as liable in all contracts unless in contracting the Crown did not comply with statutory requirements,[25] or a subsequent statute was passed enabling the Crown to revoke the contract.[26]

As, however, situations arose where the imposition of otherwise clear contractual obligations on the Crown would create governmental or political difficulties, a new approach negativing such liability has been discovered.

Already Denning J. in *Robertson v. Minister of Pensions*[27] (while attempting to explain the real reasons for Rowlatt J.s' decision in *The Amphitrite*[28]) has distinguished between binding promises creating contractual obligations on the part of the Crown and mere expressions of intention by the Executive. The further development of this view has been successfully continued in the present action. Without considering the real issues concerning Crown liability, but never forgetting that one of the parties to the alleged contract was the Crown, the obligations of the Commonwealth Government were negatived with the assistance of the respectable and innocent-looking principles of the law relating to offer and acceptance.

Thus while the successful development of the modern law required the extermination of archaic fictions, new artificial legal concepts have been evolved sacrificing progress to convenience.

I. I. KAVASS

[25] *Commercial Cable Co. v. Government of Newfoundland* [1916] 2 A.C. 210; *Auckland Harbour Board v. The King* [1924] A.C. 318; *Commonwealth v. Colonial Ammunition Co.* (1923) 34 C.L.R. 198.
[26] *Ransom & Luck Ltd. v. Surbiton Borough Council* [1949] Ch. 180.
[27] *Supra.* [28] *Supra.*

EVIDENCE=RECALL OF WITNESSES–ADMISSION OF FRESH EVIDENCE AFTER CLOSE OF CASE

"In our opinion, when a jury desires that a witness should be questioned further at any time before verdict, that may be done, and we add that if the question is relevant, and no compelling contrary reason exists, it is desirable that such a request should be complied with."[1]

These words are found in the decision of the Full Court of the Supreme Court of Victoria (Gavan Duffy, Barry and Dean JJ.) delivered by Barry J. in the case of *R. v. Hodgkinson.*[2] Barry J. continued:[3]

"It follows that when a witness is thus recalled if, in fairness, either counsel should be allowed to question him, or another witness should also be recalled and questioned, it is within the competence of the judge to permit that to be done. . . If, however, the effect of acceding to a jury's request would be to put a prisoner at

[1] [1954] V.L.R. 148. [2] [1954] V.L.R. 140. [3] *Ibid,* 148.

a disadvantage by the presentation of what is virtually a new case against him, then, of course, the trial judge, guided by the considerations discussed in *Shaw's* case,[4] should exercise his discretion against permitting the recall of the witness".

The jury at Hodgkinson's trial, after the evidence had ended, asked what was the nature of a certain "something", which one of the police witnesses said he had seen the prisoner throw away. The Chairman of General Sessions recalled the witness, who said that the "something" was an ornamental watch. The prisoner cross-examined the witness and gave his own version on oath of the incident.

He was convicted, and his application for leave to appeal was rejected by the Full Court.

The law relating to the recall of witnesses and admission of fresh evidence after the close of a case dates back to the decision of Tindal C.J. in *R. v. Frost*.[5] Two reports of this case exist. In what seems the more probable version,[6] the learned Chief Justice lays down that "if any matter arises *ex improviso,* which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply".

In 1907, Cussen J. in *R. v. Collins*[7] called a fresh witness at the request of the jury, after they had retired, and refused to allow a case to be stated for the opinion of the Full Court. His decision, however, had some doubts cast upon it by the decision of the High Court of Australia in *Titheradge v. The King*.[8] In the last-mentioned case the High Court allowed an appeal in a case where the trial Judge had called a fresh witness, and had asked him questions and called other witnesses to disprove his veracity.

Admittedly, in *Titheradge v. The King* there was no request by the jury that the witness be called, and the decision was based to some extent on the fact that the course taken had brought "the tribunal into the arena of the parties",[9] but, with due respect, *R. v. Collins* does not seem to be good law.

This belief is borne out by the case of *Shaw v. The Queen* where the majority of the High Court held that a trial judge had been wrong to accede to the request of the Crown to recall witnesses, in order to disprove statements made by the prisoner in his defence – statements which, it should have been obvious, would have formed part of such defence. In giving this decision the High Court laid down that, although the Judge has a discretionary power to allow the Crown to reopen its case and adduce further evidence after the

[4] *Shaw v. The Queen* (1952) 85 C.L.R. 365.
[5] (1839) 4 St. Tr. (N.S.) 86; (1839) 9 Car. & P. 129.
[6] (1839) 9 Car. & P. 129, 159. See the discussion in *Shaw v. The Queen* (1952) 85 C.L.R. 365, 379-80.
[7] [1907] V.L.R. 292.
[8] (1917) 24 C.L.R. 107.
[9] *Per* Barton J. *ibid.* 117.

close of the case for the defence, it is only in very exceptional cases that such a course should be permitted.

R. v. Hodgkinson, it is respectfully submitted, is not such an "exceptional case", nor did any matter arise *"ex improviso"* which the Crown could not foresee. Even though the Supreme Court did not "feel constrained" to accept English decisions on matters of procedure, it seems that its decision in this case conflicts with that of the High Court in *Shaw's* case, and, to a lesser extent, with that in *Titheradge v. The King,* where the statement of the law by Tindal C.J. was adopted.

The Court did not accept *Reg. v. Owen,*[10] a decision of the English Court of Criminal Appeal which held that it is too late to allow further evidence to be given after the summing up, on the ground that a later decision of the same Court, *Reg. v. Sanderson,*[11] ignored it. This view is incorrect, for the latter case contained clear evidence of exceptional circumstances which even Tindal C.J. would have accepted as such.

The position in Victoria, therefore, is that the latest decision of the Supreme Court on this point is in direct conflict with the law already laid down by the High Court. Even if the High Court for reasons of practical convenience affirms, rather than overruling *R. v. Hodgkinson,* we will be left with diverging streams of authority—one for England and the other for Australia.

Such a situation, as we have seen in respect of the diverging authorities regarding, for example, the burden of proof in divorce petitions based on adultery, is hardly satisfactory.

P. G. NASH

[10] [1952] 2 Q.B. 362.

[11] (1953) 37 Cr. App. R. 32.

TRANSFER OF LAND—MENTAL INCAPACITY OF TRANSFEROR—VOIDABILITY, BUT NO AVOIDANCE, OF INSTRUMENT OF TRANSFER

An interesting case dealing with a problem of some importance is *Gibbons v. Wright.*[1]

Two sisters and the appellant, their sister-in-law, became joint tenants of land in Hobart in 1943. The respondent was the executor of the sisters' wills. The joint tenancy was established by means of transfers whereby each joint tenant transferred her interest to the other in consideration of a similar transfer by the other to her. These transfers were duly registered and the three joint owners shortly afterwards purported to sever the joint tenancy and establish a tenancy in common. If the instruments of transfer took effect according to their terms, they were effectual in vesting a tenancy in common in the three women in equal shares.

[1] [1954] A.L.R. 383.