

allowing representation to that territory in either House of the Parliament.

The second ground upon which the validity of the Orders in Council was attacked was that New Guinea is under the Commonwealth Legislature, and accordingly the territories constituting the Commonwealth of Australia and New Guinea must be regarded as one British possession, because of the definition of that expression in sec. 39 of the Fugitive Offenders Act. This section says that, unless the context otherwise requires, the expression "British possession" means any part of His Majesty's Dominions exclusive of the United Kingdom, the Channel Islands and the Isle of Man. The section continues—"All territories and places within Her Majesty's Dominions which are under one legislature shall be deemed to be one British possession and one part of Her Majesty's Dominions: The expression 'legislature,' where there are local legislatures as well as a central legislature means the central legislature only." This attack upon the Orders in Council assumes that the definition of British possession embraces not only the territories and places within His Majesty's Dominions which are under one central Legislature, but also a place outside His Majesty's Dominions to which the Act is directed to apply as if it were a British possession. In my opinion the definition of a British possession in sec. 39 has no application, and indeed the context of the Act requires that it should have no application, to the identification of that place outside His Majesty's Dominions, which is only deemed to be a British possession for the purposes of the Act.

The provisions of the Fugitive Offenders Act, including Part II., were validly applied by the Orders in Council to the return of fugitive offenders from Australia to the mandated territory of New Guinea, and the repugnant provisions of the Service and Execution of Process Regulations are, by force of sec. 2 of the Colonial Laws Validity Act 1865, void and inoperative.

The Magistrate acted under the repugnant provisions of the Commonwealth Regulations, and assumed to exercise a power which he did not possess. It is true that under the Fugitive Offenders Act he had the power to make an order for the return of the appellant to New Guinea, and that had he professed to act under that power he might still have made an order that the appellant be returned to New Guinea, and have refused to discharge him. But the order which he made must remain as one made without authority, for he did not profess to fulfil the conditions of the power conferred by the Imperial provisions.

The conclusion that the appellant cannot be lawfully returned to the mandated territory of New Guinea except under the authority of the Fugitive Offenders Act, is based, not on the absence of power

under the Constitution for the Commonwealth to make a law for the return of offenders from Australia to New Guinea, but upon the repugnancy of the Regulations which it has made to the Imperial provisions. It is unnecessary to enter into what is the specific source of the power of the Commonwealth to make such a law.

In my opinion the rule *nisi* for *certiorari* should be made absolute.

LATHAM, C.J.—All the members of the Court are of opinion that in the proceedings before the Supreme Court a question of the limits *inter se* of the constitutional powers of the Commonwealth and the States was raised, and that under sec. 40A of the Judiciary Act 1903-1934 that Court should have proceeded no further in the cause. The order of the Supreme Court is therefore set aside. The orders *nisi* are discharged. No order will be made as to costs.

Order of Supreme Court set aside.

Orders nisi discharged.

[Solicitors—For the appellant, McMaster, Holland and Co.; for the respondent, H. F. E. Whitlam, Commonwealth Crown Solicitor.] G. E. S.

Supreme Court.

FULL COURT — (Mann, C.J.,
Macfarlan and Gavan } Aug. 5, 6, 27.
Duffy, JJ.)

REX v. THOMAS.

Criminal Law — Bigamy—Mens rea—Belief in invalidity of former marriage—Crimes Act 1928 (No. 3664), sec. 61—Marriage Act 1928 (No. 3726), secs. 85, 89, 91. rule 108.*

Practice—Verdict—Form—Quasi-Special verdict—Conviction non obstante veredicto—Part of verdict set aside as unreasonable—Crimes Act 1928 (No. 3664), sec. 478.

On a presentment for bigamy the defence was that, at the time of the marriage in question, the prisoner *bonâ fide* and on reasonable grounds believed that the woman whom he had previously married was a person against whom her former husband had obtained a decree *nisi* for divorce, but that the divorce had not been made absolute.—

Held, that such a belief would be a defence, provided that the facts believed were sufficient, if true, to establish that the woman's former marriage still subsisted.

Per Mann, C.J., and Gavan Duffy, J.—Treating the prisoner's defence as meaning that he believed that the woman's former marriage had not been dissolved, that belief would form a good defence, guilty intention being an element in the crime of bigamy.

* Marriage Act 1928—

Sec. 91. The memorandum that the decree *nisi* has been made absolute or discharged whenever made by the Prothonotary shall have relation to and be operative from the date at which it ought to have been made.

Per Macfarlan, J.—If the prisoner merely believed that the Prothonotary had not yet entered the memorandum, as provided by section 89 of the Marriage Act 1928, that would be no defence, owing to the provisions of section 91.

Reg. v. Tolson, (1889) 23 Q.B.D. 168; and *Reg. v. McMahon*, (1891) 17 V.L.R. 168, followed.

R. v. Wheat, R. v. Stocks, [1921] 2 K.B. 119, disapproved.

At the trial the Judge directed the jury that the existence of such a belief was no defence, and that in the absence of any other defence its verdict should be one of guilty. The jury, however, was asked to answer a question as to whether the facts alleged in defence really existed. The jury's verdict was as follows:—"Guilty: The accused at the time of going through the second marriage, believed *bonâ fide* and on reasonable grounds that the divorce granted to the first wife's former husband had not been made absolute." The Judge thereupon stated a case for the Full Court, upon the question: "Should I have directed the jury that if they found that the accused did hold such a belief *bonâ fide* and on reasonable grounds, the verdict should be not guilty?"

Held on the facts, that this question should be answered "No," because there was no evidence on which the jury could reasonably so find.

Having answered the question thus, the Court treated the second part of the verdict as insupportable, and affirmed the conviction.

CASE STATED.

John Henry Thomas was presented at the July sittings of the Supreme Court in Melbourne on a charge of bigamy. It was proved that the accused had married a woman named Agnes Julia Higgins on 25th October, 1929, and that on 22nd April, 1936, while this woman was still living, the accused was a party to a form of marriage between himself and one Bessie Deed. It was also proved that Agnes Julia Higgins had been married before, and that Higgins, her husband, had instituted a divorce suit against her, in which a decree *nisi* was granted on 27th April, 1928, and that on 28th July, 1928, the Prothonotary of the Court had entered on the petition a memorandum that he had made the decree absolute in accordance with the provisions of sec. 89 of the Marriage Act 1928. Counsel for the accused tendered evidence that on a number of occasions Agnes Julia Higgins, after the prisoner's marriage with her, but prior to his going through the form of marriage with Bessie Deed, told him that the decree *nisi* obtained as aforesaid had not been made absolute up to the time of the marriage ceremony on 25th October, 1929, and that consequently the marriage between herself and the accused was not a valid one. The evidence so tendered was objected to by the Crown Prosecutor, but admitted by the Court on the authority of *Reg. v. McMahon*, (1891) 17 V.L.R. 335. At the same time the Judge reserved the question whether or not he would direct the jury that *bonâ fide* belief by the accused in such statements, held on reasonable grounds, was a matter of defence to the charge. The accused then gave evidence that Agnes Julia Higgins had told him on a number of occasions subsequent to the 25th October, 1929, that she was

not married to him, as there had been no entry made in the Court papers of her divorce. The last occasion was in 1934, when he discovered she was living with another man by whom she was with child. He added—"I believed her, and from then on I accepted the position that I had never been legally married to her, and I told Miss Deed and began to keep company with her." It appeared that he made no other inquiries, except that when on duty as a constable at the Law Courts he asked some unidentified counsel the question—"If two persons are divorced, have they got to get a writing in the court before they marry again?" and was told "Yes."

The Judge in his charge discussed the evidence of the prisoner's belief, and continued—"Whether he had such a belief or not, as I have already said, does not matter as a defence; it is no defence in law even if he did have that belief; but if you find him guilty, as I think you should on the evidence before you, it would be useful to me and the accused and everybody concerned if you would answer a further question, and that question is: "Did the accused at the time of going through a form of marriage with Miss Deed, believe *bonâ fide* and on reasonable grounds, that the divorce granted to Mr. Higgins on 27th April, 1928, had not been made absolute?" You understand, gentlemen, that is the whole thing: did he believe, in the first place, that the divorce had not been completed, and was that belief based on reasonable grounds in the circumstances, bearing in mind the responsibility he bore to Miss Deed and himself, and the fact that the information he got was that given by his former wife? Although there is no necessity for you to bring in any verdict other than guilty or not guilty, as I say, it would be of great use in this case, both to me, the accused and the Crown, if you would consent to give an answer to this question." A juror asked: "Would that be a personal answer or unanimous from the jury?" *Martin, J.*: "You will give a verdict as a jury; and then, if you care to and can, an answer to this question, as a jury." The jury returned a verdict of guilty, and answered the question in the affirmative. Sentence was deferred, and the Judge stated a case for the Full Court, setting out the above facts and containing the following questions:—

1. Is it a good defence to the charge of bigamy contained in the indictment that the accused *bonâ fide* and on reasonable grounds, believed that the divorce granted to Mr. Higgins had not been made absolute?

2. Should I have directed the jury that, if they found that the accused did hold such a belief *bonâ fide* and on reasonable grounds, the verdict should be not guilty?

T. W. Smith for the prisoner.—The offence of bigamy is created by the Crimes Act 1928, sec. 61,

REX v. THOMAS

which is copied from the Offences Against the Person Act (24 and 25 Vict., cap. 100), sec. 57, which replaced the 9 Geo. IV., cap. 31, sec. 22. The first exception is a true exception limiting the effect of the section. The second and third are explanatory only. If the exceptions were omitted *mens rea* would presumably be an ingredient in the offence, and the three exceptions do not operate to exclude all other exculpatory facts. An honest and reasonable belief in facts which if true would afford a defence is a defence under the section. Against this proposition is *R. v. Wheat*, *R. v. Stocks*, [1921] 2 K.B. 119. But that case is contrary to *Reg. v. Tolson*, (1889) 23 Q.B.D. 168, which was followed in *Reg. v. McMahon*, (1891) 17 V.L.R. 335; and in *Reg. v. Adams*, (1892) 18 V.L.R. 566. The distinction here is that McMahon only believed a supposed fact which would not have avoided the former marriage had it been true. *Tolson's Case* was followed in *R. v. Thomson*, (1905) 70 J.P. 6; *R. v. Connatty*, (1919) 83 J.P. 292. In *Wheat's Case* the Court regarded *Tolson's Case* as deciding that the first exception excluded *mens rea*, whereas that view was put by the Crown and rejected, and the Court examined the statute to find out if *mens rea* was an essential ingredient. They relied on dicta of Bramwell, B., in *Reg. v. Prince*, (1875) L.R. 2 C.C.R. 154, but his decision was to the contrary; also on *Bank of New South Wales v. Piper*, [1897] A.C. 383, which does not support the decision. Since *Wheat's Case* have been *R. v. Carswell*, [1926] N.Z. L.R. 321, where the Supreme Court thought that neither Bramwell, B., nor *Bank of New South Wales v. Piper* support *Wheat's Case*; *R. v. Kennedy*, [1923] S.A.S.R. 183, where the mistake was of law and not of fact. In *Maher v. Musson*, 52 C.L.R. 100, [1935] A.L.R. 80, the High Court approved the proposition in *Tolson's Case*, which *Wheat's Case* disapproves. *Wheat's Case* is wrongly decided, is contrary to *McMahon's Case*, and should not be followed. [THE COURT.—There is no evidence that the prisoner, in April, 1936, believed that no memorandum had been entered; and, even if he did, his belief would be insufficient, since the memorandum could have been entered at any time, and under sec. 91 it would have related back, and thus validated the prisoner's former marriage.] That section is not intended to impose retrospective criminal liability. There was sufficient evidence to justify the verdict; or if not, there is a mistrial, as this point was never considered. If there was no entry at the date of the second marriage it was a lawful marriage, and would not become unlawful *ex post facto*; and at least there should be a new trial. The Court should not go behind the jury's finding. [MANN, C.J.—Suppose the prisoner believed facts which excuse him in law, but acted on other facts, and a mistaken belief in their relevancy?] It makes no difference—*Levett's Case*, cited in Cro. Car. 538.

Book, K.C., for the Crown.—A reasonable belief in the invalidity of a former marriage is a good defence. *Wheat's Case* is wrongly decided. There should be a new trial to decide the true issue.

Cur. adv. vult.

MANN, C.J., read the following judgment:—In my opinion the questions asked in the case should be answered as follows:—(1) It was a good defence to the charge of bigamy contained in the indictment that the accused *bonâ fide* and on reasonable grounds believed that the divorce granted to Mr. Higgins had not been made absolute. (2) No. The learned Judge should have directed the jury that there was no evidence upon which they could properly find that the accused held such a belief *bonâ fide* and on reasonable grounds.

In my opinion there is nothing in sec. 61 of the Crimes Act 1928, the section creating the offence of which the accused was convicted, which excludes the application of the general rule that a guilty intention is an element of every crime. Nor is there any other reason in law or public policy for holding that the crime of bigamy is an exception to the rule. The authorities for these propositions are the English case of *R. v. Tolson*, [1889] 23 Q.B.D. 168; and the decisions of this Court in *R. v. McMahon*, (1891) 17 V.L.R. 335, 13 A.L.T. 32; and *R. v. Adams*, (1892) 18 V.L.R. 566, 14 A.L.T. 79. The authority to the contrary is the judgment of the Court of Criminal Appeal in England in *R. v. Wheat*, *R. v. Stocks*, [1921] 2 K.B. 119. A critical examination of the judgment in that case shows that it was based upon a mistake as to what had been the grounds of the opinion of the Court in *Tolson's Case*, (1889) 23 Q.B.D. 168, and in my opinion it should not now be followed in our Courts.

This view determines the answer to the first question. It was suggested from the Bench during argument that upon a critical analysis the subject of the prisoner's belief, as expressed in the question submitted to the jury and raised in the case, might be regarded as a mixed question of law and fact. The most usual manner in which a decree *nisi* for divorce is now made absolute is by the Prothonotary entering upon the petition a memorandum that he has made the decree absolute—see Marriage Act 1928, sec. 89. It appears from the notes of evidence to which we have had recourse that the accused stated his belief to be that an entry had not been made in the Court. Treating this as a reference to the required memorandum, there appears to be one case in which the absence of a memorandum, even up to the date when the accused last went through the ceremony of marriage, would not have the effect of making Mrs. Higgins' marriage with the prisoner bigamous and void, namely, a case in which the memorandum ought to have been made, but through inadvertence or mistake was not made—see Marriage Act 1928, sec. 91.

And therefore it may be said that the fact which the accused believed to be true was not one which, if true, would necessarily have established the innocence of the accused on the present charge. In my view, however, having regard to the course of the trial in which the special instance referred to did not present itself to the mind of anyone, and to the fact that the accused could know nothing about the possibility of such a case, we are justified in favour of the accused in now treating the question submitted to the jury as referring to a *bonâ fide* belief that the former marriage of Mrs. Higgins had not been dissolved. So interpreting it, I think the first question submitted to us should be answered in the affirmative.

Turning to the second question, we find from the evidence that the accused, being then a widower, married in 1925 a Mrs. Higgins, who falsely represented herself to accused as a widow. Her real husband, Higgins, took divorce proceedings in which accused was joined as a co-respondent, and the latter was present in Court when a decree *nisi* was pronounced. This decree was subsequently and in due course made absolute, as stated in the case. The accused married Mrs. Higgins again in October, 1929. He swore that thereafter when they quarrelled she said she was not his wife, because there had not been an entry in the Court in respect of her divorce. She repeated this from time to time. He did not believe her, "because she was a woman who would say 'anything'."

In 1934, when he found that his wife was having intercourse with another man, she excused herself by repeating her former statement. He says he then believed it. He made no inquiry as to whether there was any truth in her statement. He said that it did not occur to him. In 1935 he met a Miss Deed, and in April, 1936, married her. He is a first constable of police and has been in the force since 1914.

In my opinion there is no evidence here of a *bonâ fide* belief based on reasonable grounds, and I think I should go further and say that the evidence, of which I think I have given an accurate summary, shows clearly that there was no *bonâ fide* belief or reasonable ground, if any meaning at all is to be given to those words, but only an obvious desire to avoid knowledge.

I think accordingly that the conviction should be affirmed.

MACFARLAN, J.—In my opinion the conviction should be affirmed. I agree that there was no evidence on which a jury could properly find that the accused *bonâ fide* and on reasonable grounds believed "that the divorce" of Higgins (the former husband of accused's wife) "had not been made absolute."

Having regard to the form of the first question asked, I differ from the other members of this Court as to the precise answer to be given to it. I agree

generally with what has been said by the learned Chief Justice as to *R. v. Wheat, R. v. Stocks*, [1921] 2 K.B. 119. I think, with respect, that much of the general reasoning and what appears to have been the actual *ratio decidendi* of that case are inconsistent with earlier English authorities, and in particular with *Tolson's Case*, [1889] 23 Q.B.D. 168; and *Prince's Case*, (1875) L.R. 2 C.C. 154—see judgment of Bramwell, B., (1875) L.R. 2 C.C. 154 at p. 175—as well as with the decisions of the Full Court of Victoria which were referred to by the Chief Justice. I see no reason to dissent from the test of *mens rea* (so far as it goes) applied by the Court of Criminal Appeal, viz., did the accused have the intention to do the act forbidden by the statute? But if the act forbidden by the statute is as there stated—"being married, to marry another woman during the life-time of the former wife"—I should have thought that on the facts supposed the prisoner had not the intention to do that act.

Putting aside cases where the act forbidden is wrongful in itself (apart from the crime charged or the particular statute) and certain special cases such as those of the class of *Prince's Case*, (1875) L.R. 2 C.C. 154; and *Bank of New South Wales v. Piper*, [1897] A.C. 383, which depend on the construction of the particular statute, the law, in my opinion, stands thus—(1) It is a good defence to a criminal charge if it be established that the accused *bonâ fide* and on reasonable grounds believed in the existence of a fact which, if true, would render his act lawful. (2) It is not sufficient to show merely that the accused *bonâ fide* and on reasonable grounds believed in the existence of a fact which he *bonâ fide* and on reasonable grounds believed would render his act lawful. (3) Still less is it a defence to show that he *bonâ fide* and on reasonable grounds believed that some fact or other—he does not know what—existed or did not exist, and that he believed that the existence or non-existence of that fact (whatever it might be) rendered his act lawful.

The special finding of the jury (if it stood) is not sufficient, in my opinion, to bring the present case within the first of the above positions. It falls, if not within the second, then within the third of those positions. The instances of *Lolley's Case*, (1812) Russ. & R. 237; and *Earl Russell's Case*, [1901] A.C. 446—cited in *R. v. Wheat, R. v. Stocks*, [1921] 2 K.B. 119—suggest that to some extent the judgment of the Court in the latter case may have proceeded on the second and third principles above stated.

I may illustrate the difference which I desire to bring out thus: A man charged with bigamy shows that he had been informed by someone whom he might reasonably believe (e.g., a solicitor) that his prior marriage was void because the officiating clergyman had not put a stamp on the marriage certificate. If

during the existence of that marriage he goes through the form of marriage with another woman, it is in my opinion clear that it would be no defence to a charge of bigamy that he *bonâ fide* and on reasonable grounds, believed that his prior marriage was for the reason stated void. He had made merely a mistake of law. Because even if the supposed fact existed (that is to say, even if the officiating clergyman had not put a stamp on the marriage certificate), that would not have rendered the earlier marriage void, and so would not have made his act in going through the form of marriage with another woman lawful. He cannot avoid that position by saying (I assume that his evidence is accepted): "I believe that 'owing to the lack of some formality or other (I don't know what) required by law, my former marriage 'was invalid.'" For he then fails to show that his mistake was in wrongly believing in the existence (or non-existence) of a fact which, if it existed (or did not exist), would in truth have rendered his act lawful.

For the reasons given, I am of opinion that both questions asked by the Special Case should be answered in the negative, and that on both grounds the conviction should be affirmed.

GAVAN DUFFY, J., read the following judgment: In my opinion the learned trial Judge, in asking the jury the question, "Did the accused at the time of going through a form of marriage 'with Miss Deed believe *bonâ fide* and on reasonable grounds that the divorce granted to Mr. Higgins on 27th April, 1928, had not been made 'absolute?'" was asking as to the accused's belief in the existence of a fact, namely, the fact that Mr. Higgins' divorce had not been made absolute, and if such fact existed it would have prevented accused's marriage with Miss Deed being a criminal offence.

The jury answered that question in the affirmative, and the first question we are asked in the Special Case is—"Is it a good defence to the charge of 'bigamy contained in the indictment that the accused '*bonâ fide* and on reasonable grounds believed that 'the divorce granted to Mr. Higgins had not been 'made absolute?'"

In *R. v. McMahon*, (1891) 17 V.L.R. 335, 13 A.L.T. 32, this Court, apparently applying *R. v. Tolson*, (1889) 23 Q.B.D. 168, intimated that evidence of statements made to the accused by his first wife that she had a husband alive when she purported to marry him, and therefore that their alleged marriage was void, were admissible in evidence as a step towards proving want of criminal intent on the part of the accused. In *R. v. Adams*, (1892) 18 V.L.R. 566, 14 A.L.T. 79, this Court again had to consider the section, and apparently approved the proposition that if a prisoner have a *bonâ fide* belief upon reasonable grounds of

a fact which would have rendered his first marriage invalid, the jury might properly find him not guilty of bigamy on the ground that there was no *mens rea*. If we are to proceed on the same principle, we should, I think, answer the question in the affirmative.

For the Crown, however, it was said that the decision of the Court of Criminal Appeal in *R. v. Wheat*, *R. v. Stocks*, [1921] 2 K.B. 119, is not consistent with the view formerly taken by our Full Court, and that we should therefore no longer adhere to that view. It should be observed that the fact, the belief in which was relied on, was different in the three cases. In *R. v. Tolson*, (1889) 23 Q.B.D. 168, the defendant believed her husband was dead; in *R. v. Wheat*, *R. v. Stocks*, [1921] 2 K.B. 119, the husband believed he had been divorced from his first wife; in the present case the husband believed that he had never been married to his first wife because her husband was living and the divorce from him had not been completed by the decree *nisi* having become absolute. This last position, which had also been that in *R. v. Thomson*, (1905) 70 J.P. 6, was specifically mentioned in *R. v. Wheat*, *R. v. Stocks*, [1921] 2 K.B. 119, and the Court refrained from expressing an opinion on it, whilst intimating that it might be impossible to reconcile the decision of the Common Sergeant in *R. v. Thomson*, (1905) 70 J.P. 6, holding the defendant's belief a good defence, with the decision they were then giving.

In my opinion the language of sec. 61 of the Crimes Act 1928 does raise a real difficulty. I do not propose, however, to examine it for myself at length, since I think the construction which the Crown suggested is not consistent with the judgment of the majority in *R. v. Tolson*, (1889) 23 Q.B.D. 168, and that therefore we should feel under no obligation to depart from the view heretofore taken by our own Courts. I am all the more content to take this course because the result that might easily spring from a contrary view are so shocking as to produce a natural and proper desire to struggle against it where the language is at all dubious.

The second question asked in the Special Case is: "Should I have directed the jury that if they found 'that the accused did hold such a belief *bonâ fide* 'and on reasonable grounds the verdict should be 'not guilty?'" The answer to this question should be "No." The evidence of belief is of the flimsiest description, but it may be that it was enough to justify leaving to the jury the question whether the defendant *bonâ fide* believed that the decree had not been made absolute. I am of opinion, however, that no reasonable body of men could find on the evidence that such a belief was reasonable or held on reasonable grounds. That the belief should be held on reasonable grounds is a necessary part of the defence according to the authorities, and I therefore think that the trial Judge should have told the jury that

since there was no such evidence they should dismiss the consideration of the suggested defence from their minds.

MANN, C.J.—The questions will be answered as stated by me, and the conviction affirmed.

Questions answered. Conviction affirmed.

[Solicitors—For the prisoner, Clarke and Ness; for the Crown, Menzies, Crown Solicitor.] F. D. C.S.

Before Lowe, J.

June 24, 29.

MEYER v. THE MEDICAL BOARD OF VICTORIA.

Medical Practitioner—Registration—Five-year course of studies — Inclusion of studies done in non-reciprocating country—Medical Act 1928 (No. 3730), secs. 13, 14.

An applicant for registration as a medical practitioner had passed through a regular course of medical and surgical study of more than five years' duration in Germany, Germany not being a country in which reciprocal rights are granted to Victorian practitioners. Having spent about twelve months in medical study in Scotland, he obtained certain Scottish qualifications, and was registered as a legally qualified medical practitioner in Great Britain and Ireland. The Board refused registration, on the ground that, in its opinion, the five years' study required by the Medical Act 1928, section 14 (1), must be passed in a school recognised by the Board under section 14 (2), and the absence of reciprocity excluded German schools from that category. Upon appeal to a Judge of the Supreme Court,—

Held, that section 14 (2) applies only to cases under par. 13 of the Fourth Schedule, and that the applicant, being qualified apart from par. 13 and having satisfied section 14 (1), was entitled to registration.

APPEAL under Medical Act 1928.

Moritz Meyer made application to the Medical Board of Victoria for registration as a legally qualified medical practitioner. The Board refused the application, on the ground that there was no evidence that he had passed through a regular course of medical and surgical study of five or more years' duration within the meaning of the Medical Act, the opinion of the Board being that, under sec. 14 (2) thereof, the Board is forbidden to recognise any school of medicine of any foreign country wherein practitioners registered in Victoria are not, by virtue of such registration, and without examination, entitled to practise. Germany is not a country which has conferred such a right upon Victorian practitioners. The applicant appealed to a Judge of the Supreme Court.

Herring, K.C., and Barnaby for the appellant.

Joske for the respondent.

As to jurisdiction upon appeal, the following were referred to:—*McCullin v. Crawford*, (1921) 29 C.L.R. 186, 27 A.L.R. 169; *In re Vexatious Actions Act, Ex parte Boaler*, [1915] 1 K.B. 21 at p. 32; *De Bingham v. London Life Association*, [1915] W.N. 165.

Cur. adv. vult.

LOWE, J., read the following judgment:—This is an appeal from a decision of the Medical Board of Victoria, refusing to register the appellant, Moritz Meyer, as a legally qualified practitioner, on the ground that there was no evidence that he had passed through a regular course of medical and surgical study of five or more years' duration within the meaning of the Medical Act 1928. The appeal is brought pursuant to sec. 9 of the Medical Act 1933, and is in the nature of a re-hearing. It is my duty now to inquire into and decide upon the appeal. Before me the ground taken by the Board has been again insisted on, and it has been argued that the Board could lawfully have come to no other decision. Apart from this ground, it is not disputed that the appellant is entitled to registration. It was further contended that the decision of the Board upon this ground was as to a matter solely within the jurisdiction of the Board, and that it was not competent for me to disturb it. Section 14 (3) of the Medical Act 1928 was relied upon to support this argument. Without debating the matter further, I have no doubt that I am not bound by the Board's decision in this matter, and that I must investigate and determine the matter for myself.

I must therefore consider the relevant legislation. Section 13 of the Medical Act 1928 provides—"Subject to the provisions of this Part every person "possessed or hereafter becoming possessed of any "one or more of the qualifications described in the "Fourth Schedule to this Act who proves on personal "attendance to the satisfaction of the Board that "the testimonium diploma licence or certificate testifying to such qualification was duly obtained by him "after due examination from some university college "or other body duly recognised for such purpose in "the country to which such university college or other "body belongs shall subject to the provisions of this "and the next succeeding section and of the said "Schedule be and be deemed to be entitled to registration as a legally qualified medical practitioner "and shall receive from the Medical Board a certificate of qualification."

The next succeeding section (14) provides—" (1) "No person whosoever shall be entitled to be registered as a legally qualified medical practitioner or "to receive a certificate of qualification unless he "has passed through a regular course of medical "and surgical study of five or more years' duration. " (2) No school of medicine or university or college "or other body in any country other than Great "Britain Ireland or any British possession shall be "recognised by the Board for the purposes of this "Act unless it appears to the Board that registered "legally qualified medical practitioners of Victoria "are by virtue of being so registered and without "further examination entitled to practise their pro-