The Court of Appeal found in the present case no sufficient allegation of a case of fraud. I agree. Par. 11 of the statement of claim "charges" that the testator communicated to his executors a secret trust which was either too indefinite or was invalid by reason of the Mortmain Acts. Suppose he did. Who was defrauded by his doing so? Not the testator, for *ex hypothesi* it was he who made the communication; he was a party to it and intended it. Par. 12 "charges" that the form in which the testamentary dispositions was (*sic*) arranged or settled by two of the executors was a fraudulent device for appropriating to the executors a part of the testator's estate and that the third executor was a party to it. This is a "charge" of the existence of a "scheme," not the allegation of any facts which tend *prima facie* to support a case of fraud. And there is nothing whatever in the way of admission or evidence or circumstances of suspicion to found a probability or a *prima facie* case of fraud. This ground therefore in my judgment fails.

It follows that the appeal wholly fails, subject to something which must be said as to some particular documents. . . .

As regards the documents Nos. 434 (1) and (2), these were inspected by the judge with the consent of the parties. It is a matter of everyday occurrence that to save time and dispute the parties say, "Let the judge see the document," meaning that he is to look at it as further material upon which to base his judicial decision whether it is privileged or not. No one in such a case intends to make the judge an arbitrator, and I am satisfied that the parties in the present case did not so intend. As to the right decision as regards those, the matter stands thus—No. 434 (1) is a case and opinion taken in the testator's lifetime. No. 434 (2) is a case and opinion taken after his death. In my opinion both of these are protected, and the order under appeal is right. No. 434 (2) is protected by professional privilege —No. 434 (1) is not—(*Russell* v. *Jackson*, 9 Hare, 387). No. 434 (1), however, is protected upon the grounds stated by Lord Sumner in his judgment.

The defendants giving an undertaking to produce the documents Nos. 435 (2) and 437 (1), as to which the order under appeal is obviously wrong by a slip, this appeal should in my judgment be dismissed, with costs.

Appeal dismissed.

Counsel for the Appellants — Hughes, K.C. — J. B. Matthews, K.C. — Beddell. Agents—Edmund O'Connor & Company, Solicitors.

Counsel for the Respondents — Tomlin, K.C. — D. Hogg, K.C. — Dighton Pollock. Agents—Pennington & Son, for Tatham, Worthington, & Company, Manchester, Solicitors.

HOUSE OF LORDS.

Friday, March 5, 1920.

(Before the Lord Chancellor (Birkenhead), the Lord Chief Justice (Reading), Lords Haldane, Dunedin, Atkinson, Sumner, Buckmaster, and Phillimore.)

REX *v.* BEARD.

Criminal Law—Murder—Act of Violence Done in Furtherance of Rape—Plea of Drunkenness—Intent.

Homicide by an act of violence done in the course or in the furtherance of a felony involving violence is murder.

Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.

Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Observations on *Rex* v. *Meade*, [1909] 1 K.B. 895.

Their Lordships' judgment was delivered by

Lord Chancellor (Birkenhead) — Arthur Beard was convicted of murder at Chester Assizes and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of twenty years' penal servitude. The case is brought to your Lordships' House under section 1, subsection 6, of the Criminal Appeal Act 1907 upon the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance. The facts which are relevant may be shortly stated.

About 6 p.m. or a little later on the 25th July 1919 a girl of thirteen years of age was sent by her father to purchase some small articles at a shop. About half-past six she was seen entering the gate which leads into Carfield Mill. The only person then at the mill was the prisoner Beard, who was there in discharge of his duty as night watchman. He proceeded to have carnal knowledge of the girl by force, and when she struggled to escape from him he placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation. There was some but not much evidence that the prisoner was under the influence of intoxicating liquor on the day and at the time in question. This evidence was of a character which is not unusual in crimes of violence, but in view of the legal problems to which this case has given rise it requires examination.

A witness met the prisoner on the 25th July at 2 p.m. at a public-house, where they stayed together drinking for about twenty minutes. This witness states that the prisoner was then neither drunk nor sober. They proceeded together to a club where the prisoner purchased and brought away a bottle of whisky. Another witness, whose position was one of authority over the prisoner, saw him at 6·15 p.m. at the mill and found no indication that he was drunk. About twenty minutes to seven—that is, immediately after the offence had been committed—one Jones came to the mill to meet the prisoner. A few minutes before seven they went to another public-house and had some drink. The prisoner was then introduced for membership to a trade union. He answered not unintelligently certain questions which were put to him, and he was upon the strength of such answers accepted as a member. When the police came upon the scene in the early morning of 26th July they found him excited and under the influence of drink.

The prisoner was not called at the trial, but statements made by him were put in evidence. His first statement to the police officers was admittedly untrue and was concocted by him to explain the finding of the body of the girl. In his later statements he said that he asked the girl to kiss him and that he had a struggle with her and then seemed "to lose his senses," that he would not have injured the girl if he had not been "sodden and mad with drink," and that "it was the whisky that put the finishing touch to it."

Counsel for the defence did not dispute the prisoner's criminal responsibility for the homicide of the girl. The only defence presented was that in the circumstances proved the verdict should be manslaughter and not murder, on the ground that there was no intention on the part of the prisoner to cause the girl's death, and that he was in such a drunken condition that he was incapable of knowing that what he was doing was likely to inflict serious injury within the rule laid down by the Court of Criminal Appeal in *Rex* v. *Meade*, [1909] 1 K.B. 895.

Bailhache, J., carefully reviewed the evidence and gave the following direction of law to the jury—"It is no defence to say 'I should not have done that wicked thing if I had not been so drunk.' But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing or did not know that he was doing wrong, then the defence of drunkeness succeeds to this extent—that it reduces the crime from murder to manslaughter. What I mean by that is a sort of thing like this—supposing he cuts a woman's throat under the impression that he is cutting the throat of a pig, then the crime of murder is reduced to the crime of manslaughter. But if a man says, 'I was mad and turned into a brute by drink,' it is no defence unless he satisfies you that he was so far out of his senses that he did not know what he was doing." The jury after a very brief consideration returned a verdict of murder.

In the Court of Criminal Appeal two separate and independent points of misdirection were raised on behalf of the prisoner—(1) That the learned Judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter; and (2) that the learned Judge wrongly directed the jury as to the defence of drunkenness, and gave a direction which was not in accordance with the decision in *Meade's* case and was applicable only to the defence of insanity.

The first objection failed, the Court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law, and there can be no doubt as to its soundness.

With regard to the second objection, the Court of Criminal Appeal, holding itself bound by previous decisions of its own to the view that *Rex* v. *Meade* laid down a general code, came to the conclusion that the learned Judge had given a direction which was calculated to mislead the jury by imposing a test applicable only to the defence of insanity instead of the test imagined to be generally laid down in *Meade's* case for application to the defence of drunkenness. The Court was not satisfied that the verdict would have been the same if the proper direction had been given, and substituted a verdict of manslaughter for that of murder.

The appeal to your Lordships' House from this decision raised questions of undoubted importance in the administration of the criminal law. In crimes of violence resulting in death or serious injury it often occurs that the accused is proved to have been drunk or under the influence of drink when he committed the offence; and judges have frequently to direct juries as to the principle upon which they must approach the defence of drunkenness. The language used by judges has varied, and different directions are not always easy to reconcile. In *Meade's* case the authorities were reviewed by the Court of Criminal Appeal, and a rule was laid down which has been treated as general and authoritative by judges of first instance and by the Court of Criminal Appeal, both in earlier cases and in the present case.

It has been contended before your Lordships that, whilst the decision in *Meade's* case may have been right upon the facts there proved, it is an authority of limited and not of general application; that in its limited application *Meade's* case did not affect the present case, and that consequently there was no misdirection.

It becomes necessary in view of this con-

tention to consider the state of the law before *Meade's* case and to examine the authority of this decision.

Under the law of England as it prevailed until early in the nineteenth century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man. An early statement of the law is to be found in *Reniger* v. *Fegossa* (1562, 1 Plow. 19)—"If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby." In Hale's Pleas of the Crown, vol. ii, 32, the learned author says—"This vice (drunkenness) doth deprive men of the use of reason and puts many men into a perfect but temporary frenzy; and therefore according to some civilians such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasioned thereby; so that yet the formal cause of his punishment is rather the drunkenness than the crime committed in it; but by the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." To the same effect is the passage in Hawkins' Pleas of the Crown, Book i, cap. 1, sec. 6—"He who is guilty of any crime whatsoever through his voluntary drunkenness shall be punished for it as much as if he had been sober." Coke upon Littleton, 247*a*, similarly treats drunkenness as an aggravation of the offence—"As for a drunkard who is *voluntarius dæmon*, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth his drunkenness doth aggravate it." Blackstone in his Commentaries, Book iv, cap. 2, sec. 3, has a passage to the same effect—"As to artificial voluntarily contracted madness by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as an aggravation of the offence rather than as an excuse for any criminal misbehaviour."

Judicial decisions extending over a period of nearly 100 years make it plain that the rigidity of this rule was gradually relaxed in the nineteenth century, though this mitigation cannot for a long time be affiliated upon a single or very intelligible principle.

The case of *Rex* v. *Grindley*, which was tried at Worcester Assizes in the year 1819 (1 Russ. Cr., 7th ed., 88, note *b*), was the first reported judicial decision "that drunkenness put forward as a defence to a charge of crime was a circumstance proper" to be taken into consideration. It was there held by Holroyd, J., that although voluntary drunkenness cannot excuse from the commission of a crime, yet where upon a charge of murder the material question is whether an act was premeditated or done only in the stress, heat, or impulse of the moment, the fact of the party being intoxicated was a circumstance proper to be taken into consideration. But this case cannot now be regarded as an authority. Park, J., after referring to it in *Rex* v. *Carroll* (1835, 7 C. & P. 145), said that Holroyd, J., had retracted the opinion expressed in that case, and he added that there was no doubt that that case was not law. With this view Littledale, J., agreed. The language used by Holroyd, J., as reported is capable of wide application, and perhaps justified the observation made by Park, J., that there would be no safety for human life if it were law.

In examining the language used in these and later cases it is extremely necessary to bear in mind that the judge when directing the jury with reference to the facts and circumstances of a particular case is not writing *in abstracto* a treatise upon the criminal law, and that his words must always be considered with regard to the special facts then before the jury. In *Burrow's* case (1823, 1 Lew. 75) and in *Rennie's* case (1825, 1 Lew. 76) Holroyd, J., assumed that drunkenness could not be taken into consideration as a defence to a criminal charge unless the derangement which it caused became fixed and continuous because the drunkenness itself was habitual. The information in these cases both as to the facts and as to the defence is very meagre. In the one case the prisoner urged that he was in liquor, and in the other he pleaded in mitigation that he was drunk. Little can be derived from these reports save that the learned Judge declared that only habitual drunkenness causing continuous insanity could be a defence. In *Marshall's* case (1830, 1 Lew. 76) Park, J., was of opinion that upon an indictment for stabbing the jury might take into their consideration among other circumstances the fact of the prisoner being drunk at the time in order to measure the apprehension of attack under which it was alleged that the prisoner acted. In 1831 the same learned Judge is reported to have given a similar direction in *Goodier's* case (1 Lew. 76). In 1835 *Pearson's* case (2 Lew. 144) upon an indictment for murder the defence was that the prisoner was drunk. He had beaten his wife to death with a rakeshank. Park, J., said—"Voluntary drunkenness is no excuse for crime. . . . Drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation."

In these last-mentioned cases Park, J., treats the drunken condition of the accused as relevant in considering either the extent of the apprehension in the mind of the accused of attack or the effect upon him of sudden provocation. This class of case was discussed more fully by Parke, B., in *Rex* v. *Thomas* (1837, 7 C. & P. 817), when he

expressed a view of the circumstances under which the law as to provocation might justify a verdict of manslaughter instead of murder. The judgments, however, in these cases diverged into topics not specially helpful in the matter now under debate.

In *Rex* v. *Meakin* (1836, 7 C. & P. 297) Alderson, B., directed the jury that in the case of stabbing with intent to murder, where the prisoner had used a deadly weapon, the fact that he was drunk could not alter the nature of the case. The learned Baron expressed the opinion to the jury that "if a man use a stick you would not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it as you would if he had used a different kind of weapon, but where a dangerous instrument is used, which if used would produce grievous bodily harm, drunkenness can have no effect in the consideration of the malicious intent of the party." The learned Baron's view was that drunkenness might affect the jury's view of the intent, but that the use of the deadly weapon in that case showed the malicious intent so clearly that the drunkenness of the accused could not alter it.

In *Reg.* v. *Cruse* (1838, 8 C. & P. 541) on an indictment for assault with intent to murder, Patteson, J., directed the jury that although drunkenness is no excuse for crime, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet may be guilty of very great violence. This direction was examined in *Reg.* v. *Monkhouse* (1849, 4 Cox C. C. 55) by Coleridge, J., and Rolfe, B., on an indictment for wounding with intent to murder. Coleridge, J., agreed with the substance of Patteson, J.'s, direction, but had some doubt as to the language. After stating that it is a general rule in criminal law that juries are to presume a man to do what is the natural consequence of his act, Coleridge, J., said—"If the defendant is proved to have been intoxicated, the question becomes a more subtle one, but it is of the same kind—namely, was he rendered by intoxication entirely incapable of forming the intent charged? . . . Drunkenness is ordinarily neither a defence nor an excuse for crime, and where it is available as a partial answer to a charge it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention." Here again the appropriate question seemed to be whether the prisoner was so intoxicated as to be entirely incapable of forming the intent charged, that is, the intent to murder. The words "unless the intoxication was such as to prevent his restraining himself from committing the act in question" are not to be found in any other judicial direction, and cannot, in my view, be explained unless they were unscientifically used with the object of indicating the defence of insanity. In *Reg.* v. *Stopford* (1870, 11 Cox C. C. 643), on an indictment for wounding with intent to do grievous bodily harm, Brett, J., said—"If he was merely so drunk as to put himself in a passion, drunkenness would be no excuse; he must have been so drunk as to be incapable of knowing what he was doing." The question was whether the prisoner had formed the intent to murder, and this was answered in the opinion of the learned Judge if the jury thought that his drunken condition rendered him incapable of forming the intention.

Next in order we reach the important case of *Reg.* v. *Doherty* (1887, 16 Cox C. C. 306), tried by Stephen, J., on an indictment for murder, where the question was whether the verdict should be murder or manslaughter. This eminent authority on criminal law said—"Although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime." The learned Judge then pointed out that if a drunken man formed an intention to kill another or to do grievous bodily harm to him and killed him, his drunken intention made him as guilty of murder as if he had been sober. But if his drunkenness prevented his forming such an intention, he would only be guilty of manslaughter. If he had not formed such an intention then he had not committed murder, that is unlawful homicide with malice aforethought. The learned Judge then explained that "aforethought" did not necessarily imply premeditation, but that it did imply an intention which must precede the act intended. "What then is the intention necessary to constitute murder? Several intentions would have this effect, but I need mention only two in this case—namely, an intention to kill and an intention to do grievous bodily harm. If the act which caused death—the firing of the pistol—was done with either of those intentions Doherty's crime was murder."

The same learned Judge discussed the meaning of "malice aforethought" in *Reg.* v. *Serné* (1887, 16 Cox C. C. 311), and there pointed out that these words are technical and must be construed not according to the ordinary interpretation of language but according to a long series of decided cases which have given to them a somewhat artificial sense.

Notwithstanding the difference in the language used I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which

was only committed if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime, but that the state of drunkenness may be incompatible with the actual crime charged, and may therefore negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was by reason of his drunken condition incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established, and he cannot be convicted of murder. But, nevertheless, unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter—(*per* Stephen, J., in *Doherty's* case, 16 Cox C. C. 307). This reasoning may be sound or unsound, but whether the principle be truly expressed in this view, or whether its origin is traceable to that older view of the law held by some civilians (as expressed by Hale) that in truth it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself, the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.

The conclusions to be drawn from these cases may be stated under three heads—(1) That insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention has been preserved throughout the cases. The insane person cannot be convicted of a crime—*Director of Public Prosecutions* v. *Felstead*, [1914] A.C. 534—but upon a verdict of insanity is ordered to be detained during His Majesty's pleasure. The law takes no note of the cause of the insanity. If actual insanity in fact supervenes as the the result of alcoholic excess it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. In the early cases of *Burrow* (1823) and *Rennie* (1825), both reported in 1 Lew. at pp. 75 and 76, Holroyd, J., refused to regard drunkenness as an excuse unless it had induced a continuing and lasting condition of insanity. But in *Reg.* v. *Davis* (1881, 14 Cox C.C. 563), where the prisoner was charged with wounding with intent to murder, Stephen, J., thought (and I agree with him) that insanity even though temporary was an answer. The defence was that the prisoner was of unsound mind at the time of the commission of the act, and the evidence established that he was suffering from *delirium tremens* resulting from over-indulgence in drink. Stephen, J., said—"But drunkenness is one thing and the diseases to which drunkenness leads are different things, and if a man by drunkenness brings on a state of disease which causes such a degree of madness even for a time as would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. . . . If you think there was a distinct disease caused by drinking, but differing from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity."

To the same effect is a decision of Day, J., in *Reg.* v. *Baines*, Taylor's Medical Jurisprudence (6th ed.), vol. i, p. 898; *Times*, 25th January 1886. The defence was that the prisoner was insane when the murder was committed. The evidence proved that the prisoner had on several occasions been under treatment for *delirium tremens*. He had one attack a week before and another two days after committing the crime. Day, J., held that it was immaterial whether the insanity was permanent or temporary. The question was whether there was insanity or not, and the learned Judge ruled that if a man were in such a state of intoxication that he did not know the nature of his act or that his act was wrongful his act would be excusable on the ground of insanity.

(2) That the evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

(3) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

I now come to *Rex* v. *Meade*, [1909] 1 K.B. 895. The prisoner was charged with murder. He brutally ill-treated the deceased woman during the night of her death, broke a broomstick over her, and struck her a violent blow with his fist, rupturing an intestine and causing her death. The defence was that he was drunk and did not intend to cause death or grievous bodily harm, and consequently that the verdict should be manslaughter. Lord Coleridge, J., directed the jury in the following terms—"In the first place, everyone is presumed to know the consequences of his acts. If he be insane that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive" (meaning intent), "shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter." The objection raised in the Court of Criminal Appeal was that the summing up led the jury to believe

that to justify a verdict of manslaughter they must find that the prisoner was insane or in a state resembling insanity, whereas the direction should have been that if there was absence of intention in fact it was manslaughter.

Darling, J., in delivering the judgment of the Court reviewed many of the authorities that were cited to your Lordships, and came to the conclusion that the Judges by these decisions had attempted to express the doctrine that where intent is of the essence of the crime charged the intent may be disproved by showing that the prisoner was in a condition of drunkenness which made him incapable of forming the intent. The learned Judge said—"We desire to state the rule in the following terms—A man is taken to intend the natural consequences of his acts. This presumption may be rebutted (1) in the case of a sober man, in many ways; (2) it may also be rebutted in the case of a man who is drunk by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted." The learned Judge then expressed the conclusion of the Court that on a true construction the language used by Lord Coleridge, J., did not differ from this rule. The language of the Court of Criminal Appeal contains a proposition of law which, regarded as a rule of general application, would mean that a person charged with a crime of violence may show in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous. The Court of Criminal Appeal in the present case, notwithstanding the opinion it had expressed that an act of violence done in furtherance of rape was murder, held that it was bound to follow this decision, and that the jury should have been directed to consider whether Beard at the time of placing his hand on the child as described was incapable of knowing that what he was doing was dangerous—that is, likely to cause serious injury.

Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and I apprehend can have no doubt that the proposition in *Meade's* case in its wider interpretation is not and cannot be supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent, but whether he was incapable of foreseeing or measuring the consequences of the act. In this respect the so-called rule differs from the direction of Lord Coleridge, J., which is more strictly in accordance with the earlier authorities.

Consideration of the judgment, and particularly of Darling, J.'s, observations that the Court did not wish to extend the ambit of its decision beyond that laid down in the older cases, makes it clear that it was not intended to lay down a rule which should be applied in such a case as the present. In *Meade's* case the crime charged was that the death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's* case, therefore, it was essential to prove the specific intent; in Beard's case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape. I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime, *e.g.*, wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the *mens* was *rea*. Drunkenness rendering a person incapable of the intent would be an answer, as it is, for example, in a charge of attempted suicide. In *Reg.* v. *Moore* (1852, 3 C. & K., 319), drunkenness was held to negative the intent in such a case, and Jervis, C.J., said—"If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?"

Drunkenness in this case could be no defence unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended. For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involves is in other words to be explored in relation to the ravishment, and not in relation merely to the violent acts which gave effect to the ravishment.

Lastly, I come to the actual direction of Bailhache, J. It was not a satisfactory direction. The Court of Criminal Appeal held that the learned judge had misdirected the jury because he applied the test of insanity to a case of drunkenness which *e concessis* did not amount to insanity. This distinction, as already shown, has been preserved throughout the cases. And it ought to be so preserved, for the result of a verdict of insanity is not a conviction. That the test suggested by the learned Judge is one that would properly be applied in a case of insanity is plain. The questions put—Did the person know what he was doing? or, if not, did he know that he was doing wrong?

are in accordance with the opinions expressed by the judges in *M'Naghten's* case (1843, 4 St. Trials, N.S. 849, 10 C. & F. 200); and in combination with the question whether the prisoner knew what he was doing, the very ambiguous illustration given by Bailhache, J., of the meaning that should be attributed to these questions would remove all doubt, if any existed, of the point at which his mind went astray. It is an illustration of a delusion assailing the mind of an insane person, and it is arguable that the impression conveyed to the jury may have been that they could only find a verdict of manslaughter if they found that Beard was the victim of such delusions. As this suggestion had never been made, the effect of such a direction may be made the subject of infinite conjecture. In *Meade's* case the Court of Criminal Appeal approved Lord Coleridge's direction because he had sufficiently warned the jury that there was no plea of insanity, and that it was not the defence raised. This warning is absent from Bailhache, J.'s, direction, and the questions as framed might conceivably (so it is argued) have led the jury to think that insanity was the test.

Neither should the learned Judge in my opinion have introduced the question whether "the prisoner knew that he was doing wrong" in a defence of drunkenness where insanity was not pleaded. It is a dangerous and confusing question to put to a jury, for a drunken man's judgment upon such a question is very likely to be impaired, and it might well be perplexing to a jury to determine whether, if he knew what he was doing he knew also that he was doing wrong. The general proposition that drunkenness is no excuse for crime may be seriously affected in its operation if such a question is to be a test by which the jury may determine whether the verdict should be murder or manslaughter. It is noteworthy that notwithstanding that the judges ever since *M'Naghten's* case in 1843 have had these questions in mind as the test of insanity, there is no single case known to me where drunkenness has been the defence in which the judge has directed the jury to consider whether the prisoner knew that he was doing wrong. Whenever this question has been put the defence has been that there existed insanity caused by drink. I look upon the direction of Bailhache, J., as an innovation which is not supported by authority and which should not be repeated or imitated. But while I think that the summing up was in some respects unhappily conceived, I am not prepared, reading it as a whole, to hold in this case that it amounted to or should be treated as a misdirection. The defence which is founded upon insanity is one thing. The defence which is founded upon drunkenness is another. The relevant considerations are not identical. It is inconvenient to use the same language in charging juries in relation to different defences. But the portions of the summing-up which I have criticised were in fact unduly favourable to the prisoner. He cannot complain of them unless they so confused the jury as to prevent it from properly appreciating the true issue, and I am not prepared to lay it down—though I have felt some doubt upon the point—that the actual direction given to the jury by Bailhache, J., disabled them from reaching a true conclusion upon the matters which required decision. On the contrary, I think that upon the whole the matter was so presented to them, though unscientifically, that they have in fact formulated the answer which is decisive even in a case where the defence is founded upon drunkenness.

In the present case I doubt, without reaching a conclusion, whether there was any sufficient evidence to go to the jury that the prisoner was, in the only relevant sense, drunk at all. There was certainly no evidence that he was too drunk to form the intent of committing rape. Under these circumstances it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder. I am therefore of opinion that the appeal should be allowed and the conviction of murder restored, and I move your Lordships accordingly.

Appeal allowed.

Counsel for the Crown—Sir G. Hewart (Attorney-General)—Sir E. Pollock (Solicitor-General)—Sir E. Griffiths, K.C.—Sir R. Muir—Branson—R. Sutton. Agent—Treasury Solicitor.

Counsel for the Respondent—A. Jones, K.C.—A. Jones—D. Waters. Agents—Haslam and Sanders, for Henry Bostock, Hyde, Cheshire, Solicitors.

Friday, March 26, 1920.

(Before Lords Finlay, Dunedin, Sumner, Parmoor, and Wrenbury.)

SIR W. G. ARMSTRONG, WHITWORTH, & COMPANY, LIMITED *v.* REDFORD.

(On Appeal from the Court of Appeal in England.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—"*In the Course of*"—*Accident Occurring during the Dinner Hour in a Canteen Provided by the Employer.*

By a rule of certain works all employees had to leave the works for an hour at 1 p.m. They might, however, go to a canteen run by the employers at which no profits were made, and which was entered from the street though contained in the same block of buildings as the works. A girl machinist employed in the works fell on the stairs of the canteen when returning to her work after the dinner hour. The arbitrator held that the accident arose out of and in the course of the respondent's employment and awarded her compensation.

The Court of Appeal affirmed his award.