ROBERT FURSE McMILLAN.*

I. THE SUPREME COURT OF WESTERN AUSTRALIA: ITS EARLY HISTORY.

Robert Furse McMillan devoted 28 years of his life to the service of Western Australia. He arrived at Fremantle on 19th February 1903, less than a month after his forty-fifth birthday, the newly appointed second puisne judge of the Supreme Court; and he collapsed and died at Crawley on 24th April 1931, in his seventy-fourth year, Chief Justice and Lieutenant Governor of the State, having just delivered a characteristically appropriate and witty speech at the official opening of St. George's, the first of the residential colleges at the Crawley site of the University. These 28 years spanned, more or less, the middle of the first century of the Supreme Court's existence, and his was a commanding influence in the development and administration of the law in the State in this era. His judgments dominate the Western Australian Law Reports;[1] to a great extent he set the pattern for the Court; he was an example to and commanded the respect of all the members of the profession; and that he did much to bring to the Court the prestige it now enjoys cannot be denied.

My purpose in writing this biographical account of him is to bring about a better awareness and appreciation of his contribution to the development and administration of the law. I have tried to do this mainly by an analysis and appraisement of some of his very many reported judgments. My enquiries into his private life have not been deep. Further investigation would undoubtedly provide material for a fuller personal picture. I do not believe it would change the general impression. I have looked cursorily into his background, a little more into his life as a puisne judge and then as Chief Justice of the State, its Lieutenant Governor and from time to time its Administrator. In the belief that it would help towards a better understanding of his contribution I have also traced, though only summarily, the history of the Court of which he was for so long a member.

* *This short biography was written as part of a project to publish, under the auspices of the Australian Universities Law Schools Association, a volume containing similar sketches of other Australian judges. When the larger project proved to be impracticable it was decided to publish in this Law Review the chapter dealing with a distinguished Western Australian judge.*

1 The period 1903-1930 is covered by Vols. 5 to 33 of the reports, with two of his judgments in Vol. 34. The total number of his judgments appearing in the reports is 828.

The colony had been first settled in 1829, and in its earlier years it had got along well enough without a superior court.[2] Governor Stirling, when he had felt the need for them, appointed eight justices of the peace. His authority to do so was questionable but was not questioned and the justices held courts of petty and quarter sessions and also adjudicated, though without great enthusiasm, in civil disputes. The Government Residents, whose functions were primarily administrative, also helped to settle disputes between individuals when occasion demanded. The law applied was the law of England. As Sir Owen Dixon so very aptly put it:[3] "It is a peculiarity of Western Australia that, . . . alone of the States and of many places which were formerly under British rule, it took its law simply by common law principles. There was no statute which brought common law here or preserved it. It came with the people who settled in the Swan river colony. It came on the purest principles of common law itself which said that wherever a British community settled, the common law came with them." But, as Sir Owen Dixon pointed out, "the common law is not ingenious enough, nor strong enough, to bring tribunals of law to a newly settled country," so in 1832, though the jurisdiction of the justices had not been challenged, statutory authority for the Courts was obtained. One ordinance[4] "[established] a Court of Civil Judicature"; another[5] "[extended] the jurisdiction and regulated the proceeding of the Court of Quarter Sessions."

Mr. George Fletcher Moore was the first Commissioner of the Civil Court, but in 1834 he was persuaded, somewhat reluctantly, that his talents were more suited to the post of Advocate General, thus leaving the way open for Mr. Mackie, the Chairman of Quarter Sessions, to take over as Commissioner of the Civil Court as well. Under Mr. Mackie's amiable and popular direction this system of courts served the colony admirably until 1857 when Mr. McFarland arrived to take over. He was perhaps unfortunate in having had so well beloved a predecessor, but from the start he was in trouble both with the Governor and with the profession. Soon after his arrival he began to press for the creation of a superior court, claiming that his jurisdiction as Commissioner was limited and refusing to exercise

2 Much of this early history of the Courts I have extracted from notes (as yet unpublished) prepared by the late Enid Russell when she was a member of the Faculty of the Law School of the University of Western Australia.

3 In a speech after a formal dinner held in Perth on 16th June 1961 to celebrate the centenary of the Supreme Court.

4 2 Wm. IV, No. 1.

5 2 Wm. IV, No. 4.

jurisdiction in Chamber matters in the type of case in which Mr. Mackie had acted as of course. His motives were suspect. As judge of the proposed new superior court his salary would no doubt have been considerably in excess of the mere £600 a year he was getting as Commissioner. There were also other differences with the Governor, including a dispute over the Commissioner's precedence at social functions. Matters were brought to a head when the Commissioner refused to give effect to the Passengers Act 1855 on the ground that the British parliament could not pass statutes to operate in Western Australia without the concurrence of the local legislature. Lord Carnarvon, Secretary of State for the Colonies, wrote advising the Governor to remove the Commissioner, if he considered it necessary. But Mr. McFarland forestalled any action along these lines. He resigned.

His short stay in Western Australia, however, was not without profit to the State. He certainly had focussed attention on the question of the jurisdiction of the Civil Court in the growing colony. Moreover, prior to his departure,[6] he spent some time with Mr. Archibald Paull Burt who had been appointed as his successor, and when Mr. Burt expressed himself as being of the same view regarding the restricted jurisdiction of the Court, the Government was constrained to act. There could be no suggestion that Mr. Burt who had in any event been appointed at the comparatively handsome salary of £1,000 a year, was also motivated by thoughts of financial advancement. A bill was quickly drafted, rushed through its various stages, and on 18th June 1861 the Administration of Justice (Civil) Ordinance,[7] creating the new Supreme Court "to be holden by and before one Judge to be called 'The Chief Justice of Western Australia'," was proclaimed. The first sitting of the Court commenced on 3rd July of that year, with Chief Justice Burt on the bench.

In its early years the Court was not without its teething troubles. Few, if any, British courts ever had been. It was fortunate though in its first Chief Justice. Educated and trained in England, he had been Attorney-General at St. Christopher in the West Indies when offered the appointment as Commissioner. Not untypically he carried with him from the "old country" a conviction of the excellence of the system under which he had been trained, and consequently from its very inception the Supreme Court was conducted along traditional

[6] He went to New South Wales where he became a judge, and seems to have lived in much happier circumstances than he had experienced in Western Australia.

[7] 24 Vict., No. 15.

British lines, the English practice and rules of procedure being adopted with no more variation than was absolutely necessary.

Chief Justice Burt's ability as a lawyer, his conscientiousness, his high principles, were all beyond reproach. But he was also an extremely—some would say excessively and even intolerantly—resolute man, a man who would not permit of any deviation from the standards he demanded. As a result, he ran into difficulties with the profession and the press. There were two incidents in particular in which it was considered he had been unnecessarily severe. He committed Mr. S. H. Parker, a young barrister, to gaol for contempt, and he was instrumental in the dismissal from office of Mr. E. W. Landor, a Police Magistrate. On each occasion there had been indiscretion though of a comparatively minor nature and, it was felt, not warranting the drastic treatment meted out. The press, consisting in Perth at that time of the "Inquirer" and the "Perth Gazette", was not slow to criticize and the two papers were themselves taken to task by His Honour. For a while feeling ran high and some general resentment was felt. But in time the Judge's worth came to be better appreciated, and before the end of his term both newspapers had become unstinting in their praise of his high principles. Nor did Mr. Parker suffer unduly from his short committal. He went on, though this was not in Chief Justice Burt's time, to become a judge of the Supreme Court, and later Chief Justice.

Chief Justice Burt was succeeded on his death in 1879 by Henry Thomas Wrensfordsley, with Mr. George Walpole Leake acting as Chief Justice for a short while pending the arrival of the new appointee from England. The impression made by the new Chief Justice, certainly with the legal profession, was most favourable. But he did not stay long. He left in 1882 to take up an appointment in Fiji, and to succeed him the Government selected Alexander Campbell Onslow.

Mr. Onslow had been Attorney-General in British Honduras before he came to Western Australia as Attorney-General in 1876. His appointment to the bench was not altogether popular. It was felt by the profession generally that it was time a local man was appointed and there was such a man available and eminently qualified. The man was Edward Albert Stone. Born in Perth in 1844, he had been called to the Western Australian bar in 1865 and had then commenced practice in partnership with Septimus Burt, a son of the Chief Justice. He had also been Attorney-General for a while and had acted as Chief Justice during two short absences of Chief Justice Wrens-

fordsley. The support for Mr. Stone was not entirely unavailing. Two years later (in 1878) he was elevated, the first locally born practitioner to be appointed permanently to the Supreme Court and the first puisne judge in Western Australia.[8]

Chief Justice Onslow's term of office lasted nearly twenty years. The first part of this term was marred by several acrimonious disputes between the Chief Justice and the Governor. The population of the colony was split. One camp, the official and socially elect group, was solidly behind Governor Broome. The other, the more radical, headed by Alfred Peach Hensman, supported the Chief Justice. Mr. Hensman had been brought out from England to fill the post of Attorney-General when Mr. Onslow had been appointed to the bench and part of the ill feeling against the Chief Justice and the Attorney-General had stemmed from feelings of resentment at what was felt to be unnecessary importations at the expense of local talent. But the differences between the Chief Justice and the Governor went much deeper and became most bitter, leading in 1887 to the Governor's suspending both the Chief Justice and the Attorney-General. This put Judge Stone in an awkward spot, but very wisely he declined to act as Chief Justice and Mr. Leake had to take the job on again, though only for a while. The Governor had of course referred the matter to England and in May 1888, some seven months after his dispatch, he received directions from the Secretary of State for the Colonies; the Privy Council had advised that though the Chief Justice might have acted indiscreetly, there had been no misconduct of a moral character or in connection with his duties and the suspension should be lifted. The Attorney-General's suspension, too, was terminated.

During the struggle the press had sided with the Governor and in August 1888 Mr. Hensman commenced proceedings against the "West Australian" (which had by now become the Perth daily) claiming £5,000 damages for libel. The case was tried by a jury presided over by the Chief Justice, and judgment was given for the plaintiff for £800. The newspaper, somewhat dissatisfied, applied for a new trial. The application came on for hearing before the Full Court of which the Chief Justice was of necessity a member, and he delivered the judgment of the Court dismissing the application. Stone J., the only other member of the judiciary, concurred. This did not seem right to the newspaper. It felt it could never get justice as

8 The Supreme Court Act 1880 provided (by sec. 4), in addition to "The Chief Justice of Western Australia," for "such other Judge or Judges as Her Majesty shall from time to time appoint."

long as the Chief Justice remained in office and so petitioned the Legislative Council for his removal on grounds of prejudice and persecution. The Legislative Council referred the matter to the Executive Council which, after a searching inquiry, sent the papers to England for advice. The "West Australian" of 20th August 1889 carried the text of the dispatch in reply in full. In effect it said that the Chief Justice's conduct had not been such as to warrant an address for his removal.

Chief Justice Onslow now took leave of absence which he extended several times. When he eventually returned Governor Broome had gone, and the breathing space had mollified the indignation of the press. There was comparative harmony for a while until, unfortunately, within the judiciary itself discord appeared. In 1892 the Government decided to appoint a second puisné judge and Mr. Hensman was selected. He and the Chief Justice had been great friends. Apart from the fact that they had stood together in the disputes with the Governor and the press, they had much in common, with similar backgrounds and English training. Both of them, too, were very interested in music. But after the appointment of the new judge, for some unknown reason the friends fell out, and throughout the period they were together on the bench (until the Chief Justice left for England in 1900) they made little effort to conceal their hostility for each other, socially and on the bench. Their social meetings, however, were rare. Judge Hensman, a great stickler for form and etiquette, was a firm believer in the theory that a judge should live a life apart from his fellow men, that he should withdraw from all but necessary social contacts, and he steadfastly put this theory into practice after he became a judge.

The Supreme Court remained constituted thus[9]—Onslow C.J., and Stone and Hensman JJ.—until just on the turn of the century. Then in quick succession in the space of some two years there were no less than five appointments. The series of changes commenced in 1900 with the departure for England of the Chief Justice on leave prior to retirement. There was some fuss about his qualification for a pension under the Judges' Pensions Act.[10] He had not yet reached the retiring age of sixty. To overcome this he obtained a medical certificate

9 With Mr. J. G. C. James, who held the full-time appointment of Commissioner of Titles, filling in as Acting Judge during an absence on leave of Stone J. in 1898.

10 The Judges' Pensions Act 1896 was repealed and its terms substantially re-enacted by s. 14 of the Supreme Court Act 1935.

from Dr. Saw, couched in the terms of the statute and certifying that he was incapable, by reason of permanent infirmity of body, of performing his duties as Chief Justice. But the Premier, Sir John Forrest, would have none of this. When the certificate was produced to him he is reported as having said: "I cannot act on it. I was at Government House last night and Sir Alexander Onslow sang the song, 'My pretty Jane, my pretty Jane, oh never look so shy,' and he sang it with such vigour and so skillfully that it is impossible for me to say that he is so physically or mentally incapable."[11]

The power of Sir Alexander's voice not only deferred the settlement of his pension, it also proved most unfortunate for Mr. Pennefather who had been chosen to fill the vacancy that the Chief Justice's retirement would have created. The Premier persisted in his refusal to sanction the retirement on medical grounds and Mr. Pennefather had to be content with an acting judgeship, until his permanent appointment could be arranged, or so he understood. But the selection of Mr. Pennefather was not a popular one. For one thing he had been Attorney-General at the time the selection was made, and it was suggested—with overtones of dishonest self-seeking of course—that he had appointed himself.[12] More to the point, there were others as well and better qualified for the judgeship and no members of the bar had been approached or considered. The profession did not take kindly to this and fifty-two lawyers signed a "Round Robin" in protest. Possibly in time Mr. Pennefather may have proved his worth, but he was not given the opportunity. An attempt by the Government to make provision for a fourth judgeship was defeated in the Legislative Council for the very reason that he would have filled the position, and he had to continue in the acting capacity. Even this was to be for but a few months. The Government which had appointed him was defeated and the new Government, under Mr. George Leake, K.C.—who it will be remembered had himself acted as Chief Justice on more than one previous occasion—wasted no time. It immediately set about sorting out the position regarding the Supreme Court bench. It approved Sir Alexander Onslow's retirement on pension; it informed the acting judge that his services were no longer required and it appointed Stephen Henry Parker, K.C., to fill the vacancy created by the retirement. Mr. Pennefather was a very bitter man.[13] He had had

11 See WESTERN AUSTRALIAN PARLIAMENTARY DEBATES (N.S.), Vol. 19, 868, *per* Mr. Sayer.

12 Responsible Government had been introduced into Western Australia in 1890 and Mr. Pennefather's appointment as Attorney-General was political.

13 Mr. Pennefather's bitterness remained with him for a long while. In 1906,

a promise in writing from the previous Government that it would make his appointment permanent as soon as it was in a position to do so. When informed of this Mr. Leake contended that he was not bound by any such promises of the previous Government. And then salt was rubbed into Mr. Pennefather's wounds. Very shortly after this, provision was made for a fourth judgeship,[14] and Frederick William Moorhead, who had himself had a short spell as Attorney-General when the Morgan Ministry had been in office from 21st November to 24th December 1901, was appointed.

Judge Parker was the second local man elevated to the bench. He had been born at York in Western Australia in 1846 and was educated at Bishop's College, Perth.[15] He was admitted to practice in Perth in 1876, and by the end of the century was, together with men like Mr. George Leake and Mr. Septimus Burt, among the leaders of the bar in the State. He was in fact a brother-in-law of Mr. Leake, as was Septimus Burt, who had also been offered appointment to the bench but had declined. No suggestions of nepotism were made here, and indeed none could properly have been. Both men were highly qualified and eminently suited for the positions offered to them.

The bench now consisted of Chief Justice Stone who had succeeded to that position on Sir Alexander Onslow's retirement being made effective, and three puisne judges, Hensman, Parker, and Moorhead. In June 1902 Judge Hensman, who was in England at the time, died, and it was to replace him that the Government under Sir Walter James, who had become Premier and Attorney-General on Mr. Leake's death, appointed Robert Furse McMillan. The appointment had

shortly after the arrival of Rooth J., he seized the opportunity of what was to have been an address of welcome to the new judge to rake up the past and vent his spleen to the embarrassment of all those assembled in the crowded court room to greet the new judge.

14 Act No. 16 of 1902, assented to on 19th February 1902, applied out of Consolidated Revenue the sum of £1,400 annually for the salary of a fourth judge.

15 For some time prior to 1865 Bishop Hale, who had been interested in education in the colony, had been conducting a school of his own. Having received promise of financial support, the Bishop decided to set up the school on a more permanent basis, and for this purpose an Ordinance was passed in 1865 incorporating the Governors of the Perth Church of England Collegiate School. This was in effect giving statutory status to what had previously been known as the Bishop's School, and annexed to the Ordinance was a set of regulations governing the administration of the school. The school was apparently not successful and in 1885 an Act was passed dissolving the corporate body set up by the earlier Ordinance because, as the preamble stated, the school had been unable to carry out its objectives.

barely been made when Justice Moorhead died. To fill this vacancy, attention was once again turned to the men available locally, and Robert Bruce Burnside was selected, though he was not, strictly speaking, a local man. Born at Nassau in the Bahamas,[16] he had, after an early education in England and France, been called to the bar at Lincoln's Inn in 1884. He came to Western Australia soon after he had qualified as a barrister and set up in practice at Fremantle. In 1894 he was appointed Crown Solicitor and it was from this position that he was elevated to the bench.

These two judges—McMillan and Burnside—continued on the Supreme Court bench together for over a quarter of a century. In personality and interests they were poles apart. Judge Burnside was an extrovert, with a rousing and at times earthy sense of humour. A keen sportsman, he had been elected secretary of the West Australian Racing Club when it was founded in 1884. Later he became president of the Club. He was also an enthusiastic yachtsman and for several years was Commodore of the Royal Perth Yacht Club. As the dashing skipper of "Genista" he was a familiar and popular though not always elegant figure on the Swan. Judge McMillan also had a ready wit and a keen sense of humour, but bad language or coarseness of any form was quite foreign to his nature. For him personally, too, after he became a judge, competition in any form would have been unthinkable. To gambling he had an aversion. Horse racing in particular was anathema, and bookmakers, trainers, jockeys, and all the others concerned in the racing industry were parasites. And yet, despite the seemingly fundamental differences in the characteristics of the two judges there was no real discord between them over the prolonged period they shared on the bench, and when addressing the members of the profession after Judge Burnside's death on 8th August 1929 McMillan, who was then Chief Justice, could, without any qualms of conscience, say that they had "worked for over twenty-six years in complete friendship."[17]

[16] Of the first nine permanent appointments to the bench of the Supreme Court of Western Australia, four had had some previous connection with the British Colonies in the Atlantic-Caribbean area. Burt had been Attorney-General at St. Christopher; Onslow, Attorney-General in British Honduras; McMillan's father and grandfather had had interests in Barbados; and Burnside had been born at Nassau.

[17] See (1929) 31 West. Aust. L.R., frontispiece.

II. "A PERFECT ENGLISH GENTLEMAN"— "AN ORNAMENT TO THE JUDICIARY."

Robert McMillan was unquestionably the quintessence of propriety. Those who knew him seemed unable to avoid superlatives in talking about him. The most lasting impression he left with those who had met him was of his courteousness and the refinement of his bearing and manner. He struck them all as being "a perfect English gentleman." This, in any event, was the description almost invariably and immediately offered to any enquiry about him, a description to which a not untypical addition from a member of the legal fraternity was:—"with all the characteristics of the top-notchers of the English legal profession." And, without conceding that an English training even in those days was necessarily better than one which could have been had in Western Australia, he does seem to have been born and bred to the role he was to fulfill.

His father John was a Scot, who married an English girl, Mary, "The eldest daughter of Robert Furse of South Molton, Devon, a lady possessed not only of great personal attractions but of the highest qualities of urbanity of manner and goodness of heart which tended to make her in her London home the centre of a large circle of friends."[18] John himself was a man of no mean attainments. Businessman, lawyer, politician, scholar, he achieved considerable fame and standing in his time. After an early education in Scotland and at Exeter he went to the West Indies where his father had estates, and there "prosecuted his studies at the college in Barbadoes where he obtained the distinction of a scholarship." His was to have been a career in business, but ill-health forced him to return to England where he turned to politics and law. In 1863 at the age of 31 he was admitted to the bar at Lincoln's Inn and proceeded to develop an active practice in "parliamentary and compensation cases." Politically a moderate Liberal he was prepared to use his talents as "a speaker of much force and eloquence" on the party's platforms but could not be persuaded (with one exception and even then he withdrew to avoid a possible split in the party) to stand for Parliament. His obligations to his family, and he had a large one, came first. However, he exerted considerable political influence and among his many

18 This and the other quotations in this paragraph are taken from a biographical sketch of John McMillan published in the Supplement to the *Brighton Times* of 24th September 1880. The same source also provided much of the other information.

achievements is listed the obtaining of the necessary statutory authority for the Devon and Somerset Railway from Taunton to Barnstable. He also was "one of the originators of that Marine Palace which is [or in any event was in 1880, so the *Brighton Times* claims] the pride of Brighton, and the cynosure of all other watering places," becoming a director and later chairman of directors of the Aquarium Company. His scholarly interests were satisfied, in part, as "a member of 'Our Club,' so well known as one of the most pleasant coteries of men of literature, art, etc. in London."

The first son of John and Mary McMillan, their third child, was born on 24th January 1858, at Camden New Town, London. Not unnaturally the name selected for him was that of his proud father, and the name entered for the baby in the Register of Births was John. But some time within the next few months there came a change of mind: it was not his father's but his maternal grandfather's name that the boy was to bear, and at his baptism on 2nd June 1858, he was christened Robert Furse McMillan. This was the name entered on his baptism certificate, and this was the name by which he was thereafter known.[19]

Much of Robert's time in his early years was spent at home, a home which consisted of both a town and a country residence. It was a typically Victorian upper middle class home, with its refinement and culture, its fastidiousness and decorum, but with the large family —John and Mary McMillan had nine children in all—to add a leavening of affectionate tolerance and good-natured humour. Robert's scholastic ability made itself apparent when he was quite young. At the age of 13 he was sent to Westminster School, where two years later he became a Queen's scholar. But he was no book-worm. He participated in all the usual range of school-boy activities. His young sister[20] tells with pride, stories of how he daringly climbed over the roof of the school, of how she fed him buns from a rowing boat during a long distance swim, and of his courting days. Swimming, and later when he was at Cambridge, rowing, were the sports in which he was most interested and in each he attained considerable skill. After he came to Western Australia he avoided participation in any sport, even golf, probably because he considered it inimical to his position as a judge. But he maintained his keenness for swimming

19 The Registrar of Births was informed but somehow failed to make the alteration in the Register within the prescribed period of six months. Presumably the Register remains unamended.

20 Miss Millie McMillan of Sandown, Isle of Wight, has been most helpful in providing information about her brother.

throughout his life. For those up early enough he was a familiar sight any morning walking the short distance down from his house on View Street in Peppermint Grove to the river for his daily constitutional swim.

It seems to have been accepted as of course that he would follow in his father's footsteps and become a lawyer, and he was educated and trained for this in the traditional English way. From school he went to Trinity College, Cambridge, when he was eighteen. He graduated with a first in the Law Tripos in 1879. In 1880 he obtained his LL.B. and the same year he was elected a fellow. He became a member of the Inner Temple where he held a Common Law scholarship and an Inns of Court studentship and in 1881, he was called to the bar. In the meanwhile one of his young brothers was "pursuing an equally successful career at the University of London and Middlesex Hospital,"[21] and another was being trained to be a solicitor.

After his admission to the bar, Robert, now an energetic young man of twenty-three, commenced to build up a practice. He practised for a while in London and also joined the Western Circuit attending the Devon and Exeter sessions. Competition was keen but he held his own and within a few years had established himself well enough to contemplate matrimony. He was a handsome man with fine clear-cut features, always fresh looking and spruce. Temperamentally amiable and good natured, he had a ready wit and neat and humorous turn of phrase. With his good looks, charming personality, and career as a rising young barrister, he was indeed a most eligible bachelor. When he finally fell in love, it was with an Australian girl, Margaret Elder. Her father, John Elder of Yairram, Cressy, Victoria, had sent Margaret and her three sisters to school in England. It was at school in Hampstead that the Elder sisters met and became friendly with the McMillan girls, Robert's sisters. They were frequent visitors at the McMillan home, and so it was that Robert McMillan met Margaret Aitchison Elder. There was some disparity in ages, she was considerably younger than he was, but this was of no consequence. He proposed and in 1887, when he was twenty-nine years of age, they were married. Her Australian ancestry was not without significance when later he made his decision to come to Western Australia. So he himself said when interviewed on his arrival at Fremantle in 1902.

After the marriage his practice in the south of England continued to flourish and he earned a reputation at the bar for thoroughness.

21 See the *Brighton Times Supplement* of 24th September 1880.

It was expected (by his family and friends) that, sooner or later, he would be elevated to the bench. It was probably to this end that he kept out of politics and away from the other business type interests his father had had. But the prospect of elevation in England was not an immediate one, and when the Western Australian opportunity presented itself, after a quick but nonetheless thorough assessment of the factors involved, he took it.

The events leading up to the appointment are not without interest. Many years later it was said:[22] "The James Government has not stamped indelible footprints on the sands of time. It can be allowed to its mediocrity however that it made a footprint. It selected Robert McMillan from the English bar for a Western Australian judgeship." But whatever merits or shortcomings the James Government may otherwise have had, it could hardly be allowed a claim to fame based on the part it played in the process of selection. If the Government was to be congratulated at all it was on its good luck rather than any sophisticated astuteness in its tackling of the problem.

It was not until some months after Judge Hensman's death that Sir Walter James, who was Premier and Attorney-General at the time, decided to look to the English bar for a replacement. He did consult some members of the profession in Perth first, but there was nevertheless some resentment felt at the fact that the government was looking overseas for a candidate. This did not deter Sir Walter; once he had made up his mind he moved fast. On 5th November 1902 he cabled Mr. Lefroy, the Agent-General in London, asking him to consult there with Mr. Arnold Trinder and Mr. Carver with a view to selecting a judge for the Supreme Court in Western Australia. Mr. Trinder was a "well-known solicitor" whose brother was connected with the shipping business in Western Australia. Mr. Carver, K.C., was a "leading English counsel in commercial and shipping cases and . . . the author of several standard text books."[23] The choice of these gentlemen was Mr. Drysdale Woodcock, K.C., but when approached he declined. He was interested in politics and reluctant to break his association with the English Liberal Party. It was Mr. Woodcock who first suggested that Robert McMillan would be the man for the job, a suggestion which met with the immediate approval of Mr. Trinder and Mr. Carter, and there were many others to back the recommenda-

22 See the *Leader* (a Western Australian weekly, now extinct) of 4th July 1924.

23 The *West Australian,* 1st December 1902. This was no doubt T. G. Carver. The 3rd edition of his CARRIAGE OF GOODS BY SEA (now in its 10th (1957) edn.) had just then, in 1900, been published.

tion. In announcing the impending appointment the *West Australian* on 1st December 1902 informed its readers that the new judge, "Mr. Robert Furse McMillan, of 5 Paper Buildings, Temple, London, was spoken of in the highest terms as a gentleman and as a man of all round worth by Mr. Blake Odgers, K.C., the well-known authority on the law of Libel and Slander, and also by Lord Coleridge, K.C., and others." Many years later, after McMillan's death in 1931, Mr. Norbert Keenan, K.C., speaking in his capacity as Chief Secretary and Acting Attorney-General, claimed[24] that Lord Halsbury too had recommended the appointment, though if this was so, it seems strange that it was not picked up by the press at the time of the appointment.

Be that as it may, on 20th November 1902, the active English barrister with the Australian wife, now in the prime of his life—he was 44 years of age at the time—received a short note from the Australian Agent-General. Written in Mr. Lefroy's rather scrawly but readily legible hand, it invited him to get in touch with the Agent-General's office if he was interested in applying for the vacant judgeship in Western Australia. He must have had at least some inkling of the impending invitation, and had probably already decided what he was going to do about it, because he replied the very next day offering himself for appointment. His sister says that Lord Coleridge had advised him to accept. Then followed the inevitable and probably anxious wait for the official confirmation. On 2nd December 1902—less than a month after the first cable from Sir Walter to Mr. Lefroy—it came, a letter from the Agent-General delivered by special messenger:

> "I now have pleasure in informing you that I, this day, [the letter was dated 1st December 1902] received a cablegram from the Government of Western Australia instructing me to accept your offer. The message reads further 'Cable date of departure. Advisable should take up appointment not later than 1st March. No passage allowance. Salary starts 1st December.'
>
> I shall be glad to hear from you that you are prepared to take up the appointment not later than 1st March, and it will give me much pleasure to supply you with any information you may require either of an official or domestic character."

In years to come Mr. Lefroy looked back with considerable pride at the part that he had played—not a very significant part actually—in

[24] See the *West Australian,* 25th April 1931. To the same effect is the obituary notice in (1931-2) 5 AUST. L.J. 44, which adds little authoritative support in the light of other inaccuracies it contains.

the appointment that turned out so well. "Sir Robert was my nominee," he boasted, "and I am glad to think that my choice has been so convincingly justified."[25]

The next few weeks must have been hectic for Robert McMillan. He had to wind up his professional affairs and get his family—he and his wife now had three children, two boys and a girl—ready for a move almost half-way across the world, to set up a new home, and start a new and in many ways very different life. To complicate matters one of the children fell ill during this period of preparation—nothing serious, but sufficient to preclude a long sea voyage. This was unfortunate but could not be permitted to delay the new judge's taking up his duties as arranged. So leaving his wife to follow up later with the children, he embarked on the R.M.S. Orizaba for Fremantle barely a month after his appointment had been confirmed. To keep himself profitably occupied on the long sea voyage out, he equipped himself with a set of the Western Australian statutes and by the end of the journey had acquired a good working knowledge of their contents. When the Orizaba berthed on 19th February 1903 Mr. M. L. Moss, M.L.C., was at Fremantle to greet the new judge on behalf of the Government and at the next sitting of the Full Court, on 18th March 1903, Sir Walter James, in his capacity as Attorney-General, welcomed him officially.

By nature and temperament Robert McMillan was a sociable man. In different circumstances the charm of his personality would no doubt soon have won for him a large circle of friends in Western Australia. But like his predecessor, Judge Hensman, he believed firmly that the proper fulfilment of his duties as a judge required that he avoid any close personal attachments, and he deliberately built up around himself an atmosphere of dignified reserve that no one dared but respect. He made few special friends and kept his social engagements down to a minimum. On a more impersonal plane, however, his consistent good humour and ready easy manner on all the very frequent occasions on which of necessity he did meet people in court, in chambers, and elsewhere could not but leave their mark.

Shortly after his arrival in Western Australia he bought some land at View Street, Peppermint Grove, and here was built the house that was to be his home for the rest of his life. He made two trips back to England, both short ones, no more than a few months on either occasion. When he was returning from one of them—it was

[25] The *West Australian,* 24th April 1931.

during the first World War—the ship was torpedoed; it managed, however, to limp back to port.

The Peppermint Grove house was modelled on that of the elegant McMillan home in England. And it was around his home that he built his life when away from the court. His mantle of dignified reserve was here put aside and he is best remembered for his kindliness, his ready sense of humour, the amusing stories he used to tell. Having made up his mind to keep aloof from the social life of the State he had no difficulty in creating interests for himself at home. He spent his spare time pottering around his garden, or listening to gramophone records while studying an early edition of some book, or examining and admiring some delicate piece of china. He purchased the books and pieces of china both locally and through agents in England and acquired something of a reputation as an expert on old English china. On his death he left a fine collection of books as well as a fine collection of china to be divided among his children.

The house was within easy walking distance of the Swan River, and the facilities for swimming, boating, and fishing had influenced him somewhat when he purchased the land. In the earlier years the "Phyllis", a small open boat, served for family picnic trips and fishing expeditions on the Swan. Later he acquired a sea-going launch, "Vectris", in which he used to take overnight or weekend excursions, his sons being permitted to go with him when they were old enough. For John, the elder, there was of course to be a career in law. Robin, the second boy, was also interested in the law, but for him his father planned a naval career. Robin, however, with his father's blessing, became a farmer. Of the girls—a second one had been born after the McMillans came to Western Australia—by coincidence the elder, Phyllis, married a farmer; the younger, Mary, a lawyer.

At the Court right from the start, the judge made a good impression. As has been mentioned, some resentment had been felt locally at the Government's having seen fit to look overseas for a replacement for Judge Hensman. But the appointment turned out to be a fortunate one for Western Australia. Not only was McMillan "a perfect English gentleman" but he seems also to have been endowed with all those qualities we expect—perhaps unreasonably and inevitably with some disappointment—in all members of our judiciary: an impeccable character, a sound knowledge of the law, a ready wit and a sense of humour, and a resolution of purpose tempered with a patient, courteous, and tolerant understanding of human nature. "A

man whom you could see at once," Sir Owen Dixon has said,[26] "was an ornament to the judiciary; one who struck the imagination of any young judge as a man of the highest refinement and character, representing the best traditions of the judiciary in the English-speaking world."

At his first Full Court sitting, in his reply to the Attorney-General's speech of welcome, he remarked that he had already had the opportunity of meeting some members of the bar in chambers and that he had been most favourably impressed with the cordial relationship that existed between bench and bar. In the course of his career, and largely as a result of his attitude, this relationship became more friendly. He treated seniors, juniors, and articled clerks alike with consistent kindly understanding. Firm he could be, and very incisive in rebuke when occasion demanded, but never petulant, markedly ill-tempered or rude, and he made it a practice never to reprimand counsel in court. Despite his reserve, he was readily accessible. Articled clerks were grateful for his helpfulness—the time he would take off in Chambers to instruct them on how an application should have been drafted, or the tolerant understanding with which he listened when approached at awkward times. Young barristers appreciated his encouragement, the congratulations he would send around by his associate after a particularly well argued case. And more experienced counsel enjoyed his wit and humour and would often prolong an attendance in his chambers to pass the time of day with him.

In view of his early training, it is not to be wondered at that he followed in the tradition of English practice set by Chief Justice Burt. He insisted on strict procedural propriety but nevertheless managed to maintain in court an easy and relaxed atmosphere. Neither counsel nor witnesses were overawed. And as he was on the bench for over 28 years, during almost 17 of which he was Chief Justice, inevitably his influence pervaded the legal system of the State. Moreover, over the whole of his period on the bench he was extremely industrious as a judge. It was very much the exception, when he was a member of a full court, for him not to deliver reasons for judgment, and far more usual for him to deliver reasons in which the other member or members of the court would concur.[27] These judgments are seldom long, generally not more than two or three pages, and he developed a style

[26] In a speech after the formal dinner held at Perth on 16th June 1961 as part of the celebrations held to mark the centenary of the Supreme Court.

[27] See c. I, note 1, *supra*.

particularly noticeable in his later years, of stringing together relevant quotations from other cases with a few well chosen words.[28] Often it would be a headnote or part or it that would be quoted but the judge seems to have been careful to ensure that the headnote truly reflected the ratio of the judgment.[29]

Comparatively few of his judgments were taken on appeal, and of those that were, in the majority of cases, his opinion prevailed, if not before the Full Court, then before the High Court or even the Privy Council. Appellate tribunals always treated his judgments with respect, and not infrequently adopted them. Instances of such deference cannot be expected to abound in the reported cases but they occur often enough to indicate the high regard that such tribunals had for his sound knowledge and application of the law.

In *Rowe v. Oades*,[30] for example, when still comparatively new on the bench, he had as a member of the Full Court taken a view of the case rather different from that of the other members. The issue was whether a transaction evidenced in two documents—a transfer of shares in a mine and a memorandum—was a mortgage to secure a loan and therefore redeemable, or a contract of sale. Stone C.J., with whom Burnside J. agreed, held that it was a mortgage but that the right of redemption had been lost because of the plaintiff mortgagor's laches. McMillan agreed that if the transaction was a mortgage the plaintiff was estopped, by his conduct, from obtaining the relief because he had been guilty of laches, but he would not have it that the transaction was a mortgage. He examined the authorities, and efficiently put together the relevant statements on the law from the cases.

All the members of the High Court agreed with him that the transaction was an absolute sale with a right of re-purchase, which had to be exercised within a reasonable time, and not a mortgage. Griffith C.J. repeated with approval the same quotations that McMillan had used. Barton J. commenced his judgment by stating that he could content himself by saying that, after an examination of the authorities cited by McMillan, he entirely agreed both with his

28 See, for example, West Australian Trustee Co. v. McKail, (1922) 24 West. Aust. L.R. 27; Love v. Paget, (1924) 26 West. Aust. L.R. 56; Connolly v. Connolly, (1924) 26 West. Aust. L.R. 90; Coad v. Commissioner of Railways, (1924) 26 West. Aust. L.R. 122.

29 And see the criticism of Griffith C.J. in Hough v. Ah Sam, (1912) 15 Commonwealth L.R. 452, at 455, discussed in c. IV, *infra*.

30 (1906) 8 West. Aust. L.R. 10, and on appeal to the High Court in (1906) 3 Commonwealth L.R. 73.

opinion, and the reasons which he gave. And O'Connor J. expressed his concurrence with both the reasons and the authorities on which McMillan had relied.

Lyne v. Kingsmill[31] may be taken as another example. It enjoys the rare distinction for a Western Australian case of having been included in a text book. It is cited by JOSKE in his LAW OF PARTNERSHIP IN AUSTRALIA AND NEW ZEALAND (1957) as an authority, and the only authority too, for the proposition:

> "There is no rule that one partner may not buy partnership property at a mortgagee's sale, provided there is no collusion between the partner and the mortgagee, and this is so although the partner has declined to bring into the partnership more money than he is obliged to bring in under the partnership agreement, and although the solvent partners seek to have the joint property applied in payment of the joint debts before their separate property is taken for the purpose."

It is the High Court appeal that is referred to in the citation, but it was McMillan's opinion that spelled out the law. He had heard the case at first instance. His judgment had been reversed by the Full Court and was then restored by the High Court, Griffith C.J. quoting quite extensively from his judgment which had not in fact been reported, and concluding: "I entirely concur with the view expressed by the learned judge." This view had been summed up by McMillan thus: "In my opinion the obligation of good faith does not compel a partner to do at his own cost something that he is not bound to do under the partnership articles even if it would save the partnership business." Both Barton and O'Connor JJ. also expressly approved of the McMillan judgment.

And in *Smith v. Millar's Karri and Jarrah Co. (1902) Ltd.*,[32] too, in restoring his decision which had been reversed by the Full Court, two of the three judges of the High Court were prepared to rest their decisions entirely on his opinion. Barton J. after some initial doubts concluded that McMillan was fully justified in his judgment and O'Connor J. accepted his reasoning as conclusive. The case had arisen out of a dispute between the company and its general manager as to the calculation of salary under his contract of employment. In dealing with the matter at first instance McMillan held that he was not bound to interpret a particular clause in the contract literally but

31 (1909) 11 West. Aust. L.R. 207, and on appeal to the High Court in (1910) 13 Commonwealth L.R. 292.

32 (1911) 12 Commonwealth L.R. 304.

was entitled to look at the whole of the transaction to ascertain the intention of the parties.

This approach was in keeping with his usual attitude to the interpretation of documents, and statutes as well, and towards the application of the law in general. It speaks well indeed of his ability, in the light of such an approach, that he was not reversed more often on appeal. Reverses he had of course, but of these there were not many,[33] and the occasion afforded cause for considerable comment when two of his judgments were reversed by the High Court on the one day in 1930.[34]

A judge must feel some gratification when on challenge his judicial opinion is vindicated, and some disappointment and misgiving when he is held to have been wrong. In this regard McMillan was no exception. He frankly took a pride in his good record and in his reputation. It must surely have been gratifying to know that superior courts respected his sound knowledge of the law, that counsel had to consider longer and more carefully before advising appeals from his decisions, and that a few even considered him infallible. But this reputation itself affords some support for the one serious criticism levelled against him: that he would "decide on the facts" and that in this he set a pattern for the judicial process and "ruined the law in Western Australia." Put starkly this implies that having come to a conclusion on the merits of the case as he saw them he would give weight to those portions of the evidence that would "justify" the decision in law, that the finding of facts would be so expressed as to make the decision difficult to upset on appeal, thus frustrating counsel and tending not merely to emphasise fact-finding but to emphasise it at the expense of legal argument. Criticism of this sort is almost invariably nebulous; it certainly cannot be substantiated from the reported cases themselves. But for this very reason it is equally hard to refute, and as a criticism of the judicial process it can hardly be

33 Rough statistics extracted from the reported cases of appeals to the High Court or Privy Council do not indicate a record as good as his general reputation would suggest. Of 89 cases in which either his was the only judgment or he was a member of a Full Court which rendered the decision, 43 were affirmed, 38 reversed, and 8 others restored after reversal. It is emphasised, however, that these figures refer only to reported cases and probably do not truly reflect the over-all picture.

34 The High Court visits Perth once a year and remains but for a few days during which it deals with all its Western Australian business since its previous visit. There are of course occasions on which, when for one reason or another, a hearing cannot be delayed, and then the High Court deals with the matter wherever it may happen to be sitting.

singularly Western Australian. Every judge is human. Within the sphere of his discretion he must draw conclusions depending, among other things, on his own values and preferences and in doing so give more or less emphasis to one matter or another. It is not unlikely that one of the factors he takes into consideration, even if only subconsciously, is the likelihood of an appeal. It must also be true that there would be many occasions when his conclusions would appear to be based on distortions of the facts only to those adversely affected. Be all this as it may, there is no real indication that the development of the law in Western Australia has been stifled particularly or at all. He himself made no bones about his technique; the judge should first reach what he considered a just decision and then refer to the authorities to see whether or not the decision could be legally justified. And at least one of his successors on the bench has claimed, and claimed with some pride and gratitude, that he had followed this advice. It seems to have amounted to this; the judge must rely on his training and experience in the first instance to achieve a "just" result; he should then refer to legal principles and rules to test his initial judgment. In the vast majority of cases the "legality" would no doubt coincide with the initial determination of the "justice" of the case. When there is no such coincidence the judge may be faced with a difficult decision, but one he must make. McMillan himself (as will be seen) when faced with such a problem seems to have been willing at least on occasion to apply general principles boldly.

His judgments through the years do not display any marked pattern of change. If anything the contrary would appear to be so. His characteristic use of the authorities, connecting quotations with a few well chosen words; his ability to get at the real issues quickly; his conciseness in dealing with them (he could certainly not be accused of verbosity), are discernible in more or less equal degree throughout. His reputation inevitably took time to develop, but does not seem significantly to have changed his attitude to the law, his style or his ability. In dealing with his judgments I have therefore not attempted to trace any chronological developments but have contented myself with a treatment under subject headings. The classification is of necessity very general. Cases do not always fall completely and exclusively under a particular heading. A case like *Coulter and Treffene* for example, discussed only under Criminal Law, also raised issues in the law of evidence and gave rise to an action sounding in contract. And each of the cases included under Statutory Interpretation would be of significance in some other area of the law. Nor does the classification aim at being complete, or in itself as reflecting any

particular bent of the judge. It is merely that of his very many judgments those I have selected for discussion as indicating something of his contribution to the development and administration of the law in the State seemed to me most conveniently to fit into such a classification.

III. CRIMINAL LAW.

When in practice in England Robert McMillan had not appeared frequently in the criminal courts, and after his elevation to the bench he did not regard himself as having any special competence in the criminal law field, especially, with his common law background, in a jurisdiction in which there was a criminal code. He seems to have regarded his brother Burnside as rather more of an expert, no doubt because of Judge Burnside's early experience as Crown Solicitor. But the Criminal Code had only just been enacted when McMillan arrived in the State. The act to establish the Code was assented to on 19th February 1902, to come into operation on 1st May in that year. He was appointed second puisne judge on 10th December 1902, and took up his duties in time to be a member of the Court of Criminal Appeal and (on 7th April 1903) to deliver one of the judgments in the first reported case in which the Code is mentioned.[35] And indeed it was this very awareness of the existence of the Code that has made his contribution to the development of the criminal law in this State greater than that of any of his contemporaries.

When the Code was introduced in the Legislature little attention was paid to the substantial changes it was introducing. The Premier, Mr. Leake, in his second reading speech[36] stated that no members would think of reading it through but that Mr. Sayer, who had prepared the bill, would explain the changes that were being made in the law. Mr. Sayer's summary explanation in fact referred to but a few of the very many changes. This initial attitude of unconcern seems to have set a pattern. On the very day on which the new Code became law judgment was delivered in the only criminal case[37] reported that year and it contains no mention of the Code at all. The case came before the appellate court under the Criminal Law Procedure Amendment Act[38] which was repealed by the Code. One of

35 Chomatsu Yabu, (1903) 5 West. Aust. L.R. 35.

36 See (1902) WESTERN AUSTRALIAN PARLIAMENTARY DEBATES, Vol. 19 (N.S.), 1101.

37 Skerrett, (1902) 4 West. Aust. L.R. 101.

38 50 Vic., No. 15.

the questions raised was whether the accused could be convicted of embezzlement on an indictment charging a general deficiency. Hensman J., delivering an opinion in which Parker and Moorhead JJ. concurred, stated that on the whole he thought the tendency of the courts was to confine the indictment to the non-accounting of specific sums. Section 565 (1)[39] of the new Code in fact provided expressly that in an indictment for stealing the accused could be charged for the amount of a general deficiency. It was not too much to expect, especially as the judge conceded that there was "room for some argument" on the issue, that the new statutory provision should at least have received some passing reference.[40] This tendency to overlook the provisions of the Code—the general principles contained in it, particularly the provisions relating to criminal responsibility and the fact that they supersede the common law doctrine of *mens rea*—has persisted more or less through the years until more recently.[41] Nor was McMillan himself blameless. At least two cases may be entered on the debit side of his account—*Durham v. Ramson*[42] and *Lynch v. Brown*.[43] In the former, a licensee was charged with having adulterated liquor on his premises in breach of section 7 of the Sale of Liquor Amendment Act 1897. The magistrates found as a fact that the accused knew nothing of the adulteration and dismissed the charge. In allowing the appeal from this dismissal, in a judgment in which Burnside J. concurred, McMillan said:[44]

> "There are some cases in which the Legislature thinks it is necessary to make an act an offence, although there may be no *mens rea*. We find sections of this kind only in Licensing Acts and in Customs Acts, and Acts of that sort, and it is clear to my mind that s. 7 is an enactment of that kind. It is an absolute prohibition, and it is of no avail for the accused person to say that the prohibited act is done without his knowledge or consent."

But the question was not one of whether there was any requirement of *mens rea* but whether the relevant provisions of Chapter V of the

39 Sec. 586 (1) in the present 1913 Code.

40 An editorial note in the West. Aust. L.R. Digest 1898-1911, at 66-67, states that the indictment had been "framed before the passing of the Criminal Code 1902," which is doubtful, though it certainly must have been framed before the Code became law.

41 For a discussion of the cases see also *Strict Responsibility in Western Australia* by Colin Howard, in (1961) 5 U. WEST. AUST. L. REV. 229, and my comment thereon at 249. The tendency to ignore the Code also prevailed in Queensland over this period.

42 (1907) 9 West. Aust. L.R. 76.

43 (1917) 19 West. Aust. L.R. 78.

44 (1907) 9 West. Aust. L.R. 76, at 77.

Code,[45] which are expressly made applicable by section 36, could be excluded. And this question was not considered. Moreover, if it had been, the decision, it is submitted, may well have been to the contrary. True, the judge received no assistance from counsel. The Crown Solicitor argued for the appellant that *mens rea* was not an ingredient of the offence but the respondent did not appear and was not represented and the judge should have been more astute to apply the law for his protection.

In the second case, the issue was whether a master could be liable for the acts of his servant who gave an unstamped receipt for money received on behalf of the master. In a judgment in which Burnside J. once again concurred, he followed the English decisions, *Sherras v. De Rutzen*[46] and *Attorney-General v. Carlton Bank Ltd.*,[47] and held that the master was responsible for the conduct of a man whom he employed to act in a certain capacity and "whose acts in the course of his employment are those of the master." This is certainly not the law in Western Australia now, though there may have been better—though perhaps not much better—reasons for applying it as the law then. The issue involved questions under sections 7, 8, and 9 of the Code relating to parties to offences and the criminal responsibility of persons for the acts of others, and these sections are not made expressly applicable by the Code to all offences; they have however since been held by the Supreme Court to be of general application.[48] But in any event His Honour did not consider the provisions of the Code at all, not even those made expressly applicable.

On the credit side is to be listed *Sharp v. Caratti*.[49] A charge of cutting forest produce in breach of the Forests Act 1918 had been dismissed, the magistrate apparently having found that the accused had been mistaken as to the area in which he was authorized to cut timber even though, on his own admission, the accused had not troubled to find out where the boundaries were. In a short judgment with which Burnside and Draper JJ. agreed, His Honour held on the established facts that the offence had been committed. He did say that the appeal raised the rather important issue of whether *mens rea*

45 The Chapter is headed "Criminal Responsibility," but contains all the sections relating to the mental element in offences.

46 [1895] 1 Q.B. 918.

47 [1899] 2 Q.B. 158.

48 See Snow v. Cooper, (1955) 57 West. Aust. L.R. 92, and Wilson v. Dobra, (1955) 57 West. Aust. L.R. 95. See also Solomon, [1959] Queensland R. 123.

49 (1922) 25 West. Aust. L.R. 133.

had to be proved to establish the offence, but clearly he was using the expression (which is now frowned on, and quite properly so, in jurisdictions in which the mental element of crimes is statutorily defined) in a general sense, and not implying that the common law doctrine was applicable, because he expressly referred to and quoted from section 24 of the Code which contains the excusatory provisions arising from mistake of fact. But the section could not serve to excuse the accused, because if he was under any mistaken belief as to the existence of the state of things, it was not a reasonable belief in the light of his admitted negligence.

These cases had involved prosecutions under statutes other than the Code. In cases involving charges under the Code itself the fact that the general provisions of the Code have replaced the common law has generally[50] been appreciated. And the applicability of the rule in *Bank of England v. Vagliano Bros.*,[51] emphasising that there is no presumption that a code merely restates the previously existing law and limiting the circumstances in which such law may be referred to, has not been overlooked.[52] In *Broadman*,[53] for example, as a member of the Court of Criminal Appeal with Stone C.J. and Burnside J., McMillan stressed the point that the provisions of the Code[54] relating to betting houses differed from the English law. The Code contains an express provision including, within the definition of betting houses, places used for the purpose of bets being made between the persons resorting thereto, in contrast to bets between the keeper of the premises on the one hand and the persons resorting on the other.[55] Counsel had argued that the English cases were relevant because the word "resorts" had acquired a special meaning when applied to clubs and that betting between members of a club inter se was not intended to be included within the prohibition. In a lucid and well reasoned judgment McMillan disposed of this argument. After examining the

50 There have been exceptions; see, for example, Dunstan, (1931) 33 West. Aust. L.R. 118, discussed *infra* at 207.

51 [1891] A.C. 107.

52 The rule has been frequently referred to by McMillan himself, among others. See, for example, Scott, (1909) 11 West. Aust. L.R. 52.

53 (1905) 7 West. Aust. L.R. 313.

54 Sec. 209 (sec. 211 in the 1913 Code). The section has been amended somewhat, but the provision in question is unchanged.

55 This Western Australian provision seems singular. It has no counterpart in the Queensland Code (from which the Western Australian Code was copied) nor in Sir Samuel Griffith's draft (see Queensland Parliamentary Papers C.A., 89-1897), nor in the English Draft Code or the Bill of 1880, nor in the Criminal Codes of Tasmania or New Zealand.

English decisions, he pointed out that "resort" was a "natural" word to use, and was used with its "proper English meaning" when applied to members of a club who "went there to bet with other members of the club who had certain privileges, and constituted a different class from themselves." He stressed that the Court was not laying down that "every person who occasionally bets in a club commits an offence. In order that a club may be a place which is used for the purpose of bets being made therein, . . . the betting must be frequent and designed. It must not be casual or infrequent."[56] This is still the law in Western Australia.

The defence of insanity contained in the Criminal Code (sections 26 and 27) is not framed in the terms in which the rule is expressed in the *M'Naghten* case.[57] Under the Code a person is not criminally responsible if at the relevant time he is "in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission." These provisions are identical with Sir Samuel Griffith's draft, and he was of opinion that they reflected the common law. "I believe," he said,[58] "that any direction to a jury which omitted a reference to any one of the three elements—capacity of perception, capacity of choice, and moral capacity—in a case in which such an element was material would be contrary to the Common Law;" indeed the rule was "merely a particular instance of the application of the general rules determining the question of criminal responsibility" stated in sections 23, 24, and 29. Since an act must be voluntary to involve criminal responsibility, a person who is "incapable from mental disorder of rightly perceiving the facts, [he] should be treated on the same footing as a man who in good faith misapprehended the facts," *i.e.*, who would be excused under section 24. Similarly, if he is "incapable of exercising the power of determination or choice, he should be treated on the same footing as a man who does an act independently of the exercise of his will" and is excused under section 23. And if he is "in the condition of a child as to the capacity of apprehending the notion of duty [he] ought to be equally free from criminal responsibility." This analysis by Sir Samuel has not received from the Courts the attention it deserves. It has generally been accepted, however, that what is known as the uncontrollable or irresistible impulse test can be

56 (1905) 7 West. Aust. L.R. 313, at 323.

57 (1846) 10 Cl. & F. 200; 8 E.R. 200.

58 See note to his draft, Queensland Parliamentary Papers, C.A. 89-1897, at 14.

read out of the words "capacity to control his actions." On this question McMillan, and McMillan alone, has delivered judgments which have been reported. A further question arises under the Code definition: Does the expression "mental disease or natural mental infirmity"[59] add anything to the "defect of reason from disease of mind" of the *M'Naghten* rules? On this question, too, the only reported judgment available in which the matter has been considered at all extensively is one of McMillan's.[60]

Only two cases have been reported in Western Australia in which the defence of irresistible impulse was considered and there would appear to have been none reported on the question in Queensland.[61] In each of these cases he was a member of the court which heard the appeal, and on each occasion he was the only judge who delivered reasons for judgment, the other members of the court concurring, and to emphasise his persistent industry and ability it might be mentioned that when judgment in the second of these cases was delivered he was 73 years of age.

The first case, *Moore*,[62] attracted considerable publicity. The trial was marked by a number of clashes between the trial judge, Rooth J.,[63] and Mr. C. Penny, counsel for the accused. The stand taken by Mr. Penny at the trial is not easy to follow and it was not surprising that in summing up to the jury the judge had had to point out that the case had not been an easy one and counsel had not made it any easier, and that it was difficult to say what *was* the case either for the defence or the prosecution. Mr. Penny in opening for the defence had asserted that his client was not then, *i.e.*, at the trial, insane, but that evidence would be led to show his mental condition and how it had affected his ability to control his actions. And this indeed he attempted to do, though in some vague sort of way he seemed to be hoping for a complete acquittal based on an accidental killing which

59 Sec. 27.

60 See also Dwyer C.J. in Armanasco, (1951) 52 West. Aust. L.R. 78, at 83; and note 68 *infra*.

61 None are referred to by Philp J. in *Criminal Responsibility at Common Law and Under the Criminal Code—Some Comparisons*, in (1950) U. Queensland L.J. 1, or by CARTER in CRIMINAL LAW IN QUEENSLAND. The South Australian case, Brown, ([1959] Argus L.R. 808 (High Court of Australia) and [1959] 1 All E.R. 734; [1960] Argus L.R. 395 (P.C. reversing High Court) : And see note by Peter Brett in 23 MOD. L. REV. 545) is interesting though of course the issue was rather different under the law of South Australia.

62 (1908) 10 West. Aust. L.R. 64.

63 Rooth J., who had been appointed in 1906, was the last of the judges appointed to the bench of the Supreme Court from overseas.

followed a provoked assault,[64] instead of a special verdict of not guilty on the grounds of unsoundness of mind under section 653, which would have necessitated an order that the accused be kept in custody at His Majesty's pleasure.

The jury brought in a verdict of manslaughter but stated that they had not reached agreement on whether they should recommend mercy. The judge said that he was prepared to accept the verdict without the recommendation, but six jurors refused to agree to the verdict without the recommendation. The judge then rated them for a state of affairs he described as unheard of and preposterous; surely they were not going to force him to lock them up all night. They were not. After a hurried whispered consultation the mercy-recommenders prevailed. The verdict included the recommendation. The judge was not very pleased. Expressing the view that a sentence of death would not have been undeserved, and pointing out that the offence carried a maximum penalty of life imprisonment, he nevertheless took the recommendation into consideration and imposed a sentence of ten years.

After the summing-up, on the retirement of the jury Mr. Penny had asked the judge to state a case for the Court of Criminal Appeal on two points arising from what he said were misdirections in the summing up. The judge refused. Counsel then asked if he had understood the judge to say that weak-mindedness as described by Dr. Montgomery, the Inspector-General of Insane, who had been called as a witness by the defence, was not a natural mental infirmity under section 27 and the judge answered, "yes." Counsel then repeated his request that a case be stated on this point but the judge—after some further altercation—persisted in his refusal. The doctor had stated that the accused was childish, not of ordinary intelligence, and scarcely realised his position; he was weak-minded and under stress of excitement would lose the capacity to control his actions. In answer to the judge he had stated that he would not say that the prisoner was suffering from mental disease, but on section 27 being read to him by the judge,[65] he expressed the opinion that the section covered the facts

64 Under sec. 246 of the Code provocation offers a complete defence to an assault unless it is "likely to cause death or grievous bodily harm" and under sec. 23 a person is not criminally responsible for "an event which occurs by accident," but it is not clear what counsel was really relying on.

65 Rooth's reading of the section to the witness was not in keeping with the principle that in general the expert should not answer the question which is for the tribunal of fact. On an issue like insanity, however, this is clearly difficult to avoid and it is doubtful whether judges achieve any purpose in assiduously preventing counsel from putting to the expert questions in

of the case; that the accused was suffering from a natural mental infirmity, he had been born weak-minded, and his brain had never properly developed. Another medical witness called by the defence had stated that the accused was suffering from acute mania of a recurrent nature; whenever excited he would be insane and would lose control of himself, but—and this is what the judge emphasised—the witness continued: "I can't say that he did not know what he was doing was a wrongful act."

Neither the judge nor conusel seems to have appreciated fully what the real issue was. Counsel because he had confused the insanity plea with the hope for an unqualified acquittal, and the judge, one can only surmise, because by this stage he must have been exasperated and in any event had come to the conclusion that on the evidence the accused was not insane as he understood the meaning of that term.

The case was taken on appeal on the same two points on which the judge had refused to state a case. The appeal itself was not without incident. The contents of an affidavit filed in connection with the appeal had appeared in the newspapers and McMillan warned grimly that action would be taken against the press for similar conduct in future.

The decision has been subjected to considerable criticism. Philp J., in an article in the University of Queensland Law Journal,[66] says: "There seems to have been ample evidence of irresistible impulse due to mental disease, and so the decision that the defence of insanity was not made out is difficult to understand." But in fact the defence did not get over the first hurdle—proving the mental disease or natural mental infirmity. The report of the appeal is confined to the second of the two grounds on which the appeal was brought, *i.e.*, that the judge had wrongly directed the jury that "weak-mindedness as described by Dr. Montgomery was not natural mental infirmity within

the terms of the statute. To force a search for different words to define what the statute has already defined resolves itself on occasion into a test of the witness's or counsel's ingenuity in finding the right words to convey the evidence to the jury, and in this context "right words" must mean words most suggestive of, or synonymous with, those used in the section. It can hardly be denied that the expert witness is answering the same question that it is for the jury, in the light of all the evidence, finally to determine: Was the accused insane at the time?—insane, that is, within the meaning of the statutory definition. Couching the witness's answer in different language cannot really help, and the jury can be made to understand that the final decision is theirs.

66 *Criminal Responsibility at Common Law and under the Criminal Code—Some Comparisons,* (1950) U. QUEENSLAND L.J. 1.

the meaning of section 27." The issue was clouded, the evidence confused, and counsel's argument, stressing that excitement caused by provocation had held to the impulse, did not help to clarify the question, but the evidence on the whole tends on balance to support the decision of the court. In his judgment McMillan stressed that one of the objects of the criminal law was to make excitable men restrain themselves, and continued:[67]

> "This section treats as insane certain persons who under the old law would not have been treated as insane. It accepts the medical theory of uncontrollable impulse, and treats people who are insane to the extent that they have not the capacity to control their actions, whether from mental disease or natural mental infirmity, as being persons who are irresponsible. It does not, however, go to the extent we are asked to go on this application, and enable a person who is not of the highest grade of intelligence, and is suffering from excitement, to commit murder, or any other crime, with impunity. What the section was intended to do was to relieve from responsibility a person who is prevented, from disease or mental infirmity, from controlling his actions. This is a person who in the ordinary sense of the word is insane. It was not intended to enable a person to be free from responsibility because he allowed himself to be influenced by excitement even although he might, from the nature of his intelligence, be a person more likely to be affected by excitement than another person would be.[68] I can see no evidence which showed that the crime was committed under the influence of an impulse caused by disease or natural mental infirmity. It was caused simply by the state of excitement into which this man had allowed himself to fall."

The judgment is not perhaps as clear as it might be but the Court did dismiss the appeal. In other words it decided that "weak-mindedness as described by Dr. Montgomery was not natural mental infirmity within the meaning of section 27."[69]

[67] (1908) 10 West. Aust. L.R. 64, at 66.

[68] *Cf.* Dwyer C.J. in Armanasco, (1951) 52 West. Aust. L.R. 78, at 83:—". . . it was also desirable and proper to point out to the jury, as was done, that they should distinguish between disease or natural infirmity of mind, and other states of mind such as jealousy, anger, revenge or lack of self-control, and that they should be satisfied before holding that the plea in defence was established that there was acceptable evidence of mental disease properly so called at the time of the alleged crime."

[69] *Cf.* STEPHEN'S DIGEST OF THE CRIMINAL LAW, Art. 27, which McMillan thought had been "substantially accepted by Sir Samuel Griffith when he was compiling the Queensland Code" [(1908) 10 West. Aust. L.R. 64, at 66]. Stephen's

McMillan's comments in this judgment on expert testimony in general are also worth repeating: ". . . a jury, after all, is, as Sir James Stephen said in considering this point, a very satisfactory tribunal to dispose of questions of that sort [*i.e.*, insanity]. I think we do arrive at substantial justice much more readily by means of a jury than we should if this question were left to experts who differ from each other so much."[70]

The second case, *Wray*,[71] stands out like a beacon as a case in which the defence of irresistible impulse succeeded. It would not be easy to conceive a fact situation more appropriate to such a defence. A shipping clerk, 19 years of age, who lived some 14 miles from Perth, became "fed up" with having to ride his bicycle in and out of town each day, and so arranged with a taxi driver, a stranger to him, to be driven home one evening. Having arrived at a lonely spot he shot the driver in the head, walked the short distance from there to his home and told his father what he had done. The uncontradicted medical evidence of two witnesses, who happened to be Crown experts, one being the doctor of the gaol and the other the Inspector-General of the Insane, was that the accused was suffering from "dementia praecox", and yet the jury brought in a verdict of guilty of wilful murder to which they added a recommendation of mercy on account of the accused's "youth and weak mind." The Court of Criminal Appeal readily quashed the conviction, and substituted a verdict of not guilty on account of unsoundness of mind.

In his judgment, McMillan did not refer to *Moore's case* though he once again stressed that Stephen's view had been in favour of including irresistible impulse and that Sir Samuel Griffith had incorporated this into the Queensland Code. He considered therefore that the only question in the case "was whether the accused man had the capacity to control his actions at the time of doing the act." As the undisputed medical evidence established that he did not, the jury's verdict was "unsatisfactory."

The principle of quashing a jury verdict as "unsatisfactory" was one that he himself had adopted in *Jackman*[72] (a Court of Criminal

phrase (included in that part of the article he regarded as doubtful) is "defective mental power," and among his illustrations he speaks of a person whose "mind is so imbecile that he is unable to form such an estimate of the nature and consequences of his act as a person of ordinary intelligence would form."

70 (1908) 10 West. Aust. L.R. 64, at 66.

71 (1930) 33 West. Aust. L.R. 67.

72 (1914) 16 West. Aust. L.R. 8, at 9-10.

Appeal decision in which, once again, he had delivered the judgment in which the other members of the Court had concurred) and expressed as follows:

> "In order to see what our powers are, we must look at the section of the Act in question, [*i.e.* the Code] section 689, which says, 'the Court of Criminal Appeal in any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the grounds that it is unreasonable.' Now, if the legislature had stopped there one would have been driven to the conclusion that the intention was that the same rule should be applied in this Court as is followed in the civil court. Then the section continues, 'or cannot be supported having regard to the evidence.' We must give effect to these words. In England judges who have had to consider this point have always asked themselves whether the verdict in question is a satisfactory or an unsatisfactory one. The expression "satisfactory" is perhaps somewhat wanting in preciseness, but I think its elasticity is an advantage. It is quite clear that we have on the one hand to guard against the danger of substituting trial in this court for trial by jury, but, on the other hand, we must not shirk the responsibility which has been placed on us by the legislature. I think, therefore, that the duty of this court is in every case in which there is an appeal on the facts to give the most careful consideration to those facts, and then to ask itself whether it is prepared to say the verdict of the jury is or is not a satisfactory one."

He himself had applied the principle, quoting this extract from *Jackman,* in no less than three other reported cases[73] in each of which the other members of the Court of Criminal Appeal had been content merely to express their concurrence. The statement was also adopted and applied by the Court of Criminal Appeal when he was not a member,[74] and has been cited with approval in Queensland[75] and in South Australia.[76] In New Zealand in *Mareo* (No. 3),[77] Myers C.J.,

[73] McAuliff, (1922) 25 West. Aust. L.R. 48, at 49; Matamin Rosland, (1923) 26 West. Aust. L.R. 1, at 4; and Coulter and Treffene, (1926) 29 West. Aust. L.R. 40, at 44.

[74] *E.g*, in Armanasco, (1914) 16 West. Aust. L.R. 174, at 175 by Burnside A. C.J. in a judgment in which Rooth and Northmore JJ. concurred.

[75] See Mullen, [1938] State R. (Queensland) 1, at 7; but *cf.* Jeynes, [1927] State R. (Queensland) 27, which is more in keeping with McGibbony, [1956] Victorian L.R. 427, and Aladesuru, [1956] A.C. 49 (discussed *infra* at 205).

[76] See Williams, [1946] South Aust. L.R. 216, at 223-224.

[77] [1946] N.Z.L.R. 660, at 670.

in delivering the judgment of the Full Court of Appeal (Blair, Kennedy, Finlay JJ. and himself), after referring to McMillan's statement, continued:

> "While we agreed that the question whether the trial or the verdict was satisfactory or unsatisfactory is a sound working test, we should have thought that the expression is perhaps more appropriate to the words 'or that on any ground there was a miscarriage of justice' [which appear as well in section 689 of the Western Australian Criminal Code] than to the previous words 'or cannot be supported having regard to the evidence.' But in truth it would seem that the test is applicable to either case."

It would seem rather that it is applicable to neither, and the statement of Sir Michael Myers emphasises the difficulty that judges get into when developing tests in terms other than those provided in the statute. In *Aladesuru*[78] the Judicial Committee of the Privy Council, on an appeal from the West African Court of Appeal, had to consider identical statutory provisions. Counsel (Christopher Shawcross Q.C.) argued that the Court of Criminal Appeal in England had set aside the verdict of a jury for far less reason than that it was "against the weight of evidence," namely, that it was "unsatisfactory." The Judical Committee did not comment on the use of the expression "unsatisfactory," but said that the phrase "against the weight of evidence" was inaccurate and could not be properly substituted for the words of the statute. In *McGibbony*[79] the Supreme Court of Victoria, citing *Aladesuru* and *Ross,*[80] were clearly of opinion that the words out of which McMillan spelled the "unsatisfactory verdict" test could not avail unless there was no evidence to support the verdict, thus leaving the unreasonableness of the evidence as the substantial ground for attack on jury verdicts, the test for this being "whether the applicant has satisfied the Court that no reasonable jury, properly directed, could have found him guilty on the evidence before it, had it applied itself to its task in a proper manner making in his favour the presumption of innocence to which he is entitled, and bearing in mind that it is necessary that the charge be proved beyond reasonable doubt."[81] *Jackman* has not as yet been expressly overruled, but it would indeed be risky now to base an appeal on the ground that the verdict of the jury was "not a satisfactory one."

78 [1956] A.C. 49.

79 [1956] Victorian L.R. 424.

80 (1922) 30 Commonwealth L.R. 246, at 262-263.

81 [1956] Victorian L.R. 424, at 426-427.

On one aspect of criminal law, despite identical statutory provisions, the courts of Queensland and Western Australia have taken opposed views—the question being whether the term provocation used in the sections[82] reducing wilful murder or murder to manslaughter should be given the meaning it bears at common law or the more extended meaning that could be read out of the Code itself in the chapter on "Assaults and Violence to the Person Generally; Justification and Excuse." And on this aspect of the criminal law, too, McMillan's statements have proved of considerable weight despite some inconsistencies.

In *Scott*[83] he was a member of the Court of Criminal Appeal with Parker C.J. and Burnside J. dealing with a case stated by Rooth J. The accused and a woman, with whom he had been living for some time as man and wife, quarrelled and separated. He endeavoured without success to get her to return. While they were living apart he accosted and accused her of "carrying on" with another man. When she replied "Yes, I intend to; I am done with you," he stabbed and killed her. The question was whether the trial judge had been wrong in directing the jury that, assuming the evidence of the accused to be true, there was "no evidence of provocation such as it is known to the law which would warrant . . . a verdict of manslaughter."

On the premise that the definition in section 245 applied, and both counsel and all three judges seemed agreed on this, McMillan's judgment is preferable to that of either of his brothers. Though he concurred in dismissing the appeal he did so with considerable doubts, doubts which might well have been better resolved in dissent.

He pointed out that the Code had substituted a new test for provocation which made at least two changes. First, whereas at "common law the question of provocation was . . . entirely one for the judge,"[84] under the Code it was expressly made a question of fact and was therefore to be left to the jury.[85] When *Scott's* case was heard in 1909 it would have been more correct to say that it was the preliminary question that was entirely for the judge, *i.e.*, "not whether there is literally no evidence, but whether there is none that ought reasonably

82 Sec. 281 of the Western Australian Code, and sec. 304 of the Queensland Code.

83 (1909) 11 West. Aust. L.R. 52.

84 *Ibid.*, at 57.

85 See the second paragraph of sec. 246. The first paragraph of the section under which provocation exonerates from responsibility for assaults expressly excludes assaults "likely to cause death or grievous bodily harm."

to satisfy the jury that the fact sought to be proved is established,"[86] and whether the statutory provision making the elements of the provocation "questions of fact," takes away from the judge his function of determining the preliminary question is not so obvious.[87] And secondly, while at common law in general no mere words could amount to provocation, under the Code any insult,[88] including a verbal insult would suffice. "If the words are obviously incapable of being described as an insult," he said,[89] "[the judge] is entitled to withdraw the case from the jury, but if they can be described as an insult, then I think the question should be left to the jury, even though the learned judge may take a very strong view, and may think no reasonable man could possibly come to the conclusion that an insult of that kind could amount to provocation." He also stated that if he had been dealing with the case he would have allowed the question to go to the jury albeit with a strong expression of his views. And if the Code definition of provocation is applicable and some meaning is to be given to the express provision that the elements of the provocation are questions of fact, this conclusion seems sound. Yet he was persuaded to agree that the conviction should stand because of the consequences which would follow if the appeal were allowed—the court would "be obliged to turn loose on society a man who, on his own admission, had been guilty of the crime of manslaughter."[90]

There rested the law of provocation reducing wilful murder or murder to manslaughter in Western Australia for the next twenty-two years—until *Dunstan,*[91] in which he seems completely to have forgotten his exposition of the law some 22 years earlier in *Scott's case.* The fact situation was typically unglamorous. The accused, who had for some time suspected his wife of infidelity, returned home unexpectedly one day to hear someone inside say: "Get out, here he comes." He saw a man leaving the back of the premises and gave chase, but was unable to overtake him. He returned home and drank some beer

86 *Per* Willes J., in Ryder v. Wombwell, (1868) L.R. 4 Ex. 32, at 39; and see CROSS, EVIDENCE, 54, and Holmes v. D.P.P., [1946] A.C. 588, at 597 *per* Viscount Simon.

87 See Mehemet Ali, (1957) 59 West. Aust. L.R. 28, at 33-34 *per* Wolff S.P.J., and *cf.* Young, [1957] Queensland State R. 599, in which, at 603, Philp J. (after quoting from Holmes v. D.P.P., [1946] A.C. 588, at 597) said: ". . . a judge here has the same duty as to withholding the question of provocation from the jury as is laid down in Holmes' case."

88 See sec. 245 in the Western Australian Code, and sec. 268 of the Queensland Code.

89 (1909) 11 West. Aust. L.R. 52, at 63.

90 *Ibid.*—the court under the 1902 Code had no power to order a new trial.

91 (1931) 33 West. Aust. L.R. 118.

while he brooded over the matter before he sought out his wife, she having in the meantime left the house. He found her, dragged her home, and shot her. The jury returned a verdict of wilful murder but added "a strong recommendation to mercy on the ground of provocation." The accused appealed claiming that the verdict was inconsistent with the recommendation and should in the circumstances have been manslaughter. Delivering the judgment dismissing the appeal —Northmore and Dwyer JJ., the other members of the Court of Criminal Appeal, concurred—he explained away the jury verdict on the basis that they had "found that there had been some provocation, but not enough to reduce the offence to manslaughter." Assuming that they had been properly directed, he said, they could not have found that the accused had acted "on the sudden". He may have been provoked but because of the lapse of time he could not rely on the provocation in law to reduce the homicide from wilful murder to manslaughter. This, however, did not preclude the provocation from being taken into account in the recommendation to mercy. But where His Honour went wrong—if one accepts his reasoning in *Scott's* case as right—was in assuming now that the Code made no change in the common law. "Those sections," he said,[92] referring to section 281 under which wilful murder or murder is reduced to manslaughter because of provocation, and section 245 in which provocation is defined, "are taken verbatim from the Queensland Code, and Sir Samuel Griffith, in his introduction, points out that they are covered by authority, and therefore introduce no change into the law which has been well settled in a number of cases." Reference to a draftsman's explanation of his draft as an aid to interpretation of the statute is questionable,[93] but it has become common practice when considering sections of the Code to refer to the explanatory letter with which Sir Samuel sent his draft code to the Attorney-General of Queensland.[94] And in any event Sir Samuel's letter is not free from ambiguity on the issue of whether it is

92 *Ibid.*, at 119.

93 Note the disapproval of Lord Moulton, delivering the opinion of the Privy Council in Despatie v. Tremblay, [1921] 1 A.C. 702, at 711, of what he termed "a dangerous and doubtful proceeding." And note also the statement of Philp J. in Martyr, [1962] Queensland R. 398, at 410, after reference to Sir Samuel's explanation of the draft: "what the legislature finally enacted is the only matter which concerns us."

94 The letter, dated 29th October 1897, was published with the draft in Queensland Parliamentary Papers (C.A. 89-1897) and extracts were printed and issued with the 1902 Western Australian Code as an introduction. Numerous examples of such reference by the Supreme Courts of Western Australia and Queensland and even the High Court are to be found in the reports.

the common law or the Code definition of provocation which is to apply in the homicide cases. Nor is the question merely an academic one. There are the two differences so well emphasised by McMillan himself in *Scott's case*. The one relating to verbal insults was highlighted by Viscount Simon's statement of the common law in *Holmes v. Director of Public Prosecutions*,[95] ". . . in no case [can] words alone, save in circumstances of almost extreme and exceptional character, so reduce the crime," and as yet the type of circumstances which would be exceptional enough has not been more explicitly defined judicially. "A sudden confession of adultery without more,"[96] which was for a while considered sufficient, will no longer do.

Holmes' case also brought to light a third difference, which could be significant. At common law, "where the provocation inspires an actual intention to kill . . . or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognized, *viz.*, the actual finding of a spouse in the act of adultery."[97] Under the Code this would appear not to be so. The wilful murder and murder sections (sections 278 and 279) provide expressly that they apply "except as hereinafter set forth," and then the killing on provocation section (section 281) reduces a homicide which "but for the provisions of this section, would constitute wilful murder or murder" to manslaughter if there has been provocation. From this it has been argued that since the homicide would have been wilful murder or murder, *i.e.*, that notwithstanding there was an intention to kill or do grievous bodily harm, the homicide is nevertheless reduced to manslaughter by the provocation.[98] Certainly there is no express requirement, nor is any necessary implication to be found in the terms of the Code, which would deny to the accused reliance on the provocation because it had inspired an intention to kill or do grievous bodily harm.

The Supreme Court of Queensland after extensive consideration of the matter and some differences of opinion among the members of the bench has finally, and apparently firmly, opted for an interpretation by which the provocation to reduce murder to manslaughter is not the provocation defined in the Code but as understood in common

95 [1946] A.C. 588, at 600. The position in England has now been altered by the Homicide Act 1957, sec. 4.

96 *Ibid.*

97 *Ibid.*, at 598.

98 This was an argument advanced by Stanley J. in Herlihy, [1956] State R. (Queensland) 18, at 52 in support of the contention that the common law definition cannot apply under the Code.

law.[99] In Western Australia a different view has prevailed, one in keeping with McMillan's judgment in *Scott*. In *Mehemet Ali*[1] though it was not of direct consequence to the decision, all three members of the Court of Criminal Appeal, and counsel both for the prosecution and the accused, took it for granted that the Code definition and not the common law one applied. Dwyer C.J. stated expressly that section 245 applied, and Wolff S.P.J., after expressing a preference for the minority opinion (that of Stanley J.) in the Queensland cases, and discussing *Scott* and *Dunstan,* stated that he could not "understand the reasoning of McMillan C.J. in the latter case in view of his earlier pronouncement in *Scott*:" he felt he was not bound by either of the cases, in both of which the statements of the law were obiter; in any event *Dunstan* would not "stand examination in view of the express provisions of the Code." It is pointed out with respect that this discussion of His Honour was itself clearly obiter. It does nonetheless reflect the attitude of the Supreme Court and McMillan's views as expressed in *Scott* would prevail in Western Australia.

The law now seems settled within each State but a High Court pronouncement on appeal from either State would no doubt bring uniformity. Though the statutes emanated from different legislative bodies it can hardly be maintained that the social, cultural or other factors existing in the separate jurisdictions are sufficiently different to warrant such opposed views of identical statutory provisions.

In *Dunstan,* at the trial, Mr. Arthur Haynes, counsel for the accused, had relied on excuses under section 23, that the accused's act had occurred "independently of the exercise of his will," and section 25, that the act had been done "under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably have been expected to act otherwise." Either of these defences if successful would have meant an acquittal, as compared with a reduction of the offence to manslaughter, which is all that a successful plea of provocation would have achieved. There is no reported case in which section 25 has been successfully canvassed by a defendant. Most of the situations which would fit

[99] See the "exploratory" judgments in Sabri Isa, [1952] State R. (Queensland) 269; followed by the majority decision in Herlihy, [1956] State R. (Queensland) 18; and finally Young, [1957] State R. (Queensland) 599, in which the Court accepted it as settled that the common law as laid down in Holmes v. D.P.P., [1946] A.C. 588, applied in Queensland. Dunstan was referred to with approval in the course of the judgments both in Sabri Isa and Herlihy.

[1] (1957) 59 West. Aust. L.R. 28.

within its terms like self-defence (sections 248-250 of the Code) and compulsion (sections 31-32) are otherwise expressly provided for. But the excuse offered by the section is framed in wide terms and why it has not been called in aid by defence counsel more frequently is hard to understand.[2]

Another of McMillan's Criminal Law decisions which is open to criticism is *Parker*.[3] The charge was attempted rape. The accused, a sailor, had attacked a woman whom he had never met before, at about ten at night, on a roadway near a street light. He had been apprehended by a passer-by almost immediately after he had thrown his victim to the ground across some train lines. It is not surprising that the question of his sanity arose. The conduct was strange for even a sex-starved sailor, unless he was very drunk. The defence was confused—drunkenness inducing insanity. Exactly what counsel was seeking to achieve is not clear and one feels some sympathy for the trial judge's rather sardonic note: "The address of counsel for the defence seems to me to indicate a strong suspicion of unsoundness of mind on the part of counsel himself." However, the Inspector-General of the Insane had testified that in his opinion the accused was insane at the time, or "suffering from alcoholic poisoning so as not to know what he was doing." The trial judge told the jury that drunkenness was not a defence unless it amounted to insanity and that if the accused had intentionally caused himself to become intoxicated that defence was not open to him;[4] the jury brought in a verdict of "guilty with a recommendation to mercy on account of his drunkenness."

The appeal against conviction was dismissed without counsel for the Crown being called upon. In delivering an extempore judgment in which Rooth and Northmore JJ. concurred, McMillan said:[5]

2 In a footnote to the section in his draft (it is sec. 27 in the draft: See Queensland Parliamentary papers, C.A. 89-1897, at 13) Sir Samuel says: "This section gives effect to the principle that no man is expected (for the purposes of the Criminal Law, at all events) to be wiser or better than all mankind. It is conceived that it is a rule of Common Law, as it undoubtedly is a rule upon which any jury would desire to act. It may, perhaps, be said that it sums up nearly all the Common Law rules as to excuses for an act which is prima facie criminal." Later, in one of his judgments, he referred to the section, and sec. 24 on Mistake of Fact, as "rules of common sense as much as rules of the law." See Webster & Co. v. A.U.S.N. Co. Ltd., (1902) State R. (Queensland) 207, at 217.

3 (1915) 17 West. Aust. L.R. 96.

4 Following the summing up of Griffith C.J. in Corbett, [1903] State R. (Queensland) 246, at 249.

5 (1915) 17 West. Aust. L.R. 96, at 99.

> "The general rule of law as to intention is that a man intends the natural consequences of his acts, and the natural consequences of drinking to excess is drunkenness. If the argument put forward on behalf of the accused is right, it would make a most material alteration in the law, because a man who has drunk enough to become thoroughly intoxicated would be able to commit crime with impunity unless the Crown could show that he had been deliberately drinking for the purpose of making himself drunk. That in my opinion is not the law."

But in fact the law is specifically laid down in section 28 of the Code, the third paragraph of which reads, "When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed." And if such an intention were an element of the offence it would matter not how the drunkenness was caused. His Honour did seem to appreciate that the drunkenness may have been material if the offence was one requiring proof of specific intent,[6] but accepted without question that attempted rape was not such an offence. It may be argued that in the crime of rape as defined in section 325 "an intention to cause a particular result is not expressly declared to be an element of the offence" and that drunkenness is therefore immaterial.[7] But the charge was *attempted* rape and section 4 of the Code defines attempt in terms of a person "intending to commit an offence," and beginning "to put his intention into execution." It is therefore hard to resist the conclusion that "an intention to cause a specific result" is an element of an attempt to commit any offence. Be that as it may, section 4 of the Code is not even mentioned in the judgment. This was certainly not one of his better judgments. In the judge's favour, however, it may be repeated that the judgment was delivered extempore, and, once again, counsel for the accused does not seem to have assisted. His argument, as summarized in the report, reads: "Drunkenness is not of itself a defence, but drunkenness may continue to such an extent as to render a person incapable of judging between right and wrong, and then it is a defence, and the jury should have been so directed."[8] There is no indication in the report that he

6 And note Dodd, [1961] West. Aust. R. 42, in which both Wolff C.J. at 51 and Jackson S.P.J. at 53 stressed the necessity, on a charge of wilful murder, of leaving to the jury any evidence of partial intoxication.

7 But see Hornbuckle, [1954] Victorian L.R. 281.

8 He cited Meade, [1909] 1 K.B. 985, and Dyson, [1908] 2 K.B. 454, though it is difficult to see what assistance he got from the latter case.

made any reference to section 4 or to the possible significance of drunkenness since *attempt,* and consequently specific intention, was an element of the offence.

No discussion of the criminal law of the McMillan era would be complete without some mention of the *Coulter and Treffene* case. The case is something of a *cause célèbre*[9] in Western Australian annals. It was a startling case, aroused extensive public interest and provided special interest for lawyers too. His Honour was a member of the Court which dealt with the appeal from conviction (he delivered judgment in which Burnside and Northmore JJ. concurred), and subsequently he tried the civil claim which arose out of the incident. His decision in the civil case was reversed by the Full Court and restored by the High Court.

On 21st April 1926 two unarmed police officers of the Special Gold-stealing Squad, Inspector Walsh and Sergeant Pitman, had been shot dead when they came upon the two accused, Coulter and Treffene, at an illicit gold-treatment plant in the bush some miles out of Boulder. Together with Clarke, a third member of their illicit gold-trafficking partnership, they had set about disposing of the bodies, dismembering and endeavouring to burn the parts. Pressed for time and unable to complete the burning they had thrown what was left of the bodies, together with the tools they had used in the gruesome task, down a disused mine shaft. Here some two weeks later, on 12th May, 1926, they were found, a swarm of flies having aroused curiosity. This discovery led to the detection of the offences and Clarke and Treffene were arrested on 6th June. After four days in custody, Clarke broke down and told the whole story as he knew it. Coulter whom the police already suspected was immediately arrested and he and Treffene were charged with the wilful murder of Inspector Walsh. They were both convicted and appealed[10] on the grounds, *inter alia,* that they had been convicted on the uncorroborated evidence of an accomplice and that the judge had failed properly to direct the jury on the question of corroboration; also that he had misdirected the jury on the onus of proof.

Dealing with the former of these grounds, McMillan referred to the statement in ARCHBOLD that the rule requiring the judge to direct

9 It has the doubtful distinction of having been selected by TOM GURR and H. H. COX for inclusion in their FAMOUS AUSTRALIAN CRIMES—crimes which they claim, "[i]n interest . . . challenge comparison with the classic crimes of the Northern Hemisphere."

10 The appeal is reported in (1926) 29 West. Aust. L.R. 40.

the jury not to act on the uncorroborated testimony of an accomplice was not a rule of law but merely one of practice, adding that the enforcement of the rule varied in strictness according to the nature of the evidence and the degree of complicity of the accomplice.[11] Moreover, in Western Australia, His Honour pointed out, there was another factor to be considered. Section 630 of the Code, as first enacted in 1902, expressly provided that a person could not be convicted on the uncorroborated testimony of an accomplice; this provision still appeared in the Queensland Code:[12] the Legislature in Western Australia however had since—and "very rightly," he thought—when it re-enacted the Code in 1913 deleted this provision, thus expressing confirmation of the fact that the requirement was not to be taken to be a rule of law. In any event this ground of appeal would have failed because the trial judge (Draper J.) had in his summing up referred to *Baskerville*[13] and actually warned the jury that it would be unsafe for them to convict on the uncorroborated evidence of Clarke.

On the question of onus of proof His Honour once again started off with a reference to ARCHBOLD and then continued:[14]

> "Treffene, in this case, admitted shooting the two detectives, but he set up the case that the shooting was accidental. The onus was on him to prove that it was an accident, and if this defence failed, both he and the man who was with him were guilty of wilful murder. Coulter not only sheltered himself behind the accidental shooting, but set up an alibi, and Mr. Justice Draper was right when he said that the proof of the alibi was upon Coulter."

This, as an exposition of the law applicable, was possibly correct enough in the light of the then existing authorities. It would certainly not now go unchallenged. Since *Woolmington's case*[15] there can be no question but that the burden of proving the accused's guilt beyond reasonable doubt rests throughout on the prosecution. Statutory requirements and pleas of insanity apart, the accused does not have to

11 The English practice has since then hardened, and the propositions of Lord Simonds L.C. in Davies v. D.P.P., [1954] A.C. 378, [1954] 1 All E.R. 507, in which the other Law Lords concurred, call for a considerably more strict application of what must now be taken, even though it is a rule of practice, to have "the force of a rule of law." But *cf.* Bassett, [1952] Argus L.R. 1035, and Teitler, [1959] Victorian L.R. 321.

12 Queensland Criminal Code 1899, sec. 621; and see Sneesby, [1951] State R. (Queensland) 26.

13 [1916] 2 K.B. 6.

14 (1926) 29 West. Aust. L.R. 40, at 42-43.

15 Woolmington v. D.P.P., [1935] A.C. 462.

"prove" any excusatory circumstances.[16] He carried but an "evidentiary burden", a burden of showing that there is some evidence before the court as a consequence of which the jury are left in doubt as to his guilt. The "proof of the alibi" would therefore not be "upon" the accused. Having raised the issue, there being some evidence of it, then, to use Lord Sankey's words in *Woolmington's case*,[17] "[i]f the jury . . . upon a review of all the evidence, [were] left in reasonable doubt . . . the prisoner [would be] entitled to be acquitted."

The statement that if Treffene's defence of accident failed then "both he and the man who was with him were guilty of wilful murder" must also be taken with caution. If Treffene had in fact shot both police officers, and it is not clear exactly what happened,[18] then Coulter's mere presence would not have made him guilty of wilful murder. His guilt would have depended on the extent to which he had aided, counselled or procured the commission of the offence (in the terms of section 7 of the Code read in the light of section 23)[19] or alternatively whether he and Treffene had had a common intention to prosecute an unlawful purpose of which the killing was the probable consequence (in the terms of section 8).[20]

It is not suggested that the two accused were not guilty or even that they were not proven guilty. It would have been most unfortunate if this were so, because they were both hanged at Fremantle gaol on 25th October 1926.[21]

In the same judgment McMillan also commented on the approach that should be adopted in assessing a judge's direction to the jury. He said:[22]

16 *E.g.*, mistake of fact under sec. 24; and see Geraldton Fisherman's Co-op. v. Munro, [1963] West. Aust. R. 129, at 134, and Loveday v. Ayre, [1955] State R. (Queensland) 264; Brimblecombe v. Duncan, [1958] Queensland R. 264; but *cf.* Gherashe v. Boase, [1959] Argus L.R. 215, and Bonner, [1957] Victorian L.R. 227.

17 [1935] A.C. 462, at 482.

18 It is suggested in the report that he did, though the most generally accepted version is the one contained in FAMOUS AUSTRALIAN CASES—Treffene, having shot the one officer, passed the gun to Coulter and said, "I've done my share, now you do yours." Coulter then shot the second officer.

19 See Solomon, [1959] Queensland R. 123.

20 See Brennan, (1936) 55 Commonwealth L.R. 253, parts of which are criticised in Solomon (supra, note 19), leaving, however, this proposition unaffected.

21 Prior to 1889 executions were carried out at Perth on the site where the museum now stands. From 1889 to 1915 there were 30 hangings at Fremantle gaol; then for a period of almost 8 years there were none. Between 1923 and 1932 there were 7, followed by another respite till 1952 when there was one more. Since 1952 there have been 2, one in 1960 and one in 1961.

22 (1926) 29 West. Aust. L.R. 40, at 43.

> "In criticizing the summing-up it must be looked at as a whole. It is not fair to take out an isolated passage here or there, or take a word or two away from the context. You must look at it as a complete statement and consider what effect it would have on the jury to whom it was addressed. In summing up a judge is entitled to express his own views. He presides at a criminal trial for the purpose of seeing that no innocent person is convicted. It is also his duty, if he can, to see that no guilty person escapes from the consequences of his crimes, and it may be the duty of the judge to prevent a jury from being imposed on by the cock and bull stories which are sometimes told in the criminal court. The judge must be always very careful to make the jury understand that whatever his view of the case may be they are responsible for the facts, and that the responsibility of deciding on the facts rests on them alone."

And this, it is submitted, expresses clearly and correctly how a summing-up should be regarded.[23]

To turn now to the civil suit that arose out of the incident. Clarke had certainly not won himself any general approbation when he turned King's evidence. There was a very real possibility at one stage that he would have been lynched if the mob at the goldfields had had their way. However, having escaped indictment as an accessory after the fact to two wilful murders, and earned his freedom as the result of the blow he had struck in support of the detection of crime and the vindication of justice, he did not see why he should rest content there and not take full advantage of all to which he thought his service to the State entitled him. A reward of £1,000 had been advertised on 21st May 1926—after the discovery of the remains of the officers but before any arrests had been made—by the Commissioner of Police with the Government's authority "for such information as shall lead to the arrest and conviction of the person or persons who committed the murders of John Joseph Walsh and Alfred Henry Pitman." Clarke considered he was entitled to this reward, and he claimed it. The claim was denied. He then issued a writ. The case, *Clarke v. The Crown*,[24] came on for hearing before McMillan, in March 1927, less than six months after he had delivered the judgment on the murder appeal and he was of course well aware of the facts. He had already, in the criminal case, expressed his opinion of Clarke.

[23] *Cf.* the opinion of the Privy Council in Brown, [1960] A.C. 432, [1960] 1 All E.R. 734.

[24] (1927) 29 West. Aust. L.R. 102.

"I have no sympathy with Clarke at all," he had said,[25] " he is a man outside the pale of respectable and honest persons. He is a gold stealer, or what is worse, he is a trafficker in stolen gold, one of those men who encourage miners to be dishonest. Being a man of that character I have no doubt that he is also a liar to this extent that, having no morals at all, he would be ready to deny anything to his disadvantage." And there would have been few people in Western Australia who would have disagreed with the judge. But Clarke's character was not in issue, and neither for that matter were the facts. His Honour accepted that "Clarke gave evidence which was of the greatest value to the Crown . . . Without it, there would have been no case to have been left to the jury." But Clarke himself, though he must have known of the advertised reward, had testified that when he had given the information his object had been to protect himself against a charge of murder, that he had no thought whatever of the reward, and had not even intended claiming it when he gave his evidence at the criminal trial. Counsel for Clarke relied strongly on *Williams v. Carwardine*[26] in which the fact situation was not dissimilar. The plaintiff (though unlike Clarke she had not been a party to the crime) had given information leading to the discovery of a murder and subsequent conviction of the accused, having been prompted by motives other than the proffered reward. She had been held nonetheless entitled to recover. But McMillan expressed his dissatisfaction with the case. He conceded that the "motive of a person in expressing an intention is, in general, immaterial to the question of agreement and cannot be enquired into," but in his opinion "in the case in question [*i.e., Williams v. Carwardine*] there [was] some confusion between motive and intention," and he was therefore "glad to find that his dissatisfaction with it was shared by others," including Sir Frederick Pollock who in the preface to Volume 38 of the Revised Reports suggests that the language of the judgments was unsatisfactory and that the case had been cited more than it deserved. Then, relying on *Carlill v. Carbolic Smoke Ball Co.*,[27] McMillan stated that the real issue was "whether . . . the petitioner performed the condition on the faith of the proclamation, whether the two minds [had] come together so that there [was] that consensus which is necessary to make a contract." These were questions to which he found the answers quite clearly to be in the negative. Clarke had never intended to accept the

25 (1927) 29 West. Aust. L.R. 40, at 45.
26 (1833) 4 B. & Ad. 621; 110 E.R. 590.
27 [1893] 1 Q.B. 256.

offer when he gave the information; he had done so in order to save himself from being charged with murder.

On appeal the Full Court by a majority (Burnside and Draper JJ., with Northmore J. dissenting) reversed this decision,[28] but the High Court in a unanimous decision (Isaacs A.C.J., Higgins and Starke JJ.) restored it.[29] Authority in the United States, referred to both by Isaacs A.C.J.[30] and Higgins J.,[31] is in line with the decision in *Clarke's case* and in South Africa too the same conclusion had been reached.[32] It would seem that *Williams v. Carwardine* is now acceptable, if at all, only on the basis that the plaintiff knew of the offer and accepted it whatever her motive might have been[33] and *Clarke's case* is cited with approval in most of the texts on Contract.[34]

IV. EVIDENCE.

In the course of the very many cases which came before him McMillan made numerous pronouncements on the rules of evidence. Some of these cases have been referred to in other chapters and his rulings on the points of evidence discussed. Of the remainder, three at least warrant some special reference; the first, as a precedent in an area in which precedents do not abound—that evidence of motive is admissible as circumstantial evidence and of the weight it may carry; the second, because it reflects his attitude in the rather difficult policy conflict area of police investigatory powers and individual liberties; and the third, because it is an early expression of a proposition on the question of statutory corroboration that has now become firmly cemented in the law.

The first of these cases was *Moss v. Mutual Life Assurance Co. of New York,*[35] a jury trial at which he was presiding judge. The

28 (1927) 29 West. Aust. L.R. 107.

29 (1927) 40 Commonwealth L.R. 227.

30 *Ibid.*, at 235-236.

31 *Ibid.*, at 241.

32 Bloom v. American Swiss Watch Co., [1915] S. Afr. L.R. (App. Div.) 100.

33 Gibbons v. Proctor, (1891) 64 L.T. 594, which applied Williams v. Carwardine to support a claim for a reward when the information was given before the reward was offered, is not regarded as bad law.

34 See ANSON, LAW OF CONTRACT, (21st ed.), 37; CHESHIRE AND FIFOOT, LAW OF CONTRACT (4th ed.), 45; CHITTY ON CONTRACTS (21st ed.), 35; SALMOND AND WILLIAMS ON CONTRACTS (2nd ed.), 72; WILSON, THE LAW OF CONTRACT, 22; but somehow the case has escaped the attention of the authors of the Australian Pilot to HALSBURY'S LAWS OF ENGLAND.

35 The trial is not reported. For the report of the appeal to the Full Court see (1906) 9 West. Aust. L.R. 12.

plaintiff, as executor of an estate, was seeking to recover from the Company the proceeds of a life assurance policy. The company resisted the claim on the ground, amongst others, that the insured had committed suicide. The evidence given at the trial indicated that the deceased had died out in the bush as the result of an explosion of gelignite held very close to his body, that the explosion was not accidental, and that he had had ample motive for suicide—he was a man of good connections and had just been suspended from his position as manager of an insurance company for embezzling £4,000; prosecution was imminent. His Honour's direction on the suicide issue was as follows:[36]

> "The second ground of defence is one on which most stress has been laid in this case, namely, that of suicide, and I must say that is a part of the case which I feel some trouble in dealing with . . . Counsel for the Assurance Company, Mr. Harney, in asking you to come to the conclusion that [the deceased] committed suicide, laid great stress on the fact that there is here to be found a strong motive for an act which, as a rule, is not committed by a man unless under some influence which strongly urges him to do that from which we should all shrink. Here again the onus is on him. He has to satisfy you that this is not an accidental death, but one brought about by [the deceased testator] Blake's own hand, and if the death is explicable in two ways the presumption is against suicide. It must be made out, to use the expression which was chosen by Mr. Pilkington [counsel for the plaintiff] from one of the cases, "by a preponderance of evidence," and it is really hardly so much a statement of law as of common sense, because no jury ever found that a man had committed an act of self-destruction unless there was a preponderance of evidence . . . If the matter were left so evenly balanced that the jury thought he might have died by accident or by suicide, then of course they would take the former view, and they would assume that he had not committed that which is a crime.[37] They would find that the death was an accidental death. It is in this respect that motive becomes of the greatest importance. Mr. Pilkington

[36] See (1906) 9 West. Aust. L.R. 12.

[37] Regarding the standard of proof of an allegation of a crime within civil proceedings see Helton v. Allen, (1939) 63 Commonwealth L.R. 691, and Hornal v. Neuberger Products Ltd., [1957] 1 Q.B. 247, [1956] 3 All E.R. 970; but *cf.* the Privy Council opinion in Narayan Chettyar v. Official Receiver, Rangoon, [1941] ALLAHABAD L. J. 683, applied in Jones v. Blanch, [1959] Queensland W.N. 59.

very properly told you that motive in itself is no evidence of a crime. If murder has been committed it is possible to put one's hand very often on a person who had every motive to commit the deed, but that in itself is no evidence against the suspected person; but if you found evidence against him, then motive taken in connection with that evidence would make the case much stronger against him than it would be if the motive were absent . . . If on the evidence there is anything which inclines you to believe that Blake did take his own life, then you will be more inclined, and you would be more entitled to give effect to the views which you form if you found that there was at the same time strong motive existing which would acount for his committing that act. You must, therefore, look at all the facts in the case, and one of them, and the most important one, is the presence or absence of motive."

After this direction the question was put to the jury: "Did Harry Irwin Blake die on 6th August by his own hand?" They answered in the affirmative. The plaintiff appealed and the Full Court set aside the verdict and ordered a new trial. It was not denied by any of the judges that the evidence of motive was relevant and admissible but they all seemed to think that the summing up had over-emphasised to the jury the importance given to this evidence. Their decision is not easy to follow especially as both Parker C.J. and Rooth J. accepted that the existence of a motive for self-destruction would suffice to rebut the presumption against suicide. The company then took the case on appeal to the High Court[38] who agreed with McMillan and reversed the Full Court: motive was in the circumstances of the greatest importance and the trial judge had not assigned to it a place in evidence to which it was not entitled.

The second case is *Hough v. Ah Sam*. The accused had been convicted after a summary trial on a charge of having opium, a prohibited import, in his possession. The case against him consisted of the evidence of two customs officers. They had visited the accused's premises, which they found fitted up with opium smokers' benches. The accused had denied to them that he had any opium; but on making a search the officers had found some small quantity in the bottom of a horn container and a second container almost full, both in the ashes in a fire place. Holding up the full container one of the officers had asked the accused where he had obtained it and the accused had replied: "Singapore man bring it from steamer."

38 See Mutual Life Insurance Co. of New York v. Moss, (1906) 4 Commonwealth L.R. 311.

McMillan had already, in his first year on the bench, expressed himself on this question of statements obtained by police officers. The case was *Deeble,*[39] in which he said: "Though there are cases where, before arrest, persons may be asked what they have to say in answer or explanation of the charge, I think the right of the police constables to cross-examine should be very strictly limited, and if any cross-examination takes place it should only be after express warning of the person who is to be cross-examined." And when *Ah Sam's* case came before him on appeal[40] he quashed the conviction on the ground that the accused's answer to the Customs Officer was not admissible in evidence and without it there was insufficient evidence to prove that the opium was imported.

On appeal to the High Court this judgment was reversed. Griffith C.J. stated[41] that he thought that McMillan had been misled by the head-note in *Berriman.*[42] That case, Griffith C. J. continued, did not decide that evidence of admissions made by a prisoner to a constable in answer to questions was inadmissible, although it did contain a strong expression of opinion from Erle J. as to the impropriety of asking such questions. It is submitted with respect to the Chief Justice, however, that McMillan, whose general tendency to quote headnotes has already been referred to, can hardly have been misled by the head-note in *Berriman.* The whole case as reported in Cox's Criminal Cases occupies no more than three pages, and the portion of the judgment dealing with the issue in question takes up but one paragraph. What Erle J. said was:[43] "By the law of this country, no person ought to be made to criminate himself, and no police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police officer is justified, *after a proper caution,* in putting to a suspected person interrogatories with a view to ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be sparingly resorted to. But here there was nothing whatever to show that any offence had been committed by anyone—no finding of any body, no sign of delivery, no marks of blood, not the slightest indication in fact to point to crime, and then

39 (1903) 5 West. Aust. L.R. 56 at 60.

40 Unreported.

41 Hough v. Ah Sam, (1912) 15 Commonwealth L.R. 452, at 455.

42 (1854) 6 Cox C.C. 388.

43 *Ibid.,* at 389 (emphasis aded).

it is sought, by questioning the prisoner on the subject, to establish from her own lips the crime itself, as well as her guilty connexion with it . . . [S]uch practice is entirely opposed to the spirit of our laws." And in this there is surely some support for McMillan's decision, though it is not suggested that it made that decision correct.

The rule as to statements in the nature of confessions obtained by the police or others in similar positions of power has become fairly well established now—the test being whether or not the statement was made voluntarily.[44] In discussion of the question in *Bladock v. Douglas*,[45] Virtue J. quoted from the judgment of Griffith C.J. in *Hough v. Ah Sam*:[46] "There is nothing in law to prevent a constable from putting questions to a prisoner; and whatever the prisoner says in answer may be given in evidence against him, unless the constable has held out some threat or promise, or made some false representation to the prisoner before questioning him." This, Virtue J. thought, expressed the common law rule of exclusion. "But," he continued, "as is pointed out in *McDermott's* case,[47] a practice has grown up in England for extra-judicial confessions made in answer to questions by police officers to be rejected, notwithstanding that the common law rules of exclusion do not apply, if on a broad view of the circumstances under which the confession was obtained the Judge is of opinion that it was not fairly obtained. In particular, such a view may be taken when the so-called Judges' rules have been infringed."

[44] A statement of Barton J. in Hough v. Ah Sam, (1912) 15 Commonwealth L.R. 452, at 457, suggests that the burden of proving that the confession was involuntary is on the accused but this would be contrary to the overwhelming weight of authority the other way. See, for example, the Privy Council in Ibrahim, [1914] A.C. 599, at 609.

[45] (1953) 54 West. Aust. L.R. 82, at 86-89.

[46] (1912) 15 Commonwealth L.R. 452, at 455.

[47] (1948) 76 Commonwealth L.R. 501. The McDermott case does support the view that it is proper for the Courts to reject statements in some circumstances though the common law rules of exclusion have not been infringed. Dixon J., as he then was, put the position (at 515) as follows: "Here as well as in England the law may now be taken to be . . . that a judge at the trial should exclude confessional statements if in all the circumstances he thinks that they have been improperly procured by officers of police, even though he does not consider that the strict rules of law, common law and statutory, require the rejection of the evidence. The Court of Criminal Appeal may review his decision and if it considers a miscarriage has occurred it will allow an appeal from the conviction." The High Court has also discussed the question in Lee, (1950) 82 Commonwealth L.R. 133; Basto, (1950) 91 Commonwealth L.R. 628; and Smith, (1957) 97 Commonwealth L.R. 100; and see Willie, [1960] Queensland R. 525. The Judges' rules were first formulated in 1912 and hence there is no mention of them in Hough v. Ah Sam.

The third case is *Croft*.[48] It came before the Court of Criminal Appeal in the rather unusual manner provided for in section 21 of the Code—on an application for clemency referred by the Attorney-General to the Court for their opinion. The Criminal Practice Rules[49] provide that on such a reference the Court "shall, unless they otherwise determine, consider such points in private." The case was, however, dealt with in open court, because, as McMillan said in delivering the judgment of the Court, a point arose which was "certainly of public importance." The point was whether the unsworn evidence of a child (admissible under section 101 of the Evidence Act provided it is corroborated) may be corroborated by the unsworn evidence of another child. No authorities are cited in the judgment but the same conclusion—answering the question in the negative—was reached as had already been arrived at under similar statutory provisions in Victoria[50] and subsequently reached by the Court of Criminal Appeal in England.[51] In *Scruby*[52] Virtue J., delivering judgment in which Dwyer C.J. and Walker J. concurred, stated that subject to a qualification "*Croft's* case was rightly decided and should be followed." The qualification arose from the too restrictive language used by McMillan. He had said: ". . . the unsworn evidence of a child must be corroborated by the sworn evidence of another person . . . there must be some evidence on oath of some other witness which corroborates the unsworn testimony in some material particular." McMillan probably did not intend deliberately to exclude corroboration by documentary or real evidence, but the Full Court has now made that clear. It has laid down categorically that "the section . . . only excludes as potential corroboration evidence given under its provisions." To this extent the *Scruby* judgment clarifies and possibly even extends the decision in *Croft*. It may be added that the section does not expressly exclude any particular evidence as corroboration. The exclusion is to be implied no doubt from the requirement that the testimony be "corroborated by *other* evidence."[53]

(To be continued.)

48 (1917) 19 West. Aust. L.R. 49.
49 Order XXIII, rule 7.
50 In Rima, (1892) 14 Aust. L. Times 138; 8 Australian D. 593.
51 In Manser, (1934) 25 Cr. App. R. 18.
52 (1952) 55 West. Aust. L.R. 1.
53 See sec. 101 (2) (emphasis added).