IN THE HIGH COURT OF AUSTRALIA No B28 of 2011
BRISBANE REGISTRY

BETWEEN **ADAM JOHN HARGRAVES**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

PART I: Internet publication

1 These submissions are in a form suitable for publication on the Internet.

PART II: Issues

2 Whether, and if so how, the command in section 80 of the *Constitution*, obliging the trial on indictment of an offence against any law of the Commonwealth to be by jury, imports minimum requirements into the elements of such a trial which could not be saved by the application by an intermediate court of appeal of the proviso to the common form of criminal appeal provision, in this case section 668E(1A) of the *Criminal Code* 1899 (Qld) ("**the Code**").

3 Whether sub-section 68(2) of the *Judiciary Act* 1903 (Cth) gave the Court of Appeal in this case jurisdiction under section 668E(1A) of the Code to determine the guilt of the appellant by preferring the Court of Appeal's view of the evidence (including the oral evidence of the appellant) to that of a properly instructed jury.

4 Whether the giving of a direction to the jury that breached the prohibition in *Robinson v The Queen (No 2)* (1991) 180 CLR 531 constituted a significant breach of the pre-suppositions of a procedurally fair trial by jury as described in *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45].

PART III: Section 78B of the *Judiciary Act* 1903 (Cth)

5 Notices pursuant to section 78B of the *Judiciary Act* were sent to the Attorneys-General on 1 June 2011, after special leave was granted. The appellant does not consider that any further notices are necessary.

Filed on behalf of the appellant
ADDRESS FOR SERVICE
Robinson Legal
Level 4, 350 Kent Street
Sydney NSW 2000

17 June 2011
Tel: (02) 8823 6400
Fax: (02) 9299 2201
DX 1353 Sydney
Ref: Mr David Rydon

PART IV: Citations

6 The sentencing remarks of the trial judge, Fryberg J, may be found at [2010] QSC 188. The reasons for judgment of the Court of Appeal of the Supreme Court of Queensland are not reported. The Internet citation is [2010] QCA 328.

PART V: Facts

7 The appellant, and his co-accused Messrs Daniel Stoten and his brother Glenn Hargraves, were charged, pursuant to ss 29D and 86(1) of the *Crimes Act* 1914 (Cth), with one count of conspiracy to defraud the Commonwealth between 18 June 1999 and 23 May 2001 (count 1) and, pursuant to s 135.4(3) of the *Criminal Code* 1995 (Cth), with one count of conspiracy to cause a loss to the Commonwealth between 24 May 2001 and 9 June 2005 (count 2). The reason for the separate counts was that the relevant provisions of the *Criminal Code* (Cth) were in force at different times.

8 The alleged conspiracy was an agreement to make false representations to the Commonwealth as to the allowable deductions of a company in which the appellant and his co-accused were directors and shareholders and thereby prejudice the economic interests of the Commonwealth and/or deprive the Commonwealth of taxation monies.

9 The appellant and Mr Stoten gave evidence. Their defence was a positive one that refuted the prosecution case on the issue of dishonesty. The prosecution case was that the appellant "never genuinely believed the Scheme was legitimate..." CA [33]. The appellant called his wife in support of his defence. Mr Glenn Hargraves neither gave nor called evidence. The defence case was that, based on professional advice which they received, the appellant believed at all times that the Scheme was a legitimate means of tax minimisation, and therefore that his conduct was not dishonest: CA [10].

10 Whilst summing up the case to the jury, the trial judge, Fryberg J, told the jury about a "number of techniques" that they could employ in assessing credibility by addressing a PowerPoint slide. After inviting the jury to "make notes", his Honour said:

> Next, interest. Does the witness have an interest in the subject matter of the evidence? For example, friendship, self-protection, protection of the witness's own ego. There are any number of personal interests which people have and which they sometimes try to protect in giving evidence.

11 The appellant's counsel complained about the direction but his Honour refused to discharge the jury.

12 On 8 March 2010, after a trial in the Supreme Court of Queensland, the applicant and Mr Stoten were acquitted on count 1, but convicted on count 2. Mr Glenn Hargraves was acquitted on both counts.

13 On 8 June 2010, the applicant and Mr Stoten were sentenced to six and a half years' imprisonment with a non-parole period of three years and nine months.

14 The applicant and Mr Stoten appealed their convictions and sentences to the Court of Appeal of the Supreme Court of Queensland (Muir and Fraser JJA, Atkinson J).

15 On 23 November 2010, the Queensland Court of Appeal dismissed the appellant's appeal against conviction. Muir JA (with whom Fraser JA and Atkinson J agreed) concluded at [129]-[130] that:

> ...the direction breached the prohibition against the giving of a direction, directly or indirectly, to evaluate the reliability of the evidence of an accused on the basis of the accuseds' interest in the outcome of the trial

although his Honour went on to say that:

> it may be doubted that the misdirection gave rise to a miscarriage of justice but, even if it were capable of doing so, this, as is explained below, is an appropriate case for the application of s 668E(1A) of the *Criminal Code 1899* (Qld).

16 In deciding to apply the proviso, the Court of Appeal {Muir JA at [158]-[159]} said that:

> Although the appellants gave evidence of their respective states of mind, there was a wealth of evidence from which their states of mind could be objectively assessed. That evidence demonstrated clearly that the appellants' evidence about their respective states of mind could not be accepted. For the reasons given in relation to the unsafe or unsatisfactory grounds, it is impossible to conclude rationally that after 14 February 2004 at the latest, the appellants did not believe that the Scheme was unlawful and that it was being used by them to dishonestly cause a loss to the Commonwealth. The evidence strongly suggested that the appellants had such a state of mind throughout, but the prosecution case after 14 February 2004 was overwhelming.
>
> ...
>
> ...I have concluded that the accused were proven beyond reasonable doubt to be guilty of the offence the subject of count 2. I am of the opinion that no miscarriage of justice, substantial or otherwise, has actually occurred.

PART VI: Argument

Brief statement of primary argument

17 In *Weiss v The Queen* this Court held that, when applying the common form "proviso" and determining whether a substantial miscarriage of justice has actually occurred, an element of the task of an appellate court is to review the whole of the record of trial, and "...make its own independent assessment of the evidence and determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty": at 316 [41].

18 The Full Court proceeded on the basis that this statement from *Weiss* permitted and required the appellate court to sustain a guilty verdict obtained after a substantial misdirection once the appellate court concluded that the prosecution case was so strong that, whatever evidence the accused and his witnesses gave, and however convincingly they gave it, that evidence had to be rejected; or put differently, once the appellate court concluded that it was impossible to suppose that such evidence left a reasonable doubt about the accused's guilt on the offence charged.

19 The appellant contends below that this is a misreading of *Weiss*, even in cases where trial by jury is not constitutionally mandated. But however that be, in the present case, which was a trial on indictment of an offence against the law of the Commonwealth, section 68 of the *Judiciary Act* could not pick up a statutory provision that purported to give an appellate court such a mandate. To do so would be inconsistent with the constitutional command in section 80 of the *Constitution* requiring a "trial by jury". It would be an anathema to one of *the* essential incidents of trial by jury, both as recognised by the common law and constitutionally entrenched at federation and as understood in the light of the structural purpose of the guarantee within Chapter III.

20 After all, "...the essential feature of a jury obviously lies in the imposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence": *Williams v Florida* 399 US 78 (1970) at 100 per White J delivering the opinion of the Court (referred to with approval by this Court in *Brownlee v The Queen* (2001) 207 CLR 278 at 288-289 [21] per Gleeson CJ and

McHugh J and at 302 [65] per Gaudron, Gummow and Hayne JJ). It is that feature with which the operation of the proviso in this case is concerned.

21 The Court below concluded that the direction concerning the interest of the appellant in the subject matter of his evidence and concerns of self-protection in giving evidence infringed the requirements laid down in *Robinson v The Queen* but that "it may be doubted" that it gave rise to a miscarriage of justice. First, it did, and the appellant adopts the submissions of the appellant in B24 of 2011, Mr Stoten, at [57]-[66] in that respect. Those submissions form the background to understanding the factual premise for the appellant's contentions on section 80 as it operates in the circumstances of this case. Secondly, and more importantly, the "doubt" of the appellate judge is irrelevant for the purposes of section 80 of the *Constitution*.

22 The essential function of the jury, which is the determination of all matters of fact as part of the larger mandate of deciding guilt or otherwise according to law on the federal indictable charge, would be usurped if an appellate court could prefer its view of the evidence, including the oral evidence of the appellant and his witnesses, to that of a properly instructed jury. Part of the reason why unanimous verdicts are required for the purposes of section 80 is that it helps promote deliberation amongst the jurors and works against hasty and unrepresentative verdicts and reflects the collective character of a jury in reaching an ultimate verdict. It also reflects the basic tenet of our criminal law that the accused should be given the benefit of any reasonable doubt: *Cheatle v The Queen* (1993) 177 CLR 541. It was the voice of the collective body of a properly instructed jury that was denied in the present case on matters of acknowledged "doubt" and issues that should have raised doubt had they been properly considered. Of course, as one is not permitted to enquire into the reasons a jury held for a verdict, the very notion that, consonant with section 80, an appellate court can decide the question for itself is strange. The presence of s 80 in the *Constitution,* as part of Ch III, says something about the way federal judicial power is to be exercised.

23 Despite the compelling view of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 CLR 556, the established authority in this Court is that the Commonwealth Parliament has as much latitude in avoiding the requirement of trial by jury for offences it creates as do the State Parliaments. The corollary of that reality is that when the Commonwealth Parliament specifies indictment, and thus activates the guarantee of trial by jury for a Commonwealth offence, an accused is entitled to the full

benefits of the right it provides. There is no need to narrowly interpret the right, or more correctly, the breadth of the command – the Commonwealth Parliament can choose to avoid it for certain offences if it wishes. The State "provisos" are not picked up in this exercise of federal jurisdiction for the purposes of section 68 of the *Judiciary Act*. It is no part of the province of State Parliaments to take away the constitutional right of accused persons to have their peers determine whether they are guilty or not. No doubt, the Commonwealth Parliament recognised the justice in having that right extended to the application of complicated criminal taxation offences that inevitably involve the view of a person's peers on their intent when accused of deliberately avoiding their taxation responsibilities. So viewed, the appellant was deprived of his entitlement to the right of a "...method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process": *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 per O'Connor J, endorsing Justice Miller's adoption of the definition given in the ninth edition of the *Encyclopædia Britannica* and see *R v LK* (2010) 241 CLR 177 at 198-199 [36] per French CJ with whom the joint judgment agreed at 216 [88].

24 Further, once the guarantee of trial by jury has been activated in a given case, it is not simply the accused that holds the right in question. Section 80 represents a choice about the manner in which federal judicial power is to be exercised, in the vindication of which choice the community as a whole has an interest.[1] That choice and interest is undermined where the appellate court acts as it did here.

25 Notions of "usurpation", "substitution" or "encroachment" as often seen in the authorities might be thought to be question begging. How or where is the line to be drawn? Without perhaps solving all possible cases, the appellant proffers two guiding principles, one narrower and one broader. First, it would have been considered at the time of federation by the common law incompatible with the essential features of a jury trial to allow the credibility of an accused to be assessed by an appellate court to confirm guilt, as opposed to leaving this to a properly instructed jury. Whilst the appellant does not contend that the strictest operation or view of the operation of the Exchequer Rule was constitutionally entrenched at federation by s 80, the operation of that Rule, and the way in which it was considered by the courts both here and in other

[1] James Stellios, "The Constitutional Jury – 'A Bulwark of Liberty'?", vol 27 *Sydney Law Review* 113 (2005)

jurisdictions, establishes a background to understanding that this type of encroachment upon the function of the jury would never have been tolerated, and would not have been, and should not be, considered as forming part of a "...constant evolution, before and since federation, of the characteristics and incidents of jury trial": *Ng v The Queen* (2003) 217 CLR 521 at 526 [9]. When forming a view of the guilt of the accused depended upon an assessment of his or her credibility and his state of mind, that task could only be constitutionally given to a properly instructed jury – it is part of its "authority" c*f Katsuno v The Queen* (1999) 199 CLR 40. This essential feature was more fundamental than, and not simply a manifestation of the Exchequer Rule.

10 26 Secondly, and more broadly, the appellant submits that it is inconsistent with the guarantee of trial by jury for the appellate court to exercise any power not properly available to the trial judge within the trial by jury itself. Within a trial by jury, the judge cannot direct the jury that he or she considers the prosecution case to be so strong that the jury must reject the evidence to the contrary offered by the accused. Equally of course the trial judge has no power to reject a verdict of not guilty returned by the jury and to substitute a verdict of guilty because he or she views the evidence differently. Any conferral of power on an appeal court to do the very thing which the trial judge could not do within the trial itself so undermines the process as to render the result other than a determination of guilt (or otherwise) under trial by jury.

20 27 Under either the narrower or broader principle, the Court of Appeal below, having correctly found that the *Robinson* error precluded the jury from properly proceeding with its essential task, had no power (because section 68 of the *Judiciary Act* did not pick up the Queensland proviso) to proceed to determine if it was satisfied the appellant was guilty under law of the offence charged.

28 To develop the argument, it is necessary to turn to aspects of the history concerning these issues.

The role of the jury in Australia and England in 1900

29 From its inception, the most significant functional change that took place in the role of a jury was to go from being a body of men who tried the case by being already familiar
30 with the facts or by conducting their own investigation prior to trial and then testify at trial as to what they had learned, to a body of men that was impartial, to be convinced by evidence, rather than giving a verdict from their own knowledge. This change was

recognised as complete by Lord Mansfield who was able to say in 1764, that "a juror should be as white paper, and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him": *Mylock v Saladine* (1764) 1 Black W 480 at 481 [96 ER 278 at 278]. See also Stephen, "Criminal Procedure from the Thirteenth to the Eighteenth Century" in *Select Essays in Anglo-American Legal History* Vol II, 1908, esp pp 528-9.

30 This right to an impartial jury was what was enshrined in, for instance, Article III s2.3; and the Sixth Amendment in the United States, and came to be characterised, as members of this Court have variously expressed it, as a "guardian of liberty under the
10 law", a "bulwark of liberty, a protection against tyranny", a "guarantee against the arbitrary determination of guilt or innocence", or a means for the prevention of oppression by government and the involvement of community participation and shared responsibility. And whilst, as this Court recognised in *Weiss* at 312 [30], the conduct of jury trials has always been subject to the direction, control and correction of trial judges and increasingly appellate courts, the very idea that, when a person's credibility and state of mind were in issue on trial for an offence, and a jury had been improperly instructed on matters that it was legitimate for them to consider, a trial judge or an appellate court would be able to substitute their own view of the guilt of the accused, is something that was unknown to the common law of jury trials at federation.

20 31 Certainly, as Heydon J explained in *AK v Western Australia* (2008) 232 CLR 438 at 470 [90] – 474 [98] by reference to the comment of Lord Devlin that trial by jury is "the lamp that shows that freedom lives", the understanding of a jury trial that would have pertained at federation, let alone the middle of last century, is that one of the key advantages of a jury trial according to Lord Devlin was that juries were superior to judges in assessing credibility: cited by Heydon J at 472 [94], and must have, especially on that point, at least represented "...the common professional understanding of jury trial": at 470 fn 87. That applies with even greater force to the position at federation.

32 Both in *Weiss* and in *Conway v The Queen* (2002) 209 CLR 203, this Court has recently broadly traced the evolution of the Exchequer Rule and examined various examples of
30 the strictness with which it was applied and that for which it was understood as standing. The appellant does not cavil with that general history. However, it is contended that, questions of immaterial wrongful admission or rejection of evidence aside, the issue of basic factual deliberation (especially on notions of credibility) was a

matter that was required to be submitted for the consideration and verdict of the jury, and it is that which was entrenched in section 80 of the *Constitution.*

33 Subsequently endorsed as correct or not, one must begin with an understanding that when the Court for Crown Cases Reserved confirmed the application of the Exchequer Rule for criminal proceedings in *R v Gibson* (1887) 18 QBD 537, the rationale given by Lord Coleridge was that "the Courts...would not weigh evidence" at 541. That view of the role of "appellate" courts was firm. On the civil side, the rule was that a new trial would be refused only if the error could not reasonably be supposed to have affected the result of the trial: *Conway at* 217 [29].

34 A version of the proviso had been enacted in New South Wales by section 423 of the *Criminal Law (Amendment) Act* 1883, taken from rule 48 of the *Judicature Act* 1873 (UK). It provided that upon the reservation of a question of law in accordance with section 422:

> The Judge by whom any such question is reserved shall as soon as practicable state a case setting forth the same with facts and circumstances out of which every such question arose and shall transmit such case to the Judges of the Supreme Court who shall determine the questions and may affirm amend or reverse the judgment given or avoid or arrest the same or may order an entry to be made on the record that person convicted ought not to have been convicted or may make such other order as justice requires Provided that no conviction or judgment thereon shall be reversed arrested or avoided or any case so stated unless for some substantial wrong or other miscarriage of justice. (Original punctuation)

35 In *R v McLeod* (1890) 11 NSWLR 218, Windeyer J said at 234 that an appeal court "...has no power to, and no right to usurp to itself any power, of saying what the verdict of a jury ought to be" and at 235 that the Legislature had not "unmistakably meant to transfer the ultimate power of deciding as to the sufficiency of the facts from the jury to the Court, and to give it the power of sustaining a conviction". His Honour said that he would not be a "party to the destruction of so fundamental a principle in the administration of the criminal law". Whatever other views his Honour had expressed (see *Conway* at 215 [22]), questions of mere admissibility of evidence aside, this view of the function of the jury was firmly held. While the Chief Justice in this case took a different view on the scope of s 423 (see pages 229-231), it was not in a context like the present. The third judge, Innes J, did not reach s 423.

36 The importance of the views expressed by the Privy Council in *Makin v The Attorney-General for New South Wales* [1894] AC 57 cannot be overstated in this context. That case directly considered the operation of the NSW proviso. It trenchantly resisted the idea that appeal courts had, or even *should* have, by virtue of the proviso, any fact-finding role. The attempt to limit the operation of the proviso was an expression of the clarity of the position at common law. The question was described as whether, if an appeal court concludes that inadmissible evidence had been received at trial "...the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged": at 69.

37 It is important to note that the Crown accepted that "it would not be competent for the Court to take this course at common law" but that the proviso empowered such an approach "even if it did not compel" it: at 69.

38 In delivering the advice of the Privy Council, Lord Herschell LC said "...that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence...established the guilt of the accused" so that at 69-70:

> ...in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

The Board thought that "such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases" and the "startling consequences" of not allowing the jury to "reasonably disbelieve" the evidence relied on by the appellate court would amount to a "substantial wrong" of substituting the verdict of the Court and thereby depriving the accused to a verdict of the jury.

39 The reasoning was similar in *Bray v Ford* [1896] AC 44 on the civil side in a libel case where the judge had wrongly directed the jury on certain entitlements of the plaintiff. Jury usurpation by the proviso was seen as the central reason for rejecting the submission that the Court was justified in giving the same verdict on the record of

properly admitted evidence. Lord Halsbury LC said that he "was not prepared to say what a jury might think if they were told that the original complaint was itself unfounded" and would not accept the invitation "to speculate what might have been the result if the judge had rightly directed the jury": at 47-48.

40 Lord Watson saw the error in British constitutional terms. His Lordship said at 49 that "[e]very party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal": at 49. Lord Shand said that a defendant was "entitled to have the real case submitted to the jury" so that it could be tried by that body: at 56. It is unsurprising that Lord Herschell, given his view in *Makin*, also rejected the submission that the proviso conferred an appellate fact-finding function. The appeal court could not substitute its view of the evidence when the case upon which the jury ought to have adjudicated was never wholly before them, and they were precluded, by error of the trial judge, from giving due weight to all the circumstances which might have legitimately have influenced their verdict: at 53.

41 At the time of federation, no other jurisdiction in Australia, had adopted a proviso in the form in which it was seen in NSW for criminal cases. Section 671 of the *Criminal Code Act* 1899 (Qld) provided that wrongly admitted evidence of a formal character or immaterial nature did not vitiate a conviction. Sir Samuel Griffith took the view that this proviso was "perhaps new", but "obviously right, whether it is the present law or not"[2]. Sir Samuel acknowledged having "freely drawn upon the labours" of Sir James Stephen's efforts in India. Western Australia introduced the provision in its Code in 1902. This Court in *Weiss* makes the point at 309 fn (36) that the proviso does not appear in terms in the *Federal Court of Australia Act* 1976 (Cth) (although in 2009 a form of the proviso was inserted by sub-section 30AJ(2)). In relation to reservations of questions of law in federal jurisdiction there was a version in the *Judiciary Act*. Section 75 of the *Judiciary Act* was modelled on the Qld proviso and provides to this day:

> **Certain errors not to avoid conviction**
>
> A conviction cannot be set aside upon the ground of the improper admission of evidence if it appears to the Court that the evidence was merely of a formal character or

[2] Sir Samuel Walter Griffith, *Draft of a Code of Criminal Law Prepared for the Government of Queensland*, (1897) at 306. It is interesting to note that Sir Samuel's draft cl 696 (which became s 671) included the words "or was of such a nature that it could not have affected the jury", the "could not" emphasised in the footnote by Sir Samuel.

not material, nor upon the ground of the improper admission of evidence adduced for the defence.

42 The enactment of these provisos was an attempt to undo the strict rigour of the Exchequer Rule, but within circumscribed limits. The exclusive province of the jury to find the facts on issues of belief of a witness was never doubted as being reserved to the jury and in this sense was constitutionally entrenched. Particularly in a situation such as a trial on taxation law, as Lord Devlin said "[t]he jury hear the witness as one who is as ignorant as they are of lawyers' ways of thought; that is the great advantage to a man of judgment by his peers": cited by Heydon J in *AK v Western Australia* at 472 [94].

10 43 In *R v Martinelli* (1908) 10 WALR 33 at 35, the Supreme Court of Western Australia considered, in applying its Code proviso, that as credibility was in issue then, "...no one can say what affect such [inadmissible] evidence had upon the minds of the jury". The limited proviso in Queensland and Western Australia and under the *Judiciary Act*, resolves in plain terms the dispute that the Exchequer Rule had generated. The extent of the encroachment upon the Exchequer Rule was no greater than what was necessary to prevent mere technicalities intruding upon the verdict of the jury. When the *Constitution* came into being, there was no Court in the common law world that had held that decisive matters of credibility could be resolved by the trial judge within the trial by jury or, more extremely still, decided by any appellate court that had not seen
20 the witnesses. Such a view would have turned the jury members into a mere body of commissioners, to take the evidence of the witnesses on commission and deliver a preliminary verdict with which a panel of judges was always free to disagree.

44 In *R v Grills* (1910) 11 CLR 400, Griffith CJ said at 410 that what was "really decided" by *R v Gibson* was "that if the jury are expressly invited to take inadmissible evidence into account, the conviction is bad". His Honour was concerned to avoid the view (as he had in drafting the Code) that a conviction would be set aside because of the inadvertent admission of irrelevant evidence that "passes without notice and without mischief". Although he dissented on the facts, Isaacs J at 431 expressly indicated that an excessive resort to the proviso in his view amounted "to trial by Judges and not by
30 jury" by reference to the decision in *Makin*.

45 In *R v Snow* [1918] SALR 173 the Supreme Court of South Australia accepted that the decision of Lord Blackburn in *Directors of the Prudential Assurance Co v Edmonds* (1877) 2 App Cas 487 (a civil case) represented the common law applicable to a

criminal trial. This Court refused special leave to appeal in that case: (1918) 25 CLR 377. In *Edmonds*, Lord Blackburn said at 507-508:

> When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or not the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo*

46 It would be an odd turn of events if section 80 protected anything less than the position arising from the limited encroachment made upon the Exchequer Rule by provisions such as section 75 of the *Judiciary Act*, given the identity of its Framers and the position at common law. Further, a direction that breaches the principle in *Robinson v The Queen* is a misdirection that invites the jury to, worse than taking inadmissible evidence into account, form adverse views about the credibility of an accused that undermine the presumption of innocence. It was that task left to a jury that section 80 was expressly and essentially concerned with – the imposition of the jurors to decide those question without a legal error that undermined their determination of the facts and supported the protection of reasonable doubt as provided for by *Cheatle*. As Deane J said in *Dietrich v The Queen* (1992) 177 CLR 292 at 338 "...a statutory provision which purported to enable the effective substitution of an appellate court's verdict of guilt or obvious guilt would contravene the *Constitution's* (s 80) guarantee of trial by jury".

47 Consistently with this argument, the appellate jurisdiction of this court pursuant to section 73 of the *Constitution* (and, for completeness, section 37 of the *Judiciary Act*) would not extend to allow this Court to do what was purported to be done by the Court below, in cases where section 80 applies. That jurisdiction is also constrained as an exercise of federal judicial power by the role given to the jury by section 80.

New Zealand

48 In New Zealand, the Exchequer Rule was never adopted and *Crease v Barrett* (1835) 1 Cr M & R 919 [149 ER 1353] was not applied. In *R v Taylor* (1885) 3 NZLR 125, the Court of Appeal applied the earlier English case of *R v Ball* (1807) Russ & Ry 132 [168 ER 721] (cited in *Weiss* at 306 fn 25) to support the proposition at 129 that so long as the admissible evidence left "no doubt of the guilt in the mind of any reasonable man, such a conviction ought not, it seems, to be set aside because some other evidence was

given which ought not to have been received". The proviso was adopted in New Zealand by section 415 of the *Criminal Code Act* 1893 and based upon Stephen's English Criminal Code (Indictable Offences) Bill that was introduced to the UK Parliament in 1880 although it was never enacted[3]. Unlike the English, who had not adopted the proviso at the time in the criminal law, the Code was an attempt to stop the Exchequer Rule taking hold in a jurisdiction where it had never done so.

49 Notwithstanding all this, the New Zealand Court of Appeal took the same view of its proviso as the Privy Council did in *Makin*, and not because it was bound to do so. In *R v Lawrence* (1905) 25 NZLR 129, Williams J said that the proviso was limited to cases where it was impossible to suppose that the inadmissible evidence had influenced the jury's verdict: at 138. Justices Edwards, Cooper and Denniston were similarly influenced by notions of jury usurpation: at 142-143, with Denniston J saying that a judge by "...erroneously rejecting evidence or by misdirecting the jury, may substitute the Court of Appeal for the tribunal given by the law to every person".

Canada

50 Canada also had the proviso in section 746(f) of its Criminal Code 1892. It specifically dealt with the improper admission or rejection of evidence and therefore on its face went even further than the NSW provision. The Supreme Court of Canada also viewed the proviso in the same terms as *Makin* when in *Allen v R* (1911) 44 SCR 331 it was said that the proviso created "...a discretion which they [appellate judges] may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may be safely assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt": at 339 per Fitzpatrick CJ.

51 What this examination proves is that, whatever be the current position, the Courts were striving to give a limited interpretation to the proviso because a broad reading would sit so fundamentally against what was considered the essential function of a jury in the common law. However, even applying the logic of the view of Griffith CJ in *R v Grills*, a misdirection that amounted to a breach of the principle in *Robinson v The Queen* could not be saved by the proviso where section 80 applied.

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[3] S White, "The Making of the New Zealand Criminal Code Act of 1893: a Sketch" (1986) 16 VUWLR 353.

The United States

52 In the United States, the Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

53 It is well settled that the "rules of the common law" means that the right of trial by jury preserved is that right which existed at English common law when the Amendment was adopted in 1791: *Baltimore & Carolina Line, Inc v Redman* 295 US 654 at 657 (1935). The latter part of the provision is known as the Re-Examination Clause. It is not found in the Sixth Amendment that deals with criminal trials. However, that is more likely to be a result of the fact that it was never considered that an appellate body could have a role in fact finding in a criminal trial. As Alexander Hamilton said in relation to Art III, § 2, clause 2, that gave the Supreme Court an appellate jurisdiction both as to law and fact, that "this would not work an implied supersedure of the trial by jury"[4]. The right to jury trial in criminal and civil spheres was one of the central issues for the fledgling Republic. After all, the interference with the colonists' right to jury trial had been "one of the important grievances leading to the break with England": *Parklane Hosiery Co* v Shore 439 US 322 at 340 per Rehnquist J. Indeed, a number of the earliest cases of judicial review in the American colonies/States prior to, and shortly after the adoption of the United States Constitution and Chief Justice Marshall's famous exposition involved courts striking down provisions of colonial/State legislatures interfering with trial by jury: Professor Treanor, "Judicial Review before *Marbury*", vol 58 *Stanford Law Review* 455 (2005) at 474-480, 503-508.

54 The Re-Examination Clause has been interpreted as precluding federal appellate courts from weighing the evidence in respect of any factual issue decided by the jury. In *Aetna Life Insurance Co v Ward* 140 US 76 at 91 (1891) the Court said "we have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted". In *Barreda v Silsbee* 62 US 146 at 166 (1858) it was said that "whether the jury were warranted in so finding or not, is not a question for an appellate tribunal". In *United States v Laub* 37 US 1 at 5 (1838), the Court said it was "a point too well settled to be now drawn into question, that the effect and the sufficiency of the

[4] The Federalist No 83 at 509

evidence, are for consideration and determination of the jury; and the error is to be addressed, if at all, by application to the court below for a new trial".

55 Justice Harlan put the point succinctly in *Railroad Co v Fraloff* 100 US 24 (1879) at 31-32 where his Honour said:

> This court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount...Whether [the trial court's] action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instruction correctly defining the legal rights of the parties.

56 Of course, if the instructions were not correct, that would lead to a new trial, not the appellate re-examination of the facts. The present doctrine in the Supreme Court is that the only matter that may be re-examined is any "abuse" of the discretion by the trial judge to refuse an order for a new trial: *Gasperini v Center for Humanities, Inc* 518 US 415 (1996).

57 As far as criminal trials went, it was no part of the feature of federal United States criminal jurisprudence at the time of Australian federation that any "proviso" or as they are now known in the United States, "harmless error", type provision applied. The Exchequer Rule, and such problems as its extreme application created, was in full force in the United States: Wigmore, "New Trials for Erroneous Rulings Upon Evidence: A Practical Problem for American Justice", vol 3 *Columbia Law Review* 433 (1903).

58 From 1919, in the federal sphere, something equivalent to the proviso was passed with section 269 of the Judicial Code. Most of the debate in the 20th century has been about whether constitutional violations may be subjected to harmless error review. The Supreme Court has determined that they may, on the basis of a structural error/non-structural error dichotomy with *Chapman v California* 368 US 18 (1967). The harmless error doctrine did not form any background to the understanding of section 80 when it was drafted. In any event, denial of a trial by jury on a key contested factual issue may be a "structural error" in the United States. In *Sullivan v Louisiana* 508 US 275 (1993) the Court said that as the Fifth and Sixth Amendments required a jury verdict in which guilt had been proved beyond reasonable doubt and the judge's direction breached the Fifth Amendment in terms of the standard of proof, there had

been "no jury verdict of guilt beyond a reasonable doubt" and so there was "...no object, so to speak, upon which harmless-error scrutiny can operate".

59 In *Neder v The United States* 527 US 1 (1999), Scalia J, in dissent, said that the Constitution's requirement of a jury verdict on all ingredients of the offence represented the "spinal column of American democracy" (at 31) because the "Constitution does not trust judges to make determinations of criminal guilt", absent waiver of the right to jury trial (at 32). Of course, waiver of a jury trial where section 80 applies is not possible in Australia and given the state of the common law at the time of federation, the same view as expressed by Scalia J must have taken to be entrenched by section 80.

Returning to the language of the proviso

60 Returning to the matter adverted to above at [18]-[19], and in addition to the submissions of the appellant Mr Stoten, the appellant contends that the Court below erred when it regarded itself being required by virtue of section 668E(1A) of the *Code* to engage in the exercise it did even absent section 80 considerations.

61 First, the Court below committed the error identified by Gummow and Hayne JJ in *AK v Western Australia* at 455 [53] of treating the negative proposition established in *Weiss* as some substitute for the statutory language. That negative proposition should not have been treated, especially in a case such as this, as establishing what was sufficient to show that no substantial miscarriage of justice had occurred where credibility of the appellant was the central issue in the trial. This is supported by the further reasoning of Gummow and Hayne JJ at 456 [55]. The statutory language had to be assessed here against one of the "wide variety of circumstances" that involved broader considerations of the nature of the jury verdict: see *Weiss* at 316 [42].

62 Secondly, as *Weiss* itself demonstrated at 312 [29], the reading of *R v Grills* with *Makin* shows that for the process to apply where there is a misdirection such as that which occurred here, it must be "impossible" to conclude that with proper direction the jury would have done other than return a guilty verdict. Given the different verdicts in the present case (both between the different counts and as amongst the different accused), and where credibility was central, the Court below could not fairly have come close to reaching that view.

63 Thirdly, as this Court explained in *Darkan v The Queen* (2006) 227 CLR 373 at 399 [84], the principles expressed in *Weiss* require the Court exercising a jurisdiction under

the proviso to come to a view on the admissible evidence and absent the error committed, of a satisfaction beyond reasonable doubt of the guilt of the appellant. Usually that means finding a route to conviction independently beyond doubt of the trial judge's error.

64 When these considerations are taken into account, it is clear that there was no power or occasion for a proper application of the proviso in the particular circumstances of this case.

65 In *Robinson v The Queen*, a breach of the principle therein express was described as "seriously impair[ing]" the "fairness of the trial". The unfairness of a direction that breaches *Robinson* is "manifest", because it, in effect, is a direction to the jury to treat the accused's evidence as suspect when it is in conflict with the evidence of the Crown. That of itself precluded the application of the proviso.

66 More specifically, the outcome of the trial depended upon the assessment of the credibility of the accused in relation to his state of mind concerning complicated taxation offences. The fiscal awareness of the taxpayer, and his or her honesty, is central to such a criminal prosecution. The appellant's brother was acquitted on both counts. The appellant and Mr Stoten were acquitted on count 1. The only sensible reading of those verdicts is that the credibility of the appellant and Mr Stoten must have been at the forefront of the mind of the jury to convict on count 2. It matters not what the appellate court thinks about the fortunate nature of any acquittal. This was a decision for the jury. The jury clearly thought that the appellant was not guilty on one count. Any misdirection of the trial judge on an issue which concerned the weight to be given by the jury to the appellant's oral testimony is something at the very centre of the trial.

67 The misdirection was so fundamental that a jury was deprived of the chance to render a proper and constitutional verdict. There was no independent route for the Court below to sustain the conviction and eliminate the effect of the error without placing itself in the position of the jury and assessing the accused's credibility. Being deprived of a properly instructed jury's assessment of credibility, when credibility was essential to a verdict, was of itself a substantial miscarriage of justice. In that sense, there is nothing for the proviso in section 668E(1A) of the *Criminal Code* to operate upon in this respect, because the appellant was deprived of a "trial by jury" and is therefore entitled to a new trial.

PART VII: Legislation

Constitution, sections 73 and 80

Criminal Law (Amendment) Act 1883 (NSW), ss 422 and 423 (as passed)

Judiciary Act 1903 (Cth), sections 37 (current form) and 75 (current form is unaltered from form as passed)

Criminal Code Act 1899 (Qld), section 671 (as passed), draft clause 696 (1897)

PART VIII: Orders sought

1. Appeal allowed.
2. Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 23 November 2010 and in its place order that:
    a. The appeal to that Court be allowed;
    b. The appellant's conviction be quashed and there be a new trial.

Dated 17 June 2011

Justin Gleeson
Tel: (02) 8239 0211
Fax: (02) 9210 0645
Email: justin.gleeson@banco.net.au

Peter Kulevski
Tel: (02) 9376 0611
Fax: (02) 9210 0636
Email: peter.kulevski@banco.net.au

Counsel for the appellant

Commonwealth of Australia Constitution Act

(The Constitution)

This compilation was prepared on 25 July 2003
taking into account alterations up to Act No. 84 of 1977

[Note: This compilation contains all amendments to the Constitution made by the Constitution Alterations specified in Note 1
Additions to the text are shown in bold type
Omitted text is shown as ruled through]

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges) 1977* affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal

from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74 Appeal to Queen in Council [*see* Note 12]

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

75 Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence

was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Judiciary Act 1903

Act No. 6 of 1903 as amended

This compilation was prepared on 4 May 2011
taking into account amendments up to Act No. 5 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Division 2—Power of Court

36 New Trials

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.

37 Form of judgment on appeal

The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance, and if the cause is not pending in the High Court may in its discretion award execution from the High Court or remit the cause to the Court from which the appeal was brought for the execution of the judgment of the High Court; and in the latter case it shall be the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment.

the next criminal sitting of the Court at which the convicted person appears to receive judgment.

75 Certain errors not to avoid conviction

A conviction cannot be set aside upon the ground of the improper admission of evidence if it appears to the Court that the evidence was merely of a formal character or not material, nor upon the ground of the improper admission of evidence adduced for the defence.

76 Appeal from arrest of judgment

(1) This section applies if a Court, other than:

(a) the Federal Court of Australia; or

(b) the Supreme Court of a Territory (other than the Australian Capital Territory or the Northern Territory);

convicts an accused person on indictment for an offence against the laws of the Commonwealth.

(1A) If the Court (the ***trial court***) before which the accused person is convicted arrests judgment at the trial, the Court must on the application of counsel for the prosecution state a case for the consideration of:

(a) a Full Court of the High Court; or

(b) a Full Court of the Supreme Court of the same State or Territory as the trial court.

(2) On the hearing of the case the Full Court may affirm or reverse the order arresting judgment. If the order is reversed the Court shall direct that judgment be pronounced upon the offender, and he or she shall be ordered to appear at such time and place as the Court directs to receive judgment, and an issuing officer (within the meaning of Part IAA of the *Crimes Act 1914*) may issue a warrant for the arrest of the offender.

(3) An offender so arrested may be admitted to bail by order of the Court which may be made in Court or in Chambers, at the time when the order directing judgment to be pronounced is made or afterwards.

No. XVII.

An Act to consolidate and amend in certain respects the Criminal Law. [26*th April*, 1883.]

Criminal Law Amendment.

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows :—

Commencement of Act and repeal of sundry Acts.

1. This Act (which may be cited as the "Criminal Law Amendment Act of 1883") shall commence on the first day of July one thousand eight hundred and eighty-three on which day the Acts and portions of Acts mentioned in the First Schedule hereto shall to the extent of the repeal thereby indicated be repealed except as to offences committed and things done or commenced before that day which shall be dealt with and continued and every right and liability in respect thereof shall remain as if this Act had not been passed.

Application of certain Parts of Act.

2. The Eighth and following Parts of this Act so far as their provisions can be applied shall be in force with respect to all offences whether at common law or by statute whensoever committed and in whatsoever Court tried.

Interpretation and General Clauses.

Interpretation of terms.

3. For the purposes of this Act the words in this section printed in *italics* shall have the meanings or be taken to include the terms or things or persons hereinafter in that behalf mentioned—that is to say:—

Court Judge.

(*a.*) The words *Court* and *Judge* respectively shall be equally taken to mean the Court in which or the Judge before whom the trial or proceeding is had in respect of which either word is used The term *Indictment* shall include any information presented or filed as now provided by law for the prosecution of offences And the word *Justice* or *Justices* shall be construed to mean a Justice or Justices of the Peace.

Indictment.

Justices.

(*b.*)

Effect of reversing judgment in such cases.

419. Upon the avoidance or vacating of the conviction of any such person or reversal of the judgment against him the provisions o the three last sections shall with respect to such person determine and every order made for the payment of money out of his property shall become of no effect and he shall be restored to all that he may have lost thereby.

Power to place offender's property in trust.

420. The Supreme Court or any Judge thereof at any time within six months after any such conviction for felony may on the application of the Crown or of any creditor of the offender direct that such offender's estate shall be placed under sequestration in the hands of an Official Assignee of Insolvent Estates or in the hands of some other person appointed by such Court or Judge—And every such direction after entry thereof in the book kept in the Prothonotary's office as aforesaid shall have the effect of an adjudication under any Act then in force providing for the administration of insolvent or bankrupt estates and shall vest in such assignee or person for the benefit of the creditors and family of the offender all his estate rights and credits then existing or to accrue during his disability—And every person having any claim legal or equitable against the offender whether for damages in respect of any wrong or otherwise shall be deemed a creditor within the meaning of this section—and the matter of such claim shall be inquired into and determined and such damages be assessed in such manner as the Court or a Judge may direct.

Who to be deemed creditors.

Provision for offender's family.

421. The Chief Commissioner of Insolvent Estates or Officer having corresponding duties hereafter in bankruptcy may cause to be set apart from time to time out of such estate and credits such sums for the support of the offender's wife and children as such Commissioner or Officer thinks proper subject nevertheless to the payment of the creditors of the offender or such of them as have proved their claims—Provided that on the termination of such offender's disability by any means the Official Assignee or other person appointed as aforesaid shall restore to him all property and moneys if any in the estate then unappropriated or on the death of the offender if that first happens shall deliver and pay such property and moneys to the person or persons then entitled thereto.

Restoration on disability ceasing.

Reserving Questions of Law.

Questions of law may be reserved.

422. Where any question of law arises on the trial of any person or is submitted before sentence passed on him the Court shall on the application of his counsel or attorney then made and may in its discretion without any application reserve every such question for the consideration of the Judges of the Supreme Court And thereupon the Court shall either commit the person to prison or take his recognizance with one or more surety or sureties to appear at such time and place as the Supreme Court may direct and receive judgment or if judgment has been given that he will render himself in execution And the like proceedings may be taken so far as they are applicable where any question of law arises on the arraignment of any person or as to the verdict or judgment given or to be given thereon.

roceedings thereon.

423. The Judge by whom any such question is reserved shall as soon as practicable state a case setting forth the same with the facts and circumstances out of which every such question arose and shall transmit such case to the Judges of the Supreme Court who shall determine the questions and may affirm amend or reverse the judgment given or avoid or arrest the same or may order an entry to be made on the record that the person convicted ought not to have been convicted or may make such other order as justice requires Provided that no conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice.

CRIMINAL LAW.

An Act to Establish a Code of Criminal Law.

63 Vic. No. 9. THE CRIMINAL CODE ACT, 1899.

[ASSENTED TO 28TH NOVEMBER, 1899.]

Preamble. WHEREAS it is desirable to Declare, Consolidate, and Amend the Criminal Law: Be it enacted and declared by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows :—

Short title. **1.** This Act may be cited as "*The Criminal Code Act*, 1899."

Establishment of Code. [Schedule I.] **2.** On and from the first day of January, one thousand nine hundred and one, the provisions contained in the Code of Criminal Law set forth in the First Schedule to this Act, and hereinafter called "the Code," shall be the law of Queensland with respect to the several matters therein dealt with.

The said Code may be cited as "*The Criminal Code.*"

Repeal. **3.** On and from the coming into operation of the Code—

(1) The several Statutes of the Realm mentioned in the Second Schedule to this Act shall be repealed so far as they are in force in Queensland to the extent in the said Schedule indicated; [Schedule II.]

(2) The several Statutes of New South Wales and Queensland mentioned in the Third Schedule to this Act shall be repealed to the extent in the said Schedule indicated; [Schedule III.]

(3) The several Statutes of New South Wales and Queensland mentioned in the Fourth Schedule to this Act shall be amended in the manner in the said Schedule indicated, and shall be read and construed as being so amended accordingly. [Schedule IV.]

Provided as follows :—

Saving. (1) The repeal of any Statute or part of a Statute set forth in the said Schedules shall not affect the construction of any other Statute, or of any other part of the same Statute, whether as regards the past or the future :

The presiding Judge is thereupon required to state, in a case signed by him, the question of law so reserved, with the special circumstances upon which it arose; and the case is to be transmitted to the Supreme Court at Brisbane.

Hearing.

669. Any question so reserved is to be heard and determined by the Full Court at Brisbane, after argument by or on behalf of the Crown and the convicted person or persons, if any of them desire that the question shall be argued; and that Court may—

(*a*) Affirm the judgment given at the trial; or

(*b*) Set aside the verdict and judgment, and order a verdict of not guilty or other appropriate verdict to be entered on the record; or

(*c*) Arrest the judgment; or

(*d*) Amend the judgment; or

(*e*) Make such other order as justice may require.

Or the Court may send the case back to be amended or restated.

Effect of Order of Full Court.

670. The Registrar is required to certify the judgment of the Court, under his hand and the seal of the Court, to the proper officer of the Court in which the trial was had, who is required to enter the same on the original record.

If the convicted person is in custody, the Registrar is also required forthwith to transmit another certificate of the same tenor, under his hand and the seal of the Court, to the superintendent of the prison who has the custody of such person. Such certificate is a sufficient warrant to all persons for the execution of the judgment, if it is certified to have been affirmed, or as it is certified to be amended, and execution is thereupon to be executed upon the judgment as affirmed or amended: And, if the judgment is set aside or arrested, the certificate is a sufficient warrant for the discharge of the convicted person from further imprisonment under that judgment; and in that case the superintendent is required forthwith to discharge him from imprisonment under that judgment; and if he is at large on bail, the recognizance of bail is to be vacated at the next Sittings of the Court in which the trial was had: And, if that Court is directed to pronounce judgment, judgment is to be pronounced at the next Sittings of the Court at which the convicted person attends to receive judgment.

Certain Errors not to avoid Conviction.

671. A conviction cannot be set aside upon the ground of the improper admission of evidence, if it appears to the Court that the

evidence was merely of a formal character and not material, nor upon the ground of the improper admission of evidence adduced for the defence.

Appeal from Arrest of Judgment.

672. When the Court before which an accused person is convicted on indictment arrests judgment, the Court is required, on the application of counsel for the prosecution, to reserve a case for the consideration of the Full Court as hereinbefore provided.

On the hearing of the case the Court may affirm or reverse the order arresting judgment. If the order is reversed the Court is to direct that judgment be pronounced upon the offender, and he is to be ordered to appear at such time and place as the Court may direct to receive judgment, and any justice may issue his warrant for the arrest of the offender.

An offender so arrested may be admitted to bail by order of the Supreme Court or a judge thereof, which may be made at the time when the order directing judgment to be pronounced is made, or afterwards.

Appeals from Summary Conviction to Supreme Court.

673. The law respecting appeals to the Supreme Court by persons aggrieved by summary convictions is set forth in the Statutes relating to Justices of the Peace, their Powers and Authorities.

Appeal from Summary Convictions to District Court.

674. Any person aggrieved by a summary conviction of any of the offences defined in this Code may, if the fine adjudged to be paid on the conviction exceeds five pounds, or the imprisonment adjudged exceeds one month, appeal to a District Court.

The procedure and practice respecting such appeals are set forth in the last-mentioned Statutes.

Conditional Remission of Sentence by Governor.

675. In any case in which the Governor is authorised, on behalf of Her Majesty, to extend the Royal mercy to an offender under sentence of imprisonment with or without hard labour, he may extend mercy upon condition of the offender entering into a recognizance conditioned as in the case of offenders discharged by the Court upon suspension of the execution of a sentence. The offender is thereupon liable to the same obligations, and is liable to be dealt with in all respects in the same manner, as a person discharged by the Court on recognizance upon such suspension.

1897.

QUEENSLAND.

DRAFT

OF A

CODE OF CRIMINAL LAW,

PREPARED FOR

THE GOVERNMENT OF QUEENSLAND

BY

THE HONOURABLE SIR SAMUEL WALKER GRIFFITH, G.C.M.G.,
CHIEF JUSTICE OF THAT COLONY,

TOGETHER WITH

AN EXPLANATORY LETTER TO THE HONOURABLE THE ATTORNEY-GENERAL, A TABLE OF CONTENTS, AND A TABLE OF THE STATUTORY PROVISIONS PROPOSED TO BE SUPERSEDED BY THE CODE.

PRESENTED TO BOTH HOUSES OF PARLIAMENT BY COMMAND.

BRISBANE:
BY AUTHORITY: EDMUND GREGORY, GOVERNMENT PRINTER, WILLIAM STREET.
1897.

C. A. 89—1897.

had: And, if that Court is directed to pronounce judgment, judgment is to be pronounced at the next Sittings of the Court at which the convicted person attends to receive judgment.

Certain Errors not to avoid Conviction.

696. A conviction cannot be set aside upon the ground of the improper admission of evidence, if it appears to the Court that the evidence was merely of a formal character and not material, or was of such a nature that it could not have affected the jury, nor upon the ground of the improper admission of evidence adduced for the defence.(1)

Appeal from Arrest of Judgment.

697. When the Court before which an accused person is convicted on indictment arrests judgment, the Court is required, on the application of counsel for the prosecution, to reserve a case for the consideration of the Full Court as hereinbefore provided.

On the hearing of the case the Court may affirm or reverse the order arresting judgment. If the order is reversed the Court is to direct that judgment be pronounced upon the offender, and he is to be ordered to appear at such time and place as the Court may direct to receive judgment, and any justice may issue his warrant for the arrest of the offender.

An offender so arrested may be admitted to bail by order of the Supreme Court or a judge thereof, which may be made at the time when the order directing judgment to be pronounced is made, or afterwards.(2)

Appeals from Summary Conviction to Supreme Court.

698. The law respecting appeals to the Supreme Court by persons aggrieved by summary convictions is set forth in the Statutes relating to Justices of the Peace, their Powers and Authorities.

Appeal from Summary Convictions to District Court.

699. Any person aggrieved by a summary conviction of any of the offences defined in this Code may, if the fine adjudged to be paid on the conviction exceeds five pounds, or the imprisonment adjudged exceeds one month, appeal to a District Court.

(1) This is perhaps new. It will be observed that it is limited to cases where the evidence wrongly admitted *could not* have affected the jury. The second branch is obviously right, whether it is the present law or not.

(2) This section is new.

29 Vic. No. 13, ss. 39, 40.

615. Judgment after a verdict upon an indictment for any felony or misdemeanour cannot be stayed or reversed for want of a similiter, nor by reason that the jury process was awarded to a wrong officer [or] upon an insufficient suggestion, nor for any misnomer or misdescription of the officer who returned the jury process or of any of the jurors, nor because any person has served upon the jury who was not returned as a juror by the sheriff or other officer.

[When the offence charged is created by statute, or is subjected to a greater degree of punishment by statute, an indictment which describes the offence in the words of the statute is sufficient after verdict to warrant the punishment prescribed by the statute.]

When on a writ of error brought upon a judgment on an indictment the court of error reverses the judgment, such court of error may either pronounce the proper judgment or remit the record to the court below in order that that court may pronounce the proper judgment.

15 Geo. 2, c. 27, s. 2; 6 Geo. 4, c. 119, s. 13; 9 Geo. 4, c. 69, s. 6; 29 Vic. No. 5, ss. 71, 72; 29 Vic. No. 6, ss. 115, 116. (*See* 50 Vic. No. 17, s. 239.)

616. (1.) Any person aggrieved by a summary conviction of any of the offences defined in Chapter XXXVIII., except Articles 825, 826, 827, 828, and 838, or in Chapter XLIII., except Article 414, may, if the sum adjudged to be paid on the conviction exceeds five pounds, or the imprisonment adjudged exceeds one month, or the conviction is made by one justice only, appeal to a District Court.