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*Feb. 25, 26.
*Feb. 28.

JOSIAH GILBERT ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Criminal law—Practice—Crown case reserved—Reserved questions—Dissent from affirmance of conviction—Appeal—Jurisdiction—Criminal Code, 1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906), *c.* 146, *ss.* 1013, 1015, 1016, 1024—*Admission of evidence—Res gestæ.*

Evidence of statements made by a person, since deceased, immediately after an assault upon him, under apprehension of further danger and requesting assistance and protection, is admissible as part of the *res gestæ*, even though the person accused of the offence was absent at the time when such statements were made. *Reg.* v. *Beddingfield* (14 Cox 341); *Rex* v. *Foster* (6 C. & P. 325) and *Aveson* v. *Kinnaird* (6 East 188) followed.

Statements not coincident, in point of time, with the occurrence of the assault, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have been expected to have made some explanatory reply to remarks in reference to them, are admissible as evidence.

On the trial of an indictment for murder the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally.

Held, that, in view of the character of the defence and the evidence in support of it, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter but that their verdict should be either for acquittal or one of guilty of murder.

Two questions were reserved by the trial judge for the opinion of the court of appeal but he refused to reserve a third question, as to the correctness of his charge on the ground that no objection to the charge had been take at the trial. The court of appeal

*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington, Maclennan and Duff JJ.

took all three questions into consideration and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved. On an appeal to the Supreme Court of Canada,—

The majority of the court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the court appealed from, but it was held,—

Per Girouard J.—That the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the court appealed from. *McIntosh* v. *The Queen* (23 Can. S.C.R. 180) followed. *Viau* v. *The Queen* (29 Can. S.C.R. 90); *The Union Colliery Company* v. *The Queen* (31 Can. S.C.R. 81) and *Rice* v. *The King* (32 Can. S.C.R. 480) referred to.

APPEAL from the judgment of the Supreme Court of the North-West Territories, affirming the conviction of the appellant at the trial on an indictment for murder, upon a reserved case stated by the judge who presided at the trial.

The case reserved was stated by the trial judge, Mr. Justice Newlands, as follows:—

"STATED CASE."

"The above named Josiah Gilbert was charged before me with the murder of one Barrett Henderson on or about the 15th day of August, A.D. 1906, near Regina in this judicial district. The accused pleaded not guilty and was tried before me with a jury at Regina on the 13th, 14th, 15th and 16th days of November, 1906, and was convicted and sentenced to death by hanging at Regina on the 18th day of January, 1907.

"At the trial the annexed evidence was admitted after being objected to by counsel for the accused.

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"After the verdict the counsel for the accused applied to have the following questions reserved and I have decided to reserve the same under section 937 of the Criminal Code for the opinion of the court.

"1. Were the statements of the deceased made while running towards Dick and Koch and thereafter on joining them admissible?

"2. Were the statements made by the deceased to McKinnon on arriving at the house on the deceased's farm admissible?

"Said counsel for the accused also applied to have the following question reserved:—

"3. Was the learned trial judge right in stating to the jury in his charge that there was no evidence to justify them in reducing the verdict from murder to manslaughter and that the case warranted only a verdict of murder or not guilty?

"In my charge to the jury I said, 'As far as manslaughter is concerned the Code states that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. As far as this case is concerned there has been absolutely no evidence put before you of provocation. As far as I can see in the case there is nothing that has been given in evidence that would justify a reduction of this charge from murder to manslaughter. The verdict as far as I can see can either be one of not guilty, or that of guilty of murder. Those are the only two verdicts, as far as I can see, that are open before you.'

"No objection was taken to this charge at the trial so I declined to reserve this question."

"Regina, December 14th, 1906."

"H. W. NEWLANDS, J.S.C."

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After hearing the arguments of counsel, the court, in banc, affirmed the conviction, the opinion of the court being unanimous as to the first and third questions. Mr. Justice Wetmore dissented from the opinion of the majority of the court as to the points of law involved in the second question.

His Lordship Chief Justice Sifton and their Lordships Justices Newlands and Stuart concurred in the following opinion delivered by His Lordship Mr. Justice Harvey.

HARVEY J.—"The accused was charged with murder and tried by my brother Newlands with a jury and convicted, and the matter now comes before this court by way of a reserved case as to the admissibility of certain evidence which was given on the trial.

"Two men were passing near the scene of the alleged murder about the time it was supposed to have been committed and their attention was drawn to the accused whom they saw running with something in his hand, which they took to be a gun and which the subsequent evidence shews was a gun. At almost the same moment they heard a shout and saw the deceased apparently fleeing from the accused and waving his hands and calling to them to stop. The gun was dropped, but the pursuit continued until the deceased reached the witnesses, and on his way to them and when reaching them, he shouted more than once, 'Hold on, hold on; he shot me and he will shoot me again. Hold on, boys, hold on.' The first question which is reserved is whether the evidence of these statements was properly admitted, and I am of the opinion that this question should be answered in the

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affirmative. Apart altogether from whether the words were uttered in the presence of the accused, it appears to my mind clear that the circumstances, including the utterance of the words used, were so closely connected with the shooting as to be properly admissible for, although the witnesses in question did not hear the sound of a shot, another witness did hear such sound and almost immediately after saw the two men running as they were when they first attracted the attention of the two witnesses first mentioned.

"The strongest case which could be referred to against the admissibility of this evidence was *Reg.* v. *Bedingfield*(1), in which Chief Justice Cockburn refused to receive the evidence of a statement made by the deceased to a person whom she met after coming out of the house where the accused was and where the murder was alleged to have been committed. It is easy to see a difference in principle between the two cases. In the present case there was a continuity of circumstances of which the shooting was part and in which the accused was a participant, which did not exist in the *Bedingfield Case*(1). So that for the purpose of this case it is not necessary to dissent from Chief Justice Cockburn's view though some of the text writers, Taylor, par. 583; Phipson, p. 49, express the view that he interpreted the rule too strictly.

"In *Rex* v. *Foster*(2) the court, consisting of three judges, held as admissible a statement made by the deceased in answer to a question by a witness who did not see the act which was the cause of the death but came up after. This case appears to have been accepted as authoritative, and the principle is given by Taylor, par. 583, as follows: "The principal points

(1) 14 Cox 341. (2) 6 C. & P. 325.

for consideration are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object or to form in conjunction with it one continuous transaction."

"It appears to me beyond question that the present case falls within this principle and the authority of *Rex* v. *Foster*(1).

"The second question reserved is as to the admissibility of evidence of an expression of the deceased at a later time and in no way connected with the *res gestæ*. An exchange of conveyances was being made by the deceased and the accused, and the witness states that while the deceased was being helped by him across, he turned around and saw the accused who was about five or six feet behind, whereupon 'he made a big jump into the buggy and said, 'Don't let him knife me."

"This utterance appears to me to be nothing more than an unequivocal exclamation indicating fear of injury from the accused on the part of the deceased. The principle on which an exception to the rule that hearsay evidence is inadmissible is made in the case of statements made in the hearing of an accused, or in a civil case in the hearing of an opposite party, is that he has an opportunity of denying it, and if he fails to do so, it is some evidence as against him of the truth of the statement. When one considers that the utterance in question is not a statement of fact at all and is not susceptible of denial by the accused, it is at once evident that the principle has no application and at the same time the principle of exclusion as hearsay has no application. The question appears to

(1) 6 C. & P. 325.

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me to be one then simply of whether the state of mind of the accused in this respect is material, and if it is, there is no rule as far as I am aware that requires the exclusion of this remark. It seems to me that the evidence of the witness when he said that when deceased saw accused near him 'he made a big jump into the buggy' stands in exactly the same position as the evidence of what deceased said, for each indicates the same thing, viz., fear of accused, and nothing more except that the spoken words are less equivocal than the act.

"The charge is one of deliberately shooting the deceased while the defence is that the shooting was purely accidental. If it were shewn that after the shooting the state of mind of the man shot were one of friendliness to the accused, it surely would be deemed to have an important bearing on the question in issue, and in the same way evidence indicating aversion and fear have as important a bearing in the opposite direction. Wigmore, in his work on Evidence, points out very fully the difference between the admission of utterances as proof of the truth of the facts stated and their admission to prove a state of mind which he terms their circumstantial use as opposed to the other or testimonial use, and states, in par. 1790, that to the use circumstantially the hearsay rule makes no opposition 'because the utterance is not used for the sake of inducing belief in any assertion it may contain.'

"For the reason stated I am of opinion that this evidence was properly admitted.

"A third question, though not reserved, was argued by counsel, viz., that the learned judge erred in charging the jury that there was no evidence to justify them in finding a verdict of manslaughter.

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"No one gave evidence of the actual shooting except the accused himself, and his evidence and evidence of admissions made by him before the trial was the only evidence of the actual occurrence. These all concurred in maintaining that the shooting was purely accidental. If the jury had believed this evidence, the only verdict they could have found would have been one of acquittal; but if they did not believe it, the only conclusion from the evidence was that the shooting having been established the intention to effect the natural consequence of the act existed and that the act was one of murder. It is quite easy to see that a hypothesis could be advanced that the actual facts made the case one of manslaughter, but that the accused, being the only eye witness of the shooting, determined to concoct a story which would enable him to escape the consequence of even that act; but this would be simply a hypothesis, and the jury were bound to bring in a verdict on the evidence and not on hypothesis. I am of opinion that the judge's charge was right in this respect.

"In the result therefore the learned trial judge's rulings on the two questions reserved and on the other question which was argued should be confirmed and the conviction should be affirmed."

The opinion of Mr. Justice Wetmore was delivered, as follows:—

WETMORE J.—"I agree with my brother Harvey that the evidence of the statements made by the deceased Henderson to the witnesses Koch and Dick while coming towards them and after he arrived there was properly admitted as being part of the *res gestæ*. I also agree that there was no misdirection in the case.

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But I am of opinion that the statement made by the deceased and testified to by McKinnon, namely, 'Don't let him knife me,' was improperly received in evidence. This statement was offered in evidence as a statement made in the presence and hearing of the accused and only upon that ground. It was not pretended that it was admissible on any other ground.

Evidence of this character is admissible because the jury or judge of fact is able to draw an inference from the conduct, the language, or the silence of the other party in whose presence and hearing the statement is made. Evidently, if the statement was not heard by such party, no inference could be drawn from his conduct, language or silence. In this case I may say that any reference that might be drawn was to be drawn from the silence of the accused. In order to render such testimony admissible I think that the judge ought to be thoroughly satisfied that the party accused heard the statement. I will concede that, ordinarily, if it is established that the statement was made in the presence of the accused and that he was at such a distance at the time that the statement would likely be heard by him, this would be sufficient to admit the evidence of the statement. But if the circumstances are of such a character that render it possible that the statement might not have been heard by him or render it doubtful whether it was heard by him, evidence of the statement ought not to be received. In this case the witnesses Koch and Dick were not very far distant from where the deceased and the accused were at the time the statement was made, and I think they would have been likely to hear it. Now, if they did not hear it, I think it is open to doubt whether the accused heard it. I am not prepared, however, to state that I would

hold that the evidence of this statement was improperly received if there was nothing further in the case than what I have stated. But it was developed at a subsequent stage of the proceedings that the accused was hard of hearing, and he distinctly swore that he did not hear the statement made by the deceased and testified to by McKinnon. This state of facts having come out, in my opinion rendered the testimony of McKinnon as to the statement inadmissible, or in other words improperly received. It is urged that inasmuch as the testimony when received was admissible, it is not rendered inadmissible by testimony subsequently given. I dissent from that proposition. If testimony of this character is received under a mistaken apprehension of facts it must be considered none the less inadmissible if future developments of facts shew that it ought not to have been admitted. In a case of that sort I am of opinion that either the jury should be discharged from giving a verdict or the objectionable testimony expressly withdrawn from their consideration by the trial judge. I am inclined to think that the latter course would have been quite sufficient for the purpose. It was further urged that no substantial wrong or miscarriage was occasioned by the admission of this testimony. I cannot accede to this proposition either. It is very difficult to state what will or will not influence the mind of a juryman. The remark 'Don't let him knife me' had no direct reference to the shooting; it must be remembered that when the remark was made the accused had no gun with him and a remark such as 'Don't let him shoot me' would not be pertinent as he had no means of shooting. The words, 'Don't let him knife me' might be pertinent however, and it was a remark from which a juryman might

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infer 'Don't let this man who shot me, as I told you, knife me.' Nor can I bring my mind to the conclusion that this was a mere exclamation of fear alone. Doubtless it was an exclamation of fear, but it was an exclamation which not only expressed fear but expressed fear of the accused. I am of opinion, for the reasons above stated, that the conviction should be quashed and a new trial ordered."

Chrysler K.C. and *James Balfour* for the appellant. The statutory provisions affecting the case are to be found in the "Criminal Code, 1892," sections 742, 743, 744 and 750, and in the new Code as consolidated in the Revised Statutes of 1906, sections 1013, 1015, 1016 and 1024.

The court of appeal, the Supreme Court of the North-West Territories, in banc, was not unanimous in affirming the conviction, Mr. Justice Wetmore being in favour of allowing the appeal and ordering a new trial; therefore, we comply with the condition of section 742 of the old Code. We come to this court upon a judgment as entered there and we appeal against the affirmance of the conviction by a judgment which was not unanimous; it is of no consequence what might have been the individual reasons of any of the judges for their opinions which led to that judgment.

We refer to the *Queen* v. *Cunningham*(1), which is referred to in *McIntosh* v. *The Queen*(2), by Taschereau J., at page 185. The question has been since discussed in the case of *Viau* v. *The Queen*(3), in the

(1) Cout. Dig. 401; 18 N.S. Rep. 31; Taschereau Criminal Law (3 ed.), page 866.

(2) 23 Can. S.C.R. 180.

(3) 29 Can. S.C.R. 90.

judgment of the court by Taschereau J. In the present case the third question, although not reserved, was argued and decided in the court below which treated the point of procedure as having been waived. See also *Rice* v. *The King*(1), per Strong C.J.

We rely upon *Reg.* v. *Bedingfield*(2), on which Lord Cockburn subsequently wrote a pamphlet which will be found in the Law Journal for 1880, at page 5. See also Best on Evidence(3). Archbold in his work on Criminal Evidence, concludes that *Reg.* v. *Bedingfield*(2), was affirmed by the decision in *Goddard's Case*(4). See also remarks on *Rex* v. *Foster* (5), in Roscoe on Criminal Evidence(6), and cases discussed at pages 48 and 49; *Reg.* v. *McMahon*(7); *Eastman* v. *Boston & Maine Railroad Company*(8); *Vicksburg and Meridian Railroad Company* v. *O'Brien*(9), and Greenleaf on Evidence(10), at pages 192 and 262.

Latchford K.C. for the respondent.

CHIEF JUSTICE:—The appellant in this case was tried at Regina, Province of Alberta, in the month of November, 1906, and found guilty of the murder of one Barrett Henderson; thereupon he was sentenced to death.

The learned judge before whom the case was tried, at the request of counsel for the prisoner to reserve some questions as to the admissibility of evidence,

(1) 32 Can. S.C.R. 480.
(2 14 Cox, 341.
(3) 10 ed., p. 410.
(4) 15 Cox 7.
(5) 6 C. & P. 325.
(6) 12 ed., pp. 23, 24.
(7) 18 O.R. 502.
(8) 165 Mass. 342.
(9) 119 U.S.R. 99.
(10) Vol. I., 16 ed.

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stated a special case for the opinion of the court of appeal. The questions reserved for the opinion of the court were:

1. Were the statements of the deceased made while running towards Dick and Koch and thereafter on joining them admissible?

2. Were the statements made by the deceased to McKinnon on arriving at the house on deceased's farm admissible?

The counsel for the accused also applied to have the following question reserved:

3. Was the learned trial judge right in stating to the jury in his charge that there was no evidence to justify them in reducing the verdict from murder to manslaughter and that the case warranted only a verdict of murder or not guilty?

The judge in the case, as reserved, says:

In my charge to the jury I said: "As far as manslaughter is concerned the Code states that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. As far as this case is concerned there has been absolutely no evidence put before you of provocation. As far as I can see in the case there is nothing that has been given in evidence that would justify a reduction of this charge from murder to manslaughter. The verdict, as far as I can see, can either be one of not guilty or that of guilty of murder. Those are the only two verdicts, as far as I can see, that are open before you.

No objection was taken to this charge at the trial so I declined to reserve this question.

The court of appeal, Wetmore J. dissenting, held that the statements made by the deceased to McKinnon on arriving at the house on the deceased's farm were admissible. The court was unanimously of opinion that the statements made by deceased while running towards Dick and Koch and after joining them were properly admitted and also that there had been no misdirection.

A question was raised here as to whether an appeal

lies to this court on the question reserved as to which there was no dissent in the court of appeal, but as we all agree that the appeal should be dismissed we do not think it necessary to express any opinion on that point of practice nor as to whether or not the question of misdirection was ever properly before the court below. Section 1016, Criminal Code; *McIntosh* v. *The Queen* (1).

The first statement of the deceased was made immediately after the assault. The only evidence as to the actual shooting was given by the accused, but a witness, Vine Brooks, heard the sound of a shot and immediately afterwards saw two men whom she describes as running away from the barn one apparently pursuing the other. Koch and Dick to whom the statement admitted in evidence was made were passing on the highway not far from the barn in which the fatal shot was fired. When first seen by the witnesses the accused was running through the field with something in his hand, which subsequent evidence shews was a gun, and, almost immediately, their attention was drawn to the deceased who was running from the accused towards them shouting, as they afterwards ascertained, for protection. The pursuit continued, although the gun was dropped by the accused, until the deceased reached the witnesses when he shouted to them several times as he approached—

> Hold on, hold on, he shot me and he will do it again; hold on boys, hold on.

When Koch and Dick were examined their evidence as to what occurred under these circumstances when the deceased approached them and immediately there-

(1) 23 Can. S.C.R. 180, 185.

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after when with them in the vehicle was objected to. The trial judge held it to be admissible and his ruling was sustained by the unanimous judgment of the court of appeal, and, as was intimated at the close of the argument here, we entertain no doubt that the evidence was properly admitted.

At the trial, in the court of appeal and at the argument here, counsel for the accused relied in support of their objection on the case of *Reg.* v. *Bedingfield*(1), wherein the admissibility of this kind of evidence was discussed and Cockburn, C.J. excluded all testimony of declarations after the act was done. This ruling was much criticized at the time and led to a vigorous discussion of the whole subject by Judge Pitt Taylor, in England, and Professor Thayer, in the United States, in the course of which the chief justice issued a pamphlet in defence of his ruling wherein he defines the term *res gestæ*:

> Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment,—whether on the part of the agent or wrong-doer in order to its performance, or on that of the patient or party wronged, in order to its prevention,—*and whatever may be said by either of the parties, during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive,—as e.g., in the case of flight or applications for assistance,—form part of the principal transaction, and may be given in evidence as part of the res gestæ, or particulars of it.*

There can be no doubt that under this definition the statement of the deceased to Koch and Dick would be admissible as

(1) 14 Cox 341.

having been used under the apprehension of further danger and when asking for assistance and protection even if the accused was absent.

It will be observed further that in the *Bedingfield Case*(1) when the woman Eliza Rudd came out of the house with her throat cut all action on Bedingfield's part had ceased and she was not fleeing as in the present case from her assailant.

In *Rex* v. *Foster*(2), the court, consisting of three judges, held as admissible a statement made by deceased in answer to a question by a witness who did not see the act which was the cause of the death but came up after.

The case of *Aveson* v. *Lord Kinnaird*(3) bears strongly upon the point, Park J. and Patterson J. concurring. In that case Lord Ellenborough said

if at the time she fled from the immediate personal violence of the husband I should admit what was said.

The admissibility of the second statement to McKinnon is not so clear. It was made under these circumstances: After the deceased running up to Koch and Dick in the road where they were joined by Gilbert had given his first explanation of the shooting and asked for their protection; the parties then present separated, Koch and Gilbert going to the latter's barn to get his team while Dick and the deceased went over to the shack in which Henderson lived with his hired man McKinnon who, on their arrival, very naturally asked for an explanation of the occurrence which has not been given in evidence. Subsequently, however, Gilbert appeared on the scene with Koch; then ensues a conversation with McKinnon during the

(1) 14 Cox 341.
(2) 6 C. & P. 325.
(3) 6 East 188.

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course of which Gilbert attempted to explain that the shooting was due to an accident. The deceased who was being placed in a buggy, to be conveyed to the hospital at Regina for medical treatment, perceiving the accused who stood about six feet away from him made a jump exclaiming, "Don't let him knife me."

It has been argued that this statement of the deceased is not admissible as part of the *res gestæ* not being coincident in point of time with the main facts to be proved. However that may be we are all of opinion that the words spoken on this occasion are admissible on the ground that they were uttered in the presence and hearing of the accused, and under such circumstances, in the light of what he had previously stated to McKinnon, that he might have been reasonably expected to make some answer or remark in reply thereto or explaining that his proximity to deceased did not involve any such danger as he seemed to feel.

The presumption, even taking the previous statement of counsel as to the condition of accused's hearing as a fact, would be that he might reasonably be presumed to have heard. And the learned and careful trial judge has in the exercise of a discretion vested in him decided the preliminary fact and allowed the evidence on the ground that the necessary conditions had been fulfilled.

The later statement of accused when giving evidence denying having heard the statement, could not have any effect on the previous ruling or become a test of its correctness.

The charge in view of the character of the defence and evidence in support of it cannot be complained of in so far as we can express an opinion in the ab-

sence of the text of the charge which is not before us.

There was no case of culpable homicide of less degree than murder presented on the evidence. And the accident testified to by the accused would have, if credited, entitled him to acquittal.

The appeal should be dismissed.

GIROUARD J.—Following the decisions of this court in *McIntosh* v. *The Queen* (1); *Viau* v. *The Queen* (2); *The Union Colliery Co.* v. *The Queen* (3); *Rice* v. *The King* (4), I feel that I have no jurisdiction to express any opinion upon the points of law involved in questions one and three. It was decided in those cases that no appeal lies to this court on questions as to which there was no dissent in the court of appeal. For that reason I agree that the appeal must be dismissed as to those two points.

As to the second question, I concur in the reasons given by the learned Chief Justice. I wish to add merely a word. The trial judge was undoubtedly the sole judge as to the admissibility of the statement or exclamation to McKinnon. He could not suppose that the prisoner, when standing within four or five feet, did not hear it. When, subsequently, the prisoner, being examined, disclosed the fact that he did not hear the deceased, the counsel for the prisoner does not appear to have requested the trial judge to leave the veracity of this statement to the jury. Perhaps he did, and it may be that the judge left the question to the jury. We have no means of knowing. At all events, the point is not reserved, and is not even

(1) 23 Can. S.C.R. 180.
(2) 29 Can. S.C.R. 90.
(3) 31 Can. S.C.R. 81.
(4) 32 Can. S.C.R. 480.

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mentioned by the learned judge. I, therefore, believe that, as to this second question also, the appeal should be dismissed.

DAVIES, IDINGTON, MACLENNAN and DUFF JJ. concurred with the Chief Justice.

Appeal dismissed.

Solicitor for the appellant: *James Balfour.*

Solicitors for the respondent: *Latchford & Daly.*