[HIGH COURT OF AUSTRALIA.]

HELTON . . . . . APPELLANT;
DEFENDANT,

AND

ALLEN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *July* 29-31; *Sept.* 2.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Evidence—Onus of proof—Issue of criminal offence arising in civil action—Direction unduly accentuating civil standard—New trial—Will—Beneficiary alleged to have killed testator—Exclusion from benefit—Acquittal on criminal charge—Conclusiveness—Admissibility.

A testatrix died of strychnine poisoning, and the person who by her last will was appointed executor and constituted residuary devisee and legatee was tried upon indictment for her murder. He was acquitted. Notwithstanding his acquittal proceedings were brought by one of her next of kin for the purpose of establishing that in fact he did unlawfully kill the testatrix and on that ground was disabled from occupying the office of executor or taking under the will. The question was tried with a jury. The evidence in support of the issue was entirely circumstantial. The judge in the course of a charge to the jury adverse to the defendant emphasized the difference between the standards of proof upon a criminal charge and upon a civil issue and laid weight on the slightness of the preponderance of probability upon which they might find that he poisoned the testatrix. After deliberating upon their verdict for some time the jury sought a further direction upon the "point about probabilities." The judge gave a further direction, which amounted to an instruction to find homicide if they considered there was any greater probability favouring that conclusion. The jury found that the defendant unlawfully killed the testatrix.

Held (1) that the circumstantial evidence was sufficient to support such a finding; (2) by *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. expressing no concluded opinion), that the defendant's acquittal did not prevent the application of the rule of public policy excluding from the office of executor and from benefits under a will a person who unlawfully killed a testator and did not operate to conclude the issue of the defendant's innocence or guilt and was not even admissible as an evidentiary fact upon that issue; but (3) that there had been a mistrial because, though the standard of persuasion required in support of an indictment did not apply, nevertheless the effect of the judge's direction and further direction would be to lead the jury (*a*) to disregard the gravity of the issue and to lose sight of the consideration that reasonable satisfaction is not independent of the nature of the fact to be proved so that

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the graver the allegation the greater should be the strictness of proof demanded, and (*b*) to think that they should make a mere comparison of the probabilities of guilt with those of innocence rather than to consider whether they were really satisfied that the defendant did kill the testatrix.

Observations of Lord *Atkin* in *New York* v. *Heirs of Phillips Deceased*, (1939) 3 All E.R. 952, at p. 955, explained.

Decision of the Supreme Court of Queensland (Full Court): *In re Roche*; *Allen* v. *Helton*, (1940) Q.S.R. 1, reversed.

APPEAL from the Supreme Court of Queensland.

The appellant, Edwin Claude Helton, was tried twice for the murder of a woman, Margaret Jane Roche, on 10th September 1937. On his first trial he was convicted. His conviction was, however, quashed on the ground that there had been a mistrial and an order was made for a new trial. On his second trial he was acquitted.

Under Roche's will the greater part of her property was bequeathed to Helton and he was appointed her executor. A suit was brought by Isabella Allen, the mother of Roche and one of the persons entitled in the event of an intestacy to share in the estate of Roche, wherein she propounded the will but claimed that it should be pronounced against in so far as it included provisions in favour of and for the benefit of Helton, in particular his appointment as an executor and trustee of the will and the residuary gift in his favour, and that a gift should be substituted in favour of Roche's next of kin as upon an intestacy. She alleged, first, that the will was obtained by coercion or undue influence, and, secondly, that Helton had unlawfully brought about the death of Roche and therefore was disentitled to any benefits under the dispositions of her will. Helton, by a counterclaim, propounded the will in solemn form. The suit was tried with a jury. The issue of undue influence was not supported but the jury found that Helton did unlawfully kill Roche. The judgment of the court pronounced for the validity of the will of Roche, executed on 5th April 1937, but declared that Helton was not entitled to hold or enforce any right under the will and that any right or benefit which but for the judgment would have passed to Helton under the will passed to the person or persons who would have been entitled thereto if there had been a lapse of Helton's interest under the will: *In re Roche*; *Allen* v. *Helton* (1).

An appeal by Helton to the Full Court of the Supreme Court failed: *In re Roche*; *Allen* v. *Helton* (2).

From that decision he appealed to the High Court.

(1) (1939) Q.S.R. 221. (2) (1940) Q.S.R. 1.

The evidence before the jury, the directions of the learned trial judge and the grounds of appeal to the High Court sufficiently appear in the judgments hereunder.

W. G. Mack, for the appellant. In proceedings of this nature it is necessary to show that there has been a conviction in criminal proceedings, or that circumstances exist which prevent the defendant from being brought to trial. Proceedings of this nature will not lie against a person who has been acquitted. The question of guilt or innocence cannot be litigated if the matter has been the subject of a criminal charge (*In the Estate of Hall*; *Hall* v. *Knight and Baxter* (1); *In re Houghton*; *Houghton* v. *Houghton* (2)). A verdict of acquittal is conclusive as to innocence. Public policy does not prevent a person so acquitted from benefiting from the estate of the deceased (*In re Pitts*; *Cox* v. *Kilsby* (3)). In *In re Sigsworth*; *Bedford* v. *Bedford* (4) the murderer having committed suicide, it was not possible to bring him before the court on a criminal charge. The decision in *Beresford* v. *Royal Insurance Co. Ltd.* (5) is consistent with the proposition now put to this court. The principle set forth in *Hales* v. *Petit* (6) as to attaint is applicable in order to ascertain whether or not a crime had been committed and whether the person against whom the crime is supposed to have been committed had died either a natural death or had committed suicide. The effect of an acquittal was discussed in *Davis* v. *Gell* (7). The trial judge misdirected the jury in regard to the quantum of proof. A crime alleged, as here, in a civil action by one party against another party thereto must be proved in accordance with the standard of proof required under the criminal law (*New York* v. *Heirs of Phillips Deceased* (8); *Taylor* on *Evidence*, 12th ed. (1931), vol. 1, pp. 106, 107), although if the allegation be in respect of a person not a party to the action the crime may be proved on a balance of probabilities (*Doe d. Devine* v. *Wilson* (9); *Taylor* on *Evidence*, 12th ed. (1931), vol. 1, p. 107). A crime alleged in a civil action must be proved beyond a reasonable doubt (*Statham* v. *Statham* (10); *Gaskill* v. *Gaskill* (11); *Hire Purchase Furnishing Co. Ltd.* v. *Richens* (12); *Morris* v. *Davies* (13); *Chalmers*

(1) (1914) P. 1, at pp. 4, 6.
(2) (1915) 2 Ch. 173, at p. 178.
(3) (1931) 1 Ch. 546, at p. 550.
(4) (1935) Ch. 89.
(5) (1938) A.C. 586.
(6) (1562) 1 Plowd. Com. 253, at p. 258 [75 E.R. 387, at p. 395].
(7) (1924) 35 C.L.R. 275.
(8) (1939) 3 All E.R. 952, at p. 955.
(9) (1855) 10 Moo. P.C. 502, at p. 532 [14 E.R. 581, at pp. 592, 593].
(10) (1929) P. 131, at p. 139.
(11) (1921) P. 425, at p. 433.
(12) (1887) 20 Q.B.D. 387, at p. 389.
(13) (1837) 5 Cl. & Fin. 163, at p. 215 [7 E.R. 365, at p. 385].

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v. *Shackell* (1); *Thurtell* v. *Beaumont* (2); *Stephen, Digest of the Law of Evidence*, 5th ed. (1899), p. 108, art. 94). The evidence does not show that the deceased was unlawfully killed by the appellant. Communications between the appellant and his solicitor, in the absence of a waiver of privilege by the appellant, were wrongly admitted in evidence (*French* v. *French and Kelleher* (3)).

Murphy (with him *Lynam*), for the respondent. Evidence was given in these proceedings which was not available at the trial of the criminal charge. There was sufficient evidence to justify the jury's finding. That finding should not be disturbed (*Major* v. *Bretherton* (4); *Owners of the P. Caland and Freight* v. *Glamorgan Steamship Co. Ltd.* (5)). The conduct of the appellant at the material times is of special significance (*Wills* on *Circumstantial Evidence*, 5th ed. (1902), pp. 366, 367, 415-419). The facts constituting the crime and the punishment are two entirely different concepts (*Halsbury's Laws of England*, 2nd ed., vol. 9, p. 9). It is a rule of public policy that a person is precluded from obtaining a benefit by his own wrongful act (*Cleaver* v. *Mutual Reserve Fund Life Association* (6); *In the Estate of Crippen* (7); *In the Estate of Hall*; *Hall* v. *Knight and Baxter* (8); *Whitelaw* v. *Wilson* (9); *In re Sigsworth* (10); *Beresford* v. *Royal Insurance Co. Ltd.* (11); *Lundy* v. *Lundy* (12)). The application of the rule does not depend upon whether or not the person has been convicted of his wrongful act. In *Ham* (*Administratrix*) v. *Grand Trunk Railway Co.* (13) it was held that the acquittal on the criminal charge of the person concerned did not constitute any answer to the action. An acquittal, unlike a conviction, does not ascertain any precise fact (*Phipson* on *Evidence*, 7th ed. (1930), p. 395); it is impossible to say upon what the jury acted. Acquittal is not proof of innocence (*Davis* v. *Gell* (14)). The point determined in the criminal proceedings is not the point in issue in

(1) (1834) 6 Car. & P. 475 [172 E.R. 1326].
(2) (1823) 1 Bing. 339, at p. 340 [130 E.R. 136, at p. 137].
(3) (1910) Q.S.R. 190, at pp. 199, 200.
(4) (1928) 41 C.L.R. 62, at p. 70.
(5) (1893) A.C. 207, at pp. 215, 216.
(6) (1892) 1 Q.B. 147, at p. 156.
(7) (1911) P. 109.
(8) (1914) P. 1.
(9) (1934) Ont. L.R. 415; 3 D.L.R. 554.
(10) (1935) 1 Ch. 89.
(11) (1937) 2 K.B. 197; (1938) A.C. 586, at pp. 598, 599.
(12) (1895) 24 Can. S.C.R. 650, at p. 652.
(13) (1862) 11 Up. Can. C.P.R. 86.
(14) (1924) 35 C.L.R., at pp. 290, 296.

this action (*R.* v. *Seery* (1))—see also *Virgo* v. *Virgo* (2) and *Spencer Bower* on *Res Judicata* (1924), p. 139. The acquittal of the appellant was *res inter alios acta* (*R.* v. *Hutchings* (3)). The respondent was not a party or privy to the criminal charge brought against the appellant; therefore she should not be bound or prejudiced by the verdict thereon (*Roscoe's Evidence in Civil Actions*, 20th ed. (1934), vol. 1, p. 209; *Selwyn's Law of Nisi Prius*, 13th ed. (1869), vol. 1, p. 686; *Taylor* on *Evidence*, 12th ed. (1931), vol. 2, p. 1065, par. 1693; *Phipson* on *Evidence*, 7th ed. (1930), p. 404; *Caine* v. *Palace Steam Shipping Co.* (4)). In the criminal proceedings the respondent had neither the right nor the opportunity of obtaining the redress sought by her in this action (*Midland Railway Co.* v. *Martin & Co.* (5)). The appellant, by his counsel, deliberately refrained from raising the point regarding acquittal, therefore he must be considered as having waived the point and is precluded from now asserting it (*Rowe* v. *Australian United Steam Navigation Co. Ltd.* (6); *Shepherd* v. *Felt and Textiles of Australia Ltd.* (7)). The jury was correctly directed as to the quantum of proof (*New York* v. *Heirs of Phillips Deceased* (8)). The law on this point is correctly stated in *Briginshaw* v. *Briginshaw* (9) and *In re a Solicitor*; *Ex parte the Prothonotary* (10). The direction was not objected to on behalf of the appellant. There are only two standards of proof known to the law: (*a*) the criminal standard of proof, proving beyond reasonable doubt, and (*b*) the civil standard, on the balance of probabilities (*Mutual Life Insurance Co. of New York* v. *Moss* (11); *Cooper* v. *Slade* (12); *Doe d. Devine* v. *Wilson* (13); *Brown* v. *The King* (14)). In view of the decisions in *Sodeman* v. *The King* (15) and *Briginshaw* v. *Briginshaw* (16) the statements made in *Taylor* on *Evidence*, 12th ed. (1931), vol. 1, p. 106, par. 112, should not now be regarded as sound in law.

(1) (1914) 19 C.L.R. 15, at pp. 16, 17.
(2) (1893) 69 L.T. 460.
(3) (1881) 6 Q.B.D. 300, at p. 304.
(4) (1907) 1 K.B. 670, at p. 677.
(5) (1893) 2 Q.B. 172, at p. 174.
(6) (1909) 9 C.L.R. 1, at pp. 10, 24.
(7) (1931) 45 C.L.R. 359, at p. 390.
(8) (1939) 3 All E.R. 952.
(9) (1938) 60 C.L.R. 336, at pp. 360-363.
(10) (1939) 56 W.N. (N.S.W.) 53.
(11) (1906) 4 C.L.R. 311, at pp. 318, 320-322.
(12) (1858) 6 H.L.C. 746, at pp. 772, 787 [10 E.R. 1488, at pp. 1498, 1499].
(13) (1855) 10 Moo. P.C., at pp. 531, 532 [14 E.R., at p. 592].
(14) (1913) 17 C.L.R. 570, at pp. 584-586, 595.
(15) (1936) 55 C.L.R. 192.
(16) (1938) 60 C.L.R. 336.

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W. G. Mack, in reply. If a new trial be granted because of misdirection it should be limited to the issue of unlawful killing (*Tolley* v. *J. S. Fry & Sons Ltd.* (1)).

Cur. adv. vult.

Sept. 2.

The following written judgments were delivered :—

RICH J. Unfortunate as the result may be, I feel constrained to concur in the view that the action must go down for a new trial. The impression given by a consecutive reading of the transcript of the proceedings at the trial of Charleville is that the responsibility involved in inferring from the circumstantial evidence that Helton poisoned Mrs. Roche was so continually minimized and at the same time the cogency at every point of the case against him so stressed that, when finally after a long retirement the jury sought further instruction upon the " point of probabilities ", the learned judge's direction, to the effect that if they thought the balance of probabilities was greater in favour of the affirmative conclusion they should find he committed homicide, was bound to prejudice Helton. The whole matter must then have appeared to them as one where the slightest preponderance of opinion in favour of the view that Helton was a poisoner was enough to make it necessary to find against him. It would be scarcely possible for them to understand that they must come to a reasonable satisfaction of the truth of a grave allegation and that whether the circumstances proved so satisfied them was a matter for grave and responsible consideration. Rather they must have felt that they were to treat the issue of no more consequence than a petty debt. I do not for a moment suppose that there has been any impairment of the rule laid down in *Doe d. Devine* v. *Wilson* (2) that in a civil proceeding involving even a direct allegation of crime " the reasons for suffering a doubt to prevail against the probabilities would not . . . apply." Lord *Atkin* in *New York* v. *Heirs of Phillips Deceased* (3) cannot be understood as meaning anything contrary to a rule established so long by such high authority. But it is quite another thing to press

(1) (1931) A.C. 333.
(2) (1855) 10 Moo. P.C.C., at p. 532 [14 E.R., at p. 593].
(3) (1939) 3 All E.R., at p. 955.

upon a jury's attention in a serious matter of this sort the smallness of the preponderance of probability which should lead them to find homicide and at the same time to present a most unfavourable picture both of the man and the circumstances, though no one can say that an unusually strong circumstantial case was made out against him. Indeed the poisoning case where that can be said must be rare.

It is to be hoped that the venue of the new trial will be changed.

The appeal should be allowed with costs, the plaintiffs should pay the costs of the appeal to the Supreme Court. The costs of the abortive trial should abide the result of the new trial.

STARKE J. Appeal from a judgment of the Supreme Court of Queensland, which dismissed an appeal from a judgment in that court dated 4th July 1939 which pronounced for the validity of the will of Margaret Jane Roche deceased, executed on 5th April 1937, but declared that the appellant Helton was not entitled to take, hold or enforce any right under the will and was incapable of acting as executor or trustee under the will and that any right or benefit which but for the judgment would have passed to Helton under the will passed to the person or persons who would have been entitled thereto if there had been a lapse of Helton's interest under the will.

The action in which these judgments were given was unusual in form. The plaintiff, Isabella Allen—the respondent here—was the mother of the deceased and one of the persons entitled in the event of an intestacy to share in the estate of the deceased. She propounded the will but claimed that it should be pronounced against in so far as it included provisions in favour of and for the benefit of Helton—the defendant in the action and the appellant here—in particular, his appointment as an executor and trustee of the will and the residuary gift in his favour, and that a gift should be substituted in favour of the deceased's next of kin as upon an intestacy. Helton, on the other hand, by a counterclaim, propounded the will in solemn form. The parties have raised no objection to this form of proceedings and apparently it was sanctioned in some preliminary proceedings in the Supreme Court.

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The action was tried before a jury to which were submitted the questions following and upon which the jury made the findings set forth :—

Question.	Finding.
1. Did the defendant procure the inclusion in the will of Margaret Jane Roche of the disputed parts thereof by undue influence ?	No.
2. Did the defendant unlawfully kill Margaret Jane Roche ?	Yes.

The finding upon the first question has not been challenged but the appellant challenges the finding upon the second question upon these grounds :—(*a*) That the evidence was such that no jury could reasonably make the finding that was made ; in other words, that there was no evidence to go to the jury upon the second question. (*b*) That the finding is against the weight of evidence. (*c*) That the trial judge misdirected the jury. (*d*) Non-reception of evidence.

In my opinion the evidence was such that a jury might reasonably make the finding. Helton and the deceased had been living in adultery for some years. He had obtained considerable sums of money from her, about £1,400, and the gift to him under her will is of property of very considerable value ; not less, I should think, than £5,000. The will was prepared by solicitors for the deceased and its contents were known to Helton. On 10th September 1937 Helton and the deceased had lunch together at the hotel which the deceased conducted, and where both the deceased and the appellant substantially lived together, and partook of some tinned salmon. About four thirty o'clock in the afternoon of the same day the deceased was taken ill and removed to hospital, where she died about six o'clock. Helton assisted the medical attendant to remove her to hospital. The symptoms exhibited by the deceased were consistent with poisoning by strychnine and a post-mortem examination established that her death was due to strychnine poisoning and about one-sixth of a grain was found, upon analysis, in the contents of her stomach. The remains of the tinned salmon were taken by the police who investigated the case, but there is no evidence that any strychnine was found in the salmon. But there was evidence of the finding of alophen pills, which were used by the

deceased, and that each pill contained about one-eightieth of a grain of strychnine. Evidence was also given by an old pensioner who resided at the hotel and did odd jobs for the deceased. The shorthand notes of the evidence record the following conversation in July 1937 between this old man and Helton:—"Question: Was there anything happened in July of that year as far as Helton was concerned? Do you remember some conversation about your vegetable garden? Answer: Yes. One morning I went over there and when I went into the bakehouse to him he said, 'I hunted the birds out of the garden, Bill.' I said, 'Yes? I have just hunted them now. They have pulled up every cabbage plant I have put out.' So he said, 'Well, I have some strychnine and they will have to be poisoned.'"

And there was evidence that Helton was seen about the hotel somewhere about four in the afternoon of the day of the death of the deceased.

The other material evidence may be summarized:—That Helton had quarrelled with the deceased about luncheon time on the day of her death, that he came across to the hotel about the time the deceased became ill, that he feared he would be suspected of causing the death of the deceased, consulted his solicitor on the telephone, and denied various acts and conversations attributed to him by witnesses called in support of the respondent's case and stated he had not seen her since the luncheon hour until he came across to the hotel when she became ill.

Helton had opportunity to poison the deceased and motive, arising from the terms of her will, might also be attributed to him. But the case depends upon the conversation with the old-age pensioner. Helton's version differed. According to him, he told the old-age pensioner that he had hunted the birds from his vegetable garden, who said:—"Yes. I hunted them myself this morning. They are a bloody nuisance. They want poisoning." However it was for the jury to say which was the correct version of this conversation. Assume therefore that Helton said in July 1937 that he had some strychnine in his possession and that the birds would have to be poisoned, is that a reasonable foundation for an inference that Helton had strychnine in his possession about the time the deceased

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was seized with illness in September 1937, exhibiting symptoms of strychnine poisoning? On the whole, I think the inference might reasonably be drawn. It appears from Helton's statement that he had access to strychnine and what he had or had obtained in July he might have or have obtained in September. The further inference that he administered it to the deceased depends upon other facts. He had the opportunity, and a possible motive, arising from the terms of the will of the deceased. Coupled with other facts, which have been already indicated, a reasonable basis is established for making the further inference. A like conclusion was reached by the Supreme Court of Queensland (*R.* v. *Helton* (1)).

And if there was evidence upon which the jury might reasonably find that Helton administered strychnine to the deceased the objection that the finding is against the weight of evidence, that is, that viewing the evidence reasonably, the jury could not so find, is untenable, for there is no evidence countervailing that upon which the jury reached its conclusion.

The objection that the trial judge misdirected the jury is in truth based upon the argument that the decision of this court in *Briginshaw* v. *Briginshaw* (2) was pushed to extreme lengths. After the judge's charge, the jury retired for some hours and then returned into court for further direction. The transcript records the further direction as follows:—"His Honour: I understand that there is some re-direction that you desire? Foreman of the jury: Yes. We should like a further direction on question No. 2. His Honour: In what regard? Foreman of the jury: The point about probabilities. His Honour: If I understand you, what you probably want a direction about—correct me if I am wrong and ask me later if you want any further direction—the position is this: this is a civil action and being a civil action, unlike a criminal action, your duty is to decide it upon the balance of probabilities. That means to say, gentlemen—let me illustrate in this way the difference between a criminal action and a civil action: in a criminal action if you have what we call a 'reasonable doubt,' that is to say, the type of doubt that a reasonable man has, then you give the benefit of it to the prisoner and you acquit him, the reason for that being

(1) (1939) Q.S.R. 1.

(2) (1938) 60 C.L.R. 336.

that under our law you give every chance to the prisoner. It is much more important from the point of view of criminal law that a hundred guilty men should escape than that one innocent man should suffer. So in a criminal trial you give the benefit of the reasonable doubt to the prisoner; you have to find him guilty beyond a reasonable doubt. But in a civil trial it is done on what we call the 'balance of probabilities.' If you decide that there is a preponderance of probability—probability gentlemen—in favour of the plaintiff's case, then you find for the plaintiff. By a preponderance of probability, that means that there is a greater weight of probability in his favour—then you find for the plaintiff. If not, you find for the defendant. Can I assist you any more? Foreman of the jury: No. I think it is clearly outlined to us now. His Honour: That is what you wanted to know? Foreman of the jury: Yes, thank you."

There is much in *Briginshaw* v. *Briginshaw* (1) which lends colour to this further direction. But it seriously misleads a jury when dealing with grave crime or fraud in civil cases. As *Jordan* C.J. pointed out in *In re a Solicitor* (2), a judicial tribunal in a civil case is ordinarily satisfied of the existence of a fact if it finds that the preponderance of evidence points to its existence. But the nature of the fact to be proved affects as a matter of common sense the process by which reasonable satisfaction is attained. Hence, where the matter to be proved is a grave fraud or a crime, the tribunal ought not to be satisfied that it has been established unless the preponderance of evidence is so substantial as to establish it clearly. The passage from the speech of Lord *Atkin* in *New York* v. *Heirs of Phillips Deceased* (3), which some of the learned judges in the Supreme Court of Queensland thought inconsistent with *Doe d. Devine* v. *Wilson* (4) and *Briginshaw* v. *Briginshaw* (1), appears to me in line with those cases and the observations of *Jordan* C.J. (2), in the case mentioned. "The only complaint made of his judgment in point of law," said the noble and learned Lord, "is that he laid down that there was a heavy onus on the plaintiffs and that it was necessary for them to prove their case as clearly as they would have

(1) (1938) 60 C.L.R. 336.
(2) (1939) 56 W.N. (N.S.W.) 53.
(3) (1939) 3 All E.R. 952.
(4) (1855) 10 Moo. P.C. 502 [14 E.R. 581].

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to prove it in a criminal proceeding. Their Lordships consider this criticism to be ill-founded. The proposition of the judge has been laid down time and again in the courts of this country; and it appears to be just and in strict accordance with the law" (1).

The learned trial judge in the present case did over-accentuate the rule of evidence in relation to the preponderance of probabilities in a civil case at a very critical stage of the consideration of this case by the jury. The direction was unfortunately calculated to influence the jury, and that it may have so influenced the jury cannot be doubted. Much as a new trial of this case is to be deplored —it took seven days to try and another five days upon appeal to the Supreme Court of Queensland and to this court—still no method of correcting the error is available other than an order for a new trial.

It is unnecessary to consider the objection based upon the non-reception of evidence, but as a new trial is to be had, perhaps some reference to the objection is desirable. It was stated at the Bar that Helton was indicted for the murder of the deceased and was acquitted and that the learned trial judge would not admit evidence of his acquittal. But no formal and proper evidence of his acquittal was tendered, and for this reason the objection cannot be sustained (*National Mutual Life Association of Australasia Ltd.* v. *Godrich* (2); *Campbell* v. *Loader* (3)). The well-known statement of *Blackburn* J. in *Castrique* v. *Imrie* (4) that the conviction of a person for forgery, though conclusive as to that person being a convicted felon, is not only not conclusive but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged, suggests that the judgment of acquittal of Helton on the indictment for murder of the deceased would be inadmissible in the present proceedings. But I express no concluded opinion upon the subject and merely refer to *Cleaver* v. *Mutual Reserve Fund Life Association* (5), *In the Estate of Crippen* (6), *In the Estate of Hall*; *Hall* v. *Knight and Baxter* (7), in which convictions were admitted in evidence and acted upon. It

(1) (1939) 3 All E.R., at p. 955.
(2) (1910) 10 C.L.R. 1, at p. 39.
(3) (1865) 34 L.J. Ex. 50: 3 H. & C. 520 [159 E.R. 634].
(4) (1870) L.R. 4 H.L. 414, at p. 434.
(5) (1892) 1 Q.B. 147.
(6) (1911) P. 108.
(7) (1914) P. 1.

may be that an acquittal ascertains no fact, as does a conviction, but, if a conviction cannot be "blowed off by a side wind" (*Vanderbergh* v. *Blake* (1); *Bynoe* v. *Bank of England* (2)), it may perhaps be considered high public policy that the constitutional verdict "not guilty" should also "not be blowed off by a side wind." However, as I have said, I express no concluded opinion upon the subject.

The appeal should be allowed and a new trial ordered. The appellant must have, I suppose, the costs of the appeal to the Supreme Court of Queensland in Full Court and to this Court. But the costs of the abortive trial should abide the result of the new trial.

DIXON, EVATT AND MCTIERNAN JJ. The appellant, Helton, was tried twice for the murder of a woman named Roche on 10th September 1937. On his first trial he was convicted. His conviction was, however, quashed on the ground that there had been a mistrial and an order was made for a new trial. On his second trial he was acquitted.

Under the dead woman's will the greater part of her property was bequeathed to him and he was appointed her executor. Her relations were not prepared to submit to his proving the will and taking the property and they accordingly instituted a suit for the purpose of establishing first that the will was obtained by coercion or undue influence and secondly that Helton had unlawfully brought about the death of Mrs. Roche and therefore was disentitled to any benefits under the dispositions of her will. The suit was tried with a jury. The issue of undue influence was not supported, but the jury found that Helton did kill Mrs. Roche. An appeal by Helton to the Supreme Court failed and now he carries an appeal to this court.

His grounds, briefly stated, are that his acquittal makes it impossible to apply the rule of public policy excluding a homicide from taking property under the will or on the intestacy of his victim; that at all events his acquittal should have been admitted in evidence as a probative fact; that the evidence was insufficient to warrant a finding that he unlawfully killed Mrs. Roche; and that the jury

(1) (1661) Hardres 194 [145 E.R. 447]. (2) (1902) 1 K.B. 467, at p. 470.

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were misdirected as to the standard of proof which they should demand of those supporting that allegation or, at least, were misled as the manner in which they should arrive at a finding.

The finding that Helton caused the death of Mrs. Roche is the foundation of the case and, if the evidence does not justify the finding, the remaining questions do not arise. The sufficiency of that evidence is, therefore, the first matter for discussion.

The material events took place at Augathella near Charleville. Mrs. Roche conducted a public house there and Helton kept a store on the opposite side of the road, about a hundred yards away. At her death she was a widow of fifty and he a married man of thirty-seven. For some years they had openly maintained an adulterous relation. His wife lived at the store and helped in the business which by day he there conducted, and he lived at the hotel with Mrs. Roche. On 29th September 1936 part of the licensed premises was destroyed by fire. On 7th December 1936 it appears that Helton obtained £500 from Mrs. Roche to enable him to purchase the freehold of the premises from her mother-in-law, of whom she held as lessee. On 8th April 1937 he wrote an acknowledgment of the loan. At some time early in 1937 Mrs. Roche received £652 in settlement of her claim for fire insurance. Of this Helton obtained £500 about 1st July 1937, for which also he gave written acknowledgments. There was evidence that he obtained at various times further sums, bringing the total to about £1,400. On 5th April 1937 Mrs. Roche made a will by which she appointed Helton her executor and trustee. After making some small bequests to relatives, Mrs. Roche bequeathed her real and residuary personal estate to Helton, subject to an annuity of £2 a week to her mother. The will contained a clause by which she directed her trustee that her burial should not take place at Augathella but at such other place as he should choose. Mrs. Roche showed Helton the first draft of this will when she received it from her solicitors and he was aware of the form in which it was finally executed. On 12th August 1937 Mrs. Roche left Augathella for a holiday in Brisbane, whence she returned on 8th September. Helton met her in Charleville and drove her home. She passed the following day without incident. She spent the earlier part of the next day, 10th September, in various

domestic tasks. She and Helton had lunch together, but some time before lunch, according to one witness, a violent altercation took place between them. A witness said that he was seen in his bedroom at a quarter to two. He then went over to his store. Mrs. Roche was in the habit of having a bath at about half past three or four and changing her clothes. There was evidence from which it might be inferred that on that afternoon she followed her practice. At all events, at some time after four o'clock she appeared on the verandah in other clothes, and, after speaking to a connection of hers who was engaged in painting the rafters of the verandah, she took a seat out of the wind, as she said, on the other side of the verandah, where she was plainly to be seen from Helton's store. After sitting there for ten minutes or so, she collapsed. She speedily developed the symptoms of strychnine poisoning. A doctor was summoned. Helton came over from his store and asked what was wrong. He displayed great solicitude for her and rang the doctor's house again. In a few minutes, the doctor appeared, the time being then about five o'clock. She told him that at lunch she had eaten some salmon and lettuce and since then she had had nothing except a drink of water. She was at once taken to a hospital, Helton going with her and supporting her with every sign of anxiety. There she died at ten minutes to six o'clock. That evening a post-mortem examination was made and, when, a few days later, an analyst's report on the contents of her stomach was received, it was found that she had been poisoned with strychnine.

Suspicion fell on Helton. If there was anyone who had a motive for seeking Mrs. Roche's death it was he, a man much her junior, whose alliance with her was more readily explained by the money he had gained, the property he hoped to inherit and her passion for him, than any compelling attraction on her part. His conduct after her seizure and death confirmed the natural suspicion which arose from the circumstances. According to three witnesses he had visited the hotel during the afternoon. The time of the visit would appear to have been a little before four o'clock. The evidence supported the conclusion that he was there for about half an hour, perhaps between half past three and four. The probabilities are that about twenty minutes elapsed from the time she imbibed or

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consumed the strychnine until the time of her collapse. He was, therefore, in the hotel, according to this evidence, at a time when the strychnine might have been administered, or mixed in a draught. In which form she took the strychnine is quite unknown. Before leaving for Brisbane she had been taking some medicine for a nervous condition and it is suggested as an hypothesis that a poisoner might have used her medicine as a suitable vehicle for administering strychnine.

There would be nothing unusual in Helton's going over to the hotel during the afternoon and it would afford no ground for suspicion. But, from the very moment of her death, Helton was on the defensive. Though no one had said he had been at the hotel after lunch on 10th September until Mrs. Roche's collapse, yet at a quarter to seven next morning when her brother telephoned to inquire what had happened, he is said to have volunteered the statement—" I was never near the premises from after dinner until the event happened." That afternoon he drove over to see the same man and on arriving said :—" It is terrible. I know nothing about her death." On the morning of 13th September he visited the office of the newspaper in Charleville to ask the editor not to publish any account of Mrs. Roche's death sent from Augathella by his correspondent that would prejudice him, and proceeded to give a version of his movements to the editor. He said that after lunch, when he " ate eight times the amount of salmon Mrs. Roche did," he had gone to his shop to write a letter and to take out some quantities. He went on :—" After a while, I went to the front of my shop. I looked across the street and saw Mrs. Roche sitting on a chair on the side verandah. She was all right then, so I went back into my shop to do some more work. Later in the afternoon I went to the front and looked across. She was still all right so I went back to do my work. Later again in the afternoon I again went and had a look and as Mrs. Roche was not on the side verandah I hurried across to the hotel." In his re-examination the witness said that the impression it conveyed to him and the only impression it could convey was that Helton was anticipating or expecting something : he specifically stated that he had gone out three times ; twice Mrs. Roche was all right and he had gone back to his work.

On the same morning Helton volunteered to the manager of the bank an account of Mrs. Roche's death and the events preceding it, in the course of which he said that he left her after lunch and the next thing he knew she had taken sick. On the afternoon of 13th September, according to a police constable, Helton told him that, on the day of Mrs. Roche's death, he had not seen her from lunch time until he saw her lying on the bed after her collapse; that he was busy inside his shop and had not been over to the hotel during the afternoon and had not looked from the front of his shop and seen her on the verandah. About midday on 14th September, to the man who had been painting the rafters, Helton denied that he had been near the hotel during the afternoon of 10th September and said he had been at his shop looking after it and working at quantities.

On this evidence the jury might conclude that Helton had visited the hotel at a time which included or immediately preceded the time when the deceased woman must have taken the strychnine, and that he volunteered denials of his visit before any statement had been made that he was there.

It would not have been difficult to obtain strychnine, but none was traced to his possession and the evidence that Helton had any is confined to a statement he is said to have made in July 1937 in reference to the destruction of birds in the garden. A witness swore that Helton said he had some strychnine and the birds must be poisoned.

Throughout the investigations and discussions of the cause of Mrs. Roche's death, Helton behaved in a strange manner. Within an hour of her death a police constable went to the hotel and told Helton that he would like to look around. The latter produced the keys and they went through the rooms. On seeing some article of the deceased's clothing, Helton became loudly emotional. When the remains of the salmon were produced, he called two men to come so that they might watch him eat some of it, a proceeding the constable would not suffer. No one had said that Mrs. Roche had died from poisoning and the post mortem had not taken place, but it was, of course, evident that inquiries must be directed to such a possibility. At about a quarter to eleven that night, some

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relatives of the deceased woman arrived at the hotel. Helton greeted them with the statement:—"Oh, this is terrible. Don't think I did this." During their visit it was announced that there was going to be a post mortem. Helton sprang up and said that he would not stand for it, he had her will in his pocket and he had full claim to her body. As they left he said:—"I don't want you people to think that I am implicated. It looks bad for me as I am sole executor." These witnesses say that he was loudly exhibiting great emotion, "he was broke down the whole time." Many witnesses speak of his noisy display of grief on different occasions, particularly at the funeral, and some of them express confident opinions that it was simulated. But it seems more probable that he was under great stress and was in a condition of nervous and emotional instability, a condition which might be accounted for no less plausibly by fear, remorse and excitement, than by natural grief.

Early next morning, 11th September, he consulted his solicitor over the long distance telephone. About this time a sub-inspector of police came to see him, and questioned him about, among other things, the will. After more displays of emotion, Helton besought him to take great care of the will because it meant a great deal to him, to read it out at the funeral in order to "make it legal," and to certify that it was her will. Later in the day he asked for a copy of the will.

On 15th September, when the analyst's report was received, Helton was arrested.

The question whether the circumstances summarized in the foregoing narrative warrant an inference on the part of the jury that Helton intentionally administered strychnine to the deceased woman was considered by the Queensland Supreme Court as a Court of Criminal Appeal on the occasion when his conviction was quashed and a new trial ordered. The court decided that the evidence was sufficient to authorize a finding against Helton. In this opinion we agree. It appears to us that if the evidence of the circumstances is believed, it establishes very definite motives, opportunity in fact, false denials volunteered by Helton of the existence of that opportunity, conduct on his part betokening a consciousness that he was

implicated and behaviour to be explained more probably by his guilt than by any other hypothesis. A study of the whole evidence seems to us to put suicide out of the question and to disclose no grounds whatever for suspecting any other person, nor for attributing the taking of strychnine to accident.

It follows that the verdict cannot be set aside on the ground that there was no sufficient evidence to support it.

But Helton relies upon his acquittal of the charge of murder in the Criminal Court as an answer to the application of the rule excluding a homicide from any benefit under the will or intestacy of the person who died at his hands. The rule is one of recent development. Its earliest appearance in any form may be said to be *Fauntleroy's Case*, or the *Amicable Society* v. *Bolland* (1). In *Prince of Wales &c. Association Co.* v. *Palmer* (2) it appeared that Palmer, the poisoner, had effected insurances upon his victims with the intention of defrauding, and the rule disqualifying a homicide from claiming under the will or intestacy of his victim, or by reason of his death, was scarcely in point. Its first clear formulation was left to *Cleaver's Case* (3), which arose out of the conviction of Mrs. Maybrick. It is placed upon a principle of public policy, and it was said that no system of jurisprudence could with reason include amongst the rights which it enforces rights directly resulting to a person asserting them from the crime of that person (per *Fry* L.J. (4)). In *In the Estate of Hall* (5) the doctrine was finally established and held to include not only murder but manslaughter. There *Hamilton* L.J. said that the principle could only be expressed in the wide form: "It is that a man shall not slay his benefactor and thereby take his bounty; and I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter" (6). See, further, *In re Sigsworth* (7) and *Beresford* v. *Royal Insurance Co. Ltd.* (8).

In none of these cases has the question arisen whether the acquittal in criminal proceedings of the person alleged to have committed

(1) (1830) 4 Bligh (N.S.) 194 [5 E.R. 70].
(2) (1858) 25 Beav. 605 [53 E.R. 768].
(3) (1892) 1 Q.B. 147.
(4) (1892) 1 Q.B., at p. 156.
(5) (1914) P. 1.
(6) (1914) P., at p. 7.
(7) (1935) Ch. 89.
(8) (1938) A.C. 586.

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the homicide excludes him from the operation of the rule. They do, however, make it clear that his conviction is not an essential condition, for they include instances where the homicide himself brought about his own death and where he was a fugitive from justice. It happens in the present case that Helton's acquittal was not proved or even tendered in evidence and the point was not taken. But it is an undisputed fact which we think we should not ignore. His acquittal cannot operate as an estoppel. The plaintiff in the present proceedings is not bound by it as decisive of his innocence. Nor indeed do we think that it would be admissible against her as an evidentiary fact. In *Helsham* v. *Blackwood* (1) an argument of counsel will be found which collects the authorities in support of the proposition that in civil proceedings one party is not estopped by a judgment of acquittal of the other from showing that he was guilty of the crime of which he was arraigned. The distinction between the effect of an acquittal and a conviction is there shown. It is a distinction which makes irrelevant the decision of Sir *Samuel Evans* P. in *In the Estate of Crippen* (2) admitting a conviction of murder in evidence.

The only ground upon which the acquittal of Helton could exclude the operation of the rule is that, the rule being one of public justice, it ought not on grounds of public justice to be extended to a case where the claimant has been absolved in the criminal jurisdiction from the material crime. In other words, it may be said that to retry as a civil issue the guilt of a man who has been acquitted on a criminal inquest is so against policy that a rule drawn from public policy ought not to authorize it. There is, however, no trace of any such conception in the history of the principle that by committing a crime no man could obtain a lawful benefit to himself. To qualify the rule in the manner suggested would, we think, amount to judicial legislation. It is much more than the application of settled principle to an instance hitherto unforeseen or not adverted to in the general formulation of the rule. We are, therefore, of opinion that the appellant Helton is not entitled as a matter of law to a verdict and judgment in his favour.

(1) (1851) 11 C.B. 111, at pp. 121-124 [138 E.R. 412, at pp. 416-418].
(2) (1911) P. 108.

But his appeal is not limited to a claim that he is entitled to judgment. Alternatively he complains that there was a mistrial. During the course of the trial the learned judge who presided from time to time referred to the fact that it was a civil trial so that the same strictness of proof was not required as upon a criminal charge and said, in effect, that it would be enough if there was a preponderance for the plaintiffs.

His Honour summed up against Helton and in doing so made repeated use of the difference between the standard of persuasion required of the Crown in support of an indictment and that required of a litigant upon a civil issue. At one point the learned judge quite correctly said that when a crime is charged in a civil trial it must be proved strictly because the degree of proof required in a civil trial depends upon the magnitude of the thing that is in issue and when a crime is in issue you will not lightly find that a crime has been committed, and according as the crime is grave you shall require a greater strictness of proof. And he properly referred to the presumption of innocence.

If his Honour had done nothing to cancel this direction or countervail its effect, there could have been no complaint on Helton's part as to the instructions received by the jury upon the degree of proof or certainty necessary before they found against him. But unfortunately the summing up read as a whole produces an impression that to discharge their duty the jury should simply estimate the probabilities and if they thought that the probabilities in favour of the opinion that Helton poisoned Mrs. Roche outweighed in any degree, however slight, the probabilities against that opinion they should find against him. His Honour may have felt the danger of the jury being unduly influenced by the fact that Helton had been acquitted, a fact too notorious to be outside their knowledge, and he may have feared that they would be overwhelmed by the gravity of a finding that notwithstanding his acquittal he had committed the crime. Whether from an anxiety lest this should be the result or from a desire to remove from the minds of the jury some very exaggerated view of the certainty required to justify a verdict which counsel may have put, his Honour went to great lengths in emphasizing the slightness of the considerations which might prevail with

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the jury. As a consequence his charge to the jury would, we think, produce upon the jury a quite erroneous impression of the gravity of duty placed upon them. In giving reasons in *Briginshaw's Case* (1) for his opinion that, at common law, there were only two standards of proof or persuasion, reasonable satisfaction and satisfaction beyond reasonable doubt, *Dixon* J. said :—" When the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality " (1).

Exactly the opposite effect is produced by the judge's charge. It would, we think, make the jury think that their task was a mere mechanical comparison of probabilities and take their minds away from the simple truth that they should not find that Helton committed a murder unless they were satisfied he did so. Moreover, as a whole the charge appears to us to be opposed also to another statement *Dixon* J. made in the same judgment. He said :—" But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind which would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency " (2). After the jury had been considering their verdict for some hours, they returned and asked for a further direction upon what they called the " point about probabilities." His Honour redirected them somewhat elaborately, contrasting the measure of certainty required in the two jurisdictions. The effect was to tell them that it was

(1) (1938) 60 C.L.R., at p. 361. (2) (1938) 60 C.L.R., at p. 362.

enough for them to feel that there was some preponderance of probability in the plaintiff's favour. Coupled with the general tenor of his Honour's charge on the facts and considered in relation to the stage of the trial when it occurred we think that the jury were very likely to be misled by the direction they received.

We are therefore of opinion that there must be a new trial.

In the Full Court a difficulty was felt about a passage in a recent judgment of the Privy Council, which, it was thought, laid it down that where in civil proceedings an issue rose as to the commission of a crime, the fact that the criminal act was done must be proved beyond reasonable doubt. The contrary was directly decided by the Judicial Committee in *Doe d. Devine* v. *Wilson* (1), and such a statement would be opposed to a stream of authority. The matter is discussed in *Briginshaw* v. *Briginshaw* (2), where the authorities are collected. The recent decision of the Privy Council referred to is *New York* v. *Heirs of Phillips Deceased* (3) reported in the *All England Reports* and not elsewhere. The proceedings were civil, but a conspiracy was charged. The judge found against the conspiracy. Lord *Atkin* delivered their Lordships' judgment and the passage is as follows:—"The trial judge, *Mercier* J., considered afresh the whole of the evidence. The only complaint made of his judgment in point of law is that he laid down that there was a heavy onus on the plaintiffs and that it was necessary for them to prove their case as clearly as they would have to prove it in a criminal proceeding. Their Lordships consider this criticism to be ill founded. The proposition of the judge has been laid down time and again in the courts of this country: and it appears to be just and in strict accordance with the law" (4). The respondent in the present case has produced the decree of the Cour Superieure de Quebec containing the considerants to which their Lordships refer. It discloses that what *Mercier* J. laid down was as follows: "Considerant qu'il est *incontestable* qu'en matiere de *crime* et *d'offense criminelle* productifs *d'actions* en dommages-intérets, le *crime* et *l'offense* doivent etre clairement *établis* pour donner lieu *a l'ouverture* de l'action en indemnité."

(1) (1855) 10 Moo. P.C. 502 [14 E.R. 581].
(2) (1938) 60 C.L.R. 336.
(3) (1939) 3 All E.R. 952.
(4) (1939) 3 All E.R., at p. 955.

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There could be no difficulty in supporting such a statement. In using the expression "as clearly as in a criminal proceeding" Lord *Atkin* may have had in mind the exactness of the proofs rather than the standard of persuasion or certainty. But in any case it is impossible to treat the observation as overriding *Doe d. Devine* v. *Wilson* (1) and a line of cases and authority. Another explanation suggested was that Lord *Atkin* meant that the criticism was ill founded because it was not what the judge said.

The present case and perhaps that cited illustrate the wisdom of the observation of Professor *Wigmore* cited in *Briginshaw's Case* (2) as to undue elaboration of the simple statement that in a civil case the same high degree of certainty is not required as in a criminal case, but reasonable satisfaction according to the nature of the case.

The appeal should be allowed. The order of the Supreme Court should be set aside and a new trial ordered. The costs of this appeal and of the appeal to the Supreme Court should be paid by the plaintiffs. The costs of the first trial should be costs in the action.

Appeal allowed. Order of the Supreme Court set aside and a new trial ordered. Costs of this appeal and of the appeal to the Supreme Court to be paid by the plaintiff. Costs of the first trial to be costs in the action.

Solicitors for the appellant, *McCullough & Robertson*, Brisbane.

Solicitors for the respondent, *Bergin, Papi & Finn*, Brisbane, by *McDonell & Moffitt*.

J. B.

(1) (1855) 10 Moo. P.C. 502 [14 E.R. 581].
(2) (1938) 60 C.L.R., at p. 361.