B claims diminution or extinction of damages for having saved A's life.

Although these cases are compendiously treated by the textbooks as falling in the same class,[35] it is submitted that if treated on principles precisely analogous to those governing remoteness of damage they will either be cases where the benefit accruing from the injury is or is not too remote to consider in the assessment of damages. The writer can see no reason why cases (1), (2) and (4) should be treated differently from the cases of voluntary payment considered above; in each of these three cases, there is a *nova causa interveniens* rendering the benefit too remote. In (1), for example, the voluntary forbearance of A's parents to charge for board and lodging expenses is a new intervening cause in a very real sense.

Cases (2) and (5) present special problems. If we apply the standard tests used in relation to remoteness of damage, there is no doubt that the benefit accruing from the injury should not be considered too remote. But the fact that the defendants' claims to mitigate damages would verge on the absurd indicates that they are hardly sound law, albeit theoretically satisfying the "direct causation" test. As with insurance claims mentioned above, it is submitted that to consider the facts in these cases in mitigation of damages would be contrary to public policy. For the common law has never pursued a scholastic symmetry of legal principles to the exclusion of common sense. Perhaps no more need be said on these and similar claims than Lord Halsbury, L.C. said in his speech in *The Mediana*:[36]

> Supposing a person took away a chair out of my room and kept it for twelve months, could anyone say you had a right to diminish the damages by showing that I usually did not sit in that chair, or that there were plenty of other chairs in the room. The proposition, so nakedly stated, appears to me to be absurd.

R. P. MEAGHER, Case Editor—Third Year Student.

SOME ASPECTS OF MALICE AND ESTOPPEL IN THE CRIMINAL LAW

MRAZ v. *THE QUEEN*

A woman died during or immediately after an act of intercourse with a man. The man was tried for murder and acquitted but was convicted of manslaughter. He appealed against the conviction on the ground that the jury had been misdirected as to the possibility of returning a verdict of manslaughter. The appeal was unsuccessful in the Court of Criminal Appeal, but successful in the High Court where it was ordered that a judgment and verdict of acquittal be entered. The Crown then indicted the man for rape and, after his special pleas to that indictment had been overruled, he was convicted of that crime. He again appealed against his conviction, unsuccessfully to the Court of Criminal Appeal, but successfully to the High Court where it was held that, having regard to the acquittal of murder, the Crown was estopped from indicting him for rape. About this case it might fairly be said that both the protracted litigation and the man's final acquittal were the result of the judge's misdirection of the jury at the trial for murder.[1]

It is proposed to deal with this litigation in two parts. In the first part, the indictment for murder, the conviction of manslaughter and the appeals against that conviction will be considered and commented upon. In the second part, the indictment for rape, the special pleas, the conviction of rape and the appeals against that conviction will be considered and commented upon.

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[35] *Cf.* D. A. McI. Kemp and M. S. Kemp, *The Quantum of Damages in Personal Injury Claims* (1954) 32-42.

[36] (1900) A.C. 113, 117.

[1] *Mraz* v. *The Queen* (1955) 55 S.R. (N.S.W.) 479; (1954-56) 93 C.L.R. 493; (1956) 73 W.N. 425. Appeal to the High Court in September 1956 as yet unreported.

I. *Indictment for Murder, Conviction of Manslaughter and Appeals against Conviction.*

(a) *Indictment for Murder.*

On the 14th, 15th and 16th March, 1955, Gigula Mraz was tried before Nield, J. and a jury of twelve in the Central Criminal Court upon an indictment that on the 27th September, 1954 at Woolamai in the State of N.S.W. he did feloniously and maliciously murder Isabella Joyce Wilson. The Crown case was that Mraz, while accompanying the deceased woman along a bush track leading to her home, forcibly had intercourse with her in circumstances which amounted to rape and that the deceased died during or immediately after the commission of that offence. The defence was that the intercourse was with consent.

The case was conducted by the prosecution and by counsel for the defence on the basis of murder or nothing. However, after opening the point to counsel in the absence of the jury, the trial judge directed the jury that if they were satisfied that the accused had committed the crime of rape, satisfied that by committing the crime of rape he had caused the deceased's death, and satisfied that the acts associated with the rape were malicious in the sense that they were with the intention of injuring the deceased woman, then they should find the accused guilty of murder. But if they were not satisfied that the act of rape was malicious, that is, if they thought the act of rape was simply directed towards the gratification of the accused's desires, then they should find the accused not guilty of murder but guilty of manslaughter.[2]

His Honour, the trial judge, was also emphatic that before either murder or manslaughter could be found, the jury would first have to be satisfied that rape had been committed.

The jury returned a verdict of not guilty of murder but guilty of manslaughter, and the accused was sentenced to penal servitude for 12 years.

(b) *Appeal to the Court of Criminal Appeal.*

Mraz thereupon appealed, by leave, to the Court of Criminal Appeal (Street, C.J., Herron and McLelland, JJ.). The ground of the appeal was that the trial judge had misdirected the jury when his Honour told them that they could find a verdict of manslaughter if they were satisfied that there had been a non-malicious rape which had caused the deceased's death. Street, C.J. and McLelland, J. were of the opinion that the part of the trial judge's direction complained of was erroneous and should not have been given. However, having regard to the trial judge's direction that the jury must be satisfied that rape had been committed before they could find the accused guilty of either murder or manslaughter, their Honours concluded that the jury must have found that the accused raped the deceased, in which case the proper verdict would be guilty of murder. In the result, it was held that the summing up was too favourable to the accused and, applying the proviso to s.6 of the Criminal Appeal Act (N.S.W.), 1912,[2a] their Honours dismissed the appeal on the ground "that no substantial miscarriage of justice" had actually occurred. Herron, J., although considering the summing up too favourable to the accused, did not "dissent from the decision of his Honour, in the somewhat unusual and special circumstances of this case, to leave to the consideration of the jury the alternative verdict of manslaughter, . . .".[3] His Honour was of the opinion that the verdict to which the jury came "was amply warranted by the evidence"[4] and that accordingly the appeal should be dismissed.

(c) *Appeal to the High Court.*

By special leave, Mraz appealed to the High Court on the grounds that the trial judge had misdirected the jury as to manslaughter and that the Court

[2] His Honour read and explained to the jury ss. 5 and 18 of the Crimes Act, 1900 (N.S.W.), as to which see *infra*.

[2a] Criminal Appeal Act, 1912 (N.S.W.), Act. No. 16, 1912—Act No. 31, 1951.

[3] (1955) 55 S.R. 479, 487.

[4] *Id.* at 489.

of Criminal Appeal had erred in deciding that no substantial miscarriage of justice had occurred. The appeal was allowed by Williams, Webb and Taylor, JJ., who handed down a joint judgment, and by Fullagar, J., with McTiernan, J. dissenting. All the High Court justices, in concurrence with the ruling of the Court of Criminal Appeal, held that the jury had been misdirected when they were told that they could return a verdict of manslaughter if they were satisfied that the accused had committed a non-malicious rape upon the deceased. Fullagar, J. summed up the attitude of the court on this point when he stated: "A non-malicious rape is a legal contradiction in terms".[5] The majority held further, overruling the Court of Criminal Appeal on this point, that the accused's chance of acquittal had been prejudiced by the misdirection; that there was no certainty that the jury, properly directed, would have returned a verdict of murder and that therefore there had been a miscarriage of justice such as took the case outside the proviso to s.6 of the Criminal Appeal Act.[6]

The formal order of the High Court was: "Appeal allowed. Set aside order of the Court of Criminal Appeal. Quash Conviction. Direct that judgment and verdict of acquittal be entered".[7]

(d) *Comment.*

The trial and the two appeals raise five points which may be noted here. The Crown case was presented as one of "constructive murder". This doctrine was of wide scope in the early English law, as instance Lord Coke's view, in the early seventeenth century, that death caused by any *act that was unlawful* was murder.[8] As many judges and jurists considered this too wide and too severe a statement of the law, the scope of the doctrine was gradually whittled down until, nearly two centuries later, Sir Michael Foster could assert that the unlawful act had to be a *felony* before death resulting from such an act would be murder.[9] Since then, in the face of humanitarian attacks by jurists and artful evasions by judges,[10] the scope of the doctrine has been further limited. The present English law on this matter may be taken as that laid down by the House of Lords in *D.P.P.* v. *Beard*[11] where murder was restricted to death caused by an act of violence done in the course of or in furtherance of a *felony involving violence* (e.g. rape).[12] Many English jurists have criticised this firm and authoritative statement of the law as an unfortunate and retrogressive step.[13]

In New South Wales murder is defined by s.18 of the Crimes Act, 1900 (N.S.W.) as follows:

> Murder shall be taken to have been committed where *the act of the accused*, or thing by him omitted to be done, *causing the death charged, was done* or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or *during or immediately after the commission, by the accused*, or some accomplice with him, of an act obviously dangerous to life, or *of a crime punishable by death or penal servitude for life.*

The italicised parts of the above definition define the N.S.W. counterpart of the English "constructive murder" doctrine. The important distinction between

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[5] (1954-56) 93 C.L.R. 493, 513.
[6] See *infra.*
[7] (1954-56) 93 C.L.R. 493, 517.
[8] IIIrd. Institute 56.
[9] *Crown Law* 258.
[10] E.g., Brigham, J. in *R.* v. *Whitmarsh* (1898) 62 J.P. 711; Wightman, J. in *R.* v. *Greenwood* (1857) 7 Cox 404; and Stephen, J. in *R.* v. *Serné* (1887) 16 Cox 311.
[11] (1920) A.C. 479.
[12] See also *R.* v. *Stone* (1937) 53 T.L.R. 1046; *R.* v. *Jarmain* (1946) K.B. 74; 31 C.A.R. 39.
[13] See J. W. C. Turner, "The Mental Element in Crimes at Common Law", essay in *The Modern Approach to Criminal Law* (1945) 195-261; P. H. Dean, (1938) 54 *L.Q.R.* 23. See generally, A. L. Turner, "Constructive Murder in England and Australia" (1948-50) 1 *West Australia Annual Law Review* 295.

the two versions of the doctrine is the distinction between the words "crime punishable by death or penal servitude for life" in s.18 and the words "felony involving violence" used in *Beard's Case*.[14] From a perusal of the crimes punishable by death[15] or penal servitude for life in N.S.W., it seems that the N.S.W. version is more limited than the English version of the "constructive murder" doctrine,[16] while at the same time it obviates enquiry into the meaning of "violence".

The basic difference between constructive murder and murder in the ordinary sense is to be found in a difference of mental states; in different sorts of *mens rea*. This raises the second point. Section 18(2) (a) of the Crimes Act provides that: "No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section" (i.e. s.18, the section defining murder). As far as is relevant to the present purpose, "maliciously" is defined in s.5 as follows:

> Every act done of malice . . . or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons . . . and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

Two related questions concerning the meaning and effect of ss.18(2) (a) and 5 arose in the context of this case. First, on an indictment for murder, does the Crown have to prove that the act of the accused which caused the death and which was done during or immediately after the commission of a crime, such as rape, punishable by death or penal servitude for life, was also done "maliciously" within the meaning of s.5? Second, if the first question is answered affirmatively, in what sense was the alleged rape "malicious" in this case? Street, C.J. and McLelland, J. answered the first question affirmatively. As to the second question, Street, C.J. said "an intent to rape necessarily involved an intent to injure",[17] while McLelland, J. was of the opinion that "a woman raped *with violence* is injured within the meaning of s.5 and the person committing the crime intends to do the injury".[18] Herron, J., on the other hand, said *obiter* that the first question should be answered negatively.[19]

In the High Court, Williams, Webb and Taylor, JJ., confining their attention to rape and a resultant death, expressed the view that if the jury found that[20]

> rape had been committed and that the acts of the appellant associated with or done in furtherance of his purpose had caused the death, it was unnecessary that they should embark upon an independent inquiry to ascertain whether those acts were malicious. The very fact that they were so associated or so done established beyond question that they were done 'of malice'.

Fullagar, J., after commenting on the trial judge's confusion of the two senses of malice—as volition on the one hand and motive on the other—"a confusion made worse confounded by the so-called definition in s.5 of the Crimes Act",[21] stated simply that "the act of rape is essentially and necessarily a malicious act in the only relevant sense"[22] that sense being, by implication, "the intentional doing of a wrongful act."

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[14] (1920) A. C. 479.
[15] Until the death penalty was abolished in New South Wales by Act No. 3, 1955.
[16] Some crimes, such as assault and battery, from which death result, would be included in the English but not in the N.S.W. version of the doctrine.
[17] (1955) 55 S.R. 479, 485.
[18] *Id.* at 494.
[19] *Id.* at 489.
[20] (1954-56) 93 C.L.R. 493, 505.
[21] *Id.* at 512.
[22] *Id.* at 513.

It is submitted that the answers supplied by the High Court to the questions posed above are the most satisfactory. All the justices forming the majority agreed that a finding of rape, and hence it is suggested of any crime punishable by death or penal servitude for life, necessarily involved a finding of the intentional doing of a wrongful act[23] such that any act done during or immediately after the commission of that wrongful act (or crime) would be "done of malice" so as to bring it within the definition of "maliciously" in s.5. The meaning of malice in this connection should be distinguished from its meaning in the phrase "malice aforethought" as used in relation to the English law of murder.

The third point is concerned with the return of a verdict of manslaughter on a trial for murder. Herron, J. based his decision on the right of a jury on a murder trial to find a verdict of manslaughter, a right which his Honour took to be established by s.23(2) of the Crimes Act[24] and by the authorities such as *Beavan* v. *The Queen*,[25] where the High Court held that if the jury do

> exercise their power to find a verdict of manslaughter, and it is certain that they were satisfied beyond reasonable doubt that the prisoner unlawfully killed the deceased, the verdict of manslaughter will not be invalidated merely because the facts proved by the evidence upon which the jury must have acted amount in point of law to murder.[26]

Fullagar, J., in the High Court, however, was of the opinion that the verdict of manslaughter in this case was returned as the result of an erroneous direction, not in exercise of the right referred to above, which his Honour took to be "the privilege of returning a merciful verdict of manslaughter."[27]

The fourth point is concerned with the application of the proviso to s.6 of the Criminal Appeal Act. Section 6, as far as it is relevant to this case, provides:

> The Court (of Criminal Appeal) on any such appeal against conviction shall allow the appeal if it is of opinion . . . that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice . . .; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Street, C.J. and McLelland, J., in the Court of Criminal Appeal, held that although the objection raised by the appellant as to the misdirection should be upheld, the misdirection actually operated in the appellant's favour, with the result that there had been no substantial miscarriage of justice. Their Honours were satisfied that the jury must have found rape proven, and hence, without a direction entitling the jury to find manslaughter, the verdict, as a matter of logic, should and would have been guilty of murder. The majority in the High Court, however, held that before the case could be brought within the proviso, the Crown would have to show that the accused's chance of acquittal had been in no way prejudiced by the misdirection and that the jury "must inevitably" or "would certainly" have convicted (of murder or manslaughter) if they had not been misdirected.[28] It was held that the Crown had not shown this. Without

[23] As to the legal meaning of malice, see *Shearer* v. *Shields* (1914) A.C. 808, 813; *Bromage* v. *Prosser* (1825) 4 B. & C. 247, 255; and Archbold's *Criminal Pleading, Evidence and Practice* (33 ed. 1954) 425.

[24] S.23(2) runs as follows: "Where, on any such trial (for murder where death induced by provocation), it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter."

[25] (1954) A.L.R. 775.

[26] *Id.* at 776. See also *R.* v. *Brown* (1913) 17 C.L.R. 570; *R.* v. *Surridge* (1942) 42 S.R. 278.

[27] (1954-56) 93 C.L.R. 493, 517, and *Hughes* v. *The King* (1951) 84 C.L.R. 170, 175.

[28] *White* v. *The King* (1922) 17 C.A.R. 60, 65; also *Cohen & Bateman* v. *The King*

the direction as to manslaughter, it was said, "the jury may well have hesitated long before convicting the appellant of murder, and it is very far indeed from clear that the misdirection did not operate to his grave disadvantage".[29] Authority for this proposition was drawn from *Ross* v. *The King*,[30] where it was said "the absence of any express direction as to manslaughter was an omission, as far as it went, entirely in the prisoner's favour".[31] Also the majority took the view that, if properly directed, the jury may have reached different conclusions on issues of fact.

It would seem then that the High Court considers the proviso to s.6 to be of limited operation where an appellant can show that there has been a wrong decision on a question of law at his trial. If, thereby, an appellant has "lost a chance which was fairly open to him of being acquitted, there is in the eye of the law a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have,[32] and justice is justice according to law".[33]

The final noteworthy point is in connection with the order made by the High Court after the appeal had been upheld. In this regard Williams, Webb and Taylor, JJ. stated: "The appellant has been acquitted on the charge of murder and there is no jurisdiction to direct a new trial on that charge (*Kelly* v. *The King*)".[34] It is submitted, with great respect, that this is not the position. *Kelly* v. *The King*[35] was a case where the prisoner was charged with murder but where the evidence could reasonably have supported a verdict of manslaughter only. The prisoner was convicted of manslaughter but appealed on the ground that the direction as to manslaughter was inadequate. The High Court, upholding the appeal and quashing the conviction said:

> The conviction being quashed, it remains to consider what further order should be made. It was suggested by counsel for the accused that the only order should be that the conviction be quashed. For the Crown it was contended that if the conviction were quashed a new trial should be ordered on the presentment for murder. We are all of the opinion that this Court has jurisdiction to order a trial on a charge of manslaughter only. . . . In the opinion of a majority of the Court the public interest (as well as that of the individual) will be best served by ordering a new trial on the charge of manslaughter only. . . .[36]

It would seem then that this case is not authority for the proposition that the High Court has no jurisdiction to order a new trial on a charge of murder, but rather for the proposition that the court has jurisdiction to order a new trial on the lesser charge of manslaughter *by itself*, as distinct from the graver charge of murder, even though the original indictment was for murder alone.[36a]

The question of the High Court's power to grant a new trial is dealt with in ss.36 and 37 of the Judiciary Act 1903-1955 (Cwlth.).[37] Section 36 provides: "The High Court in the exercise of its appellate jurisdiction shall have power to grant a new trial in any cause in which there has been a trial whether with or without a jury". Section 37 is in terms as follows: "The High Court in the exercise of its appellate jurisdiction . . . may give such judgment as ought

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(1909) 2 C.A.R. 197, 207; *Woolmington* v. *D.P.P.* (1935) A.C. 462, 482, 483.

[29] (1954-56) 93 C.L.R. 493, *per* Fullagar, J. at 514.

[30] (1922) 30 C.L.R. 246.

[31] *Id.* at 273, *per* Higgins, J. concurring with the view put by the Supreme Court of Victoria.

[32] I.e. a fair trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed.

[33] (1954-56) 93 C.L.R. 493, 514.

[34] *Id.* at 508.

[35] (1923) 32 C.L.R. 509.

[36] *Id.* at 516-17.

[36a] That this is the correct interpretation of *Kelly's Case* is borne out by *Callaghan* v. *The Queen* (1952-53) 87 C.L.R. 115, 125.

[37] Judiciary Act 1903 (Cwlth.), No. 6, 1903—No. 35, 1955.

to have been given in the first instance. . .". As regards the words "such judgment as ought to have been given in the first instance", when applied to the High Court's power in the present case, s.8 (1) of the Criminal Appeal Act, 1908 (N.S.W.) is in point. That subsection provides that: "The Court (of Criminal Appeal) may . . . order a new trial in such manner as it thinks fit . . . having regard to all the circumstances . . .".[38] It is clear then that in the present case the High Court had the *power* or jurisdiction to order a new trial on the charge of murder, either under s.36 of the Judiciary Act or under s.37 of the Judiciary Act when read with s.8(1) of the Criminal Appeal Act.[39]

It is submitted, however, that the real basis of the direction of judgment and verdict of acquittal is to be found in Fullagar, J.'s remark that: "The circumstances are such that I do not think that he (the appellant) should be put in jeopardy again".[40] This direction of the High Court assumed importance in the light of subsequent developments to which we shall now turn.

II. *Indictment for Rape, Special Pleas, Conviction of Rape and Appeals against Conviction.*

(a) *Indictment for Rape and Special Pleas.*

On the 6th December, 1955 Mraz was arraigned before the Central Criminal Court on an indictment charging that he "on the twenty-seventh day of September one thousand nine hundred and fifty-four at Woolamai in the State of New South Wales did without her consent ravish and carnally know Isabella Joyce Wilson."

To this indictment the prisoner entered some special pleas which were reduced to writing and which, after setting out the history of the earlier proceedings, read as follows:

> Having been acquitted of murder and manslaughter of the said Isabella Joyce Wilson the said Gigula Mraz says:
>
> (a) that in law he must be deemed to have been acquitted of the rape of the said Isabella Joyce Wilson now alleged in the said indictment.
>
> (b) that the Queen is estopped from prosecuting the said indictment.

A jury was empanelled and argument heard on these special pleas. McClemens, J., the presiding judge, overruled the pleas and directed the jury to find that "as a matter of law the special plea had not been sustained". The jury so found. Mraz was then asked how he pleaded and, after pleading "not guilty", was remanded to come up for trial at a later date before another judge and jury.[41]

On the 12th March, 1956, Mraz was recharged with rape and tried before Manning, J., and a jury. He again pleaded "not guilty". On the 14th March, 1956, he was convicted and sentenced to penal servitude for six years.[42]

(b) *Appeal to the Court of Criminal Appeal.*

Against this conviction, and the overruling of his special pleas, Mraz appealed to the Court of Criminal Appeal. The appeal was dismissed by Street, C.J. and Herron, J., with Dovey, J. dissenting.[43] Street, C.J. and Herron, J. took the appellant's argument to be that, considering the jury's verdict of not guilty of murder together with the High Court's order of acquittal, there had been, necessarily and as a matter of irresistible inference, a finding of not guilty of rape. This argument appeared to their Honours to be a contention of *res judicata*, or, in relation to the present proceedings, a plea of autrefois acquit. It was held, however, that such a plea was not open to the appellant

[38] It is significant that there is no such provision in the corresponding English Act, Criminal Appeal Act, 1907 (Eng.), 7 Ed. 7, c. 23.

[39] See *Ryan* v. *Ryan* (1914) 18 C.L.R. 601.

[40] (1955) 93 C.L.R. 493, 516.

[41] This procedure seems to have been irregular. See (1956) 73 W.N. 425, *per* Dovey, J. at 429, and Archbold, cited *supra* n.23, at 155.

[42] The jury having made a strong recommendation for mercy.

[43] (1956) 73 W.N. 425.

here, as a *charge* of murder is not the same or substantially the same as a *charge* of rape, nor was the prisoner in jeopardy of being convicted of rape on the indictment for murder.[44]

Their Honours were of the opinion that the appellant's argument must be supported, if at all, by the doctrine of issue estoppel. Relying on *dicta* of Dixon, J.,[45] in *The King* v. *Wilkes*[46] and *Blair* v. *Curran*,[47] their Honours took the crucial question in this regard to be: "What was actually decided by the High Court and what were the grounds of its decision".[48] This involved ascertaining "matters fundamental or cardinal to its (the High Court) decision", "by looking at the reasons given in the considered judgments of their Honours . . .".[49]

Looking at the jury's finding of manslaughter at the murder trial their Honours concluded that the jury must have found that—

(a) the accused brought about the death of the deceased
(b) by the unlawful act of rape but
(c) that he had not otherwise intended to injure her or to bring about her death.

All the High Court had said was that the direction as to a non-malicious rape was erroneous so that finding (c) above was irrelevant, being a matter with which the law is unconcerned. In the result, Street, C.J. and Herron, J. took the High Court to have left the question of rape, as found by the jury, open, so that the issue of rape had not, prior to the present charge, been determined in the appellant's favour.

Dovey, J. held that the record of the murder trial should read "judgment and verdict of acquittal of murder", (by dint of the jury's verdict), "judgment and verdict of acquittal of manslaughter" (by dint of the High Court's order). On the authority of *R.* v. *Barron*[50] his Honour held that an acquittal ordered by an appeal court placed the appellant in the same position, for all purposes, as an acquittal by a jury. As an acquittal by the jury in the murder trial would have involved a finding that there had been no rape, his Honour was of the opinion that the second of the special pleas was good and he would have allowed the appeal and quashed the conviction of rape.

(c) *Appeal to the High Court.*

Mraz made application for special leave to appeal to the High Court from the order of the Court of Criminal Appeal. Treating the hearing of the application for special leave as the hearing of the appeal, the High Court consisting of Dixon, C.J., Williams, Fullagar and Webb, JJ., unanimously allowed the appeal.[51] In the court's joint judgment the application and the appeal were taken to depend solely on the question of issue estoppel. It was held that, having regard to the relevant part of the definition of murder set out in s.18 of the Crimes Act,[52] the acquittal of murder "necessarily negatived the proposition that the applicant caused the death of the young woman during or immediately after the commission by the accused of the crime of rape." The affirmative of this proposition was taken to involve three elements, viz:

(1) that the applicant committed rape, and
(2) that during or immediately after the commission of the crime,
(3) an act of his caused the death of the young woman.

It was held that the whole proposition would be negatived if one of these three

[44] Their Honours cited *R.* v. *Grimwood* (1896) 60 J.P. 809; and *R.* v. *Serné* (1887) C.C.C. Sess. Pap. cvii, 418.
[45] As he then was.
[46] (1948-49) 77 C.L.R. 511, 518-19.
[47] (1939) 62 C.L.R. 464, 531ff.
[48] (1956) 73 W.N. 425, 427.
[49] *Ibid.*
[50] (1914) 10 C.A.R. 81.
[51] The appeal is, as yet, unreported.
[52] See *supra.*

elements was found to be lacking. The court was of opinion that element (3) had been established by the jury's verdict of manslaughter and that there had been neither "contest nor doubt" at the trial about the existence of element (2).[53] Hence, it was reasoned, element (1) must be taken to have been negatived. The order of the High Court setting aside the manslaughter conviction and the stated reason for that order were held not to open any other issue as a basis for the verdict of not guilty of murder.

In the result it was held that the verdict of not guilty of murder, in the circumstances, involved, as a necessary matter of law, a finding that the applicant did not commit rape. Hence the applicant's plea of issue estoppel *qua* an indictment for rape was held to be made out. The High Court allowed the appeal and entered a verdict of not guilty of rape.

(d) *Comment.*

The basic difference between the approach of the majority in the Court of Criminal Appeal, on the one hand, and the High Court, on the other, to the question of issue estoppel may be shown by posing two questions which were, in effect, asked by the two tribunals. The majority in the Court of Criminal Appeal asked: What was actually, as a matter of fact, decided by the jury when it returned a verdict of not guilty of murder but guilty of manslaughter, and by the High Court when it quashed the conviction of manslaughter and directed that a verdict of acquittal be entered? The High Court, on the other hand, appear to have asked: What must be taken, necessarily and as a matter of law, to have been decided by the jury when it returned a verdict of . . .? Having regard to the direction of the trial judge requiring the jury to be satisfied that rape had been committed before they could return a verdict of either murder or manslaughter, the Court of Criminal Appeal held that rape must have been found, as a matter of fact, by the jury, and that the High Court had not negatived this specific finding. The High Court, however, held that as the applicant had been acquitted of murder where the only real issue was that of rape, the issue of rape must be taken, as a matter of law, to have been decided against the Crown.

The principle of issue estoppel was stated by the High Court to be the treating of an "issue of fact or law as settled once for all between the parties if it is distinctly raised and if the judgment pronounced implied its determination as a matter of law."

As to what were the issues which would base an estoppel in this case, the High Court laid it down that "the jury's verdict of acquittal of murder should not be treated as involving any wider, different or additional issue than an examination of the indictment, the verdict and the matters put in issue would disclose."[54]

In answer to the objections impliedly raised by the Court of Criminal Appeal that the acquittal of murder, as a matter of law, was an incorrect verdict, insofar as the jury must have found as a fact, in order to return a verdict of manslaughter, that the accused had raped the deceased (albeit not "maliciously"), the High Court held that

> the law which gives effect to issue estoppels is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the process of reasoning by which the finding was reached in fact.

The jury do not have to understand or intend, it was said, what, as a matter of law, is the necessary meaning or the legal consequence of their verdict.

The divergence in approach to the application of the doctrine of issue estoppel manifested in the decisions of the Court of Criminal Appeal and the

[53] At first sight it may seem logically impossible to treat element (2) as independent of element (1). But it is submitted that, on closer examination, there is no such impossibility.

[54] Or, as was said elsewhere, ". . . the indictment and the verdict, as understood by reference to the law of homicide."

High Court reflects the impression of the authorities on this matter. As regards criminal proceedings, Dixon, J.[55] in *The King* v. *Wilkes*,[56] adopting the language used by Wright, J., in *R.* v. *Ollis*,[57] said: "there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial. . . ."[58] His Honour continued: "there must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding. . . ."[59] Coleridge, J., in *R.* v. *Hartington Middle Quarter* (*Inhabitants*)[60] stated the question to be

> whether the judgment concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided, as the groundwork of the decision itself, though not then directly the point in issue.[61]

On the principle of issue estoppel generally, it has been stated that "the inquiry must always be as to the point or question actually litigated and determined in the original action".[62] Isaacs, J., in *Gray* v. *Dalgety*[63] spoke as follows:

> The judgment . . . that is, the reasoned judgment, expressing what points were decided and for what reasons, must . . . be in such a case looked at in order that it may be ascertained what was really determined by the court between the parties. The reasons for so determining, of course, are not binding, but the points—that is the issues both of fact and of law —once decided, are finally decided unless under some power of rehearing the matter is reheard or unless on appeal they are differently decided.[64]

It is submitted, as a tentative conclusion based on these authorities, that the approach adopted by the High Court as to the application of the doctrine of issue estoppel in the present case is the correct one.

The real difficulty in this case arose from the trial judge's misdirection of the jury. An indication of the manner of applying the doctrine of issue estoppel where the prior decision has been based on a mistake is afforded by *R.* v. *Hartington Middle Quarter* (*Inhabitants*)[65] in which Coleridge, J. said

> the mistake of fact which occasioned a wrong judgment makes no difference: if the matter cannot be brought into controversy, of course, the mistake cannot be got at; and, though this may seem to produce injustice in the particular instance, as all estoppels are liable to do, yet in the long run the ends of equity and strict justice both are best served by holding strictly to the rule.[66]

This statement raises, indirectly, a point referred to at the end of Part I of this Note, a point which also seems to have been suggested by Dovey, J.

Dovey, J., in the Court of Criminal Appeal, based his dissent on reasons broadly similar to those advanced in the High Court. His Honour held that the acquittal now on the record should secure the prisoner the same benefits as if it had been entered by the verdict of a jury. Such a verdict in this case, it was stated, would necessarily have involved the negation of rape—the only act properly in issue from beginning to end of the earlier trial—and an estoppel as to that issue. To return to the point mentioned above: Dovey, J., in the course

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[55] As he then was.
[56] (1948-49) 77 C.L.R. 511.
[57] (1900) 2 Q.B. 758.
[58] (1948-49) 77 C.L.R. 511, 518-19.
[59] *Ibid.*
[60] (1855) 4 E. & B. 780.
[61] *Id.* at 794.
[62] *Cromwell* v. *Sac County* (1876) 94 U.S. 351,353, quoted by Higgins, J. in *Hoysted* v. *The Commissioner of Taxation* (1921) 29 C.L.R. 537, 560.
[63] (1916) 21 C.L.R. 509.
[64] *Id.* at 543.
[65] *Supra* n. 60.
[66] *Id.* at 793.

of his judgment, quoted a *dictum* of Reading, L.C.J.'s in *R.* v. *Barron* [67] to the effect that, under the Criminal Appeal Act (Eng.),[67a] if an appeal against conviction is allowed, the court *must* direct a judgment and verdict of acquittal to be entered,[68] which acquittal is to be treated as an acquittal by the jury.[69] Dovey, J. then pointed out that under the Criminal Appeal Act (N.S.W.), the court is empowered to "order a new trial in such manner as it thinks fit, if it thinks that a miscarriage of justice has occurred. . .".[70] As was submitted earlier, it seems that the High Court has the power, on a criminal appeal, to order a new trial if it thinks fit. If this is so, the High Court's failure to order a new trial, taken with its order that a verdict of acquittal be entered, may be taken as a confirmation of the jury's verdict of not guilty of murder and of the effect of that verdict *in law*. This submission, of course, supports the decision reached by the High Court on this appeal.

B. A. McKILLOP, Case Editor—Fourth Year Student.

PROOF OF TITLE IN EJECTMENT AND THE ROLE OF SEISIN IN THE MODERN LAND LAW

ALLEN v. *ROUGHLEY*

The expansion of the Torrens system, which prevents the acquisition of land by prescription in New South Wales,[1] has tended to divert judicial interest from problems arising in connection with land under the common law system of titles, which are still governed by the conflicting and confusing statements of law laid down by English courts in the Victorian era.[2] Recently the High Court in *Allen* v. *Roughley*[3] had an opportunity to settle difficult questions of property law.

The facts before the High Court were as follow: Plunkett's land had been obtained by one, J.T., in 1823 by Crown Grant, and there was no record of any dealings with the land till 1877 when Plunkett mortgaged it to Hyland. In 1880, the mortgagor and mortgagee conveyed the land to Henry Cusbert, who occupied the land till his death in 1895. In his will under the residuary clause the land was devised to trustees to the use of his son William for life and the remainder to the use of all the other children of the testator. William was in possession of the land from 1895 till 1900, although he lived on a homestead adjoining the property. In 1898 Edmund Allen (the appellant), the brother-in-law of William, also went to live on the homestead and lived there until he built a hut on Plunkett's land itself. Between 1900 and 1915 William was continuously in New Zealand and after his return until his death in 1942 he lived either on the homestead or in the hut built by Allen. Allen was in possession of the land, and had used it for his own benefit since 1898. He fenced the property, cleared several acres and planted lemon trees, sold soil and timber to various persons and alone worked and took the profits of the land. By deed in 1937 the trustees of the will of Henry Cusbert retired and appointed Allen and Roughley (the respondent) trustees of the will. In this suit the trustee (Roughley) and the representatives of William sought a declaration that Plunkett's land was an asset in the estate of the testator, Cusbert. The defendant raised two defences before Roper, C.J. in Equity, in

[67] *R.* v. *Barron* (1914) 10 C.A.R. 81.
[67a] Cited *supra* n.38.
[68] S.4(2).
[69] *R.* v. *Barron* (1914) 10 C.A.R. 81, 83.
[70] S.8(1).

[1] *Jobson* v. *Nankervis* (1944) 44 S.R. (N.S.W.) 277.
[2] The fusion of law and equity in England in 1873 introduced difficulties, since it was uncertain how far the changes affected the substantive law. The tumultuous case law and the struggle with ancient doctrines caused errors, such as the persistent oversight of the decision of the Privy Council in *Trustees, etc.* v. *Short* (1888) 13 A.C. 793 (P.C.).
[3] (1955) 94 C.L.R. 98.