

REX v. CHARLES SMITH
Holt 614, 171 E.R. 357
Newcastle Summer Assizes, 57 George III [1817].
August, 1817.

The prisoner was indicted for the murder of Charles Stuart, under circumstances of considerable aggravation. In order to bring the charge home to him, Richardson and Grey, for the prosecution, tendered in evidence a deposition, made by the deceased on the day after the fact was committed, before two justices of the peace for Newcastle. As to this deposition, the circumstances were as follows:—All but the three last lines of it had been written before the prisoner was present. He was then brought into the room. The deceased was re-sworn in his presence. The written part was then read over to the deceased, in the prisoner's presence, slowly and distinctly. At the conclusion he assented to the truth of it. The remaining three lines were then taken, in the presence of the prisoner, from the mouth of the deceased. He then made his mark.

The prisoner was asked whether he would chuse to put any questions to him, but declined to do so.

E. Alderson, for the prisoner, objected that this deposition was inadmissible, except as to the last three lines. If not good as a deposition, it could not be good as a dying declaration; for the deceased was not under apprehension of death at the time (which was admitted). Then it can only be good as a deposition under the statute of Philip and Mary. To make it so, it must be given in the prisoner's presence, that he may have power to cross-examine; and he must first have a fair opportunity to do so. Now, in order to do that, he ought to have seen the deceased examined, that he might, with his own eyes, judge of the manner in which he gave his testimony; that he might observe in what parts the deceased doubted, and where his memory was not so accurate.—This is not obtained by a mere reading over of the deposition to the deceased after it was ready cut and dried. And, as to his assent at the conclusion, it could not weight much in the case. Besides, leading questions might have been put, and improper means employed in the prisoner's absence, on which the written part might depend. The statute, he contended, ought to be construed strictly.

But Richards, C. B., thought the whole deposition admissible. He observed, the statute did not mention the prisoner's presence at all. Undoubtedly, however, the decisions established the point, that the prisoner ought to be present that he might cross-examine. But here he had that advantage offered him, and omitted to use it. The deceased was re-sworn in his presence, and re-asserted what he had before said, by assenting to the deposition when slowly read over to him.—The case of *Rex v. Radbourne*, Leach, Cro. Cases, p. 512, was in point.

The prisoner was convicted, and left for execution, on Monday, the 18th of August, at Newcastle. At Carlisle, on Saturday, August the 16th, Alderson mentioned to Richards, C. B., the case of *Rex v. Forbes*, at York Spring Ass. 1814, upon reading a note of which the Chief Baron sent an express to respite the execution, in order to give time to take the opinion of the twelve Judges on the point of law.

Richardson and Grey for the prosecution.

E. Alderson for the prisoner.

The prisoner was afterwards executed.