[HOUSE OF LORDS.]

H. L. (E.) 1935 April 5; May 23.

* WOOLMINGTON . . . . . APPELLANT;

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS . . . . . RESPONDENT.

Criminal Law—Murder—Onus of Proof—Accident—Unlawful Intention—Direction to the Jury—Reasonable Doubt of Guilt—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4.

In a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death and malice has been given, the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

Statement of the Law in Foster's Crown Law (1762), p. 255, and summing up of Tindal C.J. in *Rex* v. *Greenacre* (1837) 8 C. & P. 35 disapproved.

Order of the Court of Criminal Appeal reversed.

APPEAL from an order of the Court of Criminal Appeal refusing leave to Reginald Woolmington, the appellant, to appeal against his conviction of the wilful murder of Violet Kathleen Woolmington, who was his wife.

The appellant was convicted on February 14, 1935, at Bristol Assizes before Swift J. and a jury. The appellant and his wife were married on August 25, 1934. He was a farm labourer and bore a good character. His age was twenty-one and a half years, and his wife was four years younger. They lived at Castleton, near Sherborne, on the farm of one Cheeseman, the appellant's employer. On November 22, 1934, the appellant's wife left him and went to live with her mother, Lilian Smith, a widow, at 24 Newtown, Milborne Port. The appellant wanted her to go back to him and made efforts to induce her to go back, but she would not.

* *Present:* VISCOUNT SANKEY L.C., LORD HEWART L.C.J., LORD ATKIN, LORD TOMLIN, and LORD WRIGHT.

Next door to Mrs. Smith lived a Mrs. Brine, a sister of Mrs. Smith and aunt of the deceased woman. On the morning of December 10, 1934, Mrs. Brine, who was in the back yard of No. 25, heard the appellant's voice saying: "Are you coming back or not?" and "Where's your mother?" Then she heard the back door of No. 24 slam, and then the report of a gun. She looked out of her front window, and saw the appellant. She called to him; he made no reply, but mounted his bicycle and rode away. She went into No. 24, and found her niece lying on the mat. She had been shot through the heart.

The appellant gave evidence to the following effect: After a sleepless night on December 9–10 he thought he might frighten his wife into obedience by threatening to shoot himself. On December 10 he went to the farm till 8.20 A.M.; came home to have his breakfast; then went back to the farm, and took a gun belonging to Mr. Cheeseman, which lay on a shelf in a barn. Near the gun was a box containing two cartridges. With a fret-saw belonging to his father he sawed off part of the barrels and threw that part and the saw into a brook, and loaded the gun with the two cartridges. Then he put the gun under his overcoat in a pocket used for carrying rabbits, and returned home. There he attached to the gun some flex for carrying electric current, and with this he suspended the gun from his right shoulder and under his overcoat; and so equipped he rode on his bicycle to Mrs. Brine's house. There he tapped at the front door; his wife opened it; she was washing clothes in the kitchen. They went into the back room. He said: "Are you coming back or not, Vi?" but got no answer. His wife shut the back door, and they went into the front room. His wife said she would not go back, but had decided to go into service. Then he said, if she would not come back to him he would shoot himself; and, to explain how he meant to do this, and to show her the gun with which he meant to do it, he unbuttoned his overcoat, and brought the gun across his waist. The gun went off; he did not know it was pointing at his wife. She fell to the ground. He did not know what to do. He went out of the house and to his

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own home. There he saw his mother and told her that he had been up and shot his wife. He threw the gun on a bench in the outhouse and rode to Mr. Cheeseman and said to him: "I shall not be coming to work any more, as I have shot my wife."

A note was found in the pocket of the appellant's coat. It was in these terms:—

"Good bye all.

"It is agonies to carry on any longer. I have kept true hoping she would return this is the only way out. They ruined me and I'll have my revenge. May God forgive me for doing this but it is the Best thing. Ask Jess to call for the money paid on motor bike (Wed.). Her mother is no good on this earth but have no more cartridges only 2 one for her and one for me. I am of a sound mind now. Forgive me for all trouble caused

"Good bye

"ALL

"*I love Violet with all my heart*

Reg."

The appellant was cross-examined about the date when this note was written, whether it was before or after the death of his wife. He persisted in his statement that it was written after the death, and gave his explanation of its contents.

He said that after having written it he went downstairs and waited for the police; he intended to shoot himself; he went outside and met his father in the lane. He told his father he was going to shoot himself, but his father persuaded him not to. Then the policeman arrived and took him to the police station. When he was charged, he said: "I want to say nothing, except I done it, and they can do what they like. It was jealousy I suppose. Her mother enticed her away from me. I done all I could to get her back, that's all."

The appellant was first tried at Taunton on January 23, 1935, before Finlay J. and a jury. After considering their verdict for an hour and twenty-five minutes that jury disagreed.

At the trial out of which the present appeal arises Swift J. in his summing-up gave the following direction to the

jury: "A charge is made against Reginald Woolmington, the prisoner at the bar, of wilful murder. It is said that on the morning of December 10, about half-past nine, he murdered his wife. That she died whilst he was in that house you will, I should think, have little doubt. It is a matter entirely for you. If you accept his evidence, you will have little doubt that she died in consequence of a gun-shot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, unless the contrary appeareth.' (1) That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."

Then, after reviewing and commenting upon the evidence, the learned judge added these words: "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this

(1) Foster's Crown Law (1762), p. 255.

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case, which alleviate the crime so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident."

The jury, after considering their verdict for an hour and nine minutes, found the appellant guilty of wilful murder.

The appellant applied to the Court of Criminal Appeal for leave to appeal against his conviction, but that Court, as stated above, refused the application.

The Attorney-General having certified that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that, in his opinion, it was desirable in the public interest that a further appeal should be brought, the present appeal was brought before this House.

April 4. *T. J. O'Connor K.C.* and *J. D. Casswell* for the appellant. In delivering the judgment of the Court of Criminal Appeal, Avory J. said: "The point, and really the only point, of complaint as regards this summing-up is that the learned judge did not anywhere use the expression that the jury should acquit the accused altogether, or convict him only of manslaughter, if they entertained any reasonable doubt about the truth of his explanation of how his wife came by her death. It may be that it would have been better if the learned judge had in those few words said to the jury that if they entertained reasonable doubt whether they could accept his explanation, they should either acquit him altogether or convict him of manslaughter only."

This is precisely the exception which the appellant takes to the summing-up of Swift J.; and the complaint which he makes against the order of the Court of Criminal Appeal is that the learned judges did not take a more serious view of the omission of the trial judge to make it quite clear that the onus still lay upon the prosecution. If at the end of a trial for murder a reasonable doubt remains in the minds of the jury whether the crime has been committed, it is their duty to acquit. However the matter may have been regarded in former years, at the present time the Criminal Law rests on the foundation that, apart from statutory

enactment to the contrary, the prosecution must prove the guilt of the prisoner; otherwise he must be acquitted. Earlier authorities, such as Sir Michael Foster in the Introduction to the Discourse of Homicide in that learned judge's work on Crown Law (1); *Mackalley's* case (2); *Rex* v. *Legg* (3); *Rex* v. *Oneby* (4); East, Pleas of the Crown (5); *Rex* v. *Greenacre* (6); and Blackstone, Commentaries (7), are concerned primarily with the definition of homicide and malice. Sir Michael Foster's description of murder is repeated in Archbold's Criminal Pleading and Evidence (8) and Russell on Crimes. (9) The proper direction to the jury is that which was given by Finlay J. at the former trial. That learned judge said: "The case for the prosecution is deliberate shooting. The defence is, Not Guilty of murder. They" (the prosecution) "prove the killing, and in the absence of explanation that is murder. The defence say 'Excusable, because accidental.' Consider whether you entertain the slightest doubt that this was a deliberate killing. If you have no doubt, it is your duty to convict. . . . . If the result of a dispassionate survey is to leave a reasonable doubt in your minds, then your duty as well as your pleasure is to acquit." It is for the prosecution to satisfy the jury on all the evidence that the prisoner is not an innocent man, but a guilty man. They must take the whole of the evidence into consideration and then it is not for the prisoner to say: "My explanation is such that it must satisfy you." It is enough for him if he says: "This is my explanation," and if the jury on considering it are left in a reasonable doubt. Then it is their duty to acquit the prisoner. "Where, a prima facie case having been made against him, the defendant offers an explanation, the jury must be directed that the onus of proof of guilt is still on the prosecution, and that, if on the whole evidence they are in doubt, they should acquit": Roscoe, Criminal Evidence. (10) This is the result

(1) (1762) Clarendon Press, p. 255.
(2) (1611) 9 Co. Rep. 65 b.
(3) (1674) Kelyng, 27.
(4) (1727) 2 Ld. Raym. 1484, 1493.
(5) (1803), p. 224.
(6) 8 C. & P. 35, 42.
(7) Book IV., c. 14.
(8) 29th Ed. (1934), p. 873.
(9) 8th Ed. (1923), Vol. 1, p. 615.
(10) 15th Ed. (1928), p. 300.

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of numerous decisions: *Rex* v. *Stoddart* (1); *Rex* v. *Davies* (2); *Rex* v. *Abramovitch* (3); *Rex* v. *Aubrey* (4); *Rex* v. *Grinberg* (5); *Rex* v. *Sanders* (6); *Lawrence* v. *The King*. (7)

[The following cases were also referred to: *Rex* v. *Sturgess* (8); *Rex* v. *Davies* (9); *Rex* v. *Hopper* (10); *Rex* v. *Brain*. (11)]

April 5. *J. G. Trapnell K.C.* and *Reginald Knight* for the respondent. The killing of any human creature is homicide: Blackstone, Commentaries. (12) Felonious homicide is the killing of a human creature without justification or excuse. (13) Manslaughter is the unlawful killing of another without malice either express or implied. (14) "When a man of sound memory, and of the age of discretion, unlawfully killeth . . . . any reasonable creature in rerum natura under the king's peace, with malice forethought, either expressed by the party, or implied by law" (15) this is murder. Then comes the question of proving the commission of the crime. The Crown must prove that the prisoner killed the man. The prisoner knows how he did it; formerly he could not give evidence, but he still knew. The dead man knew, but cannot say. In the absence of evidence of others, the Court must needs resort to inference. It considers how the death wound was inflicted; by a gun, or a knife, or a hammer or other lethal weapon. Such facts supply evidence of malice prepense. When all the knowledge is in the mind of the accused, it is most reasonable that he should state, or his advocate should suggest, how the death occurred. It is not necessary to press the point that, in the absence of other available evidence, killing is per se prima facie evidence of malice, because in the present case death was inflicted by a lethal weapon; but even so, one cannot with a light heart dismiss the

(1) (1909) 2 Cr. App. R. 217, 244.
(2) (1913) 29 Times L. R. 350; 8 Cr. App. R. 211.
(3) (1914) 31 Times L. R. 88.
(4) (1915) 11 Cr. App. R. 182.
(5) (1917) 33 Times L. R. 428.
(6) (1919) 14 Cr. App. R. 11.
(7) [1933] A. C. 699, 706.
(8) (1913) 9 Cr. App. R. 120.
(9) (1913) 29 Times L. R. 350; 8 Cr. App. R. 211.
(10) (1915) 11 Cr. App. R. 136.
(11) (1918) 13 Cr. App. R. 197.
(12) Book IV., Ch. 14, passim.
(13) Ibid; p. 188.
(14) Ibid; p. 191.
(15) Coke, 3 Inst. 47.

statement of so high an authority as Sir Michael Foster (1), followed in East (2); Blackstone, Commentaries (3); and repeated in Archbold, Criminal Pleading and Evidence (4), and Halsbury, Laws of England. (5) Moreover, the appellant's own explanation, that he intended to frighten his wife into obedience by threatening to shoot himself, and showing her the gun which he meant to use, discloses an unlawful intention and is sufficient evidence of malice aforethought.

The additional facts of the note found in the pocket of his coat, and the words: "May God forgive me for doing this but it is the best thing. . . . . Her mother is no good . . . . but I have no more cartridges only 2 one for her and one for me," show first, that the note was written before the deed, and secondly that he intended to shoot his wife and himself and that, if he had had a third cartridge, he would have used it also. Those facts together show that he went to the house with a malicious intention. If in pursuing a malicious intention a man, even by accident, kills another person, that is murder.

In that view the case is a proper one for the application of s. 4 of the Criminal Appeal Act, 1907.

Counsel was not called on in reply.

At the end of the argument for the respondent VISCOUNT SANKEY L.C. announced that the order of the Court of Criminal Appeal would be reversed and that the conviction would be quashed; and that their Lordships would give their reasons at a later date.

May 23. VISCOUNT SANKEY L.C. My Lords, the appellant, Reginald Woolmington, after a trial at the Somerset Assizes at Taunton on January 23, at which, after an absence of one hour and twenty-five minutes, the jury disagreed, was convicted at the Bristol Assizes on February 14 of the wilful murder of his wife on December 10, 1934, and was sentenced

(1) Crown Law (1762), p. 255.
(2) Pleas of the Crown (1803), p. 224.
(3) Book IV., c. 14, pp. 200, 201.
(4) 29th Ed. (1934), p. 873.
(5) 2nd Ed. (1933), Vol. 9, p. 426.

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to death. He appealed to the Court of Criminal Appeal, substantially upon the ground that the learned judge had misdirected the jury by telling them that in the circumstances of the case he was presumed in law to be guilty of the murder unless he could satisfy the jury that his wife's death was due to an accident.

The appeal came before the Court of Criminal Appeal upon March 18 and was dismissed. The Court said "it may be that it might have been better" had the learned judge who tried the case said to the jury that if they entertained reasonable doubt whether they could accept his explanation they should either acquit him altogether or convict him of manslaughter only; but, relying upon s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, which provides "that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred," they dismissed the appeal.

Thereupon the Attorney-General gave his fiat certifying that the appeal of Reginald Woolmington involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. The matter now comes before your Lordships' House.

The facts are as follows. Reginald Woolmington is 21½ years old. His wife, who was killed, was 17½ years old last December. They had known each other for some time and upon August 25 they were married. Upon October 14 she gave birth to a child. Shortly after that there appears to have been some quarrelling between them and she left him upon November 22 and went to live with her mother. Woolmington apparently was anxious to get her to come back, but she did not come. The prosecution proved that at about 9.15 in the morning of the 10th Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. While she was engaged in that occupation, she heard voices from the next door house, No. 24. She knew that in that house her niece, Reginald Woolmington's wife, was living. She heard

and could recognize the voice of Reginald Woolmington saying something to the effect "are you going to come back home?" She could not hear the answer. Then the back door in No. 24 was slammed. She heard a voice in the kitchen but could not tell what it said. Then she heard the sound of a gun. Upon that she looked out of the front window and she saw Reginald Woolmington, whose voice she had heard just before speaking in the kitchen, go out and get upon his bicycle, which had been left or was standing against the wall of her house, No. 25. She called out to him but he gave no reply. He looked at her hard and then he rode away.

According to Reginald Woolmington's own story, having brooded over and deliberated upon the position all through the night of December 9, he went on the morning of the 10th in the usual way to the milking at his employer's farm, and while milking conceived this idea that he would take the old gun which was in the barn and he would take it up that morning to his wife's mother's house where she was living, and that he would show her that gun and tell her that he was going to commit suicide if she did not come back. He would take the gun up for the purpose of frightening her into coming back to him by causing her to think that he was going to commit suicide. He finished his milking, went back to his father's house, had breakfast and then left, taking with him a hack saw. He returned to the farm, went into the barn, got the gun, which had been used for rook shooting, sawed off the barrels of it, then took the only two cartridges which were there and put them into the gun. He took the two pieces of the barrel which he had sawn off and the hack saw, crossed a field about 60 yards wide and dropped them into the brook. Having done that, he returned on his bicycle, with the gun in his overcoat pocket, to his father's house and changed his clothes. Then he got a piece of wire flex which he attached to the gun so that he could suspend it from his shoulder underneath his coat, and so went off to the house where his wife was living. He knocked at the door, went into the kitchen and asked her: "Are you coming back?" She made no answer. She came into the

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parlour, and on his asking her whether she would come back she replied she was going into service. He then, so he says, threatened he would shoot himself, and went on to show her the gun and brought it across his waist, when it somehow went off and his wife fell down and he went out of the house. He told the jury that it was an accident, that it was a pure accident; that whilst he was getting the gun from under his shoulder and was drawing it across his breast it accidentally went off and he was doing nothing unlawful, nothing wrong, and this was a pure accident. There was considerable controversy as to whether a letter in which he set out his grievances was written before or after the above events. But when he was arrested at 7.30 on the evening of the 10th and charged with having committed murder he said: "I want to say nothing, except I done it, and they can do what they like with me. It was jealousy I suppose. Her mother enticed her away from me. I done all I could to get her back. That's all."

The learned judge in summing-up the case to the jury said:—

"If you accept his evidence, you will have little doubt that she died in consequence of a gunshot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law will presume the fact to have been founded in malice until the contrary appeareth.' That has been the law of this country for all time since we had law. Once it is shown to a jury that

somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."

At the end of his summing-up he added: "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident."

In the argument before the Court of Criminal Appeal cases were cited by the learned counsel on either side and text-books of authority were referred to, but the learned judges contented themselves with saying "there can be no question to start with that the learned judge laid down the law applicable to a case of murder in the way in which it is to be found in the old authorities." They repeated the learned judge's words and said: "No doubt there is ample authority for that statement of the law." They then relied, as I have already mentioned, upon the proviso to s. 4 of the Criminal Appeal Act, 1907, and dismissed the appeal.

It is true as stated by the Court of Appeal that there is apparent authority for the law as laid down by the learned judge. But your Lordships' House has had the advantage of a prolonged and exhaustive inquiry dealing with the matter in debate from the earliest times, an advantage which was not shared by either of the Courts below. Indeed your Lordships were referred to legal propositions dating as far back as the reign of King Canute (994–1035). But I do not think it is necessary for the purpose of this opinion to go as far back as that. Rather would I invite your Lordships to begin by considering the proposition of law

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which is contained in Foster's Crown Law, written in 1762, and which appears to be the foundation for the law as laid down by the learned judge in this case. It must be remembered that Sir Michael Foster, although a distinguished judge, is for this purpose to be regarded as a text-book writer, for he did not lay down the doctrine in any case before him, but in an article which is described as the "Introduction to the Discourse of Homicide." In the folio edition, published at Oxford at the Clarendon Press in 1762, at p. 255, he states: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them."

Now the first part of this passage appears in nearly every text-book or abridgment which has been since written. To come down to modern times, the passage appears in Stephen's Digest of the Criminal Law (1); also in the well known treatise of Archbold, Criminal Pleading, Evidence and Practice (2), which is the companion of lawyers who practise in the criminal courts. It also appears almost textually in Russell on Crimes (3) and in the second edition of Halsbury's Laws of England (4), which purports to state the law as on May 1, 1933, where it is said: "When it has been proved that one person's death has been caused by another, there is a prima facie presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder." The

(1) 7th Ed. (1926), p. 235.
(2) 29th Ed. (1934), p. 873.
(3) 8th Ed. (1923), Vol. 1, p. 615.
(4) (1933), Vol. 9, p. 426.

authority for that proposition is given as Foster, pp. 255, 290, and also the case of *Rex* v. *Greenacre*. (1)

The question arises, Is that statement correct law? Is it correct to say, and does Sir Michael Foster mean to lay down, that there may arise in the course of a criminal trial a situation at which it is incumbent upon the accused to prove his innocence? To begin with, if that is what Sir Michael Foster meant, there is no previous authority for his proposition, and I am confirmed in this opinion by the fact that in all the text-books no earlier authority is cited for it. Before, however, one considers the earlier criminal law several facts have to be remembered.

First, it was not till 1907 that the Court of Criminal Appeal was set up. It is perfectly true that from time to time there have been famous occasions on which the Judges and Barons were called together to give their opinion upon the law bearing on murder. Examples of this will be found; in the year 1611, in the case of *Mackalley* (2), all the Judges and Barons were moved to give their opinion; in 1706, in the case of *Reg.* v. *Mawgridge* (3), which case was argued before all the Judges and all of them except Lord Chief Justice Trevor were of opinion that Mawgridge was guilty of murder; and in 1843 in the case of *Reg.* v. *M'Naughton* (4), where all the Judges gave answers to your Lordships' House upon the test of insanity.

M'Naughton's case (4) stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *M'Naughton's* case (4) the onus is definitely and exceptionally placed upon the accused to establish such a defence. See *Rex* v. *Oliver Smith* (5), where it is stated that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, must be established by the defendant. But it was added that all the judges had

(1) 8 C. & P. 35.
(2) 9 Co. Rep. 65b.
(3) (1706) Kelyng, 119; 17 St. Tr. 57.
(4) (1843) 4 St. Tr. (N. S.) 847.
(5) (1910) 6 Cr. App. R. 19.

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met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit. See also Archbold, 29th Edition. (1), It is not necessary to refer to *M'Naughton's* case (2) again in this judgment, for it has nothing to do with it.

It is true that at a later period certain cases were reserved by the judges for the consideration of the Court of Crown Cases Reserved, but many of the propositions with regard to criminal law are contained either in the summing-up of the judges or in text-books of authority as distinguished from a Court sitting in banc.

The learned author of Stephen's Digest of the Criminal Law (3) has an interesting note on the definition of murder and manslaughter. But his remarks are rather directed to the ingredients of the crime than to the proof of it. None the less, the author does not hesitate to tread a path of very robust criticism of the previous authorities. He speaks of the "intricacy, confusion and uncertainty of this branch of the law." He refers to the definition of Coke (1552–1623) and says "these passages, overloaded as Coke's manner is, with a quantity of loose, rambling gossip, form the essence of his account of murder." He describes Coke's chapter on manslaughter as "bewildering" and adds that Hale (1609–1676) treats manslaughter in a manner so meagre and yet so confused that no opinion of it can be obtained except by reading through chapters 38 to 40 and trying to make sense of them, and concludes by saying (p. 466) that Sir Michael Foster "to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence."

Next it must be remembered that prisoners were not entitled to be represented by counsel, except in cases of felony, where counsel might argue the law on their behalf.

Thirdly, it must not be forgotten that the prisoner himself

(1) (1934) 18, 874. (2) 4 St. Tr. (N. S.) 847.
(3) 7th Ed. (1926), pp. 461, 462.

was not allowed to give evidence before the Act passed in 1898. (1)

Bearing these considerations in mind, I now turn to some of the cases cited to us. I doubt whether in any of the early ones the question of the burden of proof was considered. Rather they were concerned with the ingredients of the crime of murder. One of the first difficulties was to settle the meaning of express and implied malice. It was not till 1825 that Bayley J, in *Bromage* v. *Prosser* (2), gave his famous definition of malice as meaning a wrongful act, done intentionally without just cause or excuse. The older cases were rather concerned to give examples of what might be malice. This was so in *Mackalley's* case. (3) The prisoner was there accused of murdering a serjeant of London. The Courts were already considering cases of express or implied malice, and the passage in Coke appears simply to mean that if a man does acts calculated to kill, and actually does kill, that is evidence of malice or intent; in other words, evidence of one of the ingredients of murder, but it does not seem to be at all concerned with onus of proof or to support the statement of Sir Michael Foster on that point.

One of the most famous of the earlier treatises on criminal law was the History of the Pleas of the Crown by Sir Matthew Hale. That celebrated judge died on Christmas Day, 1675. It was known that he had left a treatise on the subject, and upon November 29, 1680, it was ordered by the House of Commons that the executors of Sir Matthew Hale be desired to print the manuscript relating to Crown Law and a Committee be appointed to take care of the printing thereof. It is not said that anything appears in Hale suggesting that the burden of proving his innocence lay on the prisoner. Looking at the edition of 1800 (4) we find him again concerned with what malice is. It is headed "Concerning murder by malice implied presumptive, or malice in law," and *Mackalley's* case (3) is duly cited.

(1) The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36).
(2) (1825) 4 B. & C. 247.
(3) 9 Co. Rep. 65 b.
(4) Chapter 37, Vol. 1, p. 454.

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As appears from Foster's Pleas of the Crown, Sir Michael Foster was familiar with Hale's treatise (see his preface), and although in the course of his book he makes reference to Hale, he gives no authority for the proposition which is under discussion. It cannot be doubted that at that time in English Courts of justice the law of evidence was in a very fluid condition. Indeed in some civil cases it differed on different circuits. See *Weeks* v. *Sparke* (1) and also the note xx. in Stephen's Digest of the Law of Evidence. (2) It was only later that the Courts began to discuss such things as presumption and onus. In Wigmore on Evidence (3), a reference is made to the judgment of Weaver J. in the case of *The State* v. *Brady*. (4) This was cited in the case of *Rex* v. *Stoddart* (5) :—

"The use of the terms 'presumption of guilt' and 'prima facie evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. . . . . 'Presumptions' of guilt and 'prima facie' cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged."

We were referred to the case of *Rex* v. *Legg* (6), where it is said that at the Newgate Session in 1674 "one John Legg, being indicted for the murder of Mr. Robert Wise, it was upon the evidence agreed that if one man kill another, and no sudden quarrel appeareth, this is murder." *Mackalley's* case (7) is quoted as an authority and the report goes on: "and it lieth upon the party indicted to prove the sudden quarrel." With regard to Kelyng's Reports, the critics have greatly differed. Sir John Kelyng was Chief Justice of the King's Bench. He died in 1671 and whatever opinion may be held about him as a judge, upon which see Foss's Biographical

(1) (1813) 1 M. & S. 679, 687, 688.
(2) 11th Ed. (1930), p. 182.
(3) Vol. 4, section 2513, note on page 3562.
(4) (1902) Ia. 91 N. W. 801.
(5) 2 Cr. App. R. 217,233.
(6) Kelyng, 27.
(7) 9 Co. Rep. 65 b.

Dictionary of The Judges of England (1), the critics have differed greatly upon the value of his Reports. Lord Campbell in his Life of Kelynge, Lives of the Chief Justices (2), says "He compiled a folio volume of decisions in criminal cases, which are of no value whatever." But, on the other hand, there are others who regard the book as of high authority: see Wallace on The Reporters (3).

The report of *Legg's* case (4) is meagre and unsatisfactory and cannot, I think, be held to mean that unless the prisoner prove the sudden quarrel, he must be convicted of murder. The word "onus" is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving or sometimes the conclusion of the whole matter.

Mawgridge's case (5), already referred to, was cited to us from Kelyng's Reports, but it was not reported by Kelyng for the simple reason that it was not tried till 1706. Campbell, in the Lives of the Chief Justices (6), says it was reported by Holt and makes caustic comments on Holt's English composition. It was added by Holt to his Edition of Kelyng's Reports and is described as a case of "great expectation" and gives the history of murder trials in English Courts from the earliest times. The case, however, is no authority for saying that the prisoner at any time is called upon to prove his innocence; quite the contrary. It is another of those cases which deal with malice and with what is such provocation as will make the act of killing to be manslaughter only.

In Hawkins' Pleas of the Crown (7): "It is also agreed, that no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or se defendendo, but that he must plead 'not guilty,' and give the special matter in evidence." This points to the fact that the verdict must be given not on any special pleading given by the prisoner but

(1) (1870), p. 381.
(2) (1849) Vol. 1, p. 511.
(3) London (1882), p. 327. [F. F. Heard, the editor of this reprint, made additions and alterations in Wallace's text without notice to the reader. Wallace himself (3rd ed. Philadelphia 1855, p. 209) dismissed Kelyng with a very short paragraph. . . . . F.P.]
(4) Kelyng, 27.
(5) Kelyng, 119; 17 St. Tr. 57.
(6) Vol. 2, p. 176.
(7) 8th Ed. (Curwood), 1824, Vol. 1, p. 88, s. 25.

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upon and as the result of the whole of the case, and it nowhere suggests that the burden of proof either at the beginning or at the end of a case is not on the prosecution.

The case of *Rex* v. *Greenacre* (1) was certainly heard by a very distinguished judge, Tindal, C.J. But it is to be observed that the dictum relied upon by the prosecution in this case—namely: " that where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder," was contained in the summing-up of the learned judge to the jury. It is the passage in Sir Michael Foster and this summing-up which are usually relied on as the authority for the proposition that at some particular time of a criminal case the burden of proof lies on the prisoner to prove his innocence. The presumption of innocence in a criminal case is strong: see Taylor On Evidence (2), and it is doubtful whether either of these passages means any such thing. Rather do I think they simply refer to stages in the trial of a case. All that is meant is that if it is proved that the conscious act of the prisoner killed a man and nothing else appears in the case, there is evidence upon which the jury may, not must, find him guilty of murder. It is difficult to conceive so bare and meagre a case, but that does not mean that the onus is not still on the prosecution.

If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law. It would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such

(1) 8 C. & P. 35, 42.
(2) 11th Ed. (1920), ss. 113, 114, Vol. 1, pp. 107, 108; 12th Ed. (1931), Vol. 1, pp. 107, 108.

facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

This is the real result of the perplexing case of *Rex* v. *Abramovitch* (1), which lays down the same proposition, although perhaps in somewhat involved language. Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in *Rex* v. *Davies* (2), the headnote of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be

(1) (1914) 11 Cr. App. R. 45.

(2) 29 Times L. R. 350; 8 Cr. App. R. 211.

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entertained. When dealing with a murder case the Crown must prove (*a*) death as the result of a voluntary act of the accused and (*b*) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i.) intentional and (ii.) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. It is not the law of England to say, as was said in the summing-up in the present case: "if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident." If the proposition laid down by Sir Michael Foster (1) or in the summing-up in *Rex* v. *Greenacre* (2) means this, those authorities are wrong.

We were then asked to follow the Court of Criminal Appeal and to apply the proviso of s. 4 of the Criminal Appeal Act, 1907, which says: "the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." There is no doubt that there is ample jurisdiction to apply that proviso in a case of murder. The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been

(1) Ante, p. 474. (2) 8 C. & P. 35, 42.

properly directed they would have inevitably come to the same conclusion.

In the result we decline to apply the proviso and, as already stated, we order that the appeal should be allowed and the conviction quashed.

My noble and learned friend Lord Atkin, who has to preside at the Privy Council to-day, asks me to say that he concurs in the opinion which I have delivered.

LORD HEWART C.J. My Lords, I concur.

LORD TOMLIN. My Lords, I also concur.

LORD WRIGHT. My Lords, I also concur.

Order of the Court of Criminal Appeal reversed, and conviction quashed: Further ordered that the cause be remitted back to the Court of Criminal Appeal to do therein as shall be just and consistent with this judgment.

Lords' Journals, April 5, 1935.

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For the respondent: *The Director of Public Prosecutions.*