WM. PREEPER AND JANE DOYLE.....APPELLANTS ; 1888

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Oct. 6 & 8.
*Dec. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law—Felony—Jury attending church—Preacher's remarks —Influence on jury—Expert testimony—Admissibility.

In the course of a trial for murder by shooting the jury attended church in charge of a constable and the clergyman directly addressed them, referring to the case of a man hung for murder in P. E. I., and urging them, if they had the slightest doubt of the guilt of the prisoner they were trying, to temper justice with equity. The prisoner was convicted.

Held, affirming the judgment of the Court of Crown Cases reserved in Nova Scotia, that although the remarks of the clergyman were highly improper it could not be said that the jury were so influenced by them as to affect their verdict.

A witness was called at the trial to give evidence as a medical expert and in answer to the crown prosecutor he said, "there are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this —not personal experience, but from books." He was not cross-examined as to the grounds of this statement and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired in the case before the court, and on what he based his opinion as to it, giving the result of his examination of the body.

Held, Strong J. and Fournier J. dissenting, that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shown by cross-examination, or other testimony, that there were no such *indicia* as stated, his evidence as to the distance at which the shot was fired was properly received.

APPEAL from a decision of the Court of Crown Cases Reserved for the Province of Nova Scotia affirming the conviction of the prisoners (appellants) for murder.

---

*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Gwynne JJ.

1888

PREEPER v. THE QUEEN.

The defendants, William Preeper and Jane Doyle, were jointly indicted for the murder of one Peter Doyle, and two questions were reserved under c. 174, s. 259 R. S. C. for the consideration of the justices for crown cases reserved in the Province of Nova Scotia.

1 As to certain observations made by a clergyman in his sermon in the presence and hearing of the jury.

The learned judge says—"It was my instruction to the jury, and the officers in charge of them, that they should not separate while out of court nor permit any person whatever to converse with them on the subject of the trial. These instructions were repeated several times during the course of the trial, and particularly on the adjournment] of the court on the evening of Saturday the 7th day of April aforesaid."

On the morning of Sunday, the 8th day of April aforesaid, the whole twelve jurors attended service at a church known as the Grafton Street Methodist Church in the City of Halifax, being accompanied by, and in charge of, the deputy sheriff. What occurred while such jury was present in such church is set out in the affidavit of Mr. F. H. Oxley, which is as follows:—

The jury who tried the above cause attended the said service, and the Reverend William Brown was the officiating clergyman and preached a sermon on the said occasion.

The subject of the said sermon was the parable of the "Prodigal Son," and the principal argument of the preacher was to point out the justice and certainty of punishment for wrong doing.

The preacher also stated that all persons were free agents and had the opportunity of choosing their course in life, and if they did wrong the merited punishment would follow as a result of their own act.

As an instance, illustrating his argument, he referred

1888

PREEPER v. THE QUEEN.

to the case of Millman, a prisoner then under sentence of death for murder in the Province of Prince Edward Island.

He also stated that he observed in his audience the men of the jury, who for several days had been separated from the community considering the fate of the prisoners accused of the murder of Doyle, and that although he realized it was not for him to instruct them in the matter yet he felt it was his duty to remind them that unless they were clearly satisfied of the guilt of the prisoners their judgment should be tempered with equity.

The question whether the verdict can stand after such an address made to the jury, tending as it does to interfere with the administration of justice and from which inferences might be drawn by the jury hostile to the prisoners, is one of the questions reserved by the trial judge.

2. One Norman McKay, a doctor of medicine, was produced as a witness on behalf of the crown and gave evidence establishing his competency to speak as a medical expert, but not as an expert in any other particular. In his capacity of medical expert he gave evidence of the character of the injuries, the organs involved, the cause of death, etc. The death of deceased was caused by a charge of shot from a shot gun, which gun was found so lying in relation to the body as to render it material to be known at the trial what distance from the body of deceased the muzzle of the gun was at the moment the fatal shot was discharged. In the course of Dr. McKay's direct examination he was asked the following question by the counsel prosecuting for the crown :—

"From your knowledge of medical science in this respect, and from your examination in this case, at how great or less a distance would the muzzle of the

1888

PREEPER v. THE QUEEN.

gun be from a human body at the time of the discharge?"

This question was at once objected to by counsel for the prisoners but allowed by the judge. The answer given by the witness was as follows:—

"Judging from what I saw, from the nature of the wound, and its appearance, I would say that the muzzle of the gun was not nearer than twenty inches, and not further away than three feet, when it was discharged."

The question of Dr. McKay's competency to be asked and to answer the above question was also reserved.

A copy of the notes of the whole of the testimony of said Dr. McKay given on said trial was appended to the reserved case.

By these notes it appears that after stating that he was a medical man of the Nova Scotia Medical Board, and a graduate of the University of Halifax and Royal College of Surgeons, England, and had conducted an autopsy on the body of Peter Doyle, after describing minutely the examination he made and the wound and shot he found, and the probing of the wound and the upward course pursued by the shot in the body, the witness proceeds to state that—

"There are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience—but from medical works. I examined the wound of deceased for the purpose of discerning this fact. Mr. Weeks asks witness: "From your knowledge of medical science in this respect, and from your examination in this case, at how great or how less a distance would the muzzle of the gun be from a human body at the time of the discharge?"

Mr. Henry objects to this question and it was

allowed subject to the objection. The witness answered:—

"Judging from what I saw, from nature of wound and appearance, I would say that the muzzle of the gun was not nearer than twenty inches, and not further away than three feet, when it was discharged. The carrying capacity of the gun, and the nature of the charge, and the condition of the gun as regards cleanliness and the shape of the hole would modify the distance as given by me. There are cases on record where the gun at a much greater distance than I have described produced such a wound as I have described. Death would be instantaneous from such a wound as I have described. In my opinion it would be impossible for a man after receiving such a wound to walk six feet, turn and sit down. If a man had been shot standing upright, and I found him at a distance of six feet sitting down after such a wound as I have described, I would expect to find blood all down his legs and pants and into his shoes, and probably on the ground, if it were possible for a man to do that, for with such a wound the heart would cease to beat instantly, after such a wound.

Cross-examined: I never witnessed a case from wound to the heart: I speak entirely from books and experience of other men: I mean that a party shot in this way could not make a step in the sense of walking: one reason I have for saying the gun was not nearer than twenty inches was that I saw no traces of burning: when a man is clothed with shirt and under shirt would not expect any burning at all: in giving my opinion as to distance of muzzle I do so on assumption there was no clothing on: independently of burning altogether I can say that it could not have been nearer than twenty inches: I never saw in any work on the subject a statement of the number of

1888

PREEPER v. THE QUEEN.

inches which might intervene between muzzle of gun and wound: in reference to burning I based my opinion as to distance, not so much as to the absence of burning as from the size of the wound and the jagged nature of the edge.

The Court of Crown Cases Reserved affirmed the conviction, McDonald C.J. and Mr. Justice McDonald dissenting. The prisoners then appealed to the Supreme Court of Canada.

Henry Q.C. and *Harrington* Q.C. for the appellants: We will first deal with the question of expert evidence reserved in the case. It is stated in the case and admitted that this evidence is most material. There are two primary objections to the evidence. First, that the subject upon which Doctor McKay was examined was not in itself a subject of expert testimony, but was a matter of ordinary knowledge.

2. If it were the witness has not given such evidence as would show that he was skilled in the science to which it relates.

As to the first objection the following authorities were referred to: Wharton on Crim. Ev. (1); *Carter* v. *Boehm* (2); *Milwaukee & St. Paul Ry. Co.* v. *Kellogg* (3); *Campbell* v. *Rickards* (4).

As to the first question reserved the learned counsel cited *Commonwealth* v. *Roby* (5); *United States* v. *Gibert* (6); *The King* v. *Wooler* (7).

Longley, Atty. Gen. of Nova Scotia, for the respondent referred on the question of expert evidence to Rogers on Law and Medical Men (8); Lawson on expert Evidence (9); Roscoe on Crim. Ev. (10); Taylor on Ev. (11);

(1) 9 Ed. sec. 405.
(2) 1 Smith L.C. 9 Ed. at p. 523.
(3) 9 4 U. S. R. 469.
(4) 5 B. & Ad. 840.
(5) 12 Pick. 517.
(6) 2 Sum. 81, 83.
(7) 6 M. & S. 367.
(8) Pp. 112 *et seq.*
(9) Ch. 3 at p. 461 and p. 128.
(10) 10 ed. Pp. 147-8.
(11) 8 ed. Vol. 2 pp. 1212-14.

Archbold's Cr. Pl. (1); *McNaghten's Case* (2); *Rex.* v. *Wright* (3); *Collier* v. *Simpson* (4); *Rowley* v. *London & North Western Ry Co.* (5); 1 Taylor's Med. Jur. (6.)

On the first question reserved the learned Attorney General cited *The Queen* v. *Kennedy* (7).

Henry Q. C. in reply cited *New England Glass Co.* v. *Lovell* (8); *Kennedy* v. *The People* (9); Taylor on Med. Jur. (10); Rogers on Law and Medical Men (11); Wharton & Stillé's Med. Jur. (12).

Sir W. J. RITCHIE C. J.—After stating the points reserved and the substance of the judges' notes at the trial, his lordship proceeded as follows :—

As to the first point, that the observations of the clergyman caused a mis-trial, there can be no doubt, I should think in the minds of all right thinking persons, that in referring, in the presence of the jury, to the trial and the jury, the clergyman entirely mistook his duty and laid himself open to the very grave charge of interfering with the administration of justice. But though his interference was most improper and unjustifiable, and worthy of the severest censure, I am constrained to agree with the court below that the observations made were not necessarily adverse to the prisoner or calculated to bias the minds of the jury against the prisoner, nor do I think the result of the trial was influenced by what the jury heard. The irregularity, therefore, is not, in my opinion, sufficient to invalidate the trial and verdict.

As to the second question reserved, if the objection to the question was to the competency of the witness to answer it it was a preliminary question for the

(1) 20 Ed. P. 313.
(2) 10 C. & F. 200.
(3) R. & R. 456.
(4) 5 C. & P. 73.
(5) L. R. 8 Ex. 221.
(6) 3 Ed. p. 686.
(7) 1 Thompson (N. S.) 203.
(8) 7 Cush. (Mass.) 319.
(9) 39 N. Y. 245.
(10) Vol. 1 pp. 698-9.
(11) P. 116.
(12) Vol. 3 Ch. 7 p. 731.

1888

PREEPER v. THE QUEEN.

Ritchie C.J.

judge with reference to which the prisoner's counsel might have cross-examined the witness or offered evidence to establish the witness's incompetency.

In this case the witness does not appear to have been cross-examined and no evidence was offered on the prisoner's behalf to show a want of capacity.

The case states that Dr. McKay was produced as a witness on behalf of the crown, and gave evidence establishing his competency to speak as a medical expert but not as an expert in any other particular, and he was not, it appears to me, asked to speak in any other capacity than as a medical man.

In the absence, then, of any cross-examination as to the witness's capacity or qualification, or any evidence before the question was answered to establish, as a preliminary question to be decided by the judge, that the question was not one of medical or surgical skill, and therefore Dr. McKay was not an expert, agreeing as I do with the learned judge who tried this case that the presiding judge must form his opinion of the witness's capacity to speak as an expert from the testimony before him, I think on the *primâ facie* evidence before the judge he was justified in allowing and could not properly have refused to allow the question to be answered because it was distinctly put to the witness as a question of medical science or skill. This the question and answer beyond all doubt established, for the question is:

From your knowledge of medical science in this respect and from your examination in this case, at how great or how less a distance would the muzzle of the gun be from a human body at the time of the discharge?

This was the question objected to and the answer to it was:

Judging from what I saw, from the nature of the wound and its appearance, I would say that the muzzle of the gun was not nearer than twenty inches, and not further away than three feet when it was discharged.

1888

PREEPER v. THE QUEEN.

Ritchie C.J.

If the question was open to objection at the time it was put, it seems to me such objection was removed by the course pursued at the trial and it is not now open to the prisoner.

The prisoner's counsel did not confine his cross-examination to the competency of the witness, but appears to have interrogated as to the reasons the witness had for saying the muzzle of the gun was not nearer than 20 inches, one of which was that he saw no traces of burning and he says:

Independently of burning altogether I can say it could not have been any nearer than twenty inches.

And again:

In reference to burning I based my opinion as to distance not so much as to the absence of burning as from the size of the wound and the jagged nature of the edges.

Here the witness was clearly speaking as a medical expert, and thus the counsel brought out the very evidence he had, at a previous stage of the case, himself objected to. Had he intended to rely on the objection previously taken in my opinion he should, on cross-examination, have refrained from bringing out the very same testimony to which, on the direct examination, he had objected, thus making it his own.

Under all these circumstances I think the appeal should be dismissed.

STRONG J.—In this case I am compelled to differ from the Chief Justice and, I believe, from the majority of the court. I am of opinion that the judgments of the Chief Justice and of Mr. Justice McDonald in the court below were correct and that the question objected to was improperly allowed.

There can be no doubt as to the rule established in practice and by incontrovertible authority, that no evidence of matters of opinion is admissible except where the subject is one involving ques-

1888

PREEPER v. THE QUEEN.

Strong J.

tions of a particular science in which persons of ordinary experience are unable to draw conclusions from the facts. The jury must, as a general rule, draw all inferences themselves and witnesses must speak only as to facts.

The only ground on which the ruling of the learned judge at the trial, as to the admissibility of this evidence, could be sustained is that the matter is one involving experience and skill in medical science. I cannot agree in the opinion that it is. Following the line of argument of the Chief Justice of Nova Scotia I think the evidence depends on other considerations than those of medical science, namely, the description of the gun, the size of the bore, the charge of powder and other facts, none of which came within the range of that peculiar observation and study which qualifies a medical expert to pronounce an opinion. It appears to me very obvious that a person familiar with the use of fire-arms, for instance a gun-maker or an instructor of musketry accustomed to test and use such weapons, would be more competent to pronounce an opinion on a point of this kind than a medical man, and that, in the absence of evidence from such a source, the jury should have been left to draw their own conclusions from the facts.

The admissibility of the witness as an expert, competent to state an opinion on the point in question, was, of course, entirely a question for the judge, and it was for him to say, in the first instance, whether Dr. McKay's testimony on this head came within the required condition. But this ruling of the learned judge, though on a question of fact, is open to review on appeal.

The witness himself says that he had no personal experience in the use of fire-arms, which I think is conclusive against the admissibility of his evidence,

1888

PREEPER v. THE QUEEN.

Strong J.

for I cannot agree that the witness is to be considered as establishing his own competency by merely stating that there were *indicia* known to him from his professional studies, from which he was enabled to form a judgment as to the distance from the deceased at which the gun which inflicted the fatal wound was fired.

As regards authority it is remarkable that no English case in point is to be found. This, it seems to me, is in the prisoner's favor since, if such evidence was admissible, the reports would have contained records of, at least, some instances in which it had been admitted.

American authority is in the prisoner's favor for although there is no case in which the facts are precisely similar the cases of *Kennedy* v. *The People* (1) ; *Cooper* v. *The State* (2) ; *Cook* v. *The State* (3) are all decisions which lay down principles at variance with those enunciated by the court below and establish that the evidence ought not to have been admitted.

As to the other question I entirely agree with the observations of the Chief Justice with reference to the impropriety of the clergyman's address, and also in the opinion that it did not affect the regularity of the proceedings.

My conclusion is that the appeal should be allowed and the conviction quashed.

FOURNIER J.—I think the evidence of Dr. McKay, produced as an expert, should not have been allowed. His knowledge of the matters as to which he testified was very slight. He was brought as an expert to speak, from his own experience and knowledge, as to what distance the gun must have been from the body when fired. This is what he says himself:—

There are *indicia* in medical science from which it can be said at

(1) 39 N. Y. 245. (2) 23 Texas 331.

(3) 24 New Jersey (C.L.) 852.

1888

PREEPER v. THE QUEEN.

Fournier J.

what distance small shot were fired at the body. I have studied this—not personal experience—but from books.

This being a matter of opinion, and not a fact at all, unless he was really an expert should not have been allowed. The character of the evidence must have had great weight with the jury.

I agree with the opinion expressed by Chief Justice McDonald in the court below, and I think the conviction bad on this ground.

There is another objection as to which I agree with the observations made by all the judges in both courts. It was certainly a great indiscretion on the part of the clergyman to make the remarks he did in the presence of the jury, but the remarks were of such a general character that I do not think the jury could have been influenced by them. I agree with the observations censuring such conduct.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed.

As to the first objection raised by the appellant, that is to say, the one relating to what the Rev. Mr. Brown said in the course of his sermon, in the presence of the jury, there is nothing in it. The reverend gentleman, far from saying anything hostile to the prisoner, actually appealed to the mercy of the jury in his favor. But even if he had expressed himself in terms that might have been construed against the prisoner that would not nullify the verdict. The case of *The Attorney General* v. *Wright* (1), is altogether against the appellant on this point.

The second point is whether the answer of Dr. McKay to the following question was rightly admitted in evidence:—

From your knowledge of medical science in this respect, and from your examination in this case, at how great or how less a distance would the muzzle of the gun be from a human body at the time of the discharge?

(1) 11 Cox 372.

The answer was as follows:—

Judging from what I saw, from the nature of the wound and its appearance, I would say that the muzzle of the gun was not nearer than twenty inches, and not further away than three feet, when it was discharged.

The contention is, that this was a question which could only have been put and answered by an expert, and that the witness was not shown to have been an expert on that subject.

The witness further said:—

There are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience—but from books.

In cross-examination he says:—

I based my opinion as to the distance, not so much as to the absence of burning as from the size of the wound and jagged nature of the edge.

I am of opinion that this evidence was admissible for the reasons given by my brother Gwynne, whose elaborate notes I have read. I could add nothing to his reasoning on the subject.

GWYNNE J.—The appeal in this case must, in my opinion, be dismissed. As to the point reserved in relation to the observations made by the minister in his sermon to his congregation knowing the jury who were charged with the case of the accused to be present, it is obvious that the case of the appellant could not have been prejudiced by such observations for, however unseemly it was for the minister to assume to address any observations to the jury under the circumstances, the particular observations were in the interest of the accused and substituting the word "mercy" for "equity" were such as might have been addressed to the jury by the judge who tried the case.

The other point reserved relates to the propriety of the surgeon who made the *post mortem* examination of the deceased being permitted to express his opinion as to certain facts which he observed on the *post mortem* examination.

1888

PREEPER v. THE QUEEN.

Gwynne J.

After he had given evidence of the injuries which he found upon the body of the deceased—of the nature of the wound (a gun shot wound) which was the cause of death—of its external appearance and its internal effects—and having stated that he had examined the wound particularly with a view of discerning the distance which the gun might have been from the deceased at the time of the infliction of the wound he was asked—

From your knowledge of medical science in this respect, and from your examination in this case, at how great or how less a distance would the muzzle of the gun have been from the body at the time of the discharge?

To this question although objected to (the objection having been overruled) the witness replied as follows,

Judging from what I saw—from the nature of the wound and its appearance I would say that the muzzle of the gun was not nearer than twenty inches and not further away than three feet when it was discharged. The carrying capacity of the gun and the nature of the charge, and the condition of the gun as regards cleanliness and the shape of the hole would modify the distance as given by me. There are cases on record where the gun was a much greater distance than I have described and produced such a wound as I have described. In my opinion it would be impossible for a man after receiving such a wound to walk six feet, turn, and sit down. If a man had been shot standing upright and I found him at a distance of six feet sitting down after such a wound as I have described, I would expect to find blood all down his legs and pants and into his shoes and probably on the ground, (if it were possible for a man to do that) for with such a wound the heart would cease to beat instantly after such a wound.

Assuming the admission in evidence of this opinion to have been an irregularity, the verdict of the jury does not for that reason become necessarily vitiated. It is not every irregularity that will vitiate a verdict, but only such an one from which it clearly appears, or can at least be reasonably affirmed that the case of the accused has been or may have been unjustly prejudiced thereby.

Now, it is difficult to conceive how such prejudice could have arisen in the present case, by reason of this

opinion of the surgeon who had made the post mortem examination, for he stated fully the facts observed by himself, upon which his opinion was founded as to the particular fact inferred from those which he had observed; if those facts did not justify the opinion the attention of the jury could not have failed to have been drawn thereto both by counsel for the prisoner and by the judge, and that this was done by the prisoner's counsel appears from the cross-examination of the witness. If the opinion was well founded I cannot see how it can be said that any injustice was done to the prisoner by its admission, and if upon cross-examination or otherwise it could have been shown to have been founded on insufficient facts it is not likely to have had any effect upon the jury. The contention, however, is not that the opinion was not well-founded, but that the question which the jury had to decide, namely, as to the guilt or innocence of the prisoner, should have been left to them without the aid of the opinion of the witness upon the fact as to which he gave the opinion, and that the mere admission of the opinion as evidence constituted such an irregularity as in point of law avoids the verdict. No case directly in point has been cited in support of this proposition and, in my opinion, it is not one for which the ends of justice demand that a precedent should be made. But the admission of the opinion in evidence did not, in my judgment, constitute any irregularity; the opinion was one the admission of which was justified by precedent as coming within a recognized exception to the general rule. It is not necessary to discuss here how far the authority of *Carter* v. *Boehm* (1), *Durrell* v. *Bederley* (2), and *Campbell* v. *Rickards* (3), has been shaken by modern decisions, for the opinion given by the witness in the present case was not upon a question which was

(1) 1 Smith. L. C. 9th Ed. p. 522. (2) Holt, 283.
(3) 5 B. and Ad. 840.

1888

PREEPER v. THE QUEEN.

Gwynne J.

the very one which the jury had to decide, as were the questions upon which the opinions of the insurance broker were offered in evidence in the above cases.

The questions in these cases were--whether, in the opinion of the witnesses offered, certain matters not disclosed to underwriters were material to have been and should have been disclosed and whether, if they had been disclosed, the policies would have been entered into. This was the very point which the juries in those cases had to decide. Here the case is very different; the question which the jury had to pass upon was the guilt or innocence of the prisoner in respect to the felony with which he was charged. This was not the question upon which the opinion of the surgeon in the present case was called and given. His opinion was formed upon facts observed by himself on the autopsy which he had made on the body of the deceased, and was given as to another fact deducible from the facts which had come under his direct observation and which, although it may have been as material to enable the jury to arrive at a just conclusion upon the question they had to decide as any other fact in evidence in the case was material to that purpose, still his opinion so given can by no means be said to have been one upon the very point the jury had to decide so as to make it inadmissible upon that ground.

The contention, however, is that, and it is no doubt in general terms true that, facts only should be stated to the jury and the inferences to be drawn from those facts should be left to them, and that therefore the witness's evidence should have been confined to the facts which came under his observation, leaving the jury to draw from his narrative of those facts their inference as to the other fact if it was material: but the object of all judicial enquiry is to elicit truth, and when a medical man gives evidence upon the trial of

an indictment for homicide as to matters observed by him upon a *post mortem* examination of the deceased his evidence from the nature of the case must for the most part be given in the form of his opinion; and when an inference as to the existence of a fact not seen is to be drawn from the facts which were observed by himself on the *post mortem*, his opinion as to the inference is not at all in the nature of a decision on a fact to the exclusion of the jury, but is evidence of a new fact not to admit which, if the fact inferred be relevant to the point in issue and which the jury have to decide, would be to reject what was essential to the investigation of truth; the fact which was sought to be established by the opinion of the surgeon who made the *post mortem* was as to the distance which the gun from which was discharged the charge of shot which caused the death of the deceased may have been from his body when discharged; that may have been an important fact which, in connection with other facts appearing in evidence, may have materially aided in enabling the jury to arrive at a sound and just conclusion upon the question they had to decide, namely, the guilt or innocence of the prisoner.

Now the external appearance of the wound, its shape and the jagged nature of the edge as well as the internal effects found, were matters which gave to the skilful anatomist and professional observer exceptional opportunity and peculiar knowledge enabling him to arrive at a correct judgment as to the fact to establish which the question was put to him, which no one but an actual and competent observer of the wound, its character and its effects, could possibly have had, and which no narrative of the appearance of the wound could convey to a jury who had no opportunity of seeing the wound itself even if they had the skill to observe its internal effects. The opinion, therefore, of

1888

PREEPER v. THE QUEEN.

Gwynne J.

the surgeon who did observe the wound and who, as he says, examined it for the express purpose of forming an opinion upon the fact as to which the question was put to him was evidence which was admissible as to the fact inferred, and which was proper to be submitted to the jury; indeed the case of *Kennedy* v. *The People* (1) upon which the learned counsel for the appellant chiefly relied is an authority in support of this view, for there it was held by the Court of Appeals for the State of New York that the opinion of the surgeon who made the *post mortem* as to the amount of force necessary to produce the wound which he found upon the deceased was properly received in evidence. Now in the present case the question objected to was one pointing precisely to the degree of force necessary to make with a charge of shot the wound which the witness found upon the deceased, the force in such case being to be estimated by the distance which the gun from which the charge of shot came may have been from the body in order to make the wound such as he found it to be. Mr. Wharton, in his work on criminal evidence, gives very many instances of the admission of the opinions of witnesses as evidence under circumstances similar to the present as, for example, among others that certain hair upon a club was in the opinion of the witness human hair and resembled the hair of the deceased—that a certain substance was hard pan—that a certain person appeared to be in fear—that on being held to answer he looked as if he felt badly—that the appearance of a blood-stain indicated that the spirt came from below; and he lays it down as a general rule, in the justice and propriety of which I entirely concur, and in support of which he cites several authorities of the courts of the United States, namely, that it is not necessary for a witness to

(1) 39 N. Y. 245.

be an expert to enable him to give an opinion as to matter depending upon special knowledge when he states the facts upon which he bases his opinions. In *Alcock* v. *The Royal Exchange Ins. Co.* (1), the Court of Queen's Bench, consisting of Lord Denman C. J., Coleridge, Wightman and Erle JJ., held that in an action for a total loss of an insured vessel, the captain having abandoned her, and the defence being that there had been no total loss, a witness might be asked whether from what he had observed of the captain's habits in "A" before the voyage he could form any judgment as to his general habits of sobriety or intoxication.

So in an action for words spoken or written a witness may be asked whether there had taken place any thing which gave a peculiar character to the expressions used; and if there had he may then be asked what in his opinion was the meaning intended by the expressions. It is quite a common practice that a surgeon who has made a *post mortem* examination of a deceased person on a case of homicide, should be asked whether a wound which he found to be the cause of death had been in his opinion caused by a blunt or a sharp instrument, whether a particular instrument produced and shown to the jury could or could not, in his opinion have inflicted the fatal wound (2).

Now, any intelligent person provided he had examined the wound could form a sound judgment upon questions of this nature, but the opinion of an intelligent surgeon who had made the *post mortem* examination and who had applied his skill and judgment in ascertaining the precise extent of the injury internally as well as externally is no doubt the most competent person to give light upon the points to a jury who had

(1) 13 Jurist 445.

(2) *Daines* v. *Hartley* 3 Ex. 200.

1888

PREEPER v. THE QUEEN.

Gwynne J.

no opportunity, and had not, perhaps, skill sufficient to enable them intelligently to examine the wound if it could have been shown to them and to observe the extent of its effects.

So in the present case there can be no doubt that a skilful surgeon who had carefully observed not only the external appearance of the wound but the intensity of its internal effects had exceptional advantages and knowledge which the jury could not have had for estimating at what distance the gun when discharged may have been from the deceased in order to have inflicted a wound of the nature, extent and intensity which he found the wound to be which caused the death of the deceased, and as the jury were entitled to have laid before them the best evidence which can be procured upon all matters relevant to the determination of the issue they had to decide, the evidence was, in my opinion, quite proper to have been received, and to have been submitted to them for such weight as they might think it to be entitled to after a cross-examination of the witness and after hearing such other evidence, if any, as had been adduced calling in question the soundness of the opinion of the witness as resting upon the facts upon which he said he had based it, and hearing the comments of counsel.

Appeal dismissed with costs.

Solicitor for appellant: *H. McD. Henry.*

Solicitor for respondent: *Attorney General for Nova Scotia.*