

still executory, the son being considerably in arrears with his payments thereunder.

Held, by *Latham C.J.*, *Rich*, *McTiernan* and *Williams JJ.* (*Starke J. dissenting*), that the devise of the real estate was adeemed by the contract for sale, and the confirmation of the will by the codicils did not indicate a contrary intention on the part of the testator.

Decision of *Roper J.*: *Gilder v. Fairweather* (1943) 44 S.R. (N.S.W.) 229; 61 W.N. 50, by majority, affirmed.

APPEAL from the Supreme Court to the High Court.

This was an appeal by a respondent to the High Court from the decision of *Roper J.*(1)

Kitto K.C. (with him *Flattery*), for the appellant.

Mason K.C. (with him *Henry*), for some respondents.

Loxton, for the executor respondent.

Cur. adv. vult.

THE COURT (*LATHAM C.J.*, *RICH*, *MCTIERNAN* AND *WILLIAMS JJ.*, *STARKE J. dissenting*) dismissed the appeal.

Appeal dismissed with costs.

Solicitors for the appellant and some respondents: *Perkins, Stevenson & Co.*

Solicitors for the executor respondent: *W. A. Gilder, Son & Co.*

Solicitors for the other respondents: *Holdsworth, Summers & Garland.*

R. v. WOOLCOTT FORBES.

1944. Court of Criminal Appeal: *Jordan C.J.*, *Halse Rogers* and *Maxwell JJ.*

May 5, 23, 1944.

Criminal law—Indictment—Authority to prefer—Officer other than Attorney-General—Appointment of more than one officer—Crown Prosecutor—Grand jury—Public office—Appointment—Powers of Governor—Advice of Executive Council—9 Geo. IV. c. 83, s. 5—Constitution Act, 17 Vic. No. 41, s. 37—Constitution Act, 1902 No. 32, s. 47—Constitution Statute, 18 & 19 Vic. c. 54 s. 2.

The power to appoint an officer, other than the Attorney-General, in whose name crimes may be prosecuted in the Supreme Court, conferred upon the Governor by s. 5 of the Act, 9 Geo. IV. c. 83, is not limited to the appointment of only one such person. Several persons may hold the office contemporaneously, irrespective of whether the commissions appointing them are general or restricted.

R. v. Hodges and Lynch ((1844) 1 Legge 201), not followed.

Section 5 of 9 Geo. IV. c. 83 is not repugnant to s. 37 of the Constitution Act, 17 Vic. No. 41 (now s. 47 of the Constitution Act, 1902 No. 32), which merely requires, in effect, that the appointment of officers under s. 5 of 9 Geo IV. c. 83, when made after 1855, shall be made by the Governor only with the advice of the Executive Council. Section 5 is not, therefore, repealed by the operation of s. 2 of the Constitution Statute, 18 & 19 Vic. c. 54.

Evidence—Statement by accused—Counsel's address—Good character—Inference—Evidence in rebuttal—Admissibility—Subsequent convictions—Character at time of offence—Similar facts—Guilty intent—Crimes Act, 1900 No. 40, s. 412.

On appeal to the Court of Criminal Appeal against convictions of forging, uttering and falsifying share certificates,

Held, that if an accused person, under the guise of offering evidence relevant to the issue, actually gives evidence which invites the inference that he is a man of good character, evidence to the contrary is admissible in reply.

R. v. Papworth ((1921) 21 S.R. 280 ; 5 Austn Digest 861), applied.

Held, also, that evidence of convictions for frauds perpetrated after the offence charged was committed, is admissible to show the probable character of the accused at that latter time, in the same way as evidence of subsequent similar facts is admissible if they throw light on the existence of a guilty intention as an element of the offence charged.

R. v. Gunn (No. 2) ((1942) 43 S.R. 27 ; Austn Digest (1943) 94), applied.

Evidence—Proof of conviction in foreign Court—Sealed exemplification—Certificate by Judge—Photostat copies—Separate documents fastened together—Not sealed on each sheet—Evidence Act, 1898 No. 11, s. 21 (a) (d).

A number of documents comprising photostatic reproductions of what purported to be records of convictions of an accused person in the District Court of the United States of America for the Southern District of New York, together with a certificate of exemplification under the seal of that Court, authenticated by a person purporting to be a Judge of the Court, and a certificate under the seal of the Court that the person so authenticating was a Judge thereof, all fastened together securely with an apparently undisturbed metal fastener, were tendered in evidence on his trial on charges of forging, uttering and falsifying share certificates.

A witness deposed to the fact that he was present when the documents were issued by the office of the United States Court, and that they had remained in the same condition from that time until they were tendered in evidence.

Held, that it was not necessary for the documents to have been sealed on every sheet and that they were admissible under s. 21 (a) (d) of the Evidence Act, 1898-1940, to prove the convictions of the accused.

Finska Angfartygs A/B & Ors. v. Baring Bros. & Co. Ltd. ((1937) 157 L.T. 585 ; 54 T.L.R. 147), referred to.

Criminal law—Jury—Attempt to bribe juror—No communication to other jurors—Disclosure to Court after verdict—New trial.

A member of a jury, during the course of a criminal trial, was offered a bribe if he would use his influence to sway the jury in favour of the accused. He refused

and did not mention the matter to the other jurors until after they had agreed upon their verdict, and then only for the purpose of enabling him to make a statement to the Court. There was nothing to suggest that the accused was responsible for the offer of the bribe, or that the juror had allowed the incident to affect his impartiality.

Held, that the accused was not entitled to a new trial.

CRIMINAL APPEAL.

This was an appeal under the provisions of the Criminal Appeal Act of 1912. The appellant, John Woolcott Forbes, was convicted, on 22nd March, 1944, upon a number of charges of forging, uttering and falsifying share certificates. He was sentenced to penal servitude for five years.

On the hearing of the appeal it was argued that the indictment was bad because the Crown Prosecutor who preferred it had no authority to do so. It appeared that Mr. Crawford, the Crown Prosecutor in question, received a general commission on 1st May, 1940, to take effect on 6th May, 1940. At that time, Mr. McKean, who subsequently died on 2nd August, 1940, still held a general commission issued on 27th February, 1927. It was submitted, for the appellant, that two persons could not, at the same time, hold commissions under the provisions of 9 Geo. IV. c. 83 s. 5, as officers in whose name, in addition to that of the Attorney-General, crimes may be prosecuted in the Supreme Court.

At the trial the Crown adduced evidence that the accused had, after committing the alleged offences, left New South Wales surreptitiously and had subsequently absconded from his bail at Bombay. Ostensibly in order to meet this evidence the accused, in the course of a statement from the dock, referred at length to his life history, both before and after the time that the offences alleged were committed, including references to his struggles to obtain an honest living in France and America after he had absconded from his bail. He stressed how he had endeavoured to further the interests of the Company to which the certificates in question related, his loyalty to his business associates, his wife and children, and his high-minded motives in his business dealings connected with the alleged criminal transactions. He mentioned the names of a number of gentlemen of good standing as being those of his friends and co-directors. Further details of this evidence are set out in the judgment of his Honour the Chief Justice. His counsel, too, in his opening address, put the accused forward as a man of integrity and one loyal to his associates.

The trial judge being of opinion, in effect, that the accused was inviting the jury to draw the inference that he was a man of blameless character, more sinned against than sinning, and one unlikely to commit the offence charged, admitted evidence in reply to prove that the accused had been previously convicted in the United States of America of certain offences arising out of frauds or attempts to defraud, perpetrated when he was in that country after committing the present offences.

These convictions in America, were proved by a number of photostat copies of the records of the American Court. These copies consisted of individual sheets, which though not themselves sealed with the seal of the American Court, were all securely fastened to certain certificates under the seal of the Court and signed by a Judge thereof, and formed, in effect, one

document. Details of these certificates are set out in the judgment of his Honour the Chief Justice. Oral evidence was given by a witness who said that he was present when the documents were issued by the office of the American Court and that they had remained in the same condition since that time until tendered in evidence.

After the jury had returned their verdict the foreman announced that a juror wished to make a statement to the Court. The juror then said that during the course of the trial he had been approached by a man who under promise of secrecy extracted from the juror, informed him that the trial would shortly take a turn favourable to the accused. He told the juror that if he would use his influence to sway the jury he would be paid a large sum of money. The juror said he then informed this person that he was not interested and that he would not allow the matter to influence his decision one way or the other.

The juror did not inform his fellow members of the jury of these facts until after they had agreed upon their verdict, and then, apparently, only for the purpose of making a statement to the Court. On appeal, it was argued that as a result of this attempt to bribe the juror, the accused was entitled, virtually as of right, to a new trial.

Shand K.C., Smyth and Cullity, for the appellant.

Crawford K.C. and Shannon, for the Crown.

Cur. adv. vult.

May 23.

JORDAN C.J. The appellant was convicted at the Central Criminal Court upon nine charges concerned with three different share certificates, in relation to each of which he was charged, under ss. 292 and 175 respectively of the Crimes Act, 1900, with forgery, uttering and falsification.

Three grounds have been argued upon the appeal: (1) that the indictment was bad, because preferred by a Crown Prosecutor who had no authority to prefer it, (2) that evidence of bad character was wrongly admitted, and (3) that an attempt had been made to bribe a juror.

As regards the first of these grounds, it was provided by s. 5 of the Act, 9 Geo. IV. c. 83, that, until further provision should be made as therein-after directed for proceeding by juries, all crimes, misdemeanours and offences cognizable in the Supreme Courts of New South Wales and Van Diemen's Land should be prosecuted by information in the name of His Majesty's Attorney-General or other officer duly appointed for such purpose by the Governors of New South Wales and Van Diemen's Land respectively, and all issues of fact joined on every such information should be tried by one or more of the respective Judges of the said courts and seven commissioned officers of His Majesty's sea or land forces. Section 10 empowered the King, by order issued with advice of the Privy Council, to authorise the Governors of New South Wales and Van Diemen's Land respectively or either of them, with the advice of the Legislative Council of the said Colonies respectively, or either of them, further to extend and apply the form and manner of proceeding by grand and petit juries or either of them in the

presentment and trial of all crimes, etc., and whenever and so far as such manner of proceeding by juries should from time to time be extended and applied as aforesaid then the form and manner of proceeding thereinbefore directed as well in the prosecution of offences as in the trial of issues should cease and determine. Each of the two sections deals with two distinct matters, how a man is to be put on his trial upon a criminal charge, and how he is to be tried. The methods prevailing at the time in England were that he was put on his trial by indictment by a grand jury, and was then tried by a petit jury. Prior to the Act 9 Geo. IV. c. 83, the method of presentment for trial by grand jury obtained in New South Wales: *R. v. McKaye*.⁽¹⁾ The sections, taken together, enable the adoption in New South Wales of both grand and petit juries or either of them, but provide that, save to the extent to which this is done, an information in the name of the Attorney-General or other duly appointed officer shall take the place of indictment by grand jury, and trial by commissioned officers shall take the place of trial by petit jury. Provision was afterwards made for trial by petit jury; but no provision has been made for indictment by grand jury. Hence, s. 5 of 9 Geo. IV. c. 83 still provides the method for putting persons on their trial in the Supreme Court.

For the appellant, it was in the first instance boldly contended that s. 5 has been inoperative since 1855. The Imperial Act 18 & 19 Vic. c. 54, it was said, provided by s. 2 that so much of 9 Geo. IV. c. 83 as was repugnant to the new Constitution should be repealed. The new Constitution (17 Vic. No. 41), provided, by s. 37 (now consolidated in the Constitution Act 1902 No. 32, as s. 47) that (with certain exceptions not here material) the appointment of all public offices under the Government of the Colony thereafter to become vacant or to be created should be vested in the Governor with the advice of the Executive Council. It was in the Governor, it was said, that s. 5 vested the power to appoint an officer to prosecute by information. Section 37 requires appointments to be made by the Governor with the advice of the Executive Council. Hence, s. 5 must be taken to have been repealed. There is no substance in this. All that s. 37 did in this respect was to make any power of the Governor, which, so far as s. 5 was concerned, was exercisable by him at his discretion, thenceforth exercisable by him only with the advice of the Executive Council.

It was next said that s. 5 does not enable the Governor with the advice of the Executive Council to appoint more than one officer at a time in whose name (in addition to that of the Attorney-General) crimes may be prosecuted in the Supreme Court, that is to say, that when an officer has been appointed, no other may be appointed so long as the first appointment still subsists. Hence, the information, which was the foundation of the trial, was bad, because it was presented by Mr. Crawford, who had been purported to be appointed by a commission issued in the lifetime of Mr. McKean who already held a general commission.

This turns upon the proper construction of s. 5, read in relation to its subject matter. When by statute the Crown is authorised to appoint a person to render services, it depends upon the language of the statute and the nature of the services, whether it is intended to provide for a single office which is to be filled by one person and one person only, who is to

(1) (1885) 6 N.S.W.L.R. 123 at 127; 5 Austn Digest 975.

continue to hold it until he vacates it by death, resignation or removal, or whether the Crown is to be at liberty to appoint a person from time to time to render the services as and when they may be required, so that several persons may be appointed successively, or even concurrently if the services are such as to be required at the same time in widely separated places or are otherwise incapable of being conveniently undertaken by a single person. The provision made by 4 Vic. No. 22, s. 22, for the appointment of a Master in Equity, and by clause IX of the Charter of Justice, for the appointment of a Prothonotary, are examples of the first. A provision authorising the appointment of a person to wind the clocks, clean the windows, or sweep the chimneys of government buildings would be an instance of the second. For the appellant we were pressed by the decision of this Court in *R. v. Hodges and Lynch* (1) given in the year 1844. The Act 9 Geo. IV. c. 83, s. 17, made provision for the institution of Courts of General and Quarter Sessions, before which, crimes were to be prosecuted and tried in the same manner as prescribed for the Supreme Courts. Section 10 of the Act 4 Vic. No. 22, after reciting s. 5 of 9 Geo. IV. c. 83, and that it was expedient that separate officers should be appointed to prosecute in Port Phillip and New Zealand, provided that until Grand Juries be established the Governor of New South Wales might appoint from time to time some fit and proper person for Port Phillip and a like person for New Zealand by whom and in whose name crimes cognizable in the Supreme Court and in the several Courts of General and Quarter Sessions should be prosecuted, and also that the Governor might appoint any officer or officers by whom and in whose name crimes cognizable in the several Courts of General and Quarter Sessions in all other parts of the Colony might be prosecuted. The question was, whether an information had been properly presented at Quarter Sessions. Mr. Cheeke had been appointed by the Governor by commission dated 2nd June, 1841, pursuant to 4 Vic. No. 22, to be the person by whom and in whose name crimes cognizable in the several Courts of Quarter Sessions in all parts of the Colony except Port Phillip and New Zealand should be prosecuted. On 3rd January, 1844, Mr. Rogers received a commission from the Governor appointing him to be Crown Prosecutor at the Parramatta Quarter Sessions. This was held by the Court of Quarter Sessions to be invalid; and an information was then lodged in the name of Mr. Cheeke. The Supreme Court expressed the view that, Mr. Cheeke never having resigned his commission of 1841, it would follow that, until a vacancy occurred, the Governor could not appoint anyone in his stead. It said also that the words "officer or officers" must be read distributively, and did not enable the appointment of more than one officer for the same Quarter Sessions. It accepted the view that the commission to Mr. Rogers was issued in mistake and was void, and concluded that Mr. Cheeke's commission must still be regarded as operative.

This authority certainly supports the view that s. 5 of 9 Geo. IV. c. 83 authorises the appointment of only one person in whose name crimes may be prosecuted in the Supreme Court. But the view is one which appears never afterwards to have been taken or acted on. Thus, in *R. v. Ellis* (2) the Full Court in 1852 upheld an indictment before the Supreme Court by information lodged by Mr. Callaghan, acting by commission as the person

 (1) (1844) 1 Legge 201.

(2) (1852) 1 Legge 749.

for the time being performing the functions of a grand jury, notwithstanding that his authority was a temporary one, extending only over the particular assizes. The Court did not appear to be treating the position occupied by Mr. Callaghan as a single office capable of being filled only when a vacancy occurred, although it is true that there is nothing to indicate whether there was at the time a person holding a general commission.

The course taken by the Legislature in relation to Circuit Courts may be regarded as throwing some light on the question. After provision had been made in 1840, by the Act 4 Vic. No. 22, for the holding of Circuit Courts by Judges of the Supreme Court, it was provided by 5 Vic. No. 4, s. 10, that crimes cognizable therein might be tried in the said Courts respectively upon information or informations exhibited therein by and in the name of the Attorney- or Solicitor-General or either of them, or in case of their absence from any such Court, by and in the name of such other person as the Governor should have appointed or should thereafter appoint in that behalf. This section was consolidated as s. 29 of the Supreme Court and Circuit Courts Act, 1900. In 1912, when Circuit Courts were abolished and provision was made for sittings of the Supreme Court at all circuit towns or any place in New South Wales, s. 29 was repealed. The Legislature had previously recognised that for the purposes of Circuit Courts sitting in widely separated parts of New South Wales, it was necessary to make provision for the appointment by the Governor for every such Court of a person in whose name informations might be exhibited (1900, No. 35, s. 29). The repeal of this section when provision was made for sittings of the Supreme Court in country districts indicates that the Legislature regarded the matter as being sufficiently covered by s. 5 of 9 Geo. IV. c. 83, which deals generally with the presentment of persons upon criminal charges in the Supreme Court.

Having regard to the kind of duties to be performed by an officer appointed under s. 5 of 9 Geo. IV. c. 83, in whose name crimes may be prosecuted in the Supreme Court, to the exacting nature of those duties, and to the wide range of territory over which they have to be performed, and having regard also to the course taken by the Legislature in relation to trials upon circuit, I think that it is proper to attribute to the Legislature an intention that more than one officer at a time may be appointed under that section. If this be correct, I see no reason for introducing implied restrictions upon the power of the Executive Government in this respect—no reason why restricted commissions should not co-exist with a general commission or why several general commissions should not exist together. This is certainly the view which has for many years been acted on in practice. We have been informed that since the year 1922 the Solicitor-General has held a general commission for the Supreme Court issued under 9 Geo. IV. c. 83, s. 5, and that since that date general commissions have also been held, and acted upon, successively, by Mr. Coyle, by Mr. McKean, to whom a general commission was issued on 2nd February, 1927, and by Mr. Crawford to whom a general commission was issued on 1st May, 1940, to take effect from 6th May, 1940. In addition, since 1912, innumerable commissions limited to particular circuit towns have been issued under s. 5 to members of the Bar appointed to prosecute at those towns. If the contention now raised be correct, it would follow that most if not all convictions in the Supreme Court during the last twenty years, whether at the Central Criminal Court or

on circuit, have been nullities. I do not think that we are forced to so startling a conclusion. We have been informed that Mr. McKean died on 2nd August, 1940, and had been prevented by illness from a time antecedent to Mr. Crawford's appointment from performing any duties under his commission. For the reasons which I have stated, I think this to be immaterial, and I am also of the opinion that there is no substance in the ground first taken.

It was next contended that evidence of the appellant's bad character should not have been admitted, and alternatively, that if such evidence was admissible, evidence of convictions for offences subsequent to the offence charged was not admissible, and in any event the convictions put in evidence were not properly authenticated.

Section 412 of the Crimes Act, 1900, provides that evidence to the character of the accused shall, in all cases, be received and dealt with as evidence on the question of his guilt. So far, however, as the reception, under this section, of evidence of bad character is concerned, it may be received only to rebut evidence given or elicited on behalf of the accused from himself or others that his character or antecedents are such that it is unlikely that he would do such an act as is charged against him, not to suggest that because of his bad character he is probably guilty: *R. v. Papworth* (1); *Maxwell v. The Director of Public Prosecutions* (2); *R. v. Hutton* (3); *MacDonald v. The King* (4).

It was contended for the appellant that all that had been done on his behalf was to meet evidence given against him that he had left Sydney surreptitiously and had subsequently absconded from his bail in Bombay. We have been informed, and it is not disputed, that counsel for the appellant, when opening the defence to the jury, said that the accused alone had fought a long fight for the company; his loyalty was his undoing, his loyalty to the company, to Bush whom he loved, to his wife and children: that sent him out of the country. In his statement made from the dock, the appellant said that he had endeavoured to get men around him and associated with him whom he could trust and depend on, and for years he had as friends and directors Sir Daniel Levy, barrister and Speaker of the House, Mr. Barnard, a barrister of New Zealand, Mr. Goldsmid, head of the Merchant Traders Association, Mr. Alec McLachlan, solicitor, Mr. Pellew, for many years the Chief Inspector of the Guardian Trustee, a million pound company, who "left that company to join us." . . . "I felt quite happy to be associated with having men like that around me." Later in his statement he said: ". . . I came to a decision that as managing director the shareholders looked to me and I thought I owed it as a duty, I was in honour bound to the shareholders and it was up to me as I was drawing a big salary to do all that I could to support the company." Later again, he said: "I feel because of my lack of education and business experience and my great trust and faith in other people and those I trusted was the cause of my downfall and why I stand in this dock before you today." Referring to his departure from Australia he said: "When I left Perth several good friends

(1) (1921) 21 S.R. 280; 5 Austn Digest 861.

(2) [1935] A.C. 309 at 318-9.

(3) (1936) 36 S.R. 534 at 542; Austn Digest (1934-1939) 811.

(4) (1935) 52 C.L.R. 739; Austn Digest (1934-1939) 584.

came down to see me off including an old friend of mine of 20 years standing, the Commissioner of Police. He met me at the train at Perth, and he came down to see me off, and he gave me a letter to a leading official at Scotland Yard, who was very friendly with him." After this, he attributed his absconding from his bail at Bombay to anxiousness through having learned that his wife was ill in London. He said that he himself became ill in Paris and had to go into a private hospital. He then continued as follows: "When I came out of that private hospital—I had been thinking things over and I had read some papers from Australia—I felt sick at heart with people who I had trusted, who had come into Court and had sworn false evidence against me, and helped people to put the worst construction upon my actions. I had no money, and my wife had very little money, and I went down and did some labouring work, at Maison la Fête, and I earned sufficient money there, which was not very much, for what was required, and I eventually went to the United States of America. Gentlemen you can understand that my wife and children came to America and they had nothing. The war was on and it made conditions difficult, and because I felt that I had burned my boats by clearing out from Bombay, I went on living under an assumed name in an endeavour to earn sufficient money to send to my wife and children to keep them from want."

The impression which this material produces upon me is that the appellant was being held out, and was holding himself out, as an injured innocent whose only fault, if so fine a character could be said to have a fault, was his intense loyalty to his company and to associates, less sensitive than himself upon the point of honour, who had betrayed his confidence; that he was happy in the society of men in high positions and that such men accepted him as their associate; that he had a high sense of honour; that he was a man whom the Commissioner of Police of Western Australia accepted as an old friend of twenty years' standing, and of whom the Commissioner thought so highly that he met him at the train on his arrival, saw him off on his departure, and regarded him as a person suitable to be provided with a letter of introduction to a leading official at Scotland Yard; and that when he was in the United States of America he occupied himself laudably in that, although he lived there under an assumed name, this was in an endeavour to obtain money honestly by earning it, in order to send it to his wife and children. This was the impression which his statement made on the learned trial Judge who heard him make it, and I have no doubt that this was the impression it was designed to produce on the jury.

In my opinion, therefore, evidence of the appellant's actual character was admissible in order to dispel the erroneous impression which he was thus seeking to produce. This being so, I am clearly of opinion that evidence of convictions for frauds subsequently perpetrated by him in the United States in the years 1939, 1940 and 1941 was admissible to throw light on his probable character in 1937, in the same way that evidence of subsequent similar facts may be admissible if they throw light on the probability of the existence of guilty intention as an element of the offence charged: *R. v. Gunn* (No. 2). (1) *Nemo repente fuit turpissimus*.

I am of opinion, also, that the convictions were properly proved in evidence. Section 21 (a) and (d) of the Evidence Act, 1898-1940, provides

that evidence of any judicial proceeding in any Court of Justice out of New South Wales may be given by production of a copy thereof sealed with the seal of such Court. The learned trial Judge admitted in evidence a document consisting of a front sheet in the following form: "The President of the United States of America. To all to whom these presents shall come Greeting: Know ye, that we have inspected the records and files of the District Court of the United States for the Southern District of New York, do find certain paper writings there, remaining of record, in the words and figures following to wit." There follow a number of sheets consisting of photostat copies of convictions of the appellant, under a number of aliases, and another person upon five charges of offences against the postal laws of the United States and upon 21 charges of unlawfully using the post office of the United States to further a conspiracy to defraud a large number of persons, to all of which the appellant pleaded guilty. The last sheet continues, "All of which we have caused by these presents to be exemplified, and the seal of the said District Court to be hereunto affixed." There follow the seal of the Court authenticated by a Judge of the Court, and a certificate that the authenticating person is a Judge, the certificate being itself authenticated by the seal of the Court. The sheets with the interposed photostat copies are all securely fastened together with a metal fastener which shows no sign of having been disturbed. In my opinion the document was admissible. The section does not require the copy to have the seal of the Court on every sheet; and, in addition, evidence was given by a witness that he was present when the document was issued by the office of the United States Court, and that the sheets have remained in the same condition, with the fastener in the same state, from the date of their issue until the date of their tender. It may be pointed out that it was held in *Finska Angfartygs A/B & Ors. v. Baring Bros. & Co. Ltd.* (1) that a section corresponding with s. 21 does not supply an exclusive method of proof.

The last ground of appeal was based upon an incident which occurred after the jury had given their verdict. The foreman said that a jurymen wished to make a statement. One of the jurymen then said that on Sunday the 12th March (after the trial had been in progress for five days) a man visited him at his home, and, after obtaining from him a promise that whatever he said would be kept in confidence, told him that in the following week the case would take a turn favorable to Forbes, and that if he was prepared to use his influence to sway the jury he would be paid £200 in small notes. The jurymen replied that he was not interested, and would not allow the matter to influence his decision one way or the other. He did not at once report the matter to the Court, because of the undertaking he had given. "I would not take notice of what he told me." It was not until after the jury had reached their decision that he told the others of the occurrence.

It was submitted that, in view of this incident, the appellant was entitled, virtually as of right, to a new trial. I entirely disagree with this submission. To yield to it would have the gravest effect on the administration of justice in criminal matters. It would mean, in effect, that no rogue with sufficient money or sufficient influence need ever allow himself to be convicted. By procuring a friend to offer a bribe to a jurymen, he could secure an in-

(1) (1937) 157 L.T. 585 : 54 T.L.R. 147.

definite number of new trials until at length, either because a jurymen was found willing to accept the bribe, or for some other reason, an acquittal was procured. An accused person who was not prepared to go to these lengths could always, by means of this device, obtain at least one new trial if the case appeared to be taking a turn unfavorable to him. There is nothing in the present case to indicate that the appellant was responsible for the offer of the bribe. But unless such an incident of itself necessitates a new trial, and I am of opinion that it does not, there are no circumstances in the case now before us which justify our directing one. There is nothing to suggest that the jurymen allowed the incident to influence him save to the extent that this was unavoidably involved in the mere fact of its occurrence. On the contrary, his attitude was that he would not allow it to influence him one way or the other. He would take no notice of it. And there is certainly nothing to suggest that it was allowed to influence the other jurymen. He made no mention of it to them until a decision had been arrived at, and then apparently, only in order that the foreman might announce to the Court that he desired to make a statement. In these circumstances I am of opinion that this ground fails also.

It follows that, in my opinion, for the reasons which I have stated, the appeal should be dismissed.

HALSE ROGERS J. The first ground of appeal in this case was that there was a mis-trial because the indictment was preferred by a Crown Prosecutor who was not the person appointed by the Governor, in whose name crimes might be prosecuted.

This point was not raised at the trial, although objection was taken to the indictment on the ground that an *ex officio* indictment could not be preferred in respect of a felony.

The point now raised involves a novel challenge to the practice of the Supreme Court in its criminal jurisdiction, a practice which has prevailed for many years without challenge.

The point taken is purely technical, and is based on a reading of 9 Geo. IV. c. 83, s. 5, which is claimed to be supported by the decision in *R. v. Hodges and Lynch*.⁽¹⁾ Put shortly, the contention is that as 9 Geo. IV. c. 83, s. 5, provided that crimes in New South Wales may be prosecuted in the name of the Attorney-General or other officer appointed for that purpose by the Governor, only one person can be so appointed, and that any purported further appointment so long as a person properly appointed holds such a commission, is invalid. Evidence on affidavit was supplied that Mr. L.J. McKean had been appointed as "an officer by whom all crimes, misdemeanours and offences cognizable in the Supreme Court shall and may by information in his name be prosecuted," and that whilst he was still living and his commission was uncanceled, a further commission was issued in 1940 to Mr. Crawford, naming him as an officer in whose name such prosecution might be made. The indictment in the present case was filed by Mr. Crawford purporting to act under that commission.

In *R. v. Hodges and Lynch* (1), this Court had to decide whether a commission to prosecute issued to a Mr. Cheeke was valid. It was objected that the information on which the judgment against the prisoners was

(1) (1844) 1 Legge 201.

founded was not presented by an officer properly authorised by law for that purpose. The suggested grounds of invalidity were (1) the form of the commission issued to Mr. Cheeke who presented the information, and (2) the fact that subsequent to the date of Mr. Cheeke's commission another commission to prosecute had been issued to Mr. Rogers, and that such commission had superseded that granted to Mr. Cheeke. It is to be noted that Mr. Cheeke's commission was to prosecute at Quarter Sessions. Mr. Rogers' commission is said to have appointed him to be "Crown Prosecutor" although that designation is not used in the Act under which the purported appointment was made. The Court held that notwithstanding certain irregularities the commission granted to Mr. Cheeke was valid. The judgment then proceeded: (1)

"Were we not satisfied on this point, the Court would have been greatly embarrassed in dealing with the other objection, namely, that supposing Mr. Cheeke's commission to have been properly issued, still it has been superseded by a subsequent commission issued to Mr. Rogers for the same identical purposes, and duly notified in the *Government Gazette*."

After considering at length the circumstances of Mr. Rogers' appointment the Court went on to say: (2)

"Much discussion took place before us as to the effect of Mr. Rogers's commission and the publication of his appointment in the *Gazette*, as having the legal consequence of superseding Mr. Cheeke's commission. The latter gentleman swears that he never resigned his commission. If so, it would follow that until a vacancy was created, the Governor could not appoint anyone in his stead. It was however argued by the Attorney-General that Mr. Rogers's appointment was consistent with that of Mr. Cheeke, for by the peculiar wording of the local ordinance, the Governor might appoint more than one Crown Prosecutor for the Quarter Sessions, for the words are 'officer or officers,' but we think that these words must be read distributively, and do not import a power of appointing any number of officers for the same Quarter Sessions. It would seem that after Mr. Rogers's appointment and before it was published, some communication took place between the Governor and Mr. Cheeke, and the Chairman of the Quarter Sessions respectively, in which oral arrangement was made that Mr. Cheeke should continue to act as Crown Prosecutor under his commission. Still we have the somewhat anomalous fact of two persons holding commissions at the same time, from the same authority, for the performance of the same duty—an irregularity which has led to considerable embarrassment. It is true that the Quarter Sessions adjudged Mr. Rogers's commission to be void, and we are not prepared to say that, as a Court of Record, the Sessions had not full power and authority to determine upon the fitness and qualifications of an officer presented to them for the conduct and despatch of such important duties as those of Crown Prosecutor, notwithstanding that Mr. Rogers held a commission for the purpose. To hold otherwise, would, on public grounds, deprive a Court of Justice of a most important privilege, and lay it open to have perhaps the most unfit person thrust into an office, concerning the administration of justice, for which he was

wholly disqualified. Setting aside this consideration, there was the important fact, however, that Mr. *Rogers* was never qualified for the office, nor accepted it, but repudiated it."

It is that passage in the judgment which is called in aid for the present appellant, and the argument presented to us is mainly founded on the sentence "It would follow that until a vacancy was created, the Governor could not appoint anyone in his stead."

It is to be observed that the Court was not called upon to determine the point which the Chief Justice said would have caused it great embarrassment.

Actually the Court was not dealing with a commission to prosecute in the Supreme Court. It was concerned with the validity of a presentment at Quarter Sessions, and it was claimed that for that particular sittings of the Quarter Sessions at Parramatta two persons had been appointed to prosecute.

The dicta in the passage which I have quoted seem to show that the Court was of opinion that the Act did not authorise concurrent commissions to different persons giving authority to prosecute. But the point now raised was not actually before the Court, and we are not, in considering the question before us, bound by any authority on the matter. A hundred years have passed since the decision in *R. v. Hodges and Lynch* (1), and the point now relied upon has never in the meantime been raised.

As already pointed out, 9 Geo. IV. c. 83, s. 5, provides that crimes cognizable in the Supreme Court and in Courts of Quarter Sessions shall be prosecuted in the name of the Attorney-General or other officer appointed for that purpose by the Governor of the Colony. By 4 Vic. No. 22, s. 10, provision was made for the appointment of an officer or officers by whom and in whose name all crimes, misdemeanours and offences cognizable in the several Courts of General and Quarter Sessions may be prosecuted. This provision was re-enacted in the Crimes Act, 1900, and still regulates the practice of Courts of Quarter Sessions.

After the institution of Circuit Courts, some question apparently arose as to the power to appoint separate officers to prosecute in the different Circuit Courts, and by the statute 5 Vic. No. 4, s. 10, which has as a side note the words "Declaratory clause as to prosecutor in Circuit Courts," it was provided "And be it declared and enacted That all crimes and offences which have been and are respectively cognizable in the said several Circuit Courts shall until the constitution of grand Juries within the said Colony continue to be so cognizable and may be tried in the said Courts respectively upon information or informations exhibited therein by and in the name of Her Majesty's Attorney or Solicitor General for the time being of the said Colony or either of them or in the case of their absence from any such Court by and in the name of such other person as the Governor for the time being of the said Colony shall have appointed or shall hereafter appoint in that behalf." It is to be noted that this provision was made before the hearing of the case of *R. v. Hodges and Lynch* (1), and the fact that no mention of it was made shows clearly how limited was the scope of the inquiry in that case, that is to say, that it concerned the validity of concurrent commissions for the same Court of Quarter Sessions and nothing more.

After the enactment of 5 Vic. No. 4, s. 10, already referred to, the practice of appointing separate Crown Prosecutors for separate Courts continued until 1912, the provisions of s. 10 abovementioned having been incorporated in the Supreme Court and Circuit Courts Act, 1900, in s. 29. There was no alteration in the practice in regard to Circuit Courts until 1912, when they were abolished, and the consolidating section of the 1900 Act was then repealed. Since 1912, the practice of appointing separate Crown Prosecutors for the Courts to be held in the various country towns has continued. The argument for the appellant in this case amounts to this, that by inadvertence the Legislature in 1912 abolished the machinery for the prosecution of crimes in such Circuit Courts and substituted nothing in its place. I cannot accept that view. I think that the proper view is that when the provisions as to Circuit Courts were repealed and provision made for sittings of the Supreme Court in country towns, it was deemed by the Legislature that the powers given to the Governor by 9 Geo. IV. c. 83, s. 5 of appointing an officer in whose name crimes and misdemeanours might be prosecuted in the Supreme Court, enabled him to make such concurrent appointments as were necessary for the carrying on of the work of the Circuit Court in its several sittings. In other words, I am of opinion that the Legislature must be taken to have regarded s. 10 of the Act, 5 Vic. No. 4 as having put an interpretation upon the section of the earlier Act conferring upon the Governor the power of appointing to prosecute on behalf of the Crown in the Supreme Court and in view of what had taken place over a period of one hundred years, to have deemed that the matter was not now open to question. For these reasons, I think that the first ground taken on behalf of the appellant fails.

It was argued that s. 5 of 9 Geo. IV. c. 83 had been inoperative since the passing of the Constitution Act in 1855, but I am of opinion that that argument cannot be supported.

The second ground of appeal was that the learned Judge was in error in admitting evidence of previous convictions of the accused. It was claimed that the accused had not raised the question of character at all, and consequently such evidence should not have been allowed to go before the jury. In *R. v. Papworth* (1), Cullen, C.J. said :

“ Where evidence is adduced on behalf of an accused person that tends to show he is a man of such character that he would be unlikely to commit the offence charged, that being a line of defence open under the Crimes Act to all accused persons on the question of guilt or innocence, then in order to prevent the jury from being misled regarding the credibility of the person who denies the guilt charged, it is open to show that his story about previous respectability and good character is not true, and therefore that his word is not to be trusted in such a way as an ordinary witness might be.”

It is clear that the learned trial Judge was of opinion that if the statement made by the accused from the dock were left to stand alone, then the jury might be misled as to his credibility, and it was in order that the jury might be informed as to the history of the accused so that they might have some basis on which they might test his credibility that the learned Judge decided to allow the evidence to be given. When one reads the statement

made by the accused one cannot come to any conclusion but that the accused was presenting himself to the jury as a man of good associates and unblemished career. It is true that he does not say this in so many words, that he does not mention the word character at all, but it is also clear what was the impression which he intended the jury to carry with them into the jury room. His reference to his associations was obviously made in the hope that the jury would apply the principle *noscitur a sociis*. Not only was this so, but we are informed that counsel for the accused, who was allowed to make an opening address on his behalf put him forward as a person of integrity and loyalty to his associates. I think that the evidence was properly admitted.

The next ground raised was that the proof of the convictions was not sufficient or not in accordance with the requirements of the law. On this point I have nothing to add to what has been said by the Chief Justice.

The last point raised was as to the statement made by the jurymen after verdict given as to the attempt to suborn him. I am not quite clear on what principle Mr. Shand has based his claim that the occurrence of this incident necessitates a new trial. There is no suggestion that it affected the indifference of the jurymen concerned, and all that we know in regard to the other jurymen is that they were unaware of the occurrence until after they had reached their verdict. I agree with what has been said by the Chief Justice as to the dangers which would be created by the allowance of such a ground of appeal as this, and I am of opinion that this ground of appeal also fails.

MAXWELL J. I have had the advantage of reading the reasons of the Chief Justice and Halse Rogers J., and have nothing to add on the first ground of appeal.

With respect to the second ground, it was argued on behalf of the appellant that this evidence was wrongly admitted because, in effect, good character had not been raised by the prisoner; it was urged that he had offered evidence in his statement from the dock in answer to evidence by the prosecution as to the circumstances of his leaving the State and later absconding from bail at Bombay. The contention on his behalf was that he was entitled to meet that with evidence which might incidentally have the colour of evidence as to character without being met with evidence to the contrary, so long as the defence confined itself to evidence which was relevant to rebuttal.

In my opinion, an accused person must be entitled to call evidence relevant to meeting evidence called by the Crown, even though it may cover the same field as evidence as to character, without contrary evidence as to character being made admissible against him: *R. v. Papworth*.⁽¹⁾ But if under the guise of offering evidence relevant to the issue before the jury he offers evidence as to character he cannot be heard to complain if he is met with evidence in reply within s. 412 of the Crimes Act, 1900.

The simple question in this instance is whether the prisoner's statement was limited to answering relevant evidence or went beyond it. I entertain no doubt that it was not so limited, but that on the contrary he was offering evidence as to character within s. 412. For the purpose of resolving this

(1) (1921) 21 S.R. 280 at 281; 5 Austn Digest 861.

question the Court is entitled to have regard to the opening, in this case, made by the prisoner's counsel. An examination of the prisoner's statement standing alone establishes that character was being raised. Read in the light of passages in counsel's opening on his behalf to which we have been referred, it is, if possible, even more abundantly made clear.

As to the objection to the nature (being subsequent to the offences charged) and the form of that evidence admitted in rebuttal at the instance of the Crown, I agree with the reasons of the Chief Justice and have nothing to add.

As to the third ground, the argument on behalf of the prisoner as to the juror's statement—set out in full in the Chief Justice's reasons—was that the inescapable conclusion was that the prisoner could not have had a fair trial by the juror who made the statement. It was faintly suggested that some at least of the remaining jurors might have been affected by it. As to this latter contention, the order of events disposes of that immediately. As to the juror directly affected, in my opinion there is no substance in the objection raised; indeed, whilst one can well appreciate the juror's embarrassment in one sense at the happening of the incident, the careful course adopted by him to bring the matter, first to the notice of his fellow-jurors after a decision had been reached, and later to the notice of the Court, shows that he was perhaps unusually mindful of his duty and no less careful to approach a decision guided only by the evidence in the case and in accordance with his obligations as a juror.

I agree that the appeal fails.

Appeal dismissed.

Solicitors for the appellant: *Harold J. Price & Co.*

PUBLIC TRUSTEE *v.* SMITH AND OTHERS.

1944. In Equity: Roper J.

May 5; June 29, 1944.

Will—Construction—Meaning of "money"—Charity—Trust—Discretion—Bequest of money for Masses—Charitable and non-charitable objects—Apportionment.

By a home-made will the testator, after instructions for his burial, authorised the giving to a named Church of some money for Masses for himself, his parents and relatives "out of the money still due to me and if any left to be given to" two named persons.