taxpayer something inconsistent with the hypothesis required by the Parliament.[31]

Thus having regard to the history of what is now section 107 of the Administration and Probate Act 1958, its definition of 'value' and the effect of the economic laws of supply and demand (which was discussed in *Myer v. Commissioner of Taxes*[32]), His Honour concluded that

> ... for the purposes of s. 7 (1), as substituted by s. 6 of the Administration and Probate (Estates) Act 1955, it is proper, where the evidence warrants it, to allow a discount from ... the ordinary market price by reason of the size of a parcel of listed shares falling to be valued thereunder, just as it would be proper, if the evidence warranted it, to allow a premium or loading, *e.g.*, in a case where the parcel carried control of the company.[33]

The valuation of the shares was therefore reduced from 18s. 9d. to 18s. 3d. *per* unit, this latter figure being arrived at on the basis of stock exchange quotations, the probable decrease in value caused by such a parcel of shares and the amount by which a broker would discount the parcel so as to be able to sell the parcel amongst his private clients.

Although other methods of valuation were discussed they were rejected by Sholl J. as not being applicable to the nature of the property in question.[34] The court's decision is a reasonable one on the wording of section 6 (now section 107) but it may be regarded as unfair in that it discriminates against small shareholders.[35] This may be so but the language of the section is clear and if any change is needed it is for the Legislature to act.

A. H. GOLDBERG

MIZZI v. THE QUEEN[1]

Criminal Law—Defence of insanity—Direction to jury—Burden of proof—Crimes Act 1958 Section 569 (4)

The prisoner was charged with the murder of a woman by stabbing her with a knife. After he had committed the act he went to a police station and made a written statement relating what had occurred. Although this showed he clearly understood what had happened, there was much doubt as to his sanity.

[31] [1960] V.R. 302, 313. [32] [1937] V.L.R. 106. [33] [1960] V.R. 302, 314.

[34] The significance of the assets backing of shares was considered and disregarded as a possible basis of valuation as regards listed shares in a public company since the combination of the evidence that the stock exchange may not value a share anywhere near its assets backing and the willing buyer-willing seller concept made it inapplicable. The method of valuation based on the compulsory acquisition of property was also disregarded as the High Court has only adopted the compensation principle for duty valuation purposes 'where, as in the case of shares not listed on the stock exchange, there is no market value for the property,' *per* Latham C.J., Rich and Williams JJ. in *Commissioner of Succession Duties (South Australia) v. Executor Trustee and Agency Company of South Australia Limited* (1947) 74 C.L.R. 358, 361.

[35] It would seem more practical to leave an estate comprising a large shareholding in one company rather than a number of small shareholdings in a number of different companies, for in many cases the shares are not sold to pay death duties but may in fact be retained and ultimately realized over a period of time.

[1] (1960) 34 A.L.J.R. 307. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ.

In the trial the fact that the accused actually killed the deceased was never questioned by the defence, and so the only issue raised was that of insanity. Three psychiatrists of undoubted qualification, two of whom were government officers employed at the psychiatric clinic at Pentridge gaol, agreed that the accused suffered from a mental disorder, paranoic schizophrenia, and that accordingly 'he had no appreciation of the wrongness of his act, and . . . it might well be that he had not a full or sufficient appreciation of the nature and quality of his act'.[2]

Although no evidence was adduced in rebuttal of this case, a jury convicted the prisoner who appealed. The Full Court of the Supreme Court of Victoria held[3] that there was evidence upon which a jury could find such a verdict and, rejecting any suggestion of misdirection, dismissed the appeal.

In allowing the further appeal, the High Court in a joint judgment held that the learned trial judge[4] had misdirected the jury both as to 'the prisoner's incapacity from disease or disorder of the mind to know the wrongness of his act'[5] and also as to the contrast between the two standards of proof operating in insanity cases.

His Honour in his summing up of the proceedings failed to stress the importance of the medical evidence and to explain how it accorded with the facts deposed, relying on the fact no doubt that the psychiatrists had given their opinions on the very morning of his summing up. However just as 'merely to read the abstract rule to the jury without demonstrating to some degree its possible or suggested application to the facts, is not to direct them sufficiently',[6] so too 'the instructions to the jury should include an attempt to explain . . . the real meaning of the expert evidence in its bearing upon that test and the considerations which may properly be used in deciding to accept or reject the opinions advanced'.[7] In the instant case the actions of the accused were open to alternative explanations. His Honour indicated that the prisoner appeared composed and suggested that the jury could draw the inference that he could therefore think reasonably and appreciate 'that his act was wrong according to the ordinary standards adopted by reasonable men'.[8] The doctors, on the other hand, were unanimous in saying that although the prisoner knew, in the sense of being aware of, his actions, he did not appreciate their significance nor did he realize their wrongfulness, moral or legal, but rather that this was the only way out of an intolerable situation—out of a nightmare. The accused was dazed and lacked culpable responsibility.

The High Court then considered the learned judge's direction as to burden of proof. If intent is an ingredient of any crime, then it would seem that it would have to be proved as does every other element.[9] But insanity provides an exception to this rule—a breach of that 'golden thread that runs through the web of the law'. As stressed in the instant case, there is an onus[10] on the Crown to prove every element of the charge beyond reasonable doubt, while on the other hand it is on the head of the

[2] *Ibid.* 308.
[3] Unreported; Herring C.J. and Gavan Duffy J., Monahan J. (dissenting).
[4] Lowe J. [5] (1960) 34 A.L.J.R. 307, 309.
[6] *Per* Evatt J., *Sodeman v. The King* (1936) 55 C.L.R. 192, 228.
[7] (1960) 34 A.L.J.R. 307, 308.
[8] *Stapleton v. The Queen* (1952) 86 C.L.R. 358, 375.
[9] *Woolmington v. D.P.P.* [1935] A.C. 462, 482; [1935] All E.R. Rep. 1, 8.
[10] This is the 'persuasive onus', as distinct from the 'evidentiary onus', to use the terminology of Glanville Williams, *Criminal Law, The General Part* (1953) 691-700.

accused to prove his sanity on the balance of probabilities; hence if the jury has substantial doubt about this defence the Crown is successful.

Such a contrast in the duties of the respective sides is difficult to convey to the layman, and it was in this task that the learned trial judge failed. In attempting to simplify an excessively difficult conception His Honour 'sought to escape by recourse to brevity and simplicity of statement'[11]—and in the opinion of the appellate Court, unsuccessfully. In this particular aspect it is important to realize that the High Court implied tacitly more than it so tersely expressed. No mention is given to a very strong submission on the part of counsel for the accused that the Court make a radical change in the law as understood generally in England and Australia.

Following the dissenting judgment of Monahan J. in the Full Court, counsel urged that while it should lie on the accused to assert and produce evidence in support of his plea of insanity, the persuasive burden should lie in this aspect, as in every aspect, on the Crown. In the course of his powerful argument, counsel gathered in his support some very eminent writers including two of the present members of the High Court before whom he was arguing: Dixon C.J.[12] and Windeyer J.[13] In the Victorian Supreme Court Monahan J. is supported by the late Macfarlan J.,[14] Barry J.,[15] Sholl J.[16] and Lowe J.[17] to say nothing of such noted text writers as Glanville Williams.[18] Nor is there any dearth of overseas precedents in Canada[19] and the United States.[20]

The 'apparent incongruity'[21] as affirmed again and again in the High Court in such cases as *Stapleton v. The Queen*,[22] *Sodeman v. The King*[23] and *R. v. Porter*,[24] is based on the *dictum* of Lord Sankey in *Woolmington v. Director of Public Prosecutions*[25] where, contrary to his own protestation, His Lordship did effect a change in the law[26] while rationalizing and simplifying it. But in dismissing the defence of insanity as an exception and *immaterial to his judgment*,[27] His Lordship placed it on one side as a problem for defendants and an anxiety for judges. Perhaps the refusal of

[11] (1960) 34 A.L.J.R. 307, 309.

[12] 'The Development of the Law of Homicide' (1935) 9 *Australian Law Journal* (supplement) 64, 68.

[13] 'The Presumption of Sanity and the Burden of Proof in Insanity' (1930) 3 *Australian Law Journal* 328. When this article was cited to him *arguendo* by counsel in the instant case, His Honour frankly admitted having flirted with the doctrine, but felt that an open espousal at such a later date might be unseemly. However it is noted, (1957) 31 *Australian Law Journal* 265, that His Honour might still be fascinated by the symmetry of the proposition, albeit in a clandestine fashion.

[14] (1935) 9 *Australian Law Journal* (supplement) 71.

[15] 'The Defence of Insanity and the Burden of Proof' (1939) 2 *Res Judicatae* 42 and cases cited therein. *Dicta* to the same effect are to be found in His Honour's judgment in *R. v. Bonnor* [1957] V.R. 227, 257.

[16] *Dictum* in *R. v. Bonnor* [1957] V.R. 227, 260.

[17] *R. v. Johnson* (unreported). His Honour's charge to the jury is quoted at length by Barry J. *op. cit.* 47-48.

[18] *Op. cit.* 352 ff. [19] *Clarke v. R.* (1921) 61 S.C.R. (Canada) 608.

[20] The most famous exposition of the principle is to be found in the judgment of Harlan J. in *Davis v. U.S.* (1895) 160 U.S. 469, which is accepted by 24 of the 49 jurisdictions in the United States as good law (3 being doubtful). See Weihofen, *Insanity as a Defence in Criminal Law* (1933) 172-200.

[21] Dixon, 'A Legacy of Hadfield, McNaghten and McLean' (1957) 31 *Australian Law Journal* 255, 257. [22] (1952) 86 C.L.R. 358, 364.

[23] (1936) 55 C.L.R. 192, 199, and [1936] 2 All E.R. 1138, 1140.

[24] (1935) 55 C.L.R. 182. [25] [1935] A.C. 462, 481 ff.; [1935] All E.R. Rep. 1, 8.

[26] Dixon, 'The Development of the Law of Homicide' (1935) 9 *Australian Law Journal* (supplement) 64, 68. [27] [1935] A.C. 462, 476; [1935] All E.R. Rep. 1, 5.

the High Court in the instant case to make a definitive statement on this submission, either for or against, indicates that there may yet be a day when the juryman convinced of the reasonableness of the law will not have to solve the dilemma put by counsel for the accused in argument before the Court:

> We are satisfied beyond reasonable doubt of this man's intention to kill, although we think it is reasonably possible that he did not have the capacity to know what he was doing; we have doubt about that but we are not going to give effect to that doubt, we are going to find him guilty beyond all reasonable doubt of the intentional killing of a human being.[28]

Having thus decided that the learned trial judge's 'direction . . . does not form a satisfactory basis for the conviction',[29] under powers conferred by section 568 (1) of the Crimes Act 1958, two courses were open to the Court under section 568 (2):

> Subject to the special provisions of this Part the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial to be had.

A verdict of acquittal would have been unsatisfactory as the nature of the Court's finding indicated that the accused should be detained as criminally insane. Moreover his insanity was so manifest that the alternative, a retrial, was not urged by either side. Turning to the 'special provisions' the problem was not solved, as the relevant sub-section, 569 (4), empowers the Court to vary the sentence only, not the verdict:

> If on any appeal it appears to the Full Court that an appellant found guilty of the offence with which he was charged was insane at the time of the commission of such offence so as not to be responsible according to law for his actions the Court may quash the sentence passed at the trial and order the appellant to be kept in strict custody until the Governor's pleasure be known . . .

Three solutions were suggested:

Firstly, the learned Solicitor-General urged that section 568 (1) be read only so far as the words 'special provisions of this Part', when a strict interpretation of section 569 (4) should compel the Court to enter a verdict of guilty, but with the special sentence provided by the section in the case of insane persons.

The Court was unwilling to adopt this course because to do so would be in effect to grant the appeal against the conviction and then to leave the conviction untouched. This line of reasoning would suggest that the sub-section is meaningful only in the case of appeal against sentence which of course is unheard of in Victoria in a trial for murder where there is no alternative sentence.

Their Honours expressed great concern in their rejection of this submission, for a basic common law principle was in question. Section 420 of the Crimes Act 1958 clearly affirms the rule that a person cannot be found guilty of an offence without an intent to do the act which constitutes the offence, which intent is lacking in the case of insane persons. To accede, then, to the Crown's submission would be to stigmatize the

[28] High Court transcript, taken by the Commonwealth Reporting Branch.
[29] (1960) 34 A.L.J.R. 307, 309.

accused with guilt where in fact he was innocent. Such a stigma would be resented by his family and certainly by the accused himself in the event of his release. Nor was the Court moved by the Solicitor-General's intimation that steps would be taken to remedy this anomalous sub-section.

Secondly, it was urged that the Court should acquit the accused under section 568 (2), subject to the special provisions in the case of insane persons contained in section 569 (4). Such a course of action would involve a rather loose interpretation of these special provisions, for the word 'sentence' would have to be replaced by the word 'conviction'. The difficulty of this construction is that the section was amended, presumably to accord with different conditions in Australia when it was copied from the corresponding English statute,[30] and so the Legislature must be taken to have turned its mind to the changes required, and accordingly to the necessity of using the offending word, 'sentence'.

It was finally suggested that if the Court were not willing to so interpret section 569 (4), it should acquit the accused under section 568 (2) and then turn to section 420[31] which reads:

> In cases where it is given in evidence on the trial of any person . . . that such person was insane at the time of commission of such offence and such person is acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence and to declare whether such person was acquitted by them on account of such insanity . . .

The difficulty with such a section is that it refers exclusively to the functions of the jury and does not purport to create any appellate power. For this reason it was not seriously entertained by the High Court.

So the dilemma of the Court is clear: either to construe the section literally and do violence to the general law regarding insanity, or to give effect to 'the true meaning of the provisions of the Act considered together . . . (and) to authorize the Court to enter what is the proper verdict according to the substance of the law'[32] while doing violence to the wording of the section.

In taking the latter course the High Court achieved a similar result to that achieved in *Attwood v. The Queen*[33] where it was prepared in effect to interpolate the words 'or is of bad character' in section 399 (e) (i) of the Crimes Act 1958. While this might respectfully appear the common-sense approach to problems of this kind, it has not always found favour with the courts.

In *R. v. Giles*[34] the Victorian Full Court held that section 403 of the Crimes Act 1958 authorized, in cases of buggery, the admission of the unsworn evidence of a male victim of tender years but not that of a female. Lamenting the fact that this contingency was clearly a *casus omissus* and an oversight on the part of the draftsman, [35] the Court construed the section strictly to set aside the conviction.

While in the Victorian case, as in the instant case the verdict was in favour of the accused, it is felt that the decision of the High Court in granting the instant appeal cannot be criticized as an undue liberty.

D. M. BYRNE

[30] 7 Edw. 7 c. 23 s. 5 (4). [31] Crimes Act 1958. [32] (1960) 34 A.L.J.R. 307, 309.
[33] (1960) 33 A.L.J.R. 537, and see case note *supra* p. 63.
[34] [1959] V.R. 583. [35] *Ibid.* 584.

The writer wishes to thank the Registrar of the High Court in making available the transcript of the case which proved invaluable in the writing of this note.