House of Lords " determined to take the opinion of the Judges on the law governing such cases " (4) the law in question had taken a traditional form. The judges were not asked to improvise a rule but to formulate the rule that existed and that is all they purported to do. The critical thing in the traditional test was capacity to distinguish right and wrong that is of course in reference to the act committed. In cases of murder the difference between capacity to understand the wrongness and the legality of

(1) (1831) 5 Car. & P. 168, at p. 168 [172 E.R. 924, at p. 925].
(2) (1840) 4 State Trials N.S. 497, at pp. 553, 554.
(3) (1843) 4 State Trials N.S., at p. 925.
(4) (1843) 10 Cl. & Fin., at pp. 203, 209-211 [8 E.R., at pp. 720, 722, 723].

the act often might not be of much significance. But in a case like Hadfield's it might be decisive. For Hadfield's mania led him to do the very act for the purpose of causing others to take his life by judicial process. The first question put to the judges relates to the effect of what at that time were often described as partial delusions. The question itself required the assumption that " the accused knew he was acting contrary to law ". This phrase is taken up in the answer and doubtless it is for that reason that the view arose that capacity to know the unlawfulness of the act was the test. But if the answer to the second and third questions is examined it will be seen that this cannot be so. The careful limitations imposed by the judges in the first answer show that they are not laying down a general proposition, as they do in answer to the second and third questions, but are dealing with the more particular hypothesis formulated. The first answer is as follows. " In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law ; by which expression we understand your Lordships to mean the law of the land." The material parts of the answer to the two questions which follow are as follows :—" it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing ; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong : which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction ; whereas the law is administered upon the

H. C. OF A. 1952.

STAPLETON v. THE QUEEN.

Dixon C.J. Webb J. Kitto J.

principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require".

It will be seen from the answer to this question that the learned Judges were very much alive to the distinction between capacity to know the law of the land and capacity to know that the act committed was one the accused ought not to do. Indeed, the contrast is clearly brought out in the express statement that the accused must be conscious that the act was one which he ought not to do and at the same time it must be contrary to law. It would be strange if *Tindal* L.C.J. so far departed from his charge to the jury as to adopt any other criterion. If the very careful and acute reply of *Maule* J. to the questions asked by the House of Lords is studied, no doubt can exist that his view was that the unsoundness of mind of the prisoner must render him incapable of knowing right from wrong, not legality from illegality. In his answer to the first question, *Maule* J. is very precise in limiting the question by the words "for that reason only", so that his answer is restricted to the case of a prisoner who does an act knowing it to be contrary to law under the influence of insane delusion with a view to redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit.

Only a few months after the Judges had advised the House of Lords in M'Naghten's case it fell to *Maule* J. to give a direction to a jury on a defence of insanity. The case is *Reg.* v. *Higginson* (1). *Maule* J. said:—"If you are satisfied that the prisoner committed this offence, but you are also satisfied by the evidence that, at the time of the committing of the offence, the prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground; but if you think that, at the time of the committing of the offence, he did know right from wrong, he is responsible for his acts, although he is of weak intellect."

In the following year *Tindal* L.C.J. in the case *Reg.* v. *Vaughan* (2), directed a jury concerning a defence of insanity made to an indictment for larceny. His direction was as follows:—"It is not mere

(1) (1843) 1 Car. & K. 129, at p. 130 [174 E.R. 743, at p. 744].

(2) (1844) 1 Cox C.C. 80.

eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shewn that the prisoner had no competent use of his understanding so as to know that he was doing a wrong thing in the particular act in question." Clearly enough their Lordships both considered the contrast to be between right and wrong in the general sense and not lawfulness and unlawfulness. From this time there are many reports of charges to juries consistently making the test depend upon the distinction between right and wrong. For example, in *Reg.* v. *Stokes* (1), *Rolfe* B. directed a jury that "Every man is held responsible for his acts by the law of this country if he can discern right from wrong." In *Reg.* v. *Davies* (2), a case in which the offence charged was arson *Crompton* J. said to a jury:—"Do you find that the prisoner set the place on fire? If you do, are you of opinion that he knew right from wrong? It is not sufficient that you should think he did it from being in a reckless depressed state of mind. You must find that, from mental disease, he did not know right from wrong." In *Reg.* v. *Richards* (3), *Crowder* J. gave a direction thus "It is for you to say whether, at the time of the act done, the prisoner knew the nature of the act done, or that it was a wrong act." In *Reg.* v. *Haynes* (4), in a case where irresistible impulse was relied upon in support of the defence of insanity to a charge of murder, *Bramwell* B. ended his charge—"We must therefore return to the simple question you have to determine—did the prisoner know the nature of the act he was doing; and did he know that he was doing what was wrong?" In *Reg.* v. *Law* (5), *Erle* C.J. asked the jury whether they were of the opinion that the prisoner was in a state to know that she was doing what was wrong. He did, however, include in his summing up the statement "It is for you to say whether, upon such evidence, you consider she was in such a state as to know the nature of her actions, and to be aware that she was committing a crime". The charge was murder and the use of the word "crime", is natural enough and does not mean that capacity to know the legal quality of the act was the test. There are, however, on the other side one or two statements that wrong means contrary to law. In particular, in the case of *Reg.* v. *Dove*, *Bramwell* B. is reported in "The Times" of July 21st of that year as having said, after explaining that the prisoner must prove that he did not know that he was doing what was wrong, "Of course, that means

(1) (1848) 3 Car. & K. 185, at p. 188 [175 E.R. 514, at p. 515].
(2) (1858) 1 F. & F. 69, at p. 71 [175 E.R. 630, at p. 631].
(3) (1858) 1 F. & F. 87 [175 E.R. 638].
(4) (1859) 1 F. & F. 666, at p. 667 [175 E.R. 898, at p. 899].
(5) (1862) 2 F. & F. 836, at pp. 837, 839 [175 E.R. 1309, at pp. 1310, 1311].

H. C. OF A. 1952.

STAPLETON v. THE QUEEN.

Dixon C.J. Webb J. Kitto J.

doing an act prohibited by law; because a man might imagine that killing was a right thing to do, and it might be contrary to law". The true view, however, appears to us to have been that which we have stated. It was admirably set out in *Pope's Treatise on the Law and Practice of Lunacy*, 2nd ed. (1890), p. 385. That author wrote:—"Accordingly, in a reasonable system of law, that person only will be criminally responsible who, at the moment of committing a criminal act, is capable of remembering that the act is wrong, contrary to duty, and such as in any well-ordered society would subject the offender to punishment. It is by a reference, such as this, to principles of general morality rather than to the enactments of positive law that the courts of this country have been content to test criminal responsibility in individual cases. That ignorance of the positive law cannot be pleaded as an excuse for crime, is a maxim necessary to the safety of society, and sufficiently near the truth for practical purpose. It would, therefore, be misleading to raise the issue of capacity or incapacity to know that a particular act is contrary to the law of the land. But a judge may, without fear of misleading, direct the jury that the accused is not responsible for his criminal acts if he has not the mental capacity to know that the particular act is wrong, or, in other words, if he cannot distinguish between right and wrong in regard to the particular act; and this is accordingly the form commonly adopted in practice."

The first occasion on which the subject seems to have been dealt with by a Court of Criminal Appeal was in the case of *R.* v. *Codere* (1). The judgment which was delivered by Lord *Reading* C.J. is not free from ambiguity but we think that the Court took the same view as we have expressed. And that is the view of the case taken by text writers. *Russell* on *Crime*, 10th ed. (1950), vol. I., p. 56; *Kenny, Outlines of Criminal Law*, New Ed. by Turner (1952), p. 69. After some discussion of the matter, Lord *Reading* says (2): "It is conceded now that the standard to be applied is whether according to the ordinary standard adopted by reasonable men the act was right or wrong". This looks definite and decisive. But Lord *Reading* goes on: "The difficulty no doubt arises over the words 'conscious that the act was one which he ought not to do', but, looking at all the answers in M'Naghten's case it seems that if it is punishable by law it is an act which he ought not to do, and that is the meaning in which the phrase is used in that case". Then follows a statement that "there may be minor cases before a court of summary jurisdiction where that view may be open to

(1) (1916) 12 Cr. App. R. 21.

(2) (1916) 12 Cr. App. R., at pp. 27-29.