The argument for the Attorney-General of Victoria was that the impugned provisions did not show a sufficient connection with the subject of marriage to fall within the ambit of s. 51(xxi) of the Constitution, that the legitimation provisions were concerned with a status arising under State law which regulated matters such as the devolution of property, and that such matters were the exclusive province of the States.

Kitto J., one of the majority judges, in sustaining the legitimation provisions, placed emphasis on the fact that it was a basic end of marriage to provide a pre-requisite for the legal recognition of family relationships and that a law providing for legitimation *per subsequens matrimonium* added to this legal significance of marriage.[17] On the other hand, McTiernan J. considered that the term "marriage" in s. 51 bore its own limitations and that the legitimation of children born *before* marriage was outside its province.[18] Dixon C.J., who also dissented, pointed out that the impugned provisions left their legal imprint almost entirely on matters within the province of the State: matters such as the guardianship of infants and the interpretation of statutes dealing with succession to property where the word "child" was used. For this reason he was not prepared to categorize the law as one with respect to "marriage". The bigamy provision was sustained by all members of the Court on the ground that it was designed to prevent the profanation of the marriage ceremony.[19]

The instant case illustrates what has been described as the "expansive" interpretation of the various heads of power vested in the Commonwealth by the placita of s. 51 of the Constitution—an interpretation which has its origins in the *Engineers' Case*. It also suggests that with the growth of Commonwealth legislation on matters of private law which fall within these placita the time is near when interpretation of such federal statute law will lead to the evolution of an extensive Commonwealth common law.

R. D. LUMB

Availability of Certiorari

The decision of the Full Court of Queensland in *The Queen v. Tennant ex parte Wood*[1] is noteworthy in regard to the limitation applied to the use of certiorari to correct an error of law of a non-jurisdictional type appearing on the face of the record of the proceedings before an administrative tribunal or inferior court. This particular use of certiorari, as is well known, was resurrected by the Court of Appeal in *R. v. Northumberland Compensation Appeal*

17. (1962) 36 A.L.J.R. 104 at p. 111.
18. *Ibid.*, at p. 109.
19. *Ibid.*, at p. 107.
1. [1962] Qd.R. 241.

Tribunal, Ex parte Shaw[2] after a long period of disuse, though its existence had been previously recognised in Australia, for instance by Dixon J., as he then was, in *Parisienne Basket Shoe Pty. Ltd. v. Whyte*[3] and by the Queensland Full Court in *R. v. Southern Division Railway Appeal Board ex parte Noonan.*[4] Any limitation on the availability of *certiorari* in such situations disclosed by English cases since the *Northumberland* case had stemmed for the most part from the uncertainty surrounding the question as to what can properly be said to constitute the "record", particularly in the case of an administrative tribunal. There was no clear indication of a limitation depending on the nature of the error of law, though undoubtedly there are some *dicta* in the older cases *e.g. Walsall Overseers v. London & North Western Railway*[5] which might be construed as suggesting that not every patent error of law justifies certiorari.

In the *Tennant* case a member of the Queensland Land Court had had referred to him the matter of determination of the unimproved value of certain land. A question arose as to the admission of a recently made valuation of the Valuer-General. Though the Land Court member admitted the valuation, he did so apparently only as an act of grace by reason of the "equity and good conscience" clause in the *Land Acts*. He was regarded by Wanstall J. (with whose judgment Mansfield C.J. agreed) as proceeding on the basis that the valuation was not merely not conclusive evidence of value but could not be legal evidence at all on the matter before him and as arriving at his decision without paying any regard to it. It was argued that this amounted to error of law on the face of the record entitling the prosecutrix to certiorari.

Wanstall J. was satisfied that the language of the Land Court member would not entitle the prosecutrix to certiorari on the jurisdictional ground as it amounted to no more than an erroneous exercise of jurisdiction; it did not constitute "a refusal, nor an abuse nor an excess of jurisdiction". Passing to the ground of non-jurisdictional error of law on the face of the record (*i.e.* the ground of the *Northumberland* case), he held, on the tenor of the reasoning in the older cases such as the *Walsall Overseers* case,[6] *R. v. Bolton*[7] and *R. v. Nat Bell Liquors*,[8] that this ground was limited to the case where the error of law was such as to render the ultimate order of the tribunal *invalid*. In the instant case he regarded the error as one as to admissibility of evidence and such an error he regarded as in principle insufficient to ground *certiorari* except perhaps when the rest of the evidence could be characterised as amounting to no

2. [1951] 1 K.B. 711.
3. (1938) 59 C.L.R. 369 at 392.
4. [1930] St.R.Qd. 10.
5. (1878) 4 App.Cas. 30 at 40.
6. *Ibid* at 39, 40.
7. (1841) 1 Q.B. 66, 72 *et seq.*
8. [1922] 2 A.C. 128.

evidence at all to justify the order made. Here the error made could not be regarded as vitiating the ultimate opinion of the Land Court which was reached upon a consideration of relevant evidence.

Stanley J., the third member of the Court, was less incisive as he considered that the remarks of the Land Court member merely showed ambiguity but he said "even if we had power to act upon the Land Court's mistaken conclusion as to the lack of weight of any evidence, I cannot see that error manifestly appears on the face of these proceedings because in them the Land Court attributed no weight to the valuations then under discussion".[9] These remarks seem to suggest that the learned judge did not consider that the error, if any, was a patent one apparent on the face of the record.

So far as concerns the proposition enunciated by Wanstall J. that an error as to the admissibility of evidence may not be regarded as such an error within jurisdiction as to ground certiorari, the English authorities referred to by him appear to supply support only by very indirect implication, as Lord Sumner in the *dicta* in *R. v. Nat Bell Liquors*,[10] referred to in *Davies v. Price*,[11] was dealing with and rejecting a submission that want of essential evidence was on the same footing as want of *jurisdiction*.

The judgment of Wanstall J. betrays a strong desire to limit the generality of some of the *dicta* in the *Northumberland* decision under the apprehension that that decision might open the way to a "spate of applications for certiorari to correct any kind of patent error of law no matter how immaterial to the actual decision".[12] The distinction between the prerogative jurisdiction and the ordinary appellate jurisdiction of the superior courts would thus become lost.

It may be conceded that an error of law which is clearly shown to be immaterial to the decision made should not be regarded as sufficient to ground this special variety of certiorari. However it would appear to be reasonable that once error appears it should rest on those who support the decision to show that it was not dependent on such error. In the situation of the *Tennant* case—and this must go for many situations where admissibility of evidence is involved—the position was that the error may have affected the decision though it was not certain that it did. To require that the prosecutrix should establish that it did would appear unreasonably to restrict what could be a very salutary use of certiorari.

E. I. SYKES*

9. [1962] Qd.R. at 252.
10. [1922] 2 A.C. at 151.
11. [1958] 1 All E.R. 671 at 676.
12. [1962] Qd.R. at 258.

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CRIMINAL LAW

Evidence By Spouses in Criminal Cases

(a) *Simple Offences*

In *Finglas v. Cahill*[1] the defendant had been convicted of assault in a court of petty sessions. At the hearing of the charge, the stipendiary magistrate allowed the wife of the defendant to give evidence for the complainant notwithstanding the objection of the defendant. The defendant appealed by way of order to review upon two grounds one of which was that the stipendiary magistrate was wrong in law in admitting the evidence of his (*i.e.* the defendant's) wife. Although the case was not one involving the liberty, health or person of the wife of the defendant, the Full Court held that she was competent to give evidence for the complainant in these circumstances.

The judgment of Hanger J., with whom Stanley and Mack JJ. agreed, in essence turned upon the construction of the *Evidence and Discovery Act of* 1867 s. 5 which provides:

> On the trial of any issue joined or of any matter or question or on any inquiry arising in any suit action or other proceeding in any court of justice . . . the parties thereto . . . and the husbands and wives of such parties . . . shall except as hereinafter excepted be competent and compellable to give evidence . . . on behalf of either or any of the parties to the said suit action or other proceeding.

Hanger J. held that this provision extended to criminal proceedings, so that standing alone it "would have made the defendant in a criminal trial, and the husband or wife of the defendant in a criminal trial, both competent and compellable as witnesses, whether in respect of an indictable offence or a simple offence."[2]

In actual fact the abovementioned provision did not in 1867 alter the law with respect to criminal proceedings for ss. 7 and 8 of the same Act, in effect, made s. 5 inapplicable to criminal proceedings. However, as interpreted by the Full Court in *Finglas v. Cahill*, s. 5 was to have a considerable delayed effect; for when in 1892 s. 7 was substantially amended and s. 8 repealed,[3] apparently in order to allow s. 3 of *The Criminal Law Amendment Act* (1892) a free operation,[4] s. 5 of *The Evidence and Discovery Act of* 1867 became applicable to criminal proceedings, at least in respect of *simple* offences. The law with respect to *indictable* offences was governed by the newly enacted s. 3 of *The Criminal Law Amendment Act* (1892), the first paragraph of which is now to be found in s. 618A

1. [1961] Qd.R. 323.
2. at p. 327.
3. *The Criminal Law Amendment Act* (1892) s. 2.
4. See Hanger J. in *R. v. Miller* [1962] Qd.R. 594 at p. 597.