and *Maclenan v. Segar*[10] and accepting an oft-quoted dictum of McCardie J. in the latter,[11] as the correct statement of the law, Fullagar J. explained the occupier's contractual liability in this way: "The obligation is, in legal theory, contractual, but the liability depends on a breach by somebody at some stage of a common law duty . . . to use reasonable care. It seems clear that the rule does not impose liability in the absence of negligence on the part of anybody".[12]

Upon whom rests the burden of proving negligence in cases of this kind? "I think that the true rule is, that the burden rests on a plaintiff in this class of case of proving negligence . . . It may be thought that the position should be otherwise: the occupier is the person most likely to be in possession of material facts. But it does not seem to me that the authorities warrant saying that the occupier must satisfy the Court or a jury that an unsafe condition of his premises was not due to anybody's negligence. It does not, of course, follow that a plaintiff may not in some circumstances be able to launch a case without specifying an act or omission on the part of any particular person as responsible for the defect or danger".[13]

Kitto J. concurred in the judgments delivered.

HAROLD SEGAL

[10] [1917] 2 K.B. 325.
[11] *Ibid.* 332-333.
[12] [1953] A.L.R. 665, 674.
[13] *Ibid.*, 675.

BIGAMY — PROOF OF ABSENCE FOR SEVEN YEARS

A POINT of considerable importance in the administration of the criminal law was considered by the Full Court of the Supreme Court of Victoria in *R. v. Broughton.*[1] The accused, who was convicted of bigamy, claimed that the trial judge was incorrect in directing the jury:— (1) that the onus of proving his wife's absence for seven years lay on the accused and he was bound to establish this on the balance of probabilities (2) that an honest and reasonable belief by the accused that his wife had been absent for seven years would be no defence.

The second direction was held to be inconsistent with *Thomas v. R.*,[2] in which case the accused, who honestly but mistakenly believed that a prior marriage of the woman he first married had not been dissolved, because the decree nisi had not been made absolute, was acquitted. However the present writer finds it difficult to see how the principle applies to this case for the presence or absence of one's conjugal partner would hardly seem to be a matter for mere belief.[3]

[1] [1953] A.L.R. 866.
[2] (1938) 59 C.L.R. 279.
[3] Defined as "conviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others"—*Bouvier's Law Dictionary* (1948) p. 118.

Moreover it could be argued that the *Thomas* case is not authority for the proposition stated, and for a defence to be made out under the statutory exceptions nothing short of actual fulfilment will suffice.

A difference of opinion occurred over the first direction. In a joint judgment Lowe A.C.J. and Barry J. denied that the defence could be separated into two distinct elements—absence of the other spouse for seven years and absence of knowledge on the part of the accused that the other spouse was living within that time—with the prisoner required to prove the former and the Crown to disprove the latter. . .[4] "when facts are in evidence putting in issue the existence of any one of the exemptions, the ultimate onus of establishing their non-existence lies on the Crown, and . . . the obligation does not rest upon the accused . . . to establish that they do exist."[5] Thus the Crown was bound to prove that the accused was aware of the existence of his wife during the last seven years. For this principle *D.P.P. v. Woolmington*[6] was cited.

Gavan Duffy J. (dissenting on this ground) adopted the remarks of Dixon J. in *Dowling v. Bowie*:[7] "A qualification or exception to a general principle of liability may express an exculpation . . . which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it."[8] On this principle the accused is required to prove the absence of his wife for seven years and until he has discharged this burden he is not entitled to the protection of the exception. However the practical impossibility of proving a negative—that he has not heard of her during this period—has been recognised in *R. v. Curgewen*[9] and *R. v. Spark*,[10] so that the Crown must then adduce evidence that he has heard of his wife during the seven years period. *Woolmington's* case did no more than establish that the crown must prove every constituent of the offence charged.[11]

While this is an important decision on the proper direction for

[4] [1953] A.L.R. 866, 868. [5] *Ibid.* 867. [6] [1935] A.C. 462.
[7] [1952] A.L.R. 1001, 1003. In this case it was held that before a prosecution could be launched under Section 141 of the Liquor Licensing Ordinance 1939-1952 of the Northern Territory the prosecution was required to prove the non-existence of a declaration exempting a person from its provisions; the argument proceeding on the ground that until this was proved the section was *prima facie* inapplicable. [8] [1953] A.L.R. 866, 869.
[9] (1865) L.R. 1 C.C.R. 1. [10] (1885) 11 V.L.R. 405.
[11] [1953] A.L.R. 866, 873.

the jury, the difference in views is not so extreme as might appear. According to both views the accused must adduce "some evidence which shows that it is a genuine and not a purely speculative question"[12] that he is within the exception. It is for the jury to determine the cogency of such evidence. It is submitted that not only is the first test more comprehensible to the lay mind but it is also correct in law. It is only in recent times that it has been possible for the accused and his wife to give evidence,[13] and to place the burden of proof on the accused in these circumstances would have been iniquitous. Moreover, although *Woolmington's* case can be avoided in that the Lord Chancellor excluded "any statutory exception"[14] the interpretation given to the case by Gavan Duffy J. is contrary to the principle that it is sufficient for a prisoner "to raise doubt as to his guilt; he is not bound to satisfy the jury of his innocence".[15]

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[12] *Ibid.* 867.
[13] In England, Criminal Evidence Act 1898; in Victoria, Crimes Act 1915. (No. 2). [14] [1935] A.C. 462, 481. [15] *Ibid.* 481.

CONSTITUTIONAL LAW (AUSTRALIA)
S. 92 — ANOTHER CASE

McNee v. Barrow Bros. Commission Agency Pty. Ltd. [1954] A.L.R. 105[1] a decision of a single judge of the Supreme Court of Victoria is an interesting contribution to the many judicial pronouncements on s. 92 of the Commonwealth Constitution.

Regulation 47(e) of the Egg and Egg Pulp Marketing Board Regulations made pursuant to s. 43 (1) of the Marketing of Primary Products Act 1935 (Vic.) prohibits the conversion of eggs into whole egg pulp without the consent of the Board. Sholl J. held that the regulation violated s. 92 in so far as it purported to prevent the pulping of cracked eggs imported as such from New South Wales by the defendant Company (in the course of its wholesale dairy produce business) for the sole and only practicable purpose of pulping and resale as egg pulp. Its operation upon the pulping of certain sound eggs imported as such (includings eggs which became cracked in transport or in regrading on arrival in Melbourne) was valid under s. 92 and severable,[2] but ultra vires the enabling statute.

[1] Also reported in [1954] 1 V.L.R. 1.
[2] [1954] A.L.R. 105, 118. The effect of s. 92 upon its operation is merely distributive, for it can in the words of Dixon J. "independently affect the persons or things within power in the same way and with the same results as if the full intended operation of the legislation had been valid". *The Commonwealth v. Bank of N.S.W.* (1948) 76 C.L.R. 1, 370.