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*Feb. 24, 25.
*Mar. 11.

NEWMAN CLARK.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Criminal law—Trial—Plea of insanity—Charge to jury—Proof—Beyond a reasonable doubt.

On a criminal trial where the prisoner pleads insanity it is misdirection for the judge to charge the jury that insanity must be proved beyond a reasonable doubt. *Rex* v. *Anderson* (7 Alta. L.R. 102) approved. *The King* v. *Kierstead* (45 N.B. Rep. 553) overruled. Idington J. dissents.

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick affirming the conviction of the appellant on an indictment for murder.

The appellant being put on trial pleaded that he was insane when the crime was committed. Subject to this defence the crime was proved.

The trial judge in charging the jury instructed them that the onus of proving insanity was on the prisoner and that such defence must be established "beyond a reasonable doubt." The appeal Division having already decided in 1818 in *The King* v. *Kierstead* (1) that this was a proper charge the trial judge refused an application for a reserved case based on it as a misdirection and the Appeal Division refused to direct that he should grant it.

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*PRESENT:—Idington Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 N. B. Rep. 553.

In a case of *Rex* v. *Anderson* (1), the Appellate Division of the Supreme Court of Alberta had, in 1814, held that such a charge was misdirection and the prisoner applied for leave to appeal to the Supreme Court of Canada under the provisions of the amendment of the Criminal Code passed in 1920 being 10-11 Geo. V, ch. 43, sec. 16. This amendment authorizes a judge of the Supreme Court of Canada to grant leave to appeal to that Court where provincial courts have given conflicting decisions on a question of criminal law. The leave was granted in this case the effect of which was that the judge granting it held that it can be granted where the court below is unanimous (if not the amendment would be unnecessary, as if there is dissent in the court below an appeal would lie as of right) and also that the refusal of the provincial court to direct the trial judge to reserve a case is an affirmance of the conviction under sec. 1024 C.C.

W. P. Jones K.C. for the appellant.

W. B. Wallace K.C. for the respondent referred to *Rex* v. *Beard* (2).

IDINGTON J. (dissenting).—The appellant was indicted for murder and convicted thereof. The defence set up was insanity. The facts bearing upon his actual commission of the crime charged seem to have been of such a conclusive character as to leave no room for doubt of his guilt unless he could be excused on the ground of insanity, or rather a doubt of his sanity which is sought to serve the same purpose.

(1) [1914] 7 Alta. L.R. 102. (2) 122 L.T. 625.

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Stripped of undue verbiage confusing or tending to confuse the mind, the issue raised is whether or not if there might have been or ought to have been created by the evidence adduced a doubt as to his sanity in the minds of the jurors who tried him, then he should have been acquitted.

The law in Canada ever since the enactment of the Criminal Code of 1892, is that declared by section 11 thereof continued in section 19 of the Criminal Code, chapter 146 of the Revised Statutes of Canada 1906, as follows:—

> 19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.
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> 2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.
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> 3. Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

In submitting the question of appellant's sanity to the jury, the learned trial judge told them that the burden was placed upon the accused to make out his insanity at the time of the commission of the offence, beyond a reasonable doubt.

Inasumch as that precise form of direction had been then recently, unanimously approved by the Court of Appeal for New Brunswick in the case of *The King* v. *Kierstead* (1), the learned trial judge refused to reserve a case for said court, founded upon the objection that there was error in so charging the jury. That court upon appeal thereto decided to abide by its ruling in said case and refused to interfere.

(1) 45 N.B.Rep. 553.

The Court of Appeal for Alberta in a similar case of *The King* v. *Anderson* (1), having, in 1914, by a bare majority decided that a charge using similar language to that now in question, was erroneous and granted a new trial, the appellant obtained from my brother Anglin leave to appeal to this court, under and by virtue of chapter 43, section 16, of the Dominion Statutes of 1920, which provides as follows:—

> 16. The following section is inserted immediately after section one thousand and twenty-four of the said Act:
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> 1024a. Either the Attorney-General of the province or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction o f an indictable offence, if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case,

and continues to provide for a judge of this court giving in such case leave to appeal.

It has been argued before us not only that there is a substantial conflict between the judgment in question and that in the *Anderson Case* (1), but also that the ruling of the Supreme Court of the United States in *Davis* v. *United States* (2), is the correct view to adopt.

The head note to that report is as follows:—

> If it appears on the trial of a person accused of committing the crime of murder, that the deceased was killed by the accused under circumstances which—nothing else appearing—made a case of murder, the jury cannot properly return a verdict of guilty of the offence charged if, upon the whole evidence, from whichever side it comes, they have a reasonable doubt whether, at the time of killing, the accused was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing.
>
> No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to shew beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

(1) 7 Alta. L.R. 102. (2) 160 U.S.R. 469.

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Such is the result of an argument in which about a hundred authorities were cited, and many of them are referred to in the judgment of the court.

Such is, as it seems to me, the drift and probable result of accepting the law as laid down in the *Anderson Case* (1), in preference to that by the New Brunswick Court of Appeal.

The grave consequences of our so deciding would be almost tantamount to repealing the above quoted enactment of our Code, obviously designed to put an end to what was presumably an undesirable state of our law as administered, and place it upon clear and, but for what has happened, I should have supposed unmistakable grounds.

In the *Anderson Case* (1), Mr. Justice Stuart was, I respectfully submit, apparently unable to define the difference between a defence to the "satisfaction of the jury" or "clearly proven" and one "beyond reasonable doubt."

And, with great respect, I cannot see how, for a moment, the protection thrown around a prisoner is, as he suggests, necessarily interfered with by the due limitation of the defence set up.

Mr. Justice Beck cited therein as authority Cyc's definition which tends in same direction as ultimately decided in the *Davis Case* (2) I refer to above.

None of the other authorities which he cites, to my mind, I respectfully submit, when closely examined and considered, really touch the kernel of what is involved herein.

On the other hand such decisions as Chief Justice Harvey relies upon, aptly present the identical view he took of the Anderson case, as that which had been

(1) 7 Alta. L.R. 102. (2) 160 U.S.R. 469.

presented by eminent judges in England, using the phrase "beyond reasonable doubt" in the same sense in relation to the proof of insanity as did the learned trial judge in that case.

He cited *Bellingham's Case*, decided in 1812; referred to in Russell on Crimes (7th ed.) at page 65; *Reg.* v. *Stokes* (1), decided in 1848, only five years after *McNaghten's Case* (2), by Baron Rolfe, who had been appointed to the Exchequer Chamber in 1839 and hence possibly one of the judges called to answer the question in the *McNaghten Case* (2), and (though best known as a leader of the Chancery Bar) had had considerable experience in criminal trials as recorder of Bury St. Edmunds, and in presiding at the trial of many notable criminal cases; and the case of *Rex* v. *Jefferson* (3), where Mr. Justice Bigham, as late as 1908, charged the jury in the same terms as now objected to.

And although that case went to appeal no one ever thought of raising such a ground as now taken herein. Why so unless clearly untenable?

The truth would seem to be that the law as laid down in the *McNaghten Case* (2), that in order to establish the defence, on the ground of insanity, it must be "clearly proven" and that "to the satisfaction of the jury" has always been, for at least a hundred years the law in England; and that it has been so presented to juries concerned in the language now complained of without challenge.

Mr. Tremear, in the second edition of his work on our code, in his notes upon the section thereof now in question, says that it was in the draft code prepared by the Imperial Commission, but never adopted by parliament.

(1) 3 Car. & K., 185. (2) 10 Cl. & Fin. 200; 8 Eng. R. 718.
(3) 72 J. P. 467.

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Law seemingly was found to be more stabilized, as it were, in England without a code, than in some other countries with one.

That, however, is no reason for our departing from our criminal code which seems to me in its terms to be more imperatively adverse to the appellants contention in its terms than the logical result of the judicially made law of England.

The word "satisfaction" has given to it, in Murray's Dictionary, as one of its many meanings, the following:

> 6. Release from suspense, uncertainty, or uneasiness (J.); information that answers a person's demands or needs, removal of doubt, conviction.
>
> Phrase, *to* (a *person's*) *satisfaction*.

I am unable to find the thing proved, as our Code so expressly requires, unless it is so beyond reasonable doubt. I should dislike very much to hold any man proved insane, either in a civil or criminal proceeding, unless I could do so beyond reasonable doubt.

And I venture to think that the safety and protection of society is just as important as is the protection of a member thereof, when that member is placed upon trial. On the one hand he or she has been most justly protected for ages by the use of a judicial formula, as it were, lest passion and prejudice should prevail and injustice be done.

And in relation to the defence of insanity, those who have given thought to the matter at all, must realize how easy it has been and still is to abuse the defence by suggestions, for example, of temporary insanity, and mislead those moved by pity or passion, to the deterioration of the due administration of justice.

I respectfully submit that society as a whole is quite as much entitled to be protected as a single member thereof. Such illustrations as proof of an

alibi, which forms part of the evidence of the actual facts pro and con, bearing upon the issue raised relative to the actual perpetration of the offence in question, are quite beside the collateral substantive issue of mental and moral responsibility.

That is only permitted to be raised as a defence in law to the actual commission of the offence when rebutting the presumption of sanity declared by said section until the insanity is proved.

The charge against an accused person should in regard to the acceptance of and weight to be given the evidence of fact for or against him or her so far as bearing upon the actual offence charged, be kept clearly and distinctly severable from the defence of insanity, and each of the issues thus raised be given its own proper place in the presentation thereof, made by the judge's charge, or otherwise.

It must be determined first whether or not upon the evidence bearing upon the actual perpetration of the offence, the accused can be found "beyond reasonable doubt" guilty, and then due consideration be given to the alternative of whether or not at the time in question the accused was of sound mind within the meaning of the statute and that finding must be subject to the like limitations of proof "beyond reasonable doubt."

The appeal, in my opinion, should be dismissed.

DUFF J.—On the trial of an accused person indicted for murder where the defence of insanity is set up, it is incumbent upon the accused in order to negative his responsibility for an act otherwise criminal to prove to the satisfaction of the jury that he was insane at the time he committed the act. *Mcnaghten's Case* (1),

(1) 10 C. & F. 200.

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and Criminal Code, section 19, subsec. 3. The trial judge told the jury that they ought to convict the prisoner unless the defence of insanity was established by the prisoner beyond a reasonable doubt, and he added:

> If you entertain any reasonable doubts as to the sanity of the prisoner at the time he committed the act, why then it is your duty to convict.

This direction was, in my opinion, an erroneous one and calculated to mislead the jury.

Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to shew that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts. This proposition is referred to by Mr. Justice Willes in *Cooper* v. *Slade* (1), in these words:

> The elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for the verdict.

The distinction in this respect between civil and criminal cases is fully explained in a judgment of Mr. Justice Patteson speaking for the Judicial Committee in the case of *Doe d. Devine* v. *Wilson* (2), The whole passage is so instructive and so apt that it is worth while reproducing it in full:—

> Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the *onus* of proving the genuineness of a deed is cast upon the party who pro-

(1) 6 H.L. Cas. 746.

(2) 10 Moore P.C. 502, at pages 531 and 532.

duces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the *onus* of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.

Now, the charge of the learned judge appears to their Lordships to have in effect shifted the *onus* from the defendants, who assert the deed, to the plaintiff, who denies it, for in substance he tells the jury that whatever be the balance of the probabilities, yet, if they have a reasonable doubt the defendants are to have the benefit of that doubt, and the deed is to be established even against the probabilities in favour of the doubt. Certainly, it has been the practice so to direct the jury in a criminal case; whether on motives of public policy or from tenderness to life and liberty, or from any other reason, it may not be material to inquire, but none of those reasons apply to a cicil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not, be raised, the *onus* would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordships' opinion, apply.

This exposition of the distinction between the two classes of cases brings out the point that the rule in criminal cases is a rule based upon policy.

The distinction may be illustrated by reference to another class of proceedings in which a similar rule applies, namely, proceedings to establish illegitimacy and proceedings in which the validity of a *de facto* marriage is called in question. Where a child is born of a married mother and husband and wife have had access during the relevant period the presumption of legitimacy is of such a character that it can only be overcome by evidence producing in the mind of the tribunal a moral certainty. And this moral certainty is contrasted by Lord Lyndhurst in a celebrated passage in *Morris* v. *Davies* (1), with a conclusion

(1) 5 C. & F. 163.

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reached by weighing the probabilities and resting upon a mere balance of probabilities. The like rule prevails where a marriage having been solemnized, there have been cohabitation and issue and a question arises as to whether the marriage ceremony was formally sufficient. In such a case it is incumbent upon those who impeach the validity of the marriage to demonstrate the existence of the defect.

All this is sometimes expressed by saying that the law presumes innocence and legitimacy but in truth the fact that in given circumstances there is a rebuttable presumption of law in favour of a certain conclusion does not necessarily afford any guide as to the weight or strength of the evidence required to rebut the presumption. The law presumes for example that a promissory note is given for a valuable consideration; a presumption which has only the effect of establishing a *prima facie* case. The law presumes innocence but it prescribes also a supplementary rule, namely, that in criminal proceedings, at all events, the presumption of innocence is not rebutted unless the evidence offered for that purpose demonstrates guilt in the sense of excluding to a moral certainty all hypotheses (not in themselves improbable) inconsistent with guilt.

The precise question to be determined is whether the same rule governs where the presumption to be overcome is a presumption of sanity. Where the question arises on a criminal prosecution the practice has been to treat the presumption as a presumption of law and this practice seems to be sanctioned both by the answers given by the judges in *Mcnaghten's Case* (1) and by the provision of the Criminal Code of Canada

(1) 10 Cl. & F. 200.

above referred to; but as I have just pointed out the circumstance that the presumption is a presumption of law tells us nothing as to the weight of the proof required to overcome it. Is there a special rule as to this?

I am unable to think of any principle or any reason of policy comparable in importance to those upon which rest the rules touching the presumptions of innocence and legitimacy for holding that a similar rule should be applied as touching the character of the proof to be exacted where the presumption to be overcome is the presumption of sanity; or why the general principle should not be adhered to that in judicial proceedings conclusions of fact may legitimately be founded upon a substantial preponderance of evidence.

I have moreover no doubt that the expressions which have for generations been used by judges in instructing juries in criminal proceedings as to the degree of certainty justifying a conviction (as "the prisoner must be given the benefit of the doubt," "guilt must be established to the exclusion of reasonable doubt"), are expressions which have passed into common speech; and that a Canadian jury receiving instructions couched in similar terms as to the probative weight of the evidence necessary to justify a given conclusion would in the great majority of cases attach to these expressions the significance which they ordinarily bear and are intended to bear when used in relation to the presumption of innocence. A jury being instructed that a finding of insanity would only be proper if they should be satisfied to the exclusion of all reasonable doubt upon that point, would not, I am quite sure, understand that an affirmative conclusion would be justified by proof consisting only of a substantial preponderance in the weight of evidence.

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It will be necessary to refer very briefly to some authorities that have been mentioned. And first of the charge of Mansfield C. J. in *Bellingham's Case*, which is said to have been approved by Lord Lyndhurst C. B. in *The Queen* v. *Oxford* (1). The report of Sir James Mansfield's charge seems to be a newspaper report only, and Lord Lyndhurst's words of approval seem to be rather directed to the Chief Justice's definition of insanity than to his remarks upon the burden of proof. Lord Lyndhurst indeed in *Oxford's Case* (1), contents himself with stating that the jury must be satisfied that the prisoner was insane before they can properly acquit him. *Bellinghams's* Case was a very painful case and I do not think it can be regarded as a satisfactory authority upon this point. See *The Queen* v. *Oxford* (1); *The Queen* v. *McNaughton* (2), and especially the speech of Mr. Cockburn. In *Oxford's Case* (1), just referred to, Lord Denman C.J., who with Alderson B. and Patteson J. presided, limited himself to remarking as regards the burden of proof that all persons "*prima facie* must be taken to be of sound mind till the contrary is shewn." In similar terms the jury was charged in *The Queen* v. *Vaughan* (3); *Reg.* v. *Higginson* (4); *Reg.* v. *Davies* (5); *Reg.* v. *Barton* (6); *Reg.* v. *Townley* (7); *Reg.* v. *Layton* (8).

It is quite true that in *Reg.* v. *Stokes* (9), Rolfe B. is reported to have said that if the jury were left in doubt it would be their duty to convict, and similar language is attributed to Bingham J. in *Rex.* v. *Jefferson* (10). When the remarks of these learned judges are

(1) 4 State Trials 508.
(2) 4 State Trials 847.
(3) 1 Cox 80.
(4) 1 C. & K. 129.
(5) 1 F. & F. 69.
(6) 3 Cox 275.
(7) 3 F. & F. 839.
(8) 4 Cox 149.
(9) 3 C. & K. 185.
(10) 72 J. P. 467.

read as a whole, however, the fair interpretation of them seems to be that the jury must be satisfied with the evidence of insanity. They were not, I think, intended to convey to the jury the impression that they must arrive at that degree of moral certainty which is necessary to justify a conviction upon a charge of crime. As against these observations may be put the language of Tindal C. J. in addressing the jury in *McNaughton's Case* (1), where he presided with Williams J. and Coleridge J. The learned Chief Justice used these words:—

> If on balancing the evidence in your minds you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not so, and if in your judgment the subject should appear involved in very great difficulty, then you will probably not take upon yourselves to find the prisoner guilty. If that is your opinion, then you will acquit the prisoner.

It seems clear that there has been no uniform practice of directing the jury on the issue of insanity in the manner adopted by the trial judge in this case and as it appears, as I have said, to be more consistent with principle that the jury should be told that insanity must be clearly proved to their satisfaction but that they are at liberty to find the issue in the affirmative if satisfied that there is a substantial, that is to say, a clear preponderance of evidence, I am constrained to the conclusion that there was substantial error in the conduct of the trial and that a new trial should be directed.

ANGLIN J.—Is it misdirection to instruct a jury that to justify a verdict of acquittal on that ground (sec. 966 Crim. Code) in a prosecution for murder the defence of insanity must be established beyond a

(1) 4 State Trials 847.

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reasonable doubt? The Supreme Court of Alberta en banc (Harvey C. J. dissenting), held that it was in *Rex* v. *Anderson* (1). The Appeal Division of the Supreme Court of New Brunswick, following its own previous judgment in *The King* v. *Kierstead* (2), has unanimously held in this case that it is not. Hence this appeal—the first brought to this court under section 1024 (a) of the Criminal Code, enacted by 10-11 Geo. V., c. 43, s. 16.

If this question were entirely open, I should be disposed to accept as more logical and humane than that approved in English law (however defensible the latter may be on grounds of policy) the view which has prevailed in the Supreme Court of the United States and in many states of the Union (Lawson on Presumptive Evidence, p. 537; 16 C.J., 775) that, while the presumption of sanity relieves the prosecutor in the first instance from proving that fact, if, upon the whole evidence, a reasonable doubt remains in the mind of the jury whether at the time of the killing the accused was mentally competent to distinguish between right and wrong or to understand the nature of his act, it cannot properly render a verdict of guilty. *Davis* v. *United States* (3); *German* v. *United States* (4). The reasoning of Mr. Justice Harlan, delivering the judgment of the court in the *Davis Case* (3), seems to me unanswerable. How can a man rightly be adjudged guilty of a crime

> if upon all the evidence there is reasonable doubt whether in law he was capable of committing crime? (P. 484).
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> * * *
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> How upon principle or consistently with humanity, can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, viz., the capacity in law of the accused to commit that crime? (P. 488).

(1) 7 Alta.L.R.102; 22 Can.C.C.455.
(2) 45 N.B. Rep. 553, 565.
(3) 160 U.S.R. 469.
(4) 120 Fed. R. 666.

Where, as in murder, intent is an essential element in the crime, if the evidence as a whole so far rebuts the presumption of intent that it is left doubtful whether the accused was capable of forming the necessary intent—could have had *mens rea*—how can it be held that all the constituent elements of criminality are established beyond reasonable doubt? Professor Thayer in his excellent Treatise on the Law of Evidence (1 ed., pp. 381-4) discusses this question with his customary lucidity.

The defence of insanity, which goes to negative an essential ingredient of the crime—criminal intent—just as does the defence of inevitable accident—and as the defence of an alibi goes to negative another essential element, the identity of the accused—is thus put on the same footing as other defences. Evidence in support of them which creates in the minds of the jury a doubt whether some essential element of the crime has been established—a doubt which on the whole evidence is not removed—entitles the accused to an acquittal, since the burden of satisfying the jury of his guilt beyond reasonable doubt, which always rests on the prosecutor and never changes, has not been discharged. *Rex.* v. *Schama* (1); *Rex.* v. *Stoddart* (2); *Rex.* v. *Myshrall* (3).

But this is not the law of England with regard to the defence of insanity as is stated by the judges in their answers to questions propounded to them by the House of Lords in *McNaghten's Case* (4), which, notwithstanding criticism by eminent judges and writers, have ever since been generally accepted in English courts as authoritative. It does not suffice in

(1) 24 Cox 591, at p. 594.
(2) 2 Cohen Cr. App. C. 217.
(3) 8 Can. Cr. C. 474.
(4) 10 Cl. & F. 200, at p. 210.

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English law that a defendant pleading insanity should create a doubt as to his sanity in the minds of the jury. He must prove his irresponsibility "to their satisfaction"—it must be "clearly proved." So said Lord Chief Justice Tindal, speaking for himself and his fellow judges.

As the learned Chief Justice of Alberta says (1) the authority of *McNaghten's Case* (2) not having been accepted in the United States

> a reference to American text writers and cases can furnish no aid in determining the law in Canada on this subject.

On the other hand our Parliament has seen fit in s. 19 (3) of the Criminal Code to define the law which is to govern Canadian courts in these terms:—

> Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

It is noteworthy that, although the codifiers undoubtedly had the language of *McNaghten's Case* (2) before them, our legislators have not said that, in order to overcome the presumption of sanity, mental irresponsibility must be "clearly proved" or even that it must be "established to the satisfaction of the jury"—but merely that it must be "proved."

Another point of difference between our statutory law and that of England, perhaps not devoid of significance, is that whereas here on insanity being "proved" the verdict is to be "not guilty", (the jury being required to find the insanity specially and, if that be the case, to state that the acquittal is on account of it s. 966), thus indicating that insanity with us goes to the question of guilt or innocence, in England since 1883 (46-47 Vic., c. 38) in like circumstances the verdict must be guilty of the act or omis-

(1) 7 Alta. L.R. 102 at p. 109. (2) 10 Cl. & F. 200, at p. 210.

sion charged but insane at the time when he did the act or made the omission, thus indicating that insanity is there not an absolute defence but rather matter available in arrest of judgment. This would seem to be a logical outcome of the view that, notwithstanding reasonable doubt as to sanity raised by the evidence, criminality involving intent may exist beyond reasonable doubt.

No doubt, however, "proved" in subsection 3 of section 19 of our Code must mean "proved to the satisfaction of the jury," which, in turn, means to its reasonable satisfaction. *Braunstein* v. *Accidental Death Ins. Co.* (1). It may possibly have been meant to cover the phrase "clearly proved" used in *McNaghten's Case* (2). "Clear and positive proof," however, was held in an Indian case cited in Stroud's Jud. Dict. (2 ed.), 323, (the report is not available here) to mean "such evidence as leaves no reasonable doubt." If the adverb "clearly" adds to the force of the participle "proved" its use, in my opinion, is not warranted under our Code. Still less is it justifiable to add to the "proved" of the Code such a distinctly qualifying phrase as "beyond all reasonable doubt," if a higher degree of certainty is thereby required than the word "proved" itself imports.

"Proved" is not a word of art. *Aaron's Reefs* v. *Twiss* (3). It may have different shades of meaning varying according to the subject matter in connection with, and the context in which, it is used. "Tested" or "made good" or "established" are its ordinary equivalents. Murray's Dict. *Crampton* v. *Swete* (4). It may require only evidence of the *factum probandum*

(1) 1 B. & S., 782, 797.
(2) 10 Cl & F. 200, 210.
(3) [1896] A.C. 273, 282.
(4) 58 L.T. 516.

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sufficient to be left to a jury. *Tatam* v. *Haslar* (1); see too *The People* v. *Winters* (2). Here I find nothing to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged—that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong. That I believe to be the law of Canada, as it appears to be that of most of the states of the American Union. Underhill on Criminal Evidence, s. 158.

The latter clause of the ancient maxim, *stabit praesumptio donec probetur in contrarium*, does not import that any special amount or degree of evidence is required to rebut the presumption. Its whole office is to shift to him against whom it operates the burden of adducing such evidence as will satisfy the tribunal that the presumption should not prevail (Best on Evidence, 11 ed., p. 314), such proof as may render the view which he supports reasonably probable. To require that a particular presumption must be negatived beyond reasonable doubt is to super-add to the force of the presumption a rule of substantive law—and that has been done in the case of the presumption of innocence. Thayer, Law of Evidence, 1st ed., pages 336 and 384. The history of this presumption of law and the distinction between it and the doctrine of reasonable doubt is dealt with by Mr. Justice (now Chief Justice) White in *Coffin* v. *United States* (3), at pages 452-60.

(1) 23 Q.B.D., 345. (2) 125 Cal. 325.
(3) 156 U.S.R. 432.

I quite appreciate the difficulty experienced by Harvey C. J. (1), and by White J. (2), in formulating the distinction between proof to the satisfaction of the jury and proof beyond reasonable doubt. How can I be satisfied of a fact if I have reasonable doubt that it is so? But, with Mr. Justice Beck, (p. 117) I am convinced that the expression "proved beyond reasonable doubt" has become consecrated by long judicial usage as pointing to an amount or degree of proof greater than is imported by the word "proved" standing alone or by the expression "established to the satisfaction of the jury," or even by "clearly proved"—certainly greater than is required to discharge the burden of proof in civil matters. That learned judge quotes an extract from the judgment delivered by Sir John Patteson in *Doe d. Devine* v. *Wilson* (3), at page 531, and a passage from Taylor on Evidence (par. 112) as illustrating this difference. But the actuality of the distinction in law between an instruction that the existence of a fact or condition must be proved and that it must be proved beyond a reasonable doubt is perhaps best tested by the inquiry whether an accused would not have ground for complaint if the trial judge having charged that the jury must be satisfied of his guilt—that it is clearly proven—should refuse to direct them that they must be so satisfied beyond reasonable doubt. I put that question to counsel for the Crown during the argument. It was not answered. I find it was anticipated by Mr. Justice Stuart in Andersons's case (pp. 113-4). With that learned judge

> I think the rule is well established that an accused person is entitled to have such a direction given,

(1) 7 Alta. Rep. 102, at p. 109-10. (2) 45 N.B. Rep. 553.
(3) 10 Moore P.C. 502.

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accompanied by an explanation of what is reasonable doubt. *Rex.* v. *Stoddart* (1); *Rex.* v. *Schama* (2); *Reg.* v. *White* (3), are instances of the recognition of this right in English law. In *R.* v. *Sterne,* cited in Best on Evidence (11 ed.) 84, Baron Parke instructed that there should be

> such moral certainty as convinces the mind of the tribunal as reasonable men, beyond all reasonable doubt.

I also agree with Mr. Justice Stuart that

> if the expression (beyond reasonable doubt) was not improper in the present case, then it inevitably follows that it is not necessary in the ordinary case,

i.e., in directing the jury as to the burden of the prosecution.

The case of *Reg.* v. *Layton* (4), in which the trial took place shortly after *McNaghten's Case* (5), where the direction given by Rolfe B. was

> the question therefore for the jury would be not whether the prisoner was of sound mind but whether he had made out *to their satisfaction* that he was not of sound mind,

may perhaps be referred to as an instance of a correct appreciation of the effect of the McNaghten Case. Lord Lyndhurst had delivered a similar charge in *Rex* v. *Offord* (6). The charge of Bigham J. in *R.* v. *Jefferson* (7), that the prisoner has to make out the charge of insanity

> to your satisfaction without any reasonable doubt; if you have reasonable doubt as to whether he knew he was doing wrong or not you must find him guilty.

though similar to that in *Bellingham's Case,* as noted in (6), and to that in *R.* v. *Stokes* (8), was, I venture to

(1) 2 Cohen Cr.App. C. 217.
(2) 24 Cox 591, at page 594.
(3) 4 F. & F. 383.
(4) 4 Cox 149, at p. 156
(5) 10 Cl. & F. 200.
(6) 5 C. & P. 168.
(7) 72 J. P. 467, at page 469.
(8) 3 C. & K. 185.

think, a misapprehension of the effect of the answer of the judges in the House of Lords. Such a charge, would, in my opinion, be clearly wrong in Canada. These *Nisi Prius* reports, however, are really of little value.

On appeal in *Jefferson's Case* (1), Lawrence J., delivering the opinion of the court setting aside the verdict on another ground, was careful to state that no question had been raised as to the direction of the trial judge (p. 470), probably to make it clear that approval of it was not to be inferred.

I am, for these reasons, of the opinion that there was misdirection at the trial of the appellant and that it is not possible to say that substantial wrong did not result therefrom. The application of the appellant for leave to appeal should, therefore, be granted and his conviction set aside and a new trial directed.

BRODEUR J.—I concur with my brother Duff.

MIGNAULT J.—A presumption being, by definition, a deduction from a known or ascertained fact, or, as the old writers expressed it, *ex eo quod plerumque fit*, it is clear that the presumption of sanity of mind, entailing civil and criminal responsibility, would be fully recognized even if it had not been made the subject of a statutory declaration. So paragraph 3 of section 19 of the Criminal Code, which states that

> every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved,

merely gives an unnecessary, I do not say a useless, legislative sanction to a universally recognized presumption of fact, entitling us to consider it as a

(1) 72 J. P. 467.

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presumption of law—although that does not add to its evidential force—which will stand as proof of the basic element of criminal responsibility, until it is rebutted or, to use the words of the Code, "until the contrary is proved."

This shews that although we have an express declaration by the legislature, the Code really adds nothing to the common law; in fact the presumption of sanity of mind, involving criminal responsibility, is recognized in England as well as in all countries, and our inquiries need not carry us further, which are subject to the common law.

We may, therefore, take the rule stated by the judges in *McNaghten's Case* (1), that the jurors should be told that every man is presumed to be sane until the contrary is proved to their satisfaction, (I do not here refer to the further statement of the judges, speaking by Tindal C. J., that insanity must be "clearly proved") as being in effect the rule of our criminal code, for although the words "to the satisfaction of the jury" are not contained in paragraph 3 of section 19, inasmuch as the contrary of the presumption must be proved, and the proof must be passed on by the jury, this proof must be sufficient to satisfy the jury that the presumption has been rebutted.

I do not think that it is necessary to consider cases that have been decided in the United States, although I have read with interest and with some measure of sympathetic consideration the able opinion of the late Mr. Justice Harlan in *Davis* v. *United States* (2), to the effect that if on the whole evidence any reasonable doubt exists as to the sanity of the accused the jury should acquit. This manifestly would transgress the

(1) 10 Cl. & F. 200. (2) 160 U.S.R. 469.

rule of our Code, for instead of proving his insanity, it would be sufficient for the accused to create in the minds of the jury a reasonable doubt whether he was sane when he committed the crime, which would, in my judgment, deprive the legal presumption of its legitimate effect.

Here the learned trial judge in charging the jury emphasized that it was their duty to convict the accused unless in their opinion he had proved his insanity beyond a reasonable doubt. Is this misdirection in law? The Supreme Court of New Brunswick, whose judgment in the case of *The King* v. *Kierstead* (1), the learned trial judge followed, has unanimously held that it was not. Inasmuch, however, as the Appellate Division of Alberta, in *Rex* v. *Anderson* (2), had decided that such a direction was wrong, the appellant was enabled to appeal to this court by reason of a recent amendment of the Criminal Code 10-11 Geo. V., ch. 43, sec. 16.

My first impression at the hearing was that if the jury entertained a reasonable doubt whether the plea of insanity was proved, the legal presumption was not rebutted. Further reflection has, however, led me to think that it is sufficient that the jury be satisfied on all the evidence that the plea of insanity has been established, and for that reason I fear that the direction which was given in this case may have been, to say the least, misleading. It is, moreover, open to the objection that something is added to the law, which is content with requiring that the contrary be proved, without specifying the degree of proof to be adduced. It is unquestionable that guilt must be proved beyond a reasonable doubt, so that the presumption of innocence is stronger, and rightly so, than the presumption of sanity. Proof in ordinary matters does not sup-

(1) 45 N.B.R. 553. (2) 7 Alta. L.R. 102; 22 Can. C. C. 455.

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pose that the evidence removes all doubt; it is the result of a preponderance of evidence, or of the acceptance on reasonable grounds of one probability in preference to another, and, in the case of insanity, the evidence generally is largely a matter of expert opinion. To say that insanity must be proved to the satisfaction of the jury does not weaken the legal presumption, but it places the plea of insanity on the same footing as all other defences which must be established so as to satisfy the jury. I would certainly not say that if the jury be in doubt whether the accused was sane or insane they should acquit him, because, if they accept his plea of insanity, they must expressly find that he was insane and return a verdict of not guilty because of insanity (sect. 966 Crim. Code). But while unquestionably all the onus here is on the accused, still the jury may accept his evidence as having greater weight than that of the Crown, although they might not feel that all reasonable doubt has been removed. Such a doubt might be caused by the testimony of one reputable expert against the opinion of other experts, and, in such a case, it is certainly within the province of the jury to accept the views of the latter in preference to those of the former. I would therefore think that a proper direction would be to call the attention of the jury to the legal presumption of sanity and to inform them, the onus being on the accused, that insanity must be proved by him to their satisfaction. Further than that I would not go.

A serious wrong or miscarriage may have resulted from the direction given by the learned trial judge, so on full consideration I concur in the judgment allowing the appeal and ordering a new trial.

Appeal allowed.