Supreme and County Court Decisions

CANADA

Federal Court of Canada, Trial Division

DUBE J.

JUNE 8, 1981

Wool v. The Queen and Nixon*

Rights and duties of a police officer — application for injunction to restrain a superior officer from removing him from an investigation and from transferring him to other duties — duty of the superior officer — injunction not available.

REASONS FOR ORDER

DUBE J.: This is an application by the plaintiff, a staff-sergeant in the Royal Canadian Mounted Police, for an interim injunction enjoining his Commanding Officer, Chief Supt. H.T. Nixon, of the "M" Division in the Yukon, from interfering with the investigation of the Honourable Chris Pearson, Government Leader, and the Honourable Douglas Graham, former Minister of Justice, of the Yukon Government.

The application also seeks to enjoin the said Nixon from transferring the plaintiff to other duties and/or out of the Yukon, from removing him from the carriage of the case, and from taking any disciplinary action against him.

And the application prays for an order of the court appointing an independent Crown counsel to consult with the plaintiff on the investigation, as well as for an order of the court preserving all material relating to the investigation.

It appears from the plaintiff's affidavit and related

* Editor's Note: This case has only recently come to our attention. It deals both generally with the duties of police officers to enforce the criminal law and, specifically, with the right of a police officer to compel the continuance of an investigation of which he has been relieved. In view of the dearth of cases on the topic, it is thought desirable to report it even at this late date.
A.W.M.

documents filed in support of his motion that in 1978 he became the plainclothes unit coordinator for commercial crime investigations in the Yukon. In the course of an investigation of land developer and contractor Barry Bellchambers with respect to a fraudulent land scheme at Whitehorse, Yukon, he was led to believe that Bellchambers might receive assistance to avoid prosecution from Graham. He instigated an investigation of Graham who was made aware of it through Pearson.

In November, 1979, A. A. Sarchuk of Winnipeg was appointed by Douglas Rutherford, Assistant Deputy Attorney-General of Canada, as special prosecutor on the case. On February 1, 1981, Nixon ordered the plaintiff not to go to Ottawa to discuss the case with Rutherford, who would make the decision as to whether or not Graham would be prosecuted. On March 4, 1981, Nixon informed him that he was no longer in charge of the plainclothes unit and on April 13, 1981, directed that he halt further investigation of the Graham/Pearson case. On May 15, 1981, Nixon caused the plaintiff to be transferred within the division to the uniformed position of Section N.C.O. and ordered him to surrender all exhibits and other material to Inspector Pott, now responsible for the investigation. On May 19, 1981, Nixon recommended his transfer from the Yukon.

In his affidavit the plaintiff claims that he has reasonable and probable grounds to believe that an offence has been committed, that he has a duty to lay a criminal information, and that Nixon's order not to do so is not a lawful order in that it purports to limit his rights as a peace officer and a citizen under s. 455 of the Criminal Code, and his duty under s. 18 of the Royal Canadian Mounted Police Act. The plaintiff fears that the exhibits will be disposed of.

The reasons given for suspending the investigation also appear in the documents attached to the affidavit. Nixon's memo to the plaintiff dated April 13, 1981, includes this paragraph:

> 6. I cannot support expending more time, effort and expense investigating the political intrigue of Yukon, as this is outside our mandate. I therefore direct that you halt further investigation of the principals involved in this case and that you not expend any

further energy in compiling a "Brief" on PEARSON. As a senior N.C.O., I expect you to accept my direction in the spirit of a "team" approach.

A further memo between the two parties dated May 8, 1981, includes this paragraph:

> 2. It is significant that review of this case at Division Headquarters, Force Headquarters and the Department of Justice, Ottawa, all reach the same conclusion: That prosecution of GRAHAM is not warranted.

A memo dated April 22, 1981, from T.S. Venner, Director, Criminal Investigation, to Nixon includes this paragraph:

> Having reviewed the evidence, I am of the opinion that the evidence falls slightly short of that required to initiate criminal proceedings against Douglas Graham.

Annexed to the memos is a letter of Rutherford, the Assistant Deputy Attorney-General of Canada, to Venner dated April 2, 1981, which includes this paragraph:

> There is, and there always has been evidence suggesting possible criminal impropriety on the part of Mr. Graham concerning what he did or attempted to do in relation to the fraud investigation of which Bellchambers was the object. All the significant direct evidence against Mr. Graham in that regard was considered by Mr. Sarchuk and his carefully considered opinion, which I accepted at the time it was given, was that Graham's behaviour fell slightly short of establishing a prima facie case of breach of trust. I see no evidentiary foundation in the completed brief, to justify a different conclusion now.

On December 19, 1979, Sarchuk, the special prosecutor, had written a very comprehensive report to the Department of Justice. The following quotations reflect his opinion in the matter:

> However, it is my opinion that Graham's conduct stops short of constituting a criminal offence — short by a hair's breadth. There is no doubt in my mind that if he could have helped Bellchambers, he would have, but that is not the same as an attempt to do so.
>
> . . . . . .
>
> Although I do not reach this conclusion without some doubt, my best judgment is that Graham's conduct borders on the commission of an offence and if there were evidence of one overt

> act designed to assist Bellchambers or interfere with the course of the investigation, I may have on balance reached a different conclusion.

The long letter goes on to reflect favourably on the competence of the plaintiff, but sheds doubts as to his perspective in the matter.

> I am most pleased with the assistance that has been given to me, particularly by Mr. Blanchflower and by Cpl. Turnbull, who will be, I trust, the R.C.M.P. investigator from this point in time on. I deliberately mention that since I have formed the conclusion that Sgt. Wool, although an extremely competent investigator, has lived with the matter so long and is so close to the case, that it might be a little difficult for him to retain the proper perspective. I repeat that I say that without criticism. It is a natural end product of living with a case for a substantial period of time. I make that comment with another concern in mind, that is the fact that the investigation and synopsis prepared for us in relation to Graham was done by Sgt. Wool.

The judicial principles upon which interlocutory injunctions have been granted in the Federal Court of Canada are, firstly, that the applicant must show a *prima facie* case. Then he must show that irreparable harm will follow if his rights are not protected. And the court will exercise its judicial discretion as to where lies the balance of convenience between the parties. But first the applicant must show that he has an apparent right (*vide*, *Canadian Javelin Ltd. v. Sparling et al.*[1]). Even under the more lenient test expounded by Lord Diplock in the *American Cyanamid Co. v. Ethicon Ltd.*,[2] a House of Lords decision, still the applicant must satisfy the court that there is a substantial issue to be tried.

Under s. 455 of the Criminal Code, the section referred to by the plaintiff, any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence *may* lay an information. The other provision relied upon by the plaintiff is s. 18 of the Royal Canadian Mounted Police Act. The opening paragraph reads as follows:

> 18. It is the duty of members of the force who are peace

[1] (1978), 4 B.L.R. 153, 59 C.P.R. (2d) 146 (F.C.T.D.), affd 91 D.L.R. (3d) 64, 59 C.P.R. (2d) 165 (F.C.A.).
[2] [1975] A.C. 396.

officers, *subject to the orders of the Commissioner*, (emphasis mine)

The section then goes on to list all the duties to be performed by members of the force. Thus it may be seen at the outset that whereas the plaintiff has a right to lay an information, that right is not absolute, but subject to the orders of the Commissioner.

It is trite law that no injunction will lie against the Queen, or against her servant, unless the latter was involved in a breach of his duty — not his general duty towards the Crown — but a specific duty the breach of which would impair the applicant's legal rights. The courts do not issue commands to the Crown when a servant of the Crown acting in his capacity of servant is liable to answer only to the Crown. When the servant has been designated by statute to fulfil a particular act which runs in favour of the applicant in whom is created a particular right and the servant refuses to discharge that duty, he is then amenable to the ordinary process of the court (*vide*, *Her Majesty The Queen et al. v. Leong Ba Chai*).[3]

In my view, the duty of Nixon with reference to the investigation is towards the Crown, or the public at large. He owes no duty to the applicant, and the applicant has demonstrated no particular personal individual right, aside from whatever right he may hold as a member of the general public, to see that the administration of justice is properly carried out. A Commanding Officer is accountable to his superior and to the Crown, not to a staff-sergeant under him. He has the administrative discretion to decide what proportion of his resources will be deployed towards one particular investigation. Generally, the court has no jurisdiction at the suit of a subject, or at the suit of a member of the force, to restrain the Crown, or its officers acting as servants, from discharging their proper discretionary functions (*vide*, *A.-G. Ont. v. Toronto Junction Recreation Club*).[4]

As appears from the material filed by the applicant himself, full consideration was given to the continuation of the investi-

[3] (1953), 107 C.C.C. 337, [1954] S.C.R. 10, [1954] 1 D.L.R. 401.
[4] (1904), 8 O.L.R. 440 (H.C.J.).

gation by the special prosecutor, by the Director of Criminal Investigation, by the Commanding Officer and by the Assistant Deputy Attorney-General of Canada. They looked into the matter and decided that there was not sufficient evidence to obtain a conviction and that further time and money should not be expended on the matter. That decision is of the type which those officers of the Crown are authorized to make. It is not incumbent upon the court to substitute itself to properly appointed officers and to make administrative decisions in their stead. The view that the plaintiff, albeit a competent investigator, has been too long with the case and may have lost the proper perspective of it is a judgment call within the purview of the authority of a Commanding Officer (*vide*, *Regina v. Commissioner of Police of the Metropolis*, *Ex parte Blackburn*).[5]

Lord Denning M.R. dealt with the duty of a British chief officer of police to prosecute and said as follows:

> In approaching the question whether or not a duty to prosecute exists it is necessary to consider the history, practice and law as to the bringing of prosecutions. No general duty exists to prosecute in any particular case. Only a right to prosecute exists. It is frequently used by the police; in exceptional cases consent has to be obtained from, e.g. the Director of Public Prosecutions to bring a prosecution. The respondent has the right to prosecute in common with his constables and with all persons.... If any duty to prosecute exists in the repondent it is owed to the Crown whose servant he is; it is not owed to any member of the public ....[6]

Again, whatever duty the Commanding Officer has to prosecute under the Canadian Criminal Code and under our Royal Canadian Mounted Police Act, said duty is owing to the Crown and not to the plaintiff. It is most certainly not for the Federal Court of Canada, upon an application of a non-commissioned officer, to order a Commanding Officer to proceed with the investigation of a case, merely because the former has reasonable and probable grounds to believe that an offence has been committed.

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[5] [1968] 2 Q.B. 118 (C.A.).
[6] *Ibid.*, at pp. 125-6.

The plaintiff also begs the court to enjoin his Commanding Officer from inflicting any disciplinary measures upon him. It is not for the court to review disciplinary actions taken by the RCMP, unless the powers given the force by Parliament are abused. Those are matters of internal management. The subject was dealt with by Rand J. in *R. and G.J. Archer v. J.R.C. White*[7] in these words:

> Parliament has specified the punishable breaches of discipline and has equipped the Force with its own Courts for dealing with them and it needs no amplification to demonstrate the object of that investment. Such a code is *prima facie* to be looked upon as being the exclusive means by which this particular purpose is to be attained. Unless, therefore, the powers given are abused to such a degree as puts action taken beyond the purview of the statute or unless the action is itself unauthorized, that internal management is not to be interfered with by any superior Court in exercise of its long-established supervisory jurisdiction over inferior tribunals.

More recently the Supreme Court of Canada has looked into the dismissal of a police officer without a hearing and the imposition of penalties and held that the constable should have been treated fairly, not arbitrarily (*vide, Nicholson v. Haldimand Norfolk Regional Board of Commissioners of Police*).[8] There is undoubtedly a duty upon the Commanding Officer and the force to "act fairly" towards the plaintiff.

There is, however, no evidence before the court that the plaintiff has been treated unfairly. Under article C-12 of chapter 11.12 of the Administration Manual of the RCMP, the Commanding Officer has full authority to transfer members within the division. There is nothing to show, at least not as yet, that a transfer will work an injustice to, or otherwise constitute an unfair treatment of the plaintiff.

In my view, therefore, the plaintiff has no absolute right to continue the investigation without the orders of his superiors. He therefore has no *prima facie* case upon which to lay a claim for an injunction. Moreover, whatever duty his Commanding Officer has to pursue the investigation it is a duty owing to the Crown, not to the plaintiff.

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[7] (1955), 114 C.C.C. 77 at p. 82, [1956] S.C.R. 154 at p. 159, 1 D.L.R. (2d) 305.
[8] [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 78 C.L.L.C. para. 14,181.

The court therefore will not enjoin the defendant Nixon from halting the investigation, which he has the discretionary power to do, and will not enjoin him from transferring the plaintiff or removing him from the carriage of the investigation, which he has the authority to do. The court will not interfere with the internal administration of the force. In the absence of evidence of undue disciplinary measures, or that the plaintiff has otherwise been treated unfairly, the court will not interfere. As to the appointment of an independent Crown counsel to consult with the plaintiff, I know of no authority on the part of this court to make such an appointment and neither have I been referred to any.

Finally, as to the preservation of files and other material relating to the Graham/Pearson investigation, counsel for the defendants has freely undertaken to preserve all the documents until the issue has been fully disposed of by trial, or otherwise.

ORDER

The application is dismissed with costs.

There are, in my view, few topics so fundamental to the nature of police work than the delicate balance between the independent discretion exercised by a police officer in the name of the law and the ultimate legislative accountability of the attorney general for all aspects of the administration of justice.

Police Discretionary Powers in a Democratically Responsive Society

[Ad]dress Delivered to the 73rd An[nu]al Conference of the Canadian [As]sociation of Chiefs of Police by [the] Honourable R. Roy McMurtry [Att]orney General of Ontario.

[Rep]rinted with the kind permission [of t]he Editor, Canadian Police Chief [Mag]azine, Vol. 67, No. 4 (October, [197]8).

[To] reflect upon the nature of the [work]ing relationship between the [polic]e and the law officers of the [Crow]n, I count myself fortunate to [be ab]le to bring to the topic the ex[perie]nce of some 20 years as a de[fence] counsel, including some [time] as a part-time Crown attorney [and a] few years as a senior counsel [to the] Metropolitan Toronto Police [...]. The experience of appearing in court on behalf of persons charged with offences, and on behalf of the Crown, and on behalf of the police themselves, has given me a perspective which I find extremely valuable in addressing the legal and practical aspects of police discretion.

Fundamental of course to the whole question of police discretion is the generally high regard which the public hold for our police forces.

To the people of our communities you are the last defence against a violent disruption of their lives, the guardians of peace and security and order. The public knows this, and if it is true that there are no atheists in fox holes, it is equally true that there are damn few cop haters when there's bad trouble around.

Fundamental to our system of law enforcement is that the police are independent of any direct political control. They are not the servants of individual ministers of the crown or even of the government as a whole. The police are not errand boys for the prosecuting attorney.

I believe very strongly in this independence, which was very well expressed by the great English jurist, Lord Denning, who stated with reference to the office of the Commissioner of Police of the Metropolis of London:

> . . . I have no hesitation in holding that, like every constable in the land, he should be, and is, independent of the executive

... it is to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself.

This is clearly the law of England and in my view it is also the law of Canada. Certainly it represents the strong traditions which in Ontario govern the relationship between the police and the law officers of the crown.

This is certainly not the occasion for a legalistic review of the many statutes which govern the relationship between the police and the crown attorney, and the police and the attorney general of a province. Underlying all of the legalistic approaches, there is one basic approach grounded firmly in common sense. The common sense approach is based on the practical fact that the police officer is a professional and a crown law officer is a professional. Each has a unique set of professional skills and provisions, each has his own domain of expertise.

In a proper working relationship between two professionals who have mutual confidence in each other's professional skills and judgement, it should be fairly rare that any question should arise as to who has the final decision to initiate or not to initiate criminal proceedings.

The Criminal Code specified that only for a handful of offences is the consent of the attorney general required before a prosecution can be launched. The oath by which a prosecution is commenced is the oath of the officer who swears the information, and not the oath of the crown law officer who advises the officer as to the law. And the fundamental principle here is that no one can tell an officer to take an oath which violates his conscience and no one can tell an officer to refrain from taking an oath which he is satisfied reflects a true state of facts.

Crown counsel are, of course, available for consultation during an investigation and prior to the laying of a charge. They should be available when an officer is deciding whether to lay a charge or which one of a number of possible charges should be laid. This kind of consultation must be encouraged as a great number of potential problems can be and in fact are avoided by timely consultation between crown attorneys and police in those cases where some legal question really does need to be addressed at an early stage. This is particularly so in complex and involved cases or highly specialized types of prosecutions.

The law officers of the crown in fact have a duty to advise as to the law relating to a contemplated prosecution. The crown law officers also have a similar duty to advise whether it is in the public interest that a prosecution be commenced. And, of course, once a charge has been laid the law officers of the crown, as officers of the court, must maintain direction of the course of the prosecution.

But it is often overlooked by the public that no government, no attorney general, no crown law officer, has any power to direct any police officer that the officer must swear his oath upon an information for an alleged offence.

One occasionally hears at conferences of attorneys general the suggestion that all proposed criminal charges should, as a matter of course, be reviewed by c[rown] officers before a decision to commence or not com[mence a] prosecution. In my view, th[ese sug]gestions completely ign[ore] basic principles of our crim[inal pro]cess. There are some real q[uestions] in law as to whether the a[ttorney] general or anyone can give [such] direction.

The suggestion also ignores t[he fact] that a police officer, just li[ke any] other citizen, has the full ri[ght of] access to our courts of law. [Just as] no one can direct an officer to [swear] an information under an oath [which] violates his conscience, no o[ne can] block his access to the court[s in a] case where he is satisfied t[hat a] prosecution is appropriate.

To suggest that this discretion sh[ould] be subject to some automatic [re]view by a crown law officer, be[fore] the discretion is even exerci[sed,] would be to undermine the very p[ur]pose for which high standards [of] professionalism are being insti[lled] and maintained in police for[ces] throughout the country. For the b[ot]tom line is that independence fr[om] political control in *individual* cas[es] is one of the hallmarks of the bas[ic] independence of constables a[nd] chief constables under our syste[m] of law.

This is not, however, to lose sigh[t] of the fundamental principle o[f] legislative and public accountabil[ity] of all those who exercise powers in the name of the public. Those o[f] us who serve the public in elective office and who therefore derive our authority from the public must be constantly aware of this principle of accountability through the parliamentary process.

Our history, our constitution and our laws lay it down very clearly that the ultimate responsibility for all matters concerning the administration of justice lies with the attorney general. This is not of course to say that an attorney general must per-

sonally scrutinize every decision made in every court every day by his prosecutors, but the final responsibility is that of the attorney general who must answer in the legislative assembly and to the public for the proper adminstration of the machinery of justice.

Thus the attorney general is given the power to commence a prosecution by preferring an indictment directly, the power to stop any prosecution by entering a stay of proceedings. Although the final and ultimate prosecutorial decision in any given case is thus that of the attorney general, it is rare for such power to be used to override the exercise of police discretion.

Similarly, it is occasionally necessary in the public interest for an attorney general to ensure that a higher priority be given to the enforcement of a particular branch of the law, of the suppression of a particular type of crime. And when that does happen it is essential for our system of democratic accountability that there [be] an appropriate response from the police to the public as represented [by] the politically responsible minis[te]r of the crown.

[I] cannot leave this topic without [co]mmenting briefly on what I mean [by] the expression "political". Par[tic]ularly as I fully appreciate that [the]re is a great deal of cynicism [the]se days about the political pro[ces]s and about politicians.

[As] you know, I am a relatively new [arri]val in the wonderful wacky [worl]d of politics. My decision to en[ter] politics was not arrived at light[ly] without a great deal of soul[sear]ching. Certainly, one does not [leave] a comfortable law practice, [parti]cularly when you have six [child]ren, without some real degree [of ap]prehension.

[Furth]ermore, we all have been long [aware] of the traditional sceptisism [about] politicians. While this is generally healthy, nevertheless an unhealthy degree of cynicism has developed in recent years which, if allowed to grow, could be very damaging to the whole political process. Certainly apathy and unwillingness to be involved are only too often the response of many citizens to the issues of the day. Most people are generous with their opinions as to what is wrong with the government but are reluctant to participate in the political process.

Lester Pearson in his memoirs wrote of the inevitable reaction to blame everything on the government or on politics, but it was often "merely an excuse of the critic's neglect of his public duty".

"When politics and politicians are disparaged and referred to contemptuously", wrote the late Prime Minister, "especially by those who are in default of their own duties as citizens, then democracy itself is diminished".

While our political process is far from perfect, I believe it is a good system, and it distresses me that *not* more of the abler people in Canada have chosen to work within it to bring about needed reform. Too many of them, it would appear, have chosen either to ridicule the political system or to avoid it and let someone else wrestle with the challenges.

It is almost as though the mock prophecy of the poet, W.B. Yeats, had come true. More than fifty years ago, Yeats wrote this:

> The best lack all conviction, while the worst are full of passionate intensity.

From my own brief experience, I believe that political service is one of the highest forms of public service but that at the same time, all politicians have a responsibility to work for the day when it will be so regarded by all thinking citizens.

In many ways, the problems, challenges and rewards of a politician are very similar to those of a police officer, and particularly to those of a chief constable. For one thing we both appear to the public to enjoy a great deal of authority, and it is part of our Canadian tradition not to be too overly respectful of authority. In many ways it is healthy for we would lose a great deal of our ability to communicate with the public, and therefore lose a great deal of our effectiveness if we were coddled in some cocoon that completely insulated us from public criticism.

The reward for each of us is similar — the reward of knowing that one is fulfilling a public obligation, the reward of knowing that what we are doing is essential to the well-being of the community, even though we seldom have the luxury of basking in warm praise.

In any event, I think that it is particularly important that police officers, when reflecting on the political process, know that your views are highly respected even though you may at times feel like voices crying in the wilderness. I believe that every responsible person in public life does recognize the legitimacy of the police point of view in relation to our criminal justice system.

We are very aware that police officers spend their working days under great pressure and often at great physical risk. We recognize the rigours and the demands of your work that make your job one of the most difficult and challenging positions in the public service. The nature of your work does give your views a practical foundation which must always command our serious attention.

I am also very aware of problems in the criminal justice system that make

your life more difficult than it need be. I refer particularly to the problem of delays in the courts which mitigate against justice and cause enormous problems for the police in enforcement and administration.

My regular meetings with senior officers have made me particularly aware of the effect of court delays upon the work of the police. I do appreciate how potentially demorlizing it must be in a serious matter, to complete an arduous and time-consuming investigation, only to see it drag on for months or even longer in the courts before the matter is resolved. For my part I am committed to doing everything in my power to reduce these delays in the courts for it is restating the obvious to reflect on the fact that a quality administration of justice is essential to effective and fair law enforcement.

n the final analysis of course, all f our freedoms, whether individual r collective, and the concept that raditionally should receive the widest support from all of us is our ommitment to the rule of law. learly, it is the foundation of any vilized society as it represents the ndamental protection for each and very citizen.

his tradition has been so long enyed in Canada and the United ates that it is generally taken for anted. It is only when we look to her jurisdictions where the tradin has never been woven into the bric of society that we realize that e choice becomes one of either archy or totalitarianism.

economic pressures mount, I pect that the importance of the e of law will become more apent. Already, special interest ups are demonstrating their imence with the democratic pros and the willingness to engage uch tactics as civil disobedience ain their own ends. In times of ss, the democratic process often appears to be a rather feeble method of pursuing one's goals. It is hoped that we all will continue to recognize the potential threat posed by any group that is willing to subvert the rule of law for their own purposes. At the same time we must be equally wary of those who would seek to circumvent the law for some apparently well-intended purpose. For we must never lose sight of the fundamental principle that to gain and maintain respect, the law must continue to earn respect. In an age of increasing crime rates, even the most law-abiding citizen is often tempted to advocate very arbitrary and unjust remedies to eliminate what he considers to be evil in society. It is hoped that our society will never forget that the pages of history are replete with the disastrous consequences of the law of man replaced by the dictates of expedience.

In this context I am reminded of that memorable scene from Robert Bolt's classic play, "A Man for All Seasons", a scene which, to my mind, epitomizes a proper commitment to the "Rule of Law".

As you may recall, the play revolves around the final years in the life of Sir Thomas More, who finds himself in a clash with Henry VIII over the latter's desire to divorce Queen Catherine.

More's future son-in-law, Roper, argues the proposition that the end justified the means, and that More should arrest the villain of the play simply because he is bad, and therefore offends the law of God.

"Then God can arrest him", More replies, and goes on to explain that he would allow the devil himself to go free until he broke the law of man.

Roper, for his part, is shocked and says that in order to get after the devil, he would be prepared to cut down every law in England — which as I have indicated, is a response we still hear from time to time today.

Sir Thomas concludes the exchange by posing this question. He asks: "And when the law was down, and the devil turned around on you — where would you hide? This country's planted thick with law from coast to coast — man's laws, not God's — and if you cut them down, do you really think that you could stand upright in the winds that would blow then? Yes, I'd give the devil benefit of law for my own safety's sake."

More's statement typifies the response to which those imbued with the concept of justice under law have traditionally taken. On balance, it is better to have the devil free than to corrupt and debase our laws to confine him.

That statement also typifies the commitment to the rule of law which has always marked the best traditions of all those engaged in the administration of justice, as judicial officers or crown law officers or police officers. It reflects our shared dedication to the proper administration of our laws. Your record, the record of your forces under your leadership in the enforcement and vindication of those laws, has been an impressive achievement.

You and the men and women under your direction have earned a wide and a deep respect among responsible members of the public. You have every right to take pride in those achievements, which reflect your dedication to the traditions and high standards of your forces. You have with those achievements, earned the right to stand proud.

And whatever the challenges, I know that your courage and your integrity and your dedication to the law will continue to sustain you as you meet the challenges which lie before all of us who are engaged in the administration of justice.

GLINSKI v. McIVER.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Denning and Lord Devlin), November 28, 29, 30, December 4, 5, 6, 7, 11, 12, 13, 14, 18, 1961, February 22, 1962.]

Malicious Prosecution—Honest belief in guilt of plaintiff—Questions not to be put to jury in absence of evidence on which to base a finding of want of such belief—Legal advice as defence.

In actions for malicious prosecution—

(a) the question whether the defendant honestly believed that the accused was guilty of the offence does not necessarily arise in every action; it should not be put to a jury unless there is affirmative evidence of the want of such belief, or some contested evidence bearing directly on that belief (see p. 700, letter H, p. 706, letter B, and p. 707, letter G, post; cf., p. 710, letter H, p. 711, letters E and G, and p. 715, letter B, post).

(b) the duty of the defendant prosecutor, before bringing the criminal charge which is the subject of the action, was to have found out whether there was reasonable and probable cause for the prosecution rather than whether there was a possible defence or whether the proposed accused was guilty (see p. 701, letter H, p. 706, letter B, and p. 710, letter A, post).

Dictum of LORD ATKIN in *Herniman* v. *Smith* ([1938] 1 All E.R. at p. 10) and of LORD MANSFIELD, C.J., in *Johnstone* v. *Sutton* ((1786), 1 Term Rep. at p. 547) adopted.

(c) though malice may, in a proper case, be inferred from want of reasonable cause, want of such cause or lack of belief in the prosecutor's case is not to be inferred from the existence of malice (see p. 705, letter I, p. 700, letter G, p. 706, letter B, p. 709, letter E, p. 710, letter E, p. 712, letter B, p. 714, letter H, and p. 724, letter F, post).

Johnstone v. *Sutton* ((1786), 1 Term Rep. 510) and dictum of LORD DENMAN, C.J., in *Turner* v. *Ambler* ((1847), 10 Q.B. at p. 260) applied.

On Sept. 13, 1955, M., a detective-sergeant of the Criminal Investigation Department, who was investigating a series of frauds on textile manufacturers, having ample grounds for suspecting that G. was a person concerned with the frauds, arrested him, the warrant being issued for the arrest of one D., and it being believed that G. had been passing under the name of D. G. was put up for identification on an identification parade. He was not, however, identified as the man known as D., and was released on the same day. On Sept. 21, 1955, a solicitor working with the legal department of New Scotland Yard, delivered to counsel a brief to prosecute certain persons and to advise on the " G. aspect of the matter ". On Sept. 22 and 23 G. gave evidence for the defence at the trial of an accused on a criminal charge. On Sept. 26, 1955, the solicitor, after a consultation with counsel at which M. was present, drafted an information for a warrant for the arrest of G. in G.'s own name, and on Sept. 29, 1955, G. was re-arrested and was charged with conspiracy to defraud. G. alleged that after he had been re-arrested, M. made it plain to G. that he would not have been charged with conspiracy if he had not given evidence on Sept. 22 and 23. G. was tried on the conspiracy charges and was acquitted. He sued M. for damages for false imprisonment and malicious prosecution. The judge put the following questions to the jury on the issues relating to malicious prosecution: (i) Has it been proved that the police officer in starting the prosecution of the appellant for conspiracy to defraud was actuated by malice, that is, any motive or motives other than a desire to bring the appellant to justice? If yes, what damages. (ii) Did the police officer honestly believe on Sept. 29, 1955 (which was agreed to be the relevant date) that the appellant was guilty of the offence of conspiracy to defraud? To the first question the jury answered " Yes " and assessed the damages at £2,500, and to the second question the jury answered, " No." It

being for the judge to decide whether there was reasonable and probable cause for the prosecution, he held that there was no such cause. On appeal to the House of Lords from an order allowing an appeal,

Held: the second question should not have been left to the jury, because there was no evidence on which there could be founded a finding that the police officer did not honestly believe in his case (see p. 706, letter A, p. 704, letter E, p. 706, letter B, p. 709, letter B, and p. 723, letter B, post); and, if the jury's answer to that question were disregarded, the correct conclusion was that there had been reasonable and probable cause for the prosecution (see p. 706, letters E and B, p. 713, letter D, p. 714, letter A, and p. 723, letter B, post).

Per VISCOUNT SIMONDS: just as the prosecutor is justified in acting on information about facts given him by reliable witnesses, so he may act on advice on the law given by a competent lawyer; and, applying this principle to the case of a police officer who prefers a charge and at every stage acts on competent advice, particularly perhaps if it is advice of the legal department of Scotland Yard, I should find it difficult to say that that officer acted without reasonable and probable cause (see p. 701, letter F, post; cf. p. 710, letter B, and p. 706, letter B, post).

Dictum of BAYLEY, J., in *Ravenga* v. *Mackintosh* ((1824), 2 B. & C. at p. 697) approved.

Appeal dismissed.

[As to disbelief in plaintiff's guilt in an action for malicious prosecution, see 25 HALSBURY'S LAWS (3rd Edn.) 364, para. 712; and for cases on the subject, see 33 DIGEST 499, 500, *405-413*.]

Cases referred to:

Abrath v. *North Eastern Ry. Co.*, (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 659; *affg.* (1883), 11 Q.B.D. 440; 13 Digest (Repl.) 322, *1292*.

Blachford v. *Dod*, (1831), 2 B. & Ad. 179; 9 L.J.O.S.K.B. 196; 109 E.R. 1110; 33 Digest 505, *460*.

Bradshaw v. *Waterlow & Sons, Ltd.*, [1915] 3 K.B. 527; 85 L.J.K.B. 318; 113 L.T. 1101; 33 Digest 506, *493*.

Broad v. *Ham*, (1839), 5 Bing. N.C. 722; 8 Scott, 40; 8 L.J.C.P. 357; 132 E.R. 1278; 33 Digest 495, *362*.

Commonwealth Life Assurance Society v. *Brock*, (1935), 53 C.L.R. 343.

Cox v. *Wirrall*, (1607), Cro. Jac. 193; 79 E.R. 169; 33 Digest 474, *77*.

Davis v. *Hardy*, (1827), 6 B. & C. 225; 9 Dow. & Ry. K.B. 380; 5 L.J.O.S.K.B. 91; 108 E.R. 436; 33 Digest 504, *459*.

Dawson v. *Vansandau*, (1863), 11 W.R. 516; 33 Digest 497, *382*.

Haddrick v. *Heslop*, (1848), 12 Q.B. 267; 17 L.J.Q.B. 313; 11 L.T.O.S. 414; 116 E.R. 869; *subsequent proceedings*, sub nom. *Chapman* v. *Heslop*, 12 Q.B. 928; 33 Digest 499, *409*.

Herniman v. *Smith*, [1938] 1 All E.R. 1; [1938] A.C. 305; 107 L.J.K.B. 225; Digest Supp.

Hicks v. *Faulkner*, (1881), 8 Q.B.D. 167; 51 L.J.Q.B. 268; 46 L.T. 127; 46 J.P. 420; *affd.*, (1882), 46 L.T. 130; 33 Digest 468, *18*.

Hinton v. *Heather*, (1845), 14 M. & W. 131; 15 L.J.Ex. 39; 153 E.R. 419; 33 Digest 499, *407*.

Huntley v. *Simson*, (1857), 2 H. & N. 600; 27 L.J.Ex. 134; 30 L.T.O.S. 157; 22 J.P. 86; 157 E.R. 247; 33 Digest 500, *415*.

Johnstone v. *Sutton*, (1786), 1 Term Rep. 510; 99 E.R. 1225; 33 Digest 465, *2*.

Leibo v. *Buckman (D.), Ltd.*, [1952] 2 All E.R. 1057; 3rd Digest Supp.

Liversidge v. *Anderson*, [1941] 3 All E.R. 338; [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; 17 Digest (Repl.) 422, *27*.

Panton v. *Williams*, (1841), 2 Q.B. 169; 10 L.J.Ex. 545; 114 E.R. 66; 33 Digest 502, *441*. A

R. v. *Comer*, (Sept. 23, 1955), "The Times", Sept. 24, 1955.

Ravenga v. *Mackintosh*, (1824), 2 B. & C. 693; 4 Dow. & Ry. K.B. 187; 2 L.J.O.S.K.B. 137; 107 E.R. 541; 33 Digest 496, *374*.

Taylor v. *Willans*, (1831), 2 B. & Ad. 845; 1 L.J.K.B. 17; 109 E.R. 1357; 33 Digest 502, *433*. B

Tempest v. *Snowden*, [1952] 1 All E.R. 1; [1952] 1 K.B. 130; 116 J.P. 28; 3rd Digest Supp.

Turner v. *Ambler*, (1847), 10 Q.B. 252; 16 L.J.Q.B. 158; 9 L.T.O.S. 36; 11 J.P. 631; 116 E.R. 98; 33 Digest 503, *444*.

Venafra v. *Johnson*, (1833), 10 Bing. 301; 6 C. & P. 50; 3 L.J.C.P. 51; 131 E.R. 920; *subsequent proceedings*, (1834), 1 Mood. & R. 316; 33 Digest 502, *439*. C

Appeal.

This was an appeal by the plaintiff in an action for malicious prosecution against an order of the Court of Appeal (LORD MORRIS OF BORTH-Y-GEST, SIR CHARLES ROMER and WILLMER, L.J.), dated Feb. 5, 1960, whereby the court allowed the appeal of the defendant, a police officer, against a judgment of CASSELS, J., dated Oct. 31, 1958, awarding damages to the plaintiff for malicious prosecution. The facts appear in the opinion of VISCOUNT SIMONDS. D

J. G. Foster, Q.C., *W. R. Rees-Davies* and *P. S. C. Lewis* for the appellant.

G. R. Swanwick, Q.C., and *W. W. Stabb* for the respondent.

Their Lordships took time for consideration.

Feb. 22. The following opinions were read. E

VISCOUNT SIMONDS: My Lords, on Jan. 31, 1956, the appellant issued a writ against the respondent, a detective-sergeant stationed at New Scotland Yard, claiming damages for false imprisonment and malicious prosecution. By his statement of claim as amended he alleged that he had been tried and acquitted before a jury at the Central Criminal Court on charges of conspiracy and of obtaining goods by false pretences and that the respondent was at all material times responsible for laying the information and the complaint and was in charge of the case. This is not denied. He also alleged that on Sept. 13, 1955, at 9.45 a.m. the respondent wrongfully arrested him and falsely imprisoned him and took him to Marylebone Lane police station where he was detained, that he was thereafter unlawfully put up for identification and detained in a detention cell until about 5 p.m. when he was released. On this issue the appellant recovered £100 damages and its only relevance is the bearing, if any, which it has on the further claim for malicious prosecution. This claim as amended was that on Sept. 28, 1955, at Marylebone magistrates' court before a justice of the peace the respondent laid an information and maliciously and without reasonable and probable cause preferred charges of conspiracy to defraud and obtaining goods by false pretences against him thereby causing him to be committed for trial and causing him to be imprisoned thereon and thereafter prosecuted him on such charges at the Central Criminal Court where he was acquitted on the said charges at the direction of the learned judge at the trial. F G H

The action was first heard before PILCHER, J., and a jury on divers days in the month of October, 1958, but owing to the illness of that learned judge the jury were discharged from giving a verdict. It was further heard before CASSELS, J., and a jury for many days in the same month and after much discussion the following questions were put to the jury: (i) Has it been proved that the respondent in starting the prosecution of the appellant for conspiracy to defraud was actuated by malice, that is, any motive or motives other than a desire to bring the appellant to justice? If yes, what damages? To this the jury answered "Yes. £2,500 damages". (ii) Did the respondent honestly believe on Sept. I

A 29, 1955, that the appellant was guilty of the offence of conspiracy to defraud? To this the jury answered "No". A third question was asked and answered favourably to the respondent. I do not think it desirable at any rate at this stage to confuse the broad issues in the case by referring to it. A further question related to the admittedly false imprisonment on Sept. 13 for which the appellant was awarded £100 damages. The significance of the date Sept. 29, 1955, is B that both parties agreed that it is at that date that the belief of the respondent as to what I will without prejudice call the guilt of the appellant must be ascertained. That does not mean that subsequent events may not throw light on what was then his belief.

The jury having thus answered the questions put to them, the learned judge said:

C "As it is for me to decide if there was reasonable and probable cause, I hold that there was no reasonable and probable cause for the prosecution"

and gave judgment for the appellant accordingly.

From that judgment, so far as it related to the sum of £2,500, the respondent appealed to the Court of Appeal and after a hearing which lasted fourteen days that court unanimously allowed the appeal. The appellant now seeks to have D the judgment restored and in the course of a hearing which has again lasted many days there can be few of the complex facts of which this story is made up and few of the great number of authorities on the law of malicious prosecution which have not more than once engaged your Lordships' attention. Of that I would make no complaint. For, as was forcibly pointed out, in such cases as these the liberty of the subject is involved on the one side and on the other the risk that E the citizen in the performance of his duty may be embarrassed if a jury too readily gives a verdict in favour of a plaintiff who has been prosecuted and acquitted. For that reason it has throughout the centuries been the law that the question whether there was reasonable and probable cause for a prosecution has been left in the hands of the judge. And still today it appears to be the unanimous opinion of those who have greater experience of such trials than I F that this need for the judge to hold the reins is as great as ever, see e.g., *Leibo* v. *D. Buckman, Ltd.* (1).

My Lords, before I come to the facts, which I will state as briefly as possible since they are carefully and exhaustively stated in the judgment of LORD MORRIS OF BORTH-Y-GEST in the Court of Appeal, I will make some general observations on the law which will, I hope, be found pertinent to the present case.

G Of the four essentials to a successful action for malicious prosecution the first two, viz., that the appellant was prosecuted by the respondent and was acquitted, are not in debate. It is on the third and fourth essentials that controversy has arisen. The third is that the prosecution was without reasonable and probable cause and the fourth that it was malicious. I need not remind your Lordships that it is for the plaintiff in such an action to prove these facts.

H My Lords, such difficulty as there is in the correct statement and application of the law as to want of reasonable and probable cause arises from the fact that, while it is for the judge to determine (whether as fact or law) whether there was such want, it is for the jury to determine any disputed facts which are relevant to that determination and his difficulty is reflected in the controversy in this case before your Lordships and in the Court of Appeal whether the second question was correctly left to the jury: "Did the respondent honestly believe", and so on. It was, I think, challenged on two grounds, the first being that though the belief of the prosecutor in the guilt of the accused may be relevant to malice it is not relevant to the question of reasonable and probable cause as to which the test is purely objective, the jury finding the facts and the judge coming to his conclusion on them. I think that there is here a confusion of thought. For if the judge is to decide on facts found by the jury, how can he ignore what may be the all-important fact that the prosecutor did not himself believe in the facts which if they were

(1) [1952] 2 All E.R. 1057.

believed might afford a reasonable and probable cause? The judge, equipped with the information which at the relevant date the prosecutor had, has to decide, adopting the standard of the reasonable man, whether there is reasonable and probable cause. How can that information include something which the prosecutor knows to be false or at least knows not to be true? But then it is said that at least the form of the question is wrong and that the jury should be asked not whether the prosecutor believed in the guilt of the accused but whether he believed in the existence of the facts which, if they existed, would afford reasonable and probable cause for thinking him guilty. This contention has some merit. But there are, I think, two serious objections to it. The first is that as a practical matter it might be extremely difficult to select a number of facts and ask the jury in regard to each of them whether the prosecutor believed in its existence. The second is that with few divagations the whole current of authority for more than a century has been in favour of a question in the form asked in this case, not necessarily in precisely the same words but in the same general terms. Let me take a single authority and invite your Lordships, since the cases have been so closely examined, ab uno discere omnes. In *Herniman* v. *Smith* (2), LORD ATKIN said (3):

> "If there is any evidence of a lack of honest belief in the guilt of the accused on the part of the prosecutor, the fact whether he honestly believed or not is a disputed but essential fact, on which the judge is to draw his conclusion, and is a question for the jury."

This is but the repetition of what had been said a score of times by the great common law judges of the second quarter of the nineteenth century. I may perhaps be permitted to express my surprise that LORD ATKIN having spoken in these unequivocal terms should have selected for his approval statements of the law in *Bradshaw* v. *Waterlow & Sons, Ltd.* (4), which itself cited from *Blachford* v. *Dod* (5) a passage from the judgment of a very learned judge, LITTLEDALE, J., that I find hard to reconcile with other authoritative pronouncements both by himself and other judges of the same era. It is possible that the explanation of that case is that it was thought that there was no fact in dispute and this leads me to the second reason why it may be and in this case was alleged to be wrong to leave this question to the jury.

The second reason, my Lords, is or may be that there is no evidence of lack of belief which can properly be left to the jury. Let me here interpolate an important principle in this branch of the law. Since *Johnstone* v. *Sutton* (6), and no doubt earlier, it has been a rule rigidly observed in theory if not in practice that, though from want of probable cause malice may be and often is inferred, even from the most express malice, want of probable cause, of which honest belief is an ingredient, is not to be inferred. I think that the importance of observing this rule cannot be exaggerated, for it is just at this stage that a jury inflamed by its own finding of malice may proceed almost automatically to a finding of want of honest belief. It is, of course, possible that the same facts may justify both findings. But it behoves the judge to be doubly careful not to leave the question of honest belief to the jury unless there is affirmative evidence of the want of it. That is a matter of great importance in the present case.

Next I would turn to a question which assumes greater importance in these days than at a time when prosecutions were largely in private hands. To believe in a fact is one thing: to believe that it constitutes an offence may be another. No doubt in the great majority of cases the issue is simple enough, and to ask whether the prosecutor believed in the existence of a particular fact is equivalent to asking whether he believed that the accused was guilty or probably guilty of an offence. Nor would it be material whether he believed in the fact because it lay within his own personal knowledge or because he relied on information given by others whose trustworthiness he had no reason to doubt. A more difficult

(2) [1938] 1 All E.R. 1; [1938] A.C. 305.
(3) [1938] 1 All E.R. at p. 8; [1938] A.C. at p. 316.
(4) [1915] 3 K.B. 527.
(5) (1831), 2 B. & Ad. 179 at p. 186.
(6) (1786), 1 Term Rep. 510.

A question arises when the issue is whether the prosecutor honestly believes in the guilt of the accused, where the facts are complicated and a question of law arises. This is particularly the case where in the administration of criminal justice the information is laid by a particular police officer who is in charge of the prosecution and responsible if it is held to be malicious, but it is, as a matter of police organisation, obvious that he must act on the advice and often on the instruction of his B superior officers and the legal department. Clear examples of this would be certain offences under the Bankruptcy Acts or, as I would suppose, conspiracies to commit so-called long firm frauds. What, my Lords, is the position of a police officer in such a case? Perhaps it is best first to see what has been said about the position of a private prosecutor (a term that I use not perhaps very accurately to distinguish his case from that of a police prosecution). Can he rely on the legal advice given C to him? He believes the facts and is advised that they constitute an offence. He prosecutes accordingly, but the accused is acquitted either because the advice is wrong or because the information proves to be wrong or incomplete or because some unexpected defence is revealed. On this question there is little direct authority and none, I think, of this House. The clearest statement is that of BAYLEY, J., in *Ravenga* v. *Mackintosh* (7). He said (8):

D

> ". . . if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description. A party, however, may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury, whether he acted bona fide on the opinion, believing that he had a cause of action."

E HOLROYD, J., in the same case expressed no decided opinion on this point. I would, however, suggest to your Lordships that, subject to the qualification which BAYLEY, J., no doubt thought it unnecessary to state, that the counsel whose advice is taken and followed is reputed to be competent in that branch of the law, the opinion of that learned judge is sound and should be adopted by your F Lordships. It appears to me that, just as the prosecutor is justified in acting on information about facts given him by reliable witnesses, so he may accept advice on the law given him by a competent lawyer. That is the course that a reasonable man would take and, if so, the so-called objective test is satisfied. Applying this principle to the case of a police officer who lays an information and prefers a charge and at every step acts on competent advice, particularly perhaps if it is G the advice of the legal department of Scotland Yard, I should find it difficult to say that that officer acted without reasonable and probable cause. I assume throughout that he has put all the relevant facts known to him before his advisers.

I must refer to one more matter before I return to the facts. A question is sometimes raised whether the prosecutor has acted with too great haste or zeal and failed to ascertain by inquiries that he might have made facts that H would have altered his opinion on the guilt of the accused. On this matter it is not possible to generalise but I would accept as a guiding principle what LORD ATKIN said in *Herniman* v. *Smith* (9), that it is the duty of a prosecutor not to find out whether there is a possible defence but whether there is a reasonable and probable cause for prosecution. Nor can the risk be ignored that in the case of more complicated crimes, and particularly perhaps of conspiracies, inquiries I may put one or more of the criminals on the alert.

I think, my Lords, that each of the aspects of the law of malicious prosecution to which I have referred will be found to have some relevance to the facts of this case, to which I again turn.

I ask first whether on Sept. 29, 1955, the respondent had reasonable and probable cause for prosecuting the appellant. Armed with a warrant which, on an information laid by him before Mr. Raphael, one of the magistrates at

(7) (1824), 2 B. & C. 693.

(8) (1824), 2 B. & C. at p. 697.

(9) [1938] 1 All E.R. 1 at p. 10; [1938] A.C. 305 at p. 319.

Marylebone magistrates' court, had been issued on the previous day, on Sept. 29 he duly arrested and charged the appellant with conspiracy to defraud such manufacturers of textiles as might be induced to supply Seymour Stores Co., Ltd., R. A. Davies Supplies Co., Art-Tex Co. and British Woollens, Willner Co. with goods on credit. The names of Henry Werner, J. Higgins, R. Davies and Bernard Kirby with other persons unknown originally appeared on the charge sheet as conspirators with him. At a later date in circumstances which were not fully explained and are in any event immaterial the names of Werner, Davies and Kirby were erased. This, then, was the charge and it was for the judge to decide whether the appellant proved that it was preferred without reasonable and probable cause. Your Lordships have not the advantage of his opinion on this question except that, the jury having answered that the respondent did not believe in the guilt of the appellant, he clearly felt constrained to decide against the former. It would appear then that the crucial question may be whether there was evidence on this matter which could be left to the jury or, alternatively, whether their verdict on such evidence as there was was perverse. But before turning to this question it is proper to consider the facts as they must have appeared to the reasonable man at the relevant date.

Before Sept. 29 a number of things had happened, which can be briefly stated. A series of frauds had been perpetrated in the names of the companies or firms mentioned on the charge sheet and had been brought to the notice of New Scotland Yard by the Yorkshire West Riding police. The respondent, who had for no long time been employed in the fraud department of New Scotland Yard, had been entrusted with the investigation of them. In these frauds a person or persons giving the names of Davies, Martin and Higgins were clearly concerned. In the course of his inquiries which lasted from May till the middle of July the respondent took the statements of a number of witnesses whom neither he nor anyone else had reason to suppose were unreliable. On the conclusion of them he submitted to his chief superintendent a report accompanied by copies of all the statements of witnesses and documents which he had obtained in the course of his investigation. He had himself formed the opinion that one Kolinsky, whom I have not yet mentioned, was the same person as Higgins and that the appellant was the same person as Davies and perhaps too the same person as Stevens whose name also appeared in connexion with the frauds. He may have been over-zealous or over-optimistic in thinking that the appellant was identical with either Davies or Stevens, but that he was dishonest in thinking so is not supported by any evidence. Nor, as events proved, was it in any way material: for the charges connecting him with them were dropped. However, before this happened the report with the statements and documents were sent to the legal department. On Aug. 10 Mr. Williamson, a managing clerk in the department who was admittedly a man of great experience in these matters, sent for him to discuss the case and on Aug. 25, having already drafted the information, sent for him again and went through the draft with him. On Aug. 30 the respondent swore the information before Mr. Raphael at Marylebone magistrates' court and warrants were applied for and issued for the arrest of Werner, Higgins, R. Davies and one Kirby. In the information it was stated that, if warrants were granted, it was proposed to put up Werner, Kolinsky, the appellant and Kirby for identification. On Sept. 13 the appellant was arrested in the name of Davies and taken to Marylebone police station and on the same day Werner and Kirby were arrested. The warrant in the name of Higgins was not executed for reasons that were no doubt valid. After his arrest Kirby made a statement admitting his part in the conspiracy.

The next event was a rebuff for the respondent, for the appellant, being put up for identification at a parade attended by numerous witnesses, was identified by none of them either as "Davies" in whose name he had been arrested or as "Stevens". He was identified in his own person in connexion with an event which I shall presently narrate, but for the moment there was no justification for his further detention. The respondent accordingly telephoned

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A to a Mr. Melville, a solicitor in the legal department of Scotland Yard, and as a result of the advice given to him released the appellant. There was a conflict of evidence whether he was told that his release was "pending further inquiries". It seems to me to be immaterial whether he was told it or understood it or not, for the fact was that forthwith Mr. Melville took steps to prepare a brief for counsel to prosecute Werner and Kirby together with instructions to advise on what he B described as "the Glinski aspect of the matter". It was made a point of attack on the bona fides of the respondent that there was an unaccountable delay in the second arrest of the appellant to which I shall come in a moment. But this was trivial. The instructions were delivered to counsel on Sept. 21. I find nothing sinister either in the fact that the respondent took no further step without advice or in the fact that eight days elapsed before counsel was instructed.

C It is necessary now to return to the identification parade of Sept. 13. As I have said, the appellant was not identified as Davies or Stevens and it was no longer possible to connect him with frauds in which persons bearing those names were involved. He was, however, identified by a taxi-driver named Howcroft as a person concerned, whether himself innocent or not, in a gross fraud which had been perpetrated on Apr. 12 and 13. The circumstances which investigation D had revealed were these. At one o'clock p.m. on Apr. 12, in response to an order from a bogus company called Seymour Stores Co., Ltd., a textile company Alma Mill, Ltd. had delivered a consignment of 1979 yards of sheeting in twenty parcels to 8, Seymour Place. They were stacked on stairs leading to the basement. On the following day at about 10.30 a.m. a man identified by the driver Howcroft as the appellant called at 8, Seymour Place, loaded the parcels into the taxi with E the assistance of another man who appeared to be waiting in the passage-way and directed the driver to take him to 7, Princes Street. There the parcels were unloaded and taken upstairs by the appellant and another man. At 7, Princes Street were the offices of a company called Coleherne Textiles, Ltd., which carried on a legitimate textile business. Its history has some relevance, for it established beyond all doubt the business association of the appellant and Werner. The appellant had been sole director of the company from Sept. 30, 1954, till Jan. 29, 1955, when Werner took over from him, but he again became a director of the company on July 25, 1955, and held office for a short time thereafter. It further established that the appellant had some experience of the textile trade without which it was unlikely that he would be engaged in a long firm fraud in that class of goods. To this must be added the fact known to the respondent that the appellant had not an unblemished reputation. He had been convicted of receiving stolen goods some years before.

Here, then, was ample ground for suspicion. Goods fraudulently ordered and unpaid for, delivered at offices which had no connexion with the textile trade and taken thence in what might be thought an unusual manner, were unloaded at the office of Coleherne Textiles, Ltd. What happened to them there? That was the next matter of investigation, and it appeared that so far as the books of the company showed nothing happened there at all. There was no record of any kind of the delivery of these goods which were of substantial value. In the meantime, however, the respondent had kept watch on the company's premises and had on June 30 seen the appellant and Werner leave them in a taxi-cab and deliver a number of parcels at an address in Berwick Street. It was subsequently accepted that this was an innocent transaction and I say no more about it. Its only significance for our present purpose is that Werner, questioned as to his association with the appellant, denied that he had been with him on that day. It further appeared that the notepaper of the four bogus companies or firms that I have mentioned were all supplied by the same printer within the space of a few days in the spring of 1955 to the order of Werner who managed to obtain it by ordering only a few sheets as samples, supposedly to be submitted to new companies or firms in the formation of which he was interested. He subsequently denied that he had any knowledge of Seymour Stores Co., Ltd., one of the companies

for which he had ordered the notepaper. The appellant had, innocently or no[t], had dealings with the same printer.

My Lords, it appears to me far from surprising that on these facts Mr. Melvill[e] after a consultation with counsel on Sept. 26, which the respondent attended, drafted an information for a warrant for the arrest of the appellant in his own name. The respondent went through it with him and on Sept. 28 swore th[e] information before Mr. Campion, a different magistrate, who issued a warrant fo[r] the arrest of the appellant. He was duly arrested the next day and at about 1[1] a.m. was charged. I now mention an incident which might have some importanc[e] if I took a different view of other facts in the case. In addition to Stevens anc[d] Davies a person giving the name of Martin appeared to have been concerne[d] in the fraud and the respondent thought that this was yet another alias of th[e] appellant. For this he relied on two witnesses named Hallam and Blackstone who had been unable to attend the identification parade on Sept. 13. This matter was therefore still open when the second information was laid. But on Sept. 29 these witnesses attended a second identification parade and failed to identify the appellant as Martin. "Stevens", "Davies" and "Martin" had all now faded from the case. There remained only the incident which I have detailed at some length. But the relevance of "Martin" is that the jury, being asked whether on Sept. 28 the respondent had any reason to believe that the appellant might be identified as the man who was said to have used the name of Martin, answered "Yes". This answer may not by itself have justified counsel for the respondent in asking the learned judge for a verdict in his favour but I could not disregard it if I had any doubt on the second question.

My Lords, it would not perhaps be right to say that every one of the facts which I have detailed in regard to what I may call the Seymour Place transaction and the association of the appellant with Werner was undisputed. For in this case very little went unchallenged. But I do say that there was none of them on the existence of which there could be a reasonable doubt and further that, assuming their existence, the respondent was amply justified in thinking that the appellant was probably guilty of the offence with which he was charged. It is in this connexion that earlier in this opinion I was at some pains to point out the position of a police officer of subordinate rank who is responsible in such an action as this but acts on the instructions and advice of his superior officer and the legal department. I see no reason whatever for saying that acting on that advice he did not honestly believe in the guilt of the accused. Nor, though various suggestions were made about what he might have said to Mr. Melville or at the conference with counsel on Sept. 21, is there a particle of evidence that he falsified any information or failed to disclose any facts which might have influenced those gentlemen.

What then were the reasons which led the learned judge to leave to the jury the question of honest belief or led them to answer it as they did? My Lords, they were expounded at great length and attempted to be justified in the speeches of learned counsel for the appellant but in the end I was left with the conviction that this case provides a striking illustration of the danger that a jury, having found malice against the prosecutor, may proceed without any evidence to find also that he had no honest belief in the probable guilt of the accused. I do not find it necessary to express any opinion on the question whether the jury's finding of malice was perverse. But I have no doubt that, whether or not the evidence on which that finding was presumably based justified it, it by no means supported and indeed had little, if any, relevance to a lack of honest belief.

I hesitate to deal at any length with this aspect of the case. If I did so, I should be repeating what has been admirably said by LORD MORRIS and WILLMER, L.J., in the Court of Appeal. I am in complete agreement with this part of their judgments. For the most part the grounds on which the appellant relied appeared to me trivial. There were, it appears, errors in the second information: it should have stated more clearly that certain charges referred to in the first

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information had been abandoned: the respondent should have made further inquiries about the transaction alleged and ultimately admitted to have been innocent: the respondent had too readily in the first instance accepted the identity of the appellant with Davies, Stevens or Martin and clung too obstinately to his opinion. I do not add to what has already been said about these and similar matters. There is, however, one argument about which I would say a few words, both because it figured so largely in the speeches of counsel and because it is a reasonable guess that it led the jury to their finding of want of honest belief.

I refer to what has been called the Comer incident. Here the sequence of events is important. It will be remembered that the appellant was arrested for the first time on Sept. 13, 1955, and released on the same day. Mr. Melville of the legal department was at once consulted and sent papers to counsel who held a conference on Sept. 26. He proceeded to draft the second information which was sworn by the respondent on Sept. 28. On the following day the appellant was arrested for the second time. It happened that, while these events were in progress, there started on Sept. 22, 1955, at the Central Criminal Court the trial of a man named Jack Comer (10) on the charge of having caused grievous bodily harm to a man called Albert Dimes on Aug. 11, in Frith Street, Soho. At this trial the appellant gave evidence for the defence on Sept. 22 and 23. Comer was acquitted. The officer in charge of the prosecution, Superintendent Sparks, the superintendent at the West End Central police station, had in the meantime found out that there was a file concerning the appellant at the Criminal Record Office and that it was in possession of the respondent. It is not in dispute that the respondent then handed over to him the relevant file and told him of the inquiries that he was making in regard to the conspiracy to defraud. Nor is it in dispute that, the Home Secretary having on Sept. 27 ordered an inquiry into the Comer trial, the respondent when he went to arrest the appellant on Sept. 29 was accompanied by Sergeant Chitty of the West End Central police station and a detective-constable named Palmer who were concerned in the investigation of the appellant's possible perjury at the Comer trial and took the opportunity of searching the appellant's premises for material relevant to that matter, nor that on his arrest they all went with him to Marylebone police station. There was, however, a serious conflict of evidence about what took place at the police station. The appellant alleged that the respondent there said to him (I quote his words):

> "He told me that I was a fool to have given evidence for Jack Comer and he made it plain that I would never have been charged with this offence [i.e., the conspiracy charge] if I did not give [presumably had not given] evidence."

He said also that Palmer as far as he recollected was present when this was said. The respondent denied that he said anything of the kind and Palmer denied hearing it. There was a further matter in which the evidence of the respondent might have appeared to the jury as unsatisfactory. I refer to an incident which took place after the appellant's file had been handed over to Superintendent Sparks. It was necessary for the respondent to recover this file which was in the possession of Detective-constable Palmer. He was told that the latter was to be found in the Edgware Road, sought him there and in due course recovered the file. In regard to this incident the respondent might have appeared to the jury—I would put it no higher—to have been secretive and lacking in candour. But, my Lords, whatever view might be taken of these two incidents, as showing that the respondent was influenced by malice, that is by some other motive than to bring the appellant to justice, they throw no light on and are not relevant to the question whether on Sept. 29 he believed in the probable guilt of the appellant. As I have pointed out at perhaps too

(10) *R. v. Comer*, (Sept. 23, 1955), "The Times", Sept. 24, 1955.

great length, the appellant had given no evidence that could properly be left to a jury that the respondent had not an honest belief when he reported to Mr. Melville, had a conference with counsel and went through the second information. I fail to see how the incidents to which I have referred could lead any jury to find that on Sept. 29 he had not the same belief. **A**

For the reasons that I have given which do no more than affirm those given by LORD MORRIS and WILLMER, L.J., I am of opinion that there was no evidence on which the second question ought to have been left to the jury. **B**

The appeal must therefore be dismissed.

My noble and learned friend **LORD REID** who is unable to be here today asks me to say that he has read and concurs in my opinion.

LORD RADCLIFFE: My Lords, one must suppose that the answers returned by the jury to the first two questions left to them at the trial meant that they considered that the prosecution of the appellant was a put-up job on the part of the police. To the first question they answered that the respondent in starting the prosecution had been actuated by a motive other than a desire to bring the appellant to justice. In my view there was evidence capable of supporting this finding and I do not think that it can be upset or ignored. The whole point of the present appeal, as I see it, is whether there was any evidence capable of supporting their second finding that on Sept. 29, 1955 (which is agreed to be the relevant date) the respondent did not honestly believe that the appellant was guilty of the offence of conspiracy to defraud. For, if there was no such evidence, then no question ought to have been put to them on this issue and the learned trial judge, instead of concluding, as I think that he must have, that their answer required him to hold that there was an absence of reasonable and probable cause moving the respondent, should have considered independently whether there was such reasonable and probable cause for the action that the respondent took. Had he done so, I agree with the view taken by the Court of Appeal (11) that the correct answer should have been that there was such cause. **C** **D** **E**

The action for malicious prosecution is by now a well-trodden path. I take it to be settled law that if the defendant can be shown to have initiated the prosecution without himself holding an honest belief in the truth of the charge (I must, of course, refine on this phrase later) he cannot be said to have acted on reasonable and probable cause. The connexion between the two ideas is **F**

(11) In the course of giving judgment in the Court of Appeal LORD MORRIS OF BORTH-Y-GEST said that after the jury had answered the questions put to them at the trial, counsel for the defendant (the respondent on the appeal to the House of Lords) invited the trial judge to hold that there was reasonable and probable cause for the prosecution, and counsel for the appellant on the appeal to the House of Lords invited him to hold the contrary. The trial judge held that there was no reasonable and probable cause for the prosecution. LORD MORRIS continued: "the transcript indicates that he so ruled because of the answer given by the jury to the second question." **G**

Subsequently in his judgment LORD MORRIS said: "on the basis of the facts which were not in dispute and on the face of statements undoubtedly given by persons of undoubted credibility, I am of the opinion that it could not be said that on Sept. 29, 1955, there was an absence of reasonable and probable cause for prosecuting [the appellant]. It follows, therefore, that the claim brought by [the appellant] ought to have failed." **H**

Similarly WILLMER, L.J., said, towards the conclusion of his judgment: ". . . I am of the opinion that . . . the material facts not being in controversy, it was for the learned judge to rule, without reference to the jury whether as a matter of objective fact there was reasonable and probable cause for the prosecution. In my judgment the learned judge's ruling on that point is vitiated by the answer of the jury as to a question (viz., question (ii), see pp. 698, 699, ante) which ought not to have been put. In these circumstances it appears to me to be our duty in this court to give our own ruling on the issue of reasonable and probable cause. Bearing in mind that the burden of proof is on [the appellant] I am not, for my part, prepared to say that absence of reasonable and probable cause has been proved. On that ground, therefore, in my opinion, the decision of the learned judge ought to be reversed and judgment entered for [the respondent]." **I**

SIR CHARLES ROMER concurred in the judgment of LORD MORRIS.

not very close at first sight, for one would suppose that there might well exist reasonable and probable cause in the objective sense, what one might call a good case, irrespective of the state of the prosecutor's own mind or his personal attitude towards the validity of the case. The answer is, I think, that the ultimate question is not so much whether there is reasonable or probable cause in fact as whether the prosecutor, in launching his charge, was motivated by what presented itself to him as a reasonable and probable cause. Hence, if he did not believe that there was one, he must have been in the wrong.

On the other hand I take it to be equally well settled that mere belief in the truth of his charge does not protect an unsuccessful prosecutor, given, of course, malice, if the circumstances before him would not have led "an ordinarily prudent and cautious man" to conclude that the person charged was probably guilty of the offence. This is involved, I think, in the formula from *Hicks* v. *Faulkner* (12) adopted by this House in *Herniman* v. *Smith* (13); and, while the state of the prosecutor's mind or belief or opinion, if a disputed issue, is a question of fact properly to be left to the jury, the question whether the circumstances reasonably justified a belief in the truth of the charge is a question for the judge himself to decide, whether the question is called one of fact or one of law.

I cannot say that I see any special difficulty in keeping separate the respective functions of judge and jury, nor do I wish to approach this matter with any preconception that the judge has a duty to lean towards protecting a prosecutor, ex hypothesi unsuccessful and malicious, from the possible injudiciousness of a jury. If there really is some evidence founded on speech, letters or conduct that supports the case that the prosecutor did not believe in his own charge the plaintiff is in my view entitled as of right to have the jury's finding on it. On the other hand, if there is not any such evidence, I do not think that an issue can be raised for the jury out of the mere argument that the facts known to the prosecutor were so slender or unconvincing that he could not have believed in the plaintiff's guilt. To argue in that way is no more than to say—"No reasonable or prudent man could have supposed that on these facts the plaintiff was probably guilty: the defendant is a reasonable and prudent man: therefore you must conclude on the evidence that the defendant did not believe in the plaintiff's guilt." To put a question to the jury as to the defendant's state of mind when it is only to be deduced by inference from the alleged feebleness of the case is, I think, to put to them indirectly exactly the same issues as the judge himself has to decide directly when he rules that there is or is not an absence of reasonable and probable cause. To do that is to confuse the respective functions of judge and jury and would allow the jury on occasions to usurp the function that ought to be reserved for the judge. It has always been recognised that the issue as to the defendant's belief (more properly, his lack of belief) does not necessarily arise in every action for malicious prosecution (see *Blachford* v. *Dod* (14)), so that in any particular trial there may be no question that can rightly go to the jury on it. In my opinion it does not arise unless there is some contested evidence bearing directly on the defendant's belief at the relevant date, apart from anything that could merely be inferred as to his belief from the strength or weakness of the case before him.

Was there then any such evidence at the trial before CASSELS, J.? Before I say what my view is on this, however, I must notice what was the respondent's main argument on this appeal, an argument to the effect that in considering whether there was an issue for the jury one should realise that the true question is whether there was a dispute "as to the main facts which formed the foundation of the prosecution complained of" and not whether there was a dispute as to what was the prosecutor's actual belief when he made his charge.

(12) (1881), 8 Q.B.D. 167. (13) [1938] 1 All E.R. 1; [1938] A.C. 305.
(14) (1831), 2 B. & Ad. 179.

In this case, it was said, there was no dispute as to these main facts and therefore no issue to go to the jury: on the other hand, to dispute about the prosecutor's belief in the plaintiff's guilt was to dispute about his opinion on a question of law which, given the facts, he was entitled to bring before the court without himself forming an opinion or holding a belief about it one way or the other. A

My Lords, I dare say that I have not done proper justice to the force of the respondent's argument in the way that I have now stated it. The cause of my failure, if there is one, lies in the fact that, despite the full and meticulous review of numerous past decisions in malicious prosecution cases which was offered to us by the respondent's counsel, I was never able to see that there was anything amiss with the various formulae such as "belief in guilt", "belief in the case laid", "belief in the truth or propriety of the charge" or "belief that the facts amounted to the offence charged" which judges have habitually used when putting a question to a jury on this issue or that there is any useful or maintainable distinction between belief in the facts on which the guilt is thought to be founded and belief in the guilt dependent on those facts. To try to maintain such a distinction in practice would involve impossible permutations in the separation and combination of facts or groups of facts and in the inferences to be drawn from them, separated or combined. But after all, the facts that are to be attended to cannot be just any set of facts; they must be such facts as, taken together, point to a case of the offence charged. They must be fraud facts, or theft facts or conspiracy facts. No doubt to take a view as to what these amount to is in a sense to form an opinion on a question of law, for it implies an idea as to what are the requisite conditions of the legal offence. But I do not see any complication in this, for an ordinary sensible man does have a general idea as to what these offences consist in; and if in a particular case an intending prosecutor has no such idea or the offence in question is complicated or special, I take it that he would be expected to suspend action until he had resorted to legal advice on it. B C D E

To put it shortly, I do not think that the elucidation of the law on the tort of malicious prosecution is likely to be assisted by hypothesising the instance of a prosecutor who believes in the existence of certain undisputed facts but has no personal opinion or belief whether they constitute a legal offence or not. I should like to come across an actual case of that nature before taking a view about it. For if the man has prosecuted, though unsuccessfully, and has been acting merely from a sense of public duty, then he is not guilty of malice, so there has been no malicious prosecution; whereas, if he has prosecuted for some reason other than a desire to vindicate justice and so has been malicious, I see no compelling reason why the law should give any protection to him on the ground of the alleged neutrality of his attitude. If we fine the matter down to police prosecutions, I think that the rights and wrongs may well depend on the nature of the explanation, if any, offered by the prosecutor in his evidence. I dare say that he may say that, having satisfied himself as to the existence of certain facts, he took action either on the strength of legal advice given to him or in accordance with the orders of some official superior. If his belief is said to rest on legal advice I think that the court is entitled to know positively, not merely by inference, what that advice was and on what instructions it was obtained. If on the other hand his action is attributed to departmental instructions, I can only say that my present view is that it would be undesirable in the public interest to allow such a reason to serve as a substitute for the belief in guilt that has habitually been required. Scotland Yard itself is not a possible defendant in these actions, nor is any police force as such. If any particular officer comes forward to make a charge it is not unreasonable, I think, if the issue arises, to hold him to the belief that the person he is prosecuting is guilty of the charge preferred. F G H I

In any event the case now before us is not in the least that of a neutral officer moved by no personal view as to the plaintiff's guilt. The respondent was insistent

A in his evidence that he preferred his charge against the appellant because he considered that the facts and circumstances then before him pointed to the appellant as guilty of conspiracy to defraud, and we come back therefore to the straightforward question whether there was any countervailing evidence produced at the trial which made it a disputed issue, to be submitted to the jury, whether he honestly entertained that belief or not.

B I have not found it easy to decide on this but on the whole I think that there was no such evidence. However one marshals or rearranges the list of circumstances and considerations in view at Sept. 29, and whatever suspicions one may entertain as to certain aspects of the respondent's conduct, I cannot see that there was really any evidence on which there could be founded a finding that he did not honestly believe in his case. The nearest that one comes to C such a piece of evidence is the remark attributed by the appellant to the respondent as being made at Marylebone Lane police station on the day of his arrest that "he was a fool to have given evidence for Jack Comer", and the impression said to have been conveyed to him on that occasion that he would never have been charged with the offence of conspiracy to defraud if he had not given that evidence. The respondent denied having made any such remark or having D said anything to justify such an impression. Accordingly there was a dispute of fact for the jury to determine whether these words had been said or this impression conveyed. This disputed fact was, in my view, relevant to the issue of malice and the existence of the dispute makes it impossible to say that the jury's finding on that issue was perverse. The alleged conversation was put to the respondent as evidence of his malice and I think that this was right. E But it is a very different thing to say that, even if the words in question were spoken and the impression somehow conveyed that the appellant's appearance on Comer's side was the cause of the conspiracy prosecution, one can fairly infer from this that the respondent had no honest belief in the appellant's guilt. In my opinion the two things have no real connexion and I think that one is bound to accept that on the issue of the respondent's belief, once the argument F based on the mere weakness or strength of the case is eliminated, nothing turned up at the trial which allowed this to be treated as a disputed issue of fact which the jury could determine.

If the jury's finding in answer to question 2 does not stand, I do not feel any doubt that the Court of Appeal were correct in holding (14a) that there was no lack of reasonable and probable cause to move the respondent when he preferred G his charge on Sept. 29, 1955.

I agree that the appeal must be dismissed.

LORD DENNING: My Lords, in *Hicks* v. *Faulkner* (15) HAWKINS, J., put forward a definition of "reasonable and probable cause" which later received the approval of this House. He defined it as an "honest belief . . . in the guilt of the accused" and proceeded to detail its constituent elements. The definition H was appropriate enough there. It was, I suspect, tailor-made to fit the measurements of that exceptional case. It may fit other outsize measurements too. But experience has shown that it does not fit the ordinary run of cases. It is a mistake to treat it as a touchstone. It cannot serve as a substitute for the rule of law which says that, in order to succeed in an action for malicious prosecution, the plaintiff must prove to the satisfaction of the judge that, at the I time when the charge was made, there was an absence of reasonable and probable cause for the prosecution. Let me give some of the reasons which show how careful the judge must be before he puts to the jury the question: "Did the defendant honestly believe that the accused was guilty?"

In the first place the word "guilty" is apt to be misleading. It suggests that, in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the *guilt* of the accused. That he must be sure of it, as a jury must, before

(14a) See footnote (11), p. 706, ante.

(15) (1881), 8 Q.B.D. 167 at p. 171.

they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court, or in the words of LORD MANSFIELD, that there is a probable cause "to bring the [accused] to a fair and impartial trial", see *Johnstone* v. *Sutton* (16). After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him. Test it this way: Suppose he seeks legal advice before laying the charge. His counsel can only advise him whether the evidence is sufficient to justify a prosecution. He cannot pronounce on guilt or innocence. Nevertheless the advice of counsel, if honestly sought and honestly acted on, affords a good protection: see *Ravenga* v. *Mackintosh* (17) by BAYLEY, J. So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him. He is no more concerned to convict a man than is counsel for the prosecution. He can leave that to the jury. It is for them to believe in his guilt, not for the police officer. Were it otherwise, it would mean that every acquittal would be a rebuff to the police officer. It would be a black mark against him, and a hindrance to promotion. So much so that he might be tempted to "improve" the evidence so as to secure a conviction. No, the truth is that a police officer is only concerned to see that there is a case proper to be laid before the court.

Next, the word "honestly" may in some cases be misleading also. It suggests that, in order to have reasonable and probable cause, a man who brings a prosecution must bring to bear a fair and open mind before he makes the charge. If this be so, then a belief which is distorted by malice, or biased by an improper motive, can hardly be said to be an honest belief. That is why a jury which has found "malice" will very likely find also "no honest belief". To them it is the same thing. Yet we all know that malice or improper motive is never a ground for saying there is no reasonable or probable cause. In the words of LORD MANSFIELD: "From the most express malice, the want of probable cause cannot be implied", see *Johnstone* v. *Sutton* (18).

Finally, even if the jury answer: "Yes, the defendant did honestly believe the accused was guilty", it does not solve the problem. Honest belief in guilt is no justification for a prosecution if there is nothing to found it on. His belief may be based on the most flimsy and inadequate grounds, which would not stand examination for a moment in a court of law. In that case he would have no reasonable and probable cause for the prosecution. He may *think* he has probable cause, but that is not sufficient. He must have probable cause in fact. In this branch of the law, at any rate, we may safely say with LORD ATKIN that the words "if a man has reasonable cause" do not mean "if he thinks he has", see *Liversidge* v. *Anderson* (19).

These reasons are, I trust, sufficient to show that the question and answer as to "honest belief" should not be used in every case. It is better to go back to the question which the law itself propounds: Was there a want of reasonable and probable cause for the prosecution? This is a question for the judge and not for the jury: and in order to enable him to answer it, the authorities give him this guidance:

First, there are many cases where the facts and information known to the prosecutor are not in doubt. The plaintiff has himself to put them before the court because the burden is on him to show there was no reasonable and probable cause. The mere fact of acquittal gets him nowhere. He will therefore refer to the depositions which were taken before the magistrate: or he may refer, as here, to the statements taken by the police from the witnesses: and he will argue from thence that there was no reasonable or probable cause. In such cases the judge should leave no question to the jury. He should take the

(16) (1786), 1 Term Rep. at p. 547.
(17) (1824), 2 B. & C. at p. 697.
(18) (1786), 1 Term Rep. at p. 545.
(19) [1941] 3 All E.R. 338; [1942] A.C. 206.

A undoubted facts and information and decide on them himself. If, on considering them, he finds that there was no want of reasonable and probable cause, he should dismiss the claim without more ado as the judges did in *Davis* v. *Hardy* (20), *Blachford* v. *Dod* (21), and *Bradshaw* v. *Waterlow & Sons, Ltd.* (22), and as the judge should have done in *Herniman* v. *Smith* (23). If he finds there was an absence of reasonable and probable cause, likewise he should say so B and leave only malice to the jury as the judge did in *Huntley* v. *Simson* (24). CHANNELL, B., put it quite simply when he said (25):

> "In cases of this kind, when the facts are not disputed, it is for the judge to say whether they show a want of reasonable and probable cause."

Second, there are some cases where the prosecutor is personally involved, so much so that his own evidence is the very basis of the case for the prosecution: C and it is flatly contradicted by the evidence of the accused. The issue then appears simple. If he was speaking the truth, there was good cause for the prosecution. If he was lying, there was no cause for it. In these cases he has to face the fact that his evidence has not been accepted at the criminal trial: for the accused man has been acquitted. But this does not mean that there was no reasonable or probable cause for prosecution. It depends on his state D of mind when he launched the charge. If he honestly believed that the facts were as he stated, then, even though it turned out to be a mistaken belief, he would have reasonable and probable cause to prosecute: but if he had no such *honest* belief and was consciously putting forward a false case, he would, of course, have no cause to prosecute, see *Venafra* v. *Johnson* (26); *Hinton* v. *Heather* (27). In such cases the judge may properly put to the jury the question: E Did he honestly believe in the guilt of the accused?, or, as I would prefer: Did he honestly believe in the case he put forward?, for that is the core of the matter, see *Hicks* v. *Faulkner* (28); *Tempest* v. *Snowden* (29).

Third, there are cases where the prosecutor is not himself personally involved but makes the charge on information given to him by others. The issue again appears simple. If the information was believed by him to be trustworthy, F there was good cause for the prosecution. If it was known by him to be untrustworthy and not fit to be believed, there was no cause for it. Here again much depends on the state of mind of the prosecutor. If there is evidence to show that he did not believe the information to be trustworthy, the question may properly be put to the jury as CAVE, J., put it in *Abrath* v. *North Eastern Ry. Co.* (30): Did he honestly believe in the case which he laid before the magis- G trates?, for that is the crucial point. But it should not be put unless there is some evidence of his want of belief, see *Cox* v. *Wirrall* (31) at the end; *Haddrick* v. *Heslop* (32); *Abrath* v. *North Eastern Ry. Co.* (33).

Fourth, there are cases where from the conduct of the defendant himself it may reasonably be inferred that he was conscious that he had no reasonable or probable cause for the prosecution. That is how it was put by a strong Court of Exchequer Chamber in *Panton* v. *Williams* (34). Thus a man may trump up a charge in order to bring pressure to bear on another. He may put forward plausible evidence and use all sorts of means to give it an air of propriety, even to the extent of getting counsel's opinion in support of it. He may even conceal facts which he knows would furnish an answer to the charge. When it comes to the trial, he may not be prepared to support it in the witness-box. Clearly such a man has no reasonable or probable cause for a prosecution. But the only way of establishing it may be to look at his conduct and see whether it can

(20) (1827), 6 B. & C. 225.
(21) (1831), 2 B. & Ad. 179.
(22) [1915] 3 K.B. 527.
(23) [1938] 1 All E.R. 1; [1938] A.C. 305.
(24) (1857), 2 H. & N. 600.
(25) (1857), 2 H. & N. at p. 604.
(26) (1833), 10 Bing. 301.
(27) (1845), 14 M. & W. 131.
(28) (1881), 8 Q.B.D. 167.
(29) [1952] 1 All E.R. 1; [1952] 1 K.B. 130.
(30) (1883), 11 Q.B.D. 440.
(31) (1607), Cro. Jac. 193.
(32) (1848), 12 Q.B. 267.
(33) (1883), 11 Q.B.D. 440; (1886), 11 App. Cas. 247.
(34) (1841), 2 Q.B. 169 at p. 194.

reasonably be inferred therefrom that he was conscious he had no good cause to prosecute. If so the question can properly be put to the jury: Did he honestly believe that the accused was guilty?, or, as I would prefer, did he know there was no good ground for the charge he made? See *Ravenga* v. *Mackintosh* (35); *Taylor* v. *Willans* (36); *Broad* v. *Ham* (37). But these cases must be carefully watched so as to see that there really is some evidence from his conduct that he knew it was a groundless charge. It must always be remembered that, if a charge is genuine the mere fact that the prosecutor has made an unfair use of it will not take away his protection. It may show malice, but it does not raise any inference of a belief that there was no reasonable or probable cause, see *Turner* v. *Ambler* (38) by LORD DENMAN, C.J.

Applying these guides I turn to the undisputed facts in the present case. In April, 1955, a number of men in London conspired together to defraud textile manufacturers in Yorkshire. Their mode of operation was this: They took fictitious names for themselves such as Higgins and Davies, and they created fictitious firms such as Seymour Stores Co., Ltd. and R. A. Davies Supplies Co. Using their fictitious names, they took *actual* premises in London for a week or two. They took a basement at 8, Seymour Place, W.1, an accommodation address at 37A, Kensington High Street, W.8, and rooms at other places. They got business paper printed with letter-headings headed with the fictitious firms but giving the *actual* addresses. On this paper they ordered goods from textile manufacturers in the north. The textile manufacturers believed that the orders were genuine and despatched the goods to the *actual* addresses given on the paper. When the goods were delivered one of the conspirators or their henchman was waiting at the address to take delivery. He soon afterwards went off with the goods and disappeared. When the manufacturers sent in the bill to the fictitious firm at the given address, it was, of course, too late. No one was there to pay it. The bird had flown. The manufacturers reported to the police.

In May, 1955, Detective-sergeant McIver of New Scotland Yard started inquiring into the conspiracy. At first he had very little to go on. He visited the addresses used by the conspirators, and tried to find out who had applied for the tenancy, who had taken delivery of the goods, and so forth. But he did not get very far. The conspirators had used false names and had given false references. All he could get was vague descriptions of the appearance of the conspirators, their height, build, complexion and so forth. The first real clue that Sergeant McIver got concerned a delivery of some two thousand yards of sheeting. The conspirators had ordered these goods in the name of Seymour Stores Co., Ltd., a fictitious concern, for delivery at an *actual* address 8, Seymour Place, W.1. On Apr. 12, 1955, the carriers delivered these goods in twenty brown paper parcels to that address. When the delivery van arrived, a man (who was no doubt one of the conspirators) came out and asked the carman to leave the parcels on the stairs leading to the basement and he did so. On the morning of the next day, Apr. 13, 1955, a lady who worked on the ground floor of the same building saw a number of brown paper parcels being taken away in a taxi. She was so suspicious that she took the number of the taxi. This was the vital clue. Sergeant McIver traced the taxi-driver. The taxi-driver remembered the occasion. He remembered the packages, at least twenty, he said, about three feet long, covered in brown paper. He remembered the address to which the parcels were taken. It was 7, Princes Street, off Hanover Square. He remembered what happened to the parcels at 7, Princes Street. They were unloaded and they were all carried upstairs. Most important of all, the taxi-driver was able to give a clear description of the man who engaged him and helped load and unload the parcels and take them upstairs. He was able to identify the man from a photograph and later on to identify him on an identification parade. The man was Christopher Glinski.

(35) (1824), 2 B. & C. 693.
(36) (1831), 2 B. & Ad. 845.
(37) (1839), 5 Bing. N.C. 722.
(38) (1847), 10 Q.B. 252 at p. 261.

A Sergeant McIver followed up this clue. On June 30, 1955, he kept watch on the address 7, Princes Street to which the goods had been taken. He looked through binoculars and saw Christopher Glinski and another man called Werner moving parcels in the office. Sergeant McIver thereupon obtained a search warrant and on July 1, 1955, searched this office. On this occasion Werner only was there, not Glinski. Sergeant McIver did not find any of the missing B goods. This was understandable enough, because ten weeks had elapsed since Glinski had taken them there. But he obtained another valuable clue. He saw a calendar on the wall bearing the name of Arnost Lowy: and he asked Werner who did his printing. He replied Lowy. Sergeant McIver thereupon went to see Mr. Lowy the printer and discovered that it was he who had printed the fictitious letter-headings which the conspirators had used. Mr. Lowy, of course, C did not know they were fictitious. He had simply run off proofs of the letter-headings. He did so, he said, on the instructions of Werner. Werner had ordered proofs of letter-headings bearing the names Seymour Stores Co., Ltd., of 8, Seymour Place, W.1, R. A. Davies Supplies Co., of 37A, Kensington High Street, W.1, and so forth. But Werner never gave a firm order for a supply of letter-headings. The conspirators were content to use the proofs only. They used D them to order the goods from the manufacturers.

Stopping there, I should have thought that on those undisputed facts Sergeant McIver had reasonable and probable cause for prosecuting both Glinski and Werner for conspiracy to defraud. There was clearly a conspiracy by some-one and the only question was: Who were the conspirators? The evidence of Mr. Lowy showed that Werner was the man who had ordered the fictitious letter-E headings. That was sufficient cause to prosecute him. The evidence of the taxi-driver showed that Glinski had taken twenty brown paper parcels from the accommodation address in Seymour Place to Werner's office in Princes Street: and there was good reason to believe that these were the very same parcels which had been delivered there the day before and had been obtained by fraud. That was sufficient ground to prosecute him. Thus far the case seems F simple enough: but it has been complicated beyond all measure by what happened afterwards. In the first place when Sergeant McIver went on Sept. 13, 1955, to arrest Glinski, the warrant was made out in the wrong name. It was made out in the fictitious name " R. Davies " and not in his true name " Christopher Glinski ". So he was released on that occasion and not charged. He was arrested again a fortnight later, as I will show, but the time was taken up getting G legal advice. Meanwhile, however, during this fortnight, Glinski had come under the notice of the police again. This was in connexion with a very different matter. There had been a fight in Soho and a man called Jack Comer was charged in connexion with it. On Sept. 22, 1955, Comer was tried at the Central Criminal Court. Now here is the point. At the trial of Comer, Glinski came forward as a witness for the defence. He said he actually saw the fight. In the H result Comer was acquitted. The police were suspicious about Glinski's evidence in the Comer case. They suspected that he had committed perjury. They wanted to get to know more about him. So the police officer in charge of the Comer case got into touch with Sergeant McIver who was in charge of the conspiracy case. It is now suggested by Glinski that it was these collocations that led to his being re-arrested on the conspiracy charge. And it is the fact that I a few days later, on Sept. 29, 1955, Sergeant McIver rearrested Glinski on the conspiracy charge. He made the arrest at Glinski's room in Paddington. With him there was a detective-constable who was concerned in the perjury inquiry. He went so as to search for any material that might be of use in it. Sergeant McIver arrested Glinski and took him to the police station. And there (according to Glinski) Sergeant McIver made this telling admission:

" He told me that I was a fool to have given evidence for Jack Comer, and he made it plain that I would never have been charged with this offence if I did not give evidence."

In short, the police would have dropped the conspiracy charge against Glinsk[i] but for the fact that he had given evidence for Jack Comer.

My Lords, even if Sergeant McIver did make this admission, I do not thin[k] it shows a want of reasonable and probable cause. It shows that he was usin[g] the charge of conspiracy for an improper purpose: and it was therefore eviden[ce] of malice on his part. But it does not destroy the reasonable and probabl[e] cause which was apparent on all the undisputed facts of the case. When th[e] facts of a case show such strong grounds for prosecution as this did, an accuse[d] cannot be allowed to say those grounds do not exist simply by a chance phras[e] which he puts into the mouth of a police officer. Were this not so, every polic[e] officer would be at the mercy of any man who happens to be acquitted.

I would therefore dismiss the appeal.

LORD DEVLIN: My Lords, it is a commonplace that in order to succeed in an action for malicious prosecution the plaintiff must prove both that the defendant was actuated by malice and that he had no reasonable and probable cause for prosecuting. The chief matter which the House has had to consider in this appeal is what is the relevance to either of these elements of a lack on the part of the defendant of an honest belief in the guilt of the plaintiff and in what circumstances a question on this point should be left to the jury. In the present case the second question left to them was:

> "Did the defendant honestly believe on Sept. 29, 1955, that the plaintiff was guilty of the offence of conspiracy to defraud?"

It is best to begin by considering more closely what is meant by malice, honest belief in guilt, and reasonable and probable cause, in their application to the facts of this case.

Malice, it is agreed, covers not only spite and ill-will but also any motive other than a desire to bring a criminal to justice. It is agreed also that there was some evidence that when on Sept. 29, 1955, the defendant charged the plaintiff with conspiracy to defraud, he did so not in order to bring him to justice for that offence but with an irrelevant and improper motive. The motive suggested was a desire either to punish the plaintiff for having a week before given evidence, which the police then believed to be perjured, for the defence in *R.* v. *Comer* (39) or in the hope of obtaining an admission from him that he was guilty of the perjury for which they subsequently prosecuted him unsuccessfully. In answer to the first question addressed to them, the jury found that there was malice in this sense. It has been submitted that this verdict was perverse. I see no reason for thinking that and I am therefore satisfied that the plaintiff has proved the first of the two matters he has to prove in order to succeed. Admittedly it was relevant to the first question for the jury to consider, among other factors, whether the defendant believed in the plaintiff's guilt on the charge of fraud. If that were the only relevance of belief in guilt, it was, in my opinion, neither necessary nor desirable to address a specific question to the jury on it. It would not, however, follow from the finding of malice that the jury were satisfied that the defendant did not believe in the plaintiff's guilt; he could have believed in guilt and still have been actuated by improper motives in launching the prosecution. Was, then, the question of belief relevant to the element of reasonable and probable cause? If so, was it right in the circumstances of this case to leave that question to the jury?

This makes it necessary to consider just what is meant by reasonable and probable cause. It means that there must be cause (that is, sufficient grounds; I shall hereafter in my speech not always repeat the adjectives "reasonable" and "probable") for thinking that the plaintiff was probably guilty of the crime imputed; *Hicks* v. *Faulkner* (40). This does not mean that the prosecutor has to believe in the probability of conviction; *Dawson* v. *Vansandau* (41).

(39) (Sept. 23, 1955), "The Times", Sept. 24, 1955.
(40) (1881), 8 Q.B.D. at p. 173.
(41) (1863), 11 W.R. 516.

A The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried. As DIXON, J., put it, the prosecutor must believe that

"the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted ";

B *Commonwealth Life Assurance Society v. Brock* (42). Perhaps the best language in which to leave the question to the jury is that adopted by CAVE, J., in *Abrath v. North Eastern Ry. Co.* (43): " . . . did [the defendants] honestly believe in the case which they laid before the magistrates? "

I venture to think that there is a danger that a jury may be misled by a question in the form left to them in the present case in which the word " guilty " C is used without any qualification. The defendant at the trial is usually pressed, as he was in the present case, to declare that he no longer believes that the plaintiff was guilty. Where, as here, the defence was not called on at the criminal trial and the only new factor for the defendant to weigh is the trial judge's ruling that there was no case to go to the jury or no case on which it would be safe for them to convict, the jury in the civil case may ask themselves whether D that would be enough to cause an honest man to change his belief. They may not appreciate unless they are carefully directed in the summing-up that there is a substantial difference between a case that warrants the making of a charge and one that survives the test of cross-examination with sufficient strength left in it to require consideration by a jury which is concerned only with guilt beyond reasonable doubt. In the course of his cross-examination in the present E case the defendant assented to the proposition that

"you must not prosecute anybody for an offence in this country unless you as the officer honestly believe that he is guilty of that offence "

and said that on Sept. 29, 1955, he did believe that the plaintiff was guilty. It would have been sufficient if he had replied that he believed that he had F a good enough case to warrant a prosecution and that it was not for him to hold or to express an unqualified opinion about guilt. If the jury in this case interpreted his answer, as they well might, as meaning that he had made up his mind that the plaintiff was guilty before he had heard his explanation and before he was tried, they might have been unfavourably impressed.

I do not make these observations in order to canvass the question whether G the jury in the present case was misled: that would be mere speculation and the form of the question was not in fact objected to. I make them in the hope that they may be of some use in the future. The word " guilt " by itself, unqualified even by " probable ", may be a source of confusion to a jury and may cause them to attach too much importance to the ultimate result of the criminal trial which must, of course, have ended in the acquittal of the plaintiff.

H Six points are settled about the question of reasonable and probable cause. First, the question is a double one: did the prosecutor actually believe and did he reasonably believe that he had cause for prosecuting? Secondly, provided that the defendant has made sufficient inquiry, the facts on the basis of which the question has to be answered are those, and only those, known to the defendant at the material time. Thirdly, though a question of fact, it is I one that in the end has to be determined by the judge and so is to be treated in the same way as if it were a question of law. Fourthly, if in the course of the judge's inquiry he finds that it is necessary to resolve some disputed question of incidental fact, that question is a jury question. But, fifthly, like any other jury question, it is to be left to the jury only if there is some evidence put forward by the party on whom the onus lies; and that, in the case of malicious prosecution, means the plaintiff, since it is he who has to show want of cause. Sixthly, a question whether the defendant in fact believed that there was cause

(42) (1935), 53 C.L.R. at p. 382.

(43) (1883), 11 Q.B.D. at p. 443.

for prosecution is, if in dispute and if there is some evidence to support a conclusion that he did not, a question to be left to the jury.

These matters being settled, counsel for the defendant bases on two grounds his submission that the second question, the one about honest belief in guilt, ought not to have been asked and that the answer to it can be disregarded as irrelevant. The first ground involves a further analysis of what is meant by the question—Did the prosecutor believe that he had cause for prosecution? Counsel submits that that means—Did he believe in the facts on which the prosecution was based? If, he submits, the prosecutor believed in the truth of the information or evidence he had obtained, there is no need for him to form any opinion on the strength of it nor to determine whether it is sufficient to sustain a prosecution; his personal opinion, as counsel puts it, on such points is irrelevant. If this submission is correct, it means that the second question was not in a form designed to obtain the relevant answer; and the appropriate form of relief for that would ordinarily be an order for a new trial. But since it is not suggested in the present case that the defendant had any reason to doubt the truth of the information he had obtained, there is here no need for a new trial, for counsel for the defendant will have established that there was no ground for putting any question at all.

The second part of counsel for the defendant's submission is that if the belief of the prosecutor goes not merely to the truth of his information but also to the truth of the charge he has preferred, there was no evidence to go to the jury that the defendant did not believe in the charge in this case. So here also it is submitted that the second question left to the jury was unnecessary and that their answer to it should be ignored. But here the matter is in dispute. The defendant's belief in the truth of his information is not challenged but his belief in the truth of the charge is strongly challenged. Counsel for the plaintiff submits that there was sufficient evidence to go to the jury of the defendant's lack of belief in the charge and that their answer that he did not honestly believe in it must be accepted. If it is accepted, it is conceded that CASSELS, J., was bound to find, as he did, that the defendant had no reasonable and probable cause and that therefore the plaintiff is entitled to judgment.

My Lords, in my judgment the first part of counsel for the defendant's submission should be rejected. It does not appear to have been advanced in this form in the Court of Appeal so that we have not the benefit of their judgment on it. I reach my conclusion for three reasons. The first is that, since the inquiry is confined to the facts operating in the defendant's mind, no distinction can practicably be drawn between his belief in the facts about which he is informed and his belief in those which he infers; or between his belief in the totality of the facts evidenced directly or indirectly and his belief in the conclusion which he draws from them. The second reason is that, while counsel for the defendant may be right in saying that the exact point has never before come up for decision, the current of authority is, in my opinion, strongly against his submission. The third reason is that if we are free, as counsel submits, to formulate the rule as we choose, we should make it the rule that the prosecutor must believe in his case. I shall develop each of these reasons in turn.

Counsel for the defendant agrees that in the reported cases the question put to the jury has almost universally been whether the defendant believed in the plaintiffs' guilt or in the truth of the charge; no case has been cited in which the jury has been asked whether the defendant believed only in the truth of the facts directly evidenced. But these were mostly cases of defendants who were not only prosecutors but also as witnesses the source of the supply of the facts on which the prosecution was based. Where the facts, if proved, point clearly to guilt, belief in the facts and belief in guilt is the same thing. The position is quite different, counsel submits, where the prosecutor is an independent investigator who took no part in the res gestae constituting the alleged offence. At first sight it is undoubtedly an attractive proposition that a police officer

A should not be expected to hold an opinion about the guilt and innocence of those he prosecutes; a prosecuting counsel is not expected to hold such an opinion any more than the magistrate who commits for trial. This point of view was very strongly and clearly put by DENNING, L.J., in *Tempest* v. *Snowden* (44). It derives, I think, a lot of its attraction from the ambiguous use of the word "guilt". If the word is used without qualification, I entirely agree, for the B reasons I have given, that a police officer should not be expected to hold an opinion. But when the question to which his mind ought to be directed is no more than the strength of his case, I think it would be unsatisfactory and impracticable to attempt to distinguish between facts proved directly and facts inferred, or (for inference depends on opinion), between fact and opinion generally. Opinion enters into everything from the beginning. The value of a statement C taken from a witness depends, until it is tested in court, on the officer's opinion of the witness's honesty, accuracy and power of observation. There may be a few cases, such as *Blachford* v. *Dod* (45), which depend entirely on paper; there the only opinion that could be relevant was as to the construction of a letter. But ordinarily when the officer comes to assess the strength of his case, he will not be able, however hard he tries, to separate his opinion of the value of his D information from his opinion about the facts to be inferred from that information or his opinion about the conclusion to which all the facts, observed or inferred, should lead; nor do I think that he would be able to do so intelligibly under cross-examination. For the making of such an assessment is not like constructing a piece of mechanism which thereafter can be taken to pieces and each component separated and weighed. It would be even more difficult for a layman E who has been a participator in the relevant events to attempt such a dissection; but where there are matters of inference or opinion, the same test must be applied to him, for it cannot be said that a policeman's opinion does not matter while a layman's does.

Invited to say where for the purposes of his submission the line should be drawn between fact in which the prosecutor must believe and opinion or inference F in which he need not, counsel for the defendant answered that the prosecutor need believe only in the truth of the primary facts. If this test were the proper one, there would, I believe, be very few cases in which the prosecutor's belief could matter at all; for it is not often that a private prosecutor puts forward an invented story or a police officer prosecutes notwithstanding his disbelief in the credibility of information received. To illustrate this I shall examine G two out of the very many authorities which have been cited to us. First, *Turner* v. *Ambler* (46) as a case of a lay prosecutor and because it is the first of the cases in which the question of the defendant's belief emerged as possibly a separate question for the jury. Secondly, *Herniman* v. *Smith* (47), because it is the latest case in which the relevant principles of law have been reviewed by your Lordships; it was a case in which there was a police investigation H though in the end the information was laid by a private prosecutor.

In *Turner* v. *Ambler* (46) the defendant was the plaintiff's landlord. The plaintiff removed and sold some of the landlord's fixtures, as LORD DENMAN, C.J., said (48) "in such a manner as could hardly fail to raise a strong suspicion that he had committed a felony". The defendant prosecuted him and his defence was that he had no criminal intent; the value of the fixtures, he said, I was small and he had removed and sold them in the course of effecting improvements to the premises. He was acquitted and sued the defendant for malicious prosecution, alleging that the defendant had prosecuted him because he wanted to get rid of him as a tenant and not because he really thought him guilty of felony. LORD DENMAN, C.J., left it to the jury to say whether there was malice and, with reference to that question, whether the evidence showed, in point

(44) [1952] 1 All E.R. 1; [1952] 1 K.B. 130. (45) (1831), 2 B. & Ad. 179.
(46) (1847), 10 Q.B. 252. (47) [1938] 1 All E.R. 1; [1938] A.C. 305.
(48) (1847), 10 Q.B. at p. 260.

of fact, want of probable cause; but he reserved to himself the question of probable cause, as distinct from that of motive. The jury found for the plaintiff and the Lord Chief Justice, deciding that want of cause was not proved, directed a verdict to be entered for the defendant. This is an example of a very common type of case in which the primary facts are undisputed and the sole question is whether criminal intent ought to be inferred from them. In the argument on the rule nisi the plaintiff's counsel contended (49) that reasonable and probable cause was not purely for the judge and that a question ought to have been left to the jury as to

> ". . . the defendant's knowledge and belief as to the real character of the transaction for which he prosecuted. Had the questions of fact been so left to them, they might justifiably have found that the defendant did not believe a felony to have been committed: and, if so, there was no probable cause."

In delivering his judgment discharging the rule, LORD DENMAN, C.J., distinguished very clearly between the defendant's knowledge of the existence of facts on the one hand; and on the other hand his belief that the facts amounted to the offence which he charged, coupled with his opinion that he had a right to prosecute. He said (50):

> "The prevailing law of reasonable and probable cause is, that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause. But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them; and also the defendant's belief that the facts amounted to the offence which he charged, because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding: and perhaps whether they did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred."

LORD DENMAN, C.J., having for these reasons considered that the defendant's belief in reasonable and probable cause was matter that was capable of being the subject for an independent question, went on to hold that, since in the case before him there was no evidence of the absence of that belief, the question need not have been put.

This is the foundation for all the present practice. It was emphasised again by LORD DENMAN, C.J., very strongly in the following year in *Haddrick* v. *Heslop* (51). In this case the plaintiff Haddrick gave evidence against the defendant Heslop in a suit for the price of certain barley; the judge told the jury that one side or the other was committing perjury and they found against the defendant Heslop. The defendant Heslop does not appear to have been present at the hearing and he received the account of Haddrick's evidence from another party. He then stated that he would indict Haddrick for perjury; and when his informant expressed an opinion that there was no ground for such indictment, he said that, even if there were not sufficient ground, it would tie up his mouth while he moved for a new trial. Haddrick was acquitted on the indictment and sued for malicious prosecution. The jury found that the defendant Heslop had acted from an improper motive and that he did not believe that there was reasonable ground for indicting. It was in relation to these facts that LORD DENMAN, C.J., said (52) that:

(49) (1847), 10 Q.B. at p. 258.
(50) (1847), 10 Q.B. at p. 260.
(51) (1848), 12 Q.B. 267.
(52) (1848), 12 Q.B. at p. 274.

A "It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause . . . I think that belief is essential to the existence of reasonable and probable cause: I do not mean abstract belief, but a belief upon which a party acts . . . where a plaintiff takes upon himself to prove that, assuming the facts to be as the defendant contends, still the defendant did not B believe them, we ought not to entertain any doubt that it is proper to leave the question of belief as a fact to the jury."

I have referred to this case in detail because it provides a good example of the sort of extraneous evidence of disbelief that can properly be left to a jury.

In *Herniman* v. *Smith* (53) the plaintiff was a timber merchant and the defendant, a builder, was one of his customers. The plaintiff employed a carrier C called Rickard to carry timber which he had imported from the docks to the sites where the defendant required it. The defendant, having discovered that some of the plaintiff's delivery notes were being faked so as to represent larger quantities than were in fact being delivered, prosecuted the plaintiff and Rickard for conspiracy to defraud; they were both convicted but their conviction was quashed in the Court of Criminal Appeal and thereupon the plaintiff sued for D malicious prosecution. The material which the defendant had when he initiated the prosecution is summarised by LORD ATKIN (54). First, he had statements from two employees of Rickard who said that they had been told by Rickard to put extra timber over and above that delivered to the customer on the bill; they agreed to do so and were therefore parties to the dishonesty they alleged. Secondly, a comparison between the quantities shown on the dock passes and E those shown on the delivery notes established that the latter had been faked, and some of the alterations were shown to be in Rickard's handwriting. Thirdly, the plaintiff delivered invoices based on the fraudulent quantities and so obtained larger payments than were due to him. These facts show that the case bears some general similarity to the present one. There was, as LORD ATKIN said, no doubt that a fraud had been practised and the real question was whether F the plaintiff Herniman was a party to it. So here it is conceded that there was a fraudulent conspiracy and the whole question is whether the plaintiff Glinski was a participator in it. If in *Herniman* v. *Smith* (53) one tries to separate the primary facts from the others, the only primary facts are the documents, which are undisputed, and the statements of the two employees; the extent to which credit was to be given to them, since both men were accomplices, G is a matter of opinion. But there was no evidence that directly implicated Herniman and the real question was whether the inference could rightly be drawn that he knew what was going on. LORD ATKIN, with whose opinion all the other members of the House agreed, held (55), applying the definition of reasonable and probable cause given by HAWKINS, J., in *Hicks* v. *Faulkner* (56), that the facts ascertained by Smith

H ". . . would induce a conviction, founded on reasonable grounds, of a state of circumstances which would reasonably lead any ordinarily prudent and cautious man placed in Smith's position to the conclusion that Herniman was probably guilty of the crime imputed."

LORD ATKIN's commentary on this definition (57) has been thought by some to be lacking in clarity, but I do not find it so. He says that the question of I absence of cause is for the judge, but that the jury are to find for him the relevant facts, when they are disputed, so that he can draw his conclusion. Among the relevant facts that he puts first as one that may be in dispute is whether the defendant honestly believed in the guilt of the accused; other facts are

(53) [1938] 1 All E.R. 1; [1938] A.C. 305.
(54) [1938] 1 All E.R. at p. 9; [1938] A.C. at p. 318.
(55) [1938] 1 All E.R. at pp. 9, 10; [1938] A.C. at pp. 317, 318.
(56) (1881), 8 Q.B.D. at p. 171.
(57) [1938] 1 All E.R. at p. 8; [1938] A.C. at p. 316.

whether the statements which he said were made to him were in fact made, and so on. This language and the language of HAWKINS, J., whose definition he approved, satisfies me that LORD ATKIN was clearly distinguishing between the prosecutor's belief in probable guilt and his belief in the facts on which he acted. It is said that this part of LORD ATKIN's speech is obiter. As to that, the first question left to the jury was whether it had been proved that the defendant commenced and proceeded with the prosecution without any honest belief that the plaintiff was guilty of fraud. If counsel for the defendant's argument is right, the proper question on this topic ought to have been:—" Has it been proved that the defendant had no honest belief that the statements made by the two employees were true? " There was no other fact in the case that could be disputable. So far from dealing with the matter summarily in this way, LORD ATKIN deals at length in the manner I have set out with the question of belief in guilt and finally holds (58) that there was no evidence to go to the jury in support of want of belief. His speech embodies the considered opinion of this House on the whole question; and whether or not it is technically obiter, your Lordships are not now likely to depart from it unless fully convinced that it is wrong.

The examination of these three authorities brings me close to the second reason I have stated for the rejection of counsel for the defendant's main submission. It is true that the exact question your Lordships have to decide was not raised in *Herniman* v. *Smith* (59); the main point argued seems to have been that the defendant did not take reasonable care to inform himself of the full facts. Nor was the exact point determined in any earlier case. But the conclusion on this point which I find to be implicit in LORD ATKIN's speech, is, in my opinion, fully supported by the trend of authority from the earliest times. It must be remembered that the question is not whether there was in the abstract reasonable and probable cause but whether the defendant had such cause. That is how it should be framed. If it were framed in the other way, the test would be purely objective and the defendant's belief in anything immaterial; but it is common ground that the defendant must believe in something. There must therefore be both actual belief and reasonable belief. I can find nothing in any statement of principle throughout the cases to indicate that the area to be covered by the former is smaller than the area to be covered by the latter. No doubt dicta can be found which are consistent with counsel for the defendant's submission, though there are very many more which are not; but the whole current of authority is to my mind against the notion that actual belief is not co-extensive with reasonable belief and that, although the reasonable man as personified by the judge has to draw the appropriate inferences and reach the appropriate conclusions, the actual believer need not.

Finally, I have said that if the House were free to formulate the rule in accordance with counsel for the defendant's submission, I should not so exercise my freedom. Counsel for the plaintiff was, in my opinion, right in asking your Lordships to approach this point on the footing that you are dealing with a prosecutor found guilty of malice. This is not, as counsel for the defendant suggested, to confuse malice with want of cause. The two elements are quite separate. But when it is said that the authorities leave your Lordships free to formulate the rule on reasonable and probable cause in one way or the other, the one making things easier for the prosecutor than the other, it is permissible to reflect that the rule has to be invoked only in the case of a malicious prosecutor. Such a prosecutor is, in any event and even though he does not believe in the guilt of the accused, immune from suit if the evidence on which he has acted turns out to be strong enough to sustain a conviction. That is as it should be, for a man who is guilty cannot complain of prosecution whatever the motives and beliefs of his prosecutor. It may be argued that a man who is prosecuted on

(58) [1938] 1 All E.R. at p. 11; [1938] A.C. at p. 320.
(59) [1938] 1 All E.R. 1; [1938] A.C. 305.

A sufficient grounds likewise ought to have no complaint. There might be force in that if the sufficiency of the grounds was judged entirely objectively, i.e., if the judge had to determine the question on the same material and in the same way as guilt or innocence is determined, i.e., on all the facts known at the date of the trial. But that is not the rule. The defendant can claim to be judged not on the real facts, but on those which he honestly, and however erroneously, B believes; if he acts honestly on fiction, he can claim to be judged on that. This being so, I do not feel disposed to dispense with the need for the defendant's honest belief in his case.

A century and a half ago when this branch of the law was being formed and there was no police organisation as there is today, the law was anxious to encourage the private prosecutor to come forward and recognised that his C motives would not always be disinterested. But it did, I think, demand that such a man should at least believe on reasonable grounds in the case he put forward and on the strength of which another might lose for the time being his liberty, be put to expense and be caused distress. I do not see why any less should be demanded of a police officer. Although he may be more exposed to attack from persons he has mistakenly prosecuted, he should not stand in D need of as high a degree of protection as the private individual, for there can be no occasion on which in his case a mixture of motives could be accepted as excusable. Counsel for the defendant agreed that, if his argument is right, the defendant in this case could have said: "I prosecuted the plaintiff to punish him for helping Comer to get an acquittal and I did not really believe that I had a strong enough case against him; but I invite the judge to say that I was E unduly pessimistic about that and so to give judgment in my favour." This is the same sort of thing as struck ERSKINE, J., in *Broad* v. *Ham* (60) as "monstrous" and DENMAN, C.J., in *Haddrick* v. *Heslop* (61) as "outrageous".

It is said that under modern conditions an officer at Scotland Yard relies on the legal department to advise him whether or not he has a strong enough case to go forward. That may be, but this is not primarily a legal question; F it is a question for the "ordinarily prudent and cautious man" (62). There cannot under our law be a prosecution unless someone is prepared to take personal responsibility for it. If the officer in charge of the case does not believe that on the material he has got, if it is left unanswered, the accused is probably guilty, if no one else at Scotland Yard is prepared to take personal responsibility for saying so, and if on top of that whoever does put his name to the information G is acting from some improper motive, it would not be right that an innocent man should be without a remedy. I doubt if many would be found to dissent from a proposition stated as baldly as that. The real force behind counsel for the defendant's submission is the danger, which he pointed out, that, if it be rejected, the decision may depend entirely on the verdict of the jury. A dishonest plaintiff has only to invent some remark which he attributes to the defendant about, for H example, the thinness of the case, to make an issue for the jury which, if determined in his favour, might be effective to take the question of want of cause out of the hands of the judge. It would be unrealistic to deny that no such danger exists. The history of actions for malicious prosecution shows undoubtedly that juries are prone to favour a plaintiff. That fact has been recognised so well and for so long that the judges of England have taken the extraordinary I course of reserving to themselves at a jury trial the decision on a pure question of fact. But a distrust of juries, whether well-founded or not, does not justify depriving the subject of a part of his protection against encroachments on his liberty; nor ought honest plaintiffs to have their position worsened because of the danger that others may be dishonest. The remedy, if one be needed, is to place within the province of the judge the whole question of want of cause, whether it involves disputed fact or not. If when these principles of law were

(60) (1839), 5 Bing. N.C. 722 at p. 727. (61) (1848), 12 Q.B. 267 at p. 274.
(62) See *Hicks* v. *Faulkner*, (1881), 8 Q.B.D. at p. 171.

being formulated, the courts had been in the least acquainted with the idea, now so familiar, of a common law judge determining a disputed question of fact, this no doubt is what would have been done; and thus there would have been avoided the extremely difficult division of functions between judge and jury which will produce a sound result only when the utmost skill is exercised by the trial judge. But so great a change could now be effected only by the legislature.

I turn now to the alternative part of counsel for the defendant's submission, namely, that there was no evidence to go to the jury that the defendant did not believe in his case. There are two questions here. One is whether the insufficiency of the case would of itself be some evidence that the defendant did not believe in it. The other is whether there is evidence extraneous to the case to show the defendant's disbelief in it, as, for example, a statement by him revealing doubt or disbelief, as in *Haddrick* v. *Heslop* (63), or evidence of acts by him inconsistent with belief.

On the first question counsel for the plaintiff submits that evidence of want of cause must also be evidence of want of belief in cause. If, he submits, the plaintiff can show that a reasonable man would not have believed that there was sufficient cause for prosecution, that is some evidence that the defendant did not in fact believe that he had such cause. There is no doubt that whether or not there is a want of cause is, in so far as it shows disbelief an ingredient of malice, a matter for the jury; so counsel for the plaintiff submits that the lack of cause, viewed objectively, must as an ingredient of disbelief be a matter for the jury even though, when taken by itself, it is a matter for the judge. The consequence of this is, as counsel for the plaintiff admits, that the jury's objective evaluation of the case for the prosecution may in the end dominate over the judge's. The jury may think that no reasonable man would believe in the prosecution's case and therefore conclude that the defendant, being a reasonable man, did not in fact believe in it; the judge may hold that a reasonable man would believe in the prosecution's case. Nevertheless, as counsel for the plaintiff argues, the jury's conclusion that the defendant did not in fact believe in his case will compel the judge to find that he had no reasonable and probable cause, unless he is prepared to go so far as to hold that no reasonable man could fail to believe in the prosecution's case; in that case, and in that case alone, there would be no evidence of lack of belief to go to the jury.

In my judgment this argument is unsound. Malice is for the jury and cause is for the judge. Malice, provided that there is some evidence of it, must be left to the jury as a question whole and entire; but the whole question of cause is for the judge and he leaves to the jury only those disputed questions in relation to it on which he needs their help. If the only evidence of lack of actual belief is lack of reasonable belief, he does not need their help at all, for lack of reasonable belief is a matter for him. That this is the right approach is, in my opinion, clearly shown by the early cases. I cite *Panton* v. *Williams* (64) because it has been generally recognised as the best source of authority on this point. TINDAL, C.J., said (65):

> "... it is the duty of the judge to inform the jury, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause ..."

This shows that a jury should be directed on reasonable or probable cause just as they are directed on questions of law. If there is no disputed question of fact and the defendant's belief in the case is not in issue, there is nothing to leave to the jury. If the only disputed question of fact is as to the defendant's belief in the case, the judge might, if he were of that mind, leave the question of belief to the jury with a direction that, viewed objectively, there was good cause for the prosecution. The jury could not disregard such a direction and make up their mind independently about want of cause as an ingredient of disbelief. A judge

(63) (1848), 12 Q.B. 267. (64) (1841), 2 Q.B. 169. (65) (1841), 2 Q.B. at p. 192.

A may, of course, defer his decision on want of cause until after he has taken the verdict of the jury, but in the final assessment his decision logically comes first. To put the point another way, the judge's decision that a reasonable man would believe in the prosecution's case raises the presumption that the prosecutor did believe in it; and it is only when there is some evidence tending to displace that presumption that there is matter for the jury to consider.

B From this disposition of the legal arguments there emerge two questions of fact to be determined by the judge on which the result of this case turns. First, has the plaintiff shown that objectively there was no reasonable and probable cause for the prosecution? Secondly, was there some extraneous evidence, fit to go to the jury, tending to show that the defendant disbelieved in his case? In my judgment both these questions should be answered in the negative and C so the appeal fails. I cannot on the first of them usefully add anything to the full and careful analysis of the facts in the judgments in the Court of Appeal. On the second question I wish to say something on counsel for the plaintiff's submission that there was some extraneous evidence to go to the jury; for it is necessary to consider why the evidence that was admittedly sufficient to go to the jury as evidence of malice was insufficient to go to them as extraneous D evidence of lack of belief.

The plaintiff was first arrested on Sept. 13, 1955, under a warrant made out in the name of Davies. An identification parade was immediately held but none of the witnesses was able to identify the plaintiff as Davies, so the case against him as Davies collapsed. But at the parade one of the witnesses identified the E plaintiff as a man who had taken the stolen goods in a taxi from an address at which some of the conspirators were undoubtedly operating. The question therefore arose whether there was a case against him, in his own name, so to speak, and based principally on this piece of evidence. The defendant's case is that from then on his actions were governed by the advice he received from Mr. Melville, a solicitor in the legal department at Scotland Yard, and from the counsel whom Mr. Melville instructed. No suggestion of malice or bad faith F is made against either solicitor or counsel. Since the defendant's state of mind was in issue, evidence of what he was told by the solicitor and counsel would in the ordinary way have been admissible. But it was thought, rightly or wrongly, that privilege would be claimed, either Crown privilege or the client's privilege that protects communication between himself and his legal advisers, to prevent the disclosure of what passed between the defendant and solicitor and counsel. G So the customary devices were employed which are popularly supposed, though I do not understand why, to evade objections of inadmissibility based on hearsay or privilege or the like. The first consists in not asking what was said in a conversation or written in a document but in asking what the conversation or document was about; it is apparently thought that what would be objectionable if fully exposed is permissible if decently veiled. So Mr. Melville was not H asked to produce his written instructions to counsel but was asked without objection whether they did not include a request for advice "on the Glinski aspect of the matter". The other device is to ask by means of "Yes" or "No" questions what was done. (Just answer "Yes" or "No": Did you go to see counsel? Do not tell us what he said but as a result of it did you do something? What did you do?) This device is commonly defended on the ground that counsel I is asking only about what was done and not about what was said. But in truth what was done is relevant only because from it there can be inferred something about what was said. Such evidence seems to me to be clearly objectionable. If there is nothing in it, it is irrelevant; if there is something in it, what there is in it is inadmissible. But at the trial questions of this sort were not objected to and consequently relevant material was obtained. I do not propose to follow the circumlocutions of questions and answers, but to summarise the inferences which any intelligent juryman would obviously be expected to draw from it,

though delicacy might prevent his actually being invited to do so. On Sept. 13, while the plaintiff was still at the police station, the defendant telephoned Mr. Melville to ask for advice and instructions and was told that he must release the plaintiff, which he did. Mr. Melville then decided to get, as he said, a second opinion and to ask for counsel's views about the advice he had given. He drafted instructions to counsel which were delivered at counsel's chambers on Sept. 21. On Sept. 26 counsel advised in conference at which Mr. Melville and the defendant were present that the plaintiff should be arrested again on a fresh warrant and prosecuted in his own name. The information for the warrant was drafted by Mr. Melville on Sept. 27 and the warrant was obtained by the defendant on Sept. 28. On Sept. 29 the plaintiff was arrested and at the police station the defendant told him that "he was a fool to have given evidence for Jack Comer".

This is the remark that is chiefly relied on as evidence of malice or improper motive and as extraneous evidence of lack of belief. That it is the former is not disputed. If it stood by itself, it might be some evidence of lack of belief. But it must be regarded in its place in the sequence of events and the exact dates are important. The plaintiff did not begin to give evidence in the Comer case until the 21st and the defendant did not know about that until the evening of the 22nd. There is no suggestion that this was discussed at the conference on the 26th or taken into consideration by counsel in giving his advice; the legal department of Scotland Yard had nothing to do with the perjury investigation which was being conducted under the superintendence of the Director of Public Prosecutions. If the second prosecution had been initiated after the defendant knew about the Comer affair, his remark might have been some evidence tending to show that he never believed in his case; since it had already been initiated, the remark is valueless as evidence of disbelief. It may show that after Sept. 22 the defendants' motives in going on with the case were not unmixed and as such it was no doubt properly accepted as evidence of malice; but coming at the time that it did it is no evidence of disbelief. As LORD DENMAN, C.J., said in the very similar case of *Turner* v. *Ambler* (66):

> "The unfair use made of the charge may prove malice, as the jury held that it did, but does not raise any inference of a belief that there was no reasonable or probable cause; for the contrary belief is perfectly consistent with malice."

For these reasons I agree with your Lordships that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Evill & Coleman* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(66) (1847), 10 Q.B. at p. 261.

RE CLARK et al. AND ATTORNEY-GENERAL OF CANADA

Ontario High Court of Justice, Evans, C.J.H.C. *November 9, 1977.*

Actions — Interventions of amici curiae — When appropriate.

Interventions *amici curiae* should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present the issues (as, for example, where one side of the argument has not been presented to the Court). Where the intervention would only serve to widen the *lis* between the parties or introduce a new cause of action, the intervention should not be allowed.

[*Morgentaler v. The Queen et al.*, [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161, 20 C.C.C. (2d) 449, 30 C.R.N.S. 209, 4 N.R. 277; *Nova Scotia Board of Censors et al. v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376, 12 N.S.R. (2d) 85, 5 N.R. 43; *Morelle Ltd. v. Wakeling et al.*, [1955] 2 Q.B. 379; *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674; *R. ex rel. Rose v. Marshall* (1962), 48 M.P.R. 64; *Re Chateau-Gai Wines Ltd. and A.-G. Can.* (1970), 14 D.L.R. (3d) 411, 63 C.P.R. 195, [1970] Ex.C.R. 366, 44 Fox Pat. C. 167, refd to]

Courts — Jurisdiction — Applicants bringing action in Supreme Court of Ontario seeking declarations with respect to Uranium Information Security Regulations, SOR/76-644, promulgated pursuant to s. 9 of Atomic Energy Control Act, R.S.C. 1970, c. A-19 — Preliminary issue raised as to whether exclusive jurisdiction in Federal Court by virtue of Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), ss. 17, 18 — Whether Supreme Court of Ontario has jurisdiction.

The applicants, all members of the federal Progressive Conservative Party, brought an application in the Supreme Court of Ontario seeking a number of declarations with respect to the *Uranium Information Security Regulations*, SOR/76-644, promulgated pursuant to s. 9 of the *Atomic Energy Control Act*, R.S.C. 1970, c. A-19. On a prelimary issue as to whether the Federal Court has exclusive jurisdiction over the application by virtue of ss. 17 and 18 of the *Federal Court Act*, 1970-71-72 (Can.), c. 1 (now R.S.C. 1970, c. 10 (2nd Supp.)), *held*, the Supreme Court of Ontario has jurisdiction. It is unclear whether ss. 17 and 18 of the *Federal Court Act* apply to this application. As a result, the Court must assume that its jurisdiction continues.

[*Denison Mines Ltd. v. A.-G. Can.*, [1973] 1 O.R. 797, 32 D.L.R. (3d) 419; *McNeil v. Nova Scotia Board of Censors* (1975), 53 D.L.R. (3d) 259, 9 N.S.R. (2d) 483 [affd [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376, 12 N.S.R. (2d) 85, 5 N.R. 43]; *Hamilton v. Hamilton Harbour Com'rs*, [1972] 3 O.R. 61, 27 D.L.R. (3d) 385, distd]

Statutes — Subordinate legislation — Validity of Regulations — Atomic Energy Control Board making Regulations providing for secrecy of information relating to certain uranium transactions — Whether within power given to Board by Atomic Energy Control Act, R.S.C. 1970, c. A-19, s. 9 — Uranium Information Security Regulations, SOR/76-644.

Statutes — Subordinate legislation — Delegatus non potest delegare — Atomic Energy Control Board making Regulations prohibiting a person from releasing information concerning uranium except with consent of Minister — Whether Regulations ultra vires — Atomic Energy Control Act, R.S.C. 1970, c. A-19, s. 9 — Uranium Information Security Regulations, SOR/76-644, s. 2(a)(ii).

The power to make Regulations given to the Atomic Energy Control Board by s. 9 of the *Atomic Energy Control Act*, R.S.C. 1970, c. A-19, is wide enough to authorize the *Uranium Information Security Regulations*, SOR/76-644, which provide for the secrecy of information relating to certain uranium transactions. However, s. 2(*a*)(ii) of the Regulations, which prohibits a person from releasing information concerning uranium except if "he does so with the consent of the Minister of Energy, Mines and Resources", is *ultra vires* the Atomic Energy Control Board. It offends the maxim *delegatus non potest delegare*. The real effect of the exemption is to vest the Regulation-making power of the Board in the Minister. The Minister could give exemptions to everyone and could effectively nullify the application of the Regulations. There is nothing in the *Atomic Energy Control Act* which justifies the conclusion that the Board is entitled to delegate the powers granted to it by the Act. The fact that s. 2(*a*)(ii) is *ultra vires* does not invalidate the entire Regulations. The appropriate approach is simply to strike out s. 2(*a*)(ii). Therefore, apart from s. 2(*a*)(ii), the Regulations are *intra vires* the Atomic Energy Control Board.

[*Re Westinghouse Electric Corp. and Duquesne Light Co. et al.* (1977), 16 O.R. (2d) 273, 78 D.L.R. (3d) 3, 31 C.P.R. (2d) 164 *sub nom. Westinghouse Electric Corp. Uranium Contract Litigation*; *A.-G. Can. v. Brent*, [1956] S.C.R. 318, 2 D.L.R. (2d) 503, 114 C.C.C. 296, apld; *Reference re Validity of Regulations as to Chemicals*, [1943] S.C.R. 1, [1943] 1 D.L.R. 248, 79 C.C.C.1, distd]

Constitutional law — Parliamentary privileges — Courts have jurisdiction to deal with questions of parliamentary privilege.

Courts — Jurisdiction — Parliamentary privileges — Courts have jurisdiction to deal with questions of parliamentary privileges.

Constitutional law — Parliamentary privileges — Privilege of Members of Parliament extends to proceedings in Parliament — Proceedings in Parliament not limited to matters taking place in Parliament but extends to "real" or "essential" functions of Members — Atomic Energy Control Board making Regulations providing for secrecy of information relating to certain uranium transactions — Members of Parliament privileged to use such information in Parliament and to release it to media, but not to their constituents.

[*Thorpe's Case* (1452), 5 Rot. Parl. 239, 1 Hatsell, pp. 28-34; *Re Parliamentary Privilege Act, 1770*, [1958] A.C. 331; *Roman Corp. Ltd. et al. v. Hudson's Bay Oil & Gas Co. Ltd. et al.*, [1971] 2 O.R. 418, 18 D.L.R. (3d) 134; affd [1972] 1 O.R. 444, 23 D.L.R. (3d) 292; affd [1973] S.C.R. 820, 36 D.L.R. (3d) 413; *Ex parte Wason* (1869), L.R. 4 Q.B. 573; *R. v. Bunting et al.* (1885), 7 O.R. 524; *A.-G. Ceylon v. de Livera et al.*, [1963] A.C. 103, refd to]

Barristers and solicitors — Solicitor-client privilege — Atomic Energy Control Board making Regulations providing for secrecy of information relating to certain uranium transactions — Client can disclose such information to solicitor for purpose of obtaining bona fide legal advice — Privilege to use information extends to institution of Court proceedings provided such proceedings maintain confidentiality of information — Clear words required to negate right of citizen to seek redress in Courts — Uranium Information Security Regulations, SOR/-76-644.

Civil rights — Due process of law — Freedom of speech — Atomic Energy Control Board making Regulations under authority of Atomic Energy Control Act, R.S.C. 1970, c. A-19, providing for secrecy of information relating to certain uranium transactions — Canadian Bill of Rights does not invalidate Atomic Energy Control Act or Regulations — Canadian Bill of Rights, s. 1(a), (d).

[*Curr v. The Queen*, [1972] S.C.R. 889, 26 D.L.R. (3d) 603, 7 C.C.C. (2d) 181, 18 C.R.N.S. 281; *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board et al.*, [1956] O.R. 862, 5 D.L.R. (2d) 342; *Re Westinghouse Electric Corp. and Duquesne Light Co. et al.* (1977), 16 O.R. (2d) 273, 78 D.L.R. (3d) 3, 31 C.P.R. (2d) 164 *sub nom. Westinghouse Electric Corp. Uranium Contract Litigation*, apld]

APPLICATION for a number of declarations concerning the *Uranium Information Security Regulations*, SOR/76-644, promulgated pursuant to s. 9 of the *Atomic Energy Control Act*, R.S.C. 1970, c. A-19.

John Sopinka, Q.C., and *S. N. Lederman*, for applicants.
J. J. Robinette, Q.C., for respondent.

EVANS, C.J.H.C.:—This application is brought by Joe Clark and five other members of the federal Progressive Conservative Party pursuant to s. 6(2) of the *Judicial Review Procedure Act*, 1971 (Ont.), c. 48, for judicial review of the *Uranium Information Security Regulations*, SOR/76-644, promulgated pursuant to s. 9 of the *Atomic Energy Control Act*, R.S.C. 1970, c. A-19. Counsel for the applicants and the respondent submitted that this was a matter of some urgency and, consequently, I agreed to hear them on the merits and granted leave to proceed.

In the notice of motion, the applicants seek the following order:

1. A declaration that the Uranium Information Security Regulations (hereinafter referred to as "The Regulations") do not prohibit the applicants from releasing any note, documents or material or communicating the contents thereof to their solicitors and counsel for the purpose of seeking legal advise and facilitating the conduct of any legal proceedings.

2. A declaration that The Regulations do not prohibit the solicitors and counsel for the applicants to release or disclose any such documents in furtherance of the conduct or prosecution of any legal proceedings.

3. A declaration that The Regulations do not prohibit the applicants or any member of the House of Commons from releasing or disclosing any such documents in the course and in furtherance of Parliamentary debate.

4. A declaration that if the said Regulations do prohibit the release or disclosure referred to in paragraphs 1, 2 or 3 above, the said Regulations are *ultra vires* the Governor General in Council and therefore of no force and effect because:

i) The Regulations contravene The Canadian Bill of Rights, 8-9 Eliz. II, Chap. 44 as amended, in that they abrogate, abridge or infringe freedom of speech and the applicants' right to security of person and enjoyment of property and their right not to be deprived thereof, except by due process of law;

ii) The Regulations deprive the applicants of their right to counsel.

iii) The Regulations abrogate, abridge and infringe the privileges, immunities and power of the applicants and other members of the Official Opposition as members of the House of Commons.

5. A declaration that The Regulations are invalid because they are not authorized by the *Atomic Energy Control Act*, R.S.C. 1970, Chap. A-19.

6. A declaration that The Regulations are invalid because they were not validly promulgated pursuant to the *Atomic Energy Control Act*.

7. A declaration that The Regulations are invalid or are not yet in force by reason of the non-compliance with s. 3 of the *Canadian Bill of Rights*, 8-9 Eliz. II, Chap. 44, as amended.

At the hearing, counsel for the applicants stated that he did not propose to make submissions respecting grounds 6 or 7 and the application for a declaration based on grounds 6 or 7 is therefore denied.

At the outset a motion was brought on behalf of the Canadian Civil Liberties Association for leave to intervene *amicus curiae*. Despite the submissions of counsel for the association, I denied the application on the grounds that the issues raised were fully covered in the facta filed by counsel and that submissions by the intervenor relative to the same issues would serve no useful purpose. Moreover, I did not consider it either necessary or proper to widen the issues which the parties proposed to present to the Court. Counsel for the intervenor conceded that there is no right of intervention and that the grant of such indulgence is within the discretion of the Court. Under the circumstances, I was not satisfied that this was an appropriate case for the intervention *amicus curiae* and exercised my discretion accordingly. Before proceeding to deal with the issues presented by the parties, however, I feel compelled to deal with the question of interventions *amici curiae*.

In the Supreme Court of Canada, provision is made in the Supreme Court Rules, SOR/72-596, for interventions. Rule 60 states that:

60(1) Any person interested in an appeal between other parties may, by leave of the Court or a Judge, intervene therein upon such terms and conditions and with such rights and privileges as the Court or Judge may determine.

(2) The costs of such intervention shall be paid by such party or parties as the Supreme Court shall order.

The intervention is by leave and is within the discretion of the Court. In *Morgentaler v. The Queen et al.*, [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161, 20 C.C.C. (2d) 449, the Court granted leave to six associations and heard submissions from each. The Court apparently was of the view that the submissions of each intervenor

would serve a useful role in determining the controversial issues presented to the Court: see also *Nova Scotia Board of Censors et al. v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376.

In England, intervention *amicus curiae* is granted primarily to Government agents such as the Attorney-General or the Official Solicitor: see, for example, *Morelle Ltd. v. Wakeling et al.*, [1955] 2 Q.B. 379; for a discussion, see Alan Levy, "The Amicus Curiae (An offer of Assistance to the Court)", 20 Chitty's Law Journal, March, 1972, pp. 94-5. J. M. L. Evans, Official Solicitor of the Supreme Court of England, in a communication dated November 26, 1969, had this to say about the role of *amicus curiae*:

> It is ... a comparatively rare procedure and is usually invoked where it is considered by the Court that an important point of law is involved which the Court wishes fully argued, and *which is unlikely to be dealt with by the parties before it*. I think it is practically unknown in my experience for any such procedure to be initiated by a bystander as indicated in these old works ...

(Levy, p. 95; emphasis added.) Where both sides are represented by able counsel and the issues are squarely put to the Court, interventions *amicus curiae* are not appropriate.

In *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674, Mackay, J., permitted intervention by the Canadian Jewish Congress. In that case, the applicant, who was the owner, sought to set aside a restrictive covenant which provided that the land was "not to be sold to Jews, or to persons of objectionable nationality". There was no respondent.

In *R. ex rel. Rose v. Marshall* (1962), 48 M.P.R. 64 (Nfld. Dist.Ct.), Kent, D.C.J., dealt with the issue of whether certain publications were obscene. The distributors did not contest the seizure of the publications and did not make submissions at the show cause hearing. However, one of the publications was "Playboy" and counsel for Hugh M. Hefner, the publisher, sought to intervene as *amicus curiae* in order to argue that "Playboy" was not obscene. At pp. 66-7, Kent, D.C.J., stated:

> At this time I did not see that Mr. Barry, appearing simply for and on behalf of Playboy and under the name on the record, had a right to be heard. However, *in the particular circumstances of this case* and the fact that I felt the hearing of all persons who might in any capacity properly be permitted to be heard before the Court, *would be of assistance to the Court, particularly where there was no voice before the Court on behalf of the publications seized*, I therefore told Mr. Barry that I would not permit him to be heard as representing a party to the action nor place him on the record as representing a party to the summons, but *as a matter of indulgence* I would hear him simply as "*amicus curiae*".

(Emphasis added.) The distributors did not make any submissions on the issue of obscenity and the trial Judge considered that counsel for Playboy could assist the Court in determining that legal issue.

In *Re Chateau-Gai Wines Ltd. and A.-G. Can.* (1970), 14 D.L.R. (3d) 411, 63 C.P.R. 195, [1970] Ex.C.R. 366, Jackett, P., dealt with an application in the Exchequer Court involving the *Canada-France Trade Agreement Act, 1933*. At pp. 412-3, Jackett, P., states that:

> Before turning to a recital of such events, however, I should mention that, while the *registrant*, being a sovereign power, *is not a party to this application*, the Court did cause the proceedings to be brought to the attention of the Deputy Attorney-General of Canada with the suggestion that, as a *matter of courtesy*, they might be brought to the attention of the Government of the French Republic and that, while such action was taken more than two years before the commencement of the hearing of this application, neither the Government of the French Republic nor the Attorney-General of Canada had, prior thereto, intervened in the matter. However, counsel instructed by the Attorney-General of Canada did appear during the first part of the hearing as *amici curiae* and were *very helpful to the Court on the issues upon which they undertook to assist the Court*. Subsequently, after an adjournment, the Attorney-General of Canada was granted leave to appear as a party, and, as such a party, has opposed the application.

(Emphasis added.) Given the circumstances in that case, the Attorney-General had a clear interest in seeking to uphold the provisions of the Agreement.

Subject to statutory or Court-made rules, it is my view that interventions *amici curiae* should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present the issues (as, for example, where one side of the argument has not been presented to the Court). Where the intervention would only serve to widen the *lis* between the parties or introduce a new cause of action, the intervention should not be allowed.

While it may have been preferable to have dealt with the application for intervention following the argument of counsel for the applicants, I concluded, in the present case, that the experience and competence of counsel for the applicants guaranteed a complete canvass of the legal issues involved and that intervention was therefore not appropriate.

Although the issue of jurisdiction was not raised in either statement, I put it to counsel that it may well be that the matter should have been brought in the Federal Court pursuant to s. 17 or s. 18 of the *Federal Court Act*, 1970-71-72 (Can.), c. 1 (now R.S.C. 1970, c. 10 (2nd Supp.)). Counsel then made submissions on the question of jurisdiction and I reserved decision. However, I proceeded to hear counsel on the merits in order to facilitate the hearing of this matter and with the hope of preventing a multiplicity of proceedings.

Given the nature of this application, there are a number of considerations relating to jurisdiction. In the first place, the applicants challenge the validity of the Regulations. This challenge involves a consideration of the nature and extent of the powers of the Board

under s. 9 of the *Atomic Energy Control Act*. Therefore, I must consider the effect of s. 18 of the *Federal Court Act*. Moreover, the applicants seek review of the approval of the Governor in Council. This involves a consideration of s. 17 of the Act. Finally, the applicants seek an interpretation of the application of the Regulations. This also involves a consideration of the ambit of s. 17.

Section 17(1) of the *Federal Court Act* provides:

> 17(1) The Trial Division has original jurisdiction *in all cases where relief is claimed against the Crown* and, except where otherwise provided, the Trial Division has *exclusive original jurisdiction* in all such cases.

(Emphasis added.) Section 2(*m*) reads:

> (*m*) "relief" includes *every species of relief* whether by way of damages, payment of money, injunction, *declaration*, restitution ... *or otherwise*;

(Emphasis added.) "Crown" is defined in s. 2 as meaning "Her Majesty in right of Canada". Counsel for the applicants strenuously argued that the application for a declaration was not "relief ... claimed against the Crown". This argument has two aspects. The first is that Parliament, the Cabinet and the Atomic Energy Control Board do not come within the meaning of the word "Crown". The second aspect is that s. 17(1) is designed solely for tort and contract actions and similar proceedings.

The issue of jurisdiction is discussed by Donnelly, J., in *Denison Mines Ltd. v. A.-G. Can.*, [1973] 1 O.R. 797, 32 D.L.R. (3d) 419, in which he dealt with an application for a declaration that the *Atomic Energy Control Act*, R.S.C. 1952, c. 11 (now R.S.C. 1970, c. A-19), was *ultra vires* the Parliament of Canada. The issue of the *Federal Court Act* was raised and Donnelly, J., concluded at p. 802 O.R., p. 424 D.L.R.:

> It asks for a declaration that the *Atomic Energy Control Act* is *ultra vires* the Parliament of Canada. *This is a matter directly affecting the Crown and its right to control atomic energy.* Whether such an action could be heard in this Court before the passing of the *Federal Court Act* need not be decided as s. 17(1) of that Act gives the Trial Division of the Federal Court exclusive jurisdiction *in all cases* where *relief* is claimed against the *Crown including relief by way of declaration.*

(Emphasis added.) Donnelly, J., goes on to state, at p. 804 O.R., p. 426 D.L.R.:

> Section 17(1) of the *Federal Court Act* when read with s. 2(*m*) is adequate to clothe the Trial Division of the Federal Court with exclusive jurisdiction where a *declaration* is sought in a *matter that affects the Crown* as is done here and to *exclude this Court from entertaining this case.*

(Emphasis added.) When s. 17 and the definitions of "relief" and "Crown" in s. 2 are read together, they appear to oust the jurisdiction of this Court where an applicant directly challenges the validity of a federal statute by means of an application for a declaration. The approach taken in *Denison Mines* would also appear to be relevant to any attack on federal Regulations and to any application for a declaration interpreting such Regulations.

The decision in *Denison Mines* is criticized by Dale Gibson, Faculty of Law, University of Manitoba, in a note entitled "Constitutional Law — Power of Provincial Courts to Determine Constitutionality of Federal Legislation", in 54 *Can. Bar Rev.* 372 (1976). At p. 373, he states that:

> Apart altogether from the constitutional implications, which will be discussed later, this decision is mistaken for several reasons. Section 17(1) applies only to cases "where relief is claimed against the Crown", and the only claim involved in the *Denison* case was against the Attorney General of Canada. The mere fact that the outcome of the litigation might "affect" the Crown does not mean that relief is claimed against the Crown. Even if the court were right on that point it is difficult to see how "Crown" rights were involved in the case. The legislative powers of the Parliament of Canada were certainly involved, but it is one of the most fundamental principles of constitutional law that Parliament and the Crown are distinct legal entities. The former is a legislative body and the latter is an executive body. Reference to the Crown in section 17(1) of the Federal Court Act cannot reasonably be construed to mean Parliament; section 2(f) of the Act removes any possible doubt about that by defining "Crown" to mean "Her Majesty in right of Canada". Finally, even if there were an ambiguity which permitted more than one meaning to be assigned to the term "Crown", the ambiguity should have been resolved in favour of jurisdiction by the High Court, since, in the words of Maxwell (Interpretation of Statutes (12th ed, 1969), p. 153):
>
> > "A strong leaning exists against construing a statute so as to oust or restrict the jurisdiction of the superior court ... a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect."

The main thrust of Professor Gibson's criticism is that he apparently feels that the term "Crown" does not include Parliament. Implicitly, Professor Gibson is restricting s. 17 to civil actions against the Crown involving tort or contract liability. (This is supported by his reference, *infra*, to *McNeil v. Nova Scotia Board of Censors* (1975), 53 D.L.R. (3d) 259, 9 N.S.R. (2d) 483 (N.S.C.A.) [affirmed [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 32 C.R.N.S. 376], involving the provincial *Proceedings Against the Crown Act*, R.S.N.S. 1967, c. 239, discussed, *infra*).

Despite his conclusion on *Denison Mines*, Professor Gibson admits, at pp. 373-4:

> The *Denison* approach received some support from the British Columbia Supreme Court in *Canex Placer Ltd. v. Attorney-General of British Columbia* (1975), 56 D.L.R. (3d) 592 (B.C.S.C.) [reversed on other grounds, 58 D.L.R. (3d) 241, [1976] 1 W.W.R. 24 (B.C.C.A.)]. That case also involved a claim for a declaration that certain legislation was unconstitutional. Since the statute concerned was provincial, the meaning of the Federal Court Act did not arise. However, the case did deal with the question of whether an action to determine the constitutionality of legislation is a proceeding against the Crown. Verchere J. held that such an action cannot be brought against the Attorney General of the province because it is a "proceeding against the Crown", and provincial legislation requires that the Queen in the right of the province should be the designated defendant in such proceedings.

Therefore, an action to determine the validity of a statute would

be a "proceeding against the Crown". This is entirely consistent with *Denison Mines*.

Professor Gibson also cites *McNeil v. Nova Scotia Board of Censors, supra*, in which the Court held that a "proceeding against the Crown" did not include an application for a declaration that an Act was *ultra vires*. It should be pointed out, however, that the *Proceedings against the Crown Act*, R.S.N.S. 1967, c. 239, is basically designed to deal with tort or contract "proceedings" against the Crown. Section 1(f) of the Act states that:

> (f) "proceedings against the Crown" includes a claim by way of set-off or counterclaim raised in proceedings by the Crown, and interpleader proceedings to which the Crown is a party;

Section 3 states that:

> 3. Subject to this Act, a person who has a claim against the Crown may enforce it as of right by proceedings against the Crown in accordance with this Act in all cases in which:
>
> (a) the land, goods or money of the subject are in the possession of the Crown; or
>
> (b) the claim arises out of a contract entered into by or on behalf of the Crown; or
>
> (c) the claim is based upon liability of the Crown in tort to which it is subject by this Act.

Thus, "proceedings against the Crown" may not be comparable to "relief . . . against the Crown". There is nothing in the *Federal Court Act* to indicate whether s. 17 is limited to tort or contract proceedings. The definition of "relief" in s. 2(*m*) would appear to go beyond such proceedings and includes "every species of relief". Unfortunately, Professor Gibson does not take cognizance of these distinctions.

The effect of the decision of Donnelly, J., in *Denison Mines* on the current application is not entirely clear. In this case, I am concerned with an application for review of the approval by the Cabinet of SOR/76-644, and the power of the Board under s. 9. I am not convinced that s. 17 of the *Federal Court Act* was designed to cover this situation. The application before me does not involve an attack on the validity of a statute and *Denison Mines* is not entirely relevant. As a result, I am reluctant to relinquish any jurisdiction existing in this Court. I must assume that the jurisdiction of this Court continues in the absence of the clearest words to the contrary.

Given the fact that we are concerned with the powers of a federal board, it is also necessary to consider s. 18 of the *Federal Court Act*. Section 18 reads:

> 18. The Trial Division has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), *including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board*, commission or other tribunal.

(Emphasis added.)

The extent of s. 18 is considered in *Hamilton v. Hamilton Harbour Com'rs*, [1972] 3 O.R. 61, 27 D.L.R. (3d) 385 (Ont. C.A.). In that case, the Court held that the Supreme Court of Ontario did not have jurisdiction to grant a declaration against the federal Harbour Commission. The Court affirmed that s. 18 ousts the jurisdiction over federal boards. At p. 62 O.R., p. 386 D.L.R., Gale, C.J.O., states that:

> It appears to us that the Hamilton Harbour Commissioners clearly come within the plain language of s. 2(*g*). They are a "federal board, commission or other tribunal" because they are a "body ... exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". That is so by reason of the provisions of the *Hamilton Harbour Commissioners' Act*, 1912 (Can.), c. 98, passed in 1912 by the Parliament of Canada, and subsequently amended from time to time. That being so, the above provisions of s. 18 apply, and it is our view that this Court no longer has any jurisdiction in a matter wherein declaratory relief is sought against such "federal board, commission or other tribunal".

The *Hamilton Harbour Commissioners Act*, 1951 (Can.), c. 17, confers two basic powers on the Commissioners:

(a) the power to regulate and control the use of the harbour;

(b) the power to deal with certain real property.

The *Harbour Commissions Act*, R.S.C. 1970, c. H-1, imposes on a commission the duty and power to regulate and control the use and development of all property within the limits of the commission's harbour jurisdiction (s. 9) and authorizes a commission to purchase and lease or sell property in the harbour (s. 10). It is clear that the operation of a commission as a landowner raises the question of provincial jurisdiction. Consequently, s. 18 may not be designed to cover such activities. The decision in *Hamilton Harbour Com'rs*, therefore, may be limited to commission activities relating to the regulation and control of harbour activities. Again, the practical effect is that the extent of the decision in *Hamilton Harbour Com'rs* is not entirely clear.

Another factor which must be considered in assessing the applicability of s. 18 is that s. 9 of the *Atomic Energy Control Act* confers the power on the Board subject to the "approval of the Governor in Council". In this respect, the applicants are seeking relief against the Board and the Governor in Council. The decision of one depends on the other and the decisions are not mutually exclusive. The complementary nature of the decision-making process takes the situation out of the ambit of s. 18 of the *Federal Court Act*.

Counsel for the applicants spent considerable time evaluating the right of the applicants to challenge the Act and the Regulations and to seek a declaration of rights. I am of the view that *Thorson v. A.-G. Can. et al.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225, and *Nova Scotia Board of Censors v. McNeil, supra*, is sufficient authority for the proposition that every citizen has the right to challenge the validity of a statute or a Regulation. The fact that the applicants go beyond this and ask alternatively for an interpretation of the application of the Regulations does not alter their basic right.

There is one aspect of this application which does concern me. In their alternative submissions, they seek a declaration that a Member of Parliament cannot be prevented from using the information in Parliament. Moreover, they seek a declaration that the Regulations do not abridge the solicitor-client privilege. In this respect, they are seeking "absolution before sinning". In my view, they should advance these two arguments as a defence if they are charged. Practically speaking, they may not be charged, in which case this part of the application is simply an academic exercise.

In *Dyson v. Attorney-General*, [1911] 1 K.B. 410, Cozens-Hardy, M.R., at p. 417, had this to say about applications for a declaration:

> The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. I can, however, conceive many cases in which a declaratory judgment may be highly convenient, and I am disposed to think, if all other objections are removed, this is a case to which r. 5 might with advantage be applied. But I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The Court may well say "Wait until you are attacked and then raise your defence," and may dismiss the action with costs.

The same approach could be taken in this case. Counsel for the applicants argued that the applicants could not obtain meaningful legal advice due to the refusal of counsel to receive information which might contravene the Regulations. If the applicants are willing to release the information but counsel refuse to receive it, it is counsel, not the applicants, who are seeking the exoneration of the Court in order to justify their receipt of the information. Once again, I am concerned that these proceedings are inappropriate.

Despite these concerns, I intend to deal with the merits of the application in the hope that it will finalize this matter although I enter the caveat that such applications should be considered most carefully. The role of the Court is not to grant "absolution before sinning" nor to deal with academic issues.

In dealing with the validity of the Regulations, the preamble of the *Atomic Energy Control Act* must be considered:

WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy, and to enable Canada to participate effectively in measures of international control of atomic energy which may hereafter be agreed upon; Therefore, His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Only Parliament is entitled to judge what steps must be taken in the "national interest". The Courts are reluctant to interfere with actions deemed to be taken in the "national interest".

Section 9 of the Act grants a wide power to the Board to make Regulations. Counsel for the applicants and respondent argued that the power to pass SOR/76-644 must be found in s. 9(*d*) (*e*) or (*g*). Those provisions read:

9. The Board may with the approval of the Governor in Council make regulations

. . . . .

(*d*) regulating the production, import, export, transportation, refining, possession, ownership, use or sale of prescribed substances and any other things that in the opinion of the Board may be used for the production, use or application of atomic energy;

(*e*) for the purpose of keeping secret information respecting the production, use and application of, and research and investigations with respect to, atomic energy, as in the opinion of the Board, the public interest may require;

. . . . .

(*g*) generally as the Board may deem necessary for carrying out any of the provisions or purposes of this Act.

At first blush, the power to make Regulations is fairly extensive.

SOR/76-644, entitled *Uranium Information Security Regulations*, is dated September 23, 1976. The preamble reads:

His Excellency the Governor General in Council, on the recommendation of the Minister of Energy, Mines and Resources, pursuant to section 9 of the Atomic Energy Control Act, is pleased hereby to approve the annexed Regulations respecting the security of uranium information made by the Atomic Energy Control Board.

Section 2 of the Regulations states:

Security of Information

2. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds, shall

(*a*) release any such note, document or material, or disclose or communicate the contents thereof to any person, government, crown corporation, agency or other organization unless

(i) he is required to do so by or under a law of Canada, or

(ii) he does so with the consent of the Minister of Energy, Mines and Resources; or

(*b*) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

Prima facie, this would cover Members of Parliament and would appear to abridge the solicitor-client relationship.

Mr. Lederman argued that s. 9(*d*) was not sufficiently broad to cover the nature and extent of s. 2 of SOR/76-644. I agree with that submission. He also argued that s. 9(*e*) was not broad enough since it dealt with information "respecting the production, use and application of and research and investigations with respect to, atomic energy" whereas s. 2 of SOR/76-644 deals with the "production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds". I do not find it necessary to decide that issue since I consider that s. 9(*g*) provides sufficient authority for the promulgation of the Regulations. While Mr. Lederman argued that s. 9(*g*) is procedural or administrative only, I cannot accept that argument. Section 9(*g*) grants considerable power to the Board to make Regulations as it "may deem necessary for carrying out any of the provisions or purposes of this Act". The purposes set out in the preamble of the Act include control of domestic atomic energy and the participation in international control. In my view, s. 9(*g*) must have some substantive basis in order to enable the Board to carry out the purposes and provisions of the Act.

This conclusion is supported by the decision of Robins, J., in *Re Westinghouse Electric Corp. and Duquesne Light Co. et al.*, unreported, dated June 29, 1977 [since reported 16 O.R. (2d) 273, 78 D.L.R. (3d) 3, 31 C.P.R. (2d) 164 *sub nom. Westinghouse Electric Corp. Uranium Contract Litigation*]. In that case, Westinghouse Electric Corporation brought two applications before Robins, J. The first was to enforce letters rogatory issued by the United States District Court for the Eastern District of Virginia and the second was to enforce letters rogatory issued by the Court of Common Pleas for Allegheny County, Pennsylvania. In dealing with the applications, SOR/76-644 was raised. It was argued that an order enforcing the letters rogatory would compel certain Canadian companies to release information respecting atomic energy contrary to SOR/76-644. Consequently, Robins, J., felt bound to deal with the issue of the validity of the Regulations. Since the determination of the validity of the Regulations is an issue peripheral to the main application, he was correct in assuming jurisdiction to determine the issue.

Robins, J., exhaustively analyses the validity of SOR/76-644. At pp. 17-8 of the judgment [pp. 282-3 O.R., pp. 12-3 D.L.R.], he deals with the background of the Regulations:

On September 21, 1976, the Government of Canada approved a Regulation under the *Atomic Energy Control Act*, R.S.C. 1970, c. A-19, to prevent the removal from Canada of information relating to uranium marketing activities during the period 1972-75. This action the Minister has said was taken "in the light of the sweeping demand for such information by U.S. subpoenas, which, while served on officers of United States companies, call for the presentation of information in the possession of subsidiary or affiliate companies wherever located". The Regulations, cited as the *Uranium Information Security Regulations*, P.C. 1976-2368, SOR/76-644 (September 21, 1976) ... prohibit the release or production of any document or material relating to these activities and prevent the giving of any oral evidence which would result in the disclosure or communication of the contents of such documents.... Their validity is attacked by Westinghouse in these proceedings. In his press release of September 22, 1976, the Minister concluded:

> "Given this background, it is not surprising that the Canadian material called for by the U.S. subpoenas contains information in respect of activities approved and supported by the Canadian government. Clearly this must be regarded as an issue of sovereignty. The government has therefore moved to prevent the removal of such documents from Canada.

No evidence has been presented in this application which would indicate that the true purpose of the Regulations is anything other than that set out by the Minister. Counsel for the applicants continually referred to the Regulations as a "cover-up" and argued that since the Regulations were passed in September, 1976, and covered the period of January, 1972, to December, 1975, there was every indication that the Regulations were a "cover-up" for the alleged illegal cartel. The Government has given the reason for the Regulations and I am bound to accept that in the absence of persuasive evidence to the contrary. Whether it was necessary to cast such a wide net in order to achieve the stated purpose is a matter for Parliament.

Before embarking on an evaluation of the validity of the Regulations, Robins, J., sets out the terms of reference to be applied. At p. 41 [p. 294 O.R., p. 24 D.L.R.], he states that:

> The question in substance is whether the Security Regulations fall within the scope of the Regulation-making power conferred by the Act on the Atomic Energy Control Board. In determining this question the meaning of the Regulations when read in the light of their object and the facts surrounding their making should be ascertained as well as the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the Regulations: Driedger, *Construction of Statutes*, at p. 199 *et seq.*

Mr. Lederman also quoted from Driedger for the proposition that s. 9(*g*) was procedural. However, I am convinced that the approach taken by Robins, J., is the correct one and that it is necessary to look to the intent of the statute in determining the extent of the Regulation-making power.

In considering the extent of s. 9, Robins, J., deals specifically with s. 9(*e*) and s. 9(*g*). At p. 42 [p. 294 O.R., p. 24 D.L.R.], he states that:

> Even if this is so, it is not imperative that the authority for these Regulations be found is s. 9(*e*) of the Act. The Regulations do not, of course, indicate under which subsection of s. 9 they were made. Sufficient authority may, in my opinion, be found in the general power under s. 9(*g*) given by Parliament to the Board with the approval of the Governor in Council to make Regulations generally as it "may deem necessary for carrying out any of the provisions or purposes of this Act".

Robins, J., then goes on to evaluate the scope and purpose of the Act in order to substantiate his conclusion on s. 9(*g*). At pp. 42-3 [pp. 294-5 O.R., p. 24 D.L.R.], he states that:

> One of the reasons for the Act according to its preamble is that it is essential in the national interest to control and supervise the development, application and use of atomic energy. The real subject of the legislation is, as McLennan, J., expressed it in *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board et al.*, [1956] O.R. 862 at p. 869, 5 D.L.R. (2d) 342 at p. 348, "the control of the production and application of atomic energy and *that control is exercised from the stage of discovery of ores up to its ultimate use for whatever purpose* ..." (emphasis added.) In this context Regulations "necessary for carrying out any of the provisions or purposes of this Act" include, in my view, measures respecting intermediate steps such as the import, export, transportation, refining, possession, ownership or sale of atomic energy or substances capable of releasing atomic energy *or any information in respect thereto.*

(Emphasis in last line added.) This approach is consistent with the principle enunciated by Driedger.

Robins, J., then goes on to discuss the discretion granted to the Board. At pp. 43-4 [p. 295 O.R., pp. 24-5 D.L.R.] he concludes that:

> To effect the control of the production and application of atomic energy Parliament enacted basically a skeletal statute to be supplemented by the conferral on the Board with the approval of the Governor in Council of broad general powers to make Regulations establishing not only details of this legislation but its principles. Whether the Regulations are "necessary for carrying out any of the provisions or purposes of this Act" is a matter to be determined by a *subjective test of necessity. The Regulation-making authority is the sole judge of necessity and the Court will not question its decision unless bad faith is established*: see *R. v. Comptroller General of Patents, Ex p. Bayer Products Ltd.*, [1941] 2 K.B. 306, *per* Scott, L.J., at pp. 311-2:
>
> > "... the effect of the words 'as appear to him to be necessary or expedient' is to give to His Majesty in Council a complete discretion to decide what regulations are necessary for the purposes named in the sub-section. That being so, it is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes. The principle on which delegated legislation must rest under our constitution is that legislative discretion which is left in plain language by Parliament is to be final and not subject to control by the courts."
>
> See also *Re Chemical Reference*, [1943] S.C.R. 1. *In my view the Security Regulations are within the purposes of the Act and as such their expediency or necessity cannot be challenged.*

(Emphasis added.) It is not proper for the Court to rethink the concerns of the Board in deciding whether such Regulations were necessary. Since the "expediency or necessity" are a "subjective" determination, the Court should not substitute its own opinion on the issue.

In the absence of probative evidence of bad faith, the Court is not justified in impugning the motives of the Board. As Robins, J., states at p. 44 [p. 275 O.R., p. 25 D.L.R.]: "Bad faith going to impugn the Regulations is not apparent in this case either on the face of the Regulations or anywhere else." As previously stated, there is no evidence before me which would justify a finding of bad faith. The Regulations are valid on their face.

Finally, Robins, J., concludes that:

> In short, the Security Regulations can be construed, in my opinion, as being in harmony with the purposes of the statute. No conflict exists between the statute and the Regulations; the Regulations are within the scope of the powers conferred upon the Board and accordingly are *intra vires* the *Atomic Energy Control Act*.

Although I am not bound by the decision of Robins, J., it is of considerable persuasive effect and I am in complete agreement with his conclusion.

As a result, I find that SOR/76-644 is *intra vires* the Atomic Energy Control Board and the Governor in Council.

There is one aspect of the Regulations which causes some concern. Section 2(*a*) prohibits the release of information concerning uranium but provides for two exceptions. The second exception reads:

> (ii) he does so with the consent of the Minister of Energy, Mines and Resources ...

Counsel for the applicants argues that this offends the maxim *delegatus non potest delegare*. After considering s. 9 of the Act and s. 2 of the Regulations, I have come to the conclusion that s. 2(*a*)(ii) is *ultra vires* the Atomic Energy Control Board. I agree with Mr. Sopinka's submission that the Minister of Energy, Mines and Resources is effectively doing the regulating. Counsel for the respondent argued that this was comparable to a case of agency rather than delegation. However, there are no guidelines provided for the Minister and there is no indication that the Board maintains a principal - agency type of arrangement with the Minister. The real effect of the exemption is to vest the Regulation-making power of the Board in the Minister. The Minister could give exemptions to everyone and could effectively nullify the application of the Regulations.

In *Judicial Review of Administrative Action*, 3rd ed. (1973), S.A. de Smith considers the principles to be considered in applying the maxim *delegatus non potest delegare*, at pp. 268-9:

> (a) Where an authority vested with discretionary powers affecting private rights empowers one of its committees or sub-committees, members or officers to exercise those powers independently without any supervisory control by the authority itself, the exercise of the powers is likely to be held invalid. ... (*Madoc Township v. Quinlan* (1972), 21 D.L.R. (3d) 136; *R. v. Sandler*, *ibid.* [(1971), 21 D.L.R. (3d) 286].

(b) The degree of control ... maintained by the delegating authority over the acts of the delegate or sub-delegate may be a material factor in determining the validity of the delegation. In general the control preserved ... must be close enough for the decision to be identifiable as that of the delegating authority. (*Osgood v. Nelson* (1872) L.R. 5 H.L. 636; *Devlin v. Barnett* [1958] N.Z.L.R. 828 ... *Hall v. Manchester Corporation* (1915) 84 L.J.Ch. 734, 741 ... *Cohen v. West Ham Corporation* [1933] Ch. 814, 826-827 ... *R. v. Board of Assessment, etc.* (1965) 49 D.L.R. (2d) 156) ...

(c) It is improper for an authority to delegate wide discretionary powers to another authority over which it is incapable of exercising direct control, unless it is expressly empowered so to delegate. (*Kyle v. Barbor* (1888) 58 L.T. 229) ... A Canadian provincial marketing board, exercising delegated authority, could not sub-delegate part of its regulatory powers to an interprovincial authority. (*Prince Edward Island Potato Marketing Board v. Willis (H.B.) Inc.* [1952] 2 S.C.R. 391).

On the basis of these principles, I have concluded that s. 2(*a*)(ii) is *ultra vires*.

Counsel for the respondent referred me to the case of *Reference re Validity of Regulations as to Chemicals*, [1943] S.C.R. 1, [1943] 1 D.L.R. 248, 79 C.C.C. 1. In that case, the Governor-General in Council was empowered to make such Regulations as he might by reason of the existence of the war deem necessary or advisable for the defence of Canada. The Court held that this power was wide enough to permit subdelegation to the Controller of Chemicals.

The point of distinction in the *Chemicals Reference* case is that the Court was dealing with a war-time situation. In this respect, the Court was willing to apply a much more flexible approach to the powers of the Executive. This is apparent in the words of Duff, C.J.C., at p. 11 S.C.R., p. 254 D.L.R.:

> The duty of the Governor General in Council to safeguard the supreme interests of the state, as contemplated by section 3, may, it seems plain, necessitate for its adequate performance the appointment of subordinate officers endowed with such delegated authority. I find it impossible to suppose that the authors of that enactment did not envisage the likelihood of the Executive finding itself obliged, in discharging its responsibility in relation to the matters enumerated in sub-paragraphs (*a*) to (*f*), to make use of such agencies.

From a practical viewpoint, the Court concluded that the Executive could not possibly handle the myriad of tasks delegated to it by the legislation. Therefore, the Court interpreted the Regulation-making power as implicitly including a power to subdelegate part of the Regulation-making power to a subordinate body. Duff, C.J.C., goes on to state, at p. 12 S.C.R., p. 255 D.L.R.:

> The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above ... when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth.

Duff, C.J.C., then concludes that the wording "necessary or advisable" is wide enough to permit the subdelegation to the Controller (p. 12 S.C.R., pp. 255-6 D.L.R.).

The approach of the Supreme Court of Canada in the *Chemicals Reference* case is dictated by the exigencies of the war-time situation. That is not so in the present case. In the first place, it is not an over-burdened Executive delegating to a subordinate. It is a federal board delegating to a Member of the Cabinet. There is nothing in the *Atomic Energy Control Act* which justifies the conclusion that the Board is entitled to delegate the powers granted to it by the Act. Finally, the Board is established to carry out the "policing" of the atomic energy field. One can assume that the Board is comprised of people who are experts in the field and are experienced in administrative practice. Consequently, the Board and not a Minister is best suited to handle the powers given to it by Parliament.

This conclusion appears to be consistent with the decision in *A.-G. Can. v. Brent*, [1956] S.C.R. 318, 2 D.L.R. (2d) 503, 114 C.C.C. 296. In that case, the Court dealt with a delegation to Special Inquiry Officers under the *Immigration Act*, R.S.C. 1952, c. 325. Section 61 provided:

> 61. The Governor in Council may make regulations for carrying into effect the purposes and provisions of this Act ...

Section 20(4) of Order in Council, P.C. 859, SOR/53-536, stated:

> 20(4) Subject to the provisions of the Act and to these regulations, the admission to Canada of any person is prohibited where in the opinion of a Special Inquiry Officer such person should not be admitted by reason of ...

The section then goes on to list three reasons. In delivering the opinion of the Court, Kerwin, C.J.C., states, at p. 321 S.C.R., p. 505 D.L.R.:

> I agree with Mr. Justice Aylesworth, speaking on behalf of the Court of Appeal, that Parliament had in contemplation the enactment of such regulations relevant to the named subject matters, or some of them, as in His Excellency-in-Council's own opinion were advisable and not a wide divergence of rules and opinions, everchanging according to the individual notions of Immigration Officers and Special Inquiry Officers. There is no power in the Governor General-in-Council to delegate his authority to such officers.

The use of such words as "deem necessary" in s. 9(*g*) of the *Atomic Energy Control Act* and "deem necessary or advisable" in s. 3 of the *War Measures Act, 1914*, does not distinguish the application before me and the *Chemicals Reference* case from the *Brent* case. Section 61 of the *Immigration Act* was sufficiently wide that the conclusion of the Court is particularly relevant to the application before me. The decision in the *Chemicals Reference* case can be distinguished because of the circumstances then existing.

Notwithstanding my conclusion on the applicability of the *Chemicals Reference* case to the issue of subdelegation, the approach of the Supreme Court of Canada in both the *Chemicals Reference* case and in *Brent* supports my conclusion that s. 9(*g*) grants substantive and not merely procedural powers. Indeed, the *Chemicals Reference* case is cited by Robins, J., in *Duquesne* at p. 44 [p. 295 O.R., p. 25 D.L.R.], to support his conclusion that the Regulations are *intra vires* the Board.

As a result, I have concluded that s. 2(*a*)(ii) of SOR/76-644 is *ultra vires* the Atomic Energy Control Board. However, this does not invalidate the entire Regulation. The appropriate is simply to strike s. 2(*a*)(ii) out of the Regulations. Therefore, apart from s. 2(*a*)(ii), the Regulations are *intra vires* the Atomic Energy Control Board.

In dealing with the issue of parliamentary privileges, counsel for the respondent submitted that the Courts have no jurisdiction to determine the nature and extent of such privileges. He argued that Parliament is the source and the sole judge of the privileges of its Members. This would create an interesting obstacle for the applicants in the present case. I would point out, however, that I am asked to interpret SOR/76-644. In doing so, I am asked to determine whether SOR/76-644 overrides or abridges existing parliamentary privileges. In this respect, I do not consider that I am infringing on the jurisdiction of Parliament.

Historically, there has always been some question whether the Courts have jurisdiction to determine the nature and extent of parliamentary privilege. As the supreme law-giving body, it would seem only natural that Parliament should be the source of authoritative guidelines on the subject. On the other hand, there is something inherently inimical about Members of Parliament determining the nature and extent of their own rights and privileges. The Courts have seized on this to consistently review the nature and extent of parliamentary privilege.

In *Thorpe's Case* (1452), 5 Rot. Parl. 239 at p. 240, 1 Hatsell, pp. 28-34, Chief Justice Fortescue wrote an opinion favouring the supremacy of Parliament in determining the nature and extent of parliamentary privilege:

> That they ought not to answer to that question, for it hath not been used aforetyme, that the justices should in anywise determine the privilege of this High Court of Parliament; for it is so high and so mighty in its nature, that it may make law, and that this is law it may make no law; and the determination and knowledge of that privilege belongeth to the Lords of Parliament, and not to the justices.

This approach has largely been overlooked in other cases.

In *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 19th ed. (1976), the author sets out the arguments on both sides at pp. 200-1:

> The House of Commons claims that its admitted right to adjudicate on breaches of privilege implies in theory the right to determine the existence and extent of the privileges themselves. It has never expressly abandoned its claim to treat as a breach of privilege the institution of proceedings for the purpose of bringing its privileges into discussion or decision before any court or tribunal elsewhere than in Parliament. In other words, it claims to be the absolute and exclusive judge of its own privileges, and that its judgments are not examinable by any other court or subject to appeal.
>
> On the other hand, the courts regard the privileges of Parliament as part of the law of the land, of which they are bound to take judicial notice. They consider it their duty to decide any question of privilege arising directly or indirectly in a case which falls within their jurisdiction, and to decide it according to their own interpretation of the law.

This passage is cited by the House of Lords in *Re Parliamentary Privilege Act, 1770*, [1958] A.C. 331 at pp. 353-4. Unfortunately, the Court does not draw any conclusions and merely reflects that "the old dualism remains unresolved" (p. 354). May, on the other hand, comes to the following conclusion, at p. 202:

> Since the House of Commons has not for a hundred years refused to submit its privileges to the decision of the courts, it may be said to have given practical recognition to the jurisdiction of the courts over the existence and extent of its privileges. On the other hand, the courts have always, at any rate in the last resort, refused to interfere in the application by the House of any of its privileges.
>
>> "It is a remarkable fact that the modern solution of the problem was anticipated by Clarendon at the beginning of the struggle between the Houses of Parliament and the courts. 'We are,' he represents the Commons as saying, 'and have always been confessed the only judges of our own privileges: and therefore whatsoever we declare to be our privilege is such: otherwise whoever determines that it is not so makes himself the judge of that whereof the cognizance only belongs to us.' And he solves the 'sophistical riddle' by showing that the proposition is only true if 'rightly understood.' 'I say the proposition rightly understood: they are the only judges of their privileges, that is, upon the breach of those privileges which the law had declared to be their own, and what punishment is to be inflicted upon such breach. But there can be no privilege of which the law doth not take notice, and which is not pleadable by, and at law'." (History of the Rebellion, Book iv, quoted by McIlwain, High Court of Parliament pp. 240-1.)

Consequently, the Courts apparently have an implicit jurisdiction to deal with questions of parliamentary privilege.

Notwithstanding the submission of counsel for the respondent, I have no hesitation in proceeding to evaluate the effect of SOR/76-644 on the privileges of Members of Parliament. *Roman Corp. Ltd. et al. v. Hudson's Bay Oil & Gas Co. Ltd. et al.*, [1971] 2 O.R. 418, 18 D.L.R. (3d) 134 (Houlden, J. [Ont. H.C.]); affirmed [1972] 1 O.R. 444, 23 D.L.R. (3d) 292 (C.A.); affirmed [1973] S.C.R. 820, 36 D.L.R. (3d) 413 (discussed, *infra*), is sufficient authority for the proposition that the Courts of law in Canada have jurisdiction to adjudicate on matters involving the privileges of Members of Parliament.

The privileges of a Member of Parliament are set out in the *Senate and House of Commons Act*, R.S.C. 1970, c. S-8. Section 4 reads:

PRIVILEGES AND IMMUNITIES OF MEMBERS AND OFFICERS

4. The Senate and the House of Commons respectively, and the members thereof respectively, hold, enjoy and exercise,

(a) such and the like privileges, immunities and powers as, at the time of the passing of the *British North America Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to that Act; and

(b) such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively.

The privileges which currently exist in England developed gradually over many centuries.

The history of parliamentary privilege in England follows an interesting course. The imprisonment of Strode in 1512 for words spoken in Parliament resulted in what is known as *Strode's Act*, 4 Hen. VIII, c. 8, which not only declared that the proceedings of Stannary Court which had imprisoned and fined Strode were void but also that all future proceedings against a Member of Parliament "for any bill, speaking, or declaring of any matter concerning the Parliament", would be void and ineffective. The nature and extent of this terminology has been disputed for many centuries. The demand for freedom of speech was succinctly stated in a petition of Sir Thomas More (Speaker in 1523) that "if any man in the Commons House should speak more largely than of duty he ought to do ... all such offences should be pardoned" (*Hall's Chronicle*, 1890 ed., p. 653). This petition, however, is not recorded in the Parliament Roll. In 1554, the three claims of freedom from arrest, freedom of speech, and of access, were first made together (C.J., 1547-1628, 37). By the end of the 16th century the practice seems to have become regular.

The Commons Protestation of December 18, 1621, was prepared by the English House of Commons and was made known to James I; John Hatsell, *Precedents of Proceedings in the House of Commons*, vol. 1 (1971), p. 79. The protestation reads:

And that, in the handling and proceedings of those businesses, every Member of the House hath, and of right ought to have, Freedom of Speech to propound, treat, reason and bring to conclusion the same ... And that every Member of the said House hath like Freedom from all Impeachment, Imprisonment, or Molestation (other than by censure of the House itself) for or concerning any Bill, speaking, reasoning or declaring of any matter or matters touching the Parliament, or Parliament business ...

This protestation was not in accordance with the King's conception of the liberties of the Commons and Hatsell, *supra*, reports that the King sent for the Journal Book and "in council with his own hand rent it out", and by a memorial of December 30, 1621, he declared it to be annulled, void and of no effect.

The recognition by law of the privilege of freedom of speech received final statutory confirmation after the Revolution of 1688. By the 9th Article of the *Bill of Rights* it was declared: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament" (1689, I William and Mary, Sess. 2, c. 2). The aforesaid language makes it clear that a Member is not amenable to the ordinary Courts for anything said in debate however criminal its nature. The term "proceedings in Parliament" connotes more than speeches and debates. A general idea of what the term covers may be gathered from looking at the cases and at the principle followed by the British House of Commons.

In *Ex parte Wason* (1869), L.R. 4 Q.B. 573, Mr. Wason laid an information relating to a promise by Earl Russell to present a petition to the House of Lords. The information charged that Earl Russell, Lord Chelmsford and the Lord Chief Baron conspired to make statements in the House of Lords in respect of the petition designed to defeat its object. This conspiracy was alleged to have taken place outside the precincts of the House. The Court held that the criminal conspiracy was so related to what would ultimately be a proceeding in the House that the act itself was a proceeding in the House.

In *R. v. Bunting et al.* (1885), 7 O.R. 524, the Ontario Queen's Bench held that a conspiracy to change a Government by bribing members of the provincial Legislature was not in any way connected with a proceeding in Parliament and therefore the Court had jurisdiction to try the offence. The Court distinguished *Ex parte Wason* on the ground that in *Wason* the whole transaction of defeating the petition could not be complete without a proceeding in the House. In *Bunting*, however, the offence of bribing, for whatsoever purpose, was said to be complete without any reference to what might or might not happen in the House. O'Connor, J., in his dissent, stated the law in general terms [at p. 563]:

> I desire it to be understood, however, that I do not hold that a member of Parliament is not amenable to the ordinary Courts for anything he may say or do in Parliament. I merely say he is not so amenable for anything he may say or do within the scope of his duties in the course of parliamentary business, for in such matters he is privileged and protected by *lex et consuetudo parliamenti*.

According to Erskine May in his book *Parliamentary Practice* (p. 89):

> What is done or said by an individual Member becomes entitled to protection

> when it forms part of a proceeding of the House in its technical sense, i.e., the formal transaction of business with the Speaker in the Chair or in a properly constituted committee. But it does not follow that everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament. Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more general sense before the House as having been ordered to come before it in due course. This is a test which may be useful in deciding how far crimes committed during a sitting may be entitled to privilege.

May observes that the privilege which formerly protected Members against action by the Crown now serves largely as protection against prosecution by individuals or corporate bodies (p. 78):

> Subject to the rules of order in debate ... a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by his privilege from any section for libel, as well as from any other question or molestation.

P. S. Pachauri in his book *Law of Parliamentary Privileges in U.K. and in India* (1971), after discussing *R. v. Bunting, supra*, and *Ex parte Wason, supra*, states (p. 86):

> The sum total of the various judicial dicta on the subject is that there must be some reasonable nexus between the acts or words and the business of the House so as to make them part of the proceedings of the House and the place where the words are spoken or acts are done are immaterial.

The principle followed by the British House of Commons in determining what is a proceeding in Parliament has been discussed on several occasions. A general idea of what the term covers is given in the *Report of the Select Committee on the Official Secrets Act*, H.C. 101, p. V. (1938-39):

> It covers both the asking of a question and the giving written notice of such question, and includes everything said or done by a Member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of Parliamentary business.

The Committee concluded that disclosures by Members in the course of debate or proceedings in Parliament could not be made the subject of proceedings under the *Official Secrets Act* and a disclosure made by a Member to a Minister or to another Member directly relating to some act to be done or some proceeding to be had in the House, even though it did not take place in the House, might be held to form part of the business of the House and should be similarly protected. But the Committee also observed that a casual conversation in the House could not be said to be a proceeding in Parliament and disclosure in the course of such conversation could not be protected as it was not in the course of a proceeding in Parliament. On the same ground the Committee also held that a Member who discloses such information in a speech in his constituency or anywhere else beyond the precincts of the House would also not be protected by the parliamentary privilege: *supra*, paras. 9, 10 and

15. The House agreed with the conclusions of this Committee on November 21, 1939 (H.C. Debates, vol. 353, c. 1083). (For a discussion, see Pachauri, *Law of Parliamentary Privileges in U.K. and in India*, pp. 87-9.)

The Report of the Committee and the ruling of the House of Commons has obvious implications for the present case. The *Official Secrets Act* can be compared to SOR/76-644 in that both require strict confidentiality of specific information. In this respect, the Members of Parliament would be free to use the information in Parliament but could not release it to constituents.

Counsel for the respondent concedes that the information can be used in Parliament but argues that the information cannot be released outside of Parliament in any manner.

Counsel for the applicants argued that the Members are entitled to release the information to the press. They argued that the right to release the information to the press would have no practical value unless the press were covered by a similar privilege. Finally, counsel submitted that the Members have the right to release the information to their constituents. I cannot accede to these latter two arguments. The privilege of the Member is finite and cannot be stretched indefinitely to cover any person along a chain of communication initiated by the Member. The privilege stops at the press. Once the press have received the information, the onus falls on them to decide whether to publish. They cannot claim immunity from prosecution on the basis of the parliamentary privilege which protects the Member releasing the information. Whether they have a valid defence under the Regulations is another matter. Finally, the Member does not have the right to release the information to any one he chooses outside of Parliament. The concept of "proceedings in Parliament" cannot be extended beyond all logical limits. I am not satisfied that the privilege enables the Member to release the information to his constituents. The concept of "proceedings in Parliament" has not been extended to cover the informing function of a Member. This is consistent with the ruling of the House of Commons in the *Official Secrets Act*.

In coming to the conclusions set out above I have relied on the authorities discussed above and on the recent decision in *Roman Corp. Ltd. et al. v. Hudson's Bay Oil & Gas Co. Ltd. et al.*, [1971] 2 O.R. 418, 18 D.L.R. (3d) 134. The reasons delivered by Houlden, J., in the High Court and Aylesworth, J.A., in the Court of Appeal, [1972] 1 O.R. 444, 23 D.L.R. (3d) 292, are of particular relevance to the current matter.

At p. 425 O.R., p. 141 D.L.R. of his reasons, Mr. Justice Houlden quoted from 28 Hals., 3rd ed., at pp. 457-8:

> "An exact and complete definition of 'proceedings in Parliament' has never been given by the courts of law or by either House. In its narrow sense the ex-

pression is used in both Houses to denote the formal transaction of business in the house or in committees. It covers both the asking of a question and the giving written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.

"In its wider sense 'proceedings in Parliament' has been used to include matters connected with, or ancillary to, the formal transaction of business. A select committee of the Commons, citing and approving a Canadian dictum, stated in its report that 'it would be unreasonable to conclude that no act is within the scope of a member's duties in the course of parliamentary business unless it is done in the House or a committee thereof and while the House or committee is sitting."

Houlden, J., then considers the Commons Protestation of 1621 and the *Bill of Rights, 1689*, at p. 426 O.R., p. 142 D.L.R.:

... the wording of the Commons Protestation of 1621, with its very similar wording to art. 9 of the *Bill of Rights, 1689*, furnishes a good indication of what was meant by the words "Proceedings in Parliament" as used in the *Bill of Rights, 1689*, and these words were not limited to matters in Parliament but, as the Protestation states, included "speaking, reasoning or declaring of any matter or matters touching the Parliament or Parliament business".

Following the statements in the House, the Prime Minister and a Member of the Cabinet sent a telegram to the plaintiff and made a statement to the press. Houlden, J., held that the privilege of a Member extended to statements in a press release where such statements had been previously made in the House.

On appeal, Aylesworth, J.A., in delivering the judgment of the Court, agreed that the telegram dispatched to the appellant Roman by the respondent Trudeau and the press release issued by the respondent Greene were mere extensions of the statements made by the respondents in the House and, therefore, they were protected by the same absolute privilege as the communications made in the House itself. Aylesworth, J.A., states at p. 450 O.R., p. 298 D.L.R.:

That is to say, that these actions were, in essence, "proceedings in Parliament" within the extended meaning of that hallowed phrase as judicially interpreted and applied.

Aylesworth, J.A., went on to say, at p. 451 O.R., p. 299 D.L.R.:

I venture also to express the view that the modern judicial concept of the meaning and application of the phrase "proceedings in Parliament" is broader than had been the case in some instances in the past. If this be so, certainly there would appear to be ample justification for it in the development of the complexities of modern government and in the development and employment in government business of the greatly extended means of communication.

The object of the privilege is, of course, not to further the selfish interests of the Member of Parliament but to protect him from harassment in and out of the House in his legitimate activities in carrying on the business of the House; consideration of the interest of the public in this regard overbears the usual solicitude in our law for the private individual. Viewed in this manner, and that approach, I think, is historically correct, it becomes abundantly clear to me that all of the actions of the respondents complained about, and specifically

the sending of the telegram and the issuing of the press release, were no more and no less than the legitimate and lawful discharge by the respondents of their duties in the course of parliamentary proceedings as Ministers of the Crown and Members of the House.

Aylesworth, J.A., follows Viscount Radcliffe in *A.-G. Ceylon v. de Livera et al.*, [1963] A.C. 103. Aylesworth, J.A., concluded that both Trudeau and Greene were discharging their "essential functions" in making the statement to the media and in sending the telegram.

In *A.-G. Ceylon v. de Livera*, Viscount Radcliffe states, at p. 120:

> ... in what circumstances and in what situations is a member of the House exercising his "real" or "essential" function as a member? For, given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others, it is important to see that those privileges do not cover activities that are not squarely within a member's true function.

And further, at p. 121:

> The most, perhaps, that can be said is that, despite reluctance to treat a member's privilege as going beyond anything that is essential, it is generally recognised that it is impossible to regard his only proper functions as a member as being confined to what he does on the floor of the House itself.

Consequently, it is necessary to determine whether the act complained of is a "real" or "essential" function of the Member.

In delivering the judgment of the Supreme Court of Canada in *Roman Corp. Ltd. et al. v. Hudson's Bay Oil & Gas Co. Ltd. et al.*, [1973] S.C.R. 820, 36 D.L.R. (3d) 413, Martland, J., quotes at length from the judgments of Houlden, J., and Aylesworth, J.A., and adds, at p. 828 S.C.R., p. 419 D.L.R.:

> Without dissenting from the views expressed in the Courts below as to the privilege attached to statements made in Parliament, I would prefer to deal with this appeal on the broader issue, on which those Courts have also expressed an opinion.

Following the authorities set out above, I have come to the conclusion that a Member of Parliament may utilize information proscribed by SOR/76-644 in Parliament and may release that information to the media. However, I hold that the privilege of the Member cannot be extended to protect the media if they choose to release the information to the public. Nor do I consider that the "real" and "essential" functions of a Member include a duty or right to release information to constituents. The cases indicate that the privilege is finite and I would not be justified in extending the privilege to cover information released to constituents.

The applicability of the Regulations to the solicitor-client relationship raises an issue of more general concern. The solicitor-and-client privilege is one that is well recognized and protected by law. A tremendous wealth of judicial pronouncements has evolved over the years dealing with the nature and extent of the privilege. The issue in this case is whether SOR/76-644 overrides or abridges that privilege. My reading of the authorities does not convince me that

the Regulations can prevent the applicants from disclosing the information to their solicitors for the purpose of obtaining legal advice.

Counsel for the applicants seeks to extend the privilege beyond the solicitor-client consultation. They argue that if the privilege is to have any meaning at all, it must be extended to enable the solicitors to initiate legal proceedings on behalf of their clients. Counsel for the respondent, on the other hand, seeks to restrict the privilege to cases of *bona fide* consultation. He argues that if the real purpose of the consultation is to circumvent the Regulations and not to obtain advice on the applicant's legal position then the privilege cannot be extended. This argument is analogous to the principle that the privilege does not extend where the consultation involves the commission of a crime. In my opinion, however, it is impossible to predict in advance whether the consultation will be *bona fide*. Consequently, it must first be determined whether the solicitor-client privilege remains intact notwithstanding the Regulations. If that is so, then the principles relating to the nature and extent of the privilege come into play.

The interplay between statute law and the solicitor-client privilege is considered by Chief Justice Jackett in *Re Director of Investigation & Research and Shell Canada Ltd.* (1975), 55 D.L.R. (3d) 713, 22 C.C.C. (2d) 70, 18 C.P.R. (2d) 155 (Fed. C.A.). By virtue of s. 10(1) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, the Director of Investigation and Research was empowered to:

> "... enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director ... may afford such evidence."

[pp. 715-6.] The issue before the Federal Court of Appeal was whether that section abridged the solicitor-client privilege. The Court held that it did not.

In delivering the reasons of the Court, Jackett, C.J., makes a number of observations concerning solicitor-client privilege. At p. 722, he states that:

> What has to be decided in this case is whether Parliament, by conferring on the Director fact finding powers in the widest possible terms, intended to undermine the solicitor-and-client relationship of confidentiality that made necessary the solicitor-and-client privilege in connection with the giving of evidence in the Courts. In my view, that question must be answered in the negative.
>
> There must always be cases where the Courts, faced with unqualified language used by Parliament to accomplish some important public objective must decide whether it was intended by Parliament, by such language, to make a fundamental change in some law or institution to which no reference is explicitly made. (Compare *George Wimpey & Co. Ltd. v. B.O.A.C.*, [1955] A.C. 169, *per* Lord Reid at p. 191, and *R. v. Jeu Jang How* (1919), 32 C.C.C. 103, 50 D.L.R. 41, 59 S.C.R. 195, *per* Duff, J., at pp. 105-6 C.C.C., p. 43 D.L.R., p. 179 S.C.R.) In my view, this is such a case.

He then goes on to discuss the nature of the privilege:

> In my view, however, this privilege is a mere manifestation of a fundamental principle upon which our judicial system is based, which principle would be breached just as clearly, and with equal injury to our judicial system, by the compulsory form of pre-prosecution discovery envisaged by the *Combines Investigation Act* as it would be by evidence in Court or by judicial discovery.

In this respect, then, the solicitor-client privilege is *prima facie* paramount to such legislation. This reasoning is particularly persuasive in the present case.

Chief Justice Jackett also considers the problem of *bona fide* consultations. At p. 723, he states that:

> It must not be forgotten that all that is being discussed in this case are *bona fide* communications between solicitor and client. Any conspiracy between a solicitor and some other person to commit a crime and any use of a solicitor-and-client relationship to cloak relevant evidence or facts from discovery falls completely outside the principle of confidentiality protected by the law.

The same principle can be applied in the present case. However, *bona fides* cannot be determined in advance and can only be challenged in the light of subsequent events.

In the present case, it is impossible to predict whether the consultations would be *bona fide*. The mere possibility that they would not does not detract from the *prima facie* right to the privilege. If subsequent evidence arises demonstrating that the consultations were not *bona fide* then the privilege is lost. Again, I would point out that the problem in dealing with "absolution before sinning" is that we have no way of knowing what the motive of the applicants actually is or whether any "sin" will be committed. Consequently, I can only offer an academic evaluation of the principles of solicitor-client privilege and can express no opinion on the *bona fides* in this particular situation.

The decision in *Re Director of Investigation & Research and Shell Canada Ltd.* is cited with approval by Osler, J., in *Re Presswood et al. and Int'l Chemalloy Corp.* (1975), 11 O.R. (2d) 164, 65 D.L.R. (3d) 228, 25 C.P.R. (2d) 33. In that case, s. 186(3) of the *Business Corporations Act*, R.S.O. 1970, c. 53, provided that company accounts and records were to be produced for examination by an inspector. The company claimed privilege for certain documents. Osler, J., cites the reasons of Jackett, C.J., in *Re Director and Shell*, at p. 166 O.R., p. 230 D.L.R., and concluded that the company was entitled to maintain the privilege and left to the master the determination whether privilege extended to particular documents.

In the absence of precise and unequivocal language, I am satisfied that SOR/76-644 does not override or abridge the solicitor-and-client privilege.

The nature and extent of the privilege is somewhat more troublesome. I agree with counsel for the applicants that the Members can initiate legal proceedings. I do not agree, however, that the in-

formation can be released to the public simply because legal proceedings are undertaken. The Court might consider that it was bound to maintain the integrity of the Regulations by sealing all pleadings and material and maintaining such confidentiality during the course of the proceedings. Indeed, there may be an onus on the party initiating the proceedings to apply for an order directing that confidentiality be maintained throughout the proceedings before placing the proscribed information in the hands of the appropriate Court officials. Proceedings *in camera*, while rare, are not unknown in our Courts. In this way, the integrity of the Regulations is maintained while the applicants are free to seek a judicial interpretation whether the Government was involved in an illegal cartel and whether such cartel vitiates the validity of the Regulations.

I am supported in this conclusion by the fact that s. 2(*a*) does not refer to Court proceedings. The section refers to "any person, government, crown corporation, agency or other organization". The administration of justice cannot be slotted into any of these. In my view the Regulations would have to contain the clearest words to negate the right of a citizen to seek redress in the Courts.

The Director of Investigation and Research under the *Combines Investigation Act*, R.S.C. 1970, c. C-23, is in a somewhat different position. Section 2(*a*) of SOR/76-644 would clearly cover the Director. Consequently, the applicants would be prohibited from releasing the information to the Director. Since the *Atomic Energy Control Act* is passed in the "national interest" and the Regulations are deemed to be necessary or advisable by the Board, the inevitable conclusion is that the Regulations must take precedence over the remedies in s. 7 and s. 8 of the *Combines Investigation Act*. The question remains whether the remedies in s. 7 and s. 8 are totally inapplicable in view of the Regulations.

Section 7(1) (rep. & sub. 1974-75, c. 76, s. 3(1)) states that:

> 7(1) Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that
>
> (*a*) a person has contravened or failed to comply with an order made pursuant to section 29, 29.1 or 30,
>
> (*b*) grounds exist for the making of an order by the Commission under Part IV.I, or
>
> (*c*) an offence under Part V or section 46.1 has been or is about to be committed,
>
> may apply to the Director for an inquiry into such matter.

Section 7(2) (paras. (*b*) and (*c*) rep. & sub. *ibid.*) sets out the material which must be filed in support of such an application:

> 7(2) The application shall be accompanied by a statement in the form of a solemn or statutory declaration showing

(a) the names and addresses of the applicants, and at their election the name and address of any one of their number, or of any attorney, solicitor or counsel, whom they may, for the purpose of receiving any communication to be made pursuant to this Act, have authorized to represent them:

(b) the nature of

(i) the alleged contravention or failure to comply,

(ii) the grounds alleged to exist for the making of an order, or

(iii) the alleged offence

and the names of the persons believed to be concerned therein and privy thereto; and

(c) a concise statement of the evidence supporting their opinion.

Obviously, s. 7(2)(*c*) creates a problem for the applicants.

In my opinion, the applicants herein are entitled to make such an application and can include as much *public* information as possible. Section 7(2)(*c*) does not say that the applicants must *prove* the offence. It simply states that the applicants must provide evidence to support "their opinion" that the offence was committed. The Director then seeks out the evidence necessary for a prosecution or other action. I recognize that the investigation may be fruitless. The Director may run up against the confidentiality problem created by SOR/76-744 or by a claim of "Crown Privilege" wherever he goes for information. That possibility is not in issue in this application.

In the result, I have concluded that SOR/76-644 does not override or abridge the solicitor-client privilege. The situation, however, is governed by the same principles which apply to any other privileged occasion and a consultation or conspiracy concerning the proposed commission of a crime would not be privileged. The privilege does not allow the applicants or the solicitor to release any proscribed information to any other "person, government, crown corporation, agency or other organization". Moreover, the Regulations do not prohibit the institution of Court proceedings provided that such proceedings maintain the confidentiality of the information.

Finally, the privilege or the ability to initiate proceedings does not enable the applicants to release proscribed information to the Director of Investigation and Research under the *Combines Investigation Act*, although the applicants are entitled to trigger an investigation under s. 7 and s. 8 without releasing such proscribed information.

Counsel for the applicants also sought to impugn the validity of the Regulations by arguing that they were contrary to s. 1(*a*) and (*d*) of the *Canadian Bill of Rights*, 1960 (Can.), c. 44 [see now R.S.C. 1970, App. III]. Despite the forceful submissions of counsel, I am not satisfied that the Regulations can be set aside on that basis.

Section 1(*a*) reads:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

Counsel for the applicants argued that SOR/76-644 deprives Canadian citizens of very basic rights without "due process of law".

The concept of "due process of law" is considered by the Supreme Court of Canada in *Curr v. The Queen*, [1972] S.C.R. 889, 26 D.L.R. (3d) 603, 7 C.C.C. (2d) 181, in which the Court considered the validity of s. 223(1) of the *Criminal Code* dealing with breath samples. It is quite true that the approach taken by the then Chief Justice and Ritchie, J., avoids the issue of the *Canadian Bill of Rights* altogether, but Laskin, J., deals with the issue at great length. I cannot conclude that what Laskin, J., says is merely *obiter* since it forms a substantial basis for his reasons.

At p. 892 S.C.R., p. 608 D.L.R., Laskin, J., starts off with the admonition that:

> The *Canadian Bill of Rights*, 1960 (Can.), c. 44 is invoked in this case to sterilize certain provisions of the *Criminal Code*, viz., ss. 223 and 224A(3), as enacted by s. 16 of the *Criminal Law Amendment Act*, 1968-69 (Can.), c. 38. That it may have a sterilizing effect upon federal legislation was decided by this Court in *Regina v. Drybones*, [1970] S.C.R. 282, 10 C.R.N.S. 334, 71 W.W.R. 161, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473. Whether that must be the result here in no way depends upon what was decided in *Regina v. Drybones*.

Consequently, it is necessary to deal with each case according to its peculiar circumstances and with particular consideration for the legislation involved.

In dealing with the phrase "due process of law" Laskin, J., states, at p. 897 S.C.R., p. 612 D.L.R.:

> The phrase "due process of law" has its context in the words of s. 1(*a*) that precede it. In the present case, the connection stressed was with "the right of the individual to ... security of the person". It is obvious that to read "due process of law" as meaning simply that there must be some legal authority to qualify or impair security of the person would be to see it as declaratory only. On this view, it should not matter whether the legal authority is found in enacted law or in unenacted or decisional law. Counsel for the appellant does not, of course, stop here. He contended for a qualitative test of legislation to meet the standard of due process of law and urged that the Court find that s. 223 fell below it. This was, however, a bare submission, not reinforced by any proposed yardstick.
>
> What it amounted to was an invitation to this Court to monitor the substantive content of legislation by reference to s. 1(*a*). The invitation is to take the phrase "except by due process of law" beyond its antecedents in English legal history, and to view it in terms that have had sanction in the United States in the consideration there of those parts of the Fifth and Fourteenth Amendments to the American Constitution that forbid the federal and state authori-

> ties respectively to deprive any person of life, liberty or property without due process of law.

He then concludes, at pp. 899-900 S.C.R., pp. 613-4 D.L.R.:

> In so far as s. 223 may be regarded, in the light of s. 223(2), as having specific substantive effect in itself, I am likewise of the opinion that s. 1(*a*) of the *Canadian Bill of Rights* does not make it inoperative. Assuming that "except by due process of law" provides a means of controlling substantive federal legislation—a point that did not directly arise in *Regina v. Drybones*—*compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the British North America Act.* Those reasons must relate to objective and manageable standards by which a Court should be guided if scope is to be found in s. 1(*a*) due process to silence otherwise competent federal legislation. Neither reasons nor underlying standards were offered here. For myself, I am not prepared in this case to surmise what they might be.

(Emphasis added.) At pp. 902-3 S.C.R., pp. 615-6 D.L.R., Laskin, J., reiterates and concludes:

> The very large words of s. 1(*a*), tempered by a phrase ("except by due process of law") whose original English meaning has been overlaid by American constitutional imperatives, signal extreme caution to me when asked to apply them in negation of substantive legislation validly enacted by a Parliament in which the major role is played by elected representatives of the people. Certainly, in the present case, a holding that the enactment of s. 223 has infringed the appellant's right to the security of his person without due process of law must be grounded on more than a substitution of a personal judgment for that of Parliament. There is nothing in the record, by way of evidence or admissible extrinsic material, upon which such a holding could be supported. I am, moreover, of the opinion *that it is within the scope of judicial notice to recognize that Parliament has acted in a matter that is of great social concern, that is the human and economic cost of highway accidents arising from drunk driving, in enacting s. 223 and related provisions of the Criminal Code.* Even where this Court is asked to pass on the constitutional validity of legislation, it knows that it *must resist making the wisdom of impugned legislation the test of its constitutionality. A fortiori* is this so where it is measuring legislation by a statutory standard, the result of which may make federal enactments inoperative.

(Emphasis added.) This approach is particularly relevant to the current case. If we accept the finding in *Pronto* that the legislation involves the "national interest" and the finding in *Duquesne* that we cannot question the decision of the Board on the subjective necessity of the Regulations, we are left with the position that we should not impugn the legislation or the Regulations on the basis of s. 1(*a*) of the *Canadian Bill of Rights*. On considering the principles enunciated in *Curr*, *Pronto* and *Duquesne*, I have concluded that the *Bill of Rights* does not invalidate the *Atomic Energy Control Act* or SOR/76-644.

Moreover, the Regulations are approved by the Governor-General in Council and we must assume that due consideration has

been given to the effect which the Regulations will have. It is not my function to assess the wisdom of the Regulations or whether their scope was excessive. The Regulations have been properly promulgated under the Act and have been passed by "due process of law".

I am also of the opinion that the same approach should be taken to s. 1(*d*) of the *Bill of Rights* ("freedom of speech"). It is trite law to say that freedom of speech is not absolute but is freedom governed by law. As Laskin, J., points out in *Curr*, we must consider the effect of the particular legislation in determining the effect of the *Bill of Rights*. The preamble of the *Atomic Energy Control Act* states that it is passed in the "national interest" and I am not prepared to dispute Parliament's decision in that respect. The Members of Parliament are fully cognizant of the effect that the Act might have and of the considerable power granted to the Board under s. 9. The Board has decided that freedom of speech must be abridged in the national interest. I realize that there is an inherent repugnance in allowing an administrative tribunal to take such drastic steps but I recognize that the Regulations also have the approval of the Governor-General in Council.

Having considered all these factors, I am of the view that Parliament is the best judge of the measures which should be taken in the public interest. By applying the principles enunciated by Laskin, J., in *Curr*, I find that the Act and SOR/76-644 are valid notwithstanding the *Canadian Bill of Rights*.

Since I have already held that the privileges of the Members continue notwithstanding the Regulations, I need not consider the effect of s. 1(*d*) on such privileges in relation to Regulations 76-644. Moreover, since I have also concluded that the solicitor-client privilege exists notwithstanding SOR/76-644, I need not consider the extent of s. 2(*c*) (right to counsel).

While this matter was reserved, counsel advised me that the Regulations have been amended. On October 13, 1977, the Cabinet approved SOR/77-836 which replaces SOR/76-644:

Short Title

1. These Regulations may be cited as the *Uranium Information Security Regulations*.

Interpretation

2. In these Regulations, "foreign tribunal" includes any court or grand jury and any person authorized or permitted under foreign law to take or receive evidence whether on behalf of a court or grand jury or otherwise.

Security of Information

3. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person in relation to the exporting from Canada or marketing for use outside Canada or uranium or its derivatives or compounds shall

(a) release any such note, document or material or disclose or communicate the contents thereof to any person, foreign government or branch or agency thereof or to any foreign tribunal unless

(i) he is required to do so by or under a law of Canada, or

(ii) he does so with the consent of the Minister of Energy, Mines and Resources; or

(b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

Application

4. Section 3 does not apply to a person unless he has such possession or control by reason of the direct or indirect acquisition by him of the note, document or material because of his being or having been

(a) engaged in the mining, exporting, refining or selling of uranium or its derivatives or compounds;

(b) appointed to a public office or appointed by a Minister pursuant to subsection 37(1) of the *Public Service Employment Act* or employed in the Public Service; or

(c) a director, an officer, employee or agent of

(i) a person engaged as described in paragraph (a),

(ii) a company incorporated in Canada that is or was a parent, subsidiary or affiliate of or related to another company incorporated in Canada so engaged or to a foreign corporation so engaged; or

(iii) the Atomic Energy Control Board, Eldorado Nuclear Limited or Uranium Canada, Limited.

It can be seen that s. 4 of the new Regulations has a profound effect on this application. Subsequent to the amendment counsel attended upon me and agreed that I should deliver judgment without regard to the amendment. I have done so.

As a result, an order will go granting a declaration as follows:

1. That the Uranium Information Security Regulations do not prohibit the applicants from releasing any note, documents or material or communicating the contents thereof to their solicitors and counsel for the purpose of seeking legal advice.

2. That the Regulations do not prohibit the applicants or any member of the House of Commons from releasing or disclosing any such documents in the course of Parliamentary debate or to the press.

3. That Subsection 2(a)(ii) of the Regulations is *ultra vires* the Atomic Energy Control Board and the Governor in Council under S. 9 of the *Atomic Energy Control Act*.

Apart from this, the application is dismissed. This is not a case for an award of costs. I am grateful to counsel for their assistance in this matter.

Order accordingly.

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CHAPTER H-21

HOUSE OF ASSEMBLY ACT
cited as
R.S.N.S., 1967, Chapter 128

INTERPRETATION

Interpretation

1 (1) In this Act,

(a) "committee" means any standing, special or select committee of the House;

(b) "House" means the House of Assembly;

(bb) "outside member" means a member of the House who is ordinarily resident within the meaning of the Elections Act more than twenty-five miles distant from the place where the House ordinarily sits;

(c) "polling district" means polling district as defined in the Municipal Act;

(d) "Speaker" means the Speaker of the House.

Interpretation

(2) In this Act, description references to "streets", "roads", "rights-of-way", "water features" or "railways" signifies the centre line of said "streets", "roads", "rights-of-way", "water features" or "railways" unless otherwise described or stated. R.S., c. 128, s. 1; 1969, c. 51, s. 1; 1978, c. 19A, s. 1.

trial of the action in which cases the whole shall belong to the Crown. R.S., c. 128, s. 26; 1972, c. 2, s. 9.

Ineligible Person Not To Sit or Vote

27 (1) No person declared by this Act or by any other law ineligible as a member of the House shall sit or vote in the same while under such disability.

Penalty

(2) If any such person sits or votes in the House, he shall forfeit the sum of one thousand dollars for every day he sits or votes; and such sum may be recovered by an action against him in the Trial Division of the Supreme Court at the suit of any person. R.S., c. 128, s. 27; 1972, c. 2, s. 9.

PART IV

POWERS AND PRIVILEGES

A - THE HOUSE OF ASSEMBLY

Privileges, Immunities and Powers

28 (1) In all matters and cases not specially provided for by an enactment of this Province, the House and the committees and members thereof respectively shall hold, enjoy and exercise such and the like privileges, immunities and powers as are from time to time held, enjoyed and exercised by the House of Commons of Canada, and by the committees and members thereof respectively.

Judicial Notice

(2) Such privileges, immunities and powers shall be part of the general and public law of Nova Scotia, and it shall not be necessary to plead the same, but the same shall in all courts of justice in this Province, and by and before all justices, be taken notice of judicially. R.S., c. 128, s. 28.

Liability of Member

29 No member of the House shall be liable to any civil action or to prosecution, arrest, imprisonment, or damages, by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him, before the House. R.S., c. 128, s. 29.

No Arrest of Member during Session

30 Except for any violation of this Act, no member of the House shall be liable to arrest, detention or molestation for any debt or cause whatever of a civil nature, during any session of the Legislature, or during the fifteen days preceding or the fifteen days following such session. R.S., c. 128, s. 30.

Exemption from Jury Duty

31 During the periods mentioned in Section 30, all officers and servants of the House or any committee, shall be exempt from serving or attending as jurors before any court of justice. R.S., c. 128, s. 31.

Power to Compel Attendance and Production

32 (1) The House may at all times command and compel the attendance before the House, or before any committee, of such persons and the production of such papers and things as the House or committee deems necessary for any of its proceedings or deliberations.

Warrant for Attendance and Production

(2) Whenever the House requires the attendance of any person before the House or before any committee, the Speaker may issue his warrant, directed to the person named in the order of the House, requiring the attendance of such person before the House or committee, and the production of such papers and things as are ordered. R.S., c. 128, s. 32.

No Liability for Act Done on Direction of House

33 (1) No person shall be liable to damages or otherwise for any act done under the authority and within the legal power of the House, or under or by virtue of any warrant issued under such authority. All persons to whom such warrants are directed may command the aid and assistance of all sheriffs, bailiffs, constables and others; and every refusal or failure to give such aid or assistance when required shall be a violation of this Act.

Protection of Speaker and Officer of House

(2) No action shall be brought against the Speaker or any officer of the House, or any person assisting the Speaker or such officer, for any act or thing done by authority of the House. R.S., c. 128, s. 33.

Rules

34 The House may establish rules for its government and the attendance and conduct of its members, and alter, amend and repeal the same; and may punish members for disorderly conduct or breach of the rules of the House. The rules and orders of the House now existing shall continue in force until altered, amended or repealed. All rules of the House not inconsistent with this Act shall have the force and effect of law until altered, amended or repealed. R.S., c. 128, s. 34.

House To Be Court of Record

35 (1) The House shall be a court of record, and shall have all the rights and privileges of a court of record for the purpose of summarily inquiring into and punishing the acts, matters and things herein declared to be violations of this Act.

Powers and Jurisdiction of House

(2) For the purposes of this Act the House is hereby declared to possess all such powers and jurisdiction as is necessary for inquiring into, judging and pronouncing upon the commission or doing of any such acts, matters, or

things, and awarding and carrying into execution the punishment therefor provided by this Act.

Warrant of Commitment

(3) Every warrant of commitment under this Section shall succinctly and clearly state and set forth on its face the nature of the offence in respect of which it is issued.

Rules

(4) The House shall have power to make such rules as are deemed necessary or proper for its procedure as such court as aforesaid. R.S., c. 128, s. 35.

B - COMMITTEES OF THE HOUSE

Oral Examination of Witness by Committee

36 Any committee may require that facts, matters, and things relating to the subject of inquiry before such committee be verified, or otherwise ascertained by the oral examination of witnesses, and may examine such witnesses, upon oath; and for that purpose the chairman or any member of such committee may administer an oath in the form following or to the like effect, to any such witness:

> "The evidence you shall give to the committee, touching (stating here the matter then before the committee), shall be the truth, the whole truth, and nothing but the truth. So help you God." R.S., c. 128, s. 36.

Taking of Affidavit

37 Where witnesses are not required to be orally examined before such committee, any oath, affirmation, declaration or affidavit in writing, which is required to be made or taken by or according to any rule or order of the House, or by direction of any such committee, and in respect of any matter or thing pending or proceeding before such committee, may be made and taken before any clerk of the